

VOLUME II OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Stephanie P. McDonald, Circuit Court Judge

RECEIVED

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S.C. Supreme Court

LORD BYRON SLATER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212846

APPENDIX

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CHARGE OF THE COURT

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1 And must satisfy you, the jury, beyond a
2 reasonable doubt.

3 I charge you further that suspicion, however
4 strong, standing alone is not sufficient to
5 sustain conviction.

6 Now, while the Court generally determines the
7 admissibility of evidence, I instruct you that as
8 regards any alleged statement made by this
9 defendant, that you members of the jury will make
10 the ultimate determination of whether or not the
11 defendant made the said statement.

12 You will recall I instructed you initially at
13 the time of the introduction of this alleged
14 statement.

15 And if the defendant made the statement,
16 whether the statement was made by the defendant
17 voluntarily and of his own free will and accord.

18 And, finally, just what weight, if any,
19 should be given to any alleged statement.

20 I charge you that you must determine if the
21 alleged statement was a product of an essentially
22 free and unconstrained choice by its maker, the
23 defendant.

24 If you determine it was, and the burden is
25 upon the State to prove this fact, as all other

1 facts beyond a reasonable doubt; then you may give
2 this statement such further consideration as you,
3 in your judgment, deem proper.

4 If you determine the alleged statement was
5 not the free and voluntary willed expression of
6 the defendant, then you should not consider the
7 statement at all.

8 In determining whether the defendant's will
9 was overcome in obtaining a statement, you should
10 consider both the characteristics of the accused
11 and the details of the interrogation, which is
12 referred to in the law as the totality of the
13 circumstances.

14 Some of the facts that you must consider are
15 the age of the accused. His education or lack
16 thereof. His mental ability or capacity. His IQ
17 or intelligence. His background. His
18 environment.

19 The advice, or lack thereof, to the accused
20 of his constitutional rights, included but not
21 limited to the procedural safeguards known as the
22 Miranda warnings concerning the right to remain
23 silent, that a statement could be used against him
24 in a Court of law. The right to have a lawyer
25 present.

CHARGE OF THE COURT

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1 If indigent, that if he could not afford a
2 lawyer, that a lawyer would be appointed to
3 represent him without any cost.

4 And that he could stop making a statement at
5 any time.

6 Other factors that you may consider are the
7 place and length of detention and the nature of
8 the questions.

9 Ladies and gentlemen, you, the jury, must
10 carefully scrutinize all of the surrounding
11 circumstances before you give any weight to an
12 alleged statement.

13 You must be satisfied beyond a reasonable
14 doubt that the statement was made by this
15 defendant, uninfluenced by promise, reward, threat
16 or injury, or any diminution of his rights.

17 In the trial of this case I have identified
18 and found certain witnesses to be experts.
19 Witnesses, who by training, education or
20 experience, are considered as experts in a
21 particular field and may give opinions in that
22 field based upon the facts of a matter.

23 Their conclusions and opinions constitutes
24 evidence to be considered by you in connection
25 with all the other testimony and evidence in the

1 case. You, the jury, may give it such weight as
2 you, in your experience and discretion, may deem
3 appropriate.

4 Ladies and gentlemen, you have been selected
5 in this case as fair and impartial jurors sworn to
6 impartially try and determine the facts of this
7 case.

8 And when you comply with your oath to do so,
9 then no one will have a right to criticize your
10 verdict and you would have fully discharged your
11 duty as jurors.

12 You must not be influenced by opinions or
13 expressions of opinions, if any, which you have
14 heard on the outside, but you are to decide this
15 case according to the testimony that you have
16 heard from the lips of the sworn witnesses along
17 with other evidence in this case.

18 Now, ladies and gentlemen, during your
19 deliberations, your verdict, be it not guilty,
20 guilty of murder, guilty of manslaughter, must be
21 the unanimous verdict of all 12 of you.

22 The same would apply with reference to the
23 second indictment with regard to possession of a
24 firearm during the commission of a felony.

25 Your verdict must be the unanimous verdict of

CHARGE OF THE COURT

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1 all 12. It cannot be a verdict of the majority;
2 and obviously it would not be one of minority.

3 Now, madam foreman, the original indictments
4 will be with you in the jury room. Once your jury
5 has deliberated and found a unanimous verdict upon
6 the charge of murder, you will turn on the back,
7 under the word verdict, which is there.

8 There are three possible verdicts. There is
9 no suggestion to me in the order that I give them
10 as to what your verdict should be, it's simply
11 I've got to put one or another ahead of each
12 other.

13 You may, in your discretion, find the
14 defendant guilty of murder. You may, in your
15 discretion, find the defendant guilty of
16 manslaughter. You may, in your discretion, find
17 him not guilty.

18 So in writing your verdict, it would be, we
19 the jury find the defendant guilty of murder. Or
20 we the jury find the defendant guilty of
21 manslaughter. Or we the jury find him not guilty.

22 Then please turn to the second indictment.
23 There are two possible forms of verdict. We find
24 the defendant not guilty. Or we find the
25 defendant guilty.

1 Again, whatever your verdict would be, it
2 would be the unanimous verdict of all 12 of you.

3 Now, as I indicated, we'll have closing
4 arguments by counsel at this time.

5 Will there be an opening and closing of the
6 State?

7 MR. DUTREMBLE: No, sir, we would defer to
8 Mr. Pennington.

9 THE COURT: Sir?

10 MR. DUTREMBLE: We would defer to Mr.
11 Pennington. We'll have one argument.

12 THE COURT: All right, sir.

13 MR. PENNINGTON: If Your Honor please.

14 Madam Forelady, ladies and gentlemen of the
15 jury, the hour is somewhat late, quarter of five;
16 I'm going to get right to the point. It's been a
17 hard two days. You've been very patient.

18 We've spent two full days examining closely
19 what took two minutes, pulling it apart piece by
20 piece and trying to assemble the pieces to see if
21 there is some clarity and the truth can emerge for
22 you to make a judgment.

23 One truth throughout this entire case has
24 been that every single person that took the
25 witness stand that was out there gave a different

1 rendition of the facts; some slightly different
2 sequence of events.

3 One person describes, someone said this.
4 Another person said, someone said that. Or
5 someone doesn't remember the statement being made
6 at all.

7 And that's because this event was sudden and
8 it was unexpected.

9 And I'd ask you to, in your deliberations, to
10 try to remember that fact throughout your entire
11 discussion.

12 Because I think that for the State to be able
13 to make a charge of murder, they're going to try
14 to say to you that at every step of the way Mr.
15 Slater, my client, Byron, was coolly reflecting on
16 what he was planning to do.

17 That he went there, because his gun was
18 loaded, he must have known that this was going to
19 unfold just the way it has. And certainly that
20 was the tone and the tenor of the cross.

21 You know, that because he had a loaded gun,
22 somehow that meant he was loaded for bear and that
23 we could all anticipate that these events were
24 going to happen.

25 But when you really look beyond the rhetoric,

1 what do you find? You find that there was no,
2 absolutely no preexisting relationship between
3 these parties.

4 The witnesses that the State called told you
5 -- the Nelson's told you, no preexisting
6 relationship and no real understanding of what was
7 happening to them.

8 This was a fight that was brought about by
9 people that aren't even here. Aren't even on
10 trial. Apparently never detected. Never
11 charged. Maybe never will be.

12 The genesis of this case is not in this
13 courtroom. It's not because Byron Slater is 19
14 years old and stupid enough to think he's a big
15 man because he has a car and can carry a loaded
16 weapon in it.

17 Or stupid enough to think that the thing to
18 do, when there's a big fight going on, is try to
19 be cool and go over and fire the gun in the air to
20 watch everybody scatter like crazy.

21 Or stupid enough maybe to say, okay, well,
22 that wouldn't be smart. Let me walk over to this
23 parking lot where this other fight is taking place
24 and see what's going on; and find himself right
25 square in the middle with these men who were there

1 and armed.

2 Not people that he's made up out of a figment
3 of his imagination. These are people that
4 existed.

5 And how do we know that? Because Mark Nelson
6 told you. Because Demetrius Nelson told you.
7 These are the flesh and blood relatives of the
8 victim who said that what they found in the midst
9 of this fray and the fog of this whole situation,
10 is six or eight guys coming upon them.

11 A group of guys. Two or three on each one on
12 each side. That's the mental image that you get.

13 Now, do we know how they were dressed? Do we
14 know what they were saying exactly? Do we know
15 exactly where they were standing? Do we have
16 footprints that you match up and you can
17 reconstruct like a ballet exactly where each
18 person stood and what they said and what they had
19 in their mind?

20 No is the answer to that. But yet somehow
21 Byron Slater is charged with the responsibility of
22 knowing and anticipating every crazy thing that
23 happened that night; and that's not fair and it's
24 not justice.

25 Byron Slater is a stupid 19-year-old former

1 high school student who was out there with a gun,
2 big man on campus, who walked into this nightmare,
3 and he, of course, did make it much, much worse.

4 But he had the courage to try to tell you
5 what he knew and what he didn't know.

6 Is he smart? Is he wise? Is he clever? Did
7 he come up and try to snow you with this story of
8 somehow, oh, yes, we know that there is gunshot
9 residue, so that meant that there was a gun in
10 Sharone's hand.

11 Wouldn't that have been the easiest story if
12 he was going to come to you and try to snow you,
13 lie to you, to somehow duck responsibility in this
14 case?

15 Wouldn't it have just been easier to say, I
16 didn't know what happened. I came up there and I
17 thought maybe I could help with my gun. So I was
18 going to come and try to be a peacemaker.

19 And then suddenly, this guy that was over
20 there leveled a gun at me, and I fired and I fired
21 and then I ran and I fired and I fired; and make
22 it nice and neat.

23 It's not a hard story. What did it take me,
24 15 second to tell that story?

25 Is that the story he told? I submit that's

CLOSING ARGUMENT BY MR. PENNINGTON

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1 the story he would tell you if he was a liar.

2 The trouble with this whole case, from start
3 to finish, is that we don't -- we're not like
4 video recorders where we can play back every
5 instant, every second out there.

6 And so people get splotches of memory of what
7 they can remember clearly.

8 There's no doubt that he walked up and he was
9 wrong. There is no doubt that he was armed; and
10 that was wrong.

11 There is no doubt that what he did made
12 things immensely worse for the Middleton family
13 and for himself.

14 The reason we're here is because he didn't
15 have any malice. The reason he is here is because
16 there is no malice aforethought in this case.

17 The Court has told you already that when any
18 person, when any human being has a deadly weapon
19 like this nine millimeter pistol, and you go up
20 and you shoot someone, you can infer that if I
21 walk up and shoot the bailiff that I have malice
22 aforethought.

23 Because you can infer just from common sense
24 that if I do that deliberately and purposefully, I
25 want him dead.

1 But that's not what happened in this case.
2 What happened in this case was like almost a
3 riot. And it was involving separate, independent
4 actors who may or may not have known anybody.

5 The one thing that's pretty clear, it seems,
6 is that the group of guys that were jumping on the
7 Nelson's and Sharone, had no connection whatsoever
8 at all with my client.

9 And so you have to ask yourself, before you
10 can bring back any kind of verdict, what is the
11 element that has to be met?

12 The most serious kind of homicide in our land
13 is murder on malice aforethought. Someone who
14 says to themselves, I either have hatred or I'm
15 fatally bent on mischief.

16 A determination to do what is wrong. A
17 violent -- this is the Court's words: A violent,
18 deliberate intention unlawfully to take the life
19 of another.

20 Now, the Solicitor and I will agree that if
21 you believe that it was as simple as my client
22 going up and seeing poor Sharone Middleton on the
23 ground, and just shooting away; that's murder.
24 There's no question about that.

25 Why isn't that what happened? Why isn't it

1 that neat and clean?

2 Well, let's look at the evidence. You've got
3 the description by the GSR expert. He comes in
4 and he tells you, well, we're usually looking to
5 see who's handled or fired a gun, but, yes, you
6 can infer other things.

7 But if you stick a gun in somebody's face and
8 pull the trigger, the numbers are going to go off
9 the scale.

10 Now, if Sharone was down on his back --
11 (demonstrating) you can't see me can you? If
12 you're going to shoot me in the chest, you've got
13 to get close enough to be able to put that gun in
14 that close proximity, ladies and gentlemen.

15 The angle of these -- there's no forensic
16 medical examiner who came in and said that you can
17 infer from the angle that this was a shot straight
18 down.

19 But if that's what the State would have you
20 believe and have you rely on and have you trust,
21 and go back and vote for a murder finding, then
22 shouldn't there be the gunshot residue? At least
23 that is logical.

24 Now, who has the burden? Does the
25 defendant? Does Mr. Slater have to come in and

1 prove his innocence? Does he have to come in and
2 convince each and every one of you of what
3 happened?

4 No. No. Let's remember how that works. In
5 fact, the State has to show you why he's guilty.

6 And when you look at that fact, that fact
7 takes away their entire theory. It is -- it makes
8 impossible that version.

9 The Judge instructed you on circumstantial
10 evidence. Circumstantial evidence is where we
11 don't have a videotape to play things back so we
12 can't see exactly what happened and so we have to
13 begin to hook things together, based on the
14 circumstances.

15 There is lots of circumstances here that are
16 missing and some that are present. And I submit
17 to you that that's an important substantial fact
18 that we don't know the answer to.

19 And when you conclude that you truly in your
20 heart of hearts don't know the answer to that
21 question, then this business of just walking over
22 and blowing this man away is gone.

23 So you're then, well, if it wasn't exactly
24 that, well, what was it? How was Sharone standing
25 or sitting or kneeling or squatting or bending the

1 moment that he was shot?

2 We don't know. Even his own cousins couldn't
3 tell you, because they were in the midst of this
4 fracas. They were close. They were right there.
5 They couldn't even see the gunman, ladies and
6 gentlemen. Think about that.

7 The Solicitor demonstrates for you, this is
8 our case: Walking up. Standing over him.
9 Shooting him.

10 But the Nelson's, the cousins tell you
11 bluntly, didn't see the gunman.

12 Saturday nights. Saturday night's all right
13 for fighting, according to Elton John.
14 Unfortunately, it had this unbelievable result.

15 A big crowd of young people out. Out to have
16 a good time. Sometimes these foolish, stupid guys
17 get guns, thinking that they are going to be big
18 shots.

19 Does that automatically make them all
20 murderers? Does that mean that they always intend
21 the results that happen?

22 Why do kids run over to a fight? What was in
23 it for Byron Slater? Was he there to get
24 something from Sharone? Was he there to prove
25 something to Sharone?

1 It just doesn't make any sense. And the
2 reason it doesn't make sense is because this was a
3 spontaneous, sudden series of events. Unplanned.
4 Chance encounter.

5 The Solicitor went to fairly great length to
6 sort of say, well, you couldn't be -- let me just
7 change it this way.

8 Do you really think that Byron Slater was
9 proud that night of what he did? Do you really
10 think that he liked what happened?

11 He knew one thing, he wasn't supposed to be
12 out there with a gun. So when all hell broke
13 loose, he did what kids do. They run. They hide.

14 He puts the gun back. And then if he knew
15 that this was a murder, why not just toss it in
16 the marsh? You've got the marsh right here on
17 exhibit 2.

18 Why not get rid of the gun all together if
19 you know that you have just clearly taken a man's
20 life?

21 But what do the circumstances tell you? The
22 circumstances show pretty clearly that they didn't
23 know exactly what happened. It wasn't as crystal
24 clear as the State contends.

25 So they rode back by to see what was going

1 by. Out of gloating? Was there anybody in that
2 car, any of those other fellows, that said that
3 there was any real talk at all about what
4 happened?

5 It was like, let's just ride back by and see
6 what's going on.

7 These are witnesses, who by the way, the
8 State has not charged, who were not implicated in
9 any way.

10 Don't you believe that if there was any kind
11 of premeditation, any kind of pre-planning, any
12 kind of malice aforethought, that the guy who's
13 driving the vehicle would have some sort of
14 criminal responsibility?

15 But the State has taken as true the
16 spontaneity of this whole situation.

17 So why do kids run over to a fight? I don't
18 know. Why carry a gun over there to act cool? I
19 don't know.

20 I wish it had been a BB gun or some other
21 kind of thing so you wouldn't have had these kind
22 of tragic consequences.

23 This is the only argument I get to make. The
24 State, because they have the burden, have the
25 opportunity to speak last.

1 And so to a degree, even though it's my
2 client that's on trial, they have the last word.
3 And there may be things that they will raise that
4 I will not have addressed.

5 I would ask you, as you deliberate, to sit
6 there and go back and forth and ask yourselves,
7 well, what would the defense prospective be on
8 these kinds of questions?

9 You know, there were four people in that car,
10 and you've got three different -- actually four
11 different versions of what was said immediately
12 after. And that's a pretty good slice of how
13 confused this whole situation is.

14 One version that you heard from, I think it
15 was Keon, who is Kenyon Nichols, is, I think I hit
16 him.

17 But someone else in the same car hears, I
18 think dog get hit.

19 Not involving my man, but just, I think this
20 guy gets hit.

21 And then he says, I said something like, I
22 think them boys get one.

23 There's no way to have any -- that's just
24 another typical example of how spontaneous events
25 are hard to record, hard to remember, hard to be

1 precise from. It all adds up to murkiness.

2 But what is clear? What is clear? I
3 promised you in opening statement that when you
4 looked at this evidence you were going to see
5 other people armed in the crowd.

6 And sure enough, there you had Mark Nelson
7 who took the stand, and on cross-examination, not
8 on direct, but on cross-examination, twice in
9 reply to the question, said he heard two or three
10 people fire their weapon that night.

11 And do you remember he then had those people
12 running, not in the direction of Crawford, but
13 running toward Jenkins. Toward the school. Do
14 you recall that testimony?

15 Looking at State's Exhibit 2. And he was
16 testifying on the stand, he described he heard to
17 or three guys firing weapons and then he
18 specifically described the guys -- I'm all turned
19 around here -- running toward Jenkins Avenue,
20 towards the school, and getting into a Crown
21 Victoria, a Ford product.

22 And he came out here. Right (indicating)
23 here. And told you the same thing.

24 Now, this is a fellow, who, I'm sure, has no
25 desire to help Byron Slater, but he's here trying

1 to honestly tell you the best that he can remember
2 about what happened.

3 Who are those guys? Are they the same exact
4 fellows who Byron Slater saw who were out there
5 raising holy hell and pointing guns and who scared
6 him enough to where he went crazy and started
7 shooting?

8 How do we know that's not what happened? How
9 do we know that's not exactly what happened?

10 There's no evidence at all in this case that
11 that's not exactly what happened.

12 There are loose ends everywhere in this case.
13 There is a bullet hole in a car that's parked
14 somewhere in the parking lot.

15 My client says he's running back to the car
16 and shooting. He's not even looking at a certain
17 point.

18 We do know that somebody wanted money out of
19 the Nelson's. And that someone was involved in
20 stealing his shoes. And you'll notice that there
21 was nowhere mentioned that they ever collected
22 shoes that belonged to Sharone at the scene or at
23 the hospital or at the autopsy. Those shoes are
24 nowhere to be found.

25 Shoes. Where are the shoes? It's another

1 huge dangling question. It's a part of the story
2 that's never been told, that might well shed light
3 on the chaos out there if we could answer that
4 question.

5 But every witness in that car said that there
6 was no pre-planned talk of robbery. No
7 pre-planned talk of taking something or even
8 needing something.

9 These guys were out to have fun, out to talk
10 to girls. And then they got themselves -- put
11 themselves -- my client put himself squarely in
12 harm's way.

13 And for that he is responsible. And for that
14 he is guilty. You heard him say he's ruined two
15 lives.

16 He didn't have to take the witness stand and
17 describe his little vision, his little slice of
18 what happened.

19 If you're going to go out and commit a crime
20 like this, do you gather an audience and say, oh,
21 well, before I do this, let me see if I can get
22 any of my friends. Anybody want a ride? You want
23 a ride? You want a ride? Let's get into my car.
24 Let's all ride together so that I can go commit
25 this horrible murder.

1 It makes no sense at all.

2 The gunshot residue. I expect during the
3 closing argument you're going to hear that the
4 gunshot residue is just a big nothing, that it's a
5 red herring. It's a smoke screen that the defense
6 has put out there.

7 But I'll tell you what, the smoke didn't come
8 from something that we cooked up in this
9 courtroom. The simple fact of the matter is that
10 there is gunshot residue on the right hand of the
11 victim.

12 What does that mean? Do we know what that
13 means?

14 They're going to say that the explanation has
15 to be, well, that Sharone, it just settled like a
16 little fog on his person.

17 And I submit to you that that's not
18 reasonable. If that's the case, then why didn't
19 it settle -- they were looking on both sides. On
20 both hands. On the front back. But it's unique
21 to his right hand. His right palm, which just so
22 happens, he is right handed.

23 Now, my client could have said, oh, yeah, I
24 saw a gun in his hand and that's why I reacted.

25 But he did something strange. He told you

1 the truth. He told you something more complicated
2 than that.

3 He couldn't say that he saw a gun in
4 Sharone's hand, but he saw a gun in another man's
5 hand. And the guy was startled when he was
6 there.

7 Imagine the scenario, ladies and gentlemen.
8 You've got this gang of guys who has decided to
9 rob somebody, and they're kind of in control of
10 somebody. And they're robbing this guy and
11 they've got their pistols.

12 But you know what? You do have to worry
13 about one thing in that scenario. And that is
14 that someone else, who's a friend of the guy
15 getting ganged, could come up with his own heat.

16 You suppose that's why that guy, when he spun
17 around and saw Byron standing there with a gun
18 reacts? And then they both start reacting?

19 Is that plausible? Is that possible? Is
20 that believable? I submit that it's completely
21 believable and completely consistent with
22 everything that you've heard.

23 Is it the easiest story to tell? No. Could
24 he have lied to you? Yes. He chose not to.

25 I have broken my promise is being short so

1 I'm going to sit down. I'm only going to say one
2 last thing, and that is this: Your commitment is
3 that you are going to, as a group, deliberate on
4 these elements and then decided as individuals to
5 see if you can reach that unanimous verdict.

6 But the proof has to remove every other
7 reasonable explanation other than manslaughter. I
8 mean other than malice.

9 In other words, trying to put this as clearly
10 as I can, the State has got to show you that
11 depraved, fatally bent on mischief, violent,
12 deliberate intention to unlawfully take away the
13 life of another.

14 It doesn't fit. It doesn't fit. What you
15 have instead is this chaotic episode involving
16 people that are never even going to spend a day in
17 jail, and my client, being swept up in that
18 moment.

19 Is that a crime? I submit to you that it is
20 a crime. That's why the Judge has given you an
21 alternative.

22 He described manslaughter as the kind of
23 thing that someone would do. It need not dethrone
24 or eliminate reason entirely. It would be such as
25 would naturally disturb or sway the reason of an

CLOSING ARGUMENT BY MR. DUTREMBLE

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1 ordinary person and render his mind incapable of
2 cool reflection; like a sudden scare, and produce,
3 what according to human experience, may be called
4 an uncontrolled impulse to do violence.

5 He's not looking to not take responsibility
6 in this case, ladies and gentlemen. He only wants
7 you to know that there is no malice toward Sharone
8 Middleton. Thank you.

9 MR. DUTREMBLE: May it please the Court, Your
10 Honor?

11 Mr. Bailiff, would you pull that screen down
12 for me, please, sir? Thank you.

13 Madam Forelady and ladies and gentlemen of
14 the jury, it now becomes my opportunity to tell
15 you what I think the evidence in this case shows.

16 And you as jurors will ultimately tell me and
17 everybody else in this courtroom what you think
18 the evidence shows.

19 I think Churchill said it best when he said
20 that jury duty is the greatest service someone can
21 render to their country in peacetime.

22 And y'all have been called upon for that duty
23 and that service. And it's not easy, but it's not
24 supposed to be easy. Because if it was easy,
25 ladies and gentlemen, it would be meaningless.

1 Your service has great meaning here today.
2 You have been chosen as jurors in this case. Not
3 to do what you want to do. Not to do what you
4 would like to do. But to do what is right.

5 You have been very attentive to your service
6 over these last few days. I have no doubt in my
7 mind that you will continue to do your duty and to
8 return a verdict in this courtroom that speaks the
9 truth.

10 Because that's all anybody in this case is
11 looking for, a verdict that speaks the truth.

12 We're here because Sharone Middleton was
13 murdered on February 3rd of this year. The Judge
14 has outlined for you the elements of murder.

15 The charge is quick. So I'm going to put
16 something on the board that may help you. Murder
17 may be defined as the willful, felonious killing
18 of a human being by a human being with malice
19 aforethought, either expressed or implied.

20 Mr. Pennington wants you to believe that
21 there is no malice in this case. Well, what is
22 malice? The Judge has defined malice for you.

23 It indicates a formed purpose and design to
24 do a wrongful act. And murder is a wrongful act.
25 Under circumstances that exclude any right to do

1 it.

2 The defendant had no right to do it.

3 It's a term of art that imparts wickedness
4 that excludes just cause or excuse.

5 He had no just cause. He had no excuse.

6 It's something that springs from wickedness.
7 From depravity. From a depraved spirit. From a
8 spirit bent on mischief at the time. And for not
9 then having a regard for the social obligation or
10 the obligation which rests upon mankind.

11 And when you take a loaded gun to a high
12 school dance, you have a spirit bent on mischief.

13 When you load a nine millimeter with all the
14 rounds that it will carry, and when you cock it
15 and you put a round in a chamber, and you take it
16 to a high school dance, you are fatally bent on
17 mischief.

18 He had a heart fatally bent on mischief. It
19 was a wrongful act. Done intentionally without
20 just cause or excuse.

21 It can be expressed, such as when I walk up
22 and stick this in your face and say, I'm going to
23 kill you. Or it can be implied, from the use of
24 this very weapon. And the Judge has charged you
25 that.

1 Express malice. Word of mouth, I'm going to
2 kill you. We don't have that in this case. It's
3 not express.

4 But we do have implied malice. And implied
5 malice may be implied or inferred if it's proved
6 beyond a reasonable doubt that there was a
7 willful, deliberate and intentional doing of an
8 unlawful act without just cause or excuse or from
9 the use of a deadly weapon.

10 This man had no just cause or excuse for what
11 he did. This man had no reason to have this in
12 his possession. It is illegal for him to have
13 this in his possession.

14 He is underage. He admitted from the stand
15 he could not buy this gun legally, he had to buy
16 it on the street. He had to buy the ammunition on
17 the street.

18 And he admitted that he took this gun to a
19 high school dance, loaded for bear, ready for
20 action, ready for use. That is malice.

21 What are the facts of this case? The facts
22 of the case: He used a deadly weapon. Any
23 article or instrument or substance likely to
24 produce death or great bodily harm.

25 The greatest bodily harm in this world was

1 committed in this case. This death of a
2 completely innocent young man who did nothing to
3 deserve the fate he suffered on that night.
4 Nothing.

5 Everybody said he was innocent, including
6 that man right there. He did nothing. This man
7 came in the darkness. In the darkness of the
8 night with this gun, fatally bent on mischief.
9 Loaded. Cocked and loaded.

10 He counted on darkness to cover his deeds.
11 He counted on secrecy to cover his deeds. He
12 counted on lies to cover his deeds.

13 But Shakespear said it best, ladies and
14 gentlemen. Truth will come to light. Murder will
15 be found out.

16 Murder was found out. Truth did come to
17 light, and it only took one day. Because the
18 North Charleston Police Department did an
19 excellent job in bringing the murderer of Sharone
20 Middleton to you to face justice.

21 What's this case all about? What are the
22 facts? It's clear that this took place after a
23 high school dance in a dirt parking lot of a
24 church. A church. You can see the steeple.

25 What did Sharone Middleton do to deserve

1 this? He was in the parking lot of a church
2 minding his own business.

3 If you look at the other photograph of the
4 church, you'll see it's a dirt parking lot. And
5 what do we know? We know, unfortunately, he died
6 somewhere in this area. (Indicating.)

7 We know that there were two projectiles, two
8 spent shell casings found in that area. And one
9 fired bullet. Five more fired bullets found back
10 here. Two more fired shell casings down here near
11 Crawford Street. (Indicating.)

12 Nine shots from this gun. Nine shots. And
13 Mr. Pennington urges you that there is no malice.

14 Folks, if you fire nine times with this gun,
15 you're doing it for a reason. It doesn't go off
16 by itself. Your finger's got to be on that
17 trigger, and you've got to be pulling it.

18 It's not an accident. And if you do it
19 intentionally, without just cause or excuse, it's
20 malice.

21 We know that the school is right there.

22 (Demonstrating.) And we know that the defendant
23 is at the school. His business is at the school.

24 Whatever is going on in the church parking
25 lot is not his business. But he made it his

1 business.

2 But he didn't just go over there to see what
3 was going on. And he didn't go over there to help
4 the person being stomped and robbed.

5 He went over there with a heart fatally bent
6 on mischief, because he armed himself. And you
7 only arm yourself if you're going to a gunfight.
8 And he was well armed.

9 And what happened? There is his car. There
10 are his clothes. That's where he died. And there
11 are the cones set up. Two expended shell
12 casings. Shot twice in the chest.

13 We found a bullet, fired bullet. Number five
14 on the screen. And we found his glasses. That's
15 his car. There are his glasses. Dragged from his
16 car. He's sitting there listening to music and
17 talking to his cousin.

18 He's dragged from his car and stomped by an
19 unknown group of people. And then brutally
20 murdered in cold-blood as he was on his back, on
21 the ground, defenseless, unable to protect
22 himself.

23 And what happened? Not only was he shot, but
24 nine shots being fired. We've already talked
25 about where these are. (Demonstrating.) The car

1 is then struck. One, two, three times by bullets.

2 And who's standing around this car? Mark
3 Nelson is still there. His brother, Demetrius, is
4 still there.

5 And all the other dudes who are out there
6 stomping Sharone Middleton is still there. And
7 this guy is firing into the crowd. Caring not a
8 thing for where those rounds went.

9 And we know he doesn't care where the rounds
10 go, because all young men fire rounds into the air
11 without worrying where those bullets are going to
12 land.

13 But we know where they landed in this case.
14 They landed in Sharone Middleton. They landed in
15 his car. And we found them and brought them to
16 you.

17 There is the bullet we found at the scene of
18 the crime. Near where his body lay. This one we
19 found in his clothing at the hospital. Look at
20 this. Look at the mushroom effect of this bullet
21 on the next slide.

22 Look what that bullet does. A hollow point.
23 A Winchester Silver Tip Hollow Point. Look what
24 that bullet does when it hits you. It
25 mushrooms. That bullet is in Sharone Middleton's

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1 body.

2 As was the next one. That one was taken from
3 his body. Look at that. Look at what this bullet
4 did when it mushroomed.

5 Give me the next one, Mike.

6 Look at that bullet. He went looking for
7 bear, and he brought the most powerful ammunition
8 he could bring with him. Look what that did to
9 that innocent 19-year-old boy.

10 And he says there is no malice.

11 We went to his house and we got this. What
12 did he do after he shot him? He knew the cops
13 would be looking for him. He wasn't concerned
14 with whether or not the boy was dying in the dirt.

15 He had to get home and hide this. So he puts
16 it up in a box thinking nobody was ever going to
17 find out what he's done.

18 Well, we found out. We got a search
19 warrant. We went and got it and we brought it
20 here to you today.

21 We brought you this. (Indicating.) We
22 brought you the ammunition. We brought you the
23 holster, the magazines. We brought you everything
24 that has to do with this case.

25 And what did he do? He went home and

1 reloaded. He shot every bullet out of this gun
2 that he could shoot and went home and reloaded it
3 so he could use it again when the time came.

4 Malice was definitely in this fellow's
5 heart.

6 We also brought you the teacher who had her
7 car parked out there in the same parking lot where
8 Sharone died. A bullet hole in her door.

9 And we brought you the fragment that we dug
10 out of the car.

11 And what did Ken Whitler from SLED tell you?
12 All the ammunition is hollow point. Winchester
13 Silver Tip Hollow Point.

14 And this fragment has characteristics of a
15 Winchester Silver Tip Hollow Point. Dug out of
16 the car that was parked there that same night.

17 This defendant has exhibited a total lack of
18 the most basic right that any human being has.
19 The right to life. He's gone. Sharone Middleton
20 is gone. His life has been stolen away from him.

21 Mr. Pennington wanted to know, what did this
22 defendant want from Sharone? He wanted his life.
23 And he took his life.

24 What more could Sharone have given him? Why?
25 Simple. Mr. Pennington told you, a young guy

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1 doing stupid thing with a gun. Big man on
2 campus. The thrill of the kill.

3 He shot nine times, hit a person twice, and
4 killed him. Why did he only hit him twice? Why
5 was only one person struck? Because he shot what
6 he aimed at. And he aimed at Sharone Middleton
7 and he hit him.

8 I think dog got hit. I think I hit him.
9 Witnesses from the stand told you exactly what was
10 said after the shooting. Deshawn Brown told you,
11 I think dog got hit.

12 THE COURT: Mr. DuTremble, I apologize for
13 interrupting you. But I've been advised that we
14 probably need to leave the building for a few
15 moments and we'll be right back.

16 But I apologize for this, but it is
17 necessary.

18 MR. DUTREMBLE: I understand.

19 THE COURT: Now, ladies and gentlemen, let's
20 escort the building at this time and we'll bring
21 you right back.

22 Remember now, don't discuss this case. Don't
23 discuss any issue of it. We'll be right back.

24 THE COURT: Dale, come here.

25 MR. DUTREMBLE: I know, Judge. I know.

1 (The following was reported on November 15,
2 2001.)

3 THE COURT: Good morning, ladies and
4 gentlemen. Please be seated.

5 Is the State now ready to proceed?

6 MR. DUTREMBLE: We are, Your Honor.

7 THE COURT: Is the defense ready?

8 MR. PENNINGTON: Yes, sir. Is the Court
9 going to put anything on the record about what
10 transpired about the interruption or--

11 THE COURT: Yes. Let the record reflect that
12 at approximately 5:45 yesterday afternoon while
13 the Solicitor was engaged in his final closing
14 argument, an unfortunate bomb threat was made,
15 requiring everybody to leave the courthouse.

16 It apparently developed readily, having
17 occurred at 5:45. The bomb squad was not
18 available and the courthouse would not have been
19 cleaned until probably after seven o'clock.

20 Therefore, upon agreement of counsel, the
21 jury was released under appropriate instructions
22 of the Court to return at 9:30 this morning.

23 And by agreement of counsel for the State and
24 of the defendant, it was agreed that the State
25 would be permitted to finish its closing arguments

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1 with a time limitation of ten minutes.

2 Does that express your understanding now,
3 sir?

4 MR. DUTREMBLE: Yes, sir, it does.

5 THE COURT: How about it?

6 MR. PENNINGTON: Yes, sir.

7 THE COURT: All right, sir.

8 MR. PENNINGTON: Your Honor, I would also, I
9 guess, add that the Court was concerned that the
10 bomb threat itself could be somehow viewed by the
11 jury as related to this case; and the Court let
12 the jury know that there had been a number of bomb
13 threats against this courthouse over the last
14 several weeks. That was communicated to the jury
15 with the agreement of counsel, myself and the
16 Solicitor.

17 I don't know if the Court wishes to add
18 anything to that in terms of saying that there's
19 no reason to think that that is in any way
20 connected with this case.

21 THE COURT: Oh, I have no reason to think
22 that. The jury fully understood that. And I told
23 them in my view I thought it was a hoax and I was
24 coming back in the courthouse, as I did.

25 But in the absolute abundance of precaution,

1 and in accordance with the procedures of the
2 appropriate authorities here, we had to vacate;
3 and I hope they understood. And they smiled and
4 said that they did.

5 MR. PENNINGTON: Thank you, Your Honor.

6 THE COURT: All right. Bring the jury in.

7 (The following was reported in the presence
8 of the jury.)

9 THE COURT: Good morning, ladies and
10 gentlemen. I apologize for the break last night
11 necessitating us to have to stop the courthouse.
12 But we recognized then and still do that it was a
13 hoax. It was a serious hoax, but in the abundance
14 of precaution, we had to vacate the building and I
15 hop that you understand the reasons therefore.

16 I have one observation to make about that
17 incident. And it is my sincere hope that whoever
18 did that comes before me prior to Christmas this
19 year. I can assure you that he won't be seeing
20 Santa Claus.

21 But I appreciate your services and I
22 appreciate your good attitude last evening and I
23 thank you for being back with me this morning.

24 At the unfortunate break of last evening, the
25 Solicitor was making his final remarks and was

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1 nearing conclusion at that time. He will now
2 continue his remarks with a court-imposed ten
3 minute limitation. Thank you.

4 MR. DUTREMBLE: Thank you, Your Honor. May
5 it please the Court.

6 Ladies and gentlemen, it occurred to me last
7 night when I was at home thinking about this case
8 that one of the things that I had not addressed
9 with you at the time of our break was Mr.
10 Pennington's contention that his client had no
11 plan. No plan to come to the school to rob. No
12 plan to come to the school to kill.

13 But folks, what the Judge charged you was
14 that there is no plan required. What was required
15 is malice.

16 And as the Judge charged you, malice does not
17 have to be in anyone's mind for any particular
18 length of time.

19 There doesn't need to be a plan. He doesn't
20 have to conspire with his buddies to go there.

21 What the law requires, what the law says is
22 that if malice is in your mind for any length of
23 time, it is sufficient for the crime of murder.

24 And since this is isn't going work, I only
25 have ten minutes, I'm going to keep going.

1 It's clear, folks, that this young man wanted
2 to shoot his gun. He told you he wanted to fire
3 his gun into the air. He went over to the Ford
4 Explorer that had been stopped by the other young
5 men, wanting to shoot the gun. But for some
6 reason it didn't suit him to shoot it.

7 He went to the parking lot with that same
8 intention, wanting to shoot his gun, where he
9 finally found somebody that suited his purpose.
10 And he did shoot his gun.

11 What did he tell you? What was the
12 testimony? Dog got hit. Those are his words.
13 Dog got hit.

14 He shot Sharone Middleton like a dog and left
15 him to die in that dirt parking lot.

16 He wants you to believe, ladies and
17 gentlemen, that all he did was panic when he saw a
18 gun, he turned around, he started running, and
19 just started firing blindly.

20 But the evidence doesn't support that. If
21 you look at the photographs of the scene of the
22 crime, which I'm sure we don't have either, you
23 will see -- technology is a wonderful thing when
24 it works.

25 But you're going to have those photographs in

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1 the back. You'll see we have nice neat groupings
2 of evidence.

3 If you look at the first photograph you'll
4 see the cones. And you see the little placards,
5 one through five right there in one little boxed
6 area where somebody was clearly shooting.

7 You look at the same photograph, you have
8 three more shoots that struck the car door. One,
9 two, three. Nice neat little grouping.

10 If you go to the second photograph you'll see
11 the little yellow placards, and it's six, seven,
12 eight, nine and 10, I believe. Right there in a
13 neat little grouping where somebody's firing a
14 gun.

15 And the last two that testified are right
16 there coming out of the driveway, two more shell
17 casings, 11 and 12, with the little yellow
18 placards. Neat little groupings of someone who's
19 aiming a gun and firing.

20 If he's just running blindly and firing
21 behind him, we're going to spray it everywhere;
22 and that's not what happened. The evidence
23 doesn't support his story.

24 The victim, Sharone Middleton, was completely
25 innocent, ladies and gentlemen. Ellis Judon told

1 you that. And this defendant himself admitted
2 from the stand that the man on the ground, who
3 didn't have a gun, was completely innocent.

4 But Byron Slater shot him anyway. And he
5 never even gave Sharone Middleton the opportunity
6 to say good-bye to his parents.

7 After he was through killing their son, he
8 went to Sonic's; and Sharone went to the morgue.

9 Nice neat grouping of shell casings and
10 projectiles. Nice neat grouping of shots striking
11 a car.

12 Can you go to the next photograph?

13 Nice neat grouping of shell casings.
14 Somebody firing their weapon. And down here, two
15 more picked up by Cathy Stanley.

16 He wants you to believe that Sharone, this
17 victim, had a gun. Sharone's dead. He can't
18 refute that terrible allegation.

19 But the evidence speaks for him. And the
20 evidence tells you Sharone didn't have a gun.
21 Mark Nelson told you that. He was there. His
22 cousin didn't have a gun. Demetrius Nelson was
23 there. He told you the same thing; his cousin
24 didn't have a gun.

25 Mrs. Middleton took the stand and told you

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1 her son didn't even own a gun.

2 And their expert from SLED, Joe Powell, told
3 you that in his expert opinion, it's highly
4 unlikely that that fellow had a gun.

5 And lastly and most importantly, that man
6 right there told you from the stand that the man
7 on the ground being ganged did not have a gun.

8 All of the evidence in this case points to
9 the only man with a gun, Byron Slater.

10 If you look at the evidence, ladies and
11 gentlemen, you're going to see that all the
12 evidence springs from this box of ammunition,
13 which you have to take back with you.

14 The fired bullet out of Sharone's body, nine
15 millimeter Luger Silver Tip Hollow Point.

16 Fired bullet out of Sharone's body, nine
17 millimeter Luger Hollow Point Silver Tip. Fired
18 bullet from the church parking lot, same thing.
19 13 un-fired bullets from his bedroom, same box.

20 Nine un-fired bullets from the box in his
21 bedroom, same box. Shell casings from the church
22 parking lot, same box. Shell fragments from the
23 teachers car, might not have been from this box,
24 but it was from a Silver Tip Hollow Point.

25 Shell casings in his yard from where he's

1 firing up in the air, same box. All the evidence
2 conclusively points to this man as the murderer of
3 the Middleton's son. And he even admitted it on
4 the stand.

5 If you will recall, the last three questions
6 I asked him on cross-examination, one, you shot
7 Sharone Middleton; didn't you?

8 And he didn't want to answer, but he did.
9 And he said, yes, sir.

10 Second question, you killed Sharone
11 Middleton; didn't you?

12 And, again, he hesitated, but he answered,
13 yes, sir.

14 Last question. You murdered Sharone
15 Middleton; didn't you?

16 And he hesitated even longer. But, again,
17 his answer was, yes, sir.

18 The hard question has been answered in this
19 case, ladies and gentlemen, out of his mouth.
20 It's easy to walk away from the hard decisions in
21 this case.

22 But that's not what your duty calls for.
23 It's not what your responsibility is in this
24 case. You are the conscience of the community.
25 You speak for the community. And you have the

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1 opportunity today to make right the terrible wrong
2 that's been done.

3 It's your duty to find a verdict that speaks
4 the truth. And I submit to you, there is only one
5 such verdict in this case.

6 Thomas Jefferson said, no man is above the
7 law and no man is below it. And we do not require
8 any man's -- I'm sorry -- permission when we
9 require him to obey it.

10 That goes for him. That goes for everyone.

11 The law of man requires everyone to obey the
12 most fundamental law of all, and that law is
13 simple; Thou shall not kill. And it applies to
14 that man right there. Everyone is under that
15 prohibition.

16 His name is Lord Byron Slater. Well, he is
17 not the Lord. He is not God. He does not have
18 the authority to grant life. He does not have the
19 authority to take life away.

20 Mr. Pennington comes to you based on
21 sympathy. He wants you to find him guilty of only
22 manslaughter.

23 Well, you know what manslaughter is, ladies
24 and gentlemen? It's when you come at night after
25 work and you find your spouse in bed with somebody

1 else. And in an uncontrollable rage, you go and
2 get your gun and you shoot them both.

3 And what the law says is you've acted in an
4 uncontrollable rage. A sudden heat of passion
5 with sufficient legal provocation.

6 And the law doesn't excuse that. You've
7 killed somebody. But the law reduces that from
8 murder to manslaughter, because we realize that
9 you simply don't have enough time to cool off and
10 think about what you're doing.

11 We don't have that in this case. There's no
12 sudden heat of passion. There is no sufficient
13 legal provocation.

14 It is a plea from Mr. Pennington for your
15 sympathy in this case, because he is only 19 years
16 old.

17 Well, ladies and gentlemen, there is a
18 quotation from the bible that I have been using
19 for years that brings this home.

20 When I was a child, I spoke as a child. I
21 thought as a child, I understood as a child. But
22 when I became a man, I put away those childish
23 things.

24 When he put his toys away, he picked up
25 deadly weapons. He replaced toys with weapons,

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1 which he loaded, which he cocked, and which he
2 used.

3 And he is man. He is not a child. And as a
4 man, he has to take responsibility for his
5 actions. He has to be punished for his wrongs.

6 And, yes, Mr. Pennington is right, this is
7 the most severe crime that we have on the books,
8 murder.

9 But the State, even though it is severe, does
10 not seek the death penalty in this case. It
11 merely seeks a verdict which speaks the truth. A
12 verdict of guilty of murder. We are not seeking
13 death.

14 Return a verdict that speaks the truth,
15 ladies and gentlemen. Do justice. Tell this
16 young man that he is guilty of the murder of
17 Sharone Middleton, an innocent and defenseless
18 young man, who deserved better than what he got.

19 Thank you for your time.

20 THE COURT: Thank you, Solicitor.

21 And thank you, Mr. Pennington, for your
22 closing statements concerning the issues in this
23 case.

24 Ladies and gentlemen, you will recall that on
25 last evening I instructed you fully with regards

1 to the various issues that have been presented in
2 the Court for your consideration.

3 I'm going to recapitulate these instructions
4 for you without, again, instructing in full. I'm
5 asking that you remember specifically these
6 instructions that I gave you, with this caveat.

7 Madam foreman, recognizing that these
8 instructions in the law were given last night, and
9 though I'm going to recapitulate them in a moment,
10 I want it clearly understood that if anybody has
11 any question about what the law is, please write
12 that question down with a pencil and paper, I'll
13 be delighted to instruct you fully in that regard
14 and fully to any other instructions that the jury
15 feel that they need.

16 You will understand, of course, that whatever
17 your verdict is in this case, as to either
18 indictment, it must be unanimous. It must be the
19 verdict of all 12 of you.

20 With regards to these indictments, which you
21 will have in the jury room, consider first the
22 charge of murder.

23 Once you have reached an unanimous verdict,
24 please turn that indictment over on the section
25 that's written verdict.

1 As to this indictment, and there's no
2 suggestion by me as to what the verdict is, it's
3 simply I've got to list them in one way or the
4 other.

5 As to murder he is either guilty of murder or
6 guilty of manslaughter or not guilty.

7 You would then proceed to the next indictment
8 wherein the State charges of the possession of a
9 firearm during the commission of a violent crime.

10 In that case, a verdict is either one or two
11 things. Either guilty or not guilty. And you
12 would write that down and sign your name, knock on
13 the door, and we will accept your verdict in the
14 courtroom.

15 Now, I ask that you specifically remember
16 that this defendant comes into Court under the
17 presumption of innocence. He doesn't have to
18 prove a thing.

19 The State of South Carolina must prove each
20 issue to your satisfaction beyond a reasonable
21 doubt. I have defined for you the term reasonable
22 doubt.

23 I have instructed you and emphasize again
24 that only you 12 are the sole and only finders of
25 the facts.

1 I am not entitled to a factual opinion and I
2 have none.

3 You also would understand that you and you
4 alone are the sole and only judges of the
5 credibility, meaning the believability, of all of
6 the witnesses who testified.

7 I have enumerated for you some tools that we
8 all use in everyday lives, be it at our work or
9 raising our family, when folks tell us things and
10 we size up whether we want to believe them or
11 not.

12 You may use these tools that I have suggested
13 or perhaps you have some other tools that are
14 beneficial to you.

15 In determining whether or not you wish to
16 believe all of a witness or none, some or all,
17 that's exclusively within your jurisdiction as you
18 judge the credibility and the believability of all
19 of the witnesses who testified.

20 I told you yesterday, and I tell you again,
21 you may believe one witness against that of many
22 or the other way around.

23 You do not determine the truth or falsity of
24 a matter by counting up the number of witnesses
25 who may have testified on one side or the other.

1 You will understand that the constitution
2 that makes unto you the finders of the facts,
3 makes unto me the instructor in the law.

4 And under your oath now, you are required to
5 accept the law as I have given it to you in my
6 instructions, remembering that you take the facts
7 as you find them to be.

8 Upon one indictment this defendant is charged
9 with murder. I have defined murder for you and I
10 have defined for you the lesser-included upon that
11 indictment, which is manslaughter.

12 You would understand that murder is the
13 killing of a -- a felonious, willful killing of a
14 human being without malice -- with malice. Excuse
15 me. With malice aforethought. I have defined for
16 you the term of malice.

17 Upon the other indictment, I have told you
18 that there is a separate statute in our court
19 system which makes it illegal to possess a firearm
20 during the commission of a violent crime.

21 In that case the State must prove that there
22 was a firearm present, that there was a violent
23 crime, and that the defendant possessed it.

24 And with all other issues, they must prove
25 these issues to your satisfaction beyond a

1 reasonable doubt.

2 I have charged you that in our system of
3 jurisprudence there is direct evidence and there
4 is circumstantial evidence.

5 And to the extent that the State relies on
6 circumstantial evidence, I have defined that for
7 you.

8 In this case there is an alleged statement
9 said to have been made by the defendant. With
10 regards to that issue, I have charged you that you
11 must find beyond a reasonable doubt that that
12 statement was freely and voluntarily made without
13 duress, hope, promise or reward.

14 You must additionally find that he was given
15 his various rights, including the Miranda rights,
16 which I have emphasized to you.

17 And above all, you must determine that he
18 freely waived his constitutional rights and that
19 he knowingly did that, and that any statement made
20 was of his own volition.

21 In this case I qualified several folks as
22 expert witnesses, and I have defined that for
23 you. And at that time I told you that you may
24 accept or reject any or all parts of an expert's
25 witness, depending on your experiences and your

1 view.

2 Now, remembering all of these instructions
3 with this caveat, if there is any question about
4 it, please let me know.

5 Now, I'm going to ask that you retire. Do
6 not begin your deliberations until I send the
7 indictment in, which will come in just a moment.

8 In addition to that, I will be sending in
9 these matters that have been introduced into the
10 trial of this case for your consideration.

11 There was a 911 tape. If for some reason any
12 of you desire to hear that again, I would suggest
13 that we bring them out and play it in the open
14 courtroom, if you desire to hear it again.

15 So at this time, please retire to your jury
16 room, and I'll be sending the indictment and the
17 evidence in in just a moment. Thank you.

18 (The following was reported out of the
19 presence of the jury.)

20 THE COURT: Who's got the indictment, please?

21 MR. DUTREMBLE: I believe the clerk has it.

22 THE COURT: All right. First, on behalf of
23 the State, are there any exceptions or additions
24 to the charge?

25 MR. DUTREMBLE: No, sir.

1 THE COURT: On behalf of the defense?

2 MR. PENNINGTON: Only with regard to renewing
3 our request for self-defense, Your Honor.

4 THE COURT: Yes, sir. And the record will
5 reflect that I have respectfully denied that upon
6 the basis, as the record will reflect. Other than
7 that we're all right?

8 MR. PENNINGTON: Yes, sir.

9 THE COURT: All right. Come forward, now,
10 and let's agree, gentlemen, as to what goes in to
11 this jury room.

12 MR. DUTREMBLE: Yes, sir.

13 THE COURT: Gentlemen, y'all look at the
14 indictments here. They appear to be clean in
15 every respect, there's nothing attached to them.

16 Mr. Bailiff, when you take these evidence
17 matters in and the indictments, tell them to begin
18 their deliberations, please.

19 And I want the alternates to come out at this
20 time.

21 Let the record reflect that at this time the
22 alternates are being removed from the jury prior
23 to deliberation.

24 Do you agree with that, Mr. Pennington?

25 MR. PENNINGTON: Yes, sir.

1 THE COURT: All right, sir.

2 (Defendant's Exhibit Number 1, stipulation
3 regarding Sharone Middleton, marked for
4 identification.)

5 THE COURT: All right, sir. Gentlemen, I
6 want on the record now that the State and the
7 defense have examined the matters in evidence and
8 have agreed that those that are going back there
9 are properly before the jury.

10 MR. YOUNG: We have, Your Honor.

11 MR. DUTREMBLE: We have agreed, Your Honor.

12 THE COURT: Let the record then reflect.

13 And tell the jury to begin their
14 deliberations.

15 (WHEREUPON, the jury began deliberations at
16 10:07 a.m.)

17 MR. DUTREMBLE: If Your Honor, please. Did
18 you dismiss the alternates already?

19 THE COURT: The record will reflect that the
20 alternates were removed prior to deliberation and
21 are now separate from the jury.

22 MR. DUTREMBLE: Thank you, Judge.

23 THE COURT: I'm sorry I didn't call that to
24 your attention. Mr. Ashley was there and he'll
25 agree.

1 MR. PENNINGTON: Yes, sir.

2 (Recess.)

3 THE COURT: Thank you. Be seated. I
4 understand we have a verdict.

5 Bring the jury out.

6 MR. PENNINGTON: I need my client, Your
7 Honor.

8 THE COURT: Sir?

9 MR. PENNINGTON: I need my client.

10 THE COURT: Wait a minute.

11 I'm sorry.

12 MR. PENNINGTON: I think he may be here, but
13 I'm not sure. He's on his way.

14 THE COURT: Have the alternates come out and
15 join us in the courtroom, please.

16 Any objection to the alternates taking the
17 alternate's chair?

18 MR. PENNINGTON: No objection.

19 THE COURT: Have them take the alternate's
20 chair.

21 Let the record specifically reflect that the
22 alternates were not in the jury room during any
23 portion of the deliberations.

24 Since they sat through the trial, though,
25 it's my policy to let them sit in the jury box and

1 accept the--

2 Any objection--

3 MR. PENNINGTON: I have no objection to
4 that, Your Honor.

5 THE COURT: All right, sir.

6 Let the record reflect that the defendant,
7 accompanied by his attorneys, is in the
8 courtroom. As is the Solicitor.

9 (WHEREUPON, the jury entered the open
10 courtroom at 11:30 a.m. to report their verdict.)

11 THE COURT: Madam foreman, I understand that
12 you and the jury have reached a unanimous verdict
13 as to both indictments. Is that correct?

14 THE FORELADY: Yes, sir.

15 THE COURT: If this be the unanimous verdicts
16 of all the jury, so signify by raising your right
17 hand, please.

18 Let the record reflect that the jury has so
19 satisfied that this is a unanimous verdict as to
20 both indictments.

21 Madam clerk, please accept the verdict and
22 hand it to me.

23 Publish the verdict.

24 THE CLERK: Case number 2001-GS-10-3221,
25 State of South Carolina versus Lord Byron Slater,

1 indictment for murder, verdict of the jury:
2 Guilty. Signed foreperson, Jody Morgan. November
3 15, 2001.

4 As to 2001-GS-10-3226, The State of South
5 Carolina versus Lord Byron Slater, indictment for
6 possession of a firearm during the commission of a
7 violent crime, verdict of the jury: Guilty of
8 possession of a firearm during the commission of a
9 violent crime. Signed foreperson, Jody Morgan
10 dated November 15th, 2001.

11 THE COURT: Madam clerk, read the specific --
12 the specific plea on the indictment of murder.

13 THE CLERK: Guilty of murder.

14 THE COURT: Guilty of murder. Thank you.

15 Would you care to check the jury or are you
16 satisfied?

17 MR. PENNINGTON: No, sir.

18 THE COURT: You're satisfied. All right,
19 sir.

20 Ladies and gentlemen of the jury, of course
21 during the trial of the case, I was not entitled
22 to a factual opinion, I had none and certainly
23 expressed none.

24 But under the law and the evidence as I have
25 heard, I can now say to you that the law and the

1 evidence in this case certainly justifies your
2 verdict of murder in this case.

3 None of you asked to come to Court this
4 week. And certainly none of you asked to sit on
5 this particular trial.

6 But having done so, in accordance with your
7 oath, you have rendered this defendant and our
8 system of justice a great service.

9 For under our system of jurisprudence, we say
10 that even in the heinous crime of murder where a
11 young individual, without any fault at all, was
12 shot down in cold blood; we still give that
13 defendant his presumption of innocence and require
14 the State of South Carolina to proof him guilty
15 beyond a reasonable doubt.

16 And that is the basis of our democracy in
17 this magnificent country. So I deeply appreciate
18 your services.

19 Have the defendant come forward.

20 MR. PENNINGTON: If Your Honor please, we
21 also have some matters of law to take up with the
22 Court.

23 THE COURT: Yes, sir, I will do that after
24 sentencing, if that's appropriate.

25 Is there anything further from the State at

1 this time?

2 MR. DUTREMBLE: Yes, sir, Your Honor, if I
3 may. I would have the family come forward as
4 well, Your Honor?

5 THE COURT: Yes, sir, they may.

6 MR. DUTREMBLE: May it please the Court?

7 THE COURT: Yes, sir.

8 MR. DUTREMBLE: Your Honor has heard the
9 facts, as has the jury, but, of course, under our
10 rules, there are some things that we just can't
11 bring out.

12 And what I want the Court to know is that
13 Sharone Middleton was probably the finest young
14 man that anybody would ever come into contact
15 with.

16 He was 19 years old. He was a student at
17 Trident Tech. He had been accepted into Clemson
18 University and would have been attending in
19 September, but for his untimely death.

20 He was a gifted artist. A scholarship has
21 been established by the school in his name.

22 Mrs. Middleton suffered the loss of her son,
23 as did her husband. Five months later she lost
24 her daughter to lupus. This has been a horrific
25 experience for this family.

1 There was no call for this murder. Sharone
2 did nothing. He lived at home. And it was his
3 practice not to go out at night, because he knew
4 what was out on the streets.

5 The only reason he was out that night was to
6 give a ride to his cousins to a school function
7 that he did not even attend, and that he came back
8 to pick them up.

9 He was not looking for trouble. He had a
10 spotless record. Never been in any trouble at all
11 in his life. Just the finest young man. His life
12 was stolen from him for no good reason.

13 I know Mrs. Middleton would like to address
14 the Court. I'm not sure that she can, but I would
15 like to give her that opportunity, because nobody
16 knows her son better than herself.

17 THE COURT: She certainly may. I would
18 understand if she feels she's uncomfortable doing
19 that. But she's certainly welcome to do it.

20 And Mrs. Middleton, you have my deepest
21 sympathy and my deepest sorrow.

22 MRS. MIDDLETON: I would like to address the
23 Court. I'm not sure how much I can do of this,
24 but in memory of my son, I have to do this for
25 him.

1 On February the third, my life took a course
2 that I never could imagine would happen to me.
3 When my daughter got a call, and she was on the
4 phone, and I heard her screaming, and she -- I was
5 in the bedroom watching a program, and she
6 screamed and says, mommy, mommy, something
7 happened to Sharone.

8 And I didn't believe her. I just didn't even
9 get up off the bed. She said, Sharone got shot.
10 And I said, what are you talking about? This
11 would never happen to Sharone.

12 And she dropped the phone. So we didn't
13 realize -- we just thought something was -- this
14 was a prank or something, because this couldn't
15 have happened to this child.

16 And then all of a sudden it hit me, you'd
17 better take this serious. So I got up -- I asked
18 -- she had the phone and the phone was -- she
19 dropped it in her dismay at trying to figure out
20 what was happening here.

21 And I went down in the den and I talked to my
22 husband and I said, You better get up, I think
23 something has happened. We need to figure out
24 what's happening here. We just got a call.

25 Anyhow, a short while later we got a call

1 back confirming us that it had happened, that he
2 was indeed shot.

3 I still did not imagine it was as serious as
4 it was. When we got to the MUSC Hospital, the
5 medical people had to make me realize how serious
6 this was.

7 I couldn't imagine -- I still did not believe
8 this had happened to my son. I think I was in
9 shock. I didn't know what to do.

10 But the second hardest thing that I had to do
11 that night, when I was told by the doctors that my
12 son had died, was how can I tell his sister, who
13 was suffering from lupus, who was chronically ill,
14 that her brother had died and how he had died?

15 We could have never imagined this happening
16 to this child, because he -- Sharone afforded all
17 -- anything that was not good. He rarely went
18 out. And if he went out, he went out with the two
19 cousins and one other cousin.

20 And that night they kept asking us, we need a
21 list of friends. We need a list.

22 There aren't any friends. He had high school
23 acquaintances, but he does not go out at night.

24 He didn't go out. If it hadn't been for him
25 going to take his cousin, I don't know what fate

1 -- I just don't understand that God had a plan
2 and he used his plan. I think he used Sharone to
3 speak to many, many people, because this death
4 spoke to many young people.

5 I would like to read one particular card that
6 I got from his art teacher. And I would also like
7 to make reference to an article that was also
8 presented to us.

9 It says: Dear Mr. and Mrs. Middleton, I
10 cannot describe the anger I felt when I woke up
11 and heard about Sharone. He was the bright spot
12 in my life at C.E. Williams. I had no doubt in my
13 mind when I moved on that he would achieve great
14 things.

15 I can only imagine the pain you are feeling
16 right now. I too have a son. If he can only be
17 half as humble and honorable as Sharone, I would
18 have accomplished something terrific.

19 Thank you for bringing him to C.E. Williams
20 Middle School. I know heaven has one more angel
21 artist to brighten up the stars.

22 And it says, love, Mrs. Stephanie Timmons.
23 And she wrote, Stephanie Timmons says Sharone
24 Middleton taught her more than she taught him.
25 She knows more people -- I'm sorry. Now she wants

1 people to know that he was not just a statistic,
2 another young man at the wrong place at the wrong
3 time.

4 He was a special person. He was a promising
5 person. He was an inspiration. And his death
6 leaves all of us the poorer.

7 And that's how I see my son. And I have a
8 picture. Can I present this, sir?

9 THE COURT: Yes, ma'am.

10 MRS. MIDDLETON: I want people -- I want the
11 jurors to see that this is my son. Or was my son.
12 (Demonstrating.) Loving, kind, and compassionate
13 to his family.

14 I know you have a loss also. And from one
15 mother to another, you are also losing a son. My
16 heart grieves with you as well.

17 Our lives have been totally disrupted. And I
18 know that the death of my son impacted the death
19 of my daughter, because she grieved so hard over
20 the death of her brother, that her heart was
21 broken.

22 And because she was -- had a physical
23 condition, the stress of losing her brother just
24 impacted her life as well.

25 She leaves to mourn not only a husband, but

1 two small children.

2 But the decision you made on that night, it
3 impacted so many lives. I will never see the
4 grandchildren from him. I will never see that
5 magnificent house that he wanted to build from
6 becoming an architect.

7 We just had so many things taken away from
8 us. He will never have a family. All I have is
9 to go to two, not one, but to two graves.

10 And I have one child left. And this is
11 impacted her life tremendously. All I have to say
12 is I thank God for faith, family and friends.

13 I thank you, the jury, and I thank this
14 Court.

15 THE COURT: Thank you so much.

16 MR. DUTREMBLE: Thank you.

17 THE COURT: Does that include the
18 statements?

19 MR. DUTREMBLE: Yes, sir. With the one
20 exception, Your Honor.

21 THE COURT: What's that?

22 MR. DUTREMBLE: In light of all the evidence,
23 the testimony, and what we've heard here today,
24 the State is asking the Court to consider imposing
25 the maximum punishment allowed in this case.

1 THE COURT: Mr. Pennington, I'll be glad to
2 hear from you.

3 MR. PENNINGTON: Thank you, Your Honor.

4 THE COURT: I'm sorry.

5 MRS. MIDDLETON: His father wants to say
6 something too.

7 THE COURT: Come forward. That's fine.

8 MR. MIDDLETON: The only thing I have to say
9 is, I'm not angry with you. I'm sorry for you.
10 If I had my way, you could walk out the door.
11 Your parents should go to jail. If they had
12 raised you like I raised my son, none of us would
13 have been here.

14 I look in my boy's bedroom hoping he was
15 laying in the bed. It aint you. It's your
16 parents. They should be arrested. There should
17 be a law when parents let a youngster do like you
18 do, having guns, they should be arrested.

19 That's the way I look at it. I'm sorry for
20 you. It aint you. Look to your left. That's
21 your problem.

22 That's all I have to say.

23 MR. DUTREMBLE: Thank you, Your Honor.

24 THE COURT: Mr. Pennington.

25 MR. PENNINGTON: If Your Honor please. This

1 is a hard, hard case. But I have some information
2 that I think the Court will need to hear in order
3 to be able to make -- which is one of the toughest
4 decisions, I'm sure, this Court ever has to make;
5 for the choices that lie before this Court is a
6 life choice.

7 You know, this Court and the laws of our land
8 represent the respect that we have and the concern
9 that we have about the dignity of life.

10 And so we stand here today, having gone
11 through what was a very difficult trial because of
12 the value of Sharone Middleton's life, as well as
13 the value of my client's life.

14 The jury has spoken. And at least I, for
15 one, can say that I respect the jury's verdict.
16 Under our law I can understand how they reached
17 that verdict.

18 It's not surprising in the fact that in
19 discussing this case with my client, we had
20 tendered or offered a plea to murder in the past.

21 The pain and the suffering of having to re-go
22 through this whole awful scenario is something
23 that we had hoped that we could somehow minimize
24 through that plea process.

25 Your Honor, this is a hard case, because

1 right from the beginning, as I read the obituary
2 on Sharone, and realized that he was a talented
3 artist and totally un-involved, I wanted to try to
4 get to the bottom of why this thing happened.

5 And the initial knee jerk reaction is that
6 there was some sort of simple story of an
7 individual who chose to go rob.

8 And, in fact, I think that's what the police
9 initially thought in this case. There was a
10 charge of robbery, that my client was involved in
11 some sort of attack and robbery on this man.

12 But as the State has discerned, and as we
13 learned from talking with all the witnesses and
14 the evidence, it wasn't quite so clear-cut.

15 In fact, what we have is two crimes by two
16 very different groups. We have the evidence
17 that's uncontested with regard to the attack on
18 Sharone and his cousins, which my client had no
19 part in in terms of planning or assisting.

20 And then we have him coming up and choosing
21 wrongfully to get involved in doing this awful
22 shooting.

23 But the facts simply do remain, there is no
24 question that there were others out there, others
25 who were armed. Others who set these chain of

1 events in motion.

2 So often, Judge, when you're looking at
3 sentencing in a murder case, people have done
4 things that you could very readily foresee were
5 going to bring about some sort of terrible result
6 like this.

7 Whether it's being a part of a robbery.
8 Whether it's being part of a break-in. Whether
9 it's being part of a drug deal or part of a
10 long-term bad relationship, a domestic violence.

11 But here you have a teenager, a 19 year old,
12 who has never been on probation, never been to the
13 Department of Corrections, much like some of these
14 other young men, and that last gentlemen that
15 stood before you this week, never really been
16 involved directly with our justice system, and who
17 stupidly thought it would be a cool thing, a smart
18 thing, to have a gun, to wave it around, to
19 intimidate other people. And then foolishly in an
20 instant used it and brought about, as he put it,
21 ruining two good lives.

22 There is some contrast in this case as well.
23 You can't help but be moved by the Middleton
24 family and the pain and suffering that they have
25 gone through.

1 And yet there are some very clear differences
2 between these two families. My client comes from
3 a family of poverty.

4 And Mr. Middleton hit the nail on the head
5 when and said that one of the big differences in
6 this case is the background of these two
7 19-year-old boys who just happened to intersect
8 that night.

9 My client was raised by a single mom, a cook,
10 in poverty. His father, who was in the household
11 when he was an infant son, is lord only knows
12 where.

13 My client does not know where he lives and
14 doesn't know where he works. He showed up for
15 Court Monday, or actually when we started Tuesday,
16 and disappeared without ever speaking to me.

17 In terms of the rest of his background,
18 because his Momma has to work such long hours in
19 restaurants, this young man and his sister, Opal,
20 who's to my left, essentially were latch key
21 kids. Kids who raised themselves on the streets.

22 I don't believe that Ms. Slater had a thing
23 to do with encouraging her son to have this
24 weapon.

25 But I don't think that she had the ability or

1 the resources or the help to be supervising and
2 raising up this young man the way that you or I or
3 the Middleton's had the chance to raise their own
4 children.

5 My client has an IQ of 82, Your Honor. I had
6 him tested. There is no question of competence,
7 and I need to make that clear for the record.

8 I had him tested by Doctor Valerie Homestrom,
9 who is a very experienced clinical psychologist,
10 and who rated his background, his life, and she
11 found it to be somewhat chaotic in the sense that
12 he was moved around a number of times as a young
13 man. Went to four elementary schools. Failed the
14 ninth grade. And when he couldn't succeed in the
15 ninth grade, he left school. He dropped out.

16 He doesn't have a lot of things going for
17 him, but he does have his Momma, who loves him.
18 His Momma, who was there at his bond hearing and
19 who has never wavered in her devotion and her
20 attention to this case and in talking with her son
21 at the jail and assisting me in this
22 representation to try to bring about the right
23 result, a just result.

24 Your Honor, the purpose of this sentence, the
25 choice that the Court is given by our Legislature,

1 is a drastic choice. A choice of 30 years without
2 parole, day for day, on the charge of murder; and
3 five years for the weapon charge.

4 Or a sentence of life imprisonment without
5 any possibility of parole or early release. In
6 effect, a slow death sentence.

7 And I would like to explore with Your Honor
8 some of the factors that I think may relate to
9 trying to make a decision on this; because it's a
10 big one.

11 If the goals of this sentence are going to be
12 to punish this 19-year-old boy, 20 now, I think
13 that's going to happen with a 30 year sentence in
14 this case, because from day one he has lost
15 everything, what little he had, on the streets.
16 His mother.

17 Every weekend, every Sunday, every family
18 day, he will miss. All those small moments. All
19 the holidays. He won't choose what programs. He
20 won't choose his meals.

21 He will be reminded every minute of every
22 day, for not a month or a year or five years or a
23 decade, but for 30 years, of the horror that he
24 brought to this community.

25 But at the same time, Your Honor, I believe

1 that one of the purposes of sentencing can also be
2 that we want people to do better.

3 We've seen that in some of the sentences that
4 the Court has imposed this week with other people
5 who were given an opportunity to be punished
6 severely, but to prove that they could better
7 themselves.

8 My client is not a bright or gifted young
9 man, but he is a remorseful young man. And he
10 wrote a letter, before this trial ever started,
11 that he wanted me -- this is not a letter that I
12 counseled him on, assisted him with; it's in his
13 own writing.

14 And it expresses, I think, his true and
15 honest feelings to this situation. It was a
16 letter to Mr. and Mrs. Middleton that said: I
17 understand that I have brought you and your family
18 pain. And I would like to apologize for the death
19 of your son. He was a good young man who had a
20 bright future ahead of him.

21 And what really hurts me is that he didn't
22 die from a robbery, he died from a mistake, and
23 that mistake ruined his life and my life.

24 Mr. and Mrs. Middleton, I'm not the type of
25 person to plan or wish any harm on another human

1 being.

2 It all happened so fast. I still ask myself,
3 how did I get caught up in a situation that didn't
4 involve me?

5 I've got a million questions running through
6 my head and it's tearing my mind up that I can't
7 answer any of them. I'm so confused right now.
8 How could this happen to two 19-year-olds who
9 didn't see that day coming?

10 No one has died -- no, it says: Now one has
11 died from a mistake and the other is mentally
12 dying from the mistake that he made.

13 I'm still young, and I don't know what it
14 really means to be a man, but by me admitting that
15 I was wrong, I'm taking the right step to become
16 one.

17 So, the address to the Middleton's: Please
18 find in your hearts to forgive me. And I would
19 like to thank your family for allowing me to free
20 my mind.

21 Your Honor, I'll pass this up to the Court.
22 In my client's own hand.

23 Your Honor, there is a practical side to
24 sentencing as well as the effects that it has on
25 this young man, and that is that we ask a lot of

1 our system of justice and our Department of
2 Corrections.

3 In that system of justice we don't pay people
4 what they deserve. They have crowded institutions
5 and I honestly believe that to send a young man
6 away for the rest of his natural life today is
7 sending the wrong message given his, I think,
8 heartfelt sorrow, and the fact that he has not
9 ever stood before a Court and then turned his back
10 on a chance.

11 He's fully aware that he can't undo. And if
12 he could, you know, if a situation came where we
13 could, through a life sentence, heal the victim or
14 the victim's family, it might call for that kind
15 of result.

16 But that's, unfortunately, not within our
17 province.

18 And I would simply ask the Court to consider
19 the fact that every human being needs some ray of
20 hope. And that it will make him a better prisoner
21 and a better man if the Court will consider a 30
22 year no parole sentence.

23 Your Honor, he may wish to address the Court.

24 THE COURT: Yes, sir. I'll be glad to hear
25 from you.

1 THE DEFENDANT: Yes, sir. That night was the
2 worst night of my life. I made a mistake that
3 took a life, and I want to apologize to the family
4 for the actions that I did.

5 And I tell my attorney from the start that I
6 was guilty. But in my heart I felt I was guilty
7 to a certain extent.

8 And I deserve the chance -- I deserve the
9 chance to get my life straight, to prove that I
10 can change.

11 MR. PENNINGTON: Your Honor, I think our law
12 is -- tries to discern between the evil act and
13 the evil person. Clearly our law tries to
14 distinguish those people who are misguided or
15 wrong, and these who are un-repentant, remorseless
16 people who have turned their back on our law.

17 I would ask you to hear also from Ms. Slater.

18 THE COURT: Ms. Slater.

19 MS. SLATER: I have deep sympathy for the
20 family. With me, I feel the same way, because I
21 lost a son. Right now I'm still losing one
22 because I can't see him anymore.

23 And I raised him the right way. The best way
24 I could. But when he leaves the house, I can't
25 answer for what he does.

1 And he knows I raised him the right way,
2 because I was the only parent there. His father
3 wasn't around to deal with him. I deal with him
4 through elementary, middle and high.

5 And I know the family is really having pain,
6 because if it was me, I would feel the same way,
7 if I lost a son by death. I'm still losing one.
8 And he is. -- you know, I won't see him or
9 whatever. And he won't be around to see his other
10 brother. His brother is in college. He would
11 have been here, but he is in college.

12 Out of all he them, he did something right.
13 And he told me to tell his brother just to keep
14 praying, you know, ask the Lord to show him
15 guidance, because that's only one who can show him
16 guidance right now.

17 He made a lot of mistakes. But I'm not the
18 fault of his mistakes, because I did my -- I did
19 what I could. All I could.

20 THE COURT: Ms. Slater, let me say this as a
21 parent. Nobody blames you. You know, we all,
22 including the parents on this jury, we do the best
23 we can. And once we put our children out in the
24 world, we can't accept responsibility for them.

25 So don't blame yourself. I know and this

1 jury knows that you did the very best you could.

2 THE COURT: Young man, your fine attorney,
3 and he is a fine attorney, and I congratulate you
4 as public defender, the chief public defender for
5 the defense that you gave him.

6 It's one of the hallmarks of our system of
7 jurisprudence, that no matter how serious a charge
8 is, that you can't afford a lawyer, he's entitled
9 to receive a splendid lawyer like you are, Mr.
10 Pennington. And I congratulate you on the defense
11 that you gave him, to wit, he had no defense.

12 You have indicated that he has lost his
13 Sundays, his Saturdays and his weekends. Equally
14 important, that deceased lost his too.

15 The difference is that he had a choice. He
16 didn't give that young man who lies died an equal
17 choice.

18 You asked for mercy. This young man could
19 have been standing before me for killing three
20 instead of one.

21 This case clearly was one for the imposition
22 of the penalty of death. The State, I presume,
23 because of his young age, did not elect to ask the
24 jury to give the sentence of death.

25 And in doing so, in my view, they gave him

1 all the mercy to which he is entitled.

2 This young man had to be a big shot with a
3 nine millimeter, taking it to a high school dance,
4 nobody bothered him. No sign of trouble. Just
5 wanted to be a big shot.

6 Seen it happen all over the State and it
7 discourages me when I see young folks with no
8 reason whatsoever, pack a cannon in their pocket
9 and go and kill an innocent child for absolutely
10 no reason.

11 I have a duty as a presiding Judge here to
12 send a message. And that message is that our
13 society cannot and will not tolerate such an
14 absolute senseless killing.

15 He shot that poor boy in cold blood for no
16 reason whatsoever, other than, by his own
17 statement, young folks do this.

18 I appreciate and accept the circumstances in
19 mitigation that you give. I cannot accept them
20 believing fully that the State of South Carolina,
21 by their declining to ask for the penalty of
22 death, have given him such mercy as he's entitled
23 to, and certainly more than he gave that poor
24 prostrate deceased upon the ground when he plowed
25 two bullets into his chest.

SENTENCING

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1 It is therefore the sentence and judgement of
2 this Court that you be imprisoned for the
3 remainder of your natural life.

4 Thank you so much.

5 MR. DUTREMBLE: Thank you, Your Honor. If
6 Your Honor please, I'll hand up the sentencing
7 sheets.

8 THE COURT: Okay. I'll let the jury go and
9 then I'll hear your motions. Let's take a quick
10 break.

11 MR. PENNINGTON: They may--

12 No, bring him back.

13 Ladies and gentlemen, I thank you for your
14 services in the case. I know it was a difficult
15 decision for you. It was equally difficult for
16 me.

17 You have done your duty as you understood
18 that duty under your oath. I did my duty as I
19 understand it, and neither one of us necessarily
20 liked it, but we took an oath to do our duty; and
21 we have done that.

22 You are now excused for the day and for the
23 week. And you'll go with this Court's heartfelt
24 thanks and appreciation.

25 (Jury dismissed from service.)

1 THE COURT: Let's take a break.

2 (Recess.)

3 THE COURT: All right. Gentlemen, I will
4 never know any more about your case than I know
5 right this minute. So I would like to hear any
6 post-trial motions at this time.

7 MR. PENNINGTON: Yes, sir.

8 THE COURT: All right, sir.

9 MR. PENNINGTON: If Your Honor please. First
10 of all, we would ask on behalf of Mr. Slater, for
11 a new trial based upon the objections made during
12 the course of the trial, specifically the illegal
13 warrantless arrest without exigent circumstances
14 of Mr. Slater in his home, which yielded his
15 statements to police officers, both near his house
16 and at the station, and which also provided the
17 probable cause in the search warrant as fruit of
18 the poisonous tree.

19 In addition, Your Honor, we would--

20 THE COURT: Let me deal with that. I ruled
21 on that and I respectfully deny that motion for
22 the bases that the record will reflect.

23 MR. PENNINGTON: Yes, sir. In addition we
24 renew our objections to the introduction of the
25 photographs of the .25 caliber pistol and the

1 introduction of the fact that the character of the
2 victim, having no prior record, again, just being
3 designed to prejudice the jury rather than give
4 them anything that was an issue in dispute.

5 THE COURT: That, in my view, was not a
6 character issue at all. It was a just a fruits of
7 the search. And I think it was appropriate under
8 the circumstances for the search to produce in
9 Court what they found.

10 MR. PENNINGTON: All right.

11 THE COURT: And do not consider it
12 prejudicial since they also found a nine
13 millimeter.

14 MR. PENNINGTON: Right. Those would be our
15 objections. We would also just simply ask for a
16 new trial to preserve any and all other objections
17 that we have made.

18 THE COURT: I understand that. All of which
19 is respectfully denied, and I again thank you for
20 the excellent representation in your capacity as
21 the Chief Public Defender of Charleston County.

22 MR. PENNINGTON: Thank you, sir.

23 THE COURT: All right.

24
25 (End of proceedings.)

1
2
3
4 I, the undersigned, Michele Rene' Darling,
5 Circuit Court Reporter for the Ninth Judicial
6 Circuit of the State of South Carolina, do hereby
7 certify that the foregoing is a true, accurate and
8 complete Transcript of Record of all the
9 proceedings had and evidence introduced in the
10 trial of the captioned case, relative to appeal,
11 in the Criminal Court for Charleston County, South
12 Carolina on the 13-15th days of March, 2001.

13 I do further certify that I am neither of
14 kin, counsel nor interest to any party hereunto.
15
16
17

18 April 11, 2002

19 Michele R. Darling
20
21 Michele R. Darling
22 Circuit Court Reporter
23
24
25

SEATTLE SOUTH CAROLINA
IN THE COURT OF APPEALS

Appellant, [Name], vs.
Respondent, [Name]

THE STATE

Respondent

CRIMINAL DIVISION

Appellant

STATE OF SOUTH CAROLINA

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STATEMENT OF ISSUES ON APPEAL

I.

Whether the court erred by refusing to instruct on self-defense where there was evidence of a fight and robbery in a parking lot which Appellant was not involved in, evidence that a gun was pointed at Appellant when he went near the commotion, and evidence that Appellant returned fire after hearing a gunshot while on the run from the scene, since this constituted evidence of self-defense mandating that instruction?

II.

Whether the court erred by allowing the decedent's mother to testify her son did not have any prior criminal record, since this testimony was not relevant?

III.

Whether the court erred by allowing Officer Hester to testify Deshawn Brown told him that he did not hear anyone else shooting in the parking lot where the victim was hit, since this testimony was inadmissible hearsay?

COUNTERSTATEMENT OF ISSUES ON APPEAL**I.**

Whether the trial judge properly refused to instruct the jury on self-defense because there was no evidence presented at trial which indicated that Applicant shot his unarmed and defenseless victim in self-defense?

II.

Whether Appellant can prove any prejudice resulting from the State's presentation of evidence that the victim did not have a prior conviction?

III.

Did the trial judge abuse his discretion by allowing the State to impeach Deshawn Brown's testimony that he did not tell police officers, when questioned, that he heard gunshots because they did not ask him with testimony from Detective Hester to the contrary?

STATEMENT OF THE CASE

The Charleston County Grand Jury indicted Appellant (Lord Byron Slater)¹ at the May 2001 term of court for murder (2001-GS-10-3221) and possession of a firearm during the commission of a violent crime (2001-GS-10-3226), in connection with the February 3, 2001 homicide of Sharone Willis Middleton. On November 13-15, 2001, Appellant received a jury trial on these charges before the Honorable Edward B. Cottingham. Charleston County Public Defender D. Ashley Pennington and Assistant Public Defender S. Boyd Young represented him at trial. Assistant Solicitors Dale DuTremble and Elizabeth Sumner, of the Ninth Circuit Solicitor's Office, prosecuted the case.

Judge Cottingham submitted the lesser-included offense of voluntary manslaughter to the jury, but the jury found Appellant guilty of both charges. Judge Cottingham sentenced him to life imprisonment. A timely Notice of Appeal was served and filed. This appeal follows.

¹ The Initial Brief of Appellant is captioned "The State v. Byron B. Slater." However, the indictment lists his name as "Lord Byron Slater," and the transcript of record is entitled "The State of South Carolina v. Lord Byron Barclay Slater." The State would, therefore, ask this Court to recaption the case as "The State v. Lord Byron Slater" because the indictment should control the caption of the case.

ARGUMENT

I.

The trial judge properly refused to instruct the jury on self-defense because there was no evidence presented at trial which indicated that Appellant shot his unarmed and defenseless victim in self-defense.

Appellant's first argument is that the trial judge erroneously failed to instruct the jury on the law of self-defense. The State disagrees and submits that the trial judge properly refused to give such an instruction because it was not supported by any evidence presented at trial.

The prosecution's evidence clearly showed that Appellant was guilty of murder. Fifteen-year-old Demetrius Nelson rode with his brother, Mark, and the victim, (his twenty-year-old cousin) Sharone Middleton, to a step show dance competition at North Charleston High School on the evening of February 3, 2001. Mark Nelson went into the show around 8:30 p.m., while the victim and Nelson drove around on Rivers Avenue. The victim and Nelson returned to the high school shortly before the competition ended and parked in a church parking lot across the street from the school. They were in the victim's white Mazda, listening to music and talking. R. pp. 12-16.

Around 10:00 p.m., they spotted Mark Nelson standing at a cross-way across the street. Mark began walking towards the victim's car as soon as he spotted it. He began running towards the car when "about six to eight guys," whom Demetrius did not recognize, began following him. Mark jumped in the car and shouted for the victim to "just drive off." He also tried to close and lock his door, but an assailant managed to open the door and

demanded that Mark give him money. When Mark responded that he did not have any money, they began hitting him until Mark gave them his money. Then, other men pulled Demetrius' door open and demanded his money. One of these individuals had a handgun. Demetrius told him he did not have any money, and the armed assailant struck him two times in his side. None of these individuals was Appellant. **R. pp. 16-19.**

Three or four other men pulled the victim out of the driver's side of the car and began kicking, beating and stomping on him. The victim covered himself on the ground in an effort to avoid their blows. Someone, other than the two armed men whom Demetrius had previously seen, shot the victim twice as he lay on the ground, defenseless. The shooter then ran away and continued shooting at the car until he jumped into another car. In all, six or seven more shots were fired. Demetrius never saw the shooter and did not see the direction in which the assailant's car fled. Finally, no one in his car had a weapon and the victim did not have a weapon in his hand as he lay on the ground. **R. pp. 19-24.**

Mark Nelson corroborated his brother's account. He went outside and talked with two of his friends after the step show. As they were talking, he saw a white Land Rover pass them. Several minutes later a group of males ran up to this car and stopped it. "[T]he next thing we know, we all saw them coming back and then we saw one dude with a gun and . . . he was waving it. And when we saw that, everybody just started running." **R. pp. 35-38; 44-45.**

Mark ran straight toward the dirt parking lot where the victim and Demetrius were. Before he could close and lock his door, an unknown individual with the gun pulled him out of the car and demanded his money. This individual was not Appellant. Mark initially said

that he did not have any money but gave the man his \$20.00 when the man threatened to shoot him.² R. pp. 38-39; 45-46.

Other individuals managed to pull Demetrius out of the car and the first armed assailant directed his attention toward Demetrius. When the man demanded Demetrius' money, Demetrius replied that he did not have any. The group then went around to the other side of the car, where still other individuals had managed to pull the victim from the car and were beating him in an effort to get his money. R. pp. 38-40; 47-48.

At that point, Mark saw two gunshots but could not see who shot his cousin because the group was surrounding him. The shooter began shooting again as he ran away from the scene. So, the Nelson brothers dove inside the car while the shooter fired a total of ten to twelve shots. The shooter and others ran straight to a "white or gray Crown Vic" and continued to shoot as they drove away from the scene. The person that robbed him was armed, but he was not the same person who shot the victim. No one in the victim's car had a weapon. R. pp. 40-43; 47-50.

Nineteen-year-old Terell Bryant testified that "[w]hen I walked out [of the gym] there was some commotion inside the bus parking lot." Bryant saw "Lord Byron walking towards me with a gun in his hand." He was walking with it "freely." Appellant and others then got into a white car and drove over to the parking lot where the victim was parked. R. pp. 66-68.

Although Bryant did not see who got out of the car, he saw the passenger door open and Appellant had gotten into the passenger door before the car left moments earlier. Bryant

² This individual was wearing a white "puffy" jacket.

fell to the ground as soon as he heard gunshots. He did not see anyone run back to the white vehicle but saw it leave the scene. He also heard gunshots being fired as the car was backing up to leave. He described the gun that Appellant was carrying as a black gun. R. pp. 68-71.

Deshawn Brown, who knows Appellant through his brother, also attended the step show that night. He spoke with Appellant and asked Appellant for a ride home. The car was being driven by "L", later identified as Ellis Judon. Before they left the vicinity, the group drove over to the parking lot, where there was a "commotion" taking place. Appellant got out of the car and walked into the crowd. Brown then heard gunshots. Everyone fled after the gunshots and Appellant ran back to the car. Brown did not see Appellant with a gun at this point. However, he saw it when Appellant fired it into the air as they were driving away from the parking lot. Brown testified that he heard other gunshots before they reached the church parking lot.³ They then went to Appellant's residence. Appellant also said that "[h]e think dog get hit," meaning that he thought that someone was shot. R. pp. 82-84; 86-92.

After they left the scene, they went to Appellant's residence. Appellant went into the house and did not have a weapon on him when he returned several minutes later. The group returned to the school and was stopped by police along the way. The police did not find a weapon in the car. Brown had already called his brother to get a ride home and his brother came and got him. Brown described the weapon Appellant had as a "black nine." R. pp. 84-86.

³ See Argument III.

Kenyon Nichols, went to the step show because Judon and Appellant were there. He was planning to ride home with them after the show. When he got to Appellant's white Monte Carlo after the show, Judon, Appellant and Brown (a/k/a Erkel) were there. Judon was driving and Appellant was sitting in the front passenger seat. R. pp. 102-04; 106.

Judon drove over to the church parking lot where a "crowd of boys" or "a gang" were located. Appellant got out of the car and walked towards this crowd. The other occupants of the car proceeded to exit it also. By the time Nichols had taken five or six steps, he heard gunshots and ran back to the car. After the others returned to the car, they sped off towards Appellant's residence. As they were driving away, Appellant started shooting into the crowd. Also, Appellant said, "I think I shot him." They stopped briefly at Appellant's residence and returned to the parking lot, where they were stopped by the police. Police did not find anything in the car. They then went to Sonic and got something to eat. Nichols described Appellant's weapon as a black 9 mm. R. pp. 104-12.

Ellis Judon, who was twenty-three at the time of trial, is a very close friend of Appellant. At Appellant's invitation, he went to the step show on February 3, 2001, in Appellant's white Monte Carlo. Judon was driving. After the show, they were going to give both Nichols (a/k/a Snub) and Brown a ride home. They were sitting in the courtyard "chilling" and talking to some girls when a group of about five males whom Judon did not recognize came over to the courtyard. These individuals looked like they were going to cause trouble. R. pp. 114-18; 129-30.

According to Judon, they walked away from the group of five men, and the other group then stopped a Ford Explorer. Appellant immediately went to his car and retrieved his

black 9 mm. pistol. Next, he ran in the direction of the truck which had been stopped, but did not do anything. Moments later, one of the members of the crowd said, "I see one" and began chasing another person across a dirt road into the church parking lot. **R. pp. 119-21; 130-31.**

Appellant, who still had his gun in his hand, ran back to his car and told Judon to go over to the dirt church parking lot. Neither Judon nor Appellant had any reason to go to the parking lot. However, Appellant, Brown, and Nichols piled into the car and Judon drove them to the parking lot. When Judon turned on his bright lights, he could see the other group stomping and kicking a person lying on the ground. **R. pp. 121-23; 131-32.**

"L. B., Nichols and Brown all got out of the car." They immediately ran back to the car after Judon heard three or four gunshots and saw the person on the ground "flip over." When Appellant and the others returned to the car, Judon backed up and prepared to leave. As he did so, Appellant fired his weapon out of the window. The group then went back to Appellant's residence. Appellant went into the residence while the others stayed outside. Judon did not know whether Appellant had placed the weapon in his house, but he did not see Appellant put it back in the glove compartment of the car and no weapon was in the car when the police stopped them. Judon had seen Appellant with the 9 mm. on at least one or two occasions previously. **R. pp. 122-29.**

Following his arrest by Officer Chris Widmer, Appellant told Widmer "he had heard the shooting and that he ran to the area to see what happened. But he also said that he didn't shoot anybody." **R. pp. 189-91; 197.** However, when interviewed by Detective Douglas Hester at 1:45 p.m. on February 4, 2001, Appellant said that he, Ellis Backmon, Brown and

Nichols went to his car after the step show, but they were blocked in in both the front and back. They saw "people running towards the church parking lot. Then we heard gunshots. Then the people who had us blocked in drove away so we followed them on to the road. It was a white Buick." Also, he claimed that he was driving his white Monte Carlo and was stopped by a female police officer who searched his car and the occupants before letting them go. After that, they went across the street to a phone booth and dropped off Brown, who was picked up by a person in a white Buick. Appellant was clear that he was driving the car and that he did not have a gun in his car at anytime that evening. He likewise denied participating in a crime at North Charleston High School or shooting a gun anytime that evening. Further, he claimed the police had stopped him as soon as they left the school when asked if he had gone to his house after the incident but before the police had stopped him.

R. pp. 219-25.

Expert ballistics testimony established that a slug removed from the victim at autopsy and one found in his clothing by EMS personnel were both fired by Appellant's weapon. Another bullet retrieved from a car parked in the church parking lot, as well as all seventeen fired cartridge casings found on the scene, were also positively matched to Appellant's weapon and a bullet jacket fragment was consistent with having been fired by his weapon or one similar to it. Nine millimeter cartridges seized pursuant to a search warrant of Appellant's residence were consistent with a type of cartridge that would be loaded into Appellant's weapon and are the correct caliber for his pistol.⁴ **R. pp. 143-64; 241-46; 251.**

⁴ Police also seized a .35 caliber pistol as well as some .35 caliber ammunition and .25 caliber ammunition from Appellant's residence.

Appellant only presented two witnesses, himself and SLED Agent Joseph Powell. Agent Powell, who is an expert in gunshot residue analysis, testified that his testing on samples taken from the victim's hands revealed that the victim had gunshot residue on his right palm, which indicated that he may have handled or fired a weapon. **R. p. 271.** While Powell could not say with certainty that the victim did not fire a weapon, he opined that it was very unlikely that the decedent shot a weapon before he was killed and it was more probable that he acquired the residue either from the cloud of gases emitted by the gunshots or by handling a weapon. **R. pp. 272-76; 280-81; 283-85.**

Appellant, a nineteen-year-old man at the time of the incident, testified that he and Judon went to the step show in his white Monte Carlo. They met up with Nichols and Brown at the show. Appellant remained at the school after the show. He was talking with some girls outside when three or four men ran up to the truck and yelled at some of the people in it. He claimed that he "wasn't too much worried about that" but admitted that he immediately walked back to his car, opened the door and grabbed his gun. His initial intent was "to shoot in the air" in order to create a commotion allegedly because "[t]hat's just something that young people be doing like after parties or clubs or whatever." **R. pp. 291-94.**

He walked over to the group, but changed his mind and did not fire the weapon. Instead, he kept the gun "pretty low by my leg" and walked back to his car once the disturbance at the truck had ended. When he reached the car, he noticed that "something was going on in the parking lot. So, . . . I start[ed] walking toward the parking lot." He claimed

it looked like a fight was taking place and he only wanted to find out what was happening. However, he never put his gun back in the glove compartment. **R. pp. 295-96.**

He walked into the dirt parking lot and saw two or three separate fights. He saw two people beating on one person on one side of the car. On the other side of the same car, he saw another two on one encounter as well as someone on the ground being beaten. He walked up where two men were "tussling or tugging." This was a different area from where he had seen the person lying on the ground being beaten. As he approached, he apparently surprised one of the individuals "and he turned to me and he had a gun in his hand. And I see his gun and I started running. And I heard a gunshot. And I start shooting my gun." **R. pp. 296-99.**

Appellant claimed that he ran as soon as he saw the person pull the weapon on him and only started shooting after he heard a gunshot fired in his direction. Also, he clearly testified that he fired his weapon as he ran away from the scene and he was unsure as to how many times he had fired his weapon. On cross-examination, he admitted that he had loaded and cocked his weapon earlier that day. He also admitted that he had put a round into the chamber because he was going to use it. **R. pp. 298-311.**

Appellant requested a jury instruction on self-defense. He argued that there was evidence a gun was pointed at him and that he ran away out of fear. He also claimed a reasonable person under the same circumstances could have reacted in the manner in which he did and that his actions were, therefore, reasonable. Because the trial judge had expressed in chambers that he was not without fault in bringing on the difficulty, he argued that he was not because the altercation involving the victim was already taking place when he

approached the crowd. The State argued against a self-defense instruction. The trial judge rejected the instruction because he was convinced that self-defense was not an issue in the case. Despite his ruling, he agreed to charge voluntary manslaughter out of an abundance of caution. **R.** pp. 334-38.

The law to be charged is determined by the evidence presented at trial. State v. Goodson, 312 S. C. 278, 440 S.E.2d 370 (1994). When reviewing the trial judge's charge, the charge must be viewed as a whole. If the charge as a whole is substantially correct and adequately covers the law, then reversal is not necessary. State v. Rabon, 275 S.C. 759, 272 S.E.2d 634 (1980). In order to establish self-defense, a defendant must establish the following elements:

1) the defendant must be without fault in bringing on the difficulty; 2) the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; 3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief; if the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence and courage to strike the fatal blow to save himself from serious bodily harm or losing his own life, and; 4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984).

State v. Goodson, 312 S.C. at 280, 440 S.E.2d at 372 (emphasis in original); State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978). See also Tate v. State, 308 S.C. 163, 417 S.E.2d 553 (1992).

Despite Appellant's contrary arguments, the State submits that the trial judge properly denied the requested instruction because there was no evidence that Appellant shot the victim in self-defense. The State's evidence clearly showed that the victim was being assaulted by another group of people when Appellant decided, for reasons known only to him, to approach the crowd while armed with a weapon and shoot the victim twice in the chest as the victim lay on the ground. The victim was not armed and had not done anything, whatsoever, to provoke him.

Instead, the victim and his friends were being robbed by the other group of people at the time the shooting occurred, again, by persons he had not provoked. Further, the State's evidence clearly established that Appellant continued to fire his weapon at the victim and the others in the victim's party as he fled back to his car and even as the car sped away from the scene. Thus, the State's evidence demonstrates beyond cavil that Appellant was not without fault in bringing on the difficulty. He also failed to meet the third and fourth elements of a self-defense charge under State v. Goodson and Davis, supra.

Likewise, Appellant's own testimony does not support a self-defense instruction. To the contrary, he admitted that the victim had done nothing to provoke him and that the victim was in a different area from where he saw the two people struggling. He also admitted that he expressly loaded his weapon and cocked it earlier that day because he intended to use it; and that he had initially approached the crowd around the truck with the intent to discharge his weapon and cause a commotion because this is what young people do. Further, he did not make any effort to immediately fire at his putative assailant, who was some ten to fifteen feet away from him, even though he had a fully loaded and cocked weapon in his hand and

had intended to use his weapon that evening. He also continued to fire his weapon as he ran away from the scene without any regard to where the shots he was firing were going, and he continued to fire his weapon until there were no more bullets in it. R. pp. 311-14; 319-22. Finally, the State's cross-examination established that Appellant shot, killed and, in fact, "murdered" the victim. R. p. 330.

Under these circumstances, it is clear that Appellant's own testimony reflects that he was not without fault in bringing on the difficulty, that the circumstances were not such as would warrant a man of ordinary prudence and courage to strike the fatal blow to save himself from serious bodily harm or losing his own life and that he had other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury other than to act as he did. See Goodson; Hendrix. As a result, he was not entitled to a self-defense instruction and the trial judge's ruling must be affirmed. Id.

Finally, Appellant could not be entitled to a self-defense instruction with respect to shooting the victim in this case because the victim had not done anything to provoke anyone and was a totally innocent person who was being robbed, beaten and stomped at the time of the shooting. Apparently, Appellant is attempting to excuse the shooting through application of the doctrine of "transferred self-defense," which has not been previously adopted in this state. See State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977). The present case demonstrates beyond any question problems inherent in such a doctrine, which excuses the shooting of an innocent person who has not done anything to provoke any attack from anyone, much less this criminal defendant.

More importantly, transferred self-defense is inconsistent with current South Carolina law regarding self-defense. As the cases cited throughout this brief demonstrate, self-defense is presently applied in a limited manner because it completely bars the prosecution of an otherwise unlawful act. A defendant now must show that his conduct clearly falls within the four elements of self-defense and his actions must be proportioned to the danger confronting him. Further, self-defense is less readily available when lethal force is used. See Goodson, supra.

It is the State's position that any contrary holding would be simply wrong. Also, the state supreme court has expressly refused to recognize "imperfect self-defense," which would reduce murder to manslaughter where the defendant could not meet all four elements of self-defense. State v. Finley, 277 S.C. 548, 290 S.E.2d 888 (1982). Adoption of Appellant's argument would require this Court to overrule state supreme court precedent, which it lacks the authority to do, and extend the protection of self-defense to incidents which involve the death or maiming of totally innocent bystanders. It would, therefore, grant, quite literally, a defendant a license to kill innocent people.

However, such a ludicrous position is completely unnecessary because this State has previously recognized the defense of accident. Also, with the proliferation of youth in this and other states carrying handguns -- not to mention recent legislative amendments which make it easy for most adults in South Carolina to lawfully carry a concealed handgun -- Respondent would stringently urge this Court not to adopt a theory of defense which will allow innocent people to be injured or killed, and which may encourage the use of guns by providing an easy out for a killer. As the present case, once again, clearly demonstrates, any

such theory will be felt most heavily by those otherwise innocent people who merely are unfortunate enough to be poor and live in areas where crimes most often occur.

Therefore, Respondent submits that Appellant's argument is without merit, and that the trial judge properly refused to instruct the jury on self-defense.

II.

Appellant cannot prove any prejudice resulting from the State's presentation of evidence that the victim did not have a prior conviction.

Barbara Middleton testified as the last prosecution witness. Without objection, she testified that neither she and her husband nor the victim owned a weapon. R. p. 254. Then, the challenged colloquy ensued as followed:

Q Did your son have any kind of prior criminal record?

MR. PENNINGTON: Objection, Your Honor.
Irrelevant.

THE COURT: I will permit that question. Go ahead.
Overruled.

THE WITNESS: No.

R. p. 254, ll. 6-12. Appellant claims that this testimony was irrelevant and "just another example of this particular solicitor's officer (sic) seeking to invoke sympathy through the admission of irrelevant evidence." **Initial Brief of Appellant at 13-14.**⁵ Respondent submits that Appellant cannot show any prejudice resulting from this testimony and the trial judge's ruling must, therefore, be affirmed.

"The admission or exclusion of evidence is a matter within the sound discretion of the trial court and, absent clear abuse, will not be disturbed on appeal." Gambell v. Int'l. Paper Realty Corp., 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996). See also State v. Martin, 347 S.C. 522, 556 S.E.2d 706 (Ct. App. 2001). To warrant reversal, an appellant "must show both the error of the ruling and resulting prejudice." Recco Paper & Label Co.

⁵ Much of the Brief of Appellant is written in a disparaging tone which the undersigned will avoid throughout the Brief of Respondent.

v. Barfield, 312 S.C. 214, 216, 439 S.E.2d 838, 840 (1994); State v. Hamilton, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct. App. 2001).

Here, Appellant sought to establish self-defense. Part of this showing, through Detective Powell, included evidence that the victim had gunshot residue on his hands, which was consistent with him having handled or fired a weapon. R. p. 271. It is respectfully submitted that the prosecution was merely attempting to negate the inference that the shooting was self-defense by establishing (1) that the victim did not have a weapon and (2) that he had never been convicted of a crime. Even if inadmissible, *cf.*, State v. Brown, 321 S.C. 184, 186-87, 467 S.E.2d 922, 923-24 (1996) (generally, specific acts of violence by deceased are inadmissible unless "directed against the defendant, or if directed against others, were so closely connected in point of time or occasion with the homicide is reasonably to indicate the state of mind of the deceased at the time of the homicide, or to prove reasonable apprehension of great bodily harm"), Appellant was not prejudiced by introduction of this testimony.

First, to the extent he is correct and it is irrelevant, it did not tend to prove or disprove anything. Secondly, the jury was not presented with evidence that the defendant had prior convictions, but the victim did not. Thus, the introduction of this evidence did not create a battle between the good character of the victim and the bad character of the defendant.

More importantly, any evidence that the victim did not have a prior conviction pales in comparison with the evidence presented to the jury surrounding the events on the night of the murder. As discussed in Argument I, supra, the State's evidence tended to show that Appellant shot the unarmed and defenseless victim as he lay on the ground being beaten,

kicked and stomped by a group of individuals who had robbed him. Appellant's own testimony reflected that he voluntarily walked over to a commotion which did not concern him and involving other people whom he did not know, all the while armed with a cocked and loaded 9 mm. weapon. He then approached someone in the struggle and, when that person drew a gun on him, fled the scene. He then began firing his weapon after he heard a gunshot fired in his direction and continued to fire as he ran away from the scene without regard to where his gunshots were being fired. By his own testimony, the victim was not in the area of the struggle involving the man who had pulled a weapon on him. Given this overwhelming evidence of guilt, where the only question for the jury to decide was whether or not Appellant murdered the victim or killed him in the sudden heat of passion, any error in the introduction of the prior conviction must be viewed as non-prejudicial and harmless beyond a reasonable doubt. Brown; contra State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999) (because evidence of defendant's guilt not overwhelming, erroneous introduction of evidence was not harmless).

III.

The trial judge did not abuse his discretion by allowing the State to impeach Deshawn Brown's testimony that he did not tell police officers, when questioned, that he heard gunshots because they did not ask him with testimony from Detective Hester to the contrary.

Applicant's remaining contention is that the trial judge erroneously allowed Detective Douglas Hester to testify that Brown never told him that Brown had heard someone else shooting at the crime scene before the fatal shooting even though specifically asked. The State submits that the trial judge did not abuse his discretion by admitting this testimony as extrinsic evidence of a prior inconsistent statement by Brown under Rule 613(B), S.C.R.E.

On cross-examination of his friend (R. p. 89) Deshawn Brown, Appellant elicited that Brown heard more than one gunshot on the night of the murder. Specifically, he testified that he heard a gunshot "when we [were] standing by the school by the gym." This was before the shooting resulting in the victim's death and it was not Appellant who fired the shot. R. p. 92, ll. 1-12.

On re-direct examination, he testified that he remembered giving a statement to police. R. pp. 96-97. When asked if he had told them that he had heard gunshots earlier that evening, he replied that he did not because the police did not ask him. R. p. 97, ll. 4-9. See also R. p. 97, l. 10 - p. 98, l. 6. He then claimed that the first time he told anybody about hearing the gunshots was when he was asked by defense counsel. R. p. 98, ll. 7-17. When again cross-examined by Appellant, he reiterated that defense counsel was the first person to ask him if he had heard more than one gunshot and the police officer who questioned him

never asked him whether or not he heard more than one gun. He also claimed that he had not been asked whether he had heard more than one gunshot by the solicitor's office. **R. p. 99, ll. 1-19.** On further re-direct examination, he again claimed that no one from the police department had asked him whether he had heard any other gunshots or seen any other weapons on the night of the crime. **R. pp. 100-01.**

It was against this backdrop that the State questioned Detective Hester as to whether or not he had interviewed Kenyon Nichols, Deshawn Brown and Ellis Judon. He indicated that he had interviewed these individuals because Appellant had advised police that those were the people with him at the step dance. **R. p. 210.** The following colloquy then occurred, which Appellant submits was improper:

Q Did you ask [Brown] about guns at the scene of the crime?

A Yes, I did.

Q Did you ask them about anybody else shooting at the scene of the crime?

A Yes, I did.

Q Well, when you were interviewing Deshawn Brown, did he ever tell you that he heard anybody else shooting out there?

MR. PENNINGTON: Objection, Your Honor, that's not proper.

THE COURT: No, sir, I will -- no, sir, I'll permit that question.

Go ahead.

BY MR. DUTREMBEL:

Q Did he ever tell you that?

A I interviewed Deshawn Brown. He never once told us about anybody else shooting at the scene.

MR. PENNINGTON: Your Honor, that's not proper impeachment. He doesn't say he asked him that question, Your Honor.

The question -- the impeachment is, you asked the question, he said no. That's impeachment. This is impeachment by omission, Your Honor, and that's not proper.

THE COURT: I will permit that limited inquiry.

MR. DUTREMBEL: Thank you, Your Honor.

THE COURT: Your position is noted for the record.

R. p. 211, l. 12 - p. 212, l. 16.

Rule 613(B), S.C.R.E., provides in pertinent part that

[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible.

See also State v. Fossick, 333 S.C. 66, 508 S.E.2d 32 (1998) (extrinsic impeachment evidence of prior inconsistent statement by state's witness was admissible, as witness denied making that statement; however, exclusion of statement was harmless). The foundation requirement for admitting extrinsic evidence of a prior inconsistent statement is so that the

witness is presented with sufficient information to admit the statement, deny it or explain it.

State v. Sierra, 337 S.C. 368, 373, 523 S.E.2d 187, 189 (Ct. App. 1999) (defendant's confrontation rights violated when prosecutor impeached defense witness with prior inconsistent statement witness allegedly made to prosecutor). See also State v. Hampton, 79 S.C. 179, 60 S.E. 669 (1908).

Here, the State submits that the prosecution laid an adequate foundation on re-direct and further re-direct examination of Brown to permit introduction of the statement to Detective Hester. He admitted giving a statement to police, but contended that he did not tell them that he had heard gunshots earlier on the night of the murder because they did not ask him. R. pp. 96-98; 100-01. Because Brown denied admitting the statement, the State was properly permitted to introduce extrinsic evidence of the prior inconsistent statement. Fossick; cf., State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (although error was harmless, trial judge erroneously excluded impeachment evidence of police investigator's prior inconsistent statement regarding other murder suspects).

Finally, even if the Court concludes that the trial judge erroneously permitted this testimony from Detective Hester, Appellant cannot show any prejudice because there was overwhelming evidence of guilt and because the trial judge's ruling did not prejudice his defense in any manner. To the contrary, Brown is the only witness who claimed to have heard gunshots prior to the fatal exchange. The remaining prosecution witnesses did not mention any gunshots before the fatal shooting. Also, Appellant's own defense was not predicated upon any belief that he was in danger based on prior gunshots. To the contrary, he purposefully went to an area where he saw a fight transpiring with a loaded and cocked

weapon, which he held by his side. When one of the persons involved in the fight turned and pointed a weapon at him, he fled the scene. He only began shooting after this person fired a gunshot at him. Thus, the trial judge's ruling did not adversely impact upon Appellant's defense and any error in introducing Detective Hester's testimony must be viewed as harmless beyond any reasonable doubt.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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Attorney General

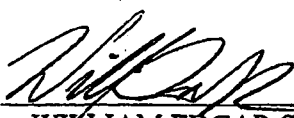
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April 28, 2003.

WES

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Charleston County
The Honorable Edward B. Cottingham, Circuit Court Judge

THE STATE,

Respondent,

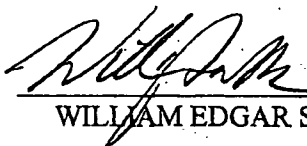
vs.

LORD BYRON SLATER,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with SCACR 211(b).



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April 28, 2003.

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vs.

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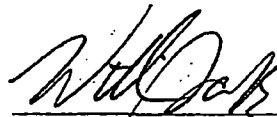
Appellant.

PROOF OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appellant by depositing three (3) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Robert M. Dudek, Esquire, South Carolina Office of Appellate Defense, 1122 Lady Street, Suite 940, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 28th day of April, 2003.



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BYRON B. SLATER,

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by refusing to instruct on self-defense where there was evidence of a fight and robbery in a parking lot which appellant was not involved in, evidence that a gun was pointed at appellant when he went near the commotion, and evidence that appellant returned fire after hearing a gunshot while on the run from the scene, since this constituted evidence of self-defense mandating that instruction?

2.

Whether the court erred by allowing the decedent's mother to testify her son did not have any prior criminal record, since this testimony was not relevant?

3.

Whether the court erred by allowing Officer Hester to testify Deshawn Brown told him that he did not hear anyone else shooting in the parking lot where the victim was hit, since this testimony was inadmissible hearsay?

STATEMENT OF THE CASE

Appellant was indicted by the Charleston County grand jury for the offenses of murder and possession of a firearm during a violent crime. R. 392. His case came on for trial on November 13, 2001, before the Honorable Edward B. Cottingham and a jury. Ashley Pennington and S. Boyd Young represented appellant. The solicitor was Dale DuTremble. R. 1.

The jury found appellant guilty on both counts. R. 389, l. 24 – 390, l. 10. Judge Cottingham sentenced appellant to life imprisonment. R. 391, ll. 1-3.

This appeal follows.

ARGUMENT

1.

The judge erred by refusing to instruct the jury on self-defense. There was evidence that someone pointed a gun at appellant during a fight in the parking lot that appellant did not start, and where he went near the commotion. Appellant returned fire after the gun was pointed at him, he ran and then heard a gunshot. This testimony constituted evidence of self-defense mandating that instruction.

Relevant Facts

Fifteen-year-old Demetrius Nelson went by the Step Show Dance at North Charleston High School on February 3, 2001. The decedent was driving. R. 12, l. 4 - 13, l. 6. The decedent and Nelson drove around Rivers Avenue while his brother, Mark, actually attended the dance for its duration. R. 15, ll. 1-18.

Near the conclusion of the dance, the decedent and Nelson returned to the High School. They parked in a lot across the street from the school. R. 15, ll. 16-18.

They listened to music in the car, and they talked until Mark spotted them when he came outside. Mark began walking towards the car. However, "some guys was following him, maybe about six to eight guys behind him." Appellant was not with these men, and one of them asked Mark for his money. When Mark responded he did not have any money, they started beating him. R. 16, l. 10 - 17, l. 25.

Another man pulled the decedent out of the driver's side of the car and "they started like kicking him and stomping him or whatever." R. 18, ll. 6-10. Another man threatened to shoot Nelson unless he gave him his money. R. 19, ll. 1-16. The decedent was on the

ground outside "covering up like his body or whatever so he wouldn't get hurt" when someone shot the decedent. Nelson did not see who shot him. R. 20, ll. 5-24.

Nelson said the decedent did not have a gun, but that at least three people on the scene had handguns that night. R. 24, ll. 3-15; R. 32, ll. 6-18.

Mark Nelson recalled trying to fight these men off when he heard the decedent get shot two times. R. 39, l. 2 - 40, l. 10. Another man on the scene, Terrell Bryant, remembered "when I walked out there [outside the dance] there was some commotion inside the bus parking lot and I was by the car that I was riding in and I saw Lord Byron walking towards me with a gun in his hand." Bryant testified appellant got into an automobile and drove away. R. 67, ll. 3-16.

Bryant said as the automobile appellant was riding in drove away, he heard gunshots. R. 69, ll. 2-10. Bryant testified after the shooting, he saw a crowd of "black males" run past him into the gymnasium. R. 71, ll. 19-24.

Deshawn Brown testified that he asked appellant for a ride home that night. Brown recalled there was "a commotion" in the parking lot and that appellant went to the commotion. R. 81, l. 17 - 83, l. 17.

Brown said as they drove away from scene, appellant was shooting the gun into the air. R. 84, ll. 3-24. Brown claimed appellant said, "he think Dog get hit" after he fired the shots from the car. R. 87, ll. 2-25.

Twenty-three year old Ellis Judon testified during the disturbance outside that appellant unlocked the car door. Appellant got his gun out of the glove compartment. R. 118, l. 12 - 119, l. 24. Judon also said appellant went towards the commotion with a gun in his hand. R. 120, l. 3 - 122, l. 7.

Officer Chris Widmer arrested appellant at his house hours after the shooting. R. 189, l. 16 - 191, l. 19. Appellant told Widmer "he had heard the shooting and that he ran to the area to see what happened. But he also said that he didn't shoot anybody." R. 197, ll. 2-10.

SLED agent Kenneth Whitler testified that the two slugs removed from the victim matched the gun seized from appellant's house. R. 245, ll. 11-16. The decedent had gunshot residue on his right palm to indicate he may have handled or shot a gun. R. 271, ll. 8-24. SLED agent Joseph Powell testified "I cannot say with certainty that he did not fire a weapon." R. 275, ll. 2-3. Powell later opined that he thought it was very unlikely that the decedent shot a gun before he was shot. R. 285, ll. 17-22.

Appellant testified in his own defense. He was only nineteen years old at the time of the incident at the Step Show Dance. R. 290, l. 23 - 291, l. 6.

Appellant was talking with some girls outside the dance when a commotion started near a truck. "It looked like they was, like, yelling at some people...I wasn't too much worried about that...I walked back to my car and open[ed] up the door and I grabbed the gun I had." R. 292, l. 8 - 293, l. 21.

Appellant said he planned to shoot the gun into the air because "that's just something that young people be doing like, after parties or clubs or whatever." R. 293, l. 21 - 294, l. 6. Appellant testified he had seen other people do this in the past. R. 294, l. 1 - 295, l. 18.

Appellant changed his mind about shooting the gun in the air, and he walked over to the "fight," which was apparently actually a robbery attempt the decedent was forced to be counter. "I just wanted to see what was going on." Appellant said he did not return to the

car to put his gun away before going to watch or investigate the fight. R. 294, l. 12 – 297, l. 14.

Appellant saw the fight itself and he saw one person on the ground. Appellant recalled there were two or three separate fights going on at the time. R. 297, l. 9 – 298, l. 23.

Appellant said he apparently surprised one man “and he turned to me **and he had a gun in his hand. And I see his gun and I started running and I heard a gunshot and I start shooting my gun.**” R. 299, ll. 8-18 (emphasis added).

Appellant said he was not sure how many times he shot his gun. R. 299, l. 19 – 300, l. 4. Appellant testified he ran when the man pointed the gun at him and that he shot after he heard a gunshot. R. 300, l. 19 – 301, l. 13. Appellant said, “it was a quick reaction.” R. 301, l. 7 – 302, l. 2.

Appellant said that he was very troubled when he found out that two shots from his gun were what actually struck the decedent. R. 306, l. 22 – 307, l. 1. Appellant repeated on cross-examination that when he got the gun out of the glove compartment, he only planned to shoot it in the air. R. 316, l. 16 – 317, l. 12.

Request for self-defense instruction

Defense counsel requested that the judge instruct the jury on the law of self-defense. R. 334, l. 7 – 336, l. 14. Defense counsel said there was evidence a gun was pointed at appellant and that he ran out of fear. Counsel argued appellant acted reasonably under the circumstances. Counsel also disagreed with the judge that appellant was at fault for bringing on the difficulty and he argued that the cases about bringing on the difficulty really related to someone “having somehow produced the altercation that leads to the necessity for

self-defense.” Counsel argued the fight was underway before appellant went to investigate.¹

R. 334, l. 7 – 336, l. 25.

The judge ruled that he would not charge self-defense. The judge stated, “they may consider a case like this, self-defense, in McCall, South Carolina, but not in Charleston.”

The judge then told defense counsel he would charge voluntary manslaughter as an option to murder. R. 338, ll. 4-22.

In his closing argument, defense counsel told the jury that appellant was a stupid nineteen year old that was not ever smart enough to make up a story about the gun being pointed at him before he ran and returned fire. R. 364, l. 20 – 365, l. 24; R. 370, ll. 5-18.

Discussion

In determining whether to charge self-defense or a lesser-included offense, our Supreme Court has said that it will view the evidence in the light most favorable to the defendant when determining if there is any evidence to justify the charge. State v. Byrd, 323 S.C. 319, 474 S.E.2d 430 (1996). In State v. Burkhart, ____ S.C. ____, 565 S.E.2d 298 (2002), the Court again repeated that self-defense must be charged if there is any evidence in the record to support that charge. See, State v. Hill, 315 S.C. 260, 433 S.E.2d 848 (1993).

Further, both self-defense and voluntary manslaughter should be submitted to the jury if there is any evidence to support those instructions. See State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). The judge

¹ The judge at first said he would not charge self-defense because appellant testified he shot the gun into the air because that was something young people do — apparently in exciting situations. Defense counsel countered that the evidence showed appellant refrained from shooting the gun into the air. The solicitor agreed with defense counsel. However, the judge then ruled he still would not charge self-defense. R. 481, l. 1 – 483, l. 13.

had to charge self-defense, just as he did voluntary manslaughter, where there was any evidence supporting that instruction. Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991); State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993). Appellant's testimony made self-defense a jury issue. See State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001); State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998).

Appellant respectfully submits that the trial judge erred by finding appellant was not without fault in bringing on the difficulty. See, State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955). Defense counsel correctly argued that the fight, robbery or resistance between the decedent and his attackers was underway before appellant ever went to investigate.

Appellant submits there are very few situations where voluntary manslaughter or self-defense become legitimate issues at trial — and where — the defendant did not smartest thing humanly possible under the circumstances. See, State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978); State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993). For example, in State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), the defendant was soliciting a prostitute when the trouble began. Here, appellant did what many students have done since fight first broke out after school — he went to watch or investigate. Although the trial court, and others, can legitimately be concerned about the fight watching practice being changed because guns were present, the presence of guns is obviously not dispositive of a self-defense, accident or manslaughter charge entitlement issue. See State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999); State v. Sullivan, 345 S.C. 169, 547 S.E.2d 183 (2001); State v. Hendrix, *supra*.

The other elements of self-defense in this case should not be in dispute. Appellant testified one of the men attacking the decedent pointed a gun at him and appellant's fear was

obviously reasonable given that a deadly weapon was pointed at him. Appellant was entitled to act on reasonable appearances where he was in imminent danger or believed he was in imminent danger. See, McAninch and Fairey, The Criminal Law of South Carolina, 1996 ed. at pg. 478-484.

Although appellant was retreating from the scene when the gun was pointing at him, he was not even required to retreat if that retreat increased his chance of being shot. State v. McGee, 185 S.C. 184, 190, 193 S.E. 303, 306 (1937). It is certainly one fair inference from this record that appellant increased the danger to himself by running.

Although appellant fetching his gun from the glove compartment with the intent to shoot it into the air may well have been stupid or childish, it did not make him responsible for the difficulty where the decedent was already being assaulted and robbed by other men. Since appellant met the four elements of self-defense cited in State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984), he was entitled to a self-defense instruction. The failure to give that instruction was reversible error.

2.

Evidence the decedent did not have a prior record was irrelevant in this case.

When the decedent's mother testified the solicitor asked her if she had plans for the decedent's continued education. The defense requested a bench conference. R. 253, ll. 7-16.

When the solicitor asked Mrs. Middleton if her son had any "kind of prior criminal record," defense counsel objected on the ground of relevance. R. 254, ll. 6-9. The judge overruled the objection, and Mrs. Middleton testified the decedent did not have any criminal record. R. 254, ll. 6-12.

Evidence is relevant if it tends to establish or make more or less probable some manner in issue upon which it directly or indirectly bears. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991); State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986). Evidence the decedent did not have a prior criminal record — or that he was a good person — was not any more relevant than whether he was planning to continue his education.

In State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999), the Supreme Court held that testimony from the decedent's sister that the decedent had attended Burke High School and played the drums in the high school band was irrelevant. The Court also found a photograph of the decedent should not have been admitted.

"We find Ms. Jones' testimony and the victim's photograph were not relevant to proving the guilt of appellant." State v. Langley, 515 S.E.2d at 100. Evidence the decedent was a good person or that he did not have a criminal record was not relevant, and it was not admissible against appellant in this case. This is just another example of this particular

solicitor's officer seeking to invoke sympathy through the admission of irrelevant evidence.

See State v. Langley, supra.

Appellant should be granted a new trial for the intentional insertion of this irrelevant testimony by the solicitor.

3.

The police officer's testimony that one witness said he did not hear anyone else shooting was inadmissible hearsay.

Officer Douglas Hester said he brought Deshawn Brown, Ellis Judon and Kenyon Nichols to the North Charleston Police Department after appellant mentioned them as witnesses to the fight and shooting. R. 210, ll. 7-22. When the solicitor asked what Officer Hester talked with these witnesses about, defense counsel objected on the grounds the solicitor was seeking to introduce hearsay testimony. R. 210, l. 7 – 211, l. 7.

When the solicitor asked Hester if Deshawn Brown told him he had heard “anybody else shooting out there,” defense counsel again stated this line of questioning was not proper. The judge stated he would allow the question. Hester then said Brown “never once told us about anybody else shooting at the scene.” Defense counsel also stated this was not proper impeachment. R. 211, l. 18 – 212, l. 16.

Discussion

Hearsay is a statement “other than one made by the declarant while testifying at trial or hearing, offered into evidence to prove the truth of the matter asserted.” See Rule 801(c), SCRE; Collins, South Carolina Evidence, §16.3 at pp. 476-484 (2nd Ed. 2000). The state did not lay any evidentiary predicate to show this testimony was admissible under a hearsay exception. In particular, there was no foundation to show that Brown told Hester this allegation while he was under the stress caused by the event or condition to allow it to be admissible as an excited utterance. See Collins, South Carolina Evidence, §19.4 at pp. 575-582 (2nd ed 2000).

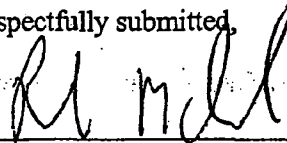
Moreover, even if the state argues this is alleged "corroboration" evidence, it is still devastating because of its cumulative effect. See, Ingle v. State, 348 S.C. 467, 560 S.E.2d 401, 404 (2002), citing Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994).

This hearsay testimony was offered to allegedly show that appellant was the only person who fired a weapon that evening. That was highly prejudicial testimony meant to destroy a claim of voluntary manslaughter. It was meant to show there was no legal provocation for appellant shooting his gun. It was also meant to counter evidence there were at least three guns in the parking lot that night, and appellant's testimony he heard gunshots after a gun was pointed at him, and he ran. See McAninch and Fairey, Criminal Law of South Carolina, at 156-163 (3rd ed) 1996). Appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Charleston County Court of General Sessions for a new trial.

Respectfully submitted,



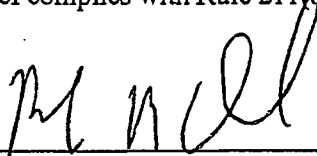
Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

This 28th day of April, 2003.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

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April 28, 2003

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

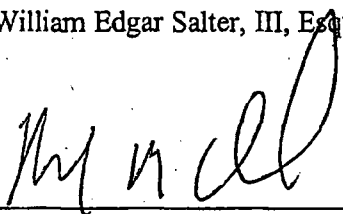
V.

BYRON B. SLATER,

APPELLANT

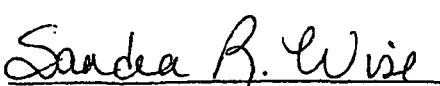
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William Edgar Salter, III, Esquire, this 28th day of April, 2003.


Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 28th day of April, 2003.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: February 3, 2005

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal From Charleston County
The Honorable Edward B. Cottingham, Circuit Court Judge**

THE STATE,

Petitioner,

vs.

LORD BYRON SLATER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

**HENRY DARGAN McMASTER
Attorney General**

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ATTORNEYS FOR PETITIONER.

QUESTION PRESENTED

Whether the majority of the Court of Appeals erroneously held that Respondent was entitled to a self-defense charge because there was no evidence presented to satisfy the first, third and fourth elements of self-defense or that Respondent communicated an intent to withdraw from the conflict, and the only evidence was that Respondent murdered an unarmed and defenseless victim?

STATEMENT OF THE CASE

Respondent is currently confined in the South Carolina Department of Corrections pursuant to commitment orders from the Charleston County Clerk of Court. The Charleston County Grand Jury indicted Respondent (Lord Byron Slater)¹ at the May 2001 term of court for murder (2001-GS-10-3221) and possession of a firearm during the commission of a violent crime (2001-GS-10-3226), in connection with the February 3, 2001 homicide of Sharone Willis Middleton. On November 13-15, 2001, Respondent received a jury trial on these charges before the Honorable Edward B. Cottingham. Charleston County Public Defender D. Ashley Pennington and Assistant Public Defender S. Boyd Young represented him at trial. Assistant Solicitors Dale DuTremble and Elizabeth Sumner, of the Ninth Circuit Solicitor's Office, prosecuted the case.

Judge Cottingham submitted the lesser-included offense of voluntary manslaughter to the jury, but the jury found Respondent guilty of both charges. Judge Cottingham sentenced him to life imprisonment. Respondent served and filed a timely Notice of Appeal. This appeal followed.

After the submission of briefs by the parties and oral argument on the issues raised therein, a majority of the Court of Appeals reversed Respondent's 2001 conviction in a published Opinion filed on August 9, 2004. *State v. Slater*, Opinion No. 3855 (S.C. Ct. App., Aug. 9, 2004). This Opinion is published as *State v. Slater*, 360 S.C. 487, 602 S.E.2d 90 (Ct. App. 2004), **App. 1-6**. In doing so, the majority addressed one of the three issues raised by Respondent: his claim that the trial judge erroneously failed to charge the jury on self-defense. The majority held that the failure

¹ The Initial Brief of Appellant is captioned "The State v. Byron B. Slater." However, the indictment lists his name as "Lord Byron Slater," and the transcript of record is entitled "The State of South Carolina v. Lord Byron Barclay Slater." The State would, therefore, ask this Court to recaption the case as "The State v. Lord Byron Slater" because the indictment should control the caption of the case.

to give the instruction constituted reversible error. 602 S.E.2d at 91-94.

The dissent found that Respondent was not entitled to a self-defense instruction because he "failed to effectively communicate his intent to withdraw after he provoked a dangerous situation." *Id* at 94-95 (Hearn, C.J., dissenting). The dissent further found that no other alleged error required reversal of Respondent's conviction. *Id* at 95-96 (Hearn, C.J., dissenting).

On August 24, 2004, Petitioner filed a Petition for Rehearing. App. 7-17. On June 25, 2004, the Court of Appeals entered an Order Denying Petition for Rehearing. App. 18-19. This Petition follows.

ARGUMENT.

The majority of the Court of Appeals erroneously held that Respondent was entitled to a self-defense charge because there was no evidence presented that Respondent shot his unarmed and defenseless victim in self-defense.

A majority of the Court of Appeals held that the trial judge erred by refusing to charge self-defense. *Slater*, 602 S.E.2d at 91-94. The State disagrees and submits that the trial judge properly refused to give such an instruction because it was not supported by any evidence presented at trial.

The State agrees with the majority that "[t]he evidence presented at trial determines the law to be charged. *State v. Goodson*, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994). If there is any evidence in the record to support self-defense, the issue should be submitted to the jury. *State v. Burkhardt*, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). Nor does the State take exception with the rule that "[f]or a defendant to argue self-defense, the record must demonstrate that "(1)[he] was without fault in bringing on the difficulty; (2) [he] actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4)[he] had no other probable means of avoiding the danger." *State v. Chapman*, 336 S.C. 149, 153, 519 S.E.2d 100, 103 (1999).

The prosecution's evidence clearly proved that Respondent was guilty of murder. Fifteen-year-old Demetrius Nelson rode with his brother, Mark, and the victim, (his twenty-year-old cousin) Sharone Middleton, to a step show dance competition at North Charleston High School on the evening of February 3, 2001. Mark Nelson went into the show around 8:30 p.m., while the victim and Nelson drove around on Rivers Avenue. The victim and Nelson returned to the high school shortly before the competition ended and parked in a church parking lot across the street from the school. They were in the victim's white Mazda, listening to music and talking. **R. pp. 12-16.**

Around 10:00 p.m., they spotted Mark Nelson standing at a cross-way across the street. Mark began walking towards the victim's car as soon as he spotted it. He began running towards the car when "about six to eight guys," whom Demetrius did not recognize, began following him. Mark jumped in the car and shouted for the victim to "just drive off." He also tried to close and lock his door, but an assailant managed to open the door and demanded that Mark give him money. When Mark responded that he did not have any money, they began hitting him until Mark gave them his money. Then, other men pulled Demetrius' door open and demanded his money. One of these individuals had a handgun. Demetrius told him he did not have any money, and the armed assailant struck him two times in his side. None of these individuals was Respondent. **R. pp. 16-19.**

Three or four other men pulled the victim out of the driver's side of the car and began kicking, beating and stomping on him. The victim covered himself on the ground in an effort to avoid their blows. Someone, other than the two armed men whom Demetrius had previously seen, shot the victim twice as he lay on the ground, defenseless. The shooter then ran away and continued shooting at the car until he jumped into another car. In all, six or seven more shots were fired. Demetrius never saw the shooter and did not see the direction in which the assailant's car fled. Finally, no one in his car had a weapon and the victim did not have a weapon in his hand as he lay on the ground.

R. pp. 19-24.

Mark Nelson corroborated his brother's account. He went outside and talked with two of his friends after the step show. As they were talking, he saw a white Land Rover pass them. Several minutes later a group of males ran up to this car and stopped it. "[T]he next thing we know, we all saw them coming back and then we saw one dude with a gun and . . . he was waving it. And when we saw that, everybody just started running." **R. pp. 35-38; 44-45.**

Mark ran straight toward the dirt parking lot where the victim and Demetrius were. Before he could close and lock his door, an unknown individual with the gun pulled him out of the car and demanded his money. This individual was not Respondent. Mark initially said that he did not have any money but gave the man his \$20.00 when the man threatened to shoot him.² R. pp. 38-39; 45-46.

Other individuals managed to pull Demetrius out of the car and the first armed assailant directed his attention toward Demetrius. When the man demanded Demetrius' money, Demetrius replied that he did not have any. The group then went around to the other side of the car, where still other individuals had managed to pull the victim from the car and were beating him in an effort to get his money. R. pp. 38-40; 47-48.

At that point, Mark saw two gunshots but could not see who shot his cousin because the group was surrounding him. The shooter began shooting again as he ran away from the scene. So, the Nelson brothers dove inside the car while the shooter fired a total of ten to twelve shots. The shooter and others ran straight to a "white or gray Crown Vic" and continued to shoot as they drove away from the scene. The person that robbed him was armed, but he was not the same person who shot the victim. No one in the victim's car had a weapon. R. pp. 40-43; 47-50.

Nineteen-year-old Terell Bryant testified that "[w]hen I walked out [of the gym] there was some commotion inside the bus parking lot." Bryant saw "Lord Byron walking towards me with a gun in his hand." He was walking with it "freely." Respondent and others then got into a white car and drove over to the parking lot where the victim was parked. R. pp. 66-68.

Although Bryant did not see who got out of the car, he saw the passenger door open and Respondent had gotten into the passenger door before the car left moments earlier. Bryant fell to the

² This individual was wearing a white "puffy" jacket.

ground as soon as he heard gunshots. He did not see anyone run back to the white vehicle but saw it leave the scene. He also heard gunshots being fired as the car was backing up to leave. He described the gun that Respondent was carrying as a black gun. **R. pp. 68-71.**

Deshawn Brown, who knows Respondent through his brother, also attended the step show that night. He spoke with Respondent and asked Respondent for a ride home. The car was being driven by "L", later identified as Ellis Judon. Before they left the vicinity, the group drove over to the parking lot, where there was a "commotion" taking place. Respondent got out of the car and walked into the crowd. Brown then heard gunshots. Everyone fled after the gunshots and Respondent ran back to the car. Brown did not see Respondent with a gun at this point. However, he saw it when Respondent fired it into the air as they were driving away from the parking lot. Brown testified that he heard other gunshots before they reached the church parking lot.³ They then went to Respondent's residence. Respondent also said that "[h]e think dog get hit," meaning that he thought that someone was shot. **R. pp. 82-84; 86-92.**

After they left the scene, they went to Respondent's residence. Respondent went into the house and did not have a weapon on him when he returned several minutes later. The group returned to the school and was stopped by police along the way. The police did not find a weapon in the car. Brown had already called his brother to get a ride home and his brother came and got him. Brown described the weapon Respondent had as a "black nine." **R. pp. 84-86.**

Kenyon Nichols, went to the step show because Judon and Respondent were there. He was planning to ride home with them after the show. When he got to Respondent's white Monte Carlo after the show, Judon, Respondent and Brown (a/k/a Erkel) were there. Judon was driving and

³ See Argument III.

Respondent was sitting in the front passenger seat. R. pp. 102-04; 106.

Judon drove over to the church parking lot where a "crowd of boys" or "a gang" were located. Respondent got out of the car and walked towards this crowd. The other occupants of the car proceeded to exit it also. By the time Nichols had taken five or six steps, he heard gunshots and ran back to the car. After the others returned to the car, they sped off towards Respondent's residence. As they were driving away, Respondent started shooting into the crowd. Also, Respondent said, "I think I shot him." They stopped briefly at Respondent's residence and returned to the parking lot, where they were stopped by the police. Police did not find anything in the car. They then went to Sonic and got something to eat. Nichols described Respondent's weapon as a black 9 mm. R. pp. 104-12.

Ellis Judon, who was twenty-three at the time of trial, is a very close friend of Respondent. At Respondent's invitation, he went to the step show on February 3, 2001, in Respondent's white Monte Carlo. Judon was driving. After the show, they were going to give both Nichols (a/k/a Snub) and Brown a ride home. They were sitting in the courtyard "chilling" and talking to some girls when a group of about five males whom Judon did not recognize came over to the courtyard. These individuals looked like they were going to cause trouble. R. pp. 114-18; 129-30.

According to Judon, they walked away from the group of five men, and the other group then stopped a Ford Explorer. Respondent immediately went to his car and retrieved his black 9 mm. pistol. Next, he ran in the direction of the truck which had been stopped, but did not do anything. Moments later, one of the members of the crowd said, "I see one" and began chasing another person across a dirt road into the church parking lot. R. pp. 119-21; 130-31.

Respondent, who still had his gun in his hand, ran back to his car and told Judon to go over

to the dirt church parking lot. Neither Judon nor Respondent had any reason to go to the parking lot. However, Respondent, Brown, and Nichols piled into the car and Judon drove them to the parking lot. When Judon turned on his bright lights, he could see the other group stomping and kicking a person lying on the ground. R. pp. 121-23; 131-32.

"L. B., Nichols and Brown all got out of the car." They immediately ran back to the car after Judon heard three or four gunshots and saw the person on the ground "flip over." When Respondent and the others returned to the car, Judon backed up and prepared to leave. As he did so, Respondent fired his weapon out of the window. The group then went back to Respondent's residence. Respondent went into the residence while the others stayed outside. Judon did not know whether Respondent had placed the weapon in his house, but he did not see Respondent put it back in the glove compartment of the car and no weapon was in the car when the police stopped them. Judon had seen Respondent with the 9 mm. on at least one or two occasions previously. R. pp. 122-29.

Following his arrest by Officer Chris Widmer, Respondent told Widmer "he had heard the shooting and that he ran to the area to see what happened. But he also said that he didn't shoot anybody." R. pp. 189-91; 197. However, when interviewed by Detective Douglas Hester at 1:45 p.m. on February 4, 2001, Respondent said that he, Ellis Backmon, Brown and Nichols went to his car after the step show, but they were blocked in in both the front and back. They saw "people running towards the church parking lot. Then we heard gunshots. Then the people who had us blocked in drove away so we followed them on to the road. It was a white Buick." Also, he claimed that he was driving his white Monte Carlo and was stopped by a female police officer who searched his car and the occupants before letting them go. After that, they went across the street to a phone booth and dropped off Brown, who was picked up by a person in a white Buick. Respondent was

clear that he was driving the car and that he did not have a gun in his car at anytime that evening. He likewise denied participating in a crime at North Charleston High School or shooting a gun anytime that evening. Further, he claimed the police had stopped him as soon as they left the school when asked if he had gone to his house after the incident but before the police had stopped him. R. pp. 219-25.

Expert ballistics testimony established that a slug removed from the victim at autopsy and one found in his clothing by EMS personnel were both fired by Respondent's weapon. Another bullet retrieved from a car parked in the church parking lot, as well as all seventeen fired cartridge casings found on the scene, were also positively matched to Respondent's weapon and a bullet jacket fragment was consistent with having been fired by his weapon or one similar to it. Nine millimeter cartridges seized pursuant to a search warrant of Respondent's residence were consistent with a type of cartridge that would be loaded into Respondent's weapon and are the correct caliber for his pistol.⁴ R. pp. 143-64; 241-46; 251.

Respondent only presented two witnesses, himself and SLED Agent Joseph Powell. Agent Powell, who is an expert in gunshot residue analysis, testified that his testing on samples taken from the victim's hands revealed that the victim had gunshot residue on his right palm, which indicated that he may have handled or fired a weapon. R. p. 271.⁵

Respondent, a nineteen-year-old man at the time of the incident, testified that he and Judon

⁴ Police also seized a .35 caliber pistol as well as some .35 caliber ammunition and .25 caliber ammunition from Respondent's residence.

⁵ While Powell could not say with certainty that the victim did not fire a weapon, he opined that it was very unlikely that the decedent shot a weapon before he was killed and it was more probable that he acquired the residue either from the cloud of gases emitted by the gunshots or by handling a weapon. R. pp. 272-76; 280-81; 283-85.

went to the step show in his white Monte Carlo. They met up with Nichols and Brown at the show. Respondent remained at the school after the show. He was talking with some girls outside when three or four men ran up to the truck and yelled at some of the people in it. He claimed that he "wasn't too much worried about that" but admitted that he immediately walked back to his car, opened the door and grabbed his gun. His initial intent was "to shoot in the air" in order to create a commotion allegedly because "[t]hat's just something that young people be doing like after parties or clubs or whatever." R. pp. 291-94.

He walked over to the group, but changed his mind and did not fire the weapon. Instead, he kept the gun "pretty low by my leg" and walked back to his car once the disturbance at the truck had ended. When he reached the car, he noticed that "something was going on in the parking lot. So, . . . I start[ed] walking toward the parking lot." He claimed it looked like a fight was taking place and he only wanted to find out what was happening. However, he never put his gun back in the glove compartment. R. pp. 295-96.

He walked into the dirt parking lot and saw two or three separate fights. He saw two people beating on one person on one side of the car. On the other side of the same car, he saw another two on one encounter as well as someone on the ground being beaten. He walked up where two men were "tussling or tugging." This was a different area from where he had seen the person lying on the ground being beaten. As he approached, he apparently surprised one of the individuals "and he turned to me and he had a gun in his hand. And I see his gun and I started running. And I heard a gunshot. And I start shooting my gun." R. pp. 296-99.

Respondent claimed that he ran as soon as he saw the person pull the weapon on him and only started shooting after he heard a gunshot fired in his direction. Also, he clearly testified that he fired

his weapon as he ran away from the scene and he was unsure as to how many times he had fired his weapon. On cross-examination, he admitted that he had loaded and cocked his weapon earlier that day. He also admitted that he had put a round into the chamber because he was going to use it. R. pp. 298-311.

Respondent requested a jury instruction on self-defense. He argued that there was evidence a gun was pointed at him and that he ran away out of fear. He also claimed a reasonable person under the same circumstances could have reacted in the manner in which he did and that his actions were, therefore, reasonable. Because the trial judge had expressed in chambers that he was not without fault in bringing on the difficulty, he argued that he was not because the altercation involving the victim was already taking place when he approached the crowd. The State argued against a self-defense instruction. The trial judge rejected the instruction because he was convinced that self-defense was not an issue in the case. Despite his ruling, he agreed to charge voluntary manslaughter out of an abundance of caution. R. pp. 334-38.

Initially, the State submits that the majority erroneously held that Respondent was entitled to a self-defense charge because he was at fault in bringing on the difficulty. It is clear that "[o]ne who provokes or initiates an assault cannot escape criminal liability by invoking self-defense." *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). However, a defendant can restore his right to self-defense if he withdraws from the conflict and communicates that decision to the opponent. *Id.*" *Slater*, 602 S.E.2d at 92-93. The majority concluded that

[h]ere, there was some evidence to support a self-defense charge. Slater maintains that when he approached the altercation between the victim and his attackers, an attacker pointed a gun at Slater. Slater then turned and ran. While running away, Slater heard gunshots and returned fire, not looking in the direction where he was firing. Slater

testified, "when I walked up on him, I guess I surprised him and he turned to me and he had a gun in his hand. And I see his gun and I started running." He added, "Yeah, when I walked up on him like here, like he turned to me, like had the gun pointed at me like he surprised." Additionally, Mark Nelson, a friend of the victim, testified that he saw one of the attackers--someone other than Slater--with a gun.

The State insists that Slater bears some responsibility for the tragedy because he was in unlawful possession of a gun and carried that gun into the altercation. However, the mere unlawful possession of a firearm, with nothing more, does not automatically bar a self-defense charge. See *State v. Burris*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (explaining that "a person can be acting lawfully, even if he is in unlawful possession of a weapon"). As importantly, Slater testified that he turned and started to run away from the attacker holding the gun. Therefore, even if Slater initially contributed to the difficulty, that he turned and ran away would restore his right to self-defense. See *Bryant*, 336 S.C. at 346, 520 S.E.2d at 322 (explaining that an appellant's attempt to leave the scene of a confrontation would signal that the "appellant truly intended to withdraw" from the situation). See also *State v. Rogers*, 329 S.C. 520, 525, 466 S.E.2d 360, 363 (1996) (reasoning that Rogers faced no overt threat because his opponent was moving away from him and said nothing to evince a threat).

Slater, at 602 S.E.2d at 93.

It is the State's position that the majority erroneously concluded that there was evidence that Respondent shot the victim in self-defense. The State's evidence clearly showed that the victim was being assaulted and robbed by another group of people when Respondent decided, for reasons known only to him, to approach the crowd while armed with a weapon and shoot the victim twice in the chest as the victim lay on the ground. The victim was not armed and had not done anything, whatsoever, to provoke him.

Further, the State's evidence clearly established that Respondent continued to fire his weapon at the victim and the others in the victim's party as he fled back to his car and even as the car sped

away from the scene. Thus, the State's evidence demonstrates beyond cavil that Respondent was not without fault in bringing on the difficulty. He also failed to meet the third and fourth elements of a self-defense charge under *State v. Goodson*.

Likewise, Respondent's own testimony does not support a self-defense instruction. To the contrary, he admitted that the victim had done nothing to provoke him and that the victim was in a different area from where he saw the two people struggling. He also admitted that he expressly loaded his weapon and cocked it earlier that day because he intended to use it; and that he had initially approached the crowd around the truck with the intent to discharge his weapon and cause a commotion because this is what young people do. R. pp. 291-94.

Further, even though he had a fully loaded and cocked weapon in his hand and had intended to use his weapon that evening, he did not make any effort to immediately fire at his putative assailant, who was some ten to fifteen feet away from him, until after a shot was fired at him as he fled the confrontation. Also, he continued to fire his weapon as he ran away from the scene, without any regard to where the shots he was firing were going; and he continued to fire his weapon until there were no more bullets in it. R. pp. 311-14; 319-22. Finally, the State's cross-examination established that Respondent shot, killed and, in fact, "murdered" the victim. R. p. 330.

Under these circumstances, Respondent's own testimony clearly reflects that he was not without fault in bringing on the difficulty, that the circumstances were not such as would warrant a man of ordinary prudence and courage to strike the fatal blow to save himself from serious bodily harm or losing his own life and that he had other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury other than to act as he did. See *Goodson*; *State v. Hendrix*, 270 S.C. 653, 244 S.E.2d 503 (1978). As a result, he was not entitled to a self-defense

instruction and the trial judge's ruling must be affirmed. *Id.*

The majority rejected the State's position that Respondent could not be entitled to a self-defense charge because he was at fault in bringing on the difficulty, stating that "[t]he State insists that Slater bears some responsibility for the tragedy because he was in unlawful possession of a gun and carried that gun into the altercation. However, the mere unlawful possession of a firearm, with nothing more, does not automatically bar a self-defense charge." *Slater*, 602 S.E.2d at 93, citing *Burris, supra*. Yet, the majority clearly overlooked that Respondent was not merely "in unlawful possession of a gun" that he had carried into the altercation. Instead, Respondent admittedly loaded his weapon and cocked it earlier that day because he intended to use it; and he admitted that he had initially approached the crowd around the truck with the intent to discharge his weapon and cause a commotion because this is what young people do. R. 291-94

Further, his testimony supports the conclusion that he was some distance away from the victim and the fights, involving people unknown to him, before *he deliberately approached the area where the shooting took place with his loaded and cocked weapon*. He could have easily avoided any lethal confrontation by not intervening.

Thus, his testimony established that he quite literally went looking for trouble and found it. As a result, the majority erred by holding that this was self-defense. Rather, as in *Bryant*, his actions were "in violation of law and reasonably calculated to produce the occasion." 336 S.C. at 345, 520 S.E.2d at 322. *See also Slater*, 602 S.E.2d at 94 (Hearn, C.J., dissenting) ("Here, all the evidence, including Slater's own testimony, indicates that he provoked a conflict by running toward an altercation while conspicuously holding a cocked and loaded handgun, even though he had no

personal connection to the people involved in the fight").⁶

Moreover, in finding that Respondent had effectively communicated his intent to withdraw to the attacker with the gun, the majority found that "[Respondent] immediately 'turned and ran' after seeing the attacker's gun. [Respondent] did exactly what the supreme court looked for in *Bryant*: he left--quickly." *Slater*, 602 S.E.2d at 94. This conclusion ignores that "[a] person who provokes an assault cannot claim a right to self-defense unless that person 'withdraws in good faith from the conflict and announces in some way to his adversary his intention to retire.'" *Bryant*, 336 S.C. at 345, 520 S.E.2d at 322. *See also Slater*, at 94 (Hearn, C.J., dissenting).

As correctly noted by the dissent, "[Respondent] admitted that the events--his running, hearing the shot, and firing back--all "happened so fast." [Respondent] further admitted that he not only shot backwards as he was running away, but that he also shot in the air after he had gotten inside a car and was riding away from the scene. ... [E]ven if Respondent] intended to withdraw, neither his words nor his actions communicated this intent." *Slater*, 602 S.E.2d at 94 (Hearn, C.J., dissenting), citing *Bryant*, 336 S.C. at 345, 520 S.E.2d at 322 ("One's right to self-defense is restored after a withdrawal

⁶ Respondent could not indiscriminately intervene in the on-going conflict(s). In South Carolina, one may act in defense of others. Yet, "[u]nder the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander [*only if*] that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense." *State v. Starnes*, 340 S.C. 312, 322-23, 531 S.E.2d 907, 913 (2003) (emphasis added).

"[I]n order for the trial court to give a defense of others charge, there must be some evidence adduced at trial that the defendant was indeed lawfully defending others." *Douglas v. State*, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998); see also William S. McAninch & W. Gaston Faurey, *The Criminal Law of South Carolina* (3rd ed. 1996) ("There must, of course, be some evidence that the defendant was defending others at the time of his act in order for him to be entitled to the instruction."). Thus, he could have only intervened on behalf of the victim. However, that is not what Respondent did. Instead, he claimed it looked like a fight was taking place and he only wanted to find out what was happening. However, he never put his gun back in the glove compartment. *R.* pp. 295-96. Once again, this prevents him from being without fault in bringing on the difficulty.

from the initial difficulty with the victim if that withdrawal is communicated to the victim by word or act.") and *State v. Graham*, 260 S.C. 449, 196 S.E.2d 495 (1973). Therefore, the majority may have overlooked that the dissent's analysis was correct:

Despite Slater's claim that he attempted to retreat, he admitted that he still had a cocked and loaded gun in his hand. With a dangerous weapon readily available for Slater to use, the person whom Slater had approached could not have known whether Slater was withdrawing from the conflict or whether Slater was retreating to gain tactical advantage. See 40 C.J.S. *Homicide* § 125 (1991) ("As long as a person keeps his gun in his hand prepared to shoot, the person opposing him is not expected or required to accept any act or statement as indicative of an intent to discontinue the assault."); see also *Bryant*, 336 S.C. at 346, 520 S.E.2d at 322 (finding the defendant failed to effectively communicate his withdrawal even though he threw down his knife because the defendant admitted the victim did not see him drop the knife). Because Slater failed to communicate his intent to withdraw, his right to use self-defense was never restored. Therefore, I find no error in the trial court's refusal to charge self-defense.

Slater, at 94-95 (Hearn, C.J., dissenting).

Finally, the majority decision below ignores that Respondent could not be entitled to a self-defense instruction with respect to shooting *the victim in this case* because the victim had not done anything to provoke anyone and was a totally innocent person who was being robbed, beaten and stomped at the time of the shooting. Apparently, the majority decision implicitly applied the doctrine of "transferred self-defense," which has not been previously adopted in this State. See *State v. Porter*, 269 S.C. 618, 239 S.E.2d 641 (1977). The present case demonstrates beyond any question problems inherent in such a doctrine, which excuses the shooting of an innocent person who has not done anything to provoke any attack from anyone, much less this criminal defendant.

More importantly, transferred self-defense is inconsistent with current South Carolina law regarding self-defense. As *Goodson*, *Bryant*, *State v. Bruno*, 322 S.C. 534, 473 S.E.2d 450 (1996).

Tate v. State, 308 S.C. 163, 417 S.E.2d 553 (1992), *State v. Davis*, 282 S.C. 45, 317 S.E.2d 452 (1984) and other self-defense cases decided by this Court and the Court of Appeals demonstrate, a self-defense instruction is presently given only in limited situations because it completely bars the prosecution of an otherwise unlawful act. The evidence must show that the defendant's conduct clearly falls within the four elements of self-defense and that his actions were proportioned to the danger confronting him. Further, self-defense is less readily available when lethal force is used. See *Goodson, supra*.

It is the State's position that any contrary holding would be simply wrong. Also, this Court has expressly refused to recognize "imperfect self-defense," which would reduce murder to manslaughter where the defendant could not meet all four elements of self-defense. *State v. Finley*, 277 S.C. 548, 290 S.E.2d 888 (1982). Allowing the majority decision to stand, as written, would require this Court to ignore its own precedent and extend the protection of self-defense to incidents which involve the death or maiming of totally innocent bystanders. It would, quite literally, grant a defendant a license to kill innocent people. However, such a ludicrous position is completely unnecessary because the defense of accident has previously recognized in South Carolina. *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999).⁷

Therefore, the State submits that the majority of the Court of Appeals erroneously held that the trial judge had an obligation to instruct the jury on self-defense, and that no other reversible error

⁷ Also, with the proliferation of youth in this and other states carrying handguns -- not to mention recent legislative amendments which make it easy for most adults in South Carolina to lawfully carry a concealed handgun -- the State would strongly urge this Court not to adopt a theory of defense which will allow innocent people to be injured or killed, and which may encourage the use of guns by providing an easy out for a killer. As the present case, once again, clearly demonstrates, any such theory will be felt most heavily by those otherwise innocent people who merely are unfortunate enough to be poor and live in areas where crimes most often occur.

is present in the case..

CONCLUSION

For the reasons stated above, Petitioner submits that this Court should grant certiorari and reverse the Opinion and judgment of the Court of Appeals.

HENRY DARGAN McMASTER
Attorney General

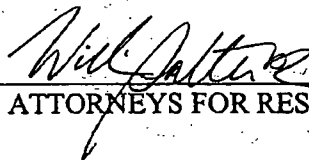
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By:



ATTORNEYS FOR RESPONDENT

October 25, 2004.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Charleston County
The Honorable G. Edward B. Cottingham, Circuit Court Judge

THE STATE,

PETITIONER,

vs.

LORD BYRON SLATER,

RESPONDENT.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for Petitioner, certify that I have served the within Petition for Writ of Certiorari on Respondent by depositing two copies of same in the United States mail, postage prepaid, addressed to his attorney of record, Robert M. Dudek, Esquire, South Carolina Office of Appellate Defense, 1205 Pendleton Street, Room 306, Columbia, South Carolina 29201. I have also this date served one copy of the Appendix on Mr. Dudek via United States mail.

This 25th day of October, 2004.



WILLIAM EDGAR SALTER, III

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P. O. Box 11549
Columbia, South Carolina 29211

ATTORNEY FOR RESPONDENT

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Byron B. Slater, Appellant.

Appeal From Charleston County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 3855
Heard April 7, 2004 – Filed August 9, 2004

REVERSED AND REMANDED

Assistant Appellate Defender Robert M. Dudek, of Columbia,
for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy
Attorney General John W. McIntosh, Assistant Deputy Attorney
General Donald J. Zelenka, and Senior Assistant Attorney
General William Edgar Salter, III, all of Columbia; and Solicitor
Ralph E. Hoisington, of Charleston, for Respondent.

BEATTY, J.: Byron Slater appeals his conviction on a murder charge, alleging, *inter alia*, that the trier of fact erred in failing to charge the jury on self-defense. We reverse and remand.

FACTS

Appellant Byron Slater was with some friends on the evening of February 3, 2001, at a school gymnasium where there had been a dance. Following the dance, Slater went outside, where he started talking with females. While there, he became aware of a disturbance near a truck. Slater walked to his car, retrieved his gun, and started to walk toward the truck. [1] Slater then changed his mind. He walked back toward his car where three friends, Ellis Judon (the driver), Kenyon Nichols, and Deshawn Brown, were waiting for him. Moments later, Slater noticed that another disturbance was taking place in an adjacent parking lot and he wanted to see what was going on. Slater asked Judon to drive there. [2] In that second parking lot, an apparent robbery was unfolding. The victim was on the ground, being stomped by five men. Slater knew neither the victim nor his attackers.

Slater testified that he walked up to the robbery and surprised one of the attackers. The man then turned around and pointed a gun toward Slater. Slater quickly turned around and started running back toward his car. As he ran, he heard a gunshot and responded by shooting his own gun behind him. Slater got into his car where his friends were waiting for him. [3] He continued shooting in the air as the car pulled away. In the ensuing chaos, the victim of the attempted robbery lay dying on the ground. He had been shot twice.

occurred. On the way, the police stopped them and searched the car but did not find any weapon.

Early the next morning, detectives from the city of North Charleston went to Slater's residence to arrest him. Following the arrest, they obtained a search warrant for Slater's house. The detectives recovered various types of ammunition from Slater's yard and from inside his house, including two guns, some projectiles, bullet shell casings.

At the police station, Slater told the police that he "didn't shoot anybody." However, a ballistics expert testified at trial that the fatal bullets came from Slater's gun, as did the ones retrieved from the crime scene. Additionally, numerous witnesses placed Slater at the crime scene with a gun. Slater himself admitted shooting his gun, but insisted that he did not mean to shoot anyone. The jury convicted Slater of murder, although the trial judge had included a manslaughter option in the jury charge. [4] The trial judge expressly refused to include a self-defense charge.

ISSUES

- I. Did the trial judge err in refusing to include a self-defense charge, reasoning that Slater had brought about the difficulty?
- II. Did the trial judge err in allowing the victim's mother to testify that her son did not have a criminal record?
- III. Did the trial judge err in allowing a detective to testify that an eyewitness to the crime had denied hearing any gunshot other than Slater's?

LAW/ANALYSIS

Slater argues that the trial judge committed reversible error in refusing to include a self-defense charge.

The evidence presented at trial determines the law to be charged. State v. Goodson, 312 S.C. 278, 535 S.E.2d 370, 372 (1994). If there is any evidence in the record to support self-defense, the issue should be submitted to the jury. State v. Burkhardt, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002); State v. Hill, 341 S.C. 260, 261, 433 S.E.2d 848, 849 (1993). A trial judge's failure to do so is reversible error. State v. Bryant, 341 S.C. 410, 416, 535 S.E.2d 431, 434 (2000). Additionally, "[c]urrent law requires the State to disprove self-defense, once raised by the defendant, beyond a reasonable doubt." Burkhardt, 350 S.C. at 261, 565 S.E.2d at 303 (citing State v. Wiggins, 330 S.C. 538, 544, 500 S.E.2d 489, 494 (1998)).

For a defendant to argue self-defense, the record must demonstrate that "(1) [he] was without fault in bringing about the difficulty; (2) [he] actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4) [he] had no other probable means of avoiding the danger." State v. Chapman, 341 S.C. 149, 153, 519 S.E.2d 100, 103 (1999). Moreover, "[o]ne who provokes or initiates an assault cannot avoid criminal liability by invoking self-defense." State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). However, a defendant can restore his right to self-defense if he withdraws from the conflict and communicates that decision to the opponent. Id.

Here, there was some evidence to support a self-defense charge. Slater maintains that when he approached the altercation between the victim and his attackers, an attacker pointed a gun at Slater. Slater then turned and ran. While running away, Slater heard gunshots and returned fire, not looking in the direction where the attacker was firing. Slater testified, "when I walked up on him, I guess I surprised him and he turned to me and

The State insists that Slater bears some responsibility for the tragedy because he was in unlawful possession of a gun and carried that gun into the altercation. However, the mere unlawful possession of a firearm, nothing more, does not automatically bar a self-defense charge. See State v. Burris, 334 S.C. 256, 2 S.E.2d 104, 108 (1999) (explaining that "a person can be acting lawfully, even if he is in unlawful possession of a weapon"). As importantly, Slater testified that he turned and started to run away from the attacker with the gun. Therefore, even if Slater initially contributed to the difficulty, that he turned and ran away would preserve his right to self-defense. See Bryant, 336 S.C. at 346, 520 S.E.2d at 322 (explaining that an appellant's attempt to leave the scene of a confrontation would signal that the "appellant truly intended to withdraw from the situation"). See also State v. Rogers, 329 S.C. 520, 525, 466 S.E.2d 360, 363 (1996) (reasoning Rogers faced no overt threat because his opponent was moving away from him and said nothing to threaten).

The dissent contends that Slater "provoked a conflict by running toward an altercation while conspicuously holding a cocked and loaded gun." The record provides otherwise. Slater testified, "I walked up on [the attacker] . . . [the gun] was by my side . . . in my right hand." That testimony is uncontroverted. The dissent apparently assumes that (1) one of the attackers saw Slater's gun; (2) was afraid for his own safety; and (3) started to shoot as a result. That scenario is plausible, but the record fails to establish it. [5] It is just as likely that Slater's gun was inconspicuous, especially given that the regrettable events of that evening occurred when "it was pretty dark" and that Slater had his gun by his side.

Citing Bryant, the dissent argues that "Slater failed to effectively communicate his intent to withdraw from the attacker with the gun. We disagree. In Bryant, the victim apparently caught the appellant breaking into the victim's truck. Id. at 343, 520 S.E.2d at 321. The two struggled, and the appellant stabbed the victim with a screwdriver. Id. at 344, 520 S.E.2d at 321. The appellant argued that he was entitled to a self-defense charge because he had dropped his knife to the ground before the fight began. Id. According to him, his gesture indicated his intent to withdraw and restored his right to self-defense. Id. Our supreme court rejected the argument.

The court initially found that the appellant brought on the difficulty because the attempted break-in was a violation of law and reasonably calculated to produce the occasion." Id. at 345, 520 S.E.2d at 322. It clarified, however, that, "[i]f, after commencing the assault, the aggressor withdraws in good faith from the conflict and announces in some way to his adversary his intention to retire, he is restored to his right to self-defense." Id. (citation omitted). In that case, the appellant himself admitted that the victim did not see him drop the knife, and therefore could not have known about the alleged withdrawal. The court reasoned earlier, that "[i]f appellant truly intended to withdraw he could have easily left the open parking lot." Id. at 345, 520 S.E.2d at 322.

Here, Slater merely walked toward the altercation; he threatened or assaulted no one. [6] More importantly, Slater immediately "turned and ran" after seeing the attacker's gun. Slater did exactly what the supreme court looked for in Bryant: he left – quickly.

Admittedly, as the dissent posits, the attacker may have thought that Slater was withdrawing simply for [some] tactical advantage." However, our task is not to determine the attacker's state of mind. Rather, as instructed by our supreme court, we are to see only whether "any evidence" in the record supports a self-defense charge. [7] Day, 341 S.C. at 416, 535 S.E.2d at 434. We find that there is some. The trial judge therefore, erred in not including the charge.

Having found that the exclusion of the requested self-defense charge was error, we need not address any remaining issues.

ANDERSON, J., concurs and HEARN, C.J., dissents separately.

HEARN, C.J., dissenting: Because Slater failed to effectively communicate his intent to withdraw a provoked a dangerous situation, I do not believe he was entitled to a charge of self-defense. Therefore respectfully dissent.

A person who provokes an assault cannot claim a right to self-defense unless that person "withdraw[ed] faith from the conflict and announces in some way to his adversary his intention to retire." State v. Blum, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999) (quoting 55 A.L.R.3d at 1003). Here, all the evidence including Slater's own testimony, indicates that he provoked a conflict by running toward an altercation conspicuously holding a cocked and loaded handgun, even though he had no personal connection to people involved in the fight. [9]

Slater argues that he withdrew from the conflict because (1) he began to run when a man involved in turmoil pointed a gun at him, and (2) he did not shoot his gun until he heard someone else fire first. In his testimony, Slater admitted that the events - his running, hearing the shot, and firing back - all "happened so fast." Slater further admitted that he not only shot backwards as he was running away, but that he was in the air after he had gotten inside a car and was riding away from the scene. In my view, even if Slater intended to withdraw, neither his words nor his actions communicated this intent. See id. ("One's right to self-defense is restored after a withdrawal from the initial difficulty with the victim if that withdrawal is communicated to the victim by word or act."); State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973).

While the trial court is required to charge the jury on self-defense if there is any evidence supporting it, I charge, all the evidence in the record shows that Slater provoked a dangerous situation and no evidence indicates that he ever communicated his withdrawal after the

provocation. Despite Slater's claim that he attempted to retreat, he admitted that he still had a cocked and loaded gun in his hand. With a dangerous weapon readily available for Slater to use, the person who had approached could not have known whether Slater was withdrawing from the conflict or whether Slater was retreating to gain tactical advantage. See 40 C.J.S. Homicide § 125 (1991) ("As long as a person keeps his gun in his hand prepared to shoot, the person opposing him is not expected or required to make any act or statement as indicative of an intent to discontinue the assault."); see also Bryant, 336 S.C. 340, 520 S.E.2d at 322 (finding the defendant failed to effectively communicate his withdrawal even though he threw down his knife because the defendant admitted the victim did not see him drop the knife). Because Slater failed to communicate his intent to withdraw, his right to use self-defense was never restored. Therefore, I find no error in the trial court's refusal to charge self-defense.

Because I disagree with the majority's decision to reverse on the failure to charge self-defense, I briefly address Slater's additional arguments on appeal. In addition to his argument regarding self-defense, Slater also contends the trial court erred by allowing the victim's mother to testify that her son did not have a criminal record.

Rule 404(a)(2), SCRE, states that although character evidence is generally not allowed, "[e]vidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case [is admissible] when it is used] to rebut evidence that the victim was the first aggressor." Here, because the gist of Slater's defense at trial was that he had been shot at first, evidence regarding the victim's character was properly offered to rebut the inference that the victim may have been the initial shooter. [10] Therefore, I find no error in the trial court allowing this testimony.

gunshot earlier in the evening when he and Slater were "standing by the school by the gym." On redi examination, Brown testified that he remembered giving a statement to the police. When asked whe told the investigating officers that he heard gunshots earlier that night, Brown replied that he did not. explained that he never told anyone about the gunshots he heard because, until the trial, he had neve asked about hearing any other gunshots that night.

At a later point in Slater's trial, the State questioned one of the officers who had questioned Brown, a following exchange occurred:

Q: Did you ask them about guns at the scene of the crime?
 A: Yes, I did.
 Q: Did you ask them about anybody else shooting at the scene of the crime?
 A: Yes, I did.
 Q: Well, when you were interviewing Deshawn Brown, did he ever tell you that he heard anybody else shooting out there?
 Defense Counsel: Objection, your Honor, that's not proper.
 The Court: No, sir, I will – no, sir, I'll permit that question. Go ahead.
 Q: Did he ever tell you that?
 A: I interviewed Deshawn Brown. He never once told us about anybody else shooting at the scene.

Slater contends on appeal that the above testimony was inadmissible hearsay because it refers to a statement "other than one made by the declarant while testifying at trial or hearing, offered into evidence to prove the truth of the matter asserted." See Rule 801(c), SCRE.

While the above testimony regarding the statements of Brown is hearsay, we find that it is admissible under Rule 613(b), SCRE. This rule provides, in pertinent part:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible.

Rule 613(b), SCRE (emphasis added). When a witness is presented with the requisite circumstances surrounding an alleged inconsistent statement and nevertheless continues to deny before the court e making the statement, another person's testimony that the witness did, in fact, make that statement is admissible under Rule 613(b), SCRE. See State v. Fossick, 333 S.C. 66, 69-70, 508 S.E.2d 32, 33

In the case before us, the investigating officer testified that he asked all the witnesses (including Brown) whether anyone else was shooting a weapon at the scene of the crime. He testified Brown had not told him about anyone else shooting. Because Brown denied ever being asked this question after he was presented with all the requisite circumstances, the officer's testimony constituted extrinsic evidence of a prior inconsistent statement and was admissible under Rule 613(b). Thus, the judge acted properly in overruling Slater's objections to the testimony.

[1] Slater testified that he retrieved the gun "to shoot it in the air ... something that young people do after parties or clubs or whatever."

[2] There is some dispute as to these facts. Slater contends that he never returned to his car because realized another confrontation was taking place in another parking lot and walked over there instead, carrying his gun.

[3] Nichols and Brown, too, had gotten out of the car, but apparently returned before Slater.

[4] The jury also convicted Slater on one count of possession of a firearm during the commission of a crime.

[5] The men involved in the robbery were apparently never apprehended. They did not participate in the proceedings, so what they may have seen is unclear.

[6] If the gun was indeed inconspicuous (see earlier discussion), it is difficult to imagine how Slater's walking toward the robbery was "in violation of law and reasonably calculated to produce" the difficult cases cited by the Bryant court all involved robbers or other felons claiming self-defense when the victims tried to defend themselves. See id. at 345, 520 S.E.2d at 322.

[7] Additionally, the supreme court cautioned that "a trial judge should specifically tailor the self-defense instruction to adequately reflect the facts and theories presented by the defendant." Day, 341 S.C. at 535 S.E.2d at 435.

[8] See Burkhart, 350 S.C. at 264, 565 S.E.2d at 304 (ordering a new trial on charges of possession of a firearm during the commission of a violent crime after overturning the underlying conviction on the violent crime).

[9] Slater made no claim of "defense of others at trial," nor did his testimony in any way reflect an intent to enter the conflict in defense of those being attacked.

[10] After the victim's mother testified, Slater presented testimony that powder residue on the victim's clothing could have resulted from the victim firing a weapon, further indicating that the defense's strategy was to implicate the victim as the initial shooter.

The South Carolina Court of Appeals

The State,

Respondent,

v.

Lord Byron Slater,

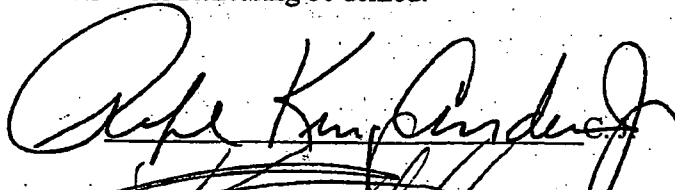
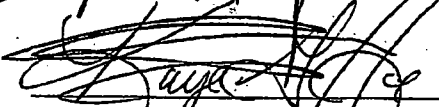
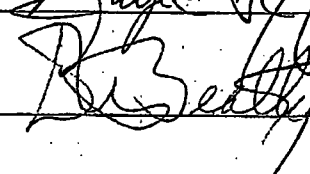
Appellant.

The Honorable Edward B. Cottingham
 Charleston County
 Trial Court Case No. 2001-GS-10-03221
 2001-GS-10-03226

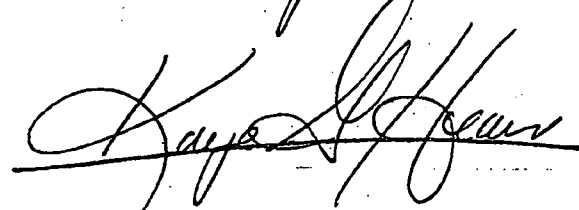
ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.


 J.
 J.

Columbia, South Carolina
 September 23, 2004

I would grant:


STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

PETITIONER,

V.

LORD BYRON SLATER,

RESPONDENT

RETURN TO
PETITION FOR WRIT OF CERTIORARI

ROBERT M. DUDEK
Assistant Appellate Defender

South Carolina Office
of Appellate Defense
1205 Pendleton Street, Room 306
Columbia, S. C. 29201

ATTORNEY FOR RESPONDENT

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COUNTER QUESTION PRESENTED

Whether the Court of Appeals correctly held respondent was entitled to an instruction on self-defense where there was evidence of a fight and robbery in a parking lot that respondent was not involved in, there was evidence that a gun was pointed at respondent when he went near the commotion, and evidence that respondent only returned fire after hearing a gunshot while he was on the run from the armed man, since this constituted evidence of self-defense mandating that instruction?

STATEMENT OF THE CASE

Respondent was indicted by the Charleston County grand jury for the offenses of murder and possession of a firearm during a violent crime. R. 392. His case came on for trial on November 13, 2001, before the Honorable Edward B. Cottingham and a jury. Ashley Pennington and S. Boyd Young represented respondent. The solicitor was Dale DuTremble. R. 1.

The jury found respondent guilty on both counts. R. 389, l. 24 – 390, l. 10. Judge Cottingham sentenced respondent to life imprisonment. R. 391, ll. 1-3.

The Court of Appeals reversed respondent's murder conviction in State v. Slater, 360 S.C. 487, 602 S.E.2d 90 (Ct. App. 2004). The majority held that respondent was entitled to an instruction on self-defense. The majority of the Court of Appeals consequently did not address respondent's two other assignments of error that he argued also entitled him to a new trial.

The state filed a petition for rehearing. That rehearing petition was denied. The state then filed a petition for writ of certiorari with this Court. This return to that petition follows.

ARGUMENT

The Court of Appeals properly held respondent was entitled to an instruction on self-defense since there was evidence respondent acted in self-defense. There was evidence that someone pointed a gun at respondent during a fight --which turned out to be a robbery attempt -- in the parking lot that respondent was not involved in, and where he went near the commotion. Respondent only returned fire after the gun was pointed at him, after he ran from the gun, and after he heard a gunshot. This testimony constituted evidence of self-defense mandating that instruction.

Relevant Facts

Fifteen-year-old Demetrius Nelson went by the Step Show Dance at North Charleston High School on February 3, 2001. The decedent was driving. R. 12, l. 4 - 13, l. 6. The decedent and Nelson drove around Rivers Avenue while his brother, Mark, actually attended the dance for its duration. R. 15, ll. 1-18.

Near the conclusion of the dance, the decedent and Nelson returned to the High School. They parked in a lot across the street from the school. R. 15, ll. 16-18.

They listened to music in the car, and they talked until Mark spotted them when he came outside. Mark began walking towards the car. However, "some guys was following him, maybe about six to eight guys behind him." Respondent was not with these men, and one of them asked Mark for his money. When Mark responded he did not have any money, they started beating him. R. 16, l. 10 - 17, l. 25.

Another man pulled the decedent out of the driver's side of the car and "they started like kicking him and stomping him or whatever." R. 18, ll. 6-10. Another man threatened to shoot Nelson unless he gave him his money. R. 19, ll. 1-16. The decedent was on the ground outside

"covering up like his body or whatever so he wouldn't get hurt" when someone shot the decedent. Nelson did not see who shot him. R. 20, ll. 5-24.

Nelson said the decedent did not have a gun, but that at least three people at the scene had handguns that night. R. 24, ll. 3-15; R. 32, ll. 6-18. Mark Nelson recalled trying to fight these men off when he heard the decedent get shot two times. R. 39, l. 2 - 40, l. 10.

Another man at the scene, Terrell Bryant, remembered "when I walked out there [outside the dance] there was some commotion inside the bus parking lot and I was by the car that I was riding in and I saw Lord Byron walking towards me with a gun in his hand." Bryant testified respondent got into an automobile, and it drove away. R. 67, ll. 3-16.

Bryant said as the automobile respondent was riding in drove away, he heard gunshots. R. 69, ll. 2-10. Bryant testified after the shooting, he saw a crowd of "black males" run past him into the gymnasium. R. 71, ll. 19-24.

Deshawn Brown testified that he asked respondent for a ride home that night. Brown recalled there was "a commotion" in the parking lot and that respondent went to the commotion. R. 81, l. 17 - 83, l. 17.

Brown said as they drove away from scene, respondent was shooting the gun into the air. R. 84, ll. 3-24. Brown claimed respondent said, "he think Dog get hit" after he fired the shots from the car. R. 87, ll. 2-25.

Twenty-three year old Ellis Judon testified that during the disturbance outside the dance that night that respondent unlocked the car door. Respondent got his gun out of the glove compartment. R. 118, l. 12 - 119, l. 24. Judon also said respondent went towards the commotion with a gun in his hand. R. 120, l. 3 - 122, l. 7.

Officer Chris Widmer arrested respondent at his house hours after the shooting. R. 189, l. 16 - 191, l. 19. Respondent told Widmer "he had heard the shooting and that he ran to the area to see what happened. But he also said that he didn't shoot anybody," R. 197, ll. 2-10.

SLED agent Kenneth Whitler testified that the two slugs removed from the victim matched the gun seized from respondent's house. R. 245, ll. 11-16. The decedent had gunshot residue on his right palm to indicate he may have handled or shot a gun. R. 271, ll. 8-24. SLED agent Joseph Powell testified "I cannot say with certainty that he did not fire a weapon." R. 275, ll. 2-3. Powell later opined that he thought it was very unlikely that the decedent shot a gun before he was shot. R. 285, ll. 17-22.

Respondent testifies

Respondent testified in his own defense. He was only nineteen years old at the time of the incident at the Step Show Dance. R. 290, l. 23 - 291, l. 6.

Respondent was talking with some girls outside the dance when a commotion started near a truck. "It looked like they was, like, yelling at some people...I wasn't too much worried about that...I walked back to my car and open[ed] up the door and I grabbed the gun I had." R. 292, l. 8 - 293, l. 21.

Respondent said he planned to shoot the gun into the air because "that's just something that young people be doing like, after parties or clubs or whatever." R. 293, l. 21 - 294, l. 6. Respondent testified he had seen other people do this in the past. R. 294, l. 1 - 295, l. 18.

Respondent changed his mind about shooting the gun in the air, and he walked over to the "fight," which was apparently actually a robbery attempt the decedent tried to resist. "I just wanted to see what was going on." Respondent said he did not return to the car to put his gun away before going to watch or investigate the fight. R. 294, l. 12 - 297, l. 14.

Respondent saw the fight itself and he saw one person on the ground. Respondent recalled there were two or three separate fights going on at the time. R. 297, l. 9 – 298, l. 23. Respondent said he apparently surprised one man “and he turned to me *and he had a gun in his hand. And I see his gun and I started running and I heard a gunshot and I start shooting my gun.*” R. 299, ll. 8-18 (emphasis added).

Respondent said he was not sure how many times he shot his gun. R. 299, l. 19 – 300, l. 4. Respondent testified he ran when the man pointed the gun at him. He only shot after he heard a gunshot. R. 300, l. 19 – 301, l. 13. Respondent said, “it was a quick reaction.” R. 301, l. 7 – 302, l. 2.

Respondent testified that he was very troubled when he found out that two shots from his gun were what actually struck the decedent. R. 306, l. 22 – 307, l. 1. Respondent repeated on cross-examination that when he got the gun out of the glove compartment, he only planned to shoot it in the air. R. 316, l. 16 – 317, l. 12.

Request for self-defense instruction

Defense counsel requested that the judge instruct the jury on the law of self-defense. R. 334, l. 7 – 336, l. 14. Defense counsel said there was evidence a gun was pointed at respondent and that he ran out of fear. Counsel argued respondent acted reasonably under the circumstances. Counsel also disagreed with the judge that respondent was at fault for bringing on the difficulty and he argued that the cases about bringing on the difficulty really related to someone “having somehow produced the altercation that leads to the necessity for self-defense.” Counsel argued the fight was underway before respondent went to investigate.¹ R. 334, l. 7 – 336, l. 25.

¹ The judge at first said he would not charge self-defense because respondent testified he shot the gun into the air because that was something young people do — apparently in exciting

The judge ruled that he would not charge self-defense. The judge stated, "they may consider a case like this, self-defense, in McCall, South Carolina, but not in Charleston."

The judge then told defense counsel he would charge voluntary manslaughter as an option to murder. R. 338, ll. 4-22.

In his closing argument, defense counsel told the jury that respondent was a stupid nineteen-year-old who was not smart enough to make up a story about the gun being pointed at him before he ran and returned fire. R. 364, l. 20 – 365, l. 24; R. 370, ll. 5-18.

The opinion of the Court of Appeals

In State v. Slater, 360 S.C. 487, 602 S.E.2d 90 (2004), a majority of the Court of Appeals wrote:

Here, there was some evidence to support a self-defense charge. Slater maintains that when he approached the altercation between the victim and his attackers, an attacker pointed a gun at Slater. Slater then turned and ran. While running away, Slater heard gunshots and returned fire, not looking in the direction where he was firing. Slater testified, "when I walked up on him, I guess I surprised him and he turned to me and he had a gun in his hand. And I see his gun and I started running." He added, "Yeah, when I walked up on him like here, like he turned to me, like had the gun pointed at me like he surprised." Additionally, Mark Nelson, a friend of the victim, testified that he saw one of the attackers -- someone other than Slater -- with a gun.

State v. Slater, 360 S.C. at 491, 602 S.E.2d at 92-93.

Further, the majority pointed to the problem with the dissenting judge's view that respondent somehow provoked this conflict. The majority wrote:

The dissent contends that Slater "provoked a conflict by running toward an altercation while conspicuously holding a cocked and

situations. Defense counsel countered that the evidence showed respondent refrained from shooting the gun into the air. The solicitor agreed with defense counsel. However, the judge then ruled he still would not charge self-defense. R. 481, l. 1 – 483, l. 13.

loaded gun.” The record provides otherwise. Slater testified, “I walked up on [the attacker]... [the gun] was by my side... in my right hand.” That testimony is uncontroverted. The dissent apparently assumes that (1) one of the attackers saw Slater’s gun; (2) was afraid for his own safety; and (3) started to shoot as a result. That scenario is plausible, but the record fails to establish it. [FN5] It is just as likely that Slater’s gun was inconspicuous, especially given that the regrettable events of that evening occurred when “it was pretty dark” and that Slater had his gun by his side.

State v. Slater, 360 S.C. at 491, 602 S.E.2d at 92-93.

The majority also distinguished State v. Bryant, 336 S.C. 340, 520 S.E.2d 319 (1999) in which the victim caught the defendant breaking into his truck. The two men struggled, and the defendant stabbed the victim to death with a screwdriver.

This Court held that under the circumstances Bryant was not entitled to a self-defense charge because he obviously started the conflict by committing a crime against the victim, who confronted him. Bryant simply dropping his knife was insufficient to signal his withdrawal from the crime he was in the process of committing, and to signal his surrender. Intuitively, the victim in Bryant could not be expected to think Bryant had withdrawn -- ceased his aggression -- and risked what actually happened to him -- being stabbed or harmed by Bryant with some other object.

The Court of Appeals in this case correctly noted:

Here, Slater merely walked toward the altercation; he threatened or assaulted no one. [FN6] More importantly, Slater immediately “turned and ran” after seeing the attacker’s gun. Slater did exactly what the Supreme Court looked for in Bryant: he left -- quickly.

Discussion.

In determining whether to charge self-defense or a lesser-included offense, this Court has held that it will view the evidence in the light most favorable to the defendant when determining if there is any evidence to justify the charge. State v. Byrd, 323 S.C. 319, 474 S.E.2d 430 (1996). In

State v. Burkhardt, 350 S.C. 252, 565 S.E.2d 298 (2002), this Court again repeated that self-defense must be charged if there is any evidence in the record to support that charge. See, State v. Hill, 315 S.C. 260, 433 S.E.2d 848 (1993).

Further, both self-defense and voluntary manslaughter should be submitted to the jury if there is any evidence to support those instructions. See State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). The trial judge here had the duty to charge self-defense, just as he did voluntary manslaughter, where there was any evidence supporting that instruction. Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991); State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993). Respondent's testimony made self-defense a jury issue. See State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001); State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998). The judge's apparent distaste for the entire situation, or his not believing the respondent's evidence of self-defense, could not substitute for the jury's right to decide the issue once any evidence raised it.

The Court of Appeals correctly held that respondent was entitled to a self-defense instruction given the evidence in this case. Surely all of the judge's on the Court of Appeals, and the Justices on this Court lament the fact that some young people like respondent commonly have access to guns.

However, the presence of guns is obviously not dispositive of a self-defense, accident or manslaughter charge entitlement issue. See State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999); State v. Sullivan, 345 S.C. 169, 547 S.E.2d 183 (2001); State v. Hendrix, *supra*. Further, there are very few situations where voluntary manslaughter or self-defense become legitimate issues at trial — and where — the defendant did the smartest thing humanly possible under the circumstances. For example, in State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), the defendant was soliciting a

prostitute when the trouble began. Here, respondent did what many students have done when a fight firsts breaks out after school — he went to watch or investigate the commotion.

The state's assertion that respondent approached the crowd and shot "the victim twice in the chest as the victim lay on the ground," is unsupported by this record. Petition for writ of certiorari at 12. Regardless, it is another example of the misunderstanding that the state's theory of the case is just that — a theory of the case — and the jury resolves the issues if there is any evidence of a lesser-included offense or self-defense. Further, lest it not be abundantly clear, no one has argued from trial through appeal that the decedent being shot in the turmoil that night was not a tragedy

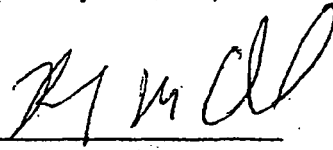
Moreover, respondent was entitled to act on reasonable appearances where he was in imminent danger or believed he was in imminent danger. See, McAninch and Fahey, The Criminal Law of South Carolina, 1996 ed. at pg. 478-484. Although respondent was retreating from the scene when the gun was pointing at him, he was not even required to retreat if that retreat increased his chance of being shot. State v. McGee, 185 S.C. 184, 190, 193 S.E. 303, 306 (1937). It is certainly one fair inference from this record that respondent increased the danger to himself by running.

The Court of Appeals followed the precedents of this Court by holding that self-defense or a lesser-included offense must be charged when there is any evidence supporting that instruction. Certiorari, respectfully, is not warranted in this case.

CONCLUSION

The writ should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R M Dudek", written over a horizontal line.

Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR RESPONDENT

This 27th day of January, 2005

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Edward B. Cottingham, Circuit Court Judge

THE STATE,

PETITIONER,

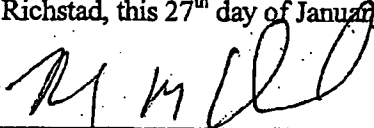
V.

LORD BYRON SLATER,

RESPONDENT

CERTIFICATE OF SERVICE

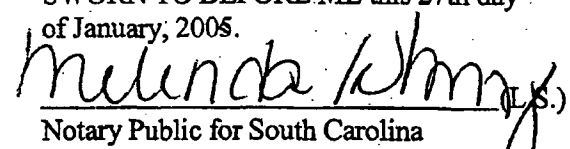
I certify that a true copy of the return to petition for writ of certiorari in this case has been served on William Edgar Salter, III, Esquire, this 27th day of January, 2005. A copy of the return has also been served on the Honorable Kenneth A. Richstad, this 27th day of January, 2005.



Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 27th day
of January, 2005.



(L.S.)
Notary Public for South Carolina

My Commission Expires: January 27, 2005

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Charleston County
The Honorable Edward B. Cottingham, Circuit Court Judge

THE STATE,

Petitioner,

vs.

LORD BYRON SLATER,

Respondent.

APPENDIX

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602 S.E.2d 90
360 S.C. 487, 602 S.E.2d 90
(Cite as: 602 S.E.2d 90)

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Page 1

Court of Appeals of South Carolina.

The STATE, Respondent,
v.
Byron B. SLATER, Appellant.

No. 3855.

Heard April 7, 2004.

Filed Aug. 9, 2004.

Rehearing Denied Sept. 23, 2004.

Background: Defendant was convicted in a jury trial in the Circuit Court, Charleston County, Edward B. Cottingham, J., of murder. Defendant appealed.

Holding: The Court of Appeals, Beatty, J., held that evidence was sufficient to establish charge of self-defense to murder.

Reversed and remanded.

Hearn, C.J., dissented with written opinion.

West Headnotes

[1] Homicide ⚡1479

203k1479

Evidence was sufficient to establish charge of self-defense to murder; although defendant approached altercation on his own, when defendant approached altercation between victim and his attackers, he discovered it was robbery in progress, he had his gun at his side, one of victim's attackers then pointed gun at defendant, so defendant turned and ran, and while running away, defendant heard gunshots and returned fire, not looking in direction where he was firing.

[2] Criminal Law ⚡814(2)

110k814(2)

The evidence presented at trial determines the law to be charged.

[3] Criminal Law ⚡1173.2(3)

110k1173.2(3)

[3] Homicide ⚡1476

203k1476

If there is any evidence in the record to support self-defense, the issue should be submitted to the jury; a trial judge's failure to do so is reversible error.

[4] Homicide ⚡794

203k794

[4] Homicide ⚡795

203k795

[4] Homicide ⚡799

203k799

For a defendant to argue self-defense, the record must demonstrate that (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4) he had no other probable means of avoiding the danger.

[5] Homicide ⚡774

203k774

One who provokes or initiates an assault cannot escape criminal liability by invoking self-defense; however, a defendant can restore his right to self-defense if he withdraws from the conflict and communicates that decision to the opponent.

[6] Homicide ⚡780

203k780

The mere unlawful possession of a firearm, with nothing more, does not automatically bar a self-defense charge.

*91 Assistant Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General William Edgar Salter, III, all of Columbia; and Solicitor Ralph E. Hoisington, of Charleston, for Respondent.

BEATTY, J.:

Byron Slater appeals his conviction on a murder charge, alleging, *inter alia*, that the trial court erred in failing to charge the jury on self-defense. We reverse and remand.

FACTS

Appellant Byron Slater was with some friends on the evening of February 3, 2001, at a school gymnasium where there had been a dance. Following the dance, Slater went outside, where he started talking with "some females." While there, he became aware of a disturbance near a truck. Slater walked to his car, retrieved a gun, and started to walk toward the truck. [FN1] Slater then changed his mind. He walked back toward his car, where three friends, Ellis Judon (the driver),

Kenyon Nichols, and Deshawn Brown, were waiting for him. Moments later, Slater noticed that another disturbance was taking place in an adjacent parking lot and wanted to see what was going on. Slater asked Judon to drive there. [FN2] In that second parking lot, an apparent robbery was unfolding. *92 The victim was on the ground, being stomped by five men. Slater knew neither the victim nor his attackers.

FN1. Slater testified that he retrieved the gun "to shoot it in the air ... something that young people be doing like after parties or clubs or whatever."

FN2. There is some dispute as to these facts. Slater contends that he never returned to his car because he realized another confrontation was taking place in another parking lot and walked over there instead, still carrying his gun.

Slater testified that he walked up to the robbery and surprised one of the attackers. The man then turned around and pointed a gun toward Slater. Slater quickly turned around and started running back toward his car. As he ran, he heard a gunshot and responded by shooting his own gun behind him. Slater got into the car where his friends were waiting for him. [FN3] He continued shooting in the air as the car pulled away. In the ensuing chaos, the victim of the attempted robbery lay dying on the ground. He had been shot twice.

FN3. Nichols and Brown, too, had gotten out of the car, but apparently returned before Slater.

Back in the car, Slater said that he thought he had "hit" someone. Slater and his three friends drove to Slater's house, where Slater left the gun. The four then went back to the parking lot where the shooting had occurred. On the way, the police stopped them and searched the car but did not find any weapon.

Early the next morning, detectives from the city of North Charleston went to Slater's residence to arrest him. Following the arrest, they obtained a search warrant for Slater's house. The detectives recovered various ammunitions from Slater's yard and from inside his house, including two guns, some projectiles, bullets, and shell casings.

At the police station, Slater told the police that he "didn't shoot anybody." However, a ballistics expert testified at trial that the fatal bullets came from Slater's gun, as did the ones retrieved from the crime scene. Additionally, numerous witnesses

placed Slater at the crime scene with a gun. Slater himself admitted to shooting his gun, but insisted that he did not mean to shoot anyone. The jury convicted Slater of murder, though the trial judge had included a manslaughter option in the jury charge. [FN4] The trial judge expressly refused to include a self-defense charge.

FN4. The jury also convicted Slater on one count of possession of a firearm during the commission of a violent crime.

ISSUES

I. Did the trial judge err in refusing to include a self-defense charge, reasoning that Slater had brought about the difficulty?

II. Did the trial judge err in allowing the victim's mother to testify that her son did not have a criminal record?

III. Did the trial judge err in allowing a detective to testify that an eyewitness to the crime had denied hearing any gunshot other than Slater's?

LAW/ANALYSIS

[1] Slater argues that the trial judge committed reversible error in refusing to include a self-defense charge. We agree.

[2][3] The evidence presented at trial determines the law to be charged. *State v. Goodson*, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994). If there is any evidence in the record to support self-defense, the issue should be submitted to the jury. *State v. Burkhardt*, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002); *State v. Hill*, 315 S.C. 260, 261, 433 S.E.2d 848, 849 (1993). A trial judge's failure to do so is reversible error. *State v. Day*, 341 S.C. 410, 416, 535 S.E.2d 431, 434 (2000). Additionally, "[c]urrent law requires the State to disprove self-defense, once raised by the defendant, beyond a reasonable doubt." *Burkhardt*, 350 S.C. at 261, 565 S.E.2d at 303 (citing *State v. Wiggins*, 330 S.C. 538, 544, 500 S.E.2d 489, 494 (1998)).

[4][5] For a defendant to argue self-defense, the record must demonstrate that "(1)[he] was without fault in bringing on the difficulty; (2) [he] actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4)[he] had no other probable means of avoiding the danger." *State v. Chatman*, 336 S.C. 149, 153, 519 S.E.2d 100, 102 (1999). Moreover, "[o]ne who

provokes or initiates an assault cannot escape criminal *93 liability by invoking self-defense." *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). However, a defendant can restore his right to self-defense if he withdraws from the conflict and communicates that decision to the opponent. *Id.*

Here, there was some evidence to support a self-defense charge. Slater maintains that when he approached the altercation between the victim and his attackers, an attacker pointed a gun at Slater. Slater then turned and ran. While running away, Slater heard gunshots and returned fire, not looking in the direction where he was firing. Slater testified, "when I walked up on him, I guess I surprised him and he turned to me and he had a gun in his hand. And I see his gun and I started running." He added, "Yeah, when I walked up on him like here, like he turned to me, like had the gun pointed at me like he surprised." Additionally, Mark Nelson, a friend of the victim, testified that he saw one of the attackers--someone other than Slater--with a gun.

[6] The State insists that Slater bears some responsibility for the tragedy because he was in unlawful possession of a gun and carried that gun into the altercation. However, the mere unlawful possession of a firearm, with nothing more, does not automatically bar a self-defense charge. *See State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (explaining that "a person can be acting lawfully, even if he is in unlawful possession of a weapon"). As importantly, Slater testified that he turned and started to run away from the attacker holding the gun. Therefore, even if Slater initially contributed to the difficulty, that he turned and ran away would restore his right to self-defense. *See Bryant*, 336 S.C. at 346, 520 S.E.2d at 322 (explaining that an appellant's attempt to leave the scene of a confrontation would signal that the "appellant truly intended to withdraw" from the situation). *See also State v. Rogers*, 320 S.C. 520, 525, 466 S.E.2d 360, 363 (1996) (reasoning that Rogers faced no overt threat because his opponent was moving away from him and said nothing to evince a threat).

The dissent contends that Slater "provoked a conflict by running toward an altercation while conspicuously holding a cocked and loaded gun." The record provides otherwise. Slater testified, "I walked up on [the attacker] ... [the gun] was by my side ... in my right hand." That testimony is

uncontroverted. The dissent apparently assumes that (1) one of the attackers saw Slater's gun; (2) was afraid for his own safety; and (3) started to shoot as a result. That scenario is plausible, but the record fails to establish it. [FN5] It is just as likely that Slater's gun was inconspicuous, especially given that the regrettable events of that evening occurred when "it was pretty dark" and that Slater had his gun by his side.

FN5. The men involved in the robbery were apparently never apprehended. They did not participate in the proceedings, so what they may have seen is unclear.

Citing *Bryant*, the dissent argues that "Slater failed to effectively communicate his intent to withdraw" to the attacker with the gun. We disagree. In *Bryant*, the victim apparently caught the appellant breaking into the victim's truck. *Id.* at 343, 520 S.E.2d at 321. The two struggled, and the appellant stabbed the victim to death with a screwdriver. *Id.* at 344, 520 S.E.2d at 321. The appellant argued that he was entitled to a self-defense charge because he had dropped his knife to the ground before the fight began. *Id.* According to him, that gesture indicated his intent to withdraw and restored his right to self-defense. *Id.* Our supreme court rejected the argument.

The court initially found that the appellant brought on the difficulty because the attempted break-in was "in violation of law and reasonably calculated to produce the occasion." *Id.* at 345, 520 S.E.2d at 322. The court clarified, however, that, "[i]f, after commencing the assault, the aggressor withdraws in good faith from the conflict and announces in some way to his adversary his intention to retire, he is restored to his right of self-defense." *Id.* (citation omitted). In that case, the appellant himself admitted that the victim did not see him drop the knife, and therefore could not have known about the alleged withdrawal. The court reasoned, as said earlier, that "[i]f appellant truly intended *94 to withdraw he could have easily left the open parking lot." *Id.* at 346, 520 S.E.2d at 322.

Here, Slater merely walked toward the altercation; he threatened or assaulted no one. [FN6] More importantly, Slater immediately "turned and ran" after seeing the attacker's gun. Slater did exactly what the supreme court looked for in *Bryant*: he left--quickly.

FN6. If the gun was indeed inconspicuous (see earlier discussion), it is difficult to imagine how Slater's act of walking toward the robbery was "in violation of law and reasonably calculated to produce" the difficulty. The cases cited by the *Bryant* court all involved robbers or other felons claiming self-defense when the would-be victims tried to defend themselves. See *id.* at 345, 520 S.E.2d at 322.

Admittedly, as the dissent posits, the attacker may have thought that Slater was withdrawing simply "to gain [some] tactical advantage." However, our task is not to determine the attacker's state of mind. Rather, as instructed by our supreme court, we are to see only whether "any evidence" in the record supports a self-defense charge. [FN7] *Day*, 341 S.C. at 416, 535 S.E.2d at 434. We find that there is some. The trial judge, therefore, erred in not including the charge.

FN7. Additionally, the supreme court cautioned that "a trial judge should specifically tailor the self-defense instruction to adequately reflect the facts and theories presented by the defendant." *Day*, 341 S.C. at 418, 535 S.E.2d at 435.

Having found that the exclusion of the requested self-defense charge was error, we need not address Slater's remaining issues.

CONCLUSION

Based on the foregoing, we reverse and remand for a new trial on both charges. [FN8]

FN8. See *Burkhart*, 350 S.C. at 264, 565 S.E.2d at 304 (ordering a new trial on charges of possession of a firearm during the commission of a violent crime after overturning the underlying conviction on the violent crime).

ANDERSON, J., concurs and HEARN, C.J., dissents separately.

HEARN, C.J., dissenting:

Because Slater failed to effectively communicate his intent to withdraw after he provoked a dangerous situation, I do not believe he was entitled to a charge of self-defense. Therefore, I respectfully dissent.

A person who provokes an assault cannot claim a right to self-defense unless that person "withdraws in good faith from the conflict and announces in some way to his adversary his intention to retire." "

State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999) (quoting 55 A.L.R.3d at 1003). Here, all the evidence, including Slater's own testimony, indicates that he provoked a conflict by running toward an altercation while conspicuously holding a cocked and loaded handgun, even though he had no personal connection to the people involved in the fight. [FN9]

FN9. Slater made no claim of "defense of others at trial," nor did his testimony in any way reflect an intention to enter the conflict in defense of those being attacked.

Slater argues that he withdrew from the conflict because (1) he began to run when a man involved in the turmoil pointed a gun at him, and (2) he did not shoot his gun until he heard someone else fire first. However, in his testimony, Slater admitted that the events—his running, hearing the shot, and firing back—all "happened so fast." Slater further admitted that he not only shot backwards as he was running away, but that he also shot in the air after he had gotten inside a car and was riding away from the scene. In my view, even if Slater intended to withdraw, neither his words nor his actions communicated this intent. See *id.* ("One's right to self-defense is restored after a withdrawal from the initial difficulty with the victim if that withdrawal is communicated to the victim by word or act."); *State v. Graham*, 260 S.C. 449, 196 S.E.2d 495 (1973).

While the trial court is required to charge the jury on self-defense if there is any evidence supporting the charge, all the evidence in the record shows that Slater provoked a dangerous situation and no evidence indicates that he ever communicated his withdrawal after the provocation. Despite Slater's claim that he attempted to retreat, he admitted that he still had a cocked and loaded gun in his hand. With a dangerous weapon *95 readily available for Slater to use, the person whom Slater had approached could not have known whether Slater was withdrawing from the conflict or whether Slater was retreating to gain tactical advantage. See 40 C.J.S. *Homicide* § 125 (1991) ("As long as a person keeps his gun in his hand prepared to shoot, the person opposing him is not expected or required to accept any act or statement as indicative of an intent to discontinue the assault."); see also *Bryant*, 336 S.C. at 346, 520 S.E.2d at 322 (finding the defendant failed to effectively communicate his withdrawal even though he threw down his knife because the defendant admitted the victim did not

(Cite as: 602 S.E.2d 90, *95)

see him drop the knife). Because Slater failed to communicate his intent to withdraw, his right to use self-defense was never restored. Therefore, I find no error in the trial court's refusal to charge self-defense.

Because I disagree with the majority's decision to reverse on the failure to charge self-defense, I briefly address Slater's additional arguments on appeal. In addition to his argument regarding self-defense, Slater also contends the trial court erred by allowing the victim's mother to testify that her son did not have a criminal record.

Rule 404(a)(2), SCRE, states that although character evidence is generally not allowed, "[e]vidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case [is admissible when it is used] to rebut evidence that the victim was the first aggressor." Here, because the gist of Slater's defense at trial was that he had been shot at first, evidence regarding the victim's character was properly offered to rebut the inference that the victim may have been the initial shooter. [FN10] Therefore, I find no error in the trial court allowing this testimony.

FN10. After the victim's mother testified, Slater presented testimony that powder residue on the victim's hands could have resulted from the victim firing a weapon, further indicating that the defense's strategy was to implicate the victim as the initial shooter.

Slater's final argument on appeal is that the trial court erred by admitting hearsay testimony of a police officer. I disagree.

At trial, Deshawn Brown, who was accompanying Slater on the night of the incident, testified he heard a gunshot earlier in the evening when he and Slater were "standing by the school by the gym." On redirect examination, Brown testified that he remembered giving a statement to the police. When asked whether he told the investigating officers that he heard gunshots earlier that night, Brown replied that he did not. Brown explained that he never told anyone about the gunshots he heard because, until the trial, he had never been asked about hearing any other gunshots that night.

At a later point in Slater's trial, the State questioned one of the officers who had questioned Brown, and the following exchange occurred:

Q: Did you ask them about guns at the scene of the crime?

A: Yes, I did.

Q: Did you ask them about anybody else shooting at the scene of the crime?

A: Yes, I did.

Q: Well, when you were interviewing Deshawn Brown, did he ever tell you that he heard anybody else shooting out there?

Defense Counsel: Objection, your Honor, that's not proper.

The Court: No, sir, I will--no, sir, I'll permit that question. Go ahead.

Q: Did he ever tell you that?

A: I interviewed Deshawn Brown. He never once told us about anybody else shooting at the scene.

Slater contends on appeal that the above testimony was inadmissible hearsay because it refers to a statement "other than one made by the declarant while testifying at trial or hearing, offered into evidence to prove the truth of the matter asserted." See Rule 801(c), SCRE.

While the above testimony regarding the statements of Brown is hearsay, we find that it is admissible under Rule 613(b), SCRE. This rule provides, in pertinent part:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place *96 it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, *extrinsic evidence of such statement is admissible.*

Rule 613(b), SCRE (emphasis added). When a witness is presented with the requisite circumstances surrounding an alleged inconsistent statement and nevertheless continues to deny before the court ever making the statement, another person's testimony that the witness did, in fact, make that statement is admissible under Rule 613(b), SCRE. See *State v. Fossick*, 333 S.C. 66, 69-70, 508 S.E.2d 32, 33 (1998).

In the case before us, the investigating officer testified that he asked all the witnesses (including Brown) about whether anyone else was shooting a weapon at the scene of the crime. He testified Brown had not told him about anyone else shooting. Because Brown denied ever being asked this question after he was presented with all the requisite circumstances, the officer's testimony constituted extrinsic evidence of a prior inconsistent statement and was admissible under Rule 613(b). Thus, the judge acted properly in overruling Slater's

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Page 6

objections to the testimony.

Accordingly, based on the foregoing, I would affirm Slater's conviction.

360 S.C. 487, 602 S.E.2d 90

END OF DOCUMENT



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

August 24, 2004

The Honorable Kenneth A. Richstad
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *The State v. Lord Byron Slater*

Dear Mr. Richstad:

Enclosed for filing please find the original and six (6) copies of the *Petition for Rehearing*, along with proof of service, in the above-referenced case.

Thank you for your assistance in this matter.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES, III

Enclosures

cc: Robert M. Dudek, Esquire
The Honorable Ralph E. Hoisington
Ms. Sandi Wofford, Victim Services

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal From Charleston County
The Honorable Edward B. Cottingham, Circuit Court Judge**

THE STATE,

Respondent,

vs.

LORD BYRON SLATER,

Appellant.

OPINION NO. 3855

PETITION FOR REHEARING

INTRODUCTION

The above-named Respondent would respectfully ask this Court to grant a petition for rehearing pursuant to Rule 221, SCACR, based upon the following facts or points of law which the majority of this Court may have overlooked, misapprehended or misconstrued.

I.

On August 9, 2004, a majority of the Court issued a published Opinion in which it reversed Appellant's 2001 Charleston County murder conviction. *State v. Slater*, ___ S.E.2d ___, Opinion No. 3855 (S.C. Ct. App., Aug. 9, 2004). In doing so, the majority addressed one of the three issues raised by Appellant: his claim that the trial judge erroneously failed to charge the jury on self-defense. The majority held that the failure to give the instruction constituted reversible error. *Id* at

2-3 The dissent found that Appellant was not entitled to a self-defense instruction because Appellant "failed to effectively communicate his intent to withdraw after he provoked a dangerous situation." *Id* at 4-5 (Hearn, C.J., dissenting). The dissent further found that no other alleged error required reversal of Appellant's conviction. *Id* at 5-6 (Hearn, C.J., dissenting).

II.

Initially, Respondent submits the majority overlooked or misapprehend that it erroneously held that Appellant was entitled to a self-defense charge because he was at fault in bringing on the difficulty. The State agrees with the majority that "[t]he evidence presented at trial determines the law to be charged. *State v. Goodson*, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994). If there is any evidence in the record to support self-defense, the issue should be submitted to the jury. *State v. Burkhardt*, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). Nor does the State take exception with the rule that "[f]or a defendant to argue self-defense, the record must demonstrate that "(1)[he] was without fault in bringing on the difficulty; (2) [he] actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4)[he] had no other probable means of avoiding the danger." *State v. Chapman*, 336 S.C. 149, 153, 519 S.E.2d 100, 103 (1999). Moreover, "[o]ne who provokes or initiates an assault cannot escape criminal liability by invoking self-defense." *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). However, a defendant can restore his right to self-defense if he withdraws from the conflict and communicates that decision to the opponent. *Id.*" *Slater*, at 2. The majority concluded that

[h]ere, there was some evidence to support a self-defense charge. Slater maintains that when he approached the altercation between the victim and his attackers, an attacker pointed a gun at Slater. Slater

then turned and ran. While running away, Slater heard gunshots and returned fire, not looking in the direction where he was firing. Slater testified, "when I walked up on him, I guess I surprised him and he turned to me and he had a gun in his hand. And I see his gun and I started running." He added, "Yeah, when I walked up on him like here, like he turned to me, like had the gun pointed at me like he surprised." Additionally, Mark Nelson, a friend of the victim, testified that he saw one of the attackers--someone other than Slater--with a gun.

The State insists that Slater bears some responsibility for the tragedy because he was in unlawful possession of a gun and carried that gun into the altercation. However, the mere unlawful possession of a firearm, with nothing more, does not automatically bar a self-defense charge. See *State v. Burris*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (explaining that "a person can be acting lawfully, even if he is in unlawful possession of a weapon"). As importantly, Slater testified that he turned and started to run away from the attacker holding the gun. Therefore, even if Slater initially contributed to the difficulty, that he turned and ran away would restore his right to self-defense. See *Bryant*, 336 S.C. at 346, 520 S.E.2d at 322 (explaining that an appellant's attempt to leave the scene of a confrontation would signal that the "appellant truly intended to withdraw" from the situation). See also *State v. Rogers*, 329 S.C. 520, 525, 466 S.E.2d 360, 363 (1996) (reasoning that Rogers faced no overt threat because his opponent was moving away from him and said nothing to evince a threat).

Slater, at 2-3.

It is the State's position that the majority may have overlooked that there was no evidence Appellant shot the victim in self-defense. The State's evidence clearly showed that the victim was being assaulted and robbed by another group of people when Appellant decided, for reasons known only to him, to approach the crowd while armed with a weapon and shoot the victim twice in the chest as the victim lay on the ground. The victim was not armed and had not done anything, whatsoever, to provoke him. Further, the State's evidence clearly established that Appellant continued to fire his weapon at the victim and the others in the victim's party as he fled back to his

car and even as the car sped away from the scene. Thus, the State's evidence demonstrates beyond cavil that Appellant was not without fault in bringing on the difficulty. He also failed to meet the third and fourth elements of a self-defense charge under *State v. Goodson*.

Likewise, Appellant's own testimony does not support a self-defense instruction. To the contrary, he admitted that the victim had done nothing to provoke him and that the victim was in a different area from where he saw the two people struggling. He also admitted that he expressly loaded his weapon and cocked it earlier that day because he intended to use it; and that he had initially approached the crowd around the truck with the intent to discharge his weapon and cause a commotion because this is what young people do. **R. pp. 291-94.**

Further, even though he had a fully loaded and cocked weapon in his hand and had intended to use his weapon that evening, he did not make any effort to immediately fire at his putative assailant, who was some ten to fifteen feet away from him. Likewise, he continued to fire his weapon as he ran away from the scene, without any regard to where the shots he was firing were going; and he continued to fire his weapon until there were no more bullets in it. **R. pp. 311-14; 319-22.** Finally, the State's cross-examination established that Appellant shot, killed and, in fact, "murdered" the victim. **R. p. 330.**

Under these circumstances, Appellant's own testimony clearly reflects that he was not without fault in bringing on the difficulty, that the circumstances were not such as would warrant a man of ordinary prudence and courage to strike the fatal blow to save himself from serious bodily harm or losing his own life and that he had other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury other than to act as he did. *See Goodson; State v. Hendrix*, 270 S.C. 653, 244 S.E.2d 503 (1978). As a result, he was not entitled to a self-defense

instruction and the trial judge's ruling must be affirmed. *Id.*

III.

The majority rejected the State's position that Appellant could not be entitled to a self-defense charge because he was at fault in bringing on the difficulty, stating that "[t]he State insists that Slater bears some responsibility for the tragedy because he was in unlawful possession of a gun and carried that gun into the altercation. However, the mere unlawful possession of a firearm, with nothing more, does not automatically bar a self-defense charge." *Slater*, at 3, citing *Burris*, *supra*. Yet, the majority may have overlooked that Appellant was not merely "in unlawful possession of a gun" that he carried into the altercation. To the contrary, Appellant admittedly loaded his weapon and cocked it earlier that day because he intended to use it; and he admitted that he had initially approached the crowd around the truck with the intent to discharge his weapon and cause a commotion because this is what young people do. R. 291-94

Further, his testimony supports the conclusion that he was some distance away from the victim and the fights, involving people unknown to him, before he deliberately approached the area where the shooting took place with his loaded and cocked weapon. He could have easily avoided any lethal confrontation by not intervening. Thus, his testimony established that he quite literally went looking for trouble and found it. As a result, the majority may have overlooked that this is not self-defense. Rather, as in *Bryant*, his actions were "in violation of law and reasonably calculated to produce the occasion." 336 S.C. at 345, 520 S.E.2d at 322. *See also Slater*, at 4 (Hearn, C.J., dissenting) ("Here, all the evidence, including Slater's own testimony, indicates that he provoked a conflict by running toward an altercation while conspicuously holding a cocked and loaded handgun,

even though he had no personal connection to the people involved in the fight").¹

IV.

Moreover, in finding that Appellant had effectively communicated his intent to withdraw to the attacker with the gun, the majority found that "[Appellant] immediately 'turned and ran' after seeing the attacker's gun. [Appellant] did exactly what the supreme court looked for in *Bryant*: he left--quickly." *Slater*, at 3. The majority may have overlooked that "[a] person who provokes an assault cannot claim a right to self-defense unless that person 'withdraws in good faith from the conflict and announces in some way to his adversary his intention to retire.'" *Bryant*, 336 S.C. at 345, 520 S.E.2d at 322. See also *Slater*, at 4 (Hearn, C.J., dissenting). As correctly noted by the dissent, "[Appellant] admitted that the events--his running, hearing the shot, and firing back--all 'happened so fast.'" [Appellant] further admitted that he not only shot backwards as he was running away, but that he also shot in the air after he had gotten inside a car and was riding away from the scene. ... [E]ven if Appellant intended to withdraw, neither his words nor his actions communicated this intent." *Slater*, at 4 (Hearn, C.J., dissenting), citing *Bryant*, 336 S.C. at 345, 520 S.E.2d at 322.

¹Appellant could not indiscriminately intervene in the on-going conflict(s). In South Carolina, one may act in defense of others. Yet, "[u]nder the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander [only if] that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense." *State v. Starnes*, 340 S.C. 312, 322-23, 531 S.E.2d 907, 913 (2003) (emphasis added). "[I]n order for the trial court to give a defense of others charge, there must be some evidence adduced at trial that the defendant was indeed lawfully defending others." *Douglas v. State*, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998); see also William S. McAninch & W. Gaston Faurey, *The Criminal Law of South Carolina* (3rd ed. 1996) ("There must, of course, be some evidence that the defendant was defending others at the time of his act in order for him to be entitled to the instruction."). Thus, he could have only intervened on behalf of the victim. However, that is not what Appellant did. Instead, He claimed it looked like a fight was taking place and he only wanted to find out what was happening. However, he never put his gun back in the glove compartment. R. pp. 295-96. Once again, this prevents him from being without fault in bringing on the difficulty.

("One's right to self-defense is restored after a withdrawal from the initial difficulty with the victim if that withdrawal is communicated to the victim by word or act.") and *State v. Graham*, 260 S.C. 449, 196 S.E.2d 495 (1973).

Therefore, the majority may have overlooked that the dissent's analysis was correct:

Despite Slater's claim that he attempted to retreat, he admitted that he still had a cocked and loaded gun in his hand. With a dangerous weapon readily available for Slater to use, the person whom Slater had approached could not have known whether Slater was withdrawing from the conflict or whether Slater was retreating to gain tactical advantage. See 40 C.J.S. *Homicide* § 125 (1991) ("As long as a person keeps his gun in his hand prepared to shoot, the person opposing him is not expected or required to accept any act or statement as indicative of an intent to discontinue the assault."); see also *Bryant*, 336 S.C. at 346, 520 S.E.2d at 322 (finding the defendant failed to effectively communicate his withdrawal even though he threw down his knife because the defendant admitted the victim did not see him drop the knife). Because Slater failed to communicate his intent to withdraw, his right to use self-defense was never restored. Therefore, I find no error in the trial court's refusal to charge self-defense.

Slater, at 4 (Hearn, C.J., dissenting).

V.

Finally, the majority may have overlooked that Appellant could not be entitled to a self-defense instruction with respect to shooting *the victim* in this case because the victim had not done anything to provoke anyone and was a totally innocent person who was being robbed, beaten and stomped at the time of the shooting. Apparently, the majority is applying the doctrine of "transferred self-defense," which has not been previously adopted in this state. See *State v. Porter*, 269 S.C. 618, 239 S.E.2d 641 (1977). The present case demonstrates beyond any question problems inherent in such a doctrine, which excuses the shooting of an innocent person who has not done anything to

provoke any attack from anyone, much less this criminal defendant.

More importantly, transferred self-defense is inconsistent with current South Carolina law regarding self-defense. As the cases cited throughout the Final Brief of Respondent demonstrate, self-defense is presently applied in a limited manner because it completely bars the prosecution of an otherwise unlawful act. The evidence must show that the defendant's conduct clearly falls within the four elements of self-defense and that his actions were proportioned to the danger confronting him. Further, self-defense is less readily available when lethal force is used. *See Goodson, supra*.

It is the State's position that any contrary holding would be simply wrong. Also, the state supreme court has expressly refused to recognize "imperfect self-defense," which would reduce murder to manslaughter where the defendant could not meet all four elements of self-defense. *State v. Finley*, 277 S.C. 548, 290 S.E.2d 888 (1982). Adoption of Appellant's argument would require this Court to overrule state supreme court precedent, which it lacks the authority to do, and extend the protection of self-defense to incidents which involve the death or maiming of totally innocent bystanders. It would, therefore, grant, quite literally, a defendant a license to kill innocent people. However, such a ludicrous position is completely unnecessary because this State has previously recognized the defense of accident.²

Therefore, the State submits that the majority may have overlooked that the trial judge

² Also, with the proliferation of youth in this and other states carrying handguns -- not to mention recent legislative amendments which make it easy for most adults in South Carolina to lawfully carry a concealed handgun -- Respondent would stringently urge this Court not to adopt a theory of defense which will allow innocent people to be injured or killed, and which may encourage the use of guns by providing an easy out for a killer. As the present case, once again, clearly demonstrates, any such theory will be felt most heavily by those otherwise innocent people who merely are unfortunate enough to be poor and live in areas where crimes most often occur.

properly refused to instruct the jury on self-defense and that no other reversible error is present in the case..

CONCLUSION

Based upon the foregoing, the State would respectfully ask the Court to grant the Petition for Rehearing.

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BY: 
WILLIAM EDGAR SALTER, III

ATTORNEYS FOR RESPONDENT

August 24, 2004

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Charleston County
The Honorable Edward B. Cottingham, Circuit Court Judge

THE STATE,

Respondent,

vs.

LORD BYRON SLATER,

Appellant.

PROOF OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within *Petition for Rehearing* on Appellant by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Robert M. Dudek, Esquire, South Carolina Office of Appellate Defense, 1205 Pendleton Street, Room 306, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 24th day of August, 2004.


WILLIAM EDGAR SALTER, III

Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

August 24, 2004.



The South Carolina Court of Appeals

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ATTORNEY GENERAL'S OFFICE

September 23, 2004

RECEIVED 9-23-04

Senior Assistant Attorney General William Edgar Salter, III
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P.O. Box 11549
Columbia, SC 29211

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Pet. for writ of certiorari

Re: The State v. Slater; Lord Byron

Dear Counsel:

Enclosed is a copy of an Order of the Court denying your Petition for Rehearing in the
above case.

The Remittitur in this case will be held in this Court only so long as required by
Appellate Court Rule 221 (b).

Please notify this office, in writing, within ten (10) days from the date of this letter,
whether or not you want any of the remaining Records on Appeal and briefs we may have in this
case. Also enclose a check payable to the S. C. Court of Appeals, in the amount of \$7.50, to
cover mailing costs. If we have not heard from you within ten (10) days, the Record on Appeal
and briefs will be disposed of.

Sincerely,

Kenneth A. Richstad
Clerk of Court

KAR/mo

cc: Assistant Appellate Defender Robert M. Dudek
Ralph E. Hoisington, Esquire

The South Carolina Court of Appeals

The State,

Respondent,

v.

Lord Byron Slater,

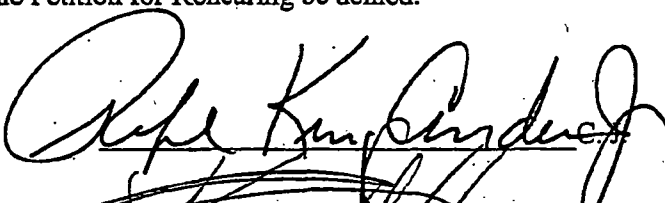
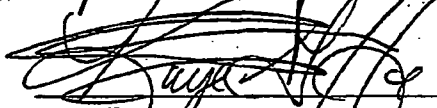
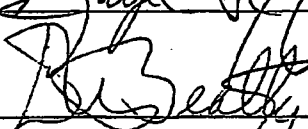
Appellant.

The Honorable Edward B. Cottingham
 Charleston County
 Trial Court Case No. 2001-GS-10-03221
 2001-GS-10-03226

ORDER DENYING PETITION FOR REHEARING

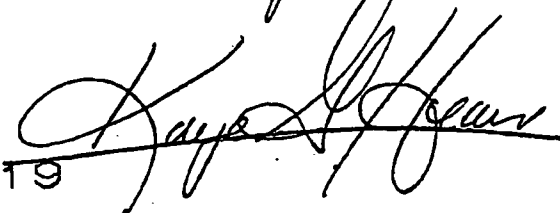
PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.


 J.
 J.

Columbia, South Carolina
 September 23, 2004

I would grant:



cc: Assistant Appellate Defender Robert M. Dudek
Attorney General Henry Dargan McMaster
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Donald J. Zelenka
Senior Assistant Attorney General William Edgar Salter, III
Ralph E. Hoisington, Esquire

The Supreme Court of South Carolina

The State,

Petitioner,

v.

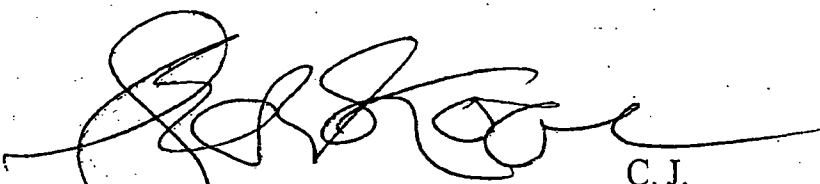
Lord Byron Slater,

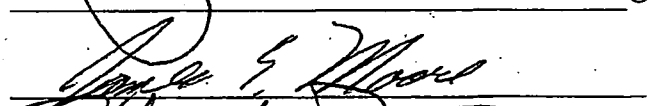
Respondent.

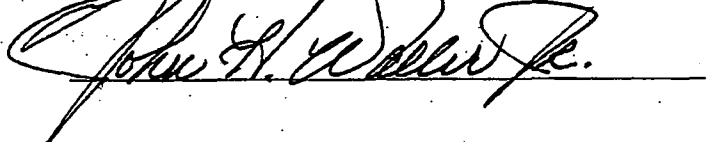
ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in State v. Slater, 360 S.C. 487, 602 S.E.2d 90 (2004).

The parties shall proceed to serve and file the appendix and briefs as provided by Rule 226(i), SCACR.


C. J.


J.


J.

Columbia, South Carolina

March 23, 2006

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal From Charleston County
The Honorable Edward B. Cottingham, Circuit Court Judge**

THE STATE,

Petitioner,

vs.

LORD BYRON SLATER,

Respondent.

BRIEF OF PETITIONER

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Attorney General**

**JOHN W. McINTOSH
Chief Deputy Attorney General**

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ATTORNEYS FOR PETITIONER.

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QUESTION PRESENTED

Whether the majority of the Court of Appeals erroneously held that Respondent was entitled to a self-defense charge because there was no evidence presented to satisfy the first, third and fourth elements of self-defense or that Respondent communicated an intent to withdraw from the conflict, and the only evidence was that Respondent murdered an unarmed and defenseless victim?

STATEMENT OF THE CASE

Respondent (Lord Byron Slater) is currently confined in the South Carolina Department of Corrections pursuant to commitment orders from the Charleston County Clerk of Court. The Charleston County Grand Jury indicted Respondent at the May 2001 term of court for murder (2001-GS-10-3221) and possession of a firearm during the commission of a violent crime (2001-GS-10-3226), in connection with the February 3, 2001 homicide of Sharone Willis Middleton. On November 13-15, 2001, Respondent received a jury trial on these charges before the Honorable Edward B. Cottingham. Charleston County Public Defender D. Ashley Pennington and Assistant Public Defender S. Boyd Young represented him at trial. Assistant Solicitors Dale DuTremble and Elizabeth Sumner, of the Ninth Circuit Solicitor's Office, prosecuted the case.

Judge Cottingham submitted the lesser-included offense of voluntary manslaughter to the jury, but the jury found Respondent guilty of both charges. Judge Cottingham sentenced him to life imprisonment. Respondent served and filed a timely Notice of Appeal.

After the submission of briefs by the parties and oral argument on the issues raised therein, a majority of the Court of Appeals reversed Respondent's 2001 convictions in a published Opinion filed on August 9, 2004. *State v. Slater*, Opinion No. 3855 (S.C. Ct. App., Aug. 9, 2004). This Opinion is published as *State v. Slater*, 360 S.C. 487, 602 S.E.2d 90 (Ct. App. 2004), App. 1-6. In reversing, the majority only addressed one of the three issues raised by Respondent: his claim that the trial judge erroneously failed to charge the jury on self-defense. The majority held that the failure to give the instruction constituted reversible error. 602 S.E.2d at 91-94.

The dissent found that Respondent was not entitled to a self-defense instruction because he "failed to effectively communicate his intent to withdraw after he provoked a dangerous situation."

Id at 94-95 (Hearn, C.J., dissenting). The dissent further found that no other alleged error required reversal of Respondent's conviction. *Id* at 95-96 (Hearn, C.J., dissenting).

On August 24, 2004, Petitioner (the State) filed a Petition for Rehearing. App. 7-17. On September 23, 2004, the Court of Appeals entered an Order Denying Petition for Rehearing. App. 18-20.

The State then filed a Petition for Writ of Certiorari on October 25, 2004. Respondent made his Return to Petition for Writ of Certiorari on January 27, 2005. This Court granted Certiorari on March 23, 2006.

ARGUMENT.

The majority of the Court of Appeals erred by holding that Respondent was entitled to a self-defense charge because there was no evidence presented that Respondent shot his unarmed and defenseless victim in self-defense.

A majority of the Court of Appeals held that the trial judge erred by refusing to charge self-defense. *Slater*, 602 S.E.2d at 91-94. The State disagrees and submits that the trial judge properly refused to give such an instruction because it was not supported by any evidence presented at trial.

The State agrees with the majority that "[t]he evidence presented at trial determines the law to be charged." *State v. Goodson*, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994). If there is any evidence in the record to support self-defense, the issue should be submitted to the jury. *State v. Burkhardt*, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). Nor does the State take exception with the rule that "[f]or a defendant to argue self-defense, the record must demonstrate that "(1)[he] was without fault in bringing on the difficulty; (2) [he] actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4)[he] had no other probable means of avoiding the danger." *State v. Chapman*, 336 S.C. 149, 153, 519 S.E.2d 100, 103 (1999). However, the State respectfully submits that the majority's application of this law to the present case was erroneous.

The prosecution's evidence clearly proved that Respondent was guilty of murder. Fifteen-year-old Demetrius Nelson rode with his brother, Mark, and his twenty-year-old cousin, Sharone Middleton (the victim), to a step show dance competition at North Charleston High School on the evening of February 3, 2001. Mark Nelson went into the show around 8:30 p.m., while the victim and Nelson drove around on Rivers Avenue. The victim and Nelson returned to the high school

shortly before the competition ended and parked in a church parking lot across the street from the school. They were in the victim's white Mazda, listening to music and talking. R. pp. 12-16.

Around 10:00 p.m., they spotted Mark Nelson standing at a cross-way across the street. Mark began walking towards the victim's car as soon as he spotted it. He began running towards the car when "about six to eight guys," whom Demetrius did not recognize, began following him. Mark jumped in the car and shouted for the victim to "just drive off." He also tried to close and lock his door, but an assailant managed to open the door and demanded that Mark give him money. Mark said that he did not have any money, the assailants began hitting him until Mark gave them his money. Then, other men pulled Demetrius' door open and demanded his money. One of these individuals had a handgun. Demetrius told him he did not have any money, and the armed assailant struck him two times in his side. None of these individuals was Lord Byron Slater (Respondent).

R. pp. 16-19.

Three or four other men pulled the victim out of the driver's side of the car and they kicked, beat and stomped on him. The victim covered himself on the ground in an effort to avoid their blows. Someone, other than the two armed men whom Demetrius had previously seen, then shot the victim twice as he lay on the ground, defenseless. The shooter then ran away and continued shooting at the car until he jumped into another car. In all, six or seven more shots were fired. Demetrius never saw the shooter and did not see the direction in which the assailant's car fled. Finally, no one in his car had a weapon and the victim did not have a weapon in his hand as he lay on the ground. R. pp. 19-24.

Mark Nelson corroborated his brother's account. He went outside and talked with two of his friends after the step show. As they were talking, he saw a white Land Rover pass them. Several

minutes later a group of males ran up to this car and stopped it. "[T]he next thing we know, we all saw them coming back and then we saw one dude with a gun and . . . he was waving it. And when we saw that, everybody just started running." R. pp. 35-38; 44-45.

Mark ran straight toward the dirt parking lot where the victim and Demetrius were. Before he could close and lock his door, an unknown individual, wearing a white "puffy" jacket and armed with a gun, pulled him out of the car and demanded his money. This individual was not Respondent. Mark initially said that he did not have any money but gave the man his \$20.00 when the man threatened to shoot him. R. pp. 38-39; 45-46.

Other individuals managed to pull Demetrius out of the car and the first armed assailant directed his attention toward Demetrius. When the man demanded Demetrius' money, Demetrius replied that he did not have any. The group then went around to the other side of the car, where still other individuals had managed to pull the victim from the car and were beating him in an effort to get his money. R. pp. 38-40; 47-48.

At that point, Mark saw two gunshots but could not see who shot his cousin because the group was surrounding him. The shooter began shooting again as he ran away from the scene. So, the Nelson brothers dove inside the car while the shooter fired a total of ten to twelve shots. The shooter and others ran straight to a "white or gray Crown Vic" and continued shooting as they drove away from the scene. The person that robbed him was armed, but he was not the same person who shot the victim. No one in the victim's car had a weapon. R. pp. 40-43; 47-50.

Nineteen-year-old Terrell Bryant testified that "[w]hen I walked out [of the gym] there was some commotion inside the bus parking lot." Bryant saw "Lord Byron walking towards me with a gun in his hand." He was walking with it "freely." Respondent and others then got into a white car

and drove over to the parking lot where the victim was parked. R. pp. 66-68.

Although Bryant did not see who got out of the car, he saw the passenger door open and Respondent had gotten into the passenger door before the car left moments earlier. Bryant fell to the ground as soon as he heard gunshots. He did not see anyone run back to the white vehicle but saw it leave the scene. He also heard gunshots being fired as the car was backing up to leave. He described the gun that Respondent was carrying as a black gun. R. pp. 68-71.

Deshawn Brown, who knows Respondent through his brother, also attended the step show that night. He spoke with Respondent and asked Respondent for a ride home. The car was being driven by "L", later identified as Ellis Judon. Before they left the vicinity, the group drove over to the parking lot, where there was a "commotion" taking place. Respondent got out of the car and walked into the crowd. Brown then heard gunshots. R. pp. 82-84; 86-92.

Everyone fled after the gunshots and Respondent ran back to the car. Brown did not see Respondent with a gun at this point. However, he saw it when Respondent fired it into the air as they were driving away from the parking lot. Respondent also said that "[h]e think dog get hit," meaning that he thought that someone was shot. Further, Brown testified that he heard other gunshots before they reached the church parking lot. R. pp. 83-84; 86-88.

After they left the scene, they went to Respondent's residence. Respondent went into the house and did not have a weapon on him when he returned several minutes later. The group returned to the school and was stopped by police along the way. The police did not find a weapon in the car. Brown had already called his brother to get a ride home and his brother came and got him. Brown described the weapon Respondent had as a "black nine." R. pp. 84-86.

Kenyon Nichols, went to the step show because Judon and Respondent were there. He was

planning to ride home with them after the show. When he got to Respondent's white Monte Carlo after the show, Judon, Respondent and Brown (a/k/a Erkel) were there. Judon was driving and Respondent was sitting in the front passenger seat. R. pp. 102-04; 106.

Judon drove over to the church parking lot where a "crowd of boys" or "a gang" were located. Respondent got out of the car and walked towards this crowd. The other occupants of the car proceeded to exit it also. By the time Nichols had taken five or six steps, he heard gunshots and ran back to the car. After the others returned to the car, they sped off towards Respondent's residence. As they were driving away, Respondent started shooting into the crowd. Also, Respondent said, "I think I shot him." They stopped briefly at Respondent's residence and returned to the parking lot, where they were stopped by the police. Police did not find anything in the car. They then went to Sonic and got something to eat. Nichols described Respondent's weapon as a black 9 mm. R. pp. 104-12.

Ellis Judon, who was twenty-three at the time of trial, is a very close friend of Respondent. At Respondent's invitation, he went to the step show on February 3, 2001, in Respondent's white Monte Carlo. Judon was driving. After the show, they were going to give both Nichols (a/k/a Snub) and Brown a ride home. They were sitting in the courtyard "chilling" and talking to some girls when a group of about five males whom Judon did not recognize came over to the courtyard. These individuals looked like they were going to cause trouble. R. pp. 114-18; 129-30.

According to Judon, they walked away from the group of five men, and the other group then stopped a Ford Explorer. Respondent immediately went to his car and retrieved his black 9 mm. pistol. Next, he ran in the direction of the truck which had been stopped, but did not do anything. Moments later, one of the members of the crowd said, "I see one" and began chasing another person

across a dirt road into the church parking lot. R. pp. 119-21; 130-31.

Respondent, who still had his gun in his hand, ran back to his car and told Judon to go over to the dirt church parking lot. Neither Judon nor Respondent had any reason to go to the parking lot. However, Respondent, Brown, and Nichols piled into the car and Judon drove them to the parking lot. When Judon turned on his bright lights, he could see the other group stomping and kicking a person lying on the ground. R. pp. 121-23; 131-32.

"L. B., Nichols and Brown all got out of the car." They immediately ran back to the car after Judon heard three or four gunshots and saw the person on the ground "flip over." When Respondent and the others returned to the car, Judon backed up and prepared to leave. As he did so, Respondent fired his weapon out of the window. The group then went back to Respondent's residence. Respondent went into the residence while the others stayed outside. Judon did not know whether Respondent had placed the weapon in his house, but he did not see Respondent put it back in the glove compartment of the car and no weapon was in the car when the police stopped them. Judon had seen Respondent with the 9 mm. on at least one or two occasions previously. R. pp. 122-29.

Following his arrest by Officer Chris Widmer, Respondent told Widmer "he had heard the shooting and that he ran to the area to see what happened. But he also said that he didn't shoot anybody." R. pp. 189-91; 197.

However, when interviewed by Detective Douglas Hester at 1:45 p.m. on February 4, 2001, Respondent said that he, Ellis Backmon, Brown and Nichols went to his car after the step show, but the car was blocked in, both in the front and in back. They saw "people running towards the church parking lot. Then we heard gunshots. Then the people who had us blocked in drove away so we followed them on to the road. It was a white Buick." Also, he claimed that he was driving his white

Me Carlo and was stopped by a female police officer who searched his car and the occupants before letting them go. After that, they went across the street to a phone booth and dropped off Bro, who was picked up by a person in a white Buick. Respondent was clear that he was driving there and that he did not have a gun in his car at anytime that evening. He likewise denied participating in a crime at North Charleston High School or shooting a gun anytime that evening. Further, he claimed the police had stopped him as soon as they left the school when asked if he had gone to his house after the incident but before the police had stopped him. R. pp. 219-25.

Expert ballistics testimony established that a slug removed from the victim at autopsy and one found in his clothing by EMS personnel were both fired by Respondent's weapon. Another bullet retrieved from a car parked in the church parking lot and all seventeen fired cartridge casings found on the scene, were also positively matched to Respondent's weapon and a bullet jacket fragment was consistent with having been fired by his weapon or one similar to it. Nine millimeter cartridges seized pursuant to a search warrant of Respondent's residence were consistent with a type of cartridge that would be loaded into Respondent's weapon and are the correct caliber for his pistol.¹ R. p. 143-64; 241-46; 251.

Respondent only presented two witnesses, himself and SLED Agent Joseph Powell. Agent Powell, who is an expert in gunshot residue analysis, testified that his testing on samples taken from the victim's hands revealed that the victim had gunshot residue on his right palm, which indicated that he may have handled or fired a weapon. While Powell could not say with certainty that the victim did not fire a weapon, he opined that it was very unlikely that the decedent shot a weapon

¹ Police also seized a .35 caliber pistol as well as some .35 caliber ammunition and .25 caliber ammunition from Respondent's residence.

before he was killed and it was more probable that he acquired the residue either from the cloud of gases emitted by the gunshots or by handling a weapon. R. pp. 271-76; 280-81; 283-85.

Respondent, a nineteen-year-old man at the time of the incident, testified that he and Judon went to the step show in his white Monte Carlo. They met up with Nichols and Brown at the show. Respondent remained at the school after the show. He was talking with some girls outside when three or four men ran up to the truck and yelled at some of the people in it. He claimed that he "wasn't too much worried about that." Nevertheless, he admitted that he immediately walked back to his car, opened the door and grabbed his gun. His initial intent was "to shoot in the air" in order to create a commotion, claiming "[t]hat's just something that young people be doing like after parties or clubs or whatever." R. pp. 291-94.

He walked over to the group, but changed his mind and did not fire the weapon. Instead, he kept the gun "pretty low by my leg" and walked back to his car once the disturbance at the truck had ended. When he reached the car, he noticed that "something was going on in the parking lot. So, . . . I start[ed] walking toward the parking lot." He testified that it looked like a fight was taking place and that he only wanted to find out what was happening. However, he never put his gun back in the glove compartment. R. pp. 295-96.

He then walked into the dirt parking lot and saw two or three separate fights. He saw two people beating on one person on one side of the car. On the other side of the same car, he saw another two on one encounter and someone on the ground being beaten. He walked up where two men were "tussling or tugging." This was a different area from the area where he had seen the person lying on the ground being beaten. As he approached, he apparently surprised one of the individuals "and he turned to me and he had a gun in his hand. And I see his gun and I started

[h]ere, there was some evidence to support a self-defense charge. Slater maintains that when he approached the altercation between the victim and his attackers, an attacker pointed a gun at Slater. Slater then turned and ran. While running away, Slater heard gunshots and returned fire, not looking in the direction where he was firing. Slater testified, "when I walked up on him, I guess I surprised him and he turned to me and he had a gun in his hand. And I see his gun and I started running." He added, "Yeah, when I walked up on him like here, like he turned to me, like had the gun pointed at me like he surprised." Additionally, Mark Nelson, a friend of the victim, testified that he saw one of the attackers--someone other than Slater--with a gun.

The State insists that Slater bears some responsibility for the tragedy because he was in unlawful possession of a gun and carried that gun into the altercation. However, the mere unlawful possession of a firearm, with nothing more, does not automatically bar a self-defense charge. See *State v. Burris*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (explaining that "a person can be acting lawfully, even if he is in unlawful possession of a weapon"). As importantly, Slater testified that he turned and started to run away from the attacker holding the gun. Therefore, even if Slater initially contributed to the difficulty, that he turned and ran away would restore his right to self-defense. See *Bryant*, 336 S.C. at 346, 520 S.E.2d at 322 (explaining that an appellant's attempt to leave the scene of a confrontation would signal that the "appellant truly intended to withdraw" from the situation). See also *State v. Rogers*, 329 S.C. 520, 525, 466 S.E.2d 360, 363 (1996) (reasoning that Rogers faced no overt threat because his opponent was moving away from him and said nothing to evince a threat).

Slater, at 602 S.E.2d at 93.

It is the State's position that the majority erroneously concluded that there was evidence that Respondent shot the victim in self-defense. The State's evidence clearly showed that the victim was being assaulted and robbed by another group of people when Respondent decided, for reasons known only to him, to approach the crowd while armed with a loaded and cocked weapon and shoot the victim twice in the chest, as the victim lay defenseless on the ground. The victim was not armed and

had not done anything, whatsoever, to provoke him.

Further, the State's evidence clearly established that Respondent continued to fire his weapon at the victim and the others in the victim's party as he fled back to his car and even as the car sped away from the scene. Thus, the State's evidence demonstrates beyond cavil that Respondent was not without fault in bringing on the difficulty. He also failed to meet the third and fourth elements of a self-defense charge under *State v. Goodson*.

Likewise, Respondent's own testimony does not support a self-defense instruction. To the contrary, he admitted that the victim had done nothing to provoke him and that the victim was in a different area from where he saw the two people struggling. He also admitted that he expressly loaded his weapon and cocked it earlier that day because he intended to use it; and that he had initially approached the crowd around the truck with the intent to discharge his weapon and cause a commotion because this is what young people do. R. pp. 291-94.

Further, even though he had a fully loaded and cocked weapon in his hand and had intended to use his weapon that evening, he did not make any effort to immediately fire at his putative assailant, who was some ten to fifteen feet away from him, until after a shot was fired at him. And, this was as he was fleeing the confrontation. Also, he continued to fire his weapon as he ran away from the scene, without any regard to where the shots he was firing were going; and he continued to fire his weapon until there were no more bullets in it. R. pp. 311-14; 319-22. Finally, the State's cross-examination established that Respondent shot, killed and, in fact, "murdered" the victim. R. p. 330.

Under these circumstances, Respondent's own testimony clearly reflects that he was not without fault in bringing on the difficulty, that the circumstances were not such as would warrant a

man of ordinary prudence and courage to strike the fatal blow to save himself from serious bodily harm or losing his own life and that he had other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury other than to act as he did. *See Goodson; State v. Hendrix*, 270 S.C. 653, 244 S.E.2d 503 (1978). As a result, he was not entitled to a self-defense instruction and the trial judge's ruling must be affirmed. *Id.*

The majority rejected the State's position that Respondent could not be entitled to a self-defense charge because he was at fault in bringing on the difficulty, stating that "[t]he State insists that Slater bears some responsibility for the tragedy because he was in unlawful possession of a gun and carried that gun into the altercation. However, the mere unlawful possession of a firearm, with nothing more, does not automatically bar a self-defense charge." *Slater*, 602 S.E.2d at 93, citing *Burris, supra*. Yet, the majority clearly overlooked that Respondent was not merely "in unlawful possession of a gun" that he had carried into the altercation. Instead, Respondent admittedly loaded his weapon and cocked it earlier that day because he intended to use it; and he admitted that he had initially approached the crowd around the truck with the intent to discharge his weapon and cause a commotion because this is what young people do. R. 291-94. Further, his testimony supports the conclusion that he was some distance away from the victim and the fights, involving people unknown to him, before *he deliberately approached the area where the shooting took place with his loaded and cocked weapon*. He could have easily avoided any lethal confrontation by not intervening.

Thus, his testimony established that he quite literally went looking for trouble and found it. As a result, the majority erred by holding that this was self-defense. Rather, as in *Bryant*, his actions were "in violation of law and reasonably calculated to produce the occasion." 336 S.C. at 345, 520

S.E.2d at 322. *See also Slater*, 602 S.E.2d at 94 (Hearn, C.J., dissenting) ("Here, all the evidence, including Slater's own testimony, indicates that he provoked a conflict by running toward an altercation while conspicuously holding a cocked and loaded handgun, even though he had no personal connection to the people involved in the fight").

Respondent could not indiscriminately intervene in the on-going conflict(s). In South Carolina, one may act in defense of others. Yet, "[u]nder the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander [*only if*] that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense." *State v. Starnes*, 340 S.C. 312, 322-23, 531 S.E.2d 907, 913 (2003) (emphasis added).

"[I]n order for the trial court to give a defense of others charge, there must be some evidence adduced at trial that the defendant was indeed lawfully defending others." *Douglas v. State*, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998); see also William S. McAninch & W. Gaston Faurey, *The Criminal Law of South Carolina* (3rd ed. 1996) ("There must, of course, be some evidence that the defendant was defending others at the time of his act in order for him to be entitled to the instruction."). Thus, he could have only intervened on behalf of the victim. However, that is not what Respondent did. Instead, he testified that it looked like a fight was taking place and that he only wanted to find out what was happening. However, he never put his gun back in the glove compartment. R. pp. 295-96. Once again, this prevents him from being without fault in bringing on the difficulty.

Moreover, in finding that Respondent had effectively communicated his intent to withdraw to the attacker with the gun, the majority found that "[Respondent] immediately 'turned and ran' after seeing the attacker's gun. [Respondent] did exactly what the supreme court looked for in

Finally, the majority decision below ignores that Respondent could not be entitled to a self-defense instruction with respect to shooting *the victim in this case* because the victim had not done anything to provoke anyone and was a totally innocent person who was being robbed, beaten and stomped at the time of the shooting. *Cf. State v. Light*, 363 S.C. 325, 333, 610 S.E.2d 504, 508 (Ct. App. 2005) (where defendant stated he had disarmed victim and taken possession of the rifle when the shot was fired, unarmed victim no longer posed a threat to the armed defendant "and he could not have reasonably believed she did. Therefore, the evidence demonstrates he did not have the right to use deadly force in self-defense and the trial court properly refused to so charge the jury"). Apparently, the majority decision implicitly applied the doctrine of "transferred self-defense," which has not been previously adopted in this State. *See State v. Porter*, 269 S.C. 618, 239 S.E.2d 641 (1977). The present case demonstrates beyond any question problems inherent in such a doctrine, which excuses the shooting of an innocent person who has not done anything to provoke any attack from anyone, much less this criminal defendant.

More importantly, transferred self-defense is inconsistent with current South Carolina law regarding self-defense. As *Goodson, Bryant, State v. Bruno*, 322 S.C. 534, 473 S.E.2d 450 (1996), *Tate v. State*, 308 S.C. 163, 417 S.E.2d 553 (1992), *State v. Davis*, 282 S.C. 45, 317 S.E.2d 452 (1984) and other self-defense cases decided by this Court and the Court of Appeals demonstrate, a self-defense instruction is presently given only in limited situations because it completely bars the prosecution of an otherwise unlawful act. The evidence must show that the defendant's conduct clearly falls within the four elements of self-defense and that his actions were proportioned to the danger confronting him. Further, self-defense is less readily available when lethal force is used. *See Goodson, supra*.

It is the State's position that any contrary holding would be simply wrong. Also, this Court has expressly refused to recognize "imperfect self-defense," which would reduce murder to manslaughter where the defendant could not meet all four elements of self-defense. *State v. Finley*, 277 S.C. 548, 290 S.E.2d 888 (1982). Allowing the majority decision to stand, as written, would require this Court to ignore its own precedent and extend the protection of self-defense to incidents which involve the death or maiming of totally innocent bystanders. It would, quite literally, grant a defendant a license to kill innocent people. However, such a ludicrous position is completely unnecessary because the defense of accident has previously recognized in South Carolina. *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999).²

Therefore, the State submits that the majority of the Court of Appeals erroneously held that the trial judge had an obligation to instruct the jury on self-defense, and that no other reversible error is present in the case..

² Also, with the proliferation of youth in this and other states carrying handguns, *see, e.g., State v. Price*, ___ S.C. ___, ___ S.E.2d ___, Op. No. 26139 (S.C., filed April 17, 2006) (Richland County defendant convicted of murder after shooting involving members of rival gangs at fraternity sponsored party) -- not to mention recent legislative amendments which make it easy for most adults in South Carolina to lawfully carry a concealed handgun -- the State would strongly urge this Court not to adopt a theory of defense which will allow innocent people to be injured or killed, and which may encourage the use of guns by providing an easy out for a killer. As the present case, once again, clearly demonstrates, any such theory will be felt most heavily by those otherwise innocent people who merely are unfortunate enough to be poor and live in areas where crimes most often occur.

CONCLUSION

For the reasons stated above, Petitioner submits that this Court should reverse the Opinion and judgment of the Court of Appeals.

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By. 

ATTORNEYS FOR RESPONDENT

April 24, 2006.

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal From Charleston County
The Honorable Edward B. Cottingham, Circuit Court Judge**

THE STATE,

Petitioner,

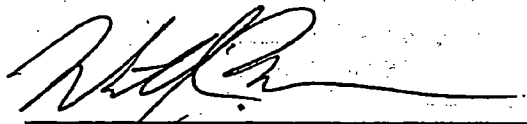
vs.

LORD BYRON SLATER,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with SCACR 211(b).



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April 24, 2006.

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal From Charleston County
The Honorable G. Edward B. Cottingham, Circuit Court Judge**

THE STATE,

PETITIONER,

vs.

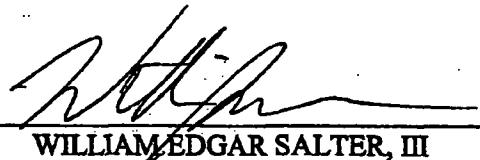
LORD BYRON SLATER,

RESPONDENT.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for Petitioner, certify that I have served the within Brief of Petitioner on Respondent by depositing three copies of same in the United States mail, postage prepaid, addressed to his attorney of record, Robert M. Dudek, Esquire, South Carolina Office of Appellate Defense, 1205 Pendleton Street, Room 306, Columbia, South Carolina 29201.

This 24th day of April, 2006.



WILLIAM EDGAR SALTER, III

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ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA IN
THE SUPREME COURT

Certiorari to Charleston County
Edward B. Cottingham, Circuit Court Judge

THE STATE,

PETITIONER,

V.

LORD BYRON SLATER,

RESPONDENT

BRIEF OF RESPONDENT

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COUNTER QUESTION PRESENTED

Whether the Court of Appeals correctly held respondent was entitled to an instruction on self-defense where there was evidence of a fight and robbery in a parking lot that respondent was not involved in, there was evidence that a gun was pointed at respondent when he went near the commotion, and evidence that respondent only returned fire after hearing a gunshot while he was on the run from the armed man, since this constituted evidence of self-defense mandating that instruction?

STATEMENT OF THE CASE

Respondent was indicted by the Charleston County grand jury for the offenses of murder and possession of a firearm during a violent crime. R. 392. His case came on for trial on November 13, 2001, before the Honorable Edward B. Cottingham and a jury. Ashley Pennington and S. Boyd Young represented respondent. The solicitor was Dale DuTremble. R. 1.

The jury found respondent guilty on both counts. R. 389, l. 24 – 390, l. 10. Judge Cottingham sentenced respondent to life imprisonment. R. 391, ll. 1-3.

The Court of Appeals reversed respondent's murder conviction in State v. Slater, 360 S.C. 487, 602 S.E.2d 90 (Ct. App. 2004). The majority held that respondent was entitled to an instruction on self-defense. The majority of the Court of Appeals consequently did not address respondent's two other assignments of error that he argued also entitled him to a new trial.

The state filed a petition for rehearing. That rehearing petition was denied. The state then filed a petition for writ of certiorari with this Court. That petition was granted by the vote of three Justices of this Court on March 23, 2006.

The state subsequently filed its brief of petitioner. This brief of respondent follows.

ARGUMENT

The Court of Appeals properly held respondent was entitled to an instruction on self-defense since there was evidence respondent acted in self-defense. There was evidence that someone pointed a gun at respondent during a fight in the parking lot that respondent did not start and was not involved in. This commotion turned out to be a robbery attempt, and the gun was pointed at respondent when he went near the commotion. Respondent only returned fire after the gun was pointed at him, after he ran from the gun, and after he heard a gunshot. This testimony constituted evidence of self-defense mandating that instruction.

Introduction

The state's claim that there was no evidence of self-defense in this tragic case, that respondent was involved in the conflict, and that respondent intentionally "murdered" a defenseless victim looks at the evidence not only in the light most favorable to the state, but with blinders on. Respondent's question presented at iii. However, the applicable standard is in the light most favorable to the defense, is there any evidence of self-defense. The trial judge can only take the issue away from the jury if there is "no evidence whatsoever" of self-defense. See State v. Byrd, 323 S.C. 319, 474 S.E.2d 430 (1996); State v. Burkhardt, 350 S.C. 252, 565 S.E.2d 298 (2002); State v. Hill, 315 S.C. 260, 433 S.E.2d 848 (1993); State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). With all due respect, the state is asking this Court set aside its precedents where the Court of Appeals below was only applying them to the unfortunate facts of this case.

Relevant Facts

Fifteen-year-old Demetrius Nelson went by the Step Show Dance at North Charleston High School on February 3, 2001. The decedent was driving. R. 12, l. 4 - 13, l. 6. The decedent and

Nelson drove around Rivers Avenue while his brother, Mark, actually attended the dance. R. 15, ll. 1-18.

Close to the time the dance was to end, the decedent and Nelson returned to the High School. They parked in a lot across the street from the school. R. 15, ll. 16-18.

They listened to music in the car, and they talked until Mark spotted them when he came outside the school dance. Mark began walking towards the car. However, "some guys was following him, maybe about six to eight guys behind him." Respondent was not with these men. One of the men following Mark asked for his money. When Mark responded he did not have any money, the men started beating him. R. 16, l. 10 - 17, l. 25.

Another man pulled the decedent out of the driver's side of the car and "they started like kicking him and stomping him or whatever." R. 18, ll. 6-10. Another man threatened to shoot Nelson unless he gave him his money. R. 19, ll. 1-16. The decedent was on the ground outside "covering up like his body or whatever so he wouldn't get hurt" when someone shot the decedent. Nelson did not see who shot him. R. 20, ll. 5-24.

Nelson said the decedent did not have a gun, but that at least three people at the scene had handguns that night. R. 24, ll. 3-15; R. 32, ll. 6-18. Mark Nelson recalled trying to fight these men off when he heard the decedent get shot two times. R. 39, l. 2 - 40, l. 10. As will be seen infra, respondent testified that he only went to investigate the commotion, and he began running when a man, apparently involved in the commotion or robbery attempt, pointed a gun at him. Respondent fired back while running after he heard a gunshot.

Another man at the scene, Terrell Bryant, remembered "when I walked out there [outside the dance] there was some commotion inside the bus parking lot and I was by the car that I was

riding in and I saw Lord Byron walking towards me with a gun in his hand." Bryant testified respondent got into an automobile, and it drove away. R. 67, ll. 3-16.

Bryant said as the automobile respondent was riding in drove away, he heard gunshots. R. 69, ll. 2-10. Bryant testified after the shooting, he saw a crowd of "black males" run past him into the gymnasium. R. 71, ll. 19-24.

Deshawn Brown testified that he asked respondent for a ride home that night. Brown recalled there was "a commotion" in the parking lot and that respondent went to the commotion. R. 81, l. 17 - 83, l. 17.

Brown said as they drove away from scene, respondent was shooting the gun into the air. R. 84, ll. 3-24. Brown claimed respondent said, "he think Dog get hit" after he fired the shots from the car. R. 87, ll. 2-25.

Twenty-three year old Ellis Judon testified that during the disturbance outside the dance that night that respondent unlocked the car door. Respondent got his gun out of the glove compartment. R. 118, l. 12 - 119, l. 24. Judon also said respondent went towards the commotion with a gun in his hand. R. 120, l. 3 - 122, l. 7.

Officer Chris Widmer arrested respondent at his house hours after the shooting. R. 189, l. 16 - 191, l. 19. Respondent told Widmer "he had heard the shooting and that he ran to the area to see what happened. But he also said that he didn't shoot anybody." R. 197, ll. 2-10.

SLED agent Kenneth Whitler testified that the two slugs removed from the victim matched the gun seized from respondent's house. R. 245, ll. 11-16. The decedent had gunshot residue on his right palm to indicate he may have handled or shot a gun. R. 271, ll. 8-24. SLED agent Joseph Powell testified "I cannot say with certainty that he did not fire a weapon." R. 275, ll. 2-3. Powell

later opined that he thought it was very unlikely that the decedent shot a gun before he was shot. R. 285, ll. 17-22.

Respondent testifies

Respondent testified in his own defense. He was only nineteen years old at the time of the incident at the Step Show Dance. R. 290, l. 23 – 291, l. 6.

Respondent was talking with some girls outside the dance when a commotion started near a truck. “It looked like they was, like, yelling at some people...I wasn’t too much worried about that...I walked back to my car and open[ed] up the door and I grabbed the gun I had.” R. 292, l. 8 – 293, l. 21.

Respondent said he planned to shoot the gun into the air because “that’s just something that young people be doing like, after parties or clubs or whatever.” R. 293, l. 21 – 294, l. 6. Respondent testified he had seen other people do this in the past. R. 294, l. 1 – 295, l. 18.

Respondent changed his mind about shooting the gun in the air, and he walked over to the “fight,” which was apparently actually a robbery attempt the decedent tried to resist. “I just wanted to see what was going on.” Respondent said he did not return to the car to put his gun away before going to watch or investigate the fight. R. 294, l. 12 – 297, l. 14.

Respondent saw the fight itself and he saw one person on the ground. Respondent recalled there were two or three separate fights going on at the time. R. 297, l. 9 – 298, l. 23. Respondent said he apparently surprised one man “and he turned to me *and he had a gun in his hand. And I see his gun and I started running and I heard a gunshot and I start shooting my gun.*” R. 299, ll. 8-18 (emphasis added).

Respondent said he was not sure how many times he shot his gun. R. 299, l. 19 – 300, l. 4. Respondent testified he ran when the man pointed the gun at him. He only shot after he heard a

gunshot. R. 300, l. 19 – 301, l. 13. Respondent said, “it was a quick reaction.” R. 301, l. 7 – 302, l. 2.

Respondent testified that he was very troubled when he found out that two shots from his gun were what actually struck the decedent. R. 306, l. 22 – 307, l. 1. Respondent repeated on cross-examination that when he got the gun out of the glove compartment, he only planned to shoot it in the air. R. 316, l. 16 – 317, l. 12.

Request for a self-defense instruction

Defense counsel requested that the judge instruct the jury on the law of self-defense. R. 334, l. 7 – 336, l. 14. Defense counsel Pennington said there was evidence a gun was pointed at respondent and that he ran out of fear. Counsel argued respondent acted reasonably under the circumstances. Counsel also disagreed with the judge that respondent was at fault for bringing on the difficulty and he argued that the cases about bringing on the difficulty really related to someone “having somehow produced the altercation that leads to the necessity for self-defense.” Counsel argued the fight was already underway when respondent went to investigate.¹ R. 334, l. 7 – 336, l. 25.

The judge ruled that he would not charge self-defense. The judge stated, “they may consider a case like this, self-defense, in McCall, South Carolina, but not in Charleston.”

The judge then told defense counsel he would charge voluntary manslaughter as an option to murder. R. 338, ll. 4-22.

¹ The judge at first said he would not charge self-defense because respondent testified he shot the gun into the air because that was something young people do — apparently in exciting situations. Defense counsel countered that the evidence showed respondent refrained from shooting the gun into the air. The solicitor agreed with defense counsel. However, the judge then ruled he still would not charge self-defense. R. 481, l. 1 – 483, l. 13.

In his closing argument, defense counsel told the jury that respondent was a stupid nineteen-year-old who was not smart enough to make up a story about the gun being pointed at him before he ran and returned fire. R. 364, l. 20 – 365, l. 24; R. 370, ll. 5-18.

The opinion of the Court of Appeals

In State v. Slater, 360 S.C. 487, 602 S.E.2d 90 (2004), a majority of the Court of Appeals wrote:

Here, there was some evidence to support a self-defense charge. Slater maintains that when he approached the altercation between the victim and his attackers, an attacker pointed a gun at Slater. Slater then turned and ran. While running away, Slater heard gunshots and returned fire, not looking in the direction where he was firing. Slater testified, “when I walked up on him, I guess I surprised him and he turned to me and he had a gun in his hand. And I see his gun and I started running.” He added, “Yeah, when I walked up on him like here, like he turned to me, like had the gun pointed at me like he surprised.” Additionally, Mark Nelson, a friend of the victim, testified that he saw one of the attackers – – someone other than Slater – – with a gun.

State v. Slater, 360 S.C. at 491, 602 S.E.2d at 92–93.

Further, the majority pointed to the problem with the dissenting judge’s view that respondent somehow provoked this conflict. The majority wrote:

The dissent contends that Slater “provoked a conflict by running toward an altercation while conspicuously holding a cocked and loaded gun.” The record provides otherwise. Slater testified, “I walked up on [the attacker]... [the gun] was by my side... in my right hand.” That testimony is uncontroverted. The dissent apparently assumes that (1) one of the attackers saw Slater’s gun; (2) was afraid for his own safety; and (3) started to shoot as a result. That scenario is plausible, but the record fails to establish it. [FN5] It is just as likely that Slater’s gun was inconspicuous, especially given that the regrettable events of that evening occurred when “it was pretty dark” and that Slater had his gun by his side.

State v. Slater, 360 S.C. at 491, 602 S.E.2d at 92–93.

The majority also distinguished State v. Bryant, 336 S.C. 340, 520 S.E.2d 319 (1999) in which the victim caught the defendant breaking into his truck. The two men struggled, and the defendant stabbed the victim to death with a screwdriver.

This Court held that under the circumstances Bryant was not entitled to a self-defense charge because he obviously started the conflict by committing a crime against the victim, who only confronted him. Bryant simply dropping his knife was insufficient to signal his withdrawal from the crime he was in the process of committing, and to signal his surrender. Intuitively, the victim in Bryant could not be expected to think Bryant had withdrawn -- ceased his aggression -- and risked what actually happened to him -- being stabbed or harmed by Bryant with some other object.

The Court of Appeals in this case correctly noted:

Here, Slater merely walked toward the altercation; he threatened or assaulted no one. [FN6] More importantly, Slater immediately "turned and ran" after seeing the attacker's gun. Slater did exactly what the Supreme Court looked for in Bryant: he left -- quickly.

App. 3.

Discussion

In determining whether to charge self-defense or a lesser-included offense, this Court has held that it will view the evidence in the light most favorable to the defendant when determining if there is any evidence to justify the charge. State v. Byrd, 323 S.C. 319, 474 S.E.2d 430 (1996). In State v. Burkhardt, 350 S.C. 252, 565 S.E.2d 298 (2002), this Court again repeated that self-defense must be charged if there is any evidence in the record to support that charge. See, State v. Hill, 315 S.C. 260, 433 S.E.2d 848 (1993).

Further, both self-defense and voluntary manslaughter should be submitted to the jury if there is any evidence to support those instructions. See State v. Gilliam, 296 S.C. 395, 373 S.E.2d

596 (1988); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). The trial judge here had the duty to charge self-defense, just as he did voluntary manslaughter, where there was any evidence supporting that instruction. Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991); State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993). Respondent's testimony made self-defense a jury issue. See State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001); State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998).

No normal person, lawyer or judge likes young people carrying guns, shooting them in the air in apparent celebration or otherwise. However, the trial judge's apparent distaste for the entire situation, or his not believing the respondent's evidence of self-defense, could not substitute for the jury's right to decide the issue once any evidence raised it.

The presence of guns is obviously not dispositive of a self-defense, accident or manslaughter charge entitlement issue. See State v. Burriess, 334 S.C. 256, 513 S.E.2d 104 (1999); State v. Sullivan, 345 S.C. 169, 547 S.E.2d 183 (2001); State v. Hendrix, *supra*. Further, there are very few situations where voluntary manslaughter or self-defense become legitimate issues at trial — and where — the defendant did the smartest thing humanly possible under the circumstances.

For example, in State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), the defendant was soliciting a prostitute when the trouble began. Here, respondent did what many students have done when a fight firsts breaks out after school — he went to watch or investigate the commotion.

The state's assertion that respondent was responsible for the commotion is not supported by the record. The state's nitpicking on the manner of respondent's retreat when a gun was pointed at him and he heard a gunshot as he ran also ignores the fact that a defendant does not even have to retreat if retreat places him in greater danger. The state's assertion that respondent did not clearly evidence "withdrawal" is also a red herring since the Court of Appeals correctly distinguished

respondent's behavior from that of the defendant in State v. Bryant. Here, respondent assaulted or threatened no one, he merely went to investigate or watch an apparent fight, and he "left quickly," he ran when the gun was pointed at him. App. 3. See Respondent's brief at 13-14; State v. McGee, 185 S.C. 184, 190, 193 S.E.2d 303, 306 (1937).

Further, no one at trial or on appeal has asserted the victim "provoked" respondent, and the state respectfully is seizing upon the emotion of the tragedy, and is beating its straw man senseless. Regardless, it is another example of the misunderstanding that the state's theory of the case is just that – a theory of the case – and the jury resolves the issues if there is any evidence of a lesser-included offense or self-defense. Again, no one has argued from trial through appeal that the decedent being shot in the turmoil that night was not a tragedy.

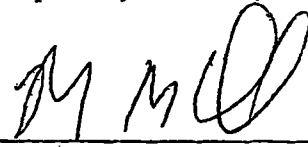
Moreover, respondent was entitled to act on reasonable appearances where he was in imminent danger or believed he was in imminent danger. See, McAninch and Faïrey, The Criminal Law of South Carolina, 1996 ed. at pg. 478-484. As stated above, although respondent was retreating from the scene when the gun was pointing at him, he was not even required to retreat if that retreat increased his chance of being shot. State v. McGee, 185 S.C. 184, 190, 193 S.E. 303, 306 (1937). It is certainly one fair inference from this record that respondent increased the danger to himself by running.

The Court of Appeals in this case followed the precedents of this Court holding that self-defense or a lesser-included offense must be charged when there is any evidence supporting that instruction, or unless there is "no evidence whatsoever" in the record supporting that instruction.

CONCLUSION

The opinion of the Court of Appeals should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Appellate Defender

ATTORNEY FOR RESPONDENT.

August 22, 2006

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Edward B. Cottingham, Circuit Court Judge

THE STATE,

PETITIONER,

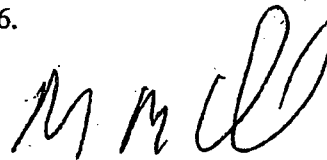
V.

LORD BYRON SLATER,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of respondent, in this case has been served on William Edgar Salter, III, Esquire, this 22nd day of August, 2006.



Robert M. Dudek
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 22nd day
of August, 2006.



Notary Public for South Carolina
My Commission Expires: November 16, 2008

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner

v.

Lord Byron Slater, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 26299
Heard March 7, 2007 - Filed April 9, 2007

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy
Attorney General John W. McIntosh, Assistant Deputy Attorney
General Donald J. Zelenka, Senior Assistant Attorney General
William Edgar Salter, III, all of Columbia, and Solicitor Ralph E.
Hoisington, of Charleston, for Petitioner.

Deputy Chief Attorney for Capital Appeals Robert M. Dudek,
of the South Carolina Commission on Indigent Defense
Division of Appellate Defense, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Lord Byron Slater ("Slater") was convicted of murder and possession of a firearm during the commission of a violent crime. Slater appealed his conviction and sentence to the court of appeals alleging that the trial court committed reversible error in failing to charge the jury on self-defense. The court of appeals reversed Slater's conviction and remanded the case for a new trial. See *State v. Slater*, 360 S.C. 487, 602 S.E.2d 90 (2004). The State appealed and this Court granted a Writ of Certiorari to review the court of appeals' decision. We reverse.

FACTUAL / PROCEDURAL BACKGROUND

Slater attended a step show at North Charleston High School in February 2001. After the step show Slater went outside and began talking with some of the girls at the school. During this time, Slater was gathered around a truck. Slater went to his car, retrieved a gun, and walked toward the truck. According to Slater, he initially retrieved his gun with the intention of shooting it into the air to cause a commotion. Slater alleges, however, that he changed his mind and returned to his car where three of his friends were waiting.

In the second parking lot, a robbery was unfolding where the victim was on the ground being assaulted by men. Slater knew neither the victim nor his attackers. Slater testified that he walked up to the robber, surprised one of the attackers. According to Slater's testimony, the man turned around and pointed toward him. Slater quickly turned away from the man and started running back toward his car. Slater testified that as he ran, he heard a gunshot and responded by shooting his own gun behind him. As Slater and his friends left the scene, Slater continued shooting in the air as the car pulled away and the victim dying on the ground from several gunshot wounds.

Slater and his three friends drove to Slater's house, where Slater left the gun. The four then went back to the parking lot where the shooting had occurred. On the way, the police stopped them and searched them but did not find a weapon.

Early the next morning, detectives from the city of North Charleston went to Slater's residence to arrest Slater for the murder of the victim. Following the arrest, they obtained a search warrant for Slater's house. Detectives recovered various ammunitions from Slater's yard and from inside his house, including two bullets, and shell casings.

At the police station, Slater told the police that he had not shot anyone. However, a ballistics expert testified at trial that the bullets which fatally wounded the victim came from Slater's gun, as did the ones retrieved from the crime scene. Additionally, numerous witnesses placed Slater at the crime scene with a gun. At trial, Slater himself admitted to shooting his gun, but insisted that he did not mean to shoot anyone.

Before the case was submitted to the jury, Slater requested a jury charge on the law of self-defense. The court declined Slater's request on the grounds that the evidence did not support the charge. Despite the court's refusal to include the jury charge on self-defense, the court included a manslaughter option in the charge. The jury convicted Slater of murder and possession of a firearm during the commission of a crime, and Slater appealed.

At the court of appeals, Slater alleged that the trial court erred in failing to charge the jury on the law of self-defense. The court of appeals agreed and reversed Slater's conviction and sentence. We granted the State's Writ of Certiorari, and the State raises the following issue for review:

Did the court of appeals err in finding that Slater was entitled to a charge on self-defense?

LAW / ANALYSIS

The State argues that the court of appeals erred in finding that Slater was entitled to a self-defense charge. We agree.

A self-defense charge is not required unless it is supported by the evidence. *State v. Goodson*, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994). To establish self-defense in South Carolina, four elements are present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of firmness and courage would have entertained the belief that he was actually in imminent danger and the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger. *State v. Bryant*, 336 S.C. 340, 344-45, 520 S.E.2d 319, 321-22 (1999). "If there is any evidence in the record from which it could reasonably be inferred

In the instant case, Slater fails to meet the first requirement for the self-defense charge: specifically, he was not without fault in bringing on the difficulty. "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense." *Bryant*, 336 S.C. at 345, 520 S.E.2d at 322. In the instant case, the record clearly reflects Slater approached an altercation that was already underway with a loaded weapon by his side. Such could be reasonably calculated to bring the difficulty that arose in this case.

Additionally, the uncontradicted evidence illustrates that Slater acted in violation of the law by carrying a weapon. The court of appeals relied on *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999), to its finding that Slater's unlawful possession of a weapon did not foreclose the possibility of asserting self-defense. Although we agree that "the mere unlawful possession of a firearm, with nothing more, does not automatically bar a self-defense charge," we reject the position that the unlawful possession of a weapon could never constitute an unlawful activity which would preclude the assertion of self-defense.

Burriss, which deals with the defense of accident, is instructive in the instant case. In *Burriss*, this Court discussed the use of an accident defense where the defendant unlawfully possessed a gun. *Burriss* maintained that he was lawfully armed in self-defense when the gun accidentally fired. *Id.* at 259, 513 S.E.2d at 106. Because a defendant must be acting lawfully to use the defense of accident, we discussed whether a person in unlawful possession of a weapon may lawfully arm himself in self-defense. *Id.* at 262, 513 S.E.2d at 108. Clarifying an ambiguity in this Court's prior case law, we noted that where the defendant's unlawful possession of a weapon is merely incidental to the defendant's lawful act of arming himself in self-defense, the unlawful possession of the weapon will not prevent the use of an accident defense. *Id.* at 262 n.5, 513 S.E.2d at 108 n.5. We further explained, however, that the unlawful possession of a firearm can, under certain circumstances, constitute an unlawful activity so as to preclude an accident defense if the weapon is the proximate cause of the killing. *Id.* Although *Burriss* takes the additional step of applying the rule in the context of accident, the analysis is equally applicable in determining if a defendant in unlawful possession of a weapon is entitled to a charge on self-defense.

Here, Slater's unlawful possession of the weapon was the proximate cause of the homicide. Slater was not merely in unlawful possession of a weapon; he carried the cocked weapon, in open view, into an already violent attack in which he had no prior involvement. Slater's actions, including the unlawful possession of the weapon, proximately caused the exchange of gunfire, and ultimately the death of the victim. Consequently, Slater fails to meet the requirement that he be without fault in bringing on the difficulty and may not avail himself of a charge on self-defense.

Accordingly, the trial court correctly found that Slater was not entitled to a self-defense charge and the court of appeals erred in reversing Slater's conviction on this ground.

CONCLUSION

For the foregoing reasons, we reverse the court of appeals' decision reversing the trial court's exclusive charge on the law of self-defense.

MOORE and BURNETT, JJ., concur. PLEICONES, J., concurring in result only.

FORM 5

STATE OF SOUTH CAROLINA)

County of Charleston)07-CP-10-2160
IN THE COURT OF COMMON PLEASLord B. Slater #279992)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

BY
JULIE J. ARMSTRONG
CLERK OF COURT

2007 MAY 23 PM 2:45

FILED

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 Lieber Corrections, P.O. Box 205
Ridgeville, SC, 29472
2. Name and location of Court which imposed sentence Ninth Judicial Circuit
Charleston County, 2144 Melbourne St, N. Chas, SC, 29405-6663
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2001-GS-10-3221, Murder

FORM 5

STATE OF SOUTH CAROLINA)

County of Charleston)De-CP-10-2160
IN THE COURT OF COMMON PLEASLord B. Slater #279992)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

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POST-CONVICTION RELIEF

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2. Name and location of Court which imposed sentence Ninth Judicial Circuit
Charleston County, 2144 Melbourne St, N. Chas, SC, 29405-6663
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2001-GS-10-3221, Murder

- (b) 2001-65-10-3226, Poss of firearm during violent crime
- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 11-15-01 Natural life
- (b) 11-15-01 (5 years)
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty: _____
- (b) after a plea of not guilty ☒ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
The judgment of conviction = yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. The South Carolina Court of Appeals
- ii. On Writ of Certiorari to the court of appeals
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Reversed and Remanded, Opinion No. 3855
- ii. Reversed, Opinion No. 26299
- iii. _____
- (c) the date of each such result:
- i. August 9, 2004
- ii. ~~July 9, 2007~~ April 9, 2007
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. 602 S.E. 2d 90
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____

- (b) _____
 (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
 (a) Ineffective Assistance of Counsel
 (b) _____
 (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
 (a) See Attached Sheets
 (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? yes
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
 (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
 (a) the specific nature thereof:
 i. Petitions for a new trial through Direct Appeal
 ii. _____
 iii. _____
 iv. _____
 (b) the name and location of the Court in which each was filed:
 i. The South Carolina Court of Appeals, 1015 Sumter St, Columbia SC, 29201
 ii. _____
 iii. _____

11. State concisely and in the same order the facts which support each grounds set out in (10):

(A) 1. Trial counsel failed to bring to the attention of the trial judge the defective advice of rights warnings, doing so would've aided the motion to suppress defendants statement and the fruits of the search warrant under fruit of the poisonous tree doctrine.

transcript pg. 322 line 11-14, pg. 334 line 3-11

Jackson v. Denno

Payton v. New York

United States v. McCraw

Miranda v. Arizona

(A) 2. Trial counsel failed to impeach Officer Palmer, who gave conflicting testimony in *curra* direct examination, doing so would've aided the motion to suppress defendants statement and the fruits of the search warrant under fruit of the poisonous tree doctrine.

transcript pg 89 line 18-25, pg 90 line 1-17, pg 91 line 5-25, pg 92 line 1

(A) 3. Trial counsel failed to request instructions on lesser including offenses of involuntary manslaughter and reckless homicide, which were supported by the evidence.

transcript pg 128 line 1-9, pg 140 line 20-25, pg 141 line 1-18

pg 151 line 5-12, pg 162 line 16-20, pg 442 line 14-18

Shackey v. State 672 N.E.2d 937

(A) 4. Trial counsel ineffective for allowing 2 witnesses to take the stand without first having them disclosed to the jury in advance through voir dire, it was a error on counsels part, witnesses weren't in defendants favor, and aided the prosecutor in a conviction of the greater offense.

transcript pg 357 line 1-25, 358 line 1-25, pg 359 line 1-23, pg 534 line 6-8

(A) 5. Trial counsel ineffective for admitting guilt in opening statement, failing to advance any theory of defense, and attempting to establish only that the defendant killed victim without malice, but presumed prejudice because defendant, who pleads not guilty, is intitled to a defense.

transcript pg. 112 line 7-22, pg. 114 line 2-9, 23-25, pg. 115 line 1-9, pg. 117 line 3-12
People v. Hattery 488 N.E.2d 513, 478 U.S. 1013

(A) 6. Trial counsel failed to object to the prosecutors closing argument comments, telling the jury the victim was shot twice while on the ground. There was no forensic medical examiner to prove that theory.
transcript pg. 531 line 18-22

(A) 7. Trial counsel duty at voir dire, is to safeguard defendant from possible bias jurors, failed to do so, when counsel did not note the fact to the trial judge, that the incident took place in a church parking lot, and there might have been potential members of that church on defendants juror panel.
transcript pg. 529 line 21-25, pg. 530 line 1-6

- 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. _____
- ii. _____
- iii. _____

- (b) the proceedings in which each ground was raised:

- i. _____
- 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) Statute 17-27-45(A)
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? N/A
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Ashely Pennington, Chas County Public Defender
2144 Melbourne Ave, Chas SC 29405
- ii. S. Boyd Young address = N/A
- iii. Robert M. Dudek, SC Office of Appellate Defense
1205 Pendleton St STE 306, Columbia SC 29201-3731
- (b) the proceedings at which each such attorney represented you:
- i. Trial Attorney
- ii. Co-Counsel to trial attorney
- iii. Direct Appeal Attorney

19. State clearly the relief you seek in filing this application:

New trial

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

No

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of _____)

VERIFICATION

I, Lord B. Slater #279992, 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.

Lord B. Slater

SWORN to and subscribed before me this 11 day of May, 2007.

Ronald W. Sess (L.S.)
Notary Public

My Commission Expires: 5 April 2016

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

I, Lord B. Slater #279992, 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.

Lord B. Slater

Applicant

SWORN or affirmed to and subscribed before me this

11 day of May, 2007.

Ronald P. Jones

Notary Public

My Commission Expires: 5 April 2016

5/11/07

Dear Mrs. Julie J. Armstrong,

Enclosed along with this short letter, is my P.C.R. application, that is to be filed with the clerk of court in the county I was convicted in, also. If its not a problem can you send me a copy thats stamped and dated, so I can have my own for my person file. I dont have the funds for any paid legal representation, being that I'm from a background of poverty, so it will be very appreciated if the courts would appoint me an attorney, that will aid me, in my P.C.R. proceedings.

Thank you for your time!

Sincerely,

Mr. Stiles

P.S., Happy Mothers Day!

Lord B. Slater #279992
Lieber Corr Inst
P.O. Box 205
Ridgeville, SC, 29472

PCR

Julie J. Armstrong
Clerk of Court
Charleston County
100 Broad Street, Suite 143
Chas, SC, 29401-2258

Legal Mail



RECEIVED
MAY 1 1981
MAIL ROOM
LIEBER C.I.

no warrant for this one

05/23/2007 14:42

CHARLESTON CRIMINAL SYSTEM
**** CRIMINAL FILING INQUIRY ****

BLC MA07 R1PIQ01

FUNCTION _

CASE ID: YEAR: 2001 COURT: GS LOC: 10 NUMBER: 003226 DEF ID: A COUNT: 01
OF: A OF: 01

***** DEFENDANT DATA *****

NAME: SLATER, LORD BYRON STATUS: JL STATUS DATE: 02 03 2001
ALIAS FLAG: N ATTORNEY: ** NO ATTORNEY ** TYPE: BOND TYPE:
BND DTE: AMT: 0.00 SURETY: ** NO SURETY FOUND **

***** FILING DATA *****

OFFICER: ** NO ARRESTING OFFICER ** BG# 0000 ARREST DATE: 02 03 2001
ARRESTING AGENCY: MUNICIPALITY: WARRANT/CITATION: DIRECT INDICTSTATUTE CHARGED: 16-23-490 DESCR: POSS OF WEAPON DURING CRIME
WARRANT FILED: 05 02 2001 REPORT GROUP CHARGED: 0549 GOC CHARGED: GINDICTMENT FILED: JUDGE: 0097 ASSIGN DATE: 02 27 2002
NEXT OR LAST EVENT: HEA EVENT DATE: 11 15 2001 EVENT TIME: 08 00
EVENT DESCRIPTION: HEARING EVENT JUDGE: 0097
NUMBER OF CONTINUANCES: CONTINUANCE DATE:
LAST UPDATE: 02 27 2002 OPERATOR: KSR

ENTER PS,DK,PD,DS,EV,SS OR HIT PF1

05/23/2007 14:41

CHARLESTON CRIMINAL SYSTEM
**** CRIMINAL FILING INQUIRY ****

BLC MA07 R1PIQ01

FUNCTION _

CASE ID: YEAR: 2001 COURT: GS LOC: 10 NUMBER: 003221 DEF ID: A COUNT: 01
OF: A OF: 01

***** DEFENDANT DATA *****

NAME: SLATER, LORD BYRON STATUS: NA STATUS DATE: 02 04 2001
ALIAS FLAG: N ATTORNEY: D ASHLEY PENNINGTON TYPE: PD BOND TYPE: SU
BND DTE: 02 05 2001 AMT: 0.00 SURETY: ** NO SURETY FOUND **

***** FILING DATA *****

OFFICER: HESTER D/VICTIMS BG# 0024 ARREST DATE: 02 04 2001
ARRESTING AGENCY: 1008 MUNICIPALITY: NC WARRANT/CITATION: G536850STATUTE CHARGED: 16-3-10 DESCR: MURDER
WARRANT FILED: 02 06 2001 REPORT GROUP CHARGED: 0116 GOC CHARGED: GINDICTMENT FILED: JUDGE: 2041 ASSIGN DATE: 11 16 2001
NEXT OR LAST EVENT: HEA EVENT DATE: 11 15 2001 EVENT TIME: 08 00
EVENT DESCRIPTION: HEARING EVENT JUDGE: 2041
NUMBER OF CONTINUANCES: CONTINUANCE DATE:
LAST UPDATE: 11 16 2001 OPERATOR: KSR

ENTER PS,DK,PD,DS,EV,SS OR HIT PF1

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Lord B. Slater, #279992)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE 9TH JUDICIAL CIRCUIT
Case No.: 2007-CP-10-2160

RETURN

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2008 OCT 17 AM 8:46

FILED

The Respondent, making its Return to the application for post-conviction relief (PCR) filed May 23, 2007, 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 Charleston County Clerk of Court. The Applicant was indicted at the May 2001 term of the Charleston County Grand Jury for murder (2001-GS-10-3221) and possession of a firearm during commission of a violent crime (2001-GS-10-3226). Ashley Pennington, Esquire, and S. Boyd Young, Esquire, represented the Applicant. On November 13, 2001, the Applicant proceeded to trial and was convicted of murder. The Honorable Edward B. Cottingham sentenced the Applicant to confinement for life.

On November 30, 2001, the Applicant filed a Notice of Appeal. Robert M. Dudek, Assistant Appellate Defender, represented the Applicant. On August 9, 2004, the South Carolina Court of Appeals reversed and remanded for a new trial. State v. Slater, Op. No. 3855 (Ct. App. Aug. 9, 2004). On or about August 24, 2004, the State filed a Petition for Rehearing. The South Carolina Court of Appeals issued an Order denying the petition on September 23, 2004. On October 24,

2004, the State petitioned to the South Carolina Supreme Court. By opinion dated April 9, 2007, the Supreme Court of South Carolina reversed the Court of Appeals decision. State v. Slater, Op. No. 26299 (Sup. Ct. Apr. 9, 2007). The Remittitur was issued on April 25, 2007.

II.

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

1. Ineffective assistance of counsel in that:
 - a. "Trial counsel failed to bring to the attention of the trial judge the defective advice of rights warnings, doing so would've aided the motion to suppress defendants statement and the fruits of the search warrant under fruit of the poisonous tree doctrine."
 - b. "Trial counsel failed to impeach Officer Palmer, who gave conflicting testimony in camera direct examination, doing so would've aided the motion to suppress defendants statement and the fruits of the search warrant under fruit of the poisonous tree doctrine."
 - c. "Trial counsel failed to request instructions on lesser included offenses of involuntary manslaughter and reckless homicide, which were supported by the evidence."
 - d. "Trial counsel ineffective for allowing two witnesses to take the stand without first having them disclosed to the jury in advance through voir dire, it was a error on counsels part, witnesses weren't in defendants favor, and aided the prosecutor in a conviction of the greater offense."
 - e. "Trial counsel ineffective for admitting guilt in opening statement, failing to advance any theory of defense, and attempting to establish only that the defendant killed victim without malice, but presumed prejudice because defendant, who pleads not guilty, is entitled to a defense."
 - f. "Trial counsel failed to object to the prosecutor's closing argument comments, telling the jury the victim was shot twice while on the ground. There was no forensic medical examiner to prove that theory."
 - g. "Trial counsel duty at voir dire, is to safe guard defendant from possible bias jurors, failed to do so, when counsel did not note the fact to the trial judge, that the incident took place in a church parking lot, and there

might've been potential members of that church on defendants juror panel."

Attached herewith and incorporated herein by reference are the records of the Charleston County Clerk of Court regarding the subject conviction, the Applicant's records from the Department of Corrections, the record on appeal, the appellate briefs, the Court of Appeals opinion reversing the trial court, the Supreme Court opinion reversing the decision of the Court of Appeals, and the Remittitur.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under

professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified, or explained is hereby denied.

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held for the sole issue of ineffective assistance of counsel.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MATTHEW J. FRIEDMAN
Assistant Attorney General

By: Matthew J. Friedman
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

10/15, 2008.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

2007-CP-10-2160

Lord B. Slater, #279992,

Applicant,

v.

AFFIDAVIT OF SERVICE BY MAIL

State of South Carolina,

Respondent.

FILED
2008 OCT 17 AM 8:46
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

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 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(s) by depositing it in the United States mail, postage prepaid to:

William L. Runyon, Jr., Esquire
#3 Gamecock Avenue, Suite 303
Charleston, SC 29407

DATED this 15th day of October, 2008.

Kristi P. Kohl

Kristi P. Kohl, Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3737

1 STATE OF SOUTH CAROLINA
2 COUNTY OF CHARLESTON

COURT OF COMMON PLEAS
2011-CP-10-03361

3 LORD BYRON SLATER,
4 Plaintiff

5 V.

TRANSCRIPT OF RECORD

6 STATE OF SOUTH CAROLINA,
7 Defendant.

8
9 November 16, 2009
10 Charleston, South Carolina

11
12
13 B E F O R E:

14 THE HONORABLE DEADRA L. JEFFERSON, JUDGE
15
16
17

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

19 Mr. Matthew Friedman, Asst. Attorney General
20 Representing the State

21 Mr. William Runion, Esquire
22 Representing the Applicant

23
24 Anne Bouley Meyer, RPR
25 Circuit Court Reporter

I N D E X

WITNESSES

ALL WITNESSES:

PAGE:

MR. ASHLEY PENNINGTON

Direct Examination by MR. RUNION

4:17

Cross-Examination by MR. FRIEDMAN

16:12

MR. LORD BYRON SLATER

Direct Examination by MR. RUNION

23:1

Cross-Examination by MR. FRIEDMAN

28:16

EXHIBITS

NO.: DESCRIPTION:

PAGE:

1 Copy of Affidavit for Petitioner:
In Evidence

15:9

1 THE COURT: This is Lord Byron Slater versus the
2 State of South Carolina. Case number 2007-CP-10-2160.

3 It's before the Court on an action for
4 post-conviction relief. The state is represented by
5 Mathew Friedman. The applicant is represented by Mr.
6 William Runion.

7 The application for post-conviction relief was
8 filed on May 23rd, 2007. There have been no amendments
9 made to the application, is that correct, Mr. Runion?

10 MR. RUNION: That's correct, Your Honor.

11 THE COURT: Okay. He was originally sentenced
12 pursuant to indictment 2001-GS-10-3221 on the offense
13 of murder. And that was by -- I think that's.

14 MR. FRIEDMAN: Yes, Your Honor.

15 MR. RUNION: Yes, Your Honor.

16 THE COURT: It is? I'm sorry. It was a bad
17 copy and I was trying to decipher the writing.

18 At that time he was sentenced to the State
19 Department of Corrections for a period of life.

20 And that was after a jury trial, correct?

21 MR. RUNION: That is correct, Your Honor.

22 THE COURT: And at the time of the jury trial
23 Mr. Slater was represented by Ashley Pennington of the
24 Public Defender's Office.

25 Okay. Is that an accurate procedural summary?

1 MR. FRIEDMAN: Yes, Your Honor.

2 THE COURT: Is the State ready to proceed?

3 MR. FRIEDMAN: Yes, Your Honor.

4 THE COURT: Is the Applicant ready to proceed?

5 MR. RUNION: Yes, Your Honor.

6 THE COURT: Okay.

7 MR. RUNION: Your Honor, we would call Mr.

8 Ashley Pennington.

9 THE COURT: Mr. Pennington, if you would come
10 to the witness stand to be sworn.

11 MR. ASHLEY PENNINGTON,
12 after having first been sworn to tell the truth, the
13 whole truth and nothing but the truth testified on his
14 oath as follows:

15 THE COURT: You may proceed, Mr. Runion.

16 DIRECT EXAMINATION

17 BY MR. RUNION:

18 Q Mr. Pennington, you've stated your name for the
19 record. What is your occupation, sir?

20 A I'm a trial attorney working as the Ninth
21 Circuit Public Defender.

22 Q And when Mr. Slater was tried, were you his
23 trial counsel?

24 A Yes, I was.

25 Q Now in the course of that trial, was there a

1 question about his statement allegedly given by Mr.
2 Slater?

3 A Yes. There was both verbal and a written
4 statement that were taken. And there was a Jackson v
5 Denno proceeding. And ultimately both were offered at
6 the trial.

7 Q Now in the course of the -- kind of general
8 question. But in the course of the discussion of the
9 statements of Mr. Slater, was there a discussion about
10 his advisement of rights by the police officers?

11 A Yes, there was. That was the issue that was --
12 that I attempted to raise, but may not have raised
13 completely in the course of the Jackson v Denno and the
14 trial.

15 Q And what was that issue that was not completely
16 raised?

17 A The case law requires that Miranda warnings be
18 given under the Fifth Amendment to defendants that are
19 placed into custodial interrogation.

20 I filed a motion and we conducted a hearing
21 pretrial where there was a witness by the name of Chris
22 Widmer (phonetic), who is a detective with the North
23 Charleston Police Department.

24 And Detective Widmer testifies on direct for Mr.
25 DuTremble that he used on card that he carried with him

1 when he arrested my client. And that he recited in
2 Court the warnings.

3 However, one of the five warnings was missing.

4 Q What one of the five warnings was missing?

5 A The one is that you have the right to stop
6 answering questions at any time.

7 Q And did you object during the Denno hearing, did
8 you argue this during the Denno hearing?

9 A I don't believe that I did.

10 Q Was the statement subsequently entered into
11 evidence by the trial court?

12 A Yes. Essentially the detective gave exactly the
13 same testimony. And the Judge then gave a recitation
14 of the law which had the same strange omission.

15 By that time the statement had already been
16 presented on direct. And at some point in the trial it
17 appears that I woke up because I asked during the
18 trial, was there the reference to the right to remain
19 silent. Or was that -- I'm sorry, back it up.

20 What I asked was, nowhere in the warnings did it
21 say that you have the right to stop answering, and the
22 officer agreed that that's correct in terms of Officer
23 Widmer's oral recitation of the rights.

24 But I did not at that time move during the trial
25 to exclude based on that deficiency.

1 Q Now, Mr. Pennington, I believe what you just
2 said is that sometime during the trial you woke up.
3 You are not implying that you actually went to sleep,
4 are you, sir?

5 A No. No.

6 Q Just so that we can keep the record clear.

7 And you of course suddenly realized that the
8 warning was incomplete and you raised the issue?

9 A I asked the questions, but it appears from the
10 record, and I have to admit that after eight years my
11 memory is very cloudy. I am having to reply very much
12 on the transcript.

13 Q Why don't we for a brief time, I believe you've
14 got the portions of the transcript that you are making
15 reference to kind of ear-marked or flagged?

16 A I do. There is the part that -- what I have
17 been sent by the Attorney General was the trial
18 portion, and I have that flagged. And this morning Mr.
19 Friedman provided me with the Jackson v Denno portions
20 and I have looked at that this morning.

21 Q Okay. Now just briefly, where were those issues
22 noted in the record that you have?

23 A All right. If the Court has the entire record.
24 In Volume One of the transcript there was a suppression
25 hearing with Officers Widmer, and I believe Hester.

1 And specifically, let me see if I can find it again.

2 I believe it was page 66 during the testimony of
3 Officer Chris Widmer. Actually his testimony begins on
4 page 65. Where he begins to talk about that he keeps a
5 yellow card in his police badge wallet that he read
6 people their rights.

7 And he found that he had it on him at that time
8 on page 65. And then he recites the rights on page 66.

9 Q All right. Now at some point later in the
10 transcript the trial judge, Judge Cottingham, as usual,
11 instructed the jury as to the statement -- as to the
12 statement is going to be admitted into evidence but
13 tells them what their duties.

14 A That's right. Judge Cottingham gave the jury
15 actually an instruction on the law before my
16 examination, cross-examination when it was offered
17 before the jury. And it was a recitation of the
18 relevant considerations for the jury in considering the
19 admissibility of the statement.

20 Essentially went over the Miranda rights. I
21 think it may have mentioned voluntariness too, I had
22 have to look back. That would be in the transcript.

23 The Court's comments were on Page 327 of the
24 testimony of Chris Widmer during the jury phase of the
25 trial. The Judge began to speak at line 20, page 327

1 and provides a description of Miranda and also some of
2 the discussion of voluntariness. And it goes on for
3 some four or five pages.

4 Q And did the trial judge likewise omit the
5 questioning of stopping to testify? Or stopping giving
6 the statement? The right to stop giving a statement?

7 A Yes. As I see it on the -- in the transcript,
8 he says the rights are as follows: One, that he has a
9 right to remain silent. Secondly: That any statement
10 that he does make can and will be used against him in a
11 court of law.

12 Thirdly, that he has the right to select the
13 lawyer of his choice, but that if he does not have the
14 money or resources to employ a lawyer, the court will
15 appoint and provide a lawyer to represent him without
16 cost or expense to him.

17 And fourth, that he has the right to consult
18 with a lawyer before answering any questions, or to
19 make any statements. And that he has a right to have a
20 lawyer present with him at all times during the
21 interview and interrogation.

22 He stops there, and then goes on: If you find
23 the defendant made the statement, and if you conclude
24 that these warnings were in fact given to this
25 defendant, and that he was afforded an opportunity to

1 exercise his constitutional rights, then you must
2 consider the third requirement did he knowingly,
3 intelligently waive.

4 So it does not appear to have the fifth element
5 of Miranda, which is that you have the right to stop
6 answering at any time.

7 Q Did you insert an objection at that time to the
8 Judge's instructions?

9 A No, sir, I did not.

10 Q All right. Now as it -- how long have you been
11 practicing law?

12 A 29 years this month.

13 Q All right. Do you think you have an obligation
14 to insert an objection?

15 Do you think now that you had an obligation to
16 insert an objection at that time?

17 A Yes. I think that the requirements of South
18 Carolina that require a contemporaneous objection,
19 while I might not have interrupted the Court's
20 instruction, I should have, at the conclusion of his
21 instruction, taken the matter up in camera.

22 Q All right. Now going to another issue, during
23 the closing argument the prosecutor talked about the
24 victim being shot twice while on the ground.

25 Do you recall any forensic evidence that

1 justified that theory?

2 A I can't recall. I honestly cannot remember the
3 case that well.

4 Q Did you insert any type of objection to that
5 argument to your recollection?

6 A Again I can't recall. I'm sure the record would
7 indicate that I must not have if you did not see it.

8 Q Well referring to the transcript at page 531
9 where the statement was made on lines 18 to 22. There
10 are no objections noted as I read the transcript.

11 What was your theory of defense in this case?

12 A That the homicide lacked the -- the murder
13 allegations lacked the necessary element of malice
14 aforethought. We were arguing that there was a -- we
15 argued self-defense, as well as that there was a lack
16 of malice.

17 Q All right. And as a result, what instruction
18 did you request of the trial court to the jury?

19 A I'd have to go back and look at those. I do
20 have the entire file here with the proffered
21 instructions if you'd like me to look back at them.

22 I'm sorry, Mr. Runion, what was your question?

23 Q Did you suggest any lesser-included offenses to
24 be charged to the jury by the trial court?

25 A The only thing I can rely on, because my memory

1 again is faded, is that I'm looking through my written
2 jury requests where I asked for manslaughter, voluntary
3 manslaughter which was jury -- proposed jury charge
4 five and six. And went on and talks about -- seven
5 talks about provocation and heat of passion.

6 I previously referenced self-defense. But in
7 terms of other lesser-included, I do not think that
8 there were any other requested lesser-included charges.

9 No, I don't see any other lesser-included. I
10 think the petitioner mentioned did I request
11 involuntary or reckless homicide, and I don't recall
12 asking for those.

13 Q Okay. Well just for the record there were no
14 other lesser-included -- or there were no other lesser
15 homicide charges requested?

16 A Right.

17 Q Now there is a question about an advisement of
18 rights by Officer Hester, do you recall that?

19 A Yes. As I have refreshed my memory both from
20 the transcript that I had, and again this morning, I
21 see that there is -- there was further testimony on the
22 Jackson V Denno issue by Detective Hester.

23 Detective Hester was actually the officer that
24 sat down and took the written waiver of rights at the
25 time that my client's statement was written out and

1 signed.

2 Q And Detective Hester took the written waiver,
3 but that was subsequent to the prior advisement of his
4 rights?

5 A Yes, sir.

6 Q In which there was no -- there was no advisement
7 that he could stop questioning at any time?

8 A I missed your question. Are you referring to
9 Detective Widmer?

10 Q Right. Detective Widmer had given him, there is
11 contention, a defective advisement of rights?

12 A Right, by Detective Widmer.

13 Q Right. So that defective advisement of rights
14 was present. And then Detective Hester later on gave
15 him a written advisement of rights?

16 A That is correct.

17 MR. RUNION: Excuse me one moment, Your Honor.

18 Q (By Mr. Runion) Now was there, do you recall
19 whether or not there were any voir dire with regards to
20 the questions, questions to the jury panel about their
21 church membership?

22 A I submitted voir dire questions. And if I may
23 refer to those?

24 A Yes.

25 Q No, Mr. Runion. The voir dire that I submitted

1 does not reflect any questions about church membership.

2 Q As it relates to, was there a search warrant in
3 this case?

4 A I believe there was.

5 Q All right. And --

6 MR. RUNION: Excuse me one moment, Your Honor.

7 Q (By Mr. Runion) Now, Mr. Pennington, I would
8 hand up to you what purports to be an affidavit for a
9 search warrant.

10 A Yes, sir.

11 Q Let me ask you a question. Is that an affidavit
12 for a search warrant?

13 A It appears to be, yes, sir.

14 Q Does that appear to be an affidavit for search
15 warrant in the case, the trial case against Mr. Slater?

16 A It appears to be, yes, sir.

17 Q In the affidavit does it list the name of the
18 alleged victim that they're seeking evidence against
19 Mr. Slater for?

20 A Well it says Mark Nelson.

21 Q All right. Was that the victim in this case?

22 A No, it wasn't.

23 Q All right. Did you ever move to suppress any
24 evidence based upon that affidavit?

25 A I can't recall if we filed a Franks-like or any

1 other suppression motion. It seems like we did raise a
2 suppression hearing because I remember in some of my
3 notes seeing that I was arguing that.

4 I have not looked at that portion of the
5 transcript. I can perhaps see if I filed a motion to
6 suppress.

7 But in answer to your question, I don't recall
8 raising the issue of the discrepancy in the name of the
9 victim, no.

10 MR. RUNION: Your Honor, we submit as
11 Petitioner's Exhibit No. 1, the identified copy of the
12 affidavit.

13 MR. FRIEDMAN: No objection.

14 THE COURT: Marked and admitted without
15 objection.

16 (Whereupon, Petitioner's Exhibit No. 1 is
17 admitted into evidence.)

18 A Mr. Runion, I did find the motion to suppress.

19 Q (By Mr. Runion) Was the motion to suppress
20 argued?

21 A Was it argued?

22 Q Yes. Do you know?

23 A I can't recall.

24 Q And was the issue of the -- essentially your
25 motion to suppress didn't raise the issue about perhaps

1 the insufficiency of the affidavit a little more?

2 A I am taking a look right now.

3 In answer to your question, no, it does not
4 raise the defect in the wrong name of the victim.

5 Q All right.

6 MR. RUNION: No further questions at that time,
7 Your Honor.

8 THE COURT: Mr. Friedman, you may proceed with
9 cross-examination.

10 MR. FRIEDMAN: Thank you, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. FRIEDMAN:

13 Q Good morning, Mr. Pennington.

14 A Good morning.

15 Q You testified that Detective Widmer, I believe
16 he had a yellow card with the Miranda rights on it that
17 he read to the Applicant?

18 A Yes, sir. That's what the transcript says.

19 Q I believe he omitted one of the warnings?

20 A He did.

21 Q And that was the right to stop questioning at
22 any time?

23 A To stop answering at any time.

24 Q Stop answer at any time?

25 A Yes, sir.

1 Q And do you recall subsequent to that Sgt. Hester
2 read the Miranda rights to the Applicant?

3 A Yes. It appears that he had him go through a
4 written form that North Charleston uses.

5 Q And if I could get you to turn to Page 79 in
6 Volume One of the transcript. At line 6.

7 A Yes, sir, I'm there.

8 Q I believe this is where he is going through
9 which Miranda rights he read, and this is number five?

10 A Yes, sir.

11 Q Which right is that?

12 A This is the right that I referred to which is
13 the right to stop answering questions.

14 Q Okay. Subsequent to that the Applicant gave a
15 statement; is that right?

16 A The written statement.

17 Q Written statement. Do you recall if he ever
18 asked Sgt. Hester to stop questioning him?

19 A According to Sgt. Hester's testimony, he said he
20 did not.

21 Q Do you recall the judge's ruling on the Jackson
22 v Denno hearing?

23 A I don't. But obviously it appears that he let
24 it in. I don't remember any of the specifics of what
25 he said or how I argued that.

1 Q I believe, if you don't mind turning to page 95?

2 A All right.

3 Q I believe that's where Judge Cottingham makes
4 his ruling?

5 A Okay.

6 Q I believe it's around line 14.

7 A He is admitting the statement.

8 Q All right. The Applicant testified at trial; is
9 that correct?

10 A He did testify, yes.

11 Q Do you recall if his testimony was consistent
12 with his written statement to Sgt. Hester?

13 A I have looked at my closing argument which
14 referenced his testimony. I can't say that they're
15 identical.

16 I think that my client in the original statement
17 to Detective Hester essentially denied being involved
18 in the shooting. So it was an exculpatory saying I was
19 not there.

20 And then my client, when he testified, actually
21 acknowledged that he was present with a gun and was
22 confronted by individuals that were also armed. And
23 that out of fear he turned and heard a shot and fired.

24 So there were, if I recall correctly,
25 differences between the Hester statement and my

1 client's statement at trial.

2 Q Okay. I believe you testified that the defense
3 was there was no malice?

4 A Yes. Right. And that we did argue for
5 self-defense. The Judge did not instruct, and the
6 Supreme Court has upheld that ruling.

7 Q Do you recall if there were any ballistics
8 testing on the gun?

9 A Here is what I remember about that. I think
10 there were ballistics test because I hired an expert to
11 then confirm. And I believe my recollection is that it
12 was clear that the weapon taken from my client's house
13 was the weapon that discharged the projectile that
14 struck the victim, Mr. Middleton.

15 Q Did you see any reason to object during the
16 closing statement when the solicitor commented that the
17 victim was on the ground and was shot twice?

18 A I couldn't answer that. I just can't remember.

19 Q You asked for a charge on self-defense; is that
20 right?

21 A Yes, I must have because I know that it was
22 argued on direct appeal. I can look back.

23 I don't know if I proffered it as a written, or
24 whether or not we argued for it orally.

25 Yes, there is -- the written charges focused, it

1 appears, on manslaughter as a lesser-included. I don't
2 see a package of charges that asked for self-defense,
3 but I do know that it was requested and denied.

4 Q I believe at page 479, Volume Two, there was
5 some discussion about the charges.

6 A I don't know that I -- wait a minute, here we
7 go. Yes, I did argue for self-defense there.

8 For some reason I don't see the charges in the
9 that packet that I sent to appellate defense. There
10 may have been things that I omitted.

11 Q And did Judge Cottingham charge self-defense in
12 this case?

13 A I think he refused to charge self-defense.

14 Q Do you recall if he charged manslaughter?

15 A I can't recall.

16 Q If I can turn your attention to 483, line 23. I
17 believe Judge Cottingham said: So I am going to charge
18 manslaughter.

19 A Okay. Yes, it appears that he did.

20 MR. FRIEDMAN: Beg the Court's indulgence.

21 THE COURT: Uh-hum.

22 MR. FRIEDMAN: That's all the questions I have,
23 Your Honor, thank you.

24 THE COURT: Any redirect?

25 MR. RUNION: No redirect, Your Honor.

1 THE COURT: Any objection to the witness being
2 excused?

3 MR. RUNION: No, Your Honor.

4 MR. FRIEDMAN: No, Your Honor.

5 THE COURT: You are excused, Mr. Pennington.
6 Are the original exhibits anywhere in the
7 record? I mean not the record you gave me, I have
8 already looked and they're not in there.

9 MR. FRIEDMAN: I don't think so, Your Honor.

10 THE COURT: Okay.

11 Any further witnesses?

12 MR. RUNION: Your Honor, we would present Mr.
13 Slater. I understand from the Court's prior --

14 THE COURT: We are not braking until 10:30.

15 MR. RUNION: Excuse me. We would in fact call
16 at this time the Applicant.

17 THE COURT: Sir, if you would come forward to be
18 sworn.

19 Is that your file that was filed, Mr.
20 Pennington?

21 MR. PENNINGTON: Yes.

22 THE COURT: Do you have the original exhibits,
23 or copies of the original exhibits in your file?

24 MR. PENNINGTON: As in the photographs, or are
25 you talking about the charges?

1 THE COURT: What would have been admitted at
2 trial.

3 MR. PENNINGTON: I have a list of what the
4 exhibits were, although it's my handwritten list. But
5 I don't have copies of all the originals. No, I don't.

6 THE COURT: If you could just, if I need
7 something, do you mind if my staff calls you?

8 MR. PENNINGTON: No, I don't mind.

9 THE COURT: Do you all mind if my staff may call
10 Mr. Pennington and ask him for copies of anything he
11 may have in his record?

12 MR. RUNION: I have no objection to that.

13 THE COURT: And if I do that, we will mark it as
14 a court's exhibit and I will send you a copy.

15 Is that acceptable to everyone?

16 MR. RUNION: I have no objection to it.

17 MR. FRIEDMAN: That's fine.

18 THE COURT: Great, thank you.

19 We will call you if we need you.

20 Mr. Runion, you may proceed.

21 MR. LORD BYRON SLATER,
22 after having first been sworn to tell the truth, the
23 whole truth and nothing but the truth testified on his
24 oath as follows:

25 DIRECT EXAMINATION

1 BY MR. RUNION:

2 Q All right. Now, Mr. Slater, you've heard your
3 trial counsel acknowledge some of the -- testify, I
4 should say, about some of the issues in this case?

5 A Yes, sir.

6 Q Okay. You are going to have to speak up because
7 this fine lady has got to take you down. She can't
8 take down nods of the head.

9 A Yes, sir.

10 Q All right. And Mr. Pennington was your trial
11 counsel?

12 A Yes, sir.

13 Q Now as it relates to the issue relating to the
14 advisement of your rights and your statement, do you
15 recall that issue?

16 A Yes, sir.

17 Q Okay. Was that issue addressed on your direct
18 appeal?

19 A No, sir.

20 Q Okay. Now you know this is your one chance to
21 have your petition for post-conviction relief?

22 A Yes, sir.

23 Q And you raised several issues, many of which, if
24 not all, have been addressed by Mr. Pennington. But on
25 the other hand you raised -- and you raised the issue

1 about lesser-included offenses not being charged?

2 A Yes, sir.

3 Q Other than voluntary manslaughter?

4 A Yes, sir.

5 Q And was there any testimony about the deceased
6 being on the ground when he was shot?

7 A Yes. But the solicitor, he was stating it
8 throughout the whole trial that he was on the ground
9 while he was being kicked and stomped. And he was shot
10 when he was being kicked and stomped.

11 Q Now as it relates to these other issues, what
12 other issues which have not been touched upon here this
13 morning?

14 A Dealing with my PCR application?

15 Q Yes, sir.

16 A All right. Dealing with argument 7, I believe,
17 deals with where the incident occurred at. I believe
18 it should have been -- the question should have been
19 asked on voir dire whether anybody was a member of this
20 particular church, or had any family members to this
21 particular church.

22 Because throughout the whole trial the solicitor
23 was making it seem that it was not just about the
24 shooting, but where the shooting took place at. And I
25 believe the jury should have been asked that question

1 about who was a member of the church.

2 Q Now you heard Mr. Pennington say he didn't ask
3 that question or ask the Court to ask that questions.

4 A Okay. I just wanted to make sure.

5 Q What other issue hasn't been touched upon that
6 you would want to testify about?

7 A I would say the opening statement.

8 Q What about that opening statement?

9 A Give me a little second. It was a question of
10 was counsel's opening statement prejudice to the
11 defendant by admitting guilt, failing to advance any
12 theories of the defense, and only attempting to
13 establish that the defendant killed victim without
14 malice.

15 Did counsel's opening statement prejudice
16 defendant when trial counsel admitted guilt by stating
17 during open statement: There is not going to be any
18 questions at the end of this case that, yes, the
19 defendant shot and killed victim. There is no doubt
20 about that. We were not here to dispute that or debate
21 that question. That's a given.

22 Transcript page 112, line 14 through 18. By
23 admitting guilt, counsel violated defendant's Sixth
24 Amendment right to have effective counsel. Defendant
25 pled not guilty to murder, and the lesser-included

1 offense which was manslaughter. And by defendant
2 pleading not guilty, he is entitled to a defense.
3 Transcript page 112, line 7 through 22. Page 114, line
4 2 through 9; 23 through 25. Page 115, line 1 through
5 9. And transcript page 117, lines 2 through 12.

6 Trial counsel failed to advance any theory of
7 defense and only attempted to establish that defendant
8 killed victim without malice. Trial counsel's opening
9 statement presumed prejudice because it made it
10 impossible for the jury to even consider any
11 lesser-included offense.

12 And counsel's opening statement violated the
13 defendant's Sixth Amendment right to a fair trial.
14 Defendant cites People versus Hattery as a case.

15 Q All right. Are there any other issues you want
16 to bring to the attention of the trial Court at this
17 time?

18 A Yes. Argument four, dealing with allowing two
19 witnesses to take the stand without first having them
20 disclosed to the jury through voir dire.

21 Trial counsel was in error for allowing two
22 witnesses to take the stand without having them
23 disclosed to the jury in advance of voir dire. Trial
24 counsel asked for the witnesses, then objected when the
25 state brought them. Transcript page 357, line 1

1 through 25. Transcript page 358, line 1 through 25.
2 And transcript page 359, line 1 through 23. Also
3 transcript page 360, line 2 through 24.

4 The witnesses weren't in defendant's favor. And
5 trial judge stated that witnesses were foundation
6 witnesses, and witness weren't prejudicial to the
7 defendant.

8 But the Judge was in error, because having two
9 witnesses show up out of nowhere without having them
10 disclosed to the jury in advance through voir dire
11 beforehand, and having Janiqua (phonetic) Akin present
12 in the courtroom, gave the jury panel the impression
13 that she was in the parking lot at the time of this
14 unfortunate situation.

15 And her presence, as well as her mother's, did
16 prejudice the defendant from receiving a fair trial by
17 allowing the witnesses to take the stand.

18 Counsel aided the state in the conviction of the
19 greater offense when during closing argument by the
20 solicitor stated, we also brought you Laquisha
21 (phonetic), who had her car parked out there in the
22 same parking lot where Sharome (phonetic) died, a
23 bullet hole in her door. Transcript page 534, line 6
24 through 8.

25 By counsel allowing witnesses to take the stand

1 without first having them disclosed to the jury in
2 advance through voir dire, violated defendant's sixth
3 Amendment right to have effective assistance of
4 counsel.

5 And under the two-prong case, defendant is to be
6 granted relief because the error of allowing those
7 witnesses to take the stand was used to convict the
8 defendant of the greater offense.

9 Q All right. Any other issue?

10 A No, sir.

11 Q All right.

12 MR. RUNION: Nothing further.

13 THE COURT: Mr. Friedman, you may proceed.

14 MR. FRIEDMAN: Thank you, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. FRIEDMAN:

17 Q Mr. Slater, when you were questioned by the
18 police, do you recall if you ever requested an
19 attorney?

20 A Excuse me?

21 Q Do you recall if you ever requested an attorney
22 when the police were questioning you?

23 A Did they ask me if I wanted an attorney?

24 Q Do you recall if you had told them that you
25 wanted one?

1 A No, I don't.

2 Q Do you recall if you ever asked them to stop
3 questioning you?

4 A See, when I was read the defective rights,
5 advise of rights warning by Chris Widmer, he didn't
6 even let me know that I had that right to stop
7 answering questions. Because I hesitate when I was
8 talking to him or whatnot.

9 And like I said, I wasn't too sure about talking
10 to him. And he kept egging me on like, you understand,
11 like he is trying to help me, you understand, give him
12 something, something so he can help me with.

13 But he never let me know that I had the right,
14 you understand what I am saying, to put an end to the
15 interrogation and invoke my right to remain silent.

16 Q But after that Sgt. Hester did you read you that
17 right; is that correct?

18 A But that was after the violation, you know what
19 I'm saying.

20 THE COURT: Sir, please answer the question yes
21 or no and then you can explain the answer.

22 THE WITNESS: Oh, sorry about that. Yes, ma'am.

23 THE COURT: Please repeat the question, Mr.
24 Friedman.

25 MR. FRIEDMAN: Sure.

1 Q (By Mr. Friedman) Do you recall that Sgt. Hester
2 did read you all of your Miranda rights after Detective
3 Widmer?

4 A I recall, yes.

5 Q And that was prior to you giving a written
6 statement; is that correct?

7 A Prior?

8 Q Before you gave the written statement?

9 A Are you saying -- Hester read me the statement
10 second. I mean he talked to me later during that
11 situation.

12 Q I'm sorry, I will rephrase it.

13 After Sgt. Hester gave you your Miranda rights,
14 after that you gave a written statement; is that
15 correct?

16 A After Sgt. Hester?

17 Q Right.

18 A Yes.

19 Q And do you recall at that point if you asked
20 Sgt. Hester to stop questioning you?

21 A I don't believe so. I am going to say no.

22 Q You testified that you believe counsel should
23 have asked the jurors if any of them belong to the
24 church where the incident took place?

25 A I say that because dealing with the situation,

1 throughout the whole situation, by the DuTremble during
2 closing arguments this is what he said. I'm quoting
3 out of the transcript.

4 What's this case all about? What are the facts?
5 It's clear this took place at the high school dance in
6 a dirt parking lot of a church, a church. You can see
7 the steeple. What did the victim do to deserve this?

8 He was in the parking lot of a church minding
9 his own business. If you look at the other photographs
10 of the church, you see it's a dirt parking lot. And
11 what do we know? We know unfortunately he died
12 somewhere in this area, indicating, referring to the
13 church again. Transcript page 529, line 21 through 25.
14 Transcript page 530, line 1 through 6.

15 And during that situation my counsel should have
16 objected to the solicitor making reference to this
17 particular church numerous times during closing
18 arguments. And by him not objecting to that, violated
19 my Sixth Amendment right to effective counsel.

20 Q Is there any indication that any of the jurors
21 in fact were members of that church?

22 A The question wasn't asked of them, so I can't
23 answer that.

24 Q You also raised the issue about two witnesses
25 that were called that weren't originally on the State's

1 witness list?

2 A Yes, sir.

3 Q Do you recall if your attorney objected to that
4 when they came up?

5 A He asked for the witnesses, and when they came
6 he objected to them.

7 Q So he did preserve that right?

8 A The Judge allowed them to take the stand because
9 he asked him. But he said they don't do that, normally
10 they don't allow witnesses to take the stand without
11 having them disclosed to the jury beforehand on voir
12 dire. But he asked for them so that's why he elected
13 to let them take the stand

14 MR. FRIEDMAN: I have nothing further.

15 THE COURT: Any redirect?

16 MR. RUNION: No redirect, Your Honor.

17 THE COURT: Sir, you may step down.

18 MR. RUNION: Other than argument, Judge, there
19 are no further witnesses.

20 THE COURT: For the Applicant, correct?

21 MR. RUNION: Yes.

22 THE COURT: Any witnesses, Mr. Friedman?

23 MR. FRIEDMAN: No, Your Honor.

24 THE COURT: You may proceed with argument.

25 MR. RUNION: Your Honor, even the best, to use

1 the -- guys use the sports analogies, and they're hokey
2 and all that sort of stuff. But sometimes they make
3 point. Even the best running backs will put the ball
4 on the ground from time to time.

5 And we have here a very fine attorney who came
6 in and says, I think I put the ball on the ground in
7 this case. And this was a murder case.

8 And the issue, and I would state that the record
9 is very clear, the issue about the advisement of rights
10 was very articulately presented on direct by Mr.
11 Pennington.

12 The further issue, Judge, is that wasn't raised
13 on appeal. I would point out to the Court, Judge, that
14 some of these issues being raised on appeal may in fact
15 have been very crucial in this matter, in this whole
16 case.

17 I point out that opinion number 3855, the Court
18 of Appeals actually reversed and remanded for a new
19 trial, and the Supreme Court later --

20 THE COURT: Found that there was no evidence in
21 the record that justified a charge of self-defense.

22 MR. RUNION: -- reversed that.

23 THE COURT: I would imagine it was because they
24 were using it as he went to the danger with the gun.

25 MR. RUNION: That's correct, Judge. But the

1 simple fact is that it's kind of difficult to say what
2 would have changed the outcome.

3 But certainly the issue on the advisement of the
4 rights, particularly the ability to stop answering
5 questions, which was strangely enough not addressed by
6 Mr. Widmer, nor was it addressed by trial court as
7 documented for the record. And that was not raised on
8 appeal by appellate counsel at either level in any way.

9 And so therefore, Judge, we think that there is
10 sufficient issue. And in additional to that, Judge,
11 there was no issue as to the -- raised as to the search
12 warrant where it identified the incorrect victim.
13 Missed a name that Mr. Slater wasn't even connected
14 with. We don't know who that person is.

15 And so therefore, Judge, we think if you take
16 all of these issues, particularly not the lack of
17 contemporaneous objection, and then the failure to
18 thrash them out on the appellate levels. Frankly, the
19 only issue that got thrashed out at the appellate level
20 was the whole self-defense matter, and everything else
21 kind of went by the way.

22 But these issues weren't even raised. So
23 therefore we think that the Petitioner, or the
24 Applicant, has in fact made out a case for relief in
25 this matter, Judge. And we would ask the Court to so

1 rule. Thank you.

2 THE COURT: You're welcome.

3 Mr. Friedman.

4 MR. FRIEDMAN: Thank you, Your Honor.

5 The State would submit that the Applicant has
6 failed to meet his burden. Detective Widmer did not
7 advise the Applicant of his right to stop the
8 questioning at any time. However, Sgt. Hester did
9 advise him of that right prior to questioning him, and
10 prior to taking a written statement.

11 The State would submit that the Applicant was
12 not prejudiced by Detective Widmer's failure to advise
13 him of that one Miranda right because he did not invoke
14 his right to stop questioning him after he was advised
15 of the right.

16 As far as ineffective assistance of appellate
17 counsel, the State would submit that appellate counsel
18 is not required to raise every not frivolous issue. In
19 this case they raised the issues that they thought had
20 the most merit.

21 In fact they raised the self-defense issue which
22 was reversed and remanded until it was later overturned
23 by the Supreme Court.

24 We would ask that you deny and dismiss the
25 application.

1 THE COURT: Are you going to address his
2 statements regarding voir dire, as well the witnesses?

3 MR. FRIEDMAN: Yes, Your Honor. As far as the
4 two witnesses on page 358 of Volume Two, counsel did
5 object to those two witnesses and they were allowed to
6 testify.

7 As far as I believe the Applicant raised that
8 there was no discussion about whether potential jurors
9 belonged to the church where the incident took place.
10 There is no indication that any of the jurors that
11 actually served were in fact members of that church.

12 So we would submit that's speculation as far as
13 whether or not any of them were members of that church.

14 I believe the Applicant also raised the issue
15 about the opening statement where he believed the
16 attorney admitted guilt. It's our position that there
17 were ballistics that show the defendant's gun was the
18 gun that was used in the shooting.

19 There is no way an attorney could get around
20 that. He argued that there is no malice. And he
21 argued self-defense. But he had no way to get around
22 the gun, the defendant's gun being the one that was
23 used in the shooting.

24 THE COURT: Yes, sir.

25 MR. RUNION: Judge, I think, I don't know that

1 it does me much good because I am in church every
2 Sunday. And I think that as a practical matter, I
3 think that in selecting the jury, a general voir dire
4 question asking who in the jury are members of church
5 or attend church regularly or what have you --

6 THE COURT: I don't know that that would have
7 been asked. I think the more relevant question would
8 have been, does anybody have any personal knowledge of
9 the facts and circumstances of this case. And that may
10 well have been asked. I'd have to look at the
11 transcript again.

12 I don't know that I would have asked about
13 church membership, I think that would have been
14 crossing the line. Whether somebody had personal
15 knowledge of the facts and circumstances of this
16 particular case, that might be more probative or
17 relevant pursuant to the statute when it comes to bias
18 and prejudice.

19 But I don't know that the court would have asked
20 the question as you are propounding it.

21 MR. RUNION: Well perhaps I'm inartfully
22 propounding it. But I think that certainly the issue
23 of church membership, church attendance, allegiance to
24 a church where someone could have a built-in reaction
25 to facts where someone was shot down in a church

1 parking lot.

2 Certainly there was not attempt to get into that
3 area. Mr. Pennington very honestly said he didn't ask
4 that question, didn't try to ask that question. And so
5 therefore we would respectfully submit that to the
6 judgment of the Court.

7 And you know, Judge, I don't like the approach
8 that we have to take in these PCR cases where you sit
9 and say, well it's ineffective assistance of counsel
10 because it is almost like saying that someone was just
11 about an idiot.

12 And of course trial counsel in this case is not
13 an idiot. Trial counsel in this case is a very fine
14 lawyer. And very honestly got on the stand and
15 admitted that there were a couple areas he was
16 concerned about and he thought would have made a
17 difference had he raised them at that time.

18 And I therefore submit the integrity of trial
19 counsel as the most serious evidence that the
20 foundation of this conviction is questionable and
21 should be reversed.

22 Thank you very much, Your Honor

23 THE COURT: You're welcome.

24 Anything further, Mr. Friedman?

25 MR. FRIEDMAN: None, Your Honor.

1 THE COURT: I have reviewed the transcript prior
2 to hearing the matter, but I need to review it again in
3 light of the testimony. However, I will say for
4 purposes of the record that at this point I am not
5 inclined to grant relieve.

6 Because we know we are bound by the Strickland
7 standard, and that is a two-prong test. It is not only
8 that counsel failed to do something, or did not make an
9 objection, or did not raise something. As we know
10 hindsight is 20/20 and no attorney is perfect.

11 And if we were judging by that standard, then
12 every case would be overturned and there would never be
13 finality of any judgment.

14 However, the US Supreme Court has very clearly
15 articulated the standard in Strickland versus
16 Washington which is found at 466 U.S. 668, 104 S. Ct.
17 2052, and 80 L. Ed. 2d 674, which has also been
18 subsequently articulated in a line of cases out of
19 South Carolina, with Butler v State not being the first
20 nor the last.

21 But again without belaboring the point, our
22 courts require a two-prong test in evaluating the
23 effective -- the allegations of ineffective assistance
24 of counsel.

25 First the Application, of course, has the burden

1 of proving that counsel's performance was deficient.
2 But the inquiry does not stop there. The Court must
3 then determine, pursuant to the second prong, whether
4 -- well getting a little ahead of myself, I apologize.

5 So Applicant must prove that counsel's
6 performance was deficient. And when considering that
7 prong, the Court has to measure an attorney's
8 performance by its reasonableness under professional
9 norms.

10 Under the second prong of the test, the Court
11 must then determine what counsel's -- in other words,
12 if in fact I determine that Mr. Pennington's
13 performance was deficient, which I am really not
14 certain that it was based on what I have already
15 reviewed, but again I'm going to review it again in
16 light of his testimony.

17 But the second part that must be proven is that
18 not only was it deficient, but that it prejudiced the
19 applicant such that there is a reasonable probability
20 that but for counsel's unprofessional errors, the
21 results of the proceedings would have been different.

22 And in looking at that, the Court looks at the
23 totality of the record. It does not look at one
24 isolated circumstance.

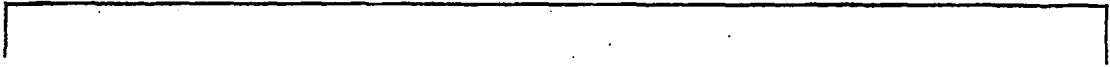
25 And without again belaboring the point and going

1 through each of these issues, while it is I think
2 uncontradicted at this point that one part of the
3 Miranda warnings was missing, it is also uncontroverted
4 that he received the full Miranda warnings before
5 actually giving his statement. So it is doubtful that
6 he can prove prejudice on that prong.

7 As regards Mr. Pennington's opening statements.
8 Based on looking at professional norms, based upon this
9 record, he did, I think, what was most beneficial to
10 his client, and probably hoping that he could get the
11 jury to believe, one, self-defense or a lesser-included
12 offense other than the most extreme offense which was
13 murder under those circumstances.

14 And again hindsight is 20/20. I don't know that
15 -- I see it everyday. I don't know that he really had
16 any other strategic alternative. And in addition to
17 that, the Applicant got on the stand and admitted he
18 shot the gun. But it was his testimony that I didn't
19 intend to shoot anyone.

20 The record is uncontroverted that he was in this
21 parking lot and went to two separate incidents with a
22 gun where he thought there was a disturbance with his
23 friends; one with his friends and one without. But
24 nevertheless, I don't know that there could be any
25 prejudice proven with regards to that.



1 Again, I will look at the totality of the voir
2 dire, but it has been my experience in criminal cases
3 that jurors are incredibly honest. If any of them knew
4 anything about the facts or circumstances of the case,
5 if they recognized a witness, if this was their church
6 they would have come out and said it prior to the jury
7 selection.

8 And certainly if they had any vague issues about
9 it, they would have brought it to the Court's attention
10 prior to any deliberation, and the matter would have
11 been -- and there is still no guarantee, even if they
12 were a member of the church, or member of this
13 particular church, even if they had knowledge of it
14 they still, if they could say that they could be fair
15 and impartial, and they could follow the Court's
16 instructions and render a verdict based solely on the
17 evidence and the Court's instruction, that would not
18 disqualify them as a juror in the case. So I don't
19 know that any prejudice can be proven as with regards
20 to voir dire.

21 As regards to the search warrant affidavit, I
22 don't think any prejudice can be shown on that either.
23 While it may have had the wrong victim listed, that's
24 a scrivener's error. The rest of the body of it was
25 quite clear about what they were looking for which was

1 the handgun. And that is what they located at the
2 residence.

3 And in addition to that, Mr. Pennington did try
4 and made a motion to suppress the gun. So I don't know
5 that he can say he was even defective in that regard.

6 He did in fact ask for a self-defense charge.
7 And then he also asked for lesser-included offenses.
8 So in that regard I do not believe he was -- that his
9 performance was defective.

10 In addition to that, we have what is dispositive
11 in this matter which is an opinion from the South
12 Carolina Supreme Court that indicates there was no
13 factual basis for the jury to conclude that
14 self-defense was a viable defense in this case. So he
15 certainly was not -- counsel could not be defective in
16 that regard, or not the perform -- he did not perform
17 defectively as regards to that.

18 And it does appear from the record that Mr.
19 Pennington did object to the two witnesses that Mr.
20 Slater has indicated. But again it has been my
21 experience that jurors will come forward and say, I
22 know this person.

23 And again if they can answer that they can still
24 hear the case fairly and impartially, that would not
25 render them -- negate their ability to sit as a juror

1 and to deliberate regarding the case.

2 There is no obligation on the State to disclose
3 witnesses unless they are exculpatory in nature. There
4 is no indication that these witnesses were exculpatory.
5 There is no indication of prejudice. In addition to
6 that, the State has a continuing obligation to make you
7 aware of any witnesses that would have been
8 exculpatory.

9 It's not unusual for witnesses to come up during
10 the course of the trial, and then for all the witnesses
11 not to be listed. So I don't know that I would -- that
12 I am convinced that that rises to any level of
13 prejudice as well.

14 But again, I am going to take -- I am inclined
15 at this point to deny the motion for post-conviction
16 relief as a basic matter. I do not believe that the
17 Applicant has proven that Mr. Pennington's performance
18 was deficient and fell below -- and that his
19 performance fell below what is reasonable under
20 professional norms.

21 And in addition to that, even if I were to find
22 that his performance was deficient in some way by some
23 oversight, based on his testimony there is simply no
24 evidence in the record that the Applicant was
25 prejudiced by that. And there is no evidence that

1 there is a reasonable probability that but for
2 counsel's unprofessional errors, the result of the
3 proceeding would have been different.

4 In addition to that, just because counsel may
5 employ some different strategy, that does not make
6 their performance deficient. Nor do they have to
7 really consult with their client when they're employing
8 a particular strategy.

9 They're only required to be an ardent advocate
10 for their client and act in their best interest based
11 on, of course, the record that they are faced with.
12 And that being the evidence that is being presented
13 against the client.

14 So based on that, I would deny the application.
15 But I am going to take the matter -- I am still going
16 to take the matter under advisement. I want to make
17 sure that my recollection is accurate regarding the
18 record. And there are some things I want to review
19 again.

20 In the meantime, Mr. Friedman, if you would
21 provide the Court with a proposed order. And you can
22 send that to me at [REDACTED] in word
23 format.

24 Please make sure that Mr. Runion is copied on
25 that.

1 MR. FRIEDMAN: Yes, Your Honor.

2 THE COURT: Of course I have not gone over
3 everything. And I give you leave to make any other
4 findings that are consistent with the record.

5 And as you all well know, I usually change stuff
6 around anyway. So if you would send that on to Mr.
7 Runion so that he will have a copy of it as well.

8 Is there anything further for the record before
9 we adjourn the proceedings, Mr. Runion?

10 MR. RUNION: Nothing from the applicant.

11 THE COURT: Mr. Friedman?

12 MR. FRIEDMAN: Nothing, Your Honor.

13 THE COURT: Thank you all very much.

14 (Whereupon, the proceedings in this matter
15 before the Court were adjourned.)

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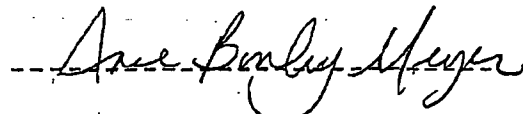
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C E R T I F I C A T E

I, the undersigned, ANNE BOULEY MEYER,
Official Court Reporter for the Ninth Judicial Circuit
of the State of South Carolina, do hereby certify that
the foregoing is a true, accurate, and complete
transcript of record, and of all the proceedings had
and evidence introduced in the above captioned case,
relative to appeal, in the Circuit Court for South
Carolina, on the indicated date.

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



Anne Bouley Meyer, RPR
Circuit Court Reporter

STATE OF SOUTH CAROLINA

AFFIDAVIT

COUNTY OF CHARLESTON
CITY OF NORTH CHARLESTON

OCA# 2001003974
INV. DET. SGT. DOUG HESTER

Personally appeared before me, a magistrate of this County, one DET. SGT. DOUG HESTER
who first being duly sworn, deposes and says that (name of the defendant)

BYRON SLATER

did within this County and State on the 3RD day of FEBRUARY
2001, violate the criminal laws of the State of South Carolina in the following particulars:

DESCRIPTION OF OFFENSE
MURDER
VIOLATION OF SECTION 16-3-20

The affiant states there is probable cause to believe that the defendant named above did commit the crime(s) set forth, and that such probable cause is based on the following facts:

That on 02-03-01 at approximately 2201 hours, while in a parking lot at the intersection of Crawford St. and Jenkins St. which is located in the City of North Charleston, the defendant, BYRON SLATER did commit the offense of MURDER, in violation of section 16-3-20 of the South Carolina Code of Laws of 1976, as amended. In that the defendant did willfully, unlawfully and feloniously while armed with a handgun did shoot the victim, one Sharone Middleton, in his chest and the side of his torso which ultimately caused his death. Facts to establish the aforesaid are that an eyewitness observed the crime in progress. That he knows the defendant by face and by name. That he did give a signed written statement implicating the defendant as the perpetrator of said crime. That said witness will be named by the courts at the time of trial. Mark Nelson, Demetrius Nelson, Det. Cpl. Scott Deckard and Det Sgt. Doug Hester of the North Charleston Police Dept. are witnesses to prove the same. All against the law, peace and dignity of the State of South Carolina.

Sworn to and Subscribed before me

this day of FEB 05 2001
200

Signature of Judge

Det. Sgt. D. Hester
(AFFILANT)

Address: NC PD

La Cross Rd.
Phone: 754-5700

BAIL set by

Padman

FEB 05 2001

no bond

PRELIMINARY HEARING held at

by

by

Defence Attorney:

Decision

BY

2001 FEB 5 PM 4:07
JULIE STRONG
CLERK OF COURT

by

(indicate jury trial, bench trial, plea, not, pros., etc.)

Disposition

Sentence

JURORS

1030
625
0116

WITNESSES

Name _____

Address _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name _____

Address: _____

Telephone: _____

Name _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name _____

Address: _____

Telephone: _____

NOTICE TO REPORT

YOU MUST REPORT FOR ARRANGMENT OF
PLEA ON THE CHARGE HEREIN TO THE
COURT OF CRIMINAL SESSIONS, LOCATED
IN THE ROYAL BUILDING, 2144 MEL-
BOURNE STREET, SOUTH CHARLESTON, ON
THE 2ND FLOOR AT

Name: _____

Address: _____

Telephone: _____

CODEFENDANTS

IF YOU DO NOT REPORT, ARREST
WARRANT WILL BE ISSUED FOR YOU

MAP 1-8-2001

ON

A

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Lord Byron Slater, #279992,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2007-CP-10-2160

ORDER OF DISMISSAL

FILED
2009 DEC 21 PM 12:00
JULIE J. ARMSTRONG
CLERK OF COURT

Presiding Judge:

Applicant's Attorney:

Respondent's Attorney:

Date of Hearing:

Court Reporter:

Deadra L. Jefferson

William Runyon, Esq.

Matthew Friedman, Esq.

November 16, 2009

Anne Meyer

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed May 23, 2007. The Respondent made its Return on October 15, 2008. An evidentiary hearing into the matter was convened on November 16, 2009 at the Charleston County Courthouse. The Applicant was present at the hearing and was represented by William Runyon, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

The Applicant and Ashley Pennington, Esquire, testified at the PCR hearing. This Court had before it the records of the Charleston County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the Record on Appeal, the appellate briefs, the opinion of the South Carolina Court of Appeals (reversing the trial court), the opinion of the South Carolina Supreme Court (reversing the decision of the Court of Appeals), the Remittitur,

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[Signature]

the PCR application, the Respondent's Return thereto, and the search warrant affidavit.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the May 2001 term of the Charleston County Grand Jury for murder (2001-GS-10-3221) and possession of a firearm during commission of a violent crime (2001-GS-10-3226). Ashley Pennington, Esquire, and S. Boyd Young, Esquire, represented the Applicant. On November 13, 2001, the Applicant proceeded to trial and was convicted of murder. The Honorable Edward B. Cottingham sentenced the Applicant to confinement for life.

On November 30, 2001, the Applicant filed a Notice of Appeal. Robert M. Dudek, Assistant Appellate Defender, represented the Applicant. On August 9, 2004, the South Carolina Court of Appeals reversed and remanded for a new trial. State v. Slater, Op. No. 3855 (Ct. App. Aug. 9, 2004). On or about August 24, 2004, the State filed a Petition for Rehearing. The South Carolina Court of Appeals issued an Order denying the petition on September 23, 2004. On October 24, 2004, the State petitioned to the South Carolina Supreme Court. By opinion dated April 9, 2007, the Supreme Court of South Carolina reversed the Court of Appeals decision. State v. Slater, Op. No. 26299 (Sup. Ct. Apr. 9, 2007). The Remittitur was issued on April 25, 2007.

ALLEGATIONS

The Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel in that:

- a. "Trial counsel failed to bring to the attention of the trial judge the defective advice of rights warnings, doing so would've aided the

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[Signature]

motion to suppress defendants statement and the fruits of the search warrant under fruit of the poisonous tree doctrine."

b. "Trial counsel failed to impeach Officer Palmer, who gave conflicting testimony in camera direct examination, doing so would've aided the motion to suppress defendants statement and the fruits of the search warrant under fruit of the poisonous tree doctrine."

c. "Trial counsel failed to request instructions on lesser included offenses of involuntary manslaughter and reckless homicide, which were supported by the evidence."

d. "Trial counsel ineffective for allowing two witnesses to take the stand without first having them disclosed to the jury in advance through voir dire, it was a error on counsels part, witnesses weren't in defendants favor, and aided the prosecutor in a conviction of the greater offense."

e. "Trial counsel ineffective for admitting guilt in opening statement, failing to advance any theory of defense, and attempting to establish only that the defendant killed victim without malice, but presumed prejudice because defendant, who pleads not guilty, is entitled to a defense."

f. "Trial counsel failed to object to the prosecutor's closing argument comments, telling the jury the victim was shot twice while on the ground. There was no forensic medical examiner to prove that theory."

g. "Trial counsel duty at voir dire, is to safe guard defendant from possible bias jurors, failed to do so, when counsel did not note the fact to the trial judge, that the incident took place in a church parking lot, and there might've been potential members of that church on defendants juror panel."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

The Applicant testified that counsel admitted Applicant's guilt during his opening statement. He argued that Detective Widmer omitted one of the Miranda warnings, specifically the warning that Applicant had a right to stop the questioning at any time. Applicant asserted that counsel failed to request jury instructions on reckless homicide and involuntary manslaughter. Applicant also testified that counsel failed to determine during voir dire whether any potential jurors were members of the church where the incident took place. He asserted that counsel allowed two witnesses to testify at trial even though they were not disclosed to the jury in voir dire. Applicant alleged that counsel should have objected to the solicitor's closing statement, in which he stated that the victim was shot twice while on the ground. Applicant testified that appellate counsel did not address the Miranda issue on direct appeal.

Trial counsel testified that he requested a Jackson v. Denno hearing on Applicant's written and oral statements, but he did not argue the issue that Detective Widmer omitted one of the warnings. Counsel testified that Sergeant Hester informed Applicant of his right to stop the questioning at any time before Applicant gave his written statement. Counsel asserted that Applicant did not ask Sergeant Hester to stop the questioning after he was given his Miranda warnings.

Counsel testified that the ballistics tests showed that Applicant's gun was the gun used to shoot the victim. Since he could not get around that fact, counsel argued in his opening statement that Applicant shot the victim in self-defense and there was no malice. Counsel argued that the judge charged self-defense and manslaughter, and counsel did not see any evidence to support charges on involuntary manslaughter or reckless homicide.

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Counsel testified that the affidavit for the search warrant lists Mark Nelson instead of the victim's name. Counsel testified that he did not raise this in a motion to suppress the evidence based on the affidavit because he believed it was an error and did not rise to the level of a defect.

Ineffective Assistance of Counsel

Applicant alleges that he received ineffective assistance of counsel. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. SCRPC Rule 71.1(e); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

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, 104 S.Ct. 2052. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test to evaluate 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, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688, 104 S.Ct. at 2065). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

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would have been different." Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id.

This Court finds that counsel's testimony was credible. This Court finds that counsel is a trial practitioner who has extensive experience in the trial of serious offenses. Counsel conferred with the Applicant on numerous occasions. During conferences with the Applicant, counsel discussed the pending charges, the elements of the charges and what the State was required to prove, Applicant's version of the facts, Applicant's constitutional rights, the possible punishments, and possible defenses or lack thereof.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. 668, 104 S.Ct. 2052; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court further finds counsel adequately conferred with the Applicant, reviewed the discovery materials with Applicant, conducted a proper investigation, and was thoroughly competent in his representation. This Court finds that counsel's representation did not fall below an objective standard of reasonableness.

This Court finds that the Applicant received the complete Miranda warnings prior to giving being interrogated and prior to giving his written statement. (Tr. p. 322, 342-46). Miranda v. Arizona does not require that an officer, when informing a person of his rights, specifically inform a person that he has the right to stop the questioning at any time. State v. Cannon, 260 S.C. 537, 197 S.E.2d 678 (1973); Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966). Further, even if the first set of Miranda warnings had been incomplete in some way, this Court

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finds that the Applicant was not prejudiced by counsel's failure to object to the first set of Miranda warnings, because Applicant did not ask the officers to stop questioning him even after receiving the second warning. This Court finds that the Applicant failed to show that counsel was deficient or that the Applicant was prejudiced in any way related to the Miranda warnings.

This Court finds that counsel's opening statement did not amount to ineffective assistance of counsel. Applicant testified that he shot his gun and the ballistics test showed that Applicant's gun was used to shoot the victim. This Court finds that counsel made a reasonable trial decision to admit the killing and argue self-defense and lack of malice under the facts and circumstances of this case. This Court also finds nothing objectionable in the State's closing argument and finds trial counsel's defense strategy respecting the arguments to the jury to be valid and reasonable in view of circumstances, the evidence presented at trial, and counsel's experience in the trial of criminal cases. See Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000) (stating where defense counsel articulates a valid reason for employing a particular defense strategy, the action will not be deemed ineffective assistance of counsel). The Applicant failed to show that counsel was deficient or that the Applicant was prejudiced in this regard.

This Court finds that counsel was not ineffective for failing to determine during voir dire whether any of the potential jurors were members of the church where the incident took place. No juror admitted to having personal knowledge of the facts and circumstances of the case. Moreover, Applicant failed to establish that any juror that served was a member of the church. As a result, the Court finds that no prejudice resulted from counsel's failure to specifically ask if any of the potential jurors were members of the church.

This Court further finds that the search warrant affidavit was sufficient. This Court finds

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it was a scrivener's error that Mark Nelson was named on the affidavit rather than the victim and that no prejudice resulted from this error.

This Court also finds that there was no evidence to support a jury charge on involuntary manslaughter or reckless homicide. Applicant's defense was self-defense, and counsel specifically requested a jury charge on self-defense. (Tr. p. 479-83). Further, the court did give a charge on voluntary manslaughter. (Tr. p. 497). Therefore, the Applicant has failed to meet his burden on this allegation, as well.

This Court finds that counsel properly objected to the two witnesses who were not on the State's witness list. Nonetheless, this Court submits that the State is not required to give the names of witnesses unless they are exculpatory. In regards to this allegation, the Applicant failed to show that counsel was deficient or that the Applicant was prejudiced in this regard.

Accordingly, in respect to all of Applicant's allegations, this Court finds Applicant has failed to prove the first prong of the Strickland test, specifically that counsel failed to render reasonably effective assistance under prevailing professional norms. This Court also finds the Applicant has failed to prove the second prong of Strickland, specifically that he was prejudiced by plea counsel's performance. Applicant's complaints concerning counsel's performance are without merit and are denied and dismissed.

All Other Allegations

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

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CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation. Specifically, the Applicant was not prejudiced such that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. Therefore, this application for PCR must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 227 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely served and filed.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 17th day of Dec., 2009.


 Deadra L. Jefferson
 Presiding Judge
 9th Judicial Circuit

Charleston, South Carolina.

9 9 of 9


FORM 5

2011-CP-10-3361

STATE OF SOUTH CAROLINA

County of Charleston

IN THE COURT OF COMMON PLEAS

Lord Byron Slater #279992

Full name and prison number (if any) of Applicant

v.

State of South Carolina

APPLICATION FOR
POST-CONVICTION RELIEFFILED
2011 MAY 10 PM 12:49
JULIE J. ARNOLD
CLERK OF COURTINSTRUCTIONS - 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 McCormick Corrections 386 Redemption
Way McCormick, SC, 29099
2. Name and location of Court which imposed sentence Ninth Judicial Circuit
Chas county 2144 Melbourne St, N. Chas, SC, 29905-6663
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2001-GS-10-3221, murder

- (b) 2001-GS-10-3226, poss of fire arm during violent crime
 (c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

- (a) 11-15-01 Natural Life
 (b) 11-15-01 (5 years)
 (c) _____

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty _____
 (b) after a plea of not guilty ✓
 (c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

both

8. If you answered "yes" to (7), list:

- (a) the name of each Court to which you appealed:
 i. SC Court of Appeals
 ii. On Writ of Certiorari to the Court of Appeals
 iii. N/A
 (b) the result in each such Court to which you appealed:
 i. Reversed and Remanded opinion No. 3855
 ii. Reversed opinion No. 26299
 iii. _____
 (c) the date of each such result:
 i. August 9, 2004
 ii. April 9, 2007
 iii. _____
 (d) if known, citations of any written opinion or orders entered pursuant to such results:
 i. N/A
 ii. N/A
 iii. N/A

9. If you answered "no" to (7), state your reasons for not so appealing:

- (a) N/A

- (b) N/A
 (c) N/A

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective assistance of counsel (PCR)
 (b) Belated Appeal
 (c) _____

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

- (a) See Attached Sheets
 (b) I did not freely and voluntarily waive my appellate rights to PCR judgment
 (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? N/A
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? PCR 2007-CP-10-2160
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
 (d) any other petitions, motions or applications in this or any other Court? N/A

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. Petition for new trial through Direct Appeal
 ii. Petition for new trial through PCR 2007-CP-10-2160
 iii. _____
 iv. _____
 (b) the name and location of the Court in which each was filed:
 i. SC court of appeals
 ii. Chas county court of common Pleas
 iii. _____

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

(A) 1. PCR counsel didn't notify applicant of PCR judgment until March 25, 2011
order of dismissal was filed December 21, 2009

2. Applicant was denied the opportunity to file a 59(c) to amend
order to include things that wasn't addressed in order, due
to the late notice of first PCR ruling by PCR counsel's own negligence

3. PCR counsel failed to file appeal in a timely manner,
counsel filed appeal March 25, 2011, which the courts ruled untimely

- iv. _____
- (c) the disposition thereof:
- i. Reversed Opinion No. 26299
- ii. Dismissed December 17, 2009 / Filed December 21, 2009
- iii. _____
- iv. _____
- (d) the date of each such disposition:
- i. N/A
- ii. N/A
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. N/A
- ii. December 21, 2009 order dismissal filed
- 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?

N/A

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

- (b) the proceedings in which each ground was raised:

- i. N/A
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) Initial PCR counsel failed to notify applicant that 1st PCR was dismissed
 - (b) Initial PCR counsel failed to timely file and serve notice of intent to appeal Judges denial of my P.C.R.
 - (c) Did not find out PCR application was dismissed until March 25, 2011 order was filed since 12/21/09
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? N/A
 - (b) your trial, if any? N/A
 - (c) your sentencing? N/A
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? N/A
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. William L. Runyon Jr Esquire PCR counsel
3 Gamecock Ave, Suite 303, Charleston, SC, 29407
 - ii. _____
 - iii. _____
 - (b) the proceedings at which each such attorney represented you:
 - i. PCR hearing
 - ii. _____
 - iii. _____

19. State clearly the relief you seek in filing this application:

To be granted a new PCR hearing to allow all issues to be addressed
Or Reinstatement of appeal from first PCR

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

N/A

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of Charleston)

VERIFICATION

I, Lord B. Slater #279992, 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.

Lord Slater 5/5/11

SWORN to and subscribed before me this 5
 day of May, 2011.

Danny G. Minton (L.S.)
 Notary Public

My Commission Expires: Jul 28, 2018

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Lord B. Slater, 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.

Lord Slater 5/5/11
Applicant

SWORN or affirmed to and subscribed before me this

5 day of May, 2011.

Penny A. Montan
Notary Public

My Commission Expires: Feb 28 2018

STATE OF SOUTH CAROLINA	)	IN THE COMMON PLEAS COURT
COUNTY OF CHARLESTON	)	
Lord Byron Slater, 279992	)	DOCKET NO.: 2011-CP-10-3361
	)	
Applicant	)	MOTION TO AMEND
State of South Carolina	)	APPLICATION PCR
	)	15(c) S.C.R.CIV.P
	)	
Respondent	)	

2011 SEP 30 PM 4:09
CLERK OF COURT

The Applicant, Lord Byron Slater, through his attorney, pursuant to Rule 15 S.C.R. CIV.P moves before this court to file an amended complaint to raise the following issues:

- 1) PCR Counsel was ineffective for failing to raise every available issue as required By Rule 71.1(d) S.C.R. CIV.P and failed to file a 59(e) to address the issues.

A) PCR Counsel failed to raise the issue that the implied malice charge impermissibly shifted the burden of proof and created a mandatory presumption in violation of due process, *Sandstrom v Montana* 99 S.Ct. 2450, 442 U.S. 510, 524, (1979). Holding that "burden shifting presumptions or conclusive presumptions" deprive a defendant of the due process of law and are therefore unconstitutional. See *Mullaney v. Wilber*, 95 S.Ct. 1881 (1975), a also see *State v Jenkins*, 443 S.E. 2d 244, 252 (1994). The only evidence of malice was the use and possession of handgun.

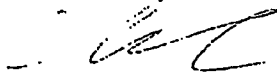
B) PCR Counsel failed to raise the issue of failure of trial counsel to adequately cross-examine the states expert witness on the issue of whether or not the victim was beaten or assaulted.

C) Ineffective assistance of appellate counsel did not raise issue that State failed to prove "Malice aforethought beyond a reasonable doubt.

D) PCR Counsel failed to file a 59(e) to argue that the defendant did not shoot victim in self-defense. The defendant shot in self-defense of the aggressors and the victim was shot accidentally which make the killing involuntary manslaughter which would have shown evidence to charge the jury accidental death, because the jury would not be charged the implied malice instruction base on the use of a deadly weapon.

E) Trial counsel was ineffective for failing to argue accident, State v Burris, 513 S. E. 2d 104 (SC 1999), involuntary manslaughter.

RESPECTFULLY SUBMITTED ON BEHALF OF
APPLICANT, Lord Byron Slater



Charles T. Brooks, III
Attorney for Applicant
309 Broad Street
Post office Box 3512
Sumter, South Carolina, 29150
(803) 418-5708

September 27, 2011

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
	)	2011-CP-10-3361
Lord Byron Slater. #279992.	)	
	)	
Applicant.	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

The Respondent, making its Return to the application for post-conviction relief (PCR) filed May 10, 2011, 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 Charleston County Clerk of Court. The Applicant was indicted at the May 2001 term of the Charleston County Grand Jury for murder (2001-GS-10-3221) and possession of a firearm during commission of a violent crime (2001-GS-10-3226). Ashley Pennington, Esquire, and S. Boyd Young, Esquire, represented the Applicant. On November 13, 2001, the Applicant proceeded to trial and was convicted of murder. The Honorable Edward B. Cottingham sentenced the Applicant to confinement for life.

On November 30, 2001, the Applicant filed a Notice of Appeal. Robert M. Dudek, Assistant Appellate Defender, represented the Applicant. On August 9, 2004, the South Carolina Court of Appeals reversed and remanded for a new trial. State v. Slater, Op. No. 3855 (Ct. App. Aug. 9, 2004). On or about August 24, 2004, the State filed a Petition for Rehearing. The South Carolina Court of Appeals issued an Order denying the petition on September 23, 2004. On

October 24, 2004. the State petitioned to the South Carolina Supreme Court. By opinion dated April 9, 2007. the Supreme Court of South Carolina reversed the Court of Appeals decision. State v. Slater, Op. No. 26299 (Sup. Ct. Apr. 9, 2007). The Remittitur was issued on April 25, 2007.

The Applicant filed his first post-conviction relief application on May 23, 2007. in which he raised the following allegations:

1. Ineffective assistance of counsel in that:

- a. "Trial counsel failed to bring to the attention of the trial judge the defective advice of rights warnings, doing so would've aided the motion to suppress defendants statement and the fruits of the search warrant under fruit of the poisonous tree doctrine."
- b. "Trial counsel failed to impeach Officer Palmer, who gave conflicting testimony in camera direct examination, doing so would've aided the motion to suppress defendants statement and the fruits of the search warrant under fruit of the poisonous tree doctrine."
- c. "Trial counsel failed to request instructions on lesser included offenses of involuntary manslaughter and reckless homicide, which were supported by the evidence."
- d. "Trial counsel ineffective for allowing two witnesses to take the stand without first having them disclosed to the jury in advance through voir dire, it was a error on counsels part, witnesses weren't in defendants favor, and aided the prosecutor in a conviction of the greater offense."
- e. "Trial counsel ineffective for admitting guilt in opening statement, failing to advance any theory of defense, and attempting to establish only that the defendant killed victim without malice, but presumed prejudice because defendant, who pleads not guilty, is entitled to a defense."
- f. "Trial counsel failed to object to the prosecutor's closing argument comments, telling the jury the victim was shot twice while on the ground. There was no forensic medical examiner to prove that theory."

- g. "Trial counsel duty at voir dire, is to safe guard defendant from possible bias jurors, failed to do so. when counsel did not note the fact to the trial judge, that the incident took place in a church parking lot, and there might've been potential members of that church on defendants juror panel."

An evidentiary hearing was convened on November 16, 2009 at the Charleston County Courthouse. William L. Runyon, Jr., Esquire, represented Applicant on his first PCR application. By Order filed December 21, 2009, the Honorable Deadra L. Jefferson denied and dismissed the application with prejudice. Applicant did not timely appeal the denial of the first PCR application.

Incorporated herein by reference are the records of the Charleston County Clerk of Court regarding the subject convictions, the records of the South Carolina Department of Corrections, the Record on Appeal, the appellate briefs, the Court of Appeals' opinion reversing the trial court, the Supreme Court opinion reversing the decision of the Court of Appeals, the Remittitur, the prior PCR application, the Respondent's Return thereto, Judge Jefferson's Order of Dismissal from the prior PCR application, and the current application.

II.

In his current application, the Applicant alleges that he is being held in custody unlawfully for the following reason:

1. Ineffective assistance of prior PCR counsel in that PCR counsel
 - a. Did not notify Applicant of judgment until March 25, 2011.
 - b. Denied Applicant the right to file a 59(e) to amend the order to include things that were not addressed in order.
 - c. Failed to file appeal in a timely manner. See Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

III.

First, the Respondent submits that all issues other than the Austin appeal issue must be summarily dismissed because they are successive to the Applicant's prior PCR application. The Uniform Post Conviction Procedure Act provides that:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

S.C. Code Ann. § 17-27-90 (2003). Successive applications are disfavored and the burden is on the Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981). The State requests that the Court summarily dismiss any issues other than the Austin appeal issue.

IV.

The State therefore requests that this Court convene an evidentiary hearing solely on the issue of whether Applicant was denied a right to appeal the denial of his first PCR application. As to all other allegations, the State moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

Respondent denies each allegation that is not expressly admitted, qualified, or explained.

VI.

WHEREFORE, the State requests an evidentiary hearing be held solely on the Austin appeal issue.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MATTHEW J. FRIEDMAN
Assistant Attorney General

By: Matthew J. Friedman
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

Nov. 3, 2011.

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

2011-CP-10-3361

LORD BYRON SLATER, #279992)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

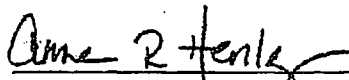
STATE OF SOUTH CAROLINA,)

Respondent.)

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

Mr. Charles Thomas Brooks
 Law Office of Charles T. Brooks, III
 309 Broad St.
 Sumter, SC 29150

DATED this 3rd day of NOVEMBER, 2011



Anne R. Henley, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

COURT OF COMMON PLEAS
2011-CP-10-03361

LORD BYRON SLATER,

Plaintiff

V.

STATE OF SOUTH CAROLINA,

Defendant.

TRANSCRIPT OF RECORD

July 24, 2012
Charleston, South Carolina

B E F O R E:

THE HONORABLE STEPHANIE P. McDONALD, JUDGE

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

Ms. Ashley Wilson, Asst. Attorney General
Representing the State

Mr. Charles T. Brooks, Esquire
Representing the Applicant

Anne Bouley Meyer, RPR
Circuit Court Reporter

1 THE COURT: Yes, ma'am.

2 MS. WILSON: May it please the Court, Your
3 Honor, Ashley Wilson for the State.

4 This case is Lord Byron Slater versus State,
5 docket number 2011-CP-10-3361.

6 Mr. Slater was originally indicted for murder
7 and possession of a weapon during the commission of a
8 violent crime in 2011 [sic]. He received a trial and
9 was convicted of murder and he was sentenced to
10 confinement for life.

11 The applicant filed a timely notice of appeal.
12 The Court of Appeals reversed and remanded the
13 applicant's conviction on August 9, 2004. The State
14 filed a petition for rehearing, which was denied.

15 The Supreme Court reversed the Court of Appeals
16 and confirmed the applicant's conviction in 2007.

17 The applicant filed his first application for
18 post-conviction relief on May 23rd, 2007. An
19 evidentiary hearing was held before the Honorable
20 Deadra Jefferson who denied his PCR application. The
21 applicant did not appeal the dismissal of his first PCR
22 application.

23 He filed a second PCR application, for which we
24 are here today, Your Honor. And then he amended his
25 application in September of 2011.

1 As you can see from the record, the State has
2 filed a return in the motion to dismiss. And the State
3 argues that all allegations, other than guilt, which
4 have been appealed, are beyond the statute of
5 limitations and successive.

6 And I spoke with Mr. Runion, who is the
7 applicant's first PCR attorney, and he told me that he
8 recalled the applicant indicating he wanted to appeal
9 from the denial of his PCR application. And he also
10 said that because of something set up with the receipt
11 of his final order, he did not file an appeal in a
12 timely manner.

13 So based on these statements from Mr. Runion,
14 the State is prepared to consent to a belated appeal.

15 THE COURT: Okay. Anything further, Mr. Brooks?

16 MR. BROOKS: May it please the Court, Judge, I
17 got appointed to this matter. And Mr. Friedman, Ms.
18 Wilson's predecessor had sent me a consent order. I
19 sent it to my client. He indicated he didn't want to
20 consent to that because he felt that there were issues
21 that Mr. Runion did not raise in his first PCR.

22 I have explained to him that having done the
23 numerous amounts of PCRs as I have, that is a problem.
24 And I actually told him what the State's motion was
25 going to be and actually told him how they were going

1 to argue it.

2 obviously he still wishes to raise issues that
3 he says Mr. Runion did not assist him with. Judge, and
4 that is his position.

5 THE COURT: Okay. Did he want to make some
6 statements for the record?

7 THE DEFENDANT: Yes, ma'am.

8 THE COURT: I'm happy to hear from you, sir.

9 THE DEFENDANT: Okay. I can stand and I can
10 present it from right here?

11 THE COURT: You can stay right there. Thank
12 you.

13 THE DEFENDANT: Thank you, Your Honor.

14 First of all, Your Honor, due to my indigent
15 status I have no control over who gets appointed my PCR
16 counsel. My first PCR counsel was Jamie C. Guerrero.
17 He took himself off my case and that's how I got Bill
18 Runion.

19 So when I got Bill Runion, I was attempting to
20 correspond with Bill Runion and asking for his
21 assistance and I sent him some amendments to change my
22 application and I never heard anything from him.

23 So being that I wasn't hearing anything from Mr.
24 Runion, I wrote my first PCR counsel, Mr. Guerrero, and
25 he forwarded the correspondence to Mr. Runion in 2007

1 and I still didn't hear anything.

2 I would like to -- can I present this as an
3 exhibit?

4 THE COURT: Hand it to your attorney.

5 THE DEFENDANT: Okay.

6 It's a letter, and also the envelope it came in.

7 THE COURT: Is that the letter you wrote to Mr.
8 Runion?

9 THE DEFENDANT: That's the letter I wrote to
10 Jamie C. Guerrero and he sent me notification that he
11 forwarded that correspondence to Mr. Runion in 2007.

12 THE COURT: Okay.

13 Thank you, sir.

14 THE DEFENDANT: Okay, Your Honor.

15 THE COURT: Well, I have got a letter dated
16 November 5, 2007 Mr. Guerrero to Bill Runion.

17 Dear Bill, enclosed please find correspondence
18 from Lord B. Slater relating to his PCR hearing in the
19 above matter. But there is nothing in it.

20 THE DEFENDANT: Yeah, because he sent the letter
21 that I sent him to Mr. Runion. I'm just showing you
22 that I attempted to correspond with Mr. Runion for
23 years. And he never returned not one of my letters
24 asking for his assistance. Okay.

25 So years gone by. It got to the point I had to

1 get my sister to get in contact with Mr. Runion to see
2 what was going on with my PCR. And he informed my
3 sister that he got my letter and he made the changes to
4 my application and that he would schedule a visit to
5 come see me.

6 Months passed, months passed, months passed and
7 I never received a visit from Mr. Runion. And come to
8 find out he never even made the changes to my PCR that
9 I requested.

10 And under Rule 1.4(g) of the civil procedures in
11 the South Carolina rules of court dealing with
12 communication, he failed to keep me informed of what
13 was going on with my PCR because my PCR was dismissed
14 in 2009, Your Honor. He didn't inform me about it
15 until 2011.

16 What kind of counsel is going to leave his
17 client in the midst of what is going on. And I was
18 writing him and asking him what's been happening.

19 THE COURT: Have you given all these letters to
20 Mr. Brooks?

21 THE DEFENDANT: See, I sent him something too.
22 But he say he didn't get it. So I believe I sent to
23 Friedman or the first attorney I had because for some
24 reason I had like two prior attorneys before I got Mr.
25 Brooks.

1 I guess they was caught up in whatever they was
2 doing. And I sent letters to a female and she
3 forwarded it to this attorney and maybe it got there,
4 you know what I'm saying. So I was trying to locate
5 these letters. So I was hesitant to send it because I
6 didn't know if it was getting to the right person.

7 This I want to submit the order of dismissal,
8 and also the attempt to appeal that is post marked
9 2011.

10 THE COURT: Is this the late appeal?

11 THE DEFENDANT: This is when he informed me that
12 I was dismissed, and also his attempted appeal. I want
13 to submit these letters to the Court.

14 THE COURT: Do you not understand what the
15 attorney for the State just said?

16 THE DEFENDANT: Yeah, I understand they are
17 giving me my appeal.

18 THE COURT: Then why do I need to look at these
19 letters?

20 THE DEFENDANT: Okay, because I just want to
21 prove that I was abandoned by my counsel. And under
22 Case versus State, he was granted a second PCR due to
23 he didn't have assistance from his first counsel.

24 He didn't have counsel the first time so it was
25 unlikely that he could have raised the appropriate

1 arguments. And my argument is being that I was
2 abandoned by my counsel prior to him being appointed my
3 counsel, and also after PCR hearing was dismissed, he
4 didn't keep me informed and let me know what was going
5 on.

6 And it's hence that dealing with his attitude
7 towards me that I could have raised the appropriate
8 arguments at my first PCR.

9 And I want to point this out, Your Honor. The
10 same counsel they appointed me, he is in the law books
11 for filing a frivolous motion just so he wouldn't have
12 to pay the people back the money that was sent to him.

13 And he lied to the judge saying these people
14 paid him with illegal drug money. This is the counsel
15 that got appointed to me, who has had questionable
16 ethics since '93, Your Honor.

17 THE COURT: Okay. What are the issues that you
18 assert could have been raised in your original
19 application and were not?

20 THE DEFENDANT: That's the amendment you said
21 you filed on my behalf.

22 MR. BROOKS: It's already in the Court's file.

23 THE COURT: And I have reviewed your file, sir.

24 THE DEFENDANT: Okay, so you should have that in
25 your Court file, Your Honor.

1 THE COURT: Right. And that's why I'm asking
2 you to make sure that you understand what the State is
3 consenting to today.

4 THE DEFENDANT: Okay, so I will be able to have
5 these issues preserved. Is that what you are saying?

6 THE COURT: No, sir. I'm asking you if you
7 understand what the State is offering you today by way
8 of a consent order?

9 THE DEFENDANT: Yeah, dealing with the first
10 PCR.

11 THE COURT: Yes.

12 THE DEFENDANT: Yeah, I understand it, Your
13 Honor, but I was trying to get these preserved for the
14 first PCR because I tried to -- do you understand, he
15 denied me my opportunity to file a 59(b) motion that
16 has to be amended into the application because he
17 didn't let me know about it until 2011.

18 You have 10 days to file a 59(b) motion, and you
19 have also got 30 days to file an appeal. He destroyed
20 all of that.

21 THE COURT: And I think that what counsel has
22 already said, and your attorney has explained to you,
23 and I'm not going to say it but this one time, okay?

24 Mr. Runion has agreed that there was ineffective
25 assistance on notifying you of your right to appeal.

1 That is why the State has offered a consent order to
2 you on the Austin appeal issue to allow that to go
3 forward.

4 THE DEFENDANT: All right, so I just want to
5 make sure -- so I will be able to preserve these issues
6 too? Because I was trying to get these amended the
7 whole time. That's all I'm trying to understand.

8 THE COURT: Solely on the appeal issues. If you
9 want a chance to talk to your attorney so that he can
10 explain that to you, that's fine.

11 THE DEFENDANT: One question before that. I
12 always wanted to cite Maple versus Thomas who was
13 granted another hearing because he was abandoned by
14 counsel at a critical stage.

15 THE COURT: That's fine. I'm reading the case
16 right now, it does not apply to your case.

17 Anything further Mr. Brooks or counsel for the
18 State?

19 MS. WILSON: Your Honor, I just want to put on
20 the record that several victims in this case are
21 present in the courtroom today.

22 THE COURT: Okay. Is anybody going to put up
23 any testimony or call a witness?

24 MS. WILSON: No, Your Honor.

25 THE COURT: All right.

1 THE DEFENDANT: Well, Your Honor, I mean so I
2 consent to my appeal I just want to preserve that the
3 issue, you understand, wasn't allowed to be raised due
4 to his ineffective --

5 THE COURT: You do not have to consent to the
6 appeal, sir. The State has conceded that issue. So
7 I'm going to rule on that appellate issue, solely the
8 appeal issue in your favor.

9 Anything else would be successive and barred
10 because you've already filed a PCR, and I don't find
11 credible your arguments on ineffective assistance on
12 anything other than the appeal.

13 Anything else you want to put on the record, Mr.
14 Brooks?

15 MR. BROOKS: No, ma'am.

16 THE COURT: Okay. I do find that the applicant
17 was denied a right to appeal the denial of his first
18 application, his first PCR application. All other
19 applications set forth in the application are dismissed
20 pursuant to 17-27-70. Thank you.

21 MS. WILSON: Thank you, Your Honor.

22 THE DEFENDANT: One thing, Your Honor, so will I
23 get the paperwork that my appeal is going through?

24 THE COURT: Talk to your attorney.

25 (Whereupon, the proceedings in this matter

1 before the Court were adjourned.)

2
3
4 C E R T I F I C A T E
5 -----
6
7
8

9 I, the undersigned, ANNE BOULEY MEYER,
10 Official Court Reporter for the Ninth Judicial
11 Circuit of the State of South Carolina, do hereby
12 certify that the foregoing is a true, accurate, and
13 complete transcript of record, and of all the
14 proceedings had and evidence introduced in the above
15 captioned case, relative to appeal, in the Circuit
16 Court for South Carolina, on the indicated date.

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

19
20 Anne Bouley Meyer

21 Anne Bouley Meyer, RPR
22 Circuit Court Reporter
23
24
25

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Lord Byron Slater, #279992,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2011-CP-10-3361

CONSENT ORDER GRANTING
 BELATED PCR APPEAL PURSUANT
 TO AUSTIN AND DISMISSING
 ALL OTHER CLAIMS

FILED
 2012 AUG 21 AM 10:11
 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed May 10, 2011. The Respondent made its Return on November 3, 2011.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the May 2001 term of the Charleston County Grand Jury for murder (2001-GS-10-3221) and possession of a firearm during commission of a violent crime (2001-GS-10-3226). Ashley Pennington, Esquire, and S. Boyd Young, Esquire, represented the Applicant. On November 13, 2001, the Applicant proceeded to trial and was convicted of murder. The Honorable Edward B. Cottingham sentenced the Applicant to confinement for life.

On November 30, 2001, the Applicant filed a Notice of Appeal. Robert M. Dudek, Assistant Appellate Defender, represented the Applicant. On August 9, 2004, the South Carolina Court of Appeals reversed and remanded for a new trial. State v. Slater, Op. No. 3855 (Ct. App. Aug. 9, 2004). On or about August 24, 2004, the State filed a Petition for Rehearing. The South Carolina Court of Appeals issued an Order denying the petition on September 23, 2004. On

October 24, 2004, the State petitioned to the South Carolina Supreme Court. By opinion dated April 9, 2007, the Supreme Court of South Carolina reversed the Court of Appeals decision. State v. Slater, Op. No. 26299 (Sup. Ct. Apr. 9, 2007). The Remittitur was issued on April 25, 2007.

The Applicant filed his first post-conviction relief application on May 23, 2007, in which he raised the following allegations:

1. Ineffective assistance of counsel in that:

- a. "Trial counsel failed to bring to the attention of the trial judge the defective advice of rights warnings, doing so would've aided the motion to suppress defendants statement and the fruits of the search warrant under fruit of the poisonous tree doctrine."
- b. "Trial counsel failed to impeach Officer Palmer, who gave conflicting testimony in camera direct examination, doing so would've aided the motion to suppress defendants statement and the fruits of the search warrant under fruit of the poisonous tree doctrine."
- c. "Trial counsel failed to request instructions on lesser included offenses of involuntary manslaughter and reckless homicide, which were supported by the evidence."
- d. "Trial counsel ineffective for allowing two witnesses to take the stand without first having them disclosed to the jury in advance through voir dire, it was a error on counsels part, witnesses weren't in defendants favor, and aided the prosecutor in a conviction of the greater offense."
- e. "Trial counsel ineffective for admitting guilt in opening statement, failing to advance any theory of defense, and attempting to establish only that the defendant killed victim without malice, but presumed prejudice because defendant, who pleads not guilty, is entitled to a defense."
- f. "Trial counsel failed to object to the prosecutor's closing argument comments, telling the jury the victim was shot twice while on the ground. There was no forensic medical examiner to prove that theory."

- g. "Trial counsel duty at voir dire, is to safe guard defendant from possible bias jurors, failed to do so, when counsel did not note the fact to the trial judge, that the incident took place in a church parking lot, and there might've been potential members of that church on defendants juror panel."

An evidentiary hearing was convened on November 16, 2009 at the Charleston County Courthouse. William L. Runyon, Jr., Esquire, represented Applicant on his first PCR application. By Order filed December 21, 2009, the Honorable Deadra L. Jefferson denied and dismissed the application with prejudice. Applicant did not timely appeal the denial of the first PCR application.

Before this Court are the records of the Charleston County Clerk of Court regarding the subject convictions, the records of the South Carolina Department of Corrections, the Record on Appeal, the appellate briefs, the Court of Appeals' opinion reversing the trial court, the Supreme Court opinion reversing the decision of the Court of Appeals, the Remittitur, the prior PCR application, the Respondent's Return thereto, Judge Jefferson's Order of Dismissal from the prior PCR application, the current application, and the State's Return thereto.

ALLEGATIONS

In his current application, the Applicant alleges that he is being held in custody unlawfully for the following reason:

1. Ineffective assistance of prior PCR counsel in that PCR counsel
 - a. Did not notify Applicant of judgment until March 25, 2011.
 - b. Denied Applicant the right to file a 59(e) to amend the order to include things that were not addressed in order.
 - c. Failed to file appeal in a timely manner. See Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).
 - d. Failed to raise every available issue as required by Rule 71.1(d) S.C.R. Civ. P. and failed to file a 59(e) to address the issues.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

An evidentiary hearing was held on July 24, 2012 at the Charleston County Courthouse. At the hearing, the Applicant was present and represented by Charles Brooks, III, Esquire. The Respondent was represented by Ashleigh R. Wilson, Assistant Attorney General. At the hearing, the Respondent moved to dismiss all allegations in the Applicant's current PCR application other than the Austin appeal issue. These allegations should be dismissed for violating the statute of limitations and the doctrine of successive applications.

The Applicant's only remaining allegation is that he is entitled to an appeal of his first PCR application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). The Respondent spoke with counsel for the Applicant in his first PCR application, William Runyon. It appears that the Applicant desired an appeal and failure to timely file a notice of appeal was due to inadvertence. All parties agree the Applicant is entitled to an appeal from the denial of his first PCR application (2007-CP-10-2160).

The State consents to allow Applicant a belated PCR appeal of the dismissal of his first PCR application (2007-CP-10-2160). This Court finds that Applicant did not knowingly and voluntarily waive his right to appeal his first PCR application. Accordingly, this Court grants Applicant a belated PCR appeal pursuant to Austin and dismisses with prejudice all other allegations put forth in the Applicant's current post-conviction relief application. In order to secure this review, however, the Applicant must appeal from this Order.

CONCLUSION

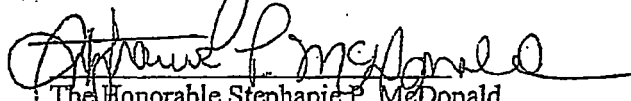
This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) and

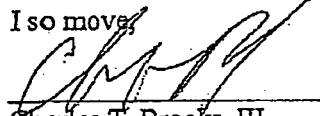
Rule 243 of the South Carolina Appellate Court Rules for the appropriate procedures for filing a belated appeal.

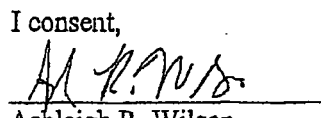
IT IS THEREFORE ORDERED:

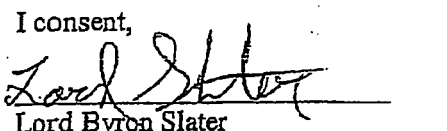
1. That the Applicant be granted a belated appeal of the denial of his first PCR application pursuant to Austin v. State.
2. All other allegations are waived and dismissed with prejudice.
3. Applicant shall be remanded to the custody of the Respondent pending his belated PCR appeal.

AND IT IS SO ORDERED this 14th day of August, 2012.


The Honorable Stephanie P. McDonald
9th Judicial Circuit

I so move,

Charles T. Brooks, III
Attorney for the Applicant

I consent,

Ashleigh R. Wilson
Assistant Attorney General

I consent,

Lord Byron Slater
Applicant for Post-Conviction Relief

DLD 2001-03-01097

WITNESSES

JOHN BURNETT AND/OR

KEITH HAIR

HESTER, NCPD

2001003974

ARREST WARRANT NUMBER

G536850

FEBRUARY 5, 2001

ACTION OF GRAND JURY

MAY 02 2001

TRUE BILL

Adon
Foreperson of Grand Jury

VERDICT

Guilty of Murder

Godie L. Morgan *NOV. 15, 2001*
Foreperson of Petit Jury Date:

DOCKET NO. 2001-GS-10- *3221*

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

MAY TERM 2001

THE STATE

vs.

LORD BYRON SLATER

Indictment for

MURDER

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on May 1, 2001 the Grand Jurors of Charleston County present upon their oath:

That Lord Byron Slater did in Charleston County on or about February 3, 2001, feloniously, willfully and with malice aforethought kill and murder one Sharone Willis Middleton by shooting him and Sharone Willis Middleton did die in Charleston County as a proximate result on or about February 3, 2001, in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


DEPUTY SOLICITOR

DLD 2001-03-01097

WITNESSES

JOHN BURNETT AND/OR

KEITH HAIR

HESTER, NCPD

2001003974

ARREST WARRANT NUMBER

DIRECT INDICTMENT

ACTION OF GRAND JURY

MAY 22 2001

TRUE BILL

For person of Grand Jury

VERDICT

~~Guilty of possession of
a firearm during the
commission of a violent
crime. Godie S. Morgan 11-15-01~~

For person of Petit Jury

Date:

Disregard: This charge was
not pressed on 11/15/01.
MFA

DOCKET NO. 2001-GS-10-3226

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

MAY TERM 2001

THE STATE

VS.

LORD BYRON SLATER

Indictment for

**POSSESSION OF A FIREARM DURING
THE COMMISSION OF A VIOLENT
CRIME**

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT FOR
POSSESSION OF A FIREARM DURING THE
COMMISSION OF A VIOLENT CRIME

At a Court of General Sessions, convened on May 1, 2001 the Grand Jurors of Charleston County
present upon their oath:

That Lord Byron Slater did in Charleston County on or about February 3, 2001, possess or visibly display
a handgun during the commission of a violent crime, to wit: Murder. This is in violation of §16-23-490
of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and
provided.


DEPUTY SOLICITOR

860
802

STATE OF SOUTH CAROLINA

COUNTY OF Charleston
STATE VS.

AKA: Loral Byron Slater

Race: _____ Sex: _____ Age: _____

DOB: 1/1/ SS#: _____

Address: _____

DL# _____ SID#: _____

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:

2001-GS-10-3226

A/W#: Direct Indictment

Date of Offense: _____

S.C. Code §: _____

CDR Code #: _____

☐ CASE RESTORED

SENTENCE

☐ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADS TO: _____

in violation of § _____ of the S.C. Code of Laws, bearing CDR Code # 1/1/1

☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections, ☐ County Detention Center, for a determinate term of _____ 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.

☐ The Defendant is to be given credit for _____ days/months jail time

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS

Recipient: _____

*Fine: \$

§14-1-206 (Assessments 100%) \$

§14-1-211(A)(1) (Surcharge) \$

§14-1-211(A)(2) (Surcharge) \$

§56-5-2995 (DUI Assessment) \$

3% to County (if paid in installments) \$

TOTAL \$

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab. or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund.

Other: _____

PRESIDING JUDGE

Judge Code: _____

Sentence Date: 11/15/01

Clerk of Court/ Deputy Clerk

Court Reporter: _____

White - Clerk

Green - Corrections

Canary - Probation

Pink - Defendant

STATE OF SOUTH CAROLINA

COUNTY OF

Charleston

STATE

VS.

Lord Byron Sloder

AKA: Lord Byron Barclay Sloder

Race: B

Sex: M

Age: _____

DOB: _____

SS# _____

Address: _____

DL# _____

SID# _____

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

2001-GS-10-3221

A/W#: G-536850

Date of Offense: Feb. 3 2001

S.C. Code §: 16-3-10

CDR Code #: 0 / 1 / 1 / 6

☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

TO: Murder (30 yrs - Life)

in violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 0 / 1 / 1 / 6

☐ NON-VIOLENT

☒ VIOLENT

☐ SERIOUS

☒ MOST SERIOUS

☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

[Signature]

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of LIFE 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.

☐ The Defendant is to be given credit for _____ days/months jail time.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine:\$ _____

§14-1-206 (Assessments 100%)\$ _____

§14-1-211(A)(1) (Surcharge)\$ 100.00

§14-1-211(A)(2) (Surcharge)\$ _____

§56-5-2995 (DUI Assessment)\$ _____

3% to County (if paid in installments)\$ 3.00

TOTAL\$ 103.00

[Signature]
Clerk of Court Deputy Clerk

Court Reporter: [Signature]

White - Clerk

Green - Corrections

Canary - Probation

Pink - Defendant

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab. or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund.

Other: Balance of Natural Life

PRESIDING JUDGE

[Signature]

Judge Code: 0101411

Sentence Date: 11-15-01

ARREST WARRANT

G-536850

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
CHARLESTON

THE STATE

against

LORD BYRON SLATER

Address:

N. CHARLESTON. SC 29406

Phone:

Sex: M

Race: B

Height: 5'7"

190

DL State: SC

DOB:

Agency ORI#:

Prosecuting Agency: NCPD

Prosecuting Officer: HESTER

Offense: MURDER

Offense Code:

Code/Ordinance Sec. 16-3-10

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality ofThe accused
is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge

(L.S.)

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant LORD BYRON SLATER
on 2-5-01

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
CHARLESTONPersonally appeared before me the affiant Det. Sgt. Doug Hester who
being duly sworn deposes and says that defendant LORD BYRON SLATER
did within this county and state on 2-3-2001 violate the criminal laws of the
State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of CHARLESTON)
in the following particulars:

DESCRIPTION OF OFFENSE:

MURDER

16-3-10

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:

SEE ATTACHED AFFIDAVIT

Sworn to and subscribed before me
on February 5, 2001

Signature of Issuing Judge

(L.S.)

Signature of Affiant

Affiant's Address

Affiant's Telephone

SC 29405

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
CHARLESTON

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that
on 2-3-2001 defendant LORD BYRON SLATER

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of CHARLESTON) as set forth below:

DESCRIPTION OF OFFENSE:

MURDER

16-3-10

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before
me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the
defendant at the time of its execution, or as soon thereafter as is practicable.

Signature of Issuing Judge

Judge Code: 749

(L.S.)

Judge's Address

Judge's Telephone

Issuing Court:

☒ Magistrate☐ Municipal☐ CircuitForm Approved by
S.C. Attorney General
July 28, 1990
SCCA 518

ORIGINAL