

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

Honorable Kristi F. Curtis, Circuit Court Judge

EARNEST MAURICE ALLEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-002056

APPENDIX

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STATE OF SOUTH CAROLINA	)	COURT OF GENERAL SESSIONS
	)	
COUNTY OF KERSHAW	)	Case No(s) : 2013GS2800681;
	)	2013GS2800682;
State of South Carolina,	)	2013GS2800683;
	)	2013GS2800811
Plaintiff,	)	
	)	
-VS-	)	TRANSCRIPT OF RECORD
	)	
Ernest Maurice Allen,	)	
	)	
Defendant.	)	
	)	

January 13-16, 2014
Kershaw, South Carolina

B E F O R E:

HONORABLE JAMES R. BARBER, Judge.

A P P E A R A N C E S:

BRETT PERRY, Esquire
Deputy Solicitor

JASON D. KRINCICH, Esquire
Attorney for the Defendant

Recorded by: Elizabeth B. Harris
Circuit Court Reporter

Transcribed by: Teresa B. Johnson
Circuit Court Reporter

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P R O C E E D I N G S

(WHEREUPON, the proceedings begin on the 13th day of January, 2014 at approximately 9:00 a.m.)

THE COURT: All right. Mr. Krincich, what we got here?

MR. KRINCICH: Your Honor, previously this case was before Your Honor, in fact, in August. I provided -- provided another copy for Your Honor to look at and would ask that you read that. I believe you read it last time. There was no objections from the state. I'd also filed a request for 10 peremptory challenges. Your Honor previously denied that motion that I made. Since we are here in a new term for court, I once again would pass a copy of the same motion up for Your Honor to review.

THE COURT: All right. We took that motion up on the matter of the defendant being permitted 10 peremptory strikes. My recollection is you believe that there was a mistake somewhere when the General Assembly passed the law that they did not make it a 10-strike offense.

MR. KRINCICH: Yes, sir.

THE COURT: I denied that motion on the basis that the statute doesn't provide for 10

1 strikes. The previous assault with intent to kill
2 only provided five strikes. I don't know of any
3 reason -- there's no change. My ruling continues
4 to be that I'm denying 10 strikes. What was the
5 other case you said you -- you said you gave a case
6 to me to read?

7 **MR. KRINCICH:** No, sir. I gave you a copy
8 to read of the motion again.

9 **THE COURT:** Oh, oh, okay.

10 **MR. KRINCICH:** Your Honor, I would ask that
11 that be -- the motion itself --

12 **THE COURT:** We'll make it Court Exhibit
13 number 1.

14 **(WHEREUPON, Court's Exhibit 1 is marked for**
15 **identification purposes.)**

16 **MR. KRINCICH:** Yes, sir. Thank you. One
17 last thing, Your Honor, -- and we do have a few
18 minutes before the jury. Mr. Allen and I prepared
19 this case for trial. This is the third time that
20 we prepared to go to trial in this case. Mr. Allen
21 has indicated before and again today that he is not
22 completely satisfied with my services, that he
23 would like the opportunity to retain new counsel.
24 Our office has talked with his mother. They have
25 talked with private counsel, Your Honor.

1 To be completely honest with you, this has
2 happened before. I have talked to three private
3 attorneys who declined to accept representation for
4 Mr. Allen. They were trying to talk to new counsel
5 today. Quite frankly, we're not exactly sure what
6 the gentleman's name is. He thinks his last name
7 is Master. I'm not familiar with any attorneys
8 with the last name Master in and around this area.
9 I don't know that anybody in the court can say that
10 they are. That individual indicated that he would
11 not accept representation until the court removed
12 me as Mr. Allen's attorney of record.

13 I explained to Mr. Allen and I believe my
14 office explained to his mother that he can come up
15 here at any time and say that he has been retained.
16 I work for the Public Defender's office. I been
17 retained. He can come up here and explain that he
18 had been retained. He's indicated, at least through
19 Mr. Allen's mother who my office has had
20 communication with this morning, that he is not
21 going to do that but has indicated that he would be
22 available for any post-trial motions, whatever that
23 may entail.

24 **THE COURT:** I don't know what that means.
25 Anything from the state?

1 **MR. PERRY:** Your Honor, I would just simply
2 say that this is the third time we got this case
3 ready for trial. I will say that there was a time
4 in the past where the State basically asked to
5 stand down. There were some issues, technical
6 issues with the indictments. But Your Honor, at
7 this point in time, this late in the game, the case
8 was originally noticed for last week. Mr. Krincich
9 and I were sick. So they had since last Monday to
10 try to find other counsel. Now, here we are a week
11 later and at the eleventh hour --

12 **THE COURT:** The alleged offenses according
13 to the indictments occurred in December of 2012,
14 which is 13 months. Did your client want to say
15 anything, Mr. Krincich?

16 **MR. KRINCICH:** Your Honor, I do believe he
17 wants to put something on the record. I would
18 advise him not to talk about the case at hand but
19 maybe what problems he's had with my
20 representation.

21 **MR. ALLEN:** I just really want to say
22 something about what y'all speaking about now. As
23 far as the time that we had to get a lawyer, at the
24 beginning, as he said, the Solicitor, in the
25 beginning, it was the State who wasn't ready.

1 **THE COURT:** Well, this case came in front of
2 me some time last fall if I remember correctly.
3 Because of some errors in the indictments, the
4 State elected not to go forward with the trial at
5 that time. I can't remember what month it was. Do
6 you remember, Mr. Perry?

7 **MR. KRINCICH:** It was August, Your Honor.

8 **THE COURT:** August. So that was September,
9 October, November, December, five months ago. Of
10 course, in the case -- I knew the case had been
11 scheduled for trial last week in front -- because I
12 was -- Judge Cooper was going to be here last week
13 and I was going to be here the following week. The
14 indictment was -- the alleged offenses occurred in
15 December of 2012, 13 months ago. And you've had
16 the opportunity to secure counsel from the time you
17 were arrested if you were going to secure private
18 counsel, somebody besides the Public Defender's
19 Office. So if you had an attorney here that says
20 he was going to represent you, the court would
21 certainly consider that. At this point in time,
22 the case is up for trial. We're going to go
23 forward with the trial.

24 **MR. ALLEN:** Your Honor, I can, uh, 100
25 percent sure tell you that my family has been doing

1 everything they could to obtain a lawyer. It's
2 been hard to get up the money. I am 100 percent
3 sure that they have something to get a lawyer with.
4 I wanted to tell you that in the beginning, I think
5 it was right before October. I've told, uh, I
6 think it was Judge Benjamin, that I wanted to seek
7 counsel. And the very next month, that's when I
8 came in and, uh, I heard about the indictments. I
9 found out --

10 **THE COURT:** He said it was August that this
11 case was called.

12 **MR. ALLEN:** I think so. Or September. One
13 of them. I'm not sure. But he, uh, -- we found
14 out that Krincich was still representing me and my
15 family was like, Okay, well, since this is a
16 problem -- there's a problem with the indictments,
17 they fell back on trying to obtain a lawyer saying,
18 Okay, we're going to see what he can do.

19 But since then, I don't feel like he and I
20 have had the time to get ready for this case. I
21 have been in the county and I've only seen Krincich
22 three or four times maybe. I don't know whether I
23 should testify or not. I don't know anything about
24 what's -- you know, I know that I'm not ready for
25 this case. These are some serious charges. I just

1 want the chance --

2 **THE COURT:** They clearly are, Mr. Allen.
3 But we're not coming up the day that this case is
4 being called for trial, 13 months after the fact,
5 and you tell me we've been trying like the dickens
6 to get an attorney. We don't have one. Nobody's
7 here right now saying I'm prepared to represent you
8 and be responsible for it, so we're going forward
9 with this trial here today.

10 Anything further?

11 **MR. PERRY:** Nothing from the state, Your
12 Honor.

13 **MR. KRINCICH:** No, Your Honor.

14 **THE COURT:** All right. Anything, uh,
15 further we need to take up? Any other pretrial
16 matters, Mr. Krincich, we need to preserve? Is
17 there a statement?

18 **MR. KRINCICH:** No, sir, Your Honor. This
19 afternoon, I think we were going to do some
20 pretrial motions. I don't think we've got time
21 right now.

22 **THE COURT:** All right. I just didn't know
23 whether we had any.

24 **MR. PERRY:** There's no Jackson v. Deno on
25 behalf of the state, Your Honor.

1 **THE COURT:** All right. Let's bring the jury
2 in please.

3 **MR. KRINCICH:** Your Honor, can we put
4 something else just on record for Mr. Allen's
5 benefit?

6 **THE COURT:** Sure.

7 **MR. KRINCICH:** One of the reasons he wants
8 to relieve me as counsel, we do have, uh,
9 disagreements about the way to handle this case.
10 Mr. Allen attempted to file numerous pro se
11 motions. I told him previously when he tried to do
12 it that I was not going to file those under my
13 name. I believe those motions for the most part
14 were frivolous. This happened again recently. His
15 mother filed those after I told her that I would
16 not do those motions. I would not file them
17 because I believed them to be frivolous. Not only
18 a waste of my time, but a waste of everybody else's
19 time.

20 There's some things -- the way he wants me to
21 proceed with the case, Your Honor, that, uh, you
22 know -- quite frankly, I'm the attorney. I know
23 what I'm doing. And he just is unhappy with that.
24 I think that's why he wants another attorney. I
25 just need to put that out there for him. I believe

1 that's, I think, the main basis. We've worked
2 together successfully in the past. But since we
3 can't see eye-to-eye --

4 **THE COURT:** We don't have hybrid
5 representation in South Carolina. So anything
6 that's filed has to be filed by the attorney of
7 record, and that is you.

8 **MR. KRINCICH:** Yes, sir. And I explained to
9 him again.

10 **THE COURT:** Obviously, you are the attorney.
11 You are ultimately going to make the call on
12 matters that deal with filings with the court.
13 Clearly, with respect to the issues of his
14 testifying or not testifying, that will be his
15 decision after he's been counseled by you and
16 questioned by me. I don't know how else to address
17 that.

18 **MR. KRINCICH:** And I told him that I was
19 going to ask for a pretrial ruling this afternoon
20 when we did some other pretrial matters in regards
21 to him testifying. At that point, he will have all
22 the information I think he needs to --

23 **THE COURT:** We'll take it up. I was just
24 told by Mr. Perry there are some pretrial matters
25 that need to be addressed. We're going to start

1 this trial tomorrow. We'll pick the jury today and
2 start it tomorrow. Any pretrial matters we have,
3 we'll deal with this afternoon.

4 **MR. KRINCICH:** Thank you, Your Honor.

5 **THE BAILIFF:** You ready for the jury, Your
6 Honor?

7 **THE COURT:** Yes, sir.

8 Let me ask you, y'all want one or two
9 alternates.

10 **MR. PERRY:** I'm happy with one, Judge. This
11 is only going to last a day.

12 **MR. KRINCICH:** I'm fine with that, Your
13 Honor.

14 **(WHEREUPON,** the jury panel enters at approximately
15 11:10 a.m.)

16 **THE COURT:** Let me get y'all to move --
17 everybody go to the end. Wherever you all, just go
18 all the way to the end. I don't want people
19 walking over everybody.

20 All right. Ladies and Gentlemen, we are about
21 to select a jury in a case entitled the State of
22 South Carolina versus Edward Maurice -- Ernest --
23 Excuse me -- Ernest Maurice Allen also known as
24 Ernest Maurice Allen slash Pickett. Mr. Allen has
25 been indicted under six indictments here in Kershaw

1 county. Four of the indictments are for Attempted
2 Murder. One of the indictments is for Possession
3 of a Weapon during the Commission of a Violent
4 Crime. One of the indictments is Resisting Arrest
5 with a Deadly Weapon.

6 Before I publish these indictments to you, I
7 want to tell you a little bit about an indictment,
8 Ladies and Gentlemen. An indictment is a notice
9 document. It is a document that puts the defendant
10 on notice of a particular crime. It is not
11 evidence and it is not to be considered by the jury
12 in the course of the trial as evidence and not to
13 be considered for any purpose other than to put the
14 defendant on notice.

15 I also want you to keep in mind two basic
16 principles of law that we have in South Carolina
17 that apply to every criminal case. First is, in
18 every instance, a defendant comes into the
19 courtroom presumed to be innocent. That
20 presumption of innocence remains with the defendant
21 throughout the course of the trial and would only
22 change if a jury, after hearing all the evidence,
23 is determined that the defendant is, in fact,
24 guilty.

25 The second thing you need to remember, Ladies

1 and Gentlemen, in every criminal offense, it is the
2 burden of the State of South Carolina to prove the
3 defendant guilty and prove the defendant guilty
4 beyond a reasonable doubt of each and every charge
5 that the State has brought. The defendant has no
6 burden. The defendant doesn't have to prove
7 anything. As I told you, the defendant is presumed
8 to be innocent and has no burden on him at all to
9 prove anything during the course of the trial.

10 That burden falls upon the State of South Carolina.

11 Now, Ladies and Gentlemen, this instance, Mr.
12 Allen, as I told you, has been charged with four
13 counts of Attempted Murder. Indictment 2013-GS-28-
14 0681 that says that Mr. Allen did in Kershaw county
15 on or about December 20, 2012 did with the intent
16 to kill attempt to kill Deputy Justin Scott with
17 malice aforethought either expressed or implied.
18 Indictment 2013-GS-28-0682 alleges that Mr. Allen
19 did in Kershaw county on or about December 20, 2012
20 with intent to kill attempt to kill Investigator
21 Mickey Sellers with malice aforethought either
22 expressed or implied. Indictment 2013-GS-28-0683
23 alleges that Mr. Allen did in Kershaw county on or
24 about December 20, 2012 with the intent to kill
25 attempt to kill Investigator Rick Bailey with

1 malice aforethought either expressed or implied.
2 Indictment 2013-GS-28-0684 states that Mr. Allen
3 did in Kershaw county on or about December 20, 2012
4 with the intent to kill attempt to kill Captain Ed
5 Corey with malice aforethought either expressed or
6 implied. Indictment 2013-GS-28-0685, Possession of
7 a Weapon during the Commission of a Violent Crime,
8 alleges that Mr. Allen did in Kershaw county on or
9 about December 20, 2012 possess a firearm or
10 visibly display what appeared to be a firearm or
11 visibly displayed a knife during the commission or
12 attempted commission of a violent crime. In 2013-
13 GS-28-0811, Resisting Arrest with a Deadly Weapon
14 alleges that Mr. Allen did in Kershaw county on or
15 about December 20, 2012 knowingly and willfully
16 resist the lawful efforts of a law enforcement
17 officer to arrest him or another person with the
18 use of threat or use of a deadly weapon against the
19 officer, to wit: the Kershaw County law enforcement
20 officers and that the defendant was in possession
21 or claimed to be in possession of a deadly weapon.

22 Now, Ladies and Gentlemen, to these
23 indictments, the defendant has entered pleas of not
24 guilty. As I told you, the defendant has now put
25 the State to the test of having to prove this

1 defendant guilty and prove him guilty beyond a
2 reasonable doubt of all of these charges.

3 Now, before we begin, Ladies and Gentlemen, I
4 want to introduce you to some individuals who will
5 be involved in this trial. And I have certain
6 questions to ask you relating to these matters.
7 First, I'd like to introduce you to Mr. Ernest
8 Maurice Allen.

9 Mr. Allen, if you would, please stand and face
10 the jury.

11 This is Mr. Allen, Ladies and Gentlemen. I
12 would inquire at this time, is there any member of
13 this jury panel or any member of the jury panel's
14 immediate family who is related by blood or
15 connected by marriage or either now or in the past
16 has had a close personal relationship with Mr.
17 Allen or either now or in the past has had
18 employment or a business relationship with Mr.
19 Allen? If so, please stand.

20 Yes, sir. Your name?

21 **THE JUROR:** Shawn Industrious.

22 **THE COURT:** I'm sorry?

23 **THE JUROR:** Shawn Industrious.

24 **THE COURT:** All right. Mr. Industrious,
25 what is your situation?

1 **THE JUROR:** I know him.

2 **THE COURT:** You just know him on a personal
3 level?

4 **THE JUROR:** Yes.

5 **THE COURT:** All right. The fact that you
6 have some personal knowledge of Mr. Allen, would
7 that prevent you from listening to the evidence in
8 this case and, based upon such evidence, render a
9 fair and impartial verdict?

10 **THE JUROR:** Yes.

11 **THE COURT:** You would not be able to do so?

12 **THE JUROR:** No, sir.

13 **THE COURT:** All right. I'm going to excuse
14 you from service on this jury. If you will, just
15 have a seat.

16 **THE JUROR:** I know the gentleman as well.

17 **THE COURT:** Why didn't you stand originally?

18 **THE JUROR:** Excuse me?

19 **THE COURT:** The fact that you know him,
20 would that prevent you from listening to the
21 evidence in this case and, based upon such
22 evidence, rendering a fair and impartial verdict?

23 **THE JUROR:** Yes.

24 **THE COURT:** Ma'am, you didn't even stand up
25 when I asked the question the first time. Now,

1 you're telling me you can't be fair?

2 **THE JUROR:** I didn't understand your

3 question.

4 **THE COURT:** Have a seat. I'll excuse you

5 from service on this jury.

6 **THE CLERK:** Your Honor, we need her number

7 please.

8 **THE COURT:** What's your number, ma'am?

9 **THE JUROR:** 101.

10 **THE COURT:** Yes, ma'am. Your name?

11 **THE JUROR:** Teresa Lee.

12 **THE COURT:** All right, Ms. Lee.

13 What is your situation?

14 **THE JUROR:** I know the defendant.

15 **THE COURT:** No, the lady behind you.

16 **THE JUROR:** We grow up together.

17 **THE COURT:** Tell me your name.

18 **THE JUROR:** Crystal Thompson.

19 **THE COURT:** I'm sorry?

20 **THE JUROR:** Crystal Thompson.

21 **THE COURT:** Thompson?

22 **THE JUROR:** Yes.

23 **THE COURT:** You know your jury number?

24 **THE JUROR:** 168.

25 **THE COURT:** 168?

1 **THE JUROR:** Yes.

2 **THE COURT:** All right. You said you grew up
3 with the defendant?

4 **THE JUROR:** Yes, sir.

5 **THE COURT:** Well, the fact that you grew up
6 with the defendant, would that prevent you from
7 listening to the evidence in this case, based upon
8 such evidence, and render a fair and impartial
9 verdict?

10 **THE JUROR:** Yes, sir.

11 **THE COURT:** You didn't stand up either, did
12 you?

13 **THE JUROR:** I didn't understand your
14 question.

15 **THE COURT:** We'll excuse you from service on
16 this jury.

17 All right. Ladies and Gentlemen, in every
18 instance, a, uh, -- most instances when parties
19 come into court, they are represented by attorneys.
20 In this instance, the State of South Carolina is
21 represented by the Solicitor's office of the Fifth
22 Judicial Circuit here in Kershaw county. Mr. Brett
23 Perry is the Solicitor that is trying this case.
24 This is the gentleman standing right here. I would
25 inquire at this time is there any member of this

1 jury panel or any member of the jury panel's
2 immediate family who is related by blood or
3 connected by marriage or either now or in the past
4 has a close personal relationship with Mr. Perry or
5 either now or in the past has had employment or
6 business relationship with Mr. Perry or with the
7 Solicitor's office in Kershaw or the Fifth Circuit?
8 If so, please stand.

9 **THE JUROR:** Could that be with the deputy
10 or investigator?

11 **THE COURT:** Pardon me?

12 **THE JUROR:** Could that be with the deputy
13 or investigator?

14 **THE COURT:** Can you have a seat?

15 **MR. PERRY:** Yes, sir.

16 **THE COURT:** Say that again.

17 **THE JUROR:** I got a close relationship with
18 the deputy and investigator.

19 **THE COURT:** I'm asking about the Solicitor
20 right now.

21 **THE JUROR:** Oh, I thought they was all at
22 the same table. I apologize.

23 **THE COURT:** Just the gentleman that I had
24 stand. So you have no connection to Mr. Perry,
25 right?

1 **THE JUROR:** No, sir.

2 **THE COURT:** Tell me your name.

3 **THE JUROR:** Number 32.

4 **THE COURT:** All right. Ladies and
5 Gentlemen, uh, representing defendant in this
6 matter is Mr. Jason Krincich. Mr. Krincich is
7 standing now. He is an attorney with the, uh,
8 Public Defender's Office. He's a member of the
9 South Carolina Bar. I would inquire at this time
10 is there any member of the jury panel or any member
11 of the jury panel's immediate family who is related
12 by blood or connected by marriage or either now or
13 in the past has a close personal relationship with
14 Mr. Krincich or either now or in the past has had
15 employment or business relationship with Mr. Perry
16 or either now or in the past has been -- or the
17 Public Defender's Office or either now or in the
18 past has been represented by Mr. Krincich? If so,
19 please stand.

20 Yes, sir. Tell me your name.

21 **THE JUROR:** William Kirkland.

22 **THE COURT:** All right. Mr. Kirkland, you
23 indicated before you are a distant cousin of Mr.
24 Krincich.

25 **THE JUROR:** Yes, sir.

1 **THE COURT:** And I inquired and I will
2 inquire again, the fact that you are a distant
3 cousin of Mr. Krincich, would that prevent you from
4 listening to the evidence in this case and, based
5 upon such evidence, render a fair and impartial
6 verdict?

7 **THE JUROR:** No, sir.

8 **THE COURT:** All right. Thank you, sir.

9 Ladies and Gentlemen, I'm now going to read
10 you the name of some potential witnesses who may
11 testify in this trial. If any of these witnesses
12 are here, I would ask them to stand so the jury
13 could see who they are. Alicia Brisbane, Special
14 Agent Derrick Horton with the State Law Enforcement
15 Division, Special Agent Sabrina Fellers with SLED,
16 Special Agent Lee Blackmon with SLED, Special Agent
17 Kristin Grant with SLED, Special Agent Tiffany
18 Hezel, H-E-Z-E-L, with SLED, Lieutenant Michael
19 Greene with SLED, Amanda Green [sic] with SLED,
20 Investigator Rick Bailey of the Kershaw County
21 Sheriff's Department, Captain Ed Corey, C-O-R-E-Y,
22 of the Kershaw County Sheriff's Department,
23 Corporal Justin Scott of the Kershaw County
24 Sheriff's Department and Corporal Mickey Sellers
25 with the Kershaw County Sheriff's Department.

1 Ladies and Gentlemen, I would inquire at this
2 time is there any member of the jury panel or any
3 member of the jury panel's immediate family who is
4 related by blood or connected by marriage or either
5 now or in the past has had a close personal
6 relationship with any of the names -- the
7 individuals whose names I just read to you?
8 If so, please stand.

9 All right. Gentlemen, y'all can be seated.

10 All right. Tell me your name again please,
11 sir.

12 **THE JUROR:** James Bryson.

13 **THE COURT:** All right. Mr. Bryson, you have
14 some connection to Corporal Scott. Is that
15 correct?

16 **THE JUROR:** And his stepdad Rick Bailey.

17 **THE COURT:** And his stepfather, Rick Bailey?

18 **THE JUROR:** Yes, sir.

19 **THE COURT:** That's the other -- all right.
20 What is that relationship? Y'all are friends?

21 **THE JUROR:** That's been my best friend
22 since like kindergarten. We work together now.

23 **THE COURT:** All right. I'm going to excuse
24 you from service on this jury. Just have a seat.

25 Yes, sir. Your name.

1 **THE JUROR:** Robert Keasler.

2 **THE COURT:** All right. Mr. Keasler, what is
3 your situation?

4 **THE JUROR:** I have served on some
5 committees with Captain Corey.

6 **THE COURT:** You have served on some
7 committees with Captain Corey in the past. The
8 fact that you have that experience, would that
9 prevent you from listening to the evidence in this
10 case and, based upon such evidence, rendering a
11 fair and impartial verdict?

12 **THE JUROR:** No, it wouldn't.

13 **THE COURT:** All right. Thank you, sir.
14 Yes, ma'am. Your name?

15 **THE JUROR:** I'm Juror number 80.

16 **THE COURT:** All right.

17 **THE JUROR:** I have a working relationship
18 with the Sheriff's Department with the individuals
19 mentioned being as I'm a dispatcher for 911.

20 **THE COURT:** You work for 911?

21 **THE JUROR:** Yes.

22 **THE COURT:** All right. Ma'am, I'm going to
23 excuse you from service on this case.

24 All right. Ladies and Gentlemen, is there any
25 member of the jury panel or any member of the jury

1 panel's family or close personal friend who has
2 been or is employed in a local, state or federal
3 prosecutor's office including but not limited to
4 the Fifth Circuit Solicitor's Office, the Attorney
5 General's Office or the U.S. Attorney's Office? If
6 so, please stand. (No response.)

7 Any member of the jury panel or any member of
8 the jury panel's immediate family or close personal
9 friend who either now or in the past has been
10 employed by local, state or federal law enforcement
11 agencies including the -- but not limited to the
12 Kershaw County Sheriff's Department, State Law
13 Enforcement Division or the Federal Bureau of
14 Investigation?

15 Yes, sir. Tell me your name.

16 **THE JUROR:** Gregory Watson.

17 **THE COURT:** All right. You know your
18 number, Mr. Watson?

19 **THE JUROR:** 179.

20 **THE COURT:** All right. What is your
21 situation?

22 **THE JUROR:** My brother-in-law who works as
23 a deputy, a sheriff's deputy.

24 **THE COURT:** You have a brother-in-law who is
25 employed with the Kershaw County Sheriff's

1 Department?

2 **THE JUROR:** Yes.

3 **THE COURT:** All right. I'm going to excuse
4 you from service on this jury. If you will, have a
5 seat.

6 Yes, ma'am. Your name?

7 **THE JUROR:** My name is Janie Unsworth. I'm
8 Juror 176.

9 **THE COURT:** All right.

10 **THE JUROR:** Our close friend and number is
11 Dexter Hamby.

12 **THE COURT:** You have a friend who is
13 employed with the Kershaw County Sheriff's
14 Department?

15 **THE JUROR:** Yes, sir.

16 **THE COURT:** All right. The fact that you
17 have a friend employed with the sheriff's
18 department, would that prevent you from listening
19 to the evidence in this case and, based upon such
20 evidence, render a fair and impartial verdict?

21 **THE JUROR:** Yes.

22 **THE COURT:** Thank you, ma'am.

23 Yes, ma'am. Your name?

24 **THE JUROR:** My name is Susan Aycock. I'm
25 Juror number 7. And I'm hoping I understood the

1 question correctly. You were referring to any law
2 enforcement agency or just the state of South
3 Carolina?

4 **THE COURT:** Well, any of them.

5 **THE JUROR:** Any of them. My stepfather is
6 a police lieutenant. My brother-in-law is a police
7 officer. My cousin and my nephew are also police
8 officers. My sister is a 911 dispatcher.

9 **THE COURT:** All right. None of them are in
10 Kershaw County?

11 **THE JUROR:** No, sir.

12 **THE COURT:** The fact that you have family
13 members who are employed with law enforcement,
14 would that prevent you from listening to the
15 evidence in this case and, based upon such
16 evidence, rendering a fair and impartial verdict?

17 **THE JUROR:** No, sir.

18 **THE COURT:** All right. Thank you, ma'am.
19 Yes, sir. In the blue shirt. Tell me your
20 name and number.

21 **THE JUROR:** Joe Quinlan, Juror 135.

22 **THE COURT:** All right.

23 **THE JUROR:** Both of my brothers are in law
24 enforcement.

25 **THE COURT:** All right. The fact that you

1 have family members in law enforcement, would that
2 prevent you from listening to the evidence in this
3 case and, based upon such evidence, rendering a
4 fair and impartial verdict?

5 **THE JUROR:** No, sir.

6 **THE COURT:** All right. Thank you, sir.

7 **MR. KRINCICH:** Your Honor, is that Juror
8 number 135?

9 **THE COURT:** 135, is that what you said?
10 Sir? No, the one that just sat down. You said
11 135?

12 **THE JUROR:** Correct.

13 **THE COURT:** All right. Thank you. All the
14 way in the back, tell me your name.

15 **THE JUROR:** Chris Capps.

16 **THE COURT:** All right. Ms. Capps, what is
17 your number?

18 **THE JUROR:** 35.

19 **THE COURT:** All right. 35, what is your
20 situation?

21 **THE JUROR:** I just have a close friend that
22 works with Richland County. He's a Richland County
23 Sheriff's Deputy.

24 **THE COURT:** All right. The fact that you
25 have a friend who works in law enforcement, would

1 that prevent you from listening to the evidence in
2 this case and, based upon such evidence, rendering
3 a fair and impartial verdict?

4 **THE JUROR:** No, sir.

5 **THE COURT:** All right. Yes, sir. Your name
6 again please.

7 **THE JUROR:** Benjamin Woodberry, 196.

8 **THE COURT:** All right.

9 **THE JUROR:** I have a brother-in-law that's
10 a deputy in Laurens county.

11 **THE COURT:** All right. The fact that you
12 have family members employed in law enforcement,
13 would that prevent you from listening to the
14 evidence in this case and, based upon such
15 evidence, rendering a fair and impartial verdict?

16 **THE JUROR:** No, sir.

17 **THE COURT:** All right. Thank you, sir.

18 **MR. PERRY:** Your Honor, may we approach
19 briefly?

20 **(WHEREUPON,** a bench conference is held off the
21 record.)

22 **THE COURT:** All right. Is any member of
23 this jury panel, either now or in the past,
24 belonged to or contributed to any organization
25 whose primary purpose is the promotion of law

1 enforcement such as MADD, SADD or the South
2 Carolina Troopers Association? If so, please
3 stand.

4 **THE JUROR:** Are you also talking out of
5 state?

6 **THE COURT:** Well, you can. You belong to
7 some group out of state?

8 **THE JUROR:** I did years ago.

9 **THE COURT:** All right. And what is that
10 group?

11 **THE JUROR:** It was called the Explorers.

12 **THE COURT:** Oh, yeah. All right. Well,
13 Explorers is a scouting organization, right?

14 **THE JUROR:** No, actually, it was actually
15 a --

16 **THE COURT:** All right. The fact that you
17 had that connection many years ago, would that
18 prevent you from listening to the evidence in this
19 case and, based upon such evidence, render a fair
20 and impartial verdict?

21 **THE JUROR:** No.

22 **THE COURT:** Okay. Thank you, ma'am.

23 All right. Ladies and Gentlemen, as I read to
24 you the allegations in the indictment, it says the
25 incident in this case alleged to have occurred in

1 December of 2012 involved a shoot out between
2 officers and a suspect. There was media coverage
3 of this event, both at the time of the incident and
4 subsequent to it. Does any member of the jury
5 panel remember reading, hearing, or seeing anything
6 about any of the coverage? If so, please stand.

7 (No response.)

8 I assume if you hadn't read, heard or seen
9 anything about it, does anybody have any knowledge
10 about this incident? If so, please stand.

11 Ma'am, did I excuse you?

12 **THE JUROR:** No, you told me to sit down.

13 **THE COURT:** I excused you. Sit down.

14 All right. Ladies and Gentlemen, has any
15 member of this jury panel formed or expressed an
16 opinion as to the guilt or the innocence of the
17 defendant, Mr. Allen? If so, please stand.

18 (No response.)

19 Is there any member of the jury panel who is
20 conscious of any interest, any bias or any
21 prejudice either for or against the defendant or
22 the State of South Carolina? If so, please stand.

23 (No response.)

24 Can each member of this jury panel give both
25 the State and the defendant, Mr. Allen, a fair and

1 impartial trial? If not, please stand.

2 (No response.)

3 Any further inquiry from the state?

4 **MR. PERRY:** Not from the state, Your Honor.

5 **THE COURT:** Anything from the defendant?

6 **MR. KRINCICH:** No, sir, Your Honor.

7 **THE COURT:** All right. Yes, sir.

8 **THE JUROR:** I know Mickey Sellers. I went
9 to school with him. I don't know if that has
10 anything to do with anything.

11 **THE COURT:** Well, the fact that you went to
12 school one of the witnesses in the case, would that
13 prevent you from listening to the evidence in this
14 case and, based upon such evidence, rendering a
15 fair and impartial verdict?

16 **THE JUROR:** I don't think so.

17 **THE COURT:** Well, we can't guess. Do you
18 believe you can be fair and impartial?

19 **THE JUROR:** Yes.

20 **THE COURT:** All right. Thank you, sir.

21 **MR. KRINCICH:** What's the jury number?

22 **THE COURT:** Tell me your jury number and
23 your name again please, sir.

24 **THE JUROR:** 192.

25 **THE COURT:** All right. Madam Clerk.

1 **(WHEREUPON, there is a pause.)**

2 **THE COURT:** All right. You want to start
3 calling them? Don't y'all call them up?

4 (No response.)

5 Don't y'all call them up?

6 **THE CLERK:** Yes, sir, we do.

7 Please follow the instructions that I gave you
8 previously as I call your number and your name.
9 Thank you.

10 Number 96, Robert B. Keasler. Please make
11 sure to bring your personal items that you have
12 with you.

13 What says the state?

14 **MR. PERRY:** Please present this juror.

15 **THE CLERK:** What says the defense?

16 **MR. KRINCICH:** Please swear this juror.

17 **THE CLERK:** Thank you.

18 Number 78, Cynthia T. Hooker.

19 What says the state?

20 **MR. PERRY:** Please present this juror.

21 **THE CLERK:** What says the defense?

22 **MR. KRINCICH:** Please swear this juror.

23 **THE CLERK:** Thank you.

24 Number 185, Cheri E. Peake.

25 What says the state?

1 **MR. PERRY:** Please present this juror.
2 **THE CLERK:** What says the defense?
3 **MR. KRINCICH:** Please swear this juror.
4 **THE CLERK:** Thank you.
5 Number 22, Jayne P. Bowers.
6 What says the state?
7 **MR. PERRY:** Please present this juror.
8 **THE CLERK:** What says the defense?
9 **MR. KRINCICH:** Please swear this juror.
10 **THE CLERK:** Thank you.
11 Number 35, Christopher L. Capps.
12 What says the state?
13 **MR. PERRY:** Please present this juror.
14 **THE CLERK:** What says the defense?
15 **MR. KRINCICH:** Please excuse this juror.
16 **THE CLERK:** Thank you.
17 Number 164, Gary M. Stumm.
18 What says the state?
19 **MR. PERRY:** Please present this juror.
20 **THE CLERK:** What says the defense?
21 **MR. KRINCICH:** Please swear this juror.
22 **THE CLERK:** Thank you.
23 Number 47, Angela L. Daloisio.
24 What says the state?
25 **MR. PERRY:** Please present this juror.

1 **THE CLERK:** What says the defense?

2 **MR. KRINCICH:** Please excuse this juror.

3 **THE CLERK:** Thank you.

4 Number 42, Jamie D. Corbitt.

5 What says the state?

6 **MR. PERRY:** Please present this juror.

7 **THE CLERK:** What says the defense?

8 **MR. KRINCICH:** Please swear this juror.

9 **THE CLERK:** Thank you.

10 Number 61, Vicky L. Gee.

11 What says the state?

12 **MR. PERRY:** Please present this juror.

13 **THE CLERK:** What says the defense?

14 **MR. KRINCICH:** Please excuse this juror.

15 **THE CLERK:** Thank you.

16 Number 165, Charles C. Talbert.

17 What says the state?

18 **MR. PERRY:** Please present this juror.

19 **THE CLERK:** What says the defense?

20 **MR. KRINCICH:** Please excuse this juror.

21 **THE CLERK:** Thank you. Counsel, the State

22 has zero strikes. The defense has four strikes.

23 Number 99, William H. Kirkland.

24 What says the state?

25 **MR. PERRY:** Please excuse this juror.

1 **THE CLERK:** Number 56, Rozalyn M. Franklin.
2 What says the state?
3 **MR. PERRY:** Please excuse this juror.
4 **THE CLERK:** Number 108, Valerie D. Mathis.
5 What says the state?
6 **MR. PERRY:** Please present this juror.
7 **THE CLERK:** What says the defense?
8 **MR. KRINCICH:** Please swear this juror.
9 **THE CLERK:** Thank you.
10 Number 175, Michael A. Turbyfill.
11 What says the state?
12 **MR. PERRY:** Please present this juror.
13 **THE CLERK:** What says the defense?
14 **MR. KRINCICH:** Please swear this juror.
15 **THE CLERK:** Thank you.
16 Number 176, Janie G. Unsworth.
17 What says the state?
18 **MR. PERRY:** Please present this juror.
19 **THE CLERK:** What says the defense?
20 **MR. KRINCICH:** Please swear this juror.
21 **THE CLERK:** Thank you.
22 Number 7, Susan Aycock.
23 What says the state?
24 **MR. PERRY:** Please present this juror.
25 **THE CLERK:** What says the defense?

1 **MR. KRINCICH:** Please excuse this juror.

2 **THE CLERK:** Thank you.

3 Number 192, Tony Wilson.

4 What says the state?

5 **MR. PERRY:** Please present this juror.

6 **THE CLERK:** Does the defense challenge this
7 juror?

8 **MR. KRINCICH:** No, Your Honor. I mean, no,
9 ma'am.

10 **THE CLERK:** Thank you.

11 Number 135, Joseph R. Quinlan.

12 What says the state?

13 **MR. PERRY:** Please present this juror.

14 **THE CLERK:** Does the defense challenge this
15 juror?

16 **MR. KRINCICH:** No, ma'am.

17 **THE CLERK:** Thank you.

18 Number 147, Harvey L. Self.

19 What says the state?

20 **MR. PERRY:** Please present this juror.

21 **THE CLERK:** Does the defendant challenge
22 this juror?

23 **MR. KRINCICH:** No, ma'am.

24 **THE CLERK:** Thank you.

25 For our first alternate, number 198, Mary

1 Deese Wright.

2 What says the state?

3 **MR. PERRY:** Please present this juror.

4 **THE CLERK:** What says the defense?

5 **MR. KRINCICH:** Please swear the juror.

6 **THE CLERK:** Thank you.

7 Number 79, Christina T. Hopkins.

8 What says the state?

9 **MR. PERRY:** Please present this juror.

10 **THE CLERK:** What says the defense?

11 **MR. KRINCICH:** Please swear this juror.

12 **THE CLERK:** Thank you.

13 **THE COURT:** All right. Anything from the
14 plaintiff with respect to the composition of the
15 jury? I mean, the state?

16 **MR. PERRY:** Nothing from the state, Your
17 Honor.

18 **THE COURT:** Anything from the defendant?

19 **MR. KRINCICH:** No, Your Honor.

20 **THE COURT:** All right. Ladies and Gentlemen
21 of the jury that did not get selected, we're going
22 to turn you loose at this time. But we're going to
23 ask you to call back tonight after six o'clock. I
24 assume you went over all that with them, didn't
25 you, Madam Clerk?

1 **THE CLERK:** Yes, ma'am.

2 **THE COURT:** And you will get further
3 instructions at that time either to call back or
4 come in or whatever we ask you to do. Those of you
5 who have been excused for the week, uh, you are
6 free to go, such as this gentleman right here.
7 Those of you who've just been excused from this
8 trial, you need to call back in like everybody
9 else. So I thank you very much for making yourself
10 available. You are free to go. Y'all have a nice
11 afternoon.

12 **(WHEREUPON, the jury panel exits at approximately**
13 12:00 p.m.)

14 **THE COURT:** All right. Ladies and Gentlemen
15 of the jury, uh, we are not going to start this
16 trial until tomorrow morning at 9:30. In just a
17 few minutes, I'm going to let you all go and ask
18 you to be back here tomorrow morning so that we can
19 begin the trial at 9:30.

20 I like to operate under the Vince Lombardi
21 rule. Probably most of y'all don't know who Vince
22 Lombardi is, but he was a football coach.
23 Actually, the Super Bowl trophy is named after him.
24 His idea was when he said to be here at 9:30,
25 probably it was a good idea to be there at 9:15. I

1 also operate under the premise that you're never
2 early. You're either on time or you're late. So
3 we don't want you to be late. I don't want anybody
4 to be late. That includes the Solicitor, the
5 defense counsel, all witnesses, court reporter,
6 clerk's office, judge, clerk for the judge,
7 everybody. Your time is valuable as well as
8 everybody else. We want to be able to start when
9 it's time to start hopefully to get you out of here
10 as quickly as we possibly can.

11 Now, Ladies and Gentlemen, I've read to you
12 the indictments. I'm not going to publish them
13 again at this time, but as you can see, this is a
14 very, very important case to both the State and the
15 defendant. We want to do everything we can to make
16 sure that both sides get a fair and impartial
17 trial. One of the ways that I'm going to ask you
18 to do that is not to discuss this case with each
19 other or with anyone else at any time until you
20 have been given instructions that you can begin
21 your deliberations.

22 So at any time that we take a break in this
23 case, you go back to the jury room, do not discuss
24 the case with each other at all. Any time we take
25 a break and you go home or leave the courthouse and

1 go somewhere, do not discuss the case with anybody
2 else that you may come in contact with.

3 The reason I ask you to do this is I want you
4 to make your decision about this -- excuse me --
5 this case after both sides have presented
6 everything they want to offer here in this
7 courtroom. You are to decide this case based on
8 the evidence that is put up in the courtroom. If
9 you start talking about the case with each other
10 before both the State and the defendant have had an
11 opportunity to offer everything they wish to offer,
12 you may begin to formulate some opinion about that
13 case even though both sides haven't put everything
14 in front of you that they need to put in front of
15 you. So do not discuss the case at any time with
16 each other and I will attempt to remind you each
17 and every time you leave the courtroom not to do
18 that.

19 Don't talk to anybody else about it. When you
20 go home today, I know you have very limited
21 knowledge about the case. But don't talk to your
22 friends or your neighbors or your family members or
23 anybody you come into contact with because I
24 promise you this, even though they have not heard
25 the first bit of evidence in the case, they will

1 have an opinion about it and they will offer it to
2 you. So please do not do that. That is not fair
3 to the state, nor is it fair to the defendant.

4 I'm also going to ask that you not do any
5 independent inquiry or investigation about this
6 case. That means, don't get on the internet, don't
7 Google anybody or anything. If we're talking about
8 the scene of something, don't drive by the scene at
9 some point in time. You have to decide the case
10 based on the evidence here in the courtroom and
11 nothing else. So please do not do any
12 investigation or make any inquiry.

13 Don't read anything about the case if there's
14 something in the newspaper. Don't listen to
15 anything on the radio. Don't watch anything about
16 it if there's something on television. Again, when
17 this case is over, you can talk to anybody you want
18 to talk to and you can talk about it as much as you
19 want to talk about it. But until then, please do
20 not do anything that would jeopardize this case for
21 either the State or the defendant.

22 Now, tomorrow morning when you come back in, I
23 will swear you and then I will give you some
24 information about service on a jury in case you've
25 not served before or its been some time since you

1 have. But as I told you, this case is very, very
2 important to both the State and the -- and the, uh,
3 defendant, so we want to make sure that both get
4 an, uh, opportunity to offer whatever they want to
5 offer.

6 Again, I'm going to ask you to be here at 9:30
7 tomorrow morning so that we can start at 9:30. And
8 be here before that. Do not discuss the case.
9 Don't investigate the case. Don't make any inquiry
10 about the case. Don't computerize the case. Don't
11 do anything about it while we're in the course of
12 this trial. Y'all have a nice afternoon and we
13 will see you tomorrow morning at 9:30. Thank you
14 all. You are free to leave at this time.

15 (WHEREUPON, the jury exits at approximately
16 12:11 p.m.)

17 **THE COURT:** All right. We will stand in
18 recess. I guess we're going to do some pretrials
19 this afternoon sometime after 2:00. I don't know
20 if we're going to do the plea on that other case or
21 not. If we can, I guess we'll do that first and
22 then take up all pretrials after that and I don't
23 know what else you got.

24 One thing that I need to bring to your
25 attention. We talked about starting the case

1 tomorrow and you thought it might finish tomorrow.
2 I think I told you in the past, Mr. Perry, that I
3 teach a class in the law school and I have to be in
4 Columbia at 4:20 for my class. Probably I'll need
5 to leave here tomorrow no later than 3:15 or so to
6 get back. We may have to come back in on Friday
7 and -- I mean, on Wednesday and conclude the trial
8 if we get started tomorrow.

9 **MR. KRINCICH:** Your Honor, could I make a
10 request that may speed things up? I don't know if
11 Your Honor had an opportunity to conduct a trial
12 for the new attempted murder statute that just came
13 out in 2010. There's not a lot of case law out
14 there. There's not a lot of unification on jury
15 instructions. If Your Honor has a prepared jury
16 instruction for attempted murder for us to review
17 beforehand, I may have some input on it that does
18 include the language that I think is necessary.

19 **THE COURT:** Okay. We'll pull up the charge
20 and see. I think I've done attempted murder. But
21 we'll pull up the charge and we'll let you look at
22 it and any assistance you can give the court would
23 be greatly appreciated as well as for Mr. Perry.
24 All right. Anything else? Uh, we have anything to
25 do between now and two o'clock, Mr. Perry?

1 **MR. PERRY:** No, sir, Your Honor.

2 **THE COURT:** So, uh, we can go to lunch?

3 **MR. PERRY:** Yes, sir.

4 **THE COURT:** All right. Y'all have a nice
5 lunch and we'll see you back here at two o'clock.

6 **(WHEREUPON, a lunch recess is taken.)**

7 **MR. PERRY:** If it please the Court, Your
8 Honor, in the matter of the State versus --

9 **THE COURT:** All right.

10 **MR. PERRY:** In the matter of the State
11 versus Ernest Maurice Allen, Your Honor, the State
12 wishes to introduce certain charges that were
13 pending at the time that, uh, this incident took
14 place. The matters that were pending, Your Honor,
15 include, uh, -- he was on Failure to Appear, Your
16 Honor, for one, two, three, four PWID Cocaines
17 third offenses. Those carry 10 to 30 years a
18 piece. He had one, two, three, four PWID Proxes
19 and another PWID Cocaine that's charged as a first
20 but should have properly have been charged as a
21 third. So, Your Honor, in essence, he had five
22 pending Distribution or PWID Cocaine third offenses
23 that could have carried 10 to 30 years a piece and
24 the Proxes as well. Your Honor, also prior --

25 **THE COURT:** How many already been charged?

1 He had three PWID thirds?

2 MR. PERRY: No, sir, Your Honor. A fifth
3 one was charged as a first for some reason.

4 THE COURT: He was charged with four and
5 there was a fifth that he was charged with first?

6 MR. PERRY: Yes, sir.

7 THE COURT: Regardless of whether -- I don't
8 think we can consider would could or should have.

9 MR. PERRY: At the very least, Your Honor,
10 he was facing four charges that carried a mandatory
11 minimum of 10 years and up to 30 for which he
12 failed to appear when he was noticed to be in court
13 for trial. Also, prior to the occurrence that
14 we're at trial on, he had a Failure to Stop for
15 Blue Light, Child Endangerment and Possession of
16 Marijuana charge.

17 THE COURT: That he had failed to appear on?

18 MR. PERRY: No, sir. Those warrants had not
19 been served yet. Law enforcement had to break off
20 the pursuit because it was so dangerous. There
21 were so many cars on the road. The speeds were
22 high. They had to break off the pursuit. But they
23 knew him by sight. They knew that he was wanted,
24 which is why they started chasing after him.

25 THE COURT: Let's talk about the ones where

1 the warrants had been served.

2 MR. PERRY: Okay.

3 THE COURT: I don't think -- I don't know
4 how we can, uh, -- if the warrants hadn't been
5 served on the other one, I don't believe we could
6 say that he was running because the warrants hadn't
7 been served.

8 MR. PERRY: Your Honor, the drug charges had
9 been served.

10 THE COURT: I understand the drug charges.
11 I'm talking about the failure to stop and the child
12 endangerment.

13 MR. PERRY: Your Honor, that goes to sort of
14 a common plan or scheme. The idea here is that he
15 was going to do whatever it took not to be taken
16 into custody to include shooting at law
17 enforcement, which is what he did here.

18 THE COURT: Wait a minute. All right.

19 MR. PERRY: The argument that the State
20 makes, Your Honor, is that, that much as in State
21 v. Lyle. We're not offering this --

22 THE COURT: You offering it to show motive?

23 MR. PERRY: And intent.

24 THE COURT: Intent?

25 MR. PERRY: Very clearly. And, Your Honor,

1 in this case, it being an attempted murder charge,
2 the State is tasked with the burden of proving to
3 the jury beyond a reasonable doubt that -- what his
4 motive was, what his intent was, what he had in his
5 head at the time. I think it's important for us to
6 be able to explain to the jury what he was facing
7 if he was taken into custody. If he was wanted on
8 jaywalking charges, 30 days isn't much reason to
9 shoot at the police.

10 **THE COURT:** I understand all that. What you
11 want to tell me, Mr. Krincich?

12 **MR. KRINCICH:** Your Honor, I think if the
13 State just want to say that it's limited to he had
14 failure to appear warrant issued by the court for
15 prior failure to appear in General Sessions Court,
16 I think we could agree with that wholeheartedly.
17 What the State has indicated that they want to do
18 is they want to get into the nature of the charges
19 and they want to get into the sentencing ranges for
20 the charges which I think is wildly inappropriate.
21 Any time I wanted to argue any type of sentencing
22 issues with the jury, it's always been denied to
23 me. I don't see a reason to argue sentencing to
24 the jury on this issue.

25 My issue I have, I think, overall is, uh, I

1 understand that they want to -- they want to be
2 able to introduce it for the purpose of intent. If
3 that's their purpose and if Your Honor agrees with
4 that, we still have to go through the 403 balancing
5 test which I imagine, Your Honor, if you get to the
6 point that you're going to allow it for intent
7 would say that it meets the requirements for 403,
8 but I think the State needs to be fair warned that
9 that's the only reason that it comes in for intent
10 not to prove his general bad character. That would
11 be too far and that would be the reason we have
12 404(b). I don't know if there's any limiting
13 instruction or if there is an admonishment from the
14 Court beforehand to the State. But for the limited
15 purpose that they want to introduce it, it's very
16 hard for me to argue.

17 **THE COURT:** All right. Mr., uh, Perry, you
18 want to introduce evidence -- I don't know who you
19 are going to get to testify to this. I guess the
20 police -- that he had five drug charges, right?

21 **MR. PERRY:** Yes, Your Honor.

22 **THE COURT:** And what else? Anything else?

23 **MR. PERRY:** Your Honor, what I would like to
24 offer into evidence is the fact that he had pending
25 charges for which he could have been sentenced

1 between 10 and 30 years. I don't even care that
2 the jury not know what they are for. Just the
3 simple fact that he had pending charges for which
4 he could have been sentenced, mandatory minimum of
5 10 and as much as 30 years and I'd like to get into
6 the fact that when law enforcement previously tried
7 to stop him, rather than stop, he fled at a high
8 rate of speed endangering other drivers to the
9 point that law enforcement had to break off the
10 pursuit. I think that goes to his motive and his
11 intent when he shot at these officers, Judge. The
12 0 to 30, 10 to 30 shows why he didn't want to be
13 taken into custody. The failure to stop shows his
14 determination not to be. It goes directly to what
15 he did in this case.

16 **THE COURT:** I'm not going to allow the
17 evidence to come in about failure to stop and all
18 those things he hadn't been charged with. No
19 warrants had been served on him. What he knew or
20 didn't know, I don't know. We're not going into
21 that.

22 **MR. PERRY:** Not even under common scheme,
23 Judge, and propensity to run from the police?

24 **THE COURT:** Because of that -- well, I don't
25 know that that's common scheme. He's not being

1 charged with running from the police. He's being
2 charged with stopping and shooting.

3 MR. PERRY: He was running when he did it,
4 Judge.

5 THE COURT: Well, I'm not going to allow it.

6 MR. PERRY: Okay.

7 THE COURT: I'm going find that -- first of
8 all, I don't know that it is relevant, second of
9 all, even if it is, because he did know about it or
10 the charges were pending, to put that in would
11 substantially outweigh the probative value. I am
12 going to allow the evidence to come in based on
13 intent and motive. But he had four serious
14 charges, five serious charges against him for which
15 he could have, uh, --

16 MR. PERRY: Your Honor, actually it was
17 nine.

18 THE COURT: I thought you said he had four
19 thirds and one first.

20 MR. PERRY: And four Proxes. They are
21 strikes.

22 THE COURT: All right.

23 MR. PERRY: 0 to 10.

24 THE COURT: He had nine serious charges.

25 MR. PERRY: Yes, sir.

1 **THE COURT:** Of which, for some of them, he
2 would have gotten or could have gotten a mandatory
3 minimum of considerable time. I don't know.

4 **MR. PERRY:** I think that speaks directly to
5 the issue of how motivated he was not to be taken
6 into custody, Judge. What's considerable to one
7 person might not be considerable to another.

8 **THE COURT:** Well, let me think about it.
9 I'll let you know in the morning. But we are going
10 to be able -- he is going to be able to put
11 evidence in that he had these nine charges pending.
12 Serious charges.

13 **MR. PERRY:** For which he failed to appear.

14 **THE COURT:** Which he failed to appear.

15 **MR. PERRY:** And a bench warrant had been
16 issued for his arrest. That's what gave law
17 enforcement the right to take him into custody.

18 **THE COURT:** That's fine.

19 **MR. PERRY:** Okay.

20 **THE COURT:** What you don't want to do is
21 over try this thing.

22 **MR. PERRY:** No, sir.

23 **THE COURT:** That will put yourself in
24 jeopardy.

25 **MR. PERRY:** Absolutely not. I just want to

1 be able to show motive.

2 **THE COURT:** All right. Then I'll decide in
3 the morning. I'll let you know in the morning when
4 I address the 10 to 30.

5 **MR. PERRY:** Thank you, Judge.

6 **THE COURT:** All right. What else we got?

7 **MR. KRINCICH:** I don't know if the State has
8 anything else at this time.

9 **MR. PERRY:** I think that's pretty much it,
10 Your Honor.

11 **THE COURT:** Defense motions?

12 **MR. KRINCICH:** I do have one, Your Honor. I
13 was going to let them finish up whatever they had.

14 **THE COURT:** I thought that was your motion.

15 **MR. KRINCICH:** I think if the State wants to
16 introduce it, they have to --

17 **THE COURT:** I thought that was a motion in
18 limine to keep all that out.

19 **MR. KRINCICH:** I think if the State wants to
20 introduce it, it has to be their motion to make
21 sure it passes that balance test. We could have
22 done it at the time of trial.

23 **THE COURT:** You got anything else, Mr.
24 Perry?

25 **MR. PERRY:** Uh, no, sir.

1 **THE COURT:** All right.

2 **MR. KRINCICH:** Your Honor, going along part
3 and parcel with that, it goes to Mr. Allen's
4 ability to testify in this matter. I'm going to
5 pass up a case, uh, from 1979. It's State v.
6 Gilbert, Your Honor. The discussion for the point
7 I have right now, I think, is so germane. This
8 deals with Mr. Allen's ability to invoke his Fifth
9 Amendment right.

10 Normally, Your Honor, throughout, I would say,
11 the course of our legal history, once it was
12 included with the Bill of Rights, defendants have
13 the right to not talk at all. With that is not
14 talk to police and not talk to investigators or not
15 to testify at their trial. The courts have always
16 held that that's a right that shouldn't be
17 disturbed. The jury should draw no inference from
18 it.

19 Here, Mr. Allen is on trial and is considering
20 testifying to the matters he's actually on trial
21 for. Those would be the six indictments that were
22 presented to the jury this morning, the four counts
23 of attempted murder, one count of resisting arrest
24 with deadly weapon and one count of possession of a
25 weapon during the commission of a violent crime. I

1 think Mr. Allen should have the right to testify to
2 those charges and to present a defense on those
3 charges while still retaining his Fifth Amendment
4 right for the charges that Mr. Perry would like to
5 have introduced in his case-in-chief through an
6 investigator.

7 **THE COURT:** You are saying what now? Oh,
8 Mr. Perry asked him are you aware that you had
9 these charges pending?

10 **MR. KRINCICH:** Even more so than that.

11 **THE COURT:** He's got to take the Fifth.

12 **MR. KRINCICH:** Even more so than that, if
13 Mr. Perry wanted to --

14 **THE COURT:** Is that a yes?

15 **MR. KRINCICH:** I think that's -- Yes, sir.
16 That's where it would start.

17 **THE COURT:** Okay. So what's he going to
18 testify to?

19 **MR. KRINCICH:** Your Honor, he could testify
20 to what happened back in December of 2012 with
21 these officers. I want to be able to protect him
22 and I don't represent him on those other charges, I
23 want to be able to protect him and his other
24 counsel that he should be allowed to retain his
25 Fifth Amendment right not to be questioned about

1 those on cross-examination. He's not on trial for
2 those right now. He still has a Fifth Amendment
3 right for those charges. Gilbert doesn't
4 necessarily help me, Your Honor.

5 **THE COURT:** I don't see where it does
6 either.

7 **MR. KRINCICH:** No, no. It doesn't. I'm
8 pointing out that this is the case that's cited
9 throughout our jurisprudence here but it is a
10 separate issue. It's not what I'm arguing here
11 today.

12 **THE COURT:** I'm not familiar with any
13 instance where a defendant has been able to get up
14 and pick and choose when he or she takes the Fifth
15 Amendment or when he or she doesn't. When they
16 subject themselves to being -- getting in the sand,
17 they subject themselves to start answering -- or
18 testifying, they subject themselves to all cross-
19 examination. If you show me something different
20 from the state or federal level, I'll be happy to
21 look at it.

22 **MR. KRINCICH:** Your Honor, I think that -- I
23 find it hard to believe it's novel point of law,
24 but I haven't been able to locate anything that
25 guides us in either direction.

1 **THE COURT:** My experience is once you
2 subject yourself to testify, it's wide open.

3 **MR. KRINCICH:** I think that's correct.
4 That's the way it has been in the past. But I
5 think, what you see with Gilbert is they try to
6 invoke their Fifth Amendment right when they didn't
7 want to answer questions that were harmful to them
8 about the actual matter at trial, not other
9 matters. What I'm trying to protect from Mr. Allen
10 is his Fifth Amendment right for matters that are
11 not before this petit jury, Your Honor. That's not
12 for them to consider. There's really no point.
13 It's not relevant.

14 **THE COURT:** That might be a whole different
15 issue, relevance.

16 **MR. KRINCICH:** Maybe it's a 401 issue, Your
17 Honor.

18 **THE COURT:** I don't know what you're worried
19 that he's going to ask him.

20 **MR. KRINCICH:** Your Honor, I think he could
21 ask him about his prior involvement with drug
22 sales, the charges that are pending. I don't know
23 that he's going to, but if he --

24 **THE COURT:** My understanding is what he's
25 attempting to do is to show that your client knew

1 of these offenses.

2 MR. KRINCICH: Yes, sir.

3 THE COURT: And the serious nature of those
4 offenses and he would go to whatever extent he
5 believed was in his interest in order to avoid
6 having to answer to those offenses including run or
7 shoot.

8 MR. KRINCICH: Yes, sir.

9 THE COURT: I agree with you. If he starts
10 to go into the merits of the drug offenses, I don't
11 think it's relevant.

12 MR. KRINCICH: Okay.

13 THE COURT: I think he certainly would have
14 a right to say, Mr. Allen, you understand that you
15 had nine -- nine warrants that were outstanding and
16 I guess they had been served on him and he had made
17 a first appearance or something.

18 MR. PERRY: He was noticed to be at trial,
19 Judge, and didn't show up.

20 THE COURT: I think he can ask him all that
21 stuff. You understand that you were looking at
22 serious time for these offenses.

23 MR. KRINCICH: I can agree with you there,
24 Judge.

25 THE COURT: He could have been convicted a

1 minimum of 10 years on some of them. I can't
2 remember what --

3 **MR. PERRY:** 10 to 30, 0 to 15 and 0 to 10,
4 Judge.

5 **THE COURT:** So I think he can pursue that
6 line of questioning. He can't go into anything
7 about were you guilty of that.

8 **MR. KRINCICH:** Yes, sir. And that's kind of
9 what I was looking for so I could fully advise him.

10 **THE COURT:** I don't think you intend to do
11 that.

12 **MR. PERRY:** No, sir, Your Honor. I'm not
13 here to try the drug cases.

14 **THE COURT:** That's for later on.

15 **MR. PERRY:** Exactly. Exactly. Just his
16 motivation. That's all.

17 **MR. KRINCICH:** And if it comes up during
18 trial, I'll obviously object to it. We've already
19 covered these issues. Thank you, Your Honor.

20 **THE COURT:** All right. Anything further?

21 **MR. PERRY:** Nothing from the state, Your
22 Honor.

23 **MR. KRINCICH:** Your Honor, I think that's
24 all at this time.

25 **(WHEREUPON, the Court recessed for the day.)**

P R O C E E D I N G S

(WHEREUPON, the Court resumes on the 14th day of January, 2014 at approximately 9:25 a.m.)

THE COURT: Anything we need to take up this morning? Where's your client?

MR. KRINCICH: He's here, Your Honor. They just didn't bring him in because jury members are still coming through. If all the jury's here --

THE COURT: They are not. We're waiting on two of them. I don't know what the deal is.

MR. KRINCICH: If we could get the bailiff to hold the door.

MR. PERRY: Judge, I've got a witness who's -- the only lay witness in this case. She's not here yet either. My investigator's trying to locate her. She's under subpoena. I talked to her yesterday.

THE COURT: Is she your first witness?

MR. PERRY: No, sir. She would be my second witness.

THE COURT: I hope she gets here.

MR. PERRY: I do.

THE COURT: See if y'all can bring the defendant in.

(WHEREUPON, there is a pause.)

1 **MR. KRINCICH:** Your Honor, I have one matter
2 to take up. Yesterday after we broke court, Mr.
3 Allen's mother filed on his behalf a motion to
4 relieve counsel and appoint counsel.

5 **THE COURT:** She doesn't have the --

6 **MR. KRINCICH:** He signed it, Your Honor. I
7 don't know if Your Honor wants to take a moment to
8 review it, Your Honor.

9 **THE COURT:** We addressed this yesterday,
10 didn't we?

11 **MR. KRINCICH:** In part, Your Honor.

12 **THE COURT:** What --

13 **MR. KRINCICH:** He said he wanted to hire new
14 counsel. He said new counsel.

15 **THE COURT:** Was new counsel here yesterday?

16 **MR. KRINCICH:** No, sir.

17 **THE COURT:** New counsel ready to go? New
18 counsel here now?

19 **MR. KRINCICH:** No, sir.

20 **THE COURT:** All right. Where is this lady?

21 **MR. KRINCICH:** His mother?

22 **THE COURT:** Yeah.

23 **MR. KRINCICH:** She is here. I saw her this
24 morning. She may be sitting outside.

25 **THE COURT:** Well, she has no standing in

1 this case to file any motion.

2 **MR. KRINCICH:** Yes, sir. I believe she was
3 just doing it at the request of her son.

4 **THE COURT:** We dealt with this motion
5 yesterday. Is there some change since yesterday?

6 **MR. KRINCICH:** He indicates no, there's no
7 change.

8 **THE COURT:** We're not going to continue to
9 do this. Mr. Allen, I've ruled. Tell her don't
10 file any more stuff.

11 **MR. KRINCICH:** Yes, sir. I'll make sure she
12 knows.

13 **THE COURT:** Anything else you've got?
14 Anything else? All right. Well, since the jury is
15 all here, let's bring the jury in.

16 If somebody wants to come in from outside,
17 y'all can open the doors.

18 **(WHEREUPON, a bench conference is held off the**
19 **record.)**

20 **THE COURT:** We have a health issue with one
21 of the jurors. That's what we're waiting on right
22 now. She had a -- she must have asthma or
23 something. She needed to take a shot of her
24 whatever it is.

25 **THE BAILIFF:** Inhaler.

1 **THE COURT:** Inhaler.

2 **(WHEREUPON, there is a pause.)**

3 **(WHEREUPON, a bench conference is held off the**
4 **record.)**

5 **(WHEREUPON, a recess is taken.)**

6 **THE COURT:** I have advised the jury that we
7 are waiting on a witness to come and that we
8 haven't forgotten about them. Mr. Perry, with the
9 consent of Mr. Krincich -- I couldn't find you. I
10 heard you were headed on your way out going to
11 personally look for the witness.

12 **MR. PERRY:** We did go to her place of
13 employment. She's been terminated from there.

14 **THE COURT:** Hold on. So I went and told the
15 jury that we hadn't forgotten about them and that
16 we were waiting on a witness to come and as soon as
17 we were in a position to go forward, we would do
18 so. I didn't want them to think that --

19 **MR. PERRY:** Not withstanding my
20 recalcitrance earlier, a plea offer has been made.
21 Mr. Krincich is discussing it with his client right
22 now that may resolve this.

23 **THE COURT:** I just wanted you to know that.
24 Krincich said he didn't have a problem with it.

25 **MR. PERRY:** I, of course, wouldn't either.

1 **THE COURT:** We couldn't find you.

2 **MR. PERRY:** I understand.

3 **THE COURT:** We didn't want to have them just
4 sitting there.

5 **MR. PERRY:** I apologize for not being in
6 here to respond.

7 **THE COURT:** That's no problem.

8 **MR. PERRY:** I'm actively trying to find her.

9 **THE COURT:** I mean, I'll give y'all some
10 time to find her. If both of you want to continue
11 the case, I might.

12 **MR. PERRY:** I don't want to continue it. I
13 want to get it done. We'll see if the offer I just
14 made resolves it.

15 (WHEREUPON, there is a pause.)

16 (WHEREUPON, a bench conference is held off the
17 record.)

18 **THE COURT:** All right. Let's bring the jury
19 in.

20 Y'all want a bench warrant on this woman?

21 **MR. PERRY:** Yes, please.

22 **THE COURT:** Well, you prepare it.

23 **MR. PERRY:** Yes, sir.

24 (WHEREUPON, the jury enters at approximately
25 10:35 a.m.)

1 **THE COURT:** Sir, let me let you -- let you
2 stand up so that the people that have to go by can,
3 uh, -- they don't have to -- I understand you have
4 a hearing -- I want you to stand up so they don't
5 have to step over you.

6 All right. Good morning to you, Ladies and
7 Gentlemen, again. As I've told you with the
8 permission of the attorneys when I stepped back
9 into the jury room, we were having a situation with
10 a witness that we're having to deal with. That
11 situation did not resolve.

12 So what we're going to -- what I'm going to do
13 is send you home and let you come back tomorrow.
14 We've got to get this situation with the witness
15 resolved. I teach a class at the law school on
16 Tuesday afternoons. I would have to leave early
17 this afternoon to get back over there.

18 We probably still could complete the case this
19 week. Rather than y'all sitting around and waiting
20 and wasting your time and everybody else's time,
21 we're going to go ahead and, uh, -- I'm going to
22 continue the case until tomorrow morning at 9:30.
23 Again, I ask you to be here then. I'm sorry about
24 this morning. Crazy things happen in trials and
25 this was totally unanticipated by anybody.

1 So again, I ask you not to discuss the case or
2 do anything about, uh, making any inquiry about the
3 case. Don't get on the internet. Don't talk to
4 anybody that you may come in contact with. Again,
5 I ask you to be back here so we can start at 9:30
6 in the morning. I apologize. Y'all are free to
7 leave. We will see you tomorrow morning.

8 Bring your hearing aid. Bring your hearing
9 aid.

10 (WHEREUPON, the jury exits at approximately
11 10:37 a.m.)

12 **THE COURT:** All right. We will come back at
13 9:30 in the morning and we will see what success you
14 have had in trying to locate this woman and we'll
15 address any issues that may come up with respect to
16 her availability tomorrow as to further proceeding
17 with the case at this time.

18 **MR. PERRY:** Thank you, Your Honor. I'm
19 having my paralegal preparing that bench warrant
20 right now. I'll have it in there for your signature
21 briefly.

22 **THE COURT:** All right.

23 (WHEREUPON, the Court recesses for the day.)
24

P R O C E E D I N G S

(WHEREUPON, the proceedings begin on the 15th day of January, 2014 at approximately 9:27 a.m.)

(WHEREUPON, the jury enters at approximately 9:28 a.m.)

THE COURT: Okay. Ladies and Gentlemen, good morning to you. Nice to see you this morning. Before we do anything else, I'm going to ask the clerk if she would swear you in.

THE CLERK: Thank you, Your Honor. Ladies and Gentlemen of the jury, could you please stand and raise your right hand and be sworn. You shall well and truly try and true deliverance make between the State of South Carolina and the person at the bar who you shall have and charge and a true verdict give according to the evidence and the law so help you God? Please signify by saying, "I do".

(WHEREUPON, each juror responds.)

THE CLERK: Thank you. Please be seated.

THE COURT: All right. Ladies and Gentlemen, I have a couple of questions before we get started here this morning. I cautioned you about talking about the case or doing anything about. The first thing I'm going to ask you is did anybody discuss this case since we left yesterday

1 afternoon? Anybody approach you about the case to
2 discuss it in anyway since we left yesterday?
3 Y'all done any independent inquiries, getting on
4 the computer or done anything about this case since
5 we left? (No response.)

6 All right. Good. Ladies and Gentlemen, as I
7 told you, this is a criminal case. The defendant,
8 Mr. Allen, has been charged with four counts of
9 Attempted Murder and one count of Resisting Arrest
10 with a deadly weapon and one count of Possession of
11 a Weapon during the Commission of a Violent Crime.
12 The indictments allege that Mr. Allen did in
13 Kershaw county on or about December 12th, 2012 with
14 the intent to kill attempt to kill Deputy Justin
15 Scott with malice aforethought either expressed or
16 implied. Another indictment says that Mr. Allen
17 did in Kershaw on or about December 20, 2012 with
18 the intent to kill attempt to kill Investigator
19 Mickey Sellers with malice aforethought either
20 expressed or implied. The third indictment alleges
21 that Mr. Allen did in Kershaw county on or about
22 December 20, 2012 with the intent to kill attempt
23 to kill Investigator Rick Bailey with malice
24 aforethought either expressed or implied. The
25 fourth attempted murder charge alleges that Mr.

1 Allen did in Kershaw county on or about December
2 20, 2012 attempt to -- with intent to kill
3 attempted to kill Captain Ed Corey with malice
4 aforethought either expressed or implied.

5 The other two indictments allege that Mr.
6 Allen did in Kershaw county or about December 20
7 possess a firearm or visibly display what appeared
8 to be a firearm or visibly displayed a knife during
9 the commission or attempted commission of a violent
10 crime. The last indictment alleges that Mr. Allen
11 did in Kershaw county on or about December 20, 2012
12 knowingly and willfully resist the lawful efforts
13 of law enforcement to arrest him or another person
14 with the use of threat or threats by use of a
15 deadly weapon against the officer, that being
16 Kershaw county law enforcement officer. The
17 defendant was in possession or claimed to be in
18 possession of a deadly weapon.

19 As I told the whole jury panel on Monday,
20 these indictments are nothing but notice documents.
21 They put this defendant on notice of the
22 perspective charges against him. They are not to
23 be considered by you as anything other than notice
24 documents. They are not evidence. They let Mr.
25 Allen know of these charges and that's what they

1 were attempting to do. And to these charges, the
2 defendant had entered a plea of not guilty to all
3 of them. As a result, we are here for the State to
4 attempt to put evidence up and determine if you can
5 find him guilty beyond a reasonable doubt.

6 I also told you the other day the two basic
7 principles of our criminal justice system that you
8 need to keep in mind throughout the course of this
9 trial. One of which is Mr. Allen comes into this
10 courtroom presumed to be innocent. That
11 presumption is with him now and will remain with
12 him throughout the course of this trial and would
13 only change if you, the jury, after hearing all the
14 evidence determine he is, in fact, guilty.

15 The other basic principle is that the burden
16 of proving this defendant guilty of one or all of
17 these charges falls upon the State of South
18 Carolina. The State must prove him guilty beyond a
19 reasonable doubt, which is a heavy burden placed on
20 the State. The defendant has no burden. The
21 defendant doesn't have to do anything in this case.
22 As I told you, he's presumed to be innocent. That
23 burden falls on the State of South Carolina.

24 Now, if you've not served on a jury before or
25 it's been some time, I'm going to go over a little

1 bit about how this process will work. The first
2 thing that's going to happen after I make these
3 comments is the lawyer's going to have an
4 opportunity to get up and speak to you. The State
5 will go first because, as I told you, the State has
6 the burden of proof. Because that burden falls on
7 the State, they get to go first throughout the
8 course of the trial.

9 When they talk to you, this is what we call an
10 opening statement, Ladies and Gentlemen. It is a
11 chance for these lawyers to introduce themselves
12 and then to tell you a little bit about what they
13 think will come out during the course of the trial.
14 It's a chance for them to educate you or inform you
15 a little bit about this trial so you will have an
16 understanding about it before they start putting up
17 evidence in the case.

18 After both the State and the defendant through
19 their respective attorneys have put their opening
20 statements in front of you, then the State would go
21 forward with presentation of his evidence. I would
22 assume that most of the evidence that would come
23 into this case would come in by way of testimony
24 from witnesses. Witnesses will be put under oath.
25 They will get in this witness chair right here.

1 They will tell you what they know about this case.
2 They've seen something, heard something, smelled
3 something, tasted something, felt something. They
4 have some knowledge about the case from one of
5 their senses. They will tell you what that factual
6 knowledge is.

7 Other types of evidence that could come in may
8 be things like photographs or documents. That type
9 of evidence comes in. It's introduced. It's given
10 an exhibit number and it will go with you to the
11 jury room for your review during the course of your
12 deliberations.

13 The testimony, Ladies and Gentlemen, will go
14 with you in your memory. It's absolutely essential
15 that you pay close attention to what's being said
16 here in this courtroom. If you don't understand
17 somebody, you can't hear something, either me or
18 the lawyers or witnesses, let me know in some way
19 and we will make sure that these witnesses or the
20 lawyer or the judge or whoever it is speaks up or
21 speaks more clearly. It's essential that you hear
22 what's being said.

23 One of the bailiffs said somebody made an
24 inquiry about taking notes. I ask you not to take
25 notes. This is not going to be a long trial. My

1 concern about taking notes is sometimes people will
2 write something down wrong and that note get into
3 the jury room and it's hard to convince them that
4 what they wrote down was in error. So this case
5 will probably be over today or tomorrow in terms of
6 the presentation of the evidence. I think you can
7 listen and not have any problem.

8 The third type of evidence that could come in,
9 Ladies and Gentlemen, is what we call a
10 stipulation. That's where the parties agree as to
11 something or stipulate as to some fact. If there
12 is a stipulation, the lawyers will tell me and I
13 will tell you. You are to accept that as those it
14 has been proven here in the courtroom.

15 After the State has put up all its evidence,
16 the State -- the defendant will have an opportunity
17 to offer any evidence the defense wishes to offer.
18 But the defendant may not put up any evidence.

19 As I told you, the defendant has no burden in
20 this case. The defendant doesn't have to do
21 anything. It all falls on the State. If the
22 defendant feels like they don't need to, then they
23 may not put up any evidence. But if the defendant
24 elects to put up evidence, it would be of the same
25 nature that the State does. I think most of it

1 would be testimony from witnesses who would testify
2 here in the trial.

3 When both sides have concluded whatever they
4 wish to offer, then the lawyers have another
5 opportunity to speak to you. This is what we call
6 closing argument. A closing argument is a little
7 bit different than the opening statement. The
8 closing argument is a chance for lawyers to review
9 with you the evidence that came in during the
10 course of the trial. It's a chance for them to
11 emphasize to you or ask you to seriously consider
12 in your deliberations certain pieces of evidence.
13 It is their opportunity to attempt to convince or
14 persuade you why you should ultimately return a
15 verdict for their respective clients.

16 When both sides have concluded their closing
17 arguments, Ladies and Gentlemen, then I will
18 instruct you or charge you as to the law. Then you
19 will retire to the jury room, determine the facts,
20 apply the law that I give you and ultimately render
21 your verdict on these charges.

22 Ladies and Gentlemen, your role in this case
23 is that of a fact-finder. You are the judges of
24 the facts. It is your responsibility to determine
25 what you consider to be the facts in this case. My

1 role is different from yours. My role is two-fold.
2 First, my responsibility is to see that this trial
3 is conducted according to the rules that we have
4 for trial in South Carolina. We have rules of
5 evidence, rules of procedure and it's my
6 responsibility to see that the trial is conducted
7 that way. It's no different than any other
8 structured evidence. Generally, structured events
9 have rules in it that have to be complied with and
10 there may be a referee, umpire or somebody that has
11 that responsibility to see that the rules are
12 followed. My other responsibility is, as I told
13 you, to charge you or instruct you as to the law so
14 that you will have that law to apply to the facts.

15 Ladies and Gentlemen, we have good lawyers in
16 this case. I want you to listen closely to
17 everything these lawyers tell you, but understand
18 that what the lawyers say in this courtroom is not
19 evidence. They are advocates for their respective
20 clients. They represent their respective client.
21 Solicitor represents the State. Mr. Krincich
22 represents the defendant. It's their
23 responsibility to do what they think they can in
24 order to represent their client. Understand what
25 they tell you is not evidence. Please do not

1 consider anything they say as evidence.

2 Again, I tell you this case is very, very
3 important to both the State and to the defendant.
4 Please pay close attention to everything that's
5 said here in the courtroom.

6 With that said, I will call on the Solicitor.
7 You ready to proceed with your opening statements?

8 **MR. PERRY:** We are, Your Honor.

9 **THE COURT:** If you would please.

10 **MR. PERRY:** Good morning, Ladies and
11 Gentlemen. My name is Brett Perry. I'm the Deputy
12 Solicitor here in Kershaw county. My role in all
13 of this is I represent the State. Basically what
14 that means is I'm here to present the case, the
15 facts as we found them to be.

16 Before I was prosecutor, I used to be a police
17 officer. I'm from back home out of Horry county.
18 I was a police officer in the city of Myrtle Beach.
19 One of the most transformative things in my life
20 happened on the night of December the 29th, 2002.
21 At the time, my wife was pregnant. We had a son
22 coming in February --

23 **MR. KRINCICH:** Objection, Your Honor. This
24 is --

25 **THE COURT:** Sustained.

1 **MR. PERRY:** I say this to say that law
2 enforcement has a very difficult job. Law
3 enforcement officers lose their lives on an all too
4 frequent basis. Even as a prosecutor, even as a
5 former police officer, riding down the road when
6 police get behind us, we all feel kind of nervous.
7 Maybe we didn't do something right. Maybe we going
8 to get pulled over.

9 If we're laying in our beds in the middle of
10 the night and we hear that glass break, the first
11 thing we want is law enforcement to come there and
12 protect us. The question I've got is who is going
13 to protect law enforcement from what they face
14 everyday. They don't do it for the money. They
15 get paid precious little. They do it because they
16 want to give something back. They want to make
17 their communities a safer place. They do it
18 because they feel a calling.

19 They understand and they freely accept the
20 danger that's involved in this. They understand
21 that every day whenever they go to work, they might
22 not be coming home. It could be the last day that
23 they ever wake up and take their kids to school and
24 kiss their wife good morning.

25 On December the 20th, 2012, four deputies at

1 the Kershaw County Sheriff's Department could very
2 easily have not gone home at the end of their
3 shift. Basically what happened on that day, the
4 defendant, Mr. Ernest Allen, was a passenger in a
5 vehicle. At the time, he was wanted on a bench
6 warrant which means he had failed to appear. He
7 failed to be in court when he was supposed to be in
8 court. He had nine charges pending at the time.
9 Of those nine charges, on almost every one of them,
10 he could have done significant time. When I say
11 significant, there were four charges for which he
12 could have done up to 30 years on. That's a lot of
13 time.

14 When he was noticed to be in court, he failed
15 to appear. A bench warrant was issued for his
16 arrest. What that tells law enforcement is go get
17 him. He didn't show up when we had him scheduled
18 to be here to go forward with the trial on those
19 matters.

20 So law enforcement was looking for him. They
21 had been putting the word out to people. Hey, if
22 you see this guy, let us know. We need to get him
23 back into custody. We need to make him come to do
24 what he was supposed to do, show up in court.

25 Investigator Mickey Sellers who works for the

1 Kershaw County Narcotics Division, an investigator
2 with them, he had developed a relationship with a
3 young lady, just a concerned citizen. This woman
4 had no charges pending. She's got no record
5 whatsoever. Wasn't get paid to do anything. She
6 was just a concerned citizen. As it turns out, she
7 knew Mr. Allen.

8 As it turns out, on December 20th, 2012, Mr.
9 Allen was a passenger in the vehicle that she was
10 driving. She knew that he was wanted. What did
11 she do? She did the right thing. She had
12 Investigator Sellers' telephone number. At every
13 opportunity she had, when Mr. Allen either wasn't
14 immediately in the car with her or, you know,
15 looking, she texted Investigator Sellers. Hey,
16 he's with me. Here's the vehicle we're in. Here's
17 the area we're in. I've seen him with a gun.

18 Investigator Sellers, realizing that this is
19 somebody who desperately does not want to go to
20 jail, realizing this is somebody who may be very
21 dangerous, realizing this is somebody who has been
22 seen with a gun, he's smart enough not to go try to
23 make that traffic stop by himself. So what does he
24 do? He notifies other officers with the Kershaw
25 County Sheriff's Department. In particular, he

1 notified Captain Ed Corey who is the head of,
2 basically, all the patrol units there.

3 Captain Corey notifies a couple of other
4 officers, Investigator Rick Bailey who is seated
5 here with us and Justin Scott who is no longer a
6 deputy at the sheriff's department. He's left to
7 go on to other things. Investigator Bailey,
8 Captain Corey, Deputy Scott, they all go get up
9 with Investigator Sellers.

10 Out here on Precipice Road here in Kershaw
11 county, they initiated a traffic stop on the
12 vehicle that they knew Mr. Allen to be in. Rather
13 than simply say, hey, you got me, I'm willing to go
14 in peacefully, Mr. Allen bails out of the vehicle
15 on foot and takes off running. Rather than simply
16 submit to law enforcement and say, hey, I want to
17 go in and face my punishment if there's any to be
18 given and have my day in court, Mr. Allen who did,
19 in fact, have a gun, a .38 caliber revolver,
20 decided that he'd start shooting at law
21 enforcement. Investigator Sellers was chasing him
22 on foot. As he's running from Investigator
23 Sellers, back over his shoulder, he points the gun
24 and he shoots at Investigator Sellers.

25 You're going to hear Investigator Sellers tell

1 you that he was scared to death. Okay. Police
2 officers are brave and macho. They go out there
3 and they do their job. But guess what? When you
4 get shot at, it's a scary thing. You're going to
5 hear him tell you that the only thing he was
6 looking for is something to get behind.

7 The youngest of the bunch, the fittest of the
8 bunch, the fastest of the bunch that was chasing
9 him was Deputy Scott. Deputy Scott was closing on
10 him. Mr. Allen was running through a yard towards
11 some woods. Investigator Scott went to get to him
12 before he got to those woods. As he got to those
13 woods, Mr. Allen turned around. No mistake about
14 this. Pointed the gun directly at Investigator
15 Scott and shot at him. Investigator Scott shot
16 back. Fortunately, nobody was hit that night.
17 Fortunately, nobody was dead.

18 At that time, Mr. Allen dropped the gun and
19 continued to flee into the woods. Law enforcement
20 did exactly what they are supposed to do at that
21 point. You're not going to running into the woods
22 after a man who may still be armed where he can see
23 you, but you can't see him. They called out other
24 officers. They tried to set up the perimeter.
25 They tried to catch him. They didn't catch him

1 that night. But ultimately, they did catch him.

2 They recovered the gun that night but they
3 didn't recover any of the bullets. So there's no
4 neat CSI stuff to be found. There's no ballistics.
5 There's no bullet that they got out of anybody or
6 out of anything. That doesn't always happen. We
7 did recover the gun. We did recover rounds inside
8 the gun that hadn't been shot yet and rounds that
9 had been shot.

10 It was also rainy that night. There's puddles
11 of water standing all over the ground. They found
12 the gun. Captain Corey, to mark the gun so that
13 nothing happened to it, everybody know where it's
14 at, takes a hat off of his head and throws it on
15 the gun. This is evidence. Don't nobody mess with
16 it. Ultimately, the homeowner that lived at that
17 location, while they are out there trying to work
18 this crime scene goes and picks up the gun and is
19 walking up to law enforcement later. Hey, somebody
20 dropped this.

21 SLED got involved. You're going to hear from
22 agents from SLED, crime scene agents that came out
23 and worked the crime scene who actually took the
24 gun into evidence, who took other things into
25 evidence. When he got out of the car, the

1 defendant dropped a cell phone. It busted into
2 pieces and fell on the side of the road. They
3 recovered evidence.

4 But you're going to hear them tell you that
5 even though they looked for DNA and even though
6 they looked for fingerprints, they didn't find any.
7 That's not unusual. It was a damp night, cold
8 night. There was water on the ground. Other
9 people handling things. It's not always like CSI.
10 There's not always a perfect fingerprint on that
11 gun. There's not always DNA on that gun.

12 Really, this isn't a question of
13 identification. You're going to hear from Ms.
14 Alicia Brisbane who was driving the car whose going
15 to tell you it was Ernest Allen in the car with me
16 and I knew him to have a gun. And you're going to
17 hear from these officers. They knew him by sight.
18 They dealt with him before. They knew who Ernest
19 Allen was. They recognized him. They weren't that
20 far from him.

21 It was night time. It so happens at this
22 residence, like so many people do, have huge street
23 light right outside. Lit up the whole yard. They
24 could see him just fine. No question about who it
25 was. There's no question about what he did. He

1 pointed a gun at the police and he shot at them.

2 Now, you know, I would submit to you that you
3 don't point a gun at somebody and pull the trigger
4 for any other reason than to cause them harm. You
5 don't do it because you're scared. You don't do it
6 because you just simply want to go on about your
7 business and get away.

8 I submit to you, in this situation, this ain't
9 a case where anybody had a right to go on about
10 their business. This isn't a situation where
11 anybody had a right to get somebody to leave them
12 alone. This isn't some thug chasing you down the
13 road or something like that. This is somebody who
14 is wanted on pending charges and on a bench warrant
15 for failure to appear and the police trying to do
16 their job. And what they get for that is shot at.

17 As the judge instructed you, the State's got
18 the burden of proof. It's a real high burden of
19 proof. It's beyond a reasonable doubt. That
20 doesn't mean beyond all doubt. It doesn't mean
21 beyond any possibility. It means beyond any
22 reasonable doubt.

23 When you hear the evidence -- nothing I've
24 told you right now is evidence. All I'm doing is
25 basically telling you what I intend to present to

1 you. When you hear the evidence that comes from
2 that stand, the people who sit there and testify
3 and tell you what happened, I believe that you will
4 be convinced beyond any reasonable doubt that Mr.
5 Allen did several things. First of all, he
6 resisted arrest with a deadly weapon. Okay. He
7 had a weapon and considered a deadly weapon, a gun,
8 during the course of resisting arrest -- during the
9 course of trying not to be taken into custody.
10 Clearly, that's what was going on. Second thing,
11 he was in possession of a firearm during the
12 commission of violent offense. Clearly, what was
13 going on was violent. You don't shoot at people
14 and that not be considered violent. He clearly had
15 a gun.

16 And then the last four charges, attempt to
17 commit murder on the four deputies there. Now,
18 that's a real high burden that I have. I have to
19 prove to you not just that he had the gun and not
20 just that he pointed the gun and not just that he
21 pointed the trigger but that he had an intent to do
22 them harm or a careless disregard for their safety,
23 the safety of their lives. And again, I think when
24 you hear the evidence, there's not going to be any
25 choice for you to make but that what he did was

1 attempt to kill these officers so that they
2 wouldn't take him into custody.

3 I appreciate your service. I know y'all have
4 been in here -- this is the third day now. But
5 none of this could happen without -- the system of
6 justice couldn't work without you. We'll try to go
7 through this as quickly as you can. Appreciate you
8 listening to everything that all the witnesses have
9 to say. I hope that once you heard everything that
10 you will agree with me beyond a reasonable doubt
11 that Ernest Allen attempted to commit murder four
12 times, that he resisted arrest with a deadly weapon
13 and that he was in possession of a firearm during
14 the commission of a violent crime. Thank you.

15 **THE COURT:** All right. Mr. Krincich.

16 **MR. KRINCICH:** Thank you, Your Honor.

17 Good morning. It's sometimes hard to get up
18 and give an opening statement as a defense
19 attorney. As the judge told you, we don't have any
20 burden of proof. Burden of proof lies solely with
21 the State. They must prove every crime that
22 they've charged and every element of each crime
23 beyond a reasonable doubt to you, the members of
24 the jury, before you can find Ernest Allen guilty.
25 Because as he sits right now, as the judge already

1 told you, he is innocent. That's the way you must
2 view him during this entire trial.

3 Once you have heard all the evidence from the
4 witness stand, once the judge gives you
5 instructions and releases you to the jury room, at
6 that point, you can begin to form opinions. And as
7 a group of 12 people, you can decide if Mr. Allen
8 is guilty or does he remain innocent as he sits
9 right now.

10 Again, it's kind of hard to give this opening
11 statement because I don't know exactly what the
12 State is going to present. Y'all were here for
13 jury selection. You heard the long list of
14 witnesses. They might not call two or three of
15 those witnesses. Solicitor may have told you what
16 two or three of those witnesses are going to say
17 and decide not to call them. So I ask that you
18 listen to everybody, remember what the Solicitor
19 said he was going to present and determine for
20 yourself if Mr. Allen is guilty of the crimes that
21 he was charged with.

22 The most serious and -- to -- Mr. Allen and
23 myself think the most important thing that he's
24 currently charged with is attempted murder. That
25 goes beyond resisting arrest with a deadly weapon.

1 That goes beyond possession of a weapon during a
2 violent crime. That means, to me, and I'll read
3 you the law. You can determine what it means to
4 you. It says attempted murder means a person who
5 with intent to kill attempts to kill another person
6 with malice aforethought either expressed or
7 complicated -- or implied. Excuse me. That means you
8 have to believe when he fired those shots, he
9 intended to kill somebody.

10 Now, the Solicitor says you can't fire a shot
11 without the intent to do serious bodily harm.
12 Maybe y'all are firearms collectors. Maybe y'all
13 fire on the weekend or part of a gun club. Maybe
14 you just watch old westerns like I do. How many
15 times have you seen somebody fire a gun without the
16 intent to kill? Plenty of times, people fire a gun
17 with the intent to scare someone, with the intent
18 to create a distraction so they could get away. If
19 you believe that Mr. Allen fired a shot without the
20 intent to kill, you must find him not guilty of
21 attempted murder.

22 Now, there's going to be a lot of evidence
23 presented. It's a fairly simple case. You're going
24 to hear everything probably today. I don't know
25 that we'll finish today. But I ask you to just

1 listen to everything. That's what I got to do. I
2 don't know what the State is going to present at
3 this point. We've heard an idea of what may come.

4 I ask that you listen, that you pay close
5 attention when the witnesses are testifying to
6 determine if you believe them, if you believe some
7 of what they say, all of what they say or none of
8 what they say. You're going to hear from different
9 officers. You're going to find that not all those
10 officers have the same story. You have to piece
11 together individually and then when you get
12 together as a jury to determine what the actual
13 truth is. Some of what the officer said true?
14 Could someone see something better than another
15 one? Does anyone have any personal bias in this
16 case that they may have misremembered something?

17 Ladies and Gentlemen, I'm going to talk to you
18 again at the end of the trial. At that point, I'll
19 tell you what I think of all the evidence is that's
20 been presented. Right now, all I'm simply asking
21 you to do is listen. Pay close attention. As the
22 judge has indicated, this is a serious case to the
23 State of South Carolina and it's a very serious
24 case to my client, Ernest Allen. Thank you.

25 **THE COURT:** All right. Mr. Solicitor, you

1 ready to call your first witness?

2 MR. PERRY: Yes, sir, Your Honor.

3 MR. KRINCICH: At this time, I make a motion
4 to sequester witnesses.

5 THE COURT: Any objection to that?

6 MR. PERRY: No objection, Your Honor.

7 THE COURT: Of course, you'll be able to
8 leave the victims in here and the officers who,
9 uh, --

10 MR. PERRY: Your Honor, I don't have any
11 witnesses in here that are not victims other than
12 Investigator Kevin Lynch, who is, uh, -- he's just
13 here for possible need from the Property and
14 Evidence division. The only person I got here,
15 Your Honor, that could possibly be called as a
16 witness who is not a victim.

17 MR. KRINCICH: Your Honor, I understand that
18 generally the victims are allowed to remain in.
19 There are individuals that are going to testify to
20 a group story. It's important to my client, in
21 fairness, to have those individuals testify and
22 give the story to the jury for the first time.

23 THE COURT: I have ruled.

24 MR. KRINCICH: Thank you, Your Honor.

25 MR. PERRY: Your Honor, the State would call

1 Investigator Mickey Sellers.

2 **MICKEY SELLERS**

3 having first being duly sworn, testifies as follows:

4 **THE CLERK:** Please be seated and state your
5 full name for the record.

6 **THE WITNESS:** Michael Sellers.

7 **DIRECT EXAMINATION**

8 **BY MR. PERRY:**

9 **Q** All right. Mr. Sellers, if you will, tell us
10 how you are employed and with whom you are employed.

11 **A** I'm employed with Kershaw County Sheriff's
12 Office. I been employed with the sheriff's office since
13 December 25th, 2003. I'm currently a Sergeant in the
14 Narcotics division.

15 **Q** In December the 20th of 2012, were you serving
16 in the same capacity?

17 **A** Yes, sir. I was.

18 **Q** And how did you come to be involved with the
19 events that took place that day, that afternoon as they
20 relate to Mr. Allen?

21 **A** Actually, I had left my number with some people
22 around some apartment complexes to let them know that we
23 were looking for this individual for some outstanding
24 warrants that we had. I was actually out working that
25 night. I was on my way home. I received a text message,

1 I believe it was around -- it was shift change, 6:30ish,
2 seven o'clock maybe.

3 Q Okay.

4 A It was still getting dark early around
5 Christmas time. I was actually on the way home. I
6 received a text message. This resident was stating that,
7 uh, --

8 MR. KRINCICH: Objection. Hearsay, Your
9 Honor.

10 THE COURT: All right.

11 MR. PERRY: I think he's simply stating that
12 he was informed about what happened or there was --
13 the defendant was in a particular location much the
14 same as a concerned citizen calling to say they are
15 breaking in my house.

16 THE COURT: All right. If that's what he's
17 trying to do testify that somebody was giving him
18 notice that he needed to be somewhere, then I'll let
19 him testify to that. Overruled.

20 THE WITNESS: Okay. I received information,
21 uh, that Mr. Allen was going to be in a beige-
22 colored van leaving Wateree Villa Apartments. I was
23 given a description of the van. I actually tried to
24 call my other two partners that worked with me. I
25 couldn't get them on the phone.

1 I was advised that he had a firearm on him. I
2 did not want to approach this by myself. I made a
3 phone call to the captain who was at the sheriff's
4 office that I just left from there. I knew it was
5 shift change. There was some deputies that were --
6 some extra deputies at the office that were about to
7 go home. I had Captain Corey round up deputies that
8 were about to leave the office.

9 I gave them a description of the van that I was
10 looking for and the general direction that it was
11 going. I actually went and sat on South Broad
12 Street, uh, by Zemp Stadium in Camden right on, I
13 believe it was Bull Street. I just sat on the side
14 of the road. Blacked out.

15 **BY MR. PERRY:**

16 **Q** When you say blacked out, you mean with --

17 **A** With my lights off on the side of the road. A
18 short time later, Captain Corey arrived in the area. He
19 was sitting in a different location. It wasn't long
20 after Captain Corey arrived I noticed the beige-colored
21 van coming off of Gate Street on South Broad and turned
22 right onto Broad Street heading towards I-20.

23 **Q** Investigator Sellers, before you proceed with
24 that, uh, why were you looking -- why was the sheriff's
25 department looking for Mr. Allen?

1 **A** We had, uh, I believe it was nine outstanding
2 warrants, bench warrants for Mr. Allen.

3 **Q** And so bench warrants?

4 **A** Yes, sir.

5 **Q** For failure to appear in court?

6 **A** For failure to appear in court.

7 **Q** Thank you.

8 **A** Uh, it was kind of a misty rain. Uh, I pulled
9 out behind the van. Captain Corey pulled out also. We
10 followed the van. We were radioing the other units to
11 let them know where we were, what speeds we were
12 traveling to kind of let them catch up to us.

13 Uh, we actually made a left onto Black River
14 Road in Camden off of 521 heading towards Bishopville or
15 Sumter county. Myself and Captain Corey pulled up to the
16 van. Captain Corey was in front of me. I was behind
17 him. The other units were catching up to us. As they
18 were getting close, the van turned left onto Precipice
19 Road.

20 At that time, I had a feeling that they were
21 going to a trailer park, which was kind of close to where
22 the direction the van was going. I did not want that van
23 to go into the trailer park. So I went ahead and radioed
24 Captain Corey to let's make the traffic stop. Captain
25 Corey activated his blue lights and went around the van.

1 I activated my blue lights. He stopped. The van
2 stopped. The passenger side door opened up. I was
3 already getting out of my car. We had already planned to
4 do a felony car stop due to the fact that we knew he had
5 a gun.

6 Q When you say felony car stop, describe that a
7 little bit. What does that mean?

8 A I mean, he was wanted on nine serious charges.
9 We knew he had a gun. We were going to do a felony car
10 stop. We're not going to walk up on the car. We were
11 going to call him out of the car to us just for the fact
12 we knew he had a gun. I want to go home. It's close to
13 Christmas. I'm not going to walk up to a car where I
14 know somebody is wanted on some serious charges and has a
15 gun on him. I'm not going to do that.

16 As soon as the van stopped, the passenger side
17 door opened. I was already exiting my vehicle. The
18 other units were pulling up behind us as all this was
19 going on. It was a pickup truck with Officer Bailey.
20 Deputy Scott was in the passenger seat. The passenger
21 side van opened up. Mr. Allen bailed out of the van and
22 started running across the yard. The yard had a large
23 yard light outside. It was pretty bright in the yard.

24 Q Could you see him clearly?

25 A I could see him. I know him from past

1 experiences.

2 **Q** Did you recognize him?

3 **A** Yes, I did.

4 **Q** Any doubt in your mind that the person sitting
5 here this morning, Ernest Allen is the man who got out of
6 that van and who ran?

7 **A** There's no doubt in my mind that's who it was.

8 **Q** Okay.

9 **A** As he started running, he crossed a small
10 ditch. I had a driveway which I did not have to run
11 across a ditch. I was behind him. Probably 15 or 20
12 yards behind him. We were directly underneath the street
13 light. He had a large jacket on. It was kind of cold
14 outside, rainy. He had his hands in front of him. I
15 didn't know if he was holding his jacket or pants or
16 whatever. I just saw something, a flash, come around
17 behind me.

18 Deputy Scott who is one of the sheriff's
19 department's world class sprinters is what I called him.
20 He's pretty fast. He was coming across the yard at an
21 angle. He had an angle on him. So he was gaining on him
22 a lot quicker than I was because I was right directly
23 behind him. I saw something silver go around towards me
24 and saw a flash.

25 **Q** Was it pointed in your direction?

1 **A** It was in my direction.

2 **Q** What was your thought at that point? What was
3 going through your mind?

4 **A** I didn't know. To start with, I didn't hear
5 the boom. I just seen a flash. I heard -- I described
6 it as it was kind of like a western movie. I never
7 thought that stuff was kind of real. You hear ricochets
8 and stuff like that on the movies but I actually heard --
9 the only thing I heard was something that said
10 (demonstrating). I don't know if it ricocheted or
11 something went by me.

12 And I yelled that he had a gun because I knew
13 Justin, he was a young deputy, he was closing in on him.
14 I did not want him to get into a confrontation with him
15 with a gun in his hand. At that time, I was standing at
16 the wide open middle of the yard. I was looking for
17 something to get behind. I didn't care if it was a rock,
18 a tree. I was looking for cover.

19 **Q** Were you scared for your life?

20 **A** Definitely. When you see a flash -- like I
21 said, I don't know if the bullet ricocheted off of a tree
22 close by to me or if it was the bullet going by me, I
23 don't know. All I know is I heard a loud noise and I was
24 looking for something to get behind. I couldn't tell you
25 how many times he shot. I know one for sure.

1 Deputy Scott was still gaining on him. I was
2 yelling, He's got a gun, He's got a gun. He went towards
3 the edge of the woods right at the edge of the wood line
4 where I could not see him anymore. Deputy Scott was
5 still closing in on him. At this time, it was like he
6 stopped at the edge of the woods. I just saw Deputy
7 Scott grabbing for his gun. It looked like they squared
8 off on each other shooting.

9 Q When you say squared off on each other, can
10 you --

11 A It was like they both faced each other and just
12 squared off. And there were numerous shots fired at that
13 time.

14 Q How far were they apart in your estimation?

15 A Probably 15 to 20 yards at the most.

16 Q Was he running away at the time?

17 A He was in the edge of the woods. I could just
18 see the muzzle flash. It didn't look like it was moving.

19 Q So your testimony was that he stopped ---

20 A Yes.

21 Q --- turned around and he stopped --

22 A He was stopped. I know he was stopped because
23 the muzzle flash was not moving. It was stopped right at
24 the edge of the woods.

25 Q Did you see in which direction he was pointing

1 the gun?

2 **A** I doubt it had to be towards Scott because the
3 muzzle flash was going out towards him.

4 **Q** Was it pointed up in the air?

5 **A** The muzzle flash was out in front of him.

6 **Q** Proceed.

7 **A** I yelled at Justin to stop and to come back to
8 me. By this time, Captain Corey and Officer Bailey were
9 coming across the yard also as all these shots were going
10 on. I called Justin back to me. I said, let's get back
11 to the cars. He went into the woods where we couldn't
12 see. I didn't know what kind of gun it was. I didn't
13 know how many bullets he had.

14 I was not going to go into a place that's dark
15 that I knew somebody has a gun shooting at me and go
16 after them, so we retreated back to the cars. We made
17 phone calls to call other units. We weren't sure if he
18 was down at the edge of the woods, but we did not want to
19 approach that area again. If he was there with a gun, he
20 could easily pop shots off at us. We had to come through
21 a lit area to get to him.

22 So we actually called SLED, I believe. Some
23 SLED officers came with their blood hounds and our blood
24 hounds. By this time, it was like a monsoon. It was
25 raining so heavy, uh, the dogs struggled tracking into

1 the woods. When we left -- we approached the area --
2 once we got some more people there, we approached the
3 area where the shots took place. Mr. Allen was not
4 there. Just a short distance into the edge of the woods
5 was a chain-linked fence. I believe it was probably a
6 six to eight-foot chain link fence that he had to go
7 over.

8 We crossed over that fence. Found some tracks
9 with the wood lines. Went across a garden and found the
10 pistol laying right in the middle of a garden. That's
11 where the pistol was marked by Captain Corey's hat. We
12 got down to the woods and just exhausted the dogs due to
13 the rain.

14 Q So ultimately, was Mr. Allen taken into custody
15 on the night of the 20th?

16 A He was not taken into custody the night of the
17 20th.

18 Q Do you know when he was taken into custody
19 subsequent to that?

20 A I believe it was the following day, the 21st.

21 Q And the charges that were pending against Mr.
22 Allen, did you have any knowledge of -- not to speak to
23 what those charges are, but the kind of time he was
24 looking at, was it a significant amount of time?

25 A Very significant. Yes.

1 Q Were they felonies or misdemeanors?

2 A Felonies.

3 MR. PERRY: Beg the Court's indulgence.

4 (Pause.)

5 BY MR. PERRY:

6 Q Did you see the gun that was found?

7 A I briefly saw it as we were tracking the dogs.

8 Q You saw where it was found?

9 A Yes, sir.

10 Q But up until that point, you didn't know that
11 he didn't still have it with him, right?

12 A Correct.

13 Q Which is why you guys didn't go into the woods
14 after him?

15 A That's correct.

16 Q Please answer any questions defendant counsel
17 may have for you.

18 CROSS-EXAMINATION

19 BY MR. KRINCICH:

20 Q Good morning, Sergeant.

21 A Morning.

22 Q Maybe we can just jump towards when you get to
23 Precipice Road. You stopped in front of a residence?

24 A Yes, sir.

25 Q Okay. Did you, at any point, draw this

1 residence or the location, are you familiar with what
2 everything looked like?

3 **A** I'm familiar, yes.

4 **Q** When you stopped in front of this residence,
5 it's in the front yard. You are in the driveway area,
6 correct?

7 **A** Correct.

8 **Q** All right. And in front of the van?

9 **A** I was not in front of the van. I was behind
10 them.

11 **Q** Behind the van. So Mr. Allen, you said, jumped
12 across a ditch. You got the opportunity to run up the
13 driveway?

14 **A** Right.

15 **Q** And then you run from the front yard into the
16 side back yard, correct?

17 **A** Correct. To the side of the house, yes.

18 **Q** You said it's kind of an open area?

19 **A** There are shrubs. A lot of azalea bushes
20 around the trees and stuff. As far as, there are some
21 big pine trees and stuff in the yard, yes.

22 **Q** So there's not necessarily a clear view from
23 the front of the road where the car stopped to where you
24 are saying the shooting started?

25 **A** No.

1 **Q** What would the distance be from the front of
2 the road where the -- the front of the house, the road
3 where the traffic stop occurred to where the shooting
4 began?

5 **A** I would say we were probably -- I don't know
6 the exact measurement. We were halfway down the driveway
7 when the first shots come off. We were running -- I was
8 running straight down the driveway. He was kind of
9 angled. He was beside the driveway. He crossed the
10 ditch. He didn't come get on the driveway. He was
11 running straight down.

12 **Q** I think we are one of the few countries that
13 doesn't use the metric system. So in yards, which I
14 think most of us are familiar with, could you tell us how
15 many yards away?

16 **A** We were probably, I don't know, 10 or 15 yards
17 off the roadway when the first shot started.

18 **Q** Then how long until you say y'all lost Mr.
19 Allen in the wood line?

20 **A** Maybe 20 to 25 yards where he angled back
21 towards the woods on the left side back of the house.

22 **Q** And what's the closest that you actually got to
23 him while pursuing him?

24 **A** Maybe 15 to 20 yards. I had to come around the
25 front of my car. I wasn't that far behind him. 15 yards

1 maybe.

2 **Q** Okay. How, uh, what was the distance -- you
3 already stated the distance between Justin Scott and Mr.
4 Allen probably never gotten more than 15 or 20 yards and
5 then they squared off on each other, right?

6 **A** It could have been a little closer. I was just
7 guessing.

8 **Q** How far do you think Ed Corey was from Mr.
9 Allen?

10 **A** I don't know exactly where he was at. They
11 were behind me. He would have to testify to that.

12 **Q** And Rick Bailey. Do you know about that?

13 **A** He was behind me also.

14 **Q** You've talked to SLED about this, right? Your
15 office didn't investigate the officer-related shooting,
16 correct?

17 **A** Right. It was turned over to SLED.

18 **Q** And it was Agent Kristin Grant who came out and
19 interviewed you?

20 **A** Yes.

21 **Q** You remember talking with her?

22 **A** I wrote a statement.

23 **Q** Now, when you stood up earlier out of your seat
24 to show how you said Mr. Allen fired the first shot, you
25 kind of turned; is that correct?

1 **A** That's correct.

2 **Q** Didn't you tell Agent Grant that he was firing
3 over the shoulder?

4 **A** Right. Firing -- this is firing over his
5 shoulder. (Demonstrating.)

6 **Q** Over his shoulder?

7 **A** Right.

8 **Q** Just like this while still running.

9 (Demonstrating.)

10 **A** Right. Not like this. (Demonstrating.)

11 **Q** Not like this? (Demonstrating.)

12 **A** Right. Just -- (Demonstrating.)

13 **Q** Still running forward?

14 **A** Right.

15 **Q** And firing backwards?

16 **A** Towards me.

17 **Q** Towards you. And that's when you had the good
18 sense to stop and say as you said, it's almost
19 Christmastime.

20 **A** I'm going home.

21 **Q** I'm going to find something to get behind.

22 **A** Right.

23 **Q** Did you find anything to get behind?

24 **A** A big pine tree.

25 **Q** Big pine tree. Okay. Did you at that time

1 cover yourself to make sure you were not in the line of
2 fire?

3 **A** Yes.

4 **Q** How would you say that you saw everything that
5 happened after that if you had covered yourself?

6 **A** It all happened together. I was still moving
7 to my location when -- I was watching Justin because I
8 knew he was gaining on him. I wasn't even behind the
9 tree when all this stuff -- other stuff -- I mean, I was
10 still in the open.

11 **Q** Okay. It actually happened December of 2012,
12 so 13 months ago.

13 **A** Correct.

14 **Q** As we all know, it's January now. We just went
15 through December. It starts getting dark outside about
16 5:30 at night. The sun is down by 6:30.

17 **A** It was dark.

18 **Q** It was dark.

19 **A** Yes.

20 **Q** All right. So you can't actually see which
21 direction Mr. Allen is facing when (Inaudible.)

22 **A** When he stopped -- Justin -- no, I could not
23 see exactly which way he was facing.

24 **Q** You end up seeing what you refer to as a muzzle
25 flair, right?

1 **A** Right.

2 **Q** That's when you fire a gun. There's a
3 reaction.

4 **A** Right.

5 **Q** A miniature explosion and a projectile which
6 shot through the barrel, right?

7 **A** Correct.

8 **Q** It's hard to see during the day that actual
9 muzzle flair, right?

10 **A** That's correct.

11 **Q** But it shows up pretty good at night.

12 **A** Correct.

13 **Q** But it's just a flair. You can't tell actual
14 direction from that, can you?

15 **A** You can tell which way the gun is pointing.

16 **Q** How so?

17 **A** When you see the muzzle flash, the end of the
18 muzzle flash, the gun is pointed in that direction.

19 **Q** Could you tell a difference between this and
20 this? It's an almost instantaneous flash, right?

21 **A** If it was shooting up at the air, it would have
22 been a lot higher up in the air. But it was level to the
23 ground. I mean, it wasn't -- it wasn't six feet in the
24 air. It was down low.

25 **Q** Okay.

1 **A** Pretty much the same height it was when it come
2 back towards me.

3 **Q** With any certainty, can you say exactly what he
4 was shooting at?

5 **A** I can not tell you which way he was facing when
6 he shot the gun at the edge of the woods towards Justin
7 Scott.

8 **Q** Just give me one second. Thank you, Sergeant
9 Sellers.

10 **THE COURT:** All right. Anything?

11 **MR. PERRY:** Nothing further from this
12 witness, Your Honor.

13 **THE COURT:** Thank you, sir. You may step
14 down.

15 **MR. PERRY:** The State would call Alicia
16 Brisbane.

17 **ALICIA BRISBANE**

18 having first being duly sworn, testifies as follows:

19 **THE CLERK:** Please be seated in the chair.
20 State your name for the record please, ma'am.

21 **THE WITNESS:** Alicia Denise Brisbane.

22 **DIRECT EXAMINATION**

23 **BY MR. PERRY:**

24 **Q** Good morning, Ms. Brisbane.

25 **A** Good morning.

1 **Q** I'm going to need you to speak up please.

2 Okay? Speak up. Speak up. How old are you, Ms.

3 Brisbane?

4 **A** I'm fine, and you?

5 **Q** No, how old are you?

6 **A** Oh, 29.

7 **Q** Are you a resident here in Camden, Kershaw
8 county?

9 **A** Yes, sir.

10 **Q** How long have you lived here?

11 **A** Eight years.

12 **Q** Do you have family here?

13 **A** Yes, sir.

14 **Q** Who all lives here besides you?

15 **A** Me and my sister and mother.

16 **Q** You have kids?

17 **A** Yes, sir.

18 **Q** How many kids do you have?

19 **A** Four.

20 **Q** Ms. Brisbane, do you have any criminal record
21 whatsoever?

22 **A** No, sir.

23 **Q** Don't have any charges pending against you or
24 anything like that?

25 **A** No, sir.

1 **Q** Have you previously had an occasion to meet and
2 get to know Investigator Mickey Sellers with the Kershaw
3 County Sheriff's Department?

4 **A** Yes, sir.

5 **Q** And at some point in time, did he speak to you
6 about Mr. Ernest Allen being wanted by the Kershaw County
7 Sheriff's Department, and these warrants for failure to
8 appear?

9 **A** Yes, sir.

10 **Q** Are you nervous this morning, Ms. Brisbane?

11 **A** Yes, sir.

12 **Q** Do you want to be here?

13 **A** Yes, sir.

14 **Q** Are you here under subpoena?

15 **A** Yes, sir.

16 **Q** So Investigator Sellers had discussed with you
17 that Mr. Allen was wanted, correct?

18 **A** Yes, sir.

19 **Q** Did he leave you any way to get in touch with
20 him?

21 **A** Yes, sir.

22 **Q** What did he leave you?

23 **A** A card.

24 **Q** Okay. Did it have a phone number on it?

25 **A** Yes, sir.

1 **Q** Okay. Now, tell us about December the 20th,
2 2012. What significant happened on that day?

3 **A** We was traveling down -- I can't remember the
4 name of the road.

5 **Q** Who is "we"?

6 **A** Me and Ernest Pickett.

7 **Q** First off, let me say, do you know Mr. Ernest
8 Allen Pickett?

9 **A** Yes, sir.

10 **Q** Is that him sitting right here?

11 **A** Yes, sir.

12 **Q** How long have you known him?

13 **A** A couple of years.

14 **THE COURT:** She's identified the defendant.

15 **BY MR. PERRY:**

16 **Q** So on December the 20th, y'all were riding
17 together?

18 **A** Yes, sir.

19 **Q** Tell the jury what happened that day.

20 **A** We was traveling down over there by the trailer
21 park.

22 **Q** Okay.

23 **A** We were turning on the road. There was some
24 cars behind me. One of the cars got in front of me where
25 I stopped.

1 Q Before we get to that part, let's talk about
2 how -- what happened earlier in the day. Did you have
3 occasion to contact Investigator Sellers?

4 A Yes, sir.

5 Q What did you contact him about and why?

6 A We was riding in Camden.

7 Q Who is "we"?

8 A Me and Ernest Pickett.

9 Q Okay.

10 A And we went to, like, an apartment complex and
11 Burger King. We was turning. That's when we --

12 Q At that time, did you know he was wanted?

13 A Yes, sir.

14 Q Did you make any attempt to contact
15 Investigator Sellers during that time?

16 A Yes, sir.

17 Q What exactly did you do?

18 A I called him when I had a chance.

19 Q Was Mr. Allen Pickett in the car with you at
20 that time?

21 A No, sir.

22 Q All right. And what did you tell him?

23 A Where we were going.

24 Q Was Mr. Allen with you?

25 A He was outside in the car.

1 **Q** Did you tell him that he was --

2 **A** Yes, sir.

3 **Q** Did you tell Investigator Sellers that Allen
4 was with you?

5 **A** Yes, sir.

6 **Q** Okay. All right. What else did you tell him?

7 **A** That I think he had a gun.

8 **Q** Why did you think he had a gun? Had you seen
9 him with a gun?

10 **A** Yes, sir.

11 **Q** Okay. All right. What else did you tell
12 Investigator Sellers?

13 **A** We were turning on Black River Road. He wanted
14 to know where we were going on. I told him I didn't
15 know.

16 **Q** Did you text him or call him? How did you let
17 him know that?

18 **A** Texted him.

19 **Q** Okay. All right. Then what happened?

20 **A** That's when the cars got behind us on, uh, the
21 road over there by the trailer park.

22 **Q** When they got behind you, then what happened?

23 **A** I stopped once the car cut me off and he jumped
24 out and ran.

25 **Q** Who jumped out?

1 **A** Ernest Allen.

2 **Q** Did you see or hear anything that happened
3 after that?

4 **A** I heard gunshots and I got on the ground.

5 **Q** Just to clarify, you had seen Mr. Allen with
6 gun at some point, correct?

7 **A** Yes, sir.

8 **Q** You notified Investigator Sellers that Mr.
9 Allen would be with you and that he possibly had a gun,
10 correct?

11 **A** Yes, sir.

12 **Q** Okay. Uh, were you being paid as any kind of
13 informant at the time by the sheriff's department?

14 **A** No, sir.

15 **Q** Okay. And you didn't have any charges, so you
16 weren't trying to get any help on any charges, correct?

17 **A** No, sir.

18 **Q** Why did you do this?

19 **A** At one point, the day -- I think it was like a
20 couple of days before, I felt threatened.

21 **Q** By?

22 **A** Ernest Allen.

23 **Q** On December the 20th, 2012, that was definitely
24 him in the car with you?

25 **A** Yes, sir.

1 Q You had believed him to be armed?

2 A Yes, sir.

3 Q You had informed Sheriff's Department officers
4 about that?

5 A Yes, sir.

6 Q You were in the car when they conducted the
7 stop?

8 A Yes, sir.

9 Q You saw him run?

10 A Yes, sir.

11 Q You heard shots?

12 A Yes, sir.

13 Q Anything else about this case that you want to
14 tell the jury?

15 A No, sir.

16 Q Please answer any questions Mr. Krincich may
17 have for you.

18 **CROSS-EXAMINATION**

19 **BY MR. KRINCICH:**

20 Q Ms. Brisbane, do you live at that trailer park?

21 A No, sir.

22 Q You just familiar with it?

23 A Yes, sir.

24 Q So you been there several times?

25 A A couple of times.

1 **Q** You familiar with where you got stopped on
2 Precipice Road?

3 **A** Yes, sir.

4 **Q** Did you get out of the car that time?

5 **A** Once I got on the ground when I heard the
6 shots.

7 **Q** Why did you get out of the car and get on the
8 ground?

9 **A** Cause I heard shots.

10 **Q** Nobody asked you to get out of the car?

11 **A** No.

12 **Q** Did any officer stay with you at the scene of
13 the traffic stop?

14 **A** I can't remember.

15 **Q** Do you remember seeing any officers when you
16 got out of the car?

17 **A** Yes, sir.

18 **Q** Who did you see?

19 **A** It was a couple of off -- a lot of officers.

20 **Q** Do you know if they were there? I'm trying to
21 figure out, when you got out of the car, were they there
22 or did they come up later?

23 **A** I think they came up later.

24 **Q** You were left there all by yourself as far as
25 you know?

4 **A** Yeah, because it was pouring down raining.

5 Q And it was dark?

6 | **A** Yes, sir.

7 | Q Thank you.

8 THE COURT: Anything further?

9 **MR. PERRY:** Nothing further from this
10 witness, Your Honor.

11 THE COURT: Thank you, ma'am.

12 **MR. PERRY:** The State would next call
13 Investigator Rick Bailey.

14 Your Honor, may Mr. Krincich and I approach for
15 a minute please.

16 **(WHEREUPON,** a bench conference is held off the
17 record.)

18 | RICK BAILEY

19 having first being duly sworn, testifies as follows:

20 **THE CLERK:** Thank you. Please be seated in
21 the chair. State your full name for the record.

22 **THE WITNESS:** My name is Richard Bailey.
23 I'm an investigator with the Kershaw County
24 Sheriff's Office.

25 DIRECT EXAMINATION

1 BY MR. PERRY:

2 Q How long have you been so employed?

3 A Kershaw County since February of 1998. I have
4 previous law enforcement before that.

5 Q Where is that and in what capacity?

6 A Previous law enforcement?

7 Q Yes, sir.

8 A Uh, Camden City Police Department. I also
9 worked for a year at Bishopville City as patrol.

10 Q Investigator Bailey, I'm taking you back to
11 December the 20th, 2012. Anything significant about that
12 night?

13 A Which is what we're here for today.

14 Q Tell me about what happened.

15 A On the night in question, I was the on-call
16 investigator for the sheriff's office. We worked -- each
17 investigator pulls what they call a week of call. During
18 that week, uh, at that time it was procedure for the on-
19 call investigator to work the night shift. My son's
20 shift was coming on that night.

21 Q Who is your son?

22 A I'm sorry. Deputy Scott is my stepson. I
23 raised him since he was a small kid. His shift was
24 coming on. I was in the squad room for shift change just
25 to talk to him because I hadn't seen him in several days.

1 I was approached by Captain Ed Corey stating that
2 Investigator Sellers may need some help on warrant
3 service that evening that it was possibly going to be
4 dangerous in nature because the defendant's supposedly
5 armed with a firearm.

6 I think Captain Corey was in his patrol car.
7 He has a nice Charger. Investigator Sellers was vehicle,
8 which is a Dodge Charger. My son wanted to ride with me.
9 I have a Chevrolet pickup truck.

10 We went out to the scene. We were back and
11 forth with Investigator Sellers over the radio because he
12 had contact with, I guess, an informant that was giving
13 him information. I had to stay back because my vehicle
14 doesn't have that same handling characteristics. It's
15 not as fast as the Dodge Chargers. So every bit of
16 information I was getting was relayed. I was attempting
17 to keep within close proximity in the vehicle I was
18 driving at the time.

19 There were more different locations that were
20 given out over the radio where they were. I think they
21 mentioned Gate Street and things of that nature. They
22 told us they were going down 521. It took us a few
23 minutes to get to him. When we did turn off of 521 onto
24 Black River Road, I was within safe distance, but not
25 within real close proximity. They made a lefthand turn

1 onto Precipice. Just a short distance on Precipice Road,
2 they did a traffic stop on the vehicle. When all the
3 cars stopped --

4 Q What was surrounding that area?

5 A I'm sorry.

6 Q Describe for the jury what was surrounding that
7 area.

8 A On Precipice Road? On that end of Precipice
9 Road near Black River is a residential area. Directly
10 where we stopped, there's a house on the right-hand side.
11 There was a, kind of a grassy area with houses. On the
12 other side of it, there's several houses up in that area.

13 Q It was nighttime. It was dark?

14 A It was. It was nighttime. It was dark. It
15 was drizzling rain.

16 Q Could you see anything?

17 A As far as?

18 Q Just around.

19 A Just the residences and street lights.

20 Q So was there a street light? I guess I'm
21 trying to get at what were the lighting conditions there
22 immediately where the traffic stop took place?

23 A Right there at the traffic stop, there was -- I
24 call them security lights. Most people have them in
25 their home. They charge like \$12 a month to have them in

1 your yard. Of course, the blue lights and headlights of
2 the patrol vehicles were there. Traffic stop was
3 initiated.

4 Q Were you physically on scene when the traffic
5 stop was initiated?

6 A Yes.

7 Q All right.

8 A When the vehicles came to a stop, like I said,
9 I was trying to catch up with them. Once the car stopped
10 rolling, I had to hit the brakes pretty hard to stop my
11 truck. It doesn't stop as quick as the Dodge. When I
12 put it into park, I saw someone jump out of the passenger
13 side of the mini van and run towards the yard. My son's
14 a lot quicker. He jumped out. I think Investigator
15 Sellers jumped out. They are a lot quicker than me.

16 They started running through the yard chasing
17 the subject to the left. Up to this time, I didn't know
18 Mr. Allen. I didn't know what his face looked like. I
19 had no idea who he was. I just knew that they were
20 chasing somebody jumping out the car. Jumped out the car
21 behind them. The ditch that they are talking about, I
22 don't want y'all to get the misconception that it is a
23 deep ditch. It is really shallow. They run through the
24 yard. By the time I got my truck in park and jumped out
25 and started running through the yard, I kind of stumbled

1 through that short ditch and got up and was running. I
2 heard the shots start of the shooting.

3 Q Could you see Mr. Allen?

4 A At that point, I could not.

5 Q You could hear the shots.

6 A I could hear the shots fired. I began ran --
7 running because as I said, my son was further out than I
8 was. As I got closer and closer, that's when I heard the
9 multiple shots. I couldn't see Investigator Sellers.
10 When we went up the driveway, I don't know if he
11 explained to you, the driveway sort of comes in on one
12 lane and kind of splits. Mr. Sellers ran this way. My
13 son kept running straight, I guess, right behind Mr.
14 Allen. I was right behind my son. That's when all these
15 shots started happening.

16 I could hear bullets. To me, it sounded like
17 the bullets hitting things within close proximity to us.
18 I think the question was asked did you see him square
19 off. I didn't see him square off because my son was in
20 front of me. I couldn't see him. In my view, if bullets
21 are coming this way at you, they are not like a
22 basketball. They are actually coming this way. So I --

23 Q Did you fear for your safety that night?

24 A Feared for my safety.

25 Q How about your son's safety?

1 **A** I was more concerned about my son's safety. Of
2 course, I was concerned about mine. I've been shot at
3 before. It's nothing like it is on TV. It will scare
4 the bejesus out of you.

5 **Q** Having been shot at before, is there any doubt
6 in your mind you were being shot at this time?

7 **A** There was no doubt in my mind. I was concerned
8 for my son's safety. First thing that came to my mind is
9 what am I going to tell his mother, what am I going to
10 tell his grandfather. Concern for my safety because I
11 just recently remarried. Yes, sir, I was concerned for
12 my safety.

13 **Q** Any doubt in your mind that you could have been
14 hit by the bullets that were fired in your direction?

15 **MR. KRINCICH:** Objection, Your Honor.

16 **BY MR. PERRY:**

17 **Q** So what happened after that?

18 **A** After the?

19 **Q** After the shots were fired.

20 **A** The shots were fired. Investigator Sellers and
21 my son backed down. Made me feel a whole lot better to
22 see him not bleeding or limping or hurt. I ran up to
23 him. Asked how he was, if he had been hit. The
24 defendant ran off through the woods. We immediately
25 backed out, regrouped, started calling in reinforcements.

1 My son did return fire. They had to start that
2 procedure. While we were doing that, officers started
3 arriving on the scene.

4 Q That's standard procedure when an officer is
5 involved in a shooting situation, isn't it?

6 A It's what?

7 Q Standard procedure?

8 A Yes.

9 Q That if an officer is involved, SLED gets
10 involved and that type of thing?

11 A Yes, that is the procedure. Anytime an officer
12 with this agency is involved in a shooting, we can't
13 investigate our own incident shootings. We have to call
14 in State Law Enforcement Division. We waited on them. I
15 think they said they wanted to bring in their
16 bloodhounds. We had something available. We started a
17 track. Like I said, it was raining pretty intense that
18 night. It was pretty cold. The dog started following
19 the track.

20 We crossed over a fence and actually found like
21 a chrome revolver. I'm not sure what caliber. We found
22 it and actually tripped over -- it looked like electrical
23 wire to me. You know, like for a hog fence or something.
24 It was a thin wire. I don't know if he tripped over it
25 and that's where the gun fell or he just threw it down or

1 what. I'm not sure. We tracked to that point. After a
2 while, we lost the track.

3 **Q** What were the conditions like that night?

4 **A** Pretty chilly.

5 **Q** Was it dry?

6 **A** Well, it started out as a mist when we
7 initiated the traffic stop. Later on after all the
8 events took place, then it started raining pretty heavy.

9 **Q** That makes it much harder to track, doesn't it,
10 for the dogs?

11 **A** Yes, sir. Yes, sir.

12 **Q** So ultimately, Mr. Allen was not apprehended
13 that night, correct?

14 **A** No, sir. He was not.

15 **Q** Do you have any other knowledge about what
16 happened that night that you feel like you would like to
17 share with the court?

18 **A** I was just an assisting officer. I pretty much
19 told you pretty much what I remember that night. Like I
20 said, I didn't know Mr. Allen before this. Did not know
21 what the seriousness of his charge were. I just knew
22 that he was wanted that Investigator Sellers needed
23 assistance.

24 **Q** And you were clearly in the line of fire that
25 night?

1 **A** Yes, sir.

2 **Q** Please answer any questions Mr. Krincich has.

3 **CROSS-EXAMINATION**

4 **BY MR. KRINCICH:**

5 **Q** Good morning, Investigator Bailey.

6 **A** Good morning.

7 **Q** Were you familiar with Precipice Road
8 previously?

9 **A** Yes, I've been patrolling Kershaw County for
10 almost 20 years.

11 **Q** So you've driven by this area several times?

12 **A** I have since found out who actually lived in
13 the house.

14 **Q** You've probably driven past it since this
15 incident occurred, right?

16 **A** I'm sure I have.

17 **Q** Maybe you have a better recollection or a more
18 firm recollection of distance than Investigator Sellers
19 did. How far were you from the area where they said Mr.
20 Allen stopped at the wood line?

21 **A** At the wood line from where I was at, I think
22 Justin was -- I think Justin was a little bit closer than
23 Investigator Sellers approximately. I'm assuming maybe
24 10 or 12 yards the distance between them. I was probably
25 another 10 yards behind Deputy Scott.

1 Q But you were blocked not only by your son, but
2 I think you told Investigator Grant you were blocked by
3 some shrubbery that was there.

4 A Some azalea bushes.

5 Q And you couldn't really see everything that was
6 going on?

7 A From chest level down, no, sir.

8 Q And you have never told anyone before that you
9 saw any muzzle flair, correct?

10 A No, sir. I didn't see any.

11 Q In fact, I think you didn't mention anything to
12 Investigator Grant that you actually even heard bullets
13 whizzing by, right?

14 A That statement was taken just like right after
15 it happened. So I pretty much was just throwing stuff
16 out right then.

17 Q Do you remember making mention that
18 Investigator Sellers said that he heard the bullets?

19 A I'm sure he did.

20 Q But you don't have any recollection of telling
21 anybody that you heard bullets whizzing by or anything?

22 A Did I?

23 Q Yes, sir.

24 A I made a statement, yes, sir.

25 Q But not to --

1 **A** Mr. Sellers.

2 **Q** You didn't make those statements to
3 Investigator Grant that night is what I'm saying?

4 **A** No, sir. Probably not. If it's not in my
5 statement, then probably not.

6 **Q** And Captain Corey was further behind than where
7 you were, correct?

8 **A** If I remember right, he was off to my left.
9 His vehicle was actually in front of the minivan. It was
10 his vehicle and the minivan and then Investigator Sellers
11 and then my pickup truck.

12 **Q** Did anybody stay back with the vehicles or the
13 driver?

14 **A** I was more concerned about my son. I didn't
15 care who was in the car.

16 **Q** Thank you.

17 **A** Yes, sir.

18 **THE COURT:** Anything?

19 **MR. PERRY:** Nothing further, Your Honor.

20 **THE COURT:** Thank you, ma'am. You may step
21 down.

22 All right. Ladies and Gentlemen, we're going
23 to go ahead and take a break before we call the next
24 witness. I'm going to let you step back in the jury
25 room. Please do not discuss the case while you're

1 back there. We'll bring you back in a few minutes.

2 (WHEREUPON, the jury exits at approximately
3 10:47 a.m.)

4 THE COURT: All right. We'll be in recess.

5 (WHEREUPON, a short recess is taken.)

6 (WHEREUPON, the jury enters at approximately
7 10:54 a.m.)

8 THE COURT: All right. Mr. Solicitor, you
9 ready to call your next witness?

10 MR. PERRY: Yes, sir, we are, Your Honor.
11 The State calls Captain Ed Corey.

12 EDWARD COREY

13 having first being duly sworn, testifies as follows:

14 THE CLERK: Please be seated in the witness
15 chair. State your name for the record.

16 THE WITNESS: Edward Corey.

17 DIRECT EXAMINATION

18 BY MR. PERRY:

19 Q Captain Corey, if you will, please tell us how
20 and with whom you are employed and your history in law
21 enforcement.

22 A I'm employed by Kershaw County Sheriff's Office
23 as Captain over patrol. I been with the Sheriff's Office
24 since January 4th, 2011. I been with the City of Camden
25 as an investigator prior to that.

1 **Q** Prior to that, were you in law enforcement as
2 well?

3 **A** Yes, sir. I started my career out in Beaufort
4 when I got out of the Marine Corp.

5 **Q** Okay. And if you will, let's go back to
6 December the 20th, 2012. Just tell us what happened that
7 afternoon, that evening as it relates to the charges
8 against Mr. Ernest Allen.

9 **A** I was contacted by Sergeant Sellers that day of
10 a subject that we had some warrants on, some outstanding
11 warrants and that he was going to need some additional
12 units to assist him in serving these warrants.

13 **Q** All right. And so --

14 **A** I was at the office. I contacted Investigator
15 Bailey, who was on call, and also Justin Scott who was
16 coming in that night to assist us. We went to meet up
17 with Sergeant Sellers.

18 **Q** Why so many officers?

19 **A** Because of the tendency with the outstanding
20 warrants and serious charges, we already had knowledge
21 that he could possibly be armed with a handgun. We
22 wanted to make sure it was safe -- the safety of
23 officers. We don't want to go out and try to stop people
24 that we know there's a possibility of harm coming to
25 citizens and us. That's why we take so many officers for

1 safety with us and the public.

2 Q And what happened next?

3 A I was contacted by Sergeant Sellers by radio.
4 We were told the location of the van. I actually met up
5 with Sergeant Sellers. Both of our vehicles were
6 together on 521 South which is Broad Street down by Bull
7 Street. We had knowledge the van was going towards Black
8 River Road. The van made a left on Black River Road.
9 I got behind the vehicle with Sergeant Sellers behind me.
10 We were waiting on Investigator Bailey to catch up to us.
11 He was behind us, another distance behind us.

12 Q All right. What happened?

13 A We continued up Black River Road. We had no
14 idea exactly where we were headed. We were basically
15 talking back and forth on the radio picking the safe
16 location to make this traffic stop. Prior to actually
17 picking a safe location, the vehicle made a left turn on
18 Precipice Road. As the vehicle was turning its turn
19 signal on to make the left turn, we made the
20 determination between us that we were going to do a
21 traffic stop on Precipice Road before it got to the
22 trailer park.

23 Q Okay. Was this going to be any ordinary
24 everyday traffic stop where you go knock on the window,
25 hey, how you doing, I'm with the Kershaw County Sheriff's

1 Department?

2 **A** No, sir. It was going to be a felony traffic
3 stop for safety -- again, safety of the public and safety
4 of the officers.

5 **Q** And again, the purpose of that stop, the
6 purpose of taking him into custody was what?

7 **A** We had the outstanding bench warrants, all for
8 serious felony charges. Again, for the safety of
9 everybody, we wanted to make sure this traffic stop was
10 done safely where nobody got harmed at all.

11 **Q** That includes the safety of the defendant,
12 correct?

13 **A** That is correct.

14 **Q** All right. Anybody else that might have
15 happened to be there, the driver of the car or the
16 residents of the household?

17 **A** Yes, sir.

18 **Q** Tell me what happened then whenever you
19 initiated that traffic stop? How precisely did it all go
20 down?

21 **A** As we made the left turn, I seen the turn
22 signal come on in the van and turned left on Precipice
23 Road. As we turned on Precipice Road, I actually turned
24 the blue lights on my car and went around the van. The
25 purpose of that was we didn't want the van to flee. As I

1 got in front of the van, the van was continuing to go on.
2 I was moving back and forth a little bit to make sure the
3 van was going to stop. As we approached, there was a
4 house on the residence. I can't remember the little side
5 street. As we approached there, the van was actually
6 coming to a stop. As I was getting out of my vehicle, --

7 Q It was night time?

8 A Yes, sir. It was nighttime and it was
9 drizzling rain.

10 Q Dark out?

11 A Yes, sir.

12 Q Could you see anything? What were the
13 conditions like?

14 A There was a yard light in the house to the
15 right, the residence. The yard light was basically --
16 you could see the house. There was a carport on the end
17 of the house and the yard light. So the yard was lit
18 pretty bright.

19 Q Okay.

20 A Did you personally have any prior experience or
21 knowledge of this defendant?

22 A Yes, sir. I've known Mr. Allen for years.

23 Q So you would recognize him on sight?

24 A Yes, sir.

25 Q Okay. So proceed to tell us what happened.

1 **A** As I was bringing my car to a stop, I was
2 getting out of the car. The passenger door of the van
3 opened up. Somebody was running. I observed officers
4 running behind him.

5 **Q** When you say somebody was running, could you
6 see whether or not it was him?

7 **A** I could not actually see. I just seen somebody
8 dart out of the right side of the van.

9 **Q** Fair enough. So what did you do?

10 **A** I was going towards the ditch area when I
11 actually seen a body up under the yard light come around
12 and square off and actually fired four rounds.

13 **Q** Now who did he fire those rounds at?

14 **A** I just knew the four rounds went off. I don't
15 know what direction the gun was pointed at the time. But
16 I did know the other three officers were in the yard
17 chasing him. I was still on basically on the road side
18 of the ditch. I never made it across the ditch.

19 **Q** How far were you from the person?

20 **A** Probably about 20 to 30 yards.

21 **Q** Could you see him clearly or was your vision
22 obstructed?

23 **A** I could see clearly a shadow turning around and
24 facing me. Like I said, when he turned around and faced,
25 he actually squared off and fired it.

1 **Q** Can you stand up and show the jury what you
2 mean?

3 **A** I just seen somebody turn around. It wasn't
4 that it was fired over his shoulder or anything. I
5 actually seen him turn around and seen the rounds go out.

6 **Q** When you say squared off and fired off, can you
7 show me that? Can you demonstrate what he did what you
8 saw?

9 **A** All I seen was a shadow turn back towards the
10 road and then the four rounds went off.

11 **Q** You heard and saw those?

12 **A** Yes, sir.

13 **Q** When you say you saw them, you didn't see the
14 bullets fly?

15 **A** I did not see the bullets. I didn't hear the
16 bullets. I just heard the rounds. Then I actually heard
17 some more firing going on.

18 **Q** Did you see the muzzle --

19 **THE COURT:** Y'all need to talk one at a time.
20 The Court Reporter can't get --

21 **BY MR. PERRY:**

22 **Q** Did you see a muzzle flash?

23 **A** I can't remember off the top of my head whether
24 I did actually see the muzzle flash. I remember it was
25 four rounds that went off. Then there were other rounds

1 that went off.

2 Q And then what happened?

3 A At that time, basically, we got all the
4 officers called back out to the road. I wanted to make
5 sure all the officers were safe. I did know that Deputy
6 Scott returned fire. We actually got SLED involved for
7 the officer-involved shooting. We did secure the area
8 until we got more help there with the dogs and SLED.

9 Q How far were you from that shadow that you saw
10 turning into fire?

11 A 20 or 30 yards, at the most, back to the
12 roadway.

13 Q Were you within the range of the firearm at
14 that point?

15 A Absolutely.

16 Q Any doubt in your mind that you could have been
17 hit if it happened to be coming in your direction?

18 A If it was coming in my direction -- anybody at
19 that point could have got hit. I didn't know what
20 direction the gun was being fired at that time.

21 Q Did you fear for your life that night?

22 A Yes, sir. I did.

23 Q All right. Now, once everybody pulled back,
24 tell us what happened.

25 A We secured the area waiting for SLED to get

1 there with the dogs and also their crime scene people.
2 We were trying to see if there was any movement in there.
3 I knew Deputy Scott returned fire. We didn't know if Mr.
4 Allen was hit. We didn't want to go rush into that area.
5 Basically, it was secured until the dogs got there.

6 Q Did you try to call him out?

7 A We called several times. We even went around
8 the back of the house to see if we could see anything
9 basically waiting on Crime Scene to get there and the
10 dogs get there. You really couldn't see anything because
11 of the woods and the tree light.

12 Q At this point, what were the conditions like?
13 Had it started to rain?

14 A It was misting at first. The rain was getting
15 harder. It was very chilly when the rain started.

16 Q Was rain staying on the ground?

17 A Yes, sir. Rain was staying on the ground.

18 Q Okay. So continue to tell us. What happened?

19 A After the dogs got there, we started tracking.
20 Basically went to where the house is to the right side of
21 the house towards the neighbor's house. There was a
22 chainlink fence that we had to go over. We went into
23 another yard. There was an electric fence or garden
24 fence, whatever you want to call it. It was bent over.
25 Shortly after we crossed that fence, we found a revolver

1 laying on the ground. At that time, instead of picking
2 it up, I took -- I had a little -- I call it beanie cap
3 that has the Sheriff's office logo on the front of it. I
4 took the beanie cap off to lay it on top of the weapon on
5 the ground just to mark the gun at that time.

6 **Q** So you are actually -- you are the one that
7 found that gun?

8 **A** We were going through the yard and walked up on
9 it and it was laying there. I actually marked it with my
10 hat.

11 **Q** Is that gun here today? Is it still in
12 evidence?

13 **A** It was turned into evidence. It was taken to
14 SLED. It was signed back over to the sergeant.

15 **MR. PERRY:** Permission to approach the
16 witness.

17 **BY MR. PERRY:**

18 **Q** Take a look at that and see if you --

19 **MR. KRINCICH:** May we approach?

20 **THE COURT:** You may.

21 **(WHEREUPON, a bench conference is held off the**
22 **record.)**

23 **BY MR. PERRY:**

24 **Q** Captain Corey, if you will, please open that if
25 you can.

1 **MR. KRINCICH:** Your Honor, just for the
2 record, I object at this point about chain of
3 custody for what he's actually opening. I'm going
4 to object.

5 **THE COURT:** All right. Well, I don't know
6 what he's going to say about what it is. But chain
7 of custody, if it is, in fact, a gun, he's capable
8 of identifying that being the gun that he retrieved
9 that night. He doesn't need chain of custody.
10 Objection is noted and overruled.

11 **THE WITNESS:** Yes, sir. This appears to be
12 the gun that I had my hat over that evening.

13 **BY MR. PERRY:**

14 **Q** Can you pick it up and, of course, look at it
15 and show us what you got? Is that, in fact, the gun that
16 you found that night or does it appear to be the gun you
17 found that night?

18 **A** Yes, sir. It appears to be the gun that I put
19 my hat over that evening.

20 **Q** All right. Can you tell us about that gun, the
21 type of gun it is?

22 **A** It appears to be a Smith and Wesson .38
23 caliber.

24 **Q** After you put your hat over that gun, do you
25 have any knowledge about what happened to it afterwards?

1 **A** No, sir. I continued with the dog team into
2 the woods.

3 **Q** Okay. But you marked it with a beanie cap or
4 knit cap, I guess?

5 **A** Yes, sir. Beanie cap. It's actually a green
6 badge on the front that come from the dog team.

7 **Q** And you said that's what caliber?

8 **A** .38.

9 **MR. PERRY:** He's testified that this appears
10 to be the gun that he found that night. He was the
11 one that found it. We would offer it as State's 1.

12 **THE COURT:** All right. Noted the objection.
13 He's testified that's the gun he found.

14 **(WHEREUPON, State's Exhibit 1 is marked for**
15 **identification purposes and admitted into the record.)**

16 **BY MR. PERRY:**

17 **Q** Captain Corey -- Okay. Never mind cause you
18 didn't do anything else with it. If you will, please
19 continue telling us what happened that night.

20 **A** We continued in the woods that evening for
21 probably an hour or an hour and a half pouring down rain
22 and finally lost scent. Basically, the incident was
23 called off that night.

24 **Q** So Mr. Allen was not, in fact, taken into
25 custody that night?

1 **A** No, sir. He was not.

2 **Q** But to your knowledge, he was taken custody at
3 some point in the future?

4 **A** Yes, sir. The next day.

5 **Q** Okay. On a somewhat unrelated matter, the
6 other deputy that was there that night, Deputy Justin
7 Scott, he's no longer with Kershaw County Sheriff's
8 Department; is he?

9 **A** That's correct.

10 **Q** In fact, he just recently within the past week
11 or two left; is that correct?

12 **A** That's correct.

13 **Q** You know where he's employed now?

14 **A** I believe he's going to be employed out at New
15 South.

16 **Q** Okay.

17 **A** I think that's the name of it.

18 **Q** As I understand it, there was a violation of
19 some departmental policy, there was a discrepancy there
20 that came up that Deputy Scott was given the option to
21 resign, correct?

22 **A** Yes, sir.

23 **Q** And he did, correct?

24 **A** Yes, sir.

25 **Q** At any time since you been at Kershaw County

1 Sheriff's Department -- or excuse me, first of all, when
2 he was a deputy there, were you his supervisor? Not
3 direct but --

4 A Yes, sir.

5 Q In fact, you were over all the patrol units,
6 correct?

7 A Yes, sir.

8 Q And Deputy Scott worked patrol, correct?

9 A Yes, sir. He did.

10 Q In fact, he was a supervisor, was he not?

11 A Yes, sir.

12 Q At any time while he was working there for you,
13 was his integrity ever called into question?

14 A No, sir.

15 Q In fact, the only reason he left was because of
16 a departmental policy violation that he freely admitted
17 and volunteered to resign, correct?

18 A Yes, sir.

19 Q Thank you very much. Please answer any
20 questions that, uh, Mr. Krincich may have for you.

21 **CROSS-EXAMINATION**

22 **BY MR. KRINCICH:**

23 Q Good morning, Captain Corey.

24 A Good morning, sir.

25 Q How long have you been in law enforcement?

1 **A** About 24 years. 24 years. 24 years..

2 **Q** And you've worked in Beaufort --

3 **A** Yes, sir.

4 **Q** Correct? And did you do some time Lancaster
5 county?

6 **A** No, sir.

7 **Q** Anywhere other than --

8 **A** Lee County.

9 **Q** I'm sorry. Lee County. Uh, City of Camden
10 Police Department and Kershaw County Sheriff's Office?

11 **A** Yes, sir.

12 **Q** So you've been on all types of different crime
13 scenes?

14 **A** Yes, sir.

15 **Q** I'm assuming that you started off as a patrol
16 man?

17 **A** Yes, sir. That's correct.

18 **Q** You worked as an investigator?

19 **A** Yes, sir.

20 **Q** You've worked your way through the ranks to the
21 point that you are the captain for the sheriff's office?

22 **A** Yes, sir.

23 **Q** You've worked numerous crime scenes?

24 **A** Yes, sir.

25 **Q** Done things like collected evidence?

1 **A** Yes, sir.

2 **Q** And when you have a shooting, there are certain
3 things that need to be collected, right?

4 **A** That's correct.

5 **Q** One being a firearm.

6 **A** Yes, sir.

7 **Q** And then bullets that come out of the firearm,
8 right?

9 **A** If they are located, yes, sir.

10 **Q** In this case, no bullets were ever located,
11 were they?

12 **A** I can't answer that, sir. SLED worked the
13 crime scene. We did not work the crime scene.

14 **Q** To your knowledge, were any bullets recovered?

15 **A** To my knowledge, no, sir.

16 **Q** And I think you already testified that you were
17 at the road, you never crossed the ditch?

18 **A** That's correct. I never crossed the ditch.

19 **Q** It was dark.

20 **A** Yes, sir.

21 **Q** The best that you can say is you saw a shadow
22 turn and fire, correct?

23 **A** Yes, sir.

24 **Q** No muzzle flair was seen by you?

25 **A** I don't remember any muzzle flair. I just know

1 there were four rounds.

2 Q You don't know which direction those shots
3 went?

4 A No, sir.

5 Q You didn't hear bullets whizzing by you?

6 A No, sir.

7 Q You heard, we'll call it a boom, from the
8 actual discharge, right?

9 A Heard four of them.

10 Q Four. And then you heard return fire?

11 A I heard other rounds being fired off. I didn't
12 know if it was return fire at the time or not.

13 Q No further questions, Your Honor.

14 MR. PERRY: Nothing further from this
15 witness.

16 THE COURT: All right. Thank you very much.

17 MR. PERRY: Your Honor, the State would call
18 Justin Scott.

19 JUSTIN SCOTT

20 having first being duly sworn, testifies as follows:

21 THE CLERK: Thank you. Please be seated.
22 State your full name for the record.

23 THE WITNESS: Charles Justin Scott.

24 DIRECT EXAMINATION

25 BY MR. PERRY:

1 **Q** Good morning, Justin. How are you doing?

2 **A** I'm doing just fine.

3 **Q** If you will, just, uh, tell the jury -- tell us
4 how old you are and where you're from, how long you been
5 living here in Kershaw county, that type of thing.

6 **A** I'm 25 years old. I've been living in Kershaw
7 county all my life. I was with the Sheriff's Department
8 for about three and a half years up until about two weeks
9 ago.

10 **Q** Were you related to anybody else in the
11 Sheriff's Department?

12 **A** I am. Rick Bailey was my stepdad at one time.
13 I still have great contact with him all the time. Up
14 until about two weeks ago, I resigned from the sheriff's
15 department for some unrelated work stuff. But there's in
16 the policy certain things, you know certain things. I
17 broke policy. And I resigned.

18 **Q** When you were questioned about that, did you
19 come forward? What happened?

20 **A** Uh, basically, I was questioned on have I had
21 any contact or physical relations with another woman
22 because I am married. I told them yeah. That breaks the
23 policy. They gave me the choice that I could resign or I
24 could get fired. It was better to resign that way if I
25 wanted to move on with another department maybe in the

1 future and come back, you know. So I resigned. I got
2 two kids. I went and found me another job. I'm going to
3 work there currently until something comes up in the near
4 future.

5 Q Now, at no time while you were a sheriff's
6 deputy or since has your integrity ever been called into
7 question, has it?

8 A No, sir.

9 Q You didn't, in fact, try to lie or cover this
10 up, did you?

11 A No, sir.

12 MR. KRINCICH: Your Honor, he's bolstering
13 his witness.

14 MR. PERRY: Fair enough.

15 BY MR. PERRY:

16 Q Let's go back to December the 20th, 2012. Were
17 you a sheriff's deputy at that time?

18 A Yes, sir.

19 Q And as it relates to Mr. Ernest Allen Pickett,
20 what happened that night? Just tell us how things went.

21 A On that night, I was actually coming in to work
22 the road that night.

23 Q You worked night shift?

24 A Yes, sir. And I was contacted by Captain Corey
25 who stated they needed some other assistance in possibly

1 arresting Mr. Allen on some, uh, active warrants.

2 **Q** Okay.

3 **A** I was -- I rode with Investigator Bailey during
4 the time we were going to do the traffic stop. They gave
5 a description of the van. We located the van on Black
6 River Road. Did a felony stop on Precipice Road which is
7 off Black River Road. I was in the passenger seat in
8 Investigator Bailey's pickup truck. I jumped out once we
9 got the vehicle stopped.

10 The first couple of shots that went off, I
11 didn't see them. I just heard them. I didn't see who
12 done it. But then I saw the -- I saw the subject from
13 the vehicle, which was Mr. Allen, uh, running through the
14 yard. The part of the yard he was running through was
15 lit up from the outside light.

16 **Q** Let's talk about that for a minute. All right.
17 Now, you're a sheriff's deputy at the time, right?

18 **A** Yes, sir.

19 **Q** Your job was to arrest somebody who was wanted,
20 right?

21 **A** Yes, sir.

22 **Q** Sometimes whenever you go to arrest people,
23 they don't want to be arrested, right?

24 **A** Yes, sir.

25 **Q** And they run, what do you do?

1 **A** I chase them and I try to arrest them.

2 **Q** That's what your duty is, right?

3 **A** Yes, sir.

4 **Q** You are duty bound to do that, correct?

5 **A** Yes, sir.

6 **Q** Is that what you did that night?

7 **A** Yes, sir. Didn't arrest him.

8 **Q** But you tried.

9 **A** I tried.

10 **Q** Tell me what happened.

11 **A** Like I said, the first couple of shots that
12 went off, I didn't see him. I just heard him. Once I
13 did see him getting into the light because at first, it
14 was a little dark. But once it got to where it was lit
15 up, I could see him. I gave chase. I started pursuing
16 him. He shot again. I then started firing back at him.

17 **Q** How close were you at this point?

18 **A** When I started, first start firing, I was
19 approximately 30 yards, 25 to 30 yards. I was enclosing.
20 Once he got to the edge of the wood line, he turned
21 around, pointed the gun at me because I was the closest
22 one at the time. He fired another shot. That's when I
23 fired several other shots at him.

24 **Q** When you say he pointed the gun at you, can you
25 get up and describe exactly what -- physically show us

1 what he did.

2 **A** (Demonstrating.) I'm running this way. He's
3 running this way. He gets to the edge of the wood line,
4 he stops and turns around. Fires one shot. Then I start
5 firing back. He turns around and takes off running.

6 **Q** How close were you to him at that point?

7 **A** I was less than 15 yards.

8 **Q** Okay. Now, as a law enforcement officer, you
9 have to qualify with your weapon every year, right?

10 **A** Yes, sir.

11 **Q** And, uh, have you ever not qualified?

12 **A** I've always qualified.

13 **Q** Do you have to shoot distances longer than the
14 15 yards that you two were apart?

15 **A** The most is 25 yards from the Academy.

16 **Q** Are you a pretty good shot?

17 **A** I'm not a perfect shot. I do miss but I mean,
18 I do shoot well enough to pass.

19 **Q** Now, on this particular night, you shot back at
20 him quite a bit, didn't you?

21 **A** Yes, sir.

22 **Q** But you didn't hit him, did you?

23 **A** No, sir.

24 **Q** Is that because you are bad shot?

25 **A** No, sir.

1 Q Is it because you didn't mean to shoot him?

2 A No, I meant to shoot him. He was a threat to
3 us and he was a threat to society and the citizens. And
4 he was already wanted for some serious charges.

5 Q Were you in fear for your life that night?

6 A I was.

7 Q Now, as close as you were to him and as much
8 training as you had, you were trying your best to shoot
9 him, weren't you?

10 A Yes, sir.

11 Q But you still missed him, didn't you?

12 A Yes, sir.

13 Q Let me ask you this question, when you are
14 shooting on the range, is it anything like having
15 somebody shooting back at you?

16 A No, sir.

17 MR. KRINCICH: Your Honor, objection.

18 BY MR. PERRY:

19 Q Uh, what else happened?

20 A Once he -- once I no longer could see him, once
21 he went to the woods, we were unsure if I hit him or not.
22 We all backed out. We waited on other units to get
23 there. We tried to call him a few times to see if he
24 would respond to us and didn't get a response. Once SLED
25 arrived on the scene, since I was the one that shot back

1 at him, I no longer could be a part of any of the search.
2 So I did not go do any search.

3 Q That's standard procedure with the department,
4 correct?

5 A Yes, sir.

6 Q Okay. So at that point, your involvement was
7 over?

8 A My involvement was over. My gun was turned
9 over to SLED.

10 Q You gave them a statement?

11 A Yes, sir.

12 Q Cooperated fully?

13 A Yes, sir.

14 Q Please answer any questions Mr. Krincich may
15 have.

16 **CROSS-EXAMINATION**

17 **BY MR. KRINCICH:**

18 Q Good morning, Justin.

19 A Good morning.

20 Q How are you doing today?

21 A I'm doing well, how about you?

22 Q All right. Thank you. Are you aware of how
23 many shots Mr. Allen's alleged to have fired?

24 A I'm not aware of the exact amount, no, sir.

25 Q You said you heard a couple of shots?

1 **A** The first couple of shots, I heard but I did
2 not see him or any of the shots come out of any gun. I
3 just heard the shots.

4 **Q** Do you know where those shots were directed?

5 **A** Like I said, I didn't see him. I just heard
6 the shots.

7 **Q** Do you remember talking with Agent Kristin
8 Grant from SLED?

9 **A** No, sir.

10 **Q** Do you remember talking to anybody, an agent
11 from SLED, the night of the incident?

12 **A** There were several agents that I actually
13 talked with, I gave statements to and stuff. I don't
14 remember names and faces and stuff like that.

15 **Q** Would you remember if I said she was female,
16 late 30s, blond hair?

17 **A** Like I said, I don't remember anything.

18 **Q** You don't remember --

19 **A** I don't remember much about the actual talking.
20 I was kind of stunned from everything that happened.

21 **Q** So there are certain events of that night that
22 kind of blurred together. Your adrenaline was pumped up,
23 right? You were on edge. You already said you were in
24 fear for your life. So there are certain things that you
25 can remember you can testify to today. Other things are

1 somewhat cloudy.

2 **A** Everything that I testified is what I remember.

3 **Q** There's been a lot of talk about distances. I
4 know you've come in a little bit later. You said you
5 first started firing at him from 20 to 30 yards away?

6 **A** It was approximately 30 yards.

7 **Q** 30 yards?

8 **A** Yes, sir.

9 **Q** 90 feet? That's how far you were from him?

10 **A** 30 yards. I usually do everything by yards.
11 It's approximately 30 yards.

12 **Q** And that's farther than what you qualified for
13 at the academy?

14 **A** Yes.

15 **Q** Do you have an estimation as far as the actual
16 roadway where the traffic stop occurred from the distance
17 that Mr. Allen entered the wood line and fired?

18 **A** I don't know how far that is exactly.

19 **Q** But he was farther than the 30 yards that you
20 started firing, right?

21 **A** Are you asking me from the vehicles to the wood
22 line, is that further than 30 yards?

23 **Q** Yes, sir.

24 **A** Yes, sir.

25 **Q** But you are not exactly sure how much?

1 **A** No, I am not exactly sure how much but it
2 appeared to be further than 30 yards.

3 **Q** And whenever you were running towards Mr.
4 Allen, did you see Sergeant Sellers?

5 **A** Not at first.

6 **Q** Did you hear Sergeant Sellers?

7 **A** I did.

8 **Q** Did you hear any commands that he gave to you?

9 **A** The only thing I recall him saying is he had a
10 gun.

11 **Q** Was that before or after you heard the shots?

12 **A** That was before.

13 **Q** Before the shots. Did you see your stepdad,
14 Rick Bailey?

15 **A** Uh, when we were riding up there.

16 **Q** Once you got out of the car, was he in front of
17 you or behind you?

18 **A** He had to be behind me because I was in the
19 passenger seat.

20 **Q** So you have no idea how close he got to the
21 scene, do you, of the shooting?

22 **A** I can't -- he was right there the whole time.

23 **Q** But behind you?

24 **A** He was right there the whole time. That's all
25 I can --

1 **Q** And again, Captain Corey was behind you as
2 well, right? Where was he?

3 **A** Captain Corey was in his car. His car was in
4 front of the van.

5 **Q** I think we -- I'm sorry if we didn't make it
6 clear. When you got out, you were -- I don't know if
7 you've heard your description as a world class police
8 sprinter. You were the fastest one out, would you agree
9 with that?

10 **A** Was I the fastest one there?

11 **Q** Yes, sir.

12 **A** Yeah.

13 **Q** And you had the angle on Mr. Allen.

14 **A** (Nods head.)

15 **MR. PERRY:** That's a yes?

16 **THE WITNESS:** Yes, sir.

17 **BY MR. KRINCICH:**

18 **Q** And Sergeant Sellers was coming from a
19 different direction?

20 **A** Sergeant Sellers was right there behind him
21 when he first took off. I was coming from an angle.

22 **Q** I think we are saying the same thing. Sergeant
23 Sellers was coming from a different direction than what
24 you were going. You had the angle on him and Sergeant
25 Sellers was directly behind him, right?

1 **A** Yes, sir.

2 **Q** As far as you know, you are the only two
3 pursuing him by foot.

4 **A** Like I said, I was faster than everybody else.
5 I didn't know if there were other people pursuing behind
6 me. I can't see behind me. I can only see what's in my
7 peripherals.

8 **Q** Did you notice which direction Mr. Allen was
9 firing any of the shots that you said were not directed
10 at you?

11 **A** The first couple of shots that went off, I did
12 not see him. I just heard the shots. But when we were
13 pursuing him, I saw him fire one shot back. Once he got
14 to the edge of the woods -- now the shot that he fired
15 when he was running was in the direction of Investigator
16 Sellers.

17 **Q** If I could stop you for second. You did
18 something with your hand. How would you say he was
19 shooting?

20 **A** He was running and firing back like this right
21 here. He's not shooting towards the woods up in the air.
22 He's pointing backwards as he's running. He's not
23 shooting sideways up in the air. He's pointing backwards
24 to exactly where Investigator Sellers was at the time.
25 Once he got to the edge of the woods, I had already

1 gained ground and was ahead of Investigator Sellers.
2 That's when he stopped and turned around and fired the
3 shot. He only fired one shot at that point in time when
4 he got to the edge of the woods.

5 Q And that was directly towards you?

6 A That was directly towards me.

7 Q Do you remember telling anybody from SLED that
8 night that fired two shots in your direction?

9 A I don't recall.

10 Q You don't recall that.

11 THE COURT: Anything?

12 MR. PERRY: Nothing further for this witness,
13 Your Honor.

14 THE COURT: All right. Thank you, sir. You
15 may step down.

16 MR. PERRY: Your Honor, may this witness be
17 excused?

18 Your Honor, I've got three more witnesses all
19 with SLED. They should be short. One of them, I'm
20 waiting on to be here, but I've got two ready to go.
21 You want me to keep going?

22 THE COURT: I don't know of any reason to
23 stop.

24 MR. PERRY: All right. The State would call
25 Sabrina Fellers.

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SABRINA FELLERS

having first being duly sworn, testifies as follows:

THE CLERK: Thank you. Please be seated in
this chair. State your full name for the record.

THE WITNESS: Sabrina Ann Fellers.

DIRECT EXAMINATION

BY MR. PERRY:

Q Good morning, Agent Fellers. How are you
today?

A Doing good. How are you?

Q If you will, please tell us how you are
employed, with whom you are employed and how long you
been there.

A I am employed as a Senior Special Agent with
the South Carolina Law Enforcement Division commonly
referred to as SLED. I am assigned to the Latent Print
Crime Scene Unit. We respond to crime scenes throughout
the state. I've been there since October of 2008.

Q What's your educational background? How does
one get qualified to do stuff like that?

A I have a Bachelors degree where I majored as
forensic science. I was hired on in North Carolina with
Charlotte Metro Police Department in their Crime Scene
Unit. I went there for approximately two years before I
came to SLED.

1 Q So what'd you do to put it in sort of, I guess,
2 common terms is sort of the CSI thing, right?

3 A Similar, yes.

4 Q To some extent?

5 A Yes.

6 Q And on December the 20th, 2012, were you
7 employed in the same capacity that you just described?

8 A Yes.

9 Q Did you have occasion to be called out to an
10 event that took place here in Kershaw county, South
11 Carolina, with an officer-involved shooting?

12 A Yes, I did.

13 Q Could you please tell us a little bit about
14 that? How you came to be called out, why you would have
15 been called out and what you did that night?

16 A Yes, I was called out shortly after eight
17 o'clock in the evening for an officer-involved shooting
18 that took place on Precipice Road. I was contacted from
19 our dispatch center, our operations center. We were on
20 call, so myself and an another agent responded to the
21 scene. The scene was a traffic stop that was initiated.
22 The subject fled the vehicle, a chase ensued and there
23 were shots fired. The officer returned fire.

24 Q Is that why you got involved because the
25 officer returned fire?

1 **A** Yes, Kershaw County requested SLED assistance.

2 **Q** And when you got on scene, what did you find?

3 What did you do?

4 **A** When I got on scene, Special Agent Hezel was
5 already on the scene and digitally photographing the
6 scene. We searched the scene or any evidence. We marked
7 it with evidence lockers so we could document it with
8 notes in the sketch. We, uh, searched for any cartridge
9 casings or bullet effects. We collected the evidence
10 that we did find. We collected evidence by chain of
11 custody from law enforcement on the scene also.

12 **Q** Let's talk about the things that you look for.
13 You said there were shots fired.

14 **A** Yes, sir.

15 **Q** Did you find any bullets, I mean, the actual --
16 when people think of a bullet, they think of the thing
17 that goes in the gun and is shot out the gun. The
18 projectile, did you find any projectiles?

19 **A** No, sir.

20 **Q** Is that uncommon?

21 **A** No, sir.

22 **Q** Particularly when something takes place
23 outside?

24 **A** No.

25 **Q** I guess there's a lot more open space than

1 there is stuff to hit, right?

2 **A** Yes.

3 **Q** So you didn't find any projectiles?

4 **A** No, sir.

5 **Q** Is it possible to do ballistics if you don't
6 find projectiles?

7 **A** The Firearms department can still look at the
8 gun for other evidence.

9 **Q** All right. Okay. And did you, in fact,
10 recover a firearm other than the one that you got from
11 Deputy Scott?

12 **A** Yes, sir.

13 **MR. PERRY:** All right. Your Honor, may I
14 approach?

15 **THE COURT:** All right.

16 **BY MR. PERRY:**

17 **Q** I'm going to show you what's been admitted into
18 evidence as State's Exhibit number 1, specifically the
19 firearm inside this box, and ask you if you can identify
20 that.

21 **MR. KRINCICH:** Your Honor, I have the same
22 objection regarding chain of custody.

23 **THE COURT:** This is already into evidence.

24 **MR. KRINCICH:** Yes, sir. I'm just renewing
25 my objection with another witness, Your Honor.

1 **THE COURT:** You don't need to do that.

2 **MR. KRINCICH:** Yes, sir.

3 **THE WITNESS:** Yes.

4 **BY MR. PERRY:**

5 **Q** What does that appear to be?

6 **A** This is the weapon that was collected on scene
7 that night.

8 **Q** All right. And also contained inside that box
9 there are other individual items. Do you recognize those
10 that you have -- first of all, did you collect that?

11 **A** Yes.

12 **Q** Let's talk about the collection of that gun.
13 Let's talk about what happened with that gun. Just tell
14 us your involvement with collecting that gun.

15 **A** When law enforcement arrived on the scene, a
16 dog was brought out. I was advised that the dog had
17 located a gun. The gun was marked with a sheriff's
18 office hat. It was located in a field behind a
19 residence. When I arrived on scene, the gun had been
20 picked up by the residents with the hat and had been
21 brought towards the front of the residence. Sheriff's
22 deputies on scene advised for the subject to put the gun
23 down. He placed it on the ground. That's where we
24 collected it from.

25 **Q** So when you collected it, it had been touched

1 by at least one other person other than the person who
2 was holding it when it was shot, correct?

3 **A** Yes.

4 **Q** Okay. And, uh, what was the conditions like
5 that night?

6 **A** It was a wet, windy, chilly night.

7 **Q** So the air was damp?

8 **A** Yes.

9 **Q** It had been raining?

10 **A** Yes.

11 **Q** Okay. When you found the gun where it was on
12 the ground, was the place where it was on the ground wet?

13 **A** Yes, it was wet around it.

14 **Q** Okay. Uh, the other items that are inside the
15 box, what do those appear to be?

16 **A** Those are cartridges cases.

17 **Q** Uh, when the gun was recovered, did you check
18 to see if it had cartridge casings in the cylinder? Did
19 you remove those cartridge casings? Were you involved in
20 that part of this?

21 **A** Yes. Myself and Special Agent Hezel opened the
22 gun up to make sure it was clear prior to removing it and
23 transporting it. It had four cartridge casings located
24 in the cylinder. It was a five-shot cylinder. The open
25 cylinder was in the top position. That was marked on

1 scene.

2 Q Okay. So there was a cylinder that was empty?

3 A Yes.

4 Q And there were four cylinders that had
5 cartridges cases in them?

6 A Yes.

7 Q Did any of those cartridges cases have
8 projectiles still in them?

9 A No.

10 Q So it appears then that at some point, whether
11 it was that night or another time those bullets had, in
12 fact, been fired, correct?

13 A Yes.

14 Q Is there any other thing about those cartridge
15 cases that would indicate that they've been fired? Is
16 there primer on those cartridge cases?

17 A There is nothing that I could testify to, but I
18 do know that firearms would have the ability to look at
19 that, yes.

20 Q Okay. What other involvement did you have with
21 the crime scene other than recovering the firearm?

22 A We recovered some items along the passenger's
23 area of the van and the driveway area where the vehicle
24 was stopped. There was a lighter, a cell phone and the
25 back off of the cell phone and the battery from the cell

1 phone. We also recovered cartridge cases in the driveway
2 area of the residence. Those were .40 caliber cartridges
3 cases.

4 Q Those would have most likely been from?

5 A Law enforcement.

6 Q Okay. This particular type question, do you
7 know if the cartridge cases stay in the weapon or are
8 they ejected from the weapon?

9 A They stay in the weapon.

10 Q The weapon that was recovered from Deputy
11 Scott, is it the type of weapon that stay in the weapon
12 or are they ejected from the weapon?

13 A They are ejected.

14 Q Which would explain the cartridges cases that
15 you found, correct?

16 A Yes.

17 Q Okay. Back to the cartridge cases briefly, the
18 cartridge cases that are in there, do you recognize them?
19 Did you remove those from the firearm?

20 A Yes.

21 MR. PERRY: Your Honor, I'd offer the four
22 cartridge cases that are included in this
23 collectively as State's Exhibit 2.

24 MR. KRINCICH: I would object again, Your
25 Honor. Chain of custody.

1 **THE COURT:** Did you identify -- she identify
2 -- you identify that these are the cartridge cases
3 that you found that night?

4 **THE WITNESS:** Yes, the packaging included in
5 the box has the lab number, item and initials on it.

6 **THE COURT:** Your initials?

7 **THE WITNESS:** Yes.

8 **THE COURT:** All right. Overruled.

9 (WHEREUPON, State's Exhibit 2 is marked for
10 identification and admitted into the record.)

11 **BY MR. PERRY:**

12 **Q** Agent Fellers, what other involvement did you
13 have that night as far as your duties with the crime
14 scene?

15 **A** We continued searching. We found a black ski
16 mask along the tree line. We collected that item. There
17 were also two bullet effects in the tree line on the
18 upper portion of the trees that were photographed.

19 **Q** When you say bullet effects, that would
20 indicate that perhaps a bullet could have hit a tree?

21 **A** They appeared to be skips and ricochets. That
22 type of an effect. They didn't appear to enter a tree.

23 **Q** Okay. So it's not where a bullet would have
24 directly impacted the tree?

25 **A** No, sir.

1 **Q** Okay. Did you have any other involvement with
2 the crime scene aspect of this?

3 **A** There was a signed consent for the van. That
4 vehicle was photographed prior to releasing it from the
5 scene. I collected the officer's gun that fired and the
6 magazine from law enforcement on the scene.

7 **Q** Were you involved in doing any of the back end
8 forensics, I guess the fingerprints stuff, that type of
9 thing or would that be Ms. Hezel?

10 **A** I collected the evidence and submitted it to
11 the laboratory. Then I processed it with Ms. Hezel, yes.

12 **Q** Okay. I'm going to ask her as well, but do you
13 know where there any fingerprints found on any of this
14 stuff?

15 **A** There were ridges on it, but they were not
16 sufficient. She's qualified to make those
17 determinations.

18 **Q** Right. I'll ask her about that. Let me ask
19 you this, if you can answer it in your experience as a
20 crime scene analyst or fingerprint expert. Is it unusual
21 to not find fingerprints on an item like a gun under the
22 conditions that this gun was found?

23 **A** No. That's not unusual.

24 **Q** Please answer any questions Mr. Krincich may
25 have for you.

1 **A** Yes, sir.

2 **CROSS-EXAMINATION**

3 **BY MR. KRINCICH:**

4 **Q** You assisted Ms. Hezel in the processing of
5 these items that were found, the firearm cartridges?

6 **A** Yes, sir.

7 **Q** Cell phone back, battery?

8 **A** Yes, sir.

9 **Q** There were no fingerprints or any useable DNA
10 recovered on any of this, right?

11 **A** I -- we swabbed the evidence and we, uh,
12 processed it for fingerprints. I can't testify to the
13 quality of the fingerprints or the DNA results from the
14 swabs I collected.

15 **Q** Have you seen any reports to review that
16 anything's been determined from those tests?

17 **A** I did not review those reports.

18 **Q** How many agents from SLED were out there that
19 night?

20 **A** That night, there was myself, Special Agent
21 Hezel for crime scene, Lieutenant Green was also scene,
22 Kristin Grant was on scene and, I think, --

23 **Q** Lee Blackmon?

24 **A** Maybe Lee Blackmon, yes, sir.

25 **Q** So a number of officers but also officers

1 assisting from the Kershaw County Sheriff's Office?

2 **A** Yes.

3 **Q** Do you know how many officers there were for
4 that?

5 **A** No, sir.

6 **Q** Everybody out there had flashlights and it was
7 dark, right?

8 **A** Yes.

9 **Q** And during this search, certain cartridges were
10 found for the .40, right?

11 **A** Yes.

12 **Q** No additional cartridges or rounds were found
13 for the .38 though, right?

14 **A** No, sir.

15 **Q** And you seen it identified it as a five-shot
16 meaning that five bullets, as we'll call them, can go in
17 there at one time, right?

18 **A** Yes. They can hold five cartridges.

19 **Q** And four spent cartridges were found?

20 **A** Yes.

21 **Q** These marks that were found on trees, you said
22 they were higher up in the tree line. You know how high?

23 **A** No, I do not.

24 **Q** Above six feet?

25 **A** Yes.

1 Q And there is no way to determine which firearm
2 caused those, correct?

3 A No.

4 Q And no actual bullets or projectiles were
5 recovered from anything like a tree or a car?

6 A No.

7 Q Or the ground even?

8 A No.

9 Q And based on those marks in the tree line, you
10 really couldn't determine which way the weapon had been
11 fired to begin with, could you?

12 A No. It appeared they were on the side of the
13 trees that were facing the roads. So it would appear as
14 they were being fired towards the back of the property.

15 Q But not at which height or where that bullet
16 originated from?

17 A No.

18 Q By the time you got there, had they moved the
19 cars from the, uh, roadway?

20 A There was -- the patrol car was still behind
21 the van and the van was still on the crime scene.

22 Q I'm sorry. Can you just repeat that?

23 A The patrol car was still behind the van and the
24 van was still on the scene.

25 Q Okay. You don't know if they had been moved,

1 do you?

2 **A** Not that I'm aware of.

3 **Q** Where were you coming from?

4 **A** I came from Berkeley county.

5 **Q** From Berkeley county. So where -- are we
6 talking about the Charleston part or further up?

7 **A** Further up. By the 199 exit.

8 **Q** So --

9 **A** Summerville area.

10 **Q** Yeah, actually pretty close to Charleston
11 county at that point.

12 **A** Special Agent Hezel had arrived on the scene
13 prior to me because she was coming from the Columbia
14 area.

15 **Q** And I think -- looked to me that Lieutenant
16 Green may have been the first one to arrive and started
17 everything. Does that sound right?

18 **A** I am not aware of his arrival time.

19 **Q** You just probably would have gotten there an
20 hour and a half to two hours after getting the call,
21 right?

22 **A** Yes.

23 **Q** Had the scene been processed before you were
24 there by SLED?

25 **A** No. Special Agent Hezel had started looking

1 for evidence and documenting with photography and I was
2 advised that a dog had been brought to the scene.

3 Q You say you didn't have anything to do with the
4 ballistics test ---

5 A No, sir.

6 Q --- that may have occurred, right?

7 A No, sir.

8 Q Thank you.

9 A Thank you.

10 **REDIRECT EXAMINATION**

11 **BY MR. PERRY:**

12 Q I just want to clarify one thing. The
13 deformities or the defects found in the trees indicate
14 that bullets had hit them possibly?

15 A Yes.

16 Q Those, by the nature of where they were on the
17 trees, would have indicated that they were from shots
18 being fired towards the tree line, correct?

19 A Yes.

20 Q Okay. And not from the tree line towards the
21 road?

22 A Yes.

23 Q Okay. Nothing further.

24 **THE COURT:** Anything?

25 **MR. KRINCICH:** No, sir.

1 **THE COURT:** All right. Thank you, ma'am.
2 You may step down.

3 **THE WITNESS:** Thank you.

4 **THE COURT:** You are free to leave.

5 **THE WITNESS:** Thank you.

6 **MR. PERRY:** The State would next call Tiffany
7 Hezel, Special Agent Tiffany Hezel.

8 **TIFFANY HEZEL**

9 having first being duly sworn, testifies as follows:

10 **THE CLERK:** Please be seated. State your
11 full name for the record.

12 **THE WITNESS:** Tiffany Hezel, H-E-Z-E-L.

13 **DIRECT EXAMINATION**

14 **BY MR. PERRY:**

15 **Q** Ms. Hezel, can you please tell us by whom and
16 in what capacity you are employed?

17 **A** I'm employed by the South Carolina Law
18 Enforcement Division commonly referred to as SLED. I'm a
19 special agent within the Crime Scene and Latent Print
20 department.

21 **Q** How long have you been one?

22 **A** I been with SLED for approximately two and a
23 half years.

24 **Q** What did you do prior to that?

25 **A** Prior to that, I was a death investigator in

1 Memphis, Tennessee for four years.

2 **Q** And what sort of experience or education does
3 one need to do those sort of jobs?

4 **A** I have a Bachelor of Science degree from the
5 University of Wisconsin at Platteville in Criminal Justice
6 with minors in Chemistry and Psychology. I have a
7 Masters of Science degree from University of Central
8 Oklahoma in Forensic Science. I have also completed
9 various external training courses in death investigation,
10 crime scene and latent prints. And I successfully
11 completed the in-house training at SLED for both crime
12 scene and latent prints. My in-house training has
13 consisted of academics and practical application.

14 **Q** And on December the 20th, 2012, were you
15 employed in the same capacity?

16 **A** Yes, I was.

17 **Q** And as it relates to the event that took place
18 here in Kershaw County involving Mr. Ernest Allen
19 Pickett, what was your involvement in that? How did you
20 come to be involved in it? What did you do?

21 **A** I actually responded and worked the crime scene
22 along with Special Agent Sabrina Fellers. However, on
23 the evidence being transported back to the laboratory, I
24 actually processed it for the latent print evidence.

25 **Q** Specifically, what sort of training and

1 experience do you have as relates to latent prints?

2 **A** As I said before, I completed the in-house
3 training process. I've done various cases up until now.
4 I probably looked at close to a thousand latent prints
5 within my training and my case work capacity.

6 **Q** All right. And did you process the items that
7 were recovered in this case for latent prints?

8 **A** Sabrina processed them, S/A Fellers processed
9 them in my presence. However, I am the one that rendered
10 the result of the findings.

11 **Q** You were actually on scene when all this stuff
12 was being recovered and being processed as well, correct?

13 **A** I was.

14 **Q** And can you please tell us -- go through the
15 items that you processed and how that's done and a little
16 bit more about fingerprints and how they physically come
17 to be on things. Just tell us about how this works.

18 **A** Let me start off first by explaining what a
19 fingerprint is. On the palms of your hands and fingers
20 and the soles of your feet and toes, excuse me, there are
21 tiny raised portions of skin that we call ridges. These
22 ridges will make up an overall flow or pattern over that
23 surface area. When you think of a fingerprint, most
24 people commonly think that it's coming from just the end
25 of your finger, which would be a fingerprint. However,

1 it's the reproduction of those ridges from all that
2 surface area of skin. Your entire palm and fingers and
3 the sole of your feet and your toes. So when we look for
4 latent print evidence, we're looking for those ridges and
5 the individual characteristics within those ridges
6 themselves. So that, to us, is a fingerprint.

7 Now, there are different ways to leave a
8 fingerprint. The most common that we process for is a
9 latent fingerprint. These ridges that are on these areas
10 of the skin have sweat pores. Throughout the day, you
11 are going to exude sweat. You're going to touch your
12 face. You're going to touch your hair. You're going to
13 touch other objects. You're going to have moistures and
14 oils accumulate along those ridges. So when you touch an
15 object, there's a chance that you may leave an outline of
16 those ridges in that moisture. Okay.

17 Latent, by definition, means hidden. So it's
18 not necessarily seen by the unaided eye. So there's some
19 sort of development that is needed for us to be able to
20 get a clear picture of what is there.

21 So in this particular case, we processed
22 several items for latent print evidence. The first item
23 was a piece of plastic from the back of a cell phone.
24 The first thing I do is a visual examination to see if I
25 can see any kind of ridge detail on that surface. In

1 this particular case, I didn't see anything so I moved
2 forward with processing it to try to bring anything that
3 was there a little more visible.

4 So it was processed with a technique called
5 cyanoacrylate fuming, which is just a fancy name for
6 super glue. So we're going to put it in a tank. We're
7 going to apply super glue. The super glue is going to be
8 heated and it turns into a vapor. That vapor will then
9 adhere to any moisture that may be present and any
10 fingerprint on that piece of evidence. It's going to
11 turn it like a white color. So it makes it much more
12 visible.

13 Once this cyanoing process is completed, we do
14 another visual examination. We're going to look over
15 that piece of evidence again and see if any latent
16 evidence has become visual that we initially see. On
17 this piece of plastic from the back of a cell phone,
18 nothing further was developed. I didn't see anything
19 that I didn't see before the fuming.

20 I then processed it with black powder and the
21 black powder is simply going to adhere to any of the
22 moisture that is there or the cyano around a fingerprint
23 that it might have helped develop. In this particular
24 case, the black powder didn't adhere to anything either.
25 So my end result for the plastic for the back of the cell

1 phone was no fingerprint developed. There was no
2 fingerprint evidence there. That is not an unusual
3 finding.

4 Like I said before, when you touch something,
5 there's a chance you will leave that transfer of your
6 ridges in moisture. There's conditions that's going to
7 determine whether or not you do that. For example,
8 everyone's ridges are different. People who work in
9 construction and brick layers, they have worn their
10 ridges very thin, so their ridges may not transfer very
11 well onto an object depending on the surface that you are
12 touching. If it is textured, your ridges are not going
13 to transfer as well as if it was a smooth surface.

14 Environment is the biggest one. Since you were
15 wanting to transfer moisture from your finger to an
16 object, if it's cold, if it's raining outside, that's an
17 excess amount of moisture in the air, especially if frost
18 has began to accumulate and say your hands are very
19 sweaty. You are taking a lot of moisture onto a wet
20 object. It's too much water. Nothing's going to
21 transfer.

22 Same thing if it's cold, but frost has yet to
23 develop and your hands are cold and you don't have any
24 sweat having developed on your hands. You are taking a
25 dry hand onto a dry surface. There's nothing to

1 transfer. Okay.

2 So there's a lot of variables that go into a
3 fingerprint transferring onto an item. Unfortunately,
4 it's not like television. It doesn't happen all the
5 time. So those are the things you have to take into
6 account when you don't find the evidence. Okay.

7 Q In this particular case, can you go through the
8 items of evidence and let us know whether or not any
9 fingerprints were found?

10 A Sure.

11 Q And can you explain again with specificity to
12 this case and the environmental and other factors, why if
13 they weren't found?

14 A So the first piece of evidence we discussed was
15 the piece of black -- the piece of plastic from the back
16 of the cell phone. No finger print evidence was
17 developed. The next piece of evidence that was processed
18 was a cell phone battery. Again, no fingerprint evidence
19 was developed. The next piece, a Samsung Verizon flip
20 phone. There was no fingerprint evidence developed.

21 An orange lighter. This did have fingerprint
22 evidence developed. However, it was found to be of
23 insufficient ridge detail, meaning, there weren't enough
24 ridges present for a comparison to take place. There
25 just wasn't enough that transferred onto the item.

1 The revolver with the five-shot cylinder again
2 was found to have insufficient ridge detail, not enough
3 ridge detail transferred from the individual that may
4 have handled it to the item. Those were the only items
5 that were processed for latent print evidence.

6 Now, speaking of the night in question, it had
7 rained. There were standing water presence on the scene.
8 So as I spoke of earlier, too much moisture, too much
9 wetness in the environment, if the individual's hands
10 were also very wet, it's not going to make for good
11 conditions for the moisture of the fingers to transfer
12 onto a wet object.

13 **Q** So would you consider it the least bit unusual
14 that no fingerprints were found on any of these items?

15 **A** I would not.

16 **MR. PERRY:** All right. And I beg the court's
17 indulgence. (Pause.)

18 **BY MR. PERRY:**

19 **Q** A lack of fingerprints would not necessarily
20 proclude that one had touched or held an item, would it?

21 **A** No.

22 **MR. PERRY:** Nothing further for this witness.

23 **MR. KRINCICH:** No questions, Your Honor.

24 **THE COURT:** All right. Thank you, ma'am.

25 You may step down.

1 **THE WITNESS:** Thank you.

2 **THE COURT:** And you are free to leave.

3 **MR. PERRY:** Your Honor, at this time, the
4 State has one more witness, Special Agent Amanda
5 Webb with SLED. She is -- I know at 9:30 this
6 morning was to testify in Lancaster county at a
7 murder trial. As soon as she cleared from that, she
8 was supposed to head this way. I don't think she
9 anticipated us moving as quickly as we have this
10 morning.

11 **THE COURT:** All right. How about if we break
12 for lunch?

13 **MR. PERRY:** That would be great, Judge.
14 Thank you.

15 **THE COURT:** All right. Ladies and Gentlemen,
16 we're going to go ahead and break for lunch. I'm
17 going to ask you to be back here at 1:30. That will
18 give you about an hour and 20 minutes. Please do
19 not discuss the case at lunch or when you get back.
20 Y'all have a nice lunch. We'll see you back here.

21 **(WHEREUPON, the jury exits at approximately**
22 12:06 p.m.)

23 **THE COURT:** All right. Mr. Krincich --
24 This your last witness?

25 **MR. PERRY:** Yes, sir. Ms. Webb is my last.

1 **THE COURT:** You anticipate putting up a
2 defense?

3 **MR. KRINCICH:** Your Honor, I discussed it
4 with Mr. Allen on more than one occasion. To be
5 quite honest with the court right now, his last
6 indication to me is that he did not want to testify.
7 I indicated at the beginning of the trial that he
8 would be the only witness we would call. If you
9 want to advise him of his rights --

10 **THE COURT:** I'll let you have lunch and see
11 how it goes. We'll do it after the State's case and
12 hear any motions.

13 **MR. KRINCICH:** Yes, sir.

14 **MR. PERRY:** Your Honor, if you want to argue
15 and charge this afternoon, the State is ready to
16 proceed.

17 **THE COURT:** Will you be ready to go, Mr.
18 Krincich?

19 **MR. KRINCICH:** Yes, sir. You want to address
20 it after lunch.

21 **THE COURT:** Address what?

22 **MR. KRINCICH:** After the State closes about
23 arguing and charging.

24 **THE COURT:** I understand that. But you'll be
25 prepared to do closing arguments this afternoon?

1 **MR. KRINCICH:** Yes, sir. Sure will.

2 **THE COURT:** All right. This is your last
3 witness. And if you elect not to put up any defense,
4 we can argue and charge and get the case to the jury
5 this afternoon.

6 **MR. KRINCICH:** Yes, sir. I agree.

7 **THE COURT:** All right. Thank y'all. Y'all
8 have a nice lunch.

9 **(WHEREUPON, a lunch recess is taken.)**

10 **THE COURT:** Mr. Wilson, step right there.
11 Raise your right hand.

12 **(WHEREUPON, Juror number 192, Tony Wilson, is first**
13 **duly sworn.)**

14 **THE COURT:** All right. Mr. Wilson, it's been
15 reported to me that following the testimony of one
16 of our witnesses or several of our witnesses that
17 you went back to the jury and made some comments to
18 the jury that you did not need to hear anymore, that
19 you have made up your mind about this case and that
20 you knew what the deal was with respect to guilt or
21 innocence. And when you were questioned about it,
22 you indicated that you didn't too much care about
23 what I did about it and you thought what's he going
24 to do, put me in jail and that they might take you
25 off the jury and you indicated that wasn't any big

1 problem. Did you go back there and discuss this
2 case?

3 **THE JUROR:** Yes, sir. I did. I didn't
4 discuss the case.

5 **THE COURT:** You went back and made comments
6 about the case in front of the jury when you were
7 instructed not to, correct?

8 **THE JUROR:** Yes.

9 **THE COURT:** What would possess you to do
10 that, Mr. Wilson?

11 **THE JUROR:** I wasn't talking about the case.

12 **THE COURT:** What were you talking about that
13 you said you didn't need to hear anymore, you
14 already made up your mind? What else is that but
15 this case?

16 **THE JUROR:** Well, I guess that's what it is.
17 I mean, pretty much yeah. I guess that's what it
18 is.

19 **THE COURT:** All right. Well, Mr. Wilson, you
20 are now in my custody. I will decide what I'm going
21 to do with you. Thinking that I might not put you
22 in jail may be a totally erroneous thinking on your
23 part.

24 Y'all got some place you could put this man
25 back in the cell where he won't be connected with

1 the defendant? How many lock ups are there back
2 there?

3 **THE DEPUTY:** We've got one holding cell down
4 here, Your Honor. That's where we usually put the
5 defendant.

6 **THE COURT:** Where can we put this fellow?

7 **THE DEPUTY:** There is no one in the holding
8 cell.

9 **THE COURT:** We're going to be putting the
10 defendant back there before too long.

11 Madam Clerk, do we have an office, an empty
12 office that he could be --

13 **THE CLERK:** The only place that I have, sir,
14 is the Grand Jury room downstairs.

15 **THE COURT:** Sit him back there in the back.

16 **THE DEPUTY:** Back there on the bench.

17 **THE COURT:** You go somewhere, Mr. Wilson, and
18 you will sit -- you won't be out by next Christmas.
19 You hear me?

20 **THE JUROR:** Yes, sir.

21 **THE COURT:** Sit back there until I decide
22 what we're going to do with you.

23 All right. We have two jurors, one Mary Deese
24 Wright and one Christina Hopkins. I need you to
25 write their names on a sheet of paper and put it in

1 a cup. Madam Clerk can draw out one of those names.

2 **MR. KRINCICH:** Your Honor, before you do
3 that, I'd ask the Court to inquire from --

4 **THE COURT:** I am but I'm going to find out
5 who we got as a juror first.

6 **MR. KRINCICH:** Yes, sir. I understand.

7 **THE COURT:** Rather than send them back after
8 I make inquiry and then bring them back. I think
9 the rules calls for a criminal alternate, if you
10 have more than one, you draw their name. In civil,
11 you take the first one.

12 **MR. KRINCICH:** Yes, sir. I agree with you.

13 **THE COURT:** You have any objection to Ms.
14 McDonald writing the names down and putting them in
15 a cup and then drawing them out?

16 **MR. PERRY:** No objections from the State,
17 Your Honor.

18 **MR. KRINCICH:** And no objections from the
19 defense, Your Honor.

20 **THE COURT:** Shake that up. You nervous?

21 **THE CLERK:** Ms. Christina T. Hopkins.

22 **THE COURT:** All right. She will take the
23 place of Mr. Wilson. Can we bring the jury in
24 please?

25 **THE BAILIFF:** Yes, sir.

1 **(WHEREUPON,** the jury enters at approximately
2 1:35 p.m.)

3 **THE COURT:** All right. Ladies and Gentlemen,
4 a couple of things I need to ask you. First of all,
5 did anybody have any conversations about this case
6 while you were gone? Anybody approached by you
7 wanting to discuss the case? Anybody do any inquiry
8 about the case since we were gone? All right.

9 Ladies and Gentlemen, prior to, uh, my having
10 gone to lunch, information came to me via the clerk
11 that, uh, one of your colleagues on the jury had
12 made a comment to the jury after certain testimony
13 that he no longer needed to hear any more testimony
14 that he made up his mind that he knew what he was
15 going to do and it came to the atten -- I think
16 someone on the jury may have said you're not
17 supposed to discuss the case and he said, well, what
18 are they going to do to me.

19 This is the information I have and it's been
20 confirmed by him. What are they going to do to me,
21 put me in jail? Somebody said probably not but
22 might kick you off the jury. He said so what. I
23 guess that maybe what it was. Well, that was
24 confirmed for me that those statements were made by
25 him. I don't know if some of you -- I know at least

1 one of you heard it. I don't know if more of you
2 heard these comments. I have removed him and
3 actually taken him into custody. So his thinking
4 that jail is not something that he might not look at
5 is false information on his part. But Ladies and
6 Gentlemen, these comments, did y'all hear those
7 comments?

8 (WHEREUPON, each juror responds.)

9 **THE COURT:** Those that heard the comments,
10 let me ask you this, the fact that these comments
11 were made, did they affect your thinking about this
12 case? Would they prevent you from listening to all
13 the evidence that has been -- come into the case so
14 far and will continue to come in until these lawyers
15 have concluded their presentation? Will that affect
16 your ability to render a fair and impartial verdict?
17 Does anybody here believe that because some comments
18 were made that you heard them affect your ability to
19 render a fair and impartial jury -- verdict has been
20 affected?

21 (WHEREUPON, each juror responds.)

22 **THE COURT:** Everybody believes that you can
23 be fair and impartial?

24 (WHEREUPON, each juror responds.)

25 **THE COURT:** All right. I thank you. Now,

1 the way that we do this, uh, under the rules, both
2 of your names were put into a cup. The clerk -- if
3 you are mad about being put on the jury or mad that
4 you didn't get put on the jury, blame the clerk.

5 So Ms. Hopkins, you have been the lucky person
6 to take the place of that juror. I will ask you to
7 take that seat.

8 Now, Ladies and Gentlemen, what I need to do
9 again is ask you to step back to the jury room. I
10 have to review with the attorneys what I've talked
11 to you about and what we've done up to this point.
12 If you will, step back in the jury room. Again,
13 don't discuss the case. We'll bring you back in a
14 very short time. Thank you. I'm sorry we had to do
15 this. When you don't obey instructions, it causes
16 problems.

17 (WHEREUPON, the jury exits at approximately
18 1:39 p.m.)

19 **THE COURT:** All right. Mr. Solicitor, you
20 heard what I said. You've heard the responses or
21 observed the responses where the jury shook their
22 head saying no they were not affected in any way, is
23 there anything further you would like the court to
24 do or you have anything you would like to say with
25 respect to my handling the situation with the jury?

1 **MR. PERRY:** Your Honor, I think you handled
2 it perfectly appropriately. I don't know of
3 anything else that could or should or needs to be
4 done.

5 **THE COURT:** All right. Mr. Krincich?

6 **MR. KRINCICH:** Your Honor, I think just to
7 clarify for the record, we were informed of this
8 when we were broke for lunch, uh, my understanding
9 that you were approached by Madam Clerk who was
10 approached by a juror. This is the only person that
11 made any kind of inappropriate comment. Is that
12 fair?

13 **THE COURT:** That's the information we have.
14 The comments were as I asked him about. I don't
15 think he cares one way or the other how we know, but
16 I don't think he misstated what his opinion was. I
17 think he said I don't need to hear any more of it.
18 I've made up my mind. That, in his mind, he thinks
19 he really didn't comment on it. I've told you
20 everything I know.

21 **MR. KRINCICH:** Yes, sir. I think what we're
22 faced with, the jurors didn't make any kind of oral
23 statement. I was able to observe all 13 of them now.
24 They all shook their head yes that they could be
25 fair and impartial. I don't think there's anything

1 else the court can do.

2 **THE COURT:** All right. Uh, we ready to go?

3 **MR. PERRY:** The State is ready for its last
4 witness.

5 **THE COURT:** Is your witness here?

6 **MR. PERRY:** She is here and ready to go,
7 Judge.

8 **THE COURT:** All right. Let's ask the jury to
9 come in.

10 **(WHEREUPON, the jury enters at approximately**
11 1:42 p.m.)

12 **THE COURT:** All right. Ladies and Gentlemen,
13 if you could recall when we broke for lunch the
14 State was in its case-in-chief. With that said,
15 I'll ask the Solicitor, you prepared to call your
16 next witness?

17 **MR. PERRY:** Yes, Your Honor. At this time,
18 the State would call its last witness, Special Agent
19 Amanda Webb. The State would call Amanda Webb.

20 **AMANDA WEBB**
21 having first being duly sworn, testifies as follows:

22 **THE CLERK:** Thank you. Please be seated in
23 the chair. State your full name for the record.

24 **THE WITNESS:** Thank you. My name is Amanda
25 Webb.

DIRECT EXAMINATION**BY MR. PERRY:**

Q Ms. Webb, would you please tell us by whom and in what capacity you are employed.

A I am employed by SLED in the Forensics DNA department.

Q How long have you been employed by SLED?

A About six years.

Q During that time, have you always done what it is that you do now?

A Yes, I have.

Q Prior to being employed with SLED, what is your educational history and your work history prior?

A Prior to SLED, I received my Bachelor of Science in Forensic Chemistry. I also received a Master of Science in Forensic Science. After completing those degrees, I was hired on by SLED in the DNA department and successfully completed all of my training and have been doing DNA casework ever since.

Q All right. So what you do in sort of common terms is sort of the CSI part of this?

A Yes, sure.

Q If you would, tell us about your involvement in the case involving the officer-involved shooting and Ernest Allen Pickett here in Kershaw County back in

1 December of 2012.

2 **A** Sure. I received some swabs from some evidence
3 items. I went to try to get DNA profiles from them. I
4 also received a buccal swab from Ernest Pickett. A
5 buccal swab is a known standard collected from the
6 cheeks, the inside of the mouth of an individual. It's
7 just so you know whose DNA was collected. If any
8 evidence profile is developed from an item of evidence,
9 then I can compare it to a known individual to see if it
10 matches or doesn't match.

11 **Q** Specifically, what did you do in this case?

12 **A** I worked a couple of items in this case. There
13 was item 3.1 which was swabs from the keypad of a Samsung
14 Verizon flip phone. 13.1 was swabs from the textured
15 grip area of revolver. 13.2 was swabs from the trigger
16 of a revolver. 14.1 was a swab from a cartridge case.
17 15.1 was a swab from a cartridge case. 16.1, swab from a
18 cartridge case and also 17.1 was swabs from a cartridge
19 case.

20 **Q** And if you would, tell the jury briefly and in
21 layman's terms the best you can whenever you do these
22 workups, what's involved and specifically what you did
23 with regard to these items that you mentioned and what
24 results, if any, were obtained.

25 **A** Sure. These items was a DNA test for what you

1 call touch DNA. If you think someone may have touched a
2 certain item, your skin cells have DNA in it and you
3 deposit those skin cells on an item when you touch it.
4 So we have the potential to get a DNA profile from items
5 with touch DNA. So I analyzed all of those items to try
6 to obtain a DNA profile.

7 I got a profile from item 13.1 which was the
8 grip area of the revolver. However, that DNA profile was
9 probably attributable to a staff DNA analyst. What that
10 means is that it more than likely was one of my coworkers
11 who probably was in the lab and their DNA got on that
12 item. There was no indication really of anybody on that
13 item. That's one of our procedures to do a check at the
14 end of any analysis.

15 We have all of the staff profiles in a database
16 in a program. We look and make certain to see if
17 possibly someone who's in the lab could have gotten their
18 DNA on an item. That seems to be the case here. I
19 couldn't make any interpretation casewise about that
20 item. I think it was a staff coworker.

21 I got a partial profile from item 17.1, a
22 cartridge case. Partial means, for DNA forensic terms,
23 I'm looking at 16 different locations of the DNA. A full
24 profile is when you get information all 16 of those
25 locations. However, I only got information from two

1 locations on this. It wasn't enough for me to make any
2 sort of determination about it at all. That's pretty
3 common with touch items, with touch DNA, especially
4 cartridge cases. You have a better chance of getting a
5 DNA profile from touch items where somebody might have
6 handled it for a longer period of time or clothing that
7 you might wear. But when it's something that you might
8 not have handled for a long time or simply touched for a
9 couple of seconds or so, you don't really transfer as
10 many skin cells. It's harder to kind of develop a
11 profile, especially for cartridge cases. Also cases,
12 after they are fired through a gun, the heat and, uh, the
13 cartridge cases expand, that can also degrade some DNA.

14 It's common not to find DNA on cartridges
15 cases. Which was also the case for the other cartridge
16 cases tested. Items 14.1, 15.1 and 16.1. Also 3.1 was
17 the flip -- the Samsung Verizon flip phone. And 13.2,
18 the trigger from the revolver, I didn't get any DNA
19 profiles from those.

20 **Q** Now, did you go out to the crime scene on the
21 night of this occurrence back in December of 2012?

22 **A** I did not.

23 **Q** Are you familiar with the weather the night of
24 that event?

25 **A** I'm not certain what the weather was.

1 Q Uh, if the weather had been cold, if there had
2 been water on the ground, would it be uncommon for you
3 not to have found any DNA on these items that you tested,
4 most specifically, the cell phone and the revolver?

5 A Yes, environment and weather conditions will
6 affect DNA. Dirt can. Sunlight can. Also rain can.
7 Rain can wash off any potential DNA that might be there.
8 Especially the lower amount of DNA, like the touch DNA.
9 That's a little easier to wash off. It's like washing
10 your hands, washing skins cells off of something.

11 Q So under the circumstances, you would not find
12 it uncommon not to have found DNA on these items?

13 A That's correct.

14 Q And lack of having found the defendant's DNA on
15 these items would not proclude having held the items at
16 some point prior to your analysis, correct?

17 A That's possible.

18 Q Please answer any questions that Mr. Krincich
19 has for you.

20 **CROSS-EXAMINATION**

21 **BY MR. KRINCICH:**

22 Q Good afternoon, Agent Webb.

23 A Good afternoon.

24 Q I have just a couple of questions really. Item
25 13.1, the swab from the textured grip, did you figure out

1 whose DNA it was from the lab?

2 **A** Yes, I did.

3 **Q** Can we all agree that that piece of evidence
4 was probably mishandled for an employee's DNA to show up
5 on it?

6 **A** I'm not certain, uh, mishandling is the case
7 here. I don't think this was at collection or packaging
8 or anything. I think this was after the item was
9 collected, the swab was collected, then I had it in my
10 custody in the DNA lab. I think that's where the
11 transfer happened. It wasn't really a mishandling. It
12 was just a simple fact that it was in the same location
13 that this worker was also working in the lab.

14 **Q** Did anybody figure out how this worker's DNA
15 ended up on the textured grip swab?

16 **A** I have theory. There's no way to be 100
17 percent certain, but I have a theory if you'd like to
18 hear that.

19 **Q** No, actually, I don't.

20 **A** Okay.

21 **Q** But Mr. Allen's DNA was not on there, was it?

22 **A** No, it was not.

23 **Q** And this is the guy that they at least gave you
24 the information that was holding that gun and firing that
25 gun that night, right?

1 **A** Uh, that's what I have listed in my paperwork,
2 yes.

3 **Q** And somebody just came in incidental contact
4 with it in the lab, their DNA did show up on it. Is that
5 supposed to happen?

6 **A** No. We go through, uh, processes to try to
7 prevent it from happening. Sometimes it does but that's
8 why we also have the staff profiles on hand to double
9 check after the analysis is performed to make certain
10 that we are reporting out the correct result.

11 **Q** And you said you didn't respond to the scene.
12 You don't know exactly where or how these items were
13 recovered, do you?

14 **A** That's correct. I can only tell who collected
15 them. I don't really know where or when.

16 **Q** Something I want to talk about is the cell
17 phone. I don't know a lot of people that have flip
18 phones. I think the past 10 years, I can say a number of
19 people have carried flip phones. Have you processed a
20 lot of flip phones.

21 **A** Yes, I don't really process and swab them
22 myself. I mainly get the swabs after someone else have
23 swabbed it and processed it. I mainly just handle the
24 swabs. But a few, a few phones. Not a great deal.
25 Maybe 50 cases or so.

1 **Q** And with the new iPhone or Android phone, the
2 larger touchscreen, is that the kind of phone you have
3 now?

4 **A** That I personally have?

5 **Q** Yeah, that you personally have.

6 **A** I actually have both. My work phone is one of
7 those old flip phones. My personal phone is a smartphone
8 touchscreen.

9 **Q** All right. Whenever you're talking on the
10 phone, do you hold the phone away from your ear?

11 **A** No, I hold it up against my ear.

12 **Q** And it touches your cheek and it touches your
13 ear, right?

14 **A** Yes.

15 **Q** It touches your hair?

16 **A** Yes, it does.

17 **Q** And that includes the flip phone as well,
18 right?

19 **A** Yes, correct.

20 **Q** And probably when you are done with your
21 touchscreen, you put it in your pocket or holster of your
22 purse, right?

23 **A** Yes, I do.

24 **Q** And with the flip phone, you close it, right?

25 **A** Yes.

1 **Q** Then you put it in your pocket or somewhere
2 else?

3 **A** Yes.

4 **Q** So that material that's on the flip phone,
5 whether it's the oils from our face or our hair that
6 would get on the screen part or the oils from our fingers
7 that would be on the keypad, they are not exposed to
8 being wiped off in your pocket, are they?

9 **A** I would expect a less chance, yes, of it being
10 wiped off. I also would expect, you know, if it's in
11 your pocket and you've worn those pants and have had your
12 hands in and out of the pocket, your DNA would also be in
13 the pockets.

14 **Q** In the pocket, right?

15 **A** Yeah.

16 **Q** On the outside of the phone?

17 **A** Yes.

18 **Q** But whenever these swabs are presented to you,
19 there was nothing that was recoverable on any of it, was
20 there?

21 **A** That's right. I didn't get any DNA at all.

22 **Q** Is that normal, I mean, with a flip phone?
23 We're talking about something that's closed.

24 **A** You know, I've seen both in case work. I've
25 seen no profiles. Uh, I've also seen profiles from

1 phones. I'm not certain. Again, it just really depends
2 on how much they are handled and cleaned, I guess. But
3 I've seen both scenarios.

4 Q Any of this appear that it had been wiped down
5 or cleaned or you just got the swabs here. You didn't
6 have the actual items?

7 A Yeah, I just had the swabs instead of the
8 phone.

9 MR. KRINCICH: No further questions, Your
10 Honor.

11 MR. PERRY: Very briefly on redirect.

12 **REDIRECT EXAMINATION**

13 **BY MR. PERRY:**

14 Q The contamination took place in the laboratory,
15 that was not contamination to the firearm, was it? That
16 was contamination to the swab, just be sure I'm clear on
17 that.

18 A To the swab, correct.

19 Q You didn't even have the firearm in the lab,
20 correct?

21 A That's correct. I wouldn't have expected it to
22 be -- yes. That's why I wouldn't expect it to be to the
23 firearm itself. That worker, that analyst wasn't near
24 the firearm, just the swab.

25 Q Again, these items had been dropped on the

1 ground, the cell phone, the gun, it's raining. It's
2 cold. It's damp. It's a wet night. Is it surprising to
3 you in the least that you didn't find enough DNA that you
4 could actually do any sort of a match?

5 **A** No, it wasn't surprising.

6 **Q** Thank you.

7 **THE COURT:** All right. Anything?

8 **MR. KRINCICH:** Yeah, if I can, Your Honor.

9 **RECROSS EXAMINATION**

10 **BY MR. KRINCICH:**

11 **Q** Not surprising on the flip phone swab either?

12 **A** No, uh, I do have some items that are
13 surprising with results. For instance, cartridge cases,
14 I'm surprised when I do get profiles from those because
15 they are handled so little. It's my experience from
16 working other cases that, uh, I compare, you know,
17 expected results to. So as I said before, I have worked
18 some phone cases. I have had cases before where I
19 haven't had any profiles. Just based on my experience
20 and seeing different cases, I realize that some times you
21 just don't get DNA from phones some times.

22 **THE COURT:** All right. Thank you, ma'am.

23 You may step down and you are free to leave.

24 **THE WITNESS:** Thank you.

25 **THE COURT:** All right. Mr. Solicitor,

1 anything further?

2 **MR. PERRY:** At this time, Your Honor, the
3 State would rest.

4 **THE COURT:** Ladies and Gentlemen, the State
5 has rested as they indicated they would after the
6 last witness which means the State has now concluded
7 the presentation of the State's evidence in its
8 case-in-chief. I have to take up some matters with
9 the attorneys before -- attorneys before we, uh, go
10 further so I'm going to ask y'all to step back in
11 the jury room. Please don't discuss the case while
12 you're back there. I'll be with you just as soon as
13 I can.

14 **(WHEREUPON, the jury exits at approximately**
15 **1:59 p.m.)**

16 **THE COURT:** All right. Anything from the
17 State?

18 **MR. PERRY:** Nothing further from the State,
19 Your Honor.

20 **THE COURT:** Anything from the defendant?

21 **MR. KRINCICH:** Your Honor, I do have a motion
22 for directed verdict on several grounds. Would you
23 like to hear that now or do you want to deal with
24 the jury? I don't know what you want to tell them
25 about sticking around.

1 **THE COURT:** No, I want to hear it now.

2 **MR. KRINCICH:** Yes, sir. Uh, Your Honor,
3 first and foremost thing that has stuck out to me
4 during this trial, and maybe I missed it. I don't
5 believe I did. I don't know that the State of South
6 Carolina has established jurisdiction in Kershaw
7 County. Your Honor, what we've heard from
8 Investigator Sellers is it was then Investigator
9 Bailey, Captain Corey and Justin Scott was that a
10 call was received or a text was received that Ernest
11 Allen who they knew to be wanted was in town with
12 Ms. Alicia Brisbane in Camden. They said they set
13 up on Bull Street in front of Zemp Stadium, observed
14 her turn from Gate Street onto 521 and 521 to Black
15 River and Black River to Precipice Road. Your
16 Honor, at no point did the State through its case-
17 in-chief establish that Precipice Road is in Kershaw
18 County.

19 Your Honor, that is tantamount to having this
20 case presented to this jury from Kershaw County, the
21 State has to establish that this actually occurred
22 in Kershaw County. Your Honor, I submit they failed
23 to do that. For that reason, that's my first
24 reason, I think the entire case at this point should
25 be dismissed, Your Honor. The State has rested.

1 They failed to establish that. If Your Honor wants
2 to address that first or you would like me to keep
3 going.

4 **MR. PERRY:** Your Honor, I think it is
5 ludicrous. It's very clear that Precipice Road is
6 in Kershaw County. Everybody on the jury knows where
7 that is. Everybody here in this courtroom knows
8 where that is. All the locations that were given as
9 far as where they were traveling.

10 **THE COURT:** My recollection is they testified
11 they were waiting on 521 within the city of Camden.

12 **MR. KRINCICH:** Yes, sir.

13 **THE COURT:** They picked up the defendant at
14 that point in his vehicle and followed him out to
15 521 until they got to, uh, -- I can't remember the
16 name of the road.

17 **MR. PERRY:** Black River Road.

18 **THE COURT:** Black River Road and turned left
19 and went down Black River Road. I can't remember
20 whether they specifically -- clearly, Camden is in
21 the city of Columbia. They testified they were in
22 Camden. Don't know whether this portion is within
23 Columbia. I'll tell you what I am going to do, you
24 have any kind of motions you want to make?

25 **MR. PERRY:** Your Honor, I would move to

1 reopen and allow the deputy to establish that
2 Precipice Road is in --

3 **THE COURT:** I'm going to allow him to do that
4 just out of abundance of caution. Let's bring the
5 jury back in.

6 **MR. KRINCICH:** Your Honor, I would object to
7 this. That's obvious. I know. And I assume I'm
8 overruled. Yes, sir?

9 **THE COURT:** Yes, you are.

10 **MR. KRINCICH:** Yes, sir. Thank you.

11 (WHEREUPON, the jury enters at approximately
12 2:04 p.m.)

13 **THE COURT:** All right. Ladies and Gentlemen,
14 the State has made a motion to reopen their case
15 just for a moment. I've allowed them to do so.
16 Proceed.

17 **MR. PERRY:** Yes, sir. We'd call Investigator
18 Mickey Sellers briefly.

19 **THE CLERK:** Is he under oath still?

20 **THE COURT:** Yes. Officer, you are under oath
21 previously. Come back up here.

22 **MICKEY SELLERS**

23 having previously been sworn, testifies as follows:

24 **DIRECT EXAMINATION**

25 **BY MR. PERRY:**

1 **Q** Investigator Sellers, I think it's already been
2 testified to that this event took place out on Precipice
3 Road.

4 **A** That's correct.

5 **Q** There was testimony that you met with officers
6 there on South Broad Street here in the city of Camden,
7 correct?

8 **A** That's correct.

9 **Q** Uh, Precipice Road and, in particular, the
10 particular location of this traffic stop, that is, in
11 fact, in Kershaw County; is it not?

12 **A** That is correct. It is in Kershaw county.

13 **MR. PERRY:** Nothing further, Judge.

14 **THE COURT:** Anything from the defendant?

15 **MR. KRINCICH:** No, sir, Your Honor.

16 **THE COURT:** All right. Thank you. You may
17 step down.

18 All right. Ladies and Gentlemen, let me let
19 you step back to the jury room again if you would.
20 As soon as we finish what we started, I'll be with
21 you.

22 **(WHEREUPON, the jury exits at approximately**
23 **2:06 p.m.)**

24 **THE COURT:** All right. Mr. Krincich,
25 anything further?

1 **MR. KRINCICH:** Yes, sir. Your Honor, I guess
2 if we're going to go charge by charge, that might be
3 the easiest way for me to put all this stuff in some
4 sort of order. I will start with the lowest charge.
5 The lowest charge only carries the least amount of
6 years, Possession of a Weapon during a Violent
7 Crime. Your Honor, I can't argue that there has
8 been no evidence presented that Mr. Allen is in
9 possession of a weapon. Ms. Brisbane testified that
10 he was. These officers testified that he was. The
11 attempted murder that he's currently charged with is
12 a violent crime. I don't have a particular motion
13 for that charge.

14 Moving along to the resisting arrest with a
15 deadly weapon --

16 **THE COURT:** Let me ask you something. You
17 indicated you're going to want a charge on ABHAN.

18 **MR. KRINCICH:** Yes, sir.

19 **THE COURT:** And the Solicitor's indicated to
20 me they have no objection to that on any of the
21 attempted murders.

22 **MR. KRINCICH:** Yes, sir.

23 **THE COURT:** Does that apply to ABHAN as well?

24 **MR. KRINCICH:** Yes, sir. When the
25 legislature codified ABHAN in 2010, they did mark it

1 as a serious and a violent crime.

2 **THE COURT:** I just wanted to tell you that
3 they are not objecting to that.

4 **MR. KRINCICH:** I will concede that that is a
5 violent crime under our statute.

6 **THE COURT:** All right.

7 **MR. KRINCICH:** The second charge that I'd
8 talk about would be the Resisting Arrest with a
9 Deadly Weapon. Your Honor, I guess this is just a
10 matter of course. No where in the state's testimony
11 did any of these officers indicate that they advised
12 Mr. Allen that he was under arrest. They knew there
13 was a bench warrant for him. They knew that they
14 were doing a felony stop. Still, the defendant has
15 to be apprised that he is under arrest. We can go
16 back and look at his actions which they are alleging
17 that he got out of the car and ran.

18 Your Honor, there's got to be a determination
19 on when the seizure was. Was he actually seized
20 when the car was stopped? We would submit that he
21 was not seized at that point, Your Honor, and no
22 arrest had been effectuated. I know it's an ongoing
23 process, but looking back through cases, I think the
24 most recent was State v. Brannon, uh, running from
25 police officers or sheriff's deputies is not

1 necessarily resisting arrest. The person has to
2 know that they are under arrest in order to resist.
3 Just on that basis, there's been no testimony that
4 Mr. Allen knew that he was under arrest. I would
5 ask that that charge be dismissed at this time, Your
6 Honor.

7 **MR. PERRY:** Your Honor, the state's response
8 to that would simply be that Mr. Allen can't create
9 the circumstances under which officers are not able
10 to physically take him into custody or get close
11 enough to him to tell him, hey, now, you are under
12 arrest. Put your hands behind your back.
13 Immediately upon the traffic stop, he bails out of
14 the vehicle and starts running and starts shooting.
15 Now, he can't very well shoot at officers to keep
16 them from getting close to him where they can tell
17 him, hey, man, you're under arrest, put your hands
18 behind your back or lay hands on him and then come
19 into court and claim that somehow or another he was
20 under arrest.

21 We believe that clearly he knew he was under
22 arrest. We believe, in fact, that the arrest was
23 effectuated when the traffic stop took place and
24 that he was fleeing from that arrest. We believe
25 that his running at that point amounted to resisting

1 arrest, but not with a deadly weapon until such time
2 as he shot at officers.

3 **THE COURT:** All right. I'm going to deny
4 your motion. He knew that he had an obligation to
5 be in court at some point in time in the past and
6 had failed to do so and that likely arrest warrants
7 were issued for him and that they attempted to
8 effect the service of these arrest warrants. He
9 clearly did not give them the chance to take him
10 into custody at that point in time. So, I'm going
11 to find that that's an appropriate charge and I'm
12 going to go forward with it.

13 **MR. KRINCICH:** Yes, sir. Thank you.
14 Finally, moving on to the attempted murder charges
15 for which he has four. The order that I reviewed
16 them from most serious to -- from least serious to
17 most serious. I don't mean any disrespect to
18 Captain Corey here, but Your Honor I would
19 respectfully ask that the attempted murder charge
20 against Captain Corey be dismissed at this time.
21 Captain Corey and the other three officers involved
22 have all testified that he was farther back. He
23 himself has testified that he never crossed that
24 ditch that would have led to -- the chase that
25 Investigator Sellers and Justin Scott engaged

1 themselves in.

2 Your Honor, with him being further back, plus
3 the testimony of Sergeant Sellers and the other
4 officers -- and, again, I'm looking at my notes when
5 he testified. Sergeant Sellers testified that shots
6 were fired over the shoulder in his general
7 direction. That's more than one shot. Deputy Scott
8 testified today that there was one shot fired
9 directly at him. He agreed that he could have said
10 more shots at another time that he couldn't remember
11 everything that he had told SLED that night.

12 Your Honor, Agent Sellers testified that only
13 four shots could be determined to be fired from that
14 revolver. If multiple shots were fired at
15 Investigator Sellers and multiple shots fired at
16 Justin Scott, I'm not quite sure that the State has
17 proven that a shot was actually fired anywhere near
18 or around Captain Corey. I would ask that that
19 attempted murder charge be dismissed against him.

20 It's my position that attempted murder under
21 the new statute for whatever reason the legislature
22 made it probably more restrictive than our murder
23 statute because they added that phrase in there,
24 with intent to kill. I don't think the State's
25 presented any evidence whatsoever that Mr. Allen had

1 the intent to kill Captain Corey. I would say the
2 same for Investigator Bailey although he was closer.
3 He indicated he was farther back, that he could not
4 see everything that was going on. I believe at some
5 point, he said he heard shots being fired while he
6 testified. Whenever I questioned why he didn't say
7 anything to SLED agents that night, he just said he
8 didn't remember. He thought he made that comment
9 before, but he doesn't deny that he did not tell
10 SLED that night that he heard shots fired.

11 Your Honor, again, with respect to Investigator
12 Bailey, I don't think the state's presented any
13 evidence whatsoever that Mr. Allen had the intent to
14 kill him. It becomes more problematic for the
15 defense when we would try to argue that before
16 Investigator Sellers or for Justin Scott being that
17 both of those individuals have indicated that they
18 were somewhere between 10 to 15 yards per Justin
19 Scott and 10 to 15 yards, I believe, for
20 Investigator Sellers away from Mr. Allen when they
21 said that he fired at him. If Your Honor feels that
22 attempted murder has to be charged to the jury on
23 those two, we would certainly understand that. But
24 I would still argue that the State has failed to
25 prove that Mr. Allen had the intent to kill. Simply

1 on that reason, I would ask that those two charges
2 be dismissed as well.

3 **MR. PERRY:** Your Honor, had Captain Corey or
4 Investigator Bailey been struck by rounds that were
5 fired in their general direction in this particular
6 case, there's no doubt that we would be going
7 forward with a murder case against Mr. Allen. Both
8 of their testimonies were that they were in fear for
9 their lives. They were clearly close enough and in
10 the general line of fire to have been hit by round
11 fired by this defendant from that .38 caliber
12 revolver.

13 Your Honor, the State would also submit that he
14 was in the commission of a felony at this time. He
15 was in the process of resisting arrest with a deadly
16 weapon and that within so doing had either of these
17 officers resulted -- a death resulted, clearly this
18 would be a felony murder situation. The fact that,
19 but for the grace of God, none of those rounds that
20 were fired in the direction of any of these four
21 officers -- and particularly with respect to Captain
22 Corey and Investigator Bailey, but for the grace of
23 God, none of those rounds hit them or anybody. We
24 don't have that situation.

25 But clearly, he intended to do what he was

1 doing. He intended to shoot that gun in the
2 direction of these officers. Clearly, all four of
3 these officers, including Captain Corey and
4 Investigator Bailey were in such proximity to him
5 that those rounds could have hit and could have
6 killed them.

7 In particular, with respect to Investigator
8 Bailey, his testimony was that he was directly in
9 the line of fire between his son, Justin Scott and
10 the defendant. In fact, he said he had a difficult
11 time even seeing the defendant because Justin Scott
12 was between them. So the fact that this defendant
13 shot in the direction of the two of them, had he hit
14 either one of them, it would have still been murder,
15 Judge.

16 **THE COURT:** Well, I'm not talking about
17 murder. Let's talk about the case. I'm ready to
18 rule.

19 **MR. PERRY:** Yes, sir.

20 **THE COURT:** I'm going to grant your motion
21 for directed verdict with respect to the captain.
22 I'm going to deny your motion with respect to the
23 other three. The captain testified, and I think
24 everybody else confirmed, that he pulled up in
25 front, stopped the vehicle and never left that

1 scene. Never crossed the ditch. Never went
2 anywhere other than there. He also testified that
3 at some point in time, he got his people to come
4 back to where he was to get them out of harm's way
5 for lack of a better term.

6 So based on that testimony, it's my belief that
7 he never believed, never heard any bullets coming,
8 never anything like that. He wasn't able to testify
9 what direction the bullets were going. The question
10 is is there any evidence. I don't think with
11 respect to this charge and that gentleman that there
12 is evidence to allow that charge go forward. I'm
13 not disputing the charge with respect to the first
14 two officers that were going after him.

15 The third officer, Bailey, I think, I mean, he
16 testified that he was behind his son. His son
17 testified he was right there with him. Right there
18 with him. So if the bullets were going towards
19 Deputy Scott, they were going towards the, uh,
20 Deputy Bailey. He was based -- this fellow, I'm not
21 saying him, but whoever was shooting was shooting at
22 these police officers based on all the evidence.
23 Nobody testified he's shooting in the air.
24 Testified they saw him stop, shoot at this police
25 officer and shoot at the other police officer with

1 one of them right next to them. I think there's
2 evidence to allow it to go to the jury. I'm going
3 to let the attempted murder on all three with the
4 caveat to the lesser included with respect to those
5 three go to the jury as well.

6 **MR. KRINCICH:** Your Honor, I believe that was
7 the last of my directed verdict motions at this
8 time. I don't think I have any additional motions.
9 I would ask that Your Honor advise my client on the
10 record of his rights as far as testifying or not
11 testifying. He's requested that I go see him again
12 this afternoon. Being that we're not going to argue
13 and charge the jury, I will have an opportunity to
14 do that. If you'd go ahead and advise him just so
15 it's clear to him what his rights are and that his
16 failure to testify would not be held against him.

17 **THE COURT:** All right. Stand and raise your
18 right hand if you would, Mr. Allen.

19 (WHEREUPON, the defendant is first duly sworn.)

20 **THE COURT:** Put your hand down. I need to be
21 able to hear you. Okay?

22 **MR. ALLEN:** Yes, sir.

23 **THE COURT:** All right. You understand the
24 State has rested in the presentation of their
25 evidence?

1 **MR. ALLEN:** Yes, sir.

2 **THE COURT:** You and your lawyer now have the
3 opportunity to offer whatever evidence that you wish
4 to offer in this case and clearly your right to get
5 up and testify or your right to not testify. You
6 understand that?

7 **MR. ALLEN:** Yes, sir.

8 **THE COURT:** Mr. Krincich indicated to me here
9 today that at this point in time, you determined
10 that you do not want to testify, is that correct?
11 Not saying between now and tomorrow morning that you
12 may not change your mind. But right now, you
13 indicated you do not want to testify, is that right?

14 **MR. ALLEN:** Yes, sir.

15 **THE COURT:** You understand, of course, you
16 have the right to testify?

17 **MR. ALLEN:** Yes, sir.

18 **THE COURT:** You have the right to get up, be
19 put under oath, get in this witness chair and tell
20 your side of the story.

21 **MR. ALLEN:** Yes, sir.

22 **THE COURT:** Of course, if you do so, you so
23 understand you're subject to being cross-examined by
24 this, uh, Solicitor here.

25 **MR. ALLEN:** Yes, sir.

1 **THE COURT:** Of course, they can ask you
2 whatever it is they want to ask you that's relevant
3 and they can do what they think is in their case's
4 best interest to attempt to impeach you to show the
5 jury that you are not a reliable witness. You
6 understand that?

7 **MR. ALLEN:** Yes, sir.

8 **THE COURT:** Including if you have a prior
9 record, and my understanding is you do have a prior
10 record, it may be that they can go into that fact.
11 You understand that?

12 **MR. ALLEN:** Yes, sir.

13 **THE COURT:** Of course, if they did and you
14 have a prior record, the court would tell them that
15 you could still testify but they could consider that
16 for purposes of your credibility, do you understand
17 that?

18 **MR. ALLEN:** Yes, sir.

19 **THE COURT:** And you also have the right to
20 not testify. The constitution of this state and the
21 United States gives you that right. You understand
22 that?

23 **MR. ALLEN:** Yes, sir.

24 **THE COURT:** And, uh, if you elected not to
25 testify then I would instruct the jury in the course

1 of my instructions that they couldn't consider the
2 fact that you didn't testify in the course of their
3 deliberation. I would specifically instruct them
4 that they couldn't talk about the fact that you
5 didn't testify. You understand that?

6 **MR. ALLEN:** Yes, sir.

7 **THE COURT:** Now, you've had an opportunity to
8 discuss this matter and met with Mr. Krincich on
9 this matter of whether you want to testify or not?

10 **MR. ALLEN:** That's what I want to do.

11 **THE COURT:** Have you not done it up to this
12 point?

13 **MR. ALLEN:** Yes, sir.

14 **THE COURT:** You have?

15 **MR. ALLEN:** Yes, sir.

16 **THE COURT:** You've been able to listen to
17 whatever his advice and counsel is, is that correct?

18 **MR. ALLEN:** Yes, sir.

19 **THE COURT:** And as of right now, you've
20 elected not to testify, right?

21 **MR. ALLEN:** Yes, sir.

22 **THE COURT:** Anybody threatened you, coerced
23 you, forced you or pressured you into making this
24 decision?

25 **MR. ALLEN:** No, sir.

1 **THE COURT:** You're doing so freely and
2 voluntarily?

3 **MR. ALLEN:** Yes, sir.

4 **THE COURT:** And it is your decision and your
5 decision alone?

6 **MR. ALLEN:** Yes, sir.

7 **THE COURT:** Have you had any alcoholic
8 beverages in the last 24 hours?

9 **MR. ALLEN:** No, sir.

10 **THE COURT:** Have you taken any drugs or had
11 any medication in the last 24 hours?

12 **MR. ALLEN:** No, sir.

13 **THE COURT:** Is there anything that would have
14 adversely impacted you or influenced you that you
15 may have taken or done that would affect your making
16 this decision?

17 **MR. ALLEN:** No, sir.

18 **THE COURT:** Mr. Krincich, any further
19 inquiries you want to make of your client?

20 **MR. KRINCICH:** No, sir, Your Honor.

21 **THE COURT:** Anything further you would like
22 to ask your client?

23 **MR. KRINCICH:** No, sir, Your Honor. I'll
24 just let everyone know that I do intend to go see
25 him this afternoon and we will have our final answer

1 tomorrow morning.

2 **THE COURT:** This is your final answer unless
3 you change your mind.

4 **MR. KRINCICH:** I think where we are right
5 now --

6 **THE COURT:** I mean, I'm not going to query
7 your client again tomorrow if he is still of the
8 opinion that he doesn't want to testify. You
9 understand that? You understand that?

10 **MR. ALLEN:** Yes, sir.

11 **THE COURT:** If you change your mind, I'll
12 again review this matter with you. But if your
13 lawyer comes in here and says that y'all talked
14 about it and you still don't want to testify, I'm
15 not going through this exercise again, you
16 understand that?

17 **MR. ALLEN:** Yes, sir.

18 **MR. KRINCICH:** Thank you, Your Honor.

19 **THE COURT:** All right. Anything further?

20 **MR. KRINCICH:** No, sir, Your Honor. That's
21 all from us right now.

22 **THE COURT:** All right. How much time you
23 think you're going to need on your closing, Mr.
24 Solicitor? I assume the state -- they've not put
25 any evidence in the case as of this point. If he

1 elects not to testify, final argument will be with
2 Mr. Krincich.

3 **MR. PERRY:** It's a pretty simple case. I
4 don't see it taking any more than 15 or 20 minutes
5 at the most.

6 **THE COURT:** All right. 30 minutes is max.

7 **MR. PERRY:** 30 minutes max?

8 **THE COURT:** 30 max?

9 **MR. KRINCICH:** I talk too much, but 30
10 minutes should be fine.

11 **THE COURT:** Now, if they put up evidence, if
12 his client testifies or their offer any other
13 evidence, of course, you will have to open on the
14 law and then you'll have the right to reply and then
15 you can make your argument after Mr. Krincich, you
16 understand that?

17 **MR. PERRY:** Yes, sir, Your Honor.

18 **THE COURT:** All right. Anything further we
19 need to take up today? We will prepare a verdict
20 form on three attempted murders, three ABHANS and
21 the two other charges.

22 **MR. PERRY:** Your Honor, is there any way we
23 can get the charge that you're going to give them at
24 some point later today just to be sure that we're
25 square with you on the law as far as our closings

1 go.

2 **THE COURT:** What charge?

3 **MR. PERRY:** The charge that you're going to
4 give the jury. Do you have that prepared?

5 **THE COURT:** No. I just kind of -- I can let
6 you see the attempted murder if you want to look at
7 that.

8 **MR. PERRY:** Is it the same as what you had
9 given us previously? Okay. Fair enough.

10 **THE COURT:** ABHAN is -- this is the only
11 ABHAN -- (Pause.)

12 I only charge the statute. You know what
13 assault and battery is.

14 **MR. PERRY:** Sure.

15 **THE COURT:** It's just with aggravating
16 circumstance. All right. Let's bring the jury in.
17 We'll tell the jury.

18 (WHEREUPON, the jury enters at approximately
19 2:27 p.m.)

20 **THE COURT:** All right. Ladies and Gentlemen,
21 I have heard some motions on this case. I have
22 determined as a matter of law the attempted murder
23 of the captain does not meet the definition of what
24 the attempted murder charge is. I have dismissed
25 that charge. But all the three attempted murders

1 with the lesser included offense of assault and
2 battery of a high and aggravated nature will
3 continue in this case. We have a -- well, --
4 Y'all step up here.

5 (WHEREUPON, a bench conference is held off the
6 record.)

7 THE COURT: As you know, I told you we're at
8 the phase of the trial where the State has rested.
9 Now, the defendant is -- has the opportunity to
10 offer whatever testimony or evidence that the
11 defense wishes to offer.

12 MR. KRINCICH: Your Honor, at this time, the
13 defendant is wanting to elect not to testify.

14 THE COURT: All right. Any other evidence?

15 MR. KRINCICH: No, Your Honor.

16 THE COURT: All right. Ladies and Gentlemen,
17 as I told you, the defendant has no burden in this
18 case. They don't have to put up a case. So we are
19 now at the phase where the lawyers have the
20 opportunity to speak with you again and instruct you
21 as to this matter.

22 I normally do not charge -- argue and charge
23 after four o'clock. I know it's 25 until 3:00, but
24 we do have a conflict in this case. Today, we have
25 to finish sometime before five o'clock. Somebody

1 has a conflict. They have to be someplace. I'm
2 concerned that by the time we argue and charge, we
3 would be so close to that time that the jury would
4 have the chance to deliberate.

5 I don't want to give you the case for a short
6 period of time and then send you home. I want you
7 to stay here for a reasonable period of time to get
8 your verdict. So that means, the long and the short
9 of it is we're going to come back tomorrow morning
10 and argue and charge on this case. I'm going to ask
11 you -- I have certain things scheduled in the
12 morning. This is the longest short case that I ever
13 had in my 17 years on the bench. But we will finish
14 it tomorrow, Ladies and Gentlemen.

15 I have some things scheduled in the morning.
16 Hopefully, they will be finished at 9:45.
17 Conceivably, they may go a few minutes longer. I'm
18 going to ask you to be here so we can start at 9:45
19 if they are finished. But if they are not and it
20 takes me another 10 minutes, y'all need to please
21 bear with me. We will be in here working.

22 I'm going to ask you to do something for me
23 when we come in in the morning. I'm going to ask
24 you to select me a foreperson. One of the 12 of
25 y'all need to be select a foreperson. If you will

1 then write it down on a sheet of paper and give it
2 back to the bailiff, the bailiff will give that to
3 me. That person will then occupy this seat that
4 this gentleman is in.

5 When we come back in, we will immediately go
6 into the arguments by the lawyers. I've gotten
7 assurances from them that they will not be lengthy.
8 They will be direct and reasonable. As I said,
9 these are good lawyers and they know what they are
10 doing and will do that. Again, I'm going to ask you
11 not to discuss the case with each other when you
12 come in in the morning.

13 Don't discuss it with anybody else while you
14 are gone tonight. Don't do anything to conduct your
15 own investigation in this matter. We'll come in
16 fresh in the morning and let them make their
17 arguments and I will give you the charge. You can
18 get the case and we'll get it resolved tomorrow. So
19 y'all have a nice evening. You can be free to go at
20 this time.

21 (WHEREUPON, the jury exits at approximately
22 2:33 p.m.)

23 **THE COURT:** All right. Anything further?

24 **MR. PERRY:** Nothing from the state.

25 **THE COURT:** All right. I'm going to put this

1 fellow in jail. I'm going to -- what I want to do
2 is put him in jail until the jury reaches its
3 verdict. How can I do that? Just call the jail
4 tomorrow and they will turn him loose after?

5 **MR. PERRY:** Yeah.

6 **THE COURT:** Remain in jail until the jury
7 reach its verdict in the case of State versus Allen.
8 They jail will be notified by -- who do y'all need
9 to hear from? The clerk?

10 **THE DEPUTY:** Yes, sir.

11 **THE COURT:** Y'all trust her? All right.
12 Bring the juror in here.

13 **(WHEREUPON, the juror enters at approximately**
14 2:35 p.m.)

15 **THE COURT:** Bring him up here. Mr. Wilson,
16 I'm going to find you in contempt of this court for
17 disregarding my instructions and discussing this
18 matter while you were on jury duty. I don't just
19 get up here and tell these jurors that for the sake
20 of hearing myself talk. The state's put a lot of
21 time, effort, energy and money in this case. This
22 defendant here is looking at a lot of time in jail
23 potentially if he's convicted.

24 I want the jurors to give everybody the full
25 benefit of the opportunity to present their case

1 before jurors start making up their minds at least
2 before they start telling people they made up their
3 minds. We can't have people doing that. You didn't
4 believe that you were going to jail. Well, you're
5 going to jail. I'm going to order that you be
6 incarcerated at the Kershaw County Detention Center
7 until this jury has reached a verdict. You will
8 remain in the Kershaw County detention center until
9 that time.

10 Ms. McDonald, who is the clerk, will call the
11 jail at the time that the jury has reached its
12 verdict and tell them that you can be released at
13 that time. That may be tomorrow. I don't know.
14 We're not going to have this kind of behavior.

15 Y'all have an order for me to sign?

16 All right. They'll give me a little order and
17 I will have it to give to you. Anyway, can we take
18 them in separate vehicles to the jail, the defendant
19 and this --

20 **THE DEPUTY:** Yes, sir. I'm taking the
21 defendant back.

22 **THE COURT:** And one of the deputies will take
23 the other fellow?

24 **THE DEPUTY:** Yes, sir.

25 **THE COURT:** All right. Anything further?

1 **MR. PERRY:** Nothing from the State, Your
2 Honor.

3 **MR. KRINCICH:** Nothing from the defense, Your
4 Honor.

5 **THE COURT:** Y'all be here tomorrow morning --
6 well, you're going to be here because we've got to
7 do those other things.

8 **MR. PERRY:** I'm going to be here bright and
9 early, Judge. We'll be ready to go.

10 **THE COURT:** Y'all have him here so we can
11 start at 9:45.

12 **(WHEREUPON, the Court recesses for the day.)**
13

P R O C E E D I N G S

(WHEREUPON, the proceedings begin on the 16th day of January, 2014 at approximately 9:50 a.m.)

THE COURT: All right. Good morning, Ladies and Gentlemen. Thank you very much for selecting the foreperson. Thank you for your willingness to do this. I'll tell you in a little while what kind of work you'll have to do. Ladies and Gentlemen, as you know, we finished both cases with all the evidence yesterday. We here this morning so both the lawyers have an opportunity to speak to you and then I will argue and instruct you as to the law. But before we go forward, I need to ask you if anybody discussed this case since we left yesterday with each other or with anyone else or were you approached by anybody to discuss the case?

(No response.)

All right. Anybody do any investigation about the case, make any inquiry about anything about the case? (No response.)

Good. I thank you for doing that. With that said, I will call on the Solicitor. You ready to proceed with your closing argument?

MR. PERRY: We are, Your Honor.

THE COURT: All right. If you would please.

1 **MR. PERRY:** If it please the Court.

2 Good morning, Ladies and Gentlemen. We are
3 just about at the end of this. And just as I was as
4 brief as I could be yesterday, I intend to be as
5 brief as I can be this morning. There are just a
6 few things that I want to talk to you about as we
7 bring this to a close, kind of go back over some of
8 what we talked about yesterday and what you've heard
9 from the state.

10 As you know, this defendant, Ernest Allen
11 Pickett, is charged with several offenses. He's
12 charged with having shot at law enforcement officers
13 and more specifically attempting to kill those law
14 enforcement officers. He's charged with resisting
15 arrest with a deadly weapon and he's charged with
16 possessing a firearm during the commission of a
17 violent crime.

18 Now, I want to kind of go through these things
19 with you individually and just basically state my
20 understanding of the law. But first, let me tell
21 you, what I tell you the law is isn't the law. The
22 judge is going to charge you with the law in just a
23 little while. And that's his province. What he
24 tells you the law is is what you are bound by and
25 what you have to follow. I just simply want to

1 point out the law as it relates to the facts in the
2 case.

3 With respect to the charge of possession of a
4 firearm during the commission of a violent crime,
5 the judge will tell you what a violent crime is.
6 But having shot at police officers, having attempted
7 to kill them is considered in this state a violent
8 crime. In this particular case, there is absolutely
9 no question, you heard the evidence from the state,
10 that this defendant was in possession of a deadly
11 weapon during the commission of this crime. You've
12 heard the officers tell you that he had a shiny
13 pistol in his hand that he was shooting at them
14 with. You heard Captain Corey tell you that he
15 found this pistol on the ground and that he marked
16 it with his hat, with his beanie. And you heard Ms.
17 Fellers, Special Agent Fellers with SLED tell you
18 that she recovered it and not that this appears to
19 be the gun, but this is the gun that she recovered.

20 This is the gun that the law enforcement
21 officers saw him with. This is the gun that he shot
22 at least four times at law enforcement with. There
23 are the four bullets, there are the four casings of
24 the bullets that he shot.

25 The next charge that we've got is resisting

1 arrest with a deadly weapon. The judge will charge
2 you what a deadly weapon is. I would submit to you
3 that its common sense that a gun, a pistol, is
4 clearly a deadly weapon. There's no question that
5 someone could be killed with that gun or more,
6 specifically, the law in South Carolina mentions a
7 firearm as being a deadly weapon. The law
8 specifically says that a person who resists the
9 lawful efforts of law enforcement officers to arrest
10 him with the use or threat of use of a deadly weapon
11 against the officer is guilty of that offense.

12 You heard the officers testify in this case.
13 This young man was wanted for multiple serious
14 charges for which he could have gotten as much as 30
15 years on some of those charges. Instead of coming
16 to court, instead of facing those charges and having
17 his day in court like we're having today, he decided
18 it would be a good idea to not report to court.
19 Somebody doesn't come into court, it's within the
20 judge's province, if we ask him to, to issue a bench
21 warrant.

22 What a bench warrant is is merely the order of
23 the court that says, hey, this person is supposed to
24 be here, they weren't here. Law enforcement
25 officers go out and get them. Go out and bring them

1 to justice. Go out and do your job, your job you
2 are sworn to do. Okay.

3 These guys don't make a lot of money. They
4 don't do it being rich or famous. They do it
5 because they care about their community. They want
6 to give something back. They want this to be the
7 kind of place where their kids can grow up safe and
8 your kids can grow up safe. They do this because
9 they don't want people running around with guns
10 shooting at police. That's why they go out and risk
11 their lives every day to try to bring those people
12 to justice.

13 On this particular day, when they were
14 attempting to affect a lawful arrest, Mr. Ernest
15 Allen Pickett, rather than submitting to hey, he got
16 me and put his hands behind his back and let's go to
17 jail or he could just run and chase me, catch me if
18 you can, what does he do? He pulls out a gun and he
19 shoots at Investigator Mickey Sellers. That's who
20 he's running from. This man that was trying to do
21 his job. He was trying to help make Kershaw county
22 a safer place for his family, for your family, for
23 my family.

24 What does Mr. Allen do? He don't want to go to
25 jail. So he decides to go shooting this officer.

1 He tried to shoot him. You heard from Justin Scott
2 who is no longer with the Sheriff's Department. He
3 didn't have to come in here. He started another
4 job. He had to leave work and come in here and
5 testify. He wasn't getting paid for being here to
6 testify. He came up here in here to tell you, I was
7 chasing him. I was the younger and faster of the
8 guys. I was closing on him. He went so far as to
9 turn around and point that gun right at me. You
10 heard and you saw Deputy Scott or Justin Scott show
11 you how he did that.

12 Now, I would submit to you that those two
13 offenses that we just talked about, resisting arrest
14 with deadly weapon, possession of a firearm during
15 the commission of a violent crime, those are pretty
16 safe. They are pretty straightforward. The
17 attempted murder, that gets a little bit more
18 involved. Okay. The law says that I have to prove
19 some things to you to establish that. It's not just
20 about shooting a gun. It's perfectly legal to shoot
21 a gun. It's not legal to shoot a gun at police when
22 they are trying to do their job and arrest you when
23 you've broken the law, when you've not come to court
24 when you are supposed to.

25 Now, I have to prove to you that it's more than

1 just shooting a gun at somebody. It's shooting a
2 gun at somebody illegally. I have to prove to you
3 beyond a reasonable doubt, it's a pretty high
4 burden, but one which I think the evidence has met
5 that he did this with malice aforethought and that
6 he did this with the intent to kill people.

7 Malice aforethought. You guys have seen
8 movies. You've watched it on TV. You hear that
9 term all the time. What does it really mean?
10 Malice is just ill will. It's just doing something
11 that you know is wrong, but you do it anyway. It's
12 ill will. It's how the law describes it.

13 I would submit to you that there can't be any
14 more wrong, that can't be any more ill or any will
15 that's ill than shooting at the police when they are
16 trying to do their job and take you into custody.
17 This isn't some traffic stop. The guy is speeding.
18 He gets scared and he takes off running. This isn't
19 like that. This is a guy who knew that he had
20 multiple very serious charges pending to which he
21 could go to prison for 30 years but decided he
22 didn't want to go to jail. He didn't want to go to
23 court to face those charges. He was going to do
24 whatever he had to do, including kill police
25 officers, to keep from being taken into custody.

1 That ill will, that intent to inflict an
2 injury, that intent to cause him death, that's
3 something that you can infer. You can infer evil
4 intent by what somebody does. You can infer what
5 somebody's intentions are by what they do.

6 What do I mean by that? I've got a little boy.
7 He's not so little anymore. But if you were at home
8 and you had small kids and you knew that your child
9 --

10 **MR. KRINCICH:** Objection, Your Honor. Not
11 part of the facts.

12 **THE COURT:** Sustained.

13 **MR. KRINCICH:** Thank you.

14 **MR. PERRY:** Your Honor, I'm merely trying to
15 describe --

16 **THE COURT:** Sustained.

17 **MR. PERRY:** If someone was at home and they
18 heard a small -- and they heard in the kitchen a
19 cookie jar being opened and they go in the kitchen
20 and they find their child with a cookie in their
21 hand holding it up to their mouth and the child
22 goes, I wasn't going to eat, I just wanted to look
23 at it but they know their child likes cookies, it's
24 logical to infer that that child intended to eat
25 that cookie. Children don't normally take cookies

1 out of the cookie jars just to look at them. They
2 take them out of cookie jars to eat.

3 In this particular case, you can infer the
4 intent to kill. You can infer that malice, that ill
5 will from actions that had been testified to. The
6 testimony, the only testimony that's been given by
7 these officers is that this gun wasn't pointed up in
8 the air. This gun wasn't pointed down at the
9 ground. This gun was pointed at them and the
10 trigger pulled.

11 I'm asking you to use your common sense and
12 think about it. You don't point a gun at somebody
13 and pull the trigger and not mean to do them harm.
14 You can't just say I just want them to leave me
15 alone. I want don't them to at least try to do
16 their job. I'm going to pull the trigger. Doesn't
17 make any sense. You know, there's a point that I'm
18 going to be sure and cover when it comes to that as
19 far as where the gun was pointed.

20 Special Agent Fellers with SLED talked to us
21 about some deformities that they found in trees.
22 Looks like the bullets may be hit those trees. If
23 you will remember, after Mr. Krincich cross-examined
24 her, I asked her one more time. I wanted to clarify
25 for you guys, I wanted her to clarify for you guys

1 exactly where and which direction the damage to
2 those trees were. If you will remember from the
3 stand yesterday, she told you that the trees that
4 were damaged, it appears that bullets had been shot
5 from the road towards the wood line. Okay.

6 Deputy Scott or Justin Scott who used to be a
7 deputy, he flat out told you he shot back. He was
8 shooting in the direction of the treeline. Special
9 Agent Fellers told you that the only, the only marks
10 that they found on any trees appeared that bullets
11 had hit the trees coming from the direction of the
12 road towards the direction of the wood line, meaning
13 in the direction of the defendant, not as if they
14 had been shot from the woods towards the deputies.
15 Any notion that he is pointing a gun over here or
16 pointing the gun down or pointing the gun out here
17 makes no sense.

18 The only testimony you've heard is from these
19 officers who said he was pointing the gun at us and
20 shot at us. Any notion that that's anything short
21 of intending to kill somebody just doesn't make
22 sense. It ought not.

23 Now, back to inferring malice. The judge is
24 going to charge you when he gives you the law that
25 malice can be inferred from the use of a deadly

1 weapon. That's back to what I was talking to you
2 about just a minute ago. The only reason you point
3 a gun at somebody and pull the trigger is because
4 you mean to do them harm. You mean to kill them.
5 You intend to kill them. This is attempted murder.
6 It's not murder. We don't have to actually show
7 somebody got murdered. Thank you, God. But for the
8 grace of God, nobody got shot. Okay. We would be
9 burying another officer or burying Mr. Allen.

10 Something else we need to think about when it
11 comes to that notion of intent, the idea of, heck,
12 they are only 15 or 20 yards apart and are pointing
13 a gun right at each other. If Mr. Allen intended to
14 shoot Justin Scott, then why isn't Justin Scott
15 shot? I would submit to you it's for the same
16 reason that Mr. Allen isn't shot. Justin Scott told
17 you. He sat right up there and told you, I wasn't
18 shooting to scare him. I was shooting to stop him.
19 I meant to shoot him.

20 Justin Scott sat right there and told you. He
21 practices regularly. He has qualified every time
22 with his weapon. He's a fairly good shot. But yet,
23 he missed him. He told you, in no uncertain terms,
24 I meant to hit him. But he didn't.

25 I would submit to you that somebody who has had

1 the training that he had and was equally close to
2 the other person, that shooting at him, I would
3 submit to you that it was certainly reasonable to
4 think that if Justin Scott intended to shoot Mr.
5 Allen and didn't, then it's certainly reasonable to
6 infer that Mr. Allen could have intended to shoot
7 Justin Scott and had missed him.

8 The fact that nobody got shot here doesn't mean
9 that attempted murder or attempted murders did not
10 take place. I don't want you to get confused by
11 that. Just because somebody didn't get shot didn't
12 mean that the attempt to do that wasn't there.
13 Remember the testimony that's been given. All these
14 officers told you, in particular, Agent Sellers,
15 Rick Bailey sitting over there. He told you that he
16 was right behind his son, Justin Scott, running in
17 that direction. Both Investigator Sellers and
18 Investigator Bailey told you they heard bullets
19 whizzing by. They were in the line of fire without
20 a doubt. Clearly, as close as they were, a .38
21 caliber revolver having hit them certainly would
22 kill them. No question about it.

23 Now, as far as the burden I have, the burden
24 the State has is a high one. It's beyond a
25 reasonable doubt. It's not beyond any doubt. It's

1 not beyond every doubt. It's beyond a reasonable
2 doubt. What that means is you have to put the
3 question to yourself, is it reasonable for me to
4 believe anything but what the state's wanting to
5 present here? Is it reasonable to believe that
6 someone who is wanted for charges that they could go
7 to jail for 30 years on, who has failed to appear
8 for it, who has had a bench warrant issued for his
9 arrest, who gets out of the car and starts running
10 and points a gun at the police, and pulls the
11 trigger and shoots at them, is it reasonable to
12 believe that he intended to do anything but cause
13 them harm, but kill them? I would submit to you
14 that it's not.

15 I think when you go back to the jury room to
16 deliberate, think about this, think about all the
17 evidence that you have heard. All the evidence that
18 you heard points to this man having a gun, being
19 wanted for multiple serious charges running into the
20 woods shooting at and intending to kill them. I
21 believe that when you've had a chance to think about
22 that, talk about it amongst yourselves, the only
23 logical verdict, the only reasonable verdict you can
24 come back with is guilty of attempting murder on
25 these deputies and certainly guilty of resisting

1 arrest with a deadly weapon and possession of a
2 firearm during the commission of a violent crime.
3 Thank you.

4 **THE COURT:** All right.

5 **MR. KRINCICH:** Thank you, Your Honor.

6 I guess I will begin by apologizing for the use
7 of the podium, kind of putting a block between you
8 and I. But I have some notes that I'd like to look
9 at and go over when I talk to you right now. I said
10 when I got up here earlier, it's not always easy to
11 give an opening statement. I don't know exactly
12 what the state's going to present. I ask you to do
13 a few things. I ask you to listen, to keep an open
14 mind and decide here at the end whether Mr. Allen is
15 guilty. He remains innocent as he still sits right
16 now. The judge is going to release you to the jury
17 room. At that point, you can begin your
18 deliberations. Excuse me.

19 It's not an easy case to do. Mr. Perry's told
20 you about his background in law enforcement. I'll
21 tell you right now, my dad was in law enforcement
22 for a number of years. He was a federal agent. He
23 also worked as an officer in the Marine Corp.
24 Served in some violent places in the '80s and '90s.
25 I know several members of the jury have close

1 connection with law enforcement as I think most
2 people do in our community. I've got good
3 relationships with Mickey Sellers, Rick Bailey,
4 Justin Scott, Captain Ed Corey. I've known those
5 guys for several years.

6 When I get up here, I'm going to talk about my
7 relationship with Mr. Allen and this case. Ladies
8 and Gentlemen, it's been said, I think to everyone
9 here that, fortunately, no one was hit and no one
10 was injured. And right now, I'm going to ask y'all
11 to do something that's just sort of tough. Y'all
12 have heard everything as we've heard it. I know how
13 people must feel when they hear these allegations.
14 As Solicitor Perry said, these guys were out there
15 doing their jobs. They were doing what they were
16 supposed to be doing.

17 You have to wonder why Mr. Allen is sitting
18 here in trial right now. I'm going to tell you, Mr.
19 Allen is sitting here in trial right now because he
20 didn't have the intent to kill anybody. He didn't
21 have the intent to harm anybody. You can see based
22 on his failure to appear in court and running from
23 law enforcement that he is scared. He is scared of
24 what is going to happen to him.

25 I'm going to make something easy for y'all. If

1 y'all want to find him guilty for resisting arrest,
2 go ahead and do it. He didn't stop when law
3 enforcement told him too.

4 Now, the question for identification right now,
5 cause y'all heard Ms. Brisbane come in and testify
6 that she was in the car with him. You heard Mickey
7 Sellers testify that he knew him from having this
8 bench warrant and Ed Corey, I believe, said the
9 same. Other officers did not know him. What I ask
10 you to do is I ask you to listen to see if any of
11 these officers had any bias or if their stories were
12 somewhat different, if there was anything in there
13 that might have changed. I submit to you that there
14 were some differences. I don't know that they will
15 make as big of a difference to you as they do to me
16 and to my client. But I'd like to point them out
17 nonetheless.

18 I guess I'll begin with maybe our last officer
19 to testify, Justin Scott. Justin wasn't here when
20 all the other officers testified. He came in at the
21 end. Solicitor Perry said he had been working. One
22 of the things I was asking every officer about was
23 their distance from Mr. Allen and what he did during
24 that time. They all agreed that it was dark. There
25 was a light in the front and in the side, but when

1 he got around the back, it was hard to see him.
2 Mickey Sellers said when he saw a muzzle flair, he
3 could tell sort of which direction it was. He
4 believed it was toward Justin Scott, but he knew he
5 had stopped. He assumed that he turned to fire on
6 him. He later testified that there was a fence
7 there. Six to eight feet is what he said. It seems
8 logical to me that Mr. Allen would have to stop at
9 that point.

10 I asked Mickey Sellers and Justin Scott about
11 how Mr. Allen was firing at them. There was some
12 discussion because Mickey Sellers said in his
13 statement that he was firing over his shoulder. I
14 asked him to demonstrate what that meant to him. He
15 turned with his right hand and did like this.
16 (Demonstrating.) He said Mr. Allen was running and
17 firing backwards.

18 I asked Justin Scott about it. He said he was
19 running and firing over his shoulder. It's a small
20 difference. They both indicate that he's firing
21 over his shoulder indicates to me it was hard to see
22 and that they have somewhat of a different memory
23 about what happened.

24 Those two officers were closest. They also
25 have a different memory about how many shots were

1 fired at them and at each other. I believe Mickey
2 Sellers testified that Mr. Allen fired a couple of
3 shots over his shoulder and a couple of shots at
4 Justin Scott. Justin Scott came in and testified
5 that he fired a couple of shots over his shoulder
6 and fired one shot at him. SLED has come in here.
7 I think all logical conclusions we can conclude that
8 four shots were fired.

9 I go over all this because I believe it has a
10 lot to do with Mr. Allen's intent. I've already
11 told you he was scared. You can figure that out by
12 his failure to appear and his running from the cops.

13 I started my opening by reading the law. I'll
14 read the law to you once again. The State must
15 prove the defendant with the intent to kill
16 attempted to kill another person with malice
17 aforethought either expressed or implied. The
18 Solicitor's gone over malice. The judge will give
19 you a more thorough definition.

20 Ladies and Gentlemen, he's running and he's
21 scared. Do you think he had the intent to kill
22 those officers? I'm not saying what he did was
23 right. You're going to be faced with the decision
24 that you can find him guilty of attempted murder,
25 guilty of assault and battery of a high and

1 aggravated nature or not guilty at all.

2 Starting with Rick Bailey, I would submit to
3 you that he's not guilty of attempted murder. He's
4 not guilty of Assault and Battery of a High and
5 Aggravated Nature. He's not guilty at all. Mr.
6 Allen didn't know how many people were getting out
7 of that car chasing him. He didn't know who was
8 behind him. Rick Bailey said he was further back
9 and his view was actually blocked by the azalea
10 bushes and his son who is in between Mr. Allen and
11 Investigator Bailey. Ladies and Gentlemen, I'm
12 going to ask you to find him not guilty of attempted
13 murder and assault and battery of a high and
14 aggravated nature.

15 Mickey Sellers said he was a lot closer and
16 directly behind Mr. Allen. The shots that Mickey
17 Sellers has testified to and the shots that Justin
18 Scott testified to, whether they were fired like
19 this or like this is while Mr. Allen was running, he
20 wasn't turning around to look. He didn't square up
21 to face Mickey Sellers. We don't know which
22 direction the gun was fired. We do know that no one
23 was hit. The house that was beside them was not
24 hit. The four police cars that was behind them was
25 not hit. No bullets were recovered -- we call them

1 projectiles -- were recovered.

2 I would ask you to find him not guilty of
3 attempted murder when it comes to Sergeant Sellers.
4 I understand that the choice is a lot harder when it
5 comes to assault and battery of a high and
6 aggravated nature or not guilty. I would ask that
7 you find him not guilty. I will tell you right now
8 my client and I would both understand if you found
9 him guilty of assault and battery of a high and
10 aggravated nature. Mickey Sellers already testified
11 that he was fearful. He said -- this is kind of
12 funny -- he said that it was sort of like a movie to
13 him. He didn't believe in all those ping, ping
14 sounds and the whizzing of bullets. Investigator
15 Bailey said this is not like a movie. This scares
16 the bejesus out of you. Those were his words.

17 When it comes to Justin Scott, Ladies and
18 Gentlemen, you heard that he was the young officer,
19 that he started firing from about 30 yards away
20 whenever he -- again, there's a little discrepancy
21 over whether Mr. Allen fired a shot or if he just
22 heard Mickey Sellers yell he has a gun. Anyway, he
23 started firing.

24 I started to ask everybody about yards. This
25 goes back to, you know, first, second, third grade.

1 Yards are three feet, right? We all know this. I'm
2 going to tell you right now, if somebody wants to
3 come down here and double check it, it's four and a
4 half feet from the end of this bar to where the tile
5 starts right here. There are 35 and a half tiles at
6 12 inches a piece. That gives us, uh, 40 feet.
7 That's 40 feet. That is less than half the distance
8 that Mr. Scott said he was when he started firing at
9 Mr. Allen. He said they exchanged a few shots.

10 I think SLED only recovered, uh, a few of the
11 shells from the .40 caliber. It wasn't a lot. I
12 only heard her testify to a couple of them. No more
13 than three, I believe. So at 90 feet away, he began
14 firing but later said whenever we squared up and
15 shot each other, I was 10 to 12 yards away. A
16 little discrepancy there especially when they say
17 that they found the bullets at the beginning part of
18 the driveway, which again, I asked everybody about
19 the yards distance and nobody could really agree on
20 how far it was. Everybody would say it was more
21 than 10 or 12 yards from where Mr. Allen fired at
22 the wood line.

23 That, I guess, kind of leads me into the bias
24 part of this. Most goes along with what I said
25 earlier about misremembering. The first time I heard

1 that used was in the Roger Clemens trial. He
2 accused Brian McNamee of misremembering certain
3 information. Actually, I think that's a brilliant
4 term because when you look at memory and how it
5 works, uh, remember something pretty well when it
6 happens.

7 And there are certain events in your life that
8 are markers that you remember. The day your first
9 child is born. You might not remember what you were
10 doing the day after, the day before but you remember
11 that when your first child is born. As you grow
12 older and really as you access that memory more and
13 you talk to people around you and you discuss it
14 with your spouse or your parents or other new
15 parents, your memory probably unbeknownst to all of
16 us changes slightly. And you remember certain
17 things differently. You and your spouse might have
18 different opinions on how the doctor was or what
19 everybody was wearing. But you still have that
20 memory in your mind as a marker.

21 I guess what I'm getting at here is these
22 officers have all had an opportunity to regroup and
23 talk about what happened. Their memories have
24 changed and has shaped by those conversations.
25 There's just certain things that in my opinion, at

1 this point, don't reach the level of proof beyond a
2 reasonable doubt for attempted murder.

3 Investigator Bailey -- you know, I too have a
4 son. He's already indicated that he was scared for
5 himself and scared for his new wife. But he was
6 scared to death for his son. I understand that.
7 Mickey Sellers is smart enough to say it's close to
8 Christmas. I'm not getting any closer. I'm yelling
9 for Justin to stop because he's the young boy. He's
10 the track star. He's out there running full force
11 at the guy who is firing at us. All those things,
12 when they get back there and they talk about them,
13 it's a big deal.

14 These guys do -- are brothers. I mean, we've
15 all heard it. They are brothers in blue. They look
16 out for each other. They're going to protect each
17 other. But all those memories and all those
18 conversations about its shape, what they testify to
19 today or yesterday, excuse me. And it's all the
20 same.

21 Would they like to see Mr. Allen convicted of
22 attempted murder? Yes, they would. I mean, what
23 happened to them was uncalled for. It should not
24 have happened, but Mr. Allen was not trying to kill
25 anybody that night. He did not have the intent to

1 kill. If anything, he had the intent to create a
2 fearful situation so he could get away.

3 Ladies and Gentlemen, it's not an easy case for
4 any of us involved in this. It's not easy for Mr.
5 Allen to sit over there. When you go back to the
6 jury room, just remember what I've asked you to do.
7 Please discuss this as a group. Don't make any
8 quick decisions. Don't feel so firmly entrenched in
9 your position that you are unwilling to listen to
10 others. But conversely, juries are powerful. You
11 as 12 people are going to decide the fate of this
12 case.

13 I want to remind you that you are also
14 individually powerful. When you are back there, you
15 don't have to succumb to group pressure. You don't
16 have to allow someone to berate you. If you are
17 firmly convinced of your decision and someone is
18 harassing you and trying to get you to change that,
19 all you have to do is knock on the door and tell the
20 bailiff that I have reached my decision and I want
21 to tell the judge. You have that power
22 individually. I ask you to use your power as a
23 group to find Mr. Allen not guilty of attempted
24 murder. Thank you.

25 **THE COURT:** All right. Ladies and Gentlemen,

1 as I told you, the indictments in this case charge
2 the defendant with a number of defenses. One of the
3 indictments charge the defendant with the charge of
4 attempted murder. One of the indictments charges
5 the defendant with the charge of possession of a
6 weapon during the commission of a violent crime.
7 One of the indictments charge the defendant with the
8 offense of resisting arrest with a deadly weapon. I
9 remind you of the fact that the defendant was
10 arrested, charged and indicted in this case is not
11 evidence in the case and can not be considered by
12 you as evidence of guilt. Nor does it create any
13 presumption or inference of guilt.

14 The indictments are simply the formal written
15 instruments which contain the charges made against
16 the defendant. They are the formal documents by
17 which this case is brought into this court. As I
18 said, there are five indictments -- excuse me. I
19 told you what the respective charge, each indictment
20 charges a separate and distinct offense.

21 You must decide each indictment separately on
22 the evidence and the law applicable to that
23 indictment uninfluenced by your decision as to the
24 other indictments. The defendant may be convicted or
25 acquitted on any or all of the offenses charged.

1 You will be asked to write a separate verdict of
2 guilty or not guilty for each indictment.

3 Ladies and Gentlemen, to the indictments, the
4 defendant has entered pleas of not guilty which
5 places upon the State the burden of proving the
6 defendant guilty. A person charged with committing
7 a criminal offense in South Carolina is never
8 required to prove himself innocent. I charge you
9 that it is a vital and important rule of law of
10 evidence that the defendant in a criminal trial, no
11 matter how great or serious may be the offense for
12 which he is charged must always be presumed to be
13 innocent until his guilt has been proven beyond a
14 reasonable doubt.

15 This presumption of innocent remains with the
16 defendant at all times, from the moment of his
17 appearance in this court throughout the trial and
18 until the jury has upon the testimony and the
19 evidence presented reached a verdict of guilty
20 beyond a reasonable doubt. It is the solemn duty of
21 this jury not clearly convinced of the defendant's
22 guilt beyond a reasonable doubt as to any charge to
23 acquit the defendant.

24 The burden of proof is upon the State to
25 establish by evidence to your satisfaction the guilt

1 beyond a reasonable doubt of this defendant here on
2 trial the three charges of attempted murder, the one
3 charge of possession of a weapon during the
4 commission of a violent crime and resisting arrest
5 with a deadly weapon.

6 Now, what is a reasonable doubt? A reasonable
7 doubt is the kind of doubt that would cause a
8 reasonable person to hesitate to act. If you have
9 such a doubt as to the guilt of the defendant, then
10 he would be entitled to a verdict of not guilty.
11 Proof beyond a reasonable doubt is proof that leaves
12 you firmly convinced of the defendant's guilt.
13 Reasonable doubt may arise from evidence which is in
14 the case or from the absence or lack of evidence in
15 the case to think that the defendant is probably
16 guilty for the circumstances or suspicious is not
17 enough. You alone must make the determination as to
18 whether reasonable doubt exists as to this
19 defendant's guilt.

20 Now, Ladies and Gentlemen, there are two types
21 of evidence which are generally presented during a
22 trial, direct evidence and circumstantial evidence.
23 Direct evidence is the testimony of a person who
24 claims to have actual knowledge of a fact, such as
25 an eyewitness. It is evidence which immediately

1 establishes the main fact to be proved.
2 Circumstantial evidence is proof of a chain of facts
3 and circumstances indicating the existence of a
4 fact. It is the evidence which immediately
5 establishes collateral facts from which the main
6 fact may be inferred. Circumstantial is based on an
7 inference and not on personal knowledge or
8 observation. The law makes absolutely no
9 distinction between the weight or value to be given
10 either direct or circumstantial nor is a greater
11 degree of certainty required of circumstantial
12 evidence than of direct evidence. You should weigh
13 all of the evidence in this case. After weighing
14 all the evidence, if you are not convinced of the
15 guilt of the defendant beyond a reasonable doubt,
16 you must find the defendant not guilty.

17 Now, Mr. Foreman and Ladies and Gentlemen of
18 the jury, under the Constitution and laws of South
19 Carolina, you are the finders of facts in this case.
20 I do not have the right to ask upon the facts or
21 even to express any opinion I may have as to those
22 facts. Nor may I intimate in any way what I may
23 think about the guilt or the innocence of the
24 defendant.

25 You are also the judges, the sole judges of the

1 credibility, by that, I mean the believability, of
2 the witnesses who have testified in this case.
3 Passing upon their credibility, you may take into
4 consideration many things, such as the demeanor or
5 the manner of the witness testifying, whether the
6 witness had reason to be biased or prejudiced,
7 whether a witness' testimony was contradicted on the
8 one hand or supported and corroborated on the other
9 hand.

10 You certainly do not determine credibility or
11 believability by counting the number of witnesses
12 for either side. You may believe a small portion of
13 a witness' testimony and disregard the larger or
14 vice versa. You may believe one witness or many
15 witnesses.

16 Ladies and Gentlemen, an issue in this case is
17 the identification of the defendant as the person
18 who committed the crime charged. The State has the
19 burden of proving identity beyond a reasonable
20 doubt. You must be satisfied beyond a reasonable
21 doubt of the accuracy of the identification of the
22 defendant before you may convict the defendant.
23 Excuse me.

24 Identification testimony is an expression of a
25 belief or impression by a witness. You must

1 determine the accuracy of the identification of the
2 defendant. You must consider the believability of
3 the identification witnesses in the same way as any
4 other witness. You may consider whether the witness
5 had an adequate opportunity to observe the offender
6 at the time of the arrest. This would be affected
7 by things like how long or short a time was
8 available, how far or close was the witness to the
9 person identifying the witness. What was the
10 lighting conditions. You can consider whether the
11 witness had the chance to see or know the person in
12 the past.

13 Once again, I instruct you that the burden of
14 proof is on the State and extends to every element
15 of the crime charged. This specifically includes
16 the burden of proof and beyond a reasonable doubt
17 the identity of the defendant as the person who
18 committed the crime. If, after examining the
19 testimony, you have a reasonable doubt as to the
20 accuracy of the identification, you must find the
21 defendant not guilty. All of these things, you will
22 consider bearing in mind that you should give the
23 defendant the benefit of a reasonable doubt. Sorry.

24 I instruct you and emphasize that the fact that
25 the defendant did not testify in this case is not a

1 factor to be considered by you in any in your
2 deliberations and in your consideration on the
3 question of the guilt or innocence of the defendant.
4 It must not be considered by you in any manner
5 during the course of your deliberation. A defendant
6 has a constitutional right to remain silent. And
7 the assertion of this right must not be considered
8 by you in your deliberation. I repeat, under your
9 oath, you are to draw no conclusion whatsoever from
10 the fact that the defendant in this case did not
11 testify. The fact that this defendant did not
12 testify should not even be discussed by you in the
13 jury room. The burden of proof as I stated to you
14 is on the state. The defendant is not required to
15 prove his innocence. The burden of proof remains on
16 the State to prove guilt beyond a reasonable doubt.

17 Mr. Foreman and Ladies and Gentlemen, the same
18 constitution and laws which makes you the finders of
19 fact and the evidence as I discussed with you makes
20 me the sole and only instructor of the law. You
21 must accept as correct the law which I charge and
22 apply it to the evidence as you find it and you
23 reach your verdict. Finally, I charge you in this
24 regard that you should not be concerned about what
25 you think the law should be or what you wish the law

1 were but only what I charge you the law to be.

2 Now, as I told you, Ladies and Gentlemen, the
3 defendant was indicted for three offenses of
4 attempted murder. Section 16-3-29 of the code of
5 laws of South Carolina states that a person who with
6 intent to kill attempts to kill another person with
7 malice aforethought either expressed or implied
8 commits the offense of attempted murder.

9 Malice is hatred, ill will or hostility towards
10 another person. It is the intentional doing of a
11 wrongful act without just cause or excuse and with
12 an intent to inflict an injury or under
13 circumstances that the law will infer as an evil
14 intent. Malice aforethought does not require malice
15 exist for any particular time before the act was
16 committed. Malice must exist in the minds of the
17 defendant just before and at the time of the act --
18 at the time that the act is committed. Therefore,
19 there must be a combination of the previous evil
20 intent and the act. Malice aforethought may be
21 expressed or inferred. These terms expressed or
22 inferred do not mean different kinds of malice but
23 merely the manner in which malice aforethought may
24 be shown to exist. That is either by direct
25 evidence or by inference from the facts and

1 circumstances which are proved. Expressed malice is
2 shown when a person speaks words which express
3 hatred or ill will for another or when the person
4 prepared beforehand to do the act which was later
5 accomplished. For example, lying in wait for a
6 person or any other acts or preparation going to
7 show that the deed was within the defendant's mind
8 would be expressed malice.

9 Malice may be inferred from conduct showing a
10 total disregard for human life. Inferred malice may
11 also arise when the deed is done with a deadly
12 weapon. A specific intent to kill is not an element
13 or attempt -- of attempted murder, but there must be
14 a general intent to commit serious bodily injury.
15 Intent means intending the result which actually
16 occurred, not accidentally or involuntarily. Intent
17 may be shown by acts and conduct of the defendant
18 and other circumstances from which you may naturally
19 and reasonably infer intent.

20 Evidence of the character of the act, the
21 character of the instrument used, the manner in
22 which it was used, purpose to be accomplished may be
23 considered in determining the intent with which the
24 act was committed. Intent may also be inferred when
25 demonstrated that the defendant voluntarily and

1 willfully commits an act, the natural tendency of
2 which is to destroy another act.

3 Now, Ladies and Gentlemen, if you find that the
4 State has not proven the defendant is guilty of
5 attempted murder, you must then determine whether
6 the State has proved the defendant is guilty of
7 assault and battery of a high and aggravated nature.
8 Section 16-3-600(b) of the code of laws of South
9 Carolina states that if a person commits the offense
10 of assault and battery of a high and aggravated
11 nature, if the person injures another person and
12 great bodily injury to another results or the act is
13 accomplished by means likely to produce great death
14 or great bodily injury. Great bodily injury means
15 bodily injury which causes a substantial risk of
16 death or which causes serious permanent
17 disfigurement or lost or impairment of a function of
18 a bodily member or organ. An assault is the
19 intentional creation of a reasonable fear of
20 immediate bodily harm.

21 It's not necessary that the attempted injury or
22 harm actually take place. For example, if I walked
23 up to you and when we are within arm's reach, I draw
24 back to hit you, that is an assault. The battery is
25 the unlawful touching of another person by a person

1 who has committed the assault. An unlawful touching
2 can be caused by a part of the accused body or by an
3 object the accused puts in motion. The battery is
4 the completion of the assault by using or applying
5 force to another person, however slight, in a rude,
6 angry or resentful manner without legal
7 justification for doing so.

8 Using my earlier example, if I carry through
9 the assault by hitting you, then that is a battery.
10 The State must also prove a circumstance of
11 aggravation. Circumstances of aggravation includes
12 the use of a deadly weapon, infliction of serious
13 bodily harm, and the resistance of lawful
14 authorities. These are only examples of
15 circumstances of aggravation.

16 Ladies and Gentlemen, the defendant was also
17 charged with possession of a weapon during the
18 commission of or attempt to commit a violent crime.
19 The State must prove beyond a reasonable doubt that
20 the defendant was in possession of a firearm or
21 visibly appeared to be -- displayed what appeared to
22 be a firearm during the commission of the violent
23 crime. Firearm means a machine gun, automatic
24 rifle, revolver, pistol or any other weapon which
25 will, if designed to, or may be deadly converted to

1 expel a projectile. In order to find the defendant
2 guilty of possession of a weapon during the
3 commission of a violent crime, you must first find
4 the defendant guilty of either committing a violent
5 crime or attempting to commit a violent crime.

6 Attempted murder and assault and battery of a
7 high and aggravated nature are violent crimes under
8 the statutes of South Carolina.

9 And, Ladies and Gentlemen, the defendant has
10 been charged with the offense of resisting arrest
11 with a deadly weapon. A person who is -- Section
12 16-3-625 of the code of laws states that a person
13 who resist the lawful efforts of a law enforcement
14 officer to arrest him or another person with the use
15 of threat -- or threat of the use of a deadly weapon
16 against the officer, the person is in possession or
17 claims to be in possession of a deadly weapon. And
18 that is unlawful.

19 A deadly weapon means any instrument which can
20 be used to inflict deadly force. Ladies and
21 Gentlemen, in order to establish criminal liability,
22 criminal intent is required. For example, the
23 mental state required to be proven by the State for
24 a particular crime might be some purpose, some
25 specific intent, knowledge of certain facts or

1 records. Criminal intent must be proven by the
2 State beyond a reasonable doubt. Criminal intent is
3 always a matter that must be determined by the jury
4 from the circumstances surrounding the situation.
5 There's no way to prove intent to a mathematical
6 certainty. There's no way medical science can
7 dissect a person's brain and determine what the
8 person had in mind. So the law says that the
9 criminal intent may be inferred from the
10 circumstances shown to have existed. This is how
11 you make a determination of whether or not the
12 element requiring intent was present. Criminal
13 intent is a mental state, a conscious wrongdoing.
14 It's up to you to determine what the defendant
15 intended to do based on the circumstances shown to
16 have existed.

17 Mr. Foreman, Ladies and Gentlemen, you have
18 been selected as fair and impartial jurors sworn
19 with partially trying to determine the facts of this
20 case. When you comply with your oath to do so, then
21 no one will have a right to criticize your verdict
22 and you will have fully discharged your duty as
23 jurors. You are to decide this case according to
24 the testimony that you have heard from the lips of
25 the sworn witnesses along with other evidence

1 introduced in the case.

2 I charge you that as jurors, you must decide
3 the issues in this proceeding without bias and
4 without prejudice to any party. You can not allow
5 yourself to be governed by sympathy, by prejudice,
6 by passion, by public opinion or by any other
7 arbitrary fact. Both the State and the defendant
8 have the right to expect that each of you will
9 carefully and impartially consider all the evidence
10 in this case, that you will follow the law as I have
11 explained it to you.

12 Mr. Foreman, Ladies and Gentlemen of the jury,
13 I have prepared a number of verdict forms, five
14 verdict forms. There are three different verdict
15 forms which relate to the attempted murder charge.
16 Each verdict form relates to one of the, uh,
17 individuals names in the indictments. I have put
18 their names at the top, Deputy Justin Scott on one,
19 Investigator Mickey Sellers on another, and
20 Investigator Rick Bailey on the third. Now, these
21 verdict forms are a little bit different in that you
22 have two possible verdicts you can reach with
23 respect to guilt.

24 These verdict forms say with respect to the
25 individuals that were, uh, the alleged victim of the

1 attempted murder, we, the jury, unanimously find the
2 defendant guilty of attempted murder. Now, if you
3 believe that he is guilty of attempted murder, then
4 Mr. Foreman, I'm going to ask you to initial right
5 by that verdict form and then circle that verdict
6 form. If you do not believe the defendant is guilty
7 of attempted murder, the State failed to prove to
8 you beyond a reasonable doubt, then you next need to
9 consider whether he was guilty of the lesser
10 included offense of Assault and Battery of a High
11 and Aggravated Nature. If you believe that that is
12 the appropriate offense for which the defendant is
13 guilty with respect to any of the alleged victims,
14 then I'm going to ask you to initial there and
15 circle that verdict. If you believe that the State
16 failed to prove the defendant guilty of either of
17 those offenses, then the third potential verdict is
18 we, the jury, unanimously find the defendant not
19 guilty. That relates to all of the attempted murder
20 charges. There are three different verdict forms.

21 On the resisting arrest with a deadly weapon ad
22 the possession of a weapon during the commission of
23 a violent crime, there are two possible verdict
24 forms. One, we, the jury, unanimously find the
25 defendant guilty or, two, we, the jury, unanimously

1 find the defendant not guilty.

2 Whatever you do, Mr. Foreman, I'm going to ask
3 you to circle that verdict with respect to each of
4 those charges. I'm going to ask you after you have
5 reached a verdict as to that respective charge and
6 all respective charges for you to sign the verdict
7 form as foreperson of the jury and date the verdict
8 form.

9 Now, as these jury, I mean, verdict forms
10 state, this verdict must be the unanimous verdict of
11 all 12 individuals. That can not be an 11 to 1
12 verdict. It can't be 7/5 or 9/3. It has to be the
13 unanimous verdict of all 12 jurors with respect to
14 each of the charges.

15 Mr. Foreman, when you have -- the jury has
16 reached its verdict with respect to all the charges,
17 I'm going to ask that you or someone knock on the
18 door. There will be a bailiff seated outside of the
19 jury room. You will advise the bailiff that y'all
20 have reached verdicts on all five, uh, verdict
21 forms. Then we will bring you back into the
22 courtroom so that your verdict form, your verdicts
23 can be published.

24 Now, in just a moment, I'm going to ask you to
25 step back to the jury room. All but the alternate.

1 I want you to stay here. When you get back to the
2 jury room, do not begin your deliberations. I need
3 to review with the attorneys the charges and
4 instructions that I've just given you. If these
5 attorneys believe that I failed to instruct you in
6 some manner or they incorrectly instructed you and I
7 agree with them, I will bring you back and give you
8 any additional instructions that I think are
9 necessary. If I do not think there's any additional
10 instructions, then I will have the bailiff bring all
11 of these verdict forms along with any exhibits that
12 have been introduced in this case to the jury room
13 and at that time, you can begin your deliberations
14 in this case. All right. If y'all will step back
15 into the jury room. Do not begin your
16 deliberations. I'll be with you momentarily.

17 (WHEREUPON, the jury exits at approximately
18 10:48 a.m.)

19 THE COURT: All right. Madam Forelady,
20 apparently all of them -- not all of them survived.
21 We lost one of jurors. But 12 of them are back
22 deliberating today. I'm going to be able to turn
23 you loose and release you from any further
24 obligations. I don't know how you feel about it.
25 Some jurors are glad they don't have to participate

1 in the process of making decisions. Some jurors
2 have worked hard, been here for a day or more and
3 they want to participate in it. But unfortunately,
4 the rules require that the 12 that are on the jury
5 are the ones that go along and make decisions so
6 we're going to be able to turn you loose.

7 If you need an excuse for work, if you want to
8 go back to the Clerk of Court's office right over
9 here, you can get an excuse. You will be getting a
10 small token of Kershaw county's appreciation for
11 your service in the not-to-distant future. Don't
12 plan on buying anything grand with that.

13 As you can see, you are absolutely essential,
14 you and your colleagues are absolutely essential to
15 this process. We can't operate without
16 participation of members of our community who come
17 in and make decisions about these cases. I do thank
18 you very much. We will turn you loose and let you
19 go at this time. Hope you have a nice weekend.
20 Thank you, ma'am.

21 (WHEREUPON, the alternate juror exits the
22 courtroom.)

23 **THE COURT:** Anything from the State with
24 respect to the instructions?

25 **MR. PERRY:** Nothing from the State, Your

1 Honor.

2 **THE COURT:** Mister, uh, --

3 **MR. KRINCICH:** Yes, sir, Your Honor. As I
4 indicated previously, I do object to the charge of
5 attempted murder with regards to specific intent.
6 Your Honor did read from what you told us you would.
7 I would disagree that specific intent is not an
8 element of attempted murder. I'd ask you to correct
9 that but I understand the Court's position on that.
10 I just make my objection noted.

11 **THE COURT:** All right. It is. Thank you
12 very much.

13 **MR. KRINCICH:** Your Honor, I do have one
14 other issue. I don't know the true solution to it.
15 I just wanted to express this. I believe Your Honor
16 did everything you could to properly charge assault
17 and battery of a high and aggravated nature. I
18 understand the law and I've got it here in front of
19 me. There's and/or in there. There's a battery or
20 there could just be an assault. I'm just not sure
21 that it's clear enough for the jury. They don't
22 have to find an actual battery to find the assault
23 and battery of a high and aggravated nature. Before
24 we had commonlaw ABHAN, AHAN. Now, it's all under
25 one.

1 **MR. PERRY:** Your Honor, I would join Mr.
2 Krincich in that. It would just simply clarify for
3 the jury that they don't have to find a battery.

4 **THE COURT:** You want me to bring the jury and
5 just tell them that.

6 **MR. PERRY:** Because it does say assault and
7 battery, I think it would be proper to instruct them
8 that they don't have to find the battery to find him
9 guilty of --

10 **MR. KRINCICH:** You surely said or in there in
11 explaining the assault.

12 **MR. PERRY:** Right. They could have easily
13 have missed it in all that.

14 **THE COURT:** All right. We'll bring the jury
15 back in.

16 **MR. KRINCICH:** Thank you, Your Honor.

17 (WHEREUPON, the jury enters at approximately
18 10:52 a.m.)

19 **THE COURT:** All right. Ladies and Gentlemen,
20 the lawyers have asked me to clarify one thing on
21 the charge. On the charge of Assault and Battery of
22 a High and Aggravated Nature, uh, the offense says
23 that there has to be great bodily injury to another,
24 that which would be the assault and the battery or
25 the act is accomplished by means likely to produce a

1 death or great bodily injury. So there doesn't
2 actually have to be the battery in an assault and
3 battery, you know, the unlawful touching or, uh,
4 striking in some way. There either has to be --
5 there is a battery or the act is accomplished by
6 means likely to produce death or great bodily
7 injury. So with that said, I'm going to let you
8 step back to the jury room. I think that's all
9 we're going to do. I'll have everything brought to
10 you in just a moment and you can begin your
11 deliberations.

12 (WHEREUPON, the jury exits at approximately
13 10:53 a.m.)

14 THE COURT: All right. Anything with respect
15 to the additional instruction?

16 MR. PERRY: I think that cleared it up
17 nicely, Judge. Thank you.

18 THE COURT: From the defense?

19 MR. KRINCICH: No, sir. Thank you, Your
20 Honor.

21 THE COURT: All right. If y'all will get
22 with Mr. Zaparas, here are the verdict forms.

23 (WHEREUPON, the jury deliberation begins at
24 approximately 10:57 a.m.)

25 (WHEREUPON, the jury enters at approximately

1 12:20 p.m.)

2 **THE COURT:** All right. Mr. Foreman, it's
3 been reported that the jury has reached a verdict.

4 **THE JUROR:** We have.

5 **THE COURT:** That's a verdict as to all five
6 indictments?

7 **THE JUROR:** We have.

8 **THE COURT:** A unanimous verdict will all 12
9 jurors?

10 **THE JUROR:** Yes, sir.

11 **THE COURT:** All right. If you would, hand
12 the verdict form to the bailiff please.

13 (WHEREUPON, the verdict forms are passed to the
14 Court.)

15 **THE CLERK:** Thank you, Your Honor. This is
16 the State of South Carolina, county of Kershaw, the
17 State versus Ernest Maurice Allen, defendant, on
18 indictment 2013-GS-28-682, attempted murder for
19 Investigator Mickey Sellers. We, the jury,
20 unanimously find the defendant guilty of attempted
21 murder. Signed by Michael A. Turbyfill,
22 foreperson.

23 On indictment 2013-GS-28-681, attempted murder
24 on Deputy Justin Scott, we, the jury, unanimously
25 find the defendant guilty of attempted murder.

1 Signed by Michael A. Turbyfill, foreperson.

2 On indictment 2013-GS-28-683, attempted murder
3 on Investigator Rick Bailey, we, the jury,
4 unanimously find the defendant guilty of the lesser
5 included offense of Assault and Battery of a High
6 and Aggravated Nature. Signed by Michael A.
7 Turbyfill, foreperson.

8 On indictment 2013-GS-28-685, Possession of a
9 Weapon during the Commission of a Violent Crime, we,
10 the jury, unanimously find the defendant guilty.
11 Signed by Michael A. Turbyfill, foreperson.

12 On indictment 2013-GS-28-811, Resisting Arrest
13 with a Deadly Weapon, we, the jury, unanimously find
14 the defendant guilty. Signed by Michael A.
15 Turbyfill, foreperson.

16 Mr. Foreman and Ladies and Gentlemen of the
17 jury, if these are your verdicts, please signify by
18 raising your right hand.

19 (WHEREUPON, each juror responds.)

20 THE CLERK: Thank you.

21 THE COURT: All right. Anything from the
22 State with respect to the, uh, jury?

23 MR. PERRY: No, sir, Your Honor.

24 THE COURT: From the defendant?

25 MR. KRINCICH: Your Honor, we would ask that

1 you poll them individually.

2 **THE COURT:** Madam Clerk.

3 **THE CLERK:** Thank you, Your Honor.

4 Robert B. Keasler, were these your verdicts?

5 **THE JUROR:** Yes, ma'am, they were.

6 **THE CLERK:** Are they still your verdicts?

7 **THE JUROR:** Yes, ma'am, they are.

8 **THE CLERK:** Thank you.

9 Cynthia T. Hooker?

10 **THE JUROR:** Yes, ma'am.

11 **THE COURT:** Were these your verdicts?

12 **THE JUROR:** Yes, ma'am.

13 **THE CLERK:** Are they still your verdicts?

14 **THE JUROR:** Yes, ma'am.

15 **THE CLERK:** Thank you.

16 Cheri E. Peake, were these your verdicts?

17 **THE JUROR:** Yes, ma'am.

18 **THE CLERK:** Are they still your verdicts?

19 **THE JUROR:** Yes, ma'am.

20 **THE CLERK:** Thank you.

21 Jayne P. Bowers, were these your verdicts?

22 **THE JUROR:** Yes, ma'am.

23 **THE CLERK:** Are they still your verdicts?

24 **THE JUROR:** Yes, ma'am.

25 **THE CLERK:** Thank you.

1 Gary N. Stumm?

2 THE JUROR: Yes.

3 THE CLERK: Were these your verdicts?

4 THE JUROR: Yes.

5 THE CLERK: Are they still your verdicts?

6 THE JUROR: Yes.

7 THE CLERK: Thank you.

8 Jamie D. Corbitt, were these your verdicts?

9 THE JUROR: Yes, ma'am.

10 THE CLERK: Are they still your verdicts?

11 THE JUROR: Yes, ma'am.

12 THE CLERK: Thank you.

13 Valerie D. Matthis, were these your verdicts?

14 THE JUROR: Yes.

15 THE CLERK: Are they still your verdicts?

16 THE JUROR: Yes.

17 THE CLERK: Thank you.

18 Michael A. Turbyfill, were these your verdicts?

19 THE JUROR: Yes, ma'am.

20 THE CLERK: Are they still your verdicts?

21 THE JUROR: Yes, ma'am.

22 THE CLERK: Thank you.

23 Janie G. Unsworth, were these your verdicts?

24 THE JUROR: Yes, ma'am.

25 THE CLERK: Are they still your verdicts?

1 **THE JUROR:** Yes, ma'am.

2 **THE CLERK:** Thank you.

3 Joseph R. Quinlan --

4 **THE JUROR:** Yes.

5 **THE CLERK:** Are these your -- were these

6 your verdicts?

7 **THE JUROR:** Yes.

8 **THE CLERK:** Are they still your verdicts?

9 **THE JUROR:** Yes.

10 **THE CLERK:** Thank you.

11 Harvey L. Self, were these your verdicts?

12 **THE JUROR:** Yes.

13 **THE CLERK:** Are they still your verdicts?

14 **THE JUROR:** Yes.

15 **THE CLERK:** Thank you.

16 Christina T. Hopkins, were these your verdicts?

17 **THE JUROR:** Yes, ma'am.

18 **THE CLERK:** Are they still your verdicts?

19 **THE JUROR:** Yes, ma'am.

20 **THE CLERK:** Thank you.

21 Your Honor, the jury's been polled.

22 **THE COURT:** Thank you. Anything further from

23 the defense?

24 **MR. KRINCICH:** No, sir, Your Honor.

25 **THE COURT:** All right. Ladies and Gentlemen,

1 uh, I want to thank you very much for your service.
2 As I said, this is the longest short case I've been
3 involved in. I know it started Monday and here we
4 are Thursday. But as you can see, we can't do this
5 without you. You are a very important part of our
6 process both on the civil and the criminal side. I
7 want to thank you for making yourself available to
8 be here this week.

9 One of the things I'm a little curious about is
10 that all the ladies are on one row and all the men
11 are on the other row. Y'all had a break down in
12 there or something? Uh, what I'd like to ask you to
13 do, first of all, you're going to get a small token
14 of appreciation. It won't be large, but we'll send
15 you a check in the not-to-distant future. The
16 excuse for work, Ms. McDonald says that you can go
17 into her office which is right down here and they
18 can give you an excuse.

19 You can, uh, -- I'm going to send you back to
20 the jury room and ask you to wait back there just
21 one minute. I want to come back there and speak to
22 you a second before you go. But I do thank you for
23 your service. If you would, step back to the jury
24 room. Y'all have a nice weekend. Just think, you
25 don't have to do this for three more years.

1 **(WHEREUPON, the jury exits at approximately**
2 12:25 p.m.)

3 **THE COURT:** Anything from the state?

4 **MR. PERRY:** Nothing from the state, Your
5 Honor.

6 **THE COURT:** Anything from the defendant?

7 **MR. KRINCICH:** Your Honor, I don't have
8 anything at this time. I would ask that you
9 recognize ten days to file any post-trial motions
10 under Rule 29 of the Criminal Rules of Procedure.
11 If I have anything to file, I'll make sure it's
12 filed in that time period.

13 **THE COURT:** You need 10 days to file post-
14 trial motions?

15 **MR. KRINCICH:** Yes, Your Honor. I would just
16 ask for 10 days under the rules. Other than to
17 renew my directed verdict motion at this time --

18 **THE COURT:** All right. I will give you 10
19 days.

20 **MR. KRINCICH:** Thank you, Your Honor.

21 **THE COURT:** I'm going to sentence him later
22 on this afternoon. You planning on being around?

23 **MR. KRINCICH:** Yes, sir. I can do it
24 whatever time you want to do it.

25 **THE COURT:** Give me a chance to think about

1 this. I'll bring your client back later on this
2 afternoon. We're going to do some pleas and some
3 other things. We'll sentence him then.

4 **MR. KRINCICH:** Yes, sir.

5 **THE COURT:** All right.

6 **MR. KRINCICH:** Thank you.

7 **(END OF PROCEEDING)**

8

9

10

11

12

CERTIFICATE

289

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

I, the undersigned, Teresa B. Johnson, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Richland, South Carolina, on this 13th day of June, 2014.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.



Teresa B. Johnson

Circuit Court Reporter

State of South Carolina)	In the Court of General Sessions
)	Fifth Judicial Circuit
County of Kershaw)	2013-GS-28-0681
	2013-GS-28-0682
	2013-GS-28-0683
	2013-GS-28-0684
	2013-GS-28-0685
	2013-GS-28-0811

The State of South Carolina,)
)
 Plaintiff,)
)
 vs.) Transcript of Record
)
 Ernest Maurice Allen,)
)
 Defendant.)
)
)

January 16, 2014
Camden, South Carolina

B E F O R E:

The Honorable James R. Barber, III, Judge

A P P E A R A N C E S:

Brett A. Perry, Esquire, Assistant Solicitor
Attorney for the State

Jason D. Kirincich, Esquire
Attorney for the Defendant

Elizabeth B. Harris, CVR-M
Circuit Court Reporter

I N D E X

<u>Witness/Description</u>	<u>Page No.</u>
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E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>I.D.</u>	<u>Ev.</u>

No Exhibits Introduced during this portion.

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SENTENCING HEARING

THE COURT: All right, Mr. -- what is your name?
Allen or Allen Pickett?

DEFENDANT: Allen.

THE COURT: Allen, and you're twenty-six years of age,
right?

DEFENDANT: Yes, sir.

THE COURT: And you live here in Camden. How far did
you go in school?

DEFENDANT: Tenth grade. Got my GED.

THE COURT: All right, and are you married?

DEFENDANT: No, sir.

THE COURT: Any children?

DEFENDANT: Yes, sir.

THE COURT: How many children you got?

DEFENDANT: Three.

THE COURT: How old are they?

DEFENDANT: Two, seven, and one ten.

THE COURT: Two, seven, and one ten?

DEFENDANT: Yes, sir.

All right, Mr. Solicitor, what you want to tell me?
Anything?

MR. PERRY: Your Honor, you've heard everything as it
relates to the facts of the case, but I do have his record
here that I think needs to be considered.

1 Your Honor, 2005 I've got a conviction for possession
2 of crack cocaine first offense. I've got a resisting ---

3 THE COURT: When was that? 2005?

4 MR. PERRY: Yes, sir. A resisting arrest, Your Honor,
5 in 2005 which I think speaks to this particular charge or
6 these particular charges. Failure to stop for blue light,
7 Your Honor, a 2005 conviction which I think again goes to
8 exactly what we're talking about here. Your Honor, there's
9 also a non-conviction for resisting arrest in 2006. In
10 2006, there's a second conviction for possession of crack
11 cocaine. In 2009, Your Honor, there was a pointing and
12 presenting firearms which was dismissed. A conviction of
13 violating beginner's permit. In 2009, there was also a
14 conviction for driving under suspension. 2009, there is
15 a conviction for DUS second offense and simple possession
16 of marijuana first. 2010, Your Honor, the charge that
17 shows is assault upon a corrections employee. What I
18 show a conviction to is other resisting arrest. Another
19 2010 conviction for simple possession of marijuana, Your
20 Honor. Another 2010 conviction, Your Honor, for resisting
21 arrest.

22 THE COURT: That was when?

23 MR. PERRY: 2010.

24 THE COURT: All right.

25 MR. PERRY: I'd like to hand this up, if I might.

1 THE COURT: I don't need it.

2 MR. PERRY: Okay.

3 THE COURT: Anything else you want to tell me?

4 MR. PERRY: No, sir, Your Honor. You, you're heard
5 everything. You were with us here all day yesterday. I
6 just -- I would -- I'd ask that he be sentenced
7 accordingly.

8 THE COURT: According to what?

9 MR. PERRY: According to his actions, Your Honor.
10 This man was wanted for multiple ---

11 THE COURT: I'm very familiar with the facts. I don't
12 know if there's something you wanted to tell me about the
13 state's position with regard to a sentence or not.

14 MR. PERRY: The state's position is is that at the
15 very least, whatever you sentence him to on the attempted
16 murder charges, the attempted -- or the assault and battery
17 high and aggravated, we believe that the possession of a
18 firearm during a violent felony would be appropriate to
19 give him a consecutive five-year sentence with that. The
20 plea offers were made and rejected for both twenty years
21 and seventeen years, Your Honor.

22 THE COURT: All right, Mr. Kirincich, what you want to
23 tell me? Anything?

24 MR. KIRINCICH: Your Honor, I think just to -- first
25 to clear things up. It may not matter much to Your Honor,

1 but the 2006 conviction that Solicitor Perry read, it's
2 listed on the sentencing sheet ---

3 THE COURT: I don't know what 2006 conviction.

4 MR. KIRINCICH: 2006 possession for crack cocaine,
5 Your Honor. It's listed on his rap sheet, excuse me, as a
6 SCDC -- there's, there's no separate conviction court
7 charge that we can see for that. That's one thing that Mr.
8 Allen and I had reviewed recently, and one thing I think
9 that we'd just dispute at this point. I don't think we
10 dispute anything else on his criminal record.

11 Your Honor, as you indicated, you very familiar with
12 the facts of this case. You've heard everything that we
13 had to present or everything that we did present at this
14 point.

15 While we're disappointed in the verdict that the jury
16 reached, Your Honor, I made some concessions to the jury
17 about things I thought they should do, and, and that was
18 based on my conversations with my client: that he never had
19 the intention to do harm to anyone. He has always been
20 very remorseful for everything that happened. He's cried
21 with me. He cried when he was in bond court. He had
22 indicated to other officers that, that he was sorry and not
23 trying to hurt anyone.

24 Your Honor, I've, I've advised Mr. Allen to probably
25 not say anything as this may not be the last hearing that

1 occurs for this particular case and these five charges.

2 He, he does want to say something, though, Your Honor, and
3 I can't stop him from doing it. He has every right to
4 speak, even against my advice.

5 Your Honor, we would ask you not impose any
6 consecutive sentences. Obviously, he would like as little
7 time as possible. Solicitor has relayed the thoughts of
8 the state and told you about the plea offers. I hope that
9 you would not necessarily punish him for going to trial,
10 but he did believe that there was a triable issue on some
11 of these charges.

12 I think I can say without being facetious at all that,
13 that Your Honor probably agreed with us on one of those,
14 that there was a directed verdict entered for at least one
15 charge. The jury agreed with us on the charge involving
16 Investigator Rick Bailey.

17 Your Honor, I, I think that's all I have to say right
18 now. Mr. Allen, if he chooses to speak.

19 (COUNSEL CONFERS WITH DEFENDANT.)

20 MR. KIRINCICH: Your Honor, he, he is -- he's not
21 going to say anything.

22 THE COURT: Well, I listened to all this, and I'm
23 aware of the negotiations or discussions that took place
24 between the plaintiff -- I mean, the state and the
25 defendant. I saw what unfolded during the course of the

1 week with -- which resulted in your mother being arrested.
2 I don't know what's going to happen on that, but it isn't
3 good. She's obviously in jail now. I don't know how long
4 she'll stay in jail, and I assume that the state intends to
5 prosecute on that. And, you know, even if she's found not
6 guilty, she's going to have to spend a good bit of time and
7 energy and maybe money in trying to defend herself.

8 After hearing the facts in this case, you know, I
9 think the jury paid close attention to what was said during
10 the course of the trial and both the state's evidence,
11 state's closing argument, your lawyer's closing argument.
12 I can't dispute their verdict at all. I think that they
13 clearly -- I never personally would have thought that the
14 -- I thought an ABHAN was probably the appropriate decision
15 with respect to Officer -- Deputy Bailey.

16 Isn't that his name?

17 MR. PERRY: Yes, sir.

18 THE COURT: The exposure you were looking at on all
19 these charges, and I understand you've got a bunch of other
20 charges that are pending. I don't know what the time is
21 that you're facing on all those other charges. I just
22 never understood why you didn't seriously consider trying
23 to resolve this, maybe get your mother out of trouble. And
24 I guess you did what you thought was in your best interest,
25 and I certainly am not going to punish you for this.

1 But you -- what you did was a terrible thing, even if
2 you never intended to kill any of these people. When you
3 shoot guns at people, bad things happen. Nothing good
4 happens when you shoot guns at people, nothing except you
5 missed. That's the best thing that's going to happen when
6 you shoot guns, and when people are shooting guns at you,
7 it ain't a good thing.

8 You're probably just as lucky that you're standing
9 here as anybody else. You could be dead over a drug
10 charge. Now you're looking at thirty, sixty, ninety, a
11 hundred and ten.

12 What are the other two? One's a five or both of them
13 are five?

14 MR. PERRY: Five, ten, thirty, thirty, and twenty,
15 Judge.

16 THE COURT: The ten is the ---

17 MR. PERRY: Ten is the possession ---

18 THE COURT: --- possession of a ---

19 MR. PERRY: --- of a deadly weapon. Five is the
20 possession of a firearm during the commission of a violent
21 crime.

22 THE COURT: And you were looking at thirty on the
23 other. Fortunately, your lawyer made a good argument of
24 the captain's case.

25 (A PAUSE.)

1 SENTENCE OF THE COURT:

2 THE COURT: All right, Mr. Allen, on indictment
3 2013-GS-28-0681, sentence of this court you be committed to
4 the Department of Corrections for a term of twenty years,
5 plus costs and assessments as applicable. On 2000 --
6 that's attempted murder. On 2013-GS-28-0682, sentence of
7 this court you be committed to the Department of
8 Corrections for a term of twenty years, plus costs and
9 assessments as applicable. On 2013-GS-28-0683, ABHAN,
10 sentence of this court you be committed to State Department
11 of Corrections for a term of twenty years, plus costs and
12 assessments as applicable. All those three will run
13 concurrent.

14 On the possession of a weapon during the commission of
15 a violent crime, sentence of this court you be committed to
16 the Department of Corrections for a term of four years,
17 plus costs and assessments as applicable. That sentence
18 will run consecutive to your attempted murder,
19 2013-GS-28-0681. And your 2013-GS-28-0811, sentence of
20 this court you be committed to the Department of
21 Corrections for a term of two years, plus costs and
22 assessments as applicable, and that will run concurrent.

23 MR. KIRINCICH: Thank you.

24 THE COURT: Good luck to you.

25 MR. PERRY: Thank you, Judge.

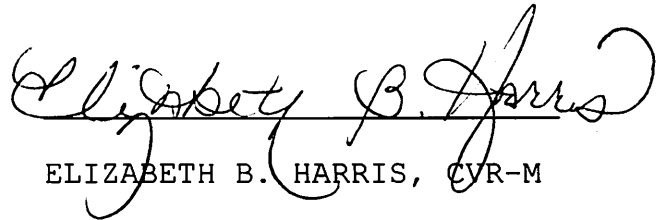
1 THE COURT: Give him credit for time served on the
2 ABHAN.

3 **--- END OF TRANSCRIPT OF RECORD ---**

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR KERSHAW COUNTY, SOUTH CAROLINA, ON THE 16TH DAY OF JANUARY, 2014.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.



ELIZABETH B. HARRIS, CVR-M

COLUMBIA, SOUTH CAROLINA

APRIL 2ND, 2015

WITNESSES

(S) M Taylor

- Kershaw County Sheriff

ARREST WARRANT NUMBER

2012A2810100610

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date: JUL 17 2013

VERDICT

TRUE BILL

Foreperson of Petit Jury

Date:

DOCKET NO. 2013-GS-28-0681

The State of South Carolina

County of

Kershaw

COURT OF GENERAL SESSIONS

JULY TERM 2013

K96

THE STATE
vs.

Ernest Maurice Allen

Indictment for
ATTEMPTED MURDER

SC Code: 16-03-0029

CDR Code: 3410

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

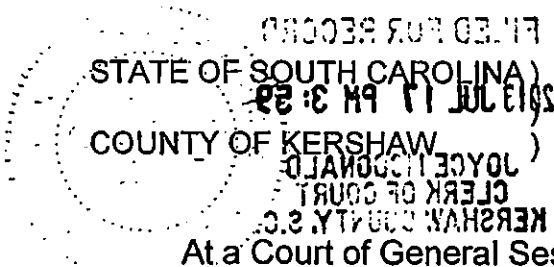
Witness:

C.C.C. PLS. AND G.S.

FILED FOR RECORD
2013 JUL 17 PM 3:59
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

ATTEST: True, Correct & Certified
Copy of Original on File in this
Court

Grant C. Hasty
Clerk of Court Kershaw County



INDICTMENT

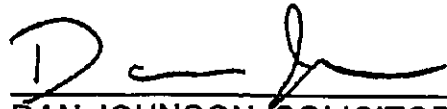
At a Court of General Sessions, convened on JULY 17, 2013, the

Grand Jurors of Kershaw County present upon their oath:

ATTEMPTED MURDER

That Ernest Maurice Allen did in Kershaw County on or about December 20, 2012, did with the intent to kill, attempt to kill DEPUTY JUSTIN SCOTT with malice aforethought, either expressed or implied. All in violation of SC Code of Laws § 16-3-29 (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) M Taylor
- Kershaw County Sheriff

ARREST WARRANT NUMBER

2012A2810100611

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date:

JUL 17 2013

VERDICT

TRUE BILL

Foreperson of Petit Jury
Date:

DOCKET NO. 2013-GS-28-0682

The State of South Carolina

County of

Kershaw

COURT OF GENERAL SESSIONS

JULY TERM 2013

K96

THE STATE
vs.

Ernest Maurice Allen

Indictment for
ATTEMPTED MURDER

SC Code: 16-03-0029
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After being fully advised as to my
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Defendant

I
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Defendant

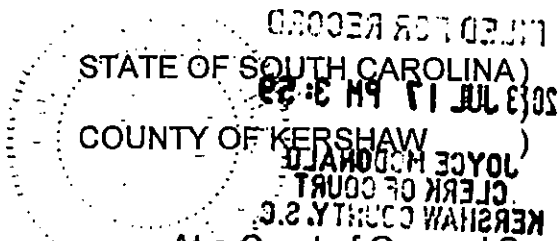
Witness:

C.C.C. PLS. AND G.S.

FILED FOR RECORD
2013 JUL 17 PM 3:59
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

ATTEST True, Correct & Certified
Copy of Original on File in this
Court

Janet C. Haskins
Clerk of Court Kershaw County



INDICTMENT

At a Court of General Sessions, convened on JULY 17, 2013, the

Grand Jurors of Kershaw County present upon their oath:

ATTEMPTED MURDER

That Ernest Maurice Allen did in Richland County on or about December 20, 2012, did with the intent to kill, attempt to kill INVESTIGATOR MICKEY SELLERS with malice aforethought, either expressed or implied. All in violation of SC Code of Laws § 16-3-29 (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) M Taylor
- Kershaw County Sheriff

ARREST WARRANT NUMBER

2012A2810100611

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

SEP 11 2013

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2013-GS-28-0682

The State of South Carolina

County of

Kershaw

COURT OF GENERAL SESSIONS

JULY TERM 2013

K96

THE STATE
vs.

Ernest Maurice Allen

AMENDED

Indictment for
ATTEMPTED MURDER

SC Code: 16-03-0029

CDR Code: 3410

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.

FILED FOR RECORD
2013 SEP 11 PM 1:15
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

ATTEST True, Correct & Certified
Copy of Original on File in this
Court

Janet C. Hasty
Clerk of Court Kershaw County

STATE OF SOUTH CAROLINA)
 COUNTY OF KERSHAW)

INDICTMENT

At a Court of General Sessions, convened on JULY 17, 2013, the
 Grand Jurors of Kershaw County present upon their oath:

**AMENDED
ATTEMPTED MURDER**

That Ernest Maurice Allen did in Kershaw County on or about December 20, 2012, did with the intent to kill, attempt to kill INVESTIGATOR MICKEY SELLERS with malice aforethought, either expressed or implied. All in violation of SC Code of Laws § 16-3-29 (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) M Taylor

- Kershaw County Sheriff

ARREST WARRANT NUMBER

2012A2810100609

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date:

JUL 17 2013

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2013-GS-28-0683

The State of South Carolina

County of

Kershaw

COURT OF GENERAL SESSIONS

JULY TERM 2013

K96

THE STATE

vs.

Ernest Maurice Allen

Indictment for
ATTEMPTED MURDER

SC Code: 16-03-0029

CDR Code: 3410

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

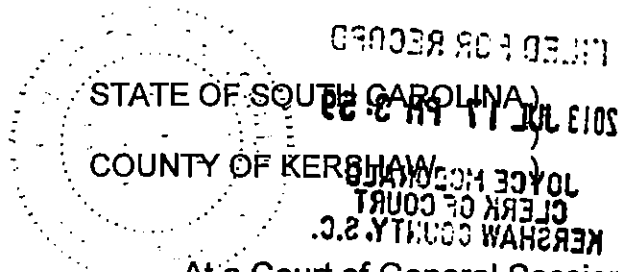
Defendant

Witness:

C.C.C. PLS. AND G.S.

FILED FOR RECORD
2013 JUL 17 PM 3:59
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

ATTEST True, Correct & Certified
Copy of Original on File in this
Court
James C. [Signature]
Clerk of Court Kershaw County



INDICTMENT

At a Court of General Sessions, convened on JULY 17, 2013, the
Grand Jurors of Kershaw County present upon their oath:

ATTEMPTED MURDER

That Ernest Maurice Allen did in Richland County on or about December 20, 2012, did with the intent to kill, attempt to kill INVESTIGATOR RICK BAILEY with malice aforethought, either expressed or implied. All in violation of SC Code of Laws § 16-3-29 (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) M Taylor

- Kershaw County Sheriff

ARREST WARRANT NUMBER

2012A2810100609

ACTION OF GRAND JURY

TRUE BILL

[Signature]
Foreperson of Grand Jury
Date: **SEP 11 2013**

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2013-GS-28-0683

The State of South Carolina

County of

Kershaw

COURT OF GENERAL SESSIONS

JULY TERM 2013

K96

THE STATE
vs.

Ernest Maurice Allen

AMENDED
Indictment for
ATTEMPTED MURDER

SC Code: 16-03-0029
CDR Code: 3410

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.

FILED FOR RECORD
2013 SEP 11 PM 1:15
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

ATTEST True, Correct & Certified
Copy of Original on File in this
Court

[Signature]
Clerk of Court Kershaw County

STATE OF SOUTH CAROLINA)

COUNTY OF KERSHAW)

INDICTMENT

At a Court of General Sessions, convened on JULY 17, 2013, the
Grand Jurors of Kershaw County present upon their oath:

AMENDED
ATTEMPTED MURDER

That Ernest Maurice Allen did in Kershaw County on or about December 20, 2012, did with the intent to kill, attempt to kill INVESTIGATOR RICK BAILEY with malice aforethought, either expressed or implied. All in violation of SC Code of Laws § 16-3-29 (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) M Taylor
- Kershaw County Sheriff

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.

FILED FOR RECORD
2013 JUL 17 PM 3:59
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

ATTEST True, Correct & Certified
Copy of Original on File in this
Court
Janet C. Wash
Clerk of Court Kershaw County

DOCKET NO. 2013-GS-28-0685

The State of South Carolina

County of

Kershaw

COURT OF GENERAL SESSIONS

JULY TERM 2013

K96

THE STATE
vs.

Ernest Maurice Allen

Indictment for
WEAPON-POSS DURING COMM VIO
CRIME

SC Code: 16-23-0490
CDR Code: 0549

ARREST WARRANT NUMBER

2012A2810100607

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: JUL 17 2013

VERDICT

Foreperson of Petit Jury
Date:

FILED FOR RECORD
 JUL 17 2013
 STATE OF SOUTH CAROLINA
 COUNTY OF KERSHAW
 CLERK OF COURT
 KERSHAW COUNTY S.C.

INDICTMENT

At a Court of General Sessions, convened on JULY 17, 2013, the
 Grand Jurors of Kershaw County present upon their oath:

POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME

That Ernest Maurice Allen did in Kershaw County, on or about December 20, 2012, possess a firearm, or visibly display what appeared to be a firearm, or visibly displayed a knife, during the commission or attempted commission of a violent crime, in violation of Section 16-23-0490, 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) SELLERS

- Kershaw County Sheriff

ARREST WARRANT NUMBER

DP00034

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

AUG 21 2013

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2013-GS-28-0811

The State of South Carolina

County of

Kershaw

COURT OF GENERAL SESSIONS

AUGUST TERM 2013

K96

THE STATE
vs.

Ernest Maurice Allen

Indictment for
**RESISTING ARREST W/DEADLY
WEAPON - 1ST OFF**

SC Code: 16-03-0625

CDR Code: 2352

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.

FILED FOR RECORD
2013 AUG 21 PM 4:33
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)

INDICTMENT

At a Court of General Sessions, convened on AUGUST 21, 2013,
the Grand Jurors of Kershaw County present upon their oath:

RESISTING ARREST WITH A DEADLY WEAPON

That Ernest Maurice Allen did in Kershaw County on or about December 20, 2012, knowingly and willfully resist the lawful efforts of a Law Enforcement Officer to arrest him/her or another person with the use or threat of use of a deadly weapon against the Officer, to wit: KC LAW ENFORCEMENT OFFICERS and that the defendant was in possession or claimed to be in possession of a deadly weapon, in violation of Section 16-03-0625, 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

3146 OF SOUTH CAROLINA

COUNTY OF Kershaw
 STATE VS.
Ernest Maurice Allen
 AKA: Earnest Maurice Allen Pickett
 Race: BLACK Sex: M Age: 26
 DOB: [REDACTED] SS#: [REDACTED]
 Address: 1527 Red Hill Rd
 City, State, Zip: Camden, SC 29020
 DL#: [REDACTED] SID#: [REDACTED]

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐
 In disposition of the said indictment comes now the Defendant who was
 TO: Attempted Murder

in violation of § 16-03-0029 of the S.C. Code of Laws, bearing CDR Code # 3410
☐ 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's initials)
 The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: [Signature] 6991
Perry, Brett SC Bar# [REDACTED] Defendant Attorney for Defendant SC Bar# [REDACTED]

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed [REDACTED] years
 and/or to pay a fine of \$ [REDACTED]; provided that upon the service of [REDACTED] days/months/years and/or payment
 of \$ [REDACTED]; plus costs and assessments as applicable*; the balance is suspended with probation for [REDACTED]

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 the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP [REDACTED]
 Total: \$ [REDACTED] plus 20% fee: \$ [REDACTED]
 Payment Terms: [REDACTED]
☐ Set by SCDPPPS [REDACTED]

Recipient: [REDACTED]

*Fine:
§ 14-1-206 (Assessments 107.5 %) \$ [REDACTED]
§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ [REDACTED]
§ 56-5-2995 (DUI Assessment) \$12 \$ [REDACTED]
§ 56-1-286 (DUI Breath Test) \$25 \$ [REDACTED]
Proviso 47.9 (Public Def/Prob) \$500 \$ [REDACTED]
§ 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00
§ 14-1-213 (Drug Court Surcharge) \$150 \$ [REDACTED]
§ 50-21-114 (BUI Breath Test Fee) \$50 \$ [REDACTED]
§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ [REDACTED]
Proviso 90.5 (SCCJA Surcharge) \$5 \$ 5.00
3% to County (if paid in installments) \$ 3.90
 TOTAL \$ 133.90

[REDACTED] days/hours Public Service Employment
 Obtain GED ☐
 Attend Voc. Rehab. or Job Corp. [REDACTED]
 May serve W/E beginning [REDACTED]
 Substance Abuse Counseling ☐
 Random Drug/Alcohol testing ☐
 Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ [REDACTED] beginning [REDACTED]
 \$ [REDACTED] paid to Public Defender Fund
 Other: [REDACTED]

ATTEST: True, Correct & Certified
Copy of Original on File in this
Court
[Signature]
☐ Appointed PD or appointed other counsel
§ 47.12 requires \$500 be paid to Clerk
during probation.

Clerk of Court/ Deputy Clerk [Signature]
 Court Reporter: [Signature]
 SCCA/217 (03/2011)

Presiding Judge [Signature]
 Judge Code: 2110
 Sentence Date: 1/16/14

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

317

COUNTY OF Kershaw
 STATE VS.
Ernest Maurice Allen
 AKA: Earnest Maurice Allen Pickett
 Race: BLACK Sex: M Age: 26
 DOB: [REDACTED] SS#: [REDACTED]
 Address: 1527 Red Hill Rd
 City, State, Zip: Camden, SC 29020
 DL#: [REDACTED] SID#: [REDACTED]

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
 TO: Murder / Attempted Murder

INDICTMENT/CASE#: 2013-GS-28-0682A/W#: 2012A2810100611Date of Offense: 12/20/2012S.C. Code § : 16-03-0029CDR Code #: 3410

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0029 of the S.C. Code of Laws, bearing CDR Code # 3410
☐ 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's initials)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: [Signature] 6991
Perry, Brett SC Bar# [REDACTED] Defendant Attorney for Defendant SC Bar# [REDACTED]

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed [REDACTED] years
 and/or to pay a fine of \$ [REDACTED]; provided that upon the service of [REDACTED] days/months/years and/or payment
 of \$ [REDACTED]; plus costs and assessments as applicable*; the balance is suspended with probation for [REDACTED]

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 the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP [REDACTED]

Total: \$ [REDACTED] plus 20% fee: \$ [REDACTED]

Payment Terms: [REDACTED]

☐ Set by SCDPPPS [REDACTED]

Recipient: [REDACTED]

*Fine: [REDACTED] \$ [REDACTED]
 § 14-1-206 (Assessments 107.5 %) \$ [REDACTED]
 § 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00
 § 14-1-211(A)(2) (DUI Surcharge) \$100 \$ [REDACTED]
 § 56-5-2995 (DUI Assessment) \$12 \$ [REDACTED]
 § 56-1-286 (DUI Breath Test) \$25 \$ [REDACTED]
 Proviso 47.9 (Public Def/Prob) \$500 \$ [REDACTED]
 § 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00
 § 14-1-213 (Drug Court Surcharge) \$150 \$ [REDACTED]
 § 50-21-114(BUI Breath Test Fee) \$50 \$ [REDACTED]
 § 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ [REDACTED]
 Proviso 90.5 (SCCJA Surcharge) \$5 \$ 5.00
 3% to County (if paid in installments) \$ 3.90
 TOTAL \$ 133.90

[REDACTED] days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. [REDACTED]

May serve W/E beginning [REDACTED]

Substance Abuse Counseling ☐

Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ [REDACTED] beginning [REDACTED]

\$ [REDACTED] paid to Public Defender Fund

Other: [REDACTED] ATTEST True, Correct & Certified

Copy of Original on File in this
 Court

[Signature]
 Clerk of Court Kershaw County

☐ Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Clerk of Court/ Deputy Clerk [Signature]

Court Reporter: [Signature]

SCCA/217 (03/2011)

Presiding Judge [Signature]

Judge Code: 2170

Sentence Date: 1/16/14

STATE OF SOUTH CAROLINA

COUNTY OF Kershaw
 STATE VS.
Ernest Maurice Allen
 AKA: Ernest Maurice Allen Pickett
 Race: BLACK Sex: M Age: 26
 DOB: [REDACTED] SS#: [REDACTED]
 Address: 1527 Red Hill Rd
 City, State, Zip: Camden, SC 29020
 DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
 TO: Assault / Assault and battery of a high and aggravated nature (ABHAN)

in violation of § 00-00-0008 16-03-0608 B1 of the S.C. Code of Laws, bearing CDR Code # -0013 3411
☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)
 The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: Brett Perry SC Bar# 6981 Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 20 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 the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP

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	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$ <u> </u>
§ 56-5-2995 (DUI Assessment)	\$12	\$ <u> </u>
§ 56-1-286 (DUI Breath Test)	\$25	\$ <u> </u>
Proviso 47.9 (Public Def/Prob)	\$500	\$ <u> </u>
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$ <u> </u>
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$ <u> </u>
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ca	\$ <u> </u>
Proviso 90.5 (SCJA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)	\$	\$ <u>3.90</u>
TOTAL	\$	\$ <u>133.90</u>

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013-GS-28-0683
 A/W#: 2012A2810100609
 Date of Offense: 12/20/2012
 S.C. Code § : 16-03-0029
 CDR Code #: 3410

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

 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: ATTEST: True, Correct & Certified

Copy of Original on File in this

Court

Janet C. Hasty

Clerk of Court Kershaw County

☐ Appointed PD or appointed other counsel,

§ 47.12 requires \$500 be paid to Clerk
 during probation.

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2110

Sentence Date: 1/16/14

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

319

COUNTY OF Kershaw
 STATE VS.
Ernest Maurice Allen
 AKA: Earnest Maurice Allen Pickett
 Race: BLACK Sex: M Age: 26
 DOB: [REDACTED] SS#: [REDACTED]
 Address: 1527 Red Hill Rd
 City, State, Zip: Camden, SC 29020
 DL#: [REDACTED] SID#: [REDACTED]

INDICTMENT/CASE#: 2013-GS-28-0685
 A/W#: 2012A2810100607
 Date of Offense: 12/20/2012
 S.C. Code §: 16-23-0490
 CDR Code #: 0549

SENTENCE SHEET

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
 TO: Weapons / Poss. weapon during violent crime, if not also sentenced to life without parole or death

in violation of § 16-23-0490 of the S.C. Code of Laws, bearing CDR Code # 0549
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: [Signature] 6891
 Perry, Brett SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 4 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: 1/16/14 2013-GS-28-0685
☐ 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 the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP
 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 \$ 100.00
 § 14-1-211(A)(2) (DUI Surcharge) \$100 \$
 § 56-5-2995 (DUI Assessment) \$12 \$
 § 56-1-286 (DUI Breath Test) \$25 \$
 Proviso 47.9 (Public Def/Prob) \$500 \$
 § 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00
 § 14-1-213 (Drug Court Surcharge) \$150 \$
 § 50-21-114 (BUI Breath Test Fee) \$50 \$
 § 56-5-2942(J) (Vehicle Assessment) \$40/ca \$
 Proviso 90.5 (SCCJA Surcharge) \$5 \$ 5.00
 3% to County (if paid in installments) \$ 3.90
 TOTAL \$ 133.90

 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:

ATTEST True, Correct & Certified
 Copy of Original on File in this
 COURT:

[Signature]
☐ Appointed PD or appointed other counsel Kershaw County
 § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk: [Signature]

Court Reporter: [Signature]

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2110

Sentence Date: 1/16/14

STATE OF SOUTH CAROLINA

COUNTY OF Kershaw
STATE VS.

Ernest Maurice Allen

AKA:

Race: Sex: Age:

DOB: SS#:

Address:

City, State, Zip:

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Resisting / Resisting arrest with a deadly weapon - 1st offense

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS2800811

A/W#: 2013GS2800811

Date of Offense: 12/20/2012

S.C. Code §: 16-03-0625

CDR Code #: 2352

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0625 of the S.C. Code of Laws, bearing CDR Code # 2352

☒ 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's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Perry, Brett

SC Bar# 6991

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 2 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 formonths/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 the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ 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	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)	\$	\$ 3.90
TOTAL	\$	\$ 133.90

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,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2910

Sentence Date: 1/16/14

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Kershaw County
James R. Barber, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERNEST MAURICE ALLEN,

APPELLANT

APPELLATE CASE NO. 2014-000165

INITIAL BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

- I. Did the trial Court commit reversible error when it failed to grant appellant's motion for a directed verdict on the charge of resisting arrest, when the evidence showed that Appellant did not submit to the arrest and thus no arrest was ever effectuated?
- II. Did the trial Court commit reversible error when it allowed evidence to be submitted to the jury that the Appellant was facing substantial jail time, as a motive and intent exception to Rule 404(b), even though no rule 403 prejudice analysis was conducted, and the PWID charges bore no logical connection to the charges for which he was on trial?

STATEMENT OF THE CASE

(Earnest Maurice Allen (“Appellant” or “Defendant”) was indicted by the State of South Carolina (“The State” or “Respondent”) in Kershaw County on one count of resisting arrest with a deadly weapon in violation of § 16-03-0625 S.C. Code of Laws, 1976, as amended on August 21, 2013; four counts of attempted murder in violation of § 16-3-19 S.C. Code of Laws, 1976, as amended on July 17, 2013; and one count of possession of a weapon during the commission of a violent crime in violation of §16-23-0490 S.C. Code of Laws, 1976 as amended on July 17, 2013. *See indictments 2013-GS-28-0685, 2013-GS-28-0681, 2013-GS-28-0682, and 2013-GS-28-0811.*

A jury trial was held on January 16, 2014 in Kershaw County, lasting one day. At trial, directed verdict was granted in favor of Appellant on one count of attempted murder. The Jury found Appellant guilty of possession of a weapon during the commission of a violent crime, resisting arrest with a deadly weapon, and two counts of attempted murder. The jury found the Appellant guilty of a lesser included offense of assault and battery of a high and aggravated nature on one count of attempted murder. *See Verdict forms.*

Appellant timely filed a notice of Appeal on January 27, 2014 and served upon respondent. *See Notice of Appeal.* This appeal was filed on January 7, 2014.

STATEMENT OF FACTS

This case originates from an incident that occurred on December 20th, 2012 in Kershaw County, South Carolina. On that date, four officers with the Kershaw county Sherriff's office sought to execute arrest warrants on the Appellant. The arrest warrants were for possession with intent to distribute cocaine (PWID), and carried significant prison time as penalties. Trial Transcript p.82. The officers received information from a female individual that Appellant would be riding with her in her car later that day, and gave the officers a description of the car and an approximate time and location. Trial Transcript p. 83. Once the officers spotted the vehicle, and believing the Appellant to be in the car, they initiated the blue lights. Once the blue lights were initiated, the Appellant exited the vehicle on foot and fled from the officers. Trial Transcript 84. The officers later testified that the Appellant turned and fired a handgun at the officers. Trial Transcript p. 101. The firing of the handgun halted the officers' pursuit and the Appellant was not arrested that night. Later that night a handgun was discovered, and the evidence indicated that it was the gun used by the Appellant earlier that night. Trial Transcript p. 103. Appellant was subsequently arrested and charged with resisting arrest with a deadly weapon, attempted murder, and possession of a weapon during the commission of a violent crime. Trial Transcript p. 104.

From the outset of the trial, Counsel for The State sough to center the case around Appellant's pending charges for PWID, and thus prejudice the jury's perception of the Appellant before hearing all the facts. Before opening statements, Counsel for The State made a motion to allow into evidence the sentencing ranges that the Appellant was facing for those charges. Trial Transcript p. 49. Despite objection from Counsel for Appellant, the trial allowed the testimony into evidence. Trial Transcript p. 52. Almost immediately into

his opening statement Counsel for The State made the jury aware that the Appellant was had nine pending charges at the time of the incident for which he was on trial. Trial Transcript p. 82. He continued his effort to establish a prejudicial view of the Appellant by telling them that the charges were “serious charges” and that “there four charges for which he could have done up to 30 years on.” Trial Transcript p. 82. Further testimony was presented which reiterated the fact that the Appellant was facing “serious felony charges”. Trial Transcript p. 136.

At the close of The State’s case in chief, Counsel for the Appellant moved for a directed verdict on the charge of resisting arrest with a deadly weapon. Trial Transcript p. 213. Trial Counsel argued that no evidence was presented that an arrest had actually been effectuated. Trial Transcript p. 220. The trial Court denied the motion, but directed verdict was granted in favor of Appellant on one count of attempted murder. Trial Transcript p. 216.

Ultimately, the Jury found Appellant guilty of one count of possession of a weapon during the commission of a violent crime, once count of resisting arrest with a deadly weapon, and two counts of attempted murder. The jury found the Appellant guilty of a lesser included offense of assault and battery of a high and aggravated nature on one count of attempted murder .This appeal follows.

ARGUMENT

Standard of Review

A criminal Defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. *State v. Ladner* 373, S.C. 103, 12, 644, 644 SE 2d 684 (2007). When reviewing a denial of a directed verdict, the Court views the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *State v. Gaines*, 380 S.C. 23 667SE 2d 728 (2008).

Though the admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002), an abuse of discretion does occur when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)

I. The trial Court erred in failing to Grant Appellant's motion for directed verdict on the resisting arrest charge when it improperly applied a seizure analysis in determining whether an arrest had been effectuated, and since the evidence showed that appellant did not submit to the arrest, under the *Williams* standard, there was not sufficient evidence presented that an arrest had occurred.

When the state seeks to ascribe criminal penalties against a Defendant for his resistance of an arrest for separate charges, the burden is on the State to show that an arrest had been effectuated, and when the arrest was effectuated, before the state can meet its burden. *State v. Williams* 237 S.C. 252, 116 S.E.2d 858 (1960); *State v. Brannon* 388 S.C. 498, 697 S.E.2d 593 (2010).

It is well established jurisprudence that there is a distinction between an “arrest” and a “seizure” when dealing with an agent of the government. *Terry V. Ohio*, 392 U.S 1 S. Ct.1868 L.Ed 889 (1968) and its progeny, make clear that an individual can be seized under the Fourth Amendment, without being arrested. The US Supreme Court has gone on to clarify that an individual is seized under the Fourth Amendment to the US Constitution when a reasonable person, in the view of all the circumstances of a particular case, would not believe he was free to leave. *Michigan v. Chesternut*, 486 US 567, 573, 108 S. Ct. 1975,100 L.Ed.2d 565 (1988). This amounts to an objective standard.

In contrast, our state, in *State v. Williams*, 237 SC 252,116 S.E. 2d 858 (1960, further clarified that determining whether an arrest occurred required an analysis of intent, both of the officer and of the suspect. In *Williams*, the Court acknowledged that “It is not necessary that there be an application of actual force, or manual touching of the body, or physical restraint which may be visible to the eye, or a formal declaration of arrest”. *Id* at 257. However, the Court made clear that the person being arrested must understand that he is in the power of the one arresting and submits in consequence. In cases, such as the present one, where there is no manual, touching the Court established that there must be an intent on the part of the officer to arrest the suspect, and intent on the part of the suspect to submit, under the belief and impression that submission was necessary.” *Id*. This amounts to a subjective standard.

In *State v. Brannon* 388 S.C 498, 697 S.E.2d 593 (2010), the Court further clarified that on a resisting arrest charge the State must show that an actual arrest occurred, as opposed to a mere seizure, and that when a suspect flees he is clearly not submitting to the officers, and thus no arrest can occur since it fails to satisfy the second prong of the *Williams*

test. *Id* at 505. In that case, police responded to a call regarding a suspected vehicle burglary. When police arrived on the scene they noticed an individual standing beside a Ford Explorer, which was where the caller had identified the suspect as being. Upon seeing the suspect, the officer shouted “Stop Police”. Thereafter, the suspect fled on foot for approximately 33-350 yard before being apprehended. He was charged with resisting arrest under South Carolina Code 16-9-320(A). At trial, Counsel for the Defendant moved for a directed verdict on the charge, arguing that there was no evidence that an arrest was made when he ran from police. The Court of Appeals reversed, finding that there was no seizure, and thus no arrest. The Supreme Court reversed, finding that seizure analysis was improper in determining whether or not an arrest was effectuated. The Court further held that the Defendant did not submit to the police officers, as required under the second prong of the *Williams* test, as evidenced by the fact that he ran from the officer. *Id*.

Though the Defendant in the case at hand was charged with violation of a different statute than that of the Defendant in *Brannon*, there still must be an inquiry into whether or not an arrest was being effectuated, in order to satisfy the State’s burden. An Arrest itself is an ongoing process in South Carolina. *State v. Dowd* 306 S.C. 341, 268 411 S.E.2d (1991) In *Brannon*, the Defendant was charged with violation of 16-9-320(A). Here, the appellant was charged with 16-3-625.

Admittedly, the statute at issue in this case is a lower threshold than that of the statute in *Brannon*. However, the statute reads: “A person who resists the lawful efforts of a law enforcement officer to *arrest him* or another...” This language is unambiguous on its face, and as such the Court has no right to impose another meaning. *Gay v. Ariail* 381 SC 341, 673 S.E. 2d 418 (2009). Given that there are distinctions between a seizure and an

arrest, there must be a determination as to when (if ever) the officers' actions amounted to an effort to arrest, as opposed to an effort to seize. The record shows that officer's actions, at all relevant times, amounted to a continuation of the effort to seize, as opposed to an effort to arrest. This is especially true given the fact that it was never announced that he was under arrest, which was cited as a factor by the *Brannon* Court.

In this case, officers identified the vehicle and began following the car. Testimony was presented that an officer initiated the blue lights to conduct a traffic stop. Thereafter testimony was presented that the Appellant exited the side of the automobile and ran on foot away from the officers. There was no testimony that a verbal notification to the Defendant that he was under arrest was made. The appellant was not taken into custody on that date, but was later arrested and charged. At the close of the State's case, Counsel for the Defendant requested a directed verdict on the grounds that an arrest had not been effectuated, and cited *Brannon* as support. The State argued against the motion indicating that because the appellant "clearly knew he was under arrest" an arrest was effectuated at the time of the traffic stop, and the trial Court denied the motion. Trial Transcript p. 215. This amounts to an analysis of whether or not the Appellant was seized, as opposed to whether or not he was under arrest, because it relies on the reasonable expectation of the Appellant, not on the actual intents of both the officer and the suspect.

In looking at the seizure, which appellant does not dispute occurred when the blue lights were initiated, and failing to use the two-prong test outlined in *Williams*, the Trial Court failed to analyze whether the Appellant ever intended to submit to the arrest, and thus committed reversible error. It is evident from the Court's holding in *Brannon*, that running from the police shows an intent on the part of the suspect to not submit to the arrest, and that

even if it is the officer intends to effect a full custodial arrest, until such time as the two prongs are satisfied, the officer is attempting a mere seizure and not an arrest.

Therefore, under *Brannon*, the Trial Court erred in failing to grant Defendant's motion for directed verdict because there was not sufficient evidence presented that the arresting officer's actions ever effectuated an actual arrest.

II. The trial Court erred in allowing evidence to be submitted to the jury that the appellant was facing substantial jail time on pending charges, under the intent/motive exception to SCRE rule 404(b), when the Court failed to conduct a prejudice analysis, and since the crimes for the pending charges held no logical relevance to the crime of attempted murder for which he was being charged, the evidence of the pending charges was inherently prejudicial.

Whenever evidence is submitted to a jury of a criminal Defendant's prior criminal charges it is inherently prejudicial, and as a consequence the trial Court must evaluate the degree of prejudice presented, and determine whether there is any logical relevance between the prior charges and the charges being prosecuted. *State v. Adams*, 322 S.C. 114, 470 S.E. 2d 366 (1996); *State v. Wallace*, 384 S.C. 428, 683 S.E. 2d 275 (2009)

It is a fundamental tenant in South Carolina jurisprudence that admission of evidence regarding a criminal Defendant's prior bad acts is inherently prejudicial, and as such should only be submitted to the jury in certain limited circumstances. *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). In the years following *Lyle*, this state codified that long-held understanding in Rule 404(b) of the South Carolina Rules of Evidence. Rule 404(b) does carry with it the common law exceptions regarding motive, identity, existence of a common scheme or plan, absence of mistake, or intent. However, the rule does not set forth the

burden of proof required for the admission of evidence of bad acts which have not resulted in conviction and, therefore, case law controls on this issue. *State v. Smith*, 300 S.C. 216, 387 SE 2d 245 (1989).

Even if the trial Court does find that one of the exceptions listed in 404(b) applies, the trial Court then must determine whether the probative value of admitting evidence of the bad act substantially outweighs its danger of unfair prejudice, under SCRE 403. If not, then the evidence must not be submitted, even though it qualifies as an exception under 404(b). *Wallace* at 435.

In this case, after finding that evidence of the Defendant's pending charges could be admitted, under the intent and motive exceptions of 404(b), the Court failed to conduct a prejudice analysis as required under *Wallace*. The record is unclear as to exactly how many charges were pending against the Defendant, but it is clear that there were four Possession with Intent to Distribute (PWID) third offense charges of which the Defendant was aware. Each of these charges carried between ten and thirty year penalties. Counsel for the State sought to introduce into evidence the fact that the Defendant was facing serious jail time, and as such show a motivation that he "didn't want to be taken into custody". Trial Transcript p. 51. Counsel for the Plaintiff objected to The State's request and requested that the Court address the 403 issue, if it allowed it under 404(b). Trial Transcript p. 53.

The trial Court ultimately allowed evidence to be admitted regarding the four PWID charges, under the intent/motive exception. However, the Court failed to address the issue of prejudice, and whether or not the probative value substantially outweighed the risk of unfair prejudice. In his opening statement, Counsel for The State stated "He had nine charges pending at the time. Of those nine charges, on almost every one of them, he could

have done significant time. When I say significant, there were four charges for which he could have done up to 30 years on. That's a lot of time." Trial Transcript p.82. Officer Edward Corey later testified that he had "outstanding bench warrants, all for *serious felony charges*" against the Defendant. Trial Transcript p. 136. Though counsel for the Defendant did not renew his objection at this time, the admission of the evidence was so close in time to his objection prior to opening statements that it is preserved for review. *State v. Forrester*, 343 S.C. 637, 541 S.E. 2d 837 (2001)

Furthermore, the trial Court's decision to allow testimony that the Defendant had pending criminal charges was inconsistent with the logical relevance standard set forth in *Adams*. The charges that the Defendant was on trial for were attempted murder and resisting arrest. However, the serious felony charges that were referenced by Officer Corey were all drug related. It can hardly be argued that possession of cocaine is inherently linked with resisting arrest and attempted murder. The State argued at trial that the Defendant's alleged actions were motivated by his reluctance to be arrested and face the substantial jail time.

However, there is a significant logical leap between acknowledging that a Defendant facing significant jail time will may not want to be taken into custody, and inferring that the Defendant is willing to attempt murder as a result. Though the State's argument is admittedly stronger with regard to the resisting arrest charge, in light of attempted murder charges it seems that allowing the jury to know that the Defendant was facing "serious felony" charges has the primary effect of implying the Defendant is the type of individual who commits felonies, and as such is more likely to have committed this particular felony. This is precisely the scenario in which evidence of prior bad acts should not be admitted *Lyles* at 810.

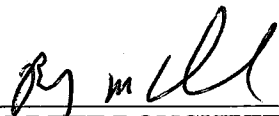
The record supports a finding of the prejudicial nature of the evidence submitted to the jury by Counsel for The State. Shortly before the close of the State's case, it came to the Court's attention that a juror had declared his belief in the Appellant's guilt or innocence. Trial Transcript p. 188. Juror 192 admitted that he had made statements to other jurors he "did not need to hear anymore", and that he had "made up his mind about this case and that he knew what the deal was with respect to guilt or announce". Trial Transcript p. 188-189. The Court held the juror in contempt and ordered him to remain in custody until the jury reached a verdict. Trial Transcript p. 234. It is important to note that juror 192's declaration came before the close of the State's case, and before the jury was aware of whether or not the Appellant, or any witnesses on his behalf, would testify.

Therefore, because the trial Court failed to conduct a prejudice analysis with regard to the admission of the Defendant's prior charges, and because there was no logical relevance between the prior charge of PWID and the charges for which the Defendant was being tried, it committed a reversible error.

CONCLUSION

The trial Court erred in failing to grant Defendant's motion for directed verdict on the charge of resisting arrest with a deadly weapon. There was no evidence that the Appellant ever intended to submit to the arrest. As such, there was no evidence that an arrest was ever effectuated. In addition the trial Court erred in allowing the admission of evidence regarding the Appellant's pending charges because it failed to conduct a prejudice analysis, and since the pending charges bore no rational relationship to the charges for which he was on trial, such evidence violated rule 403 SCRE. South Carolina law indicates that both errors are not harmless, and request that this Court order a new trial.

Respectfully submitted,

By: 

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ROBERT M. DUDEK
Chief Appellate Defender

ATTORNEYS FOR APPELLANT

This 6th day of January, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Kershaw County
James R. Barber, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERNEST MAURICE ALLEN,

APPELLANT

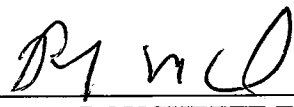
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Jury Verdicts
- (3) Trial Transcript
 - Cover page
 - Trial Transcript p. 20-64
 - Trial Transcript p. 80-223
 - Trial Transcript p. 229-288

I certify that this designation contains no matter which is irrelevant to this appeal.

January 6, 2015.

By: 
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Kershaw County
James R. Barber, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

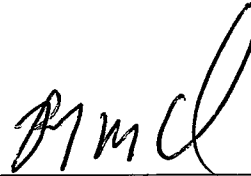
ERNEST MAURICE ALLEN,

APPELLANT

APPELLATE CASE NO. 2014-000165

CERTIFICATE OF SERVICE

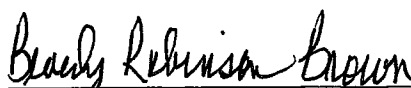
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of January, 2015.



ROBERT M. DUDEK
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
This 6th day of January, 2015.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: December 9, 2024.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY

Court of General Sessions

James R. Barber, Circuit Court Judge

Appellate Case No. 2014-000165

THE STATE.

Respondent,

v.

ERNEST MAURICE ALLEN,

Appellant.

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Other Authorities:

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Rule 404(b), SCORE	17, 23
S.C. Code Ann. § 16-3-625 (2003).....	9, 10
S.C. Code Ann. § 16-9-320 (2003).....	9, 10

STATEMENT OF ISSUES ON APPEAL

I.

The trial court correctly denied Appellant's motion for directed verdict on the charge of resisting arrest with a deadly weapon because the evidence was sufficient to demonstrate the officers intended to arrest him.

II.

Appellant's argument regarding prior bad act evidence is not preserved, but even if preserved, the trial court properly allowed evidence that Appellant was facing substantial prison time to show motive and intent pursuant to Rule 404(b), SCRE.

STATEMENT OF THE CASE

A Kershaw County Grand Jury indicted Appellant for four counts of attempted murder, one count of resisting arrest with a deadly weapon, and one count of possession of a firearm during the commission of a violent crime. (R.* Indictments.) On January 13-16, Appellant proceeded to trial before a jury and the Honorable James R. Barber. Jason D. Kirincich, Esquire, represented Appellant, and Assistant Solicitor Brett Perry represented the State. The jury found Appellant guilty on two counts of attempted murder, one count of the lesser included offense of assault and battery of a high and aggravated nature (ABHAN), one count of resisting arrest with a deadly weapon, and one count of possession of a firearm during the commission of a violent crime.¹ (Tr. 281-82.) Judge Barber sentenced him to twenty years' imprisonment for the two attempted murder charges and the ABHAN charge, two years' imprisonment for the resisting arrest with a deadly weapon charge, to run concurrently, and four years' imprisonment on the possession of a firearm during the commission of a violent crime charge, to run consecutive to the others. (Sent. Tr. 10.)

On January 21, 2014, Appellant filed a Notice of Appeal.

¹ The trial court directed a verdict on one attempted murder charge. (Tr. 220, lines 20-21.)

STATEMENT OF FACTS

In December of 2010, Appellant had nine outstanding Kershaw County bench warrants for failure to appear in court. (Tr. 98, lines 1-6.) Sergeant Michael Sellers with the Kershaw County Sheriff's Office left his number with people at local apartment complexes to let them know he was looking for Appellant. (Tr. 95, lines 18-24.) On December 20, 2012, he received a text message from a citizen notifying him that Appellant was in a beige van leaving a particular apartment complex. (Tr. 95, line 15-Tr. 96, line 22.) The citizen advised Sgt. Sellers that Appellant had a firearm on him. (Tr. 97, line 1.) Based on the information, Sgt. Sellers did not want to approach Appellant by himself, so he gave a description of the van and its general direction to some other deputies. (Tr. 97, lines 1-11.) Sgt. Sellers parked on the side of the road with his lights off and awaited the van. (Tr. 97, lines 11-17.) Captain Edward Corey joined him and soon they saw the van. (Tr. 97, lines 17-22.) They began following, and as the van got close to a trailer park, Sgt. Sellers decided to make a felony car stop.² (Tr. 98, line 8-Tr. 99, line 10.)

Sgt. Sellers activated his blue lights, the van stopped, and Appellant bailed out of the passenger side and began running across the brightly lit yard of a home. (Tr. 99, lines 1-23.) Sgt. Sellers was able to recognize Appellant because he knew him from past experience. (Tr. 99, line 25-Tr. 100, line 7.) Other units were on the scene too, and Deputy Justin Scott ran after Appellant and was able to gain on him quickly. (Tr. 100, lines 18-23.) Sgt. Sellers saw something silver and a flash in his direction, and then he

² A felony traffic stop, or felony car stop, is one that is carried out with consideration for the safety of the public and the officers. (Tr. 136, lines 2-10.) Rather than a typical traffic stop where the officer approaches the driver, in a felony stop the officer does not walk up to the car but rather calls the suspect out of the car to him. (Tr. 99, lines 6-15; Tr. 135, line 23-Tr. 136, line 13.)

heard a loud noise and began looking for something to get behind. (Tr. 100, line 23-Tr. 101, line 24.) He yelled to Deputy Scott that Appellant had a gun because Scott was closing in on him. (Tr. 101, lines 12-13; Tr. 102, lines 1-2.) He saw Deputy Scott and Appellant face each other about fifteen to twenty yards apart and saw the muzzle flash of numerous shots fired. (Tr. 102, lines 6-15.) Deputy Scott returned fired but did not hit Appellant. (Tr. 153, line 16-Tr. 155, line 12.) The officers decided to retreat to their cars rather than follow a man with a gun into a dark area. (Tr. 103, lines 10-21.) Appellant was not apprehended that night but was arrested the next day and charged with four counts of attempted murder, one count of resisting arrest with a deadly weapon, and one count of possession of a firearm during the commission of a violent crime. (Tr. 104, lines 14-20; R.* Indictments.)

Prior to trial, the State moved to introduce Appellant's pending charges at the time the incident took place, arguing it showed motive and intent as to why he was willing to do whatever it took not to be taken into custody, including shooting at law enforcement. (Tr. 49, line 10-Tr. 51, line 25.) The trial court ruled it would allow evidence that he had nine serious charges pending to be admitted based on intent and motive. (Tr. 55, lines 11-13; Tr. 56, lines 9-12.) The trial court then determined it would decide the next morning whether the evidence regarding the amount of time Appellant was facing on those pending charges, ten to thirty years, could come in. (Tr. 57, lines 2-4.)

Defense counsel argued Appellant should be able to invoke his Fifth Amendment right not to be questioned regarding the charges he had pending at the time of this incident. (Tr. 58, line 2-Tr. 61, line 13.) The trial court agreed with defense counsel that going into the details of the offenses would not be relevant but that the State would have

the right to ask Appellant whether he understood he had nine warrants that were outstanding and whether he understood he was “looking at serious time for these offenses.” (Tr. 62, lines 9-22.) Defense counsel agreed with the trial court on that distinction. (Tr. 62, lines 23-24.) The trial court then clarified the State could pursue the line of questioning about the amount of time he was facing on pending charges but prohibited the State from asking whether he was guilty of those charges. (Tr. 63, lines 3-7.) Defense counsel stated, “Yes, sir. And that’s kind of what I was looking for so I could fully advise him.” (Tr. 63, lines 8-9.)

The next morning, neither party asked the trial court for a further ruling on whether the evidence regarding the specific amount of time Appellant was facing on those pending charges could come in. Indeed, Appellant seemed satisfied with the trial court’s decision to prohibit any evidence about the facts or merits of the pending charges. When the State mentioned in its opening statement that Appellant “had nine charges pending at the time [and] could have done significant time up to [thirty] years,” Appellant did not object. (Tr. 82, lines 8-12.) Sgt. Sellers testified that the reason the sheriff’s department was looking for Appellant was because he had nine outstanding bench warrants for failure to appear in court. (Tr. 97, line 23-Tr. 98, line 6.) Sgt. Sellers further testified Appellant was wanted on nine serious charges. (Tr. 99, line 8.) Investigator Rick Bailey testified that he was approached by Captain Ed Corey to assist Sellers on warrant service. (Tr. 123, lines 1-5.) Captain Corey confirmed he was contacted by Sellers to assist him in serving outstanding warrants on Appellant. (Tr. 134, lines 9-12.) Deputy Justin Scott testified that his job was to arrest people who were wanted. He further elaborated that if they run, it is his duty to chase them and try to arrest them and that is what he did here. He specifically stated that he did not arrest Appellant that night,

but he tried. (Tr. 152, line 19-Tr. 153, line 9.) Appellant objected to none of this testimony. Nor did Appellant object when the State argued in its closing, “This young man was wanted for multiple serious charges for which he could have gotten as much as [thirty] years on some of those charges.” (Tr. 239, lines 13-15.)

Before closing arguments, after the State rested, defense counsel moved for a directed verdict on the various charges. (Tr. 208-22.) As to the charge of resisting arrest with a deadly weapon, he argued that because the officers did not advise Appellant he was under arrest, no arrest was effectuated and, thus, the charge should be dismissed. (Tr. 214, line 7-Tr. 215, line 6.) The State responded that as soon as the van stopped Appellant bailed out, began running, and began shooting at the officers. (Tr. 215, lines 13-14.) Thus, the State argued, Appellant’s own actions kept the officers from getting close enough to tell him he was under arrest. (Tr. 215, lines 15-20.) The State argued Appellant knew he was under arrest and fled from that arrest. (Tr. 215, lines 21-24.) The trial court denied the directed verdict motion, ruling:

[Appellant] knew that he had an obligation to be in court at some point in time in the past and had failed to do so and that likely arrest warrants were issued for him and that they attempted to effect the service of these arrest warrants. He clearly did not give them the chance to take him into custody at that point in time. So, I’m going to find that that’s an appropriate charge and I’m going to go forward with it.

(Tr. 216, lines 3-12.)

Ultimately, the jury found Appellant guilty on two counts of attempted murder, one count of the lesser included offense of assault and battery of a high and aggravated nature (ABHAN), one count of resisting arrest with a deadly weapon, and one count of

possession of a firearm during the commission of a violent crime.³ (Tr. 281-82.) The trial court sentenced Appellant to twenty years' imprisonment for the two attempted murder charges and the ABHAN charge, two years' imprisonment for the resisting arrest with a deadly weapon charge, to run concurrently, and four years' imprisonment on the possession of a firearm during the commission of a violent crime charge, to run consecutive to the others. (Sent. Tr. 10.)

³ The trial court directed a verdict on one attempted murder charge. (Tr. 220, lines 20-21.)

ARGUMENT

I.

The trial court correctly denied Appellant’s motion for directed verdict on the charge of resisting arrest with a deadly weapon because the evidence was sufficient to demonstrate the officers intended to arrest him.

Appellant argues the trial court erred in denying his “motion for directed verdict on the resisting arrest [with a deadly weapon] charge.” (App.Br.7.) First, he argues the trial court improperly applied a “seizure analysis” in determining whether an arrest had been effectuated. Second, he argues there was not sufficient evidence presented that an arrest had occurred because the evidence showed Appellant did not submit to the arrest under the Williams⁴ standard. However, the trial court did not apply a seizure analysis, and the State was not required to show Appellant submitted to the arrest in order to demonstrate he met the elements of the crime of “resisting arrest with a deadly weapon.” Thus, the trial court correctly denied the directed verdict motion, and this Court should affirm.

“When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight.” State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. Id. “If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury.” Id. at 292-93, 625 S.E.2d at 648. The trial court should grant a directed verdict when the evidence merely raises a

⁴ State v. Williams, 237 S.C. 252, 116 S.E.2d 858 (1960).

suspicion that the accused is guilty. State v. Hernandez, 382 S.C. 620, 625-26, 677 S.E.2d 603, 605-06 (2009). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Ladner, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007).

The South Carolina Code defines “resisting arrest with a deadly weapon” as follows: “A person who resists the lawful efforts of a law enforcement officer to arrest him or another person with the use or threat of use of a deadly weapon against the officer, and the person is in possession or claims to be in possession of a deadly weapon” S.C. Code Ann. § 16-3-625 (2003). In contrast, “opposing or resisting law enforcement officer serving process” is defined as:

It is unlawful for a person knowingly and willfully to oppose or resist a law enforcement officer in serving, executing, or attempting to serve or execute a legal writ or process or to resist an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not.

S.C. Code Ann. § 16-9-320 (2003).

Appellant relies on State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010), and State v. Williams, 237 S.C. 252, 116 S.E.2d 858 (1960), in arguing a suspect must submit to the officers in order for an arrest to occur for the purposes of resisting arrest. He first argues Brannon stands for the proposition that on a resisting arrest charge the State must show an actual arrest occurred. Yet a close look at Brannon reveals the Court views an arrest in South Carolina an “ongoing process.” Brannon, 388 S.C. at 504, 697 S.E.2d at 597 (quoting State v. Dowd, 306 S.C. 268, 270, 411 S.E.2d 428, 429 (1991)). Thus, the Court’s inquiry centered on whether the arresting process was underway when Brannon fled. Brannon, 388 S.C. at 504, 697 S.E.2d at 597. The Court found an arrest was not

being made because the State “failed to put forth any evidence demonstrating that the officers either intended to arrest Brannon or that Brannon submitted to the arrest.” Id. (emphasis added.)

There are two factors in Brannon that immediately distinguish it from the case at hand. First, Brannon was charged with resisting arrest under section 16-9-320, and the Court emphasized that “knowingly and willfully” are elements of that crime. They are not elements of the crime charged here, resisting arrest with a deadly weapon. Based on the language of the two statutes, only section 16-9-320, “opposing or resisting law enforcement officer serving process,” requires the person to act “knowingly and willfully.” Because that is the statute under which Brannon was charged, Appellant’s reliance on Brannon is misplaced. Section 16-3-625, the statute under which Appellant was charged, does not require that the person act knowingly and willfully. Second, the Court found the State did not put forth enough evidence that an arrest was being made because the officers testified they merely stopped Brannon to question him. Here, direct testimony was given by the officers that their intent was to arrest Appellant. Thus, the Court’s analysis in Brannon and its focus on proof of submission to the arrest is inapplicable to the situation here. In Brannon, the Court focused on the fact that neither officer testified he intended to arrest Brannon. Specifically, one officer testified “our intention was to approach the subject and find out exactly what he was doing there at the time.” Brannon, 388 S.C. at 505, 697 S.E.2d at 597. Here, rather than having testimony that the officers only wanted to approach Appellant, clear evidence exists through the officers’ testimony that they were trying to serve outstanding warrants on Appellant and arrest him. Thus, the intention of the arresting officers was clear.

Although Appellant acknowledges he “was charged with violation of a different statute than that of the [d]efendant in Brannon” and that the statute at issue has a “lower threshold,” he still emphasizes the need for an inquiry into whether an arrest was being effectuated. (App.Br.9.) He then argues that here the effort was on seizing Appellant rather than arresting him. He argues the trial judge’s analysis in denying the direct motion “amounts to an analysis of whether or not the Appellant was seized, as opposed to whether or not he was under arrest, because it relies on the reasonable expectation of the Appellant, not on the actual intents of both the officer and the suspect.” (App.Br.10.) This argument is a red herring and appears to confuse the real issue.

In Brannon, the Court analyzed the difference between a seizure and an arrest. “[A]n arrest represents the highest form of seizure.” Brannon, 388 S.C. at 503, 697 S.E.2d at 596. A seizure can occur, as in Terry v. Ohio⁵, without leading to an arrest. However, the trial court was not analyzing whether Appellant was arrested or whether he was seized because Appellant ran, shot at police, and was not apprehended. Evidence was presented that the officers’ sole intent in performing the felony traffic stop was to arrest Appellant for his nine serious outstanding charges. The State respectfully disagrees with Appellant’s contention that the trial court improperly engaged in a “seizure analysis” by examining Appellant’s reasonable expectation during the encounter. In denying Appellant’s directed verdict motion, the trial court stated, “[Appellant] knew that he had an obligation to be in court at some point in time in the past and had failed to do so and that likely arrest warrants were issued for him and that they attempted to effect the service of these arrest warrants. He clearly did not give them the chance to take him into custody at that point in time.” (Tr. 216, lines 4-10.) Nothing about the trial court’s

⁵ 392 U.S. 1 (1968).

ruling indicated he conducted a reasonable person, objective analysis. On the contrary, the trial court clearly looked at the subjective intent of Appellant. Indeed, Appellant's argument defies logic. It is Appellant alone who attempts to interject the word "reasonable" and the incorrect "objective" standard into the discussion. The trial court either considered a subjective standard under what Appellant claims is the proper arrest analysis by looking at the intent of both the officers and Appellant, or it considered an objective standard by looking at whether a reasonable person would consider himself free to leave. It certainly cannot be both. Here, the trial judge considered the evidence regarding the officers' intent, the evidence that Appellant knew he was under the ongoing process of arrest because he had been noticed for court and not appeared, and the evidence that Appellant ran from and shot at the officers so as not to give them a chance to take him into custody. Thus, the trial court followed the guidelines in Brannon and Williams for analyzing whether an arrest was occurring using a subjective standard.

It would be an absurd result indeed if our jurisprudence was such that a person who knew he had nine outstanding warrants for his arrest could escape a charge of resisting arrest with a deadly weapon simply by evading apprehension after running and shooting as soon as the police pulled him over. Similarly, it would be absurd if a defendant simply had to testify he did not submit to an arrest in order to obtain a directed verdict on a resisting arrest charge. The Court's analysis in Brannon relates only to situations like Brannon's in which the only evidence shows the police merely stopped the person to question him about possible involvement in a crime, not to serve arrest warrants that both the police and the person knew were outstanding.

Appellant argues that Williams made clear the person being arrested must understand he is in the power of the one arresting and submit in consequence. He further

argues that in cases like this one in which there is no manual touching, the Williams court established there must be intent on the part of the officer to arrest the suspect and intent on the part of the suspect to submit. The actual quote from Williams as is follows:

However, in all cases in which there is no manual touching or seizure **or any resistance**, the intentions of the parties to the transaction are very important; there must have been intent on the part of one of them to arrest the other, and intent on the part of such other to submit, under the belief and impression that submission was necessary. **There can be no arrest where the person sought to be arrested is not conscious of any restraint of his liberty.**

237 S.C. at 257, 116 S.E.2d at 860-61 (emphasis added).

Appellant argues Williams requires the suspect have a subjective intent to submit. Appellant does not explicitly argue he did not submit to the arrest, but he does argue the trial court failed to analyze whether he ever intended to submit to the arrest. Appellant seems to misconstrue Williams' analysis of a suspect's subjective intent. By referring to "all cases in which there is no . . . resistance," the Williams court made clear it was laying out guidelines for specific situations where a suspect would not likely know he was being arrested because there was "no manual touching or seizure or any resistance." Only then does the Court stress the importance of considering the intent of both parties. On the other hand, the Court seems to be saying, in a situation where there is touching, seizure, or resistance (in other words, actions on the part of either the officer or the suspect that show a restraint on liberty is occurring), intent is clear and no further analysis is required. It makes sense that when actions show a restraint of liberty, such as touching, resistance, running, and chasing, the internal intent of the parties need not be considered.

The circumstances in Williams distinguish it from the case at hand. An officer performed a traffic stop of Williams' brother and noticed Williams bend over as if putting

something under the seat. He asked Williams to get out of the car and noticed a jar of unstamped liquor under the front seat. While the officer radioed another officer, Williams started walking away. The officer went up to him and placed his hand on Williams' shoulder, at which time Williams jerked loose. The officer asked Williams' brother to get him to not resist. Williams calmed down and came back to the patrol car, but suddenly caught the officer by the arm, took his pistol, and went down the road. He then disappeared.

Williams's complaint on appeal was that he was unlawfully arrested after the car was stopped. However, the Court analyzed when the actual arrest occurred, determining that Williams was not arrested until after the officer found the liquor. Prior to that time, the officer had only requested he get out of the car. The Court found a request to get out of the car did not amount to an arrest, finding "there must be an actual or constructive seizure or detention of the person, performed with the intention to effect an arrest and so understood by the person detained." Williams, 237 S.C. at 257, 116 S.E.2d at 860 (quoting Jenkins v. United States, 161 F.2d 99, 101 (10th Cir. 1947)). To determine Williams did not consider himself under arrest when he stepped out of the car, the Court analyzed his own testimony where he said he walked away from the car even though the officer told him to stand there because "[h]e hadn't told me about an arrest or nothing." Williams, 237 S.C. at 258, 116 S.E.2d at 861.

Here, the situation was vastly different. The officers here were in pursuit of the van Appellant was riding in solely for the purpose of arresting him for nine outstanding warrants.⁶ This was anything but a random traffic stop. As soon as the officers activated

⁶ Appellant was aware of the warrants because he was noticed to be at trial and did not appear. (Tr. 62, lines 18-19.)

their blue lights and stopped the van, Appellant began resisting by running from them. Unlike Brannon, where the Court found an arrest was not being made because the State “failed to put forth any evidence demonstrating that the officers either intended to arrest Brannon or that Brannon submitted to the arrest,” extensive evidence was put forth that the officers intended to arrest Appellant. Sgt. Sellers testified that the reason the sheriff’s department was looking for Appellant was because he had nine outstanding bench warrants for failure to appear in court. (Tr. 97, line 23-Tr. 98, line 6.) Sgt. Sellers further testified Appellant was wanted on nine serious charges. (Tr. 99, line 8.) Investigator Rick Bailey testified that he was approached by Captain Ed Corey to assist Sellers on warrant service. (Tr. 123, lines 1-5.) Captain Corey testified he was contacted by Sellers to assist him in serving outstanding warrants on Appellant. (Tr. 134, lines 9-12.) Deputy Justin Scott testified that his job was to arrest people who were wanted. He further elaborated that if they run, it is his duty to chase them and try to arrest them and that is what he did here. He specifically stated that he did not arrest Appellant that night, but he tried. (Tr. 152, line 19-Tr. 153, line 9.)

Appellant also argues the officers made no verbal notification to Appellant that he was under arrest. However, one of the very cases Appellant relies on makes clear “a formal declaration of arrest” is not necessary. Williams, 237 S.C. at 257, 116 S.E.2d at 860. Also, the officers had activated their blue lights which indicated an intent to arrest. Furthermore, Appellant’s own actions kept the officers from getting close enough to tell him he was under arrest. In his brief, Appellant states, “The record shows that officer[s]’ actions, at all relevant times, amounted to a continuation of the effort to seize, as opposed to an effort to arrest.” (App.Br.10.) However, based on the Court’s analysis in Brannon, what took place here was never simply a seizure, even one that would eventually result in

an arrest. Rather, the record shows the officers stopped the van for the purpose of arresting Appellant for nine outstanding warrants. Most notably, Deputy Scott testified that his job was to arrest people who were wanted and that if they run, it is his duty to chase them and try to arrest them and that is what he did here. He specifically stated that he did not arrest Appellant that night, but he tried. (Tr. 152, line 19-Tr. 153, line 9.) This testimony alone is sufficient to distinguish Appellant's case from Brannon and Williams.

In sum, the evidence presented established the officers' intent was to arrest Appellant and Appellant actively resisted the arrest by running and shooting as soon as the officers stopped the van. Furthermore, the trial court did not analyze the stop under a seizure analysis and, even if it did, it had no impact on the sufficiency of the evidence to survive a directed verdict motion. Sufficient evidence existed to prove the elements of resisting arrest with a deadly weapon, and the trial court properly submitted the case to the jury for its resolution. Therefore, this Court should affirm the trial court's decision.

II.

Appellant's argument regarding prior bad act evidence is not preserved, but even if preserved, the trial court properly allowed evidence that Appellant was facing substantial prison time to show motive and intent pursuant to Rule 404(b), SCRE.

Appellant argues the trial court erred in allowing evidence to be submitted to the jury that he was facing substantial jail time on pending charges, under the intent/motive exception to Rule 404(b), SCRE. He argues the trial court failed to conduct a prejudice analysis under Rule 403, SCRE, and that because the pending charges held no logical relevance to the crime of attempted murder, the evidence was inherently prejudicial.⁷ On the contrary, the trial court properly allowed the State to introduce evidence that Appellant was facing substantial prison time to show why he ran from police and began shooting at them when faced with an arrest. Thus, this Court should affirm the trial court's decision.

Initially, the State submits this issue is not preserved. The State wanted to introduce the fact Appellant had pending charges and brought the issue before the trial court in a pretrial matter. Defense counsel stated he would agree "wholeheartedly" if the State simply wanted to say Appellant had warrants for prior failures to appear issued by the trial court. (Tr. 52, lines 12-16.) However, he argued the State should not be allowed to mention the nature of the charges or the sentencing ranges. (Tr. 52, lines 17-20.) He

⁷ In his brief, Appellant also seems to argue the fact that a juror told other jurors he had made up his mind and did not need to hear more, and was subsequently held in contempt and taken into custody, demonstrated the prejudicial nature of the evidence. (App.Br.14; Tr. 188-89.) He does not elaborate on how this shows prejudice, but regardless, when the trial judge asked both parties if they had any objection to his removing the juror and replacing him with an alternate, he did not object. (Tr. 190, line 23-Tr. 191, line 19.) Thus, any issue involving this matter is not preserved for this Court's review.

further argued that if the trial court found the charges could come in for the purpose of intent, the trial court would still have to go through a Rule 403, SCRE, balancing test.

(Tr. 53, lines 2-5.) He also stated:

I think the State needs to be fair warned that that's the only reason that it comes in for intent not to prove his general bad character. That would be too far and that would be the reason we have 404(b). I don't know if there's any limiting instruction or if there is an admonishment from the Court beforehand to the State. But for the limited purpose that they want to introduce it, it's very hard for me to argue.

(Tr. 53, lines 8-16.) (emphasis added.) The solicitor conceded he did not care that the jury hear the nature of the charges but simply wanted to be able to state that Appellant had pending charges for which he could have faced mandatory minimums of ten to thirty years. (Tr. 54, lines 1-15.) In addition, the State asked to introduce evidence of a previous occasion when law enforcement tried to stop Appellant and he fled at a high rate of speed; however, the trial court did not allow that evidence. (Tr. 54, lines 5-21.) The trial court then stated:

I'm going [to] find that—first of all, I don't know that it is relevant, second of all, even if it is, because he did know about it or the charges were pending, to put that in would substantially outweigh the probative value. I am going to allow the evidence to come in based on intent and motive.

(Tr. 55, lines 7-13.) The trial judge determined he would think about whether to allow testimony about the mandatory minimums to come in and told the parties he would let them know in the morning, but he ruled that the State would at least be able to put in evidence that Appellant had the nine serious charges pending. (Tr. 56, lines 1-12.)

At that point, the following exchange took place:

The Court: Defense motions?

[Appellant]: I do have one, Your Honor. I was going to let them finish up whatever they had.

The Court: I thought that was your motion.

[Appellant]: I think if the State wants to introduce it, they have to--

The Court: I thought that was a motion in limine to keep all that out.

[Appellant]: I think if the State wants to introduce it, it has to be their motion to make sure it passes that balance test. We could have done it at the time of trial.

(Tr. 57, lines 11-22.) (emphasis added.)

Defense counsel then argued Appellant should be able to invoke his Fifth Amendment right not to be questioned regarding the charges he had pending at the time of this incident. (Tr. 58, line 2-Tr. 61, line 13.) The trial court agreed with defense counsel that going into the merits of the drug offenses would not be relevant but that the State would have the right to ask Appellant about whether he understood he had nine warrants that were outstanding and whether he understood he was “looking at serious time for these offenses.” (Tr. 62, lines 9-22.) Defense counsel agreed with the trial court on that distinction. (Tr. 62, lines 23-24.) The trial court then clarified the State could pursue the line of questioning about the amount of time he was facing on pending charges but prohibited the State from asking whether he was guilty of those charges. (Tr. 63, lines 3-7.) Defense counsel stated, “Yes, sir. And that’s kind of what I was looking for so I could fully advise him.” (Tr. 63, lines 8-9.) After the State assured the trial court it was “not here to try the drug cases” but simply wanted to use the pending charges to show motivation, Appellant stated, “And if it comes up during trial, I’ll obviously object

to it. We've already covered these issues. Thank you, Your Honor." (Tr. 63, lines 17-19.)

The next morning, neither party asked the trial court for an additional ruling on whether the evidence regarding the specific amount of time he was facing on those pending charges could come in. Indeed, Appellant seemed satisfied with the trial court's decision to prohibit any evidence about the facts or merits of the pending charges. The State submits the above discussion that began with Appellant's argument regarding his Fifth Amendment right not to answer questions about the pending charges was sufficient to address the issue of the amount of time he was facing. Thus, the trial court's ruling that the State could pursue the line of questioning about the amount of time he was facing on pending charges but was prohibited from asking whether he was guilty of those charges seems to have encompassed the State's original motion regarding amount of time. It is clear from the following exchange that defense counsel agreed with the trial court's decision to allow the State to question Appellant regarding the minimums he could have been convicted for.

The Court: I agree with you. If he starts to go into the merits of the drug offenses, I don't think it's relevant.

[Appellant]: Okay.

The Court: I think he certainly would have a right to say, Mr. Allen, you understand that you had nine—nine warrants that were outstanding and I guess they had been served on him and he had made a first appearance or something.

[The State]: He was noticed to be at trial, Judge, and didn't show up.

The Court: I think he can ask him all that stuff. You understand that you were looking at serious time for these offenses.

[Appellant]: I can agree with you there, Judge.

The Court: He could have been convicted a minimum of 10 years on some of them. I can't remember what—

[The State]: 10 to 30, 0 to 15 and 0 to 10, Judge.

The Court: So I think he can pursue that line of questioning. He can't go into anything about were you guilty of that.

[Appellant]: Yes, sir. And that's kind of what I was looking for so I could fully advise him.

(Tr. 62, line 9-Tr. 63, line 9.) (emphasis added.) The fact that defense counsel then stated that he would object if “it” came up during trial shows that he realized the requirement to object contemporaneously to evidence that had been ruled upon during *in limine* motions. Yet he did not object at any time to the evidence the State presented during trial that Appellant had those nine pending charges and that he was facing significant time. The State submits defense counsel's failure to object to this evidence after acknowledging he would object when necessary demonstrates that the “it” he was referring to was any evidence of the nature of the charges themselves, which is what Appellant wanted to keep out. Thus, his argument now on appeal that evidence regarding the amount of time Appellant was facing was admitted in error misconstrues the record's account of the trial judge's rulings and counsel's arguments and statements.

When the State mentioned in its opening statement that Appellant “had nine charges pending at the time [and] could have done significant time up to [thirty] years,”

Appellant did not object. (Tr. 82, lines 8-12.)⁸ As Appellant points out in his brief, Captain Corey later testified that he had “outstanding bench warrants, all for serious felony charges,” to which Appellant did not object. (App.Br.13.) Appellant argues that “[t]hough counsel for [Appellant] did not renew his objection at this time, the admission of the evidence was so close in time to his objection prior to opening statements that it is preserved for review.” He bases this argument on State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001). “In most cases, [m]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced.” Forrester, 343 S.C. at 642, 541 S.E.2d at 840 (citation and internal quotation marks omitted). However, the Supreme Court held in Forrester that “[b]ecause no evidence was presented between the ruling and [the] testimony, there was no basis for the trial court to change its ruling. Thus, . . . [the] motion was not a motion *in limine*. The trial court’s ruling in this instance was in no way preliminary, but to the contrary, was a final ruling. Accordingly, [the defendant] was not required to renew her objection to the admission of the testimony in order to preserve the issue for appeal.” Id. (quoting State v. Mueller, 319 S.C. 266, 268-69, 460 S.E.2d 409, 410 (Ct. App. 1995)). The rationale behind this exception is that when no evidence is taken between the ruling and the introduction, no opportunity exists for the court to change its ruling. Here, Captain Corey was the fourth witness, so this certainly was not a case of the ruling coming directly prior to Appellant’s lack of objection to the evidence. Thus, Forrester is inapplicable and standard *in limine* rules apply. Consequently,

⁸ Appellant also did not object when the State argued in its closing, “This young man was wanted for multiple serious charges for which he could have gotten as much as [thirty] years on some of those charges.” (Tr. 239, lines 13-15.)

Appellant's failure to object prevents this issue from being preserved for appellate review. Additionally, when the trial court ruled during the discussion regarding Appellant's Fifth Amendment right not to answer questions that the pending charges and the amount of time he was facing could come in, Appellant argued the nature of the charges should not come in, and the trial court agreed. Thus, Appellant got what he asked for—that any evidence of the nature of the drug charges be excluded—and, consequently, had no need to object when evidence he agreed to was presented. The State submits the reason defense counsel did not object, then, is because he had already agreed with the trial court that evidence of the pending charges and their sentencing ranges could come in as long as the nature of the charges did not.

As to Appellant's argument that the trial judge failed to conduct a balancing test, the State submits the trial judge did conduct a balancing test under Rule 403, SCRE, when considering the totality of the 404(b) evidence the State sought to introduce. The trial judge excluded evidence that Appellant ran from the police a previous time. He specifically found "to put that in would substantially outweigh the probative value." (Tr. 55, lines 7-15.) By ruling immediately after making that statement that, "I am going to allow the evidence to come in based on intent and motive," the trial judge implicitly indicated the probative value of the evidence of the nine pending charges was not substantially outweighed by danger of prejudice. If Appellant desired a more specific ruling than that, he could have and should have requested one. It is incumbent upon an appellant to obtain a ruling from the trial judge to preserve an issue for appeal. Shortly after his ruling to allow the evidence in, when the trial court asked Appellant whether the *in limine* motion was a defense motion "to keep all that out," Appellant stated, "I think if the State wants to introduce it, it has to be their motion to make sure it passes that balance

test. We could have done it at the time of trial.” (Tr. 57, lines 17-22.) Despite saying this, Appellant did not ask for a balancing test or even object at all to the evidence at the time of trial. Thus, Appellant cannot now complain about an alleged error his own conduct caused. See State v. Curtis, 356 S.C. 622, 632, 591 S.E.2d 600, 605 (2004) (“A party cannot complain of an error which his own conduct created.”).

Appellant’s argument that there must be “logical relevance” between the prior charges and the ones being prosecuted is based on State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) *overruled on other grounds by State v. Giles*, 407 S.C. 14, 754 S.E.2d 261 (2014). In Adams, the issue was whether drug use could be used to establish motive for the crime charged. Specifically, the State sought to show the defendant robbed the store to get money for drugs. The Adams court found logical relevance between the drug use and the crime based on testimony by the defendant that he robbed the store because he ran out of money to buy drugs. The Court distinguished three other cases where drug use was not logically relevant to the crime because it was not contemporaneous with, or closely related to, the crimes committed. Appellant’s reliance on this “logical relevance” connection is misplaced. Here, the trial court did not allow evidence regarding the nature of the pending charges to come in, in direct response to defense counsel’s argument to exclude it. Thus, no testimony about possession of cocaine was presented to the jury. Consequently, it is of no moment that possession of cocaine is not “logically relevant” to resisting arrest with a deadly weapon and attempted murder. What was important in this case was the fact that Appellant had pending charges, was facing a significant amount of time in prison, and thus was motivated to resist arrest and shoot at the officers when the police stopped him. Any pending charge that fit this criteria was logically relevant. No other connection between the nature of the pending charges and the current crime was

necessary because that evidence was excluded pursuant to the trial judge's favorable ruling for Appellant to exclude any evidence of the merits of the drug offenses. Thus, the trial court's decision and Appellant's convictions should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

April 22, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY

Court of General Sessions

James R. Barber, Circuit Court Judge

Appellate Case No. 2014-000165

THE STATE,

Respondent,

v.

ERNEST MAURICE ALLEN,

Appellant.

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

In addition to the matter designated by Appellant, Respondent proposes the following to be included in the Record on Appeal:

- (1) Trial transcript pages 71-79 and**
- (2) Sentencing transcript page 10.**

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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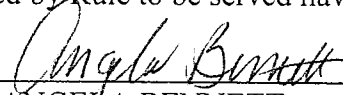
PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 22nd day of April, 2015.



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Kershaw County
James R. Barber, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERNEST MAURICE ALLEN,

APPELLANT

APPELLATE CASE NO. 2014-000165

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STATEMENT OF ISSUE ON APPEAL

- I. Did the trial Court commit reversible error when it failed to grant appellant's motion for a directed verdict on the charge of resisting arrest, when the evidence showed that Appellant did not submit to the arrest and thus no arrest was ever effectuated?
- II. Did the trial Court commit reversible error when it allowed evidence to be submitted to the jury that the Appellant was facing substantial jail time, as a motive and intent exception to Rule 404(b), even though no rule 403 prejudice analysis was conducted, and the PWID charges bore no logical connection to the charges for which he was on trial?

STATEMENT OF THE CASE

(Earnest Maurice Allen ("Appellant" or "Defendant") was indicted by the State of South Carolina ("The State" or "Respondent") in Kershaw County on one count of resisting arrest with a deadly weapon in violation of § 16-03-0625 S.C. Code of Laws, 1976, as amended on August 21, 2013; four counts of attempted murder in violation of § 16-3-19 S.C. Code of Laws, 1976, as amended on July 17, 2013; and one count of possession of a weapon during the commission of a violent crime in violation of §16-23-0490 S.C. Code of Laws, 1976 as amended on July 17, 2013. (R. 249-260).

A jury trial was held on January 16, 2014 in Kershaw County, lasting one day. At trial, directed verdict was granted in favor of Appellant on one count of attempted murder. The Jury found Appellant guilty of possession of a weapon during the commission of a violent crime, resisting arrest with a deadly weapon, and two counts of attempted murder. The jury found the Appellant guilty of a lesser included offense of assault and battery of a high and aggravated nature on one count of attempted murder. (R. 241-242.)

Appellant timely filed a notice of Appeal on January 27, 2014 and served upon respondent. This appeal was filed on January 7, 2014.

STATEMENT OF FACTS

This case originates from an incident that occurred on December 20th, 2012 in Kershaw County, South Carolina. On that date, four officers with the Kershaw county Sherriff's office sought to execute arrest warrants on the Appellant. The arrest warrants were for possession with intent to distribute cocaine (PWID), and carried significant prison time as penalties. (R.49, line 8-13.) The officers received information from a female individual that Appellant would be riding with her in her car later that day, and gave the officers a description of the car and an approximate time and location. (R. 50, line 1-17.) Once the officers spotted the vehicle, and believing the Appellant to be in the car, they initiated the blue lights. Once the blue lights were initiated, the Appellant exited the vehicle on foot and fled from the officers.(R. 51, line 15-22.) The officers later testified that the Appellant turned and fired a handgun at the officers. (R.68, line 1-11.) The firing of the handgun halted the officers' pursuit and the Appellant was not arrested that night. Later that night a handgun was discovered, and the evidence indicated that it was the gun used by the Appellant earlier that night. (R. 70.) Appellant was subsequently arrested and charged with resisting arrest with a deadly weapon, attempted murder, and possession of a weapon during the commission of a violent crime.(R. 71, line 14-24.)

From the outset of the trial, Counsel for The State sough to center the case around Appellant's pending charges for PWID, and thus prejudice the jury's perception of the Appellant before hearing all the facts. Before opening statements, Counsel for The State made a motion to allow into evidence the sentencing ranges that the Appellant was facing for those charges.(R. 31, line 10-24.) Despite objection from Counsel for Appellant, the trial allowed the testimony into evidence. (R. 34, line 12-24.) Almost immediately into his

opening statement Counsel for The State made the jury aware that the Appellant was had nine pending charges at the time of the incident for which he was on trial.(R. 49, line 8.) He continued his effort to establish a prejudicial view of the Appellant by telling them that the charges were "serious charges" and that "there four charges for which he could have done up to 30 years on."(R. 49, line 10-14.) Further testimony was presented which reiterated the fact that the Appellant was facing "serious felony charges." (R. 101, line 8.)

At the close of The State's case in chief, Counsel for the Appellant moved for a directed verdict on the charge of resisting arrest with a deadly weapon. (R. 179, line 7-25). Trial Counsel argued that no evidence was presented that an arrest had actually been effectuated. The trial Court denied the motion, but directed verdict was granted in favor of Appellant on one count of attempted murder.(R., line 3-12.)

Ultimately, the Jury found Appellant guilty of one count of possession of a weapon during the commission of a violent crime, once count of resisting arrest with a deadly weapon, and two counts of attempted murder. The jury found the Appellant guilty of a lesser included offense of assault and battery of a high and aggravated nature on one count of attempted murder .This appeal follows.

ARGUMENT

Standard of Review

A criminal Defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. *State v. Ladner* 373, S.C. 103, 12, 644, 644 SE 2d 684 (2007). When reviewing a denial of a directed verdict, the Court views the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *State v. Gaines*, 380 S.C. 23 667SE 2d 728 (2008).

Though the admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002), an abuse of discretion does occur when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)

I. The trial Court erred in failing to Grant Appellant's motion for directed verdict on the resisting arrest charge when it improperly applied a seizure analysis in determining whether an arrest had been effectuated, and since the evidence showed that appellant did not submit to the arrest, under the *Williams* standard, there was not sufficient evidence presented that an arrest had occurred.

When the state seeks to ascribe criminal penalties against a Defendant for his resistance of an arrest for separate charges, the burden is on the State to show that an arrest had been effectuated, and when the arrest was effectuated, before the state can meet its burden. *State v. Williams* 237 S.C. 252, 116 S.E.2d 858 (1960); *State v. Brannon* 388 S.C. 498, 697 S.E.2d 593 (2010).

It is well established jurisprudence that there is a distinction between an “arrest” and a “seizure” when dealing with an agent of the government. *Terry V. Ohio*, 392 U.S. 1 S. Ct. 1868 L.Ed 889 (1968) and its progeny, make clear that an individual can be seized under the Fourth Amendment, without being arrested. The US Supreme Court has gone on to clarify that an individual is seized under the Fourth Amendment to the US Constitution when a reasonable person, in the view of all the circumstances of a particular case, would not believe he was free to leave. *Michigan v. Chesternut*, 486 US 567, 573, 108 S. Ct. 1975, 100 L.Ed.2d 565 (1988). This amounts to an objective standard.

In contrast, our state, in *State v. Williams*, 237 SC 252, 116 S.E. 2d 858 (1960), further clarified that determining whether an arrest occurred required an analysis of intent, both of the officer and of the suspect. In *Williams*, the Court acknowledged that “It is not necessary that there be an application of actual force, or manual touching of the body, or physical restraint which may be visible to the eye, or a formal declaration of arrest”. *Id* at 257. However, the Court made clear that the person being arrested must understand that he is in the power of the one arresting and submits in consequence. In cases, such as the present one, where there is no manual, touching the Court established that there must be an intent on the part of the officer to arrest the suspect, and intent on the part of the suspect to submit, under the belief and impression that submission was necessary.” *Id*. This amounts to a subjective standard.

In *State v. Brannon* 388 S.C 498, 697 S.E.2d 593 (2010), the Court further clarified that on a resisting arrest charge the State must show that an actual arrest occurred, as opposed to a mere seizure, and that when a suspect flees he is clearly not submitting to the officers, and thus no arrest can occur since it fails to satisfy the second prong of the *Williams*

test. *Id* at 505. In that case, police responded to a call regarding a suspected vehicle burglary. When police arrived on the scene they noticed an individual standing beside a Ford Explorer, which was where the caller had identified the suspect as being. Upon seeing the suspect, the officer shouted "Stop Police". Thereafter, the suspect fled on foot for approximately 33-350 yard before being apprehended. He was charged with resisting arrest under South Carolina Code 16-9-320(A). At trial, Counsel for the Defendant moved for a directed verdict on the charge, arguing that there was no evidence that an arrest was made when he ran from police. The Court of Appeals reversed, finding that there was no seizure, and thus no arrest. The Supreme Court reversed, finding that seizure analysis was improper in determining whether or not an arrest was effectuated. The Court further held that the Defendant did not submit to the police officers, as required under the second prong of the *Williams* test, as evidenced by the fact that he ran from the officer. *Id.*

Though the Defendant in the case at hand was charged with violation of a different statute than that of the Defendant in *Brannon*, there still must be an inquiry into whether or not an arrest was being effectuated, in order to satisfy the State's burden. An Arrest itself is an ongoing process in South Carolina. *State v. Dowd* 306 S.C. 341, 268 411 S.E.2d (1991). In *Brannon*, the Defendant was charged with violation of 16-9-320(A). Here, the appellant was charged with 16-3-625.

Admittedly, the statute at issue in this case is a lower threshold than that of the statute in *Brannon*. However, the statute reads: "A person who resists the lawful efforts of a law enforcement officer to *arrest him* or another..." This language is unambiguous on its face, and as such the Court has no right to impose another meaning. *Gay v. Ariail* 381 SC 341, 673 S.E. 2d 418 (2009). Given that there are distinctions between a seizure and an

arrest, there must be a determination as to when (if ever) the officers' actions amounted to an effort to arrest, as opposed to an effort to seize. The record shows that officer's actions, at all relevant times, amounted to a continuation of the effort to seize, as opposed to an effort to arrest. This is especially true given the fact that it was never announced that he was under arrest, which was cited as a factor by the *Brannon* Court.

In this case, officers identified the vehicle and began following the car. Testimony was presented that an officer initiated the blue lights to conduct a traffic stop. Thereafter testimony was presented that the Appellant exited the side of the automobile and ran on foot away from the officers. There was no testimony that a verbal notification to the Defendant that he was under arrest was made. The appellant was not taken into custody on that date, but was later arrested and charged. At the close of the State's case, Counsel for the Defendant requested a directed verdict on the grounds that an arrest had not been effectuated, and cited *Brannon* as support. The State argued against the motion indicating that because the appellant "clearly knew he was under arrest" an arrest was effectuated at the time of the traffic stop, and the trial Court denied the motion. (R. 181.) This amounts to an analysis of whether or not the Appellant was seized, as opposed to whether or not he was under arrest, because it relies on the reasonable expectation of the Appellant, not on the actual intents of both the officer and the suspect.

In looking at the seizure, which appellant does not dispute occurred when the blue lights were initiated, and failing to use the two-prong test outlined in *Williams*, the Trial Court failed to analyze whether the Appellant ever intended to submit to the arrest, and thus committed reversible error. It is evident from the Court's holding in *Brannon*, that running from the police shows an intent on the part of the suspect to not submit to the arrest, and that

even if it is the officer intends to effect a full custodial arrest, until such time as the two prongs are satisfied, the officer is attempting a mere seizure and not an arrest.

Therefore, under *Brannon*, the Trial Court erred in failing to grant Defendant's motion for directed verdict because there was not sufficient evidence presented that the arresting officer's actions ever effectuated an actual arrest.

II. The trial Court erred in allowing evidence to be submitted to the jury that the appellant was facing substantial jail time on pending charges, under the intent/motive exception to SCRE rule 404(b), when the Court failed to conduct a prejudice analysis, and since the crimes for the pending charges held no logical relevance to the crime of attempted murder for which he was being charged, the evidence of the pending charges was inherently prejudicial.

Whenever evidence is submitted to a jury of a criminal Defendant's prior criminal charges it is inherently prejudicial, and as a consequence the trial Court must evaluate the degree of prejudice presented, and determine whether there is any logical relevance between the prior charges and the charges being prosecuted. *State v. Adams*, 322 S.C. 114, 470 S.E. 2d 366 (1996); *State v. Wallace*, 384 S.C. 428, 683 S.E. 2d 275 (2009)

It is a fundamental tenant in South Carolina jurisprudence that admission of evidence regarding a criminal Defendant's prior bad acts is inherently prejudicial, and as such should only be submitted to the jury in certain limited circumstances. *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). In the years following *Lyle*, this state codified that long-held understanding in Rule 404(b) of the South Carolina Rules of Evidence. Rule 404(b) does carry with it the common law exceptions regarding motive, identity, existence of a common scheme or plan, absence of mistake, or intent. However, the rule does not set forth the

burden of proof required for the admission of evidence of bad acts which have not resulted in conviction and, therefore, case law controls on this issue. *State v. Smith*, 300 S.C. 216, 387 SE 2d 245 (1989).

Even if the trial Court does find that one of the exceptions listed in 404(b) applies, the trial Court then must determine whether the probative value of admitting evidence of the bad act substantially outweighs its danger of unfair prejudice, under SCRE 403. If not, then the evidence must not be submitted, even though it qualifies as an exception under 404(b). *Wallace* at 435.

In this case, after finding that evidence of the Defendant's pending charges could be admitted, under the intent and motive exceptions of 404(b), the Court failed to conduct a prejudice analysis as required under *Wallace*. The record is unclear as to exactly how many charges were pending against the Defendant, but it is clear that there were four Possession with Intent to Distribute (PWID) third offense charges of which the Defendant was aware. Each of these charges carried between ten and thirty year penalties. Counsel for the State sought to introduce into evidence the fact that the Defendant was facing serious jail time, and as such show a motivation that he "didn't want to be taken into custody". (R. 33, line 15-16.) Counsel for the Plaintiff objected to The State's request and requested that the Court address the 403 issue, if it allowed it under 404(b). (R. 35.)

The trial Court ultimately allowed evidence to be admitted regarding the four PWID charges, under the intent/motive exception. However, the Court failed to address the issue of prejudice, and whether or not the probative value substantially outweighed the risk of unfair prejudice. In his opening statement, Counsel for The State stated "He had nine charges pending at the time. Of those nine charges, on almost every one of them, he could

have done significant time. When I say significant, there were four charges for which he could have done up to 30 years on. That's a lot of time." (R., line 8-13.) Officer Edward Corey later testified that he had "outstanding bench warrants, all for *serious felony charges*" against the Defendant. (R. 101, line 7-10.) Though counsel for the Defendant did not renew his objection at this time, the admission of the evidence was so close in time to his objection prior to opening statements that it is preserved for review. *State v. Forrester*, 343 S.C. 637, 541 S.E. 2d 837 (2001)

Furthermore, the trial Court's decision to allow testimony that the Defendant had pending criminal charges was inconsistent with the logical relevance standard set forth in *Adams*. The charges that the Defendant was on trial for were attempted murder and resisting arrest. However, the serious felony charges that were referenced by Officer Corey were all drug related. It can hardly be argued that possession of cocaine is inherently linked with resisting arrest and attempted murder. The State argued at trial that the Defendant's alleged actions were motivated by his reluctance to be arrested and face the substantial jail time.

However, there is a significant logical leap between acknowledging that a Defendant facing significant jail time will may not want to be taken into custody, and inferring that the Defendant is willing to attempt murder as a result. Though the State's argument is admittedly stronger with regard to the resisting arrest charge, in light of attempted murder charges it seems that allowing the jury to know that the Defendant was facing "serious felony" charges has the primary effect of implying the Defendant is the type of individual who commits felonies, and as such is more likely to have committed this particular felony. This is precisely the scenario in which evidence of prior bad acts should not be admitted *Lyles* at 810.

The record supports a finding of the prejudicial nature of the evidence submitted to the jury by Counsel for The State. Shortly before the close of the State's case, it came to the Court's attention that a juror had declared his belief in the Appellant's guilt or innocence. (R. 153-154.) Juror 192 admitted that he had made statements to other jurors he "did not need to hear anymore", and that he had "made up his mind about this case and that he knew what the deal was with respect to guilt or announce." (R. 153-154.) The Court held the juror in contempt and ordered him to remain in custody until the jury reached a verdict. (R. 193, line 16.) It is important to note that juror 192's declaration came before the close of the State's case, and before the jury was aware of whether or not the Appellant, or any witnesses on his behalf, would testify.

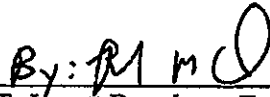
Therefore, because the trial Court failed to conduct a prejudice analysis with regard to the admission of the Defendant's prior charges, and because there was no logical relevance between the prior charge of PWID and the charges for which the Defendant was being tried, it committed a reversible error.

CONCLUSION

The trial Court erred in failing to grant Defendant's motion for directed verdict on the charge of resisting arrest with a deadly weapon. There was no evidence that the Appellant ever intended to submit to the arrest. As such, there was no evidence that an arrest was ever effectuated. In addition the trial Court erred in allowing the admission of evidence regarding the Appellant's pending charges because it failed to conduct a prejudice analysis, and since the pending charges bore no rational relationship to the charges for which he was

on trial, such evidence violated rule 403 SCRE. South Carolina law indicates that both errors are not harmless, and request that this Court order a new trial.

Respectfully submitted,

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This 16th day of July 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

July 16, 2015



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Kershaw County
James R. Barber, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

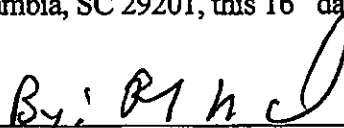
ERNEST MAURICE ALLEN,

APPELLANT

APPELLATE CASE NO. 2014-000165

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 Jennifer Ellis Roberts, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of July 2015.

By: 
ROBERT M. DUDEK
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of July, 2015.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY

Court of General Sessions

James R. Barber, III, Circuit Court Judge

Appellate Case No. 2014-000165

THE STATE,

Respondent,

v.

ERNEST MAURICE ALLEN,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL**I.**

The trial court correctly denied Appellant's motion for directed verdict on the charge of resisting arrest with a deadly weapon because the evidence was sufficient to demonstrate the officers intended to arrest him.

II.

Appellant's argument regarding prior bad act evidence is not preserved, but even if preserved, the trial court properly allowed evidence that Appellant was facing substantial prison time to show motive and intent pursuant to Rule 404(b), SCRE.

STATEMENT OF THE CASE

A Kershaw County Grand Jury indicted Appellant for four counts of attempted murder, one count of resisting arrest with a deadly weapon, and one count of possession of a firearm during the commission of a violent crime. (R.249-260.) On January 13-16, Appellant proceeded to trial before a jury and the Honorable James R. Barber. Jason D. Kirincich, Esquire, represented Appellant, and Assistant Solicitor Brett Perry represented the State. The jury found Appellant guilty on two counts of attempted murder, one count of the lesser included offense of assault and battery of a high and aggravated nature (ABHAN), one count of resisting arrest with a deadly weapon, and one count of possession of a firearm during the commission of a violent crime.¹ (R. 241-242.) Judge Barber sentenced him to twenty years' imprisonment for the two attempted murder charges and the ABHAN charge, two years' imprisonment for the resisting arrest with a deadly weapon charge, to run concurrently, and four years' imprisonment on the possession of a firearm during the commission of a violent crime charge, to run consecutive to the others. (R. 266.)

On January 21, 2014, Appellant filed a Notice of Appeal.

¹ The trial court directed a verdict on one attempted murder charge. (R. 185, lines 20-21.)

STATEMENT OF FACTS

In December of 2010, Appellant had nine outstanding Kershaw County bench warrants for failure to appear in court. (R. 65, lines 1-6.) Sergeant Michael Sellers with the Kershaw County Sheriff's Office left his number with people at local apartment complexes to let them know he was looking for Appellant. (R. 62, lines 18-24.) On December 20, 2012, he received a text message from a citizen notifying him that Appellant was in a beige van leaving a particular apartment complex. (R. 62, line 15-R. 63, line 22.) The citizen advised Sgt. Sellers that Appellant had a firearm on him. (R. 64, line 1.) Based on the information, Sgt. Sellers did not want to approach Appellant by himself, so he gave a description of the van and its general direction to some other deputies. (R. 64, lines 1-11.) Sgt. Sellers parked on the side of the road with his lights off and awaited the van. (R. 64, lines 11-17.) Captain Edward Corey joined him and soon they saw the van. (R. 64, lines 17-22.) They began following, and as the van got close to a trailer park, Sgt. Sellers decided to make a felony car stop.² (R. 65, line 8-R. 66, line 10.)

Sgt. Sellers activated his blue lights, the van stopped, and Appellant bailed out of the passenger side and began running across the brightly lit yard of a home. (R. 66, lines 1-23.) Sgt. Sellers was able to recognize Appellant because he knew him from past experience. (R. 66, line 25-R. 67, line 7.) Other units were on the scene too, and Deputy Justin Scott ran after Appellant and was able to gain on him quickly. (R. 67, lines 18-23.) Sgt. Sellers saw something silver and a flash in his direction, and then he heard a loud

² A felony traffic stop, or felony car stop, is one that is carried out with consideration for the safety of the public and the officers. (R. 101, lines 2-10.) Rather than a typical traffic stop where the officer approaches the driver, in a felony stop the officer does not walk up to the car but rather calls the suspect out of the car to him. (R. 66, lines 6-15; R. 100, line 23-R. 101, line 13.)

noise and began looking for something to get behind. (R. 67, line 23-R. 68, line 24.) He yelled to Deputy Scott that Appellant had a gun because Scott was closing in on him. (R. 68, lines 12-13; R. 69, lines 1-2.) He saw Deputy Scott and Appellant face each other about fifteen to twenty yards apart and saw the muzzle flash of numerous shots fired. (R. 69, lines 6-15.) Deputy Scott returned fired but did not hit Appellant. (R. 118, line 16-R. 120, line 12.) The officers decided to retreat to their cars rather than follow a man with a gun into a dark area. (R. 70, lines 10-21.) Appellant was not apprehended that night but was arrested the next day and charged with four counts of attempted murder, one count of resisting arrest with a deadly weapon, and one count of possession of a firearm during the commission of a violent crime. (R. 71, lines 14-20; R. 249-260.)

Prior to trial, the State moved to introduce Appellant's pending charges at the time the incident took place, arguing it showed motive and intent as to why he was willing to do whatever it took not to be taken into custody, including shooting at law enforcement. (R. 31, line 10-R. 33, line 25.) The trial court ruled it would allow evidence that he had nine serious charges pending to be admitted based on intent and motive. (R. 37, lines 11-13; R. 38, lines 9-12.) The trial court then determined it would decide the next morning whether the evidence regarding the amount of time Appellant was facing on those pending charges, ten to thirty years, could come in. (R. 39, lines 2-4.)

Defense counsel argued Appellant should be able to invoke his Fifth Amendment right not to be questioned regarding the charges he had pending at the time of this incident. (R. 40, line 2-R. 43, line 13.) The trial court agreed with defense counsel that going into the details of the offenses would not be relevant but that the State would have the right to ask Appellant whether he understood he had nine warrants that were

outstanding and whether he understood he was “looking at serious time for these offenses.” (R. 44, lines 9-22.) Defense counsel agreed with the trial court on that distinction. (R. 44, lines 23-24.) The trial court then clarified the State could pursue the line of questioning about the amount of time he was facing on pending charges but prohibited the State from asking whether he was guilty of those charges. (R. 45, lines 3-7.) Defense counsel stated, “Yes, sir. And that’s kind of what I was looking for so I could fully advise him.” (R. 45, lines 8-9.)

The next morning, neither party asked the trial court for a further ruling on whether the evidence regarding the specific amount of time Appellant was facing on those pending charges could come in. Indeed, Appellant seemed satisfied with the trial court’s decision to prohibit any evidence about the facts or merits of the pending charges. When the State mentioned in its opening statement that Appellant “had nine charges pending at the time [and] could have done significant time up to [thirty] years,” Appellant did not object. (R. 49, lines 8-12.) Sgt. Sellers testified that the reason the sheriff’s department was looking for Appellant was because he had nine outstanding bench warrants for failure to appear in court. (R. 64, line 23-R. 65, line 6.) Sgt. Sellers further testified Appellant was wanted on nine serious charges. (R. 66, line 8.) Investigator Rick Bailey testified that he was approached by Captain Ed Corey to assist Sellers on warrant service. (R. 88, lines 1-5.) Captain Corey confirmed he was contacted by Sellers to assist him in serving outstanding warrants on Appellant. (R. 99, lines 9-12.) Deputy Justin Scott testified that his job was to arrest people who were wanted. He further elaborated that if they run, it is his duty to chase them and try to arrest them and that is what he did here. He specifically stated that he did not arrest Appellant that night, but he tried. (R. 117, line 19-R. 118, line 9.) Appellant objected to none of this testimony. Nor

did Appellant object when the State argued in its closing, "This young man was wanted for multiple serious charges for which he could have gotten as much as [thirty] years on some of those charges." (R. 199, lines 13-15.)

Before closing arguments, after the State rested, defense counsel moved for a directed verdict on the various charges. (R. 173-187.) As to the charge of resisting arrest with a deadly weapon, he argued that because the officers did not advise Appellant he was under arrest, no arrest was effectuated and, thus, the charge should be dismissed. (R. 179, line 7-R. 180, line 6.) The State responded that as soon as the van stopped Appellant bailed out, began running, and began shooting at the officers. (R. 180, lines 13-14.) Thus, the State argued, Appellant's own actions kept the officers from getting close enough to tell him he was under arrest. (R. 180, lines 15-20.) The State argued Appellant knew he was under arrest and fled from that arrest. (R. 180, lines 21-24.) The trial court denied the directed verdict motion, ruling:

[Appellant] knew that he had an obligation to be in court at some point in time in the past and had failed to do so and that likely arrest warrants were issued for him and that they attempted to effect the service of these arrest warrants. He clearly did not give them the chance to take him into custody at that point in time. So, I'm going to find that that's an appropriate charge and I'm going to go forward with it.

(R. 181, lines 3-12.)

Ultimately, the jury found Appellant guilty on two counts of attempted murder, one count of the lesser included offense of assault and battery of a high and aggravated nature (ABHAN), one count of resisting arrest with a deadly weapon, and one count of possession of a firearm during the commission of a violent crime.³ (R. 241-242.) The

³ The trial court directed a verdict on one attempted murder charge. (R. 185, lines 20-21.)

trial court sentenced Appellant to twenty years' imprisonment for the two attempted murder charges and the ABHAN charge, two years' imprisonment for the resisting arrest with a deadly weapon charge, to run concurrently, and four years' imprisonment on the possession of a firearm during the commission of a violent crime charge, to run consecutive to the others. (R. 266.)

ARGUMENT

I.

The trial court correctly denied Appellant's motion for directed verdict on the charge of resisting arrest with a deadly weapon because the evidence was sufficient to demonstrate the officers intended to arrest him.

Appellant argues the trial court erred in denying his “motion for directed verdict on the resisting arrest [with a deadly weapon] charge.” (App.Br.7.) First, he argues the trial court improperly applied a “seizure analysis” in determining whether an arrest had been effectuated. Second, he argues there was not sufficient evidence presented that an arrest had occurred because the evidence showed Appellant did not submit to the arrest under the Williams⁴ standard. However, the trial court did not apply a seizure analysis, and the State was not required to show Appellant submitted to the arrest in order to demonstrate he met the elements of the crime of “resisting arrest with a deadly weapon.” Thus, the trial court correctly denied the directed verdict motion, and this Court should affirm.

“When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight.” State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. Id. “If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury.” Id. at 292-93, 625 S.E.2d at 648. The trial court should grant a directed verdict when the evidence merely raises a

⁴ State v. Williams, 237 S.C. 252, 116 S.E.2d 858 (1960).

suspicion that the accused is guilty. State v. Hernandez, 382 S.C. 620, 625-26, 677 S.E.2d 603, 605-06 (2009). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Ladner, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007).

The South Carolina Code defines “resisting arrest with a deadly weapon” as follows: “A person who resists the lawful efforts of a law enforcement officer to arrest him or another person with the use or threat of use of a deadly weapon against the officer, and the person is in possession or claims to be in possession of a deadly weapon” S.C. Code Ann. § 16-3-625 (2003). In contrast, “opposing or resisting law enforcement officer serving process” is defined as:

It is unlawful for a person knowingly and willfully to oppose or resist a law enforcement officer in serving, executing, or attempting to serve or execute a legal writ or process or to resist an arrest being-made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not.

S.C. Code Ann. § 16-9-320 (2003).

Appellant relies on State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010), and State v. Williams, 237 S.C. 252, 116 S.E.2d 858 (1960), in arguing a suspect must submit to the officers in order for an arrest to occur for the purposes of resisting arrest. He first argues Brannon stands for the proposition that on a resisting arrest charge the State must show an actual arrest occurred. Yet a close look at Brannon reveals the Court views an arrest in South Carolina as an “ongoing process.” Brannon, 388 S.C. at 504, 697 S.E.2d at 597 (quoting State v. Dowd, 306 S.C. 268, 270, 411 S.E.2d 428, 429 (1991)). Thus, the Court’s inquiry centered on whether the arresting process was underway when Brannon fled. Brannon, 388 S.C. at 504, 697 S.E.2d at 597. The Court found an arrest

being made because the State “failed to put forth any evidence demonstrating that the officers either intended to arrest Brannon or that Brannon submitted to the arrest.” Id. (emphasis added.)

There are two factors in Brannon that immediately distinguish it from the case at hand. First, Brannon was charged with resisting arrest under section 16-9-320, and the Court emphasized that “knowingly and willfully” are elements of that crime. They are not elements of the crime charged here, resisting arrest with a deadly weapon. Based on the language of the two statutes, only section 16-9-320, “opposing or resisting law enforcement officer serving process,” requires the person to act “knowingly and willfully.” Because that is the statute under which Brannon was charged, Appellant’s reliance on Brannon is misplaced. Section 16-3-625, the statute under which Appellant was charged, does not require that the person act knowingly and willfully. Second, the Court found the State did not put forth enough evidence that an arrest was being made because the officers testified they merely stopped Brannon to question him. Here, direct testimony was given by the officers that their intent was to arrest Appellant. Thus, the Court’s analysis in Brannon and its focus on proof of submission to the arrest is inapplicable to the situation here. In Brannon, the Court focused on the fact that neither officer testified he intended to arrest Brannon. Specifically, one officer testified “our intention was to approach the subject and find out exactly what he was doing there at the time.” Brannon, 388 S.C. at 505, 697 S.E.2d at 597. Here, rather than having testimony that the officers only wanted to approach Appellant, clear evidence exists through the officers’ testimony that they were trying to serve outstanding warrants on Appellant and arrest him. Thus, the intention of the arresting officers was clear.

Although Appellant acknowledges he “was charged with violation of a different statute than that of the [d]efendant in Brannon” and that the statute at issue has a “lower threshold,” he still emphasizes the need for an inquiry into whether an arrest was being effectuated. (App.Br.9.) He then argues that here the effort was on seizing Appellant rather than arresting him. He argues the trial judge’s analysis in denying the directed verdict motion “amounts to an analysis of whether or not the Appellant was seized, as opposed to whether or not he was under arrest, because it relies on the reasonable expectation of the Appellant, not on the actual intents of both the officer and the suspect.” (App.Br.10.) This argument is a red herring and appears to confuse the real issue.

In Brannon, the Court analyzed the difference between a seizure and an arrest. “[A]n arrest represents the highest form of seizure.” Brannon, 388 S.C. at 503, 697 S.E.2d at 596. A seizure can occur, as in Terry v. Ohio⁵, without leading to an arrest. However, the trial court was not analyzing whether Appellant was arrested or whether he was seized because Appellant ran, shot at police, and was not apprehended. Evidence was presented that the officers’ sole intent in performing the felony traffic stop was to arrest Appellant for his nine serious outstanding charges. The State respectfully disagrees with Appellant’s contention that the trial court improperly engaged in a “seizure analysis” by examining Appellant’s reasonable expectation during the encounter. In denying Appellant’s directed verdict motion, the trial court stated, “[Appellant] knew that he had an obligation to be in court at some point in time in the past and had failed to do so and that likely arrest warrants were issued for him and that they attempted to effect the service of these arrest warrants. He clearly did not give them the chance to take him into custody at that point in time.” (R. 181, lines 4-10.) Nothing about the trial court’s

⁵ 392 U.S. 1 (1968).

ruling indicated he conducted a reasonable person, objective analysis. On the contrary, the trial court clearly looked at the subjective intent of Appellant. Indeed, Appellant's argument defies logic. It is Appellant alone who attempts to interject the word "reasonable" and the incorrect "objective" standard into the discussion. The trial court either considered a subjective standard under what Appellant claims is the proper arrest analysis by looking at the intent of both the officers and Appellant, or it considered an objective standard by looking at whether a reasonable person would consider himself free to leave. It certainly cannot be both. Here, the trial judge considered the evidence regarding the officers' intent, the evidence that Appellant knew he was under the ongoing process of arrest because he had been noticed for court and not appeared, and the evidence that Appellant ran from and shot at the officers so as not to give them a chance to take him into custody. Thus, the trial court followed the guidelines in Brannon and Williams for analyzing whether an arrest was occurring using a subjective standard.

It would be an absurd result indeed if our jurisprudence was such that a person who knew he had nine outstanding warrants for his arrest could escape a charge of resisting arrest with a deadly weapon simply by evading apprehension after running and shooting as soon as the police pulled him over. Similarly, it would be absurd if a defendant simply had to testify he did not submit to an arrest in order to obtain a directed verdict on a resisting arrest charge. The Court's analysis in Brannon relates only to situations like Brannon's in which the only evidence shows the police merely stopped the person to question him about possible involvement in a crime, not to serve arrest warrants that both the police and the person knew were outstanding.

Appellant argues that Williams made clear the person being arrested must understand he is in the power of the one arresting and submit in consequence. He further

argues that in cases like this one in which there is no manual touching, the Williams court established there must be intent on the part of the officer to arrest the suspect and intent on the part of the suspect to submit. The actual quote from Williams as is follows:

However, in all cases in which there is no manual touching or seizure **or any resistance**, the intentions of the parties to the transaction are very important; there must have been intent on the part of one of them to arrest the other, and intent on the part of such other to submit, under the belief and impression that submission was necessary. **There can be no arrest where the person sought to be arrested is not conscious of any restraint of his liberty.**

237 S.C. at 257, 116 S.E.2d at 860-61 (emphasis added).

Appellant argues Williams requires the suspect have a subjective intent to submit. Appellant does not explicitly argue he did not submit to the arrest, but he does argue the trial court failed to analyze whether he ever intended to submit to the arrest. Appellant seems to misconstrue Williams' analysis of a suspect's subjective intent. By referring to "all cases in which there is no . . . resistance," the Williams court made clear it was laying out guidelines for specific situations where a suspect would not likely know he was being arrested because there was "no manual touching or seizure or any resistance." Only then does the Court stress the importance of considering the intent of both parties. On the other hand, the Court seems to be saying, in a situation where there is touching, seizure, or resistance (in other words, actions on the part of either the officer or the suspect that show a restraint on liberty is occurring), intent is clear and no further analysis is required. It makes sense that when actions show a restraint of liberty, such as touching, resistance, running, and chasing, the internal intent of the parties need not be considered.

The circumstances in Williams distinguish it from the case at hand. An officer performed a traffic stop of Williams' brother and noticed Williams bend over as if putting

something under the seat. He asked Williams to get out of the car and noticed a jar of unstamped liquor under the front seat. While the officer radioed another officer, Williams started walking away. The officer went up to him and placed his hand on Williams' shoulder, at which time Williams jerked loose. The officer asked Williams' brother to get him to not resist. Williams calmed down and came back to the patrol car, but suddenly caught the officer by the arm, took his pistol, and went down the road. He then disappeared.

Williams' complaint on appeal was that he was unlawfully arrested after the car was stopped. However, the Court analyzed when the actual arrest occurred, determining that Williams was not arrested until after the officer found the liquor. Prior to that time, the officer had only requested he get out of the car. The Court found a request to get out of the car did not amount to an arrest, finding "there must be an actual or constructive seizure or detention of the person, performed with the intention to effect an arrest and so understood by the person detained." Williams, 237 S.C. at 257, 116 S.E.2d at 860 (quoting Jenkins v. United States, 161 F.2d 99, 101 (10th Cir. 1947)). To determine Williams did not consider himself under arrest when he stepped out of the car, the Court analyzed his own testimony where he said he walked away from the car even though the officer told him to stand there because "[h]e hadn't told me about an arrest or nothing." Williams, 237 S.C. at 258, 116 S.E.2d at 861.

Here, the situation was vastly different. The officers here were in pursuit of the van Appellant was riding in solely for the purpose of arresting him for nine outstanding warrants.⁶ This was anything but a random traffic stop. As soon as the officers activated

⁶ Appellant was aware of the warrants because he was noticed to be at trial and did not appear. (R. 44, lines 18-19.)

their blue lights and stopped the van, Appellant began resisting by running from them. Unlike Brannon, where the Court found an arrest was not being made because the State “failed to put forth any evidence demonstrating that the officers either intended to arrest Brannon or that Brannon submitted to the arrest,” extensive evidence was put forth that the officers intended to arrest Appellant. Sgt. Sellers testified that the reason the sheriff’s department was looking for Appellant was because he had nine outstanding bench warrants for failure to appear in court. (R. 64, line 23-R. 65, line 6.) Sgt. Sellers further testified Appellant was wanted on nine serious charges. (R. 66, line 8.) Investigator Rick Bailey testified that he was approached by Captain Ed Corey to assist Sellers on warrant service. (R. 88, lines 1-5.) Captain Corey testified he was contacted by Sellers to assist him in serving outstanding warrants on Appellant. (R. 99, lines 9-12.) Deputy Justin Scott testified that his job was to arrest people who were wanted. He further elaborated that if they run, it is his duty to chase them and try to arrest them and that is what he did here. He specifically stated that he did not arrest Appellant that night, but he tried. (R. 117, line 19-R. 118, line 9.)

Appellant also argues the officers made no verbal notification to Appellant that he was under arrest. However, one of the very cases Appellant relies on makes clear “a formal declaration of arrest” is not necessary. Williams, 237 S.C. at 257, 116 S.E.2d at 860. Also, the officers had activated their blue lights which indicated an intent to arrest. Furthermore, Appellant’s own actions kept the officers from getting close enough to tell him he was under arrest. In his brief, Appellant states, “The record shows that officer[s]’ actions, at all relevant times, amounted to a continuation of the effort to seize, as opposed to an effort to arrest.” (App.Br.10.) However, based on the Court’s analysis in Brannon, what took place here was never simply a seizure, even one that would eventually result in

an arrest. Rather, the record shows the officers stopped the van for the purpose of arresting Appellant for nine outstanding warrants. Most notably, Deputy Scott testified that his job was to arrest people who were wanted and that if they run, it is his duty to chase them and try to arrest them and that is what he did here. He specifically stated that he did not arrest Appellant that night, but he tried. (R. 117, line 19-R. 118, line 9.) This testimony alone is sufficient to distinguish Appellant's case from Brannon and Williams.

In sum, the evidence presented established the officers' intent was to arrest Appellant and Appellant actively resisted the arrest by running and shooting as soon as the officers stopped the van. Furthermore, the trial court did not analyze the stop under a seizure analysis and, even if it did, it had no impact on the sufficiency of the evidence to survive a directed verdict motion. Sufficient evidence existed to prove the elements of resisting arrest with a deadly weapon, and the trial court properly submitted the case to the jury for its resolution. Therefore, this Court should affirm the trial court's decision.

II.

Appellant's argument regarding prior bad act evidence is not preserved, but even if preserved, the trial court properly allowed evidence that Appellant was facing substantial prison time to show motive and intent pursuant to Rule 404(b), SCRE.

Appellant argues the trial court erred in allowing evidence to be submitted to the jury that he was facing substantial jail time on pending charges, under the intent/motive exception to Rule 404(b), SCRE. He argues the trial court failed to conduct a prejudice analysis under Rule 403, SCRE, and that because the pending charges held no logical relevance to the crime of attempted murder, the evidence was inherently prejudicial.⁷ On the contrary, the trial court properly allowed the State to introduce evidence that Appellant was facing substantial prison time to show why he ran from police and began shooting at them when faced with an arrest. Thus, this Court should affirm the trial court's decision.

Initially, the State submits this issue is not preserved. The State wanted to introduce the fact Appellant had pending charges and brought the issue before the trial court in a pretrial matter. Defense counsel stated he would agree "wholeheartedly" if the State simply wanted to say Appellant had warrants for prior failures to appear issued by the trial court. (R. 34, lines 12-16.) However, he argued the State should not be allowed to mention the nature of the charges or the sentencing ranges. (R. 34, lines 17-20.) He

⁷ In his brief, Appellant also seems to argue the fact that a juror told other jurors he had made up his mind and did not need to hear more, and was subsequently held in contempt and taken into custody, demonstrated the prejudicial nature of the evidence. (App.Br.14; R. 146-154.) He does not elaborate on how this shows prejudice, but regardless, when the trial judge asked both parties if they had any objection to his removing the juror and replacing him with an alternate, he did not object. (R. 155, line 23-R. 156, line 19.) Thus, any issue involving this matter is not preserved for this Court's review.

further argued that if the trial court found the charges could come in for the purpose of intent, the trial court would still have to go through a Rule 403, SCRE, balancing test.

(R. 35, lines 2-5.) He also stated:

I think the State needs to be fair warned that that's the only reason that it comes in for intent not to prove his general bad character. That would be too far and that would be the reason we have 404(b). I don't know if there's any limiting instruction or if there is an admonishment from the Court beforehand to the State. But for the limited purpose that they want to introduce it, it's very hard for me to argue.

(R. 35, lines 8-16.) (emphasis added.) The solicitor conceded he did not care that the jury hear the nature of the charges but simply wanted to be able to state that Appellant had pending charges for which he could have faced mandatory minimums of ten to thirty years. (R. 36, lines 1-15.) In addition, the State asked to introduce evidence of a previous occasion when law enforcement tried to stop Appellant and he fled at a high rate of speed; however, the trial court did not allow that evidence. (R. 36, lines 5-21.) The trial court then stated:

I'm going [to] find that—first of all, I don't know that it is relevant, second of all, even if it is, because he did know about it or the charges were pending, to put that in would substantially outweigh the probative value. I am going to allow the evidence to come in based on intent and motive.

(R. 37, lines 7-13.) The trial judge determined he would think about whether to allow testimony about the mandatory minimums to come in and told the parties he would let them know in the morning, but he ruled that the State would at least be able to put in evidence that Appellant had the nine serious charges pending. (R. 38, lines 1-12.)

At that point, the following exchange took place:

The Court: Defense motions?

[Appellant]: I do have one, Your Honor. I was going to let them finish up whatever they had.

The Court: I thought that was your motion.

[Appellant]: I think if the State wants to introduce it, they have to--

The Court: I thought that was a motion in limine to keep all that out.

[Appellant]: I think if the State wants to introduce it, it has to be their motion to make sure it passes that balance test.
We could have done it at the time of trial.

(R. 39, lines 11-22.) (emphasis added.)

Defense counsel then argued Appellant should be able to invoke his Fifth Amendment right not to be questioned regarding the charges he had pending at the time of this incident. (R. 40, line 2-R. 43, line 13.) The trial court agreed with defense counsel that going into the merits of the drug offenses would not be relevant but that the State would have the right to ask Appellant about whether he understood he had nine warrants that were outstanding and whether he understood he was “looking at serious time for these offenses.” (R. 44, lines 9-22.) Defense counsel agreed with the trial court on that distinction. (R. 44, lines 23-24.) The trial court then clarified the State could pursue the line of questioning about the amount of time he was facing on pending charges but prohibited the State from asking whether he was guilty of those charges. (R. 45, lines 3-7.) Defense counsel stated, “Yes, sir. And that’s kind of what I was looking for so I could fully advise him.” (R. 45, lines 8-9.) After the State assured the trial court it was “not here to try the drug cases” but simply wanted to use the pending charges to show motivation, Appellant stated, “And if it comes up during trial, I’ll obviously object to it. We’ve already covered these issues. Thank you, Your Honor.” (R. 45, lines 17-19.)

The next morning, neither party asked the trial court for an additional ruling on whether the evidence regarding the specific amount of time he was facing on those pending charges could come in. Indeed, Appellant seemed satisfied with the trial court's decision to prohibit any evidence about the facts or merits of the pending charges. The State submits the above discussion that began with Appellant's argument regarding his Fifth Amendment right not to answer questions about the pending charges was sufficient to address the issue of the amount of time he was facing. Thus, the trial court's ruling that the State could pursue the line of questioning about the amount of time he was facing on pending charges but was prohibited from asking whether he was guilty of those charges seems to have encompassed the State's original motion regarding amount of time. It is clear from the following exchange that defense counsel agreed with the trial court's decision to allow the State to question Appellant regarding the minimums he could have been convicted for.

The Court: I agree with you. If he starts to go into the merits of the drug offenses, I don't think it's relevant.

[Appellant]: Okay.

The Court: I think he certainly would have a right to say, Mr. Allen, you understand that you had nine—nine warrants that were outstanding and I guess they had been served on him and he had made a first appearance or something.

[The State]: He was noticed to be at trial, Judge, and didn't show up.

The Court: I think he can ask him all that stuff. You understand that you were looking at serious time for these offenses.

[Appellant]: I can agree with you there, Judge.

The Court: He could have been convicted a minimum of 10 years on some of them. I can't remember what—

[The State]: 10 to 30, 0 to 15 and 0 to 10, Judge.

The Court: So I think he can pursue that line of questioning. He can't go into anything about were you guilty of that.

[Appellant]: Yes, sir. And that's kind of what I was looking for so I could fully advise him.

(R. 44, line 9-R. 45, line 9.) (emphasis added.) The fact that defense counsel then stated that he would object if "it" came up during trial shows that he realized the requirement to object contemporaneously to evidence that had been ruled upon during *in limine* motions. Yet he did not object at any time to the evidence the State presented during trial that Appellant had those nine pending charges and that he was facing significant time. The State submits defense counsel's failure to object to this evidence after acknowledging he would object when necessary demonstrates that the "it" he was referring to was any evidence of the nature of the charges themselves, which is what Appellant wanted to keep out. Thus, his argument now on appeal that evidence regarding the amount of time Appellant was facing was admitted in error misconstrues the record's account of the trial judge's rulings and counsel's arguments and statements.

When the State mentioned in its opening statement that Appellant "had nine charges pending at the time [and] could have done significant time up to [thirty] years," Appellant did not object.⁸ (R. 49, lines 8-12.) As Appellant points out in his brief, Captain Corey later testified that he had "outstanding bench warrants, all for serious

⁸ Appellant also did not object when the State argued in its closing, "This young man was wanted for multiple serious charges for which he could have gotten as much as [thirty] years on some of those charges." (R. 199, lines 13-15.)

felony charges,” to which Appellant did not object. (App.Br.13.) Appellant argues that “[t]hough counsel for [Appellant] did not renew his objection at this time, the admission of the evidence was so close in time to his objection prior to opening statements that it is preserved for review.” He bases this argument on State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001). “In most cases, [m]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced.” Forrester, 343 S.C. at 642, 541 S.E.2d at 840 (citation and internal quotation marks omitted). However, the Supreme Court held in Forrester that “[b]ecause no evidence was presented between the ruling and [the] testimony, there was no basis for the trial court to change its ruling. Thus, . . . [the] motion was not a motion *in limine*. The trial court’s ruling in this instance was in no way preliminary, but to the contrary, was a final ruling. Accordingly, [the defendant] was not required to renew her objection to the admission of the testimony in order to preserve the issue for appeal.” Id. (quoting State v. Mueller, 319 S.C. 266, 268-69, 460 S.E.2d 409, 410 (Ct. App. 1995)). The rationale behind this exception is that when no evidence is taken between the ruling and the introduction, no opportunity exists for the court to change its ruling. Here, Captain Corey was the fourth witness, so this certainly was not a case of the ruling coming directly prior to Appellant’s lack of objection to the evidence. Thus, Forrester is inapplicable and standard *in limine* rules apply. Consequently, Appellant’s failure to object prevents this issue from being preserved for appellate review. Additionally, when the trial court ruled during the discussion regarding Appellant’s Fifth Amendment right not to answer questions that the pending charges and the amount of time he was facing could come in, Appellant argued the nature of the

charges should not come in, and the trial court agreed. Thus, Appellant got what he asked for—that any evidence of the nature of the drug charges be excluded—and, consequently, had no need to object when evidence he agreed to was presented. The State submits the reason defense counsel did not object, then, is because he had already agreed with the trial court that evidence of the pending charges and their sentencing ranges could come in as long as the nature of the charges did not.

As to Appellant's argument that the trial judge failed to conduct a balancing test, the State submits the trial judge did conduct a balancing test under Rule 403, SCRE, when considering the totality of the 404(b) evidence the State sought to introduce. The trial judge excluded evidence that Appellant ran from the police a previous time. He specifically found "to put that in would substantially outweigh the probative value." (R. 37, lines 7-15.) By ruling immediately after making that statement that, "I am going to allow the evidence to come in based on intent and motive," the trial judge implicitly indicated the probative value of the evidence of the nine pending charges was not substantially outweighed by danger of prejudice. If Appellant desired a more specific ruling than that, he could have and should have requested one. It is incumbent upon an appellant to obtain a ruling from the trial judge to preserve an issue for appeal. Shortly after his ruling to allow the evidence in, when the trial court asked Appellant whether the *in limine* motion was a defense motion "to keep all that out," Appellant stated, "I think if the State wants to introduce it, it has to be their motion to make sure it passes that balance test. We could have done it at the time of trial." (R. 39, lines 17-22.) Despite saying this, Appellant did not ask for a balancing test or even object at all to the evidence at the time of trial. Thus, Appellant cannot now complain about an alleged error his own

conduct caused. See State v. Curtis, 356 S.C. 622, 632, 591 S.E.2d 600, 605 (2004) (“A party cannot complain of an error which his own conduct created.”).

Appellant’s argument that there must be “logical relevance” between the prior charges and the ones being prosecuted is based on State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) *overruled on other grounds by* State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014). In Adams, the issue was whether drug use could be used to establish motive for the crime charged. Specifically, the State sought to show the defendant robbed the store to get money for drugs. The Adams court found logical relevance between the drug use and the crime based on testimony by the defendant that he robbed the store because he ran out of money to buy drugs. The Court distinguished three other cases where drug use was not logically relevant to the crime because it was not contemporaneous with, or closely related to, the crimes committed. Appellant’s reliance on this “logical relevance” connection is misplaced. Here, the trial court did not allow evidence regarding the nature of the pending charges to come in, in direct response to defense counsel’s argument to exclude it. Thus, no testimony about possession of cocaine was presented to the jury. Consequently, it is of no moment that possession of cocaine is not “logically relevant” to resisting arrest with a deadly weapon and attempted murder. What was important in this case was the fact that Appellant had pending charges, was facing a significant amount of time in prison, and thus was motivated to resist arrest and shoot at the officers when the police stopped him. Any pending charge that fit this criteria was logically relevant. No other connection between the nature of the pending charges and the current crime was necessary because that evidence was excluded pursuant to the trial judge’s favorable ruling for Appellant to exclude any evidence of the merits of the drug offenses. Thus, the trial court’s decision and Appellant’s convictions should be affirmed.

CONCLUSION

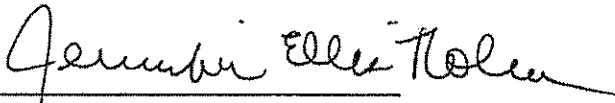
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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Attorney General

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Assistant Attorney General

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Solicitor, Fifth Judicial Circuit

BY: 
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ATTORNEYS FOR RESPONDENT

July 6, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of General Sessions

James R. Barber, III, Circuit Court Judge

Appellate Case No. 2014-000165

THE STATE,

Respondent,

v.

ERNEST MAURICE ALLEN,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule
211(b), SCACR.

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
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Appellant.

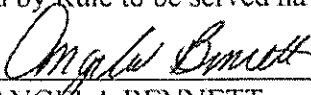
PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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The Floyd Law Firm PC
P.O. Drawer 14607
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Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 6th day of July, 2015.


ANGELA BENNETT
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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

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ATTORNEY GENERAL'S
OFFICE

Appeal From Kershaw County
James Barber, Circuit Court Judge

Case No. 2014-000165

Mf file
(Jennifers
case)

The State Appellee

V.

Ernest Allen.....Appellant

**APPELLANT'S MOTION TO SUPPLEMENT FINAL BRIEF OF APPELLANT
BASED ON RECENTLY DECIDED CASE LAW.**

NOW COMES the Appellant, who moves this Honorable Court for leave to supplement the Final Brief of Appellant. Appellant's request is based on the fact that this Court's decision in State v. King (S.C. App. 2015), having been decided after the initial filing of Appellant's brief and having recently come to the attention of Appellant's counsel, presents a new legal issue which was not available at the time Appellants Brief was filed. Appellant seeks leave to include the following as a third point of argument:

III. Did the trial Court commit reversible error when the Court instructed the jury that specific intent to kill was not an element of attempted murder statute S.C. Code §16-3-29?

Appellant further contends that this issue has otherwise been preserved for appeal, is likely to be dispositive, and the interest of justice so requires.

PROCEDURAL BACKGROUND

The initial brief of Appellant was timely filed on January 8th, 2015. Thereafter, on April 22, 2015 this Court's ruling in State v. King was handed down. That decision deals squarely with the intent required for conviction under S.C. Code § 16-3-29. Oral arguments were held in this case on February 2nd, 2016. Thereafter the decision came to the attention of Appellant's counsel. As of the date of this motion, the Court has not rendered its decision.

ADDITIONAL ARGUMENT REQUESTED

Appellant seeks to include, as an additional argument, that the trial Court committed reversible error when it instructed the jury that:

"a specific intent to kill is not an element or attempt of attempted murder, but there must be a general intent to commit serious bodily injury". Tr. tr. p. 268.

The record also reveals that Defense counsel timely objected to the instruction at trial:

"Your honor did read from what you told us you would. I would disagree that specific intent is not an element of attempted murder. I'd ask you to correct that but I understand the court's position on that. I **just make my objection noted**". Tr. tr. p. 278.

As such the issue is otherwise preserved for review by this Court.

In King, this Court ruled for the first time that S.C. Code §16-3-29, which was enacted in 2010, was a specific intent crime requiring a finding that the Defendant acted with the specific intent to kill. In the Case, the trial Court charged the jury that:

"A Specific intent to kill is not an element of attempted murder but it must be a general intent to commit serious bodily harm." Id.

This instruction is the exact same instruction given in this case. This Court's decision in King makes clear that the record likely contains a reversible error of law for which Appellant requests the opportunity to be heard. Appellant further contends that given the seriousness of the charges for which the Appellant is facing, the fact that King was decided after submission of Appellant's initial brief, and that no decision has yet been reached by this Court, justice so requires that Appellant's motion be granted, and as such Appellant request fourteen (14) days in which to submit an amended brief.

Respectfully Submitted,

By: T. Jarrett Bouchette

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ROBERT M. DUDEK
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ATTORNEYS FOR APPELLANT

This 24th day of February 2016.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM KERSHAW COUNTY
COURT OF GENERAL SESSIONS

James Barber, Circuit Court Judge

Case No. 2014-000165

The State.....Appellee

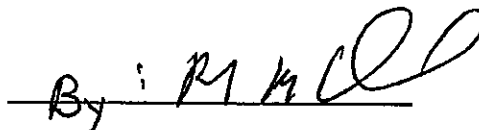
V.

Ernest Allen.....Appellant

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the "Appellants Motion to Supplement Final Brief of Appellant Based on Recently Decided Case Law" has been served upon the following parties this 23rd day of February , 2016

Mark Farthing Esq.
Office of the Attorney General
PO Box 11549
Columbia SC 29211

By: 

T. Jarrett Bouchette, Esq.
ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Kershaw County
Honorable James R. Barber, III, Circuit Court Judge
Appellate Case No. 2014-000165

THE STATE,

Respondent,

vs.

ERNEST MAURICE ALLEN,

Appellant.

**RETURN TO APPELLANT'S MOTION TO SUPPLEMENT
FINAL BRIEF OF APPELLANT BASED ON
RECENTLY DECIDED CASE LAW**

Respondent ("the State"), through its undersigned counsel, would respectfully show unto the Court as follows:

Procedural History

In December of 2012, Appellant Ernest Maurice Allen was eventually apprehended and arrested after he fled from and fired multiple gunshots at law enforcement officers attempting to lawfully arrest him on outstanding bench warrants. In July of 2013, the Kershaw County Grand Jury indicted Appellant for four counts of attempted murder, one count of resisting arrest with a deadly weapon, and one count of possession of a weapon during the commission of a violent crime. On January 13, 2014, a jury trial was commenced in the Kershaw County Court of General Sessions with the Honorable James R. Barber, III, circuit court judge, presiding. During trial, the trial judge granted a directed verdict as to one of the attempted murder charges.

Thereafter, at the conclusion of trial, the jury convicted Appellant of two counts of attempted murder, one count of the lesser-included offense of assault and battery of a high and aggravated nature, one count of resisting arrest with a deadly weapon, and one count of possession of a weapon during the commission of a violent crime. Following the verdict, the trial judge sentenced Appellant to concurrent terms of imprisonment of twenty years for each of the attempted murder convictions, twenty years for the assault and battery of a high and aggravated nature conviction, and two years for the resisting arrest with a deadly weapon conviction. Likewise, the trial judge sentenced Appellant to a consecutive four-year term of imprisonment for the possession of a weapon during the commission of a violent crime conviction. Appellant then timely filed a notice of appeal.

Subsequently, on January 6, 2015, Appellant filed an Initial Brief of Appellant and Designation of Matter with this Court. In his initial brief, Appellant raised two distinct issues – one challenging the trial judge’s ruling in regard to his motion for a directed verdict on the resisting arrest with a deadly weapon charge and another challenging the trial judge’s admission of evidence related to his prior criminal acts. Significantly, Appellant did not raise any issues challenging the trial judge’s instructions to the jury on any grounds. Following the filing of the Initial Brief of Appellant, the State – on April 22, 2015 – filed an Initial Brief of Respondent addressing the issues raised in Appellant’s initial brief along with its own Designation of Matter. Thereafter, on June 22, 2015, Appellant filed the Record on Appeal containing the matter the parties believed was relevant to the issues Appellant had raised on appeal, and the parties filed their final briefs shortly after in July of 2015. Following the filing of the final briefs, this Court scheduled Appellant’s appeal for oral argument, and an oral argument was conducted on

February 2, 2016. Then, twenty-two days later, Appellant filed his Motion to Supplement Final Brief of Appellant Based on Recently Decided Case Law.

Response to Appellant's Motion Seeking to File a Supplemental Brief Addressing a Previously-Unraised Appellate Issue

In his Motion to Supplement Final Brief of Appellant Based on Recently Decided Case Law, Appellant asks this Court to permit him to file an amended or supplemental final brief of appellant raising an entirely distinct issue that he previously elected not to pursue in his appellate brief. Specifically, Appellant seeks to raise an issue in regard to whether the trial judge committed reversible error through his jury instructions on the intent element of the offense of attempted murder. In support of that request, Appellant notes the issue he now seeks to pursue was addressed in State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), which was decided on April 22, 2015 – a date three months and seventeen days after Appellant submitted his initial brief and ten months and three days before Appellant filed his motion seeking to raise the new issue. Because King was decided after Appellant filed his initial brief, Appellant maintains it “presents a new legal issue which was not available at the time” he filed his brief.¹ As a result, Appellant asserts this Court should grant his motion and permit him to submit a new appellate brief raising a previously-unraised issue in an appeal in which the briefs and records have long been completed and submitted to this Court, an oral argument has been conducted before this Court, and a decision is presently pending from this Court.

¹ It is unclear why Appellant contends the decision in King presented a new legal issue that was not available at the time he filed his initial brief. Significantly, if Appellant's contention was correct and an appellant could not have raised an appellate challenge to a trial judge's jury instruction on attempted murder until after an appellate court decision had been issued on that subject, the decision in King itself could not exist because the issue would have been “unavailable” for King to raise. Thus, it would be more accurate to state Appellant could have pursued an appellate challenge to the trial judge's attempted murder jury instruction in light of fact defense counsel objected to it during trial and simply elected not to do so in favor of raising other appellate issues until he reconsidered his earlier decision and filed his motion seeking to file a supplemental or amended brief nearly a year after King was decided.

Contrary to Appellant's contentions, Appellant's motion should be denied because no authority in South Carolina permits an appellant to raise new issues after that appellant files an initial brief with the appellate court. Instead, pursuant to South Carolina law, an appellant's argument on appeal is ordinarily limited to the issues raised in the initial brief, and issues not raised in that brief are deemed to be abandoned. See Rule 208(b)(1)(B) ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); see also Jones v. Leagan, 384 S.C. 1, 17, 681 S.E.2d 6, 15 (Ct. App. 2009) ("An issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal."); Gold Kist, Inc. v. Citizens & S. Nat'l Bank of South Carolina, 286 S.C. 272, 276, 333 S.E.2d 67, 70 (Ct. App. 1985) (instructing issues not raised in an appellate brief are deemed to be abandoned).

Furthermore, after an appellant selects the issues he wishes to pursue on appeal and files an initial brief, that appellant is precluded from using a reply brief, a final brief, an oral argument, a petition for rehearing, or a petition for a writ of certiorari to raise new, previously-unraised issues. See Rule 211(b), SCACR (instructing final briefs must be identical to initial briefs in every respect except with respect to references to the record and the correction of typographical errors); see also Herron v. Century BMW, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011) ("[A] party may not raise an issue for the first time in a petition for rehearing."); State v. Nelson, 336 S.C. 186, 193, 519 S.E.2d 786, 789 (1999) ("It is axiomatic that oral argument may not be used as a vehicle to argue issues not argued in the appellate brief."); Bochette v. Bochette, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) ("An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant's brief."); JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 77 (2nd ed. 2002) ("There are two prerequisites to preserving an issue for consideration by the Supreme Court on a

writ of certiorari: (1) the issue must have been raised in the **initial arguments to the Court of Appeals**, and (2) the issue must have been raised in the petition for rehearing before the Court of Appeals.” (emphasis added)). For the same reasons our rules and case law consider an issue not raised in an initial brief to be waived and prohibit an appellant from raising a new issue in a reply brief, a final brief, during oral argument, or in any pleadings filed after an appellate court reaches a decision in a case, Appellant is not permitted to amend his final brief to raise a new, previously-unraised issue, and his motion seeking to do just that after all the briefs have been filed, the record has been filed, and oral argument has been conducted must be denied. See Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992) (“[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State.”); cf. Sloan Constr. Co., Inc. v. South Carolina Bd. of Health and Envtl. Control, 285 S.C. 523, 526, 331 S.E.2d 345, 347 (1985) (“The second brief[, which was a revised brief of appellant,] was improper. Our rules do not allow such a revision. The prejudice created by such a brief is obvious, and it will not be considered.”).

WHEREFORE, Respondent prays that this Court will deny Appellant’s Motion to Supplement Final Brief of Appellant Based on Recently Decided Case Law; and grant such other and further relief as the Court may deem just and proper.²

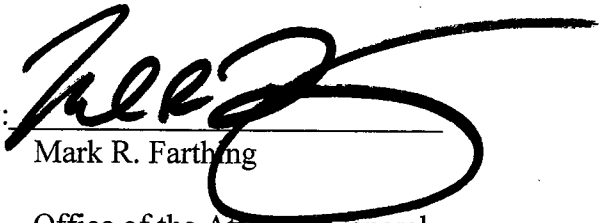
Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

² Although the State believes such relief would be improper, the State would ask for an opportunity to file its own amended brief and be heard on the issue in the event this Court were to grant Appellant’s motion.

By:


Mark R. Farthing

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February 29, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Kershaw County
Honorable James R. Barber, III, Circuit Court Judge
Appellate Case No. 2014-000165

THE STATE,

Respondent,

vs.

ERNEST MAURICE ALLEN,

Appellant.

PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Return to Appellant's Motion to Supplement Final Brief of Appellant Based on Recently Decided Case Law on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

T. Jarrett Bouchette, Esquire
Johnny Gardner Law Group, P.A.
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Conway, SC 29526

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 29th day of February, 2016.


ANNE A. MUELLER
Legal Assistant
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Post Office Box 11549
Columbia, SC 29211

The South Carolina Court of Appeals

The State, Respondent,

v.

Ernest Maurice Allen, Appellant.

Appellate Case No. 2014-000165

The Honorable James R. Barber, III

Kershaw County

Trial Court Case No. 2013GS2800681, 2013GS2800682,
2013GS2800683, 2013GS2800685, 2013GS2800811

ORDER

The Court has received the Appellant's motion to supplement the final brief of appellant based on recently decided case law, as well as the Respondent's return to this motion. The motion is Denied.

FOR THE COURT

BY

Jay A. Kitchin
CLERK

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire

Robert Michael Dudek, Esquire *RL*

Thomas Jarrett Bouchette, Esquire

Jennifer Ellis Roberts, Esquire

Daniel Edward Johnson, Esquire

Mark Reynolds Farthing, Esquire

FILED

31281110

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Ernest Maurice Allen, Appellant.

Appellate Case No. 2014-000165

Appeal From Kershaw County
James R. Barber, III, Circuit Court Judge

Unpublished Opinion No. 2016-UP-135
Heard February 2, 2016 – Filed April 6, 2016

AFFIRMED

Thomas Jarrett Bouchette, of Johnny Gardner Law
Group, P.A., of Conway, and Chief Appellate Defender
Robert Michael Dudek, of Columbia, for Appellant

Attorney General Alan McCrory Wilson, Assistant
Attorney General Mark Reynolds Farthing, Assistant
Attorney General Jennifer Ellis Roberts, and Solicitor
Daniel Edward Johnson, all of Columbia, for
Respondent.

PER CURIAM: Ernest M. Allen appeals his convictions for resisting arrest with a deadly weapon, possession of a weapon during the commission of a violent crime, assault and battery of a high and aggravated nature (ABHAN), and two counts of attempted murder. Allen contends the trial court erred in denying his motion for a directed verdict on the resisting arrest charge. He also maintains the trial court erred in allowing evidence of pending charges to be submitted to the jury. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in denying his motion for a directed verdict on the resisting arrest charge: *State v. Brannon*, 388 S.C. 498, 501, 697 S.E.2d 593, 595 (2010) ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." (quoting *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006))); *Weston*, 367 S.C. at 292-93, 625 S.E.2d at 648 (Holding if any direct evidence or substantial circumstantial evidence reasonably tends to prove the guilt of the accused, this court must find the case was properly submitted to the jury); S.C. Code Ann. § 16-3-625 (2015) ("A person who resists the lawful efforts of a law enforcement officer to arrest him or another person with the use or threat of use of a deadly weapon against the officer, and the person is in possession or claims to be in possession of a deadly weapon, is guilty of a felony and, upon conviction, must be punished by imprisonment for not more than ten nor less than two years.").

2. As to whether the trial court erred in allowing evidence of pending charges to be submitted to the jury: *State v. Williams*, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (holding an issue not raised and ruled upon by the trial court is not preserved for appeal); *Ex parte McMillan*, 319 S.C. 331, 334, 461 S.E.2d 43, 45 (1995) (holding a party cannot acquiesce to an issue at trial, but then complain on appeal); *State v. Mitchell*, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998) ("[B]ecause counsel acquiesced in the judge's limitation of his cross-examination, and made no other objections regarding [the issue], [a]ppellant cannot now complain about this issue.").

AFFIRMED.

HUFF, A.C.J., and KONDUROS and GEATHERS, JJ., concur.

RECEIVED

MAY 17 2016

ATTORNEY GENERALS
OFFICE

PETITION FOR REHEARING FOR A SENTENCE
AFFIRMED BY THE COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

Appellate Case No.2014-000165

The State, Respondent

v.

Earnest Maurice Allen, Appellant.

PETITION FOR REHEARING OF APPELLANT
EARNEST M. ALLEN

Earnest Maurice Allen appeals the decision of the Court of Appeals to affirm his conviction for Attempted Murder without ruling on newly supplemented evidence that was submitted by former lawyer on February 24, 2016 in regards to specific intent before the decision was made by the Court to deny his appeal on April 6, 2016.

s/ Earnest M. Allen, Pro Se
Earnest M. Allen
386 Redemption Way
McCormick SC 29899

April 20, 2016

Other Counsel of Record:

Attorney General Alan McCrory Wilson, Assistant
Attorney General Mark Reynolds Farthing, Assistant
Attorney General Jennifer Ellis Roberts
and Solicitor Daniel Edward Johnson, all of Columbia
for Respondent.

Thomas Jarrett Bouchette
Johnny Gardner Law, P.A.
212 Main Street
Conway, SC 29526
Former Attorney for Appellant

SC Attorney General
RECEIVED

MAY 16 2016

Referred to

Roberts/rm

Answered

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QUESTIONS PRESENTED

1. Did the Court of Appeals error in affirming conviction without ruling also on issue regarding specific intent that was raised in a supplemented brief and submitted to the Court before decision was made to affirm based on other issues raised in initial brief?
2. Did the Court of Appeals error in not ruling that the trial Court committed reversible error when it instructed the jury that specific intent to kill was not an element of attempted murder statute S.C. Code B16-3-29?

ARGUMENT

1. The Court of Appeals committed error when it made the decision to affirm my conviction for Attempted Murder without ruling on supplemented evidence regarding specific intent, that was submitted to the Court after submission of initial brief due to new ruling of law in State v. King (S.C. App. 2015)

2. The trial court committed reversible error when it instructed the jury that:

"a specific intent to kill is not an element or attempt of attempted murder, but there must be a general intent to commit serious bodily injury."Tr.tr.p.268 (Line 12 and 13)

The record also reveals that Defense counsel timely objected to the instruction at trial:

"Your honor did read from what you told us you would. I would disagree that specific intent is not an element of attempted murder. I'd ask you to correct that but I understand the Court's decision on that. I just make my objection noted."Tr.tr.p.278(Line 7-10)

As such the issue is otherwise preserved for the review by this Court.

In King, this Court ruled for the first time that S.C. Code 816-3-29, which was enacted in 2010, was a specific intent crime requiring a finding that the Defendant acted with the specific intent to kill. In this case, the trial Court charged the jury that:

"A specific intent to kill is not an element of attempted murder but it must be a general intent to commit serious bodily harm."Id.

This instruction is the same exact instruction given in this case. This Court's decision in King makes clear that the record contains a reversible error of law for which I request the opportunity to be heard.

CONCLUSION

The Court of Appeals should grant this petition for a rehearing.

Respectfully submitted,

s/ Earnest M. Allen, Pro Se
Earnest M. Allen
386 Redemption Way
McCormick SC 29899

PROOF OF SERVICE OF A PETITION FOR REHEARING

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

Appellate Case No.2014-000165

The State, Respondent

v.

Earnest Maurice Allen, Appellant

PROOF OF SERVICE

I certify that I have served the notice of A Petition for Rehearing on the Court of Appeals by depositing a copy of it in the United States Mail, postage prepaid, on April 20, 2016 addressed to Jenny Abbott Kitchings Clerk of Court P.O. Box 11629 Columbia SC 29211.

I certify that I have served the notice of A Petition for Rehearing on the State by depositing a copy of it in the United States Mail, postage prepaid, on April 20, 2016 addressed to Alan McCrory Wilson P.O. Box 11549 Columbia, SC 29211-1549.

April 20, 2016

s/ Earnest M. Allen
Earnest M. Allen
386 Redemption Way
McCormick SC 29899



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

May 03, 2016

Ernest Maurice Allen, 310134
McCormick Correctional Institution
386 Redemption Way
McCormick SC 29899

Re: The State v. Ernest M. Allen
Appellate Case No. 2014-000165

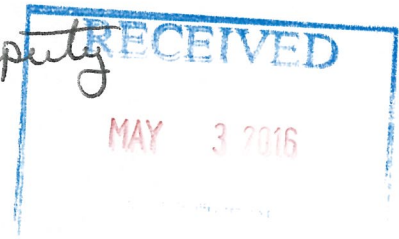
Dear Mr. Allen:

This responds to your recent *pro se* petition for rehearing. Since you are represented by counsel in this matter, no action will be taken on this *pro se* filing. *Miller v. State*, 388 S.C. 347, 697 S.E.2d 527 (2010); *Jones v. State*, 348 S.C. 13, 558 S.E.2d 517 (2002); *State v. Stuckey*, 333 S.C. 56, 508 S.E.2d 564 (1998); *Foster v. State*, 298 S.C. 306, 379 S.E.2d 907 (1989).

Very truly yours,

V. Claire Allen, Deputy

CLERK



cc: Alan McCrory Wilson, Esquire
Robert Michael Dudek, Esquire
Thomas Jarrett Bouchette, Esquire
Jennifer Ellis Roberts, Esquire
Daniel Edward Johnson, Esquire
Mark Reynolds Farthing, Esquire

RP

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County

James R. Barber III, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

ERNEST MAURICE ALLEN,

APPELLANT

Appellate Case No. 2014-000165

MOTION TO BE RELIEVED AS COUNSEL

Counsel for Ernest Maurice Allen moves to be relieved as counsel. In support of this motion, Counsel states:

1. On October 3, 2014, Chief Appellate Defender Robert Dudek moved this Court to appoint Thomas Bouchette as lead counsel in this case as part of the 2014 Appellate Practice Project. On October 7, 2014, this Court appointed Mr. Bouchette as lead counsel and Mr. Dudek as co-counsel. Hereinafter, Mr. Bouchette and Mr. Dudek will be referred to collectively as “Counsel.”

2. On January 6, 2015, Counsel filed the Initial Brief of Appellant and Designation of Matter. On April 22, 2015, Respondent filed the Initial Brief of Respondent and Designation of

Matter. The Record on Appeal was filed on June 22, 2015. Counsel filed Final Brief of Appellant on July 16, 2015, and Respondent filed the Final Brief of Respondent on July 15, 2015.

3. This Court heard argument on February 2, 2016.

4. On April 6, 2016, this Court issued an unpublished opinion affirming Appellant's conviction. State v. Ernest Allen, 2016-UP-135 (S.C. Ct. App. filed April 6, 2016).

5. On April 11, 2016, Counsel sent Appellant a letter informing him of this Court's opinion, advising him that our office would be closing his case, and informing him of the rights and time limits associated with an application for post-conviction relief. In short, Counsel would not seek additional relief through the direct appeal process on Appellant's behalf.

6. On April 22, 2016, Appellant filed a *pro se* petition for rehearing.

7. Counsel received notice of the petition for rehearing by way of letter from Mark Farthing, the attorney for the Respondent, on April 29, 2016.

8. After inquiry, the Clerk's Office indicated that they would also like Counsel to file a formal Motion to Withdraw. In compliance with the Clerk's request, Counsel is filing the instant motion.

9. This motion is made in good faith. Counsel has not asked opposing counsel to consent.

10. Counsel understands that Appellant intends to proceed *pro se* or obtain additional counsel. If the Court grants the instant motion, Counsel respectfully requests this Court allow Appellant to re-file his prior *pro se* petition for rehearing.

Wherefore, Thomas Jarrett Bouchette and Robert M. Dudek, Counsel for Ernest Maurice Allen, move to be relieved as counsel.

Respectfully submitted,

Susan B. Hackett for
 Robert M. Dudek
 Chief Appellate Defender
 1330 Lady Street, Ste. 401
 Columbia, S.C. 29201
 803-734-1330

Susan B. Hackett for
 T. Jarrett Bouchette
 Johnny Gardner Law Group, P.A.
 212 Main Street
 Conway, S.C. 29526
 803-248-7135

ATTORNEYS FOR APPELLANT

This 3rd day of May, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County

James R. Barber III, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

ERNEST MAURICE ALLEN,

APPELLANT

Appellate Case No. 2014-000165

CERTIFICATE OF SERVICE

I certify that a true copy of the motion to be relieved in this case has been served on Jennifer Ellis Roberts at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Ernest Maurice Allen, #310134, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 3rd day of May, 2016.

Susan B. Hackett for
Robert M. Dudek
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 3rd day
of May, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

The South Carolina Court of Appeals

The State, Respondent,

v.

Ernest Maurice Allen, Appellant.

Appellate Case No. 2014-000165



The Honorable James R. Barber, III
Kershaw County

Trial Court Case No. 2013GS2800681, 2013GS2800682,
2013GS2800683, 2013GS2800685, 2013GS2800811

ORDER

The Court has received a motion to relieve Mr. Thomas Bouchette and Mr. Robert M. Dudek as counsel for Ernest M. Allen. This motion is Granted. Mr. Thomas Bouchette and Mr. Robert M. Dudek are now relieved as counsel and the Appellant, Ernest M. Allen, is considered to be proceeding as *pro se*.

FOR THE COURT

U. Ke J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire

Robert Michael Dudek, Esquire *mpm (AP cur)*

Thomas Jarrett Bouchette, Esquire

Jennifer Ellis Roberts, Esquire

Daniel Edward Johnson, Esquire

Mark Reynolds Farthing, Esquire

Ernest Maurice Allen

FILED

7/15/16



RECEIVED

JUL 19 2016

ATTORNEY GENERALS

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
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www.sccourts.org

July 18, 2016

The Honorable Joyce McDonald
PO Box 1557
Camden SC 29021-1557

REMITTITUR

Re: The State v. Ernest M. Allen
Lower Court Case No. 2013GS2800681, 2013GS2800682,
2013GS2800683, 2013GS2800685, 2013GS2800811
Appellate Case No. 2014-000165

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,

Joy A. Kitchings
CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire
Robert Michael Dudek, Esquire
Thomas Jarrett Bouchette, Esquire
Jennifer Ellis Roberts, Esquire
Daniel Edward Johnson, Esquire
Mark Reynolds Farthing, Esquire

RECEIVED

AUG 29 2016

**ATTORNEY GENERALS
OFFICE**

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Kershaw County
James R. Barber, Circuit Court Judge

*Return due
9/2/16*

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

EARNEST MAURICE ALLEN,

APPELLANT

Appellate Case No. 2014-000165

MOTION TO RECALL THE REMITTITUR

Now comes, the Appellant, who request this Honorable Court to recall the the remittitur. Appellant's request is based on the facts that:

1. Appellant submitted a petition for a rehearing on time.
2. Appeal counsel closed Appellant's case along with letter dated April 11, 2016. Therefore, appellant was not "Hybrid Counsel." (See Exhibit B)
3. When Appellant's counsel became aware that Appellant's petition was not being considered because of his failure to file a motion to relieve himself as counsel, appeal counsel immediately submitted that motion to the Court on May 3, 2016, stating that, "In short, Counsel would not seek additional relief through the direct appeal process on Appellant's behalf." (See Exhibit A, pg.2#5), and also respectfully requested that the Court allow Appellant to re-file. (See Exhibit A, pg.2#10)

For the above mentioned reasons this SC Court of Appeals should grant the Appellant's motion to recall the remittitur, and consider the appellant's

Petition For A Reahearing dated April 20, 2016, timely filed.

Respectfully submitted,

Earnest M. Pickett(Allen)
SCDC# 310134
386 Redemption Way
McCormick SC, 29899
Pro'Se

This 13rd day of August, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Kershaw County
James R. Barber, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

EARNEST MAURICE ALLEN,

APPELLANT

Appellate Case No. 2014-000165

Affidavit

CERTIFICATE OF SERVICE

I, Earnest M. Allen, certify that I have served a motion to recall the remittitur in this case on Jenny A. Kitchings, Clerk of SC Court of Appeals, Post Office Box 11629, Columbia SC 29211, and Jennifer Ellis Roberts, at the Attorney General's Office, Post Office Box 11549, Columbia SC 29211-1549, this 23rd day of August, 2016.

/s/ Earnest M. Allen

Earnest M. Allen #310134

386 Redemption Way

McCormick SC 29899

Pro'Se

SWORN TO BEFORE ME this 23rd day
of ~~May~~, 2016. of August 2016

Michael Camme
(L.S.)

Notary Public for South Carolina

My Commission Expires: July 09, 2026

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County

James R. Barber III, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

ERNEST MAURICE ALLEN,

APPELLANT

Appellate Case No. 2014-000165

MOTION TO BE RELIEVED AS COUNSEL

Counsel for Ernest Maurice Allen moves to be relieved as counsel. In support of this motion, Counsel states:

1. On October 3, 2014, Chief Appellate Defender Robert Dudek moved this Court to appoint Thomas Bouchette as lead counsel in this case as part of the 2014 Appellate Practice Project. On October 7, 2014, this Court appointed Mr. Bouchette as lead counsel and Mr. Dudek as co-counsel. Hereinafter, Mr. Bouchette and Mr. Dudek will be referred to collectively as "Counsel."

2. On January 6, 2015, Counsel filed the Initial Brief of Appellant and Designation of Matter. On April 22, 2015, Respondent filed the Initial Brief of Respondent and Designation of

Matter. The Record on Appeal was filed on June 22, 2015. Counsel filed Final Brief of Appellant on July 16, 2015, and Respondent filed the Final Brief of Respondent on July 15, 2015.

3. This Court heard argument on February 2, 2016.

4. On April 6, 2016, this Court issued an unpublished opinion affirming Appellant's conviction. State v. Ernest Allen, 2016-UP-135 (S.C. Ct. App. filed April 6, 2016).

5. On April 11, 2016, Counsel sent Appellant a letter informing him of this Court's opinion, advising him that our office would be closing his case, and informing him of the rights and time limits associated with an application for post-conviction relief. In short, Counsel would not seek additional relief through the direct appeal process on Appellant's behalf.

6. On April 22, 2016, Appellant filed a *pro se* petition for rehearing.

7. Counsel received notice of the petition for rehearing by way of letter from Mark Farthing, the attorney for the Respondent, on April 29, 2016.

8. After inquiry, the Clerk's Office indicated that they would also like Counsel to file a formal Motion to Withdraw. In compliance with the Clerk's request, Counsel is filing the instant motion.

9. This motion is made in good faith. Counsel has not asked opposing counsel to consent.

10. Counsel understands that Appellant intends to proceed *pro se* or obtain additional counsel. If the Court grants the instant motion, Counsel respectfully requests this Court allow Appellant to re-file his prior *pro se* petition for rehearing.

Wherefore, Thomas Jarrett Bouchette and Robert M. Dudek, Counsel for Ernest Maurice Allen, move to be relieved as counsel.

Respectfully submitted,

Susan B. Hackett for
Robert M. Dudek
Chief Appellate Defender
1330 Lady Street, Ste. 401
Columbia, S.C. 29201
803-734-1330

Susan B. Hackett for
T. Jarrett Bouchette
Johnny Gardner Law Group, P.A.
212 Main Street
Conway, S.C. 29526
803-248-7135

ATTORNEYS FOR APPELLANT

This 3rd day of May, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Kershaw County

James R. Barber III, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

ERNEST MAURICE ALLEN,

APPELLANT

Appellate Case No. 2014-000165

CERTIFICATE OF SERVICE

I certify that a true copy of the motion to be relieved in this case has been served on Jennifer Ellis Roberts at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Ernest Maurice Allen, #310134, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 3rd day of May, 2016.

Susan B. Hackett for
Robert M. Dudek
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 3rd day
of May, 2016.

[Signature] (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.



JOHNNY GARDNER LAW GROUP, P.A.

DUI • PERSONAL INJURY • CRIMINAL • FAMILY • BUSINESS

JOHNNY GARDNER
HEATHER MOORE
JARRETT BOUCHETTE
ADAM SZYSZKOWSKI

April 11th, 2016

Mr. Earnest M. Pickett (Inmate # 310134)
386 Redemption Way
McComick SC 29899

Re: State v. Ernest M. Allen: Appellate Case No: 2014-000165

Dear Mr. Pickett (Allen):

Enclosed is a copy of the opinion of the Court of Appeals in your case. Unfortunately, the Court affirmed the trial Court's ruling and denied our request for a new trial. Please be advised that our office will be closing your case along with this letter.

Please be aware that there is a **one year statute of limitations for filing an application for post-conviction (PCR) relief**. This is one year from the date of the enclosed opinion. This statute of limitations is **very strictly enforced**, so please be sure that **you** comply with it. Please understand *it is your responsibility alone to be sure this PCR application is timely filed*. **This application must be filed with the clerk of court in the county of your conviction**. There is also now a **one year statute of limitations for filing for federal habeas**. However, you must **exhaust your PCR claims** in state court, before raising them in federal court.

Please be aware that the time between your direct appeal becoming final, and the date your PCR application is filed **will count against your federal habeas statute of limitations in the future**. I do wish you the best. Feel free to contact me if you have any questions.

Sincerely,

T. Jarrett Bouchette, Esq.

TJB
Enclosure: Post-Conviction Relief Application

Wherever life takes you, we'll be there.

212 MAIN STREET • CONWAY, SC 29526 • 843.248.7135 • FAX: 843.248.0270
WWW.JOHNNGARDNERLAW.COM • INFO@JOHNNGARDNERLAW.COM

The South Carolina Court of Appeals

The State, Respondent,

v.

Ernest Maurice Allen, Appellant.

Appellate Case No. 2014-000165

The Honorable James R. Barber, III

Kershaw County

Trial Court Case No. 2013GS2800681, 2013GS2800682,

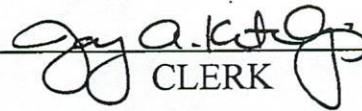
2013GS2800683, 2013GS2800685, 2013GS2800811

ORDER

The Court's remittitur was sent to the Clerk of Kershaw County on July 18, 2016. It is now necessary for this Court to recall the remittitur. The Clerk of Kershaw County is, therefore, directed to return the remittitur to the Clerk of the South Carolina Court of Appeals within ten days from the date of this order.

FOR THE COURT

BY


CLERK

Columbia, South Carolina

cc:

Ernest Maurice Allen, 310134

Alan McCrory Wilson, Esquire

Jennifer Ellis Roberts, Esquire

Daniel Edward Johnson, Esquire

Mark Reynolds Farthing, Esquire

The Honorable Joyce McDonald

FILED

September 9, 2016

The South Carolina Court of Appeals

The State, Respondent,

v.

Ernest Maurice Allen, Appellant.

Appellate Case No. 2014-000165

RECEIVED

OCT 24 2016

ATTORNEY GENERALS
OFFICE

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Huff J.

AK J.

John E. Deate J.

Columbia, South Carolina

cc:

Ernest Maurice Allen, 310134

Alan McCrory Wilson, Esquire

Jennifer Ellis Roberts, Esquire

Daniel Edward Johnson, Esquire

FILED

October 21, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

NOV 23 2016

Appeal from Kershaw County
James R. Barber, Circuit Court Judge

ATTORNEY GENERALS
OFFICE

THE STATE,

RESPONDENT,

V.

EARNEST MAURICE ALLEN,

APPELLANT,

Appellate Case No. 2014-000165

Case No. 2013-GS-28-0681;82;83

PETITION FOR WRIT OF CERTIORARI

Earnest M. Allen(Pickett)#310134
Pro'Se Petitioner
M.C.C.I. F3-B-120
386 Redemption Way
McCormick, S.C. 29899

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ALSO INCLUDED

*APPENDIX

*CERTIFICATE OF SERVICE FOR APPENDIX

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition For A Rehearing was made and finally ruled on by the Court of Appeals on this 21st day of October, 2016.

TABLE OF AUTHORITIES

Cases:

State V. King 412 S.C. 403, 772 S.E. 2d. 189 . .

Griffin v. Kentucky, 479 U.S. 314, 93 L.Ed. 2d. 649

Statutes:

S.C. Code Ann. 16-3-29

QUESTIONS PRESENTED

1. Did the S.C. Court of Appeals err by failing to act on Petitioner's Motion To Supplement A Final Brief with the issue of trial Judge's erroneous instructions to jury that "A specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury." State v. King, 412 S.C. 403, 772 S.E. 2d. 189 (2015)?

ARGUMENT

Petitioner filed a Motion To Supplement A Final Brief before the S.C. Court of Appeals dated February 24, 2016, see Exhibit A, to be allowed to raise the issue of trial Judge's erroneous instructions to the jury that "A specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury." See Exhibit B, Tr. tr. p. 268 (Lines 12-14).

The S.C. Court of Appeals, in State v. King, a case in which the exact jury instructions was given, held "the legislature intended to require the state to prove specific intent to commit murder as an element of attempted murder." Therefore, the trial Court erred by charging the jury that attempted murder is a general intent crime.

This exact same instruction was given in Petitioner's case, and the Court of Appeals failed to allow Petitioner to Supplement his Final Brief with this issue, which was preserved by Petitioner's trial counsel through objection. See Exhibit C, Tr. tr. p. 278 (Lines 6-10).

In sum, if prejudice was found in King due to the erroneous instruction being given to the jury that attempted murder is a general intent crime, then prejudice can also be found in Petitioner's case. Petitioner attempted to Supplement his Final Brief regarding this issue but was unable to do so because the Court of Appeals failed to act on his Motion To Supplement allowing him to raise this issue, which was preserved for appeal.

CONCLUSION

Therefore, for the foregoing facts and legal authority, Petitioner requests the Court to rule on his issue of trial Judge's erroneous instruction to the jury that attempted murder is a general intent crime; or send the issue back to the S.C. Court of Appeals for adjudication.

November 18, 2016.

/s/ Earnest M. Allen Pickett
Earnest M. Allen(Pickett)
M.C.C.I. F3-B-120
386 Redemption Way
McCormick, S.C. 29899
Pro'Se

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Kershaw County
James R. Barber, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EARNEST MAURICE ALLEN,

APPELLANT,

Appellate Case No. 2014-000165

Case No. 2013-GS-28-0681;82;83

DESIGNATION OF MATTER

Appellant proposes that the following be included in the Record on Petition For Writ Of Certiorari..

1. A copy of Motion To Supplement Final Brief Based On Recently Decided Case Law that was submitted to the SC Court of Appeals on February 24, 2016 by Appeal Counsel.
2. A copy of Trial Transcript pages 268 and 278.

I further certify that no matter in this Designation is irrelevant to this petition.

/s/ Ernest M. Allen-Pickett
Ernest M. Allen(Pickett)
Pro'Se Petitioner
386 Redemption Way
McCormick, S.C. 29899

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Kershaw County
James R. Barber, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EARNEST MAURICE ALLEN,

APPELLANT,

Appellate Case No. 2014-000165

Case No. 2013-GS-28-0681;82;83

CERTIFICATE OF SERVICE

I, Earnest M. Allen, certify that I have served the Petition For Writ Of Certiorari and Designation Of Matter on Respondent by depositing two copies of the same in the United States Mail, postage prepaid, addressed to:

ALAN McCRORY WILSON
MARK REYNOLDS FARTHING
JENNIFER ELLIS ROBERTS

Office of the Attorney General
Post Office Box 11549
Columbia, S.C. 29211-1549
(803)734-3727

I further certify that all parties required by Rule to be served have been served. This 18th day of November, 2016.

(Exhibit A)

COPY

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Kershaw County
James Barber, Circuit Court Judge

RECEIVED

FEB 24 2016

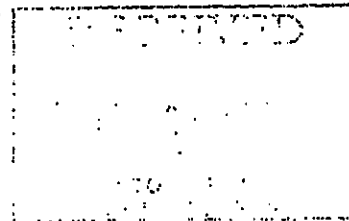
SC Court of Appeals

Case No. 2014-000165

The State Appellee

V.

Ernest Allen.....Appellant



**APPELLANT'S MOTION TO SUPPLEMENT FINAL BRIEF OF APPELLANT
BASED ON RECENTLY DECIDED CASE LAW.**

NOW COMES the Appellant, who moves this Honorable Court for leave to supplement the Final Brief of Appellant. Appellant's request is based on the fact that this Court's decision in State v. King (S.C. App: 2015), having been decided after the initial filing of Appellant's brief and having recently come to the attention of Appellant's counsel, presents a new legal issue which was not available at the time Appellants Brief was filed. Appellant seeks leave to include the following as a third point of argument:

III. Did the trial Court commit reversible error when the Court instructed the jury that specific intent to kill was not an element of attempted murder statute S.C. Code §16-3-29?

Appellant further contends that this issue has otherwise been preserved for appeal, is likely to be dispositive, and the interest of justice so requires.

PROCEDURAL BACKGROUND

The initial brief of Appellant was timely filed on January 8th, 2015. Thereafter, on April 22, 2015 this Court's ruling in State v. King was handed down. That decision deals squarely with the intent required for conviction under S.C. Code § 16-3-29. Oral arguments were held in this case on February 2nd, 2016. Thereafter the decision came to the attention of Appellant's counsel. As of the date of this motion, the Court has not rendered its decision.

ADDITIONAL ARGUMENT REQUESTED

Appellant seeks to include, as an additional argument, that the trial Court committed reversible error when it instructed the jury that:

"a specific intent to kill is not an element or attempt of attempted murder, but there must be a general intent to commit serious bodily injury". Tr. tr. p. 268. (Line 12 and 13)

The record also reveals that Defense counsel timely objected to the instruction at trial:

"Your honor did read from what you told us you would. I would disagree that specific intent is not an element of attempted murder. I'd ask you to correct that but I understand the court's position on that. I just make my objection noted". Tr. tr. p. 278. (Line 7-10)

As such the issue is otherwise preserved for review by this Court.

In King, this Court ruled for the first time that S.C. Code §16-3-29, which was enacted in 2010, was a specific intent crime requiring a finding that the Defendant acted with the specific intent to kill. In the Case, the trial Court charged the jury that:

"A Specific intent to kill is not an element of attempted murder but it must be a general intent to commit serious bodily harm." Id.

This instruction is the exact same instruction given in this case. This Court's decision in King makes clear that the record likely contains a reversible error of law for which Appellant requests the opportunity to be heard. Appellant further contends that given the seriousness of the charges for which the Appellant is facing, the fact that King was decided after submission of Appellant's initial brief, and that no decision has yet been reached by this Court, justice so requires that Appellant's motion be granted, and as such Appellant request fourteen (14) days in which to submit an amended brief.

(Exhibit B)

Jury Charge

268

Did the
evidence show
that I prepared?
... or hatred,
or ill will?

1 circumstances which are proved. Expressed malice is
2 shown when a person speaks words which express
3 hatred or ill will for another or when the person
4 prepared beforehand to do the act which was later
5 accomplished. For example, lying in wait for a
6 person or any other acts or preparation going to
7 show that the deed was within the defendant's mind
8 would be expressed malice.

9 Malice may be inferred from conduct showing a
10 total disregard for human life. Inferred malice may
11 also arise when the deed is done with a deadly
12 weapon. A specific intent to kill is not an element
13 or attempt -- of attempted murder, but there must be
14 a general intent to commit serious bodily injury.
15 Intent means intending the result which actually
16 occurred, not accidentally or involuntarily. Intent
17 may be shown by acts and conduct of the defendant
18 and other circumstances from which you may naturally
19 and reasonably infer intent.

20 Evidence of the character of the act, the
21 character of the instrument used, the manner in
22 which it was used, purpose to be accomplished may be
23 considered in determining the intent with which the
24 act was committed. Intent may also be inferred when
25 demonstrated that the defendant voluntarily and

Wrong! Isn't
Charge! specific
an intent
element
of attempted
murder?
Sure it is!

1 Honor.

2 THE COURT: Mister, uh, --

3 MR. KRINCICH: Yes, sir, Your Honor. As I
4 indicated previously, I do object to the charge of
5 attempted murder with regards to specific intent.
6 Your Honor did read from what you told us you would.
7 I would disagree that specific intent is not an
8 element of attempted murder. I'd ask you to correct
9 that but I understand the Court's position on that.
10 I just make my objection noted.

11 THE COURT: All right. It is. Thank you
12 very much.

13 MR. KRINCICH: Your Honor, I do have one
14 other issue. I don't know the true solution to it.
15 I just wanted to express this. I believe Your Honor
16 did everything you could to properly charge assault
17 and battery of a high and aggravated nature. I
18 understand the law and I've got it here in front of
19 me. There's and/or in there. There's a battery or
20 there could just be an assault. I'm just not sure
21 that it's clear enough for the jury. They don't
22 have to find an actual battery to find the assault
23 and battery of a high and aggravated nature. Before
24 we had commonlaw ABHAN, AHAN. Now, it's all under
25 one.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Kershaw County
James R. Barber, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EARNEST MAURICE ALLEN,

APPELLANT,

Appellate Case No. 2014-000165

Case No. 2013-GS-28-0681;82;83

CERTIFICATE OF SERVICE

I, Earnest M. Allen, certify that I have served the Appendix of The Petition For Writ Of Certiorari on Respondent by depositing two copies of the same in the United States Mail, postage prepaid, addressed to:

ALAN McCORRY WILSON
MARK REYNOLDS FARTHING
JENNIFER ELLIS ROBERTS

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I further certify that all parties required by Rule to be served have been served. This 10th day of November, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Richland County
Honorable James R. Barber, III, Circuit Court Judge
Appellate Case No. 2016-002345

RECEIVED

DEC 28 2016

S.C. SUPREME COURT

THE STATE,

Respondent,

vs.

ERNEST MAURICE ALLEN,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

The Court of Appeals did act on and correctly denied Allen's motion seeking for him to be allowed to supplement his final appellate brief with a previously-unraised issue challenging the trial judge's instructions to the jury on the offense of attempted murder because Allen abandoned that issue by not raising it in his initial appellate brief and South Carolina law does not permit an appellant to raise new arguments after all the briefs have been filed, the record on appeal has been filed, and an oral argument has been conducted in a particular case.

STATEMENT OF THE CASE**Procedural History**

In December of 2012, Petitioner Ernest Maurice Allen was eventually apprehended and arrested after he fled from and fired multiple gunshots at law enforcement officers attempting to lawfully arrest him on outstanding bench warrants. In July of 2013, the Kershaw County Grand Jury indicted Allen for four counts of attempted murder, one count of resisting arrest with a deadly weapon, and one count of possession of a weapon during the commission of a violent crime. On January 13, 2014, a jury trial was commenced in the Kershaw County Court of General Sessions with the Honorable James R. Barber, III, circuit court judge, presiding. During trial, the trial judge granted a directed verdict as to one of the attempted murder charges. Thereafter, at the conclusion of trial, the jury convicted Allen of two counts of attempted murder, one count of the lesser-included offense of assault and battery of a high and aggravated nature, one count of resisting arrest with a deadly weapon, and one count of possession of a weapon during the commission of a violent crime. Following the verdict, the trial judge sentenced Allen to concurrent terms of imprisonment of twenty years for each of the attempted murder convictions, twenty years for the assault and battery of a high and aggravated nature conviction, and two years for the resisting arrest with a deadly weapon conviction. Likewise, the trial judge sentenced Allen to a consecutive four-year term of imprisonment for the possession of a weapon during the commission of a violent crime conviction. Allen then timely filed a notice of appeal.

Subsequently, on January 6, 2015, Allen's appellate counsel filed an Initial Brief of Appellant and Designation of Matter with the Court of Appeals. In Allen's initial brief, appellate counsel raised two distinct issues – one challenging the trial judge's ruling in regard to Allen's motion for a directed verdict on the resisting arrest with a deadly weapon charge and another

challenging the trial judge's admission of evidence related to Allen's prior criminal acts. Significantly, appellate counsel did not raise any issues challenging the trial judge's instructions to the jury on any grounds. Following the filing of the Initial Brief of Appellant, counsel for the State – on April 22, 2015 – filed an Initial Brief of Respondent addressing the issues raised in Allen's initial brief along with the State's Designation of Matter. Thereafter, on June 22, 2015, appellate counsel filed the Record on Appeal containing the matter the parties believed was relevant to the issues that had been raised on appeal, and the parties filed their final briefs shortly after that in July of 2015. Following the filing of the final briefs, the Court of Appeals scheduled Allen's appeal for oral argument, and an oral argument was conducted on February 2, 2016. Then, twenty-two days later, appellate counsel filed a Motion to Supplement Final Brief of Appellant Based on Recently Decided Case Law through which he sought to raise an additional issue challenging the trial judge's jury instructions on attempted murder, and the State filed a return opposing that motion. Subsequently, on March 28, 2016, the Court of Appeals issued an order denying the motion.

Thereafter, on April 6, 2016, the Court of Appeals issued an unpublished opinion in which it unanimously affirmed Allen's convictions and sentence. State v. Allen, Op. No. 2016-UP-135 (S.C. Ct. App. filed Apr. 6, 2016). Following the issuance of that opinion, Allen filed a pro se Petition for Rehearing while still represented by appellate counsel on April 20, 2016, and the State objected to that petition as an improper pro se filing. On May 3, 2016, the Court of Appeals notified Allen it would not take action on his pro se petition based on the fact it was filed while he was still represented by counsel. On that same date, Allen's appellate counsel filed a Motion to Be Relieved as Counsel, and, on May 10, 2016, Allen refiled his pro se Petition for Rehearing. Subsequently, on July 15, 2016, the Court of Appeals granted appellate counsel's

motion to be relieved, and remittitur was issued on July 18, 2016. Following that, Allen moved for the remittitur to be recalled on August 23, 2016, and the Court of Appeals granted that motion on September 9, 2016. Thereafter, on October 21, 2016, the Court of Appeals denied Allen's pro se Petition for Rehearing. Allen then filed a petition for a writ of certiorari in the Supreme Court.

Factual History

On the afternoon of December 20, 2012, Investigator Michael Sellers of the Kershaw County Sheriff's Office provided his contact information to various people at several different apartment complexes located in Camden, South Carolina, and notified those people he was searching for Allen in connection to multiple outstanding warrants.¹ (R. p. 62; p. 81; p. 177). Thereafter, several hours later, Investigator Sellers received information indicating Allen, who was armed, was going to be riding in a beige-colored van that was leaving a particular apartment complex at that time. (R. pp. 63-64; pp. 81-82). In response, Investigator Sellers notified several other officers about the information he had received, and he responded to Allen's reported location along with those officers. (R. pp. 64-65; pp. 87-89; pp. 99-100; pp. 116-117).

Upon arriving, the officers encountered a van matching the description of the one Allen was reported to be travelling in, and they initiated an investigatory stop of that vehicle. (R. pp. 64-66; p. 82; pp. 89-90; pp. 100-101; p. 117). Once the van was stopped, Allen suddenly jumped out of the vehicle and rapidly fled from the area on foot. (R. p. 66; pp. 82-84; p. 90; p. 103; p. 117). In response, three officers chased after Allen and, during the pursuit, Allen pointed a handgun at the officers and fired multiple shots in their direction. (R. pp. 67-70; pp. 90-92; p. 104; pp. 117-118; pp. 126-127). However, Allen failed to hit anyone with his shots and escaped

¹ At that time, Allen had been charged with five counts of possession of cocaine with intent to distribute along with four counts of possession of cocaine with intent to distribute in proximity to a park or school and had failed to appear in court on several of those charges. (R. pp. 31-33; p. 65).

into a wooded area after one of the officers returned fire. (R. pp. 69-71; p. 92; pp. 118-120). Following Allen's escape, the officers regrouped, and a tracking unit was called to the scene. (R. pp. 70-71; pp. 92-93; p. 105; p. 120). During the ensuing search for Allen, officers located Allen's gun – a .38-caliber revolver – in the wooded area but were unable to locate Allen that night. (R. pp. 70-71; pp. 93-94; pp. 106-110; p. 131).

Subsequently, on the following day, Appellant was apprehended and arrested. (R. p. 71; p. 110). He was then indicted for numerous offenses, including resisting arrest and multiple counts of attempted murder, and he proceeded to trial. (R. p. 40). At the outset of trial, the solicitor indicated he wished to introduce evidence of Allen's pending charges to establish Allen's motive and intent at the time of the incident. (R. pp. 31-33). In response, defense counsel conceded it was "very hard for [him] to argue" against the limited purpose for which the solicitor wanted to admit the evidence related to the pending charges but asserted he did not believe specific information regarding the nature of the charges or their potential sentences was appropriate. (R. pp. 34-35). After considering the matter, the trial judge ruled the solicitor would be permitted to introduce limited evidence related to the pending charges for which failure to appear bench warrants had been issued to establish motive and intent. (R. pp. 36-38). Furthermore, the trial judge took under advisement the issue of whether evidence related to Allen's potential sentences for the pending charges would be admissible. (R. p. 39).

Following the trial judge's ruling, the trial continued forward, and the officers who attempted to apprehend Allen on the date of the incident along with the other witnesses involved in the investigation testified about Allen's flight, attempt to shoot the officers, and eventual arrest. (R. pp. 62-111; pp. 115-150; pp. 162-172). During the presentation of that testimony, several of the officers noted – without objection – Allen was wanted on nine outstanding bench

warrants for failure to appear in court at the time he fled and was facing a significant potential sentence for his serious pending charges. (R. p. 65; pp. 71-72; p. 120). Thereafter, the State rested its case, and defense counsel moved for a directed verdict on the resisting arrest charge and attempted murder charges. (R. p. 173; pp. 178-183). After considering the matter, the trial judge denied defense counsel's motion as to the resisting arrest charge and granted the motion in regard to one count of attempted murder. (R. p. 181; pp. 185-186). The defense then rested its case, the parties presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (R. pp. 197-236). As part of his jury instructions, the trial judge instructed the jury "[a] specific intent to kill is not an element . . . of attempted murder[.]" (R. p. 268). Following the presentation of the jury instructions, the trial judge inquired of the parties if they had any objections to his charge, and defense counsel indicated he objected to the trial judge's remarks indicating a specific intent to kill was not an element of attempted murder. (R. pp. 277-278). In response, the trial judge noted defense counsel's objection. (R. p. 278).

Subsequently, at the conclusion of trial, the jury convicted Allen of two counts of attempted murder, one count of the lesser-included offense of assault and battery of a high and aggravated nature, one count of possession of a weapon during the commission of a violent crime, and one count of resisting arrest. (R. pp. 241-242). Following the verdict, the trial judge sentenced Allen to an aggregate term of imprisonment of twenty-four years. (R. p. 266). Allen then timely filed an appeal, and his appellate counsel raised two separate contentions to the Court of Appeals in Allen's appellate brief: (1) the trial judge allegedly erred by failing to grant Allen's directed verdict motion in regard to the resisting arrest charge; and (2) the trial judge allegedly erred by allowing the admission of evidence establishing Allen was facing substantial jail time at the time he fled from the officers. (App. Br. pp. 3-15).

Thereafter, on appeal, the Court of Appeals heard oral arguments in Allen's case, and, several weeks later, Allen's appellate counsel filed a motion seeking for the Court of Appeals to permit him to "supplement" Allen's appellate brief with an issue he had previously not raised on appeal regarding the trial judge's jury instructions on the intent necessary to prove the offense of attempted murder. (App.'s Motion to Supplement Final Br. pp. 1-2). In support of that motion, appellate counsel noted the issue he wished to pursue by supplementing his brief had been addressed in State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), which was decided on April 22, 2015 – a date three months and seventeen days after he had submitted his initial brief and ten months and three days before he filed his motion seeking to raise the new issue – while maintaining the King decision "present[ed] a new legal issue which was not available at the time" he originally filed his appellate brief. (App.'s Motion to Supplement Final Br. pp. 1-2). In response, the State opposed the motion, and the Court of Appeals ultimately denied the request to supplement Allen's appellate brief.² (Return to App.'s Motion to Supplement Final Br. pp. 1-5; Order, dated Mar. 28, 2016). Shortly after that, the Court of Appeals issued an unpublished opinion affirming Allen's convictions and sentence. State v. Allen, Op. No. 2016-UP-135 (S.C. Ct. App. filed Apr. 6, 2016). In affirming, the Court of Appeals solely addressed the two issues properly raised in Allen's appellate brief and found the trial judge committed no error by either denying the directed verdict motion or admitting the evidence related to Allen's pending charges. State v. Allen, Op. No. 2016-UP-135 (S.C. Ct. App. filed Apr. 6, 2016).

² Although Allen has not included the State's return to his motion or the Court of Appeals' ruling on his motion with his petition for a writ of certiorari, this Court can and should take judicial notice of those documents, which are available through the South Carolina Appellate Court Public Index, as they are directly relevant to the contentions raised in Allen's petition. See Rule 201(f), SCRE ("Judicial notice may be taken at any stage of the proceeding."); see generally Sloan v. Greenville County, 380 S.C. 528, 537, 670 S.E.2d 663, 668 (Ct. App. 2009) (recognizing an appellate court can take judicial notice of an appellate court docket).

Following the issuance of the Court of Appeals' opinion, Allen filed a pro se Petition for Rehearing while still represented by appellate counsel. (Pet. for Reh. pp. 1-5). In that petition, Allen contended the Court of Appeals "committed error when it made the decision to affirm [his] conviction for attempted murder without ruling on supplemented evidence regarding specific intent that was submitted to the Court after submission of initial brief due to new ruling of law in [the King decision]." (Pet. for Reh. pp. 3-4). Allen further contended the trial judge committed reversible error by instructing the jury a specific intent to kill was not necessary to prove the offense of attempted murder. (Pet. for Reh. pp. 3-4). Subsequently, once several procedural matters were resolved, the Court of Appeals denied Allen's petition for hearing. (Order, dated Oct. 21, 2016).

ARGUMENT

The Court of Appeals did act on and correctly denied Allen's motion seeking for him to be allowed to supplement his final appellate brief with a previously-unraised issue challenging the trial judge's instructions to the jury on the offense of attempted murder because Allen abandoned that issue by not raising it in his initial appellate brief and South Carolina law does not permit an appellant to raise new arguments after all the briefs have been filed, the record on appeal has been filed, and an oral argument has been conducted in a particular case.

In his petition for a writ of certiorari, Allen contends the Court of Appeals erred by allegedly failing to act on his Motion to Supplement Final Brief of Appellant Based on Recently Decided Case Law through which he sought to supplement his final brief of appellant with an issue he had failed to raise in his initial brief of appellant. In support of that contention, Allen maintains the jury instruction found to be improper by the Court of Appeals in State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), was presented to the jury during his trial over defense counsel's objection and the Court of Appeals allegedly erroneously failed to allow him to supplement his appellate brief with that issue when he finally decided he wished to raise it.³ Thus, Allen appears to be suggesting the Court of Appeals was unconditionally required to grant his motion and allow him to supplement his final brief with an issue his appellate counsel had previously elected not to raise after the time period for the filing of briefs had lapsed, the record on appeal had been filed, and an oral argument had been conducted in his case and committed reversible error by failing to do so.

Contrary to Allen's contentions, the Court of Appeals committed no error by denying his motion to permit him to raise a new issue outside of the permitted time period for doing so because no authority in South Carolina permits an appellant to raise new issues after that appellant files an initial brief with the appellate court. Instead, pursuant to South Carolina law,

³ Notably, this Court has granted the State's petition for a writ of certiorari in the King case. See State v. King, 412 S.C. 403, 411, 772 S.E.2d 189, 193 (Ct. App. 2015) (holding the legislature intended to require the State to prove a specific intent to kill in order to establish the offense of attempted murder), cert. granted (Mar. 28, 2016).

an appellant's argument on appeal is ordinarily limited to the issues raised in the initial brief, and issues not raised in that brief are deemed to be abandoned. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); see also Jones v. Leagan, 384 S.C. 1, 17, 681 S.E.2d 6, 15 (Ct. App. 2009) ("An issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal."); Gold Kist, Inc. v. Citizens & S. Nat'l Bank of South Carolina, 286 S.C. 272, 276, 333 S.E.2d 67, 70 (Ct. App. 1985) (instructing issues not raised in an appellate brief are deemed to be abandoned). Furthermore, after an appellant selects the issues he wishes to pursue on appeal and files an initial brief, that appellant is precluded from using a reply brief, a final brief, an oral argument, a petition for rehearing, or a petition for a writ of certiorari to raise new, previously-unraised issues. See Rule 211(b), SCACR (instructing final briefs must be identical to initial briefs in every respect except with respect to references to the record and the correction of typographical errors); see also Herron v. Century BMW, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011) ("[A] party may not raise an issue for the first time in a petition for rehearing."); State v. Nelson, 336 S.C. 186, 193, 519 S.E.2d 786, 789 (1999) ("It is axiomatic that oral argument may not be used as a vehicle to argue issues not argued in the appellate brief."); Bochette v. Bochette, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) ("An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant's brief."); JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 77 (2nd ed. 2002) ("There are two prerequisites to preserving an issue for consideration by the Supreme Court on a writ of certiorari: (1) the issue must have been raised in the **initial arguments to the Court of Appeals**, and (2) the issue must have been raised in the petition for rehearing before the Court of Appeals." (emphasis added)). Therefore, because Allen did not raise an appellate challenge to

the trial judge's jury instructions in his initial brief, he was deemed to have abandoned that issue on appeal and had no right to raise that issue later by supplementing his brief, arguing that issue in a petition for rehearing, or raising that issue in a petition for a writ of certiorari. See Town of Sullivan's Island v. Felger, 318 S.C. 340, 350, n. 3, 457 S.E.2d 626, 631 (Ct. App. 1995) ("A party is bound by his statement of an issue on appeal."); cf. Barr v. Barr, 287 S.C. 13, 14-15, 336 S.E.2d 481, 482-483 (Ct. App. 1985) ("The wife raised five exceptions to the family court order, but has abandoned all but one either by not arguing them in her brief or by failure to assign error in the exceptions. A provision of an order neither excepted to nor raised in the brief is not properly before the court on appeal." (citations omitted)).

For the same reasons our rules and case law consider an issue not raised in an initial brief to be waived and prohibit an appellant from raising a new issue in a reply brief, a final brief, during oral argument, or in any pleadings filed after an appellate court reaches a decision in a case, Allen was not permitted to amend his final brief to raise a new, previously-unraised issue that had been abandoned by not being raised at an appropriate time, and his motion seeking permission to do just that after all the briefs had been filed, the record on appeal had been filed, and an oral argument had been conducted in his case was improper.⁴ See Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992) ("[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State."); cf. Sloan Constr. Co. v. South Carolina Bd. of Health and Envtl. Control, 285 S.C. 523, 526, 331 S.E.2d 345, 347 (1985) ("The second brief[, which was a

⁴ Notably, nothing prevented Allen from raising an appellate challenge to the trial judge's jury instructions at the time he filed his initial appellate brief despite the fact King had not yet been decided or, otherwise, the decision in King itself could not exist because such an issue would have been unavailable for King to raise since no appellate decision had been issued on that subject matter at the time King filed his appeal. See King, 412 S.C. at 411, 772 S.E.2d at 193 (addressing King's trial challenge to a jury instruction indicating the State was not required to prove a specific intent to kill in order to establish the offense of attempted murder).

revised brief of appellant,] was improper. **Our rules do not allow such a revision.** The prejudice created by such a brief is obvious, and it will not be considered.” (emphasis added)). Accordingly, the Court of Appeals correctly denied Allen’s improper motion seeking for an issue not properly before the appellate court to be addressed, and there are no proper grounds warranting the grant of a writ of certiorari in Allen’s case. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (explaining it constitutes reversible error for the Court of Appeals to address an issue that is not properly before it). Allen’s petition for a writ of certiorari should be denied.

CONCLUSION

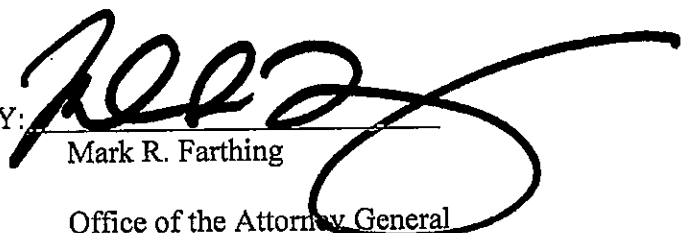
For all the foregoing reasons, it is respectfully submitted the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

BY: 

Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

December 28, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

On Writ of Certiorari to the Court of Appeals
Appeal from Richland County
Honorable James R. Barber, III, Circuit Court Judge
Appellate Case No. 2016-002345

DEC 28 2016

S.C. SUPREME COURT

THE STATE,

Respondent,

vs.

ERNEST MAURICE ALLEN,

Petitioner.

PROOF OF SERVICE

I, Keely Carter, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Ernest Maurice Allen, # 310134
M.C.C.I. F3-B-120
386 Redemption Way
McCormick, SC 29899

I further certify that all parties required by Rule to be served have been served.
This 28th day of December, 2016.


KEELY CARTER

Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Kershaw County
Honorable James R. Barber, Circuit Court Judge
Appellate Case No. 2016-002345

THE STATE,

RESPONDENT,

V.

EARNEST MAURICE ALLEN,

PETITIONER.

RESPONSE TO RESPONDENT'S RETURN

Earnest M. Allen#310134
Pro'Se Petitioner
M.C.C.I. F3-B-120
386 Redemption Way
McCormick, S.C. 29899

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TABLE OF AUTHORITIES

Cases:

State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015)

Statutes:

S.C. Code 16-3-29

Other Authorities:

Rule 208(b)(7), SCACR

STATEMENT OF ISSUE ON CERTIORARI

The Court of Appeals did not act on and correctly deny Petitioner's Motion To Supplement a Final Brief because the Petitioner never received anything from the South Carolina Court of Appeals, nor Appeal Counsel in regards to the status of that motion.

STATEMENT OF THE CASE

Procedural History

After timely filing Initial Brief on January 6, 2015, the Court of Appeals handed down its ruling in State v. King on April 22, 2015. That decision deals squarely with the intent required for conviction under S.C. Code 16-3-29. Therefore, the case was brought to appeal counsel's attention. On February 24, 2016, a Motion To Supplement A Final Brief Based On Recently Decided Case Law containing this information was submitted to the Court in the effort to bring this matter to the Court's attention before it made a decision regarding petitioner's appeal. But on April 6, 2016, the Court made the decision to affirm the petitioner's convictions for Attempted Murder without applying its holding reached in State v. King.

In response to the decision of the Court, the petitioner contacted his appeal counsel and requested that he submit A Petition For A Rehearing as soon as possible, but again it was to no avail. The petitioner then asked if appeal counsel would submit a motion to the Court to relieve himself as counsel, but again it was to no avail because appeal counsel was under the impression that he would automatically be taken off of the case due to the fact that the Court had made its decision; saying, "Please be advised that our office will be closing your case along with this letter."; and "In short, counsel would not seek relief through the Direct Appeal process on Petitioner's behalf."

With no other way to file A Petition For A Rehearing on time, the Petitioner filed Pro'Se on April 20, 2016, and it was responded to by Assistant Attorney General Mark R. Farthing on April 27, 2016, requesting that the Court not consider the petition due to "Hybrid Representation." The letter from the Attorney General's Office was then used to show appeal counsel that he hadn't been removed automatically as he thought he would be, and that he indeed needed to file a Motion To Be Relieved As Counsel if the petitioner wished to file pro'se.

It wasn't until May 3, 2016, that appeal counsel made the initiative to submit that motion, and because of his mistake appeal counsel requested that the Court allow the petitioner to re-file the prior pro'se petition for a

rehearing and suggested that the petitioner resend the petition to the Court if he wished the Court to consider it; petitioner did so, but again it was to no avail.

Finally, on July 15, 2016, the petitioner received a letter from the Court informing him that the Motion To Be Relieved As Counsel had been granted and that the petitioner could now proceed pro'se. But on July 18, 2016, the Court sent the Remittitur. . .

When the petitioner received a Remittitur, and not a response to the Petition For A Rehearing, petitioner took it to mean that the Court was not going to consider it and submitted a motion to the Court requesting that it recall the remittitur; and on September 9, 2016, the Court found reason to grant it. However, on October 21, 2016, the Court found reason to deny the petition. Therefore, the petitioner is now bringing this issue before the Supreme Court.

ARGUMENT

The Court of Appeals did not act on and correctly deny petitioner's Motion To Supplement A Final Brief because the petitioner never received anything from the South Carolina Court of Appeals, nor Appeal Counsel in regards to the status of that motion.

In the Return To Petition For Writ Of Certiorari, the Respondent contends that on March 28, 2016, the Court of Appeals denied petitioner's Motion To Supplement, and herein is where the problem lies. The petitioner never received anything from the Court of Appeals or Appeal Counsel in regards to that motion. Had the petitioner received an order from the Court denying the motion, the petitioner would have included a copy of that motion in the Appendix. Furthermore, had the petitioner been informed that the motion was denied, he would have been appealing the fact that the motion was denied by the Court, instead of arguing that the Court failed to rule on the motion.

Had the petitioner been informed that the motion was denied, the petitioner would have argued against the Court's decision to deny it in the Petition For A Rehearing that was submitted on April 20, 2016. Nowhere in the Record did the petitioner mention that he was aware of the fact that the motion had been denied. But everywhere in the Record it shows that the petitioner was unaware of the status of that motion.

Had the Court of Appeals or Appeal counsel sent the petitioner a copy of the order denying the motion the petitioner's Petition For A Rehearing, and the petitioner's Petition For Writ of Certiorari would have been based on that because SCACR Rule 208(b)(7) states that, "When pertinent and significant authorities come to the attention of a party after his Initial Brief has been served and filed, the party shall promptly advise the clerk of the Appellate Court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to an issue to the citations pertain, but the lesser shall, without argument, state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited."

Therefore, the issue should not be whether or not the issue was abandoned by the petitioner. But rather did the Court of Appeals err by failing to act on petitioner's Motion To Supplement A Final Brief with the issue of trial Judge's erroneous instructions to the jury that "a specific intent

to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury." State v. King, 412 S.C. 403, 772 S.E. 2d. 189 (2015)?

This is the essential issue of the petitioner's Writ Of Certiorari and the focal issue which the petitioner is asking the Court to review and address because contrary to the ascertain by the Respondent that the petitioner's Motion To Supplement was ruled upon and denied, petitioner has received no such motion hearing, judgment, ruling, or order from any Court denying his Motion to Supplement the record in his appeal.

CONCLUSION

Therefore, for all the foregoing reasons, it is respectfully submitted that the Petition For Writ Of Certiorari should be granted.

Respectfully submitted,

Earnest M. Allen
SCDC No. 310134
M.C.C.I. F3-B-120
386 Redemption Way
McCormick, S.C. 29899
Pro'Se

January 6, 2017

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Kershaw County
Honorable James R. Barber, Circuit Court Judge
Appellate Case No. 2016-002345

THE STATE,

RESPONDENT,

V.

EARNEST MAURICE ALLEN,

PETITIONER,

AFFIDAVIT OF SERVICE

I, Earnest M. Allen, certify that I have served the within Response To Respondent's Return on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Alan Wilson
Office of the Attorney General
Post Office Box 11549
Columbia, S.C. 29211

I further certify that all parties required by Rule to be served have been served. This 6th day of January, 2017.

Earnest M. Allen
SCDC No. 310134
M.C.C.I. F3-B-120
386 Redemption Way
McCormick, S.C. 29899
Pro'Se

The Supreme Court of South Carolina

The State, Respondent,

v.

Ernest Maurice Allen, Petitioner.

Appellate Case No. 2016-002345
Lower Court Case Nos. 2013GS2800681,
2013GS2800682, 2013GS2800683, 2013GS2800685,
2013GS2800811

RECEIVED

AUG 28 2017

ATTORNEY GENERAL'S
OFFICE

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY



CLERK

Columbia, South Carolina

August 25, 2017

cc:

The Honorable Jenny Abbott Kitchings
Alan McCrory Wilson, Esquire
Jennifer Ellis Roberts, Esquire
Daniel Edward Johnson, Esquire

FORM 5

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

County of KERSHAW)Earnest Maurice Allen #310134)

2017-CP-28-904

Full name and prison number (if any) of Applicant)

v.)

APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF)

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legible handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention McCormick Correctional Institution
2. Name and location of Court which imposed sentence Kershaw County
Court House, 1121 Broad Street Camden S.C. 29020
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2013GS2800681 - Attempted Murder
 - (b) 2013GS2800682 - Attempted Murder

ATTEST True, Correct & Certified
Copy of Original on File in this
Court
Janet C. Hasty
Clerk of Court Kershaw County

FILED FOR RECORD

2017 OCT 13 PM 1:46

JANET C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.