VOLUME I of II

STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Eugene C. Griffith, Jr.

Case No.: 2023-001525

State of South Carolina,

Respondent

vs.

Mykel Johnson #351916,

Appellant

APPENDIX

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INDEX

Trial Transcript dated June 18-20, 2012..... 1

Anders Brief of Appellant 320

State v. Johnson, 2014-UP-134 (S.C. Ct. App. Filed April 2, 2014..... 332

Remittitur 334

Application for Post-Conviction Relief 335

Return 342

Post-Conviction Relief Hearing Transcript Dated May 17, 2016..... 347

Order of Dismissal 397

Motion to alter/Amend Judgment 404

Order Denying Motion to Alter/Amend Judgment 414

Indictments and Sentence Sheets 415

Brief of Petitioner 421

Brief of Respondent 455

Reversed and Remanded 478

Respondent's Petition for Rehearing 481

Return to Petition for Rehearing 485

Order 490

Amendment to Post-Conviction Relief Application 491

PCR Transcript of Record dated August 9, 2021 493

Order of Dismissal 526

Notice of Appeal 547

STATE OF SOUTH CAROLINA	) COURT OF GENERAL SESSIONS
COUNTY OF BEAUFORT	) Case No(s).:2011GS0702269, 2011GS0702270
State of South Carolina, Plaintiff,	)
-VS-	) TRANSCRIPT OF RECORD
Mykel Johnson, Defendant.	)

June 18-20, 2012
Beaufort, South Carolina

B E F O R E:

HONORABLE CARMEN T. MULLEN, Judge.

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

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ERIK ERICKSON, Esquire
Attorney for the Defendant

Recorded by: Sharon Vizer-Hanks
Circuit Court Reporter

Transcribed by: Teresa B. Johnson
Circuit Court Reporter

I N D E X

	DIRECT	CROSS	REDIRECT	RECROSS
June 18, 2012				
Jury Qualifications	7			
Jury Selection	14			
Jackson v. Deno motion				
STATE WITNESSES:				
George Erdel				
by Mr. Stephens	21			
by Mr. Erickson		24		
Argument of Counsel	27			
Ruling of the Court	28			
Biggers motion				
STATE WITNESSES:				
George Erdel				
by Mr. Stephens	29			
by Mr. Erickson		35		
Frank Babecki				
by Mr. Stephens	44			
by Mr. Erickson		47		
Motions	48			

INDEX

	DIRECT	CROSS	REDIRECT	RECROSS
June 19, 2012				
Ruling of the Court	68			
Court Remarks to Jury	70			
Opening Statements				
by Mr. Stephens	77			
by Mr. Erickson	82			
STATE WITNESSES:				
Melanie Smith				
by Mr. Stephens	85			
by Mr. Erickson		88		
Josh Dowling				
by Mr. Stephens	90			
by Mr. Erickson		103		
by Mr. Stephens			115	
by Mr. Erickson				120
Billy Crumpton				
by Mr. Stephens	125			
George Erdel				
by Mr. Stephens	130			
by Mr. Erickson		144		
by Mr. Stephens			153	
by Mr. Erickson				155

INDEX

	DIRECT	CROSS	REDIRECT	RECROSS
June 19, 2012 (con't)				
STATE WITNESSES (con't):				
Jeff Vortisch				
by Mr. Stephens	161			
Frank Babecki				
by Mr. Stephens	169			
by Mr. Erickson		180		
by Mr. Stephens			197	
Desiree Constantineau				
by Mr. Stephens	199			
by Mr. Erickson		209		
by Mr. Stephens			213	
by Mr. Erickson				215
Motions	221			
DEFENSE WITNESSES:				
Josh Dowling				
by Mr. Erickson	225			

I N D E X

	DIRECT	CROSS	REDIRECT	RECROSS
June 20, 2012				
DEFENSE WITNESSES (con't):				
Kendalle Simmons				
by Mr. Erickson	247			
by Mr. Stephens		250		
STATE REBUTTAL WITNESSES:				
Malcolm Moore				
by Mr. Stephens	263			
Closing Argument				
by Mr. Stephens	266			
by Mr. Erickson	278			
by Mr. Stephens	288			
Jury Charge	294			
Deliberation	311			
Verdict	312			
Sentencing of the Court	314			
Certificate of Reporter	319			

EXHIBITS PAGE

NO.	DESCRIPTION	ID	EV
	PLAINTIFF EXHIBITS		
P-1	Photo lineup	31	155
P-2	911 DVD	68	87
P-3	Large aerial photo	68	123
P-4	Photo	68	123
P-5	Photo	68	123
P-6	Photo	68	123
P-7	Photo	68	123
P-8	Photo	68	165
P-10	Bullet	68	123
P-11	Cell phone texts	68	129
	DEFENSE EXHIBITS		
D-1	Photo	109	123
D-2	Photo	109	123
D-3	DVD - victim interview	149	149
D-4	Text messages	183	183
D-5	Statement	210	
	COURT EXHIBITS		
C-1	Release of Juvenile Records		

P R O C E E D I N G S

THE COURT: All right. We ready to have the jury come back in?

MR. STEPHENS: Yes, ma'am.

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

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

THE COURT: Ladies and Gentlemen, if you would, give me your attention. At this time, we are about to begin the trial entitled the State of South Carolina versus Mykel Johnson, Ladies and Gentlemen, who is charged in the bill of indictments by the Grand Jury of Beaufort County with two counts of Attempted Murder.

Ladies and Gentlemen, the State in this case is being represented by Jeffrey Stephens and Adam Rousseau.

Gentlemen, if you would, stand and face the jury panel. Thank you.

Ladies and Gentlemen, Mr. Johnson, Mykel Johnson, is being represented by Eric Erickson.

If you both would, please stand. Mr. Johnson, if you would, also stand and face the jury panel. Thank you, gentlemen. You may be seated.

Ladies and Gentlemen, I'm going to ask you a number of questions related to this case. I again ask you that if you need to respond to a question, if you would, simply stand, give me your name and juror number and, uh, then when called upon, go ahead and tell me what you need to tell me.

Ladies and Gentlemen, I will tell you that this is a case or an allegation of attempted murder that occurred on October 28th of 2011 back at the Cross Creek Apartments behind the TJ Maxx here in Beaufort county in that mall, the PetSmart shopping mall. Ladies and Gentlemen, the allegation is that the defendant did shoot at a Frank Babecki and, as well, a Desiree Constantineau.

Ladies and Gentlemen, is there any member of the jury panel related by blood or connected by marriage with the defendant in this case, Mr. Mykel Johnson? If so, please stand. (No response.)

Is here anyone on the jury panel -- I'm sorry. Is there any member of the jury panel who is a close personal friend or share a special relationship with the defendant, Mr. Mykel Johnson? If so, please stand. (No response.)

Additionally, Ladies and Gentlemen, you've been introduced to the attorneys trying this case,

Mr. Stephens, Mr. Rousseau and Mr. Erickson -- Rousseau, I apologize, sir.

Ladies and Gentlemen, the question is the same. Is there any member of the jury panel related by blood, connected by marriage or does anyone on the jury have a close personal or special relationship with any of the attorneys trying this case? If so, please stand. (No response.)

Additionally, Ladies and Gentlemen, is there any member of the jury panel who has ever been represented by any of the attorneys trying this case or been an employee or have any particular relationship with any of the attorneys trying this case? If so, please stand. (No response.)

Ladies and Gentlemen, the following are a list of potential witnesses in this case. My question will be the same. Is there any member of the jury panel related by blood or connected by marriage or have a close personal or social relationship with any of these potential witnesses? They are: First Sergeant Christopher Cushman of the Beaufort Police Department.

And if you are here, Ladies and Gentlemen, any of the witnesses that are here, if you would, please stand and face the panel.

Investigator Josh Dowling of the Beaufort Police Department. Thank you, Investigator Dowling.

Investigator George Erdel of the Beaufort Police Department, Master Sergeant Melanie Smith, Sergeant Jeff Vortisch, Frank Babecki, Desiree Constantineau, Kenny McCollum, Adriana Johnson, Malcolm Moore.

Thank you, sir.

Billy Crumpton, Kendalle Simmons. Very well.

Ladies and Gentlemen, the question is, is there any member of the jury panel related by blood or connected by marriage or have a close personal or social relationship with any of those potential witnesses? If so, please stand. (No response.)

Ladies and Gentlemen, I know you know very little about this case. It is an alleged shooting. But my question to you is is there any member of the jury panel that has any independent knowledge about this case. In other words, from another source, either by word of mouth or the newspaper or anything else. If so, please stand.

THE BAILIFF: One standing, Your Honor.

THE COURT: Yes, ma'am. Your name and juror number.

THE JUROR: 187, Shirley Rogers.

THE COURT: Ms. Rogers, before you go ahead and speak in front of the rest of the panel, would you please come around and just speak to me in private if you don't mind? Thank you.

(WHEREUPON, the following bench conference is held with Juror Number 187, Shirley Rogers.)

THE COURT: You understand what the allegations are. My question is, can you be fair and impartial in the trial of this case or would you prefer not to sit on it?

THE JUROR: I would prefer not to sit on it.

THE COURT: Okay. All right, Ms. Rogers. I'm going to go ahead and excuse you. What I want you to do is this for me. I want you to call the jury line after six o'clock tonight. It will tell you whether or not you need to report tomorrow. If you need to report, come. If it says call the next day, which it may say call Tuesday night after 6:00, just follow whatever it says.

THE JUROR: Okay.

THE COURT: Okay. All right. Thank you.

(WHEREUPON, the bench conference is concluded.)

THE COURT: Number 187, Ms. Rogers, is going to be excused from the trial of this case. I have

her calling after 6:00.

THE BAILIFF: Yes, ma'am. That's what I gave her a card for.

THE COURT: Thank you.

Ladies and Gentlemen of the jury panel, is there any member of the jury panel who is a member of or a contributor to any group which has as its primary concern the promotion of law enforcement or victim's rights? That would include such groups as CAV, Citizens Against Violent Crime, or MADD, Mothers Against Drunk Driving, or SADD, Students Against Drunk Driving. If so, please stand.

(No response.)

Ladies and Gentlemen, based on the nature of the charges, is there any juror that feels that they can not sit and be fair and impartial in the trial of this case to both the State and the defense? If so, please stand. (No response.)

Ladies and Gentlemen, is there any member of the jury panel who's conscious of any interest, any bias or prejudice for or against the defendant, Mr. Mykel Johnson? If so, please stand.

(No response.)

Ladies and Gentlemen, is there any member of the jury panel who has ever been a victim of an

attempted murder? If so, please stand.
(No response.)
Ladies and Gentlemen, is there any member of the jury panel who has ever been accused of or convicted of attempted murder? If so, please stand. (No response.)
Ladies and Gentlemen, is there any reason whatsoever that you can not give both the State of South Carolina and the defendant, Mr. Mykel Johnson, a fair and impartial trial in this case? If so, please stand. (No response.)
Is there any further questions to request of this panel from the State?
MR. STEPHENS: None, Your Honor. Thank you.
THE COURT: From the defense?
MR. ERICKSON: No, Your Honor.
THE COURT: Thank you.
How long is it going to take?
THE CLERK: Just a few minutes.
THE COURT: Okay. Ladies and Gentlemen, what's going to happen at this time is those that have been qualified, your name is being put into a computer. It will randomly select a list of jurors. When your name is called, I'm just going to ask that you simply stand in your place. The

attorneys have an opportunity to either ask you to be seated or to be struck from the trial of this case. They each have a certain amount of strikes that they are allowed to employ. All right. If you are chosen, Mr. Sorrell will tell you to come take a seat in the jury panel. All right. It will take -- just a moment and we should be able to get going, Ladies and Gentlemen.

(WHEREUPON, the trial jury is selected.)

THE COURT: Are there any matters -- any matters of law I need to take up regarding the jury selection process from the State?

MR. STEPHENS: No, Your Honor. Thank you.

THE COURT: From the defense?

MR. ERICKSON: No, Your Honor.

THE COURT: Very well. Ladies and Gentlemen, those of you that are sitting out here still in the gallery, obviously, you are not jurors in the trial of this first case. I'm going to ahead and excuse you, Ladies and Gentlemen. I simply need to ask you to call in to the jury line.

You're going to be given a card when you leave. It's going to have a phone number with a recorded message. Call in after 6 o'clock tonight. It will tell you whether or not you need to report

in the morning. It may tell you to call Tuesday night after 6 o'clock. I respectfully just ask that you follow the prompts. We do need you if we are going to pull another jury. Again, Ladies and Gentlemen, I don't want to keep you coming and going unless I absolutely need you. Again, if you'll just call after 6 o'clock. Don't call before. The message literally gets put on there at 5:59. All right. Thank you for being here, Ladies and Gentlemen. You are excused.

(WHEREUPON, the jury panel exits at approximately 11:39 a.m.)

THE COURT: Well, welcome, Ladies and Gentlemen. As you understand, you are the jury for the trial of this first case. I am going to go ahead and excuse you to return tomorrow. There are a few things I need to tell you for instructions. As well, after I excuse you, your bailiffs are going to take you back to the jury room. You are to report straight to the jury room through a back door and not come through the courtroom tomorrow when you report.

Ladies and Gentlemen, again, there are a few things. Most importantly, you are not to discuss this case. Not only with each other or with anyone

else. Again, Ladies and Gentlemen, the reason for that is simply someone is going to tell you something about something. They know nothing about this case. I know you very little. But again, you are not permitted to go home and tell a spouse or a loved one even what the charges are, the parties involved, the attorneys or any of the potential witnesses. Again, Ladies and Gentlemen, it would be inappropriate for you to be influenced by any outside source. You are going have everything you need to decide this case right here in this courtroom. Again, I don't want you tainted in any way.

Additionally, Ladies and Gentlemen, I don't think there's going to be anything in the newspaper or on the news or on the radio or television. But out of an abundance of caution, if you happen to wake up tomorrow morning and open the paper or turn on the TV and see something about this case, you are to turn it off or disregard it. Again, it would be -- would not be appropriate for you again to be influenced in any way.

Additionally, Ladies and Gentlemen, I have instructed the parties and the witnesses and the lawyers in this case not to speak to you when they

come and go from the courthouse. The reason why is that even in innocent conversation as you are walking down the stairs or riding the elevator can be misconstrued. It always gets reported back. So out of abundance of caution, they are told not to speak with you. So again, if you pass them and don't smile or even say hello, they are not being unfriendly. They are simply following my order.

Ladies and Gentlemen, additionally, if you were able to get into the courtroom here today with a cell phone or a computer, I'm going to ask that you leave it back in your car or back at home. It is not permissible for you to bring electronic devices or electronic communication into the courtroom or into your jury room. There's just too much temptation to be able to get information off of it. We ask that you leave it back there.

If you are concerned about someone needing to contact you emergently while you are performing jury service here, Ladies and Gentlemen, just give them the Clerk of Court's number. Tell them to say that you are sitting on a jury in Carmen Mullen's courtroom and I assure you I will find you immediately. All right.

Ladies and Gentlemen, I appreciate your

willingness to serve. I will tell you that this case is only expected to last two days. It's expected to last Tuesday and Wednesday. Possibly could go over to Thursday. We don't always know what happens. I will tell you that that's what your expectation should be.

Additionally, I typically run my courtroom from 9:30 until about 5:00 or 5:30 in the afternoon. However, Ladies and Gentlemen, if any of you have prior engagements or a certain time that you need to be home, either to pick up children or a longstanding party or a baseball game, I don't want anyone to miss those things. I'm simply asking that you tell the bailiffs what it is that you need and what time you need to be out of here. I can certainly accommodate you based on the short length of this trial.

Ladies and Gentlemen, the last thing before I go ahead and excuse you to your jury room, I need you before you leave today to elect a foreperson. A foreperson doesn't have any more say than anyone else. They are simply the person that gets the discussion going once the case is sent to you for your deliberations. And it's also the person that I speak with in regards to time and when you all

are able to report for jury duty. What I'm going to ask, Ladies and Gentlemen, when you have elected that foreperson, let the bailiffs know. That foreperson needs to keep this front seat up here at all times. My alternate needs to stay in the back. You can move around if you have trouble seeing.

Ladies and Gentlemen, for the rest of you, as you come and go from the courtroom, you are welcome to change seats if you'd like. You certainly are not limited to the seats that you are in.

Again, Ladies and Gentlemen, thank you. Does anyone have any problem with reporting tomorrow morning at 9:30? Are y'all okay? We can start at 10:00 if we need to. A lot of times, my jurors, usually when I say that, they say we want to report at 9:00 or earlier. But is 9:30 okay for everyone? I know some of you are driving a good distance. I want to make sure you get here.

Ladies and Gentlemen, I can not start until all 13 of you are here. So if you run into car trouble or have any problem, please call to the clerk's office. Tell them what it is and we will come get you. Okay? Again, Thank you, Ladies and Gentlemen. We appreciate it. We look forward to seeing you tomorrow morning at 9:30. You are

excused.

(**WHEREUPON**, the jury exits at approximately 11:45 a.m.)

THE COURT: All right. Y'all, it's my understanding that we have some pretrial motions that we're going to try to take up right now.

For this case, if y'all will be back at 1:00, Mr. Erickson and Mr. Stephens. And we'll be at ease in this case until 1 o'clock. We're going to get as many of the pretrial motions done as we possibly can. Whatever is flow over, we'll do in the morning.

MR. STEPHENS: Okay.

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

THE COURT: Thank you, you all. Please be seated. All right. What is the first motion we're going to take up?

MR. STEPHENS: Your Honor, the State's got a Jackson v. Deno motion on statements that Mr. Johnson made when he was first taken into custody, Your Honor. The State calls Investigator George Erdel from the Beaufort Police Department.

THE CLERK: Come forward and be sworn, sir.

GEORGE ERDEL

having first been sworn, testifies as follows:

THE CLERK: You may be seated. Would you state your name and spell it for the court, please?

THE WITNESS: George Erdel. E-R-D-E-L.

DIRECT EXAMINATION

BY MR. STEPHENS:

Q Investigator Erdel, you are a criminal investigator for the Beaufort Police Department, is that correct?

A Yes, sir.

Q And as part of your, uh, duties, were you involved in investigating the shooting that occurred at Cross Creek Apartments on October 28th of last year?

A I was involved. Uh, Investigator Dowling was the primary case officer.

Q So you were not the lead investigator?

A That's correct.

Q Now, also as part of your duties related to that investigation and other duties you may have at the Beaufort Police Department, were you involved in the apprehension of a suspect in that case, Mykel Johnson, on November 8th, 2011?

A Yes.

Q Where was Mr. Johnson taken into custody?

A He was -- I don't recall the exact location, the name of the street. It was in a trailer out in

Yemassee.

Q And who actually went and took him into custody?

A The United States Marshall Service.

Q Obviously, there was some local law enforcement involved in that as well?

A Correct. Members of the Beaufort County Sheriff's Office and myself were also present.

Q What was your role in that in taking him into custody at that location?

A I was there because I had knowledge of the case. I basically -- the actual apprehension itself, I was on the perimeter. I was at the rear of the house. The Marshall Service members actually entered the house and took custody of him.

Q Someone else actually went into the home and got him?

A That's correct.

Q And when he was brought out of the home, was he in handcuffs at that time?

A Yes.

Q Do you know if anyone had read him his Miranda rights at that point?

A I do -- I don't believe so, no.

Q Did you personally speak with Mr. Johnson?

A I did.

Q What did you say to him?

A I told him, in essence, that we would be going to the police department, that he would be advised of his rights and he could speak to us, to the law enforcement at the police department.

Q Okay. Did you ask him any questions at that point?

A No, sir.

Q Did Mr. Johnson make any statements to you?

A Yes.

Q And what, if any, statements did he make to you at that time?

A He stated that he had wanted to turn himself in and he was going to do so once he had an attorney. He also asked me how we had found him. And he stated that there was -- I really didn't understand exactly what he was saying. He said something about there being something on his cell phone that he wanted us to see. But because I had not mirandized him and I wanted to get him down to the police department, I didn't ask him to elaborate any further.

Q Again, you stated that you had not asked him any questions at that point?

A That is correct.

Q There is no question that he was under arrest?
A That's correct.
Q Now, after he, uh, was taken to the Beaufort Police Department or to the Beaufort County Detention Center, was -- tell me, did you interview him there?
A Uh, a statement was made at the police department in which he invoked his rights and the interview was terminated.
Q Okay. So at that point, he was given his Miranda warnings and declined to speak with officers?
A Correct.
Q It was clear at that point he understood his rights?
A Yes.
Q Just to repeat. The statements that he made from the point that he was going to turn himself in if he got a lawyer, that's what you testified to?
A Yes, sir.
Q And asked how did you find him?
A Yes.

MR. STEPHENS: Your Honor, that's all the questions the State has.

THE COURT: Okay. Mr. Erickson?

MR. ERICKSON: Thank you, Judge.

CROSS-EXAMINATION

BY MR. ERICKSON:

Q Officer Erdel, I want to ask you how many officers were out there from Yemassee to arrest Mr. Johnson?

A Maybe -- between 10 to 15 maybe.

Q 10 to 15?

A Perhaps. I didn't really count.

Q Uniformed officers?

A Yes.

Q Clearly he --

A I wasn't in uniform. I was wearing my normal, you know, shirt and tie kind of thing. Monday through Friday attire. I'm not a patrol officer. I wear detective clothing. I was not uniformed but the rest of the officers were.

Q Would you describe that as a show of force by the police departments?

A Uh, you have to specify, sir. I was the only member of the Beaufort Police Department that was there. The United States Marshall Service was there. I don't know that I would classify it that way or not.

Q Were guns drawn?

A I assume so.

Q Is it reasonable to say that's a show of force?

A I suppose.

Q Was Mr. Johnson handcuffed at the time he gave those statements?
A Yes.
Q All right. Did you know Mr. Johnson's age at the time?
A Yes.
Q How old was he?
A I believe he was 16.
Q And how much education did Mr. Johnson have at that time?
A I have no idea.
Q Did he ask for his mother?
A Not that I recall.
Q Did he ask for any adult to accompany him?
A Not that I recall.
Q Did he ask for a lawyer before he made those statements?
A No.
Q How do you know that?
A Well, he didn't ask me for a lawyer.
Q Could he have asked somebody in your party of 10 to 15?
A That would call for me to speculate, and I don't really know.
Q Who else might have been in there to hear what

Mr. Johnson had to say?

A The members of the Marshall Service that took him into custody, if he said anything.

Q To your knowledge, are you the only one that, uh, heard those two statements?

A I don't know if the people that were standing around heard him or paid him any mind or not. There were other people in the immediate vicinity. Whether they paid any attention or not, I couldn't say.

Q Did you answer Mr. Johnson's question on how did you find him?

A I said somebody gave you up.

Q Somebody did what?

A Gave you up.

Q Okay. I don't have nothing further.

THE COURT: Anything further?

MR. STEPHENS: No, Your Honor. Only argument by the State.

THE COURT: Okay. You may step down, sir. Thank you.

Whenever you're ready, Mr. Stephens.

MR. STEPHENS: Excuse me, Your Honor.

THE COURT: Whenever you're ready.

MR. STEPHENS: Your Honor, the State just argues that this is clearly voluntary statements

that while Mr. Johnson was under arrest at this point, there's no question this was custodial. However, it was not an interrogation. No questions were asked of him. When he was interviewed later, he was given his Miranda rights. He clearly understood them and invoked his right to remain silent. Mr. Johnson established that he knew what his rights were and he did invoke them, but these were spontaneous admissions -- excuse me, utterances by the defendant.

THE COURT: Mr. Erickson?

MR. ERICKSON: That's what I want to make clear, Your Honor. Mr. Johnson clearly invoked his rights during the video interrogation. There's no reason he would have said these things at that time. He clearly understands what he says to be used against him. I just have serious doubt as to whether or not he made those questions. I would say, uh, with the show of force and all those deputies that he really had no chance in that situation to really, uh, say anything. I mean, I would just ask that you deny the motion letting those two statements in.

THE COURT: Okay. Well, respectfully, I do think the statements were voluntary. They were not

elicited by interrogation and they were spontaneous utterances from his own mouth, unsolicited. I think they are voluntary and I think it's admissible. Mr. Stephens, what's your next motion?

MR. STEPHENS: Your Honor, the State has a Biggers motion on the admissibility of a photo lineup done by one of the victims in the case, uh, Frank Babecki.

THE COURT: Okay.

MR. STEPHENS: Again, the State recalls Investigator --

THE COURT: Sorry. Come on back. I didn't realize you were there too. I'm just going to remind you you are under oath. Thank you, sir.

THE WITNESS: Yes, Your Honor.

GEORGE ERDEL

having previously been sworn, testifies as follows:

DIRECT EXAMINATION

BY MR. STEPHENS:

Q Investigator Erdel, you testified a moment ago that you were involved, although not the lead investigator, with the investigation of the shooting that occurred at Cross Creek Apartments on October 28th --

COURT REPORTER: I'm sorry. That occurred?

BY MR. STEPHENS:

Q I'm sorry. That occurred at Cross Creek Apartments in Beaufort on October 28th. As part of your involvement in that investigation, did you have contact with the victims in the case, Frank Babecki and Desiree Constantineau?

A Yes, sir.

Q Do you know if, uh, either one of them submitted to a photo lineup to identify the suspect involved in the shooting?

A Uh, Mr. Babecki did.

Q How was the photo lineup prepared that was given to Mr. Babecki?

A When a photo lineup is conducted, we -- if we have a subject that we want to put into the lineup, we use a program. It's our reporting system. We search for a criteria of other people that look similar to that person. The system comes back with people whose parameters fit that description. We scroll through the pictures until we find suitable candidates. There are six candidates up in a lineup, then we print the lineup out.

Q So the computer gives you a list of potential pictures based on the criteria you put in and then you select individuals to go in the lineup?

A Yes, sir.

Q How is the order of the pictures in the lineup determined?

A The program randomizes them. You have to hit like a little button that says "Done", "Randomize". And you can't print the lineup until you hit that button. You press that button. The lineup is finished. You hit the print button and the lineup comes out.

MR. STEPHENS: Your Honor, may I approach?

THE COURT: You may.

(WHEREUPON, State's Exhibit 1 is marked for identification purposes.)

BY MR. STEPHENS:

Q Officer Erdel, I'm handing you what's been marked State's Exhibit 1. Can you please take a look? Can you identify that document?

A This is the photo lineup that I printed out.

Q How do you know that's a photo lineup you printed out. Is there anything that identifies it as such? Are there any markings on it?

A The date of the printout is up top here and where Mr. Babecki initialed and placed a date by Mr. Johnson's photograph as indicated on here.

Q Now, is Mr. Johnson's photo on that lineup?

A Yes, sir.

Q All right. It's at the number 1 position,

correct?

A Correct.

Q Now, you just testified a minute ago that that is a random generation by the computer?

A Correct.

Q So you had nothing to do with placing that picture in the number 1 position?

A I did not.

Q Now, you also indicated that it is initialed by Frank Babecki. So the next question, did you present this to, uh, -- this photo lineup to him?

A I did.

Q What, if any, instructions did you give him when you presented this to him?

A There's a standard disclaimer that we give that the person may or may not be in the photographic lineup. The person who is viewing the lineup should not assume that the person who committed the offense is in the lineup. So I gave him that admonition before handing him the lineup.

Q Now, are you present in the room when they look through the lineup?

A I give them the lineup. I usually will leave the room and give them a chance to look at it without me being in there.

Q In this case, did you leave the room?
A I wasn't able to make it out of the room before Mr. Babecki identified Mr. Johnson as the offender.
Q Would it be fair to say that he picked him out immediately?
A Yes.
Q Now, based on your discussions with Mr. Babecki and Mrs. Constantineau, did they have any prior knowledge of the suspect that they believed had committed the offense?
A They stated that they knew who he was and that they had seen him on numerous occasions prior and he was a known person to them, in other words.
Q Under those conditions, do you believe, in your opinion as a police investigator that you needed to give Mr. Babecki a photo lineup to identify the suspect?
A No, sir.
Q Why did you submit it?
A Out of an abundance of caution.
Q Did the female victim in the case, Mrs. Constantineau, also do a photo lineup?
A She did not.
Q Do you recall why she didn't do one?
A I don't recall. I believe -- she was pregnant at the time. I want to say that she had to leave for --

because of the stress and all that stuff and what was going on with the baby, but I couldn't say that with 100 percent certainty. I do believe she had left around the same time I gave Mr. Babecki a lineup.

Q Did you observe Mr. Babecki circle and initial the spot where the picture of Mykel Johnson was?

A Yes.

Q And are those his initials?

THE COURT: Can I see the lineup?

THE WITNESS: I'm sorry. Can you say that again?

BY MR. STEPHENS:

Q So those are his initials ---

A Yes, sir.

Q --- that you saw him put on there? Was this entire process video recorded?

A Yes.

MR. STEPHENS: Beg the Court's indulgence for just a moment, Your Honor. (Pause.)

BY MR. STEPHENS:

Q How would you gauge Mr. Babecki's certainty that this was the individual he seen shooting at him and his wife?

A Positive. Very -- 100 percent.

MR. STEPHENS: Your Honor, I don't have

anything further for Investigator Erdel at this point.

THE COURT: Okay. Mr. Erickson.

MR. ERICKSON: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. ERICKSON:

Q Officer, you mentioned you prepared Mr. Babecki prior to this lineup?

A As far as how? I'm confused.

Q You stated certain things to Mr. Babecki as far as the order of the lineup?

A As far as -- no, not as far as the order. I basically say that just because I'm giving you a lineup does not mean the person is in there.

Q All right. That's what I wanted to hear. And the other thing, did you have an occasion prior to the lineup to look at Facebook with Mr. Babecki?

A I don't know about prior to the lineup. I don't remember if I did that or if Investigator Dowling did that. I'm not sure. I'm not sure.

Q You have any knowledge that Facebook was used prior to the lineup in this case?

A Prior to the lineup?

Q Yes.

A I have no knowledge of that, no.

MR. ERICKSON: I would -- at this time, I would like to play the video of that lineup. I believe there is something about Facebook said by Mr. Babecki either in the beginning or the end of that.

THE COURT: Okay. Let's go ahead and play it. Let's cue it up.

MR. ERICKSON: I could not get it to play on that big screen. I don't know whether we can see it on --

MR. STEPHENS: Your Honor, we can bring, uh, -- I believe Mr. Erickson's got a copy of the video. We can bring one of the other televisions up.

THE COURT: All right.

MR. STEPHENS: He's trying -- since he's the proponent for the evidence, Your Honor, we don't have anything cooked up and ready to play. So we would need, I think, a few minutes.

THE COURT: Okay. Let's go ahead and bring it out. All right. So we'll go ahead and break and take 10 minutes and you can go ahead and pull it up. Uh, after your Biggers hearing, what else does the State have?

MR. STEPHENS: Your Honor, all that I have is, uh, I have a motion in limine to request that

the defense not be able to inquire into speculation as to the defendant -- victim, Frank Babecki's drug involvement. Specifically, after the female victim, Mrs. Constantineau, testifies, in her video interview, the officers ask her if she's aware of whether her husband is involved in any drug use with I believe either this defendant or other people. She says probably. I think that's highly prejudicial, also not relevant to these charges unless there's some tie that's made between his drug use and the offense charged. The State would argue that that should be excluded.

If Mr. Erickson tries to use that as some kind of prior inconsistent statement by Mrs. Constantineau, we just ask that that portion relating to speculation on Mr. Babecki's drug use be admitted.

THE COURT: Okay.

MR. ERICKSON: Well, to reply to that, Your Honor, I think --

THE COURT: We're not arguing it yet.

MR. ERICKSON: All right.

THE COURT: We're not arguing it yet.

MR. ERICKSON: All right.

THE COURT: So what other motions do you have

after?

MR. STEPHENS: Lastly, Your Honor, the State intends to use jail calls from between the defendant, Mr. Johnson, and his mother and Malcolm Moore to show a, uh, attempt to interfere with the victims. He asked his mother to have someone pay the victims not to show up. The State would argue that as evidence of consciousness of guilt. I don't know if we need a preliminary ruling on admissibility, Your Honor. But before the State mentions any of that in its opening, we want to bring that up.

THE COURT: Okay. All right. Anything else, Mr. Erickson, from you?

MR. ERICKSON: I have a text message that I may try to get in.

THE COURT: Okay.

MR. ERICKSON: From Frank to my client about wanting to, uh, buy some marijuana.

MR. STEPHENS: The State has no objection to that, Your Honor. We're going to have Billy Crumpton with the Beaufort County Sheriff's Office testify on foundation for the search of the defendant's cell phone. We believe that's going to lay the foundation.

THE COURT: Okay. All right. Well, let's go and get those hooked up however long it takes to get it hooked up.

MR. STEPHENS: So, Your Honor, are we in recess?

THE COURT: We are. Someone just get it hooked up. Let me know when y'all are done.

(WHEREUPON, a short recess is taken.)

THE COURT: All right. Mr. Erickson, are we cued up?

MR. ERICKSON: Yes, Your Honor.

THE COURT: All right. Let's go.

MR. ERICKSON: Do I need to have Investigator Erdel back?

THE COURT: All right. You needed me to see -- what am I looking for here, Mr. Erickson?

MR. ERICKSON: You're going to look for a statement from Mr. Babecki relating to Facebook.

THE COURT: Okay.

MR. ERICKSON: And Mr. Babecki, the officers asked Mr. Babecki to describe what the perpetrator looks like.

THE COURT: I see, uh, Investigator Erdel. Who is the other investigator? I can't tell.

MR. STEPHENS: Your Honor, that's

Investigator Tony Ray.

THE COURT: Thank you.

MR. ERICKSON: If I could ask Investigator Erdel to --

THE COURT: Come on up.

MR. ERICKSON: I think that would be just easier.

THE COURT: Come on up, Mr. Erdel.

(WHEREUPON, Defendant's Exhibit 3 is played.)

MR. ERICKSON: I just missed it. I got to back it up.

THE COURT: I didn't hear it. Was it Ray that said it? Investigator Ray?

MR. ERICKSON: Uh, it was, uh, George Erdel.

THE COURT: Okay. Well, then back it up and play it louder cause I didn't hear it.

(WHEREUPON, Defendant's Exhibit 3 is resumed.)

MR. ERICKSON: This is -- I can't get it at the 36-minute mark exactly. I have to kind of play it. You want me to alert you when it gets closer?

THE COURT: Is he telling how he knows the defendant in this case? Is that what he's talking about?

MR. ERICKSON: Right now, he is.

THE COURT: Okay.

(WHEREUPON, Defendant's Exhibit 3 is continued.)

MR. ERICKSON: We're at the 24-minute mark. We need to get to 36.

THE COURT: Okay.

MR. ERICKSON: I don't -- you know, sometimes it's hard to skip around.

THE COURT: Can't fast-forward it?

MR. ERICKSON: Well, I fast-forwarded it too much last time.

THE COURT: Hold on a second.

(WHEREUPON, Defendant's Exhibit 3 is continued.)

MR. ERICKSON: We've got 10 minutes of this before it comes up.

THE COURT: Well, I'm interested -- there was a portion that we discussed about the potential of him having bought drugs or talked to your client. They are saying there's a cell phone, either a text or a phone call.

(WHEREUPON, Defendant's Exhibit 3 is continued.)

THE COURT: All right. Investigator Erdel, does that refresh your recollection in any way about something that had to do with Facebook?

THE WITNESS: Yes, Your Honor. That would have been subsequent to the identification by photo lineup. I was attempting to obtain a more current

picture to see if his appearance had changed.

MR. ERICKSON: And I did not recall that until I watched the video.

THE COURT: That was after you did the lineup?

THE WITNESS: That video there was taken after the lineup. I did the lineup first because Investigator Dowling was -- initially, Your Honor, when that incident happened --

THE COURT: Well, this should be easy enough. What was the date of that video? Cause your lineup was on 10/28 of '11.

MR. ERICKSON: I think they were both on --

THE WITNESS: They were on the same day.

THE COURT: On the same day.

THE WITNESS: The way the video burns, Your Honor, it will go in order, subsequent order from, like, first video to last video. So the lineup video was first. Then you will see the other video will be second.

THE COURT: Okay. So you did a photo lineup, then once he identified him on a photo lineup, you went to Facebook to see if you could pull up a more current picture of him?

THE WITNESS: Yes, Your Honor. And to

clarify, if I may, when the initial report went out, I was doing something else. I did not even know that it had taken place until Investigator Dowling called me and said, hey, I'm working a shooting case, and asked me to, you know, research the name, the alias name that we had and so forth and put the lineup together.

So the victims, Mr. Babecki and his wife came down to meet me. I showed them the photo lineup. Once we got things solidified, later on, a positive identification had been made. Then it was let's find out. Research the suspect and find out what his deal is, who he is, where he is, what he looks like, any information we can.

THE COURT: You can go ahead and ask him questions.

MR. ERICKSON: I don't have any more questions for Officer Erdel. I would be curious as to what Mr. Babecki would have to say as to when he saw the Facebook photo.

THE COURT: Mr. Babecki is not here.

MR. STEPHENS: He is outside, Your Honor.

THE COURT: He is?

MR. STEPHENS: So I intend to call him next.

THE COURT: Okay. All right. You can step

down, sir.

Go ahead and call him.

MR. STEPHENS: Your Honor, if I can leave that up.

THE COURT: Sure.

MR. STEPHENS: If we need to watch the video and for my motion in limine -- I don't want to make the motion now, but I want to cover any references or activity that's not directly connected to the offense or to what immediately proceeded the offense. Provided upon whatever Mr. Erickson may provide in his defense.

THE COURT: Come right up here. Put your left hand on the Bible and raise your right hand.

FRANK BABECKI

having first been sworn, testifies as follows:

THE CLERK: You may be seated. State your name and spell it for the Court please, sir.

THE WITNESS: Frank, F-R-A-N-K. Last name B-A-B-E-C-K-I.

DIRECT EXAMINATION

BY MR. STEPHENS:

Q Mr. Babecki, uh, October 28th, 2011, do you recall a shooting that took place at Cross Creek Apartments?

A Yeah.

Q Uh, what was your involvement in that shooting? Just in general.

A Uh, I was living at that development. Somebody I know was walking towards me and said what happened the other night. Shots started ringing out.

Q Now, do you recall going to Beaufort Police Department later that day and having a picture lineup, six pictures on a page presented to you when they were trying to identify the person, suspect involved?

A Yes.

Q You're being handed what's been marked State's Exhibit 1. Is that the photo lineup that was given to you when, uh, they were trying to identify the suspect involved in the shooting?

A Yes.

Q Are those your initials on the page, Mr. Babecki?

A Yes.

Q Did you recall circling that picture and initialing it?

A Yes.

Q Do you recall if you were told whether the person who committed the crime was definitely on that page or whether he just might be on that page?

A Yeah.

Q Go ahead and tell us, sir.

A Say the question again.

Q Were you told that the person who committed the offense was definitely going to be on that page?

A No, no, no, sir.

Q Now, you recall being interviewed at the Beaufort Police Department by Investigator Edwards seated right here and another investigator?

A Yes, sir.

Q Were you shown Facebook photos of Mr. Johnson from his Facebook page?

A Yes, sir. I believe so, yes.

Q Do you recall if that was before or after you did the photo lineup?

A I think before. No, after. I did it after. I saw that after.

Q Okay. Now, Mr. Babecki, when you were shown that picture where you just circled, how certain were you of the, uh, identity of the person you circled as the person who shot at you?

A I knew him. I'm certain.

THE COURT: How did you know him?

THE WITNESS: He lived in my neighborhood.

THE COURT: And you had seen him before?

THE WITNESS: Yes.

MR. STEPHENS: Your Honor, I don't have any further questions for Mr. Babecki at this time.

THE COURT: Mr. Erickson?

CROSS-EXAMINATION

BY MR. ERICKSON:

Q Yes, Mr. Babecki, do you know why you were shown those Facebook photos?

A Do I know why?

Q Yeah.

A No, sir.

Q Did you want to see those or did the officer?

A I believe at the time he did and then I also did too.

Q You don't remember why you wanted to look at those Facebook?

A It was so long ago, I really don't recall.

Q How do you remember that you saw Facebook after the lineup?

A Cause the lineup was shown to me first when it happened. It was after, but I don't recall asking for the Facebook pages. I don't recall asking for that.

Q So the officer asked for you to look at them?

A I believe so.

MR. STEPHENS: Your Honor, I have to object.

At this point, it's been asked and answered. Mr. Erickson is going at it many different ways but Mr. Babecki has already testified he doesn't know why.

THE COURT: Mr. Erickson, anything further?

MR. ERICKSON: Nothing further.

THE COURT: Anything further?

MR. STEPHENS: Nothing further from the State, Your Honor. Thank you.

THE COURT: Okay. You can step down, sir.

Anything else, Mr. Stephens?

MR. STEPHENS: Your Honor, as I indicated, the State intends to make a motion in limine. I think it would help if I could cue this video up to the start so you would have a better idea of the kind of information --

THE COURT: Is this in regards to any alleged drug dealing by your client?

MR. STEPHENS: Uh, drug use by Mr. Babecki, Your Honor.

THE COURT: Drug use?

MR. STEPHENS: Yes, Your Honor. I think that that would be prohibited as 404(b) and under 403, unduly prejudicial, Your Honor.

THE COURT: Unless it affects his ability to identify the defendant as the assailant.

MR. STEPHENS: Yes, Your Honor. But any generalizations that he has used drugs in the past not directly connected to his recall or use immediately before or after this incident, Your Honor.

THE COURT: All right. Well, Mr. Erickson, as far as the photo ID lineup, I do think, quite frankly, it was a good lineup. I don't feel it's necessary since the officer said cause he knew him. I don't think it was suggestive. I certainly don't see any prejudice to it. He testified that he actually knew your client and had been in the neighborhood. So I think it's a good lineup and I'm going to let it in. Okay.

MR. ERICKSON: Just for the record, I was going to say that the Facebook show up was unnecessarily suggestive and it could have influenced the witness. He told you that he couldn't remember exactly.

THE COURT: He said it was done after the lineup.

MR. ERICKSON: But he said it was so long ago that he had trouble remembering, so I just questioned his memory.

MR. STEPHENS: Your Honor, if Mr. Erickson

wants to cross-examine Mr. Babecki during trial as to his present ability to recall, uh, Mr. Johnson and whether that's affected by seeing the FaceBook photos, I think that's open area for cross-examination.

THE COURT: I'm assuming Mr. Babecki, and maybe we should have asked him, gave him his name. I'm assuming gave the officer the name of the person that shot at him cause he knew him.

MR. STEPHENS: He used his street name Hot Boy, Your Honor.

THE COURT: Okay.

MR. STEPHENS: Your Honor, if I may move on to the State's motion in limine.

THE COURT: Okay.

(WHEREUPON, a short recess is taken.)

THE COURT: All right. What are we looking at now, Mr. Stephens?

MR. STEPHENS: Your Honor, I just wanted to play the beginning of that interview. For one, it's going to be about 10 or 12 minutes. But pretty quickly, the investigator in this case asked Frank Babecki's wife if she knows if Frank's been involved in drug use. And this is the kind of information I don't think should come in. It's not relevant under

403, highly prejudicial.

THE COURT: You are playing Mrs. Babecki's --

MR. STEPHENS: Yes, sir. To the very beginning.

THE COURT: Okay.

MR. STEPHENS: They do them kind of continuously.

(WHEREUPON, Defendant's Exhibit 3 is played.)

MR. STEPHENS: Your Honor, I'd like to stop it there.

THE COURT: Okay.

MR. STEPHENS: Just to, uh, -- I just think that that illustrates what I'm worried about coming in. Basically, any general information that, uh, especially if it's speculative that Mr. Babecki may use drugs, I believe that one of the alibi witnesses is going to be Kendalle Simmons. He's listed as an alibi witness. He testified that, uh, Mr. Babecki used drugs with him, Your Honor. If it is not connected to Mr. Babecki's ability to observe the events or recall the events or if it's not connected to how any of the res geste of how this offense happened, Your Honor, I just believe it is unduly prejudicial and it's also that character evidence that wouldn't be admissible or appropriate for this

case, Your Honor.

THE COURT: Mr. Erickson?

MR. ERICKSON: Your Honor, Judge, it comes under other crimes, wrongs, and I believe there's an exception where at certain times, that bad act evidence could come in. I want to show it for the reasons of motive or identity. You just heard Mrs. Babecki talk about a drug deal slash robbery gone wrong. That's our position in this as to the motive, as to why my client was named in this particular crime. Mr. Babecki's mad at my client for possibly doing that, that drug deal gone wrong. That's totally speculation too, but it still goes to motive and it goes to identity. If it wasn't for drug use, these two parties wouldn't even know each other.

THE COURT: It goes to identity?

MR. STEPHENS: Your Honor, --

THE COURT: Let him explain that. I'm having a hard time finding the identity connection.

MR. ERICKSON: Identity, that is why these two parties know each other, that is why Mr. Babecki can pick out my client through texting transactions.

THE COURT: Between your client and Mr. Babecki?

MR. ERICKSON: Right. That's the only way, uh, Mr. Babecki knows where my client lives, because of drug transactions.

THE COURT: Okay. But none of that occurred at anyone's house is my understanding. I think it's permissible. The underlying case, you can basically say that it was alleged that H.B. robbed Mike of money. Is that correct?

MR. STEPHENS: Yes, Your Honor. The State has no objection to that. We also have no objection to the text that Mr. Erickson --

THE COURT: And it was over marijuana apparently. So where do you need to go further than that? And what is this text message that you want to get in Mr. Erickson said? And it is a text message from who to who?

MR. ERICKSON: Mr. Babecki to my client.

THE COURT: What does it say?

MR. ERICKSON: I'll hand it up to you. It's written in language that's not plain language. I went ahead and transcribed it the best I could. Actually, I do have the extract. It's an extract. If you give me a minute, I can find the actual extract.

THE COURT: Okay.

MR. ERICKSON: It's also the same as what I have on this sheet. I found the actual extract.

THE COURT: Frank Babecki's text to your client. (Reading.)

All right. And you want to get that text in, correct?

MR. ERICKSON: Yes, ma'am.

THE COURT: Well, I can tell you that if Frank Babecki takes the stand, he can certainly ask him about this text. That's coming in. That basically shows that he uses drugs. The text is, "Could you spot me a 10 and I'll have it for you by two o'clock latest, my man. I need a smoke bad. I got like two bucks just til my deposit goes through." Basically, this is Frank Babecki, the victim, trying to get spotted a 10? I'm assuming it's marijuana. I don't know if a 10 is a dime bag or what it is exactly. But I'm sure it's something.

MR. STEPHENS: That's what Mr. Erickson is going to argue. I expect that Mr. Babecki is going to testify that the same friend who got the defendant's number is the one who sent the text messages. And just based on our interviews, I expect that's what he's going to testify to. But the State doesn't have an objection to that. We do

believe that part of that might be the drug transaction that might have started this whole thing.

THE COURT: Uh-huh. Again, I'm having a hard time. Are we going to unnecessarily be talking about Frank Babecki's character and his pot smoking? No. But it's definitely relevant based on how these people know each other and whether or not it was someone else who used Mr. Babecki's phone to email the defendant.

MR. STEPHENS: Your Honor, I don't think that that, uh, -- the State has any issue with that. Again, our concern is that a witness named Kendalle Simmons may be called to testify just that he has, in the past, used drugs with Frank Babecki. I think that's unduly prejudicial and not relevant to this offense.

THE COURT: I think he can ask him how he knows him. I agree, I don't think it's necessary that they talk about the past that they, you know, smoked. But if he says I bought drugs from him or we do drugs together, uh, I'm having a hard time following exactly what you're trying to give me. Basically, through this, it's going to come out. At least, at a minimum, smoking marijuana.

MR. STEPHENS: Yes, Your Honor. But there's a difference between those specific facts and Mr. Erickson banging the drugs that he uses drugs with this person and this person. I don't believe that that is relevant. Now, that specific act on October 27th might have been the genesis of this shooting. The State has no objection to that. Otherwise, we don't find his drug use to be relevant or potential drug use, alleged drug use to be relevant except as it relates specifically to this incident. We also would object to Mrs. Constantineau being asked on cross-examination if her husband uses drugs. We again believe that's highly prejudicial. She already stated that she can speculate about his use.

THE COURT: Uh-huh.

MR. STEPHENS: But we believe it's going to be impossible to unring that bell when the question is asked in front of the jury.

THE COURT: Well, how are you going to unring the bell? It's already done in this text message. There's nothing to unring.

MR. STEPHENS: Ma'am, Mr. Babecki is going to say he didn't send that message.

THE COURT: If you're asking me are we going to beat a dead horse on drug use, again, there's an

allegation that he was high while this occurred and either imagined the shooting or can't adequately identify anyone. But I don't think that really matters, because his eight-month pregnant wife is also going to testify who shot at him. So again, to the point -- let's just do this, Mr. Stephens, at the point you think they are going into it unnecessarily, you can object. I'll do whatever I need to do. I just don't see how you avoid the drug issue in this case based on this text message. I understand your client says it wasn't his. It was his friend's. But if that's the case, Frank's going to have to get up here and testify that his friend, Kendalle -- who's the one that was supposedly texting?

MR. STEPHENS: I think it was his friend Mike that he referenced.

THE COURT: Then apparently he's going to have to throw his friend Mike under the bus. That Mike's the big smoker.

MR. STEPHENS: I understand.

THE COURT: Anyway, okay. What else you got, Mr. Erickson?

MR. STEPHENS: The last thing I've got and I don't know that we need a pretrial determination.

The State intends to put on the evidence through Investigator Erdel of flight as consciousness of guilt and argue it in opening, Your Honor. Also, uh, that we intend to put on evidence that Mr. Johnson had, uh, tried to have someone offer money to the victims not to show up as interfering with the victims, interfering with witness is also consciousness of guilt, Your Honor. Part of that is going to be through the testimony of Mr. Babecki and through jail calls that we recorded between Mr. Johnson and his mother.

THE COURT: Yeah, the jail calls to his mother to pay off the victims?

MR. STEPHENS: Yes, Your Honor. There is a jail call where Mr. Johnson says specifically, he talks about if the victim don't show up, the case gets dismissed. He says should we offer them money not to show up. I believe that's relevant especially since Mr. Babecki is going to testify that he was, in fact, offered money not to show up. I can play that for you, Your Honor. I'm not sure how clear that's going to be through my computer. I might have to work on that.

THE COURT: Why don't you work on that.

Mr. Erickson, you need to be heard on that?

MR. ERICKSON: That was between the mother and Mr. Johnson. The mother will testify that she did not answer that question. She didn't give any money to anybody. That's just a standard question that people have, what if people don't show up. You know? Nobody knows who's going to show up at a trial.

THE COURT: I do think it's -- I think it's relevant. I think it certainly is admissible in this case.

MR. STEPHENS: Your Honor, the State would argue State v. Edwards, 383 S.C. 66. That's a 2009 case, Your Honor, where the defendant in that case gave a letter to, I believe his wife, to give to victim in the case threatening her if she did show up to testify against him. That letter was not delivered. But we believe this is a similar situation where the defendant attempted to interfere with this. The court called the attempt the same. Interfering with a witness.

THE COURT: Again, I think it's appropriate and I think it's allowed. I'm going to let that portion in.

MR. ERICKSON: I totally object to that Edwards case, Your Honor. That dealt with an

attempt to kill situation. This situation deals with an attempt to get some money. In the money situation, which is what we have, Mr. Babecki or whoever it is, can take it or leave it. There's no threat on his life. Therefore, I would argue this is no intimidation of a witness like you have in Edwards where there was a threat to kill a witness.

THE COURT: I'm having a hard time with the distinction. Why don't you give me the Edwards case and let me take a look at it?

MR. STEPHENS: Thank you, Your Honor. There are other cases cited in Edwards about any attempt to procure a witness' absence from court as being intimidation of a witness, Your Honor. Specifically, Your Honor, Edwards cites State v. Goodson, a 1954 case, where it says evidence of a person charged with a crime procured or attempt to procure the absence of a witness or to bribe or suppress testimony --

THE COURT: You going too fast.

MR. ERICKSON: Where are you?

MR. STEPHENS: Quoting State v. Goodson. It's on the third page of the Edwards opinion. Evidence of a person charged with a crime procured or attempted to procure the absence of a witness or

to bribe or suppress testimony against him tends to show unrighteousness of the defendant's cause and a consciousness of guilt.

THE COURT: I mean, once again, it goes here, just reading this Edwards case, just as conflicting statements and attempts to flee are indicative of guilty knowledge and intent, so too are threats that are communicated.

MR. ERICKSON: Your Honor, I'm arguing this is not a threat situation. Edwards is all about witness intimidation, threat to kill. There's no threat to kill here.

THE COURT: My understanding here is that Mr. Babecki is going to testify that someone offered him money not to come. Is that correct?

MR. STEPHENS: Yes, Your Honor. Your Honor, the State had debated whether we were going to offer testimony about an intent to threaten or kill the victims in the case. However, we don't have anything that is, that can be linked directly enough to the defendant other than his statement that he -- that maybe they should offer them money not to show up.

THE COURT: I think the problem you're going to have in this case, Mr. Stephens, is that you got

to connect the threat, which I'm going to assume the mother tried to pay the witness. Is that correct? Is that what she's going to say?

MR. STEPHENS: Your Honor, when I spoke with Mr. Babecki today, he indicated that Malcolm, who I took to be Malcolm Moore contacted him and offered him money that would be provided from the mother for him not to show up. Again, we also have the phone call between Mr. Johnson and his mother where he asked to contact the victims and offer them money not to show up. We believe that that is the connection.

THE COURT: Okay. I'm going to need to hear that statement. That's a tough connection to go ahead and try to make that a third party went and offered the victim money in this case. To read your own case law you just provided, that's difficult to do and certainly grounds for reversal if it's not connected up. I haven't heard what his statement is. I don't know if it's a question. I don't know if it's a statement or what exactly he's doing. But if you do get a conviction, I'm assuming you want to keep it.

MR. STEPHENS: Yes, ma'am.

THE COURT: All the case law that you just

handed up says unless it's direct, it won't be upheld.

MR. STEPHENS: Your Honor, I can point you to this. I'm not sure how clear it's going to be. I do have the jail call that the State intends to offer. May I proceed?

THE COURT: Sure.

(WHEREUPON, there is a pause.)

MR. STEPHENS: Your Honor, I don't know that I'm going to get it any louder than the computer speakers here, although I can have it prepared for the morning if I need to.

THE COURT: If you play it for the jury. Okay. Why don't you go ahead and play it for me right now.

(WHEREUPON, jail call recording is played.)

MR. STEPHENS: I believe that the officer recorded the wrong one. He pulled the calls I asked for specifically. I apologize for wasting the court's time.

(WHEREUPON, jail call recording is played.)

MR. STEPHENS: There is a discussion just beforehand about what happens if the victims don't show up. Then he says got some people who can offer them some money not to show up.

THE COURT: We haven't gotten to that yet?

MR. STEPHENS: That was it, Your Honor.

THE COURT: Okay.

MR. STEPHENS: Just before that, he's talking about if they don't show up, the charges get dismissed. That whole portion. Later that same day, Your Honor, there's a portion that Mr. Johnson makes to his mother, tell Malcolm something got to move quick, quick. Since the State, the testimony from Mr. Babecki is going to be Malcolm contacted him about the bribe, the State would argue that's part of the same plan.

THE COURT: Any more?

MR. STEPHENS: On this issue, no.

(WHEREUPON, jail call recording is continued.)

MR. STEPHENS: That's all that we would offer on that, Your Honor. That and just Mr. Babecki's testimony that Malcolm Moore, whose street name is Rachet came to him and offered him money. He said the mother would pay him $500 beforehand and $500 after the trial if he didn't appear. We'll say, Your Honor, that the defendant was aware that he was being monitored. Other than the one comment about offering them some money, I think it's all vague.

If Mr. Johnson had really thought for a second

in that particular call that this was recording, we wouldn't have even had that. But we do have him clearly saying to his mother that she should contact people and would offer them money not to show up. Later the same afternoon on March 15th, there's a comment from him to his mother that if they don't show up, the charges are going to get dismissed and then asking if she's contacted Malcolm Moore cause something's got to move quick, quick. Then the testimony from Mr. Babecki that Malcolm Moore did contact him to offer him money.

THE COURT: All right. Let me tell you, I'm going to do some of my own research. I'll let you all know in the morning.

MR. ERICKSON: I also have the mother willing to testify on that no connection. She's here now. I'm just saying that's wishful thinking of Mr. Johnson about witnesses not showing up. We all think that that might happen. But that case law talks about a connection and Mrs. Johnson is right here as well as Malcolm Moore who will both testify that there's no connection, neither of them gave any money.

THE COURT: And neither of them even approached Mr. Babecki?

MR. ERICKSON: Not according to my knowledge. Not according to what they said they'd testify to.

THE COURT: So it didn't happen is what you're saying they are going to say?

MR. ERICKSON: Yes, ma'am.

THE COURT: That's different than them just doing it on their own. You are telling me that their testimony is going to be that they didn't do it?

MR. ERICKSON: That's correct.

MR. STEPHENS: Your Honor, I believe that goes to weight, not admissibility. I have a witness who's going to testify that they did.

THE COURT: Let me do this. Again, I'm going to read the case law again. Obviously, it's disfavored, not full-scale disfavored these days. Let me go through and see what else I can find in other jurisdictions.

MR. STEPHENS: Thank you. And that's all from the State, Your Honor.

THE COURT: Mr. Erickson, what do you have?

MR. ERICKSON: The only other thing I had was the text message coming in and we've already covered that.

THE COURT: Yep.

MR. ERICKSON: So I don't believe I have anything.

THE COURT: We're good to go then. Have you all premarked your exhibits?

MR. ERICKSON: Yes, ma'am.

THE COURT: You have?

MR. ERICKSON: I will. We will before tomorrow.

MR. STEPHENS: Your Honor, I've only premarked the photo lineup. We'll have the others marked.

THE COURT: I'll let you all know this issue and if you all can premark what you can agree on, what you can, mark it for ID. Okay.

MR. STEPHENS: Yes, Your Honor.

THE COURT: Anything else y'all need?

MR. STEPHENS: Nothing from the State, Your Honor.

THE COURT: Okay. Anything else, Mr. Erickson?

MR. ERICKSON: No, that's all.

THE COURT: Okay.

(WHEREUPON, the Court recesses for the day.)

P R O C E E D I N G S

(WHEREUPON, State's Exhibits 2 through 11 are marked for identification purposes.)

(WHEREUPON, the Court resumes on the 19th day of June, 2012 at approximately 9:47 a.m.)

THE COURT: Did y'all have an opportunity to mark your exhibits?

MR. STEPHENS: I have, Your Honor. I don't know if Mr. Erickson has anything to mark.

MR. ERICKSON: I have mine marked. Yes, ma'am.

THE COURT: Have you had yours marked?

COURT REPORTER: I've marked State's Exhibits.

THE COURT: But not defense. Okay. Thank you. Okay.

Maybe at the first break, Mr. Erickson, you can get that done.

MR. ERICKSON: Get what done?

THE COURT: Get your exhibits marked by the Court Reporter.

MR. ERICKSON: Oh, I see. All right.

THE COURT: All right. Before we start, just as far as the ruling as to, uh, the intimidation of a witness, you have not charged the defendant with intimidation of a witness, have you?

MR. STEPHENS: Uh, no, Your Honor. Since he's a juvenile, there would be a delay trying to have that charge waived up to General Sessions, we did not charge him.

THE COURT: Okay. Well, I have read again Edwards. While I understand it's persuasive and I understand why the State's trying to use it, I have just decided that we're not going to put it in evidence. I think we all recognize that this is certainly a 403 analysis. I do think the prejudice outweighs any probative value. The question is whether or not Mr. Johnson shot at these two people. I don't think it's necessarily intimidation of a witness. If you want to charge him with that later on, you are welcome to. But in this case, I think out of an abundance of caution, I'm not going to allow you to present that evidence. All right.

MR. STEPHENS: I understand, Your Honor.

THE COURT: Thank you.

MR. ERICKSON: Thank you, Your Honor.

THE COURT: Even though I do agree with you, Mr. Stephens that the sway is kind of towards allowing it these days, whereas prior to now, it's always been a strict prohibition. I just don't think in this case it's a good idea.

MR. STEPHENS: Your Honor, just in the off chance that witness testimony strays there --

THE COURT: If they open up the door, absolutely you can run through it.

MR. STEPHENS: Thank you, Your Honor.

THE COURT: All right. Anything else, y'all?

MR. STEPHENS: Nothing from the State, Your Honor.

THE COURT: Anything else, Mr. Erickson?

MR. ERICKSON: No, ma'am.

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

THE BAILIFF: Yes, Your Honor.

(WHEREUPON, the jury enters at approximately 9:55 a.m.)

THE COURT: Thank you. Good morning, Ladies and Gentlemen. It's a pleasure to see you all. At this time, we are going to begin the trial of this case. Before we do that, I'm going to go ahead and have you sworn in as the jury in this case. So, if you will, all please stand and raise your right hand. Lasondra is going to administer the oath.

(WHEREUPON, the jury is first duly sworn.)

THE COURT: Thank you, Ladies and Gentlemen. What I am now going to say is intended to serve as

an introduction to the trial of this case. These remarks are not a charge on the law. I am going to instruct you on the law that is applicable to this case at the end of the trial. This is just simply an explanation so you can better understand how the trial will unfold.

Ladies and Gentlemen, the defendant in this case, Mr. Johnson, has been charged by indictments that are filed in this court with the offenses of Attempted Murder, the elements of which I will explain to you at the end of the trial. Ladies and Gentlemen, these indictments are simply the charge by which the case is brought into the courtroom. It is not in any sense evidence of any of the allegations that it contains.

The defendant, Mr. Johnson, has plead not guilty to these indictments. The State, therefore, has the burden of proving each of the elements of the indictments beyond a reasonable doubt. It is your duty, Ladies and Gentlemen of the jury, to decide whether the State has met that burden.

Your purpose as jurors is to find and determine the facts. You, the jury, are the sole judge of all facts in this case. If at any time I make any comment regarding the facts of this case, you must

disregard it. You are only to determine the facts of this case from the testimony you are going to hear from the witness stand as well as any other evidence that's entered into this case. It's up to you to determine the inferences which you feel may be properly drawn from the evidence. Please understand that it is especially important that you perform your duty of determining the facts diligently and consciously. Ordinarily, there is no way to correct an erroneous determination of the facts by a jury.

On the other hand and with equal emphasis, the same law that makes you the judge of the facts makes me the judge of the law. The law as given by the court is the only law that you may consider. You must accept and follow it even though you may disagree with it. I can not tell you what the facts of this case are. You can not disagree with me about what the law is or what you think the law ought to be. Your job is to take the law as I give it to you and apply it to the facts as you find them. From there, render a true and just verdict under the oath you just took.

Now, Ladies and Gentlemen, until I advise you to begin your deliberations in this case, you must

not discuss this case with anyone. That includes your fellow jurors, friends, family members or anyone that is involved in this case. After the case is submitted to you, you must discuss it only in the jury room with your fellow jurors.

The attorneys and parties in this case have been advised that they are not to talk to you coming and going from the courthouse over the next day or so. Ladies and Gentlemen, again, if you happen to pass someone involved in this case and they don't say hello, they are not being unfriendly. They are simply following my orders.

Ladies and Gentlemen, additionally, during the trial of this case, you are not to read, listen to or watch any news reports about this case. This includes anything that may be in the newspaper or on the internet, radio or television. And you must not consider anything, Ladies and Gentlemen, that you may have read or head about this case outside of this courtroom before or during the trial.

Please understand that it is important that you keep an open mind and not decide any issue in the case until all the evidence has been presented, the parties have made their closing argument and I charge you on the law that is applicable to this

case. Please understand it is your solemn duty to determine the guilt or innocence of the defendant. Your verdict must be based solely on the evidence as is presented to you in this trial and on the law as I instruct you during and at the close of the trial.

Ladies and Gentlemen, now, in just a moment, the Solicitor is going to make what is called an opening statement. He's going to tell you or explain to you what he believes the issues are in this case. The attorney for the defendant is also going to make an opening statement, although he is not required to do so.

Ladies and Gentlemen, what these attorneys tell you in their opening statements is not evidence in this case. It is argument. I remind you, Ladies and Gentlemen, that the evidence in this case will come from the witness stand as well as the other exhibits that are entered into the case or any stipulations the lawyers enter into.

From time to time during the trial of this case, you may hear one of the lawyers say something like, Your Honor, I believe we have a matter of law to take up or I myself may have a bench confidence with them or I may send you back to your jury room to discuss something with the attorneys. I want you

to know something. We aren't hiding anything from you. Oftentimes when I have to rule as a matter of law whether or not certain evidence is admissible, I may make a comment on the facts of this case. Again, I would never want anything I say to influence you in your determination of facts. Out of an abundance of caution, we do it in private outside of your presence.

Ladies and Gentlemen, in determining what the true facts are in this case, you must decide whether or not the testimony of the witnesses are believable. It's my responsibility to rule as a matter of law whether or not certain testimony is admitted. Once it is admitted, whether or not you believe it is solely for you to determine.

In deciding whether to believe a witness, you have the right to consider the interest of a witness, the bias of the witness, any prejudice of a witness, you can look at the opportunity that that witness had to see the things that matters about which they are testifying. You can look at the way the witness acts on the witness stand. You have the right to use anything that is in the record to help you determine the believability of the witnesses in this case.

Ladies and Gentlemen, it is my understanding from the bailiffs that some of you have requested that you be allowed to take notes during the trial of this case. To that end, we are going to provide you with, if they have not already, with a notepad and pens and pencils to go ahead and take notes. Ladies and Gentlemen, as you come and go from the courtroom during the trial of this case, you are to leave your notepads and pens in your seat.

You are to use your notes for your sole benefit and not for anyone else's on the jury. You may rely on your notes, but again, please, Ladies and Gentlemen, some people are better notetakers than others. Please don't discount when you go back for your deliberations some adequately recalling testimony that may be different than what you have on your notes. Again, Ladies and Gentlemen, your job is to watch and look at all the evidence in this case. And at the end of this case, render a true and just verdict. Ladies and Gentlemen, at this time, we are going to go ahead and begin the trial of this case.

Is there anything further the State would like me to address the jury on?

MR. STEPHENS: No, Your Honor. Thank you.

THE COURT: Anything from the defense?

MR. ERICKSON: No, ma'am.

THE COURT: Ladies and Gentlemen, we are going to begin the trial of this case. If you would, give Mr. Stephens your attention.

MR. STEPHENS: Thank you.

Good morning, Ladies and Gentlemen. My name is Jeff Stephens. I'm an Assistant Solicitor with the 14th Judicial Circuit Solicitor Office. That means I'm the prosecutor of the case. We have a big fancy name. That also means that I've got the honor and the privilege of representing the State of South Carolina in this case, the State versus Mykel Johnson. Mykel Johnson is that young man you see sitting over there. He is 16 years old. He's being charged with Attempted Murder, he's being tried for Attempted Murder and he's being tried as an adult.

Now, I'm not sure when childhood ends. I'm not sure when childhood ends generally for most of us. I know that my grandfather grew up on a farm in Iowa. He left home at 15 in 1943 and enlisted in the Merchant Marines. Then when he turned 16, he enlisted in the Army and fought in World War II. I think even in World War II, that was a little unusual. Most of us don't have our childhood end

abruptly at 15. I think today it's more usual for people to cling to their childhood well into their 20s.

I can say for Mykel Johnson, his childhood ended abruptly on October 28th, 2011, when he made the decision to arm himself with a handgun, when he made the decision to pull that handgun out and to fire two rounds at a car being driven by a young pregnant marine, and Desiree Constantineau. You're going to hear from her in just a little while today. Also, in the car that Mr. Johnson fired at was her husband, Frank Babecki.

Two rounds were fired. The evidence is going to show you that one of those rounds went through the rear passenger panel of the vehicle and hit the passenger side front window shattering it. The other round went through the rear driver's side panel and lodged in the rear driver's side passenger's seat in the headrest in the little metal bar. You're going to see a picture of that.

You're going to hear that after Mr. Johnson made this decision to pull this weapon and shoot at these victims, he then fled from the scene. He fled from his mother's house or his mother's apartment, Cross Creek Apartments, in Beaufort and was

apprehended about a week and a half later at a trailer in Yemassee, South Carolina. That's information that you may consider in what we call consciousness of guilt evidence. What it means is that someone flees from the scene knowing that someone's going to search for them. That shows a consciousness of their own guilt.

You're going to hear testimony from Investigator Erdel with the Beaufort Police Department. Investigator Erdel is going to tell you that he was present when Mykel Johnson was apprehended in Yemassee. When Mr. Johnson exited the home, his first words to Investigator Erdel, they weren't what's going on, what are you doing here, they were I was going to turn myself in when I hired a lawyer. He then said how did you find me. This is consciousness of guilt. What's more, they are products of a calculating adult mind, not a child. He fled his mother's home. He went hiding. That's a calculated adult mind, Ladies and Gentlemen.

You are also going to hear the 911 call from the victims in this case reporting this incident to the police. You are going to hear the fear in their voices cause this just happened. More importantly,

you're going to hear with an absolute certainty as to who shot at them, Mykel Johnson, who they knew as a Hot Boy. They will testify to that. You will hear testimony that they continued to be absolutely certain of that. Frank Babecki also submitted to a photo lineup ID.

COURT REPORTER: I'm sorry, Your Honor. I hate to interrupt. I can't hear him.

THE COURT: I'm sorry. If you will, just speak up, Mr. Stephens, just a little.

MR. STEPHENS: Absolutely.

THE COURT: Thank you.

MR. STEPHENS: Frank Babecki submitted to do a photo lineup where he immediately, within seconds before the officer even left the room identified the picture of Mykel Johnson as the person who shot at him.

Now, you may hear witnesses who say that Mykel Johnson was at a different location when this happened. I would urge you to follow the judge's direction. She said when you listen to a witness, consider their motives, why they are here. You may hear testimony from friends of Mykel Johnson who are just here to try to get him out of trouble.

You'll also hear the testimony of the victims

who had no motive to get Mr. Johnson in trouble. They do not want to be here. They have a young child now and just want to move on with their lives. However, they are here to tell you the truth that for some reason, Mr. Johnson decided to pull out a pistol and shoot at their vehicle.

Now, Mr. Babecki is going to tell you that all they did when they were leaving their apartment complex on October 28th is he asked his wife to slow down when he recognized Mr. Johnson. He yelled something out of the window, what happened the other night. For whatever reason, whether he was in fear or whether he was just acting aggressively or whatever goes through the mind of someone who shoots somebody else, he pulled a weapon and shot him.

At that point, when he pulled the weapon, he aimed it at their vehicle and he was shooting at them, he formed the intent to commit murder. He knew the probable consequences of pulling that trigger, that he might end the lives of two people. Only by narrow circumstance, unless he's a trick marksman, did that not happen.

Again, Ladies and Gentlemen, I'm confident that after you heard all the evidence in this case, the testimony of Babecki, the testimony of the officers

involved and you've seen all the evidence that you will be convinced that the State has met its burden of proving beyond a reasonable doubt that Mr. Johnson did commit Attempted Murder, two counts on Desiree Constantineau and Frank Babecki, and you will return a verdict of guilty on both of those indictments.

THE COURT: Thank you, Mr. Stephens.

Mr. Erickson.

MR. ERICKSON: May it please the Court?

THE COURT: Yes, sir.

MR. ERICKSON: Mr. Solicitor.

Ladies and Gentlemen of the jury, I want to first thank you for being here doing your community service. My name is Eric Erickson. I represent Mr. Johnson. I've been a defense attorney here in the Low Country for about 15 years. Before that, like Mr. Stephens, I was in the Army. I was in the military, I should say. Mr. Stephens was in the Marines. So we're both coming at this with some government experience. We both have knowledge about what a crime is.

Today, you're going to hear about a crime. And what I don't like about opening statements is what you just heard from the Solicitor. He told you

about the whole case. But you know what? It was all about one side. Court is hearing about two sides. You ever had a friend or a brother or sister tell you about one side of a story and you ask yourself is that all there is? Well, of course not. There's always another side. There's always another angle.

What we try to do in court is try to find truth. We find the truth using evidence. Today, there's going to be different kinds of evidence. There's going to be witness evidence, which is called direct testimony. There may be scientific evidence. There may be physical evidence, like a gun. Scientific evidence is going to be things like DNA, fingerprints, and there might be circumstantial evidence. The judge is going to give you the law on what those different types of evidence are. Like the judge said, your job is to listen to the facts and the judge will give you the law.

I want to talk a little bit about our defense. Mr. Solicitor said a little bit about an alibi defense. Before we even get there, our biggest defense is the credibility of the witnesses. The State's going to bring up witnesses. You're going to have to weigh and balance, using your own

judgement the truth of what they have to say, how they got what they have to say, how close were they, what motive do they have to say what they say.

I like to say in my trials that anybody can say anything about anybody at any time. I mean, that's really what anybody can do. My job is to prevent that. My job is to say, hey, don't listen to somebody just because they said it. Look for corroboration. Is there any scientific evidence or physical evidence that corroborates or matches the story? You're going to see evidence in here that I'm going to be calling out mismatch, no match, no evidence, lack of evidence. That's what you're going to see in this case. And it's going to be the Solicitor's job to make sure he fills in all these gaps. Thank you for being here.

THE COURT: Thank you, sir.

Mr. Stephens, will you call your first witness, sir?

MR. STEPHENS: Thank you, Your Honor. The State calls Melanie Smith.

THE CLERK: Place your left hand on the Bible and raise your right hand for me please.

MELANIE SMITH

having first been sworn, testifies as follows:

THE CLERK: Please be seated. State your name and spell it for the Court please.

THE BAILIFF: State your full name for the Court Reporter and spell your last name.

THE WITNESS: My name is Melanie Smith. My last name is S-M-I-T-H.

DIRECT EXAMINATION

BY MR. STEPHENS:

Q Ms. Smith, where are you currently employed?

A Beaufort County Communications, the 911 center.

Q How long have you been employed with 911?

A I been there 14 years.

Q And what are your duties and responsibilities in that office?

A I make the investigations on complaints. I'm the liaison for all the departments. My main job is making tapes for evidence or lawyers or Freedom of Information request.

Q Now, if you could, briefly describe what happens when emergency services receives a 911 call and how those might be stored or recorded.

A Uh, everything comes in through our digital phone lines. It's also recorded on a digital recorder. The dispatcher will take the call and then dispatch emergency services. When I get a copy, correction, a

request for a recording, I'll go to our CAD, which is our computer-aided dispatch program, find the incident and all the documentation that goes with it and then go to the recorder and find the phone calls or radio transmissions, whichever is requested and make copies of those.

Q Now, you say every 911 call is saved or only when they are requested?

A No, they are all saved for a minimum of 60 days.

Q Did you receive a request from me to download or record a copy of a 911 tape for the case of the State versus Mykel Johnson?

A Yes, I did.

Q And did you, for lack of a better word, burn a copy of that tape from your digital storage device to some kind of portable media?

A Yes, to a disk, CD.

MR. STEPHENS: Your Honor, may I approach?

THE COURT: You may.

MR. ERICKSON: No objection.

BY MR. STEPHENS:

Q I'm handing what's been marked as State's Exhibit 2 to Master Sergeant Smith. You can hold on to that for a moment, Master Sergeant.

A Okay.

Q Do you recognize that disk?

A Yes, I do.

Q Now, what is it?

A It's a copy of the 911 call for a shots fired call at 266 Robert Smalls Parkway that occurred on October 28th, 2011.

Q All right. Is there a case number or some other identification on it?

A What I have here is Beaufort Police Department's event number. That's how we track things. Do you need me to state that event number?

Q That's all right. So that was a recording of a shots fired that basically is what it says it is. Your information system records the location from which they get the call with all those details?

A Correct.

MR. STEPHENS: Your Honor, at this point, the State moves to admit State's Exhibit 2 and play the recording for the jury.

THE COURT: Any objection?

MR. ERICKSON: No objection.

THE COURT: Okay. Please go ahead.

(WHEREUPON, State's Exhibit 2 is admitted into the record.)

(WHEREUPON, State's Exhibit 2 is played.)

MR. STEPHENS: Thank you, Master Sergeant Smith.

Your Honor, I don't have any further questions for Master Sergeant Smith at this time.

THE COURT: Mr. Erickson?

MR. ERICKSON: Yes, ma'am. I'd like to ask Ms. Smith a few questions.

CROSS-EXAMINATION

BY MR. ERICKSON:

Q Ms. Smith, good morning.

A Good morning.

Q You got a tough job listening to all those type of calls. I don't know how you get any sleep. My first question is were you able to hear anybody else in the background when you were talking to that woman?

A I actually wasn't talking to her. I just made the recording.

Q Didn't you ask questions?

A I'm sorry. I couldn't hear you.

Q Oh, you weren't the person asking the questions?

A I wasn't the person actually taking the call. I actually just made the recording from the system.

Q Who was asking the questions?

A The call taker, Erin Mowry.

Q All right. I don't have anything further. Thank you.

THE COURT: Anything further?

MR. STEPHENS: No, Your Honor. Thank you.

THE COURT: Any objection to Master Sergeant Smith being released?

MR. STEPHENS: Not from the State, Your Honor.

MR. ERICKSON: Not from the State -- I mean, not from the defense.

THE COURT: You are excused. Thank you.

THE WITNESS: Thank you.

THE COURT: The State will call the next witness.

MR. STEPHENS: Your Honor, the State calls Officer Joshua Dowling of the Beaufort Police Department.

THE CLERK: Place your left hand on the Bible and raise your right hand please.

JOSHUA DOWLING

having first been sworn, testifies as follows:

THE CLERK: Please be seated. State your name and spell it for the Court please.

THE BAILIFF: Please state your full name

and spell your last name for the Court Reporter.

THE WITNESS: First name's Joshua. Last name Dowling, D-O-W-L-I-N-G.

DIRECT EXAMINATION

BY MR. STEPHENS:

Q Officer Dowling, you are currently a police officer with the Beaufort Police Department, correct?

A I am. I been here since May of 2007. I had prior law enforcement. I worked at another agency. I became an investigator with the City of Beaufort approximately two years ago.

Q So you been an investigator for two years?

A Yes.

Q Or thereabout. Were you working in your capacity as a police investigator on October 28th, 2011?

A I was.

Q And did you come assigned to an investigation of shots fired in the vicinity of Cross Creek Apartments in Beaufort, Beaufort County, South Carolina?

A I did. The case that we're here for today. I was involved in it. Yes.

Q Where were you or how did you get assigned to this investigation?

A October 28th, 2011, uh, at the time of this incident, I was in close proximity to the incident

location. I had received a call from the on-duty supervisor in reference to a shooting. I had responded to that location. I was not too far from the location. I was within the shopping center, Cross Creek Shopping Center, which the incident location is further north of that shopping center.

Q How long after the first report of shots fired were you able to respond to that location?

A I would say several minutes had elapsed by the time the initial officers had arrived there and ascertained what had transpired. And by the time they had relayed that information to me, I would say several minutes had elapsed.

Q Okay. It happened quickly because you were on call and had your vehicle do you say?

A Yes. I was out of my vehicle at a store on a follow up on another case.

Q All right. Now, when you arrived at the scene, did you go to the actual Cross Creek Apartments or the IHOP where the victims called 911? Where did you go initially?

A Our initial action is we congregated by the entrance to the Cross Creek Apartment complex. It's a long driveway and it takes you to the apartment complex. Our initial concern when I arrived there is we had an

active shooter. The other officers had ascertained that this suspect lived in the complex. Our first priority on scene was to see if we could locate this shooter. We had congregated in a group and moved in slowly and tactically to this apartment complex.

Q Now, how familiar are you with that area of the Cross Creek Apartments and that part of Parris Island Gateway?

A I'm very familiar since that's an area that's quite patrolled frequently.

MR. STEPHENS: Your Honor, may I approach?

THE COURT: You may.

BY MR. STEPHENS:

Q I'm showing the witness what has been previously marked as State's Exhibit 3. Do you recognize this?

A I do. That's an aerial shot of Cross Creek Apartments. That would be the shopping center I referenced earlier.

Q Is this a fair and accurate representation of how this area looks? I don't know if it's that time of year. But is it a fair and accurate representation of where everything is located in narrow view?

A Yes.

Q Now, can you please point out approximately

where the defendants and their -- excuse me. The victims and their vehicle were located when you responded to this incident.

Q When I responded to this incident, the victim's vehicle had pulled into -- this is an aerial shot of IHOP -- they were pulled into one of these side parking lots. That's where the victim's vehicle was by IHOP.

MR. STEPHENS: Your Honor, can you see or do I need to move?

THE COURT: That's fine. Can the jury see? Can you all see?

THE WITNESS: You want me to step down maybe?

THE COURT: Why don't you go ahead and step down and get up closer to the jury so they could have a better opportunity. I believe there's an easel over there too if you want to use that.

BY MR. STEPHENS:

Q I can hold it for you. Were you able to determine where the -- or the approximate location that the shots were fired at the vehicle?

THE COURT: Take it a little closer to the jury.

THE WITNESS: The general proximity of where the shooting, the vehicle was, the victim's vehicle was engaged was within this general vicinity right

here. The reason why we believe that strongly is there was shattered, fresh shattered glass by this entry way.

COURT REPORTER: I'm sorry. Fresh shattered glass --

THE COURT: Fresh shattered glass by the entry way.

BY MR. STEPHENS:

Q Now, when you arrived by the scene, did you take any photographs of the scene where the suspected shooting had occurred? Any damage to the vehicle or anything like that?

A Yes, all photographic evidence that I took when I processed the scene was with the victim's vehicle which was right here and parked here and photographed it. A couple of photographs were taken later on at the apartment complex.

Q Thank you, Officer Dowling. Officer Dowling, let me show you a number of photographs. If you could, please identify them if you can. This is State's Exhibit 4. Do you recognize it?

A Yes, this photograph right here is the entryway to Cross Creek. This is the shattered glass that I had just referenced that corroborated the damage to the victim's vehicle.

Q Now, were you able to determine where that shattered glass came from, what window of the vehicle or anything like that?

A That glass right there would have been -- I have it documented. One moment.

Q Let me -- let me just move on with the pictures and maybe that will tell us more information. Do you recognize this picture, State's Exhibit number 5?

A Yes, that right there is the victim's vehicle that was photographed at the IHOP parking lot. Right here, there was a bullet that went through the rear passenger panel right here. That's one round entered through there. Another round was suspected to enter right through this window right here.

Q Did the victims indicate those were not preexisting holes in the vehicle?

A Yes, that's correct. Those were a result of the shooter in this case.

Q I'm showing you what's been marked as State's Exhibit number 6. Do you recognize that picture?

A I do. When I was processing the vehicle for evidence purposes, we had opened the rear. I took a -- when I process the scene, I try to take as many photographs as possible. This was a shot of the interior of the vehicle from the rear of the victim's vehicle.

Q Now, it appears like that passenger door window is broken. Is that correct?

A Yes, that's where we suspected that one of the bullets exited out the passenger window of the victim's vehicle. Just to give you a better overview, this right here is where this being on the driver's side, the rounds went in. One of the rounds went out the passenger window. Another round got lodged into the headrest which I took a photograph of.

Q This is marked as State's Exhibit 7. You just mentioned that you took a photo of a round that lodged in the seat. What am I looking at here?

A This right here was by the -- the only case I worked in an attempted murder where this was almost a homicide. The reason why is when the gun was fired, one of the rounds get lodged into the headrest, the rear driver's headrest. You can see right here. That's a bullet right there. This little tiny metal that supports the headrest, because the rest of it is surrounded by insulation, that one little pole right there prevented this round from going right through. One of the rounds went out the passenger window. This round was stopped by this little beam right here.

Q Now, did the victims indicate that there was a person that had been sitting in that passenger side seat?

A Yes.

Q What did they tell you as far as who had been sitting there?

A Desiree Constantineau was the driver. Frank Babecki was the passenger in the front.

Q Lastly, this is State's Exhibit number 8. What is that?

A That right there is simply just a close up picture of the bullet that was lodged into this beam right here. It's the bullet right there. We were able to pull it out. We photographed it. That just reflected off that pole right there that was stuck in the insulation.

Q Thank you, Officer Dowling. Officer Dowling, handing you what's been marked as State's Exhibit 10. Can you please take that out, examine it and tell me if you recognize it?

A Yes, this is my handwriting. What I did when I was at the incident location, this right here is a bullet that was recovered out of the headrest for evidence purposes right there. The bullet I was able to recover from the headrest.

Q Thank you. I'm retrieving State's Exhibit number 10 from the witness. I didn't ask, but how were you able to identify that as the bullet you retrieved?

A That right there is my handwriting on the evidence. To maintain custody of it, I took the bullet and brought it back to the Beaufort City Police Department. We have an evidence protocol where we write down what we retrieve, the case number, the item that was collected and that's put into an evidence locker and stored it at the Beaufort City Police Department pending disposition of the case.

Q Thank you. Now, did you do anything else to process the scene to look for evidence?

A In regards to the victim's vehicle?

Q Yes. Was there anything else you could do to process the scene for all the DNA, the fingerprints or any of the stuff that you normally see in CSI and NCIS, all those shows?

A There was no other evidence that was collected that I could think of at the time that would be pressing to collect. We had the photographic evidence and we had the round that was collected.

Q Did the victims indicate if the suspect had ever touched the vehicle or been anywhere near the vehicle?

A No, he was not in -- although in proximity of the vehicle, he did not touch the vehicle. He was what they explained to be walking on the side, walking into

the apartment complex, they were exiting, driving out.

Q When any kind of firearm fires a bullet, isn't there a cartridge or something left behind when a weapon fires?

A It would depend on what kind of weapon was fired.

Q In this case, were you able to recover any kind of brass or cartridge, anything like that from the area?

A There was none located. But the main concentration was processing the vehicle. The first concentration was securing this apartment complex. With the amount of vehicle traffic in there, it could have been crushed. It is a heavily wooded area as well, the entryway.

Q Now, if you had taken a suspect into custody immediately or shortly after this shooting, is there anything you could have done to process the suspect for evidence?

A When we take a suspect involved in a shooting into custody, a recent shooting, the Beaufort County lab advises us, it's a four-hour window where we can do gunshot residue. When you discharge a firearm, powder comes out of the gun and gunshot residue. You are able to do a swab and confirm that this person shot a gun. It's about a four-hour --

MR. ERICKSON: I'm going to object to this testimony. Has he been entered as an expert witness in ballistics?

THE COURT: Okay. If y'all will approach right over here.

(WHEREUPON, a bench conference is taken off the record.)

BY MR. STEPHENS:

Q Investigator Dowling, was a suspect taken into custody such that a gunshot residue test could be performed within that four-hour window that you had to test them under your normal procedures?

A No.

Q Now, what steps, if any, did you take to try to locate the suspect that the victims had identified on the 911 call as Hot Boy?

A Well, at the time of this shooting, we brought the victim back to the Beaufort City Police Department. We had a street name of Hot Boy, which Investigator Erdel ran it through a program. We have a database where if we have any cases with a person from a criminal case simply to a traffic accident, we enter these individuals into databases. We were able to run this name, this street alias of Hot Boy and come up with the defendant's name Mykel Johnson that showed an apartment address at Cross

Creek Apartments. Subsequently, what we were able to do is put Mykel Johnson into a photo lineup and the victim was able to identify, corroborating the street name of the actual suspect.

Q Now, after you had retrieved a known address for Mykel Johnson, who you believed might be this Hot Boy, what steps did you take to apprehend him?

A The initial actions that we took is after we had identified the suspect, we did a search warrant at the apartments that Mykel Johnson, the defendant, was linked to, at Cross Creek Apartments. We executed that search warrant, but there was nobody home at that point.

Q Was there any indication that Mykel Johnson did actually live there?

A Yes.

Q Were you able to speak to anyone who lived there to identify whether Mykel Johnson was located there?

A I spoke to his mother, Adriana Johnson. She advised me that he, uh, lived in the back bedroom. You walk into the apartment and you go straight down the hallway. She explained to me that that was his bedroom that he stayed at.

Q Now, did you or any other member of law enforcement go back to that address and look for him at

any time prior to his apprehension in Yemassee?

A Yes, there was -- all the officers -- any time the city has a violent crime like this, we do our best to try to apprehend the suspects. The entire Beaufort City Police Department knew about this. We also share information. We have an outstanding relationship with Beaufort County Sheriff's Office. We relayed wanted subjects. They relay to us. There was an effort to apprehend him and get him off the streets to protect everybody. There were police officers going out to that general area on the look out for him. There was absolutely no sign of him.

Q So you and other officers from Beaufort Police Department were unable to locate him in that area again?

A That's correct. We had to request the services of the United States Marshall Services. Any time that we have the inability of tracking down somebody, we have good contact with the U.S. Marshalls. They were able to track the defendant down.

Q Were you present when the defendant, Mr. Johnson was taken into custody?

A I was not present when he was taken into custody, no.

Q And did you subsequently interview him or take any other investigative steps?

A Yes, when he was taken into custody, he was brought back to the Beaufort City Police Department. We always want to get everybody's side of the story to give them a chance to --

Q Investigator Erdel [sic], let me just ask, uh, did Mr. -- were there any other evidence that was obtained in this case after Mr. Johnson was taken into custody?

A As it pertains to?

Q Is there any other additional evidence that you as a lead investigator in the case were able to obtain after Mr. Johnson was taken into custody?

A Mr. Johnson did not want to talk. He wanted the representation of an attorney when we asked him for his side of the story. From the defendant's side, we did not develop any information.

MR. STEPHENS: Your Honor, I don't believe I have any further questions of Investigator Erdel [sic] at this point.

THE COURT: Mr. Erickson?

MR. ERICKSON: Thank you. May it please the Court.

CROSS-EXAMINATION

BY MR. ERICKSON:

Q You had the occasion to fill out the search

warrant. Is that the truth?

A In regards to the apartment complex?

Q Yes, sir.

A Yes, sir.

Q Was there some confusion as to the nickname of the defendant?

A Initially when I typed the affidavit up, uh, I had indicated on the affidavit the street alias of "Hot Dog" and his street alias is actually "Hot Boy". That was just due to coor -- getting everything coordinated, going from the crime scene, back to the P.D., typing up an affidavit because these affidavits are quite involved. There was a typo. When I showed the judge, I observed my typo and I scratched it out with the permission of the judge and indicated Hot Boy, which is his street name. I explained to the judge it was simply a typo on my part.

Q I see that on the search warrant. Thank you for clearing that up. Is it true that you did not see the crime scene or the crime happen?

A Did I witness the shooting?

Q Yes.

A No, I did not witness the shooting.

Q About how long did you arrive at the scene after you recall?

A A very short time thereafter from when the

officers arrived based upon the dispatch tapes from hearing in the background, the officer arrived and I was called in immediately thereafter. Within minutes because I was inside the store at Cross Creek Shopping Center doing a followup on a case. So within minutes.

Q So we developed a time line. Would you say the 911 call happened when?

A When did the 911 call happen?

Q Yes, sir.

A Based upon -- the 911 call, based upon the victim had advised that she'd just been shot at and was pulling across the street to the IHOP.

Q So your testimony is just a few minutes after the 911 call, you arrived at the scene?

A Yes, I was there a short time after.

Q From that time, how long did you take to go over to the apartment where Mr. Johnson presumably lived?

A When I arrived on the scene, I generalized what actions took place. I wasn't keeping a time long of the exact moments and time. I thought we had an active shooter. I believe the police officers did too. From the best of my recollection, when the initial officers got there, they called me. We had established a perimeter by the entrance. We moved into the apartment complex to see if the shooter was still there. Our

biggest concern is the shooter is going to engage us. We just didn't know the exact details at that point. As far as a general time log of events, I'm just going based upon my recollection of arriving, moving in and going from that point forward.

Q What I'm getting at officer is there wasn't much time for the shooter to run anywhere, was there?

A I would have to completely speculate on that. There's trails behind the apartment complex. There's various trails. And I know because I've had people bail out. When I was a road officer, I had people bail out in that general area and I immediately lose them because there's trails back there that take you to Broad River Boulevard. There's another one that takes you to the shopping center. So if somebody wanted to leave that area in a hurry, that certainly wouldn't be an issue.

Q And when did you actually search the apartment where Mr. Johnson presumably lived?

A Well, there was a great deal of time that lapsed at that point. After we secured the Cross Creek Apartment complex, after we made sure there were no more apparent victims and the shooter wasn't in that general area, I went back to the victim's vehicle. Had a chance to talk to the victims and ascertain what was going on. At that point, we return to the Beaufort Police

Department with the victim. Do a photo lineup once we figure out who Hot Boy's street name really was. Then we had to coordinate with a judge to go before a judge and have a search warrant signed to enter the apartments that we suspected the suspect to be in. So a great deal of time elapsed at that point because of the logistics and gathering the evidence and coordinating with a judge.

Q All right. Thank you. Let me turn to the shots. How many shots were fired at the victim? Did you say two?

A Yes, sir.

Q Did you see or determine what caliber bullet that was?

A No, sir.

Q Why was that?

A The round that was recovered?

Q Yes, sir.

A Well, the -- I'm not a ballistic expert by any means. When I look at it, if I had to take an educated guess, I would guess either a .40 caliber or .45 caliber. I'm certainly not a ballistics expert.

Q Is there any reason that it was not sent out to ballistics?

A Yes, sir. The reason why we didn't send it out to ballistics is any ballistics that we do, we send it

out to SLED, which is the South Carolina Law Enforcement Division. They have a division that they process ballistic forensics. That was held onto because to do a ballistic analysis, you want to recover the weapon. In this case, we never recover the weapon, which is not uncommon in cases. Sometimes, you do. When you do recover a weapon, it's nice because you can take that bullet recovered from the scene and say that that gun fired it. There was no need to have a ballistic analysis done in my opinion.

Q I want to know what kind of shells or bullets you found when you executed your search warrant.

A Inside the defendant's apartment?

Q Yes, sir.

A If I can just pull out my search warrant. One moment, sir. (Pause.)

Upon executing a search warrant at the defendant's residence and within his bedroom, I located the following -- you requested the ammunition, sir?

Q Yes, sir.

A Two shot gun shells of federal .22 caliber box with 50 rounds in it. It only had 49 rounds in it.

MR. ERICKSON: May I approach the witness?

THE COURT: You may.

MR. ERICKSON: At this time, I'd like to

admit to defense exhibits relating to the officer's testimony.

(**WHEREUPON**, Defendant's Exhibits 1 and 2 are marked for identification purposes.)

BY MR. ERICKSON:

Q Officer, while she's marking the second one -- Officer, I'm going to show you what we're calling Defense Exhibit 1. Could you identify that please?

A It appears -- is that the box of federal ammunition?

Q Yes, sir. Is that the one you found in your report?

A I have no idea.

Q Let me try Exhibit number 2 and see if that refreshes your recollection. Were those shells found within this box?

A I would have no way of knowing. These are -- it would appear to be some of the rounds we observed on that day, yes. I can't definitively answer that.

Q Would you look at your report? Did you take the pictures? Were you the one that took the photos of the evidence?

A Inside the apartment?

Q Yeah.

A Yes.

Q You should have that. Let me approach -- let me get the whole wad of photos and try to refresh his memory here. Basically, Officer, I have a CD with 48 pictures taken inside of Mr. Johnson's car. Excuse me, his apartment. Would you look through here. Those are some of the pictures I found on that CD.

A Yes, sir. These were -- when we executed the search warrant, these are photos that were taken.

Q All right. Are there any photos that matched the two marked as Defense Exhibits?

A Yes, right there.

Q So would that be a true copy of what you saw in the apartment?

A The pictures?

Q Yes, sir.

A Yeah, those are the -- I took those photographs when we executed the search warrant, yes.

Q Thank you, Officer. Caliber bullet on that photo is what?

A On the search warrant or the picture?

Q On this picture right here, this caliber bullet.

A I can not make out the caliber on the picture.

Q Well, this is the caliber of the tray of bullets. It says .22. So that would be what, .22

caliber?

A Yes.

Q All right. .22 caliber. And you just testified that the slug in the car is probably a .45 caliber, is that right?

A Possibly a .40 caliber or a .45 caliber.

Q That's not -- that's different from this, is that true?

A Yes. But there's been no claim made by me or anybody else that those rounds were the same ones that were used as the attempted murder weapon. Those rounds right there are .22 caliber.

Q There is a second significance to this, isn't there officer? There's only one shell there missing there. And there are two shots?

A Yes.

Q So this is not a match?

A There's been no claim that there is a match here. In addition, we have the shotgun shell that was recovered inside the apartment. It's not uncommon for us to execute the search warrant and find multiple different rounds inside the residence. That's not uncommon at all.

Q So the shotgun shells was not a match with the vehicle either, is that right?

A No.

Q So it's safe to say that all the shells that you found in the apartment were not a match?

A There was no -- in regards to ammunition of .40 caliber or .45 caliber, we did not recover any inside that apartment.

Q I'm going to ask you about forensic evidence. Just for the jury's sake, could you define what forensic evidence is.

A A definition of forensic evidence?

Q Yes, sir.

A From my standpoint, forensic evidence would be physical evidence that could be tested scientifically from collection of DNA, fingerprints, microscopic evidence to analyze and try to create a link towards. I mean, that's -- I'm by no means a scientist, but that's my general understanding of forensics.

Q That's basically scientific evidence, is that fair?

A Yes.

Q Was any DNA in this case gathered?

A No.

Q Was any fingerprints in this case gathered by law enforcement?

A No.

Q Was there a gun found by law enforcement in

this case?

A No.

Q And you mentioned there was no gunpowder residue test that was done either?

A Due to the time that had elapsed, there would be no reason to administer gunshot residue. A suspect was apprehended several, several days later. We would not do that test. Nor was there any need for any DNA collection or fingerprint collection. Fingerprint and DNA would be collected. Let's say you went to a burglary, the scene of a burglary, someone crawled into a residence, then there would be grounds to dust for fingerprints to collect DNA. Under this case, there was no need to collect DNA or fingerprints.

Q I just have a final question, Officer. Absent the two eyewitnesses in this case that are going to testify later, what do you personally know that connects my client, Mr. Johnson, to this crime?

A Well, you have the -- you have the personal knowledge.

Q Without any eyewitness testimony, do you have any physical evidence that connects Mr. Johnson to the crime? Physical evidence?

A Physical evidence like a weapon?

Q That's right.

A There was no weapon recovered.

Q All right. So I'm asking you as an officer, based on what you seen, what evidence connects Mr. Johnson to this crime absent the eyewitness testimony? Just you personally, what you found, what you gathered.

MR. STEPHENS: Objection, Your Honor. May I approach?

THE COURT: You may.

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

BY MR. ERICKSON:

Q I'm trying to ask you a final question. It's related to any physical scientific evidence that you gathered in this case, is there any of that linking Mr. Johnson to the crime?

A From the physical evidence standpoint, it is certainly not uncommon for violent cases when you do not have a gun. The gun could be anywhere. It could be in the Beaufort River. It could be in the woods. We do not have the gun. So we do not have that physical evidence. That certainly frustrates me. But from that standpoint, physical evidence-wise, that would, in my view, that would be the only piece of evidence that we would have to link a shooter to the case. This case involves a gun that was deployed. There would be no other physical

evidence until -- unless Mr. Johnson was taken into custody within one or two hours, we would have been able to administer gunshot residue, but he wasn't. We didn't recover the gun. So there is no physical evidence that we can collect.

Q All right. Nothing further. Thank you.

REDIRECT EXAMINATION

BY MR. STEPHENS:

Q Just a few questions, Officer Dowling. Uh, first off, I neglected to ask. When Mr. Johnson was taken into custody, did he have a cell phone in his possession?

A He did. When he was taken into custody by the U.S. Marshalls, he did have in possession a cell phone.

Q Now, were there any attempts to forensically -- I know we keep throwing out that word forensic -- forensically examine the cell phone that he had in his possession when he was taken into custody?

A Yes, the Beaufort County Sheriff's Office, they have a computer division that deals with forensics when it comes to, I wouldn't necessarily say forensics, but they have the capability to take a telephone and extract information out of it that includes address book information, text messages sent, calls, ingoing, outgoing calls, that was done on the defendant's telephone.

Q Now, why did you -- does that have to be done pursuant to a search warrant?

A The phone extraction, yes. You need a search warrant to do that.

Q Was one obtained for the search of Mr. Johnson's phone?

A Yes.

Q Why did you -- what kind of evidence were you looking for on that cell phone?

A When we do extraction reports on cell phones, we look for correspondence during the commission of the crime, any incoming and outgoing calls, text messages that were sent so on and so forth.

Q Do you know which technicians specifically conducted the extraction on Mr. Johnson's cell phone?

A Yes, Billy Crumpton with the Beaufort County Sheriff's Office.

Q Thank you, Officer Dowling. Uh, first of all, there were questions about, from Mr. Erickson about whether or not Mr. Johnson would be able to flee the scene prior to your arrival. Was Beaufort Police Department in control of what vehicles were leaving Cross Creek Apartments at the time you arrived prior to your arrival and/or foot traffic leaving the apartments?

A No, when we initially arrived on the scene, it

was more or less trying to organize, trying to ascertain what had happened at this location. So from the outer perimeter, the only area we were monitoring was the driveway that the vehicles could have gone undetected. Certainly, anybody could have left on foot completely undetected. When you take Cross Creek, you have a heavily wooded region. It's not -- it would be very easy to slip through the police.

Q All right. There were questions about -- there were questions about whether or not you had done a gunshot residue test on the suspect. I believe you answered why you didn't. Let me just ask, if Mr. Johnson was located in his home when you executed that search warrant, would a gunshot residue test had been performed on him?

A Yes, absolutely. If we had arrested him a short time thereafter, a four-hour window, we would have done a gunshot residue, yes.

Q If there was no gunshot residue on him, would that have exonerated him?

A After the shooting?

Q Yes.

A Sure.

Q But he was not at that residence?

A No.

Q Now, there were questions about the bullets, the 49 bullets I think that were testified to that were located inside Mr. Johnson's residence and the two shotgun shells. There were no weapons, corresponding weapons for any of those sets of ammunition located in the apartment, were there?

A No, we just recovered the ammunition. No weapons.

Q If there were corresponding weapons, those would have also had to have been taken from the residence?

A Yes, they would have been seized, correct.

Q You've got an issued sidearm as part of your job as a Beaufort Police Department officer, correct?

A Yes, sir.

Q Now, had you ever qualified to fire that weapon?

A Yes, I carry a Springfield .45 S.D.

Q Now, when you qualify or shoot that weapon, do you have to take your ammunition with you?

A Ammunition is provided by the City of Beaufort Police Department.

Q I'm just asking. If you have ammunition and clips that are inserted in that weapon, don't you take them with you when you intend to fire that weapon?

A Yes, sir.

Q What caliber weapon do you carry as a police officer?

A I carry a .45.

Q You ever shot a lower caliber weapon?

A Yes, sir. I shot over my years a multitude of .38s, .22s, .40 caliber. I've shot shotguns.

Q Now, what would you use if you were trying to penetrate an object?

A A vehicle or --

Q You just stated that carry a .45. Why do you carry a .45?

A A .45 -- a .40 caliber or .45 is going to have -- a .45 is going to have more of a -- it's going to penetrate walls and penetrate vehicles. If you shot a vehicle, that round is going to penetrate that vehicle and go right throw and hit the target.

Q In your opinion, if you had to shoot at someone, would you use a .22 or would you use that service .45 pistol that you carry?

A If I was -- if someone engaged me in a shooting, I would use my .45 because more likely to save my life and hit the target.

Q Thank you, Officer Dowling. I don't have any further questions for Officer Dowling. Thank you.

THE COURT: Anything further?

MR. ERICKSON: I might want to expand on the perimeter that you were talking about. I'd like to get the map down so the jury can see how that perimeter was set out.

THE COURT: Go ahead.

MR. ERICKSON: Mr. Bailiff, if you would, help me out with that. Thank you very much.

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

RECROSS EXAMINATION

BY MR. ERICKSON:

Q What I'd like to show the jury is the perimeter, uh, just after you arrived at the scene, how you branched out --

THE COURT: Mr. Erickson, if you would, stand this way so that my jurors can see. Thank you.

THE WITNESS: You'd like to see where we set up when I arrived?

BY MR. ERICKSON:

Q Yes, sir.

A There was officers right here dealing with the victim.

Q Point out where the site was where the shooting occurred first just to orient everybody.

A The shooting had taken place in this proximity.

Q Okay.

A This right here is Parris, uh, Gateway, Highway 280. That's IHOP and the Sake House.

Q Where is Mr. Johnson's apartment on that map?

A Mr. Johnson's apartment would be right over here.

Q All right. Go ahead and show me the perimeter that you set up.

A When we initially arrived there?

Q Yes, sir.

A When we initially arrived, there were officers with the victims. We set out -- there were a few officers here. We congregate. I don't wear bulletproof vest unless I go into a high risk situation. We're setting up officers who had higher caliber weapons and shotguns so on and so forth. We had a quick debriefing of how we're going to move in into this shopping center. There's several points of ambush that's heavily wooded. Then you contend with breezeways where you could be ambushed walking in. We moved in slowly and tactically.

Q That was within minutes of arriving at the scene?

A Well, minutes arriving --

Q Within minutes of arriving at the scene, you branched out like that?

A Between -- just to kind of explain to the jury how everything developed, you have the initial shooting. The victim goes here. When the police arrive there, they talk to the victim. I'm way over here. After they ascertain what's going on, they contact me by a cell phone. I walked out. I remember I parked far away. I had to walk to my vehicle. By the time I got to my vehicle and took that left turn, which sometimes can be quite death-defying with the volume of traffic. I believe I pulled in here or here and met with the officers. We had a debrief. We had a bulletproof vest. I mean, I can't give you the exact time period, but by the time things developed, I mean, I can't say for certain how many minutes elapsed.

Q Any officers arrived before you at the scene or were you the first responder?

A I was probably one of the last people to arrive at the scene.

Q Okay. Thank you for pointing that out. Nothing further for this officer.

THE COURT: Anything further, Mr. Stephens?

MR. STEPHENS: No, Your Honor. The State just moves to admit State's Exhibits, uh, 3, 4, 5, 6, 7, 8 and 10 into evidence.

THE COURT: Any objection?

MR. ERICKSON: No objection. The defendant would move Exhibit 1 and 2 into evidence.

THE COURT: Okay.

MR. ERICKSON: It's right here.

THE COURT: Any objection, Mr. Stephens?

MR. STEPHENS: No objection, Your Honor. Thank you.

THE COURT: Without objection.

(WHEREUPON, State's Exhibits 3, 4, 5, 6, 7, 8, and 10 are admitted into the record.)

(WHEREUPON, Defendant's Exhibits 1 and 2 are admitted into the record.)

MR. STEPHENS: Can I approach?

THE COURT: You may.

MR. STEPHENS: Can we approach?

THE COURT: Guys, over here. This way.

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

THE COURT: Ladies and Gentlemen of the jury, we're going to go ahead and take a very short recess. Do not discuss this case at this time. Please go refresh yourselves.

Mr. Foreperson, when y'all are ready, knock on the door and we'll bring you back into the courtroom. All right. Thank you.

(WHEREUPON, the jury exits at approximately 11:15 a.m.)

THE BAILIFF: The jury is clear. The door is closed, Your Honor.

THE COURT: All right. We'll take a 10-minute recess and be back. Thank you.

(WHEREUPON, a short recess is taken.)

THE COURT: The State ready to go?

MR. STEPHENS: Yes, Your Honor.

THE COURT: You ready?

MR. ERICKSON: (No response.)

THE COURT: You ready?

MR. ERICKSON: I'm ready, Your Honor.

THE COURT: Let's bring the jury in.

THE BAILIFF: Yes, Your Honor.

THE COURT: Thank you.

(WHEREUPON, the jury enters at approximately 11:32 a.m.)

THE COURT: Go ahead and sit down, Ladies and Gentlemen of the jury. They are standing for you.

THE BAILIFF: The jury is seated, Your Honor.

THE COURT: Welcome back, Ladies and Gentlemen. At this time, we're going to go ahead and continue with the trial of this case. If the

State would, call the next witness.

MR. STEPHENS: Yes, Your Honor. Thank you. The State calls Billy Crumpton.

THE CLERK: Sir, would you place your left hand on the Bible and raise your right hand for me please.

BILLY CRUMPTON

having first been sworn, testifies as follows:

THE CLERK: Please be seated. State your name and spell it for the court please.

THE WITNESS: William Crumpton. Last name is spelled C-R-U-M-P-T-O-N.

DIRECT EXAMINATION

BY MR. STEPHENS:

Q Mr. Crumpton, where are you currently employed?

A With the Beaufort County Sheriff's Office.

Q What are your duties there?

A I'm employed as the Computer Forensics Technician.

Q In total, how long have you been working in law enforcement?

A Almost 27 years in law enforcement.

Q And how long have you been working in this specific area of computer technician?

A Since about 2004.

Q Now, Officer Dowling of the Beaufort Police Department testified a few minutes ago about having taken a, having seized a cell phone belonging to the defendant in this case, Mr. Mykel Johnson, and having received a search warrant for the search, forensic search of that cell phone. Were you involved in the search of that cell phone?

A No, I wasn't.

Q Can you please describe to the jury just in brief detail how a computer search or searching a cell phone works? How do you go in and pull out information off that phone.

Q There's a variety of different applications or tools that you can use to examine and/or extract information from a cell phone. A cell phone is a pretty dynamic piece, dynamic device. It kind of changes a little bit because it's always reaching out to the network versus a hard drive which if you pull it off a computer, it kind of is what it is.

The software that we use in this particular instance is a user-friendly device which contains software. Once you know what the model and make of the phone is, you can look that model and make up in this device and it tells you actually what kind of cable, the number of the cable that's required for the cell phone.

It's going to tell you -- it will give you some choices as far as call logs or text messaging or contacts that might be available in the phone.

Basically, with this software, you just hook the cell phone up to the device. Identify it in the device as a Samsung and the model number and then you say extract. In this particular phone, that was pretty much the extent of it. It's straightforward. Then, whatever is available in the phone, it gives you that information in an extraction report which gives you call logs, history and SMS and that type of thing.

Q How is a, for example, a text message log, how does that look when it prints it out?

A Well, the phone log is going to give you the telephone number. Uh, it's going to give you the date, the name of the -- the incoming number and the outgoing number. It just depends on what's available in the phone. Some people put, they may put just the name or they may put no name and the number or no name. It just depends on what the user actually inputs into the device as to what you're going to get out of it.

MR. STEPHENS: Your Honor, may I approach the witness?

THE COURT: You may.

BY MR. STEPHENS:

Q Officer Crumpton, I'm handing you what's marked as State's Exhibit 11. Do you recognize that document?

A I do.

Q What is it?

A This is an SMS text message log based on the most recent review of this case that looks like a text message log for this case for that phone.

Q Would you please -- can you please flip through very briefly and see if that appears to be the same log that you originally extracted from the phone without any additions or changes?

A Can I check my notes just a second?

Q Certainly.

A (Reviewing.) Yes, it does.

Q Thank you. Retrieving State's Exhibit 11 from the witness. This is, uh, all the text messages that could be pulled off of that Samsung that belonged to Mr. Johnson that was submitted for your evaluation or your extraction?

A Yes.

MR. STEPHENS: All right. Your Honor, at this point, the State moves to have State's Exhibit 11 moved into evidence.

THE COURT: Any objection?

MR. ERICKSON: No objection.

THE COURT: Without objection.

(**WHEREUPON**, State's Exhibit 11 is admitted into the record.)

BY MR. STEPHENS:

Q And the original cell phone is still in police custody, is that correct?

A It's been returned to the city.

MR. STEPHENS: Okay. Your Honor, I don't have any further questions for Officer Crumpton at this time.

THE COURT: Mr. Erickson?

MR. ERICKSON: No questions for this officer.

THE COURT: All right. Any objection to Officer Crumpton being excused?

MR. STEPHENS: None from the State, Your Honor.

MR. ERICKSON: Nothing from the defense.

THE COURT: You are excused, sir. Thank you.

THE WITNESS: Thank you, Your Honor.

THE COURT: Call your next witness.

MR. STEPHENS: Thank you, Your Honor. Your Honor, the State calls George Erdel.

THE CLERK: Place your left hand on the Bible. Raise your right hand for me please.

GEORGE ERDEL

having first been sworn, testifies as follows:

THE CLERK: Please be seated. State your name and spell it for the court please.

THE WITNESS: My name is George Erdel. Common spelling on the first name. Last name is E-R-D-E-L.

DIRECT EXAMINATION

BY MR. STEPHENS:

Q Officer Erdel, where are you currently employed?

A I'm at Beaufort Police Department.

Q And what are your duties there?

A I'm a Criminal Investigator.

Q How long have you been employed with the Beaufort Police Department?

A I been employed with the Police Department for nine years. I been in investigations for about three.

Q Prior to coming to the Beaufort Police Department, did you have any other experience in law enforcement?

A Yes, I was a military police officer in the U.S. Marine Corps for about seven years. I reenlisted early in my first.

Q Now, as part of your duties as an investigator, were you ever assigned in any capacity to, as lead

investigator or to assist in the investigation in the case of the State versus Mykel Johnson?

A I assisted Investigator Dowling. Investigator Dowling was the lead case officer. I did assist him at his request with certain elements of the case.

Q You said you assisted with certain elements of the case. What was your initial involvement with the case, how were you tasked initially in this case?

A Initially, I was advised by Officer Dowling that there had been a shooting. Prior to receiving that information, I was engaged in some other duties. I was not aware initially that the shooting had taken place. Upon receiving information from Officer Dowling, he basically told me that there was a suspect that went by the street name of Hot Boy and asked me to look into and see if I could search that alias and find out who Hot Boy was. At which time, I did. I went into our report system. There is a computer program. I searched the name Hot Boy. It came up with Mr. Johnson was associated with that alias. There were no others associated with that alias in the system.

Q Did that program also provide you any personal information like home address or anything like that?

A Yes, it did. It did.

Q What home address did it provide?

A Cross Creek Apartments. I don't recall the specific apartment number.

Q Okay. What did you do with that information?

A As far as -- I compiled a photographic lineup at the request of Officer Dowling to show the victims. It was my understanding they knew who Hot Boy was but they only knew him as Hot Boy. I had to get a picture of him. Once I did, I used that photograph for a lineup to see if they could identify, if they could make a match with a person they knew and verify that he was Hot Boy.

Q Let's talk a little bit more about how a photo lineup is done. You said you went to get information about this defendant. How exactly do you get pictures of other potential suspects to put into a photo lineup?

A There's a module in this program that you basically put the person that you want to put in a lineup. In this case, it would be Mr. Johnson. You select criteria such as height, weight and race and sex. The system selects potential matches so that you could have somebody to look similar to put in the lineup.

Once you scroll through the pictures that it provides you and finds the best matches, there's a feature -- it's actually a requirement to complete the lineup up. There's a button that says done slash randomize. You press that button and it scatters the

pictures and have the computer determine what slots they should be in. Then you hit the print button and you can print out the lineup.

Q All right. Was that procedure followed in this case?

A Yes, it was.

Q How many pictures do you use?

A Six.

Q They sometimes call that a six pack?

A I have heard that referred to as six-pack photo lineup.

Q Have you heard of other means of doing identification such as a show-up identification or single photo identification?

A Yes, I have.

Q Why is the six-photo lineup done instead of a show-up, for instance?

A In this instance, a show-up would be where the victims, if the suspect was located shortly thereafter, we could have brought the victims to the suspect and say is this the guy if it would have been in the immediate proximity, if it would have been very shortly thereafter. If it was close in time to distance, we could bring the victim and say is this the guy who shot you. However, once time lapses, you have the option to do either a

single photo, which I believe we could have done single photo because he was a known person. However, out of an abundance of caution, I went ahead and did a six-pack photo lineup and placed Mr. Johnson in that line up.

Q Did either of the victims indicate that they knew the suspect who had shot at them?

A They both did. They both stated they knew who he was.

Q Is a photo lineup normally done in a situation when the victims know the person involved?

A It's not required, however, I like to kind of extend a level playing field, make it more fair so to speak. In this particular case, I have no prior knowledge of Mr. Johnson. I did not know him from the next person. In my opinion, it would be better to do a six-person photo lineup. In my mind, that would establish that the victims, if they picked him from six people, that's not suggestive, whereas somebody might argue, well, you just showed him one picture. So I wanted to do the six-person photo lineup for fairness sake and to establish that they really did know who he was.

Q There were two victims in this case, Frank Babecki and Desiree Constantineau, is that correct?

A Yes, sir.

Q Did they each do a photo lineup or both or neither?

A Mr. Babecki did. And Mrs. Con -- I can't say her name -- Constantineau did not.

Q Do you recall why she did not do a lineup?

A I do not recall. I want to say that Mr. Babecki stayed at the police department after our initial, after he initially had come down there. I think she left because she -- she was pregnant at the time and she was very stressed out and upset. I think she may have had to go somewhere or she wanted to just to get out of there. I don't recall specifically. I do believe that she left at that point.

Q Do you recall how far along she was at that time?

A I want to say like eight months maybe.

Q When you took Mr. Babecki, is there a certain location you go to do the photo lineup?

A We have an interview room at the Police Department.

Q So you will take the witness in there presumably. What do you tell them?

A Basically, admonition is given when you do a lineup. Bare in mind, one was not required but I did one anyway, so I followed it to the hill. Basically, there's

an admonition that when you give somebody a lineup, just because you are giving that person a lineup does mean that person is in there. That's what I told Mr. Babecki. Actually, I believe it was just prior to entering into the interview room.

Sometimes what will happen is you think you might have somebody that is a match for this or whatever and they may not be in there. I don't want to prejudice anything he's going to want to say or suggest anything to him. I let him know the person may or may not be in here. That was the admonition I had given to him prior to entering -- if my memory serves me correctly, it was just prior to entering the room.

Q When you give the photo lineup to Mr. Babecki, did he select an individual as the suspect he believed that shot at him?

A He did. He selected -- he immediately selected Mr. Johnson as the individual he claimed shot him.

Q You said immediately, about how long did it take for him to select that photo?

A I couldn't get out -- I set him down at the table. Another thing I do is I leave the room to avoid any -- I don't want the person to think that I'm suggesting to them anything in any way. My goal upon handing him a lineup was to leave the room and allow him

time to choose. We have -- most people can see if they know it's in there. Basically, what I would normally do is I'll leave the room and give that person a few minutes to look at the lineup. I will see that they made a decision on the monitor. Once I see that and I come back into the room -- I was not able to actually even leave the room before he empathically stated that's him and initialed. I said, if that's him, initial the picture and circle it.

Q Investigator Erdel, I'm handing you what's been marked as State's Exhibit number 1. Do you recognize that document?

A Yes, sir.

Q What is it?

A This the photo lineup that I prepared for Mr. Babecki.

Q Now, is there any indication on there where he selected the individual in the number 1 spot as the suspect?

A Yes, sir. The photograph is circled and has his initial and the date on there. Mr. Babecki's initials.

Q Thank you. I'm retrieving State's Exhibit number 1 from Investigator Erdel. Now, Investigator Erdel, you also interviewed the victims in this case when

Mrs. Constantineau got back to the police station, is that correct?

A That is correct.

Q Now, did they both indicate to you that -- they are here and going to testify. But just in brief, did they indicate to you that their neighbor that they knew as Hot Boy was outside the vehicle that they drove past?

A They were very emphatic about it. They indicated it was Hot Boy.

Q Now, did Mr. Babecki indicate that he actually saw, uh, Hot Boy shoot at him?

A Yes.

Q Did Mrs. Constantineau -- excuse me -- yeah, Mrs. Constantineau state that she saw Mr. -- that she saw Hot Boy shoot?

A (No response.)

Q To the best of your recollection.

A I don't remember if she said that she saw the actually firing of the gun, but basically, her indication was she knew that -- she knew him. Her husband asked her to stop. She was driving. Slow down so that he could talk to him and he fired the gun. Whether -- I can't recall if she indicated she actually saw him firing the gun. But she was -- it was her account that he shot the gun at her.

Q Now, based on the photo lineup and their indication that Hot Boy, who you were able to identify was Mykel Johnson, was the person that shot at them, were you able to get arrest warrants for the arrest of Mr. Johnson?

A I believe Officer Dowling did that.

Q Now, do you recall or do you know how and when Mr. Johnson was taken into custody?

A Mr. Johnson was taken into custody. As Investigator Dowling had testified to earlier, we were unable to locate him that day or for a significant period of time thereafter. I don't recall the exact date. I basically made contact with the U.S. Marshall Service. I kind of serve as the default liaison between the Beaufort Police Department and Marshall Service. We have utilized their assistance in the past to find people who have fled the area or don't want to be found. That's because they are able to -- that's just what they do all the time. We kind of exhausted our resources or our abilities to find him. I contacted the Marshall Service in order to help us locate him. They eventually did locate him.

Q Were you present when the -- with the U.S. Marshalls when he was taken into custody?

A I was.

Q How did that happen?

A The Marshall Service personnel contacted me. The supervising agent Stewart Cunningham out of the Savannah office contacted me and stated that he wanted me to go with the team to, and I don't recall the address. It was an address. It was a trailer in Yemassee. He stated we're going out there. We've got information that he's out there. Basically, what happens -- I been on a few of these. I won't be able to say what they do every time. But basically a team of officers, that includes Marshalls and also Beaufort County Sheriff's Deputies surround the -- surrounded -- in this particular instance, surrounded the trailer.

I took up a position if you were basically looking at the front door of the trailer or you would consider the front side, you would say I would be on the back right corner of the trailer. I overheard the Marshall personnel. They actually had pulled some people out of the apartment and were calling out Mr. Johnson at which time he apparently had failed to come out. Then I heard the commotion and was actually going into the residence in getting him out of the room that he had been in. They brought him out front in handcuffs at that point.

Q Did you speak with Mr. Johnson when he was brought out of that trailer?

A I didn't, uh, -- I didn't ask him any questions. Basically, in an instance like that where somebody's under arrest and we know it, especially when it's a big case, we will bring it back to talk with us. I did speak with him because he asked me questions. At which point, I engaged him in a conversation but it was at his behest. It was -- he initiated it.

Q You know if he had been provided Miranda warnings yet?

A At that point, he had not. He was not being questioned at that point.

Q You said he asked you questions. Do you recall what he said to you?

A I do recall what he said to me. He asked me -- I do not recall the exact order, but the gist of it was, uh, he did say that he was going to turn himself in once he hired a lawyer. There was -- he didn't specify and I didn't ask. He said there was something in his phone that will tell the story. Then he asked how did y'all find me. That's -- you know, I did tell him, listen, I'm not going to discuss the case with you here. I'm going to take you back to the police department. In actuality, I had a Beaufort County Sheriff's Deputy transport him to the police department and handed him off to officers there. I was still out with the Marshalls at the trailer

trying to get a ride back to my vehicle where it was staged at.

Q All right. Uh, now, when he was given his Miranda warnings later at the Beaufort Police Station, do you have any question in your mind that he understood that he had a right to remain silent and not say anything?

A I believe he understood what his rights were, yes.

Q Now, when you, uh, when he came out and he asked you or said that he was going to turn himself in when he got a lawyer and asked you how you found him, did he ask you any questions about what you wanted him for?

A No.

Q But he did indicate that he would have turned himself in and got a lawyer, correct?

A That's what he said.

Q When you took him into custody, did he have a weapon on him?

A No.

Q Were you able -- were officers able to locate weapons in that residence in Yemassee that could be linked back to Mr. Johnson?

A No, sir.

Q You said you didn't recall when he was taken

into custody. Would it be fair to say that it was at least a week or so later?

A I believe it was around a week, week and a half. It's been a lot of cases between now and then. I couldn't quote you the exact number of days, but it was not contemporaneous with the incident. It was probably between a week to a week and a half later to the best of my recollection. I mean, I could look at the report and tell you the specific date, but I don't recall it off the top of my head.

Q I know you said you didn't recall the exact location, but in proximity was -- how close would you said that this trailer was to the AmTrak stop in Yemassee?

A I mean, it's in Yemassee and the train station is in Yemassee. It wouldn't be far. I couldn't give you an exact date or an exact time or distance range from it, but it's probably not too terribly far.

Q Thank you, Investigator. After Mr. Johnson was taken into custody, did you take any other investigative steps to assist in this investigation?

A Other than turning over the phone to Investigator Dowling once I got it off his person at the scene, Mr. Johnson had the phone at the scene, I believe. But after that, no.

MR. STEPHENS: Your Honor, I don't believe I have any further questions for Investigator Erdel at this time. Thank you.

THE COURT: Mr. Erickson?

MR. ERICKSON: Thank you, Judge.

MR. ERICKSON: May it please the Court.

THE COURT: Yes, sir.

CROSS-EXAMINATION

BY MR. ERICKSON:

Q Officer Erdel, did you ever hear the name Little Man?

A I don't think so.

Q That hadn't come up in your discussions?

A With?

Q When you were investigating this crime, did Little Man ever come up in your discussions?

A I didn't really -- again, I was in an assistant role as far as basically finding Mr. Johnson or making liaison with the Marshall Service and doing the lineup. I didn't -- other than that, I really didn't have a lot of involvement. I couldn't speak to that. I never heard the name or said the name. I had a limited role in the actual investigation of the offense itself.

Q How did you come up with the name of Hot Boy? Who gave you that?

A I believe Investigator Dowling may have referenced it. I mean, as you heard earlier, it was in the -- actually in the initial call. I don't recall specifically how I heard it. It may be that Investigator Dowling told me or I heard one of the other officers saying it. I can not recall specifically how I heard the name Hot Boy. I know it was relayed to me. I didn't know it first hand.

Q And you did not see the crime occur?

A No, sir.

Q Were you a first responder or a second responder?

A I never went to the scene at all.

Q You, uh, conducted a video interview of the witnesses, did you not?

A Yes, sir.

Q And one interview was with Mr. Babecki?

A Yes, sir.

Q And that was on video?

A Yes, sir.

Q And then there was a Mrs. Constantineau, Desiree, was another video interview?

A Yes, sir.

Q Have you had a chance to see that interview?

A I have not reviewed it in its entirety. I have

seen some of it previous to today.

Q During the interview, Officer, did you feel Mr. Babecki was being truthful in all his answers?

A Not necessarily.

MR. STEPHENS: Objection, Your Honor. This calls for speculation. He could be more specific.

THE COURT: Why don't you rephrase your question?

BY MR. ERICKSON:

Q All right. Officer, you were there when Mr. Babecki answered all your questions?

A Yes.

Q During the video?

A Yes, sir.

Q Did you feel that he was being truthful -- were there times in that video where you felt he was being untruthful?

A I don't know if I can say that anything he said was overtly not true. I felt like maybe there would be something -- in other words, if you would say it would be a lie, I guess, of omission, in other words, there were things that were not revealed, however, I can't think of anything where he said that was like in and of itself like a lie, not true.

MR. ERICKSON: At this time, Your Honor, I'd

like to admit the CD ---

THE COURT: You want to play the video?

MR. ERICKSON: --- into evidence, but I don't want to play it right now. I just want to mark it.

MR. STEPHENS: Objection, Your Honor. At this point, I believe it's Crawford v. Washington testimony or hearsay. He's not trying to admit it as evidence of prior inconsistent statement. Right now, I think it's a definite Crawford issue. They were asked questions as part of a law enforcement investigation.

THE COURT: Okay. Y'all need to approach.

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

BY MR. ERICKSON:

Q Officer Erdel, are you familiar with the video interview that you did on Mr. Babecki and Desiree Constantineau?

A Yes.

MR. ERICKSON: Can I approach the witness?

THE COURT: You may.

BY MR. ERICKSON:

Q Does this look like the CD or the DVD?

A Uh, this is not my handwriting. However, Investigator -- I don't recall specifically. I assume

this contains the video. This is our case number. This should be the DVD that it was done on.

Q I believe there is a photo lineup on there as well.

A I think the photo lineup we printed out. I don't know if we made a copy of the CD or DVD. I think it was strictly a hard printout and one that I had already just looked at a few minutes ago.

Q All right. Thank you.

MR. ERICKSON: Any objections to admitting this as an exhibit?

MR. STEPHENS: Your Honor, the State would just have to renew its earlier objection.

THE COURT: On the basis?

MR. STEPHENS: Well, Your Honor, one, the State believes this testimony is hearsay. Neither of the victims have testified. If it's admitted, that's the interview of the victims. It's their words about what happened. They are going to be present. He may be able to use it later if he believes there's inconsistencies.

THE COURT: Erdel was also in those interviews.

MR. STEPHENS: Yes, Your Honor.

THE COURT: He was there as well.

MR. STEPHENS: And I think that Mr. Erickson is free to ask whether he thought, whether Investigator Erdel thought there were inconsistencies between the two victims. However, --

THE COURT: I'm going to go ahead and allow it admitted. But I agree with Mr. Stephens. You need to ask the question that we discussed. So go ahead and do that.

(WHEREUPON, Defendant's Exhibit 3 is marked for identification and admitted into the record.)

BY MR. ERICKSON:

Q This will be Defense Exhibit number 3. Now, Officer, you interviewed both of those witnesses in that video interview, is that correct?

A That's correct.

Q Were there instances where there were inconsistencies between their answers?

A Yes.

Q Do you remember any particular inconsistencies?

A I remember there was his wife, Mrs. Constantineau, and that's Mr. Babecki's wife, I'm trying to remember to the best of my ability how the words kind of came out. But basically, uh, I was asking her how Mr. Babecki had known Hot Boy and if there had ever been any kind of interactions as far as any drug use or dealing

between them. She said she thought so.

MR. STEPHENS: Objection, Your Honor. May I approach?

THE COURT: Y'all approach.

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

BY MR. ERICKSON:

Q Did we cut you off in your answer?

A It's the nature of the business, I guess.

Q You said you remember inconsistency between the husband and the wife?

A There was some variation in what he said versus what she said.

Q Anything in particular you remember?

A I don't recall particular words that were used. I don't know what to say without getting cut off again.

Q You remember anything --

THE COURT: You can go ahead and answer the question.

THE WITNESS: Okay. All right. Uh, she said basically -- she said that they had known each other, Hot Boy knew her husband. And I had asked was there -- I don't recall if I asked -- there was another party that was mentioned besides Hot Boy. It was like a mutual circle of people that kind of

-- came to know Mr. Babecki. She said somebody about possibly something to do with marijuana being involved. He said -- he said something different. I don't recall specifically what he said. It will be on the video.

BY MR. ERICKSON:

Q One other followup question on that. Was there any inconsistency about a so-called robbery or drug deal gone bad?

A They had referenced the fact that, if I'm remembering correctly, that supposedly, Hot Boy had robbed Mr. Babecki's friend. Neither Mrs. Constantineau nor Mr. Babecki could give us Mike's last name. I don't think there was any -- if I recall correctly, I don't think there was any difference in what they said about that but that basically Hot Boy had ripped off this guy named Mike in a deal for marijuana. I want to say around -- it was either $275 or $375 worth of marijuana.

They both referenced that event. I don't remember specifically what they said about the event other than it was in the sense that it was a robbery, it wasn't like somebody sticks a gun in your face robbery. It was a, here, I'm going to sell you marijuana, then I take the money and run and don't give you the marijuana. That kind of thing. They both reference that event.

Q Let me turn your attention to Desiree Constantineau. Any particular reason she did not do a photo lineup?

A I don't -- again, like I said earlier to Mr. Stephens, if I -- you got to understand it was a chaotic kind of thing that was going on as far as patrol officers were still out holding the house. We're not a large agency. We don't have -- we're not the L.A.P.D. We don't have a lot of officers. While this is going on, multiple calls, things -- you know, business for a police department continues whether we've got something, quote, unquote, hot going on or not.

So Investigator Dowling had gotten with me. I want to say Mr. Babecki and his wife came down there in their own vehicle. In fact, I'm fairly sure that's what happened. She was very stressed out. She was, I believe, eight months pregnant at the time.

They both stated they knew who the person was. They had basically laid out very clearly that this was a known entity to them. This was a known person. It was not some random stranger. I may have intended to have given her one later and just didn't once I saw how clearly and adamantly that Mr. Babecki identified Hot Boy. I just don't recall why I didn't give her one or if she was even there or if she left. I just don't recall.

Q Isn't it true, Officer, that on the video interview Ms. Babecki asked to do a lineup?

A She may have. I don't recall.

Q Also, isn't it true that maybe she didn't get a lineup because she really didn't see who did the shooting?

A She told me she saw who did the shooting. That would have no effect on the lineup one way or the other. I mean, if she said I didn't see the person, if she would have told me I didn't see him, then I would say what's the point of giving you a lineup. But she said she did see him.

Q All right. Nothing further right now.

THE COURT: Anything further, Mr. Stephens?

MR. STEPHENS: Yes, Your Honor. Just for the record, the State wanted to renew its objection to that line of questioning about the inconsistencies.

THE COURT: You did it contemporaneously and it's on the record.

MR. STEPHENS: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. STEPHENS:

Q Just a couple of questions. You stated that -- I think some of this has been beaten to death. When I asked you originally about the photo lineup, you stated

you didn't believe it had to be done because both victims stated they knew the defendant, correct?

A Right. And my understanding of experience and training and case law, my understanding is when the person is a known -- you show a lineup, you are required to show a lineup if you want to do a photo ID if they don't know the person. By the time, even by the time the lineup was done, it was very clear to me that both of them knew who they were talking about. Obviously, I wasn't at the scene. I wasn't there when it happened, but they both were adamant and said this is the person who shot at me. So that's why, even though I didn't have to do a lineup though, again, like I said, out of an abundance of caution, I did one anyway to try to take the extra step.

Q Thank you, Investigator. And as far as that name Hot Boy, that's a name provided by the victims, correct?

A That was a name provided by the victims. And I assume, to the best of my recollection, it was relayed to me, I know it was relayed to me by them personally, specifically when they came down, but as to how the first time I heard Hot Boy, I assume it was Investigator Dowling that told me. I don't recall it specifically.

Q Did they mention that Hot Boy was their

neighbor?

A They did.

Q And when it retrieved this picture of Mykel Johnson, it also indicated he was in fact known as Hot Boy in the neighborhood of the victims, correct?

A That's correct. In other words, when I was looking for him, I didn't put in Mykel Johnson. I had no idea who Mykel Johnson was. I had never dealt with him. I had never seen him. I basically did like a search query like you would do -- it wasn't on the internet, but there's a slot you can go to to search for aliases. That's how I found that photograph and that information.

MR. STEPHENS: Your Honor, I've got no further questions for officer, uh, for Investigator Erdel. The State does just move to admit State's Exhibit 1.

THE COURT: Any objection?

MR. ERICKSON: Is that the lineup photo?

THE COURT: Yes.

MR. ERICKSON: No objection. Just one followup on the neighbor answer.

(WHEREUPON, State's Exhibit 1 is admitted into the record.)

RECROSS-EXAMINATION

BY MR. ERICKSON:

Q This talk about neighbors, there's a bunch of buildings in a row, right?

A Yes, sir.

Q So how many buildings apart do these people live?

A I didn't ask that. If they told me, I don't recall the answer. I was -- at that point, I was more concerned about there's a shooter out here. There's a guy who has been reported to have shot somebody out there. I don't believe that I asked him that question as far as how far apart they were. At that point, it had become clear to me that they knew who they were talking about. They lived in the same complex. I don't believe I asked him like how far away it was. I don't know how far away it was.

MR. ERICKSON: Nothing further.

THE COURT: Anything further, Mr. Stephens?

MR. STEPHENS: No, Your Honor. Thank you.

THE COURT: You may step down, sir.

THE WITNESS: Thank you, Your Honor.

MR. STEPHENS: If I could, the State would ask for a very short recess. I don't see my -- I want to make sure my next officer is ready to come testify.

THE COURT: Okay. Ladies and Gentlemen of

the jury, we're going to go ahead and take a brief recess again. Do not discuss this case. It would be inappropriate to do so at this time. We'll be right back with you shortly. Thank you.

(**WHEREUPON**, the jury exits at approximately 12:14 p.m.)

THE BAILIFF: The jury is clear. The door is closed, Your Honor.

THE COURT: Thank you.

Mr. Stephens, who do you have left to call?

MR. STEPHENS: Your Honor, for officers, right now, I only have Sergeant Vortisch with the Beaufort county Detention Center. I just wanted to speak with him for a moment.

THE COURT: Okay. And who else?

MR. STEPHENS: Also to arrange for my next witness. I have the victims. However, Your Honor, they've got a small child with them. I let them go until 1:00 cause they had no childcare and they had the child here all morning.

THE COURT: Okay.

MR. STEPHENS: I had one other witness, but I don't think he's going to be able to make it before I close the case. I'll keep him as a rebuttal witness depending on when we go into the defense

case.

THE COURT: So you've got Vortisch left and then Mr. Babecki and Mrs. Constantineau, is that correct?

MR. STEPHENS: Yes, Your Honor.

THE COURT: What I propose we do, let's go ahead and put Vortisch up. Then we'll take a break for lunch and come back. Then we'll be able to fit the two victims in. Okay?

MR. STEPHENS: Thank you, Your Honor.

THE COURT: That way, we'll get them back here by 1:00. You also might want to see if maybe someone in your office can take the baby while they are testifying.

MR. STEPHENS: Yes, Your Honor. My victim's advocate will.

THE COURT: Okay. All right. Go talk to -- I'll give you five minutes to talk to Vortisch, then we'll come on in and do that. Okay.

MR. STEPHENS: Your Honor, I think there might be an issue. I intended to call Sergeant Vortisch to put on one jail call in which the defendant states this is Hot Boy, since there has been an issue of identity.

MR. ERICKSON: I'm going to object. We had

pretrial motions yesterday. Now, all of a sudden, he wants to bring up another statement.

MR. STEPHENS: This is one of the jail calls that were all turned over to Mr. Erickson.

THE COURT: He had them all, right?

MR. STEPHENS: Yes, Your Honor.

THE COURT: Well, it's fair game.

MR. STEPHENS: I also sent an email to Mr. Erickson where I indicated I was going to use this jail call.

THE COURT: All right. Well, it's fair game. Okay. Let's go ahead and take five minutes. Talk to Vortisch quickly and let's get going.

Mr. Erickson, it looks like we're really moving along here. How many people do you intend on putting up?

MR. ERICKSON: Maybe two.

THE COURT: Two? Okay. Does it look like we going to argue and charge today, y'all?

MR. ERICKSON: I don't know. I was thinking that we could do closing statements and my case tomorrow.

MR. STEPHENS: I think that he may -- in Mr. Erickson's case, he may eat up time on the cross-examination of the victims with playing the video.

THE COURT: Okay. I guess my point is, Mr. Erickson, if you've got witnesses, you better get them down here this afternoon if they are not here now. Okay?

MR. ERICKSON: All right.

THE COURT: Okay.

MR. STEPHENS: Thank you, Your Honor.

THE COURT: Mr. Stephens, you have three minutes now.

MR. STEPHENS: Thank you, Your Honor.

(WHEREUPON, a short recess is taken.)

THE COURT: Okay. Let's bring them in now.

MR. STEPHENS: Your Honor, just to avoid getting into anything that might be inadmissible, I was just going to fast-forward over the phone call just the portion where Mr. Johnson identifies himself ---

THE COURT: Okay.

MR. STEPHENS: --- as Hot Boy.

THE COURT: Why don't you just go ahead and do it?

MR. STEPHENS: I just wanted to make sure that foundation is set. Even if Mr. Erickson does object, I'm kind of like a robot. I've got to go through my motions.

THE BAILIFF: Jury entering, Your Honor.

(**WHEREUPON**, the jury enters at approximately 12:22 p.m.)

THE BAILIFF: The jury is seated, Your Honor.

THE COURT: Thank you.

Welcome back, Ladies and Gentlemen.

If you would, call your next witness, Mr. Stephens.

MR. STEPHENS: Thank you, Your Honor. Your Honor, the State calls Jeff Vortisch.

THE COURT: Come on, Sergeant.

THE CLERK: Place your left hand on the Bible. Raise your right hand for me please.

JEFF VORTISCH

having first been sworn, testifies as follows:

THE CLERK: Please be seated. State your name and spell it for the Court please.

THE WITNESS: Sergeant Jeff Vortisch. J-E-F-F. V-O-R-T-I-S-C-H.

DIRECT EXAMINATION

BY MR. STEPHENS:

Q Now, you are currently a Sergeant Correctional Officer, is that correct?

A Yes, sir.

Q And where do you work?

A Beaufort County Detention Center.

Q And what are your duties at the Beaufort County Detention Center?

A I run the Office of Professional Standards, Internal Affairs, Inmate Phone System, a few of those.

Q You mention Inmate Phone System. How exactly does the Inmate Phone System work?

A If someone is booked into our facility, they are given a pin number. It's a unique digit of numbers to this person. You have to put the number into the phone to use our inmate phone system. And it automatically records the name of the person, those numbers associated with the name and then it identifies, they have to say their first and last name when they make the call. That's the one of our policies and procedures. And, uh, all calls are recorded except those to attorneys. And those to attorneys, we have track of them, but we don't record them.

Q Now, did you do anything to indicate to the inmates that their calls are being recorded?

A Yes, sir. There is a recording at the beginning of every call that says this phone call is subject to recording and monitoring. It's in our handbook as well that they are issued that all calls are

subject to be monitored. A part of my duties is I do listen to phone calls as an administrator for the program. They are told right up front that calls are subject to be listened to.

MR. STEPHENS: Your Honor, may I approach?

THE COURT: You may.

BY MR. STEPHENS:

Q Sergeant Vortisch, I'm handing you what is marked as State's Exhibit number 9. Do you recognize it?

A Yes, sir. I do.

Q What is it?

A This is a CD that I created for you under a subpoena, a subpoena I received for the month of June. At the top of the CD, I put the subpoena number 0602. I also put the disk number 0602. Sometimes it takes more than one disk. I write the name of the person. I initial it and I date it.

Q Thank you, Sergeant Vortisch. I am retrieving State's Exhibit number 9.

MR. STEPHENS: Your Honor, at this point, I'd like to load the disk, have Sergeant Vortisch identify the information to confirm that these are calls from Mr. Johnson and then play the call that we mentioned. (Pause.)

BY MR. STEPHENS:

Q Sergeant Vortisch, I apologize if it's a bit clumsy. But do you recognize the kind of screen that comes up when that disk is loaded?

A This is a screen that is displayed when you put in a disk that has been recorded with the secured software. It's proprietary. It lets the location of the calls, in this case, Beaufort County Detention Center, the call time, the type of call, the number that was called and the person making the call.

Q All right. Now, what does that account number signify?

A The account number 83800, that is Mykel Johnson's number that was assigned to him when he was booked into our jail.

Q All right. And you used that name or number to retrieve these?

A Yes, sir.

Q Okay. Now, directing your attention specifically to the call date 05-04-2012. Who -- clearly this is a CD of calls from Mr. Johnson. But what in this call indicates that it's Mr. Johnson making the call?

A There's a couple of things. It tells me that it's coming from Housing Unit SHA. It tells me the phone that was being used. Mr. Johnson was housed in SHA by himself because of his statute. The other thing it tells

me is obviously his name, Mykel Johnson. His number is 83800.. The date and time, I can verify that through our records within the jail that put him at that location at that time.

MR. STEPHENS: Your Honor, at this point, the State moves to admit State's Exhibit number 9 and play a portion of the jail call dated 5/04/2012 for the jury.

MR. ERICKSON: No objection.

THE COURT: Without objection.

(WHEREUPON, State's Exhibit 9 is admitted into the record.)

(WHEREUPON, there is a pause.)

MR. STEPHENS: I'm begging the court's indulgence. Technology fails for you in court, Your Honor. The State would ask for a very brief recess even though we set this up and tried it in advance to make sure it will play.

THE COURT: Ladies and Gentlemen, I think now is a very good time for lunch. It's about 12 -- a little after 12:30 back by the clock back there. Ladies and Gentlemen, I'm going to ask that you return to the jury room by 1:45. At that time, we will go ahead and continue the trial of this case.

I need to remind you, Ladies and Gentlemen,

over the lunch hour, you are not only not to discuss this case, you are not to do any independent research. Go get a bite to eat. We look forward to seeing you all back. And if you will, be back at 1:45 and we'll continue the case. Thank you.

(WHEREUPON, the jury exits at approximately 12:32 p.m.)

THE BAILIFF: The jury is clear. The door is closed, Your Honor.

THE COURT: Sergeant, I hope you have no where to go other than back to the jail.

THE WITNESS: Thank you, ma'am.

THE COURT: You okay?

THE WITNESS: Yes, ma'am.

THE COURT: All right. We'll see y'all back. Okay. I'm sure you'll get it cued up by then, Mr. Stephens.

MR. STEPHENS: Yes, Your Honor.

THE COURT: See y'all back at 1:45.

(WHEREUPON, a lunch recess is taken.)

THE COURT: Thank you, y'all. Please be seated.

Come on up, Sergeant.

You cued up and ready to go?

MR. STEPHENS: Yes, Your Honor. We tested at

length.

THE COURT: Okay. Let's bring the jury on in.

THE BAILIFF: Yes, Your Honor.

THE COURT: Thank you.

THE BAILIFF: Jury entering, Your Honor.

(**WHEREUPON**, the jury enters at approximately 2:05 p.m.)

THE BAILIFF: Jury seated, Your Honor.

THE COURT: Thank you.

Welcome back, Ladies and Gentlemen. I hope you had a nice lunch. At this time, my understanding is we are cued up and ready to play the CD. So whenever you are ready, sir.

MR. STEPHENS: Thank you, Your Honor.

BY MR. STEPHENS:

Q Officer Vortisch, I just want to confirm. You saw me reload and prep this jail call, correct?

A Yes, sir. I did.

Q Just to refresh everyone's recollection, hopefully, I'm not taking out any of the Court Reporter's equipment here. This call is listed as 05-04-2012, correct?

A Yes, sir.

Q And the originator, is this still the housing

unit that the defendant was lodged at, his name and account number?

A Yes, sir. It is.

Q All right. Now, this is a phone call cued at just before the eight minute mark.

(WHEREUPON, State's Exhibit 9 is played.)

MR. STEPHENS: Your Honor, that's all the State wanted to produce.

THE COURT: Okay.

MR. STEPHENS: That was the defendant making a phone call.

THE COURT: No. No editorial.

MR. STEPHENS: Yes, Your Honor. Sorry.

THE COURT: It speaks for itself.

MR. STEPHENS: Your Honor, I have no further questions for Sergeant Vortisch. Thank you.

THE COURT: Mr. Erickson?

MR. ERICKSON: Appreciate the job you do over there. No questions.

THE WITNESS: Thanks.

THE COURT: You are excused, Sergeant.

THE WITNESS: Thank you.

THE COURT: The State will call their next witness.

MR. STEPHENS: Thank you, Your Honor. The

State calls Frank Babecki.

THE CLERK: Place your left hand on the Bible and raise your right hand for me, sir.

FRANK BABECKI

having first been sworn, testifies as follows:

THE CLERK: Please be seated. State your name and spell it for the court please.

THE WITNESS: First name's Frank --

THE BAILIFF: Wait until you get there.

THE WITNESS: First name is Frank, F-R-A-N-K. Last name is Babecki, B-A-B-E-C-K-I.

DIRECT EXAMINATION

BY MR. STEPHENS:

Q Mr. Babecki, where do you live, sir?

A Excuse me.

Q Where do you live?

A Uh, Cross Creek.

Q That's Cross Creek Apartments?

A Yes, sir.

Q In Beaufort?

A Yes.

Q Who else lives with you?

A My wife and my six-month year old daughter.

Q And your wife is Desiree Constantineau?

A Yes, sir.

Q Okay. I'm going to try hard not to mall your names.

A Yeah.

Q How long have you lived at Cross Creek Apartments?

A Uh, since August, last August.

Q August of 2011?

A Yes.

Q So if you moved in in August, on October 28th of 2011, you been there, uh, about three months?

A Yes.

Q Now, while you were residing at Cross Creek Apartments from August until October 28th of last year, did you meet a young man who lived in a complex who went by Hot Boy?

A Yeah. Yes, sir.

Q Do you see that individual in the courtroom?

A Yes.

Q Can you point him out please?

A (Pointing.)

MR. STEPHENS: I'd note for the record that Mr. Babecki has indicated the defendant, Mr. Johnson.

BY MR. STEPHENS:

Q How did you meet Mr. Johnson?

A I seen him a few times hanging out by the -- they got like a little playground area over there. I talked to him a couple of times. That's really it.

Q You said you seen him around a few times. Prior to October 28th, 2011, can you estimate how many times you may have seen him at the complex?

A 10, 15.

Q You know if you had mutual friends or people in common that you both knew?

A Uh, yeah. Yes.

Q Okay. Now, on October 28th, 2011, you recall what you were doing that day?

A No, sir.

Q Was there an incident where your car was shot at?

A Well, yes. Yes. If you are asking me that question, yes. What happened was my wife and I were going to IHOP. When we were leaving, that's when it all happened. We were pulling out.

Q Let me try to break this down piece by piece, Mr. Babecki. So you and your wife were planning on going to IHOP?

A Yes.

Q This is --

A She was pregnant at the time.

Q So before you --
A She was eight months.
Q All right. And do you recall what time of day this happened?
A It was noon.
Q Now, uh, you were going to IHOP. Did you have a car at that time?
A It was a rental car at the time.
Q Were you driving that rental car?
A My wife was.
Q Did you encounter Mr. Johnson on your way to IHOP?
A Yes, he was walking into the neighborhood. Said what happened the other night.
Q In general, what were you referring to when you asked what happened the other night?
A Uh, a few days prior before that, uh, something happened like a pot deal. So I wanted to go ask him what happened.
Q Did you actually approach him?
A No, I didn't approach him. I was in the vehicle. We were rolling. I said what happened the other night. He was walking the other way.
Q Was your windows up or down?
A The driver's side was down. The driver's side

was down.

Q So you driving along to IHOP. You see Mr. Johnson.

A Yes.

Q Where was he located on the road?

A He was on the sidewalk.

Q All right.

MR. STEPHENS: Your Honor, may I approach?

THE COURT: You may.

BY MR. STEPHENS:

Q Mr. Babecki, I'm going to ask you to exit the witness stand just so you can --

THE COURT: Go ahead and step down, sir.

BY MR. STEPHENS:

Q -- just so you can point on the map.

THE COURT: If you'll just speak up for my Court Reporter when you do cause you won't have the mic on you. Thank you, sir.

THE WITNESS: No problem.

BY MR. STEPHENS:

Q Would you please indicate -- could you please indicate about where your car was and where Mr. Johnson was located when you yelled out the window at him?

A He was walking through here. About right here he was walking this way.

THE COURT: Thank you. You need to speak up.

THE WITNESS: Oh, I'm sorry. Okay. Uh, I was driving out this way, my wife and I, to go right across the street to here. He was on the sidewalk walking the opposite direction.

BY MR. STEPHENS:

Q Thank you, Mr. Babecki. You may have a seat. For the record, the witness has indicated a portion of the map just in front of the Parris Island Gateway Road that intersects Ambrose Way on the map. That's State's Exhibit 3.

Now, you said you yelled something out the window about something that happened the other day?

A Yes, my words are what happened the other night.

Q What, if anything, happened after that?

A What if anything?

Q I'm sorry. It's lawyer's speak, Mr. Babecki. I'm just asking what happened next.

A What happened next? As I was driving, bullet holes started shattering my windows.

Q All right. So you saw Mr. Johnson holding some kind of firearm?

A Yes.

Q Could you describe what kind of firearm it was?

A Yeah, it was a silver gun. Black and silver gun.

Q About how far away from the vehicle would you estimate he was when you saw this happen?

A 20 feet.

Q Can you tell what direction he was running?

A Towards the complex.

Q Okay.

A We were going towards IHOP. So he was going -- he was already in the neighborhood.

Q What happened next, Mr. Babecki?

A After that, my wife started panicking. The windows shattered. Two or three windows shattered. She called 911. We pulled over in the parking lot. The cops came.

Q Now, if I could go back to this incident involving Mike. I think you were asked when you were interviewed later by Investigator Erdel if, uh, the defendant, Mr. Johnson's phone number was located in your phone.

A Yes.

Q You recall that?

A Yes.

Q Can you explain why the defendant's phone number would be in your phone?

A I had his phone number. I had his phone number for the couple of times that I bumped into him and took his number. He took mine. We were friends for the most part. More acquaintances. We see each other and say what's up.

Q You know if anyone had used your phone to --

A At the time, a buddy of mine Kendalle was living in there. Maybe one or two or three times, he probably would use it if he ran out of minutes on his phone. He slept over at the house all the time.

Q Did anyone else --

A I might have even sent that text message to do a favor for somebody.

Q Now, when you say that text message, you understand there is message that was sent on October 26th from your phone to Mr. Johnson's phone?

A Right.

MR. STEPHENS: This is reading from State's Exhibit 11, Your Honor.

THE COURT: Uh-huh.

BY MR. STEPHENS:

Q Uh, I -- "could you spot me a 10 and I'll have it for you by two o'clock. I need a smoke bad. I got like two bucks. Just until my depsit [sic] goes through and I give you an extra 10 for fronting me homey".

A That was the text that was sent.
Q You recall sending a text like that from your phone?
A Yeah, I believe so.
Q Now, were you saying that on your own behalf, Mr. Babecki?
A No, actually I was getting it for somebody.
Q All right. Were they trying to purchase marijuana from the defendant, Mr. Johnson?
A They were trying to get it through me because I knew where to get it from.
Q Why would you think that Mr. Johnson would have marijuana for sale?
A At the time when we were talking, I actually -- he actually told me he had a little bit to sell.
COURT REPORTER: I'm sorry. Actually?
THE WITNESS: He had a little bit for sale.
BY MR. STEPHENS:
Q Now, was this transaction, to your knowledge, was this transaction connected at all to the --
A There wasn't any transaction.
Q Okay. So there was never a --
A There was no transaction, no.
Q When you referenced Mike and what happened last night, you said something about a drug deal gone bad?

A Yeah. I didn't actually know the whole story. It was something over like $300. I didn't know the whole story. So truthfully, I was asking him what happened the other night. Mike told me it was something over $300. That's what I was asking him about. My words were just what happened that night.

Q Is Mike some other person who lived in the --

A He used to live in there. He was staying with somebody in the Navy.

Q So Mr. Babecki, you are saying that you were not involved in whatever transaction went bad?

A No, no. I wasn't involved in that. I heard of it through Mike. I saw him. I just said what happened the other night.

Q Do you know of any reason that Mr. Johnson might think you were involved in that transaction?

A Not to my knowledge, sir.

Q Thank you, Mr. Babecki. Just a few more questions for you. Now, let me ask you about how everything looked when the shooting happened. You said it was some time in the afternoon, you think maybe between 12:00 and 2:00. Was it an overcast day? A bright day?

A It was beautiful out. Like right now. Sunny day.

Q Did you have any problem recognizing Mr. Johnson as the individual that was on the street?

A No, not at all. I knew him.

Q What was -- do you recall what he was wearing at the time?

A I believe a black t-shirt, black pants.

Q And did he say anything to you before pulling out that gun and opening fire at you?

A No, not a word, sir. He ran while he was shooting.

Q Mr. Babecki, you have a, uh, pending charge with the Solicitor's office for Financial Transaction Card Fraud, is that correct?

A Yes, sir.

Q Now, any promises been made by my office about how that charge would be disposed of?

A No.

Q So we haven't offered you anything in exchange for your testimony?

A No.

Q Correct me if I'm wrong, but is that scheduled to go into our Pre-trial Diversion program?

A I'm pretty sure. I'm pretty sure, sir.

MR. STEPHENS: Your Honor, I don't believe I have any further questions for Mr. Babecki at this

time.

Thank you, Mr. Babecki. Mr. Erickson may have some questions for you.

CROSS-EXAMINATION

BY MR. ERICKSON:

Q Mr. Babecki, what do you do for work, sir?

A I'm a plumber.

Q All right. And you mentioned you know Mr. Johnson because you lived in the same apartment complex?

A Yes, sir.

Q Any other reasons you might know Mr. Johnson?

A No, sir. Any other reasons why I might know him?

Q Yes, sir.

A No.

Q How about through phone number exchanges?

A What do you mean by that?

Q Did you exchange phone numbers?

A Yes.

Q What about any drug exchanges?

MR. STEPHENS: Objection, Your Honor. May I approach?

THE COURT: You may.

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

BY MR. ERICKSON:

Q Back to my question, Mr. Babecki. Did you have any drug exchanges, such as marijuana with Mr. Johnson?

A Maybe once or twice before, yes, sir. Something very small. Maybe $5 or $10 worth.

Q Worth of marijuana?

A Yes.

MR. ERICKSON: May I approach the witness?

THE COURT: You may.

BY MR. ERICKSON:

Q I've got a phone text the prosecutor alluded to. I want you to go ahead and read that and see if that is correct.

A What am I reading?

Q Right here. If you could, read that aloud.

A Yeah. It says I -- could you spot me a 10 and I'll have it for by two o'clock latest, my man. I need a smoke and I got two bucks just until my deposit goes through and I'll give you. That's what it says.

Q Did you text that?

A It could have been me. I believe so. Yeah, I believe so. It could have been for a friend of mine. That's the way I text so I believe so.

Q What is a 10?

A A 10, like a 10, $10 worth.

MR. STEPHENS: Your Honor, I object. It's cumulative. We already have all the texts that are admitted.

THE COURT: It's already in evidence?

MR. STEPHENS: Yes, Your Honor.

MR. ERICKSON: This is a particular text. There's over 300 texts. This is number 151 that I would like the jury to focus in on.

THE COURT: Okay. Can I see it?

BY MR. ERICKSON:

Q Let me ask you another question, Mr. Babecki.

MR. ERICKSON: Is that all right, Judge?

THE COURT: I want to see it first.

(WHEREUPON, there is a pause.)

BY MR. ERICKSON:

Q Mr. Babecki, may I approach again?

A Yes, sir.

Q You mentioned this is your text. I would like you, for the record, to state the date on there for me please.

A The date?

Q The date that you made that text.

A It says on here 10/27/11.

Q Is that a day before the incident?

A Yeah. It was 10/28, the incident. Yeah.

MR. ERICKSON: I'm going to go ahead and admit this as Defendant's Exhibit number 4, I believe.

(**WHEREUPON**, Defendant's Exhibit 4 is marked for identification and admitted into the record.)

THE COURT: It's in evidence subject to your objection.

MR. STEPHENS: Your Honor, the State already has its objection on the record as cumulative. But we understand Your Honor's ruling.

BY MR. ERICKSON:

Q Mr. Babecki, you said you were friends with Mr. Johnson at one time?

A Yeah. More like acquaintances. Like I said, we've bumped past each other while I would be coming home from wherever I was.

Q You know of any particular reason why Mr. Johnson might shoot you?

A Not at all. Or my wife.

Q Would it be -- could it possibly be because your friend was robbed the night before?

A Like I said, I didn't know the whole situation. I was asking him what happened the other night. I was trying to get his side of the story. I just asked what happened, if he was all right or whatever. I didn't know

what happened. I just overheard the story about $300 and I said what happened the other night. That's when the shots started.

Q Did your friend tell you who robbed him?

A No.

Q Actually, was it more of a drug deal gone bad?

A I believe so. I don't have any information on it other than what I just told you, sir.

Q In your testimony just now, you mentioned you were driving the car?

A My wife was.

Q I just wanted to clear that up. Why were you not driving the car?

A Why wasn't I driving the car?

Q Yes, sir.

A At the time, I believe I was suspended.

Q You did not have a driver's license?

A It was suspended because I didn't know I had to make up -- when I moved here from New York, I owed $108. It got confused with the DMV up there. I had to take care of that when I got down to South Carolina. I got a new South Carolina driver's license. I wasn't driving for like two or three months at the time.

Q Why were you in a rental car?

A We were in a rental car because my wife -- we

had a brand new Toyota Camry and she got hit in the back in Port Royal and it tore the back out of the car. So we were in a rental car for about a month.

Q All right. You mentioned about your past. In fact, the prosecutor bought out the fact that you were charged right now with a crime, is that it?

A Yeah. Yes.

Q What are you charged with?

A I believe it's -- what happened was it was a misunderstanding. But it's a transaction and credit card fraud. What happened was there was a misunderstanding.

MR. STEPHENS: Your Honor, I would object on relevance. We already established that he was charged with financial card crime. He already stated that he was charged and it's pending. I don't understand the relevance or any other line of inquiry on it.

MR. ERICKSON: My next question is if he received any favorable treatment for testifying here today.

THE COURT: Go ahead and ask it.

BY MR. ERICKSON:

Q Mr. Babecki, any favorable treatment from the State for testifying today?

A No.

Q What about the offer of pretrial intervention?
A No, not at all, sir.
Q But you were offered that, is that correct?
A Yes, PTI, yes, I was.
MR. ERICKSON: At this time, Your Honor, I have entered, uh, Exhibit number 3 is the video. I would like to play it because there's some inconsistent statements.
THE COURT: Okay. I don't need the editorial. Let's just go ahead and play it.
MR. ERICKSON: All right.
THE COURT: Is it cued up? Are you ready to go?
MR. ERICKSON: Well, it was until he unplugged it.
MR. STEPHENS: I'm just going to confer with Mr. Erickson to make sure it's cued up.
THE COURT: Okay.
(WHEREUPON, there is a pause.)
MR. ERICKSON: There's two witness interviews on this tape. I'm trying to get the right one.
(Pause.)
Soon as I know who's coming on, I'll turn it up. (Pause.)
(WHEREUPON, Defendant's Exhibit 3 is played.)

MR. ERICKSON: Can I get a recess to get the right video on here, Your Honor?

THE COURT: Okay. Are you finished with questioning him or is there anything else we can do in the meantime?

MR. ERICKSON: I want to show the video and then question him some more on the inconsistencies.

THE COURT: Okay. Why don't you see what you can do to get it set up?

Ladies and Gentlemen of the jury, are y'all okay? We just got back so does anyone need a break? No?

(WHEREUPON, there is a pause.)

MR. ERICKSON: What we could do is Mr. Babecki could stand down subject to recall and then we could do the next witness. It's in that order.

THE COURT: My understanding from Mr. Stephens is that he didn't have any objection to you going ahead and doing Mrs. Constantineau's although you are going to want to question her, I assume.

MR. STEPHENS: That's correct, Your Honor. At this point, like I said, the entire disk has been moved into evidence.

THE COURT: Let's do this. Why don't you play both of them since that's what's cued up and

ask him questions that are relevant to him and then when she comes up, they will have already seen it and you can ask those questions.

MR. ERICKSON: All right.

(WHEREUPON, Defendant's Exhibit 3 is played.)

BY MR. ERICKSON:

Q I want to stop it right there. Did you hear what your answer was, Mr. Babecki?

A Yes, I heard my answer. Yes, I heard my answer. You going -- referring back to the text messages? Is that what you're going back towards?

Q That's correct.

A Yes.

Q Any particular reason --

A My answer was no that I never smoked with him, but through the text messages, I was asking him for a buddy of mine that needed something. There was no transaction made.

Q But the question you were asked was do you ever smoke weed.

A No, that question was did I ever smoke weed with him. That's what the question was and I said no.

Q Should I play that again?

A You can play that again. That's what I thought I heard.

(WHEREUPON, Defendant's Exhibit 3 is played.)

BY MR. ERICKSON:

Q All right. So you stated that you never smoked marijuana with H.B. ---

A Yes, sir.

Q --- is that correct?

A Yes.

Q This video was done on the day of the incident, October 28th?

A Yes.

Q And that text that you just read, that was a day before, right?

A That was the day before, yeah. There was no transaction made when they asked me that question. It was a text message, but there was no transaction having made.

Q Okay. I think I also heard you say that you did not blame Mr. Johnson for the robbery on your friend?

A No, I didn't blame him.

Q So your statement is that Mr. Johnson did not rob your friend?

A I didn't -- well, when you asked me earlier, I didn't know the full story. What happened was when I heard it from Mike when he was walking in the neighborhood, I had asked him what had happened the other

night. Simple as that. Those were the exact words.

Q All right. The officer was concerned with this video. In fact, he stopped twice because he was concerned about your answers?

A My wife answers.

(WHEREUPON, Defendant's Exhibit 3 is played.)

BY MR. ERICKSON:

Q I believe your wife --

A She said I knew where he lived. I was never in his house. I don't know where his apartment door was.

Q All right. Well, the officer who interviewed both you and your wife says it does not match up. Here is what he says.

(WHEREUPON, Defendant's Exhibit 3 is played.)

BY MR. ERICKSON:

Q I'll stop it right there. Why did you get H.B.'s phone number?

A Why did I?

Q Yes.

A When we bumped heads at the playground that night in the beginning, that's when I got his phone number when I was walking back from my mail box. He got a new phone number, I believe. And it was not Mike's god-brother. He was living with Mike's real brother. Mike's god-brother was in the Navy. Mike's other brother

who lives in Bluffton, that's what they were referring to on that tape.

Q But you said you got H.B.'s number from Mike.

A I got his new number from Mike.

Q Right.

A His new number.

Q Why did Mike need his new number?

A Mike wanted to give it to his brother.

Q And it's Mike's brother who got robbed?

A I'm assuming so. I didn't know all the information, sir.

Q Okay. There's another point where the officer states it doesn't match up. They are talking about that.

MR. STEPHENS: Objection, Your Honor. Mr. Erickson keeps editorializing and testifying as he goes along.

THE COURT: Just ask him questions, Mr. Erickson.

(WHEREUPON, Defendant's Exhibit 3 is played.)

BY MR. ERICKSON:

Q Did you just say H.B. robbed his brother?

A Yes, because that's what Mike told me when he got to the scene.

Q So that's what you thought?

A Mike told me the night before. When they got

to the scene after the shooting, Mike was walking. He was at the scene when the cops were there. That's when he said it.

(WHEREUPON, Defendant's Exhibit 3 is played.)

BY MR. ERICKSON:

Q You just hit another spot.

A Uh-huh.

Q And the officer said it doesn't match up with what your wife said.

A What doesn't match up?

MR. STEPHENS: Objection, Your Honor. Again, this is not a question he just asked.

THE WITNESS: What doesn't match up, sir?

BY MR. ERICKSON:

Q About the so-called robbery of $250.

A Yeah, because there was no information known to get it. I didn't know. I was clueless to it. I heard about it. I asked him what happened. I was clueless of the whole situation.

Q We haven't played this whole thing, have we? I'm going to continue this tape.

(WHEREUPON, Defendant's Exhibit 3 is played.)

BY MR. ERICKSON:

Q Let me stop it right there. That statement that you just gave, Mike -- it says Mike told me that

H.B. robbed him of $250. You believe that statement?

A Yes.

Q And that's really the point of this whole incident, isn't it?

A The point of the whole incident was that I --

MR. STEPHENS: Objection. Calls for speculation, Your Honor.

THE COURT: You can ask him a question.

BY MR. ERICKSON:

Q You were pissed that your friend Mike was robbed, weren't you?

A When the kid came -- I knew the kid for, like I said, I lived in there, it was three months.

Q Who was the kid?

A Mike. The kid Mike. I didn't know them for a very long time. Like I said, I was clueless to the situation. When it went down, I heard from Mike that he robbed his brother for $250 or for $300. That's all I know.

Q So you were pissed about that?

A When he told me, I was like that was wrong to do.

Q Did that make you want to get back at H.B.?

A No. Almost nine years older than the kid. It's not my business. It wasn't any of my business.

(WHEREUPON, Defendant's Exhibit 3 is played.)
BY MR. ERICKSON:
Q 25 feet. That's not what your wife said.
A I said 25 feet when I was questioned earlier. My wife might have said 10 feet.
Q That's correct.
A I didn't have a ruler at the time, sir.
Q That's correct.
(WHEREUPON, Defendant's Exhibit 3 is played.)
BY MR. ERICKSON:
Q I'm going to stop you there. You explained how the shots came into the car.
A The shots came through the back of the car. As we were pulling out, he was already past us. He was running and shooting.
Q All right. Let me ask you, at this time, did you like H.B.?
A At the time, I was, like I said, an acquaintance. I was a friend of his at the time which I thought.
Q So you liked him?
A Yeah, he was a nice kid.
Q Did you hang out with him?
A I told you a couple of times that we saw each other, it was, hey, what's up, what you doing tonight,

blah, blah, blah. Nothing. Then I would walk upstairs. That's about it.

Q Did you feel bad for Mike getting robbed?

A Did I feel bad? No, it was not my business. I didn't feel bad at all.

Q You say you --

A When I first heard about it, at first, I didn't believe it. I didn't know if it was true. I didn't know if it was the truth or a lie. I was -- like I said, I was clueless to it.

Q Let's see what you said on the tape.

A All right.

(**WHEREUPON**, Defendant's Exhibit 3 is played.)

BY MR. ERICKSON:

Q You just gave completely different answers.

A On what?

MR. STEPHENS: Objection, Your Honor. Mr. Erickson is still editorializing and not asking questions.

THE COURT: Ask him a question, Mr. Erickson.

BY MR. ERICKSON:

Q I asked you do you -- what did I say? I asked you if you liked H.B.

A You asked me if I liked him. I said yes, he was more like an acquaintance. When I first met him,

there were no problems. Hi, how are you doing and I'd go upstairs. Other than that, that was it.

Q But did you hear yourself on the tape? You said you don't like him.

A Yes, after the situation. That's why I said it. At the time, we're going back 10 months ago. It's really hard to remember word-for-word.

Q And I asked you if you felt bad for Mike getting robbed. And you just said no.

A On the tape?

Q No, here.

A Yeah. No, no. You asked me if I felt bad. I said at the moment, I said that was wrong. That's what I told you. I said I thought that was wrong to do. Those were my words.

Q All right. We're just about done. Another 30 seconds on the tape. I've got another question before I start it. Did you say that your wife saw the shooting?

A My wife was in the vehicle, yes.

Q Did she see the shooting?

A Not that I know of, no. She was driving the car. Once the bullets hit, she just was hysterical. Like I said, she was eight months pregnant. One went through the back window and hit the passenger, the headrest. A bullet got stuck in that. Could of hit my

head. Another went out the passenger window.

Q All right. So back to my question. You are stating today that your wife did not see the shooting?

MR. STEPHENS: Objection, Your Honor. This calls for speculation on the part of Mr. Babecki as to what his wife saw.

THE COURT: Okay. You just need to ask a question.

MR. ERICKSON: All right. I'm just trying to reiterate what he's saying. Let's listen to your answer on the video.

THE COURT: Ask him the question.

(WHEREUPON, Defendant's Exhibit 3 is played.)

BY MR. ERICKSON:

Q And so did my wife. That's what you said on the tape?

A Yes.

Q All right. I have nothing further. Thank you.

THE COURT: Mr. Stephens?

MR. STEPHENS: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. STEPHENS:

Q I'll try to be brief. Mr. Babecki ---

A Yes.

Q --- how do you feel about Mr. Johnson after he

shot at your vehicle?

A How do I feel?

Q Yeah, how do you feel about him personally knowing that he's the person that shot at your vehicle?

A I mean, how would anybody feel if you got shot at?

Q That's fair enough, Mr. Babecki.

A You been shot at, wouldn't anybody be annoyed?

Q Mr. Babecki, you testified on cross-examination about text messages that you sent, that you admitted to sending to the defendant. I'd like to take a look at one additional text message.

A Uh-huh.

Q I'm handing the witness what's been marked as State's Exhibit 11. Mr. Babecki, can you read the text message sent at -- number 156. First, let me ask you, is that a text message you remember sending to Mr. Johnson?

A 156. Good job. Thanks for trying to kill me and my pregnant wife.

Q Thanks, Mr. Babecki. Do you recall sending that message?

A Yeah, I recall sending it, sir.

Q That was sent after the shooting.

A Yes, sir.

Q Did you receive any kind of response from Mr.

Johnson?

A No, not that I believe.

Q Thank you, Mr. Babecki. I don't have any further questions for you.

A No problem, sir.

THE COURT: Mr. Erickson, anything further?

MR. ERICKSON: No, ma'am.

THE COURT: Mr. Babecki, you may step down, sir.

The State will call the next witness.

MR. STEPHENS: Thank you, Your Honor. The State calls Desiree Constantineau.

THE COURT: Mrs. Constantineau, come on forward please. Place your left hand on the Bible and raise your right hand.

THE WITNESS: Yes, ma'am.

DESIREE CONSTANTINEAU

having first been sworn, testifies as follows:

THE CLERK: Please be seated. State your name and spell it for the court please.

THE WITNESS: My name is Desiree Constantineau. C-O-N-S-T-A-N-T-I-N-E-A-U.

DIRECT EXAMINATION

BY MR. STEPHENS:

Q Good afternoon, Mrs. Constantineau.

A Good afternoon, sir.

Q I see by your uniform that, uh, -- although I already know this -- you are a Lance Corporal in the United States Marine Corps.

A Yes, sir.

Q You are currently on active duty, is that correct?

A Yes, sir.

Q Are you stationed at one of the local bases here?

A Yes, sir. I'm at the air station.

Q And where do you live?

A I live at Cross Creek Apartments.

Q How long have you lived there?

A Uh, about a year.

Q You live there with your husband, Frank?

A Yes, sir.

Q Now, we just watched the video of your interview. It looks like you were pregnant during that interview, is that correct?

A Yes, sir.

Q You have a child now?

A Yes.

Q At the time of -- do you recall the events of October 28th, 2011?

A Yes, sir. I do.
Q It involved a shooting at your vehicle?
A Yes, sir.
Q At the time that occurred, you lived at Cross Creek Apartments about three months?
A Yes.
Q Did you know a neighbor by the name of, street name of Hot Boy?
A Yes, sir. I did.
Q And how did you know that individual?
A Uh, he lived in my apartment complex. I had met him through my husband.
Q Prior to October 28th, 2011, about how many times do you think you have seen that individual?
A Uh, maybe about five.
Q Do you see that individual in the courtroom right now?
A Yes, sir.
Q Could you please point him out?
A He's right there. (Pointing.)
Q Let the record reflect that Mrs. Constantineau has indicated the defendant, Mr. Johnson. You know Hot Boy's actual name when you knew him at Cross Creek?
A No, sir. I didn't. I didn't find out until after the shooting.

Q Now, on the day of the shooting, can you please tell the court what you were doing just prior to the shooting?

A Uh, yes, sir. Myself and my husband were leaving our apartment complex. We were just driving out the entrance. My husband had seen the defendant and told me to stop. I stopped. He yelled out the window what happened the other day. The defendant kept walking. We continued to drive. When we started to drive is when we heard the shots.

Q Now, you said that you saw the defendant walking on the same street that you were driving on?

A Yes, sir. We were leaving the apartment complex as he was walking in.

Q And who recognized him as Hot Boy, your neighbor? Did you recognize him or --

A Yes, sir. I did.

Q So you recognized him. Did your husband point out that that was Hot Boy?

A Yes, sir. He did.

Q But did you independently recognize him to be Hot Boy as well?

A Yes, sir. I did.

Q Now, you said that your husband yelled out the window at him and then you heard shots fired. Did you

actually see Hot Boy shoot at your car?

A No, sir. I did not.

Q What was the, uh, -- what did you see? You said that your husband yelled out the window. Where were you looking when that happened?

A I was looking right at him. When my husband yelled, he was about equal with the driver's side window.

Q Was your car stopped at that point or still in motion?

A When he was talking to him, my car was stopped.

Q All right. Now, was it completely stopped or was it what we call a California stop, kind of a roll and stop?

A It was pretty much like a roll and stop. He didn't even acknowledge my husband when he talked to him.

Q Now, at what point did you look away from the defendant such that you did not see, uh, any shots being fired?

A As soon as he didn't acknowledge, I just kept driving. I looked right at the road.

Q You said that you heard shots fired. Uh, what, if anything, did you see other than the sound of shots fired?

A As soon as I heard the second shot, I turned around and looked behind the vehicle and I saw him

running.

Q Did you see if there was any impact from the shots that were fired?

A Uh, yes, sir. The passenger side front window was completely shattered. And the back window on the driver's side, there was a hole in it. Then, after everything happened, we drove across the street to the IHOP parking lot. We got out of the car. That's when I walked around the back of the car, saw a bullet hole in the actual back panel of the vehicle.

Q You saw Hot Boy on the road as you were exiting, uh, Cross Creek Apartments. Did you see anyone else near your vehicle?

A No, I did not. Not at all.

Q Did you see anyone within eyeshot?

A No, sir.

Q When Mr. Johnson was running away, did you see anyone else?

A No.

Q Did you see if Mr. Johnson had anything in his hands?

A No, sir.

Q You said you crossed at IHOP and then called 911?

A Yes, I did.

Q You recall if you were interviewed by Beaufort Police Department about what happened?

A I was. Initially when we had called the cops, uh, they had come there and just kind of assessed the vehicle. Then we followed them to the police station where myself and my husband were both interviewed.

Q Before you called 911, did you discuss what you were going to tell them with your husband?

A No, sir. Not at all.

Q How soon after the shooting would you say it was before you called 911?

A Probably about 45 seconds, which is what it took me to drive from where I was across the street to IHOP.

Q At any point between when you reported the shooting to 911 and being interviewed by the Beaufort Police Department, did you and your husband discuss exactly what you were going to tell the officers?

A No, sir.

Q Did you compare notes on what you saw versus what he saw so that you could have your story straight?

A When we wrote our statements, we were completely separate from each other. We didn't even have a chance to talk.

Q What was Hot Boy wearing when you saw him by

the side of the road?

A Uh, he was wearing a black t-shirt and a black pair of pants.

Q Did you have any problem whatsoever recognizing him?

A No, not at all.

Q It was a clear sunny day?

A It absolutely was, yes, sir.

Q How far away would you say he was from your car when you saw him and recognized him?

A Maybe about 10 or 15 feet, if that.

MR. STEPHENS: Your Honor, may I approach?

THE COURT: You may.

BY MR. STEPHENS:

Q Lance Corporal, I'm just going to ask you to step down from the witness box for one second.

A Okay.

Q If you would, show the jury where on this map that's been marked as State's Exhibit number 3, where your car was located about the point that the shots were fired at it.

A We were about right here.

THE COURT: You need to speak up, ma'am.

THE WITNESS: Yes, ma'am. We were approximately right here.

BY MR. STEPHENS:

Q That is just to the left of the sign or the marking on the map that says Ambrose Run?

A Yes.

Q Thank you, Mrs. Constantineau. Now, Lance Corporal when your husband leaned across you and yelled out the window what happened -- let me first ask, do you know what he yelled out the window?

A Yes, sir. He yelled what happened the other night.

Q Do you know what he was asking by that question?

A I didn't know exactly what happened until afterwards. My husband said something about someone robbing money.

Q At the time he yelled, did you think that was about some kind of robbery?

A No, sir. I didn't.

Q To the best of your knowledge, was your husband angry at Hot Boy when he was yelling out the window?

A No, sir. Not at all.

Q Was he acting in a confrontational manner?

A Not at all.

Q Did he have any weapons in the vehicle that were out in view?

A Absolutely not. No.

Q Do you have any idea why the individual you know as Hot Boy would shoot at your vehicle?

A No, not at all.

Q After this happened and you went to IHOP, you went by the Beaufort Police Department, is that correct?

A Yes, sir.

Q And after the interview and subsequent to these actions, have you had any effects that went on about this robbery, I mean, about this shooting? I notice that you were eight months pregnant at the time. It had been speculated by one of the officers that you might have been having a problem or concerns over the safety and health of the child. Was that correct?

A Yes, sir. I did wind up going, uh, for weekly stress tests after that incident happened where they strapped a fetal heart rate monitor around my stomach to check the blood pressure and make sure the baby's heart rate was okay.

Q Did you have any medical concerns about the baby's health before this happened?

A No, sir.

Q Thank you.

THE COURT: Mr. Erickson?

MR. ERICKSON: Thank you, Judge. May it

please the Court.

CROSS-EXAMINATION

BY MR. ERICKSON:

Q Mrs. Constantineau?

A Constantineau.

Q Constantineau. Why were you not shown a photo lineup?

A I'm not sure, sir.

Q Did you ask to see one?

A No, sir. I did not.

Q Isn't it true that you were, uh, videotaped with Officer Erdel prior to today?

A Yes, sir.

Q Have you seen that tape?

A No, sir. I haven't.

Q All right. Isn't it true that you did not see the shooting?

A I didn't see him actually fire the gun, no, sir.

Q About how far away were you from the shooter?

A Probably about 10, 15 feet.

Q So you could not see who did it?

A I didn't see anyone else, sir, but I did not see him fire the gun, no.

Q Did you see a gun?

A No, sir.

Q You wrote a statement, I believe, on that very same day.

MR. STEPHENS: May I approach the witness?

THE COURT: You may.

BY MR. ERICKSON:

Q I'm going to approach you and ask you if that's the statement you wrote that day.

A Yes, sir. It is.

MR. ERICKSON: All right. I'd like to mark that as a defense exhibit.

THE COURT: Go ahead and hand that to the Court Reporter.

(WHEREUPON, Defendant's Exhibit 5 is marked for identification purposes.)

MR. ERICKSON: That will be number 5, I believe.

BY MR. ERICKSON:

Q I'd like for you to refresh your recollection and spend a few minutes on what you wrote. You can go ahead and keep that.

A Yes, sir.

Q My question to you is why did you not describe the shooter in your statement?

A I'm not sure, sir. It was pretty much directly

after the shooting. I wasn't thinking straight. I had never written a statement like this before. I didn't know I had to.

Q Is it because you might not have known who the shooter was?

A Absolutely not, no.

Q You say, you testified just now you seen Mykel Johnson, who is sitting here, about five times?

A Yes, sir.

Q You should know about how tall he is?

A Yes, sir.

Q How tall is he?

A About my height, about 5'6.

Q 5'6.

MR. ERICKSON: Judge, may I have the witness come down and stand next to my client?

THE COURT: No, sir.

MR. ERICKSON: May they stand in front of the jury?

THE COURT: No, sir.

MR. ERICKSON: May I have my client stand up?

THE COURT: You may if you would like.

MR. ERICKSON: Go ahead and stand up.

(WHEREUPON, the defendant complies.)

MR. ERICKSON: That's as good as we can do, I

guess.

THE COURT: You may be seated, sir.

BY MR. ERICKSON:

Q There was also a 911 tape. You remember calling in?

A Yes, sir.

Q Were you the one that dialed 911?

A Yes, sir.

Q All right. During that call, were you asking your husband what the shooter looked like?

A No, sir.

MR. ERICKSON: Beg your indulgence one minute please. (Pause.)

BY MR. ERICKSON:

Q Let me ask you -- this is about the 911 tape -- you remember saying that your husband knows who he is?

A Yes, sir.

Q Why didn't you say that you know who he is?

A Cause I've only seen him a couple of times, sir. My husband actually had conversations and things of that sort with him. I hadn't.

Q You also stated in your 911 call that your husband knows where he lives.

A Yes, sir. I didn't know where he lived. He only been at my apartment a couple of times. I had seen

him across the street at the playground.

Q To the best of your knowledge, the only description you made at the time was that he had black pants, black hat and black shirt?

A Yes, sir.

Q All right. I think that's all the questions I have.

THE COURT: Anything further, Mr. Stephens?

MR. STEPHENS: Yes, Your Honor. Just a few questions on redirect.

REDIRECT EXAMINATION

BY MR. STEPHENS:

Q Mrs. Constantineau, look at the defense exhibit that you were handed. Do you still have that or was that retrieved?

A Yes.

Q If you look at that defense exhibit, doesn't it say as we pulled away, he fired two shots that hit our car?

A Yes, sir.

Q It doesn't say that you saw him fire two shots at your car, correct?

A No, sir. It does not.

Q You just testified on direct that you saw no one other than Mr. Johnson outside your car, correct?

A Correct, sir.
Q And you heard the two shots that were fired?
A Yes, sir.
Q You saw Mr. Johnson run away?
A Yes, sir.
Q Is that a conclusion that you made that he fired the two shots that hit your car?
A Yes, sir. There was absolutely nobody else around.
Q Thank you, Mrs. Constantineau. I don't believe I have any further questions. I'll beg the Court's indulgence for just one moment. (Pause.)
Mrs. Constantineau, one more question. You called 911 prior to this statement being given to the Beaufort Police Department, correct?
A Yes.
Q You recall if you identified Hot Boy and what he was wearing in that 911 call?
A Yes, sir. I did. They had asked me what did he look like and I did tell him.
Q So you had already described him?
A Yes.
Q Thank you. No further questions. Thank you.
MR. ERICKSON: I just have a couple of follow-up.

RECROSS-EXAMINATION

BY MR. ERICKSON:

Q Did you think your husband was pissed at Mykel Johnson for allegedly robbing Mike?

A No, sir.

Q On the video, you said just the opposite.

MR. STEPHENS: Objection, Your Honor. Again, this is the attorney testifying. Is there a question there.

THE COURT: You need to pose a question, Mr. Erickson.

MR. ERICKSON: Well, I just did. I'm bringing up a prior inconsistent statement.

THE COURT: You didn't phrase it properly. You have to phrase it properly to be able to ask it.

MR. ERICKSON: All right.

BY MR. ERICKSON:

Q You remember giving a video interview with Officer Erdel?

A Yes, sir, vaguely.

Q You remember the statement you made on that video about the robbery?

A I don't remember my exact words, but I remember speaking with the officer about it, yes, sir.

Q Do you remember saying that your husband was

pissed at Mark for the robbery?

A No, sir. I don't remember that.

MR. ERICKSON: I'd like to play that.

THE COURT: Actually, no, you've already played it once because you couldn't figure out how to play it during that person's testimony. We're not going to play it multiple times.

MR. ERICKSON: All right. It's in evidence. That's all the questions I have for this witness. I've got a rebuttal witness. I'd like to call Officer Erdel back up.

THE COURT: Okay. Sir, they haven't rested their case yet, number one. So you can't call a witness. You need to sit down.

Anything further of this witness at this time?

MR. STEPHENS: No thank you, Your Honor.

THE COURT: Ma'am, you may step down. Thank you.

MR. STEPHENS: Your Honor, the State is preparing to rest. Just want to make sure that our request to publish the exhibits that have been moved into evidence. I don't know that we need to take a recess.

THE COURT: You want to go ahead and publish them?

MR. STEPHENS: Yes, Your Honor. The State requests to publish State's Exhibits 1 -- I believe 1 through 10 or 1 through 11, Your Honor.

THE COURT: Okay. Go ahead and pass them around.

MR. STEPHENS: Your Honor, for the sake of expediency, I would like to try to hand State's Exhibit 3 up.

THE COURT: I think it's already been published.

MR. STEPHENS: Yes, Your Honor. I think the jurors have seen it. The State has nothing else, Your Honor. We are prepared to rest.

THE COURT: Let's go ahead and let those circulate. Let them circulate. Then we'll take a break.

(WHEREUPON, there is a pause.)

MR. STEPHENS: Your Honor, prior to resting, I believe that I have covered jurisdiction on the record. Out of abundance of caution, the State would also ask that the Court take judicial notice that Cross Creek Apartments is in Beaufort, Beaufort County, South Carolina.

THE COURT: Okay.

(WHEREUPON, there is a pause.)

THE BAILIFF: They are finish, Your Honor.

THE COURT: Thank you. Ladies and Gentlemen of the jury, at this time, the State has rested their case. There's some matters of law I need to take up with the attorneys. I'm going to send you back to your jury room. We're going to be back with you shortly. Again, do not discuss this case. It would be inappropriate to do so at this time.

(WHEREUPON, the jury exits at approximately 3:57 p.m.)

THE BAILIFF: The jury is clear and the door is closed, Your Honor.

THE COURT: Okay. We're going to take five minutes. Then we're going to come back and we're going to argue any directed verdict motions.

Mr. Erickson, you need to get it together. That's all I can tell you right now. If you ever, in my courtroom, ask a victim to stand up next to a defendant who allegedly shot at her, I'm going to put you in jail. That was absolutely ridiculous. You could have gotten your client's size in by asking the investigating officer who either arrested him or booked him what his height was.

MR. ERICKSON: That's what I plan to do for rebuttal.

THE COURT: You should have never asked a victim to stand next to a defendant. I've been doing this for 18 years and I've never heard anyone do that.

Secondly, everyone in this room better learn how to use technology or I'm not going to let you do it again in this courtroom. You have wasted so much of this jury's time by not knowing how to cue up a CD. Y'all need to learn how to do it.

Additionally, y'all need to have had, and you apparently did, Mr. Stephens, but have the exhibits premarked. Number one, you were offering an exhibit and you didn't even hand it to the Court Reporter. It's sitting up there with the witness. It's not her job to hand it. She doesn't know any better. Additionally, you can't call rebuttal witness in the State's case. Seriously, y'all, you need to take five minutes. Everyone needs to get their head together and try the rest of this case cleanly.

(WHEREUPON, a short recess is taken.)

THE COURT: All right. Any motions? Mr. Erickson, any motions?

MR. ERICKSON: No, ma'am.

THE COURT: All right. My understanding is we still have a couple of jurors out on a smoke

break. How many witnesses do you intend to call, Mr. Erickson?

MR. ERICKSON: I'm still trying to figure that out now. We have a maximum of two.

THE COURT: Are they both here and we'll be able to have them testify today?

MR. ERICKSON: That's correct. One is in jail. I'm not sure if we want to call him yet or not.

THE COURT: Do we need to have him brought over? Do we have him here?

OFFICER: I'll get him. I'll get him.

THE COURT: He's not in lockup right there though?

OFFICER: No, ma'am.

THE COURT: Let's go get him. Who is it? Do you know who it is?

MR. ERICKSON: Kendalle.

THE COURT: Kendalle? Let's bring him on over. I appreciate it guys. Thank you.

MR. ERICKSON: The other one is Malcolm Moore who is with us in the back.

THE COURT: Very good. Okay. Okay. Mr. Erickson and Mr. Stephens, come approach.

(WHEREUPON, a bench conference is held off the

record.)

THE COURT: All right. Mr. Erickson, any motions?

MR. ERICKSON: Yes, Your Honor. One motion. I make a motion for directed verdict on the grounds the State did not prove all the elements of attempted murder. I don't think they proved it was intentional. I don't think they proved it was malice aforethought, nor did they sufficiently prove beyond a reasonable doubt the identity of the shooter. Based on those grounds, I would ask you to direct a verdict in our favor.

THE COURT: All right. Mr. Stephens.

MR. STEPHENS: Thank you, Your Honor. I believe the State has met its burden, especially today, with the evidence in the light most favorable to the State. There was direct testimony from the victims in the case and direct evidence from Mr. Babecki that Mr. Johnson was the individual who fired the weapon at the car. Evidence from Mrs. Constantineau that he was present and the shots were fired which was circumstantial evidence that he fired at the vehicle.

Your Honor, we believe that the use of a deadly weapon, there could be implied or inferred malice

aforethought with the use of a deadly weapon, Your Honor. Taking the weapon, brandishing it at the car and firing, we believe shows the intent to kill.

THE COURT: Well, viewing the evidence in light of the State, the nonmoving party, I do find that there was both direct and circumstantial evidence that Mr. Johnson, in this case, shot at the vehicle with Mr. and Mrs. Babecki. At this time, I'm denying the defense's motion for directed verdict.

My understanding is the jury is all back, is that correct?

THE BAILIFF: Correct.

THE COURT: Mr. Erickson, are we going to call your first witness, the man that's sitting back here?

MR. ERICKSON: When is the best time to call my rebuttal witness?

THE COURT: Well, you can either call it in your case which is where would be normally done as far as any rebuttal. If you would like to call rebuttal witness, you may do that.

MR. ERICKSON: That's my first witness I'd like to call.

MR. STEPHENS: Your Honor, I do have, uh, one

housekeeping matter. I intend to cross-examine Mr. Moore with the jail call conversation between himself and Mr. Johnson in which he states, you remember I seen you shoot me. I didn't know if you wanted to hear that beforehand if there's any concerns. Again, that's the attempt to give him an opportunity to explain and then to confront him with that prior statement. Given that there have been issues about jail calls, I just want to make sure that --

THE COURT: My question is how do we identify that it's Mr. Moore that states it. How could he have identified it?

MR. STEPHENS: I can ask him if it's his voice, Your Honor, in the jail call. I can -- on rebuttal, I can call Sergeant Vortisch about the jail logs. I do have a copy of the jail logs.

THE COURT: Is Mr. Moore in jail?

MR. STEPHENS: He was, uh, a visitor visiting Mr. Johnson.

THE COURT: Okay. Explain to me again how we are having a jail log and where Mr. Moore was. You wanted to get in this statement that he said you remember I saw you shooting?

MR. STEPHENS: Yes.

THE COURT: This is a conversation between Mr. Moore and I'm assuming Mr. Johnson who was in jail, correct?

MR. STEPHENS: Correct. Mr. Moore was visiting the jail along with Mr. Johnson's mother.

THE COURT: Well, I think you can ask Mr. Moore on cross-examination whether you recall stating that. If he says no, then, uh, I guess you can use it to impeach him. You can ask him, you know, if that's your voice. Is that you speaking with him?

MR. STEPHENS: Yes, Your Honor.

THE COURT: I don't think Vortisch can do anything other than verify again that it's a phone call from Mr. Johnson. No one can verify who's on the other side.

MR. STEPHENS: Yes, Your Honor.

THE COURT: Okay. All right. So Mr. Erickson, who are you going to call first? I just want to make sure that person is in the courtroom.

MR. ERICKSON: I'm going to call Officer Dowling.

THE COURT: Okay. Very good. Let's bring the jury in.

THE BAILIFF: Yes, Your Honor.

(WHEREUPON, the jury enters at approximately 4:12 p.m.)

THE COURT: You can call your first witness.

MR. ERICKSON: Thank you, Your Honor. The defense calls Officer Dowling to the stand.

THE COURT: Come on forward, sir. We're just going to reswear you again out of an abundance of caution, if you don't mind.

THE WITNESS: Yes, Your Honor.

THE COURT: Place your left hand on the Bible. Raise your right hand.

JOSHUA DOWLING

having first been sworn, testifies as follows:

THE CLERK: Please be seated. State your name and spell it for the Court please.

THE WITNESS: First name Joshua. Last name Dowling, D-O-W-L-I-N-G.

DIRECT EXAMINATION

BY MR. ERICKSON:

Q Thank you, Officer. Is it true that you are the lead investigator in this case?

A Yes, sir.

Q Did you have an occasion to make a police report?

A I did the investigative notes in regards to the

case. I didn't do the initial report. That's done by the responding officer that arrives on the scene.

MR. ERICKSON: May I approach the witness, Your Honor?

THE COURT: You may.

BY MR. ERICKSON:

Q This is a copy of the police report I got from your office. Can you tell me if that's authentic?

A It appears to be out of order. In my case file, I have the case, the report. This one appears to be authentic, but it appears to be out of order.

Q So you do have your own case file?

A I have -- documented in my case notes, I have a police report as well.

Q I just really have one question for you to answer. I wanted to ask you in your case notes do you have a height and weight for Mykel Johnson.

A I have -- when I did the -- when I typed out the arrest warrant to arrest Mr. Johnson, the defendant, it's indicated that his height is that of 5'4 and that his weight is 130 on the arrest warrant.

Q Would you mind looking through the report that I have and see if there's any other height and weight measurements for Mr. Johnson?

MR. STEPHENS: Objection, Your Honor. May we

approach?

THE COURT: You may.

You keep looking.

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

MR. ERICKSON: May I approach the witness?

THE COURT: You may.

BY MR. ERICKSON:

Q Officer, I'm going to show you what I'm talking about to speed things up here. All right. Let me refer you to this page here. Mykel Johnson.

A Yes, sir.

Q What do you show there for the measurements?

A That right there indicates a height of 5'3 and weight of 130.

Q All right. Let me just take another minute and see if it says anything else about his measurements.

MR. STEPHENS: Objection, Your Honor.

THE COURT: Basis?

MR. STEPHENS: The State doesn't know where that information is coming from, whether or not this is some form of hearsay that may or may not be --

THE COURT: Why don't you ask him that on redirect?

MR. STEPHENS: Thank you, Your Honor.

THE COURT: Or direct.

MR. ERICKSON: And here is the booking report.

THE WITNESS: Yes, sir.

MR. ERICKSON: What does that say?

THE WITNESS: The booking report indicates a height of 5'3, weight 130.

MR. ERICKSON: All right. Let me keep looking through this report to see if it says anything else. That's all the questions I have for this officer.

THE COURT: Anything further, Mr. Stephens?

MR. STEPHENS: No, Your Honor. Thank you.

THE COURT: All right. You may step down, sir. Thank you.

THE WITNESS: Thank you.

THE COURT: All right. If you will, call your next witness.

MR. ERICKSON: (No response.)

THE COURT: Sir, are you going to call your witness?

MR. ERICKSON: (No response.)

THE COURT: Ladies and Gentlemen of the jury, we are going to take another short recess. Again, do not discuss this case. It wouldn't be

appropriate to do so at this time. We'll be right back with you. Thank you.

(**WHEREUPON**, the jury exits at approximately 4:17 p.m.)

THE BAILIFF: The jury is clear, Your Honor.

THE COURT: Thank you. Sir, do you need a minute to talk to your client?

MR. ERICKSON: I do, Your Honor.

THE COURT: All right. We're going to take ten minutes.

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

THE COURT: Okay. Mr. Erickson, I don't think you need to be talking about -- why don't y'all approach for a minute.

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

THE COURT: All right. Mr. Erickson?

MR. ERICKSON: That's all of our witnesses.

THE COURT: You're going to go ahead and rest?

MR. ERICKSON: Not going to call anybody else.

THE COURT: Okay. You're going to rest?

MR. ERICKSON: Yes, ma'am.

THE COURT: Okay. All right. The State have

anything else?

MR. STEPHENS: We don't have a case in rebuttal.

THE COURT: All right. Let's bring the jury on in. I'm going to go ahead and send them home for the day. We're going to start back up at 10:00 a.m. tomorrow morning. We're going to argue and charge.

Mr. Erickson, when the jury comes in, I think you need to stand up and rest in front of the jury. All right. Thank you.

THE BAILIFF: Jury entering, Your Honor.

(WHEREUPON, the jury enters at approximately 4:36 a.m.)

THE BAILIFF: The jury is seated, Your Honor.

THE COURT: Thank you. Welcome back, Ladies and Gentlemen.

Mr. Erickson?

MR. ERICKSON: Yes, Your Honor. At this time, the defense calls no more witnesses. We rest.

THE COURT: Thank you, sir. Ladies and Gentlemen, at this time, both sides have rested their case. What we have left to do is hear the arguments from the lawyers and also my charge on the law. There's also some matters that I need to take

up with the lawyers before we do all that.

Ladies and Gentlemen, based on the late hour, it's almost about 20 til 5:00. I'm going to go ahead and send you home for the evening and ask that you return tomorrow morning at 10:00 a.m. We're going to go ahead and conclude this case. Normally, we'll start at 9:30. Inevitably, you're going to be sitting back there for the first half hour anyway, so you may as well not be here until 10:00. All right.

Ladies and Gentlemen, again, although you have heard all the evidence in this case, you have not heard the arguments of the lawyers, nor my charge on the law. That would be inappropriate for you to do any of your own independent research or to discuss this case with anyone. I simply ask that you go home, get a good night's rest. We look forward to seeing you all back tomorrow morning at 10 a.m. and we're going to conclude the case. Thank you, Your Honor. Make sure you leave your notes in your seats. Okay.

(WHEREUPON, the jury exits at approximately 4:38 p.m.)

THE BAILIFF: Jury is clear, Your Honor.

THE COURT: Thank you. Any motions?

MR. STEPHENS: No motions from the State, Your Honor.

MR. ERICKSON: Motions? Motion to renew my directed verdict motion based on the same argument.

THE COURT: Okay. Respectfully, I deny it based on the same. I do think there is evidence on which this jury can determine that your client, Mr. Johnson, shot at the vehicle.

I want to go through, y'all, my jury charge with you so that you can anticipate what I'm going to charge in the morning. Does anyone have any specific request to charge before I go through mine?

MR. ERICKSON: Not from the defendant.

THE COURT: From the State?

MR. STEPHENS: Your Honor, other than standard instructions and I think this is probably all going to be covered, Your Honor, the elements of attempted murder, direct and circumstantial evidence, credibility of witnesses.

THE COURT: Okay. Anything other than the standard?

MR. STEPHENS: Uh, Your Honor, just since attempted murder is a fairly new charge, I'd just ask that the malice aforethought and expressed and inferred, uh, expressed and inferred, malice

aforethought be given from the murder charge. I'm not sure how the charge is written for the new attempted murder charge. I'm sure it's the same.

THE COURT: I explain it the same. I explain it the same. All right. Let me just go through what I'm going to charge. I obviously charge presumption of innocence, reasonable doubt, jury is the judge of the facts, I'm the judge of the law. I explain direct and circumstantial evidence, how to judge the credibility of witnesses, uh, the fact that the defendant did not testify can not be considered by them in the jury room. I am going to charge prior inconsistent statements. I'm going to charge identification. I'm going to charge criminal intent and obviously attempted murder and expressed and inferred malice. There was no alibi defense. And the verdict must be unanimous. Obviously, the verdict is just up or down two counts of attempted murder. Uh, anything else from either side?

MR. STEPHENS: Nothing from the State, Your Honor.

THE COURT: Anything else?

MR. ERICKSON: Nothing from the defense.

THE COURT: All right. Y'all, I look forward to seeing you all tomorrow morning at about a

quarter til 10:00. If you all will, be prepared and ready to go and no one will be late. Also, if you would, tonight before you leave, I want to make sure y'all have gone through the evidence and make sure we have them lined up with the Court Reporter particularly if you intend on using any of the evidence tomorrow during your closing arguments. I don't want anyone shuffling, looking for exhibits while you are arguing. You better have them at your hand. You better have them ready to go. All right. Good night, y'all.

(WHEREUPON, the Court recesses for the day.)

PROCEEDINGS

(WHEREUPON, the Court resumes on the 20th day of June, 2012 at approximately 10:00 a.m.)

THE COURT: Sir, anything we need to take up this morning?

MR. ERICKSON: Yes, ma'am. I have a motion.

THE COURT: Okay.

MR. ERICKSON: I have alerted Mr. Stephens to this earlier today as well as your law clerk. I would like to reopen the defense case-in-chief specifically to call one alibi witness. The reason for doing that, Your Honor, if I may proceed?

THE COURT: Yes.

MR. ERICKSON: Yesterday, he was -- and I'm talking about Kendalle Simmons. Kendalle was not dressed for court. He had jail clothes on. I really did not want to have him testify in his clothes. Today, I got his clothes.

THE COURT: So why didn't you have clothes for him and have him dressed out? If you had had clothes there, he would have been dressed.

MR. ERICKSON: Well, our case-in-chief was supposed to be Wednesday in our planning. So today, I had arranged for clothes to be delivered there. I believe Officer Grayson over there said he knew

somebody or had a way of getting clothes to Kendalle today. That's the conversation I remember with Mr. Grayson. That's the reason we weren't ready yesterday.

THE COURT: You understand trials are fluid. You never know when the State is going to end their case. You obviously are the defense. Again, you don't know what witnesses they'll put up. You don't know how long the cross-examinations are. While I will give you this much deference, I truly believe as a trial lawyer, probably the hardest thing to trying a case is having your witnesses here when they need to be here. I think that is a difficult part. I also think smart lawyers get someone else in charge of that, whether it's their paralegal or someone else to make sure that they are there when they need to be. When you see things are moving along, you need to be prepared. With that said --

Mr. Stephens, sit down. Until you are ready to speak, sit down.

I have looked at the case law. It's clearly within my discretion whether or not to allow you to reopen your case understanding this is not any type of precedence I am not to set in any way, shape or form. But in this case, I am going to allow you to

reopen your case to call Kendalle Simmons.

Is he dressed out, y'all?

OFFICER: No, ma'am.

THE COURT: And do you have clothes for him?

And Mr. Stephens, I'm going to let you put on the record everything you want.

MR. STEPHENS: Thank you, Your Honor.

THE COURT: No worries. Just sit down.

MR. STEPHENS: Thank you, Your Honor.

THE COURT: Do you have clothing for him?

MR. ERICKSON: Yes. I was at the jail at eight o'clock. Delivered the clothes to Officer Chaplin, who said he would dress him. That was at 8:30 this morning.

THE COURT: Do we have something back there?

MR. ERICKSON: He told me to leave the clothes at the front desk.

THE COURT: He might take about 10 or 15 minutes at the most, y'all. Is that okay? Thank you. I appreciate it, y'all.

While we are doing that, Mr. Stephens, you can go ahead and put your objection on the record.

MR. STEPHENS: Thank you, Your Honor. The State has no objection to Mr. Erickson being allowed to reopen his case. I believe that the case law is

clear that it's within the Court's sound discretion.

However, Your Honor, just a few points about the reason to reopen his case. Kendalle Simmons is currently a detainee at the county detention center. We don't believe that Mr. Erickson has any kind of right to have Mr. Simmons dressed out in civilian attire. I believe the case law on that issue all deals with prejudice to having the defendant in jail clothes. Clearly, we'd never put a defendant on for trial in jail clothes. Precedent set in Supreme Court case Estill v. Williams, 425 U.S. 501, 1976 case and its progeny of cases all deal with, uh, jail, uh, the defendant being dressed in jail attire. I haven't found anything about a witness and a right for him to be dressed out in civilian attire.

Notwithstanding that, Your Honor, Mr. Simmons has currently pending General Sessions charges. He has a retained attorney, Kimberly Smith with the private bar. We spoke with Kimberly Smith this morning. She was not contacted about Mr. Simmons testifying. He is represented by counsel. He has been approached and asked to testify and --

THE COURT: Mr. Erickson, did you call Ms. Smith, his lawyer?

MR. ERICKSON: No, ma'am. I did not know he had a lawyer.

MR. STEPHENS: That's it, Your Honor. That's all the State's position on that.

THE COURT: Well, I agree with you, Mr. Stephens that there is no right to have a witness dressed out, although I am going to let him be dressed out in this case.

MR. STEPHENS: I understand, Your Honor. Thank you.

THE COURT: Clearly, I am concerned that Mr. Erickson did not contact Mr. Simmons' lawyer. He did give you the name as an alibi witness though, didn't he?

MR. STEPHENS: He did, Your Honor.

THE COURT: Thank you. All right. We'll be at ease until I speak with Ms. Smith and until Mr. Simmons is dressed out. Will someone come let me know when he's done? And we'll go from there. Okay.

(WHEREUPON, there is a short recess.)

THE COURT: All right. I have called over to Kimberly Smith's office. She is at a Worker's Comp hearing in Yemassee. Fred Kuhn is on his way over to speak with Mr. Simmons just to make sure that he

has counsel ahead of time. We will speak to him. When he gets here, I will go ahead and just make a couple of comments to Mr. Simmons. Then I will give them an opportunity to go speak. Okay. So protecting everybody's rights. Mr. Stephens, is it possible, can you pull up for me what he's charged with and can you tell me whether or not Kimberly Smith is appointed or retained?

MR. STEPHENS: Yes, Your Honor. I believe she is retained on the charges on Mr. Simmons or was handling it for the purposes of the preliminary hearing, Your Honor.

THE COURT: Okay.

MR. STEPHENS: Was at least involved somewhat. He has a possession of -- Unlawful Carrying of a Pistol and I believe Possession of a Stolen Pistol, Your Honor.

THE COURT: Uh-huh.

MR. STEPHENS: He pled guilty on some charges in July of last year and has not been sentenced on those yet. There is a co-defendant who is awaiting trial. And I think, as part of the plea offer, his sentencing is deferred.

THE COURT: Okay. So he's already pled guilty though.

MR. STEPHENS: Yes, Your Honor.

THE COURT: Okay.

MR. STEPHENS: I have a copy of the transcript of that plea.

THE COURT: Okay.

MR. STEPHENS: The State's position is it's still a conviction even though he hasn't been sentenced.

THE COURT: Well, let's just let him come over and explain to him what perjury is.

MR. STEPHENS: Thank you, Your Honor.

MR. ERICKSON: Can I ask what those convictions were? What he plead down to or whatever?

MR. STEPHENS: Mr. Erickson has been provided a copy of the transcript. He basically had been charged with Armed Robbery. He pled, I believe, to Assault and Battery and Strong Armed Robbery. I beg the Court's indulgence.

THE COURT: All right.

MR. STEPHENS: Yes, Your Honor. It's an Armed Robbery pled down to a Strong Arm Robbery and an Assault and Battery first degree, Your Honor.

THE COURT: Okay.

MR. ERICKSON: Thank you.

MR. STEPHENS: I can make another copy of

this prior to the beginning if we stand in recess for a few minutes, Your Honor.

THE COURT: I think we'll have a minute.

MR. STEPHENS: Thank you, Your Honor.

THE COURT: You do believe Ms. Smith was retained?

MR. STEPHENS: I do, Your Honor. We spoke very briefly at Mr. Simmons --

THE COURT: What does it say?

THE CLERK: She was court-appointed.

THE COURT: She was court-appointed.

MR. STEPHENS: My apologies. I was mistaken.

THE COURT: Okay. And his deal was that his sentencing would be deferred until he testified against the co-defendant in his trial?

MR. STEPHENS: I think that's the case, Your Honor. Mr. Bannon, the assistant Solicitor, prosecuted Mr. Simmons on that charge, on those charges rather. I do know that they are deferred. I don't know all the details of his plea agreement on that, Your Honor.

(WHEREUPON, there is a pause.)

THE COURT: Mr. Kuhn, thank you so much for coming. What I'm going to do is bring Mr. Simmons out real quickly. You haven't meant him, have you?

MR. KUHN: I have not.

THE COURT: I did not think so. Bring him on out. I just want to introduce him to you.

You are Mr. Simmons?

THE WITNESS: Yes, ma'am.

THE COURT: Mr. Simmons, I'm Carmen Mullin. I am trying the case of Mykel Johnson who I understand you have been called as an alibi witness. It's also my understanding that obviously you were in lockup. I've been told by the State that you pled guilty to Strong Arm Robbery and Assault and Battery first degree last July and that you are going to testify against a co-defendant in another case and at that point, you're going to be sentenced. Your attorney is Kimberly Smith, is that correct?

THE WITNESS: Yes, ma'am.

THE COURT: Mr. Kuhn is one of the head partners of the firm that Kimberly Smith is in. Moss and Kuhn is the firm name. Ms. Smith right now is in another courtroom and indisposed. I asked Mr. Kuhn to come down here and speak to you in regards to your giving testimony. Again, you will have to be concerned about obviously perjuring yourself which would possibly result in new charges. I just

want you to have counsel before you testify and have him just be here while you testify.

Mr. Kuhn, the intent is that if he still wishes to testify and wants to go forward, we're going to go ahead and put him up. We'll be done. It will be quick and you will be out of here.

So if you would, uh, Grayson, just give Mr. Kuhn a little bit of time to go speak with him.

And Fred, as soon as you're ready, just let them know and come back and get me and we'll go from there. Okay. I appreciate it. Thank you.

I will say Kimberly was appointed on this case. I was able to find that out.

We're going to be at ease until he comes back.

(WHEREUPON, a short recess is taken.)

THE COURT: Is Ms. Smith back there? Bring her out here.

MRS. SMITH: Hey, Judge.

THE COURT: Good to see you.

MRS. SMITH: Good to see you.

THE COURT: And I'm sorry we drug you out of a Worker's Comp hearing.

MRS. SMITH: You didn't.

THE COURT: You just finished?

MRS. SMITH: Yeah. I was on the way back

when I got your message. So sorry y'all have been waiting on me.

THE COURT: Do we need to bring Mr. Simmons out?

MRS. SMITH: I think so.

THE COURT: Okay. Let's go ahead and bring him out. Have you had an opportunity to talk with him? Is he going to testify? Do you know?

MRS. SMITH: Judge, myself and Mr. Kuhn have talked with him at length. He's made his decision.

THE COURT: You're going to testify?

THE WITNESS: Yes.

THE COURT: Okay. And Ms. Smith, you'll stay with me while --

MRS. SMITH: Absolutely. I'm not going anywhere.

THE COURT: Again, Mr. Erickson, you understand that when you subpoena someone who has pending charges, has not been sentenced and is in jail, you are required to let their lawyer know.

MR. ERICKSON: Your Honor, like I said, I didn't know he had a lawyer.

THE COURT: He's in jail. There's a pretty good indication he had a lawyer. Okay. Let's go ahead and -- why don't we just have him take a seat

somewhere. You're going to call him obviously, Mr. Erickson.

MR. ERICKSON: I'd like to take a couple of minutes with him right now.

THE COURT: No, we're going forward. This jury's been here since 10 o'clock this morning. You should have spoken with him beforehand. We're going forward.

Let's go ahead and -- you can take a seat, sir, right there just in front of Mr. Kuhn. Yes, sir.

Let's bring the jury in.

THE BAILIFF: Yes, Your Honor.

Jury entering, Your Honor.

THE COURT: Thank you.

(WHEREUPON, the jury enters at approximately 11:36 a.m.)

THE BAILIFF: The jury is seated.

THE COURT: Thank you. Good morning, Ladies and Gentlemen. I apologize for the delay. All good plans don't always go accordingly. Ladies and Gentlemen, at this time, what I am going to do is allow the defense to call one more witness before we go ahead and argue and charge on this case.

So at this time, Mr. Erickson, if you will, call your witness.

MR. ERICKSON: Thank you, Your Honor. The defense calls Kendalle Simmons to the stand.

THE COURT: Come on over here, Mr. Simmons. Right here. Place your left hand on the Bible and raise your right hand.

THE WITNESS: Right here?

THE COURT: Yes, sir. Right here.

THE CLERK: Raise your right hand.

KENDALLE SIMMONS

having first been sworn, testifies as follows:

THE CLERK: Please be seated. State your name and spell it for the court please.

THE WITNESS: Kendalle Simmons. K-E-N-D-A-L-L-E, S-I-M-M-O-N-S.

THE COURT: Mr. Simmons, I'm just going to ask you -- I can hear you pretty well. Speak up if you can so everybody can hear you. All right, sir. All right. Mr. Erickson.

DIRECT EXAMINATION

BY MR. ERICKSON:

Q Good morning, Mr. Simmons.

A Good morning.

Q Tell me where you physically live.

A Lady's Island, South Carolina.

Q All right. What address is that?

A [redacted].

Q How far did you get in school?

A 10th grade.

Q And how old are you right now?

A 20.

Q All right. And what was your last job?

A Working -- I was working at Zaxby's.

Q Do you know somebody named Mykel Johnson?

A Yes, sir.

Q Could you point him out?

A (Pointing.)

Q How do you know Mykel Johnson?

A From school.

Q All right. How long have you known Mr. Johnson?

A Six or seven years.

Q All right. Can you take -- can you take me back to an incident -- do you remember what you were doing on the night of October 28th, 2011?

A Friday.

Q That day, do you remember what you were doing?

A Yes, sir.

Q What were you doing?

A Well, I got up that morning. Went to go get my check around 2:00. Took it to Wal-Mart and cashed it. I

went to a friend, Malcolm Moore's house. I arrived at his house a little after 3 o'clock. He was making music the whole day.

Q Now, where is Malcolm Moore's house?

A On Lady's Island.

Q Okay. Is that close to where you live?

A Yes, sir.

Q And who was there?

A It was me, myself, Malcolm and Mykel.

Q So there was a total of three people there?

A Three people, yes, sir.

Q And you said you made music together?

A Yes, sir.

Q Is that a normal thing that y'all do when you get together?

A Yes, sir. Yes, sir.

Q All right. And then, uh, how long did that go on?

A Until I left.

Q What time was that?

A Around 6:45, 7 o'clock p.m.

Q Now, since you been friends for six or seven years with Mr. Johnson, you know where he lives?

A Yes, sir.

Q Where does he live?

A Cross Creek Apartments.

Q And how far is that from the house you were making music at?

A Around -- well, driving, it will take you like 15 minutes to get there. So it's approximately two to three miles maybe.

Q That's all I have for this witness. Please answer any questions from the Solicitor.

THE COURT: Mr. Stephens.

MR. STEPHENS: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. STEPHENS:

Q Mr. Simmons, you said that you've known Mr. Johnson for six or seven years, is that correct?

A Yes, sir.

Q Would you say that you are good friends with him?

A Yes, sir.

Q Very good friends?

A Yes, sir.

Q Now, let me just take you specifically to that date that Mr. Erickson talked about a minute ago. On October 28th, you said you got up around 2:00 and you went to cash a check?

A To go get it and cash it, yes.

Q Where did you have to go get it?
A Zaxby's.
Q And how far is that from where you lived on Lady's Island?
A Maybe 10 minutes, 10 or 15 minutes.
Q All right. Before you went to Zaxby's to go get your check, did you do anything else to get ready to go get out?
A You mean like, I freshened up.
Q So what time do you think you left your house?
A Around 1:30.
Q You just said that you went to go get your check around 2:00. Okay. So you left the house at 1:30. You went and got your check around 2:00?
A Yeah, cause I can't get my check til 2 o'clock.
Q Fair enough. Now, after you got your check, where did you take it to?
A Wal-Mart.
Q Okay. Zaxby's is pretty close to Wal-Mart, correct?
A Yes.
Q How long do you think it took you to get from Zaxby's to Wal-Mart to cash your check?
A Three minutes.
Q You had to park?

A Yeah.
Q Then you went in to Wal-Mart?
A Uh-huh.
Q Did you have to wait in line to cash your check?
A Yes.
Q Okay. Uh, when you left Wal-Mart, you said it took you probably -- well, it would take about 15 minutes to get from Cross Creek Apartments to Mr. Moore's address on Lady's Island. How long did it take you to get from Wal-Mart to -- approximately how long did it take you to get from Wal-Mart to Mr. Moore's address?
A Around 15 minutes.
Q Okay. And you estimate you got there around 3:00 in the afternoon, is that correct?
A Around 3:00, yes.
Q Did you check your watch when you got there?
A No, sir.
Q Do you keep any kind of journal, Mr. Simmons? Diary or anything like that?
A No, sir.
Q Did you do anything to notate this is the time I got to Malcolm Moore's home?
A No, sir.
Q So you are just estimating that you got there

around 3:00?

A Yeah, I know I got there around 3:00 for sure.

Q How do you know for sure, sir?

A Cause I received a phone call and I looked at the time.

Q All right.

A I get my check at 2 o'clock. It takes me like two to three minutes to get to Wal-Mart and park and stuff like you said. The line was very long. It was a Friday. So I walked around Wal-Mart. My check was cashed like 2:45. So I know I got to Malcolm's house 3 o'clock, around 3:00, a little bit after 3:00 maybe.

Q You said you know what time it was cause you looked down at the phone call you received. My first question is what time was it when you got that phone call?

A Like 3:15.

Q And who was that call from?

A One of my girlfriends.

Q Again, fair enough, Mr. Simmons. Do you know where Mr. Johnson was before he, uh, -- before he got to Mr. Moore's home?

A No, sir.

Q Were you with him any time before 2:00 in the afternoon when you got up and went to Zaxby's?

A No, sir.

Q You said that you left Mr. Moore's home around 7:00 p.m., is that correct?

A Yes.

Q When you left Mr. Moore's home, was Mr. Johnson still there?

A Yes, sir.

Q Do you know what time he went home?

A No, sir.

Q Did you see if he went home?

A No, sir. I left and went home.

Q Do you recall if you saw Mr. Johnson at his home or in Beaufort any time after that date?

A As in?

Q Did you see him around anywhere in town after the date that they were making music on October 28th?

A I believe so. Yes.

Q You saw him out and about in Beaufort after that date?

A Uh-huh.

Q Did you see him at his home or Cross Creek Apartments after October 28th?

A Yes.

Q Mr. Simmons, are you sure that that was October 28th, 2011?

A Friday.

Q I didn't say Friday, Mr. Moore -- Mr. Simmons. I said are you sure that it was October 28th that you saw him at Malcolm Moore's home?

A Yes.

Q How do you know that?

A Cause if it was, that day was a Friday. Because my friend killed himself October 30th, 2010. I know it was October 28th.

Q Okay. You know that you saw Mr. Johnson on October 28th at 3:00 p.m. exactly at Mr. Moore's home? And you said that you saw him at some point later at Cross Creek Apartments. Do you recall when you saw him next at Cross Creek Apartments?

A The exact date and time?

Q In general -- relative to October 28th, when did you see him next to the best of your recollection?

A Probably like, uh, a week later maybe.

Q Okay. Now, Mr. Simmons, did anyone contact you other than Mr. Erickson, the attorney here, did anyone contact you to talk to you about the testimony that you were going to give here in court?

A No, sir.

Q Did you ever have a conversation with Malcolm Moore about how he wanted you to testify or Mr. Johnson

wanted you to testify in court?

A Say that again.

Q Did you ever talk to Malcolm Moore or Mykel Johnson about how they wanted you to testify here in court?

A As in what should I say?

Q That's correct.

A No.

Q Mr. Simmons, you have the street name Hood or Hoodman?

A Yes.

Q Are you aware that Mr. Moore and Mr. Johnson -- are you aware if Mr. Moore or Mr. Johnson had a telephone conversation at Beaufort County Detention Center asking about making sure that your testimony was straight if you had to testify?

A Did I know anything about it?

MR. ERICKSON: Objection. Calls for speculation.

MR. STEPHENS: I asked if he knows.

THE COURT: You can ask the question.

BY MR. STEPHENS:

Q Again, Mr. Simmons, I just ask are you aware of whether Mr. Johnson had a conversation with Malcolm Moore at the Beaufort County Detention Center on or about March

31st of this year when they discussed making sure you had your testimony straight if you testified in court?

A No, sir.

Q So you are unaware of that? And you just said you had no conversations with Malcolm Moore prior to testifying today about the subject of your testimony?

A Say that again.

Q I'm sorry. That's a little too much lawyer speak. You just testified, didn't you, that you didn't talk to Malcolm Moore about how you were going to testify.

A Yes.

Q Did you receive any letters from Mr. Johnson about how he wanted you to testify as his alibi witness in court?

A No, sir.

Q When you saw Mr. Johnson at Malcolm Moore's home on October 28th, do you know if he was armed?

A No, sir.

Q No, he wasn't or you don't know?

A That he wasn't, to my knowledge.

Q So you just mean he didn't show you if he had a handgun on him at that time?

A I'm pretty sure he wasn't. He wasn't armed.

Q All right, Mr. Simmons. Do you know if Mr.

Johnson possesses an weap -- any guns?

A No, sir.

Q You don't know or to the best of your knowledge, he does not?

A He does not.

Q How do you know that?

A Cause I never saw him with a gun.

Q All right. Have you ever been to his home, to the apartment, Cross Creek Apartments?

A Yes, sir.

Q Do you know if he has guns or ammunition in his apartment?

A No, sir. He doesn't that I saw.

Q Thank you, Mr. Simmons.

MR. STEPHENS: Your Honor, I don't believe I have any further questions for the witness.

THE COURT: Mr. Erickson, anything further?

MR. ERICKSON: Nothing further.

THE COURT: All right. You can just keep your seat for a minute.

Ladies and Gentlemen of the jury, I need to take up a very brief matter of law.

Mr. Erickson, are you resting at this time?

MR. ERICKSON: Yes, Your Honor. The defense rest.

THE COURT: Any further?

MR. STEPHENS: Uh, yes, Your Honor. The State intends to call one, possibly two rebuttal witnesses, Your Honor.

THE COURT: Okay. Ladies and Gentlemen, I'm going to go ahead and send you back to your jury room very briefly. Again, do not discuss this case. It wouldn't be appropriate to do so. Thank you.

(WHEREUPON, the jury exits at approximately 11:57 a.m.)

THE BAILIFF: The jury is clear.

THE COURT: Okay. Y'all can take him back. You can step down, sir.

MR. STEPHENS: Your Honor, the State may put up Malcolm Moore. We have a jail call that we'd like to play, a conversation between Mr. Johnson and Mr. Moore. I believe that the State can, because it's already in evidence, the jail calls, if we could just play them. However, if you believe we need to introduce Malcolm Moore's testimony to play it, he's already been subpoenaed.

THE COURT: Is that him back there?

MR. STEPHENS: Uh, yes, Your Honor. Like I said, the State's position is that the jail calls already in evidence. We're prepared just to play.

THE COURT: All the jail calls are on the CD?

MR. STEPHENS: Yes, Your Honor.

THE COURT: Did you pull out certain ones? I thought there was a lot. My understanding is there was an enormous amount in this case.

MR. STEPHENS: Yes, Your Honor. There are over 400 jail calls.

THE COURT: And did you give the jury all 400 or do you have a disk hopefully narrowed down?

MR. STEPHENS: It is a disk, Your Honor. I mean, all the jail calls are on one disk. They don't have a computer to play it on, Your Honor.

THE COURT: Well, they'd have to ask for it. But I guess my question is how do you get the jury to zero in on the jail calls you want them to if you have them all in evidence.

MR. STEPHENS: I also have a disk, Your Honor, with just that jail call on it. I have a jail call with the prior -- the prior jail call I admitted on it, but it's got two other calls on it. I have a disk with just the call I want to play and the testimony of Mr. Simmons on its own disk, Your Honor. I can have it marked appropriately, Your Honor.

THE COURT: I don't know if you can use it to

impeach him. It's a conversation that he wasn't a part of. I don't think it's really for impeachment. I think you do really have to call, uh, Mr. Moore who is in the back of the courtroom and you say he's under subpoena. If you want to go ahead and pull him up here and get them to play it and then go ahead and say is this you speaking with H.B.

MR. STEPHENS: Yes, ma'am.

THE COURT: We'll go ahead and do it that way. Anyone else after that do you think?

MR. STEPHENS: No, Your Honor.

THE COURT: I think we're good.

MR. STEPHENS: Okay.

THE COURT: Okay. Let's do this. Your motions are renewed, Mr. Erickson. I respectfully deny your motion again for a directed verdict based on the same thing I've done before since you have now rested your case. We're going to go ahead and bring them in.

We'll just go ahead, for the record, you will renew your motion again for directed verdict just right now after the rebuttal. But we're going to go straight into closings and argument. This jury has been waiting a long time today. Okay. Any objection, Mr. Erickson?

MR. ERICKSON: Your Honor, I think I needed to publish one of my last exhibits.

THE COURT: Which one was that?

MR. ERICKSON: Number 5. I tried to do that yesterday.

THE COURT: You have now rested twice and not done everything you needed to do? Okay. Which one did you want to publish?

MR. ERICKSON: Defense number 5.

THE COURT: Okay. It's going to go to the jury anyway. It's a piece of evidence. So if they are going to have it back there, we're not going to go ahead and show it as a viewing right now.

MR. ERICKSON: That's all I need.

THE COURT: Okay. Everyone else ready to go? You ready to call Mr. Moore?

MR. STEPHENS: Yes, ma'am.

THE COURT: You are Mr. Moore, correct?

THE WITNESS: Yes, ma'am.

THE COURT: All right, sir. Let's bring the jury back in.

THE BAILIFF: Yes, Your Honor.

THE COURT: Again, we're going to go straight into closing arguments, y'all.

MR. STEPHENS: Appreciate it, Your Honor.

Thank you.

(WHEREUPON, the jury enters at approximately 12:02 p.m.)

THE COURT: Thank you. It's my understanding you'd like to call a rebuttal witness, is that correct, Mr. Stephens?

MR. STEPHENS: Yes, Your Honor. Thank you.

THE COURT: All right.

MR. STEPHENS: The State calls Malcolm Moore.

THE COURT: Come on forward, Mr. Moore. Come right around here, sir. There's a Bible over here. If you will, place your left hand on the Bible and raise your right hand.

MALCOLM MOORE

having first been sworn, testifies as follows:

THE CLERK: Please be seated. State your name and spell it for the court, please.

THE WITNESS: My name is Malcolm Moore, M-O-O-R-E.

DIRECT EXAMINATION

BY MR. STEPHENS:

Q Good morning, Mr. Moore. Do you know the defendant in this case, Mykel Johnson?

A Yes, sir.

Q And would you say that you are a good friend of

his and his family's?

A Yes, I would say that.

Q In fact, have you been sitting with his family during this trial?

A Yes, sir.

Q Now, how many times would you say you went to visit Mr. Johnson while he's been at the detention center?

A Probably like three or four.

Q Three or four. So it would it be fair to say you may have visited him dozens of times?

A No.

Q Okay. Do you recall if you visited him on March 31st, 2012?

A I didn't recall the date, sir.

Q Do you recall a conversation with him where he discussed the testimony, the potential testimony of Hood or Kendalle Simmons?

A I mean, he always talked about a lot of stuff. You have to really refresh my memory.

Q You recall if he had a conversation with you where he said you had to make sure Kendalle Simmons' testimony was straight if he came to testify?

A I mean, he was stressing. He always asked about a lot of stuff. I'd shoot him little short answers

just so he wouldn't have to worry about it.

Q So you don't -- you do or do not recall if he said Kendalle Simmons testimony had to be straight.

A No, sir.

Q You don't recall?

A No, sir.

MR. STEPHENS: Thank you, Your Honor. I've got no further questions for Mr. Simmons.

THE COURT: Okay. Mr. Erickson?

MR. ERICKSON: No questions.

THE COURT: All right. You may step down, sir.

THE WITNESS: All right.

THE COURT: All right. Any further from the State?

MR. STEPHENS: No, Your Honor.

THE COURT: Ladies and Gentlemen, the State has now rested as well.

For the record, Sharon, again, the motions are renewed and denied based on the same grounds.

Ladies and Gentlemen, at this time, what we're going to do is go ahead and hear the arguments from the attorneys. I'm going to charge you on the law that's applicable to this case. I'm going to get this case sent to you.

I will also tell you that, based on the late hour, I believe the bailiffs are back there ordering pizza or something for you to feed you so that by the time we're finished, you'll be able to go back and begin your deliberations and have something to eat. Ladies and Gentlemen, so if you don't mind, again, anyone need a break? Are you all okay?

Mr. Stephens.

MR. STEPHENS: Thank you, Your Honor.

I was about to say good morning, folks, but I think good afternoon may be more appropriate. I get to speak to you twice today so bear with me. You may be tired of hearing my voice and what I've got to say. First, I'd like to talk to you a little bit about what Mr. Johnson is charged with, the evidence that you've heard and the burden the State has to prove and my recitation of what I think the evidence is and what we did prove.

Now, the Court will instruct you that the arguments of counsel are just arguments. This is not the evidence. What I'm saying to you is not the evidence. If there's some conflict between anything that I say and that Mr. Erickson says, between what you remember or your notes -- I applaud you all for being diligent and taking notes. Please feel free

to disregard and go with what you know the facts are. You are the finders of fact.

Now, as to the charges, Mr. Johnson there is charged with Attempted Murder times two. The judge will shortly instruct you as to the elements of attempted murder. Basically, what it means is in Beaufort County, South Carolina, Mr. Johnson did with the intent to kill and malice aforethought, which will also be defined that he did act in attempting to kill the victims in the case.

Now, you can all understand kind of what attempt to kill is. You try to kill someone. There's some other legal terms that are going to be defined as far as malice and malice aforethought. You will talk about whether it's direct or inferred. In this case, you are going to receive an instruction that use of a deadly weapon in a shooting like this, when there is a conscious decision to use that weapon showed such a disregard for human life that that -- from that you can infer an attempt to kill and malice aforethought. When Mr. Johnson fired that weapon, he understood the probable consequences of it. He could hit and kill someone. It was aimed at the vehicles of the victims.

You heard their testimony that they were in the car. They had spoken with him. It wasn't like he was firing up in the air and the bullets just happened to come down and penetrate the car. So those are the elements, intent to kill, malice aforethought and actual -- the actual act of intent to kill or the intent, the attempt and the malice aforethought.

Now, what evidence did you see to prove those elements? The first thing you heard is the 911 call. If you recall the fear in the voice of Mrs. Constantineau when she was on the phone with 911, it was immediately after the incident. Mrs. Constantineau and Mr. Babecki, they were not thinking about what might come in at trial or getting stories straight. They told you exactly what happened. The person they recognized as Hot Boy, who lived in an apartment complex had shot at them. They can't tell you why. We'll talk about motive in a minute.

But what you heard on the 911 tape was his name, his description and what happened. That's pretty compelling evidence immediately after the incident.

COURT REPORTER: I'm sorry, Your Honor. I'm

having trouble hearing. I apologize.

MR. STEPHENS: I'll try to speak up.

THE COURT: Speak up.

MR. STEPHENS: I apologize.

THE COURT: Thank you. Thank you.

MR. STEPHENS: The next piece of evidence you saw was this, State's Exhibit number 1, it's the photo lineup that Mr. Babecki did. It clearly states that he recognized this suspect, Mykel Johnson, as the person that shot him. Lets up any confusion as to whether Hot Boy was Mykel Johnson. You also heard the telephone call from the jail and you might have wondered what all the setup to listen to a 10-second snippet of conversation. In that jail call, Mr. Johnson clearly says this is Hot Boy, which is his street name. So let there be no confusion when the victim said Hot Boy did this, they are talking about Mykel Johnson.

You saw the pictures of the scene. The pictures are consistent with the story that the victims told. You see the shattered glass from the passenger side windshield. You see the impact holes from the bullets that penetrated the car. The shattered windshield is there. The other bullethole is there. There's the bullet that was recovered

from the vehicle which you also saw in court.

Again, Ladies and Gentlemen, when I started this case, I talked about don't be fooled by the fact that he's 16. His childhood has ended. He has the calculating mind of an adult. He took the calculated act of aiming and shooting this vehicle. Consider that he was also running. We're going to talk about that flight as well.

Other than the 911 call and the photos, you heard the victim's testimony from Mrs. Constantineau and Mr. Babecki. They have been completely consistent. You saw the prior statement from Mrs. Constantineau that Mr. Erickson tried to introduce to show there has been some change in their stories or something that's not been consistent. Please consider where there might be variations between some of the things that happened before the shooting, things that Mr. Babecki might not have wanted to be completely forthcoming about. He did admit that he's made small purchases of marijuana from Mr. Johnson. That's something he didn't admit first off to the law enforcement. But if you think about it, it's completely understandable. Who wants to walk in the first time they meet a police officer and say, by the way, I've made small purchases of

marijuana from the person that shot at me. It had nothing to do with the actual shooting.

They had been completely consistent from the 911 call to the statements they wrote to the interviews that you watched to their testimony here is the fact that on October 28th, some time around 2:00 in the afternoon, they were leaving their apartment complex. They saw Mr. Johnson on the side of the road. Mr. Babecki yelled out the window something about the other day. And Mr. Johnson fired at him.

Mrs. Constantineau told you she didn't actually see him fire. I asked if that was a conclusion you made. She said yes. She concluded by the fact that she heard the pistol shot and saw the shattered windshield that she inferred that, uh, and seeing Mr. Johnson before and afterward that she concluded that he shot at her.

When the judge gives you your instruction, one of the things she's going to talk about is direct and circumstantial evidence. Direct evidence is like Mr. Babecki gave, that he saw Mr. Johnson aim a pistol at their vehicle and shoot. Circumstantial evidence is something from which you can infer additional facts. That's kind of confusing. I know

it is for me when I try to think about it. But I'm a prior military attorney. In the military, we give an example of what we're talking about when the judge gives that instruction. The example we usually give is if you look outside and you see that it's raining, that is direct evidence that it's raining. If you look outside your window and you see that the ground is wet, that's circumstantial evidence it was raining.

The important thing to consider is both types of evidence are equally admissible. You should give weight to both of them in court. The fact that Mr. Babecki actually saw the shooting, Mrs. Constantineau saw the defendant, then heard the rounds and then saw him running away with no one else in sight, that's circumstantial evidence that that was Mr. Johnson who fired the pistol.

Now, that's compelling enough that there was the evidence that these witnesses had been completely consistent in their stories. That's not all you can consider in this case. I also mentioned in the beginning that you can consider the flight of the defendant from the scene as evidence of his guilt. That is -- when we talk about circumstantial evidence, that's some more of this circumstantial

evidence that you can consider, that he fled the scene. That he knew that they were looking for him and he was in hiding in Yemassee when he was apprehended. You can consider the statements he made when he was apprehended.

I just want to make sure. Am I still talking too --

COURT REPORTER: Good.

MR. STEPHENS: Okay. You can consider that he said not why do you want me, what's this all about or even can I call my mom. No, he said I was going to turn myself in when I got a lawyer. He said how did you find me. Thoughts of a calculating mind and not a child. Also, the thing that a person who knew they were guilty would ask.

Besides that, one of the things that we haven't talked about but has been moved into evidence, you're going to have a copy of the text messages from Mr. Johnson's cell phone. You heard testimony from Officer Crumpton about the computer extraction that they do on a cell phone to pull these text messages. Mr. Erickson referenced some of the text messages from Frank Babecki. Mr. Babecki admitted about trying to set up a purchase of marijuana.

There are other messages in here that I'd urge

you to look at. One, I mentioned Mr. Babecki's text message to Mr. Johnson asking or saying, hey, good job, buddy, trying to kill me and my pregnant wife. That's something that he said Mr. Johnson never replied to. Consider that. Text message about trying to kill them. No response.

What else is there? Well, if you look on October the 23rd, there's a text message from Mr. Johnson's mother to Mr. Johnson saying that she's going to have to get him and his guns out of her house. Mr. Erickson elicited the fact that there was two different types of ammunition for weapons that weren't used in this incident that were in his apartment, two different types of ammunition. Now, that's some evidence that he has guns. There's a text message from his mother that he has guns.

So folks, you also have to consider the testimony that was provided by Mr. Simmons. Mr. Simmons says he was somewhere else. What he said was around 3 p.m., because I got a phone call. Mr. Johnson was at Malcolm Moore's home and they were making music.

Well, the State argues two things with respect to that. One, Mr. Simmons, despite his friendship and any bias to fabricate, may be completely honest

to the best of his recollection. He may have seen Kendalle Simmons -- excuse me, Mykel Johnson at Malcolm Moore's home some time after 3:00 p.m. on October 28th. He doesn't say where was Mr. Johnson before that. What he doesn't say is where was Mr. Johnson after that. It is completely understandable and plausible that Mr. Johnson got to Malcolm Moore's home.

Malcolm Moore wasn't called as an alibi witness, so I don't know how Malcolm Moore got there. Excuse me. I don't know how Mykel Johnson got to his home if that's what happened. I don't know where Mykel Johnson was taken to after they were done making music. He wasn't taken back home.

You've already heard testimony that on the search, and it was under observation by the Beaufort County Police Department and that Mr. Johnson fled the county or fled the area. That's option number 1. Mr. Simmons could be completely truthful. Only Mr. Simmons knows for sure if he was completely truthful. And he could be just not knowing. Or he could be trying to help his buddy out, a guy he's known for six or seven years, a good friend. He doesn't really have to make up a story. All he has to do is be certain that this was October 28th.

Now, there is some credence to that, Ladies and Gentlemen, he says he saw Mykel Johnson at his apartment after this date. He says that, uh, he was still around town when we already know Mykel Johnson fled the area.

Also worth noting, when you are considering the credibility of Mr. Simmons, that he said Mykel Johnson doesn't have guns. I know this for a fact, he does not have guns. Well, what do we know for a fact? He has guns, according to his mother. He has ammunition according to the pictures that you saw and the testimony of Officer Dowling. Mr. Simmons is not credible. If you want to consider his testimony in the best light possible, he is simply unaware of what happened before he got to Malcolm Moore's house.

So elements -- you have testimony direct and circumstantial that Mr. Moore or Mr. Johnson fired a weapon, two rounds penetrating the vehicle of the victims. That is attempt to kill. That is intent to kill because he made a conscious choice. He made an instantaneous choice. Apply the evidence you've heard to these elements. Malice aforethought, use of deadly weapon, you can infer he was actually trying to kill these people. That was a conscious

decision he made. All the elements are met.

You are going to hear about the State's burden, not just the proof, but proof beyond a reasonable doubt. The judge is going to give you that definition. I would submit in the military, we give the example that reasonable doubt is not doubt that is fanciful or imaginative. Just because there is some possible explanation, no matter how outlandish, a second shooter on the grassy knoll, that is not reasonable doubt.

Reasonable doubt is a doubt that would cause you to pause on something that was important to you. In this case, there is no reasonable doubt. Mr. Moore -- excuse me, Mr. Johnson fired the rounds, attempted to kill the victims. That's what happened.

I talked to you a minute ago about the text messages. We talked about the flight of the defendant. Even though he says I was going to turn myself in, also consider the texts that were then sent from his aunt around November 5th, 2011. Was Mr. Moore [sic] actually going to turn himself in or was his flight only a pause? I submit Mr. Moore [sic] is a calculating criminal. He was planning on fleeing, not just Beaufort, but fleeing farther.

The diligent actions of the Marshall Service here today.

Ladies and Gentlemen, when you consider the elements of the crime of attempted murder that the judge is going to give you, the evidence that you heard, physical evidence that you've seen and the testimony you've heard, and you consider the burden of the State to prove this case beyond a reasonable doubt, I'm confident you are going to arrive at the evident conclusion that we have met our burden, that we've shown beyond a reasonable doubt that Mr. Johnson attempted to murder the victims in this case. Thank you.

THE COURT: Thank you, sir.

Mr. Erickson.

MR. ERICKSON: Thank you. May it please the Court, Your Honor.

I'm going to need a tripod over there.

(Pause.)

Is that close enough for y'all to see?

Can we move it a little closer? Put it right there in the middle.

How about that? Is that better for everybody?

All right. I always like to thank the jurors for being here and trying to help us solve this case

today. I've got a closing statement there. I'll be referring to it point-by-point. The first thing I want to say is these are awesome charges against my client, my 16-year-old client, Mr. Johnson for attempted murder. That's about as tough as it gets.

The way this statement is set up, it's set up almost like a scale. On one side, we have evidence of guilt. On the other side, we have reasonable doubt which leans more towards evidence. The judge is going to give you a definition on what reasonable doubt is. But for now, according to the case law, reasonable doubt is anything that makes you hesitate to act.

So to start out, the way I'm going to -- now, you can use any way you want to try to decipher all this evidence you've heard during these last couple of days. The way I'm going to lay it out is I'm going to lay it out first with the police officers, what they had to say. And much of them testified the same. For instance, when we talk about the weapon, all of the officers said there was no weapon found. When there's no weapon found, that led us to reasonable doubt. No weapon was attributed to Mr. Johnson.

The other thing I have on this statement is

when I looked at this, the big picture, I saw a lot of missing and mismatched evidence. I told you that in opening statement. That's why I call this defense the M&M defense. There's an M or a double M almost with every piece of evidence. The weapon is the first example of missing evidence.

You look at the next piece of evidence all the officers testified to. They talked about the bullets. Everybody testified there were two shots. I have an exhibit that shows what kind of bullets that were attached to Mr. Johnson during the search of his bedroom. I have these Exhibit 1 and 2. One of them is the shell box with the .22 bullets. Here is the box of rounds. There's 50 rounds here. There's only one missing. I call that a mismatch. There's two shots, only one bullet missing. So it couldn't have been from this ammunition. Plus Officer Dowling testified it was probably a .45 slug. These are .22s. Again, that's a mismatch.

Let's go down to the next piece of possible evidence. Ballistics, that's the scientific name for gun examination or bullet examination. There was none. The State put on no ballistics expert. That leads to reasonable doubt. That's missing evidence.

Let's go down to number 4, gunpowder residue found on the defendant's hands. There was no test done for one reason or another. Again, that's an M, that's missing evidence the State does not have.

We go down to the next piece of possible evidence. No DNA. Since there's no DNA, that's missing evidence. That's reasonable doubt. No fingerprints. Missing evidence. Reasonable doubt. No confession. Missing evidence. Reasonable doubt. No written confession.

Number 8, no forensic evidence. That just talks about you heard the officers say forensic evidence is scientific evidence. That's kind of a whole ball of wax. The last thing I have is evidence that the officers talked about, the perimeter set up. I think that's important.

When I had Officer Dowling down there, we looked at the map. You'll get to see it. He was pointed out where the officers spread out. It was fairly quick. There were a couple of officers already in the vicinity. So if somebody was running, and I'm going to say Mr. Johnson was running, there's a good chance he would have been caught. Officers have radios. They've got dogs. They've got cars. They had the perimeter. They

should have caught Mr. Johnson in his own neighborhood if, in fact, Mr. Johnson was there. That's a mismatch. They tried to do that but they found nobody. There's no match, so it's a mismatch. Okay. Now, that's all I have to say about the officers.

Now, we got to talk about the witnesses because what they say up there is evidence. Frank was the first -- Frank Babecki was the first witness. You will see the video. I know I bothered you a lot by playing the video and -- but I wanted to make sure you saw it. You have another chance to see it if you want. I'm just going to say, there was a lot of inconsistent statements. You heard him up here. Even when he was on the stand, uh, he could not be straight. He could not give two answers the same.

So I want you to -- if you don't remember the video, I want you to look at the video, particularly statements about, uh, in the video Frank was asked if he smokes marijuana. His answer was no, never. But there was a text from the day before that's in evidence.

This is Defense Exhibit 4. You will see two text messages. One from 10/26 and one from 10/27. Mr. Babecki did not deny doing these. He's trying

to buy marijuana here. So why does he say he's never smoked or doesn't smoke? That's an inconsistent statement. Why does he want to lie? I don't know. Frank even went up on the stand and said he was driving at one point. I had to correct him. He said, oh, that's right. I was a passenger.

Let's talk about this same phone text and the fact there's another thing, another problem. I asked him about this. I said this looks like it came from your phone. This is Frank. This is your name. This is your phone. He said, yeah, that was my phone but I let somebody else use my phone. I was trying to help somebody else get some marijuana. It wasn't for me. Wow, that's a story.

He makes another statement down here, number 5. He was asked why did he have H.B.'s phone number in his cell phone. Mr. Babecki said, well, I had it for Mike. Well, I think he had it because he really wanted to buy some weed. So again, he's not straight. Inconsistent statement. Then, he talks about that he was 25 feet away in the video. He says 20 away up here.

That's different than what Desiree says. Desiree says that she was only 10 feet away. I'm going to talk to her about right now. What's

important for Desiree is that she said she did not see the shooter. And I think that's big. She's closer, 10 feet away and doesn't see the shooter, how does Frank see the shooter at 25 feet away? Desiree says she did not see the gun. That's also big. Didn't see the gun. Didn't see the shooter. But you know what, that's incredible.

If you look at the two witnesses, you're going to have to give weight to these witnesses. That's what I call credibility. I think you're going to have to give very little weight to what Frank says because of all the inconsistent statements. I'm going to say Desiree is the more credible witness. In this case, her credibility helps the defense because of what she said there. She did not see the gun, did not see the shooter. And you know what, that makes sense.

Really, at the end of the day, you've got to do what makes sense. I'll tell you why it makes sense. I'm going to use one of the State's exhibits. It makes sense because when the car was driving by, whoever shot, made the shots, did it from the rear. You can see the bullets enter the rear left side and then came out the front. What Desiree is saying is totally true. You can't see who is shooting you

from behind. But Frank said, oh, he saw him. He saw the shots. He saw the gun.

The last thing I want to talk about is motive. This is our defense. Our motive here is Frank was -- and I'm going to use the word pissed because that's what Desiree says in the video. Frank was pissed that his friend, Mark's brother, was robbed the night before. Frank was pissed. Thought it was Mr. Johnson that did it. Wanted to pin this shooting on Mr. Johnson. That's the motive. That's the motive. That's the why. That's the reason for pinning this whole thing on Mr. Johnson, to get Mr. Johnson in trouble for something he didn't do.

When I cross-examined Frank here about the robbery, Frank was inconsistent again. First, he said he did blame Mr. Johnson. Then he said he didn't. Was inconsistent. Can't believe what Frank's saying. Frank is the main reason we're here today. We wouldn't be here if Desiree said she didn't see the gun or didn't see the shooting. We're here because of Frank.

I'm going to talk about the defendant not wanting to testify. The judge is going to give you an instruction there. He's 16 years old. I don't know you were when you were 16. I didn't learn to

talk in a courtroom until I was much older. He doesn't like talking in front of people. But he has friends. He has friends and he has a good one up here that you listened to today and I thought he was truthful. The prosecutor had a hard time finding any untruth.

The alibi, that's who exactly I'm talking about. He's our alibi witness. He's the witness that comes up there and says that he was with Mr. Johnson at the time of this incident. They were making music together. That's what they do. That's what Mr. Johnson hopes to do when he grows up. He wants to make music. Too bad you didn't get a chance to hear any of that today.

I'm just about done here. I want to go back to this other side. There's one point I wanted to get in. It's about tools of the trade. All these potential evidence tools that the police could have done or got in one way or another. Those are tools of the trade. Those are tools that would help you decide this case. That's all physical evidence, forensic, scientific evidence that you can touch, feel, smell. That's -- that would corroborate, uh, the witness testimony. There was no corroboration. None of that.

And to make you understand that those are the tools of the trade in a court of law. If you had a builder building a house and he didn't have all the tools he needed to build that house, that house would not have been built. That's what I'm saying today. You can not build this case, uh, without that other evidence. What you're doing is you're taking somebody's word and that's it. You've got to have more than that. So those are the tools of the trade and the state is missing those tools. They are not in the toolbox today. They can't build a house today.

To sum it up here, credibility really decides motive. That's our second biggest offense. You have got to weigh and balance how much weight to give each one of those witnesses up there. I'm going to say Frank does not deserve much weight. The burden of proof, the State has that burden of proof and its beyond a reasonable doubt. If you think you have to hesitate, speculate, say the word probably, that's not good enough for this court. With every piece of evidence, you've got to say beyond a reasonable doubt that is helpful to convict Mr. Johnson.

I'm going to say to you that there's a lot of

reasonable doubt. Each one of those yeses I had on the other side is reasonable doubt. The State has to overcome each of those yeses to give you that reasonable doubt. I thank you for being here and listening to our case today.

THE COURT: Mr. Stephens?

MR. STEPHENS: Thank you, Your Honor. I'm going to try to be brief although this is a very serious charge. I'm going to try to give it as much time as it needs. What is this case about? Mr. Erickson came up with some different theories about what he believes the case is about. The one that we most need to disabuse ourselves of is this idea that this case is --

COURT REPORTER: I'm sorry, Your Honor. I am so sorry. I just can't hear.

THE COURT: That's alright. You need to speak up just a little bit more, Mr. Stephens. I know it's hard. You've got your back turned.

MR. STEPHENS: I know. I'm just surprised.

This case is not about Frank Babecki. He is the victim in this case, as is his wife. Mr. Erickson said that Frank Babecki was the main reason that we are here today. That is simply not true. Mykel Johnson who is sitting right over there is the

main, sole, and exclusive reason that we are here today.

Mr. Erickson said that the State did not have the proper tools to build a house. Well, this is not a metaphor, folks. These are real peoples' lives. But if we were to go into that metaphor, we have built the house. Mykel Johnson built it himself. He provided the tools. He pulled out a gun and shot at the victims. You seen the evidence of the shooting. He fled from the scene. He made the statements about the crime. Folks, Mykel Johnson built this house himself. Now, he has to live in it.

What else do we have for theories or what this case is about? Well, Mr. Erickson told you in the beginning, in his opening that he believed this was about mismatched or missing evidence. He made that analogy. I'll address what's missing. First, live testimony in the history of jurisprudence has always been the best evidence for a jury to hear. You judge credibility and you can tell based on your knowledge and experience, knowledge of the ways of the world that people are telling the truth. You can believe witnesses totally, not at all or somewhere in the middle. You can believe some

witnesses or no witnesses based on your own judgement. You heard the victims. Were they credible? Were they shot at? You heard the 911 call. Were they shot at? There's no evidence that's missing. You heard the evidence.

What is Mr. Erickson talking about about evidence is missing. He mentioned a gun. There was no gun. There were no ballistic examinations. He mentioned gunshot residue. Ladies and Gentlemen, I submit that evidence was not present because each one of those items, including DNA and fingerprints, fled the scene with Mr. Johnson. There was no gun because the shooter took it with him. Maybe he disposed of it, maybe he threw it in the woods, maybe he took it to Yemassee, maybe it ended up in a river somewhere. We don't know. And it's a good thing that you don't have to have a weapon to convict cause then all a shooter has to do is get rid of that weapon and case closed. We got to dismiss. That's not true.

You heard the evidence. The gun disappeared when the shooter fled the scene. That shooter was Mykel Johnson. The gunshot residue, which would have been on his hands or clothing, that fled the scene when he left. There's no way to test that

when the shooter leaves. And it's not required, Ladies and Gentlemen.

DNA fingerprints. Again, you heard me ask Officer Dowling if there's any way to process a scene for DNA fingerprints. There's not testimony that the shooter touched the vehicle or touched anything else other than the gun that he was carrying that could be tested. Again, that evidence fled the scene. There's nothing missing. You've heard the evidence. You've seen that beyond a reasonable doubt, Ladies and Gentlemen.

Assuming this did happen, well, Mr. Erickson stated that Frank was, and I quote, pissed and that's why this was fabricated. This whole thing was fabricated against Mykel Johnson. Ladies and Gentlemen, just ask yourselves whether that's reasonable. You heard the 911 call. Minutes or seconds after the shooting, Mrs. Constantineau was on the phone saying this is what happened, this is who did it. It was Hot Boy.

Is it reasonable that they stopped somewhere between Cross Creek Apartments and the IHOP parking lot and came up with this plan to frame Mykel Johnson? No doubt that someone did shoot at the car. You seen the pictures of broken glass. You

seen the puncture holes in the vehicle. This was a real shooter. Mykel Johnson did it. This whole notion of a mismatch of information is simply not true. This idea of fabricating a case based on a motive that some third person was robbed and somehow Frank Babecki is now trying to get even with Mykel Johnson, it just simply doesn't make sense.

However, Mr. Erickson did indicate that, uh, there was this robbery or ripping somebody off for drugs. Frank Babecki confirmed it. Assuming that's true, what was in the mind of Mykel Johnson? Car pulls up. Someone asked what happened the other day. For whatever reason -- there's been ample evidence that there was drug distribution involved. Mr. Johnson is not going to go to the police. He does self-help. Pulls a gun. That's how he makes his statement. He fires. Again, calculating actions of an adult.

So what I think the case is about -- and my opinions are not evidence, but to me, everything keeps coming back to guns. Whatever your position is on guns, on control or Second Amendment right to have guns, everyone has to agree that guns are prevalent and all over the place. They are a culture. And unfortunately, they all to frequently

end up in the hands of someone who should never have a firearm.

There's ample evidence that Mr. Johnson had guns. There's ample evidence that he, uh, as Mr. Erickson just said, how he wants to make music when he gets older. Now, I don't know what kind of music he wants to make. Quite frankly, although I don't like it, if he wants to make music that's about selling drugs or shooting at people, that's fine. Because you know what, that's artistic expression. But if you live that out, you lose the line between reality and what's acceptable fantasy if you actually try to live that out, the drugs and the guns. That, I have a problem with, Ladies and Gentlemen.

I don't know what was going through Mykel Johnson's mind when he pulled out a gun and he shot at these two victims. The evidence prove he did it. We've met our burden to show that Mykel Johnson attempted to kill these victims. Now, the case is going into your hands. You have the awesome responsibility and the duty to take it into jury deliberations.

I know that given his age, you may have sympathies for Mr. Johnson. Ladies and Gentlemen,

everyone in this courtroom has a duty. I have a duty to put up a case. Mr. Erickson has his duty. Now, it's time to perform your duties to consider the evidence and to render the appropriate verdict. Consider the evidence, the elements that have to be met, whether the State met its burden. I'm confident again that you will find we have met our burden of proving Mykel Johnson guilty of attempted murder of the victims in this case. Thank you very much.

THE COURT: Mr. Foreperson and members of the jury, it's now my duty to charge you on the law that's applicable to this case. Now, the defendant has charged -- excuse me. The State has charged the defendant, Mykel Johnson, with two counts of Attempted Murder. I remind you, Ladies and Gentlemen, that the fact that the defendant was arrested, charged and indicted in this case is not evidence in this case, nor does it create any presumption or inference of guilt. These documents are simply the formal written instruments which contain the charges that are made against the defendant. They are the formal documents by which this case is brought into this courtroom.

Ladies and Gentlemen, the defendant, Mr.

Johnson, has pled not guilty to these indictments and that plea puts the burden on the State to prove that the defendant is guilty beyond a reasonable doubt. Ladies and Gentlemen, a person charged with committing a criminal offense in South Carolina is never required to prove himself innocent. I charge you that it's an important rule of law that the defendant in a criminal trial, no matter what the seriousness of the charge may be, will always be presumed to be innocent of the crime for which an indictment was issued unless guilt has been proven by evidence satisfying you, the jury, of that guilt beyond a reasonable doubt.

This presumption of innocence accompanies the defendant throughout the trial until you reach a verdict of guilt based on evidence satisfying you of that guilt beyond a reasonable doubt. The presumption of innocence is not a mere legal theory. It's not just a legal phrase we use. It is a substantial right to which every defendant is entitled unless you, the jury, are satisfied from the evidence of the defendant's guilt beyond a reasonable doubt.

Now, what is a reasonable doubt in the law? A reasonable doubt is the kind of doubt that would

cause a reasonable person to hesitate to act in their most important decisions. Now, Ladies and Gentlemen, the State has the burden of proving the defendant guilty beyond a reasonable doubt. Now, some of you may have served as jurors in civil cases where you were told that it was only necessary to prove that a fact is more likely true than not true such as what we call the greater weight of the evidence or the preponderance of the evidence. In criminal cases, the State's evidence and proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. Ladies and Gentlemen, there are very few things in this world that we know with absolute certainty. In criminal cases, the law does not require proof that overcomes every possible doubt.

If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you think there is a real possibility that the defendant is not guilty, you must give the defendant the benefit of the doubt and find him not guilty.

I remind you, Ladies and Gentlemen, that during the trial, you and I have certain duties to perform. As the trial judge, it is my responsibility to preside over the trial of this case and I also have the duty to rule on the admissibility of the evidence that's offered during this trial. You are to consider only the competent evidence that is then before you. Ladies and Gentlemen, you are to consider only the testimony which has been presented from the witness stand and any exhibits which have been made a part of the record in this case.

Ladies and Gentlemen, I have the additional duty to charge you on the law that's applicable to this case. As the presiding judge, I am the sole judge of the law in this case. It's your duty as jurors to accept and apply the law as I will now state it to you. If you already have an idea as to what the law is or what the law ought to be and it does not agree with what I now tell you the law is, you must abandon this idea because you have sworn to accept the law and apply the law exactly as I have stated to you.

Now, Ladies and Gentlemen, in every case tried in this court before a jury, the jury becomes the sole and exclusive judge of the facts in a case.

The trial judge can not state, comment, or make any statement to a trial jury about the facts in this case. Since you, the jury, are the sole judge of the facts in this case, you are not to infer from what I said during the progress in this trial in ruling upon the admissibility of evidence or otherwise or anything that I say now during the course of this instruction to you that I have an opinion about the facts in this case. The law does not allow me to have an opinion about the facts of this case. Again, Ladies and Gentlemen, this is a matter solely for you, the jury, to determine.

Ladies and Gentlemen, there are two types of evidence that are generally presented in a trial. They are direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact such as an eyewitness. It is evidence which immediately establishes the main fact to be proved. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may or may not be inferred. Circumstantial evidence is based on inference and not on personal knowledge or

observation.

Ladies and Gentlemen, the law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial than of direct evidence. Ladies and Gentlemen, you should weigh all the evidence in this case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find the defendant not guilty. If, on the other hand, after hearing all the evidence in this case, if you are convinced of the guilt of the defendant beyond a reasonable doubt, you must find the defendant guilty.

Ladies and Gentlemen, necessarily you must determine the credibility of witnesses who have testified in this case. Credibility simply means believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine which evidence convinces you of its truth.

In determining the believability of witnesses who have testified in this case, you may believe one witness over several witnesses or several witnesses over one witness. You may believe a part of the testimony of a witness and reject the remaining part

of the testimony of that same witness. You may believe the testimony of a witness in its entirety or reject the testimony of a witness in its entirety. You may consider whether any witness has exhibited to you any interest, bias, prejudice or other motive in this case. And you may also consider the appearance and manner of the witness while on the witness stand.

Ladies and Gentlemen, I instruct you and emphasize that the fact that the defendant did not testify is not a factor to be considered by you in any way in your deliberation and in your consideration on the question of the guilt or the innocence of the defendant. It must not be considered by you in any manner whatsoever. A defendant has the constitutional right to remain silent. The assertion of this right must not be considered by you in your deliberations. I repeat, Ladies and Gentlemen, under your oath, you are to draw no conclusions whatsoever from the fact that the defendant in this case did not testify. The fact that this defendant did not testify should not even be discussed in a jury room. The burden of proof, as I have stated to you, is on the State. Ladies and Gentlemen, the defendant is not required

to prove his innocence. The burden of proof remains on the State to prove guilt beyond a reasonable doubt.

Now, Ladies and Gentlemen, there has been evidence presented that witnesses have made prior statements which are not consistent with the witnesses' present testimony. You may use this evidence to decide whether to believe the witness. You may also use evidence of the earlier contradictory statements to determine the truth of those statements. It's up to you to decide whether to believe the earlier statements or the testimony given at trial.

If a witness is shown to have knowingly testified untruthfully concerning any material matter, you may consider this in determining whether to trust the witness' testimony as to other matters. You again may reject all testimony of that witness or give all or part of the testimony the weight you think it deserves.

Now, Ladies and Gentlemen, I remind you again that the burden of proof in this trial is on the state. This burden of proof of beyond a reasonable doubt extends to every element of the crime charged and it specifically includes the burden of proving

beyond a reasonable doubt the identity of the defendant as the person who committed the crime.

Identification testimony is an expression of belief or impression by a witness. You must determine the accuracy of the identification of the defendant. You must consider the believability of each identification witness in the same way as any other witness. You must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may find the defendant guilty. On the other hand, if, after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

In order to establish criminal liability, criminal intent is required. For example, the mental state required to be proven by the State for a particular crime might be purpose, intent, knowledge, recklessness or criminal negligence. Criminal intent must be proven by the State beyond a reasonable doubt.

Ladies and Gentlemen, criminal intent is always a matter that must be determined by the jury from the circumstances surrounding the situation. There's no way to prove intent to mathematical

certainty. There's no way medical science can dissect a person's brain and determine what the person had in mind. So the law says that criminal intent may be inferred from the circumstances shown to have existed at the time. This is how you make a determination of whether or not the element requiring intent was present.

It is not necessary to establish intent by direct and positive evidence. Intent may be established by inference in the same way as any other fact by taking into consideration the acts of the parties and all the facts and circumstances of the case based on evidence introduced during the trial of this case. Ladies and Gentlemen, again, criminal intent is a mental state, a conscious wrongdoing. It's up to you to determine what the defendant intended to do based on the circumstances shown to have existed.

Ladies and Gentlemen, the defendant is charged in this case with two counts of Attempted Murder. I will go ahead and tell you the requirements or the elements of Attempted Murder. A person who, with intent to kill -- attempts to kill another person with malice aforethought either expressed or implied commits the offense of attempted murder. Ladies and

Gentlemen, an attempt is an effort to accomplish a crime which does not succeed. An attempt includes a specific intent to do a particular criminal act along with an act falling short of the act intended. The State must show more than mere preparation in intent. There must be some overt act committed in an effort to commit the crime.

Ladies and Gentlemen, intent means intending the result which actually occurs, not accidentally or involuntary. Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent.

Ladies and Gentlemen, malice is hatred, ill-will or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will infer an evil intent. Ladies and Gentlemen, malice aforethought does not require that malice exist for any particular time before the act is committed. But malice must exist in the mind of the defendant just before and at the time that the act is committed. Therefore, there must be a combination of the previous evil intent and the act.

Ladies and Gentlemen, malice aforethought may be expressed or inferred. Now, these terms expressed or inferred do not mean different types of malice but merely the manner in which malice may be shown to exist, that is, either by direct evidence or by inference from the facts or circumstances which are proved beyond a reasonable doubt.

Ladies and Gentlemen, expressed malice is shown when a person speaks words which express hatred or ill-will for another person or when the person prepared beforehand to do the act which was later complained of or accomplished. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the defendant's mind would be expressed malice. Malice may be inferred, Ladies and Gentlemen, from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon.

A deadly weapon is an article, instrument or substance which is likely to cause death or great bodily harm. Ladies and Gentlemen, whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case. I charge you, Ladies and Gentlemen, that the following

are examples of instruments which may be deadly weapons: a pistol, a shotgun, a rifle, a dirk, a dagger, a knife, lighter fluid. Ladies and Gentlemen, also a gun may be a deadly weapon even if it is not operating.

Now, Ladies and Gentlemen, the defendant in this case has raised the defense of alibi. In order to establish an alibi, it must be shown the defendant was at another specified place at the time the crime was committed and that it was therefore impossible for the defendant to have been at the scene of the crime. Mere denial of presence at the scene of a crime does not constitute an alibi. Ladies and Gentlemen, there is no burden on the defendant to prove an alibi. The burden is on the State to prove beyond a reasonable doubt that the defendant was actually present at the scene of the crime and actually participated in it and was not somewhere else. In other words, the State has the burden of disproving the defendant's alibi defense.

Ladies and Gentlemen, during the course of this trial, you have been allowed to take notes. I charge you that your notes should be used only as aids to your memory and should not be allowed to take precedence over your independent memory of

facts. Ladies and Gentlemen, the notes are only for the jury's personal use in refreshing recollection of the evidence.

When in deliberations at the end of the case, do not rely on the recollection of a juror who took notes about the testimony of a witness solely because the juror took notes. You should not be unduly influenced by the notes of other jurors. As well, we all know notes can be wrong. Ladies and Gentlemen, notes are not entitled to any greater weight than each juror's memory of the evidence. Those jurors who do not take notes should rely on their independent recollection of the evidence and not be influenced by the fact that another juror has taken notes.

Keep in mind, Ladies and Gentlemen, that every word spoken in this courtroom is recorded verbatim and can be replayed for you during your deliberations if necessary. Ladies and Gentlemen, if there is a discrepancy between a juror's recollection of the evidence and the juror's notes, you, the jury should request a read back of the record. The Court's transcript prevails over a juror's notes. Ladies and Gentlemen, I remind you that your notes are not a substitute for the

official record or for the governing principles of law which I am going to further charge you.

Now, Mr. Foreperson and members of the jury, I have now charged you on the law that's applicable to this case in order to help guide you a fair and just result. You are the judges of the facts in this case. Based on your determination of the facts in this case and the law as I have explained it to you, you will soon begin your deliberations.

Ladies and Gentlemen, you have been selected as fair and impartial jurors. You are sworn to fairly and impartially try and determine the facts in this case. When you comply with your oath to do so, no one can criticize your verdict. Ladies and Gentlemen, you are to decide the case based solely on the testimony you have heard from the sworn witnesses who have testified for you along with the evidence in this case and exhibits presented to you which you will have back in the jury room.

Ladies and Gentlemen, you must decide the issues in this case without any bias or prejudice towards either party. You can not allow yourself to be governed by prejudice for or against any person by public opinion or by any other arbitrary factor. Both the defendant and the State have the right to

expect that each of you will be careful -- that will carefully and impartially consider all the evidence in this case and that you will follow the law as I have instructed to you in reaching your verdict in this case.

And to that end, Mr. Foreperson, my law clerk has prepared a verdict form. It simply has across the top the State of South Carolina, county of Beaufort. The State of South Carolina again versus Mykel Johnson. And it has the indictment numbers. There are two questions on this verdict form, Mr. Foreperson. You must find a verdict on each question. The first is as to indictment 2011-GS-07-2269, the charge of Attempted Murder against Frank Babecki, we, the jury, unanimously find the defendant, Mykel Johnson, either not guilty or guilty. The second question says the same thing as to the second victim, Desiree Constantineau. Ladies and Gentlemen, please don't get the order that I placed, guilty or not guilty, as having any significance whatsoever. Every trial, I just reverse them.

All right. Mr. Foreperson, under that, there is a certification that this is the unanimous verdict of the jury, it is the verdict of all 12

jurors. I ask that you sign the form and date it. And when you have reached a verdict, Mr. Foreperson, I ask that you knock on your jury room door and we will accept you back into the courtroom to accept your verdict. All right.

Ladies and Gentlemen, for the very last time, I am going to send you back to your jury room and I'm going tell you not to begin deliberating. I'm going to ask the attorneys if there's anything further that they want me to charge you. If there is, I'm going to bring you back out and charge you further. If not, I'm going to send back with the bailiff this verdict form and all the evidence that's come into the case. And that is going to be your signal to begin your deliberations. All right? Thank you, Ladies and Gentlemen. I appreciate it. I hope lunch is coming soon. I will be with you very shortly. Thank you.

(**WHEREUPON**, the jury exits at approximately 2:48 p.m.)

THE BAILIFF: The jury is clear, Your Honor.

THE COURT: All right. Any exceptions or additions?

MR. STEPHENS: Just one question, Your Honor.

THE COURT: Yes.

MR. STEPHENS: I heard the charge on prior inconsistent statement. I didn't -- don't believe I heard anything on prior inconsistent statement. I don't know if the evidence -- I didn't put on prior inconsistent statement. I don't know if the evidence called for it.

THE COURT: I don't think it called for it.

MR. STEPHENS: Does that require some allegation of recent fabrication?

THE COURT: Right, and I don't think we're there.

Anything, Mr. Erickson?

MR. ERICKSON: No additions.

THE COURT: All right. Gentlemen, I want you to go through and make sure that the evidence is marked and what's going in and let's get it back to them. Okay. And we will be at ease.

(WHEREUPON, deliberation of the jury commenced.)

(WHEREUPON, the alternate juror is dismissed.)

THE BAILIFF: Jury entering, Your Honor.

THE COURT: Thank you.

(WHEREUPON, the jury enters the courtroom.)

THE BAILIFF: The jury is seated.

THE COURT: Mr. Foreperson, I understand you've reached a verdict.

THE JUROR: Yes, we have, Your Honor.

THE COURT: Please pass it to the bailiff, sir.

(WHEREUPON, the verdict forms are handed to the Court.)

THE COURT: Would you please publish the verdict?

THE CLERK: State of South Carolina, county of Beaufort, the State of South Carolina versus Mykel Johnson as to indictment number 2011-GS-07-02269, the charge of Attempted Murder against Frank Babecki, we, the jury, unanimously find the defendant, Mykel Johnson, guilty. As to indictment number 2011-GS-07-02270, the charge of Attempted Murder against Desiree Constantineau, we, the jury, unanimously find the defendant, Mykel Johnson, guilty.

THE COURT: Thank you.

Ladies and Gentlemen, of the jury, if this is your verdict, will you please indicate by raising your right hands?

(WHEREUPON, each juror responds.)

THE COURT: Thank you. All the jurors have raised their right hand. Is there anything further required with this jury from the State?

MR. STEPHENS: Not from the State, Your Honor. Thank you.

THE COURT: From the defense?

MR. ERICKSON: Nothing, Your Honor.

THE COURT: Ladies and Gentlemen, I get to send you away with my thanks. You not only have resolved this case, uh, for us, but additionally, when I start a week, I have a number of cases that are on the roster. And we are able, because we have jurors willing to sit and hear these cases, be able to resolve those cases by either guilty pleas or other means.

Please understand how much we appreciate your good work here. You all have been a wonderful jury, very attentive. Y'all have been very diligent. I apologize there has been some waiting in this case. Of course, it was to make sure that we put the best evidence for you -- forward for you and gave everyone a fair opportunity to present their case.

Ladies and Gentlemen, at this time, I will tell you you are permitted to discuss this case with people if you choose. Sometimes the attorneys or a witness may want to know what you thought or you are permitted to go home and tell a family member what you were doing out here for the last three days. Of

course, you are never required to talk to anyone about this. If someone persists, I want you to call to the Clerk's office and just let me know who that person is and I will go take care of them.

All right. You have earned your jury exemption certainly for the next three years up here in circuit court. I can't take care of anything in a lower court. Again, Ladies and Gentlemen, thank you for being here. Thank you for your attention. At this time, you are excused for the remainder of the week. Thank you.

(WHEREUPON, the jury exits the courtroom.)

THE BAILIFF: Jury is clear and the door is closed, Your Honor.

THE COURT: Thank you. All right. Mr. Erickson, we need to go ahead and sentence your client.

MR. ERICKSON: I just want to renew post-trial motions?

THE COURT: Sir?

MR. ERICKSON: I just want to renew my motion for directed verdict based on the same grounds also motion for JNOV and motion for new trial and motion for an appeal bond.

THE COURT: All right. Well, respectfully, I

do think there was evidence in which this jury could and did find your client guilty. Additionally, I deny your motion for a new trial. And lastly, I'm going to go ahead and sentence him and I'm not going to give him an appeal bond. As you know, he is facing up to 60 years of prison on these charges. We need to go forward. We need to sentence him. After that, you can file your appropriate appeals and whatever else you need to.

MR. ERICKSON: Yes, ma'am.

THE COURT: All right. Again, what is his prior record? And I know he is a juvenile. So I don't know if there's anything.

MR. STEPHENS: Yes, Your Honor. He's got prior juvenile convictions. I'm not sure what they term them for. Resisting Arrest in 2011, Your Honor. Armed Robbery that was pled to. A Juvenile in Possession of a Handgun in 2010, Your Honor. I'll hand up those convictions, Your Honor.

THE COURT: Okay. No, I'm fine.

Mr. Erickson, what do you want to say about your client?

MR. ERICKSON: I want to say that he's still a juvenile at age 16. I'm sorry the Court had to treat him as an adult. His mind is still

developing. This is a tough situation, obviously, for him and his mother who are very close. Mr. Johnson had all -- for intents and purposes had the desire to complete his GED and go on to try to have some kind of a music career.

I guess when you look at the facts of this case, the fact that nobody was actually injured or killed, I think that is some mitigation to this lengthy 60-year potential sentence. That's probably the best thing that happened in this case that nobody died or got injured. I don't know if my client wants to say anything.

THE COURT: Would you like to say anything, Mr. Johnson?

MR. JOHNSON: I just want to say I'm sorry, you know, even though I'm innocent. I'm sorry that that even happen to the victims, but I ain't the one who did it. I do want to say I want continue still to finish school and get my GED and become a successful citizen. I ask you can you please have leniency.

THE COURT: I need a sentencing sheet.

MR. STEPHENS: Your Honor, I'm handing up the sentencing sheets.

THE COURT: Mr. Erickson, I agree with you.

The best thing out of this entire situation is that no one was injured and I do think that's a mitigating circumstance. I agree with you. I also know that he is 16 years of age. That's very young. However, of course, these are very serious charges. As you know, each one carries up to 30 years. The significance -- I think he's understood from the beginning, quite frankly, in one of the jail phone calls. He said it to his mother. I'm looking at 60 years in prison.

On indictment number 2011-2269, it is for Attempted Murder, the sentence of this Court is you be committed to the Department of Corrections for a period of 15 years. Indictment number 2011-2270, again for Attempted Murder, the sentence of this Court is you be committed to the Department of Corrections for a period of 15 years. Those are to run concurrent to each other. Obviously, I've given you time that you've served since you been arrested on this. Good luck to you, sir.

MR. STEPHENS: Thank you, Your Honor.

MR. ERICKSON: Thank you, Your Honor.

THE COURT: All right. Is there anything else on this case that we need to put on the record?

MR. STEPHENS: Your Honor, nothing from the

State. Mr. Erickson just stepped back with his client.

THE COURT: All right. Tell him to come on back. He can go back again afterwards.

Mr. Erickson, I just wanted to make sure there was nothing further that we need to put on the record for you in regards to this case. They are welcome to let you go back and speak with your client further. Is there anything else, sir?

MR. ERICKSON: No, ma'am.

THE COURT: Okay. Well, we'll go ahead and be at ease in this courtroom.

(END OF PROCEEDING)

CERTIFICATE

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

I, the undersigned, Teresa B. Johnson, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Beaufort, South Carolina, on this 30th day of December, 2012.

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

Teresa B. Johnson
Circuit Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MYKEL JOHNSON,

APPELLANT

APPELLATE CASE NO. 2012-212478

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUE ON APPEAL 3

STATEMENT OF THE CASE 4

ARGUMENT 5

CONCLUSION .....

PETITION TO BE RELIEVED AS COUNSEL .....

TABLE OF AUTHORITIES

Cases

Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) 5, 6

Edmond v. State, 341 S.C. 340, 534 S.E.2d 682, 685 (2000) 5

Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982) 6

State v. Bell, 347 S.C. 267, 554 S.E.2d 435 (Ct.App.2001) 6

State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006) 6

Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986) 5

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to strike testimony from the investigator that Appellant did not want to talk and wanted the representation of an attorney because the testimony constituted an improper comment on Appellant's constitutional right to remain silent and right to an attorney?

STATEMENT OF THE CASE

In December of 2011, the Beaufort County Grand Jury indicted Johnson for two counts of attempted murder, indictments #2011-GS-70-2269, 2270. On June 18, 2012, Johnson proceeded to jury trial before the Honorable Carmen t. Mullen. Attorney Eric Erickson represented Johnson at trial. Attorney Jeffrey S. Stephens prosecuted the case on behalf of the State. The jury returned verdicts of guilty and Judge Mullen sentenced Johnson to fifteen (15) years concurrent for each charge. A timely notice of intent to appeal was served on June 28, 2012. This appeal follows.

ARGUMENT

The trial judge erred in failing to strike testimony from the investigator that Appellant did not want to talk and wanted the representation of an attorney because the testimony constituted an improper comment on Appellant's constitutional right to remain silent and right to an attorney.

The jury found Appellant guilty of shooting at Desiree Constantineau and Frank Babecki as they were driving out of their apartment at the Cross Creek Apartment Complex. The Appellant, Johnson, also lived in the apartment complex and Babecki admitted that he purchased marijuana from Johnson. (R. p. 181, lines 2-7). Both Constantineua and Babecki identified Johnson as the shooter. (R. p. 174, line 20 – p. 175, lines 1-2; p. 202, line 4 – p. 203, lines 1-22).

Investigator Joshua Dowling with the Beaufort Police Department investigated the incident. At trial Investigator Dowling testified that after Johnson was taken into custody, "Mr. Johnson did not want to talk. He wanted the representation of an attorney when we asked him for his side of the story. From the defendant's side, we did not develop any information." (R. p. 103, lines 13-16). During a pre-trial hearing Investigator George Erdel with the Beaufort Police Department testified that Johnson was mirandized before invoking his rights. (R. p. 24, lines 3-13). The judge erred in failing to strike Investigator Dowling's comments on Appellant's invocation of the right to remain silent and the right to an attorney.

> In Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), the United States Supreme Court held that the due process clause of the Fourteenth Amendment is violated when a state prosecutor seeks to impeach a defendant's exculpatory story, told for the first time at the trial, by cross-examining him about his post-arrest silence after receiving Miranda warnings. Doyle also prohibits the State from commenting upon the defendant's request for an attorney. See Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986); Edmond v. State, 341 S.C. 340, 345, 534 S.E.2d 682, 685 (2000). The rationale for Doyle is

> that it would be a violation of due process to allow comment on the silence which Miranda warnings have encouraged.
>
> Subsequent to Doyle, in Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982), the Supreme Court clarified that Doyle was applicable only in situations in which the government had induced, via Miranda warnings, a defendant's belief that his exercise of a constitutional right would not be used against him. 455 U.S. at 607, 102 S.Ct. 1309 ("in the absence of the sort of affirmative assurances embodied in the Miranda warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to post arrest silence when a defendant chooses to take the stand.") See also State v. Bell, 347 S.C. 267, 554 S.E.2d 435 (Ct.App.2001) (recognizing that Doyle is applicable only after Miranda warnings have been given).

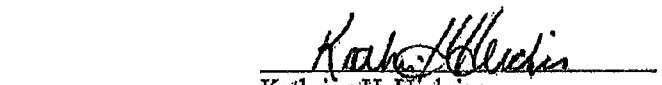
State v. Weston, 367 S.C. 279, 291-292, 625 S.E.2d 641, 648 (2006).

Investigator Dowlings testimony constituted a Doyle violation as the testimony was an improper comment on appellant constitutional right to remain silent and right to an attorney. The judge's failure to strike and give a curative instruction to the jury requires reversal of the conviction and sentence.

CONCLUSION

Based on the above argument the conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of August, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MYKEL JOHNSON,

APPELLANT

APPELLATE CASE NO. 2012-212478

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Mykel Johnson states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. She has reviewed the record of appellant's trial before Judge Carmen T. Mullen, which was held on June 20, 2012, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Mykel Johnson.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of August, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MYKEL JOHNSON,

APPELLANT

APPELLATE CASE NO. 2012-212478

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictments and sentencing sheets;
(2) Entire trial transcript.

I certify that this designation contains no matter which is irrelevant to this appeal.

August 19th, 2013.

Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 19, 2013

Kathrine H. Hudgins
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MYKEL JOHNSON,

APPELLANT

APPELLATE CASE NO. 2012-212478

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Mykel Johnson, # 351916 at Lee Correctional Institution, 990 Wisacky Hwy. Bishopville, SC 29010 this 19th day of August, 2013.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of August, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Mykel Johnson, Appellant.

Appellate Case No. 2012-212478

Appeal From Beaufort County
Carmen T. Mullen, Circuit Court Judge

Unpublished Opinion No. 2014-UP-134
Submitted February 1, 2014 – Filed April 2, 2014

APPEAL DISMISSED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Salley W. Elliott, both of Columbia; and Solicitor Isaac McDuffie Stone, III, of Bluffton, for Respondent.

PER CURIAM: Dismissed after review pursuant to *Anders v. California*, 386 U.S. 738 (1967). Counsel's motion to be relieved is granted.[1]

APPEAL DISMISSED.

FEW, C.J., and SHORT and GEATHERS, JJ., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
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April 18, 2014

The Honorable Jerri Ann Roseneau
PO Box 1128
Beaufort SC 29901-1128

REMITTITUR

Re: The State v. Mykel Johnson
Lower Court Case No. 2011GS0702269, 2011GS0702270
Appellate Case No. 2012-212478

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Mykel Johnson, 351916
Salley W. Elliott, Esquire
Alan McCrory Wilson, Esquire
Kathrine Haggard Hudgins, Esquire
Isaac McDuffie Stone, III, Esquire

RECEIVED
APR 21 201
SC OFFICE OF
APPELLATE DEFENSE

AW 14835

2014CP0701759

FORM 5

STATE OF SOUTH CAROLINA)
2014 JUL 21 PM 1:01
COUNTY OF Beaufort) IN THE COURT OF COMMON PLEAS
ANN ROSEMEAU
BEAUFORT COUNTY, S.C.
Mikel Deshawn Bannon 00[illegible] COURT
Full name and prison number (if any) of Applicant.)

v.) **APPLICATION FOR**

State of South Carolina) **POST-CONVICTION RELIEF**

INSTRUCTIONS - READ CAREFULLY

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

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

If the application is taken in forma pauperis it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Beaufort county
2. Name and location of Court which imposed sentence Beaufort county
3. Name(s) of co-defendant(s) (if any) NO co-defendants
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
   (a) 2011GS 0702-269
   (b) 2011GS 0702276
   (c)
5. The date upon which sentence was imposed and the terms of the sentence:
   (a) June 20, 2012 15 years run concurrent
   (b)

Revised 3/2003

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty Jury trial

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?
Conviction Yes I appealed

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. The court of Appeals

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Dismissed in the court of Appeals

ii. _____

iii. _____

(c) the date of each such result:

i. April 4

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. N/A

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) I answered Yes to number (7)

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: Ineffective Assistance of Counsel

(a) _____

(b) _____

(c) _____

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

(a) My lawyer didn't probably represent me at trial

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

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

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? This is my 1st P.C.R.

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? Already specified in (B)

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

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

(a) the specific nature thereof:

i. Direct Appeal.

ii. _____

iii. _____

iv. _____

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

i. The court of Appeals Columbia

ii. S.C.

iii. _____

iv. _____

(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

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

i. N/A

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. n/a This is my 1st P.C.R

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. N/A

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) NO the grounds have not been Presented. Because

(b) this my 1st P.C.R

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____

(b) your trial, if any? Yes my trial.

(c) your sentencing? _____

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

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Direct appeal.

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

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

i. Eric Ericson Beaufort county At my trial.

ii. Kathrine Haggard Hudgins of columbia. for

iii. the courts of appeal.

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

i. Eric Ericson at my trial.

ii. Kathrine Haggard Hudgins on my appeal.

iii. _____

19. State clearly the relief you seek in filing this application:

A new trial. or vacated sentence or a time cut

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

NO

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of)

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

Mikel Johnson

SWORN to and subscribed before me this 15th
day of July, 2014.

(L.S.)
Notary Public

My Commission Expires: 09/10/2023

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

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

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

[redacted] Mikkel Johnson
Applicant

SWORN or affirmed to and subscribed before me this 15th day of July, 2014.

Notary Public

My Commission Expires: 09/10/2023

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
Mykel Johnson, #351916, Applicant, v. State of South Carolina, Respondent.	)	2014-CP-07-1759 **RETURN**

Respondent, making its Return to the application for post-conviction relief (PCR) filed July 21, 2014, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. The Applicant was indicted at the December 2011 term of the Beaufort County Grand Jury for two (2) counts of Attempted Murder (2012-GS-07-2269, 2270). Eric Erickson, Esquire, represented him. The Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted. The Honorable Carmen T. Mullen sentenced Applicant to incarceration for fifteen (15) years for each count of Attempted Murder, with the sentences to run concurrently.

A notice of appeal was filed on Applicant's behalf and an appeal perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Johnson, 2014-UP-134 (Filed on April 2, 2014). The Remittitur was issued on April 18, 2014.

Attached herewith and incorporated herein are the records of the Beaufort County Clerk of Court regarding the subject conviction(s), Applicant's records from the South Carolina

Department of Corrections, the application, and the record on appeal. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "My lawyer didn't probably(sic) represent me at trial."

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCP.

III.

Respondent's interpret Applicant's allegation as ineffective assistance of counsel. In a post-conviction relief action, Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held on Applicant's allegations.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Deputy Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

January 29, 2016.

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	IN THE COURT OF COMMON PLEAS 2014-CP-07-1759
MYKEL JOHNSON, #35196 Applicant, vs STATE OF SOUTH CAROLINA, Respondent.	AFFIDAVIT OF SERVICE BY MAIL

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:

James K. Falk, Esq.
Falk Law Firm, LLC
PO Box 1058
Charleston, SC 29402

DATED this 29th day of January, 2016.

Elizabeth McLellan, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA
FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT
COURT OF COMMON PLEAS
CASE NUMBER 2014-CP-07-01759

MYKEL D. JOHNSON — APPELLANT

VERSUS

MAY 17, 2016

TRANSCRIPT OF POST-CONVICTION RELIEF HEARING

BEAUFORT, SOUTH CAROLINA

STATE OF SOUTH CAROLINA — APPELLEE

B E F O R E:

HON. BROOKS P. GOLDSMITH, JUDGE

WANDA H. ROWE, CVR-M
OFFICIAL COURT REPORTER

APPEARANCES

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INDEX

Caption.....1

Appearances.....2

Index.....3

By the Court.....4

ERIC ERICKSON

Direct Examination
By Mr. Falk.....5

Cross-examination
By Mr. Johnson.....34

Re-direct Examination
By Mr. Falk.....40

MYKEL D. JOHNSON

Direct Examination
By Mr. Falk.....42

By the Court.....43

ATTACHMENTS

Certificate of Reporter.....50

Keyword Index

No exhibits were admitted.

BEGINNING 9:42 A.M.

BY THE COURT:

MR. JOHNSON: May it please the Court, your Honor? This is Mykel Johnson versus the State of South Carolina. It's Case Number 2014-CP-07-01759. Mr. Johnson was indicted at the December 2011 term of the Beaufort County Grand Jury for two counts of attempted murder. Eric Erickson, Esquire, represented him. He proceeded to jury trial, pursuant to which he was found guilty as indicted. I believe that would be on June 18 through June 20, 2012. The Honorable Carmen T. Mullen sentenced him to confinement for fifteen years for each count of attempted murder, both charges to run concurrently. A notice of appeal was filed on his behalf, and an appeal was perfected. The Court of Appeals confirmed his conviction and sentence. On April 2, 2014, the remittitur was thereafter issued on April 18, 2014. He filed this immediate action on July 21, 2014. The State filed its return on January 29, 2016. And he is represented here today by Mr. Jim Falk.

THE COURT: Mr. Falk.

MR. FALK: Yes, your Honor. We would like to call Mr. Erickson to the stand.

THE COURT: All right.

MR. FALK: May I bring my documents up?

THE COURT: You may.

MADAM CLERK: Place your left hand on the *Bible* and raise your right. Do you solemnly swear or affirm that the testimony you give to the Court in this case, shall be the truth, so help you God?

ERIC ERICKSON: I do.

MADAM CLERK: You may be seated.

ERIC ERICKSON, DIRECT EXAMINATION

BY MR. FALK:

Q Mr. Erickson.

A Good morning.

Q Good morning. Could you explain to the Court how you became involved with my client.

A Well, I was privately retained by his mother, and went from there.

Q Okay. I didn't know if you were appointed to the case or privately retained.

A Private.

Q Okay. And how much time did you spend with Mr. Johnson? He was in custody at the time; was he not?

A That's correct. I'll have to pull my file. I did a number of jail visits, and I can add those up to get some kind of time. I first did a jail visit on January 10, and second one was January 18. February 2nd was the third one.

Q Is this 2012?
A 2012, correct. Jail visit number 4 was, looks like, February 10. Jail visit number 5 was February 22nd.
Q During those visits, was there a discussion about an alibi witness?
A Yes, there was.
Q What kind of discussion did you have? Did he give you a list of people who would be alibi witnesses?
A Yes. And I believe we called one as an alibi witness. I believe that was Malcolm Moore.
Q Does the name Josh Talley ring a bell?
A He was the police officer for Beaufort City.
Q And Kendale Simmons?
A Yes, he was another one of Mr. Johnson's friends and possible alibi witnesses.
Q Okay. Because that was the -- that was the alibi witness that you had called, is it not? Kendale Simmons?
A I'd have to look at the record. I know I called one of the two.
Q Okay.
A I have more jail visits if you want to let me continue as far as your first question.
Q No, I think we're okay.

A Okay.
Q Now, as far as your conversation about Kendale Simmons, he was in custody at that time. Is that correct?
A Correct.
Q Did you speak with him while he was in custody?
A Umm.
Q Did you speak with his alibi witness?
A I'd have to -- I'd have to check my notes on that. Which one you talking about? Malcolm Moore or Kendale Simmons?
Q Kendale Simmons.
A I -- I have a note where I received an email from Kendale about the alibi on February 28, 2012.
Q But you don't recall whether or not you spoke to him?
A Not without referring to my notes. Like I said, there was an email from him. Could I come back to that? Cause I'll look through it.
Q Well, do you recall any conversations other than my client suggesting that Kendale Simmons would be an alibi witness? Do you recall any conversations you had with my client about Mr. Simmons?
A Do I recall any conversations with Mr. Simmons?
Q Yes.

A Other than that email, I haven't found anything yet. I know I have some notes that Mr. Johnson wanted me to call Malcolm Moore. That was in jail visit number -- number 16. And I did call Malcolm Moore. I'm still trying to find Kendale Simmons, whether or not I had discussions with him. I can't answer your question with Kendale Simmons, other than that email I received from him.

Q Can you recall asking my client whether or not he had any conversations with Kendale Simmons after his arrest?

A Not exactly.

Q Is it safe to say that, when Mr. Simmons came to testify, that, that somewhat backfired on the defense?

A I don't know why the jury did not accept that alibi. I do have a note, sir, where Malcolm Moore and Kendale Simmons came to my law office to discuss the alibi. That was at 5:30 in the afternoon on March the 19th, 2012.

Q Okay. Do you have a copy of the transcript up there?

A I do.

Q Would you look at Page 263 there. The State interviewed Malcolm Moore as their rebuttal witness.

A I'm on Page 263, Line --

Q Starting with Line 22. If you could kind of just look through those -- his testimony -- that whole -- goes from 263 through 265.

A Okay.

Q Would it appear that the State's rebuttal witness somewhat took the wind out of Mr. Simmons' testimony, where it shows -- where it relates that there was a jail call between the two? Between Mr. Moore and Mr. Simmons.

A Where do you see that jail call? I see where they visited.

Q Line 24, where there was a comment from Mr. -- well, there's a reference to the comment, and it's earlier in the transcript that do you recall -- you were referring to a comment made by Mr. Simmons -- excuse me -- by Mr. Johnson that Kendale Simmons' testimony had to be straight?

A Yes, I see that.

Q And then, there were prior copy -- there's prior discussions about Mr. Moore and conversations about Mr. Simmons' testimony and that it had to be straight.

A I see that.

Q Do you think that that -- and the prosecution was aware of that because they reviewed the jail tapes. Is that correct?

A Correct.
Q Okay. Did you have an opportunity to review those jail tapes prior? I mean, is it possible, right? those 400 jail tapes?
A Right. It's safe to say I did not review all of them.
Q Okay. But is it safe to say that, when you call an alibi witness who then looks as though he's been -- his credibility's been challenged, is that certainly -- is it a detrimental effect on the case?
MR. JOHNSON: Objection, your Honor. That calls for speculation, and that's the ultimate question for this Court to decide, not for a witness to opine upon.
A I -- I just know that --
THE COURT: Hold on just one second.
MR. FALK: I'm not sure if he's not qualified to render that opinion. He certainly can render an opinion on an expert -- on an ultimate issue of a case. I'm just asking if he thinks the fact that his alibi witness had took a great deal of effort to get into the Court, that he testified that, yeah, I was with Mr. Johnson; and then, all of a sudden, there's testimony that the jury's made aware of the fact that there's communication between two people; and it sounds as though Mr. Johnson was trying to set up this alibi, you know, tell the

alibi witness what to say. So, I think when you have an alibi witness, then, all of a sudden it shows up that person is lying, I think that that has a problem with your case. I think he could opine to that.

MR. JOHNSON: Your Honor, that sounds to me like he's trying to render an expert testimony. And under *Green versus State* in this state, there are no legal experts in PCR, and I would ask you to strike his testimony -- or strike the question and not allow the testimony.

THE COURT: I've overruled the objection. I'll allow the witness to answer the question, if the witness can.

MR. FALK: Thank you, your Honor.

BY MR. FALK:

A Well, sir, if you're referencing the term straight, I think that has more than one meaning, really. It could mean what you're suggesting, and it could also mean you have to tell the truth.

Q Okay. All right. So, this is a case that had a -- that the two alleged victims in the case made identifications. Is that correct?

A Correct.

Q Or one of the witnesses -- one of the victims did?

A One did.

Q Okay. And that was a -- they identified them through a photo pack. Is that correct?
A Photo lineup.
Q Yeah, okay. And that was Mr. -- I cannot --
A Frank Babecki.
Q Babecki. He identified my client. Is that correct?
A Yes, sir.
Q Okay. Now, Joshua Dowling was called to testify. If you could look at Page 101. Excuse me -- yeah. Page 101, Line 1.
A Okay.
Q Have you looked at Lines 1 through 4?
A 1 through 4, okay.
Q On 101.
A Yes.
Q So, there, Joshua Dowling, in effect, would be bolstering subsequent testimony from Mr. Babecki about the photo I.D. Is that correct?
MR. JOHNSON: Objection. That calls for a legal conclusion, your Honor. The term *bolstering* should be stricken from that question.
BY MR. FALK:
Q So, that was the -- and Mr. Babecki had not testified at that time.

THE COURT: Mr. Falk, do you want to respond to that?

MR. FALK: I'll withdraw the question.

THE COURT: The question's withdrawn. Fine.

BY MR. FALK:

Q At the time when they called Joshua Dowling to the stand, Mr. Babecki had not testified yet. Is that correct?

A Correct.

Q And so, the jury did not hear anything about an identification up until that time. Is that correct?

A I'd have to review what -- Joshua Dowling was the second witness. I'd have to review what the first witness --

Q Okay.

A -- said. What's her -- Edeline or Earline? Erdel, I guess, is his name. The Beaufort Police.

Q Sure. Okay. Do you want to look at that?

A I don't -- I don't know if he mentioned it or not. And your question --

Q Well, the only person who made an identification in this case is Mr. Babecki. Is that correct?

A Correct.

Q And up until this time, the jury did not -- was not aware that any identification had been made. Is that

correct?
A I'd have to review what Officer Erdel said in his testimony. He was -- Erdel was the first witness.
Q If you want to look.
A Let's see. All right, I guess that was pretrial motions where George Erdel spoke first.
Q Right.
A As far as the primary case, Melanie Smith; then Josh Dowling; then, Billy Crumpton; then, George Erdel. So, your question, I guess, would go to Melanie Smith. She was the 911 operator.
Q Okay.
A And that'd be what she had to say about any identification.
Q But as far as the photo pack and the -- as far as the photo pack, that what -- the jury first hears that from Officer Dowling. Is that correct?
A Yes.
Q Okay. Did you consider to try to object to that statement made by Officer Dowling?
A Well, if I didn't object, I guess I didn't.
Q Okay. Isn't that hearsay testimony, though? This is what somebody else did.
A I believe so.
Q And so now, the jury, the first time they hear

about this identification is from an officer.

A I -- I would have to look at the opening statement by Solicitor Stephens. He pretty much laid out the whole case in his opening statement.

Q Okay. But as far as there was no trial strategy as far as letting the jury hear from Officer Dowling about the item.

MR. JOHNSON: Objection, your Honor. He's putting words in this witnesses' mouth. That is a leading question and this is his witness. On direct examination, that is not proper.

MR. FALK: (a) your Honor, I think under these circumstances, if your Honor wants me to move to have him treated as a hostile witness, but he's certainly the State's witness in this case. I'm just calling him first. I should be able to -- I should be able to lead, I would think.

THE COURT: All right. I'll overrule the objection. Go ahead.

BY MR. FALK:

Q Did you have any kind of reason for not objecting to that being a hearsay statement?

A Not that I know of.

Q Okay. Thank you. And then, if we could look at Page 136, Line 14. I guess Lines 14 through 18.

A Yes, I see that.
Q Did you consider objecting to those statements? Again, it's when you gave the photo lineup to Mr. Babecki that he selected an individual as the suspect he believed had shot at him. And so, he did; he selected -- he immediately selected Mr. Johnson as the individual he claims shot at him. Did you consider objecting to that?
A Evidently not.
Q So, would that have been trial strategy to let the jury hear that?
A My strategy was to get any statements tossed out in pretrial. I believe we did a pretrial motion on that, and it was -- I was denied. And so, the statements were going to come in. And I suppose I could have objected again.
Q Well, Mr. Babecki had not testified. He didn't even testify on this day. Had Mr. Babecki not testified, the jury still hears about this identification.
A That's right. And my strategy was, I thought that was a tainted identification photo lineup, and I addressed that at pretrial with the idea that he was probably shown a Facebook picture pre-I.D. But under cross-examination, Mr. Babecki said he was not shown

that Facebook pre-I.D.; he was shown that Facebook after.

Q Okay.

A I had argued that unduly suggestiveness on my pretrial motion, and -- and it was denied.

Q That objection's not preserved?

A Correct.

Q Now, what was the reason for allowing the 911 call to come in?

A Well, that was utterance of the victims.

Q Did you try to have it -- did you try to have the 911 call excluded?

A No, cause I did not know what ground I could do that.

Q That that was hearsay? Out-of-court statements, offered to prove the truth of the matter asserted?

A Well, you had the 911 operator testify as to the authenticity. And then, you had the actual witnesses testifying.

Q Well, actually, the 91 -- the person on the 911 call was not in court. Is that correct?

A Say that again.

Q The person who testified to the authenticity of the 911 calls was not the witness, because the person on the 911 call was not present.

A Well, whoever that Mrs. Smith was, I believe she was in charge of authenticity.
Q If you look at -- if you look at 89, Page 89, Line 1.
A I see that. The call-taker, Erin Mallory.
Q So, the Court heard -- the Court heard statements made by Erin Mallory.
A I see that, but the --
Q Okay. And so, you made your own decision that that would be admissible because it was excited utterance?
A I did, because they also had Frank Babecki in Court to testify to that call, as well as his wife.
MR. FALK: Your Honor, if I may for a moment. I have tried to get a copy of this 911. The disk, the disk that is in evidence that's identified here as the one that was played, does not play anymore. And I asked Mr. Erickson, I mean, you could hear -- it's a five-minute-forty-one second 911 call. The exhibit in the file says it, but it does not play. You can hear maybe the first 17 seconds of it. As a matter -- if we could possibly hold this record open, if necessary, just so we -- if it is possible to get another copy of the 911 call, possibly from the solicitor's office. I drove down here Friday to listen to the tape, and it was unplayable. I asked Mr. Erickson, and he does not -- he

said -- I talked to Mr. Erickson on Friday. He does not have a copy of it. And to the extent that the 911 call would possibly have information that would not fit under the excited utterance, it's not transcribed. So, there's no record of what, actually, was here. And I'm just saying to the extent the 911 call may have contained prejudicial hearsay, which would not be admissible under the hearsay exception. I would just like an opportunity to find it, get a certified copy. And I'll give it to Mr. Johnson. I'll give it to the Court before it reaches its decision.

MR. JOHNSON: I'm aware of that. It does not play. I have no objection to that, your Honor. The only objection I will say, and I've kind of let this go maybe a little too far, is that this is not one of the issues that was brought up in the application. The only amendment that I have received from Mr. Falk is that counsel was ineffective for not objecting to Mr. Dowling making some type of reference, which the State disputes, on Mr. Johnson's right to remain silent. Therefore, I believe any of this 911 testimony is not proper, because it was not pled and the State is not aware that this was going to be argued today, your Honor.

MR. FALK: I think I did talk to Mr. Rutledge [sic] about the 911 tape; that I was trying to get it; that I

thought there'd be parts of it that were inadmissible. I did not file a written, but I do believe we had a conversation, because he knew I was coming down here to get the tape.

MR. JOHNSON: Yeah, we discussed that, your Honor, but for the State to be properly prepared, we must have, you know, usually amendments of any type of amendment to the application.

THE COURT: All right. I understand that now. So, where are we? Mr. Falk wants to leave the record open to give him an opportunity to see if he can listen to the C.D. and determine whether or not there's any issue.

MR. FALK: No, my point would be is, if the solicitor's office still has a copy of the C.D., I think it's certified that that is the original copy, then, I would provide it to Mr. Rutledge [sic], and provide it to the Court, and the Court can make its own determination.

MR. JOHNSON: And our argument is, your Honor, it's still going to come in, because it's an excited utterance. The lady who made the 911 tape -- I mean, the call, was clearly still under the impression of the situation. And he would have no legal basis on which to object to this 911 tape coming in.

THE COURT: Let me ask a question about that, now

that you mentioned it. Tell me, when was the 911 call made?

MR. JOHNSON: Immediately after Mr. Johnson shot the car up to the two victims. They pulled into an IHOP. Within seconds after, Mr. Johnson shot the car.

THE COURT: Is there any evidence to the contrary?

MR. FALK: Well, your Honor, I will say that the case law -- I think it's the two cases I filed, *Crawford*, United States Supreme Court. One of them is *Hammond*, and I think the other one is *Davis*, both of which talk about how -- and I think they were both 911 calls -- where you can still have portions of testimony like this that may -- part of it fits under the hearsay exemption, but it can evolve into testimonial hearsay, and I'm not aware of what the jury was able to hear. You know. It's part of the record in the case, but it's not part of the record that was supplied to me. But there is certainly a very realistic possibility that, after five minutes, she may have calmed down and she may have no longer been still agitated. And any statements that were no longer -- what I'm saying is that portions may have been inadmissible, just like there's portions that may not have been admissible, and I'm unable to determine.

MR. JOHNSON: Your Honor, there is no *Crawford*

issue. They had a chance to cross-examine this witness because she testified at trial. So, I think *Crawford* is out the window on this case. Clearly, if someone is on a 911 tape, the entirety of that 911 tape, you're not going to calm them down. That's just common sense. And under 803(2), excited utterance, a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. Clearly, here within minutes, seconds of the shooting, she's still going to be in that state. That's just common sense, your Honor. I don't think any case law can overturn that. So, the entirety of the 911 tape would be under an excited utterance, and there's no objection to which Mr. Erickson could make.

MR. FALK: Your Honor, if I could -- at this point, there is a *Crawford* issue because that person has not testified. If that person doesn't testify, the jury still hears the 911 tape. I mean, we're going on the assumption that both of these victims are going to testify the next day. And I think Mr. Erickson was going on the assumption that both of these victims are going to testify the next day. But the point is, at this moment, it's all hearsay.

THE COURT: Well, let me ask you this. Why would it not be possible for, during the lunch break today, or

some time today --

MR. FALK: Yes, your Honor.

THE COURT: -- go get the disc, listen to it, and see. We'll leave the issue open today.

MR. FALK: Thank you, your Honor.

THE COURT: And come back to it perhaps a few hours later.

MR. FALK: Okay.

THE COURT: I just hate to leave the record open for thirty days or whatever and we're stumbling all over each other.

MR. JOHNSON: That's fine with me, your Honor.

THE COURT: All right.

BY MR. FALK:

Q Joshua Dowling again testified on Page 96.

A Page 96?

Q And starting at -- well, I guess that's a question from 24 -- on Line 24, over to Line -- Page 97, Line 5. If you read that, is it not hearsay statements again?

A What the victims told the officer?

Q Yes.

A Yes.

MR. JOHNSON: What line, now?

MR. FALK: Page 96, Line 24, going over to Page 97, Line 5.

MR. JOHNSON: Thanks.

BY MR. FALK:

A Again, that's a situation where the victims are going to testify in court.

Q So, if the victims are going to testify, then, this -- then, is there not a relevancy objection to this or that this is cumulative testimony?

MR. JOHNSON: Your Honor, I'm going to object, because I don't believe this is hearsay. I think this goes to the fact of what the police officer does with that information and the subsequent action by the police office. Because if you look at Page 97, you talk about the picture, getting the bullet out of the -- out of the headrest of the car. So, he has to know where the passenger's sitting to be able to conduct an investigation on where the bullet -- why it was lodged or where it was lodged. And that's the basis for his subsequent investigation. Your Honor, that's not a hearsay statement.

MR. FALK: I still think it's, again, the jury's hearing evidence that, if it's information that should come from the witness and not from somebody who heard what the witness says.

THE COURT: All right. You argue it's bolstering, then.

MR. FALK: Yes, well, or cumulative. If you want to say bolstering or the objection should be it's irrelevant because it's cumulative. But yes. And again, your Honor, this witness hadn't testified. The victims hadn't testified at this time. The jury hears the entire case for the State through the hearsay statements from the investigating officers.

MR. JOHNSON: Your Honor, then, I'm going to object to this entire line of questioning, because this is the first time I've heard that this was going to be an issue here at PCR. So, this is more of a surprise tactic than anything else.

THE COURT: What do you know about that, Mr. Falk?

MR. FALK: I think it falls under the general ineffective assistance of counsel that every Court determines.

THE COURT: I'm going to sustain the objection.

MR. JOHNSON: Thank you, your Honor.

BY MR. FALK:

Q All right. Could you look at Page 103.

A Page 103?

Q Yes. If you would look at Lines 13 through 16.

A All right.

Q Is it fair to say that that's, again, Joshua Dowling is testifying?

A Yes.
Q And is he not telling the jury that my client wanted to exercise his *Miranda* rights to talk to his lawyer; he didn't want to speak?
A Yes.
Q So, he's exercising his right to remain silent.
A Yes.
Q And the jury heard that.
A Well, heard what?
Q Well, the jury heard these police officer saying that my client chose to exercise his right to remain silent.
A Yes.
Q Okay. And that was post-*Miranda*. Is that not correct? to read to the -- this statement was made after he was *Mirandized*. Is that not correct?
A It was made -- when did you say?
Q Well, he had already been *Mirandized* at this point, had he not?
A Correct, back at the police station.
Q All right. And so then, Officer Dowling said we talked to him further or we tried to talk to him, but instead, he chose to remain silent; invoke his right to remain silent.
A Correct?

Q Did you consider objecting at that point?
A No, I did not object and I did not consider it.
Q Did you want the jury to hear that?
A My client wanted to have his right to remain silent?
Q Yes.
A I didn't think there was anything wrong with that.
Q Are you familiar with the Supreme Court case of *Doyle versus Ohio*?

MR. JOHNSON: And your Honor, I'm going to object at this point, because, under *Ashley versus State* and *Simmons versus State,* this is the exact issue raised at the Court of Appeals through an *Anders versus California* brief. The Court of Appeals affirmed his conviction. That was dealt with on direct appeal. And therefore, it's improper for a PCR forum.

MR. FALK: Your Honor, the reason why -- certainly, I talked to appellate counsel on this, and this is an issue that was not preserved. So, that is why it was an *Anders* brief and not a merit brief. This was an unpreserved issue, so, it was never really going to be heard by the appellate court because trial counsel failed to preserve the objection that my client's *Fifth Amendment* right to remain silent had been impeded or whatever, had been jeopardized, because the Court was

able -- because the jury was able to hear that. They certainly were able to draw their own negative conclusions. It did go up on appeal. It was an *Anders* brief; not a merits brief; and the reason why is because the issue was not preserved. You got to preserve these issues in order for it to go up. There is no clear error doctrine.

MR. JOHNSON: Just to respond, your Honor. As your Honor is aware, if an issue is unpreserved, the Court of Appeals is very quick to tell appellate counsel. So, further, an *Anders* brief is not just when you just think it's not preserved. An *Anders* brief, the whole point is that, in good conscience and through the duty that appellate counsel has to argue merit issues, if they feel that there is no merit issues to raise, they're allowed to file an *Anders versus California* brief. The Court then reviews the entire record for any preserved errors and makes a decision.

In this case, they said that it is affirmed. Pursuant to *Anders versus California*, there was no mention in the Court of Appeals' opinion concerning the fact that this issue was not preserved. So, I think that the Court of Appeals dealt with this issue, and therefore, it's not proper under *Simmons versus State* and *Ashley versus State* for the PCR forum.

THE COURT: I'm not sure I have the order. Do you all have it?

MR. FALK: I have a copy of the -- may I approach?

THE COURT: I thought I had a copy in this packet.

MR. FALK: The Court of Appeals didn't say anything other than affirm. It didn't say -- the Court of Appeals didn't say anything. They just said *affirmed*. I don't know what conclusion we can draw from that, but I mean, we certainly have a constitutional right that my client had that's recognized by the United States Supreme Court in *Doyle versus Ohio* and its progeny. The only cases since *Doyle versus Ohio* have been saying that. This issue only arises once a person has been *Mirandized*. So, once a person's been *Mirandized*; and then, the jury hears the fact that he wanted to remain silent. There was prejudicial error in *Doyle versus Ohio*, and I think it's prejudicial error here. And I think the only reason is because trial counsel didn't preserve the objection.

THE COURT: All right. So, see if I understand correctly. It was not briefed. It wasn't addressed in the *Anders* brief.

MR. JOHNSON: It was briefed. That's the exact issue that was briefed, your Honor.

MR. FALK: But -- but --

MR. JOHNSON: I can provide a copy of that if I can get in my database.

MR. FALK: May I approach, your Honor?

THE COURT: If you don't talk one at a time, the court reporter's going to get upset.

All right. So, it was briefed.

MR. FALK: The issue was -- was --

THE COURT: The issue was.

MR. FALK: Right. But what I'm saying is, the appellate defense was not able to say that this issue had been preserved.

MR. JOHNSON: Your Honor, that's a hearsay statement, whatever appellate counsel said.

MR. FALK: No, I mean, it was -- all right, there was no sentence in that brief that's saying the issue wasn't preserved.

THE COURT: No, but errors allege that it was not stricken.

MR. FALK: But if you read the transcript, there was no request to have it stricken with appellate counsel. They're saying -- as I read that, they're saying that -- the appellate defense there is saying that the error was that the judge should have sua sponte made its own motion to strike it and give a corrective instruction to the jury.

THE COURT: All right. The pretrial hearing referenced in the Page 5 of the *Anders* brief is referring -- you all tell me if I'm right, now -- merely to the fact that Johnson was *Mirandized*. It doesn't have anything to do with the statement. That wasn't discussed.

MR. FALK: Well, there was a *Jackson versus Denno*.

THE COURT: There was?

MR. FALK: Yes.

THE COURT: That issue was or was not taken up in --

MR. FALK: I think the voluntariness of the statement -- some other statement -- in the *Jackson versus Denno* hearing, there were the statements that were at issue that -- but it was not that issue. I mean, there were other statement by my client made that trial counsel tried to keep out through the *Jackson versus Denno* hearing.

THE COURT: But this issue wasn't taken up in the *Jackson v. Denno* hearing.

MR. FALK: Not that I can see, your Honor.

THE COURT: All right. Let's go back to -- now I think I now understand what all occurred. And the State's position is? The applicant says that he failed to object. The State says it was submitted to the

appellate court on *Anders* brief. The appellate court doesn't specifically address the issue. Okay. Now, help me again. What says the State, now? You're citing which case for the proposition that?

MR. JOHNSON: I am citing two cases, your Honor. And I've had them -- it's *Simmons versus State*, which is 264 S.C. 417. That's 1974 case, which stands for the proposition that the PCR is not a substitute for direct appeal. And also, *Ashley versus State*, which is 260 S.C. 436. It's a '73 opinion that basically states that PCR applicant cannot assert any issues that could have been raised at trial or on direct appeal. And the fact that this issue was briefed on direct appeal shows that this is not proper for PCR forum, as this issue's already been addressed because an *Anders* brief that, your Honor, the Court is presumed to have reviewed the entire record and make an opinion -- or issued an opinion based on they reviewed the entire record.

THE COURT: Well, I assume if we have the --

MR. JOHNSON: And in *Anders* brief, the defendant at the time, applicant here, is given the opportunity to brief any issue they think would have merit. It's like a *Johnson* petition is to PCR.

THE COURT: Right. But I guess if we had the State's brief, the State's brief where it said --

MR. FALK: There is no brief.

MR. JOHNSON: We don't respond to an *Anders* brief.

THE COURT: You don't.

MR. JOHNSON: No, your Honor. Just like a *Johnson* petition, the State is not required to respond.

MR. FALK: And my response is the citations that he gave is that we are not raising an issue that we could have raised on direct appeal, because we couldn't raise it on direct appeal because it wasn't preserved. I mean, that's the whole issue here is that these are issues that were not preserved. We're making an assumption that the Court of Appeals didn't see anything here, but we can also equally make the same assumption that the Court of Appeals doesn't address it because it wasn't preserved.

I mean, we all know that South Carolina has very rigorous error preservation rules, and that there is no clear -- what the other standard is other states have, clear error or something like doctrine like that. And so, I mean, I think it would be unrealistic. The relief that they, in effect, are asking for in that *Anders* brief, I think it would be unrealistic for a trial counsel to stand up and say, you know, you shouldn't have said that and I'm going to tell the jury that you shouldn't have said that.

THE COURT: The *Simmons* citation was 464 South Carolina? What was the --

MR. JOHNSON: *Simmons?* 264 S.C. 417.

THE COURT: 417. And the other was 264, 36?

MR. JOHNSON: Yes, sir.

THE COURT: Let me look at those, since we're apparently going to come back and address this issue. We're going to break this case up into a later date some time today -- later time some time today. But go ahead. We'll take that issue under advisement today.

MR. FALK: Okay.

THE COURT: Hopefully, resolve it today.

MR. FALK: Okay. Your Honor, let me just make sure I have no further questions.

THE COURT: All right.

MR. FALK: We have no more questions.

MR. JOHNSON: May it please the Court, your Honor?

THE COURT: Certainly.

ERIC ERICKSON, CROSS-EXAMINATION

BY MR. JOHNSON:

Q So, Mr. Erickson, how long have you been practicing criminal law?

A As of today?

Q Yes, or as of this trial.

A Since 1996, when I started as a public defender.

Q So, it's fair to say you've tried quite a few cases.
A Yes.
Q Have you tried murder cases?
A Not to trial. I've had a murder case that I got dismissed based on some psychiatric examinations.
Q But have you tried attempted murder cases in the past?
A This is my first attempted murder case.
Q But it's safe to say you had been practicing for about sixteen years before this case came about?
A Yes.
Q And been in front of juries?
A Yes.
Q And dealt with hearsay objections?
A Yes.
Q And *Jackson v. Denno* hearing?
A Yes.
Q And *Neil v. Biggers* hearings, correct?
A Yes.
Q Okay.
A I'll say that attempted murder was not codified until 2011. It used to be called an ABWIK. And I have dealt with a lot of ABWIKs prior -- prior to the attempted murder.

Q And that would be the *Omnibus Crime Bill* of, I guess, June 2010?
A Yes.
Q And in this case, you have two victims who knew Mr. Johnson prior to this incident, correct?
A At least one did.
Q The male did.
A Yes, Mr. Babecki.
Q And as you tried to point out, it was over -- they knew each other because of drug transactions, correct?
A Correct.
Q Marijuana transactions?
A Correct.
Q Okay. And he readily identified Mr. Johnson immediately after -- or actually during the incident, correct?
A Correct.
Q Because he actually conversed with him prior to the shooting.
A Correct.
Q And the jury heard all that testimony, correct?
A Correct.
Q And during when Officer Dowling shows Mr. Babecki the lineup, Mr. -- or Officer Dowling is leaving the room to give Mr. Babecki time to make his decision. And

by the time he gets to the door, Mr. Babecki says, stop, I know exactly who it is, correct?

A I don't recall that.

Q Would you dispute that, my recitation of the facts that the jury would have heard?

A I don't -- I don't know what you're alluding to.

Q What I'm alluding to is that this was the information that this jury would have heard at the trial.

A Okay.

Q And they know -- the victims know Mr. Johnson as Hot Boy, his street name.

A Correct.

Q Okay.

MR. JOHNSON: Court's indulgence, your Honor.

THE COURT: All right, sir.

BY MR. JOHNSON:

Q You've testified that you did have discussions concerning the alibi witnesses?

A Yes.

Q And you actually called a few at trial, correct?

A Yes.

Q Do you see any of those witnesses here today?

A No.

Q Now, concerning Mr. Dowling's testimony prior to

the victims coming in and testifying, as to Mr. Babecki identifying Mr. Johnson, did you not take that testimony as simply Officer Dowling testifying as to what he observed Mr. Babecki doing?

MR. FALK: Your Honor, this is a leading, I mean.

MR. JOHNSON: It's cross-examination, your Honor.

MR. FALK: Of his own witness.

MR. JOHNSON: It's not my witness. He called him.

THE COURT: Overruled. Go ahead.

BY MR. JOHNSON:

Q Do you want me to re-state that question?

A Re-state the question, yes, sir.

Q On Page 101, opposing counsel is trying to allude that this is a hearsay statement from Officer Dowling as to what Mr. Babecki did, but in your trial strategy, did you not take those statements as Mr. -- or Officer Dowling testifying as to simply what he observed?

A And what statements are you alluding to?

Q It's Page 101 that he showed the photo lineup to Mr. Babecki.

A Yes.

Q Is that not simply what he observed? He observed Mr. Babecki pointing out Mr. Johnson in the photo lineup?

A Correct.

Q So, you wouldn't have had a reasonable basis on which to object, would you?
A No.
Q And then, the next day, did Mr. Babecki not come in and testify that he picked Mr. Johnson out of the lineup?
A Yes, he did.
Q And the female was not shown in the photo lineup, correct?
A Correct.
Q Because she was pregnant?
A Correct. And I also believe the female never saw who actually did the shooting, and I brought that up in trial.
Q And she readily admits that in her testimony; does she not?
A Correct.
Q And based on all that evidence that the jury heard, they convicted him of two counts of attempted murder, correct?
A Yes.
Q Because, had he been a few inches closer to the female victim, this would be a murder case, correct?
MR. FALK: Objection. That's speculation.
MR. JOHNSON: Your Honor, the bullet landed four

inches from her head.

THE COURT: Overruled. Go ahead.

BY MR. JOHNSON:

Q Is that not correct?

A Correct.

MR. JOHNSON: No further questions at this time, your Honor. Thank you.

THE COURT: Re-direct?

ERIC ERICKSON, RE-DIRECT EXAMINATION

BY MR. FALK:

Q Mr. Johnson asked you about your experience prior to this case, your experience trying criminal cases.

A Yes, cause I -- I have a book of my trial victories that I usually bring over to the jail when somebody's deciding whether or not to retain me.

Q Is it fair to say that the trial court was frustrated with the counsel in this case on both sides?

A In some parts of the trial, yes.

Q You were admonished by the judge. Is that correct?

A That's correct.

Q And you were admonished (1) because you asked the victim to come and stand next to the defendant.

MR. JOHNSON: Objection, your Honor, as to relevance, and this is outside the scope of cross-examination.

MR. FALK: Your Honor, I don't think it's outside the scope. We're talking about errors that he's admonished for, and it's in the record.

MR. JOHNSON: And I've never asked anything about those, your Honor.

THE COURT: No. I'll sustain the objection.

MR. FALK: I'm sorry. You said you'll sustain the objection?

THE COURT: Yes.

MR. FALK: No further questions.

MR. JOHNSON: Nothing for the State, your Honor. Thank you.

THE COURT: You may step down, Mr. Erickson.

A Thank you, Judge.

THE COURT: Call your next witness.

MR. FALK: One moment, your Honor.

I call my client to the stand.

THE COURT: All right.

MADAM CLERK: Place your left hand on the *Bible*. Raise your right. Do you solemnly swear or affirm the testimony you give to the Court in this case shall be the truth, so help you God?

MADAM CLERK: You may be seated.

COURT REPORTER: I'm sorry. Your answer was?

MR. MYKEL D. JOHNSON: Yes, I do.

MADAM CLERK: You may be seated.

MYKEL D. JOHNSON, DIRECT EXAMINATION

BY MR. FALK:

Q You were brought to the police station. Is that correct?

A Yes, that's correct.

Q And when you got to the police station, did they read you your *Miranda* rights?

A That's correct.

Q And do you recall how quickly after you got there that they read you your *Miranda* rights?

A Probably like ten minutes there.

Q Okay. Some time after they read you your *Miranda* rights, do you recall having telling Mr. Johnson that you didn't want to talk?

A Yes, I told him I wanted proper representation, my counselor, now I want to speak.

Q Okay.

COURT REPORTER: I'm sorry. Say that again, please.

A Proper -- I wanted to be represented by my counsel. I invoke my right to speak.

Q And that statement was made after you were read your *Miranda* rights. Is that correct?

A Yes.

MR. FALK: No further questions.

MR. JOHNSON: Nothing from the State, your Honor.

BY THE COURT:

THE COURT: You may step down. Call your next witness.

MR. FALK: We have no further witnesses.

MR. JOHNSON: Your Honor, I have no further witnesses at this time. I'd like to see what the Court is going to rule and how the Court's going to rule before I call Mr. Erickson again to the stand, your Honor.

THE COURT: Say that again. You want to what, now? We're going to wait. Aren't we still --

MR. ERICKSON: Yes, your Honor.

THE COURT: -- going to re-convene this hearing?

MR. FALK: We're going to make an attempt to go get the tape from the solicitor's office, that's correct.

MR. JOHNSON: But I just want to reserve the right to re-call Mr. Erickson.

THE COURT: I see. Depending on what happens then.

MR. JOHNSON: Yes, sir.

THE COURT: Okay. I understand. We'll do that. All right. Then, we'll continue this case until hopefully, a few hours from now.

MR. FALK: Thank you, your Honor. Thank you.

OFF THE RECORD 10:43 A.M.

BACK ON THE RECORD 12:41 P.M.

MR. FALK: Your Honor, if I could just tell you where we stand. I spoke to the -- well, the solicitor's office called me, and they said they will not know if they've got this disc until tomorrow, which is the soonest that they would know. And he is not optimistic that they will have the disc. But he will know whether or not it exists tomorrow.

He's got my telephone number. He's got Mr. Johnson's telephone number. My suggestion, if, I mean, a way to resolve this, if the disc does exist, if you allow us to, in effect, tender proposed orders, which we could brief whatever argument we think exists from the disc. And so, you know, so the Court would have an opportunity to hear it; counsel would have an opportunity to hear it; and then, we could tender proposed orders.

THE COURT: Well, let me ask you this. I guess there's a problem with us re-visiting this tomorrow.

MR. FALK: Your Honor, I have a get a biopsy tomorrow. And so, that's going to be tomorrow or Thursday. Otherwise, that's the obvious answer, yes. But I can't -- I -- possibly Friday, but I don't know if you all will still be here.

THE COURT: That'll be the only thing we have Friday, I think, isn't it?

MR. JOHNSON: Yes, sir. We're not scheduled for Friday, but I can certainly, if your Honor wants me to, I can certainly stay down here and we can do it.

THE COURT: And of course we may not have it. May not have a disc.

MR. FALK: Well, that's what I'm saying. And the reason why I gave them Mr. Johnson's number is that, if it's after 11:00 o'clock, I'm not going to be able to do anything with the information. You know what I'm saying. And so, Mr. Johnson will know tomorrow whether or not --

MR. JOHNSON: I can certainly advise.

MR. FALK: -- whether or not it exists. And then, we can go from there.

THE COURT: All right. So, --

MR. FALK: I'll be able to respond by telephone Thursday or whatever. I'm just not sure I'll be ready to --

THE COURT: All right. So, let me see if I -- I'm going to try to do it in a nutshell to see if I understand your proposal. And that is that we will conclude the hearing today, with the exception of the issue about the disc.

MR. FALK: Yes, your Honor.

THE COURT: And if it does not exist, you both going to send proposed orders?

MR. FALK: Yes, your Honor.

THE COURT: If it does exist, and we'll get a copy; you all brief it; and still send proposed orders?

MR. FALK: Well, here's -- in order to save time on the A.G.'s, my suggestion, if it does exist, let me tender my proposed order first. And then, Mr. Rutledge [sic] -- which would, in effect, include a brief as to why it's admissible and what it says. Mr. Rutledge [sic] would have an opportunity to review that. Then, he could tender a second, you know, and give --

MR. JOHNSON: I'm kind of confused on that. I'd rather have -- have -- know before; have a hearing; let you rule on it; and then we, you know.

MR. FALK: Okay. Well, then, maybe it's Friday. Maybe we'll know.

THE COURT: Well, we'll know some time tomorrow whether we're going to have one.

MR. JOHNSON: Yes, sir. And I will certainly alert all parties and your Honor.

THE COURT: All right.

MR. FALK: Based on my conversation, I'm not optimistic it exists.

THE COURT: Here's the plan. See if this is agreeable, then. If there's a disc, we'll be back here 9:30 Friday.

MR. FALK: Okay.

THE COURT: If there's not, then, you both are going to send proposed orders.

MR. FALK: Yes, your Honor.

THE COURT: Within? That's the trick. Within?

MR. FALK: Thirty? Okay. Fifteen.

THE COURT: Fifteen.

MR. JOHNSON: Fine with me, your Honor.

THE COURT: With the caveat that, if one of you presents something in the proposed order that the other side considers new they need to respond to, then, you fire something out saying I disagree with Page 3, Item whatever; --

MR. FALK: Yeah, okay.

THE COURT: -- we didn't talk about that. You know, something like that.

MR. JOHNSON: Yes, sir.

MR. FALK: I mean, obviously, my issue's going to be the *Doyle*.

THE COURT: All right. I was looking over -- looking at some things earlier to give you some early thoughts on some things I was looking at. And let's

suppose the Court found there was a *Doyle* violation. All right. But you know, that doesn't necessarily result in --

MR. FALK: Prejudice.

THE COURT: Yes. I was looking at some cases that would say that doesn't necessarily end it.

MR. JOHNSON: And that would be my argument, your Honor.

THE COURT: Okay.

MR. JOHNSON: Is that, based on the identification and everything else, that there's --

THE COURT: That's why I wanted to mention that, so you --

MR. FALK: No, I know. I just -- I thought there was case law. There's a difference between whether or not there's a problem on a hearsay thing. Whether it is an evidentiary question that should have been dealt with one way or another, and hearsay was let in and it shouldn't, but where we're talking about a constitutional right. I thought the prejudice -- I have a lesser requirement of prejudice when it's a violation of a constitution, as opposed to just an evidentiary.

THE COURT: All right. One of the cases I was looking at mentioned the fact that there was a *Doyle* violation --

MR. FALK: Okay.

THE COURT: -- in this case -- in that case, but it wasn't egregious. And it was just kind of just something. And they mentioned that the solicitor did not hammer it and did not argue it. It was just something that came out during the trial. Therefore, so, if you're going to -- if you're going to address that issue, be thinking, okay, what if it is a *Doyle* violation.

MR. FALK: Yes, your Honor.

THE COURT: All right. Friday, 9:30, if disc. Otherwise, proposed orders, fifteen days.

MR. JOHNSON: Sounds good.

MR. FALK: Thank you, your Honor.

THE COURT: All right.

MR. JOHNSON: Appreciate your patience, your Honor.

THE COURT: Sure thing.

END PROCEEDING 12:46 P.M.

CERTIFICATE OF REPORTER

MAY 17, 2016 TRANSCRIPT OF

POST-CONVICTION RELIEF HEARING

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

I, Wanda H. Rowe, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing May 17, 2016 Transcript of Post-conviction Relief Hearing is a true, accurate, and complete record of the proceedings had on said date, in the case of Mykel D. Johnson versus State of South Carolina, Beaufort County, Court of Common Pleas, Case Number 2014-CP-07-01759; that no exhibits were admitted; that I am of neither kin, counsel, nor interest to any party hereto.

THIS CERTIFICATE OF REPORTER CONTAINS MY ORIGINAL SIGNATURE AND IS ATTACHED TO THE ORIGINAL OF THIS TRANSCRIPT REQUESTED BY SCCID. PURSUANT TO SCACR 607, REQUESTS FOR COPIES OF THIS TRANSCRIPT MUST BE MADE TO THE COURT REPORTER. UNAUTHORIZED COPYING/EMAILING IS PROHIBITED.

Witness my signature October 27, 2016.

Wanda H. Rowe, CVR-M
Official Court Reporter

ORIGINAL

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
Mykel Johnson, #351916, Applicant, v. State of South Carolina, Respondent.	)	2014-CP-07-1759 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 21, 2014. The Respondent made its Return on January 29, 2016. An evidentiary hearing into the matter was convened on May 17, 2016, at the Beaufort County Courthouse in Beaufort, SC. Jim Falk, Esquire, represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Eric Erickson, Esquire, also testified. This Court had before it a copy of the records of the Beaufort County Clerk of Court, records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. The Applicant was indicted at the December 2011 term of the Beaufort County Grand Jury for two (2) counts of

Attempted Murder (2012-GS-07-2269, 2270). Eric Erickson, Esquire, represented him. The Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted. The Honorable Carmen T. Mullen sentenced Applicant to incarceration for fifteen (15) years for each count of Attempted Murder, with the sentences to run concurrently.

A notice of appeal was filed on Applicant's behalf and an appeal perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Johnson, 2014-UP-134 (Filed on April 2, 2014). The Remittitur was issued on April 18, 2014.

In his current Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "My lawyer didn't probably(sic) represent me at trial."

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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witness presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

SUMMARY OF TESTIMONY

At the evidentiary hearing, Counsel testified that he was retained by Applicant's mother and visited Applicant at least five times while Applicant was in custody. During these meetings, he and

Applicant discussed possible alibi witnesses, and Applicant gave him a list of witnesses to locate including: Malcolm Moore, was called at trial; Josh Dowling, a police officer; and Kendale Simmons, a friend of Applicant's who was in custody at the time. Counsel then testified that he called Mr. Moore at trial and had spoken with Mr. Moore on March 12, 2012 concerning his testimony prior to trial. Counsel then testified that the State's rebuttal witness was that Mr. Simmons' testimony needed to be "straight," which Counsel considered to mean tell the truth. Counsel admitted he did not review all of the jail tapes. Counsel then stated that one of the victims had identified the Applicant prior to and during trial. Counsel stated he did not object to Ofc. Dowling's testimony on page 101 of the transcript because he did not see that it would be hearsay testimony.

Counsel then testified that his strategy was to have any of Applicant's statements suppressed prior to trial. He also addressed the photo lineup during a pretrial hearing, arguing that it should be suppressed; however this pretrial motion was denied. Counsel also stated that the 911 tape which was introduced at trial was an excited utterance. Counsel lastly testified he did not object on page 103 of the transcript because he did not consider the officer's testimony a comment on his right to remain silent.

On cross-examination, Counsel testified he has tried cases since 1996. Counsel admitted this was his first attempted murder case, however he had tried cases that dealt with assault and battery with intent to kill (which was changed to attend murder and 2010) prior to this case. Counsel also testified he had dealt with Jackson v. Denno hearings as well as Neil v. Biggers hearings prior to this

case. Counsel reiterated that one of the victims identified Applicant in a photo lineup and also during the incident. Counsel then stated he found no reason to object to Ofc. Dowling's testimony because he was simply testifying to what he saw at the time. Counsel lastly stated that while the male victim identified the Applicant, he emphasized at trial that the female victim could not identify the Applicant.

Applicant testified that when he was advised of his Miranda rights, he told the officer that he did not want to talk to him until he had an attorney.

Ineffective Assistance of Counsel

The Applicant alleges he is entitled to post-conviction relief on the basis that he received ineffective assistance of trial 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). To be entitled to post conviction relief, the Applicant must prove both of the following: (1) his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) the Applicant suffered prejudice 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). Under this standard, counsel's deficient performance must have prejudiced the Applicant to the extent that "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).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

First, this Court finds Applicant's testimony concerning Counsel's alleged ineffectiveness not credible while finding Counsel's testimony credible.

A. **Trial counsel's failure to object to the testimony by Officer Dowling.**

Applicant contends that Counsel was ineffective for failing to object to Ofc. Dowling's testimony on p. 101 of the transcript. This argument is without merit.

Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d, 529 (1992).

Further, "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct **from counsel's perspective at the time.**" State v. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985) (emphasis added), citing Strickland v. Washington, 104 S.Ct. 2052, 890 L.E.2d 674(1984). Because of the difficulties inherent in making the evaluation, a court must

indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. Id.

In this case, Counsel clearly articulated that he did not object to Ofc. Dowling's testimony because he did not see this testimony as hearsay, but rather what he saw at the time. This court agrees that the statements were not hearsay as he observed the victim identify Applicant in a photo lineup and thus counsel had no reasonable basis on which to object. This Court finds these are legitimate reasons for his lack of objection to the testimony.

Under Butler and Whitehead, Counsel's representation of Applicant in this regard was not ineffective based on his particular trial strategy. Thus, this allegation is denied.

B. **Doyle v. Ohio violation**

Applicant also alleges that Counsel was ineffective for failing to Ofc Dowling's testimony that when Applicant was arrested, he invoked his right remain silent. This allegation is without merit.

This allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973).

This was the exact issue raised in Applicant's direct appeal. (See Anders Brief of Appellant pp. 5-6). As such, this issue is not proper for the PCR forum. Therefore, this allegation is denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED!

Brooks P. Goldsmith
Presiding Circuit Court Judge
Fourteenth Judicial Circuit

June 20, 2016

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	FOR THE 14th JUDICIAL CIRCUIT
Mykel Johnson Applicant	)	2014-CP-07-1759
vs.	)	
State of South Carolina Respondent,	)	MOTION TO ALTER / AMEND SENTENCE

2016 JUL -7 PM 3:51
ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

TO: Honorable Brooks P Goldsmith, PO Box 895, Edisto Island SC 29483; Rutledge Johnson, Office of SC Attorney General, PO Box 11549, Columbia, SC 29211-1549, .

Applicant by counsel moves pursuant to Rule 59(e) South Carolina Rules of Civil Procedure to alter or amend this court's June 20, 2016 Order of Dismissal.

As grounds for this motion, states:

Applicant's counsel received a copy of the Court's June 20, 2016 Order of Dismissal on July 5, 2016.

On or about June 19, 2016 Applicant's counsel submitted a proposed order granting PCR relief in the above case. (Copy attached hereto as exhibit A). Both at the PCR hearing and in his proposed order, Applicant's counsel argued that Officer Dowling was permitted to testify before the jury that the defendant invoked his Miranda right to counsel and his right to remain silent. Applicant's counsel argued further that trial counsel's failure to object to Officer Dowling's testimony and thus preserve the Doyle v Ohio issue for appellate review amounted to ineffective assistance of counsel.

In its Order of Dismissal the PCR judge ruled that Applicant's Doyle v Ohio argument is barred by S.C. Code Ann. § 17-27-20(b) because it is a direct appeal issue. The court notes that the Doyle v Ohio issue was raised in applicant's Anders brief. However, applicant's counsel respectfully contends that the Court's order of dismissal does not address whether trial counsel's failure to properly preserve the issue for direct appeal amounts to ineffective assistance of counsel. Counsel for applicant maintains further that appellate review by means of an Anders brief is not the equivalent of appellate review by means of a merits brief.

Applicant therefore moves that Order of Dismissal be altered or amended to address whether trial counsel's failure properly preserve the Doyle v Ohio issue for appellate review amounts to ineffective assistance of counsel.

Respectfully Submitted,

James Falk, Esq.
PO Box 1058
Charleston, SC 29402
(843) 606- 6007
(843) 972 9005 fax
jfalklaw@gmail.com

Charleston, SC
July 5, 2016

CERTIFICATE OF SERVICE

Undersigned certifies that on July 5, 2016 a copy of the above was deposited in the US Mail to the above named individuals at the above identified address.

James Falk

2016 JUL -7 PM 3:51
JETRI ANN ROSEREAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

EXHIBIT A

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
Mykel Johnson, #351916, Applicant, v. State of South Carolina, Respondent.	2014-CP-07-1759 **ORDER GRANTING APPLICANT POST CONVICTION RELIEF**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 21, 2014. The Respondent made its Return on January 29, 2016. An evidentiary hearing into the matter was convened on May 17, 2016, at the Beaufort County Courthouse in Beaufort, SC. Jim Falk, Esquire, represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Eric Erickson, Esquire, also testified. This Court had before it a copy of the records of the Beaufort County Clerk of Court, records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. The Applicant was indicted at the December 2011 term of the Beaufort County Grand Jury for two (2) counts of Attempted Murder (2012-GS-07-2269, 2270). Eric Erickson,

EXHIBIT A

Esquire, represented him. The Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted. The Honorable Carmen T. Mullen sentenced Applicant to incarceration for fifteen (15) years for each count of Attempted Murder, with the sentences to run concurrently.

A notice of appeal was filed on Applicant's behalf and an appeal perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Johnson, 2014-UP-134 (Filed on April 2, 2014). The Remittitur was issued on April 18, 2014.

In his current Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "My lawyer didn't probably(sic) represent me at trial."

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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witness presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

As specific grounds for his ineffective assistance of counsel claim, Applicant asserts that trial counsel permitted a state's witness to testify that in response to questioning by law enforcement, Applicant exercised his Fifth Amendment right to remain silent. Applicant asserts that the state's testimony violated his rights under *Doyle v Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) and trial counsel's failure to either:

EXHIBIT A

object to the testimony; move to strike the testimony; and or seek a curative instruction constituted ineffective assistance of counsel.

At the trial the State called Officer Joshua Dowling of the Beaufort Police Department to testify as the lead investigator into the case. At the close of his testimony the following colloquy took place:

> Q: Investigator Erdel [sic], let me just ask, uh, did Mr. -- were there any other evidence that was obtained in this case after Mr. Johnson was taken into custody?
> A: As it pertains to?
> Q: Is there any other additional evidence that you as a lead investigator in the case were able to obtain after Mr. Johnson was taken into custody?
> A: Mr. Johnson did not want to talk. He wanted the representation of an attorney when we asked him for his side of the story. From the defendant's side, we did not develop any information.

(Trial Transcript p. 103, lines 5-16)

The record reflects no contemporaneous objection from Mr. Erickson to this testimony. During his direct examination at the PCR hearing, Mr. Erickson stated that he did not see any grounds upon which to object to Officer Dowling's testimony. Mr. Erickson testified further that his failure to object was neither purposeful nor was it part of his trial strategy.

In *Doyle v. Ohio*. The United States Supreme Court held that the due process clause of the Fourteenth Amendment is violated when a state prosecutor seeks to impeach a defendant's exculpatory story told for the first time at the trial, by cross-examining. The protections in *Doyle* were then extended to protect against the state commenting upon the defendant's request for an attorney. *See Wainwright v. Greenfield*,

EXHIBIT A

474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (19~6). In *Wainwright* the Court stated that "The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony." *Wainwright*, 474 U.S. at 292, 106 S.Ct. 634.

In *Brown v. State*, 375 S.C. 464, 652 S.E.2d 765 (2007) the South Carolina Court of Appeals considered the effect of an alleged *Doyle* violation in the context of a post-conviction review. In *Brown* the South Carolina Court of Appeals denied applicant's requested relief finding that there was no *Doyle* violation. The Brown court noted that in order for there to be a *Doyle* violation applicant's statement must have been both post-arrest and post-Miranda. In *Brown* the court found no evidence that applicant was ever Mirandized prior to making his statement. However, in Mr. Johnson's case there was clear evidence that Mr. Johnson was given his Miranda warning before he made the statement invoking his right.

Prior to the start of Mr. Johnson's trial, the court conducted a *Jackson v Denno* hearing. At this pre-trial hearing the following colloquy occurred between the solicitor, and Stephen Erdel, who was a criminal investigator for the Beaufort Police Department.

Q: There- is no question that he [Mykel Johnson] was under arrest?
A: That's correct.
Q: Now, after he, uh, was taken to the Beaufort Police Department or to the Beaufort County Detention Center, was - - tell me, did you interview him there?
A: Uh, a statement was made at the police department in which he invoked his rights and the interview was terminated.
Q: Okay. So at that point, he was given his Miranda warnings and declined to speak with officers?
A: Correct.

EXHIBIT A

(Trial Transcript page 24 lines 1 – 14).

Although Appellate counsel raised this issue of Officer Dowling's testimony in its *Anders* brief, there was no basis for appellate review because trial counsel failed to preserve the issue. An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review." *State v. Nichols*, 325 S.C. 111, 120–21, 481 S.E.2d 118, 123 (1997) A party cannot complain of an error which his own conduct has induced. *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984). "Where an objection and the ground therefore is not stated in the record, there is no basis for appellate review." *State v. Morris*, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct.App.1991).

Whether or not Officer Dowling's testimony violated Applicant's rights under *Doyle* and *Wainwright* would have been an issue for direct appeal and therefore not cognizable in a PCR application. *Simmons v State* 264 S.C. 417, 215 S.E2d 883 (1974). However trial counsel's ineffective assistance of counsel as evidenced by his failure to preserve this issue is a proper subject of collateral attack though a PCR action. See *Hyman v State*, 278 S.C. 501, 299 S.E.2d 330 (SC 1983); *Mangal v State*, 415 S.C. 310, 781 S.E2d 732 (SC App 2015). This court finds that trial counsel was deficient in not objecting to Officer Dowling's testimony. Since trial counsel failed to make a contemporaneous objection to the testimony, he was precluded from either moving to strike the testimony and or seek a curative instruction from the court.

Having concluded that trial counsel was deficient for failing to either object to; move to strike; and or seek a curative instruction for Officer Dowling's testimony, this court must consider whether Applicant was prejudiced by trial counsel's deficient performance. The

United States Supreme Court stated that testimony regarding a defendant's silence in the face of police questioning has a significant potential for prejudice. *U.S. v. Hale*, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed2d 99 (1975). *The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest. Id* at 422 U.S. 180. The Hale court went on to rule that *the respondent's silence during police interrogation lacked significant probative value and that any reference to his silence under such circumstances carried with it an intolerably prejudicial impact. Id.* Similarly this Court finds that Officer Dowling's testimony regarding Applicant's invocation of his Fifth Amendment Right was equally prejudicial.

CONCLUSION

Based on all of the forgoing this Court finds that Applicant met his burden of proof that Trial counsel's performance was deficient and that as a direct result of counsel's deficient performance, the jury heard highly prejudicial testimony that deprived applicant of his constitutional protections against self-incrimination. Accordingly this court grant's applicant post-conviction relief and remands this case back to the Beaufort County Solicitor's Office.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief is granted; and,
2. Applicant shall be released from the custody of the South Carolina Department of Corrections.

EXHIBIT A

AND IT IS SO ORDERED!

STATE OF SOUTH CAROLINA | COURT OF COMMON PLEAS

COUNTY OF BEAUFORT | FOR THE 14th JUDICIAL CIRCUIT

Mykel Johnson

Applicant | 2014-CP-07-1759

2016 AUG -3 PM 3:04
TERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

vs.

State of South Carolina | MOTION TO ALTER/AMEND

Respondent | SENTENCE

This matter comes before the Court by way of Applicant's Motion pursuant to Rule 59(e), requesting that this court alter or amend the Order of Dismissal dated June 20, 2016.

After reviewing memorandum submitted by both parties I find no reason to alter or amend the prior Order.

THE MOTION OF THE APPLICANT IS ACCORDINGLY DENIED.

July 31, 2016

BROOKS P. GOLDSMITH

415

WITNESSES

Inv. J. Dowling, Beaufort PD

ARREST WARRANT NUMBER

J358107

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date: DEC 15 2011

VERDICT

Foreperson of Petit Jury
Date:
INDICT

DOCKET NO. 2011GS0702269

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

DECEMBER Term 2011

THE STATE

vs.

Mykel Johnson

Indictment for

Attempted Murder

SC Code: 16-03-0029
CDR Code:3410

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I

Hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. and G.S.

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

INDICTMENT
2011GS0702269

At a Court of General Sessions, convened on December 15, 2011, the Grand Jurors of Beaufort County present upon their oath:

Attempted Murder

That in Beaufort County, South Carolina, on or about October 28, 2011, the Defendant, Mykel Johnson, with intent to kill and malice aforethought, did attempt to kill Frank Babiecki, to wit: the Defendant did shoot a handgun at Frank Babiecki; in violation of the Common Law of South Carolina.

Against the peace and dignity of the State, and contrary to the statue in such case made and provided.

Solicitor

STATE OF SOUTH CAROLINA)
COUNTY OF Beaufort)
STATE VS.)
Mykel Johnson)
AKA:)
Race: AFRICAN AME Sex: M Age:)
DOB: SS#:)
Address:)
City,State,Zip:)
DL#: SID#:)
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS0702269
A/W#: J358107
Date of Offense: 10/28/2011
S.C. Code § : 16-03-0029
CDR Code #: 3410

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Attempted Murder

in violation of § 16-03-0029 of the S.C. Code of Laws, bearing CDR Code # 3410
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State:

ATTEST: Jeff Stephens, Red Team | 72418 SC Bar# | Mykel Johnson Defendant | Attorney for Defendant | 8232 SC Bar#

WHEREFORE, the Defendant is commited to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed ___ years
and/or to pay a fine of $ ___; provided that upon the service of ___ days/months/years and/or payment
of $ ___; plus costs and assessments as applicable*; the balance is suspended with probation for ___
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services' standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$ 5.00
3% to County (if paid in installments)		$ 3.90
TOTAL		$ 133.90

Certified - A True Copy
Jerri Ann Roseneau - Clerk of Court
Beaufort County, SC - LaSandra Young

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk: LaSandra Young
Court Reporter: Shawn L. Vazquez-Hafka
Presiding Judge
Judge Code: 7142
Sentence Date: 6/20/12

SCCA/217 (03/2011)

WITNESSES

Inv. J. Dowling, Beaufort PD

ARREST WARRANT NUMBER

J358108

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date: DEC 15 2011

VERDICT

Foreperson of Petit Jury
Date:

INDICT

DOCKET NO. 2011GS0702270

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

DECEMBER Term 2011

THE STATE

vs.

Mykel Johnson

Indictment for

Attempted Murder

SC Code: 16-03-0029
CDR Code:3410

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I

Hereby appear in my own proper person and plead guilty to the within indictment or to:

Defendant

Witness:

C.C.C. PLS. and G.S.

418

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

INDICTMENT
2011GS0702270

At a Court of General Sessions, convened on December 15, 2011, the Grand Jurors of Beaufort County present upon their oath:

Attempted Murder

That in Beaufort County, South Carolina, on or about October 28, 2011, the Defendant, Mykel Johnson, with intent to kill and malice aforethought did attempt to kill Desiree Constantineau, to wit: the Defendant did shoot a handgun at Desiree Constantineau; in violation of the Common Law of South Carolina.

Against the peace and dignity of the State, and contrary to the statue in such case made and provided.

Solicitor

STATE OF SOUTH CAROLINA)
COUNTY OF Beaufort)
STATE VS.)
Mykel Johnson)
AKA:)
Race: AFRICAN AMESex: M Age:)
DOB: SS#:)
Address:)
City,State,Zip:)
DL#: SID#:)
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS0702270
A/W#: I358108
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CDR Code #: 3410

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TO: Attempted Murder

in violation of § 16-03-0029 of the S.C. Code of Laws, bearing CDR Code # 3410
NON-VIOLENT ☒ VIOLENT ☐SERIOUS ☒MOST SERIOUS ☐Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐§17-25-45

The charge is: ☒ As Indicted, ☐Lesser Included Offense, ☐Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: Jeff Stephens, Red Team | 72418 SC Bar# | Mykel Johnson Defendant | Anni Nichson Attorney for Defendant | 8232 SC Bar#

WHEREFORE, the Defendant is commited to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of $ —; provided that upon the service of — days/months/years and/or payment
of $ —; plus costs and assessments as applicable*; the balance is suspended with probation for —
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
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Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

PTUP _____
_____ days/hours Public Service Employment
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Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§14-1-211(A)(2) (DUI Surcharge)	$100	$
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§ 56-1-286 (DUI Breath Test)	$25	$
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§ 50-21-114(BUI Breath Test Fee)	$50	$
§.56-5-2942(J) (Vehicle Assessment)	$40/ea	$
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3% to County (if paid in installments)		$ 3.70
TOTAL		$ 133.70

Certified - A True Copy
Jerri Ann Roseneau - Clerk of Court
Beaufort County, SC - LaSandra Young

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk: LaSandra Young
Court Reporter: Sharon L. Vegas-Hayden
Presiding Judge
Judge Code: 142
Sentence Date: 6/21/12

SCCA/217 (03/2011)

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Beaufort County

Brooks P. Goldsmith, Circuit Court Judge

MYKEL JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001684

BRIEF OF PETITIONER

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ISSUES PRESENTED 1

STATEMENT 2

STANDARD OF REVIEW 13

ARGUMENT

I. The PCR court erred in concluding as a matter of law that Petitioner's claim that trial counsel rendered ineffective assistance by failing to object to an officer's improper comment on his silence was procedurally barred pursuant to Section 17-27-20(B) of South Carolina Code because they unpreserved issue regarding the officer's improper comment was raised in a brief pursuant to *Anders v. California,* 386 U.S. 738 (1967), on direct appeal. 14

II. Trial counsel rendered ineffective assistance in abrogation of the Sixth and Fourteenth Amendments to the United State Constitution by failing to object to a police officer's testimony that Petitioner invoked his Fifth Amendment rights to silence and counsel subsequent to his arrest and the advisement of rights. 18

CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Anders v. California, 386 U.S. 738 (1967) ..... passim

Brecht v. Abrahamson, 507 U.S. 619 (1993) 22

Brown v. Singletary, 226 S.C. 482, 85 S.E.2d 738 (1955) 24

Brown v. State, 375 S.C. 464 652 S.E.2d 765 (Ct. App. 2007) 22, 23

Chastain v. Hiltabidle, 381 S.C. 508, 673 S.E.2d 826 (Ct. App. 2009) 19

Doyle v. Ohio, 426 U.S. 610 (1976) 21

Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) 14, 15

Edmond v. State, 341 S.C. 340, 534 S.E.2d 682 (2000) 22, 23, 25

Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004) 19

Griffin v. California, 380 U.S. 609 (1965) 21

Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001) 17, 19, 23

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) 19

Jackson v. Denno, 378 U.S. 368 (1964) 5

Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014) 13

Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013) 13

Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007) 19

McFadden v. State, 342 S.C. 637, 539 S.E.2d 391 (2000) 26

McHam v. State, 404 S.C. 465, 746 S.E.2d 41 (2013) 7, 15, 16, 17

Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006) 20

Sellner v. State, 416 S.C. 606, 787 S.E.2d 525 (2016) 13

Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975) 14

Simmons v. State, 416 S.C. 584, 788 S.E.2d 220 (2016) 18, 19

Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) 13

State v. Arther, 290 S.C. 291, 350 S.E.2d 187 (1986) 23

State v. Carlson, 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 2005) 17, 23

State v. Cockerham, 294 S.C. 380, 365 S.E.2d 22 (1988) 23

State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003) 17, 23

State v. Gray, 304 S.C. 482, 405 S.E.2d 420 (Ct. App. 1991) 23

State v. Hawkins, 292 S.C. 418, 357 S.E.2d 10 (1987) 23

State v. Holliday, 333 S.C. 332, 509 S.E.2d 280 (Ct. App. 1998) 23

State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987) 21

State v. Lawrence, 349 S.C. 129, 561 S.E.2d 633 (Ct. App. 2002) 7

State v. Lyles, 381 S.C. 442, 673 S.E.2d 811 (2009) 16

State v. McIntosh, 358 S.C. 432, 595 S.E.2d 484 (2004) 22, 25

State v. Myers, 301 S.C. 251, 391 S.E.2d 551 (1990) 23

State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997) 11

State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996) 25

State v. Porter, 389 S.C. 27, 698 S.E.2d 237 (Ct. App. 2010) 17, 23

State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986) 22

Strickland v. Washington, 466 U.S. 668 (1984) 13, 20, 21

United States v. Hale, 422 U.S. 171 (1975) 12

Wainwright v. Greenfield, 474 U.S. 284 (1986) 22

Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) 19

Statutes

S.C. Code Ann. § 17-27-20(B) 1, 10, 14

Rules

Rule 52(a), SCRCP 19

Rule 59(e), SCRCP 18, 19, 20

Rule 243(l), SCACR 12

ISSUES PRESENTED

I. Did the PCR court err in concluding as a matter of law that Petitioner's claim that trial counsel rendered ineffective assistance by failing to object to an officer's improper comment on his silence was procedurally barred pursuant to Section 17-27-20(B) of the South Carolina Code because the unpreserved issue regarding the officer's improper comment was raised in a brief pursuant to Anders v. California, 386 U.S. 738 (1967), on direct appeal?

II. Did trial counsel render ineffective assistance in abrogation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to a police officer's testimony that Petitioner invoked his Fifth Amendment rights to silence and counsel subsequent to his arrest and the advisement of rights?

STATEMENT

Petitioner lived in the same apartment complex as Frank Babecki[1] and his wife, Desiree Constantineau. App. 170, ll. 12-23; App. 201, ll. 10-11. At various times, Babecki would contact Petitioner to purchase marijuana. App. 177, ll. 12-15; App. 181, ll. 2-7. On October 27, 2011, Babecki sent a text message to Petitioner asking "could you spot me a 10 and I'll have it for you by two o'clock. I need a smoke bad. I got like two bucks. Just until my depsit [sic] goes through and I give you an extra 10 for fronting me homey." App. 176, ll. 14-25; App. 181, ll. 11-19; App. 182, ll. 18-25. At trial, Babecki explained "a 10" meant $10 worth of marijuana, but he could not recall if he sent the text message to request marijuana for himself or for a friend. App. 176, ll. 12-13; App. 177, ll. 2-7; App. 181, ll. 20-25.

Also on October 27, 2011, Babecki's friend, Mike, or Mike's brother, was robbed during a "drug deal gone bad." App. 151, ll. 7-25; App. 178, ll. 1-17; App. 184, ll. 6-8; App. 191, ll. 21-25; App. 207, ll. 14-18. Babecki suspected Petitioner had committed the robbery against his friend. App. 151, ll. 7-12. While the robbery did not involve guns or violence, it did involve a promise to sell a quantity of marijuana between $250 and $375 with no marijuana being provided despite the exchange of funds. App. 151, ll. 17-25; App. 178, ll. 1-17; App. 192, l. 24 – App. 193, l. 2; App. 193, ll. 17-19.

On October 28, 2011, Babecki and Constantineau were leaving the apartment complex in a rental car. App. 171, ll. 14-19; App. 172, ll. 6-8; App. 203, ll. 4-6. Along the way, Babecki claimed he saw Petitioner walking along the sidewalk within the complex. App. 172, ll. 11-14; App. 173, ll. 5-6; App. 203, ll. 6-7; App. 203, ll. 11-14. Babecki yelled out the window and

[1] At the time of Petitioner's trial, Frank Babecki had pending criminal charges for financial transaction card fraud. App. 179, ll. 11-13. His charges were "scheduled to go into [the solicitor's] Pre-trial Diversion program." App. 179, ll. 21-23.

asked what happened last night in reference to the alleged robbery during the drug deal. App. 172, ll. 14-23; App. 174, ll. 14-15; App. 183, l. 20 – App. 184, l. 3; App. 189, l. 20 – App. 190, l. 1; App. 202, ll. 7-8. When Petitioner did not answer, Babecki and his wife started driving away. App. 202, ll. 8-9; App. 203, ll. 11-20. According to Babecki, Petitioner shot twice at the rear of his car while the car was driving away. App. 174, ll. 20-24; App. 194, ll. 11-15; App. 202, ll. 9-10.

Thereafter, Babecki and his wife drove to the parking lot of a nearby restaurant, where they called 911. App. 87, ll. 5-7; App. 157, ll. 11-15; App. 204, ll. 6-8; App. 204, ll. 23-25. The police arrived shortly thereafter. App. 175, ll. 14-15. Oddly, Babecki's friend, Mike, also arrived at the scene shortly after the shooting. App. 191, l. 24 - App. 192, l. 3. According to Babecki, Mike was walking and "was at the scene when the cops were there." App. 192, ll. 1-3.

Babecki and his wife gave video recorded statements to police, in which they claimed the shooter was "Hot Boy." App. 100, ll. 14-23; App. 138, ll. 4-25; App. 205, ll. 1-6. Investigator George Erdel described Babecki's interview as containing lies of omission. App. 146, ll. 2-24. While Erdel did not know if "anything [Babecki] said was overtly not true," he "felt like maybe there would be something - - in other words, if you would say it would be a lie, I guess, of omission, in other words, there were things that were not revealed." App. 146, ll. 18-22. Erdel qualified his answer by saying he could not "think of anything where he said that was like in and of itself like a lie, not true." App. 146, ll. 22-24. The police searched a "database" of "street names" and determined Petitioner's nickname was "Hot Boy." App. 100, ll. 20-25; App. 131, ll. 6-21. This database search also revealed Petitioner lived in the same apartment complex as Babecki and his wife. App. 100, l. 25 – App. 101, l. 1; App. 131, l. 22 – App. 132, l. 2. The

police arrested Petitioner, charging him with two counts of attempted murder. App. 102, ll. 13-23; App. 139, l. 7 – App. 140, l. 23.

On December 15, 2011, a Beaufort County grand jury indicted Petitioner for two counts of attempted murder (2011-GS-07-2269; -2270). App. 415-416; App. 418-419. On June 18, 2012, the state, represented by Jeffrey S. Stephens, called the case to trial before the Honorable Carmen T. Mullen and a jury. App. 1. Eric Erickson represented Petitioner. App. 1.

Relevant trial facts

The second witness called in the state's case-in-chief was Investigator Joshua Dowling, the lead investigator in the case. When the prosecutor questioned Dowling about his interrogation of Petitioner, Dowling told the jury that Petitioner refused to cooperate with the police investigation. App. 102, l. 24 – App. 103, l. 16.

> Q. And did you subsequently interview him or take any other investigative steps?
>
> A. Yes, when he was taken into custody, he was brought back to the Beaufort City Police Department. We always want to get everybody's side of the story to give them a chance to - -
>
> Q. Investigator Erdel [sic], let me just ask, uh, did Mr. - - were there any other evidence that was obtained in this case after Mr. Johnson was taken into custody?
>
> A. As it pertains to?
>
> Q. Is there any additional evidence that you as the lead investigator in the case were able to obtain after Mr. Johnson was taken into custody?
>
> A. **Mr. Johnson did not want to talk. He wanted the representation of an attorney when we asked him for his side of the story. From the defendant's side, we did not develop any information.**

App. 102, l. 24 – App. 103, l. 16 (emphasis added). Trial counsel did not object.

In light of the prosecutor's desire to introduce statements allegedly made to George Erdel, a police officer, by Petitioner upon his arrest, the trial judge presided over a hearing in accordance with Jackson v. Denno, 378 U.S. 368 (1964). During the hearing, Erdel claimed that when Petitioner was arrested, he said "he wanted to turn himself in and he was going to do so once he had an attorney," and he asked how the police had found him. App. 23, ll. 12-16. Petitioner also told Erdel there was something on his phone that he wanted Erdel to see, but Erdel did not "understand exactly what he was saying." App. 23, ll. 16-19. As Erdel had not yet advised Petitioner of his rights, he did not pose any questions to Petitioner. App. 23, ll. 20-25.

Shortly thereafter, Petitioner was transported to the local police department. App. 24, ll. 3-5. According to Erdel, when Petitioner was questioned at the police station, he was advised of his rights and "he invoked his rights." App. 24, ll. 5-14. At the conclusion of the hearing, the parties argued regarding the admissibility of the statements allegedly made to Erdel just after his arrest. App. 27, l. 24 – App. 28, l. 23. The judge found the statements were voluntary, not elicited by police interrogation, and were "spontaneous utterances." App. 28, l. 24 – App. 29, l. 2. Thus, the trial judge held the statements were admissible.[2]

Erdel's testimony during the pre-trial hearing established that Petitioner's invocation of his rights to silence and counsel occurred *after* he was advised of his rights. This testimony also placed trial counsel on notice that Petitioner had invoked his rights to silence and counsel *and* that the state intended to elicit such testimony during the trial. However, trial counsel did not move to exclude the testimony or request any preliminary ruling on the admissibility of the

[2] When Erdel testified before the jury, the solicitor elicited these two statements during his direct examination. App. 140, l. 24 – App. 142, l. 2. Trial counsel did *not* object or renew his pre-trial objections.

testimony. As previously noted, trial counsel did not object and move to strike when Dowling testified improperly regarding Petitioner's invocation of his rights during the trial.

Dowling arrived to the scene shortly after the 911 call. App. 90, ll. 14-15; App. 90, l. 22 – App. 91, l. 13. Dowling recovered a single bullet from the car. App. 97, ll. 14-22. The police collected no other evidence from the car. App. 98, ll. 9-19. The police collected no evidence from the scene, and no cartridge cases were found near where the shooting allegedly occurred. App. 99, ll. 2-14. Although the police recovered the bullet from the car, the police were unable to provide the caliber of the bullet with any certainty. App. 107, ll. 12-21. Dowling guessed it was either a .40 caliber or .45 caliber based on the size. App. 107, ll. 18-21. He explained the bullet was not examined forensically because a gun was not recovered in order to conduct any comparison testing. App. 107, l. 22 – App. 108, l. 10. In his opinion, there was "no need to have a ballistic[s] analysis done." App. 108, ll. 9-10. In light of Petitioner being arrested outside the "four-hour window" established by police protocol in order to test a suspect for gunshot residue, the police did not collect any swabs from Petitioner's hands. App. 100, ll. 9-13.

Petitioner defended against the charges by arguing that Babecki wanted revenge against him for the "drug deal gone bad." App. 285, ll. 3-13. Babecki concocted the elaborate ruse of a shooting to mete out his revenge. App. 285, ll. 3-13. Additionally, Petitioner called his friend, Kendalle Simmons, as a witness to establish an alibi. Simmons told the jurors that on October 28, 2011, he and Petitioner were visiting with Malcolm Moore. App. 249, ll. 1-21. Simmons arrived at Moore's home around 3 p.m., and Petitioner was already there. App. 249, ll. 1-3; App. 249, ll. 10-11; App. 252, ll. 7-16. When Simmons left between 6:45 p.m. and 7 p.m., Petitioner was still there. App. 249, ll. 17-21; App. 254, ll. 2-7.

The jury found Petitioner guilty as charged. App. 312, ll. 8-17. Judge Mullen sentenced sixteen-year old Petitioner to fifteen years' imprisonment on each count and ordered the sentences to be served concurrently. App. 317, ll. 11-20; App. 417; App. 420.

Direct appeal

Petitioner filed a notice of appeal, which was perfected by Kathrine Haggard Hudgins by way of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 320-331. The issue raised on appeal was whether the trial judge erred in failing to strike testimony by the investigator that Petitioner "did not want to talk and wanted the representation of any attorney because the testimony constituted an improper comment on [his] constitutional right to remain silent and right to an attorney." App. 320-331.

In the brief, appellate counsel quoted Dowling's testimony regarding Petitioner's invocation and argued the judge erred in failing to strike the testimony. App. 325-326. At no point in the brief did appellate counsel state or argue that trial counsel objected to the testimony. App. 325-326. Certainly, appellate counsel could make no such statement or argument because trial counsel had *not* objected to the testimony. In fact, appellate counsel filed the brief pursuant to Anders, supra, signaling to the Court of Appeals that counsel found no *preserved* issue that would warrant reversal.

Thereafter, the Court of Appeals reviewed the entire record for any preserved issues with potential merit. See McHam v. State, 404 S.C. 465, 474, 746 S.E.2d 41, 46 (2013)(explaining that "[u]nder the Anders procedure, an appellate court is required to review the entire record, including the complete trial transcript, for any *preserved* issues with potential merit"); State v. Lawrence, 349 S.C. 129, 130, 561 S.E.2d 633, 634 (Ct. App. 2002)(noting that after its review in accordance with Anders, the "only preserved issue at trial" was the directed verdict motion).

Finding no *preserved* issues with potential merit, the Court of Appeals dismissed the appeal and relieved appellate counsel on April 2, 2014. App. 332-333; State v. Johnson, 2014-UP-134 (S.C. Ct. App. filed April 2, 2014). Remittitur was issued on April 18, 2014. App. 334.

Post-conviction relief

On July 21, 2014, Petitioner filed an application for post-conviction relief (PCR). App. 335-341.[3] On May 17, 2016, the matter proceeded to an evidentiary hearing before the Honorable Brooks P. Goldsmith. App. 347. James K. Falk represented Petitioner, and J. Rutledge Johnson represented the state. App. 348.

PCR hearing

At the PCR hearing, trial counsel[4] acknowledged Dowling testified about Petitioner's post-arrest silence and trial counsel posed no objection to the testimony. App. 371, l. 20 – App. 373, l. 2. In fact, trial counsel did not even consider objecting to the testimony. App. 373, l. 2. Trial counsel stated frankly, "I didn't think there was anything wrong with that." App. 373, l. 7.

When PCR counsel began questioning trial counsel regarding the long line of cases excluding such testimony, the state posed an objection, stating the issue was "improper for a PCR forum." App. 373, ll. 10-16. According to the state, this was "the exact issue raised at the Court of Appeals through an Anders versus California brief. The Court of Appeals affirmed his conviction. That was dealt with on direct appeal." App. 373, ll. 10-16. PCR counsel countered that the issue was "not preserved" for appeal, and thus, appellate counsel had filed an Anders

[3] During the PCR hearing, the state agreed that PCR counsel had amended the application to include an allegation "that counsel was ineffective for not objecting to Mr. Dowling making some type of reference, which the state disputes, on Mr. Johnson's right to remain silent." App. 365, ll. 16-20.

[4] At the PCR hearing, trial counsel explained he was retained by Petitioner's mother to represent Petitioner on the criminal charges while Petitioner was in jail awaiting trial. App. 351, ll. 12-18.

brief, not a merits brief. App. 373, ll. 17-20. The appellate court would not consider the issue "because trial counsel failed to preserve the objection that [Petitioner]'s Fifth Amendment right to remain silent had been impeded or whatever, had been jeopardized, because the Court was able - - because the jury was able to hear that." App. 373, l. 20 – App. 374, l. 1. The jury was permitted "to draw their own negative conclusions." App. 374, ll. 1-3. PCR counsel was emphatic, "It did not go up on appeal. It was an Anders brief; not a merits brief; and the reason why is because the issue was not preserved. You got to preserve these issues in order for it to go up. There is no clear error doctrine." App. 374, ll. 3-7.

The state responded that "if an issue is unpreserved the Court of Appeals is very quick to tell appellate counsel." App. 374, ll. 9-10. Further, the state argued,

> [A]n Anders brief is not just when you just think it's not preserved. An Anders brief, the whole point is that, in good conscience and through the duty that appellate counsel has to argue merit issues, if they feel that there is no merit issues to raise, they're allowed to file an Anders versus California brief. The Court then reviews the entire record for any *preserved* errors and makes a decision.

App. 374, ll. 11-18 (emphasis added). According to the state, the Court of Appeals "affirmed" and made "no mention concerning the fact that this issue was not preserved." App. 374, ll. 19-22. In the state's view, "the Court of Appeals dealt with this issue." App. 374, ll. 22-23. "[T]he fact that this issue was briefed on direct appeal" was proof, according to the state, "that this [issue was] not proper for PCR forum" as the issue had "already been addressed because an Anders brief [was filed] ... [and] the Court is presumed to have reviewed the entire record and ma[d]e an opinion - - or issued an opinion based on they reviewed the entire record." App. 378, ll. 12-18. Thus, the issue was procedurally barred as "not proper ... for the PCR forum." App. 374, ll. 24-25.

PCR counsel countered that the Court of Appeals "didn't say anything other than affirm," and that no conclusion could be drawn from the opinion to suggest that the Court of Appeals entertained and rejected an unpreserved issue. App. 375, ll. 5-8. PCR counsel explained trial counsel failed to preserve the issue for appeal by failing to object to the comment on Petitioner's exercise of his constitutional right to silence was reversible error in light of controlling case law. App. 375, ll. 9-19. According to PCR counsel, the issue being raised at the PCR hearing was not an issue that could have been raised on direct appeal because it was not preserved. App. 379, ll. 6-9. PCR counsel continued, "I mean, that's the whole issue here is that these are issues that were not preserved." App. 379, ll. 9-11. The Court of Appeals did not review, and could not have reviewed, the error because it was not preserved, and South Carolina's "very rigorous error preservation rules" would prohibit such review. App. 379, ll. 16-19.

Order denying relief

By an order dated June 20, 2016, Judge Goldsmith denied Petitioner relief. App. 397-403. The PCR judge found Petitioner's allegation that trial counsel "was ineffective for failing to [object to Officer] Dowling's testimony that when [Petitioner] was arrested, he invoked his right to remain silent" was "without merit." App. 402. According to the PCR judge, the issue raised a "direct appeal issue that [was] procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003)." App. 402. Although the PCR court correctly noted that "[p]ost-conviction relief is not a substitute for a direct appeal" and that "[a] post-conviction relief application cannot assert any issues that could have been raised ... on direct appeal," the PCR court erred in holding that because this issue was raised on direct appeal, the issue was "not proper for the PCR forum." See App. 402.

Motion to alter or amend

Petitioner filed a motion to alter or amend on July 7, 2016, including a copy of his proposed order granting relief. App. 404-413. In his motion to alter or amend, PCR counsel took issue with the court's failure to consider whether trial counsel failed to properly preserve the issue of the officer commenting on Petitioner's silence for appeal. App. 404-413. In other words, as PCR counsel explained, trial counsel failed to object to the officer's testimony, and as a result, the issue was not preserved for review. App. 404-413. Error preservation rules in South Carolina do not permit an issue to be raised for the first time on appeal; rather, the issue must have been raised to and ruled upon by the trial judge to be preserved for appellate review. App. 404-413 (citing State v. Nichols, 325 S.C. 111, 120-121, 481 S.E.2d 118, 123 (1997)). In light of the fact that trial counsel failed to object, which would have been necessary to preserve the issue for appellate review, any review pursuant to Anders by the appellate court would necessarily have excluded consideration of this issue. App. 404-413. Thus, the issue presented for PCR was *not* a direct appeal issue because it was not preserved for appellate review. App. 404-413. The question properly before the PCR court was whether the failure to object amounted to ineffective assistance of counsel in derogation of the Sixth and Fourteenth Amendments to the Constitution. App. 404-413. This question went unanswered as the PCR court improperly applied a procedural bar.

In his motion, PCR counsel quoted the specific objectionable testimony and explained the transcript "reflect[ed] no contemporaneous objection" from trial counsel. App. 404-413. PCR counsel also explained that trial counsel testified at the PCR hearing that "he did not see any grounds upon which to object to Officer Dowling's testimony" and "that his failure to object was neither purposeful nor was it part of his trial strategy." App. 404-413. Thus, PCR counsel

argued, trial counsel's performance was deficient due to his failure to object to the testimony. App. 404-413. PCR counsel further argued trial counsel's deficient performance was prejudicial citing United States v. Hale, 422 U.S. 171 (1975). App. 404-413. As PCR counsel explained, the United States Supreme Court cautioned against permitting witnesses comment on a defendant's invocation of his right to silence because jurors likely assign "much more weight" to a defendant's invocation and silence than warranted. App. 404-413 (citing Hale, 422 U.S. at 180). Informing the jury of a defendant's invocation of his constitutional right offered little probative value, but presented "an intolerably prejudicial impact." App. 404-413 (citing Hale, 422 U.S. at 180). PCR counsel concluded that Dowling's testimony regarding Petitioner's invocation of his Fifth Amendment rights was "equally prejudicial." App. 404-413.

Order denying motion to alter or amend

On July 31, 2016, providing no elaboration, Judge Goldsmith denied the motion to alter or amend. App. 414. The order provided simply that the judge found "no reason to alter or amend the prior [o]rder." App. 414.

Appeal

Petitioner filed and served a notice of appeal on August 10, 2016. Subsequently, Petitioner filed a petition for writ of certiorari. On October 30, 2017, the South Carolina Supreme Court transferred Petitioner's case to this Court pursuant to Rule 243(l), SCACR. On November 1, 2018, this Court granted the petition and ordered briefing. This brief of petitioner follows.

STANDARD OF REVIEW

Recently, this Court clarified the standard of review an appellate court reviewing a PCR action must use when analyzing claims of ineffective assistance of counsel pursuant to Strickland v. Washington, 466 U.S. 668, 688 (1984). Smalls v. State, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839-840 (2018). This Court explained the "standard of review in PCR cases depends on the specific issue" raised on appeal. Id. at 180, 810 S.E.2d at 839. The reviewing court will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." Id. at 180, 810 S.E.2d at 839. However, the appellate court will "will review questions of law de novo, with no deference to trial courts." Id. at 180-181, 810 S.E.2d at 839. In another recent case, this Court explained the appellate courts give "great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them." Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). "Questions of law are reviewed de novo," and the reviewing court must "reverse the PCR court's decision when it is controlled by an error of law." Id. See also Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013).

ARGUMENT

I. The PCR court erred in concluding as a matter of law that Petitioner's claim that trial counsel rendered ineffective assistance by failing to object to an officer's improper comment on his silence was procedurally barred pursuant to Section 17-27-20(B) of the South Carolina Code because the unpreserved issue regarding the officer's improper comment was raised in a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), on direct appeal.

Concession of error

In its return, the state candidly admitted the PCR court erred in finding Petitioner's claim that trial counsel provided ineffective assistance by failing to object to an officer's improper comment on his silence was procedurally barred because the issue was raised in a brief pursuant to Anders. Ret. at 6-8. The state requested this Court reverse the PCR court's dismissal of Petitioner's allegation. Ret. at 8. Petitioner respectfully joins in this request.

Proper forum

PCR is the proper forum for Petitioner's claim for relief – trial counsel's ineffective assistance in failing to object to the officer's improper testimony – because the issue was not decided, and could not have been decided on direct appeal. The Uniform Post-Conviction Relief Procedures Act provides that post-conviction relief is "not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(B). "Under the doctrine enunciated in Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975), errors which can be reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings." Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993). "Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective

assistance of counsel." Id. at 9, 430 S.E.2d at 520. Neither the Act nor case law precludes review in PCR of Petitioner's issue as it could not have been decided on direct appeal due to trial counsel's failure to object.

Petitioner's case presents striking similarities to McHam v. State, 404 S.C. 465, 746 S.E.2d 41 (2013). On appeal, McHam's counsel filed a brief pursuant to Anders, supra, arguing the trial court erred in refusing to suppress evidence seized as a result of the unlawful search of McHam's car. McHam, 404 S.C. at 471, 746 S.E.2d at 45. The Court of Appeals dismissed McHam's direct appeal after review. Id.

Subsequently, McHam filed a PCR application alleging trial counsel was ineffective for failing to object contemporaneously to the admission of the drug evidence based on the illegal search and seizure. Id. Trial counsel had argued the suppression motion during the pre-trial proceedings, but he had failed to object contemporaneously, which was necessary to preserve the matter for appeal. Id. at 471-472, 746 S.E.2d at 45. At the PCR hearing, trial counsel conceded he did not preserve the issue by objecting contemporaneously and stated that the suppression motion was the "most critical part of McHam's trial." Id. at 472, 746 S.E.2d at 45.

The state argued the issue was improper for PCR. Id. According to the state, "the opinion of the Court of Appeals did not appear to dismiss the Anders appeal on a procedural basis as it did not employ that language." Id. Incredulously, the state maintained the issue "was dismissed on the merits and, as a result, formed no basis for a PCR claim." Id.

The PCR judge denied McHam relief, finding counsel's representation on the suppression motion exceeded the standard of reasonableness and that he was not ineffective for failing to prevail on the motion. Id. Further, the PCR court determined the Court of Appeals had reviewed the suppression issue presented on direct appeal and the dismissal of the appeal was on the merits, not a

procedural ground. Id. According to the PCR court, the Court of Appeals determined the search and seizure issue lacked merit, and, therefore, any error by trial counsel was harmless. Id. It was the PCR court's conclusion that "McHam had not demonstrated that his attorney failed to properly argue the motion to suppress or that the lack of an objection had led to the dismissal of his direct appeal." Id.

In rendering an opinion in McHam, this Court first explained the Anders procedure. "Under the Anders procedure, an appellate court is required to review the entire record, including the complete trial transcript, for any *preserved* issues with potential merit." Id. at 475, 746 S.E.2d at 46 (emphasis in original). Additionally, this Court re-iterated its previous holding "that an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a PCR claim alleging ineffective assistance of counsel." Id. at 475, 746 S.E.2d at 47. This Court found it "clear the Court of Appeals did not consider the merits of the Fourth Amendment issue because it was not preserved by trial counsel." Id. Thus, this Court held the PCR court was in error to hold otherwise. Id.

Similarly, State v. Lyles, 381 S.C. 442, 444-445, 673 S.E.2d 811, 813 (2009) provided that "a decision of the Court of Appeals dismissing an appeal after conducting a review pursuant to Anders is not a decision on the merits of the appeal, but simply reflects that the appellate court was unable to ascertain a non-frivolous issue which would require counsel to file a merits brief."

Thus, the question presented in the instant matter was whether the Court of Appeals reviewed the improper testimony of Dowling as part of the Anders procedure. That answer turned on whether the issue was preserved for appellate review because the Court of Appeals reviewed the record for *preserved* errors only.

"The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal." State v. Porter, 389 S.C. 27, 37, 698 S.E.2d 237, 242 (Ct. App. 2010) (citing State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003)). "A contemporaneous objection is required to preserve issues for direct appellate review." Id. at 38, 698 S.E.2d at 242 (citing State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005)). "Issues not raised and ruled upon in the trial court will not be considered on appeal." Id. at 38, 698 S.E.2d at 243 (citing Humbert v. State, 345 S.C. 332, 338, 548 S.E.2d 862, 866 (2001)).

Trial counsel failed to object to Dowling's testimony. The trial transcript showed no objection to the testimony, and trial counsel candidly admitted during the PCR hearing that he had not objected to the testimony, had not even considered an objection, and saw nothing wrong with the testimony. There was simply no argument to support the PCR judge's finding, which was based upon the state's argument during the hearing, that the Court of Appeals considered the issue as part of its Anders review procedures. Quite simply, the issue regarding the propriety of Dowling's comment on Petitioner's invocation of his Fifth Amendment rights was not preserved for appellate review. Therefore, PCR was the proper forum for consideration of the issue.

Generally, "[t]his Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them, and it will reverse the PCR judge's decision when it is controlled by an error of law." McHam, 404 S.C. at 473, 746 S.E.2d at 45. The PCR judge's decision that Petitioner's claim for relief was procedurally barred was controlled by an error of law. Therefore, this Court must reverse the PCR judge's decision and address the merits of Petitioner's claim.

II. Trial counsel rendered ineffective assistance in abrogation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to a police officer's testimony that Petitioner invoked his Fifth Amendment rights to silence and counsel subsequent to his arrest and the advisement of rights.

Remand is unnecessary

In its return, the state requested this Court remand this PCR action to the circuit court for findings of fact on the issue presented. Ret. at 8-9. In support of this request, the state argued that a ruling by this Court on the merits would be unfair to the state. Ret. at 9. Citing Simmons v. State, 416 S.C. 584, 593, 788 S.E.2d 220, 225 (2016), the state argued that a ruling by the appellate court would be unfair to the state. Ret. at 9. The state "would be deprived of the opportunity to have this matter fully resolved by a proper order from the PCR court." Ret. at 9 (internal quotation omitted). To this point, a remand would permit the state to present "the panoply of arguments available to it, especially related to the prejudice prong in the PCR analysis." Ret. at 9 (internal quotation omitted).

The reason the PCR judge did not make findings of fact is because the state convinced the judge in its argument that the issue was not preserved for review. While the state's concession of legal error is laudable, even commendable, the state should not receive a second bite at the apple where the state's erroneous legal argument induced the PCR court to make the legal error. The state had every opportunity to present any argument it wanted – even arguments in the alternative. Instead, the state chose to argue – erroneously – that the issue was procedurally barred.

The issue is preserved for appellate review. The state argued the issue is not preserved because "[t]he PCR court did not make a finding of fact on whether Counsel was deficient or Petitioner was prejudiced by the Doyle violation." Ret. at 8. However, this is not the test for error preservation. The purpose of filing a motion pursuant to Rule 59(e), SCRCP, is to preserve for

appeal an issue not addressed in the final order. See Simmons v. State, 416 S.C. 584, 592, 788 S.E.2d 220, 225 (2016) (explaining that "[t]o preserve issues for appellate review, after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP[] motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by [section] 17-27-80 [of the South Carolina Code] and Rule 52(a), SCRCP") (internal quotation omitted) (alterations in original); Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (stating that "[b]ecause [PCR applicant] did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review"); Humbert v. State, 345 S.C. 332, 337, 548 S.E.2d 862, 865 (2001) (holding an issue was "not preserved for review" where the PCR judge did not rule on the issue and the applicant did not file a Rule 59(e), SCRCP, motion requesting a ruling); Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (explaining that "[a] party *must* file [a Rule 59(e)] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review") (emphasis in original); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (noting that "[i]f the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review"); Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (explaining that "[p]ost-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it"); Chastain v. Hiltabidle, 381 S.C. 508, 515, 673 S.E.2d 826, 829 (Ct. App. 2009) (holding that "[w]hen an issue is raised to but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion"). Petitioner filed a motion pursuant to Rule 59(e), SCRCP, specifically requesting the PCR judge "to

address whether trial counsel's failure [to] properly preserve the Doyle v. Ohio issue for appellate review amounts to ineffective assistance of counsel." App. 404-405.

A remand is unnecessary, and would be improper, in this case because Petitioner did everything required of him to preserve this issue for appeal by presenting the issue at the hearing and raising it in his Rule 59(e), SCRCP, motion. This Court must address this issue on the merits. This point was made clear by the South Carolina Supreme Court in Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006). The Pyes raised an issue at the summary judgment hearing and in the Rule 59(e) hearing, but the court did not rule upon it. Pye, 369 S.C. at 565-566, 633 S.E.2d at 510-511. After determining the issue was preserved for review "even though the circuit judge did not rule on the theory" presented, the Court addressed the merits of the issue on appeal. Id. at 566, S.E.2d at 511.

Ineffective assistance of counsel

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). "The benchmark for judging any claim of ineffectiveness must be whether 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." Id. at 686.

To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688.

Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Specifically, on the prejudice prong, the question to ask is "whether there is a reasonable probability that, absent the errors, the fact finding would have had a reasonable doubt respecting guilt." Id. (emphasis added). The United States Supreme Court specifically ruled that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. Moreover, the Court held that:

> The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Id. at 696.

Thus, in a PCR action, the applicant must prove by a preponderance of the evidence that (1) counsel's performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 695.

Deficient performance

In Doyle v. Ohio, 426 U.S. 610, 611 (1976), the United States Supreme Court held it is improper for the prosecution to comment or elicit testimony concerning a defendant's exercise of his right to remain silent post-arrest. See also Griffin v. California, 380 U.S. 609 (1965); State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). "The obvious purpose is to try to prevent jurors from improperly inferring the accused is guilty simply because he exercised rights guaranteed to

him by the state and federal constitutions." Edmond v. State, 341 S.C. 340, 346, 534 S.E.2d 682, 685 (2000). In State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986), our Supreme Court made clear "[a]n accused has the right to remain silent and the exercise of that right cannot be used against him. The [s]tate cannot, through evidence or the solicitor's argument, comment on the accused's exercise of his right to remain silent." Id. at 394-395, 350 S.E.2d at 924. "Testimony that a defendant refused to comment on an accusation against him is an unconstitutional comment on his post-arrest silence." Id. at 395, 350 S.E.2d at 924.

The Doyle rule, as well as other principles prohibiting the prosecutor from using or commenting on a defendant's exercise of his constitutional rights, is 'rooted in due process and the belief that justice is best served when a trial is fundamentally fair.'" State v. McIntosh, 358 S.C. 432, 443, 595 S.E.2d 484, 490 (2004)(quoting Brecht v. Abrahamson, 507 U.S. 619, 628 (1993)). Therefore, "the state may neither comment upon nor present evidence at trial of a defendant's decision to exercise his right to remain silent or be represented by an attorney." Edmond, 341 S.C. at 345, 534 S.E.2d at 685.

"Doyle and its progeny have [] made clear that it is the breach of the implied assurance contained in the Miranda warnings that violates the fundamental fairness required by the Due Process Clause." Brown v. State, 375 S.C. 464, 472 652 S.E.2d 765, 769 (Ct. App. 2007)(citing Wainwright v. Greenfield, 474 U.S. 284, 291 (1986)). The Court of Appeals explained that "'[t]he point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony.'" Id. (quoting Wainwright, 474 U.S. at 292). In Brown, the Court of Appeals stated:

> The courts of South Carolina have consistently recognized the significance of Doyle on post-arrest silence. Moreover, our supreme court and appellate court have

> warned solicitors against violation of the Doyle prohibition. State v. Myers, 301 S.C. 251, 258-259, 391 S.E.2d 551, 555 (1990); State v. Arther, 290 S.C. 291, 350 S.E.2d 187 (1986); State v. Holliday, 333 S.C. 332, 509 S.E.2d 280 (Ct. App. 1998); State v. Gray, 304 S.C. 482, 405 S.E.2d 420 (Ct. App. 1991).

Brown, S.C. at 472-473, 652 S.E.2d at 769; see also State v. Cockerham, 294 S.C. 380, 381-382, 365 S.E.2d 22, 23 (1988)(holding the prosecutor's indirect reference to Cockerham's silence and request for counsel violated his right to due process of law); State v. Hawkins, 292 S.C. 418, 423-424, 357 S.E.2d 10, 13 (1987)(finding a solicitor's comments on a defendant's lack of remorse reversible error).

"Representation of a criminal defendant entails certain basic duties." Id. at 688. Counsel has "the overarching duty to advocate the defendant's cause" and "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. South Carolina's preservation rules require a contemporaneous objection in order to preserve an issue for appeal. Porter, 389 S.C. at 37, 698 S.E.2d at 242; Dunbar, 356 S.C. at 142, 587 S.E.2d at 693-694; Carlson, 363 S.C. at 595, 611 S.E.2d at 287; Humbert, 345 S.C. at 338, 548 S.E.2d at 866.

The United States Supreme Court decided Doyle in 1976, decades before Petitioner's trial. The Doyle principle has been a part of federal and state criminal law jurisprudence for over four decades. There was simply no excuse for trial counsel to be unaware of Doyle and its progeny and fail to object to the testimony clearly in violation of Doyle. Dowling told the jurors that after Petitioner was arrested, he "did not want to talk," "wanted the representation of an attorney," and that as a result, the police were unable to develop any information "[f]rom the defendant's side." App. 102, l. 24 – App. 103, l. 6. During the pre-trial hearing, Erdel established that Petitioner's invocation of his rights to silence and counsel occurred after Petitioner was advised

of his rights. App. 24, ll. 5-14. This was an obvious and glaring comment on Petitioner's post-arrest silence that violated Petitioner's constitutional rights. Trial counsel offered no reason for his failure to object and stated he saw nothing wrong with Dowling's testimony. Counsel's deficient performance is clear and the record amply supports such a finding and conclusion of law on this point.

In its return, the state boldly asserts that trial counsel "did not have the opportunity to explain his lack of objection to the Doyle violation because the court did not consider the allegation that Counsel was ineffective for failing to object to the Doyle violation on its merits." Ret. at 10. In fact, trial counsel did not explain his failure to object to the obvious Doyle violation because the state objected to the answer. App. 373, ll. 10-16. The state argued, successfully, that the questions and answers regarding trial counsel's performance in relation to the Doyle violation were not relevant because the issue was a direct appeal issue and not proper in the PCR forum. App. 373, ll. 10-16. Now, the state seeks to profit from its admittedly improper objection and legal argument presented at the PCR court. The state should not be permitted to benefit from his admitted erroneous legal argument. Doing so would encourage litigants to present erroneous arguments at the trial level, admit those erroneous arguments on appeal, and obtain a remand to obtain another opportunity to prove their cases. See Brown v. Singletary, 226 S.C. 482, 484, 85 S.E.2d 738, 738 (1955) (noting that a party may not "take his chances of a successful issue, reserving vices in the trial, of which he has notice, for use in case of disappointment in the result").

Despite the state's suggestion that trial counsel may have some "trial strategy or reason" for failing to object, the state admitted Dowling impermissibly commented on Petitioner's silence and invocation of his right to an attorney and that trial counsel failed to object. Deficient performance is apparent and is all but actually conceded by the state in its return. Ret. at 9.

Prejudice

Having determined trial counsel performed deficiently, the next question is whether trial counsel's deficient performance was prejudicial, meaning there was a reasonable probability that, but for the error, the result of the proceeding would have been different. The answer must be in the affirmative. The bar against improper comments on a defendant's invocation of silence serves to prevent jurors from improperly inferring guilty based simply upon an exercise of the defendant's constitutional rights. Edmond, 341 S.C. at 346, 534 S.E.2d at 685. Commenting a defendant's invocation violates a defendant's right to a fundamentally fair trial. McIntosh, 358 S.C. at 443, 595 S.E.2d at 490.

This Court held Edmond suffered prejudice due to his attorney's failure to object to the detective's testimony and the prosecutor's closing argument that he exercised his right to silence because the testimony and argument "were direct and improper references to the exercise of his constitutional rights." Edmond, 341 S.C. at 348, 534 S.E.2d at 686. "Jurors may have used the improper testimony and comments to infer petitioner was guilty simply because he exercised his rights." Id.

According to this Court, "[i]n deciding the prejudice prong in [a] PCR action," the court "examine[s] the following factors, which are the same ones analyzed in deciding on direct appeal whether a similar error is harmless beyond a reasonable doubt." Id. "To be harmless, the record must establish the reference to the defendant's right to silence was a single reference, which was not repeated or alluded to; the solicitor did not tie the defendant's silence directly to his exculpatory story; the exculpatory story was totally implausible; *and* the evidence of guilt was overwhelming." State v. Pickens, 320 S.C. 528, 530-531, 466 S.E.2d 364, 366 (1996) (emphasis added); see also McIntosh, 358 S.C. at 447, 595 S.E.2d at 492; Edmond, 341 S.C. at 348, 534 S.E.2d at 686-687;

McFadden v. State, 342 S.C. 637, 642-643, 539 S.E.2d 391, 394 (2000). Importantly, all four factors must be proven beyond a reasonable doubt in the direct appeal context in order to determine the error was harmless.

The first factor weighs against Petitioner as the reference to his invocation of his rights to silence and counsel occurred only once. The second factor also weighs against Petitioner because the solicitor did not tie Petitioner's silence to his exculpatory story. However, the third and fourth factors weigh heavily in Petitioner's favor.

Petitioner defended against the charges by arguing that Babecki wanted revenge against him for the "drug deal gone bad." It was undisputed that Babecki had purchased drugs from Petitioner in the past and that on the day of the shooting, Babecki was attempting to purchase more drugs from Petitioner either for a friend or himself. Further, it was undisputed that Babecki believed his friend, Mike, had been robbed of a substantial amount of money in a "drug deal gone bad" the day before the shooting. Additionally, it was undisputed that Babecki believed Petitioner was involved in the robbery. Finally, it was also undisputed that Babecki's friend, Mike, the same one who was allegedly robbed the night before, appeared at the scene of the shooting for reasons unknown to anyone. Petitioner's theory that Babecki concocted the shooting avenge his friend is not implausible. Petitioner even called an alibi witness to testify that he was somewhere else shortly after the shooting. Therefore, the third factor weighs heavily in Petitioner's favor as his exculpatory story was not "totally implausible."

Finally, the fourth factor weighs in favor of finding trial counsel's deficient performance prejudicial as the evidence against Petitioner was not overwhelming. The only evidence against Petitioner was the testimony of Babecki and Constantineau, who testified inconsistently with each other and inconsistently with their prior statements to police. Even one of the state's

principal witnesses, Investigator Erdel, testified that Babecki was untruthful during the police interview. Erdel attempted to skirt the question, but the video interview showed Erdel confront Babecki with inconsistencies and Erdel's belief that Babecki was lying. Eventually, Erdel was forced to admit that Babecki's statement to police was filled with lies of omission. App. 146, ll. 18-22. The state's case rested upon the jury believing a witness that even the police did not believe was telling the truth. Dowling's testimony that Petitioner invoked his rights to silence and counsel, which prevented the police from investigating anything "[f]rom the defendant's side," allowed the jury to infer Petitioner was guilty simply because he exercised his rights.

After weighing the four factors, the determination is clear that Petitioner suffered prejudice as a result of trial counsel's failure to object to Dowling's improper comment on Petitioner's invocation of his rights to silence and counsel. Therefore, Petitioner is entitled to relief.

CONCLUSION

Petitioner respectfully requests this Court (1) reverse the PCR court and hold the issue is not procedurally barred, (2) find trial counsel provided ineffective assistance of counsel in derogation of the Constitution, and (3) order a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of November, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Beaufort County

Brooks P. Goldsmith, Circuit Court Judge

MYKEL JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Ruston Neely, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Mykel Johnson, #351916, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 29th day of November, 2018.

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 29th day of November, 2018.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027

ORIGINAL

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO BEAUFORT COUNTY
Court of Common Pleas

The Honorable Brooks P. Goldsmith, Circuit Court Judge

RECEIVED
APR 01 2019
SC Court of Appeals

Mykel Johnson.....Petitioner,

v.

State of South Carolina,.....Respondent.

Appellate Case No. 2016-001684

BRIEF OF RESPONDENT

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INDEX

RESPONDENT'S ISSUE PRESENTED 1

STANDARD OF REVIEW 2

STATEMENT OF FACTS 3

Procedural History 3
Statement of Facts 3
Relevant Trial Testimony 4
Relevant Facts from Post-Conviction Relief Hearing 6

ARGUMENT:

I. Respondent concedes the PCR court erred in finding that Petitioner's claim was barred for lack of jurisdiction pursuant to Section 17-27-20(B), agreeing with the Assistant Attorney General's erroneous argument at the PCR hearing. 7

II. This Court should not address the merits of Petitioner's allegation *de novo* because the merits of Petitioner's allegation were not ruled on by the Circuit Court and, thus, this issue is not preserved for appellate review 8

III. Petitioner was not prejudiced by Counsel's failure to object to testimony that commented on Petitioner's invocation of his constitutional rights were Petitioner made pre-*Miranda* statements to law enforcement and the four *Doyle* factors show a lack of prejudice under *Strickland* 10

A. The *Doyle* violation was cumulative to Petitioner's pre-*Miranda* statements and silence. Therefore, the *Doyle* was of minuscule prejudicial value and Petitioner has not proven there was a reasonable probability the *Doyle* violation changed the result of the trial 11

B. Each *Doyle* factor shows Petitioner was not prejudiced under *Strickland* 15

1. The reference to Petitioner's silence was a single reference ... 16
2. The State did not tie the exercise of Petitioner's right to an exculpatory account 16
3. Petitioner's account was totally implausible 17
4. The evidence of Petitioner's guilt was overwhelming 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Suber v. State,
371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007)..... 3
Butler v. State,
286 S.C. 441, 442, 334 S.E.2d 813, 814..... 3, 13
Strickland v. Washington,
466 U.S. 668, 670, 104 S. Ct. 2052, 2056, 80 L. Ed. 2d 674 (1984)..... 4, 8, 9, 11, 13, 16
Smith v. Robbins,
528 U.S. 259, 288 (2000)..... 8
McCray v. State,
305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991)..... 10
Simmons v. State,
416 S.C. 584, 593, 788 S.E.2d 220, 225 (2016)..... 7, 8, 10
McFadden v. State,
342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000)..... 12, 16
Brown v. State,
375 S.C. 464, 479, 652 S.E.2d 765, 773 (Ct. App. 2007)..... 12, 16, 18
State v. Truesdale,
285 S.C. 13, 19, 328 S.E.2d 53, 56 (1984), (overruled on other grounds)..... 13, 14, 17
United States v. Shaw,
701 F.2d 367, 382 (5th Cir. 1983)..... 17

Rules

S.C. Code Ann. § 17-27-80..... 10

RESPONDENT'S ISSUES PRESENTED

1. Respondent concedes the PCR court erred in finding that Petitioner's claim was barred as lacking jurisdiction pursuant to Section 17-27-20(B), agreeing with the Assistant Attorney General's erroneous argument at the PCR hearing.

2. Should this Court address the merits of Petitioner's allegation *de novo* when the merits of Petitioner's *Doyle* violation were not ruled on by the Circuit Court?

3. Was Petitioner prejudiced by Counsel's failure to object to testimony that commented on Petitioner's invocation of his constitutional rights were Petitioner made pre-*Miranda* statements to law enforcement and the four *Doyle* factors show a lack of prejudice under *Strickland*?

STANDARD OF REVIEW

This Court will reverse the post-conviction relief court's decision when it is controlled by an error of law. *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

"Applicant bears the burden of proving the allegations in his application." *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814. Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. "The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Strickland v. Washington*, 466 U.S. 668, 670, 104 S. Ct. 2052, 2056, 80 L. Ed. 2d 674 (1984).

STATEMENT OF FACTS

Procedural History

Petitioner was indicted on December 5, 2011, by the Beaufort County Grand Jury for two counts of Attempted Murder (2012-GS-07-2269, 2270). App. 1. Eric Erickson (Counsel), Esquire, represented him. App. 1. Petitioner proceeded to a jury trial pursuant at which he was found guilty as indicted. App. 415-416. The Honorable Carmen T. Mullen sentenced Petitioner to incarceration for fifteen years for each count of Attempted Murder, with the sentences to run concurrently. App. 418-419.

A notice of appeal was filed on Petitioner's behalf and an appeal perfected. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. *State v. Johnson*, 2014-UP-134 (Filed on April 2, 2014).

Petitioner filed an application for post-conviction relief (PCR) on July 21, 2014. An evidentiary hearing was convened on May 17, 2016, at the Beaufort County Courthouse. Jim Falk, Esquire, represented Petitioner. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent. On June 20, 2016, The Honorable Brooks P. Goldsmith signed an order of dismissal dismissing Petitioner's allegations. App. 403.

Statement of Facts

On October 28, 2011, the victims, Frank Babecki and Desiree Constantineau, were driving down the street when they saw Petitioner. App. 173. Babecki yelled, "what happened the other night." App. 45. In response, Petitioner pulled out a gun and began firing at the victims' vehicle. App. 174. Babecki testified he heard a drug deal went bad involving Petitioner and a third party, and was merely asking to figure out what happened. App. 178. This testimony was corroborated through Petitioner's cell phone. App. 176. Texts from Petitioner's cell phone indicated Petitioner was selling drugs to Babecki. App. 176. Babecki also sent a text to Petitioner accusing him of shooting at Babecki and his pregnant wife. App. 198. Babecki later picked Petitioner out of a photo line-up as the shooter and stated he clearly saw him and knew him. App. 33. The other victim in the case, Constantineau, also testified she saw Petitioner directly before and after the shooting and believed the only logical conclusion was that Petitioner fired the shots. App. 202-203.

Officer Joshua Dowling arrived at the scene shortly after the 911 call. App. 90-91. Dowling recovered a bullet from the car. App. 97. Law enforcement collected no evidence from the scene, and no cartridge cases were found near where the shooting allegedly occurred. App. 99. Dowling

believed the caliber of the bullet was either a .40 caliber or .45 caliber based on the size. App. 107. A text from Petitioner's mother to Petitioner stated that he needed to leave her house and take his guns, indicating multiple firearms, with him.

A search warrant was executed Petitioner's house and .22 caliber rounds and shotgun shells were recovered from the location, but no corresponding firearms. App. 109. He explained the bullet was not examined forensically because a gun was not recovered in order to conduct any comparison testing. App. 107.

Law enforcement was unable to locate Petitioner and contacted the United States Marshal service for assistance. App. 102. The Marshals were able to locate Petitioner in Yemassee, South Carolina and he was arrested on November 8, 2011, eleven days after the shooting. App. 21. Since Petitioner was arrested outside the four-hour window necessary to test a suspect for gunshot residue, law enforcement did not attempt to collect gunshot residue from Petitioner's hands. App. 100.

The jury found Petitioner guilty as charged. App. 312, 11. 8-17. Judge Mullen sentenced Petitioner to fifteen years' imprisonment on each count and ordered the sentences to be served concurrently. App. 317.

Relevant Trial Testimony

Petitioner made statements to law enforcement after his arrest. App. 23. A *Denno*[1] hearing was held to determine the admissibility of Petitioner's statements to Officer George Erdel by Petitioner after his arrest. The trial judge found Petitioner's pre-*Miranda* statements were admissible as spontaneous utterances. App. 24.

[1] Jackson v. Denno, 378 U.S. 368 (1964)

After his arrest and before he was read his *Miranda* rights, Petitioner requested an attorney and made statements to law enforcement. App. 141. These statements were admitted into evidence, through the testimony of Erdel, after a *Denno* hearing on the statement's admissibility. App. 29; 141.

> Q: You said he asked you questions. Do you recall what he said to you?
>
> A: I do recall what he said to me. He asked me, I do not recall the exact order, but the gist of it was, uh, he did say that he was going to turn himself in once he hired a lawyer. There was – he didn't specify and I didn't ask. He said there was something in his phone that would tell the story. Then he asked how did y'all find me.

App. 141.

Petitioner was then taken to the local law enforcement facility. App. 24. At that facility, Investigator Joshua Dowling read Petitioner his *Miranda* rights. App. 24. Petitioner then requested an attorney and refused to speak to law enforcement. App. 103. In response to the question:

> Q: Is there any additional evidence that you as a lead investigator in the case were able to obtain after Mr. Johnson was taken into custody?
>
> A: Mr. Johnson did not want to talk. He wanted the representation of an attorney when we asked him for his side of the story. From the defendant's side, we did not develop any information."

App. 103.

Relevant Facts from Post-conviction Relief Hearing

At trial, Officer Dowling testified, "Mr. Johnson did not want to talk. He wanted the representation of an attorney when we asked him for his side of the story. From the defendant's side, we did not develop any information." App. 103.

At Petitioner's evidentiary hearing, Counsel stated he did not consider objecting to Officer Dowling's statement because "[He] didn't think there was anything wrong with that." App. 373.

The State argued Petitioner's claim that Counsel was ineffective for failing to object to Officer Dowling's statement, which was a *Doyle* violation, was procedurally barred because the

Doyle violation was brief in an *Anders* appellate brief. App. 373-377. In the order of dismissal, the PCR court agreed with the State's argument and found:

> This allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State. 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashlev v. State. 260 S.C. 436, 196 S.E.2d 501 (1973). This was the exact issue raised in Applicant's direct appeal. (See Anders Brief of Appellant pp. 5-6). As such, this issue is not proper for the PCR forum. Therefore, this allegation is denied.

App. 402.

The State now concedes this was an error of law.

ARGUMENT

I. Respondent concedes the PCR court erred in finding that Petitioner's claim was barred for lack of jurisdiction pursuant to Section 17-27-20(B), agreeing with the Assistant Attorney General's erroneous argument at the PCR hearing.

A remand to the Circuit Court for a determination on the merits of Petitioner's claim is the only proper remedy. The PCR court incorrectly dismissed Petitioner's allegation that Counsel was ineffective for failing to object to Dowling's testimony on the basis of a lack of jurisdiction:

> This allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. *Ashlev v. State*, 260 S.C. 436, 196 S.E.2d 501 (1973). This was the exact issue raised in Applicant's direct appeal. (See Anders Brief of Appellant pp. 5-6). As such, this issue is not proper for the PCR forum. Therefore, this allegation is denied.

App. 402.

The PCR court appears to have based this decision on the Assistant Attorney General's erroneous legal argument at the PCR hearing. The Assistant Attorney General argued that Petitioner's *Anders* brief, on Petitioner's unpreserved *Doyle* violation allegation, precluded review of that issue for PCR. App. 373-377. Respondent concedes the Assistant Attorney General's argument was legally incorrect. Respondent also concedes the PCR court erred in agreeing with the Assistant Attorney General's erroneous position.

The law is clear that even in *Anders* briefing situations, the normal *Strickland* analysis applies. "With a claim that counsel erroneously failed to file a merits brief, it will be easier for a defendant-appellant to satisfy the first part of the *Strickland* test, for it is only necessary for him to show that a reasonably competent attorney would have found one non-frivolous issue warranting a merits brief." *Smith v. Robbins*, 528 U.S. 259, 288 (2000). "[U]nder the *Anders* procedure, an

appellate court is required to review the entire record, including the complete trial transcript, for any preserved issues with potential merit. Thus, this Court concluded the merits of an unpreserved claim were not considered by the court of appeals on direct appeal pursuant to *Anders*." *Jamison v. State*, 410 S.C. 456, 466, 765 S.E.2d 123, 128 (2014). Therefore, the PCR court's mistaken acceptance of the Assistant Attorney General's argument that Petitioner's *Anders* brief, on an issue that was unpreserved, procedurally barred Petitioner's claim was an error of law. "[W]e review questions of law *de novo*, and will reverse the decision of the PCR court when it is controlled by an error of law." *Id*, at 465, 765 S.E.2d at 127.

Accordingly, this Court should grant the petition for certiorari, reverse the PCR court's dismissal of Petitioner's *Doyle* allegation, and remand for a PCR hearing and findings on the merits of that allegation.

II. This Court should not address the merits of Petitioner's allegation *de novo* because the merits of Petitioner's allegation were not ruled on by the Circuit Court and, thus, this issue is not preserved for appellate review.

This Court should not address the merits of Petitioner's claim *de novo* because Petitioner's claim is not preserved for appellate review. The PCR court did not make a finding of fact on whether Counsel was deficient or Petitioner was prejudiced by the *Doyle* violation. Accordingly, this Court should grant the petition for writ of certiorari and remand to the PCR court for a finding of fact as to whether Counsel was deficient for or Petitioner was prejudiced by Petitioner's allegation.

The PCR court failed to rule on the merits of Petitioner's *Doyle* allegation. App. 402. The PCR court did not make a finding of fact on whether Counsel was deficient or Petitioner was prejudiced under *Strickland*. Thus, there is no ruling on the merits for this Court to review. The appropriate remedy when the PCR court fails to make specific

findings of fact as required by S.C. Code Ann. § 17-27-80 is for the order to be vacated and the case to be remanded for a new PCR hearing. "The PCR court dismissed McCray's allegations of ineffective assistance of counsel without making findings of fact on the specific allegations raised. S.C. Code Ann. § 17-27-80 (1976), requires the PCR court to make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented. The PCR court's conclusions regarding ineffective assistance are insufficient for appellate review and fail to meet the standard set forth in the statute. Accordingly, we reverse the order denying McCray relief and remand for a new PCR hearing." *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991). Accordingly this Court should grant certiorari and remand to the PCR court for a full factual finding. "[A] preemptive ruling on the merits would be unfair to the State, which would be deprived of the opportunity to have this matter fully resolved by a proper order from the PCR court. In this regard, the State correctly asserts it should not be foreclosed from the panoply of arguments available to it, especially related to the prejudice prong in the PCR analysis." *Simmons v. State*, 416 S.C. 584, 593, 788 S.E.2d 220, 225 (2016). The State needs the opportunity to create a record as to prejudice, as this testimony was not elicited from trial counsel during the evidentiary hearing. The State also recognizes and agrees with Appellant's statement that "PCR is the proper forum for Petitioner's claim for relief." Appellant cites to cases and argues that the PCR court is the proper forum to decide the merits of Appellant's case, but then concludes that this Court should rule on the merits. The State finds this argument inconsistent, but would concur with Appellant that the proper forum for a ruling on the merits would be the PCR court. The State is not attempting to circumvent the judicial system by asking for a remand in this case for the PCR court to

hear testimony concerning the prejudice prong of the Doyle issue. The State simply requests this issue be argued and ruled upon in the proper forum, as it is conceded that this is what should have been done originally. Therefore, where the PCR court failed to consider an allegation's merits and make the appropriate findings of fact regarding the allegation a new PCR hearing is the appropriate remedy.

Accordingly, this Court should grant the petition for certiorari, reverse the PCR court's dismissal of Petitioner's *Doyle* allegation, and remand for a PCR hearing and findings on the merits of that allegation.

III. Petitioner was not prejudiced by Counsel's failure to object to testimony that commented on Petitioner's invocation of his constitutional rights were Petitioner made pre-*Miranda* statements to law enforcement and the four *Doyle* factors show a lack of prejudice under *Strickland*.

Counsel did not have the opportunity to explain his lack of objection to the *Doyle* violation because the court did not consider the allegation that Counsel was ineffective for failing to object to the *Doyle* violation on its merits. Therefore, there was no trial strategy or reason given by Counsel for his failure to object. However, Petitioner cannot prove he was prejudiced by the *Doyle* violation.

Officer Dowling testimony impermissibly commented on Petitioner's silence and his invocation of his right to an attorney:

> Q: Is there any additional evidence that you as a lead investigator in the case were able to obtain after Mr. Johnson was taken into custody?
>
> A: Mr. Johnson did not want to talk. He wanted the representation of an attorney when we asked him for his side of the story. From the defendant's side, we did not develop any information."

App. p. 103.

Officer Dowling's testimony was unresponsive to the solicitor's question and violated *Doyle* by commenting on Petitioner's choice to remain silent and invoke his right to an attorney after being *Mirandized*. "The State may not comment on a defendant's exercise of a constitutional right." *McFadden v. State*, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000).

However, Petitioner made statements to law enforcement before he was *Mirandized* that divested the State's *Doyle* violation of its potential prejudice. "[Petitioner] did say that he was going to turn himself in once he hired a lawyer. There was – he didn't specify and I didn't ask. He said there was something in his phone that would tell the story. Then he asked how did y'all find me." App. 141. These statements were made by Petitioner before he was *Mirandized* and, thus, were admissible. "*Doyle* is only applicable after *Miranda* warnings have been given." *Brown v. State*, 375 S.C. 464, 479, 652 S.E.2d 765, 773 (Ct. App. 2007). Petitioner's statements that his exonerating story would be told by his cell-phone and he would turn himself in once he had an attorney were admissible and encompassed the substance of the State's *Doyle* violation. Those pre-*Miranda* statements were admissible and, accordingly, were used by the State in its closing argument. App. 273. The *Doyle* violation provided the jury with no new information and gave the State no new tools by which to assert Petitioner's guilt. The jury heard Petitioner's request for an attorney and that his story would be told by the information on his cell phone through his pre-*Miranda* statements. The State was able to argue Petitioner's guilty conscience through his pre-*Miranda* statements. Petitioner's admissible pre-*Miranda* statements encompassed the entirety of the potential prejudice of the *Doyle* violation. Therefore, Petitioner was not prejudiced by the *Doyle* violation because he was exposed to the potential prejudice by his pre-*Miranda* statements.

Further, Petitioner's case is conclusively shown to lack prejudice by the four *Doyle* factors. Petitioner concedes the first two. Petitioner's alibi is incomplete and lacking in credibility. The

evidence against Petitioner is substantial. Based on this lack of prejudice, this Court should deny Petitioner's requests for a finding that Counsel was ineffective and a new trial.

A. The *Doyle* violation was cumulative to Petitioner's pre-*Miranda* statements and silence. Therefore, the *Doyle* was of minuscule prejudicial value and Petitioner has not proven there was a reasonable probability the *Doyle* violation changed the result of the trial.

Petitioner has not proven he was prejudiced by Counsel's failure to object to Dowling's statement concerning Petitioner's silence and invocation of his right to an attorney. "A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Strickland*, 466 U.S. at 670.

Petitioner has the burden to prove he was prejudiced by the *Doyle* violation. "Applicant bears the burden of proving the allegations in his application." *Butler v. State*, 286 S.C. at 442, 334 S.E.2d at 814. Petitioner must prove that Counsel's deficient performance 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.

One piece of cumulative testimony, which was not once commented on by the State in its closing argument, did not create a reasonable probability that the result of the trial would have been different. An analogous example is found in *Truesdale*: "The comment concerning Appellant's silence is miniscule in the record. Its negligible effect is shown by failure of his competent, experienced counsel to object at the time it was made, or at any other time. It was never once referred to or commented upon by the Solicitor during the trial, or in jury argument. Moreover, it was precipitated by Appellant's own spontaneous remark upon awakening and does

not indicate an attempt on the part of the State to elicit an incriminating response." *State v. Truesdale*, 285 S.C. 13, 19, 328 S.E.2d 53, 56 (1984), (overruled on other grounds).

Erdel permissibly testified Petitioner requested an attorney during his arrest. App. p. 140. Dowling impermissibly testified Petitioner requested an attorney after being *Mirandized*. App. p. 103. However, Petitioner's post-*Miranda* request for an attorney was merely cumulative to Petitioner's pre-*Miranda* request for an attorney. Likewise, Petitioner refused to respond to Babecki when Babecki texted Petitioner accusing him of firing shots at himself and his pregnant wife. App. p. 198. Petitioner also made the statement to Erdel that "there was something in his phone that will tell the story." App. p. 141. The inference from this statement is that Petitioner will not be telling law enforcement his story. Petitioner's statement to Erdel was pre-*Miranda* and thus admissible. These statements demonstrate Petitioner's failure to tell his side of the story post-*Miranda*. The State used only Petitioner's permissible pre-*Miranda* statements to show Petitioner's guilty conscience.

Petitioner's pre-*Miranda* request for an attorney, the admission of which does not violate *Doyle*, extracts the prejudice from Dowling's mention of Petitioner's post-*Miranda* request for an attorney. Accordingly, Petitioner failed to show that but for the deficiency "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. Petitioner's post-*Miranda* request for an attorney is merely cumulative to admissible evidence and, therefore, there is no reasonable probability Counsel's failure to object to the statement changed the result of the proceeding. "The admission of improper evidence is harmless where it is merely cumulative to other evidence." *State v. Johnson*, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989).

The two sentences concerning Petitioner's post-*Miranda* invocation of rights had minuscule prejudicial value because any prejudice was already established to the jury through permissible avenues. There was no reason for Counsel to object to the *Doyle* violation because there was nothing to gain from objecting. If Counsel had objected, been sustained, and requested a curative instruction that instruction would not cure Petitioner's pre-*Miranda* statements. Petitioner's desire for an attorney and his failure to tell law enforcement 'his side of the story' were already in evidence. App. p. 141. The pre-*Miranda* statements had been ruled admissible through a *Denno* hearing and the jury heard them through law enforcement testimony. Every potential argument from the post-*Miranda* invocation of rights was argued through the permissible pre-*Miranda* statements. "You can consider the statements he made when he was apprehended...he said I was going to turn myself in when I get a lawyer." App. p. 273. "Mr. Johnson never replied to. Consider that. Text message about trying to kill them. No response." App. p. 273. Despite the jury's reception of unconstitutional testimony, the cumulative pre-*Miranda* statements of Petitioner rendered any potential prejudice minuscule.

The trial court also correctly charged the jury considering Petitioner's silence:

> "I instruct you and emphasize that the fact that the defendant did not testify is not a factor to be considered by you in any way in your deliberation and in your consideration on the question of the guilty or innocence of the defendant. It must not be considered by you in any manner whatsoever. A defendant has the constitutional right to remain silent. The assertion of this right must not be considered by you in your deliberations. I repeat, Ladies and Gentleman, under your oath, you are to draw no conclusions whatsoever from the fact that the defendant in this case did not testify. The fact that this defendant did not testify should not even be discussed in a jury room."

App. 300 l. 9-23. (emphasis added)

The trial court's strong language assisted the jury in understanding Petitioner's silence was not to be considered. In this case, the trial court's instruction goes too far. The State can use a

defendant's pre-*Miranda* silence against him. "*Doyle* is only applicable after *Miranda* warnings have been given." Brown, 375 S.C. at 479, 652 S.E.2d at 773. The trial judge's instruction encompassed both the properly used pre-*Miranda* silence and improper mention post-*Miranda* silence. "A defendant has the constitutional right to remain silent. The assertion of this right must not be considered by you in your deliberations." App. 300. Therefore, any potential that the jury would consider Petitioner's silence against him was cured by the trial judge's broad instruction.

Petitioner has failed to meet his burden to prove there is a reasonable probability the result of the proceeding would have been different if Counsel had objected to Dowling's statement. *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. Petitioner must meet his burden to obtain relief. Therefore, this Court should deny the Petition for Writ of Certiorari.

B. Each Doyle factor shows Petitioner was not prejudiced under *Strickland*.

There are four factors to be considered in determining whether Petitioner was prejudiced by a *Doyle* violation:

> An applicant for PCR, however, must show prejudice from counsel's deficient performance. When a *Doyle* violation has occurred, as alleged here, we will consider the following factors in determining prejudice on PCR:
>
> 1) whether the reference to the accused's exercise of his constitutional right was a single reference;
> 2) whether the State tied the exercise of this right directly to the accused's exculpatory account;
> 3) whether the accused's exculpatory account was totally implausible; and
> 4) whether the evidence of guilt was overwhelming.

Gantt v. State, 354 S.C. 183, 188, 580 S.E.2d 133, 136 (2003) (citations omitted).

The four factors listed in *Doyle* are not rigid rules, but factors to be weighed in determining whether Petitioner was prejudiced under *Strickland*. "When a *Doyle* violation has occurred, the prejudice prong of the PCR analysis runs parallel to the harmless error analysis applied in a direct appeal." *McFadden*, 342 S.C. at 641, 539 S.E.2d at 393.

Petitioner emphasized the word '*and*' when listing the *Doyle* factors. Based on Petitioner's emphasis of the word 'and,' Petitioner **incorrectly** asserted, "Importantly, all four factors must be proven beyond a reasonable doubt... in order to determine the error was harmless." PWC 22. Petitioner's statement that Respondent must prove all four *Doyle* factors beyond a reasonable doubt in order to show to show a lack of prejudice is incorrect. Importantly, Petitioner cites *Pickens* and its progeny as cases for this proposition. PWC 21. Neither *Pickens*, nor its progeny, stand for that assertion. However, *Truesdale*, cited in *Pickens*, bases its decision on *United States v. Shaw*, 701 F.2d 367, 382 (5th Cir. 1983), (which it proclaimed an "excellent analysis") that "the determination must be made on a case-by-case analysis." *Truesdale*, 285 S.C. at 18, 328 S.E.2d at 56. *Shaw* states the following:

> Subsequent cases have illustrated, however, that factual situations are not always amenable to description within the rigid *Chapman* types. Consequently, we have held *Chapman* inapplicable and the error to be harmless even though the defendant's story is "not totally implausible," but the evidence of guilt is "substantial." While Chapman's categories are helpful, Fifth Circuit precedent demonstrates that the second and third categories are not to be used as rigid rules.

Shaw, 701 F.2d at 382 (citations omitted)

Here, the record does show that all four *Doyle* factors are proven and the violation was, therefore, harmless and lacking in prejudice:

1. <u>The reference to Petitioner's silence was a single reference.</u>

Petitioner concedes this factor. The only mention of Petitioner's post-*Miranda* silence is Dowling's statement: "Mr. Johnson did not want to talk. He wanted the representation of an attorney when we asked him for his side of the story. From the defendant's side, we did not develop any information." App. p. 103. The solicitor did not reference this statement in the closing argument or ask further questions. Because the reference was only a single reference this factor is in the State's favor.

2. The State did not tie the exercise of Petitioner's right to an exculpatory account.

Petitioner also concedes this factor. The State did not reference Petitioner's post-*Miranda* silence at all. It certainly did not tie that silence to an exculpatory account.

The State's closing argument did tie Petitioner's pre-*Miranda* request for an attorney to his fleeing from law enforcement and guilty conscience. "You can consider that he said not why do you want me, what's this all about or even can I call my mom. No, he said I was going to turn myself in when I got a lawyer." App. p. 273. This is certainly allowed. "*Doyle* is only applicable after *Miranda* warnings have been given." *Brown*, 375 S.C. at 479, 652 S.E.2d at 773.

The State did not tie Petitioner's exculpatory account, in the form of an alibi, to his post-*Miranda* invocation of his constitutional rights. Therefore, this factor is in the State's favor and shows a lack of prejudice from Dowling's statement.

3. Petitioner's account was totally implausible.

Petitioner asserted an alibi defense through a single witness, Kendalle Simmons. Simmons, who was a friend of Petitioner's, testified he was with Petitioner from 3:00 pm until 7:00 pm the day the incident occurred. App. pp. 248-249. The State noted this was not an actual alibi as the victim stated the incident took place sometime between 12:00 pm and 2:00 pm. App. p. 275. The State pointed out several inconsistencies in Simmons' statements. Simmons testified he saw Petitioner on dates in which the State had established Petitioner was no longer in town. App. p. 254. Simmons also testified that Petitioner did not own a firearm or ammunition. App. p. 258. The State established through text messages with his mother and a search warrant of his room that he did. App. pp. 109; 129.

Further, two witnesses placed Petitioner directly on the scene, with the handgun, as the person who was firing the shots. App. pp. 46; 203. This was further corroborated by Petitioner's

actions after the incident. Immediately following the shooting, Babecki accused Petitioner by text of shooting at himself and his pregnant wife. App. p. 198. Petitioner did not respond to that accusation. App. p. 199. This pre-*Miranda* silence was permissively referenced as indicative of guilt by the State along with Petitioner's flight and hiding from law enforcement. App. p. 274.

Petitioner also misstates the record. It is not "undisputed that Babecki believed his friend, Mike, had been robbed of a substantial amount of money in a 'drug deal gone bad' the day before the shooting." PWC p. 22. Mike was not robbed, his brother was. Babecki testified, "I heard from Mike that [Petitioner] robbed his brother for $250 or for $300." App. p. 193. Petitioner's theory is that Babecki concocted a scheme to falsely accuse Petitioner. PWC p. 22. Petitioner alleges Babecki concocted a scheme to shoot up his own vehicle, make his 8-month pregnant wife a co-conspirator, and rely on Petitioner to run from law enforcement and not have an actual alibi. Babecki had known Mike for three months. App. 193. Petitioner alleges Babecki did this as revenge for Mike's brother, who he did not know. App. 192. These assertions are patently unreasonable and implausible.

Petitioner's exculpatory account rests solely on the assertion that he was not at the scene of the incident when it took place. Witnesses place Petitioner directly on the scene. Petitioner's actions following the incident are consistent with a guilty conscience. Petitioner's only alibi witness made demonstrably false statements and, therefore, was completely unreliable and unbelievable. Therefore, Petitioner's account was implausible and this factor is in the State's favor and shows a lack of prejudice from Dowling's statement.

4. The evidence of Petitioner's guilt was overwhelming

The State provided overwhelming evidence in the form of direct evidence and supporting circumstantial evidence of Petitioner's guilt. The two victims saw and knew Petitioner. App. 46;

202. They named him as the shooter and called 911 immediately after the incident. App. 46; 202. Following the incident, Petitioner consistently acted with a guilty conscience. He left his mother's home, where he lived. App. 101. When law enforcement found him, his first words were to ask how they found him, which indicates he knew law enforcement was looking for him and he was attempting to hide from them. App. 141. He said he wouldn't turn himself in until he had an attorney. App. 141. Petitioner's only alibi witness was a friend of his who made statements that were shown to be patently false on behalf of Petitioner and was completely unreliable and unbelievable. Further, Petitioner's witness did not present an actual alibi since he did not account for Petitioner's whereabouts during the actual time of the shooting. Therefore, the State had overwhelming evidence of guilt and this factor is also in the State's favor.

Since all four factors weigh in the State's favor, Petitioner has failed to prove there was a reasonable probability the *Doyle* violation changed the result of the trial. Therefore, Petitioner is not entitled to post-conviction relief. Accordingly, this Court should deny Petitioner's requests to find Counsel ineffective and for a new trial.

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO BEAUFORT COUNTY
Court of Common Pleas
The Honorable Brooks P. Goldsmith, Circuit Court Judge

RECEIVED
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SC Court of Appeals

Appellate Case No. 2016-001684

MYKEL JOHNSON, #351616

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Brief of Respondent**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Susan B. Hackett, Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

This 1st day of April, 2019

Tamieka Russell-Brown
LEGAL ASSISTANT

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mykel Johnson, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-001684

Appeal From Beaufort County
Brooks P. Goldsmith, Circuit Court Judge

Unpublished Opinion No. 2020-UP-033
Heard December 10, 2019 – Filed February 5, 2020

REVERSED AND REMANDED

Appellate Defender Susan Barber Hackett, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Benjamin Hunter Limbaugh, both of Columbia, for Respondent.

PER CURIAM: Mykel Johnson filed this post-conviction relief action (PCR) arguing the PCR court erred in denying his petition on procedural grounds. We reverse and remand pursuant to Rule 220(b), SCACR, and the following authorities: *Sloan v. Friends of Hunley, Inc.*, 393 S.C. 152, 159 n.3, 711 S.E.2d

895, 898 n.3 (2011) (indicating a concession allows the court to end the matter); *Bowaters Carolina Corp. v. Carolina Pipeline Co.*, 259 S.C. 500, 505, 193 S.E.2d 129, 132 (1972) (holding an appellate court need not pursue an issue conceded during oral arguments); *Love v. State*, 428 S.C. 231, 243-45, 834 S.E.2d 196, 202-03 (2019) (indicating "[t]he PCR court, not this [c]ourt, should make the initial factual and legal findings on [a PCR applicant's] claim for relief" even though the dissent viewed the resolution of the claim as "straightforward").

REVERSED AND REMANDED.

LOCKEMY, C.J., and KONDUROS and HILL, JJ., concur.

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

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February 05, 2020

Ms. Susan Barber Hackett, Esquire
Division Of Appellate Defense
PO Box 11589
Columbia SC 29211-1589

Mr. Benjamin Hunter Limbaugh, Esquire
1000 Assembly Street
Columbia SC 29201

Re: Mykel Johnson v. State
Appellate Case No. 2016-001684

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

Jenny A. Kitchings 1/27

CLERK

cc: Alan McCrory Wilson, Esquire
The Honorable Brooks P. Goldsmith

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
FEB 20 2020
SC Court of Appeals

Certiorari to the Court of Appeals
Appeal from Beaufort County
Brooks P. Goldsmith, Post-Conviction Relief Judge
Appellate Case Number 2016-001684
Unp. Op. No. 2020-UP-033 (Feb. 5, 2020)

Mykel Johnson ..... Petitioner,

v.

State of South Carolina, ... Respondent.

RESPONDENT'S PETITION FOR REHEARING

Through its unpublished, *per curiam* opinion issued on February 5, 2020, this Court reversed and remanded this matter back to the post-conviction relief court. In this unpublished opinion, this Court indicated the remand was based, at least in part on a concession made by Respondent. However, the opinion issued by this Court does not indicate the scope of the remand, leading to confusion as to what actions the lower court and all parties should take. Respondent requests this Court issue a new opinion specifically stating the purpose and scope of the remand.

Looking to what occurred in the case, Petitioner filed a post-conviction relief application and an evidentiary hearing was held before the Honorable Brooks P. Goldsmith. At that hearing, Respondent improperly argued Petitioner's claim that counsel was ineffective for failing to object to Officer Dowling's statement was procedurally barred because the potential *Doyle v.*

Ohio, 426 U.S. 610 (1976) violation issue was raised in a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). In the order of dismissal, the post-conviction relief court agreed with Respondent's argument and erroneously found:

> This allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State. 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashlev v. State. 260 S.C. 436, 196 S.E.2d 501 (1973). This was the exact issue raised in Applicant's direct appeal. (See Anders Brief of Appellant pp. 5-6). As such, this issue is not proper for the PCR forum. Therefore, this allegation is denied.

App. 402.

On appeal, Petitioner raised the issue that the PCR court erred in concluding as a matter of law that Petitioner's claim that trial counsel rendered ineffective assistance by failing to object to an officer's improper comment on his silence was procedurally barred pursuant to Section 17-27-20(B) of South Carolina Code because the unpreserved issue regarding the officer's improper comment was raised in a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), on direct appeal. Respondent conceded in its brief that the decision of the post-conviction relief court was erroneous and the proper relief was to remand the case to the lower court for a limited hearing as to this issue. Respondent made the same concession and request for relief during oral argument before this court on December 10, 2019.

At argument, the concession made by Respondent was specifically limited to this issue and the requested relief was to remand the case to the post-conviction relief court for a limited hearing to develop the record as to counsel's alleged failure to object to Officer Dowling's testimony. Respondent recognizes that this Court appears to have granted the requested relief, however, the issued opinion does provide leave for ambiguity and interpretation. This Court

certainly appreciates the potential issues posed if this case were to be remanded to the post-conviction relief court with limited guidance as to the scope of the hearing to be held.

Conclusion

Based on the foregoing ambiguity and the State's limited concession in oral argument, it is respectfully submitted that this Court should issue a new opinion specifically finding that the case is to be remanded to the post-conviction relief court for a hearing limited to the allegation that counsel was ineffective for failing to object to Officer Dowling's testimony.

Respectfully submitted,

ALAN WILSON
Attorney General

BENJAMIN LIMBAUGH
Assistant Attorney General

BY: Benjamin Limbaugh
Benjamin Limbaugh
S.C. Bar No. 103334
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
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ATTORNEYS FOR RESPONDENT

February 20, 2020
Columbia, South Carolina

STATE OF SOUTH CAROLINA
In the Supreme Court

Certiorari to the Court of Appeals
Appeal from Beaufort County
Brooks P. Goldsmith, Post-Conviction Relief Judge
Appellate Case Number 2016-001684
Unp. Op. No. 2020-UP-033 (Feb. 5, 2020)

RECEIVED
FEB 20 2020
SC Court of Appeals

MYKEL JOHNSON,

PETITIONER

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Respondent's Petition for Rehearing** has been served upon the applicant by placing two copies in Interagency Mail addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

This the 20th day of February, 2020.

Jennifer Jennison
Administrative Coordinator for Respondent

ORIGINAL

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APR 0 2 2020
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Beaufort County

Brooks P. Goldsmith, Circuit Court Judge

MYKEL JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001684

RETURN TO PETITION FOR REHEARING

On February 5, 2020, this Court reversed and remanded the lower court's denial of Petitioner's application for post-conviction relief in an unpublished opinion. Johnson v. State, Op. No. 2020-UP-033 (S.C. Ct. App. filed Feb. 5, 2020). Subsequently, the state filed a petition for rehearing asking this court to "issue a new opinion specifically stating the purpose and scope of the remand." On March 23, 2020, this Court ordered Petitioner to file a return to the state's petition for rehearing. Pursuant to this Court's order, Petitioner files this return.

Petitioner opposes the state's request because this Court's opinion is clear and requires no clarification. In its opinion issued on February 5, 2020, this Court explained that Petitioner appealed the denial of his post-conviction relief application "arguing the PCR court erred in denying his petition on procedural grounds." After reviewing the briefs and hearing oral

argument, this Court reversed and remanded the case. As noted by this Court in its opinion, the state conceded in its briefing and at the oral argument that the PCR judge erred and that the error was due, at least in part, to the state's legally erroneous argument to the PCR judge. No additional clarification is necessary for the lower court and all parties to understand the purpose and scope of the remand.

At Petitioner's trial, the state questioned Investigator Joshua Dowling regarding his investigation of Petitioner. During this examination, Investigator Dowling informed the jurors that he was unable to develop any information "from the defendant's side" because Petitioner did not want to speak with police and requested the assistance of counsel. App. 102, l. 24 – App. 103, l. 16. It was undisputed that trial counsel did not object. Appellate counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 320-331. The issue raised on appeal was whether the trial judge erred in failing to strike testimony by the investigator that Petitioner "did not want to talk and wanted the representation of any attorney because the testimony constituted an improper comment on [his] constitutional right to remain silent and right to an attorney." App. 320-331. Finding no *preserved* issues with potential merit, this Court dismissed the appeal and relieved appellate counsel on April 2, 2014. App. 332-333; State v. Johnson, 2014-UP-134 (S.C. Ct. App. filed April 2, 2014).

Thereafter, Petitioner filed a PCR application, which was later amended to include a claim that trial counsel was ineffective for not objecting to Dowling's testimony on Petitioner's exercise of his right to silence and counsel. App. 335-341; App. 365, ll. 16-20. During the PCR hearing, the state objected to the presentation of evidence related to trial counsel's failure to object to Dowling's testimony. According to the state, the issue was "improper for a PCR forum." Because this was "the exact issue raised at the Court of Appeals through an Anders

versus California brief. The Court of Appeals affirmed his conviction. That was dealt with on direct appeal." App. 373, ll. 10-16. "[T]he fact that this issue was briefed on direct appeal" was proof, according to the state, "that this [issue was] not proper for PCR forum" as the issue had "already been addressed because an Anders brief [was filed] ... [and] the Court is presumed to have reviewed the entire record and ma[d]e an opinion - - or issued an opinion based on they reviewed the entire record." App. 378, ll. 12-18. Thus, the issue was procedurally barred as "not proper ... for the PCR forum." App. 374, ll. 24-25.

The PCR judge agreed with the state's argument. In the order denying relief, the PCR judge found Petitioner's claim that trial counsel "was ineffective for failing to [object to Officer] Dowling's testimony that when [Petitioner] was arrested, he invoked his right to remain silent" was "without merit." App. 402. According to the PCR judge, the issue raised a "direct appeal issue that [was] procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003)." App. 402. Although the PCR court correctly noted that "[p]ost-conviction relief is not a substitute for a direct appeal" and that "[a] post-conviction relief application cannot assert any issues that could have been raised ... on direct appeal," the PCR court erred in holding that because this issue was raised on direct appeal, the issue was "not proper for the PCR forum." See App. 402.

In its return to the petition for writ of certiorari and its brief of respondent, the state candidly admitted the PCR court erred in finding Petitioner's claim that trial counsel provided ineffective assistance by failing to object to an officer's improper comment on his silence was procedurally barred because the issue was raised in a brief pursuant to Anders. Ret. at 6-8. The state requested this Court reverse the PCR court's dismissal of Petitioner's allegation. Ret. at 8. Further, during the oral argument before this Court, the state conceded the PCR court erred when it relied upon the argument made by the state that the issue presented was procedurally barred.

All agree that PCR is the proper forum for Petitioner's claim for relief – trial counsel's ineffective assistance in failing to object to the officer's improper testimony – because the issue was not decided, and could not have been decided on direct appeal. All agree that the PCR judge erred as a matter of law when he concluded Petitioner's claim was procedurally barred on collateral review. Finally, all agree that the remedy for the error is a remand to the PCR court for a hearing. This Court's opinion makes this abundantly clear; therefore, it is unnecessary for this Court to issue a new opinion.

s/Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of April, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
APR 02 2020
SC Court of Appeals

Certiorari to Beaufort County

Brooks P. Goldsmith, Circuit Court Judge

MYKEL JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Rehearing in the above referenced case has been served upon Benjamin Limbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Mykel Johnson, #351916, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 1st day of April, 2020.

By: RM

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 1st day of April, 2020.

Marcy Augore (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.

The South Carolina Court of Appeals

Mykel Johnson, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-001684

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

James E. Lockemy C.J.

J.

J.

Columbia, South Carolina

cc:
Susan Barber Hackett, Esquire
Benjamin Hunter Limbaugh, Esquire
Alan McCrory Wilson, Esquire
The Honorable Brooks P. Goldsmith

FILED
April 23, 2020

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT
	)	
COUNTY OF BEAUFORT	)	Case No.: 2014-CP-07-01759
Mykel D. Johnson, Applicant,	)	**AMENDMENT TO POST-CONVICTION RELIEF APPLICATION**
Vs.	)	
State of South Carolina, Respondent.	)	

2021 JUL 29 AM 11:33
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

The Applicant above named in the aforementioned matter, through his Attorney, Tommy A. Thomas, respectfully re-alleges those allegations as contained in the original Application for Post Conviction Relief and moves to amend his original Post Conviction Relief Application.

That the Applicant believes that Counsel was ineffective and that his plea was involuntarily given for the following reasons:

a. Failure to object to Officer Dowling's testimony regarding Applicant's decision to exercise his right to remain silent
b. Failure to object to any mention of implied malice due to use of a firearm, including Belcher/implied malice charge

Respectfully submitted,

Tommy A. Thomas, Esq.
Attorney for Applicant
P.O. Box 88
Irmo, SC 29063

July 27, 2021

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS FOR THE
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
		DOCKET NO.: 2014-CP-07-01759
MYKEL D. JOHNSON,	)	
	)	
Appellant,	)	
	)	
vs.	)	CERTIFICATE OF SERVICE
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

2021 JUL 29 AM 11:33
JEAN ANN ROSEMOND
BEAUFORT COUNTY
CLERK OF COURT

I, Jacquelyn E. Miller, Paralegal to Tommy A. Thomas, P.C., hereby certify that I placed in the United States Mail, a copy of an Amendment to Post-Conviction Relief Application, with postage prepaid and the return address clearly shown on said envelope to Samantha J. Weidauer, Esq. with the Attorney General's Office, at:

Office of the Attorney General
ATTN: Samantha J. Weidauer, Esq.
P.O. Box 11549
Columbia, SC 29211-1549
sweidauer@scag.gov

Jacquelyn E. Miller, Paralegal
Tommy A. Thomas, P.C.
Attorney for Applicant
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

Irmo, SC
July 27, 2021

STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
	)
COUNTY OF BEAUFORT	) FOURTEENTH JUDICIAL CIRCUIT
MYKEL D. JOHNSON	) NO. 2014-CP-07-1759
	)
VS.	) TRANSCRIPT OF RECORD
	)
THE STATE OF SOUTH CAROLINA	) PCR Hearing
	)

B E F O R E:

The Honorable Eugene C. Griffith, Jr., Judge

Beaufort, South Carolina

DATE: Monday, August 9, 2021

9:45 a.m.

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

Tommy A. Thomas, Esquire

Post Office Box 88
Irmo, South Carolina 29063
thomaslaw@me.com

Attorney for the Applicant

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Attorney for the State

Reported by: Cathy J. Provost, RMR, Official Court Reporter

INDEXES

PAGE:

Certificate of Reporter 33

INDEX TO WITNESSES

WITNESSES:	DIRECT:	CROSS:	REDIRECT:	RECROSS:
MYKEL D. JOHNSON				
By Attorney Thomas	10	--	--	--
ERIC J. ERICKSON				
By Attorney Thomas	13	--	23	--
By Attorney Weidauer	--	19	--	--

INDEX TO EXHIBITS

(No exhibits marked.)

- - - - - - - - - - -

COURT REPORTER LEGEND:

dash -- intentional/purposeful interruption; change in thought
ellipses ... trailing off
[ph] phonetically written
[sic] written as said
[indiscernible] unable to be understood due to low volume or quality of audio

-- P R O C E E D I N G S --

(Court called to order.)

ATTORNEY WEIDAUER: May it please the Court.

THE COURT: Yes, ma'am.

ATTORNEY WEIDAUER: Samantha Weidauer on behalf of the State of South Carolina. Your Honor, this post-conviction relief matter of Mykel Johnson is Case No. 2014-CP-07-01759 out of Beaufort County. The procedural history is a bit lengthy so if Your Honor would bear with me I'd like to put that into the record.

In Mr. Johnson's underlying General Sessions case Mr. Johnson was indicted for two counts of attempted murder. He proceeded to a jury trial before Judge Carmen Mullen and was represented by Eric Erickson. Applicant was found guilty and sentenced to concurrent sentences of 15 years for each charge.

Applicant then filed a notice of appeal from these convictions. Applicant Defender Katherine Hudgins filed an Anders brief in which she raised one issue. That issue was: Did the trial judge err in failing to strike testimony from the investigator that appellant did not want to talk and wanted the representation of an attorney because the testimony constituted an improper comment on appellant's constitutional right to remain silent and right to an attorney. By unpublished order, the South Carolina Court of Appeals affirmed applicant's conviction and sentence.

On July 21st, 2014, applicant filed an application for post-conviction relief, and was represented by James Falk. Following an evidentiary hearing on May 17th, 2016, Judge Brooks Goldsmith signed an order of dismissal dismissing Johnson's allegation. In his order judge Goldsmith found applicant's allegation that counsel was ineffective for failing to object to Officer Dowling's testimony; that when applicant was arrested, he invoked his right to remain silent was procedurally barred, as this issue was raised in applicant's direct appeal.

Mr. Falk filed a motion to alter or amend the order. Judge Goldsmith denied this motion. Applicant appealed from the PCR Court's decision and filed a petition for writ of cert. After a return for writ of certiorari was filed, the matter was transferred to the Court of Appeals and cert was granted and briefs were requested.

In the brief of petitioner Appellant Defender Susan Hackett argued the PCR Court erred in concluding as a matter of law that petitioner claimed that trial counsel rendered ineffective assistance by failing to object to an officer's improper comment on his silence was procedurally barred because the unpreserved issue regarding the officer's improper comment was raised in a brief pursuant to Anders v. California.

An oral argument was held before the Court of Appeals on December 10th, 2019. On February 5th, 2020, by unpublished opinion, the Court of Appeals reversed and remanded the matter,

finding the Court erred in denying applicant's post-conviction relief allegation on procedural grounds. The State petitioned for rehearing, and the Court denied that petition.

The remittitur was sent June 24th of 2020. The State would, therefore, move to limit applicant's allegation solely to the allegation that trial counsel failed to object to Officer Joshua Dowling's testimony and dismissed the other allegation asserted in applicant's amended application today.

THE COURT: All right. What say you, Mr. Thomas?

ATTORNEY THOMAS: Your Honor, if it please the Court. I have spoken to the Attorney General about this. I think if it does please the Court, I have copies of the brief of the appellant, and also a brief of the State, as well as the PCR order of dismissal. I don't know if you have those in the records, but I'd be glad to hand these up.

THE COURT: I'd love to see them.

ATTORNEY THOMAS: They are excellent in regards to mapping out this issue. And certainly appellant defense, or appellant defense's, argument in here is exactly what we're going to be talking about today.

THE COURT: Okay. That's the one where Ms. Hackett made that argument, you said?

ATTORNEY THOMAS: Sir?

THE COURT: Ms. Hackett made that argument?

ATTORNEY THOMAS: Yes, sir. Yes, sir. Your Honor, if it

please the Court. And I think that that brief is somewhat lengthy, but especially when it starts talking about ineffective assistance of counsel, it talks about the necessary of remand, but we're already beyond that point, so I think that's part of the end of the brief and certainly pertinent to what we're talking about.

When I first looked at this case, I thought it was somewhat complicated. It appeared to be very complicated, and it's really not after spending some time in preparation. It did go up to the court. There were two prongs that were presented. Really what the Court decided was while there was ineffective assistance of counsel by not objecting to the police officer's testimony, that he exerted his right to remain silent. The State actually conceded that point, and then the issue became an argument about remand.

And it's really back before the Court today in regards to just a remand from the Court of Appeals. There was a request to clarify that as to whether or not this was a complete remand to start the case all over again or whether or not this was a remand in regards to the sole issue, and the Court just denied that request for rehearing without answering that question.

THE COURT: They'll do that. They'll do that.

ATTORNEY THOMAS: Yes, they did.

THE COURT: They've done it to me, sent something back and gave me no advice as to what I was supposed to do with it.

ATTORNEY THOMAS: And I guess maybe now's the time to raise this. In review -- this was my first time representing Mr. Johnson. In looking at this, there does also seem to be an implied *Belcher* issue in this case but, of course, to raise that case we would actually have to consider the remand to be a complete remand, which would allow us then to raise that issue before the Court. We did amend the pleadings to --

THE COURT: The *Belcher* issue being the instruction on malice was improper?

ATTORNEY THOMAS: Yes, sir.

THE COURT: Okay.

ATTORNEY THOMAS: And there appear to be no -- there was no evidence presented that would reduce mitigation rights that leads to justification. And I would be glad to go into that if the Court wishes. If the Court does perceive this to be purely a remand on the issue of his right to remain silent, then we would just like to note that for the record.

THE COURT: Okay.

ATTORNEY THOMAS: Your Honor, where we are today is really, I think, an issue of prejudice. The State argued that -- in the appeal that -- it would be unfair for the court to rule basically on the merits, for the appellant court to just rule on the merits, say that it met the criteria for Strickland and therefore just set the case aside, the conviction aside.

So we are really back, I think, in regards to, putting on

the record the issues in regards to, whether this ineffective assistance of counsel produced a prejudice to the applicant. And I would certainly argue that it does. I don't think there's any way in the world a comment on someone's right to remain silent is not prejudicial. But that's kind of where we are today.

Your Honor, and if it please the Court, I would call Mr. Johnson to the stand just briefly in regards to, I think, an issue that has already been decided by the Court of Appeals, but I'd like to put it on the record anyway.

THE COURT: All right. You may create a record on that.

ATTORNEY WEIDAUER: Your Honor, may I respond?

THE COURT: Sure. Sure.

ATTORNEY WEIDAUER: As Mr. Thomas mentioned, this was remanded back to the court, and the order of dismissal showed that that one particular issue was incorrect in the order of dismissal, and in that order of dismissal it stated that it was procedurally barred.

We concede that that was incorrect and that it should be back before the court but particularly on that one issue. If we were to expand it to the *Belcher* issue, that would give applicant another bite of the apple.

THE COURT: And you will present testimony from him on the *Belcher* issue or on the --

ATTORNEY THOMAS: I will present testimony, Your Honor, on the issue in regards just to the right to remain silent.