

Volume II of II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

D Garrison Hill, Circuit Court Judge

RECEIVED

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S C Supreme Court

ALLAN LEE HAWKINS,

PETITIONER,

V

STATE OF SOUTH CAROLINA,

RESPONDENT

A P P E N D I X

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1 there, that's a dangerous place In fact, it's so
2 dangerous I won't even go over there unless I have my gun
3 with me At the ready That's how dangerous, you better
4 stop going over there Don't you think if that place was
5 really dangerous that's what he would have said? But no
6 he doesn't He goes in there with gun Why? Because
7 that's evidence of planning, it's evidence of what he
8 wanted to do that day which was to rob a man, a 66-year
9 old man who got his money from selling drugs and was easy
10 pickings Easy pickings Get that money What's David
11 Gilbert going to do after he gets robbed? Tell the police
12 my drugs and money got stolen? My drug money He's not
13 going to tell People like that are easy to rob That's
14 what he was going to do is he was going to rob him
15 That's evidence of planning

16 However, malice does not have been to express, it can
17 be inferred And just this along, ladies and gentlemen,
18 use of a deadly weapon That can be enough You can say
19 he used a deadly weapon in this situation, we can infer
20 malice from that and we're going to do so But not only
21 that, another instance of inferred malice would be the
22 commission of a felony Armed robbery is a felony He's
23 going over there, if he killed somebody in the commission
24 of doing this armed robbery, there some inferred malice
25 right there

1 How can we know that the defendant's story is not
2 what happened that day? Because first off, we have an eye
3 witness. And contrary to what you just heard from the
4 defense, that eye witness story is vastly different from
5 what the defendant told you. Shawn Banks, a man who has
6 no -- has no dog in this fight, none. He doesn't -- he
7 knew who the defendant was by first name. Doesn't have
8 anything against him, he has no reason to frame this
9 defendant. He knew David Gilbert just like everybody else
10 did, over there buying some drugs. He has no reason to
11 try to make up something to defend David Gilbert's honor
12 or whatever reason. He has no reason to lie.

13 And we know what he told was accurate for several
14 reasons. First, because minutes after this happened, I
15 say minutes, say at least within 30 minutes, while he is
16 still shaken up over at that place called King Express
17 where he ran, he told the same story as what he told on
18 the stand. He told the officers what had happened. He
19 was able to describe the location of the bullet on David
20 Gilbert. Remember the officer testifying, he said, I saw
21 David Gilbert was shot just below the neck. How would he
22 know that unless he saw it? Because he did see it. He
23 described the defendant's gun as a black semi-automatic
24 gun. He saw that. And that's key. He saw what happened.
25 And what he says happened is this. He -- as he's

1 about ready to leave he hears a thump And up to this
2 point there's been no argument, he's heard no raised
3 voices by this defendant or David Gilbert They were just
4 sitting there They were talking, sure He's not paying
5 attention because it wasn't his concern He doesn't know
6 what they're talking about But they're just talking,
7 they're not arguing Then there was this thump He looks
8 back and David Gilbert, he does not say he's on the bed,
9 David Gilbert is picking himself up off the coffee table
10 where he has just been thrown A key, at that point he
11 sees this defendant at the foot of the bed with the
12 pistol At this point

13 Because what David Gilbert did was without any
14 warning -- I'm sorry, what this defendant did without any
15 warning while he's having that conversation with David
16 Gilbert, the victim, to divert his attention with these
17 pills, without any warning he picks him up and throws him
18 Why does that happen? That way? Because that's what he
19 wanted to was to robbery him There was no argument
20 David Gilbert didn't get mad about the pills, he picked
21 him up and threw him And then pulled the gun and told
22 David Gilbert to get on the bed

23 And Shawn Banks said at point he really is going to
24 get out of there And he turns to go and he hears the
25 shot and he looks back and there is David Gilbert on the

1 bed with a bullet whole in him and then he does run So
2 what he says is vastly different than what this defendant
3 says

4 Now, what also we know about this case that proves
5 that what the defendant told you is not true is the
6 evidence There's blood at -- well three places
7 Remember there's a puddle of blood on the floor There's
8 blood at two places on the bed And this is key There's
9 a pool of blood up near the front, up near the pillow
10 You remember it? The officer testified that looked like
11 somebody had been sitting there a minute and blood had
12 actually accumulated Then there some brushing of blood
13 by the back of the bed So you can -- and it's very close
14 to where the blood is on the floor So you can probably
15 imagine at point somehow David Gilbert was either picked
16 up by this defendant and thrown off the bed so he can get
17 David Gilbert's pistol or David Gilbert who we know was
18 still alive after this shooting, who bled to death, was
19 able to get off the bed and just stumble down

20 But what's key about that is you will see when you
21 look at the defendant's statement, he uses one word that I
22 think is very significant He said that after he threw
23 David Gilbert on the floor, that David Gilbert went to the
24 bed To the bed He does not say on the bed Now in
25 court yesterday he said David Gilbert jumped up on the

1 bed Why that's significant is because what he said in
2 his statement, before he knew where that blood is going to
3 be found up on the head of the bed, makes since with the
4 story that he's already telling Because if David Gilbert
5 has been thrown on the floor and is going for his gun,
6 he's not going to get up on top of the bed and take all
7 that extra time to go under the pillow and get it The
8 pillow is right by the side of the bed If he's going to
9 really -- if he's doing what the defendant said he's going
10 to go to the bed, get the gun from out from under the
11 pillow and turn to shoot And that's what he said in his
12 statement, doesn't say jumped up on the bed so that's key
13 The blood was where Shawn Banks told you David Gilbert
14 was Where he was shot At the head of the bed
15 And then secondly this gunshot residue And this
16 again, is absolutely key information If you remember,
17 the SLED agent testified that when they tested this
18 gunshot residue they looked at four different places The
19 back of both hands and palms of both hands And she said
20 three of those locations had gunshot residue The left
21 palm -- I'm sorry, the left back of the hand, the left
22 palm, both had some amounts The right palm had the most
23 Had a lot of gunshot residue The back of the right hand
24 had none And I asked the witness if somebody had
25 something in his or her hand and a gunshot came and that

1 gunshot residue was begin expelled towards them, would you
2 expect to find gunshot residue on the hand? And she said,
3 No Because it would be something there blocking it So
4 what she testifies to about this gunshot residue is
5 completely consistent David Gilbert couldn't have had a
6 gun in his hand because he has all that gunshot residue in
7 his palm

8 And it's completely consistent with David Gilbert
9 just flinching a little bit, hand out like this, getting
10 the gunshot residue on the front of his palm and none on
11 the back If he had the gun in his hand and that gun were
12 pointed, there would be no gunshot residue on his palm and
13 there would be gunshot residue on the back of his hand
14 because it would be exposed And I don't see any way
15 around that

16 The defendant's action contradicts what his versions
17 are Once again, he went to the house with a loaded
18 pistol, he stole from David Gilbert Why is that his
19 first reaction after he shoots David Gilbert? Because
20 that's why he was there He was there to rob him So his
21 first reaction is to take the money and the gun and
22 perhaps the drugs And then he flees He flees the
23 house He flees the county with a loaded gun He heads
24 to Myrtle Beach At least a day, it looks to me from his
25 statement, you can read it, perhaps two days before he was

1 supposed to He had a trip planned towards the end of the
2 week but he was going to get out of there The guilty
3 flee He went with a loaded gun Why is he going with a
4 loaded gun to Myrtle Beach? That was a question he
5 couldn't answer yesterday Along with many other
6 questions The reason is because he is running from the
7 law He got rid of the murder weapon and he's going to
8 keep that weapon

9 How would you expect someone to act who just got shot
10 by somebody -- who just shot somebody in self-defense?
11 Put yourself in that position You just had to take
12 somebody's life because that person was going to try to
13 kill you What is your reaction going to be? To leave?
14 It's going to be to call the police Right? I mean, if
15 he had called the police right then and the police had
16 shown up there and if this really happened the way he said
17 it did, it would have been patently obvious David
18 Gilbert would be lying there with a gun beside him, with a
19 gun with his fingerprints on it, it would be obvious He
20 would have nothing -- he would have nothing to prove, it
21 would have been obvious Why didn't he call the police?
22 Why did he take the gun? Ladies and gentlemen, I submit
23 to you that he took that pistol because it was under the
24 pillow He leaves it there, the police show up, there's
25 no chance of self-defense when that pistol is tucked away

1 like that No chance

2 He took the pistol for that reason He says he
3 freaked out Well why does freaking out mean when you
4 run? Why does it mean take the money and run? Why
5 doesn't it mean, Oh my gosh, I can't believe what just
6 happened And sit down and call the police Why doesn't
7 it mean that? Why doesn't it mean an hour later when you
8 do start to calm down you say, I better tell the police
9 what happened I've got to call the police right now
10 There's no reason not to He shot somebody in
11 self-defense according to what he said There's no
12 reason Somebody who really did shoot somebody in
13 self-defense would have done that

14 And finally his story about the shooting is
15 unbelievable And I spent a fair amount of time
16 cross-examining the witness just yesterday on it so I'm
17 not going to belabor the point but his version about how
18 he shot David Gilbert could not have happened His
19 testimony is that David Gilbert got the gun and turned
20 around and when he saw the gun he got his gun out and shot
21 him Now think about that for just a minute How in the
22 world could that have happened? How could he have had
23 time, how could he have had the guts? Somebody has the
24 drop on you with a gun, you're going to duck, you're going
25 to run, you're going to back up You're not going to go

1 for your gun

2 Yet he says -- how long does it take? Let's see, if
3 it really happened the way the defendant said and David
4 Gilbert got the pistol and was turning around, from the
5 moment he saw the pistol to the moment David Gilbert was
6 around is what, what fraction of a second? And he said,
7 according to his testimony, in that minuscule amount of
8 time is able to first off have it registered what's going
9 on Secondly, reach back for his pistol, pull up his
10 shirt, reach in there and pull out his gun without
11 shooting himself first He said that there was a bullet
12 in the chamber and no safety on Able to get it out that
13 carefully, pull it up, aim and fire It's impossible
14 That can't even happen in the movies, it couldn't have
15 happened

16 The defense wants you to focus on what you haven't
17 heard If Ross Walton or phone records and all these
18 other things were that important, the defense can call
19 witnesses just as much as we can What I want you to
20 focus on is what you have heard The testimony that you
21 have heard The defense said at the beginning of this
22 case that this is an important day the defendant, well
23 ladies and gentlemen, it's an important day for the State
24 as well When somebody commits an act like this, no
25 matter who it is against, no matter who the victim is,

1 they need to be held responsible It's an important day
2 for the State, it's an important day for David's family
3 And, ladies and gentlemen, I ask you now that you hold
4 this defendant responsible for his acts of killing another
5 human being on November 22 of 2005 and of robbing that
6 person on that day and find him guilty Thank you

7 THE COURT Mr Foreman, you have been sitting for
8 about an hour, I'm going to give a break prior to giving
9 the Court's instructions During this break please
10 refresh yourselves, please do not discuss the case and
11 please leave your notepads in your seats I'm thinking
12 we'll about ten minutes And in the interim I'm also
13 going to look into what we're going to do about lunch So
14 don't panic If you would go with your caretakers

15 (WHEREUPON, the jury left open court at
16 approximately 12 05 p m)

17 THE COURT Okay, I thought about it and while the
18 facts of Burris are not on point, nor the facts on Slater,
19 I am going to charge the language from Burris which is a
20 person who shoots another can be acting lawfully even if
21 he is in unlawful possession of a weapon If he was
22 entitled to arm himself in self-defense at the time of the
23 shooting I think y'all's arguments both fall within the
24 ambient of that And I think no harm no foul It's
25 always better to be on the liberal side than more

1 restrictive side And so I'm going to charge it And I
2 would imagine nobody has any exceptions?

3 MR ARIAIL No, Your Honor

4 THE COURT Okay All right, take a five minute
5 recess

6 (WHEREUPON, a short break was taken)

7 THE COURT Is the State ready to proceed?

8 MR MOYER Yes, Your Honor

9 THE COURT Is the defense ready to proceed?

10 MR ARIAIL Yes, Your Honor

11 THE COURT Please bring in the jury

12 THE COURT Mr Foreman, ladies and gentlemen, during
13 this trial you and I have certain duties to perform As
14 the trial judge it is my responsibility to reside over the
15 trial of this case And I also have the duty to rule upon
16 or pass upon the admissibility of evidence offered during
17 this trial You are to consider only the competent
18 evidence that is before you And you are to disregard and
19 disabuse from your mind any testimony ordered stricken
20 from the record in this case during the progress of this
21 trial if there has been any You're to consider only the
22 testimony which has been presented from this witness stand
23 together with any exhibits which have been made a part of
24 the record in this case And any stipulation of counsel
25 made into the record

1 I have the additional duty to charge you the law
2 applicable to this case As the presiding Judge, I'm the
3 sole judge of law of this case And it is your duty, as
4 jurors, to accept and apply the law as I now state it to
5 you If you have a preconceived idea as to what the law
6 is or what the law ought to be in a case or in this case
7 or it does not agree with what I now tell you the law is,
8 you are obligated under the oath which you have taken to
9 abandon this preconception on your part because you are
10 sworn to accept the law and apply the law precisely as I
11 now state it to you

12 In every case tried in this Court before a jury, the
13 jury becomes the sole and exclusive judges of the facts in
14 a case You, the jury, are the judges of the facts in
15 this case The Court is the judge of law The
16 Constitution of our state has declared the trial judge
17 shall not intimate, state, comment upon or make any
18 statement to a trial jury about the facts in a case
19 Since you, the jury, are the sole judges of the facts in
20 this case, you are not to infer anything from what I've
21 said during the progress of this trial in ruling upon the
22 admissible of evidence or otherwise Or anything that I
23 say now during the course of this instruction to you that
24 I have any opinion about the facts in this case The law
25 does not permit me to have an opinion about the facts

1 This is a matter solely for you, the jury, to determine
2 As jurors then, it is your duty, as I've instructed
3 you, to determine the effect, the value, the weight and
4 the truth of the evidence presented during this trial
5 Necessarily, you must assess the credibility of the
6 witnesses who have testified in this case Credibility is
7 simply a legalistic term meaning believability It
8 becomes your duty as jurors to analyze and to evaluate the
9 evidence and determine that evidence which convinces you
10 of its truth I instruct you that in determining the
11 question of the credibility or believability of witnesses
12 who have testified, you may believe one witness as against
13 several witnesses or several witnesses as against one
14 witness You may believe a part of the testimony of a
15 witness and reject the remaining part of the testimony of
16 that same witness If you have a good and sound reason,
17 you may believe the testimony the witness in its entirety
18 or reject the testimony of a witness in its entirety You
19 may consider whether any witness has any exhibited to you
20 any interest, any bias, any prejudice or other motives
21 You may consider the demeanor of a witness That is the
22 appearance and manner of the witness from the witness
23 stand You can believe as much or a little of each
24 witnesses testimony as you think proper Of course, you
25 do not determine the truth merely by counting the number

1 of witnesses Throughout this process, ladies and
2 gentlemen, you have but one objective To seek the truth
3 regardless of its source

4 I instruct you that a person who has a pass criminal
5 record is competent to testify during a trial A pass
6 record does not effect the ability of that witness to
7 testify, the pass record may only be considered by you if
8 at all in determining the witnesses believability Ladies
9 and gentlemen, remember, you are the sole judges of the
10 facts in this case And of the believability of any and
11 all of witnesses

12 I further instruct you that you have heard evidence
13 that the defendant was convicted of a crime And
14 committed bad acts Not the subject of a conviction
15 Other than the ones for which the defendant is now on
16 trial This evidence may be considered by you if you
17 conclude it is true, only in deciding whether the
18 defendant's testimony is believable and for no other
19 purpose You must not consider the defendant's prior
20 record as any evidence of defendant's guilt of the charges
21 we are trying today

22 Ladies and gentlemen, the rules of evidence
23 ordinarily do not permit witnesses to testify to opinions
24 or conclusions An exception to this rule exist for
25 witnesses we call expert witnesses A witness who by

1 education, experience and training, has become an expert
2 in some art, science profession or calling may state an
3 opinion as to relevant and material matters In which the
4 witness claims to be an expert And may also state the
5 reasons for that opinion You should consider any expert
6 opinion received in evidence in this case like any other
7 evidence Give it the weight you think it deserves If
8 you decide that the opinion of an expert witness is not
9 based on sufficient education and experience, or if you
10 conclude that reasons given in support the opinion are not
11 sound or that opinion is outweighed by other evidence, you
12 may disregard the opinion entirely An expert witness'
13 testimony is to be given no greater weight than that of
14 other witnesses simply because the witness is an expert
15 Further, you're not required to accept an expert's opinion
16 even though it is not contradicted

17 Ladies and gentlemen, an issue in this case is the
18 identification of the defendant as the person who
19 committed the crime charged The State has the burden of
20 proving of approving identity beyond a reasonable doubt
21 You must be satisfied beyond a reasonable doubt of the
22 accuracy of the identification of the defendant before you
23 may convict the defendant Identification testimony is an
24 expression of belief or impression by a witness You must
25 determine the accuracy of the identification of the

1 defendant You must consider the believability of each
2 identification witness in the same way as any other
3 witness You may consider whether the witness had an
4 adequate opportunity to observe the offender at the time
5 of offense This will be effected by things like how long
6 or short a time was available How far or close the
7 witness was, the lighting conditions and whether the
8 witness had a chance to see or know the person in the
9 past

10 Once again, I instruct you, the burden of proof on
11 the State extends to every element of the crime charged
12 And this specifically includes the burden of proving
13 beyond a reasonable doubt the identity of the defendant as
14 the person who committed the crime If after examining
15 the testimony you have a reasonable doubt as to the
16 accuracy of the identification, you must find the
17 defendant not guilty

18 I further instruct you a statement alleged to have
19 been made by the defendant has been admitted into evidence
20 in this case While the Court has determined that the
21 statement is admissible, I instruct you that you make the
22 ultimate decision of whether or not the defendant made the
23 statement If the defendant did make the statement, you
24 must determine whether the statement was made by the
25 defendant voluntarily and of his own freewill This means

1 that the statement was not caused by pressure, force,
2 fear, threat, coercion or intimidation Or by hope or a
3 promise of leniency Or reward of any kind In
4 determining whether the statement was voluntary, you
5 should consider both the characteristics of the defendant
6 and the details of the questioning

7 Some of the factors you must consider are the age of
8 defendant The defendant's education or lack of
9 education The defendant's mental ability or capacity
10 The defendant's IQ or intelligence The defendant's
11 background and environment The place and length of the
12 detention The nature of the questions And the advice
13 or lack thereof to the defendant of his Constitutional
14 rights Including but not limited to the right to remain
15 silent That any statement could be used against him in
16 the court of law The right to have a lawyer present
17 That if he could not afford a lawyer a lawyer would be
18 appointed to represent him without any cost And that he
19 could stop making the statement at any time

20 You must carefully consider all the surrounding
21 circumstances before you give any weight to an alleged
22 statement The State has the burden of proving beyond a
23 reasonable doubt that the alleged statement was
24 voluntarily If you determine it was, you may give the
25 statement any further consideration that you deem proper

1 You must decide what weight, if any, should be given to
2 the alleged statement If you determine the alleged
3 statement was not a free and voluntarily statement of the
4 defendant, you should not consider the statement at all

5 Ladies and gentlemen, I instruct you that they're two
6 types of evidence which are generally presented during a
7 the trial Direct evidence and circumstantial evidence
8 Direct evidence is the testimony of a person who asserts
9 or claims to have actual knowledge of a fact Such as an
10 eye witness Circumstantial evidence is proof of a chain
11 of facts and circumstances indicating the existence of a
12 fact The law makes absolutely no distinction between the
13 weight or value to be given to either direct or
14 circumstantial evidence Nor is a greater degree of
15 certainty required of circumstantial evidence than of
16 direct evidence You should weigh all of the evidence in
17 this case After weighing all of the evidence, if you are
18 not convinced of the guilt of the defendant beyond a
19 reasonable doubt, you must find the defendant not guilty
20 Conversely, if you're convinced of the guilt of the
21 defendant beyond a reasonable doubt then you must find him
22 guilty

23 Ladies and gentlemen, I instruct you that the fact
24 that the defendant was arrested, charged and indicted in
25 this case is not evidence in this case And cannot be

1 considered by you as evidence of guilt in this case Nor
2 does it create any presumption or inference of guilty
3 This documentation, ladies and gentlemen, are simply the
4 formal written instruments which contain the charge or
5 charges made against the defendant They serve as the
6 formal documents by which this case is processed or
7 brought into this court

8 The defendant has pled not guilty to the indictments
9 and that plea casts the burden on the State to prove the
10 defendant guilty Because a person charged with
11 committing a criminal offense in South Carolina is never
12 required to prove themselves innocent I instruct you, that
13 it is a cardinal and important rule of the law of evidence
14 that a defendant in a criminal trial, no matter what the
15 seriousness of the charge or charges made against him may
16 be, will always be presumed to be innocent of the crime
17 for which he is indicted Unless his guilt has been
18 proven to you by evidence satisfying you of that guilt
19 beyond a reasonable doubt

20 This presumption of innocence does not cease when you
21 retire to deliberate But it accompanies the defendant
22 from the time of his appearance throughout the trial until
23 you reach a verdict. Based upon evidence satisfying you
24 beyond a reasonable doubt Our Supreme Court has said
25 that the presumption of innocence is like a robe of

1 righteousness placed about the shoulders of a defendant
2 And it remains with him and assigns him to that class, the
3 innocent, until that presumptive robe of righteousness has
4 been stripped from his person by evidence satisfying you
5 of that guilt beyond a reasonable doubt

6 Mr Foreman, ladies and gentlemen, the presumption of
7 innocence is not merely a legal theory It is not just a
8 legal phrase It is a substantial right to which every
9 defendant is entitled unless you the jury are satisfied
10 from the evidence of his guilt beyond a reasonable doubt
11 You may be asking, What is a reasonable doubt in the law?
12 The State has the burden of proving the defendant guilty
13 beyond a reasonable doubt Some of you may have served as
14 jurors in civil cases Were you were told that it is only
15 necessary to prove that a fact is more likely true than
16 not true In criminal case the State's proof must be more
17 powerful than that It must be beyond a reasonable doubt
18 Prove beyond a reasonable doubt is proof that leaves you
19 firmly convinced of the defendant's guilt They're very
20 few things in this world that we know with absolute
21 certainty And in criminal cases the law does not require
22 proof that over comes every possible doubt If based on
23 your consideration of the evidence you are firmly
24 convinced that the defendant is guilty of crime charged,
25 you must find him guilty If on the other hand, you think

1 there is a real possibility that he is not guilty, you
2 must give him the benefit of the doubt and find him not
3 guilty

4 Ladies and gentlemen, the defendant is charged with
5 murder The State must prove beyond a reasonable doubt
6 that the defendant killed another person with malice
7 aforethought Malice is hatred, ill will or hostility
8 towards another person It is the intentional doing of a
9 wrongful act without just cause or excuse And with an
10 intent to inflict an injury or under circumstances that
11 that law will infer an evil intent Malice aforethought
12 does not require that malice exists for any particular
13 time before the act is committed But malice must exist
14 in the mind of the defendant just before and at the time
15 the act is committed Therefore, there must be a
16 combination of the previous evil intent and the act

17 Malice aforethought maybe expressed or inferred The
18 terms express and infer do not mean different kinds of
19 malice but merely the manner in which malice may be shown
20 to exist That is either by direct evidence or by
21 inference from the facts and circumstances which are
22 proven Express malice is shown when a person speaks
23 words which express hatred or ill will toward another Or
24 when the person prepared beforehand to do the act which
25 was later accomplished For example, lying in wait for

1 a person Or any other act of preparation going to show
2 that the deed was within the defendant's mind would be
3 express malice Malice may be inferred from conduct
4 showing a total disregard for human life Inferred malice
5 may also arise when the deed is done with a deadly weapon
6 A deadly weapon is any article, instrument or substance
7 which is likely to cause death or great bodily harm
8 Whether an instrument has been used as a deadly weapon
9 depends on the facts and circumstances of each case The
10 following are examples of instruments which may be deadly
11 weapons A pistol, a shotgun, a riffle, a dirk, a dagger,
12 a knife, a slingshot, metal knuckles, a razor, gasoline, a
13 fire bomb or maltol cocktail, lighter fluid A gun may be
14 a deadly weapon even if it is not operating

15 Ladies and gentlemen, I instruct you -- I apologize,
16 I instruct you that if one intentionally kills another
17 during the commission of a felony, the inference of malice
18 may arise If facts are proven beyond a reasonable doubt
19 sufficient to raise an inference of malice to your
20 satisfaction This inference would simply be an
21 evidentiary fact to be taken into consideration by you
22 along with all the other evidence in the case And you
23 may give it the weight that you decide it should receive

24

25 Ladies and gentlemen, the defendant has also been

1 charged with armed robbery In order to prove this
2 offense, the State must first prove beyond a reasonable
3 doubt that the defendant took personal property from the
4 person or presence of another person Property is in the
5 presence of a person if it is within the person's reach
6 inspection, observation or control So that the person
7 could, if not overcome with violence or prevented by fear,
8 keep possession of the property The State must also
9 prove beyond a reasonable doubt that the defendant carried
10 the property away by intending to permanently deprive the
11 owner of the property and to keep the property for the
12 defendant's own use The slightest removal of the
13 property or the complete possession of the property, even
14 for an instant, by the defendant, is sufficient to show a
15 taking and carrying away of the property The taking and
16 carrying away of the property must have been done with
17 violence Or by putting the owner of the property in fear
18 of violence

19 Finally, the State must prove beyond a reasonable
20 doubt that the defendant was armed with a deadly weapon
21 during the robbery A deadly weapon is any article,
22 instrument or substance which is likely to cause death or
23 great bodily harm Whether an instrument has been used as
24 a deadly weapon depends on the facts and circumstances of
25 the each case And again, uses in the same example The

1 following are examples of instruments which may be deadly
2 weapons A pistol, a shotgun, a riffle, a dirk, a dagger,
3 a knife, a sling shot, metal knuckles, a razor, gasoline,
4 a fire bomb, maltol cocktail and lighter fluid A gun may
5 be a deadly weapon even if it is not operating

6 The defendant is also charged with possession of a
7 weapon during the commission of or attempt to commit a
8 violent crime The State must prove beyond a reasonable
9 doubt that the defendant was in possession of a firearm
10 Or visibly displayed what appeared to be a firearm during
11 the commission of a violent crime A firearm means any
12 machine gun, automatic rifle, revolver, pistol or any
13 weapon which will is designed to or maybe readily
14 converted to expel a projectile Murder and armed robbery
15 are violent crimes As defined by South Carolina Code
16 Annotated 16-1-60

17 Ladies and gentlemen, the defendant has raised the
18 defense of self-defense Self-defense is a complete
19 defense And if it is established you must find the
20 defendant not guilty The State has the burden of
21 disproving self-defense by proof beyond a reasonable
22 doubt If you have a reasonable doubt of the defendant's
23 guilty after considering all of the evidence, including
24 the evidence of self-defense, then you must find the
25 defendant not guilty On the other hand, if you have a

1 reasonable doubt of the defendant's guilt after
2 considering all of the evidence, including the evidence of
3 self-defense, then you must find the defendant guilty
4 The following elements are required to establish
5 self-defense First, the defendant must be without fault
6 in bringing on the difficulty If the defendant's conduct
7 was the type which was reasonably calculated to and did
8 provoke a deadly assault, the defendant would be at fault
9 in bringing on the difficulty And would not be entitled
10 to an acquittal based on self-defense

11 The second element of self-defense is that the
12 defendant was actually in imminent danger of death or
13 serious bodily injury or that the defendant actually
14 believed that he was in imminent danger of death or
15 serious bodily injury If the defendant was actually in
16 imminent danger, it must be shown that the circumstances
17 would have warranted a person of ordinary firmness and
18 courage to strike the fatal blow to prevent death or
19 serious bodily injury If the defendant believed that he
20 was in imminent danger of death or serious bodily injury,
21 it must be shown that a reasonably prudent person of
22 ordinary firmness and courage would have had the same
23 belief

24 In deciding whether the defendant actually was or
25 believed he was in imminent danger of death or serious

1 bodily injury, you should consider all of the facts and
2 circumstances surrounding the crime Including the
3 physical condition and characteristics of the defendant
4 and the victim The defendant does not have to show that
5 he was actually in danger It is enough if the defendant
6 believed he was in imminent danger and a reasonably
7 prudent person of ordinary firmness and courage would have
8 had the same belief The defendant has the right to act
9 on appearances even though the defendant's belief may have
10 been mistaken It is for you to decide whether the
11 defendant's fear of immediate danger of death or serious
12 bodily injury was reasonable And would have been felt by
13 an ordinary person in the same situation

14 Ladies and gentlemen, the relative sizes, ages and
15 weights of the defendant and the victim may be considered
16 in deciding the apparent or actual need for force in
17 self-defense And the amount of force needed The
18 reputation of the victim as a violent person may be
19 considered in deciding whether there was a need for force
20 Whether the defendant had reason to believe there was a
21 need for force and whether deadly force was reasonably
22 necessary The intoxication of the victim may be
23 considered in deciding whether the defendant's fear of
24 death or bodily harm was reasonable The final element of
25 defense is that the defendant had no other probable way to

1 avoid the danger of death or serious bodily injury Then
2 to act as the defendant did in this particular instance
3 The defendant has no duty to retreat if by doing so the
4 danger of begin killed or suffering serious bodily injury
5 would increase

6 I further instruct you that a person cannot be
7 required to make an exact calculation as to the degree or
8 amount of force which may be needed to avoid death or
9 serious bodily harm Therefore, in self-defense, the
10 defendant has the right to use the force needed to avoid
11 death or serious bodily harm The force used in
12 self-defense does not have to be limited to the degree or
13 amount of force used by the victim The defendant has the
14 right to use so much force as appeared to be necessary for
15 complete self protection In which a person of ordinary
16 reason and firmness would have believed to be needed to
17 prevent death or serious bodily harm A person who shoots
18 another can be acting lawfully Even if he is in unlawful
19 possession of a weapon if was entitled to arm himself in
20 self-defense at the time of the shooting

21 Ladies and gentlemen, if indictments in this case
22 allege several different offenses against the defendant
23 And they are Indictment 2006-GS-23-3511, an indictment
24 from murder And Indictment 2006-GS-23-003512, count one
25 which is an indictment for armed robbery and count two

1 which is possession of a weapon during the commission of
2 or attempt to commit a violent crime Ladies and
3 gentlemen, each of these indictments charges a separate
4 and distinct offense You must decide each indictment
5 separately on the evidence and the law applicable to it
6 Uninfluenced by your decision as to any other indictment
7 The defendant may be convicted or acquitted on any or all
8 of the offenses charged Ladies and gentlemen, you will
9 be ask to write a separate verdict of guilty or not guilty
10 for each count of each indictment

11 Ladies and gentlemen, there are two possible verdicts
12 as to each offense And you don't have to write these
13 down because these will go into the jury room with you
14 As to the Indictment for murder, We, the jury, by
15 unanimous consent find the defendant guilty of murder or
16 not guilty As to count one, on Indictment 2006-3512,
17 armed robbery, We, the jury, by unanimous consent find the
18 defendant guilty of armed robbery or not guilty And as
19 to count two, which is possession of a weapon during the
20 commission of or attempt to commit a violent crime, We,
21 the jury, by unanimous consent find the defendant guilty
22 of possession of a weapon during the commission of or
23 attempt to commit a violent crime or not guilty

24 Ladies and gentlemen, I emphasize that there's
25 absolutely no significance whatsoever to the order in

1 which I've stated these potential verdicts Ladies and
2 gentlemen, your verdict must be a unanimous one which
3 means all 12 of you must agree

4 Mr Foreman, it will be your responsibility to write
5 the verdict once the jury agrees on its verdict and it
6 will also be your responsibility to date and sign each
7 verdict form It will also be your responsibility to
8 knock on the door and advise the bailiffs when the jury
9 has completed its deliberations and reach a verdict
10 Also, if there are any questions during the deliberations,
11 it is your responsibility to write those questions out and
12 again, knock on the door and advise the bailiff of any
13 questions

14 Ladies and gentlemen, if you have any questions
15 during deliberations I need the advise you that there will
16 be a delay in our response And it's not that we're
17 ignoring you, it's that there's a procedure that we must
18 follow in answering your questions So if you have a
19 question and there is a delay, please know that we're not
20 ignoring you we're simply adhering to that procedure

21 I'm going to ask that you return to your jury room
22 but please do not yet begin your deliberations There's
23 matter of law that I must take up with the attorneys that
24 may require further instructions or clarification of an
25 instruction However, if there's no further instruction

1 we will send in the evidence, the verdict forms and your
2 notepads and at that time we will advise you to begin your
3 deliberations I'm anticipating that your lunch should
4 probably be here in another 15 minutes I think we
5 probably submitted the order around 12 00, 12 15 So we
6 were estimating an hour so I'm thinking that it should be
7 here anywhere between 1 00 and 1 15 Again, please do not
8 begin your deliberations, please leave your notepads in
9 your seats and please go with the bailiffs

10 (WHEREUPON, the jury left open court at
11 approximately 12 50 p m)

12 THE COURT Any exceptions from the State?

13 MR MOYER No, Your Honor

14 THE COURT From the defense?

15 MR ARIAIL No, Your Honor

16 THE COURT Okay, can y'all go through the evidence
17 for me, indulge me one more time and make sure everything
18 is in order

19 MR ARIAIL Everything's there

20 THE COURT Okay, Mr Bailiff, if you can get all the
21 notepads with the exception of the alternate

22 THE BAILIFF You want me to bring her back out?

23 THE COURT Yes Once you take in the evidence and
24 the verdict form, if you would bring her back out for me
25 that will be great

1 (WHEREUPON, deliberations began at approximately
2 1 04 p m)

3 THE COURT Ma'am, you can get your notepad and you
4 can destroy your own notes if you would like On behalf
5 of the State as well as the Defendant and defense counsel,
6 we thank you for your time and your attention in this
7 case We know that being an alternate is really kind of a
8 thankless job Get to do all the work but it's almost
9 like getting dressed for the dance and not going---

10 THE ALTERNATE I learned a lot

11 THE COURT I'm go glad it was educational experience
12 for you You are welcome, we've ordered your lunch and we
13 have a nice comfortable place for you where you can wait
14 for it to arrive You're welcome to stay until the jury
15 has completed its deliberations or you are free to leave
16 And I'm going to excuse you for the week You are free to
17 discuss this case if you would like But I would ask that
18 you not do that until after Friday By the same token you
19 are free not to discuss the case if you would like If
20 anyone should persist in trying to speak with you, please
21 make the clerk's office aware of it so we can protect your
22 privacy You're excused with the Court's profound thanks
23 If you'd go with the bailiff we have some place for to
24 wait

25 THE ALTERNATE You're welcome

1 THE COURT Thank you, ma'am

2 (WHEREUPON, the alternate was excused)

3 THE COURT The record should reflect the jury has
4 begun its deliberations at 1 04 I would ask that you all
5 stick as close as you can for me Because it's been my
6 experience that questions come right after lunch And I
7 assume everybody has a number to leave with my clerk and
8 with the clerk's office so that we can contact you

9 (WHEREUPON, Court was in recess awaiting a
10 verdict

11 THE COURT We have question from the jury and it
12 reads as follows We respectfully request a transcript of
13 the trials proceedings and testimony And this my
14 response Mr Foreman and ladies and gentlemen of the
15 jury, our technology does not allow us to immediately
16 produce a transcript of the proceedings However, we can
17 replay the testimony for you If you desire to have the
18 testimony replayed, please advise the Bailiff and we will
19 accommodate your request

20 Is there any exception to that response from the
21 State?

22 MR MOYER Only thing I would suggest, can we make
23 it clear they don't have to hear the whole thing, they---

24 THE COURT I'm not going to give them any direction
25 They were astute enough to say -- it is deliberately

1 nebulous so that they will tell us what they want If
2 they want to hear the whole thing all over again, then
3 that's just what we'll have to suffer through

4 MR MOYER Okay

5 THE COURT I suspect they're looking for something
6 very specific and they will tell us that That has been
7 my experience in seven years that they will tell you what
8 they want

9 MR ARIAIL And you said it in so many words and I
10 just say take -- I don't know how you say it like this but
11 take the testimony as it has been stated I mean, I don't
12 know you just want to---

13 THE COURT I don't think I can do that I have to
14 be very neutral My only purpose is to tell them once
15 they give me something like this, the only thing I'm
16 supposed to let them know is anything they want to rehear,
17 we can replay it for you but we can't produce a
18 transcript

19 MR ARIAIL That's fine

20 THE COURT Lunch is a funny thing I suspect, based
21 on my experience, as I've indicated, that there's
22 something very specific that they want to hear And that
23 will tell us that I don't think they're going to want to
24 hear the whole transcript I think they're going to be
25 very specific and I suspect they're either want to rehear

1 the defendant's testimony or they want to rehear the
2 witness, Mr Shawn Banks', testimony That is my
3 suspicion I might be off I'm not clairvoyant But I
4 suspect because this is a credibility case and it comes
5 down to who they believe based on the two folk that were
6 there So the purpose of the Court's instruction and
7 belief it or not I guess it's requested a lot, that's why
8 I have a can response They ask either for one person's
9 testimony or two or three peoples testimony This is the
10 very first time, however, I've had a request for the
11 entire transcript

12 But this response I think purports with Supreme Court
13 precedent and advises them that we can't do that for you
14 but if there's anything you want we'll be glad to replay
15 it And just left the bailiffs know and we'll be glad to
16 accommodate you immediately So -- however, if they come
17 back and say they want the whole transcript, I may, I may
18 have a little chat with the foreperson before we do that
19 Because that's two days of testimony basically give or
20 take Eliminating instructions That's a lot of
21 testimony to listen to So Okay, I'll have the Court
22 Reporter mark this as a Court's Exhibit, is there any
23 exception to this response being sent to the jury, from
24 the State

25 MR MOYER No

1 THE COURT From the defense?

2 MR ARIAIL No, Your Honor

3 THE COURT I'll have it marked as a Court's Exhibit
4 and I'll have the bailiffs advise the jury that they are
5 not to discard this That it is a part of the record and
6 it has to remain with the proceedings

7 Madam Court Reporter, if you could mark that for us
8 and we'll send it back with the bailiff

9 And I would ask that you all sit tight and sort of
10 stay in place because I suspect we're going to get a
11 request for exactly what was they want to hear Then I'll
12 have the court reporter cue up the tape and we'll go from
13 there We'll be at ease

14 (WHEREUPON, Court was in recess awaiting a
15 verdict)

16 (WHEREUPON, Court's Exhibit No 1 was marked for
17 identification and received into evidence)

18 THE COURT The jury has sent an additional note and
19 that note is, We respectfully request the definition of
20 murder that, Your Honor, read to us in closing
21 instructions including definition of malice And what I
22 would do is just reread the instruction to them Is there
23 any exception from the State?

24 MR MOYER No

25 THE COURT From the defense?

1 MR ARIAIL No, Your Honor

2 THE COURT Okay, please bring the jury

3 (WHEREUPON, the jury came into open court at
4 approximately 4 05 p m)

5 THE COURT And I'll have this note marked as an
6 Exhibit Exhibit two

7 (WHEREUPON, Court's Exhibit No 2 was marked for
8 identification and received into evidence)

9 THE COURT Mr Foreman, ladies and gentlemen, in
10 response to your note, We respectfully request the
11 definition of murder that, Your Honor, read to us in
12 closing instructions including the definition of malice
13 The Court reinstructs you as follows The defendant is
14 charged with murder The State must prove beyond a
15 reasonable doubt that the defendant killed another person
16 with malice aforethought Malice is hatred, ill will or
17 hostility towards another person It is the intentional
18 doing of a wrongful act without just cause or excuse And
19 with an intent to inflict an injury or under circumstances
20 that that law will infer an evil intent Malice
21 aforethought does not require that malice exists for any
22 particular time before the act is committed But malice
23 must exist in the mind of the defendant just before and at
24 the time the act is committed Therefore, there must be a
25 combination of the previous evil intent and the act

1 Malice aforethought maybe expressed or inferred The
2 terms express and infere do not mean different kinds of
3 malice but merely the manner in which malice may be shown
4 to exist That is either by direct evidence or by
5 inference from the facts and circumstances which are
6 proven Express malice is shown when a person speaks
7 words which express hatred or ill will toward another Or
8 when the person prepared beforehand to do the act which
9 was later accomplished For example, lying in wait for
10 a person Or any other act of preparation going to show
11 that the deed was within the defendant's mind would be
12 express malice Malice may be inferred from conduct
13 showing a total disregard for human life Inferred malice
14 may also arise when the deed is done with a deadly weapon
15 A deadly weapon is any article, instrument or substance
16 which is likely to cause death or great bodily harm
17 Whether an instrument has been used as a deadly weapon
18 depends on the facts and circumstances of each case The
19 following are examples of instruments which may be deadly
20 weapons A pistol, a shotgun, a riffle, a dirk, a dagger,
21 a knife, a slingshot, metal knuckles, a razor, gasoline, a
22 fire bomb or maltol cocktail, lighter fluid A gun may be
23 a deadly weapon even if it is not operating

24 If one intentionally kills another during the
25 commission of a felony, the inference of malice may arise

1 If facts are proven beyond a reasonable doubt sufficient
2 to raise an inference of malice to your satisfaction
3 This inference would simply be an evidentiary fact to be
4 taken into consideration by you along with all the other
5 evidence in the case And you may give it the weight that
6 you decide it should receive

7 Ladies and gentlemen, that will conclude the
8 additional instruction If you need anything please do
9 not hesitate to let us know and we will accommodate your
10 request immediately If you would go with the bailiff

11 (WHEREUPON, the jury left open court at
12 approximately 4 10 p m)

13 THE COURT Are there any exceptions from the State?

14 MR MOYER No, Your Honor

15 THE COURT From the defense?

16 MR ARIAIL No, Your Honor

17 THE COURT Okay, we'll be at ease

18 (WHEREUPON, Court was in recess awaiting a
19 verdict)

20 THE COURT We have another note and that note reads
21 as follows We request the definition of self-defense
22 Do all criteria have to be met? What I would do is
23 recharge self-defense and I think the suicide question
24 will be answered by the additional instruction Is there
25 any exception from the State?

1 MR MOYER No, Your Honor

2 THE COURT From the defense?

3 MR ARIAIL Your Honor, I would go back in regards
4 to your self-defense charge I think you have the burden
5 of proof in there, all that and no objection if that's the
6 case Thank you

7 THE COURT I'm just going to reinstruct the entire
8 self-defense

9 MR ARIAIL That's fine

10 THE COURT Please bring in the jury We'll have the
11 note marked as a Court's Exhibit

12 (WHEREUPON, Court's Exhibit No 3 was marked for
13 identification and received into evidence)

14 (WHEREUPON, the jury came into open court at
15 approximately 5 00 p m)

16 THE COURT Ladies and gentlemen, we received your
17 note, We request the definition of self-defense Do all
18 criteria have to be met? In response to that question I
19 reinstruct you as follow The defendant has raised the
20 defense of self-defense Self-defense is a complete
21 defense And if it is established you must find the
22 defendant not guilty The State has the burden of
23 disproving self-defense by proof beyond a reasonable
24 doubt If you have a reasonable doubt of the defendant's
25 guilty after considering all of the evidence, including

1 the evidence of self-defense, then you must find the
2 defendant not guilty On the other hand, if you have a
3 reasonable doubt of the defendant's guilt after
4 considering all of the evidence, including the evidence of
5 self-defense, then you must find the defendant guilty
6 The following elements are required to establish
7 self-defense First, the defendant must be without fault
8 in bringing on the difficulty If the defendant's conduct
9 was the type which was reasonably calculated to and did
10 provoke a deadly assault, the defendant would be at fault
11 in bringing on the difficulty And would not be entitled
12 to an acquittal based on self-defense

13 The second element of self-defense is that the
14 defendant was actually in imminent danger of death or
15 serious bodily injury or that the defendant actually
16 believed that he was in imminent danger of death or
17 serious bodily injury If the defendant was actually in
18 imminent danger, it must be shown that the circumstances
19 would have warranted a person of ordinary firmness and
20 courage to strike the fatal blow to prevent death or
21 serious bodily injury If the defendant believed that he
22 was in imminent danger of death or serious bodily injury,
23 it must be shown that a reasonably prudent person of
24 ordinary firmness and courage would have had the same
25 belief

1 In deciding whether the defendant actually was or
2 believed he was in imminent danger of death or serious
3 bodily injury, you should consider all of the facts and
4 circumstances surrounding the crime Including the
5 physical condition and characteristics of the defendant
6 and the victim The defendant does not have to show that
7 he was actually in danger It is enough if the defendant
8 believed he was in imminent danger and a reasonably
9 prudent person of ordinary firmness and courage would have
10 had the same belief The defendant has the right to act
11 on appearances even though the defendant's belief may have
12 been mistaken It is for you to decide whether the
13 defendant's fear of immediate danger of death or serious
14 bodily injury was reasonable And would have been felt by
15 an ordinary person in the same situation

16 Ladies and gentlemen, the relative sizes, ages and
17 weights of the defendant and the victim may be considered
18 in deciding the apparent or actual need for force in
19 self-defense And the amount of force needed The
20 reputation of the victim as a violent person may be
21 considered in deciding whether there was a need for force
22 Whether the defendant had reason to believe there was a
23 need for force and whether deadly force was reasonably
24 necessary The intoxication of the victim may be
25 considered in deciding whether the defendant's fear of

1 death or bodily harm was reasonable The final element of
2 self-defense is that the defendant had no other probably
3 way to avoid the danger of death or serious bodily injury
4 Than to act as the defendant did in this particular
5 instance

6 A person cannot be required to make an exact
7 calculation as to the degree or amount of force which may
8 be needed to avoid death or serious bodily harm
9 Therefore, in self-defense, the defendant has the right to
10 use the force needed to avoid death or serious bodily
11 harm The force used in self-defense does not have to be
12 limited to the degree or amount of force used by the
13 victim The defendant has the right to use so much force
14 as appeared to be necessary for complete self protection
15 In which a person of ordinary reason and firmness would
16 have believed to be needed to prevent death or serious
17 bodily harm A person who shoots another can be acting
18 lawfully Even if he is in unlawful possession of a
19 weapon if was entitled to arm himself in self-defense at
20 the time of the shooting

21 Ladies and gentlemen, that will conclude the
22 additional instruction If you need anything further
23 please do not hesitate to let us know and we will
24 accommodate you immediately If you would go with the
25 bailiffs

1 (WHEREUPON, the jury left open court at
2 approximately 5 05 p m)

3 THE COURT Any exception from the State?

4 MR MOYER No, Your Honor

5 THE COURT From the defense?

6 MR ARIAIL No, Your Honor

7 THE COURT We'll be at ease We'll see what the
8 jury does next

9 (WHEREUPON, Court was in recess awaiting a
10 verdict)

11 THE COURT We have a note The note reads as
12 follows Your Honor, we have after great deliberation
13 reached a verdict on the following counts, armed robbery,
14 possession of a weapon during the commission of or attempt
15 to commit a violent crime We are hung on the murder
16 count We await your directions What I would propose is
17 that I give them an Allan charge

18 Is there any exception from the State?

19 MR MOYER No, Your Honor

20 THE COURT From the defense?

21 MR ARIAIL No, Your Honor

22 THE COURT Okay, bring in the jury

23 I'll have the note marked as a Court's Exhibit

24 (WHEREUPON, Court's Exhibit No 4 was marked for
25 identification and received into evidence)

1 THE COURT Ladies and gentlemen of the jury, I have
2 received your note and in response to that note I'm going
3 to give you an additional -- this additional instruction
4 Mr Foreman and members of the jury, as I've indicated I'm
5 going to give you an additional jury charge It has to do
6 with trying to reach a verdict Because hopefully you can
7 make another effort and reach a verdict in this case And
8 I have some very brief comments that I would like to make
9 by way of further instruction on this matter of your being
10 able to attempt to reach a verdict

11 As I have already told you, you're the sole judges of
12 the facts and of the evidence in this case As the Judge
13 as I've already told you, I'm not permitted to even give
14 you a hint as to how I feel about any factual matter and
15 certainly can give you no hint as to what your verdict
16 ought to be in this case It is my duty to state the law
17 of this case as I've done and it is your duty, ladies and
18 gentlemen, to attempt to bring in a verdict But I can
19 say this, that when a matter is in dispute, it is not
20 always easy for even two men to agree or two persons or
21 two men or two women And when 12 must agree, it becomes
22 obviously and correspondingly much more difficult

23 But it is important that litigation and this
24 litigation be ended If it may be ended without a single
25 one of you doing violence to your own conscious No juror

1 is expected to give up an opinion based on reason
2 satisfactory to himself or herself merely for the purpose
3 of being in agreement And I want to be clearly
4 understood on that point

5 You are not called upon often to try cases There
6 are over 49 circuit Judges whose work it is to try cases
7 from day-to-day throughout the year And it is very
8 unusual, almost unheard for a jury to go out and promptly
9 return with a verdict This what would happen if the jury
10 was normally in agreement to begin with At the same
11 time, we usually get a verdict And what that means is
12 that it is normal for juror to disagree at first But the
13 fact that we normally get a verdict also means that after
14 reasonable persons lay aside all extraneous matters and
15 determined to decide the case on the basis of the law
16 evidence, they do come to a common understanding and are
17 able to write a verdict

18 It has never been intended that the verdict of the
19 jury should be the verdict of any one person On the
20 other hand the verdict of the jury is the collective
21 reasoning of all persons put together And that's why we
22 have a jury So that we may have the benefit of
23 collective thought and collective reasoning It becomes
24 your duty to tell the other jurors how you may feel about
25 the case And why you think as you do And I am sure

1 that you all have been doing that On the other hand, it
2 becomes the other jurors duty to exchange views with you
3 And you should listen to each other and give to the other
4 thoughts such meaning as you think it should have And so
5 to degree it can be said that jury service is a matter of
6 give and take

7 If you do not agree on a verdict it just means that
8 in some future term of court, before some other Judge,
9 perhaps that some other jury will sit where you are The
10 same participates will come and the same lawyers probably
11 will come and they will ask basically the same questions
12 And presumably and probably they will get much the same
13 answers And we will go through the whole process again
14 And I have no reason now to think that any other 12
15 citizens of Greenville County will be more capable of
16 solving this controversy than the 12 of you So I'm going
17 to ask you at this time to deliberate further and to see
18 if you cannot reach a verdict in this case

19 I want to close this part of the added instruction by
20 reminding you again, that while it is important that
21 litigation be ended, it should be end in the form of a
22 verdict by no jurors doing violence to his or her own
23 conscious No juror is expected to give up an opinion
24 based on reason and satisfactory to himself or herself
25 merely for the purposes of being in agreement With that

1 added instruction I'm going to ask you to retire to your
2 jury room and to deliberate further

3 I will say, however, that we know it is late and you
4 all probably I think had lunch about 1 15 Our only
5 option for dinner, however, is pizza And it will take
6 about 45 minutes to get that We have a bailiff who is
7 really quite generous and he's going to go pick it up for
8 you But it's still with traffic and everything will take
9 about 45 minutes to arrive I would ask that you all
10 discuss whether or not you would like for us to order
11 dinner for you And then once you've reached consensus on
12 that, Mr Foreman, if you would knock on the door and let
13 the bailiffs know of your preference whatever And
14 whatever your preference is we will abide by it

15 Okay, I appreciate your time You all may resume
16 your deliberations If you will go with the bailiff

17 (WHEREUPON, the jury left open court at
18 approximately 6 07 p m)

19 THE COURT Any exception from the State?

20 MR MOYER No, Your Honor

21 THE COURT From the defense?

22 MR ARIAIL No, Your Honor

23 THE COURT Okay, guys we'll be at ease

24 (WHEREUPON, Court was in recess awaiting a
25 verdict)

1 THE COURT Okay Jury has another question Reads
2 as follows Your Honor, may we have the option of
3 deliberating on a lesser charge in the murder count? I do
4 not believe we'll reach a verdict on murder but we are
5 willing to debate a lesser charge Is this acceptable?
6 Any suggestions? There weren't any request for lesser
7 included, I don't know that they would have been
8 appropriate under the circumstances Well simply because
9 of the self-defense So I was making sure -- what do you
10 all suggest we do?

11 MR MOYER Just tell them no they can't I don't
12 see any other -- obviously we know---

13 THE COURT Y'all just want me to write no on the
14 note?

15 MR ARIAIL No, I---

16 THE COURT It's pretty cut and dry I mean, I just
17 want---

18 MR ARIAIL I don't see any other option

19 THE COURT Yeah, because I think what they probably
20 are contemplating is involuntarily or something Because
21 in their minds I think they're thinking sudden heat or
22 passion But that's not an option They can only
23 consider the law as instructed and that's not part of the
24 law So, may we have the option of deliberating -- y'all
25 just want me to write no on here?

1 MR ARIAIL No

2 MR MOYER Uh-huh

3 MR ARIAIL No

4 THE COURT All right, we will -- I guess I should
5 just say that's not an option That's a little softer
6 than no I'm just going to write, No, that is not an
7 option Is that acceptable? Do y'all want to see this
8 before it's sent in?

9 MR MOYER No need

10 THE COURT I just simply wrote, No, that is not an
11 option And we'll have it marked as a Court's Exhibit and
12 have the bailiff take it in And they said they're still
13 talking about dinner So

14 (WHEREUPON, Court's Exhibit No 5 was marked for
15 identification and received into evidence)

16 (WHEREUPON, Court was in recess awaiting a
17 verdict)

18 THE COURT Okay, we have another note The note
19 reads, May we have the definition of reasonable doubt
20 And what I would do is reinstruct them on reasonable
21 doubt

22 Is there any exception from the State?

23 MR MOYER No, Your Honor

24 THE COURT From the defense?

25 MR ARIAIL No, Your Honor

1 THE COURT Also they've indicated they want dinner
2 So we've told them it will take 45 minutes And I'm sure
3 y'all are all hungry

4 MR ARIAIL Sure And can you state that one more
5 time for my client? He didn't hear what the question was

6 THE COURT I'm sorry, I apologize, I did not realize
7 that he wasn't sitting there I'm so very sorry May we
8 have the definition of reasonable doubt is the question

9 MR ARIAIL Thank you

10 THE COURT Not a problem

11 Okay, please bring in the jury

12 (WHEREUPON, the jury came into open court at
13 approximately 7 20 p m)

14 THE COURT Ladies and gentlemen, we received your
15 note, May we have the definition of reasonable doubt? And
16 in response to that note I give the following instruction
17 The State has the burden of proving the defendant guilty
18 beyond a reasonable doubt Some of you may have served as
19 jurors in civil cases where you were told that it is only
20 necessary to prove that a fact is more likely true than
21 not true In criminal cases the State's proof must be
22 more powerful than that It must be beyond a reasonable
23 doubt Proof beyond a reasonable doubt is proof that
24 leaves you firmly convinced of the defendant's guilt
25 They're very few things in this world that we know with

1 absolute certainty And in criminal cases the law does
2 not require proof that overcomes every possible doubt If
3 based on your consideration of the evidence you are firmly
4 convinced that the defendant is guilty of the crime
5 charged, you must find him guilty If on the other hand
6 you think there is a real possibility that he is not
7 guilty, you must give him the benefit of the doubt and
8 find him not guilty

9 Ladies and gentlemen, that will conclude the
10 additional instruction, if you need anything further
11 please don't hesitate to let us know and we will
12 accommodate you immediately And I think you've already
13 spoken with the bailiffs about your dinner and it is begin
14 ordered as we speak We anticipate the bailiff will go
15 pick it up and I'm hoping less than 45 minutes, I'm hoping
16 more like 30 Okay If you need anything please let the
17 bailiffs know If you would go with the bailiff

18 (WHEREUPON, the jury left open court at
19 approximately 7 22 p m)

20 THE COURT Any exception from the State?

21 MR MOYER No, Your Honor

22 THE COURT From the defense?

23 MR ARIAIL No, Your Honor

24 THE COURT Note will be marked as a Court's Exhibit
25 Y'all might want to go walk down the street and get y'all

1 something to eat Leave us your cell phone numbers in
2 case there's another question But we'll, of course,
3 we'll be here But if y'all could just go some place
4 close

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

7 (WHEREUPON, Court was in recess awaiting a
8 verdict)

9 THE COURT We have another and it reads as follows
10 We are still hung, maybe irreparably so at this time We
11 await instructions as to our next step I can do one of
12 two things Based on case law I can bring in the
13 foreperson and ask him if he feels any further
14 instructions will aid the jury in reaching a verdict If
15 he would discuss it and let me know We live or die --
16 but we live by that response Or I can declare a
17 mistrial What is your preference from the State?

18 MR MOYER I think the first option

19 THE COURT From the defense?

20 MR ARIAIL Your Honor, we prefer the first
21 instruction

22 THE COURT I'm sorry?

23 MR ARIAIL The instruction in regards to the
24 foreperson, that will be fine with us

25 THE COURT Please bring in the foreperson only

1 THE BAILIFF Yes, Your Honor

2 (WHEREUPON, the foreperson was questioned by the
3 Court)

4 THE FOREPERSON Do I need to approach?

5 THE COURT No, sir, you can stay right there What
6 I'm going to do, I received your note regarding the jury
7 being hung And what I'm going to ask is if you think any
8 further instruction will aid the jury in reaching a
9 verdict? And for you to discuss that with your fellow
10 juror members and then advise us as to whether or not you
11 think any further instruction will aid you in reaching a
12 verdict

13 THE FOREPERSON Versus definitions, things like
14 that, instructions or deliberate?

15 THE COURT Any further instruction Rather any
16 further instruction at all will aid in reaching a verdict
17 And once you all have reached the decision, if you would
18 just let the bailiffs know and we'll bring you back in and
19 you call tell us that

20 THE FOREPERSON Thank you, very much

21 THE COURT You're welcome, sir

22 (WHEREUPON, the foreperson was excused to
23 continue to deliberate)

24 THE COURT Any exception from the State?

25 MR MOYER No, Your Honor

1 THE COURT From the defense?

2 MR ARIAIL No, Your Honor

3 THE COURT We'll have the note marked and we'll
4 await the jury's decision

5 (WHEREUPON, Court's Exhibit No 7 was marked for
6 identification and received into evidence)

7 (WHEREUPON, Court was in recess awaiting a
8 verdict)

9 THE COURT The jury sent the following note Does
10 reasonable doubt apply strictly to facts alone? How
11 does -- how does one define being without fault in
12 bringing on the difficulty? I think this answer to one is
13 yes

14 MR ARIAIL What was it? Reasonable doubt---

15 THE COURT Does reasonable doubt apply strictly to
16 the facts alone? The only thing the jury can consider is
17 the facts because they're the fact finders They can't
18 have any doubt about the law, they're bound to follow the
19 law as I instruct them Whether they disagree with me or
20 not

21 MR ARIAIL Yeah, I guess the application of the law
22 with the facts I don't know how you say that with that

23 THE COURT No, there's only one answer Because
24 there are only the fact finders The question, Is does
25 reasonable doubt apply strictly to the facts alone?

1 MR ARIAIL Yes, because you're the fact finders---

2 THE COURT Fact finders

3 MR ARIAIL Can we say that? That will be fine,
4 yes

5 THE COURT I'm just going to tell them, Yes

6 MR ARIAIL Okay

7 THE COURT Keep it simple I have to be very
8 careful not to invade their deliberative process

9 MR ARIAIL That's fine

10 THE COURT I think then on the other part of it I
11 would just reinstruct them on -- because I think the
12 definition given is fairly self explanatory and really is
13 common sense Because it's very clear The instruction
14 is first the defendant must be without fault in bringing
15 on the difficulty If the defendant's conduct was the
16 type which was reasonably calculated to and did provoke a
17 deadly assault, the defendant would be at fault in
18 bringing on the difficulty and would not be entitled to
19 an acquittal based on self-defense That's the only
20 definition really that we have in case law to define being
21 without fault in bringing on the difficulty

22 MR ARIAIL Are you going to recharge in regards to
23 that?

24 THE COURT I think that's the only option I have

25 MR ARIAIL Yeah That will be fine Yes, to the

1 first one and then recharge them on the second one, that's
2 fine

3 THE COURT Any exception from the State?

4 MR MOYER No, ma'am

5 THE COURT Please bring the jury

6 I need to make sure that I understand --

7 Actually go get the bailiff and tell him to bring me
8 the foreperson first Because I need to make sure I read
9 this correctly

10 (WHEREUPON, the foreperson came into the
11 courtroom)

12 THE COURT Just for the record, you wrote, Does
13 reasonable doubt apply strictly to the facts alone, was
14 that your question?

15 THE FOREPERSON Yes, ma'am

16 THE COURT Okay, I just wanted to make sure I read
17 it correctly

18 You can bring in the whole panel

19 Sir, you can go ahead and have a seat

20 (WHEREUPON, the jury came into open court at
21 approximately 9 05 p m)

22 THE COURT Ladies and gentlemen, I received your
23 note and the first question is, Does reasonable doubt
24 apply strictly to the facts alone? And the Court's answer
25 would be, Yes

1 As regards to the second question which is, How does
2 one define being without fault in bringing on the
3 difficulty, I would reinstruct you as follows The
4 defendant must be without fault in bringing on the
5 difficulty The defendant's conduct was the type which
6 was reasonably calculated to and did provoke a deadly
7 assault, the defendant would be at fault in bringing on
8 the difficulty And would not be entitled to an acquittal
9 based on self-defense

10 I hope this will aid you If you need anything
11 further, please do not hesitate to let us know and we will
12 accommodate you If you would go with the bailiffs

13 (WHEREUPON, the jury came into open court at
14 approximately 9 08 p m)

15 THE COURT Any exception from the State?

16 MR MOYER No, Your Honor

17 THE COURT From the defense?

18 MR ARIAIL No, Your Honor

19 THE COURT And for the record, we ask the foreperson
20 whether additional instruction would aid the jury and I
21 think by virtue of the jury sending a note that indicated
22 an affirmative answer And I'll have this note marked as
23 a Court's Exhibit And we'll be at ease and wait further
24 direction from our panel
25

1 (WHEREUPON, Court's Exhibit No 8 was marked for
2 identification and received into evidence)

3 (WHEREUPON, Court was in recess awaiting a
4 verdict)

5 THE COURT We have a note The note reads as
6 follows Is participating in a felony a provocative act
7 in and of itself in context to quotes must be without
8 fault in bringing on the difficulty? And the next
9 question, Were the events Mr Hawkins and Mr Gilbert
10 participating in defined as felonies?

11 Yes, sir

12 MR MOYER I think my response is for the second
13 question the answer would be, Yeah In just that armed
14 robbery is a felony So I think that that statement would
15 answer that question

16 THE COURT Depends on what events they're talking
17 about Are they talking about selling the pills are they
18 talking about the gun, are they talking about the wallet,
19 are they talking about -- what are they talking about?

20 MR ARIAIL Yeah Because selling the drugs --
21 Uh-huh

22 MR MOYER I think---

23 THE COURT Selling the drugs -- selling prescription
24 drugs, does that come under the crack and cocaine statue?

25 MR ARIAIL That's methadone

1 MR MOYER Schedule four

2 THE COURT Depends on what schedule they are

3 MR ARIAIL Did he say Mr Hawkins and Mr Gilbert?

4 THE COURT Mr Hawkins and Mr Gilbert

5 MR ARIAIL Okay So he's only referring to the
6 pills

7 THE COURT Pardon me?

8 MR ARIAIL We were just talking about it's not well
9 it's Mr Walton, it was referring to Mr Hawkins and Mr
10 Gilbert which only would and be the pills The felonies
11 that they had It's not---

12 THE COURT Yeah, you're right Were the events that
13 Mr Hawkins and Mr Gilbert defined as felonies? That
14 would be the sell of the drugs And I would debate --
15 don't those pills come under the statute as crack,
16 cocaine, meth? Prescription drugs, that can't come under
17 the same category as crack meth and everything else,
18 doesn't it I'm not sure

19 MR MOYER 44-53-370---

20 THE COURT It depends on what the schedule is

21 MR MOYER Yeah

22 THE COURT You need to look under the statute and
23 see what comes under that schedule

24 THE COURT Because I know possession of them is the
25 same Actually, they were selling them Possession of

1 prescription drugs is the same as crack cocaine and
2 methamphetamine Because when you get stopped -- say they
3 stop you for something and they find that people have
4 Xanax or whatever, they plea under the same statute It's
5 a schedule whatever drug It's still zero to three and or
6 five, I think, is the range of punishment I don't know
7 whether those felonies -- but selling them is different,
8 that comes under the category of distributing

9 MR MOYER I think it's in 44---

10 THE COURT Irregardless of the quantity

11 MR MOYER --53-370

12 MR ARIAIL Right

13 MR MOYER Can we take a break, Your Honor, and let
14 me run back to the office?

15 THE COURT Yeah, sure

16 MR ARIAIL What was the first question again, Your
17 Honor, I'm sorry?

18 THE COURT Is participating in a felony a
19 provocative act in and of itself in context to must be
20 without fault in bringing on the difficulty? My response
21 to that would be that's a factual issue for you, the jury,
22 to determine

23 MR LANDIS Maybe get back to inference---

24 THE COURT I'm sorry, I didn't hear you

25 MR ARIAIL He was saying---

1 THE COURT Well let's wait for Mr ---

2 MR LANDIS Yeah, I didn't want to---

3 THE COURT Yeah, wait for Mr Moyer to come back
4 What did y'all figure out?

5 MR MOYER As I see it, methadone is a scheduled two
6 controlled substance And under 44-53-370 (b) 1, schedule
7 two -- distribution of schedule two narcotic is a felony

8 THE COURT I think actually it's probably is more of
9 possession with intent to distribute since the act never
10 actually cumulated

11 MR MOYER Okay

12 THE COURT But it's still a felony and they're all
13 opioids and they're all schedule two Methadone and
14 Oxycodone

15 MR ARIAIL And could you read me the question one
16 more time

17 THE COURT Sure Is participating in a felony a
18 provocative act in and of itself in context to quotes must
19 be without fault in bringing on the difficulty question
20 mark end quotes Were the events Mr Hawkins and Mr
21 Gilbert participating in defined as a felonies?

22 And actually what I would propose to do is simply
23 answer the jury as regards to the first question that as
24 the fact finders the answer to that question is solely
25 within your province

1 MR MOYER I agree with that

2 THE COURT And that answer to the second would be,
3 Yes

4 MR MOYER Yes, that's the way I would see it

5 THE COURT And how does---

6 MR ARIAIL Your Honor, the way we would like the
7 second one answered clearly would be -- I think the issue
8 with the second one we would like them to be fully
9 charged -- we don't think they can separate out -- I mean,
10 I know they're asking a specific question in regards to
11 it We believe there should be more information in
12 regards to that

13 THE COURT I can't give them anything that's outside
14 of the evidence

15 MR ARIAIL I guess what I would say is that we
16 would like for them to be recharged fully in regards to
17 that?

18 THE COURT Fully in regards to what?

19 MR ARIAIL Self-defense Because what they're
20 asking is fault in whether or not the felony is enough to
21 fall outside without fault I guess there's a felonious
22 act in regards to that

23 THE COURT They asked a very specific question and I
24 think it goes to their fact finding capacity And I don't
25 think they need to be recharged on self-defense What

1 they're struggling with is whether their being involved in
2 a drug deal contributed to bringing on the difficulty
3 That's a factual issue within their factual province as a
4 jury And I think for my to lean one way or other invades
5 their province I think they need to be told that that's
6 a factual issue for you to determine If you need for me
7 to reinstruct you on the law, I'll be glad to do it and
8 I'm available to do it

9 MR ARIAIL Okay, that's fine And I would just
10 say---

11 THE COURT Because what they're asking is a factual
12 question And up to this point when they wanted to be
13 reinstructed they did that, they asked me that

14 MR ARIAIL Okay And---

15 THE COURT Are you referring to question one or
16 question two?

17 MR ARIAIL I'm on two

18 THE COURT Oh, were the events---

19 MR ARIAIL I'm sorry, I---

20 THE COURT I think there question is very specific
21 on question two and it's a yes or no answer And I've
22 already reinstructed -- I mean, they are astute enough --
23 I mean, the foreperson's a teacher

24 MR ARIAIL Okay, I understand We just take
25 exception to that, think that it should be fully charged

1 in its whole context I understand that's just our

2 THE COURT I don't think that would be an answer to
3 their question The question is, Were the events Mr
4 Hawkins and Mr Gilbert participating in defined as
5 felonies? As I read the question as we were out during
6 the break, it introduces another issue which I was
7 hesitant to raise because no one else did, but it really
8 isn't in the evidence So for me to answer, y'all don't
9 have to agree anyway Because it was never presented to
10 them whether it was a felony

11 MR ARIAIL I mean, I

12 THE COURT They can only rely on the evidence that's
13 before them

14 MR MOYER I mean, the facts scenario was brought
15 before them

16 THE COURT Yeah but nobody ever brought out whether
17 it was a felony or not

18 MR MOYER I mean, that's not a fact issue I mean,
19 the facts of what took place came out before the jury and
20 now the jury wants to know well is fact scenario fit the
21 legal definition of a felony Just like we told them an
22 armed robbery is a felony then---

23 THE COURT However, there's nothing in the law that
24 required me to charge them that So in the context that
25 they're asking it is factual Because it ties into their

1 question about whether a felony contributes to bringing on
2 the difficulty

3 MR MOYER Which is first the first question The
4 second question --

5 THE COURT The second question and the first
6 question are inextricably tied to one another

7 MR MOYER Sure, but---

8 THE COURT Can't separate them

9 MR MOYER I understand But they're two distinct
10 questions and the second question is this incident or is
11 this particular act a felony under the law? And which I
12 think is only -- only the judge of the law can answer that
13 question I think telling them yes it would be, I think
14 would be part of an instruction They should be told

15 MR ARIAIL As you've stated, it's not part of the
16 record therefore it should be given to them We just
17 simply say---

18 THE COURT It's no different to me than when the
19 jury sort of goes off on their own and ask for additional
20 definitions and ask for additional evidence and other
21 things that are outside of the record We're bound by our
22 record You know, it's almost like when they start to do
23 their own investigation, it's almost the same to me
24 They're bound by the record and the evidence that's before
25 them You could have presented evidence that it was a

1 felony You didn't And it's not before them And I
2 think for me, it is my job to instruct the law applicable
3 to the facts and circumstances of the case Whether it's
4 a felony or not is not a part of what I am required to
5 instruct them in this case

6 The first question and the second question are
7 inextricably tied to one another They are struggling
8 with whether them being involved -- and, of course, I'm not
9 in there, I'm not clairvoyant, but after -- I can pretty
10 much anticipate based on the context of this question, it
11 appears that they are struggling with whether being
12 involved in a felony, as they phrased it, is a provocative
13 act in and of itself In other words, was them being
14 involved in a drug deal sufficient to bringing on the
15 difficulty that happened? And that's a factual issue for
16 them to determine Whether it was a felony or not really
17 doesn't matter in context of self-defense Because within
18 the ambient of what I've instructed them, it is whether
19 any type of conduct, felony, misdemeanor or otherwise, was
20 reasonably calculated to bring on the difficulty

21 So what they should be focusing on is whether in the
22 context or the totality of all of the behavior, whether
23 that was sufficient to bring on the difficulty It really
24 is irrelevant to some extent to whether it was a felony or
25 not

1 MR MOYER Maybe that should be what they're told

2 THE COURT If I can remember what I just said I
3 have to ask the Court Reporter read that back

4 MR MOYER For purposes of---

5 THE COURT Did they turn the air off in here?

6 MR ARIAIL It goes off at a certain---

7 THE COURT Did they turn the air off?

8 MR MOYER I think it must be

9 For purposes of self-defense, you know, whether that
10 conduct was a felony or not---

11 THE COURT Really doesn't matter

12 MR MOYER Maybe that should be told that

13 MR ARIAIL I mean, I don't think that is just a
14 specific answer to their question So I don't think we
15 can

16 THE COURT I can tell them what they should or
17 should not consider I can tell them they're confined to
18 the record Whether it is or not it's not in the record
19 and it's not appropriate for their consideration

20 MR ARIAIL And that's fine to do right there

21 THE COURT Do you have any exception to that?

22 MR MOYER I think with the added explanation that
23 whether---

24 THE COURT Keep it simple I'm not going to
25 invade---

1 MR MOYER Whether it's a felony or not is not---

2 THE COURT I just said that

3 MR MOYER --law of self-defense Okay, I didn't---

4 THE COURT I just said it very simply in a way that
5 they would -- of course I'll have to get April to read it
6 back to me because I don't remember But I'll get her to
7 do that later

8 MR ARIAIL That's fine I just want to know what
9 we were -- he said one thing is that what we're going to
10 tell the jury?

11 THE COURT I don't know Why don't y'all agree on
12 something and let me know Y'all have a prayer meeting
13 and let me know what you think What y'all got?

14 MR ARIAIL We would like to -- I'll start if you
15 want me to

16 THE COURT Wait one second All right

17 MR ARIAIL I don't know if we've agreed We might
18 after we discuss but we were saying take the facts as you
19 find them and the law has been charged Which is --

20 MR MOYER I think the only way we disagree is I
21 would like added to that that whether the -- whether that
22 conduct was a felony or not is not -- does not play into
23 the law of self-defense

24 MR ARIAIL Then I would have exception to the last
25 part in that if we're going to do that then we got to go

1 back to the charge Full charge in regards to what you
2 said in regards to -- I don't know how to do that I
3 mean, it's very simply Just say is short and sweet I
4 think

5 THE COURT The problem is exactly what I anticipated
6 it would be which is the Slater case Because if you're
7 involved in illegal activity and it brings about the
8 difficulty it is relevant for them to consider That's
9 why I specifically did not want to charge that Because I
10 knew this was going to come up And it is relevant for
11 them to consider

12 MR ARIAIL But under that we said it was unlawful
13 possession

14 THE COURT There's another portion of the case and
15 when I went backed and looked through, I read the advance
16 sheets and I make my own notes relevant language and one
17 of the things the Supreme Court says is they are
18 specifically rejecting that -- and I'm trying to remember
19 the exact language, I don't want to misstate it I don't
20 remember whether it just relates to a gun or whether it
21 talks in terms of illegal behavior as a whole in bringing
22 about the difficulty

23 MR ARIAIL Did you utilize Burris or Slater in
24 that?

25 THE COURT Pardon me?

1 MR ARIAIL Did you use Slater or Burris?

2 THE COURT I used Burris

3 MR ARIAIL Burris, okay

4 THE COURT Because the language in Slater is any act
5 of the accused in violation of the law and reasonably
6 calculated to produce the occasion amounts to bringing on
7 the difficulty And bars the right to self-defense It
8 doesn't limit to a gun

9 MR ARIAIL But that language wasn't charged

10 THE COURT It wasn't But I should have in
11 hindsight because I knew this was -- because it wasn't a
12 balanced -- see the problem is the cases are sort of -- I
13 won't say they're in opposition to one another, they're
14 not They're two very factually dissimilar situations
15 However, they both deal with accident in the context of
16 self-defense I charged it out of an abundance of caution
17 because I figured no harm, no foul But the problem that
18 this jury is now struggling with is rather illegal
19 activity amounts to bringing on the difficulty And the
20 case is that it is a fact that they can consider but it's
21 something they give it the weight they think it deserves

22 MR ARIAIL And I think that's fine to say right
23 there It's a fact they consider and give it the weight
24 they think it deserves

25 THE COURT See and the language I was thinking about

1 from the Slater case is the that Supreme Court has
2 rejected the position that unlawful possession of a weapon
3 could never constitute and unlawful activity which would
4 bar the assertion of self-defense

5 MR ARIAIL And---

6 THE COURT But I don't know that that's necessarily
7 relevant to our discussion but that's what I was trying to
8 recall while I was or thinking out loud

9 MR ARIAIL I think we're back, once again, Mark and
10 I were sitting here hashing out language But, I mean---

11 THE COURT Okay, I think what I think we may need to
12 respond -- give them in response to -- and I think this
13 will probably cover both questions In considering the
14 first element of self-defense, that the defendant must be
15 without fault in bringing about the difficulty, you as the
16 fact finders must consider whether the conduct was the
17 type which was reasonably calculated to a did provoke the
18 assault In making this assessment you should consider
19 the testimony in the entire record and the facts as you
20 find them Whether the events Mr Hawkins and Mr Gilbert
21 engaged in amounted to bringing on the difficulty, is the
22 factual issue for you, the jury, to determine This
23 evidence are simply evidentiary facts to be considered by
24 you, the jury, along with the other evidence in the case
25 and you may give it the weight you decided it should

1 receive

2 Is there any exception from the State?

3 MR MOYER No, Your Honor

4 THE COURT From the defense?

5 MR ARIAIL No, Your Honor

6 THE COURT I didn't hear you?

7 MR ARIAIL No, Your Honor

8 THE COURT Okay, let me just write the last part
9 because I sort of -- Do you all want me to type it out or
10 do y'all want me to bring them out?

11 MR ARIAIL Could I see it one more time when you
12 right it out just to check it I'm not very good at
13 hearing

14 THE COURT It's okay, I'm visual too That's why
15 I've got to write it out

16 MR ARIAIL May wife says that all the time

17 THE COURT Well I now think that the question is
18 larger than -- because they've already reached a verdict
19 on the armed robbery and the possession of a weapon during
20 the commission of a violent crime What they're now --
21 what they're deadlocked on, I don't know if they're still
22 deadlock, is the murder charge So they're considering
23 the elements of murder as well as the self-defense And
24 participation in a felony is evidence of inferred malice
25 So whether it was a felony or not may well be appropriate

1 for the Court to answer Because I kept thinking, where
2 did I mention felony in my charge and where would they
3 have thought about that

4 MR ARIAIL I'm trying to remember your felony
5 murder charge

6 THE COURT Felony inference, we charge felony
7 inference which is, if one intentionally kills another
8 during the commission of a felony, the inference of malice
9 may arise If facts are proven beyond a reasonable doubt
10 sufficient to raise and inference of malice to your
11 satisfaction, this inference would simply be an
12 evidentiary fact to be taken into consideration by you
13 along with all the evidence in the case and you may give
14 it the weight you decide it should receive So I think we
15 do have to answer that question Because we charged them
16 on felony murder inference

17 MR ARIAIL And I would say that -- I guess the way
18 I would do it---

19 THE COURT And I probably should have given them a
20 list of felonies or something or examples We just didn't
21 think far enough ahead about it

22 MR ARIAIL I mean, I would be, I guess---

23 THE COURT Normally when you charge felony inference
24 the State usually argues that the activity was a felony
25 But in this instance I don't think -- I don't think that

1 argument was made

2 MR ARIAIL See that's my concern is they're not
3 making the inference that was a felony but they---

4 THE COURT I think they're grappling with whether it
5 was murder and whether it was self-defense And to that
6 extent the question -- that's the only way -- only reason
7 they would ask that question, that's the only time the
8 charge felony -- because otherwise it wouldn't have been
9 before them

10 MR ARIAIL I guess my argument is, like you said
11 earlier, the felony, in regards to David Gilbert and
12 Mr Hawkins was never placed in the record I don't have
13 a problem saying---

14 THE COURT Well the activity was placed in the
15 record and by virtue of the fact that we charged felony
16 murder inference it is in the record Because what has
17 been presented to the jury is that if you -- well
18 actually, the felony I think that was being referred to
19 was armed robbery

20 MR ARIAIL Yeah, they're referring to armed robbery
21 as the felony, not the felony of the sale of the pills
22 So I mean, I have no problem saying---

23 THE COURT No, I don't know that the jury is limited
24 by that They're only limited by the entire record

25 MR ARIAIL But my concern and that's the reason --

1 specifically in regards to that felony, I understand
2 they're asking is that specifically a felony, can they
3 consider that

4 THE COURT I think can

5 MR ARIAIL In regards to it I'm saying that he
6 didn't place that in the record so I don't know how you
7 answer I mean, we can't answer that question because the
8 felony he's talking about is the armed robbery that the
9 felony---

10 THE COURT Your arguments don't limit what the jury
11 can consider from the record

12 MR ARIAIL Well I would request that they be given
13 a fuller detail in regard to that like you had stated in
14 your --

15 THE COURT Oh, I'm going to give this whole thing
16 But I still think and I think that what I would propose
17 than in answering the second question, that the answer be
18 yes but add the additional language that this is simply an
19 evidentiary fact for you to consider or not consider, give
20 it the weight that you think it deserves

21 MR ARIAIL Yeah--

22 THE COURT I wouldn't lean one way or the other
23 because I think it is an evidentiary fact for them to
24 weigh and consider They can disregard it, they can
25 include it, they don't have to But I think as long as we

1 add the language -- the answer to the first question I'm
2 going to read to you again And then what I say propose
3 on the second question that the answer be yes And then
4 simply say but ladies and gentlemen, this is simply an
5 evidentiary fact to be take into consideration by you
6 along with all the other evidence And you may give it
7 the weight that you decide it should receive Which means
8 you can include it or not include it, disregard it, regard
9 it, it's up to you as the fact finder Then I would maybe
10 at the end of it say again, I emphasize as the fact
11 finders you have to determine the facts in this case And
12 it's for you to give the evidence the weight you deserve
13 it should receive Which makes us all completely neutral
14 and takes us out of the deliberative process My job is
15 to be neutral and state the law and make sure they're
16 equipped to find the facts and apply the law to facts

17 MR ARIAIL I would say everything is fine with that
18 except for the first yes in regards to it and I'd like you
19 to start off with the simple listing that can take the
20 facts as---

21 THE COURT I don't see how I could not answer --
22 well that would seem very confusing---

23 MR ARIAIL That would be vague---

24 THE COURT --to them for me to simply say the last
25 part of it without answering the question Because the

1 behavior is in the record It is before them And we did
2 charge on felony -- felony inference of murder I don't
3 know that they -- I think they are still grappling
4 graveling with the issue of self-defense And I think the
5 answer that I'm going to give them more than equips them
6 to answer -- because it takes us out of it completely
7 You know, these are just facts you have to weigh You
8 know, it doesn't way more heavily one way or the other
9 So I'm going to read the first answer to you which
10 would be in response to, Is participating in a felony a
11 provocative act in and of itself in the context -- in
12 context to must be without fault in bringing on the
13 difficulty And the answer would be, in consider the
14 first element of self-defense, that the defendant must be
15 without fought in bringing about the difficulty, you as
16 the fact finders must consider whether the conduct was the
17 type which was reasonably calculated to and did provoke
18 the assault In making this assessment you should
19 consider the testimony in the entire record and the facts
20 as you find them Whether the events Mr Hawkins and Mr
21 Gilbert engaged in amounted to bringing on the difficulty
22 is a factual issue for you, the jury, to determine These
23 factual issues are simply evidentiary facts to be
24 considered by you, the jury, along with the other evidence
25 in this case And you may give it the weight you decide

1 it should receive

2 And then as regards, Were the events Mr Hawkins and
3 Mr Gilbert participated in defined as felonies? I would
4 answer, yes Then again say, these are simply -- these
5 would -- this would simply be an evidentiary fact to be
6 taken into consideration by you, the jury, along with the
7 other evidence in the case and you may give it the weight
8 you decide it should receive

9 MR ARIAIL And the second question -- I think the
10 first one, there was some language in your first question
11 that I think was applicable to the second in regards to
12 bringing it on and all of that I think if you can
13 duplicate---

14 THE COURT I don't need to repeat bringing on the
15 difficulty in the second question because that's not what
16 they asked And I think to some extent it covers it And
17 I would tell them, were the events Mr Hawkins -- I think
18 they're two separate questions Although they're tied to
19 one another, I think answering it, I almost answered
20 number two while I answered number one but I still think I
21 need to answer number two and still again reinforce that
22 it's simply evidentiary fact for you to consider Along
23 with everything else And you may give it the weight you
24 think it deserves Which means you can disregard it if
25 you want, you can give it weight if you want, you don't

1 have to give it any weight, you're the fact finders

2 MR ARIAIL Right

3 THE COURT The State concedes that the felony murder
4 inference dealt with the armed robbery, correct?

5 MR ARIAIL Correct

6 MR MOYER That's what I argued in my---

7 THE COURT That's what I thought you argued

8 Is there any exception to me simply giving them the
9 answer that I read as it relates to both questions?

10 MR MOYER Not from the State

11 THE COURT From the defense?

12 MR ARIAIL And that would be?

13 THE COURT The one I read---

14 MR ARIAIL Yes, to the second one, correct?

15 THE COURT No, what I'm saying is just read that one
16 answer I read the first time for both questions

17 MR ARIAIL That would be fine

18 MR MOYER Well, I still think---

19 THE COURT Let me tell you why I'm struggling with
20 it Other than the fact that it's 10 20 and it's hot in
21 here I'm struggling with it because I don't want them to
22 be confused that felony inference can arise from this drug
23 deal Because that's not what you argued to them and
24 that's not the underlying felony that you argued That
25 was not the theory of your case The theory of your case

1 was that the reason felony inference murder applied was
2 because it took place in the course of an armed robbery

3 MR MOYER Well I certainly argued that point but I
4 don't think the jury is confined to what I argued They
5 can look at the entire regard and they can find any
6 unlawful conduct that they want to find

7 THE COURT See that Slater language, any unlawful
8 conduct -- but see then that leaves me with whether I
9 should -- I don't want to have to append the charge and
10 charge that Slater language because it's very heavy and I
11 think by itself would be problematic and I probably should
12 have charged it in conjunction with bringing on the
13 difficulty to begin with Which is that any unlawful
14 conduct can be considered by the jury in bringing on the
15 difficulty But I still don't want them getting confused
16 about -- because the drug deal is -- will the drug deal
17 bring about difficulty?

18 MR MOYER Well I certainly argued that, Your Honor,
19 and they can -- I did argue that in my closing And they
20 can, if they so choose they can in their province as a
21 jury---

22 THE COURT You argued that in the context of
23 bringing on the difficulty?

24 MR ARIAIL No, he argued the armed robbery was the
25 bringing about the difficulty, not the sell of the pills

1 MR MOYER No, I argued the whole thing Him going
2 in there doing a drug deal with a gun And once again,
3 whether I argued it not, I'm not sure that confines the
4 jury

5 MR ARIAIL But I think confines them in regards to
6 drawing inference out of that specifically when that
7 felony is not in the record That is going to cause them
8 confusion

9 THE COURT He did argue that the drug deal brought
10 about the difficulty as I recall I'm just trying to
11 remember back to the entire argument

12 MR ARIAIL I thought his specific argument was
13 that---

14 THE COURT He argued that continuous chain of
15 activity that brought about the entire difficulty
16 Basically that they were all building blocks upon one
17 another I'm paraphrasing but that's basically how his
18 argument went You know, they're involved in this elicit
19 behavior and then it escalated and he brought the gun to
20 the situation, then the armed robbery, then it continued
21 to escalate

22 MR ARIAIL As I remember in theory was he had the
23 pills, argument's in regards to that I mean, his theory
24 is he pulled the gun -- I mean, I don't see -- I don't see
25 how the drug deal was bringing about -- I don't think he

1 argued that and I don't think this jury has heard that
2 That's my -- their confusion in regards to that And now
3 we're throwing in a felony that---

4 THE COURT No the evidence is before the jury that
5 they were involved in an elicit behavior and that elicit
6 brought about the situation

7 MR ARIAIL Well, and I---

8 THE COURT Well the jury is instructed that your
9 arguments are just that, arguments, your theory on the
10 case That they are the fact finders They're not bound
11 by your argument

12 MR ARIAIL I understand I guess I'm saying---

13 THE COURT Or your theory for that matter

14 MR ARIAIL --never said Mr Gilbert was the culprit
15 of this or was the one that, you know -- and now we've got
16 this question in regards to the felony activity between
17 them They've never indicated anything that -- I just
18 don't think that was advanced to the jury---

19 THE COURT I don't think it has to be I don't
20 think you have to -- when I instruct the jury I tell them
21 that what you argue is just that, it's arguments, it's not
22 evidence That they are the fact finders That they are
23 only bound by the evidence of sworn witnesses -- from the
24 testimony of sworn witnesses and the evidence that's
25 introduced And as fact finders their job is to look at

1 the evidence, to find the facts as they see them and apply
2 the law as I instruct them

3 MR ARIAIL Right

4 THE COURT That's all they're bound by They're not
5 bound by your argument or your theory for that matter

6 MR ARIAIL Right Exactly

7 THE COURT Either one of your theories

8 MR ARIAIL Right

9 THE COURT It's just argument Your theory is what
10 you believe the case is and what you believe the evidence
11 shows

12 MR ARIAIL And I still think you're, I don't know
13 how you're going to address it now but the issue is -- I
14 mean, I think what you were talking about the language
15 that you used in the first part is still going to be
16 language that should be used in which fully accomplishes
17 what needs to be done in both of those questions

18 THE COURT I'm going to take a quick break and I'll
19 make a decision Then we will proceed

20 (WHEREUPON, a short break was taken)

21 THE COURT Okay, this is how I would propose we
22 answer the question The first question is, Is
23 participating in a felony a provocative act in and of
24 itself in context to must be without fault in bringing on
25 the difficulty? And I'll answer that as follows In

1 considering the first element of self-defense, that the
2 defendant must be without fault in bringing about the
3 difficulty, you as the fact finders must consider whether
4 the conduct was the type which was reasonably calculated
5 to and did provoke the assault In making this assessment
6 you should consider the testimony and evidence in the
7 entire record and the facts as you find them Whether the
8 events that Mr Hawkins or Mr Gilbert engage in amounted
9 to bringing on the difficulty is a factual issue for you,
10 the jury, to determine These factual issues are simply
11 evidentiary facts to be considered by you, the jury, along
12 with the other evidence in the case and you may give it
13 the weight you decide it should receive

14 Is there any exception to that response from the
15 State?

16 MR MOYER No, Your Honor

17 THE COURT From the defense?

18 MR ARIAIL No, Your Honor

19 THE COURT The second question is, Where the events
20 Mr Hawkins and Mr Gilbert participating in defined as
21 felonies? And I thought through that a little bit more
22 and that is a legal issue, it is not a factual issue It
23 is for the Court to define the law for the jury and I
24 think the appropriate answer and I got a little creative
25 and I'll see if you all agree with my response What I

1 would do is answer that by saying, Yes And then say --
2 and I don't think I need to get into defining it, whether
3 it's possession or distribution, possession with the
4 intent or distribution, I don't think we need to get into
5 all of that because they didn't ask that Nor do I think
6 it would be appropriate to introduce that before the jury

7 But I would say answer that question, Yes This is
8 simply an evidentiary fact to be considered by you, the
9 jury, along with the other evidence in the case And you
10 may give it the weight you decide it should receive
11 Again, I instruct you in considering the first element of
12 self-defense that the defendant must be without fault in
13 bringing about the difficulty You as the fact finders
14 must consider whether the conduct was the type which was
15 reasonably calculated to and did provoke the assault In
16 making this assessment you should consider the testimony
17 and evidence in the entire record and the facts as you
18 find them And again, I emphasize, that these are simply
19 evidentiary facts to be considered by you, the jury, along
20 with the other evidence in the case and you may give it
21 the weight you decide it should receive

22 Is there any exception from the State?

23 MR MOYER No, Your Honor

24 THE COURT Any exception from the defense?

25 MR ARIAIL Your Honor---

1 THE COURT If I can remember how I just did it

2 MR ARIAIL The exception that I would have, I do
3 not believe that he advanced the felony in regards to the
4 drug deal I don't think there's any information in the
5 record that that drug deal was a felony Therefore, I
6 don't think---

7 THE COURT But the facts are before the jury that it
8 was a drug deal And it's the Court's job to define the
9 law for the jury And if they want to know if it's a
10 felony, I think it's within the Court's responsibility to
11 define that for them Now to go any further than that
12 with it I think may well be an issue But I think that
13 the Court has a duty to define the law for the juror But
14 the reason I couched it the way did was the emphasize for
15 them that they shouldn't give it any additional weight
16 because of that or any less weight It's just a factual
17 issue for them to consider just like all the other factual
18 issues in the case But I don't think I can not answer
19 it

20 MR ARIAIL And I would just not my exception there
21 And also, I think, that in regards to it, I don't know if
22 they're drawing any inference or how they're dealing with
23 it but---

24 THE COURT Or I can simply answer, Yes

25 MR ARIAIL No, I mean, there's no question I

1 mean, I want to note my---

2 THE COURT Because the only other way for me to
3 address it would be to go into the whole stuff about
4 express and implied malice and to go into that whole
5 other -- down that other road and I don't think I need do
6 that either Because they didn't ask that Or I could
7 bring the Foreperson and ask him exactly what they're
8 asking about on that second question

9 MR ARIAIL I think that would be appropriate

10 THE COURT But I think the question is fairly clear
11 When they -- if they had just said were the events that
12 Mr Hawkins participated in defined as felonies, then I
13 would have responded an armed robbery is defined as
14 felony And I think it still would have been within the
15 Court's responsible to also define that possession with
16 intent to distribute or distributing a scheduled two drug
17 is a felony That would be appropriate under the facts as
18 presented But when they say, Were the events Mr Hawkins
19 and Mr Gilbert participating in defined as felonies? I
20 think they're very clearly referring to the -- and that's
21 your client's version of the events, not the State's
22 version Your client alleges that it was a drug deal that
23 went bad

24 MR ARIAIL I guess my question is, is it a
25 misdemeanor or -- and that was nothing they put in which

1 would---

2 THE COURT It's not a misdemeanor, it's is felony

3 MR ARIAIL I know but if that was -- evidence was
4 not presented it was a felony, I believe

5 THE COURT They don't have to, that's a legal issue
6 for the Court And distribution and possession with the
7 intent to distribute has nothing to do with quantity, it
8 has to do with the intended behavior attached to the
9 transaction It could be one pill and that would be -- of
10 course, distribution looks more at how a drug is packaged
11 Possession with intent to distribute looks at more how a
12 drug was packaged But neither one of them -- well
13 trafficking deals with quantity But distribution and
14 possession with the intent to distribute look more at the
15 nature of the transaction not the amount of drugs It
16 certainly is not a possession

17 MR ARIAIL I understand, I just want to note my
18 exception

19 THE COURT What is your preference as to how I
20 should -- I'm going to give you an option, I'll note your
21 exception but I'm still going to give you an option as to
22 how I answer it

23 MR ARIAIL Sure

24 THE COURT I can answer it, Yes Or I can answer it
25 with the additional explanation

1 MR ARIAIL The additional explanation would be
2 better

3 THE COURT Okay

4 MR ARIAIL Thank you, Your Honor

5 THE COURT You're welcome

6 Any exception from the State?

7 MR MOYER No, Your Honor

8 THE COURT Please bring in the jury

9 (WHEREUPON, the jury came into open court at
10 approximately 11 08 p m)

11 THE COURT Ladies and gentlemen, in response to your
12 first question and I'm going -- it's -- although it's in
13 two parts I read it was one question Which is, Is
14 participating in a felony a provocative act in and of
15 itself in context to must be without fault in bringing on
16 the difficulty? In response to that question I provide
17 you the additional instruction In considering the first
18 element of self-defense, that the defendant must be
19 without fault in bringing about the difficulty, you as the
20 fact finders must consider whether the conduct was the
21 type which was reasonably calculated to and did provoke
22 the assault In making this assessment you should
23 consider the testimony and evidence in the entire record
24 and the facts as you find them Whether the events
25 Mr Hawkins and Mr Gilbert engaged in amounted to

1 bringing on the difficulty is a factual issue for you, the
2 jury, to determine These factual issues are simply
3 evidentiary facts to be considered by you, the jury, along
4 with the other evidence in the case and you may give it
5 the weight you decide it should receive

6 As regards to your second question which is, Were the
7 events Mr Hawkins and Mr Gilbert participating in
8 defined as felonies? The answer to that question is, Yes
9 And I would further instruct you that this is simply and
10 evidentiary fact to be considered by you, the jury, along
11 with the other evidence in the case and you may give it
12 the weight you decide it should receive Again, I
13 emphasize, in consider the first element of self-defense,
14 that the defendant must be without fault in bringing about
15 the difficulty, you as the fact finders must consider
16 whether the conduct was the type which was reasonably
17 calculated to and did provoke the assault In making this
18 assessment you should consider the testimony and evidence
19 in the entire record and the facts as you find them And
20 again, I emphasize, that these are simply evidentiary
21 facts to be considered by you, the jury, along with the
22 other evidence in the case and you may give it the weight
23 you decide it should receive

24 That concludes the Court's additional instruction
25 If you need anything else, please let us know

1 (WHEREUPON, the jury left open court at
2 approximately 11 11 p m)

3 THE COURT Okay Any exception from the State?

4 MR MOYER No, Your Honor

5 MR ARIAIL Other than the one previously noted

6 THE COURT We'll note your exception for the record
7 and we'll have the jury note marked as next Exhibit in
8 line

9 (WHEREUPON, Court's Exhibit No 9 was marked for
10 identification and received into evidence)

11 THE COURT We will wait further communication from
12 the jury Be at ease

13 (WHEREUPON, Court was in recess awaiting a
14 verdict)

15 THE COURT The jury has reached a verdict Is there
16 anything before we bring the jury, from the State?

17 MR MOYER No, Your Honor

18 THE COURT From the defense?

19 MR ARIAIL No, Your Honor

20 THE COURT Please bring the jury

21 (WHEREUPON, the jury came into open court at
22 approximately 11 23 p m)

23 THE COURT Mr Foreman, is it correct the jury's
24 reached a verdict?

25 THE FOREMAN Yes, we have, Your Honor

1 THE COURT If you could give the verdict forms to
2 the bailiff

3 Madam Clerk, if you could publish the verdict

4 Sir, if you would stand for the publication of the
5 verdicts

6 You made proceed when you're ready

7 THE CLERK Your Honor, in the case of
8 2006-GS-23-3512, the State vs Allan Lee Hawkins, as to
9 the Indictment 2006-GS-23-3512, count one, we, the jury,
10 by unanimous consent find the defendant guilty of armed
11 robbery As to the count two, we, the jury, by unanimous
12 consent by the defendant guilty of possession of a weapon
13 during the commission or attempt to commit a violent
14 crime Also in case of 2006-GS-23-3511 we, the jury, by
15 unanimous consent find the defendant guilty of murder

16 These are signed by our Foreperson, Craig Martin

17 Ladies and gentlemen of the jury, if you agree these
18 are the verdicts you reached in your deliberation room,
19 would you please raise your right hand

20 (WHEREUPON, all members of the jury raised their
21 right hand)

22 THE COURT Is there any request to poll --

23 You may put your right hand down

24 Is there any request to poll the jury from the State?

25 MR MOYER No, Your Honor

1 THE COURT From the defense?
2 MR ARIAIL Yes, Your Honor
3 THE COURT Madam Clerk, if you would poll the jury
4 Ladies and gentlemen, you may be seated If you
5 would give the clerk your attention
6 THE CLERK The verdict that was just published was
7 the verdicts you reached in the jury room I ask you, was
8 it your verdict then and it is your verdict now? When I
9 call your name please answer yes or no
10 Craig Martin?
11 MR MARTIN Yes
12 THE CLERK Carolyn Mayer?
13 MS MAYER Yes
14 THE CLERK C M Cooledge?
15 MR COOLEGE Yes
16 THE CLERK Christopher Camposano?
17 MR CAMPOSANO Yes
18 THE CLERK Alicia Johnson?
19 MS JOHNSON Yes
20 THE CLERK Joshua Schreckengost?
21 MR SCHRECKENGOST Yes
22 THE CLERK Harold Mcabee?
23 MR MCABEE Yes
24 THE CLERK Zoe Ball?
25 MS BALL Yes

1 Cathy Green?

2 MS GREEN Yes

3 THE CLERK John Matthews?

4 MR MATTHEWS Yes

5 THE CLERK Susan Lewis?

6 MS LEWIS Yes

7 THE CLERK Christine Sammons?

8 MS SAMMONS Yes

9 THE COURT Mr Foreman, ladies and gentlemen, on
10 behalf of the State and Defendant and defense counsel, we
11 thank for your time and your attention to this case We
12 know that jury service is a great sacrifice and that you
13 have had to neglect so to speak many of your professional
14 and personal obligations to be here with us this week I
15 hope that jury service has been educational for you I
16 often tell juries when I qualify them that real court is
17 nothing like Judge Judy, Joe Brown, Peoples Court, all the
18 shows that we have on t v , CSI, Law and Order, all those
19 other shows And that I am always happy to see jurors
20 serve because it gives them a real indication and a real
21 experience of what jury service is actually like Which
22 is how unique our system is Which is where 12
23 individuals sit as fact finders and apply the law Which
24 is usually a very complicated set of laws and find the
25 fact and apply law to those facts and render a verdict

1 So I hope this experience has been educational for
2 you You may discuss the case if you would like You're
3 also free not to discuss this case if you would like If
4 someone should approach you about discussing this case and
5 persist in trying to speak with you and you don't wish to
6 speak about it, please advise the clerk's office so we can
7 take the appropriate action to protect your privacy We
8 have your work excuses available and we will distribute
9 those to you before you leave this evening

10 Also, Mr Foreman, I need you to hang around with us
11 just for a moment so we can have you sign the actual
12 indictments and place the jury's verdict on the back of
13 the actually indictments

14 You all are excused for the week with the Court's
15 profound thanks If any of you have concerns about
16 getting home or need rides home, please let us know and we
17 will arrange for your transportation

18 I will hear post-trial motions and sentencing
19 shortly, if any of you desire to remain for sentencing,
20 please advise the bailiff and we will escort you to the
21 gallery of the courtroom where you will be allowed to
22 watch the sentencing portion of the proceedings You may
23 go with the bailiff

24 (WHEREUPON, the jury left open court and was
25 excused at approximately 11 28 p m)

1 THE COURT Has the State prepared sentencing sheets?

2 MR MOYER Yes, I have, Your Honor

3 THE COURT Are there any post-trial motions?

4 MR LANDIS Your Honor, we respectfully request 10
5 days to make any

6 THE COURT I don't think the rules provide for that
7 do they? Do they in criminal cases?

8 MR ARIAIL Yes

9 THE COURT I'm sorry, I'm so tired, I apologize

10 MR LANDIS Under Rule 29 Ten days off the
11 imposition of the sentence

12 THE COURT That's for reconsideration of sentence,
13 isn't it?

14 MR ARIAIL Post-trial motions maybe made

15 THE COURT I'm looking in the wrong section that
16 might be part of the problem, uh Except for motions for
17 new trials based on after the imposition of sentence I
18 prefer to hear motions right after a trial because it is
19 fresh in my mind And we do not have a break from court
20 and I'm going to directly into a non-jury term in
21 Charleston where I'll probably hear 600 motions, so it is
22 better for me that I hear it now when it's fresh, the
23 evidence is fresh so I can make a timely ruling So that
24 in the event you wish to appeal the matter that you can
25 move forward

1 MR ARIAIL Can we then therefore have a five minute
2 break to make sure?

3 THE COURT Sure

4 (WHEREUPON, a short break was taken)

5 THE COURT Are there any post-trial motions from the
6 State?

7 MR MOYER No, Your Honor

8 THE COURT From the defense?

9 MR ARIAIL We just make a motion for a new trial

10 THE COURT Any response from the State?

11 MR MOYER Your Honor, I just renew the response
12 that had at the stage of directed verdict which is
13 standard

14 THE COURT Okay

15 MR ARIAIL And we are keeping all our previous --
16 incorporating all our previous motions, which I don't
17 think we need the do, but also preserving our exceptions

18 THE COURT The law is well established that to grant
19 or refuse a new trial is within discretion of the Court
20 and will not be disturbed absent an abuse of discretion
21 However, the law is equally clear that where there is
22 competent evidence to sustain the jury's verdict, the
23 Judge may not substitute his or her judgment for that of
24 the jury The Court would deny the request or granting of
25 a new trial It is clear that there is competent evidence

1 to sustain the jury's verdict And to grant a new trial
2 it would require the Court to act in a capacity as fact
3 finder and to substitute its judgment for that of the
4 jury

5 I think it is clear from this record that this was a
6 credibility case Based on the two parties who were
7 present at the time of this incident That being, I know
8 his first name is Shawn, I want to make sure I'm accurate
9 That being Shawn Banks and the defendant, Mr Hawkins
10 Each who had differing versions of the events as they
11 transpired As well as the State having one theory of
12 this case and the defense having another That being the
13 State's theory that this was a premeditated act arising
14 out of the desire to rob the decedent versus the defenses
15 theory that this was a drug transaction that went awry
16 And that the decedent in this case had a volatile temper
17 and was very unpredictable And in that volatility he
18 acted out of character, at least with Mr Hawkins, and
19 that event escalated from that point and that Mr Hawkins
20 then shot the decedent in self-defense as he attempted to
21 reach for a gun that he kept under his pillow

22 Again, I think this all came down to credibility as
23 to whose story the jury believed and as to whose theory
24 the jury believed And if I had any concern about the
25 evidentiary support for the conviction, any concern I had

1 was eliminated when I realized the jury's verdict on the
2 armed robbery as well as possession of a weapon during the
3 commission of violent crime That being, of course,
4 predicated on the earlier note where they immediately told
5 us they reached a verdict of armed robbery and possession
6 of a weapon during the commission of a violent crime I
7 think that's very telling Now that I have that
8 information it helps me in hindsight to have some context
9 of their other questions

10 And I think the defense as well as the State made a
11 strategic decision in not requesting lesser included
12 offenses I think the jury would have liked to have had
13 the option of a lesser included offense based on their
14 notes And I sort of presumed this originally, they
15 wanted the opportunity to find for a lesser offense, that
16 being that possibly this happened in the heat of some
17 situation But that option was not available to them and
18 that is neither I don't think a right or wrong decision, I
19 think it's just simply a strategic one made by the
20 attorneys in this case based on their individual theories
21 of the events Which is the State's theory that this was
22 premeditated event and the defenses theory that the
23 defendant had an absolute vindication so to speak because
24 he acted in self-defense and should have been availed a
25 verdict of not guilty based on self-defense

1 So with that in mind I do not believe that there's
2 any basis for the motion for a new trial and that motion
3 is denied

4 Does the State wish to be heard on sentencing?

5 MR MOYER No, Your Honor The only thing we would
6 add is his criminal record which for the most part you
7 know

8 THE COURT Well my next question was is there any
9 other record other than the forgeries that we already
10 discussed and I think there was a simple possession,
11 wasn't there?

12 MR MOYER He had a possession of Xanax in 1999

13 THE COURT Yeah, I had six counts of fraudulent
14 check in 2000 and one count of fraudulent check in 2001
15 and three in 2007 And you said in year was the
16 possession so Xanax?

17 MR MOYER One moment, Your Honor It was in 2001

18 THE COURT And were the fraudulent checks, those
19 were magistrate level offenses?

20 MR MOYER Yes, they were

21 THE COURT Does the victim's family wish to be
22 heard?

23 MR MOYER They do not, Your Honor

24 THE COURT State take any possession on sentence?

25 MR MOYER Leave it in the Court's discretion, Your

1 Honor

2 THE COURT Okay, be glad to hear from the defense

3 MR ARIAIL Your Honor, in regards to this case and
4 you've heard the facts in regards to it, know a lot about
5 Mr Hawkins, his background and his family I think as
6 you've seen in what's going on with him over the last few
7 years, really I think he was at a point in time in his
8 life things were going on And I think he has made
9 substantial improvement No question he's certainly an
10 individual, you know, that I've dealt with, I've had no
11 issues with while he's been on bond for the last two and a
12 half years And he is a good person at heart, he's got a
13 great family And I think the circumstances of this case
14 as you've seen in regard to it, it is a tragic situation
15 clearly for the family, he's sorry that And in regards
16 to that we would simply ask that you give him the minimum
17 amount you can with regards to the murder sentence And
18 not seek life and with the minimum of 30 for murder and
19 run the sentences concurrent

20 THE COURT Sir, anything you want to state for the
21 record on your own behalf?

22 MR HAWKINS Yes, ma'am I said this earlier when I
23 was on the stand and I'm going say it again, I'm not
24 saying I'm guilty to what I've been sentenced to today but
25 I can say that what happened was wrong And to his family

1 and to my family, I am very sorry I lost a friend that
2 day But I was scared I was going to lose my life And I
3 just done what I thought was right and I'm sorry That's
4 all I can say I can take it back If I could I would
5 I promise I would There's not a day goes by in the last
6 two and a half years that I don't wake up everyday and
7 think about everything that happened I think about it
8 daily And I am SORRY And I hope one day y'all can
9 forgive me for that God's forgave me already, I got
10 peace in my heart with God I'm just asking for y'all to
11 forgive me, that's all I ask

12 As far as the Court goes, I just beg your mercy, Your
13 Honor Please have mercy upon me

14 THE COURT Thank you, sir

15 I said this to counsel earlier and I meant it in
16 earnesty, I believe that Mr Hawkins is very different
17 person than he at the time of these incidents than he is
18 now And not unlike many other people, his judgment was
19 clouded by circumstances to some extent of his on creation
20 but to some extent beyond his control It is unfortunate
21 that it ended the way it ended for both families Both
22 for the victim's family and both for the defendant and his
23 family Because I truly believe Mr Hawkins when he says
24 that this gentleman was his friend And I believe that he
25 has remorse regarding this incident

1 The Court as you know is bound by certain statutory
2 minimum sentences, none of which can be suspended or
3 probation given And I would find it appropriate --

4 And sir, if you would stand for sentencing

5 As regards to the charge of possession of a weapon
6 during the commission of a violent crime, Sir, you are
7 sentenced to the State Department of Corrections for a
8 period of five years You will get credit pursuant to
9 24-13-40 to be calculated and applied by the department
10 for any time that you have served As regards to the
11 armed robbery, Sir, you're sentenced to 10 years in the
12 State Department of Corrections And as regards to the
13 crime of murder, Sir, you're sentenced to 30 years in the
14 State Department of Corrections All these sentences are
15 to run concurrent to one another, credit pursuant to
16 24-13-40 to be calculated and applied by the Department of
17 Corrections

18 And also as a caveat, Mr Ariail and Mr Landis, you
19 all probably will need to write a letter to R&E and by
20 that acronym I mean Reception and Evaluation, you all, of
21 course, know what I mean And advise them of your
22 client's physical condition And it probably would help
23 if you all get a report for the pulmonologist as well as
24 the -- and I did not ask on yesterday what the results of
25 that visit were or what the recommendations or the

1 diagnosis or prognosis was but I guess I should ask at
2 this point, was there any follow treatment, any follow up
3 visit in the next week or two regarding his treatment?

4 MR HAWKINS It's just my regular follow ups and my
5 blood, testing my blood and my regular doctor about my
6 lungs

7 THE COURT They didn't diagnose anything?

8 MR HAWKINS They didn't know exactly what it was,
9 they're still uncertain

10 MR ARIAIL He's on some medication

11 THE COURT What I would suggest you do is you have
12 his doctors do any applicable reports regarding his
13 condition for the doctors at the Department of Corrections
14 so that his treatment regimen is not interrupted and so
15 that he receives the medications that he is currently
16 taking Because if you don't what's going to end up
17 happening, and I don't want to speak for the Department of
18 Corrections, but it has been my experience that will
19 happen is there will be an interruption in his treatment
20 And they will reassess him and then they will prescribe
21 his medicine And then that will then interrupt the
22 course and that would not serve anyone's interest It
23 would cost the State more money, it would cost your
24 client's health And I think you should contact whoever
25 the director is over a R&E and make them aware of what his

1 situation is So that they can have -- they're going to
2 do a full evaluation anyway but I think it would help them
3 to know what his situation is

4 Okay, is there anything further from the State?

5 MR MOYER No, Your Honor

6 THE COURT From the defense?

7 MR ARIAIL No, Your Honor

8 THE COURT Thank you all, it was a pleasure to try
9 this case with you

10 (WHEREUPON, the proceedings were concluded)

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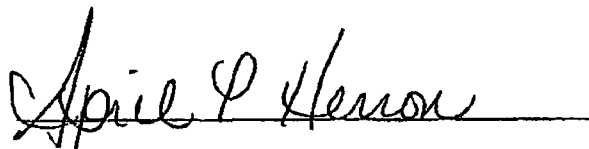
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, APRIL P HERRON, Official Court Reporter for the
13th Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings had and
evidence introduced in the trial of the captioned case,
relative to appeal, in the Court of General Sessions for
Greenville County, South Carolina, on the 14-17 day of
January, 2008

I do further certify that I am neither of kin,
counsel nor interest to any party hereto

August 15, 2008


APRIL P HERRON, Court Reporter

STATE OF SOUTH CAROLINA)
 County of GREENVILLE)

In the Court of Common Pleas

2010-P-23-3719

ALLAN LEE HAWKINS #290682)
 Full name and prison number if any of applicant.)
 v)
STATE OF SOUTH CAROLINA)
 Name of Respondent)

APPLICATION FOR
 POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly, handwritten, or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant 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 applicant was convicted.

- 1 Place of detention MCCORMICK CORRECTIONAL INSTITUTION
386 REDEMPTION WAY, MCCORMICK, S C 29899
- 2 Name and location of Court which imposed sentence GREENVILLE COUNTY COURT OF GENERAL SESSIONS
- 3 The indictment number or numbers (if known) upon which and ~~the offense or offenses~~ for which sentence was imposed
 - (a) 2006-GS-23-03511
 - (b) 2006-GS-23-03512
 - (c) _____
- 4 The date upon which sentence was imposed and the terms of the sentence
 - (a) JANUARY 17, 2008 30-YEARS
 - (b) JANUARY 17, 2008 10-YEARS, 5-YEARS
 - (c) _____

- 5 Check whether a finding of guilty was made
- (a) after a plea of guilty _____
- (b) after a plea of not guilty X _____
- (c) after a plea of nolo contendere _____
- 6 Did you appeal from the judgment of conviction or the imposition of sentence? _____
- YES _____
- 7 If you answered "yes" to (6), list
- (a) the name of each Court to which you appealed
- I SOUTH CAROLINA COURT OF APPEALS _____
- II _____
- III _____
- (b) the result in each such Court to which you appealed
- I DISMISSED _____
- II _____
- III _____
- (c) the date of each such result
- I SUBMITTED JANUARY 4, 2010 FILED JANUARY 28, 2010 _____
- II _____
- III _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results
- I UNPUBLISHED OPINION NO 2010-UP-065 _____
- II _____
- III _____
- 8 If you answered "no" to (6), state your reasons for not so appealing
- (a) N/A _____
- (b) _____
- (c) _____
- 9 State concisely the grounds on which you base your allegation that you are being held in custody unlawfully
- (a) PLEASE SEE ATTACHED PAGE _____
- (b) _____
- (c) _____

10 State concisely and in the same order the facts which support each of the grounds set out in (9)

(a) PLEASE SEE ATTACHED PAGE

(b) _____

(c) _____

11 Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law ?

YES

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

NO

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) NO

(d) any other petitions, motions or applications in this or any other Court?

YES

12 If you answered "yes" to any part of (11), list with respect to each petition, motion or application

(a) the specific nature thereof

I MOTION FOR REHEARING

II PETITION FOR WRIT OF CERTIORARI

III _____

IV _____

(b) the name and location of the Court in which each was filed

I SOUTH CAROLINA COURT OF APPEALS

II SOUTH CAROLINA SUPREME COURT

III _____

IV _____

(c) the disposition thereof

I DENIED

II DISMISSED

III _____

IV _____

(d) the date of each such disposition

I DECIDED MARCH 18, 2010

II DECIDED APRIL 21, 2010

III

IV

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition

I UNPUBLISHED OPINION

II UNPUBLISHED OPINION

III

IV

13 Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? NO

14 If you answered "yes" to (13), identify

(a) which grounds have been presented

I

N/A

II

III

(b) the proceedings in which each ground was raised

I

N/A

II

III

15 If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented

(a) PLEASE SEE ATTACHED PAGE

(b)

(c)

16 Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? YES

(b) your trial, if any? YES

(c) your sentencing? YES

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence?

YES

(e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? NO

17 If you answered "yes" to one or more parts of (16), list

(a) the name and address of each attorney who represented you

1 ROBERT M ARIAIL, JR 11 N IRVINE ST ,SUITE 11, GREENVILLE, S C 29601

11 JOSEPH L. SAVITZ, III., P.O BOX 11589, COLUMBIA, S C 29211

111

(b) the proceedings at which each such attorney represented you

1 ARRAIGNMENT, BOND HEARING, TRIAL, SENTENCING

11 DIRECT APPEAL

111

18 State clearly the relief you seek in filing this application

I ASK THAT MY CASE BE REVERSED AND REMANDED

AND A NEW TRIAL BE GRANTED

19 Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)

VERIFICATION

I, ALLAN LEE HAWKINS, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application, that I know the contents thereof, that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application, and that the matters and allegations therein set forth are true

Allan L Hawkins

Sworn to and subscribed before me

This 4 day of May, 2010

Jose L Young L S
 Notary Public for South Carolina
 My Commission Expires 8-28-2011

FILED
 MAY 10 P 2 41

**APPLICATION TO PROCEED WITHOUT PREPAYMENT
 OF COSTS AND AFFIDAVIT
 IN SUPPORT THEREOF**

I, ALLAN LEE HAWKINS, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty or perjury that the following facts are true

- (1) I am the applicant in this action and I believe I am entitled to redress
- (2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor

Allan L Hawkins
 Applicant

Sworn to and subscribed before me

This 4 day of May, 2010

Jose L Young L S
 Notary Public for South Carolina
 My Commission Expires 8-28-2011

- 9
 - a Ineffective Assistance of Counsel
 - b Ineffective Assistance of Counsel
 - c Ineffective Assistance of Counsel
 - d Ineffective Assistance of Counsel
 - e Ineffective Assistance of Appellate Counsel

- 10
 - a Ineffective Assistance of Counsel for failing to object to erroneous malice instruction
 - b Ineffective Assistance of Counsel for failing to ask for manslaughter charge after jury asked if they could deliberate on a lesser charge
 - c Ineffective Assistance of Counsel for failing to ask for a mistrial after consecutive hung jury statements
 - d Ineffective Assistance of Counsel for failing to object when my due process rights were violated when the trial Judge refused to give the jury the option of deliberating on a lesser offense of manslaughter
 - e Ineffective Assistance of Appellate Counsel for failing to raise and brief the preserved felony question that swayed the decision of the jury

- 15
 - a Ineffective Assistance of Counsel (PCR Remedy)
 - b Ineffective Assistance of Counsel (PCR Remedy)
 - c Ineffective Assistance of Counsel (PCR Remedy)
 - d Ineffective Assistance of Counsel (PCR Remedy)
 - e Ineffective Assistance of Appellate Counsel (PCR Remedy)

Allan Lee Hawkins SCDC#290682
McCormick Correctional Institution
386 Redemption Way
McCormick, South Carolina 29899

May 4, 2010

Paul B Wickensimer, Clerk
Greenville County Courthouse
305 East North Street
Greenville, South Carolina 29601

Dear Mr Wickensimer,

Please find enclosed an original and one (1) copy of my Post Conviction Relief application Please clock stamp the copy and mail it back to me in the provided envelope at a suitable time Thank you for your time and patience in helping me with this matter

/s/ Allan L Hawkins

Allan Lee Hawkins SCDC#290682
Pro-Se Applicant

Allan Lee Hawkins SCDC#290682 F-3-238
McCormick Correctional Institution
386 Redemption Way
McCormick, South Carolina 29899

PCR Application

Greenville County Courthouse

Paul B Wickensimer, Clerk

305 East North Street

Greenville, South Carolina 29601

138

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C A No 2010-CP-23-3719
COUNTY OF GREENVILLE	)	
	)	
Allan Lee Hawkins	)	
S C D C No 290682,	)	
	)	
Applicant,	)	
	)	RETURN
v	)	
	)	
State of South Carolina,	)	
	)	
Respondent	)	
_____	)	

In response to the post-conviction relief application filed May 10, 2010, the Respondent would show this Court

I

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment¹. The Greenville County Grand Jury indicted the Applicant at the April 2006 term of General Sessions for murder (2006-GS-23-3511), armed robbery (2006-GS-23-3512, count 1), and possession of a weapon during commission of a violent crime (2006 GS-23-3512, count 2). R Mills Ariail, Jr, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On January 17, 2008, the Honorable Deadra L. Jefferson sentenced the Applicant to concurrent terms of thirty (30) years for murder, ten (10) years for armed robbery, and five (5) years for possession of a weapon during commission of a violent crime.

¹ Respondent notes the Applicant's name in the Department of Corrections' system is Alan Lee Hawkins.

A notice of appeal was filed at the South Carolina Court of Appeals Joseph L. Savitz, III, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders² brief. The Court of Appeals dismissed the appeal State v. Hawkins, Op. No. 2010-UP-065 (S.C. Ct. App. filed January 28, 2010). The Court of Appeals denied the Applicant's pro se Notice of Reconsideration of Appeal on March 18, 2010. The Applicant filed a pro se petition for writ of certiorari at the South Carolina Supreme Court. By order dated April 21, 2010, the Supreme Court dismissed the matter pursuant to State v. Lyles, 381 S.C. 442, 673 S.E.2d 811 (2009).

Attached herewith and incorporated herein by reference are the records of the Greenville County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

II

In his application for post conviction relief the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel
 - a. Failed to object to erroneous malice instruction
 - b. Failed to ask for manslaughter charge after jury asked if they could deliberate on a lesser charge
 - c. Failed to ask for a mistrial after consecutive hung jury statements
 - d. Failed to object when the trial judge refused to give the jury the option of deliberating on the lesser offense of manslaughter
2. Ineffective assistance of appellate counsel
 - a. Failed to raise and brief the preserved felony question that swayed the decision of the jury

² Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L. Ed. 2d 493 (1967)

III

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a criminal defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984), Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different ” Cherry, 300 S C at 117-18, 386 S E 2d at 625 A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial ” Johnson v State, 325 S C 182, 186, 480 S E 2d 733, 735 (1997) (citing Strickland v Washington, 466 U S 668, 104 S Ct 2052 (1984))

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v State, 279 S C 264, 265, 305 S E 2d 247, 248 (1983) (citing Norman v State, 276 S C 278, 277 S E 2d 707 (1981))

IV

The Respondent denies each allegation not expressly admitted, qualified or explained

V

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Assistant Deputy Attorney General

KAREN C RATIGAN
Assistant Attorney General

P O Box 11549
Columbia, S C 29211

By Mary S. Williams for
Attorneys for Respondent

Sept. 15, 2010

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
	)	
	)	2010-CP-23-3719
	)	
ALLAN LEE HAWKINS, 290682	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent	)	
_____	)	

- 1 I am an employee of the Respondent in the above-captioned action.
- 2 Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail
- 3 I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid

Allan Lee Hawkins, 290682
 McCormick Correctional Institution
 386 Redemption Way
 McCormick SC 29899

DATED this 15th day of September, 2010


 Judy A. C. Carey, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

COURT OF COMMON PLEAS

2010-CP-23-03719

ALLAN LEE HAWKINS,
APPLICANT,)

vs)

TRANSCRIPT OF RECORD

STATE OF SOUTH CAROLINA,
RESPONDENT)

ORIGINAL

August 2, 2011
Greenville, South Carolina

B E F O R E

THE HONORABLE D GARRISON HILL, JUDGE

A P P E A R A N C E S

HAL W ROACH, ESQ
Attorney for the Applicant

KAREN C RATIGAN, ESQ
Assistant Attorney General

HOLLIE M JENKINS
Circuit Court Reporter

I N D E X

(AW) - Denotes Applicant's Witness
(RW) - Denotes Respondent's Witness

Page No

<u>(AW) ALLAN LEE HAWKINS</u>	
Direct Examination by Mr Roach	4
<u>(RW) MILLS ARIAIL</u>	
Direct Examination by Ms Ratigan	19
Cross-Examination by Mr Roach	27

E X H I B I T S

(There were no exhibits introduced)

P R O C E E D I N G S

THE COURT This is 2010-CP-23-03719, Allan Hawkins
v the State of South Carolina Mr Hawkins is present in
the courtroom with his counsel, Mr Roach

And, Ms Ratigan

MS RATIGAN Thank you, Your Honor

May it please the Court

This is the case of Mr Hawkins v the State of South
Carolina He was indicted for murder, armed robbery, and
possession of a weapon during the commission of a violent
crime He was represented on these charges by Mr Ariall

The case was brought to trial in January of 2008,
before Judge Jefferson Mr Hawkins was found guilty of
the charges as indicted He received concurrent sentences
of 30 years for murder, 10 years for armed robbery, and
five years for the weapons charge

He did have an appeal that was filed at the South
Carolina Court of Appeals It was perfected in the nature
of an Anders brief That appeal was dismissed in January
of 2010 There was a pro se motion for rehearing that was
denied And Mr Hawkins then filed a pro se petition for
writ of certiorari to the Supreme Court And that was
dismissed in April of 2010

This application was timely filed And the State is
ready to proceed

1 THE COURT Mr Roach

2 MR ROACH Thank you, Your Honor

3 May it please the Court

4 Our first witness will be Mr Allan Hawkins

5 THE COURT All right

6 MR ROACH Mr Hawkins, would you approach the stand
7 to be sworn by the Court?

8 THE CLERK Mr Hawkins, please, place your left hand
9 on the Bible and raise your right hand
10 WHEREUPON,

11 ALLAN LEE HAWKINS,
12 after first having been duly sworn, testified as follows

13 THE CLERK You may be seated

14 Please state your full name for the record

15 THE WITNESS Allan Lee Hawkins

16 DIRECT EXAMINATION

17 BY MR ROACH

18 Q Mr Hawkins, where are you, currently, incarcerated?

19 A South Carolina Department of Corrections

20 Q Mr Hawkins, I need to ask you some questions that I
21 would normally not ask a PCR client of mine My business
22 address is at 11 North Irvine Street here in Greenville
23 The attorney that you're claiming a -- complaining about
24 is Mills Ariail His office is, also, at 11 North Irvine
25 Street in Greenville, South Carolina We do not practice

1 together, but we are in the same building

2 Knowing that, are you willing to allow me to continue
3 to represent you in this PCR matter?

4 A Sir, as I told you before in the letter, if it wasn't
5 a conflict on your interest, then I'd be willing to go
6 forth, yes

7 Q Okay One other thing You had a workers
8 compensation case that Mr Ariail represented you on, is
9 that right?

10 A Right

11 Q One of the people that he consulted was Jeff Ezell at
12 ■ North Irvine Street here in Greenville Okay A year
13 ago when he was consulting Mr Ezell with that, I
14 practiced law with Mr Ezell Knowing that additional
15 connection, do you have any objection to me proceeding as
16 your attorney in this PCR case?

17 A Again, no, sir The same answer as the last, if
18 you're adequate with going forth, I am as well I'm
19 comfortable with it

20 Q Okay My understanding is that you have,
21 essentially, three major issues that you wish to address
22 And I want to address the first one right now And that
23 deals with whether or not there was an erroneous malice
24 instruction given by the Judge that Mr Ariail failed to
25 address Are you familiar with that issue, Mr Hawkins?

1 A Yes, sir

2 Q Would you tell the Judge why you believe that there
3 was a malicious -- I'm sorry, incorrect malice
4 instruction, and why that you believe that Mr Ariail was
5 deficient in failing to object to that instruction?

6 A I apologize I didn't bring my notes

7 May I have that brown folder?

8 MR ROACH Judge, may I approach?

9 THE COURT Sure

10 MR ROACH Thank you, Judge

11 BY MR ROACH

12 Q You just need the brown folder?

13 A Yes, sir That's all I need

14 Excuse me just a moment

15 Q Yes, sir

16 A Now, can you repeat the question?

17 Q The erroneous malice charge instruction

18 A Correct

19 Q Why is it that you believe that Mr Ariail was
20 deficient in failing to object to the malice charge?

21 A Well, as I began to study a little bit about my case
22 and the law pertaining to it, I noticed in High v State
23 that that became a burden-shifting instruction, that the
24 presumption of malice is automatically shifted to the
25 Defendant, which is -- the states have ruled that it's no

1 longer a good law to do that

2 Q And what particular portion of that malice charge do
3 you believe shifts the burden to you?

4 A That the presumption of malice may arise from the use
5 of a deadly weapon

6 Q Okay And the testimony, in this case, indicated
7 that you did have a firearm or a handgun with you, is that
8 correct?

9 A Yes, sir, correct

10 Q Okay And your belief is any instruction involving
11 that malice may be inferred from the use of a deadly
12 weapon is a -- is burden shifting in your case?

13 A Correct, when both parties were in possession of a
14 weapon

15 Q Okay Now, I'm going to ask you a couple of
16 procedural things You were represented by Joseph Savitz
17 with the chief -- who is the chief public defender at
18 the -- at appellate defense down in Columbia, is that
19 right?

20 A Yes, sir

21 Q Your -- his Anders brief was filed in your case on
22 June 16th, 2009, is that right?

23 A I believe so

24 Q And then there's a case that came out from the South
25 Carolina Supreme Court of State v Belcher

1 MR ROACH It's opinion #26729, Judge

2 THE COURT Okay

3 BY MR ROACH

4 Q That case was issued on October 12th of 2009, is that
5 right?

6 A Correct

7 Q And then your actual appeal was dismissed on January
8 28th, 2010, is that right, by the Court of Appeals

9 A Correct

10 Q Is that right?

11 A I believe so I don't have it exactly right in front
12 of me, but it sounds right

13 Q But one of the things that you -- that was on appeal,
14 at that time, was whether or not the use of a handgun -- a
15 weapon automatically precludes self-defense, is that
16 right?

17 A (There was no response)

18 Q The question on appeal was whether or not the use of
19 a handgun automatically --

20 A Okay Yes, sir That's what he brought up

21 Q -- precludes self-defense, is that right?

22 A Correct

23 Q Now, the reason this is important is that the Belcher
24 case says that the law that had been used for eons in
25 South Carolina that you can infer malice from the use of a

1 handgun, basically, says that that's not good law anymore,
2 right?

3 A Right

4 Q But the last sentence says that it's not applicable
5 in cases that -- where there's the -- a conviction is
6 challenged on post-conviction relief, is that right?

7 A Right

8 Q But, before that, it talks about it is effective --
9 or in effect for all cases which are pending on direct
10 review, or not yet filed where the issue is preserved, is
11 that right?

12 A The actual Belcher case, yes

13 Q This case did not come out -- this case came out
14 while your case was still pending before the Court of
15 Appeals, is that right?

16 A Correct

17 Q Okay And that's why you believe this Belcher case
18 is applicable to your case, is that right?

19 A Correct

20 Q Although your case does not use the magic words that
21 Belcher may have in it?

22 A Oh, right And it doesn't, actually, use the full
23 extent of it as well It uses some parts of the Belcher
24 case, the one that the courts, actually, used to overturn
25 the Belcher case

1 Q Yes, sir Is there anything else that we need to
2 tell the Judge about your erroneous malice instruction
3 issue that we haven't addressed with him today?

4 A Well, this case here, I'd like to bring up for the
5 record, Plyer v State, which will be used a couple more
6 times that the Court has, also, ruled that counsel was
7 deficient for failing to object to an improper charge on
8 malice, which improperly shifted the burden of proof from
9 the State to the Defendant

10 Now, that one -- I want to stop there But the other
11 parts -- we'll go into the other issue But I notice in
12 Parker v Shecut that counsel, also, failed to preserve
13 and raise an issue for appellate review And in order for
14 something to be preserved -- I mean, to come about in
15 appellate court, it has to be preserved And counsel
16 failing to preserve that issue -- excuse me -- cannot be
17 considered harmless

18 Q Okay Is there anything else we need to tell the
19 Judge more about your malice charge, or does that pretty
20 much sum it up?

21 A That pretty much sums it up, sir

22 Q Okay Let's go to the next thing, which deals with
23 the fact that no voluntary or involuntary manslaughter
24 charge was given in your trial, is that right?

25 A Correct

1 Q And why is it that you believe that a manslaughter --
2 particularly, a voluntary manslaughter charge would have
3 been appropriate in your case?

4 A Well, mainly, because -- there's a lot of reasons
5 But, specifically, in one, the jury asking for it was, you
6 know, enough for me to understand that there was not
7 enough for them to convict me of murder And they made
8 that clear three different times

9 MR ROACH And in particular on Page 548, Judge
10 BY MR ROACH

11 Q Is that -- that's the portion where the jury,
12 specifically, asked for an instruction on a charge lesser
13 than murder, is that right?

14 A Right

15 Q And I believe, also, in there, there is, also --

16 A I believe -- and that was after the third time of
17 them asking that they -- or stating that they couldn't
18 come up with a verdict

19 Q Okay But that's when they, specifically, asked for
20 a charge lesser than that, is that right?

21 A Correct

22 Q Now, however, on Page 599 of the transcript, the
23 Judge says that the Prosecution and the Defense made a
24 strategic decision not to request any lesser included
25 offenses, is that correct, Mr Hawkins?

1 Did you and your lawyers decide not to have a lesser
2 offense like voluntary manslaughter given as an option to
3 the jury?

4 A That was never an option presented to me It was
5 murder or self-defense There was never any talk about
6 anything in between

7 Q Did you ever ask them if they could give you -- if
8 you were entitled to another charge, such as voluntary
9 manslaughter?

10 A Sir, in my ignorance, I didn't know

11 THE COURT Where is that now you said in the
12 transcript?

13 MR ROACH Page 599 is where the Court says, The
14 Defense has made a strategic decision not to request a
15 lesser included offense

16 THE COURT Okay

17 MR ROACH And it's Page 548 where the jury requests
18 instructions on a lesser -- the lesser included offense

19 THE COURT Thank you

20 MR ROACH Yes, sir

21 BY MR ROACH

22 Q The evidence that was shown in your case, what legal
23 provocation do you believe was presented to you that would
24 have warranted the use of a lesser included offense like
25 voluntary manslaughter?

1 A When the actual shooting took place in the midst of
2 an altercation between David and I, there was an actual
3 physical altercation after a verbal that led to the
4 weapons being brandished at the time, and then the
5 shooting occurred And, to me, that would warrant a
6 lesser included offense of manslaughter, or possibly
7 involuntary manslaughter

8 Q Now, one of the defenses that you raised in this was
9 self-defense, is that right?

10 A Correct

11 Q But you're, also, familiar with the case of State v
12 Gilliam that says that a self-defense charge is not
13 dispositive of --

14 A A manslaughter charge

15 Q -- an involuntary manslaughter charge --

16 A Correct

17 Q That you can get both charges, is that right?

18 A Correct

19 Q And that's what you believe that your attorney,
20 Mr Ariail -- Mills Ariail, should have requested, but did
21 not request, is that right?

22 A Correct

23 Q Is there anything else about the manslaughter
24 instruction that we should tell the Judge that we haven't
25 covered today?

1 A Give me a moment to look here

2 I, also, want to bring up Lowery v State as well
3 The Supreme Court, also, ruled in favor of Lowery -- of
4 getting a lesser included offense on voluntary
5 manslaughter where there was evidence, including the
6 Defendant's -- including testimony, which, if believed,
7 indicated that the victim and defendant were in a heated
8 argument, and that the victim was about to initiate a
9 physical encounter when the shooting occurred warranted a
10 lesser included offense charge of voluntary manslaughter

11 The Supreme Court ruled that trial court's error in
12 failing to instruct voluntary manslaughter was not
13 rendered harmless And by the jury's returning verdict of
14 murder, even though the jury was not convinced that the
15 Defendant acted in self-defense, the jury could have
16 discerned that there was sufficient legal provocation in
17 THE heat of passion to find the Defendant guilty of
18 voluntary manslaughter

19 Q Let me ask you a side issue that's a aside from this

20 A Okay

21 Q During the course of jury deliberations, were you
22 ever informed that the Prosecution had offered you a deal
23 to plead guilty to 15 years to a voluntary manslaughter
24 charge?

25 A The only plea that was offered to me was up until the

1 point of my trial There was never a negotiation about a
2 plea for a certain amount There was a couple different
3 pleas before my trial started But, during the course of
4 my trial, no

5 Q And I'm, specifically, talking about jury
6 deliberations Did -- was there any mention to you of a
7 deal or an offer of 15 years?

8 A No, sir, not during deliberations, no

9 Q Okay Had you been offered that 15 years, what would
10 you have done?

11 A Sir, it's kind of hard to answer in hindsight I
12 mean, with the instruction of my lawyer -- because that's
13 who my trust was in at that moment If he would have
14 suggested for me to take a 15-year plea, then I would have
15 took it

16 Q Okay The next issue I want to address is the third
17 issue And I believe it's going to be your last issue and
18 it's failure of Mr Ariail to ask for a mistrial

19 MR ROACH And what we're looking at particularly,
20 Judge, is Page 552 of the transcript

21 BY MR ROACH

22 Q Do you recall how many different times, Mr Hawkins,
23 that the jury came out and, basically, said that they were
24 having a difficult time making a decision and, perhaps,
25 were hung or unable to reach a decision in your case?

1 A Three times to be exact, sir

2 Q What I see is that there is one time on Page 543
3 where they sent a note to the Judge Is that a fair
4 statement, Mr Hawkins?

5 A Yes, sir, it sure is

6 Q There's another one on Page 548 where they mention
7 that, is that right?

8 A Correct

9 Q Finally, again, on Page 552 is where they come out
10 and indicate that they may be forever hung?

11 A Right

12 Q And, at that point, the Court advises that she can
13 either give further jury instructions or grant a mistrial?

14 A Correct

15 Q Do you know whether -- do you know why a mistrial was
16 not accepted by your defense team at that point?

17 A No, sir, I do not

18 Q Did you have a discussion with your defense team
19 about the -- a mistrial?

20 A There was a sidebar discussion between Mr Moyer, and
21 Mr Ariail, and the Judge, I believe But as far as me
22 being involved in it, I don't believe I was involved ever
23 in a conversation like that

24 Q Back then, did you know what a mistrial was?

25 A I mean, I knew that it was -- that they had to

1 release me at that moment, yes

2 Q Okay Did you ever indicate that you didn't want a
3 mistrial, and that you wanted to go ahead and have the
4 jury make this final decision?

5 A No, sir

6 Q Okay Is there anything further that we should tell
7 the Judge about this mistrial issue that we haven't told
8 him so far?

9 A Well, I believe that it would be safe to say that if
10 I was given the option of choosing a mistrial, I think
11 it's obvious that I would have taken that, you know,
12 because I would have went home at that moment

13 Q Yes, sir

14 A You know, so I want to make sure that's clear

15 Q Okay Is there anything else we need to tell the
16 Judge about the mistrial issue?

17 A No, sir

18 Q Mr Hawkins, you have been the primary witness that
19 we have had this morning Is there anything that I have
20 left out that we need to tell your Judge about your
21 post-conviction relief petition? Because this is the last
22 chance you have to tell him anything, or it may be the
23 last chance that you have to tell him anything

24 A Correct

25 Sir, I don't want to waste the Court's time with

1 anything further than that I believe that's the issues
2 that I have that need to be addressed

3 Q So you believe we've fairly covered all those, is
4 that right?

5 A Yes, sir, I believe so

6 MR ROACH Thank you, Mr Hawkins

7 I want you to answer any questions that the Attorney
8 General's Office may have

9 THE WITNESS Okay

10 MS RATIGAN I don't have any questions for
11 Mr Hawkins, Your Honor

12 THE COURT All right

13 MR ROACH Your Honor, that being the case, that is
14 the Petitioner's case We have nothing further

15 Mr Hawkins, would you come back down, please

16 THE COURT You can step down, Mr Hawkins

17 THE WITNESS Thank you, Your Honor

18 MS RATIGAN Your Honor, the State would call
19 Mr Ariail

20 THE CLERK Mr Ariail, please place your left hand
21 on the Bible and raise your right hand

22 WHEREUPON,

23 MILLS ARIAIL,

24 after first having been duly sworn, testified as follows

25 THE CLERK Thank you

1 You may be seated

2 Please state your name for the record

3 THE WITNESS Mills Ariail

4 DIRECT EXAMINATION

5 BY MS RATIGAN

6 Q Mr Ariail, do you recall representing Mr Hawkins on
7 these charges?

8 A Yes, I do

9 Q And just a couple of preliminary issues before we get
10 into his main brief Did you file discovery motions in
11 this case?

12 A I did

13 Q Did you review those with your client?

14 A In depth

15 Q Did you discuss his version of what had happened with
16 the victim that day?

17 A I did And he gave a statement afterwards, which, I
18 guess, was his testimony -- or his statement in regards to
19 what had happened before that And we went over that and
20 then other facts that were not part of that statement

21 Q This is a very lengthy transcript Could you just
22 give a very brief synopsis of what the State's theory was
23 in this case?

24 A The State's theory, in this case, was -- and it was
25 based off the statements from Mr Hawkins and his

1 co-defendant in this case in that there was a --
2 Mr Hawkins had gone to buy prescription pills in this
3 case

4 And he went to this -- a friend's house It was a
5 Mr Gilbert, if I'm not mistaken But he had gone to his
6 house And, during that time, what they were alleging was
7 that they had gone into this to rob him at gunpoint, and
8 to take the pills that they knew that he had at his house
9 Because they had bought pills from him before

10 So what happened was they went into the house And
11 there was an altercation between Mr Hawkins and
12 Mr Gilbert in regards to the pills And, apparently,
13 what had happened was the altercation began as a result
14 of, I think, them taking his pills And he pulled -- from
15 my view and what, I think, Allan and I had discussed was
16 that Mr -- the decedent had pulled a gun on Allan And,
17 as a result, he had pulled his gun, which he had -- which
18 he testified was not on safety, but was ready to be used
19 And he discharged his weapon And Mr Gilbert was killed

20 At that time, the State continued to argue that he
21 had picked up his wallet He had taken the prescription
22 pills that were there and had, also, taken the weapon that
23 Mr Gilbert had on him at that time And then the State
24 was arguing that he left, discarded the weapon, divided
25 the money, I believe, between them He discarded the

1 wallet And, at the same time, then Mr Hawkins had fled
2 the State, I think, and went to Tennessee was their theory
3 in the case

4 Q And you discussed all this with Mr Hawkins?

5 A I discussed everything in regards to, also, what his
6 statement had said, and how that hurt us in regards to
7 what evidence they were going to bring in And, also, the
8 statement of his co-defendant, who had provided a
9 statement about what had happened

10 Q And so how did you -- what did you decide to do in
11 terms of defense at trial? What was your theory?

12 A My theory of the case was, clearly, I believed
13 that -- and we had discussed this in depth that he had
14 gone, that there was -- you know, whether or not there was
15 a disagreement or -- over the drugs What happened I
16 believed and he believed -- and I still believe that he
17 did not intend to kill Mr Gilbert in this

18 I believe that he pulled a weapon The SLED gunshot
19 residue expert had testified that there was, clearly,
20 something on the decedent's hand, which showed that he had
21 something on his hand as what I believed was a weapon
22 coming to Mr Hawkins The problem I had with his theory
23 was -- is that he, clearly, went into this And they were
24 arguing that it was a robbery, and then the felony murder
25 issue, and other issues that came about that I explained

1 to him that would, you know, create problems dealing with
2 this situation

3 Q So you, basically, were arguing self-defense?

4 A Self-defense was our theory of the case, correct

5 Q Okay It would be fair to say the jury was out for a
6 long time in this case?

7 A I thought they were out -- and I'll have to go back
8 It was nine, 10 hours, I believe They had sent back
9 numerous notes I think there was eight or nine notes in
10 regards to reasonable doubt, and in regards to questions
11 about what information they needed about it

12 I thought they had made a decision -- from my
13 understanding and going back to the transcript, they had
14 made a decision early on in regards to the armed robbery
15 and the possession of a weapon during a violent crime,
16 which I did not believe was beneficial to us -- to
17 Mr' Hawkins

18 They were hung up on the murder charge, which I could
19 see why And I explained that to Mr Hawkins during the
20 deliberations

21 Q Let's go back a little bit to the instructions Did
22 you perceive any problem with the Judge's malice
23 instruction at the time?

24 A At the time, I thought it -- I mean, and, from my
25 review of the law at the time, it was consistent with

1 what -- I think the charge was in regards to the charge of
2 inferred malice with a deadly weapon Not until this
3 Belcher decision did I -- I think it was changed

4 Q If you had perceived there were any issues with any
5 of the jury charges, would you have made an exception?

6 A Oh, no question

7 Q And, during the deliberations, did the State ever
8 come to you with a plea offer?

9 A There was a time -- the jury was out And I remember
10 this because they had come back with the two verdicts
11 They said they had made a decision in regards to armed
12 robbery and possession of a weapon And I had taken that
13 as not a good sign in regards to their finding against
14 Mr Hawkins

15 I explained to him that the -- what I thought the
16 weak points of our case -- his case were, clearly, what he
17 had done after the weapon was discharged Clearly, my
18 view was that he had picked up the wallet, had taken the
19 pills, and then he had left I had always thought from
20 the beginning if he'd have stayed there, we would have
21 been able to work this down to a voluntary

22 At that time when all this was going on, I remember
23 we had a discussion And, actually, it was Mr Moyer and
24 myself, and we were called to talk with Judge Jefferson
25 And she had indicated -- and there was a sidebar that her

1 view was that they were struggling significantly with the
2 murder charge And she believed, based upon the testimony
3 of the gunshot residue expert, that they might find him
4 not guilty of that

5 At that time, Mr Moyer came down and indicated and
6 told me that he would allow Mr Hawkins to plead to 15
7 years to voluntary manslaughter This was, from my
8 recollection and going back, consistent with what we had
9 going into it in the plea offer I think it started off
10 at 25, it came down to 20, and then went down towards the
11 beginning of trial

12 But I took that to Mr Hawkins And, at the time, I
13 had a discussion with him during the dinner break to say
14 that my view was that if he could get 15 years on
15 voluntary manslaughter, I thought that was an excellent
16 deal in that I believed that he had already been convicted
17 of the armed robbery, which carried 10 to 30 And if he
18 could wrap all these into one and be able to do that that
19 he should take it I remember him, specifically, telling
20 me that he believed -- he wanted the jury to make a
21 decision in regards to all the charges And he did not
22 want to plead guilty to that voluntary manslaughter
23 Q Okay Now, did you have a specific strategy in not
24 requesting any kind of manslaughter charge?

25 A My view was it was -- from the beginning, I thought

1 it was self-defense versus -- I mean, based upon his
2 statement, testimony, and other issues that were there, I
3 believed it was self-defense or a murder And I thought
4 that was the strongest theory that we had based upon I,
5 also, thought Mr Hawkins would be -- and he was an
6 excellent witness in regards to his case He showed --
7 you know, he had no criminal -- I think he had a very
8 limited criminal record There were things that supported
9 that

10 And I don't believe to this day he intended to go in
11 there and to murder or do anything to Mr Gilbert in
12 regards to it I think his -- this was a friend of his, a
13 family friend So I thought that was the best way, based
14 upon what the testimony that I had in front of me was, to
15 pursue this case

16 Q So kind of an all or nothing?

17 A That's exactly the way I believed it -- and I
18 think -- I mean, we discussed that And, based upon all
19 that we had, I thought that was -- we agreed upon it

20 Q So would it be fair to say that Mr Hawkins knew that
21 you weren't going to request manslaughter?

22 A I think we discussed that I mean, I think -- Paul
23 Landis, who was my co-counsel, we discussed that and went
24 through it at length as the best option we thought we
25 could put before the jury, because of what we had in front

1 of us And we thought it was a self-defense or murder
2 case

3 Q Now, as Mr Hawkins testified, and as I'm sure you
4 remember, the jury came back three times and said they
5 were hung And after the third time, Judge Lee [sic],
6 basically, asked you and Mr Moyer, do y'all want to go
7 for a mistrial, or do you want further instructions? Do
8 you remember that conversation?

9 A I do

10 Q And do you remember why you told the Judge you would
11 ask for further instructions, instead of a mistrial?

12 A Yeah And this went hand in hand with what the
13 decision -- I mean, and I know Mr Hawkins just testified
14 that if he had a mistrial, he would have been let go But
15 the problem was he had two -- I wasn't -- there were
16 already two guilty verdicts that had been returned We
17 didn't know what they were for the armed robbery and the
18 possession of a weapon

19 We had a discussion in regards to it And he wanted
20 the jury to make a decision in regards to these, because
21 he felt strongly that he was going to be found not guilty
22 I, clearly, talked with him in regards to that And if we
23 had felt -- I mean, we felt during that time that he had
24 the strongest case for a not guilty at that time, based
25 upon the jury being held out as long as they were So he

1 wanted to go forward and have that decided

2 Q If he had asked you, at that point, to ask for a
3 mistrial, would you have done so?

4 A Yes

5 MS RATIGAN That's all I have, Your Honor

6 THE COURT Cross-examination

7 MR ROACH Yes, please

8 CROSS-EXAMINATION

9 BY MR ROACH

10 Q Mr Ariail, where was this discussion that you, and
11 Mr Landis, and Mr Hawkins had about this mistrial
12 option?

13 A I remember it was -- I can't remember what courtroom
14 we were in, but it was, certainly, the holding cell that
15 was situated -- I think we were in courtroom -- I don't
16 know if it was #8, somewhere upstairs But it was in
17 the -- during the dinner break Because I, specifically,
18 remember before going on the break that we had the
19 conversation Mr Moyer walked out He told me this is
20 what he was willing to do Based upon -- I thought that
21 he -- I mean, he didn't feel comfortable, and that's why
22 he extended And I went back and had a conversation with
23 Mr Hawkins in the holding cell

24 Q No, no I'm talking about the mistrial When the
25 Judge says, I will either give you a mistrial, or more

1 instructions I think you said that you had discussed
2 that with Mr Hawkins, is that right?

3 A Yes

4 Q Where did you discuss that?

5 A I believe we had a discussion here in the courtroom
6 as to that when they had come back We had had that from
7 the first, second, and third conversations in regards to
8 that And, clearly, his indication was we want to
9 proceed And we had another -- I'm sure we had a
10 conversation here, I believe, at counsel table

11 Q The reason I say it, on Page 552 where the Judge
12 makes her offer, I don't see a break in there or any
13 indication like, Excuse me, Judge, while I discuss this
14 with my client, is that right? That's not in this
15 transcript?

16 A I don't remember I don't have the transcript in
17 front of me If it's not there -- I don't see any break

18 Q Okay In your testimony, I think you believe it's a
19 fair statement that prior to this shooting, in this case,
20 that there was an argument between Mr Hawkins and
21 Mr Gilbert, is that right?

22 A And I'm making sure I've got the names -- I couldn't
23 remember the decedent's name I think it was Mr Gilbert,
24 correct?

25 Q I believe that's correct, yes

1 A There was a shooting -- when you said that -- there
2 was a shooting at the house?

3 Q Yes, sir

4 A Is that where he was killed?

5 Q Yes, sir

6 A Okay Yes

7 Q In the seconds or minute or so before that, there was
8 an argument, is that right?

9 A Correct

10 Q And I think that you might agree that that argument
11 was a very loud and animated argument Is that a fair
12 statement, too?

13 A Going back -- I don't have my notes in front of me
14 I think there was some animation in regards to it,
15 clearly, over -- the one thing I do remember about this
16 case is that -- and in talking with Mr Hawkins, I think
17 Mr Gilbert had a -- was addicted to painkillers or
18 whatever And he was known to have erratic mood swings at
19 that time And I think that he could have overreacted at
20 that time

21 Q Yes, sir And I think that the evidence, you would
22 agree, would have supported, at least, the giving of a
23 voluntary manslaughter charge, is that -- based upon the
24 argument that occurred before the shooting, actually,
25 occurred?

1 A Yes I mean, it -- I think there was enough there
2 potentially to be able to get that

3 Q Okay Do you have anything in writing where
4 Mr Hawkins waived that presentation of a jury charge to
5 the jury?

6 A I don't have anything in writing from Mr Hawkins

7 Q Okay The other thing, the offer of 15 years if he
8 pled to voluntary manslaughter Do you have anything in
9 writing that shows -- where it was offered by
10 Mr Hawkins -- to Mr Hawkins and then rejected by him?

11 A I have no -- Mr Moyer did not put it in writing
12 during the trial I do have -- and I don't have it in
13 front of me right now, but the plea offers that were
14 extended prior to trial But nothing was put in writing
15 in regards to the 15-year voluntary manslaughter during
16 trial

17 Q And what I mean is, whenever you were on your dinner
18 break or whatever, did you take your note pad and write
19 out that the State has offered you 15 years, I accept,
20 reject, circle one, signed Allan Hawkins?

21 A No, I did not

22 MR ROACH One second, Judge

23 THE COURT Okay

24 (Pause)

25 MR ROACH Judge, that's all we have

1 Thank you

2 MS RATIGAN I have nothing on redirect

3 And the State would rest, Your Honor

4 THE COURT Thank you, Mr Ariail

5 THE WITNESS Thank you

6 MR ROACH We have no further evidence to present,
7 Your Honor

8 THE COURT Tell me about the -- how does Belcher
9 apply?

10 MR ROACH It's an -- I'll admit it's an imperfect
11 application But based upon what's in Belcher and taking
12 everything in there to the -- Mr Hawkins best interest
13 and taking it to his favor, he had his appeal filed And
14 his Anders brief was filed on June 16th of '09 The
15 Belcher case is -- then comes out four months later in
16 October of '09, which says that it doesn't apply to PCR
17 cases, but it does apply in this case -- being the Belcher
18 case -- and for all cases which are pending on direct
19 review, or not yet filed where the issue is preserved

20 THE COURT Wait a minute Read that to me one more
21 time

22 MR ROACH It states, Because our decision -- and
23 this is the decision which says that inference to deadly
24 weapon equals malice -- because our decision represents a
25 clear break from our modern precedent, today's ruling is

1 effective in this case and for all cases which are pending
2 on direct review or not yet final where the issue is
3 preserved

4 And his case was pending on direct review and did not
5 have a decision until January 28th of '10 Now --

6 THE COURT But it hasn't been preserved

7 MR ROACH And that's what I'm saying I'll admit
8 to you it's not a perfect preservation But if you look
9 at what's in the Anders brief, it does talk about whether
10 or not the jury was -- that the use of a weapon does not
11 automatically preclude self-defense

12 And I think that the fact that they are talking, at
13 least, in the Anders brief of a -- the use of a weapon,
14 although it deals with a self-defense aspect of it that,
15 at least, for the purposes of being preserved and taking,
16 again, to every -- giving him every benefit of the doubt
17 that it's preserved enough to be applicable under Belcher

18 Like I say, it's not a perfect preservation I will
19 admit to you that But I think it's close enough to
20 warrant the application of Belcher

21 THE COURT Well, if Mr Savitz had filed some kind
22 of petition or -- I don't know what exactly he would file
23 in the Court of Appeals to say, hey, don't throw out my
24 appeal because of the Belcher case, that wouldn't have
25 gotten very far, would it?

1 MR ROACH I don't know I can't say that it
2 wouldn't I think -- I mean, perhaps, Savitz could have
3 filed a supplemental brief

4 THE COURT Right

5 MR ROACH I don't know if he could or not But to
6 say that he believed that Belcher was applicable in
7 this -- I don't know if he could or not, Judge I mean, I
8 don't know if the time for briefing all those issues had
9 already gone and past

10 THE COURT Right

11 MR ROACH And so he may not have been able to file
12 that brief

13 MS RATIGAN I maybe can shed a little bit of light
14 on that I usually attach all the appellate documents
15 when I file my return I'm looking at it And it looks
16 like I did not attach -- for some reason -- I don't know
17 why I did not attach Mr Hawkins pro se motion to
18 reconsider In the pro se motion to reconsider, he
19 references Belcher And the Court still denies the motion
20 to reconsider

21 So we would argue --

22 THE COURT To reconsider the dismissal of the
23 appeal?

24 MS RATIGAN Yes, sir

25 THE COURT All right So that --

1 MR ROACH I have not seen that, Judge

2 MS RATIGAN Like I said, usually, I attach copies
3 of all the appellate documents But, for some reason -- I
4 don't know why -- I attached the order dismissing it
5 But, for some reason, I did not attach the actual pro se
6 motion Mr Hawkins filed

7 THE COURT Well, I'm just trying -- are you claiming
8 that Mr Savitz was ineffective or --

9 MR ROACH I don't think that we are, but let me
10 double-check

11 (Pause)

12 MR ROACH No We're not saying that appellate
13 counsel is deficient, Judge

14 THE COURT All right So how can Mr Ariail be
15 clairvoyant about what the State Supreme Court is going to
16 do --

17 MR ROACH It is Mr Hawkins position that other
18 states had been ruling on that, although it had not,
19 specifically, been ruled upon here in South Carolina And
20 that should have been -- that's an issue that he wanted to
21 have had raised

22 THE COURT So he's saying that a reasonable lawyer
23 familiar with the Sandstrom v Montana, and other
24 burden-shifting theories would have continued to object,
25 despite the precedent that existed and the belief that, at

1 some point, the Supreme Court is going to change their
2 mind and bring the State in line with these other cases
3 Is that the theory?

4 MR ROACH That would be a fair statement, I
5 believe, Judge

6 THE COURT All right Yes, ma'am, Ms Ratigan

7 MS RATIGAN Just briefly, Your Honor

8 There is, actually, a case that says counsel is not
9 expected to be clairvoyant about changes in the law --
10 future changes in the law Mr Ariail, clearly, was under
11 no affirmative duty to continuously object to at that
12 time -- to what, at that time, was a perfectly valid
13 malice instruction So we would argue that there's no
14 error in terms of a malice instruction and Mr Ariail's
15 handling of it

16 Regarding the lack of a charge for voluntary and
17 involuntary manslaughter, Mr Ariail testified it was a
18 strategic decision to go for all or nothing, and to argue
19 he was either guilty of murder or not guilty because it
20 was in self-defense And, as was noted, the trial court
21 seemed to acknowledge that that was a strategic decision
22 by both sides to go for all or nothing

23 And then the third main issue today was Mr Ariail's
24 failure to ask for a mistrial Mr Ariail testified that
25 he had a discussion with his client, and his client wanted

1 the jury to decide, that they had been out for a while and
2 he wanted the jury to be the ones to make the decision
3 about his ultimate fate And that is why he asked for
4 further instructions, instead of a mistrial And we'd
5 argue Mr Hawkins hasn't met his burden of proof today

6 THE COURT Any further argument?

7 MR ROACH No, Judge

8 Thank you

9 THE COURT Okay Well, thank you for your
10 presentations

11 I'm going to review the record in light of the
12 testimony I've heard today And I'll let you know my
13 decision, hopefully, in the next several weeks

14 Thank you

15 *****END OF TRANSCRIPT OF RECORD*****
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CERTIFICATE OF REPORTER

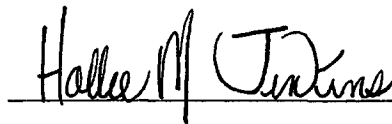
STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

I, HOLLIE JENKINS, 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 the proceedings had and the evidence introduced in the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 2nd day of August, 2011

I do further certify that I am neither of kin, counsel, nor interest to any party hereto

November 28, 2011



Hollie M Jenkins, Court Reporter

My Commission Expires 09/24/20

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C A No 2010-CP-23-3719
COUNTY OF GREENVILLE	)	
	)	
Allan Lee Hawkins,	)	
S C D C No 290682,	)	
	)	
Applicant,	)	
	)	ORDER OF DISMISSAL
v	)	
	)	
State of South Carolina,	)	
	)	
Respondent	)	
_____	)	

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed May 10, 2010. The Respondent made its return on September 15, 2010. An evidentiary hearing into the matter was convened on August 2, 2011 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Hal W. Roach, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, R. Mills Ariail, Jr., Esquire. The Court had before it the trial transcript, the records of the Greenville County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the Respondent's return, and the appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the April 2006 term of the Greenville County Grand Jury for murder (2006-GS-

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23-3511), armed robbery (2006-GS-23-3512, count 1), and possession of a weapon during commission of a violent crime (2006-GS-23-3512, count 2) He was represented by R Mills Ariail, Jr, Esquire

After the State called the case to trial, the Applicant was found guilty On January 17, 2008, the Honorable Deadra L Jefferson sentenced the Applicant to concurrent terms of thirty (30) years for murder, ten (10) years for armed robbery, and five (5) years for possession of a weapon during commission of a violent crime

A notice of appeal was filed at the South Carolina Court of Appeals Joseph L Savitz, III, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders¹ brief The Court of Appeals dismissed the appeal State v Hawkins, Op No 2010-UP-065 (S C Ct App filed January 28, 2010) The Court of Appeals denied the Applicant's pro se "Notice of Reconsideration of Appeal" on March 18, 2010 The Applicant filed a pro se petition for writ of certiorari at the South Carolina Supreme Court By order dated April 21, 2010, the Supreme Court dismissed the matter pursuant to State v Lyles, 381 S C 442, 673 S E 2d 811 (2009)

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons

- 1 Ineffective assistance of trial counsel
 - a Failed to object to erroneous malice instruction
 - b Failed to ask for manslaughter charge after jury asked if they could deliberate on a lesser charge
 - c Failed to ask for a mistrial after consecutive hung jury statements
 - d Failed to object when the trial judge refused to give the jury the option of deliberating on the lesser offense of manslaughter

¹ Anders v California, 386 U S 738, 87 S Ct 1396, 18 L Ed 2d 493 (1967)

#2 & 8
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- 2 Ineffective assistance of appellate counsel
 - a Failed to raise and brief the preserved felony question that swayed the decision of the jury

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S C Code Ann § 17-27-80 (2003)

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v State, 351 S C 385, 389, 570 S E 2d 172, 174 (2002)

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v Washington, 466 U S 668, 104 S Ct 2052 (1984), Porter v State, 368 S C 378, 383, 629 S E 2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v State, 300 S C 115, 117-18, 386 S E 2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v State, 325 S C 182, 186, 480 S E 2d 733, 735 (1997) (citing Strickland v Washington, 466 U S 668, 104 S Ct 2052).

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The Applicant stated trial counsel failed to address the trial judge's improper malice instruction. The Applicant stated that, as trial counsel did not object to the instruction, he could not make a State v. Belcher² argument on appeal. The Applicant stated trial counsel should have requested a jury charge on the lesser-included offense of voluntary manslaughter. The Applicant stated the charge would have been appropriate because (1) the shooting occurred during an altercation with the victim and (2) the jury asked for it during deliberations. The Applicant stated the only plea offer in this case was presented prior to trial and that, if there had been a plea offer during jury deliberations, he would have accepted it if advised to do so. The Applicant stated trial counsel should have moved for a mistrial because the jury stated they were hung on three (3) occasions. The Applicant stated that, while the trial judge asked the parties if they preferred to declare a mistrial or instead provide the jury with further instructions, he did not know why trial counsel did not choose the mistrial option.

Trial counsel testified the defense theory of the case was that the Applicant went to the victim's home to buy pills (and had no intent to kill him) but that the Applicant shot the victim after the victim pulled out a weapon. Trial counsel testified the SLED gunshot residue expert stated there was gunshot residue on the victim's hand and that this corroborated the defense case. Trial counsel testified he did not perceive a problem with the malice instruction. Trial counsel testified that, based on the Applicant's statement and testimony, the defense case was that the jury would either find self-defense or murder. Trial counsel testified he discussed this with the Applicant, who understood the all-or-nothing approach. Trial counsel stated that, at one point during jury deliberations, the State made an offer of fifteen (15) years in exchange for a plea to voluntary manslaughter. Trial counsel stated he discussed the offer with the Applicant and

² 385 S.C. 597, 685 S.E.2d 802 (2009)

#4 & 8
7/14

recommended the Applicant accept it. Trial counsel stated, however, that the Applicant wanted the jury to return a decision. Trial counsel stated the jury deliberated for more than nine (9) hours and sent out numerous notes. Trial counsel stated the jury had decided two charges but were deadlocked on the third. Trial counsel stated he and the Applicant discussed whether to ask for a mistrial or ask for further jury instructions, and that the Applicant stated he wanted the jury to make the decision. Trial counsel stated he would have moved for a mistrial if the Applicant had wanted to do so.

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the trial judge's jury instruction regarding malice. At the time of the Applicant's trial, this was a proper instruction. (Trial transcript, pp 521-22). More than twenty (20) months later, the South Carolina Supreme Court found this instruction was improper. State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). The South Carolina Supreme Court has long held that counsel cannot be expected to be clairvoyant about changes in the law. See State v. Gilmore, 314 S.C. 453, 445 S.E.2d 454 (1994). As such, there was no error in trial counsel failing to object to the malice instruction. Further, this Court notes Belcher was decided three (3) months before the Applicant's appeal was dismissed and, while the Applicant raised the applicability of Belcher in his pro se "Notice of Reconsideration of Appeal" at the South Carolina Court of Appeals, that petition was denied.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have requested a jury charge for the lesser-included offense of voluntary manslaughter. Trial counsel testified the defense strategy was for all-or-nothing and that either the jury would accept the self-defense argument or they would not. Trial counsel also testified this matter was discussed with the Applicant, who agreed to proceed with only a jury charge of murder. This Court finds trial counsel is credible and that he articulated a valid strategic decision why he did not request a manslaughter charge.³ See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel).

This Court finds the Applicant failed to meet his burden of proving trial counsel did not convey a plea offer from the State that was made during jury deliberations. Trial counsel testified he conveyed the fifteen (15) year offer to the Applicant and that they discussed it. Trial counsel testified that, while he believed it was a good offer and advised the Applicant to accept it, the Applicant wanted the jury to make a determination of his guilt or innocence. This Court finds trial counsel's testimony is credible. This Court finds trial counsel fulfilled his responsibilities in conveying the plea recommendation to the Applicant and that the Applicant simply chose to leave his fate to the jury. See Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (holding counsel's failure to convey the State's plea offer to defendant constituted deficient performance).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have moved for a mistrial. After the jury had deliberated several hours and sent numerous notes

³ The trial judge even noted that both the State and the defense had made strategic decisions not to request the lesser-included charge of voluntary manslaughter. (Trial transcript p. 599)

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JH

to the trial judge, the jury's sixth note stated they were "still hung, maybe irreparably so at this time" (Trial transcript, p 552) The trial judge asked each party if they preferred a mistrial or further jury instructions Trial counsel stated he preferred further instructions (Trial transcript, p 552) Trial counsel testified he made this decision after speaking to the Applicant and that the Applicant remained strong in his opinion that this jury should decide the case This Court finds trial counsel's testimony is credible and notes that the Applicant did not object when trial counsel elected for further jury instructions This Court finds the Applicant failed to prove trial counsel erred in making this choice, especially as it was at the Applicant's direction

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance See Frasier v. State, 351 S C at 389, 570 S E 2d at 174

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them Therefore, they are hereby denied and dismissed

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CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED

- 1 That the application for post-conviction relief be denied and dismissed with prejudice, and
- 2 That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 22nd day of August, 2011



D. Garrison Hill
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

WITNESSES

Paul Silvaggio

Greenville County Sheriffs Office

11/29/2005

DOCKET NO 2006-GS-23-

LMM

003511

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

April TERM 2006

1-17 08

THE STATE

GUILTY

vs

ALLAN LEE HAWKINS

ARREST WARRANT NUMBER

1341744

ACTION OF GRAND JURY

TRUE BILL

Brendly J. Reynolds

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Guilty

Indictment for

✓ 0116

MURDER

VIOLATION § 16-03 0010

Craig A. Martin
Foreperson of Petit Jury

1-17 08

Date

752

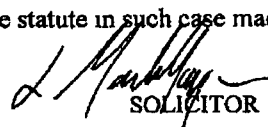
STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on April 18 2006 the Grand Jurors of Greenville
County present upon their oath

That ALLAN LEE HAWKINS did in Greenville County, on or about the 22nd day of November, 2005
unlawfully and with malice aforethought kill DAVID GILBERT by means of shooting him, and that DAVID
GILBERT died as a proximate result thereof This is in violation of §16-3-10 of the South Carolina 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


SOLICITOR

WITNESSES

Paul Silvaggio *Maxwell*

Greenville County Sheriffs Office

11/29/2005

DOCKET NO 2006-GS-23-
LMM

003512

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

1-17-08 April TERM 2006

THE STATE
GUILTY vs GUILTY

ALLAN LEE HAWKINS

ARREST WARRANT NUMBER
I341745 I341750

ACTION OF GRAND JURY

TRUE BILL

Burdette J. Reynolds

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

0139 Guilty

0549 Guilty

Craig A. Martin
Foreperson of Petit Jury

1/17/08
Date

Indictment for

✓
0439
0549

ARMED ROBBERY AND POSSESSION OF
WEAPON DURING THE COMMISSION OF OR
THE ATTEMPT TO COMMIT A VIOLENT CRIME

VIOLATION § 16-11-330
§ 16-23-049

75, -

STATE OF SOUTH CAROLINA	)	INDICTMENT FOR
	)	ARMED ROBBERY AND POSSESSION OF WEAPON DURING
COUNTY OF GREENVILLE	)	THE COMMISSION OF OR THE ATTEMPT TO COMMIT A
		VIOLENT CRIME

At a Court of General Sessions, convened on April 18 2006 the Grand Jurors of Greenville County present upon their oath

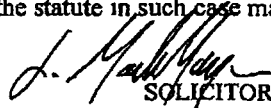
COUNT ONE - ARMED ROBBERY

That ALLAN LEE HAWKINS did in Greenville County, on or about the 22nd day of November, 2005, while armed with a deadly weapon, or while alleging either by action or words he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery would reasonably believe to be a deadly weapon, take by means of force or intimidation, goods or monies described as U S Currency and/or wallet from the person or presence of David Earl Gilbert This is in violation of §16-11-330 of the South Carolina Code of Laws (1976) as amended

COUNT TWO - POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME

That ALLAN LEE HAWKINS did in Greenville County, on or about the 22nd day of November, 2005, possess or visibly display a handgun during the commission or attempted commission of a violent crime, to wit Armed Robbery This is in violation of §16-23-490 of the South Carolina 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


SOLICITOR