

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

Honorable Eugene C. Griffith, Circuit Court Judge

BEN ROBERT STEWART,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001478

APPENDIX

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1 you up towards the door?

2 A. A couple steps.

3 Q. Or are you right at the door?

4 A. Right at the door. A couple steps away from the door.

5 Q. You were at the door?

6 A. Yes, sir.

7 Q. So you are standing right there?

8 A. Yes, sir.

9 Q. And then Dontavious tells you -- what are his
10 instructions to you?

11 A. "Stay right here. And when I go in the other side of
12 the door, you come in."

13 Q. Okay.

14 A. Yes, sir.

15 Q. Now, which way does Dontavious go? He's -- you are
16 both here. Does he cut back behind the store?

17 A. He cut and ducked down and go around the store.
18 Ducking down, he goes to the other side.

19 Q. He goes to the other side and you are peaking through
20 the window?

21 A. I'm just standing at the door, yes, sir.

22 Q. And so --

23 (Off the record)

24 (Back on the record)

25 BY MR. BRACKETT:

1 Q. So when -- at some point in time you are looking
2 through the window do you see Dontavious enter the store
3 from the other side?

4 A. Yes, sir.

5 Q. About how long after he left you did he come into the
6 store?

7 A. A couple seconds.

8 Q. Two seconds?

9 A. Two -- about five seconds.

10 Q. And about how long after he enters the store do you
11 enter the store?

12 A. I don't know. He entered and I came right in.

13 Q. Okay. And you walked -- and you walked straight up to
14 where we see you standing there?

15 A. Yes, sir.

16 Q. Okay. So you come straight in and you stand there and
17 that's right near the counter where you walk around to go
18 back behind?

19 A. No, I was standing like right in front of the counter,
20 like I'm about -- like I'm about the -- about them
21 cigarettes. I was standing right there.

22 Q. Yeah, that's the first place we see you. And you are
23 standing there for about maybe five seconds before you walk
24 over to the other part of the counter where Mr. --

25 A. Yes, sir.

1 Q. -- Mack is?

2 A. Yes, sir.

3 Q. That's the first place that you went. You go straight
4 in the door and you go stand there.

5 Is that where -- what did he tell you to do when you
6 walked in?

7 A. He was telling me to grab the man or tape him up or
8 grab him.

9 Q. Tape him up. Did you have tape?

10 A. Yes, sir.

11 Q. You had tape?

12 A. Yeah, he gave me type.

13 Q. What kind of tape?

14 A. Black tape.

15 Q. Duct tape?

16 A. Yes, sir.

17 Q. Where was the duct tape?

18 A. It was in the trunk.

19 Q. Where was it on you? Was it in the trunk when you were
20 in the store?

21 A. He gave it to me.

22 Q. It's in your pocket?

23 A. Yeah, he gave it to me.

24 Q. Okay. So you walk in and you stand there for a few
25 seconds and then you walk over and stand by the other door,

1 the one that Dontavious came in?

2 A. Yes, sir.

3 Q. Okay. Now, you said they were talking. What were they
4 saying?

5 A. What they were talking about?

6 Q. Yes.

7 A. They were just talking about the money and talking
8 about he is going to get the money or -- or he was going to
9 get the money, or Mr. Marshall is going to get the money, or
10 Dontavious is going to get the money.

11 Q. And what was Dontavious saying?

12 A. He wasn't going to let him -- he said no, he ain't
13 going to let him get the money, because he thought he was --
14 he was thinking -- I guess he was telling him he was going
15 to mash the button.

16 Q. Okay.

17 A. I can't really hear everything, what they -- I don't
18 remember everything that they were saying.

19 Q. When was the first time that you knew something was
20 going seriously wrong with the plan?

21 A. When I heard a gunshot.

22 Q. Whose gun?

23 A. Whose gun?

24 Q. Yeah.

25 A. I can't even tell, because I was turned that way. I

1 wasn't even looking. I wasn't even looking in the store.

2 Q. Was it a big gun or a little gun?

3 A. It was -- it was a gunshot, pow-pow. I just heard a
4 gunshot. I wasn't looking that way.

5 Q. Okay. What happened when you heard the gunshot?

6 A. I ran out of the store.

7 Q. You ran out of the store wearing these shoes?

8 A. Yes, sir.

9 Q. Where did you run to when you hit the door?

10 A. Where did I run to?

11 Q. Yeah.

12 A. I ran toward the car.

13 Q. Okay. You hit the door and keep on moving?

14 A. Yeah, I was -- yeah, I was running toward the car.

15 Q. So, I mean, you are scared?

16 A. Yes, sir.

17 Q. You just heard gunshots?

18 A. Yes, sir.

19 Q. And you are not wasting any time?

20 A. Yeah.

21 Q. You are getting out of there?

22 A. Yes, sir.

23 Q. You hit the door and you keep moving.

24 At what point do you see Davorius?

25 A. He is coming towards me about -- as I was running out

1 the door.

2 Q. You said he was about four or five steps from you?

3 A. Yeah, about like from where you are at to a little bit
4 more back where I'm at, but close range.

5 Q. Tell me to stop when I'm as far from you as Davorius
6 was when you cleared the door.

7 A. I was -- he was about right there and I'm about right
8 here when --

9 Q. So he was pretty much right by the bumps?

10 A. Yeah, he was right there -- no, he was a little bit
11 past the pumps.

12 Q. Okay. But --

13 A. A little bit past the pumps.

14 Q. Between the pumps and the car wash?

15 A. Yeah, he was nothing -- he could shoot me right in
16 close range.

17 Q. So you felt like you had no place to run but back to
18 the car?

19 A. No, sir, because Dontavious was coming behind me too.

20 Q. That's where you were headed anyway, because when you
21 hit the door -- before you even saw Davorius, you said that
22 you were running back to the car?

23 A. I was running -- yeah, I was running that way.

24 Q. Okay. You got Davorius in front of you and Dontavious
25 behind you. It's the devil and the deep blue sea?

1 A. Yes.

2 Q. You have got nothing to do but head back to the car?

3 A. Head back to the car, that's it.

4 Q. Okay. Who was the faster between the three of you?

5 A. I don't know.

6 Q. Okay. Who was in the lead as you were running?

7 A. Me.

8 Q. Okay. And so Dontavious and Davorius are behind you?

9 A. Dontavious was behind me. Davorius was in front of me.

10 Q. Oh, I thought that you said you were in the lead?

11 A. I was in the lead of Dontavious. Dontavious was
12 coming --

13 Q. You were in the middle?

14 A. Yes, sir.

15 Q. All the way back to the car?

16 A. Yes, sir. Yeah.

17 Q. You were running like three of you together from
18 basically just past the pumps all the way back to the car as
19 a group of three; that's Davorius in front of you,
20 Dontavious behind you?

21 A. We was just running, yeah.

22 Q. Nowhere to run? You can't run left or right?

23 A. You are going a straight shot.

24 Q. Are you yelling at each other?

25 A. Well, when I got -- we got to the apartments, we

1 started -- started yelling after we got to where the car is
2 at, by the trash can. When we stepped over the brick right
3 here and we was talking right there, arguing.

4 Q. Who was arguing?

5 A. Davorius and Dontavious was arguing at me.

6 Q. What were they arguing about?

7 A. Asked me why I didn't grab the man.

8 Q. When did you first learn that Dontavious had been shot?

9 A. After he -- he didn't know he was shot at first until
10 he was like "man -- he like touched his shirt, took his
11 hoodie off, and then he felt -- he said he felt blood in his
12 shirt and he was like he was shot.

13 Q. In the car?

14 A. Yes, sir.

15 Q. That was the first time he found out he was shot?

16 A. Yes, sir.

17 Q. So he had to take the hoodie off and feel it actually?

18 A. Yes, sir, he didn't --

19 Q. He said like a twinge of pain, or something back there,
20 and he checked it out?

21 A. Yes, sir, he really didn't -- I guess he really didn't
22 know. I didn't know. At the point in time I didn't know.

23 Q. Okay. But that was the first time that you heard him
24 saying anything --

25 A. Yes, sir.

1 Q. -- about him being shot?

2 A. Yes, sir.

3 Q. So who is driving at this point?

4 A. Who is driving?

5 Q. Yes.

6 A. Dontavious was driving. He got back in the car and
7 drive.

8 Q. Okay. When you got back to the car, where was Ben?

9 A. Well, Ben was coming back from somewhere at the
10 apartments on the other way, I guess. He was about to run,
11 or something like that, but he didn't. He came back. I
12 guess they were telling him to come back, I don't know.

13 Q. Okay.

14 A. He was coming back.

15 Q. Did he say he heard the shots too and that's what
16 freaked him out?

17 A. I ain't -- I didn't even know. He just came back to
18 the car.

19 Q. Okay.

20 A. That's all I know.

21 Q. Did Davorius say -- I think you testified before
22 Davorius said he heard the shots and that's why he came
23 running?

24 A. That's why he came running, yes, sir. He was standing
25 out of the car anyway.

1 Q. So he came running as soon as he heard the shots and he
2 made it to the gas pumps and guys were on your way out?

3 A. Yes, sir. By the gas pumps. Not at the gas pumps.

4 Q. Not at the gas -- I understand what you are saying.

5 A. Yes, sir.

6 Q. A few feet from the gas pumps?

7 A. It wasn't where the camera could see it, yes, sir.

8 Q. I understand.

9 A. Yes, sir.

10 Q. Y'all get back in the car?

11 A. Yes, sir.

12 Q. And Dontavious is driving and you head back to
13 Hartsville?

14 A. Yes, sir.

15 Q. All right. Did they say anything about -- at this
16 point now Dontavious has taken his hoodie off and he feels
17 in his back and says "oh, my god. I have been shot. We got
18 to get to the hospital"?

19 A. He just was touching -- he just touched himself and
20 said he had been shot, and he told his brother -- he told
21 his brother to roll up a blunt.

22 Q. Okay.

23 A. He told his brother to roll up a blunt.

24 Q. And did his brother do that?

25 A. Yes, sir.

1 Q. And you headed back to Hartsville together?

2 A. Yes, sir.

3 Q. Okay. Were they mad at you in the car?

4 A. Yes, sir, they was loud and talking and arguing at me
5 in the car the whole time.

6 Q. And they were mad at you because?

7 A. I didn't cooperate and I owed them money.

8 Q. On the ride down, it's about two hours down from
9 Hartsville?

10 A. It's right at an hour and a half, almost two hours,
11 sir.

12 Q. And how long did you guys ride around Rock Hill before
13 you robbed the BP?

14 A. About an hour, hour and a half.

15 Q. Okay.

16 A. Some change. Two hours.

17 Q. You said you were drinking on the down. What were you
18 drinking?

19 A. They was drinking.

20 Q. What were they drinking?

21 A. They was just drinking like a little bit of gin and Bud
22 Lite.

23 Q. And Bud Lite?

24 A. Yes, sir.

25 Q. How many? Several beers?

1 A. No, just a couple. Just had about two or three beers
2 and that's it.

3 Q. Did you guys have to stop for gas anywhere?

4 A. We didn't stop. We had enough gas.

5 Q. Okay. To make it there and back to Hartsville?

6 A. Yes, sir.

7 Q. All the way?

8 A. Yes, sir.

9 Q. Now, did anybody have to stop to use the bathroom?

10 A. No, sir.

11 Q. From there to Rock Hill and all the way back?

12 A. Ain't -- nobody didn't stop to use the restroom. I
13 guess they used the restroom when I was gone. I don't know.

14 Q. When you were gone where?

15 A. In the store, I guess. I don't know when they used the
16 restroom, but they didn't use the restroom when we came
17 back.

18 Q. Okay.

19 A. That's all.

20 Q. Back in Hartsville --

21 A. Yes, sir.

22 Q. -- did he go to the hospital?

23 A. Yes, sir.

24 Q. Did they take Dontavious in the back?

25 A. Yes.

1 Q. Does Davorius go with him?

2 A. No, sir, he stayed there with me for a little while.
3 Then we both went back.

4 Q. Okay. How long did you guys stay in the hospital
5 for --

6 A. About ten, fifteen minutes.

7 Q. Okay. And where did you go from there?

8 A. I left and I went.

9 Q. You left? Where did you go?

10 A. Yes, sir, me an and Davorius left.

11 Q. Oh, okay.

12 A. Yes, sir.

13 Q. Where did you and Davorius go?

14 A. We go to Monday's house.

15 Q. Monday Bishop?

16 A. Yes, sir.

17 Q. And that's where you run into Ben Stewart?

18 A. Yes, sir.

19 Q. And who went in the back room?

20 A. Ben Stewart and Davorius, I keep getting Donte and
21 Davorius. Davorius.

22 Q. Ben Stewart and Davorius go in the back room. And then
23 they come back and do what?

24 A. They have a bag and they give it to Reed Allen.

25 Q. Why did you go to Monday Bishop's house?

1 A. Because he told me -- he was like he is taking me to my
2 grandma's house next and that's where I had to -- that's
3 where I had to be at because I had no ride home.

4 Q. So they dropped you off at your grandma's house?

5 A. Yes, sir.

6 Q. Was everything forgiven at that point?

7 A. No, nothing was forgiven. It was just -- I guess
8 they -- he was wanting too much stuff he was worried about.
9 His brother and he just -- I guess he just let me stay
10 there.

11 Q. Okay. So you get back to your grandma's house on
12 Flynn's Road?

13 A. Yes, sir.

14 Q. How far is that from Farmington?

15 A. I mean, it's -- Hartsville is a small town. It's -- I
16 can't really -- I can't really say.

17 Q. Ten minutes by -- can you walk it, drive it?

18 A. No, you ain't going to walk. It's about ten or fifteen
19 minutes -- ten minutes in the car. Five, ten minutes in the
20 car.

21 Q. So it's a few miles?

22 A. Yes, sir.

23 Q. And was your grandma home?

24 A. What?

25 Q. Was your grandma home?

- 1 A. Oh, yes, sir. Yes, sir.
- 2 Q. What's your grandma's name?
- 3 A. Eloise Wilson.
- 4 Q. What do you do call her?
- 5 A. I call her Eloise.
- 6 Q. You don't --
- 7 A. I call her grandma. Eloise, grandma.
- 8 Q. She was home then?
- 9 A. Yes, sir.
- 10 Q. What time of day was this?
- 11 A. This was in the morning. It was like right when it was
- 12 getting light. It was light outside. It was getting light
- 13 outside. It was like seven o'clock.
- 14 Q. You must have been pretty worn out after all this?
- 15 A. Yes, sir.
- 16 Q. Riding around all night, shooting. You ran into the
- 17 house and you saw your grandma?
- 18 A. Yes, sir.
- 19 Q. And you said "grandma, you are not going to believe
- 20 this."
- 21 A. I didn't even really tell her about it.
- 22 Q. Why?
- 23 A. I was scared to tell her.
- 24 Q. What?
- 25 A. I was scared to tell anybody about it.

1 Q. You didn't tell your grandma that you were just in a
2 place where a man got shot and killed in an armed robbery?

3 A. No, sir.

4 Q. And you are -- this is the first time that you are away
5 from Davorius and Dontavious Mack and your sweet grandma is
6 standing there, you are finally back safe in her house, and
7 this is your first opportunity to call the police and you
8 didn't pick up the phone and call them?

9 A. No, sir. I was scared f what would happen to my
10 family.

11 Q. Okay. How long did you stay with grandma?

12 A. I didn't stay there that long. I stayed there for a
13 little while, and then I had went to Cameo Street.

14 Q. And how long did you stay in the Hartsville after that?

15 A. How long I stayed in Hartsville? I left there. I was
16 there. That was Wednesday morning. I left there Friday.

17 Q. Who did you stay with while you were in Hartsville?

18 A. From Cameo Street to Farmington.

19 Q. All family?

20 A. Not, this ain't all family. Just my aunt -- my aunt
21 and my cousin stay on Cameo Street, and Shonda stays in
22 Farmington.

23 Q. So you didn't tell your grandma?

24 A. Huh?

25 Q. You didn't tell your grandma?

1 A. No, sir.

2 Q. You didn't tell your aunt?

3 A. I told my cousin and them, you know.

4 Q. You didn't tell a responsible adult?

5 A. No, sir.

6 Q. You just told a bunch of kids?

7 A. I just wait until my momma came back and I -- I let her
8 know what was going on.

9 Q. I see.

10 All this time -- and you knew a man had died by this
11 point, did you not?

12 A. Yes -- I didn't know if I died. I just know there was
13 gunshots. I didn't know.

14 Q. You don't have family back in Rock Hill who you wanted
15 to check out what happened at the BP that you were involved
16 in robbing?

17 A. I didn't check. I didn't check it.

18 Q. You didn't call?

19 A. No, sir.

20 Q. You didn't -- nothing?

21 A. I didn't, no, sir.

22 Q. And on Friday you jump up and run to Columbia?

23 A. Yeah, my momma came to Hartsville Friday and I had got
24 a ride with her to Columbia.

25 Q. And you stayed down there until you finally went up to

1 Rock Hill to turn yourself in?

2 A. I stayed down there until -- yes, sir, until I had got
3 me a lawyer. I had -- I got a lawyer present. I had to get
4 a lawyer, and then I turned myself in with a lawyer.

5 MR. BRACKETT: Beg the court's indulgence just one
6 minute while I look through my notes.

7 (Off the record)

8 (Back on the record)

9 BY MR. BRACKETT:

10 Q. Did you see Dontavious or Davorius in the three days
11 that you remained in Hartsville before you went down to
12 Columbia?

13 A. No, sir.

14 Q. Dontavious was pretty mad at you after you left the BP,
15 wasn't he?

16 A. Yes, sir.

17 Q. He was really upset?

18 A. Yes, sir.

19 Q. The most upset that he was the whole night?

20 A. Yes, sir.

21 Q. Because the truth of the matter is is that he wasn't
22 really upset with you when you didn't have the money to pay
23 for some gas, isn't that right?

24 A. He was upset when -- because I didn't have no money.

25 Q. I'm sorry?

1 A. He was upset because I didn't have no money.

2 Q. No. Isn't the truth, Terrell, that he was upset with
3 you because you and he were supposed to go rob the BP
4 together, but when you got in there, you punked out?

5 A. No, sir.

6 Q. You punked out?

7 A. No, sir.

8 Q. You went and hid by the door and the first sign of
9 trouble you ran out of there leaving him behind?

10 A. No, sir.

11 Q. That's why he was mad at you, wasn't it?

12 A. No, sir.

13 Q. And that's what the yelling was all about, because you
14 were all talk in the car, isn't that right?

15 A. No, sir.

16 Q. And then when you came time to show, you didn't
17 represent?

18 A. No, sir.

19 Q. Isn't that right?

20 A. No, sir.

21 MR. BRACKETT: I don't have no further questions.

22 THE COURT: I'm sorry, redirect?

23 MR. SWERLING: Just a couple.

24 REDIRECT EXAMINATION BY MR. SWERLING:

25 Q. Terrell, Mr. Brackett was asking you about what was

1 right about what he was mad about, Dontavious?

2 A. What he was mad about.

3 Q. What was he mad about?

4 A. He was mad because I didn't have no gas money.

5 Q. Okay. And what was he mad about about what happened in
6 the BP station?

7 A. Because I didn't grab the individual and he -- I didn't
8 do what he wanted me to do.

9 Q. Did you -- let me ask you this. Did you ever agree to
10 do what he wanted you to do?

11 A. No, sir.

12 Q. And why were you in that BP station in the first place?

13 A. Because I was forced. My life was in danger.

14 Q. Did you feel like you had a choice?

15 A. No, sir.

16 Q. Now, at the beginning when I was asking you some
17 questions, I may have confused the days or -- I may have.

18 I'm not sure, but this was Monday night when you went up to
19 Rock Hill, correct?

20 A. Yes, sir.

21 Q. Okay. And it was Tuesday morning when these events
22 took place?

23 A. Events? This events right here?

24 Q. Yes.

25 A. It was --

1 Q. On the 10th, Tuesday morning, early?

2 A. It was Tuesday -- what -- it was Tuesday night when
3 everything happened.

4 Q. The 9th was Monday.

5 A. Yes, sir.

6 Q. And you went up Monday night to Rock Hill, correct?

7 A. Yes, sir.

8 Q. I may have said Tuesday.

9 It was after twelve on Tuesday, correct --

10 A. Yes, sir.

11 Q. -- when all this took place?

12 A. Yes, sir.

13 Q. I may have misstated it. I apologize for that.

14 MR. SWERLING: Thank you.

15 MR. SNOW: Just a couple of questions, judge.

16 THE COURT: Yes.

17 MR. SNOW: Brief.

18 RECROSS EXAMINATION BY MR. SNOW:

19 Q. Mr. Addison, on direct Mr. Swerling, your attorney,
20 asked you how long -- about knowing Mr. Stewart and you said
21 that you knew him.

22 Then when the solicitor asked you if you knew Mr.
23 Stewart. You said you had just met him. Now, which is it?

24 A. I knew of Stewart. I didn't never knew him. I said I
25 knew of him.

1 Q. So you knew of him?

2 A. Through the streets. Through the words, talking.

3 Q. Okay. And also on direct your attorney asked you about
4 this when did Donte -- Dontavious get the gun from Mr.
5 Stewart?

6 A. Yes, sir.

7 Q. You indicated that they got outside -- he got outside
8 the car --

9 A. No, sir.

10 Q. -- went around and got your gun from him?

11 A. No, sir.

12 Q. On -- when the solicitor asked you the question, you
13 said Mr. Stewart handed it across the seat.

14 A. No.

15 Q. Which is it?

16 A. Dontavious reached and grabbed it from him.

17 Q. Oh, okay. So now Dontavious reaches back?

18 A. And grabbed it from Ben Stewart, yes, sir.

19 Q. But you earlier you said Ben Stewart handed it up to
20 him, didn't you?

21 A. No, sir.

22 They may have both reached. That's what I'm saying.
23 They may have both reached their arms and gave it to him.
24 He gave him the gun.

25 MR. SNOW: One second.

1 (Off the record)

2 (Back on the record)

3 MR. SNOW: Nothing further, judge.

4 MR. BRACKETT: I have nothing further.

5 THE COURT: All right. Thank you, sir. You may
6 stand down.

7 THE WITNESS: All right.

8 THE COURT: Well, hold it. Hold it just a minute.
9 Before we do that, Mr. Foreman, ladies and gentlemen of the
10 jury panel, we are going to take a short break at this time.

11 I want to work a little bit later. Let me go
12 ahead and give you a break at this time. We will take about
13 ten minutes. You may refresh yourselves during the break.

14 If someone needs to call someone, you can do that
15 at this time. I'm not sure how long we are going to be
16 here. Probably not too much longer, but I want to work a
17 little bit longer.

18 Please retire to the jury room.

19 (The following takes place outside the presence of
20 the jury panel)

21 MR. SNOW: May we approach?

22 THE COURT: Yes, sir.

23 (Whereupon, the lawyers approached the bench for
24 an off-the-record discussion).

25 (Whereupon, proceedings were recessed)

1 (Whereupon, proceedings were reconvened)

2 THE COURT: We ready to go then?

3 MR. SWERLING: Yes, sir.

4 MR. BRACKETT: Yes, sir.

5 THE COURT: Please bring the jury in.

6 (The following takes place in the presence of the
7 jury panel)

8 MR. SNOW: Mr. Stewart would call Ms. Efrid, Your
9 Honor.

10 Judge, she testified yesterday. Does she need to
11 be sworn again?

12 THE COURT: Come on up, Ms. Efrid.

13 Ms. Efrid, you were previously called in this case
14 and placed under oath. You remain under oath for your
15 testimony today.

16 THE WITNESS: All right.

17 THE COURT: Please just have a seat.

18 DIRECT EXAMINATION BY MR. SNOW:

19 Q. Ms. Efrid, state your name for the record again.

20 A. Qiauna Capris Efrid.

21 Q. I want to thank you for coming back today. I have a
22 few more questions to ask you.

23 A. Okay.

24 Q. Yesterday you testified as to hearing three car door
25 slam?

1 A. Yes.

2 Q. Now, would you tell the jury approximately how far away
3 is your apartment, your condo or townhouse, from the car in
4 this case, the so-called getaway car?

5 A. Ten feet.

6 Q. Ten feet?

7 A. Yes.

8 Q. Before you heard the three voices, and tell me if I'm
9 correct, you heard three voices yelling?

10 A. Yes.

11 Q. Did you hear any conversation prior to that?

12 A. No.

13 Q. Didn't hear any conversation --

14 A. No.

15 Q. -- before that?

16 A. No. Prior to the yelling, is that what you are asking?

17 Q. Prior to the yelling.

18 A. No.

19 Q. Prior to people talking?

20 A. No.

21 Q. Or walking around the car?

22 A. No.

23 Q. You didn't hear anyone talking before you heard the
24 voices yelling and the suspects running towards the car?

25 A. No, sir.

1 MR. SNOW: Thank you.

2 THE COURT: Hold on just a minute, please, ma'am.

3 We will follow this order.

4 Yes, sir.

5 CROSS EXAMINATION BY MR. THOMPSON:

6 Q. Ms. Efird, along those lines. So the first time that
7 night you hear any voices, or when you hear them coming from
8 one side of your apartment building to where the car was
9 parked on the other side?

10 A. Yes.

11 Q. And I think you had mentioned to us that you saw two
12 people go across the parking lot of your building and then
13 jump up on that little wall there?

14 A. Yes.

15 Q. Okay. And I think you said both of those were black
16 males, correct?

17 A. Yes.

18 Q. Now, when they were coming, you heard voices one from
19 each, one saying -- if you could --

20 A. Yes. I heard one say "he shot me" and then one say
21 "hurry up". And then you hear a third voice and he
22 didn't -- to me it sounded like he was already -- if you go
23 up on the wall and you can kind of -- because you can
24 kind of -- it's kind of hard to explain, but if you stand on
25 the wall, you can see down the parking lot, and another

1 person saying "hurry up." So the one guy who is saying I he
2 got shot and the other guy saying hurry up to each other.

3 Q. Okay.

4 A. Then you hear another "hurry up" and then they get in
5 the car.

6 Q. So at least one person back at the car is saying to
7 "hurry up" as well?

8 A. Yes.

9 Q. And could you hear when the car started?

10 A. -- it started after -- they all got in the car and then
11 the car starts. And they are pulled into -- like how you
12 pull forward into a parking spot --

13 Q. Right.

14 A. And then the car like comes out and faces this way, so
15 I get a good view of the back of their car.

16 Q. Okay.

17 A. And then they take off.

18 Q. But at any point could you see inside the car to see
19 how many people were in the car?

20 A. I couldn't tell you how many people were in there, no.

21 Q. All right.

22 MR. THOMPSON: No further questions.

23 THE COURT: Counsel, anything further?

24 MR. SWERLING: I have none, Your Honor, I'm sorry.

25 THE COURT: Do you have anything else?

1 REDIRECT EXAMINATION BY MR. SNOW:

2 Q. Your window was up that night, wasn't it?

3 A. Yes, sir.

4 Q. Thank you.

5 THE COURT: Any questions related to that?

6 MR. THOMPSON: No.

7 THE COURT: Thank you, ma'am. You may stand down.

8 Are we going to excuse this witness this time?

9 MR. SNOW: Yes.

10 MR. THOMPSON: Yes, sir.

11 THE COURT: Thank you for coming. You can be
12 excused.

13 MR. SNOW: Thank you for coming. Thank you so
14 much.

15 THE WITNESS: Thank you.

16 MR. SNOW: The next witness Mr. Stewart would like
17 to call is Anna Warner.

18 ANNA WARNER, having been first duly sworn,
19 testified as follows:

20 DIRECT EXAMINATION BY MR. SNOW:

21 Q. Ms. Warner, could you state your name for the record,
22 please?

23 A. Anna Warner.

24 Q. And Ms. Warner, do you reside here in Rock Hill?

25 A. Yes.

1 Q. Is that correct?

2 A. Yes.

3 Q. York County.

4 Where do you reside at?

5 A. In the Northwoods Apartments on Celanese Road.

6 Q. Okay. And that's the same place that Ms. Efird
7 resides, correct?

8 A. Used to.

9 Q. Used to reside.

10 Turning your attention to October 10th, 2006, the
11 reason we are all here today, relative to the BP robbery as
12 well as the murder of Mr. Marshall, you gave a statement to
13 the police?

14 A. Correct.

15 MR. SNOW: May I approach?

16 THE COURT: Yes, sir.

17 BY MR. SNOW:

18 Q. Is this your statement?

19 A. Yes.

20 Q. And other than the red E I put on the top there, does
21 it look like your statement? Has it changed in any way?

22 A. No, it looks the same.

23 Q. Okay. And that night what did you tell police about
24 voices you heard and people that you saw?

25 A. I woke up hearing yelling. I looked out my window. I

1 thought it was a domestic dispute, because it was pretty
2 loud, and I saw a males. Males, I think. I mean, it
3 didn't -- they sounded like males. And there was probably
4 about I would say at least two, maybe more. I didn't get a
5 good look. It was dark and I didn't see very well, but
6 there was a car and people yelling and running and then the
7 car sped off. So I thought it was --

8 Q. Okay.

9 A. -- a little odd.

10 Q. Is it fair to say that in your statement you said there
11 were two -- "that I saw two males" and there were --

12 A. Yeah. I mean, everything is kind of blurry a little
13 bit still, and then it was a little -- because I had just
14 woken up. It was early morning it was kind of dark, but, I
15 mean, there could have been more. I really don't know.

16 Q. Well, would this refresh your recollection of what you
17 told the police?

18 A. Okay.

19 Q. This is in your statement.

20 A. Uh-huh.

21 Q. Would you read what you said in your statement to the
22 police?

23 And that was on October 10th, 2006, so that was
24 shortly -- I take it that was shortly after you observed the
25 incident, right?

1 When did you give that statement?

2 A. I don't remember. I'm sorry.

3 Q. You don't remember?

4 A. It may have been later that day. It's two years ago.

5 Q. But it's fair to say that you gave that statement
6 shortly after the incident?

7 A. Yes, definitely.

8 Q. And certainly your memory or recollection was certainly
9 fresher on that day --

10 A. Definitely.

11 Q. -- than it is some two years later?

12 A. Right.

13 Q. Right?

14 A. Uh-huh.

15 Q. Would you read that, what you told the police, relative
16 to the voices and the people that you saw?

17 A. Okay. So just the voices and who I saw?

18 Q. Well, it's a short statement, so you can read the
19 entire thing.

20 A. Okay. "At approximately 4:30 a.m. I was asleep but
21 woke up because I could hear someone yelling loudly outside.
22 I do not know what they were saying. They sounded like
23 black males to me. I looked out the window into the parking
24 lot. The BP station is to my left. The two people I saw
25 were fairly tall and thin. The car they got into was a

1 silver or light tan like a Le Sabre or Park Avenue or
2 something like that."

3 Q. Is that your statement?

4 A. Yes.

5 Q. Was it altered in any way?

6 A. No.

7 MR. SNOW: Nothing else, Your Honor. Thank you.

8 THE COURT: Solicitor?

9 CROSS EXAMINATION BY MR. THOMPSON:

10 Q. I'm going to show you something that's been marked
11 State's Exhibit No. 11. State's Exhibit No. 11.

12 Does that appear to be part of the apartment complex
13 where you lived, or at least part of the building where you
14 lived in?

15 A. Yes, part of the building.

16 MR. THOMPSON: Madam Clerk, if you could dim the
17 lights for just a moment.

18 BY MR. THOMPSON:

19 Q. I have it up here. It's going to get a little brighter
20 here as it warms up.

21 If you could take a laser pointer for me. Where -- was
22 this apartment building at the top left, was that yours?

23 A. No, you can't see my apartment from this picture.

24 Q. Not your apartment, but is that the building?

25 A. Yes, yes, that's my building.

1 Q. So now where would your apartment be in relation to
2 kind of where that building?

3 A. Like right there.

4 Q. Okay. So are you on the -- when you looked out the
5 window, did you look out from the ground floor or the higher
6 floor?

7 A. Yes.

8 Q. Ground floor?

9 A. Yes.

10 Q. And where was the car parked around in there?

11 A. Probably right about in here.

12 Q. Do you remember if it was pulling --

13 A. Somewhere.

14 Q. Okay.

15 A. Sorry.

16 Q. Do you remember, was it pulled in straight, forward?

17 A. I don't remember, but the way my memory serves me right
18 is it seemed like they were walking towards the car, like it
19 had been pulled in forward. I don't -- like I said, it's
20 still a little blurry, but I --

21 Q. Right.

22 A. I don't want to say something I'm not sure of, so --
23 but it seems like that.

24 Q. Okay. And when you saw -- again, could you actually
25 see inside the car at all?

1 A. No.

2 Q. So do you have any idea whether someone else was in it?

3 A. No, I don't know.

4 Q. Do you know if the car was running when they got in it?

5 A. I don't know that either.

6 Q. Okay. All right. Thank you.

7 MR. THOMPSON: No further questions.

8 THE COURT: Any questions of this witness?

9 MR. SWERLING: I have no questions, Your Honor.

10 THE COURT: Anything else?

11 MR. SNOW: Nothing else, judge.

12 Thank you so much.

13 THE COURT: Can she be excused then?

14 MR. THOMPSON: Yes, sir, Your Honor.

15 THE COURT: Thank you for coming, ma'am. You may
16 be excused.

17 MR. SNOW: I think you can go back in order. I
18 have one more witness to call but --

19 THE COURT: Okay.

20 MR. SWERLING: Judge, I call Johnetta Evans.

21 JOHNETTA EVANS, having been first duly sworn,
22 testified as follows:

23 DIRECT EXAMINATION BY MR. SWERLING:

24 Q. Ms. Evans, would you tell the jury what your name is
25 and where you are from?

1 A. Johnetta Evans from Hartsville.

2 Q. How long have you lived in Hartsville, Ms. Evans?

3 A. Ever since I was in kindergarten.

4 Q. Okay. Do you know Terrell Addison?

5 A. No, sir.

6 Q. Do you know Ben Stewart?

7 A. No, sir.

8 Q. Do you know Donte and Davorius Mack?

9 A. Yes, sir.

10 Q. Do you know them well?

11 A. Yes, sir.

12 Q. Now, let me ask you specifically about an incident back
13 on May 21st, 2006.

14 Did there come a time when Dontavious Mack came to your
15 house and threatened with you a pistol?

16 A. Yes, sir.

17 Q. And as a result of that, did you have a warrant issued
18 for his arrest?

19 A. Yes, sir.

20 Q. Okay. Are you afraid of Dontavious Mack?

21 A. Yes, sir.

22 Q. What's his reputation in the Hartsville community for
23 being violent?

24 A. He's known for what he did. I mean, he's just a
25 violent person. I have always known him as that, and people

1 in Hartsville are scared of the both of them.

2 Q. Okay. And does that go to both of them? I want to ask
3 you again. Does that go to Davorius as well?

4 A. Yes, sir.

5 Q. By the way, was Davorius with Donte the day they came
6 over and --

7 A. No, sir.

8 Q. -- threatened you with a gun?

9 A. Yes, sir. Yes, sir, they threatened me with a gun. I
10 thought --

11 Q. They threatened with you a gun?

12 A. Yes, sir.

13 Q. Now, let me go do October 12th, 2006.

14 Did you have an occasion that day to see Dontavious
15 Mack?

16 A. What do you mean? What day is this?

17 Q. You spoke with the police on October 12th, 2006.

18 A. Okay.

19 Q. The day that this happened -- I guess it was the
20 evening of the 10th?

21 A. Okay.

22 Q. Did you have an occasion to see Dontavious Mack?

23 A. Dontavious came to my house after he got out of the
24 hospital.

25 Q. That's what I mean, yes.

1 A. Okay.

2 Q. I'm just trying to -- the date is actually I guess the
3 evening of the 10th.

4 A. Okay.

5 Q. And do you recall that?

6 A. Yes, sir.

7 Q. And when he came over to your house, was your husband
8 home?

9 A. Yes, sir.

10 Q. What's your husband's name?

11 A. Tiyone Evans.

12 Q. And did he want to talk to your husband?

13 A. Yes, sir.

14 Q. Now, at that point did you and he have a conversation
15 about him being shot with a .22?

16 A. Yes, sir. When he came in, I had already heard about
17 the incident from my sister, so he started saying -- I was
18 like "you know, are you all right?" He was like "no. You
19 know, I'm all right. It wasn't but a .22."

20 Q. So he dismissed that it was nothing but a .22?

21 A. Yes, sir.

22 Q. Is that what his words were?

23 A. Yes, sir.

24 Q. Did he show you the wound?

25 A. He pulled off his shirt, yes, sir.

1 Q. Now, after that, did he go and talk to your husband?

2 A. After that, okay, my husband mostly was in the restroom
3 and then -- you know, for awhile. So then my husband came
4 down the hall. When he came down the hall, it turned into
5 him and Donte and I walked out. But when I walked out,
6 where I was, I could still, you know, hear everything that
7 was going on.

8 Q. So you could overhear Donte talking to your husband?

9 A. Yes, sir.

10 Q. And did he tell him about the store in Rock Hill being
11 robbed?

12 A. Yes, sir.

13 Q. Did he admit robbing it?

14 A. Yes, sir.

15 Q. Did he also tell your husband that he was high on
16 Ecstasy that evening?

17 A. Yes, sir.

18 Q. And did he tell you -- or did he tell your husband that
19 Davorius, his brother, during the robbery was "beating the
20 man and I got him to stop"?

21 A. Yes, sir.

22 Q. And when they were leaving, he -- the man shot him in
23 the back?

24 A. Yes, sir.

25 Q. And then he said "I shot him in the finger and the man

1 fell to the ground"? Let me just show you --

2 A. If that's what I signed, yes, but I don't remember.

3 Q. Well, I'll let you just took a look at it. I want to
4 see if it refreshes your memory.

5 Right down here. I'll just point to it, if that's all
6 right with Your Honor.

7 Right here.

8 A. (Shaking head yes).

9 Q. Is that right?

10 A. Yes, sir.

11 Q. So there is the conversation that he was having. And
12 he said "when the man fell to the ground", he said "then
13 something just told me to kill him."

14 A. Yes, sir.

15 Q. Is that what he said?

16 A. Yes, sir.

17 Q. And then he said he just turned around and started
18 shooting the man with the .380?

19 A. Yes, sir.

20 Q. He also told your husband, and you overheard it, that
21 he took about four hundred dollars and about one hundred
22 dollars and something in coins?

23 A. Yes, sir.

24 Q. And then they drove to Carolina Pines in Hartsville?

25 A. Yes, sir.

1 Q. Now, let me ask you something.

2 This statement was given on October 12th, 2006. In
3 this particular statement the only two people he referenced
4 being in the robbery were him and his brother Davorius?

5 A. Yes, sir.

6 Q. Is that right?

7 A. Yes, sir.

8 Q. And Davorius, according to him, was beating the man up?

9 A. Yes, sir.

10 Q. Is that right?

11 A. Yes, sir.

12 Q. Did he sound pretty matter of fact about, this like it
13 didn't mean a whole lot to him?

14 A. Yeah, he was laughing like it was a joke.

15 Q. Okay. Answer any questions that Mr. Snow might have or
16 the solicitor might have.

17 MR. SNOW: Beg court's indulgence, judge.

18 THE COURT: Yes.

19 (Off the record)

20 (Back on the record)

21 MR. SNOW: Ms. Evans, a couple of quick questions,
22 just to be sure.

23 CROSS EXAMINATION BY MR. SNOW:

24 Q. In your statement, the same statement that Mr. Swerling
25 is referencing, you -- if you recall, you indicated that

1 Donte came over around 2:00, 2:30. Does that sound right to
2 you? Can I show you your statement?

3 A. Okay, yes, sir.

4 Q. Is that your statement there? And you can read that.
5 Take your time and look at it.

6 A. That's all right.

7 Q. Here.

8 A. No, that's all right.

9 Q. Does that refresh your recollection?

10 A. Yes, sir.

11 Q. Okay. So it was around 2:00, 2:30?

12 A. Yes, sir.

13 Q. And when you heard Donte talk about the incident, he
14 never mentioned my client?

15 A. No, sir.

16 Q. He never indicated my client gave him a gun?

17 A. No, sir.

18 Q. He never said my client --

19 A. Period.

20 Q. Period?

21 A. To me, to him, I didn't hear it.

22 Q. You know about his reputation, correct?

23 A. Yes, sir.

24 Q. And he has a reputation of having guns, doesn't he?

25 A. Yes, sir, all the time.

1 Q. That's right.

2 He doesn't sound like someone that needs to borrow a
3 gun for anything?

4 A. Oh, no, no, no, no. He got them.

5 MR. SNOW: That's all I have.

6 CROSS EXAMINATION BY MR. THOMPSON:

7 Q. Ms. Evans, now, I believe Dontavious, he was a friend
8 of your husband Ty's, right?

9 A. Yes, sir.

10 Q. And after you -- you weren't actually in the room? He
11 wasn't talking to you when he was talking, right?

12 A. No, sir.

13 Q. He was talking to your husband?

14 A. Yes, sir.

15 Q. But you were kind of listening in, right --

16 A. Yes, sir.

17 Q. -- to see what was going on?

18 A. Yes, sir.

19 Q. And after you heard, did you and your husband kind of
20 discuss what he had talked about?

21 A. Yes, sir.

22 Q. And ultimately y'all decided the best thing to do was
23 to call and tell the police, didn't you?

24 A. Yes, sir.

25 Q. And you did that, right?

1 A. Yes, sir.

2 Q. And as a matter of fact, you are the first one to tell
3 the police that --

4 A. Yes, sir.

5 Q. -- these people were involved in this, weren't you?

6 A. Yes, sir.

7 Q. And even the Rock Hill Police Department came down to
8 talk to you, didn't they?

9 A. Yes, sir.

10 Q. And this is actually the statement that comes from the
11 Rock Hill Police Department, doesn't it?

12 A. Yes, sir.

13 Q. And as you said earlier, I think he didn't -- you
14 didn't hear him mention either Ben Stewart or Terrell
15 Addison in that statement, right?

16 A. No, sir.

17 Q. And I think they have gone over -- apparently they had
18 a lot of bragging about things like Terrell beating -- or
19 I'm sorry, Davorius going in and beating the guy?

20 A. Yes, sir.

21 Q. And getting four hundred dollars and about a hundred
22 dollars in coins?

23 A. Yes, sir.

24 Q. Now, at one point you mentioned that you were talking
25 to a girl named Shonda who lives in the Farmington

1 Apartments?

2 A. Yes, sir.

3 Q. Now, do you know Terrell Addison?

4 A. No, sir. I know his family. All of his family you are
5 talking about in Hartsville, I know them. My family knows
6 them and all.

7 Q. Do you know who he is?

8 A. No, sir.

9 Q. Had you really ever seen him before?

10 A. No, sir.

11 Q. So you don't know if he ever stayed with this Shonda
12 girl in Farmington Apartments?

13 A. No, sir. My little sister used to stay in Farmington
14 also. She knows them and she probably knows him too, but I
15 don't.

16 Q. Okay. Is Shonda a good friend of yours?

17 A. Yes, somewhat, but I don't have friends. I don't deal
18 with people, just family.

19 Q. All right. And Donte -- or Donte showed y'all where he
20 got shot. Did you actually see where he got shot, or he
21 just show Ty?

22 A. I glanced at it, but I didn't want to look at it. He
23 went to pulling his shirt off, I peeped around and I just
24 seen the bandage, or whatever, and I just turned my face.

25 Q. Okay. When he came in to you to show that on that

1 date, he didn't have a gun?

2 A. No.

3 Q. I'm. Sorry?

4 A. You said when he came to show me, he didn't have a gun,
5 no.

6 Q. Did Donte, when he came there at that time, did he have
7 a gun?

8 A. No.

9 Q. He actually -- did take his whole shirt off?

10 A. Uh-huh, but I didn't stay to see.

11 Q. Now, Ms. Evans, I think --

12 I tell you what. I have no further questions. Thank
13 you very much.

14 MR. SWERLING: Judge, just one followup.

15 THE COURT: It's not your turn, is it?

16 MR. SWERLING: Oh.

17 MR. SNOW: I think it is, judge.

18 THE COURT: Did you call her? Y'all got me out of
19 order.

20 MR. SWERLING: Sorry, judge.

21 REDIRECT EXAMINATION BY MR. SWERLING:

22 Q. Ms. Evans, I just want to follow up on something Mr.
23 Thompson said. You actually called the police?

24 A. Yes, sir.

25 Q. Did you call -- was it 911?

1 A. No, sir. Well, yes, sir.

2 Q. Okay.

3 A. But there's a certain officer I know.

4 Q. And Dontavious found out you called the police,
5 correct?

6 A. Yes, sir.

7 Q. Did he threaten you after that?

8 A. Yes, sir.

9 Q. Are you afraid of him?

10 A. Yes, sir.

11 MR. SWERLING: That's all I have. Thank you,
12 judge.

13 THE COURT: Mr. Snow.

14 RE CROSS EXAMINATION BY MR. SNOW:

15 Q. Ms. Evans, I think you mentioned that your husband is a
16 friend of Donte's, right?

17 A. Yes, sir, he was.

18 Q. And you gave your statement first to the police, is
19 that correct?

20 A. Yes.

21 Q. And then your husband gave a statement?

22 A. Because, see, my statement was what he told him, so
23 they wanted him to come, because he's the one that he told
24 it to and it wasn't me, but I heard everything that I say.

25 Q. You overheard it clearly?

1 A. Yes, sir.

2 Q. No doubt about that?

3 A. No doubt.

4 Q. No doubt?

5 A. Uh-huh.

6 Q. Thank you.

7 RECROSS EXAMINATION BY MR. THOMPSON:

8 Q. One further question, Ms. Evans.

9 I believe you talked to one of our investigators, a Ms.
10 Perron, recently, is that right, or a lady on the phone from
11 our office?

12 A. I don't know. They done sticked me with so many people
13 to talk to, I don't know.

14 Q. At any right -- I'm sorry, you also talked to Detective
15 Rudick, I believe, is that correct?

16 A. Yes.

17 Q. And that would have been sometime today, right?

18 A. Yes.

19 Q. And when you talked to him, didn't you relay to him
20 that some of Terrell's family had threatened you as well?

21 A. No, I did not.

22 MR. SWERLING: Objection, Your Honor.

23 THE WITNESS: No, I did not.

24 MR. SWERLING: Objection.

25 BY MR. THOMPSON:

1 Q. You didn't tell that to Mr. Rudick?

2 A. No, sir. Don't lie on me.

3 Q. When he --

4 THE COURT: Approach just a minute.

5 (Whereupon, the lawyers approached the bench for
6 an off-the-record discussion).

7 THE BAILIFF: Order, please.

8 THE COURT: If I hear anymore out there in the
9 audience, whoever is making noise is going to be leaving the
10 courtroom. I'm not going to allow that. Now, I looked at
11 you couple of times. It's happened on two or three times.

12 The next person that make any noise out there is
13 going to be leaving the courtroom. I'm not going to allow
14 you to remain in here.

15 (Whereupon, the lawyers approached the bench for
16 an off-the-record discussion)

17 MR. SWERLING: Your Honor, I would move to strike
18 that last comment and --

19 THE COURT: Mr. Foreman, ladies and gentlemen of
20 the jury, please disregard the last question asked by the
21 solicitor and the answer by the witness, and the court
22 reporter is instructed to strike that from the record.

23 All right, let's proceed.

24 MR. THOMPSON: All right.

25 BY MR. THOMPSON:

1 Q. Now, you said that Dontavious had threatened you since
2 you gave your statement?

3 A. Yes, sir.

4 Q. All right. But he's been locked up since you gave
5 that.

6 A. No, he wasn't locked up. I mean, no, he hasn't
7 direct -- I mean, he didn't threaten me himself personally.

8 Q. Okay. So he didn't threaten you himself?

9 A. No. No.

10 Q. Oh, okay.

11 A. Okay.

12 Q. Thank you.

13 MR. THOMPSON: No further questions.

14 A. Family.

15 MR. SWERLING: Nothing further.

16 MR. SNOW: Nothing further, judge.

17 THE COURT: Thank you, ma'am. You may stand down.

18 THE WITNESS: Thank you.

19 MR. SWERLING: I call Trion Evans.

20 JOHNETTA EVANS: Tiyone.

21 MR SWERLING: Tiyone.

22 TIYONE EVANS, having been first duly sworn,
23 testified as follows:

24 DIRECT EXAMINATION BY MR. SWERLING:

25 Q. Would you identify yourself for the jury, Mr. Evans?

1 A. I'm Tiyyone Evans.

2 Q. And where do you live?

3 A. Hartsville, South Carolina.

4 Q. Are you married to Johnetta?

5 A. Yes, sir.

6 Q. And how old are you?

7 A. Thirty years old.

8 Q. Let me get right to sometime around October 10th, 2006.

9 Did you have an occasion to see Dontavious Mack?

10 A. Yes.

11 Q. Do you remember about what time it was?

12 A. No.

13 Q. Okay. Now, do you know Dontavious Mack?

14 A. Yes.

15 Q. Do you know Davorius Mack?

16 A. Yes, sir.

17 Q. Do you know their reputation in the community for
18 violence and carrying guns?

19 A. Yes, sir.

20 Q. What is it?

21 A. What their reputation is?

22 Q. Yes.

23 A. All I know is what they say. I don't know how true it
24 is.

25 Q. That's what reputation is.

1 What do they say?

2 A. They say they are thugs. Young thugs, I guess.

3 Q. They does what?

4 A. Thugs.

5 Q. Thugs. Okay. I'm sorry. I thought you said does.

6 Do you know Dontavious -- do you know of your own
7 personal knowledge Dontavious carrying guns?

8 A. Yes.

9 Q. Now, when they came over, or when he came over it -- it
10 was Dontavious that came over that evening?

11 A. Yes, sir.

12 Q. And do you remember about what time it was?

13 A. No, sir.

14 Q. Did you have a conversation with him?

15 A. Yes, sir.

16 Q. All right. Now, you had actually heard about there
17 were some claim that he had made that he had gotten shot
18 over at Farmington Apartments?

19 A. Uh-huh.

20 Q. And that's what you were asking him about?

21 A. No, he was telling me about it.

22 Q. Okay. And then the conversation went to the armed
23 robbery and shooting, the killing of Mr. Marshall up in Rock
24 Hill?

25 A. Yes, sir, it wasn't no conversation. It was him

1 telling me.

2 Q. He was just telling you?

3 A. (Shaking head yes).

4 Q. And did he tell you that when he was on his way back
5 from Charlotte they stopped and robbed a store?

6 A. Yes, sir.

7 Q. And he killed a man working there?

8 A. Yes, sir.

9 Q. Did he tell you that the man shot him in the back and
10 he just turned around and shot him?

11 A. Yes, sir.

12 Q. In fact, did he tell that you he shot him finger off?
13 You knew that he shot his finger off first?

14 A. I think he said that, yes, sir.

15 Q. Then he said he unloaded the rest of the shots in the
16 man?

17 A. Yes, sir.

18 Q. Is that what he told you?

19 A. (Shaking head yes).

20 Q. What was his attitude about it?

21 A. He was remorseful.

22 Q. Was he laughing?

23 A. No.

24 Q. Okay. Was he joking?

25 A. No.

1 Q. Okay. Who did he say was with him?

2 A. I'm not sure.

3 Q. Did he say that it was Davorius "Bubba", that's his
4 brother, and a dude name Ben?

5 Let's take a look at your statement and see if that's
6 what he said.

7 A. All I know is what they say. I can't remember two and
8 a half years ago.

9 Q. Okay. Does that -- is that what the statement says?

10 A. Yes, that's what it say.

11 Q. It was him, Davorius, and guy name Ben from
12 Philadelphia?

13 A. (Shaking head yes).

14 Q. Is that right?

15 A. (Shaking head yes)

16 Q. You have to answer.

17 THE COURT: Verbally, sir. He's recording it.

18 A. Yes, sir.

19 BY MR. SWERLING:

20 Q. He doesn't even mention Terrell Addison in here, does
21 he?

22 A. No, sir.

23 Q. Do you know Terrell Addison?

24 A. No, sir.

25 Q. Did you know Ben Stewart?

1 A. No, sir.

2 Q. Did he tell you that he used a .380?

3 A. I'm not sure.

4 Q. Let me get you to take a look at this.

5 A. Yes, I see it right here, but I'm not sure. I can't
6 remember if he told me exactly two and a half years ago. I
7 can't remember that.

8 Q. Well, would you think your memory two and a half years
9 ago would be better than it is today?

10 A. Yes, sir.

11 Q. And he also told you he got shot with a .22?

12 A. Yes, sir.

13 Q. All right. Answer any questions that either Mr. Snow
14 has or the solicitor has. Thank you.

15 CROSS EXAMINATION BY MR. SNOW:

16 Q. Mr. Evans, you heard your wife testify, correct?

17 A. Yes, sir.

18 Q. And she didn't hear anything -- any -- my client's name
19 even mentioned in the conversation that you had, correct?

20 A. (Shaking head yes).

21 Q. He didn't say anything about that?

22 A. Yes, sir.

23 Q. Now, did you happen to hear the name Ben Stewart at
24 some point after this?

25 A. I'm not sure.

1 As far as my recollection remembering to two and a half
2 years ago, I don't remember none of this. All I know is
3 what y'all showing me on this paper and what y'all are
4 telling me.

5 Q. Okay.

6 A. As far as what was said, as far as what I remember, I
7 don't remember nothing, period.

8 Q. Well, let me ask you this.

9 I'm going to have you look at your statement and you
10 take a look at it. Let's talk about what your statement
11 says. I want you to take your time and look at it. You can
12 read it, if you want, and let's talk about what's in your
13 statement that was taken October 18th, 2006.

14 A. I see the statement, and all I could tell you --

15 Q. Well, I haven't asked you a question yet, sir. I want
16 you to read it and look at it. I'm going to ask you a
17 question.

18 In your statement --

19 A. Uh-huh.

20 Q. -- does it say anything in there about Ben Stewart
21 giving him a gun?

22 A. No, sir.

23 Q. He just said he shot the man with the .380?

24 A. Yes, sir.

25 Q. And you are not sure at what point you heard of Ben

1 Stewart's name, correct?

2 A. Correct.

3 Q. Okay. And that statement is dated October 18th, 2006?

4 A. That's right.

5 Q. Is that when you gave the statement, you said?

6 A. It say 10-18-06.

7 Q. October 10th -- October 18th, 2006?

8 A. Uh-huh.

9 Q. And you are a friend of Dontavious, is that correct?

10 A. That's right.

11 Q. Right.

12 And you have also seen him have guns, carry guns?

13 A. I ain't seen him carry guns. I just heard. I know
14 what people say.

15 Q. People say.

16 And people say he carry guns, right?

17 A. Yeah, that's what they say.

18 Q. And he's not the kind of guy that needs to borrow a
19 gun?

20 A. No.

21 Q. Thank you, sir.

22 CROSS EXAMINATION BY MR. THOMPSON:

23 Q. Now, you had said what people say, but from your
24 experience with Dontavious, what's your opinion of his
25 reputation, what you know about him?

1 A. My opinion?

2 Q. Yes.

3 A. In my opinion, Dontavious won't hurt a soul.

4 At least they are trying to hurt him. That's just my
5 opinion.

6 Q. Now, when Dontavious was talking to you that day, he
7 went off in a room with you, right?

8 A. Well, not necessarily a room. When you walk into the
9 apartment, it's the kitchen and the living room right there
10 together. We were just right there in the kitchen part.
11 It's really one open space.

12 Q. Okay. But your wife wasn't part of the conversation at
13 that point, right?

14 A. No.

15 Q. She was kind of trying to listen in from somewhere else
16 in the apartment?

17 A. Exactly.

18 Q. Okay. I'm going to give you a copy of your statement
19 again and ask you to look, because I just want to go over a
20 couple of things in it.

21 A. Okay.

22 Q. Is that it, your statement?

23 A. Yes, sir.

24 Q. And you say in this that it was between six and eight
25 in the evening when he came over?

1 A. This is what the statement says.

2 Q. Right.

3 And the statement that you realize to be true from when
4 you gave it, is that correct?

5 A. Yes, sir.

6 Q. All right. And in that statement you mentioned that
7 his brother, Davorius, that you know as "Bubba", that he was
8 with him, right?

9 A. Right.

10 Q. When the robbery occurred in Rock Hill?

11 A. Yes, sir.

12 Q. And also you say a guy named Ben, you don't know his
13 last name, but he's from Philadelphia, right?

14 A. Right.

15 Q. And his sister is Monday?

16 A. Correct.

17 Q. Do you know Monday Bishop?

18 A. No.

19 Q. Okay. Did you know Shonda upstairs in the Farmington
20 Apartments?

21 A. No, sir.

22 Q. You didn't know your wife's friend Shonda?

23 A. No, sir.

24 Q. But he didn't mention Terrell Addison, correct?

25 A. No, sir.

1 Q. Thank you.

2 MR. THOMPSON: No further questions.

3 MR. SWERLING: I have nothing further.

4 MR. SNOW: Judge?

5 RECROSS EXAMINATION BY MR. SNOW:

6 Q. Mr. Evans, you are not saying your wife is lying, are
7 you?

8 A. No. The only thing I'm saying is I don't remember
9 nothing from 2006. I don't even know if this is the same
10 statement I said or not. All I know is what y'all have
11 given me and what's right here in my face. That's all I
12 know.

13 As far as me remembering two years ago, I can't do
14 that.

15 Q. So you don't even know if you mentioned Ben's name, do
16 you?

17 A. I know I said -- I see right here say he saying he
18 mentioned Ben here, but as far as remembering him saying
19 Ben's name, no.

20 Q. You don't think your wife would testify to -- would
21 make up something on the stand, do you?

22 A. No, sir.

23 Q. And you are a friend of Mr. Dontavious?

24 A. Yes, sir.

25 Q. Dontavious Mack, right?

1 A. Yes, sir.

2 THE COURT: Anything else?

3 MR. SWERLING: No.

4 THE COURT: Thank you, sir. You may stand down.

5 MR. SWERLING: Judge, can we just approach for a
6 second?

7 THE COURT: Yes.

8 (Whereupon, the lawyers approached the bench for
9 an off-the-record discussion)

10 MR. SWERLING: Excuse us one minute.

11 (Off the record).

12 (Back on the record)

13 MR. SWERLING: Judge, we are going to admit --
14 there are two statements made by Davorius Mack. One was to
15 the Hartsville Police Department, and then there was another
16 statement to the Rock Hill Police Department on October
17 18th, and we are moving to admit those. I believe it's
18 without objection, and we will put a copy in the record. I
19 just need to make sure we have a clean copy.

20 THE COURT: Do we have a number for them yet?

21 Approach just a minute.

22 (Whereupon, the lawyers approached the bench for
23 an off-the-record discussion)

24 THE COURT: All right. Those statements are
25 admitted without objection, as part of the record.

1 MR. BRACKETT: State's Exhibit No. 96 and 97 we
2 would move into evidence at this point.

3 The first statement by Davorius Mack to the
4 Hartsville Police Department, and the first statement by
5 Davorius Mack to the Rock Hill Police Department.

6 THE COURT: I thought --

7 MR. SWERLING: They are actually one wanting to
8 put them in. I have no objection.

9 MR. BRACKETT: Yes.

10 MR. SWERLING: Based upon the other discussions
11 that we have had in connection with this.

12 THE COURT: As long as the record is complete.

13 MR. BRACKETT: Yes.

14 MR. SWERLING: Judge, the other point or piece of
15 evidence is that the State and Mr. Addison stipulate that
16 there is no evidence of a .38 being fired in the BP station
17 on October 10th.

18 MR. BRACKETT: That is correct. The State accepts
19 that stipulation.

20 THE COURT: Okay. How about --

21 Counsel, do you agree with that stipulation?

22 MR. SNOW: I agree, judge.

23 THE COURT: Thank you. Anything else on that?

24 MR. SWERLING: No, sir. We would rest.

25 THE COURT: All right.

1 MR. SNOW: Your Honor, Mr. Stewart would call
2 Officer Haire. We have a few questions of the officer.

3 THE COURT: Detective Haire, you previously were
4 sworn. You continue to be sworn and under oath for your
5 testimony at this time.

6 THE WITNESS: Yes, sir.

7 THE COURT: Go ahead.

8 DIRECT EXAMINATION BY MR. SNOW:

9 Q. I wanted to get it settled.

10 As to Ben Stewart, on October of 2006, do you know how
11 old was Mr. Stewart then?

12 If you don't mind, would you look through to refresh
13 your recollection?

14 Well, I'll ask it this way. Is it fair to say that Mr.
15 Stewart was twenty years old at that time?

16 A. In 2006?

17 Q. Yes.

18 A. That's correct.

19 Q. And at some point, if you know through your
20 investigation, he was charged with, I hope I say this right,
21 carrying a pistol -- unlawful carrying of a pistol of
22 someone under twenty-one?

23 A. That's correct.

24 Q. All right. And that charge was brought about as it
25 relates to this case, isn't that correct?

1 A. Yes, sir.

2 Q. Okay. And that had to do with the allegations of
3 carrying a pistol in connection with the allegations
4 stemming from the house where Mr. Reed said he had a pistol,
5 correct?

6 A. It stems from the entire incident.

7 Q. The entire incident?

8 A. Yes.

9 Q. And the allegations were certainly had to do with Mr.
10 Reed saying he had a pistol?

11 A. Yes, sir.

12 Q. And if you know, that charge had been dismissed,
13 correct? Well, he's no longer facing that charge?

14 MR. BRACKETT: Objection, Your Honor.

15 THE COURT: Yeah, I agree.

16 Counsel, approach.

17 (Whereupon, the lawyers approached the bench for
18 an off-the-record discussion)

19 THE COURT: Mr. Foreman, ladies and gentlemen of
20 the jury, counsel has just referred to a case against Mr.
21 Stewart, Ben Stewart, the defendant, being dropped on a
22 charge of possession of a pistol by a person under
23 twenty-one.

24 After that charge was made, as it was made in any
25 number of cases in South Carolina, the South Carolina

1 Supreme Court ruled on the case that went up that the
2 particular statute under which persons were charged with
3 possession of a pistol by a person under twenty-one was
4 Unconstitutional, based on the South Carolina Constitution,
5 and it did not -- they could not do that, make a charge
6 against someone who was at least eighteen. And so that
7 charge was dismissed, based on the fact that the South
8 Carolina Supreme Court ruled that the statute under which he
9 was charged was unconstitutional.

10 That charge to Mr. Stewart, and anyone else who
11 was charged under that statute, that is possession of a
12 person under twenty-one, was dropped at that time. And
13 that's the reason it was dropped. Okay.

14 MR. SNOW: That's all that's I have, judge. Thank
15 you.

16 THE COURT: Anything else?

17 MR. BRACKETT: Nothing about this case, Detective
18 Haire, but your wife e-mailed me some questions. I'm just
19 kidding.

20 MR. BRACKETT: We have nothing.

21 THE COURT: Thank you, sir. You may stand down.

22 All right. For scheduling purposes, counsel,
23 approach just for a second.

24 (Whereupon, the lawyers approached the bench for
25 an off-the-record discussion)

1 THE COURT: All right, Mr. Foreman, ladies and
2 gentlemen of the jury, this will conclude all of the taking
3 of testimony and evidence in the case, as far as I know. We
4 will make a final decision on that first the thing in the
5 morning when we start back, but that's the way it appears
6 right now. If that changes, we will address that the first
7 thing in the morning, but it appears we may have finished
8 all of the testimony and evidence in the case.

9 We have yet remaining final arguments of counsel
10 and my instruction to you with regard to the law that
11 applies to the issues in this case.

12 I want to -- even though you have heard all the
13 testimony and evidence in the case, you should not begin
14 discussing this case among yourselves or with anyone else
15 you might see on a break from court, including your family,
16 friends. You should not read, listen to, or watch any media
17 account of this trial, including anything that might appear
18 on the Internet about this case. And that's very important.
19 Even though you have heard all the testimony and evidence in
20 the case, you have not yet heard my instruction to you with
21 regard to the law that applies to the issues in this case,
22 so you are really not ready to start forming opinions or
23 discussing the case yet, so please keep an open mind about
24 that until you have heard my instruction to you with regard
25 to the law that applies.

1 Please have a pleasant night tonight and be back
2 in the jury room ready to go in the morning at 9:30. 9:30,
3 and we will try to get started promptly at 9:30. Have a
4 good night and we will see you then.

5 (The following takes place outside the presence of
6 the jury panel)

7 THE COURT: All right. Please bring Mr. Stewart
8 around and let me question him about his right to testify or
9 not testify.

10 BEN ROBERT STEWART, having been first duly sworn,
11 testified as follows:

12 THE COURT: Sir, for the record, you are Ben
13 Robert Stewart, is that correct?

14 DEFENDANT STEWART: Yes, sir.

15 THE COURT: Mr. Stewart, we have reached the stage
16 of your trial where you may present your defense.

17 You have the right to testify in your own behalf.
18 However, no one can make you testify.

19 In the event you have a record for any conviction
20 involving dishonesty or false statement or for a crime
21 punishable by imprisonment for more than one year and this
22 court determines that the probative value of admitting this
23 evidence outweighs its prejudicial effect to you, the
24 solicitor would be able to introduce this record for
25 impeachment purposes to attack your credibility.

1 If you elect not to take the stand, I would charge
2 the jury that they are not to give the fact that you did not
3 testify any consideration whatsoever and there is to be
4 absolutely no prejudice to you because you did not testify.

5 It is left entirely up to you whether or not you
6 testify. You may talk with your attorney, your family and
7 friends, or anyone else, but the ultimate decision is left
8 entirely up to you.

9 Do you understand that it is your decision as to
10 whether you will or will not testify in your case?

11 DEFENDANT STEWART: Yes, Your Honor.

12 THE COURT: Have you discussed with your attorney
13 the advantages and disadvantages of testifying?

14 DEFENDANT STEWART: Yes, sir, we have.

15 THE COURT: And do you wish to testify in your
16 case, sir?

17 DEFENDANT STEWART: No. No, Your Honor.

18 THE COURT: Is that your decision, sir?

19 DEFENDANT STEWART: Yes, sir.

20 THE COURT: All right. Thank you. You may return
21 to your seat.

22 MR. SNOW: Thank you, judge.

23 THE COURT: All right. Counsel, then we will
24 adjourn. I'll ask you -- if you want to take a few minutes
25 to do whatever you need to do and then meet with me in

1 chambers and let's work on the charges.

2 MR. SWERLING: Yes, sir.

3 If you want to -- should we just go ahead and
4 renew the motions at this time?

5 THE COURT: I beg your pardon. I appreciate you
6 reminding me. Yes, sir, let's do that at this time.

7 MR. SWERLING: Judge, just on behalf of Mr.
8 Addison, we would renew the motion we made at the conclusion
9 of the State's case, and we make the same statements we made
10 then and incorporate them now.

11 With the additional information about Mr.
12 Addison's testimony itself, we say it supports a directed
13 verdict motion on all those charges.

14 THE COURT: All right. Thank you, sir.

15 I will deny the motions for the same reasons that
16 I gave earlier, looking at the evidence in the light most
17 favorable to the State against whom the motion is made.

18 MR. SNOW: Judge, we would move for a directed
19 verdict in this case --

20 THE COURT: And I will deny your motion.

21 MR. SNOW: -- to all charges.

22 THE COURT: I'll deny your motion for a directed
23 verdict for the same reasons I gave earlier in the directed
24 verdict stage, looking at the evidence in the light most
25 favorable to the State.

1 All right. Thank you, gentlemen.

2 If you will meet with me. Take a few minutes, if
3 you need to, and come on back to chambers and we will start.
4 Thank you.

5 (Whereupon, proceedings were adjourned to February
6 27, 2009)

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1 STATE OF SOUTH CAROLINA)
2 COUNTY OF YORK) IN THE COURT OF GENERAL SESSIONS

3

4 THE STATE) TRANSCRIPT OF RECORD
5 -vs-) 2007-GS-46-0670
6 TERRELL ANTONIO) 2007-GS-46-0671
7 ADDISON,) 2007-GS-46-0672
8) 2007-GS-46-0673
9) 2007-GS-46-0675
10) 2007-GS-46-0676

11 DEFENDANT.

12 FEBRUARY 27, 2009
13 YORK, SOUTH CAROLINA

14

15 (VOLUME V)

16

17 B E F O R E:

18 THE HONORABLE LEE S. ALFORD, JUDGE. ; And a Jury.

19

20

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

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23 WILLY THOMPSON, DEPUTY SOLICITOR
24 ATTORNEYS FOR THE STATE

25 JACK SWERLING, ESQUIRE
ATTORNEY FOR THE DEFENDANT

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28 MICHAEL R. WATTS
29 CIRCUIT COURT REPORTER

30

31

32

33

1 STATE OF SOUTH CAROLINA)
2) IN THE COURT OF GENERAL SESSIONS
3 COUNTY OF YORK)

4 THE STATE) TRANSCRIPT OF RECORD
5) 2007-GS-46-2525
6 -vs-) 2007-GS-46-2526
7) 2007-GS-46-2527
8 BEN ROBERT STEWART,) 2007-GS-46-2528
9) 2007-GS-46-2529
10 DEFENDANT. 2007-GS-46-2530
11 2007-GS-46-2531
12 2007-GS-46-2532
13 2007-GS-46-2533
14 2007-GS-46-2535

15 FEBRUARY 27, 2009
16 YORK, SOUTH CAROLINA

17
18
19 B E F O R E:

20 THE HONORABLE LEE S. ALFORD, JUDGE. ; And a Jury.
21

22
23
24 A P P E A R A N C E S:

25 KEVIN BRACKETT, SOLICITOR
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CIRCUIT COURT REPORTER

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1 (PROCEEDINGS, FEBRUARY 27, 2009)

2 (Davorius Mack Statement marked as Court's Exhibit
3 No. 6 for identification)

4 THE COURT: All right, counsel, are we ready to
5 proceed now?

6 MR. SWERLING: Yes.

7 THE COURT: All right. Let me ask whether -- I
8 don't think -- I don't think Defendant Stewart needs to rest
9 before the jury. I think I told the jury yesterday that
10 that would probably take care of that. I don't think we
11 need to do that. We done that on the record, correct?

12 MR. SNOW: I don't think we have rested yet,
13 judge.

14 THE COURT: You haven't?

15 MR. SNOW: No.

16 THE COURT: Are you going to offer any evidence?

17 MR. SNOW: Nothing else from Stewart, judge.

18 THE COURT: Okay.

19 MR. SNOW: The defense rest.

20 THE COURT: Well, then I guess we will do that
21 before the jury then. I will ask if you there is anything
22 further and you can say the defense rests.

23 MR. SWERLING: If I remember, we did the motions
24 yesterday, so we don't have to renew those?

25 THE COURT: No, sir.

1 Anything else?

2 MR. BRACKETT: Not from the State, Your Honor.

3 MR. SWERLING: No, Your Honor.

4 THE COURT: Okay. All right. Does the defense
5 require the State to open on the law?

6 MR. SWERLING: No, Your Honor.

7 MR. SNOW: No, Your Honor.

8 THE COURT: All right. Have y'all decided what
9 order you are going to argue?

10 MR. SWERLING: Well, can I just confer with him
11 one second.

12 THE COURT: Sure.

13 (Off the record)

14 (Back on the record)

15 MR. SWERLING: Your Honor, I'll go first.

16 THE COURT: Okay.

17 All right. Please, ma'am, bring the jury in.

18 (The following takes place in the presence of the
19 jury panel)

20 THE COURT: Good morning, Mr. Foreman, ladies and
21 gentlemen of the jury. I hope you had a pleasant night last
22 night.

23 We are ready to resume with the trial at this time
24 and we are to that part of the trial where counsel will make
25 their final arguments to you. I ask that you listen

1 attentively now as counsel address you in final arguments.

2 Counsel, we are ready to proceed.

3 MR. SWERLING: Thank you.

4 May it please the court?

5 THE COURT: Yes, sir, counsel.

6 MR. SWERLING: Good morning, ladies and gentlemen.

7 THE JURY: Good morning.

8 MR. SWERLING: Okay. I get to talk to y'all first
9 and you are going to hear a little bit of lawyer talk this
10 morning. We will try, of course, to keep it as short as we
11 can, but we all want to make our points to you.

12 What we are saying to you is not evidence. What
13 it is is things that we are suggesting that you ought to
14 consider, whether it's on behalf of the State or on behalf
15 of each one of the defendants, by Mr. Snow or myself. It's
16 matters of evidence or lack of evidence that we are asking
17 you to consider to support the verdict. Of course, the
18 State is going to ask you to support it one way, and we are
19 going to ask you to look at it another way, but what it
20 comes down to is this. It's going to be your view of what
21 the facts are, and it's going to be your view as to what the
22 facts are as applied to the law, because the facts are one
23 thing, but when you get the instructions from the judge in a
24 few minutes, or an hour, or so, then you are going to see
25 how those legal principles have to apply to the facts for

1 you to come up with a verdict in the case.

2 As we talked about in the beginning, you have
3 probably the most important function here in the courtroom,
4 because you are actually going to decide the facts. You are
5 going to decide the verdict. The judge will give you the
6 law. You have heard the testimony. You have seen
7 documentary evidence, and now it's going to be time to reach
8 a verdict.

9 One of the important things the judge will tell
10 you is that the verdict -- there is a number of different
11 charges; that each charge is going to have to be resolved by
12 you separately. You can have one verdict on one charge and
13 another verdict on another charge. You can have all
14 verdicts the same in all the charges and none of the
15 verdicts the same.

16 And as far as each defendant is concerned, whether
17 it's Mr. Stewart or Mr. Addison, you are going to have to
18 decide their responsibility separately as to whether they
19 are guilty or not guilty of the offense.

20 So there is going to be a number of different
21 verdict forms, a number of different verdict possibilities.
22 His Honor will instruct you about that at the conclusion of
23 the case. But what he will tell you also is that it has to
24 be a unanimous verdict. I mean, as to each count and as to
25 each defendant you will have to come up with a unanimous

1 verdict.

2 And what we are asking you to do as twelve people,
3 who are going to eventually deliberate on the case, are
4 going to go into a jury room and you are going to put all
5 your collective thoughts together, your every-day
6 experiences together, and you are going to resolve this
7 case, one way or the other.

8 Now, you are going to be given some guiding
9 principles on how to do that, but basically it's using your
10 common sense. Bring whatever good common sense that you
11 have outside the courtroom into the courtroom and applying
12 the law to the facts and resolving the case.

13 If you remember, at the beginning of the case we
14 talked about if you hesitate about something on the outside
15 of your every-day life, your business and personal affairs,
16 you know, you may or you may not do it. But in a courtroom,
17 if you hesitate, if there is a reasonable hesitation, if
18 there is a reasonable doubt as to whether or not the State
19 has offered evidence, or there is a lack of evidence as to
20 any of the elements His Honor will talk to you about, in the
21 courtroom you just can't say well, I may or may not do it.
22 In a courtroom you have to resolve doubt in favor of the
23 person accused of a crime. That's the fundamental building
24 block of our entire system of justice.

25 We submit to you, and I submit to you, that at the

1 conclusion of the case, when you hear all the arguments,
2 when you hear the law, when you got into the jury room to
3 deliberate, there is reasonable doubt in this case. There
4 is reasonable doubt that arises from the evidence, and there
5 is reasonable doubt that arises from the lack of evidence in
6 this case as to the guilt of my client, Terrell Addison.

7 Now, I want you to also understand from the
8 beginning in my opening statements I made no bones about the
9 fact that this is a tragic case. There is no question about
10 it. No one ever got up here and told you this was not a
11 terrible, terrible tragic case for the people sitting in
12 this courtroom - the friends and family of Mr. Marshall.

13 And I have never, from the beginning of this case,
14 ever disputed whether or not Terrell Addison was there. You
15 heard some evidence during the course of this trial about
16 the State attempting to prove he was there, but that
17 evidence was never challenged. And I think we told you
18 right up front that Terrell Addison was in the store. He
19 was in the store with Dontavious Mack, and Dontavious Mack
20 shot Mr. Marshall.

21 What we offered evidence about is not to try and
22 throw a smoke screen in front of you as to whether or not
23 Terrell Addison was there or not there. What we tried to do
24 is develop through the examination of the State's witnesses,
25 as well as the testimony of Terrell Addison, that he was not

1 there willingly, that he was not a willing participant in
2 this armed robbery. And obviously not being a willing
3 participant in the armed robbery and not having the intent
4 to commit the armed robbery, being under duress to go in
5 there to commit the armed robbery with Dontavious Mack, then
6 he should be found not guilty; and that the law does allow
7 under certain circumstances when you have those events come
8 together, the person should be found not guilty. I will
9 talk to you about the law about that a little bit later, but
10 His Honor is also going to talk to you about the law, but
11 it's going to be your view of the facts, how you view the
12 facts.

13 But, again, it's very important for you to
14 understand from the beginning this has not been any kind of
15 show to try and say that Terrell Addison was not there. He
16 was there. We admitted it up front. We didn't challenge
17 the print. We didn't challenge the shoes. We didn't
18 challenge the testimony about whether he was present in the
19 store or not. That has never been the issue in this case.

20 The issue is whether or not he had the intent to
21 commit an armed robbery. The issue is whether or not he was
22 forced to be there. Did he have any other reasonable
23 alternative. Were the Mack brothers dangerous people who
24 had the capability of inducing fear in someone and causing
25 them to believe that if they did not commit an act that they

1 wanted to do, that they, themselves, would be hurt and that,
2 and, therefore, there was no other reasonable alternative
3 than to go ahead and follow through with the act that they
4 wanted.

5 The one thing that I think that nobody
6 anticipated, whatever happened that night, the one thing
7 that nobody anticipated is that anybody was going to get
8 shot. That was the act solely on the part of Dontavious
9 Mack. Dontavious Mack is the only person who shot Mr.
10 Marshall.

11 If you remember the testimony is that there were
12 three .380 caliber shell casings in the store. There is no
13 evidence, by stipulation, that a .38 -- if Terrell Addison
14 even had a .38, there is no evidence that he ever fired a
15 gun. In fact, ladies and gentlemen, there is no evidence
16 that he ever pointed a gun. The only evidence that he even
17 presented a gun was the statement of Dontavious Mack, who
18 has been impeached beyond impeachment as far as his
19 credibility is concerned, because you can look at the video
20 yourselves and see that Terrell Addison was never holding a
21 gun, never had a gun in his hand, and Mr. Thompson in his
22 opening statement told you that. He told you that there was
23 no evidence that Terrell Addison ever took the gun out of
24 his pocket.

25 So you are going to have to rely on a lot of

1 testimony of Dontavious Mack and Davorius Mack. You are
2 going to have to rely on really what they said in this case
3 to decide whether or not Terrell Addison was in that store
4 voluntarily, whether he was a willing participant in that
5 crime, whether or not he was being forced to participate in
6 that crime, whether he had a choice to commit -- be in that
7 particular place at that particular time when that crime was
8 committed, and should he be held accountable; or should the
9 law, as the law says, should you come back and say under the
10 circumstances as we find them, as the circumstances we hear
11 and the evidence and applying that to the law, that Terrell
12 Addison was not a willing participant, that Terrell Addison
13 did not intend to rob, did not intend certainly to have
14 anyone killed. And we are going to explain to you, as I
15 said, the law of duress. And if you find that that existed,
16 then the law says that Terrell Addison should be found not
17 guilty.

18 We talked about a couple of other legal principles
19 at the beginning and that was the presumption of innocence.
20 The fact that even right now, even after hearing all that
21 evidence, you are going into the jury room in a few minute,
22 or an hour, or so. Until you resolve that the State has
23 proven Terrell Addison's guilt beyond a reasonable doubt and
24 stripped that cloak of innocence away, the law says he is
25 still presumed to be innocent. That presumption of

1 innocence does not disappear, until you say beyond a
2 reasonable doubt, of all twelve of you who are going to
3 deliberate, that he is guilty, that I have no hesitation, I
4 have no reasonable doubt about his involvement in this case.
5 So that's the principle is still there. I just wanted to
6 remind you of it.

7 And then we talked about the reasonable doubt at
8 the beginning of this case. The judge will explain to you
9 reasonable doubt, but generally we understand it to be is a
10 hesitation to act. It is not being convinced that the
11 evidence proves his guilt beyond a reasonable doubt, that
12 you still have a reasonable doubt in your mind from the
13 evidence, or lack of evidence, as to whether or not he's
14 responsible for the acts the State has said.

15 Those are the two fundamental principles that you
16 ever going to decide, you are going to use in that jury
17 room.

18 Now, we don't give anybody any instructions about
19 how to go ahead and deliberate on a verdict. We expect
20 twelve people to go back there, sort through the facts and
21 sort through the law and come up with a verdict in a case
22 with no experience. But, you know, it works. You go back
23 there and you will deliberate. Each one of will you be
24 heard. Each one of you will review the evidence in the
25 case. Each one of you will have a recollection of what the

1 judge tells you about the law is. And each one of you will
2 give an opinion about whether or not the State has met its
3 burden of proof or not.

4 Remember, there is no burden on a defendant to
5 prove anything. Under our system of justice the entire
6 burden is placed on the State of South Carolina, the
7 charging body. No defendant has to prove his innocence. In
8 fact, Terrell Addison did not have to take the stand
9 yesterday and be subjected to cross-examination. And had he
10 not, the judge would have instructed you that that was his
11 absolute right and that you could not consider that. It's
12 not even something that's allowed to enter into your
13 deliberations, but Terrell Addison did want to get on the
14 stand. He did want to tell you exactly what happened that
15 night, so that you could have what he said and compare that
16 to Dontavious and Davorius Mack and Reed Allen and decide
17 whether or not the State has met its burden of proof,
18 whether he's guilty or not guilty. And he got up there and
19 he told you what happened that night. And you do that. You
20 need to compare it to what the other three said. Not only
21 do you need to compare that, but you need to compare the
22 individuals.

23 You look at the three individuals who got up on
24 the stand before you, because you will have to decide the
25 credibility of the witnesses. You are going to have to

1 decide who is telling the truth and who is not telling the
2 truth. You are going to have to decide what motives they
3 have, what interests they have, what biases they have, what
4 are they going to get. Is there something that they are
5 going to receive out of the benefit of testifying? I mean,
6 Dontavious Mack clearly said "hey, I'm up here to help my
7 brother. That's what I'm here for, to help my brother."

8 Davorius said "well, you know, I'm here to get the
9 best sentence I can."

10 Reed Allen is in the same position as well.

11 So they do have a reason and a motive to shade the
12 truth.

13 Terrell Addison got up there or -- let me back up
14 a minute.

15 One of the things that I was going to ask you to
16 consider when you are weighing the credibility of the
17 people, because you are the judges of the credibility, is
18 the demeanor of the witnesses that are on the stand.

19 Now, there is a clear distinction, I suggest to
20 you, between the demeanor and the attitude of Davorius Mack,
21 Dontavious Mack, Reed Allen, and then Terrell Addison. The
22 three of them -- the first three where combative. They were
23 argumentative. They were -- I wouldn't say exactly
24 communicating very well or wanted to be there. They were
25 inconsistent with each other. They were inconsistent with

1 their own statements. In fact, when you go back, and I'm
2 going to review it for you in a little built, none of their
3 statements were consistent with each other, and none of
4 their statements were consistent with any other person that
5 was involved in the case.

6 So you have a lot of things to look at to decide
7 whether or not they are credible or not; their motive, their
8 interests, their bias, or their prejudice, to testify the
9 way they are.

10 And number two, the various statements that they
11 gave that contradicted each other and the various statements
12 that they gave that contradict the other co-defendants
13 statements as well.

14 Through all these years the one thing that I
15 always tell a jury is this: There is only one way to tell
16 the truth. The truth only comes out one way. You can't
17 give different variations and versions of the truth. The
18 truth is truth. It's a pure word. In fact, what you are
19 going to be doing at the end of this case is rendering a
20 verdict in the case. A lot of people don't realize that the
21 word veradicto is a Latin word. The word verdict comes from
22 the word veradicto, which means to speak the truth. In a
23 courtroom, what we are looking for is pure truth.

24 And so I say to you that there is only one way to
25 do it. And over the last few days, ladies and gentlemen,

1 you have been subjected to so many difference versions of
2 what happened that day, that there is only one conclusion
3 that you can come from from all those different versions,
4 and that is that someone is not telling the truth. Two
5 people are not telling the truth. Three people are not
6 telling the truth. But yet the State is asking you to rest,
7 rest on that, in deciding the fate of Terrell Addison.

8 I'm asking you, when you weigh the credibility of
9 these witnesses, when you looked at the witnesses on the
10 stand, when you hear their testimony, when you compare their
11 testimony, and you realize that it is inconsistent with each
12 other, and question yourself as to why it's inconsistent,
13 you will come to one conclusion - that they are not telling
14 the truth. That they are not telling the truth.

15 And one of the reasons that they are not telling
16 the truth, and I think one of them said it so eloquently,
17 and I can't remember whether it was Dontavious or Davorius,
18 "I'll say anything I need to say. I will testify to
19 anything that I need to do to help myself, or to help my
20 brother." I think it was Dontavious who said that.

21 Do you thing for a moment that the truth means
22 anything to Dontavious, Davorius, and Reed Allen? I suggest
23 to you it does not. I suggest to you that it does not. You
24 just look at this case from the very beginning, from the
25 very beginning, from the very first statements that were

1 made, Dontavious and Davorius do everything that they can
2 during the -- not only the first statement, but all the
3 statements, to say all of this was Terrell Addison's idea
4 and all of this was Ben Stewart's idea. The two guys that
5 you have heard the most about, about their backgrounds,
6 their reputations, their instances when they have done
7 things in the past, the two guys who are most likely to be
8 the ones organizing a robbery and committing a robbery, they
9 put it off on someone else. Does that surprise you? It
10 shouldn't. But it should suggest to you this. That if they
11 are doing everything that they can from the very beginning
12 to blame other people and put the blame on them, they are
13 not so stupid. They are street smart, because from the very
14 beginning what they were trying to do, as Davorius said, is
15 "to deflect away from me." And do you remember I asked him
16 "well, why did you say that in that statement about Terrell
17 driving the car?

18 "To deflect everybody away from me.

19 "So you were willing to lie about Terrell Addison
20 driving the car?

21 "Yes. I wanted to deflect the police away from
22 me."

23 Ladies and gentlemen, that's what you are dealing
24 with, and that's what -- you are going to have to go back in
25 that jury room and decide this case on.

1 I submit to you that the credibility alone and the
2 versions of what those individuals testified to, as
3 inconsistent as they are, in and of itself raises a serious
4 reasonable doubt which would cause a reasonable person to
5 hesitate and cause a person to say "I have a doubt. And
6 because of that doubt I cannot say beyond a reasonable doubt
7 that Terrell Addison was a willing participant in that
8 robbery." And, again, that is what we are asking you to do.

9 Now, Terrell Addison, as I said, got on the stand
10 and what did he tell you? He told you that he lived in
11 Hartsville; he moved to Rock Hill; has an extremely large
12 family still living in Hartsville; and spends a lot of his
13 time down there. Goes down there once a week or once every
14 other week. He doesn't hang around with the Mack brothers;
15 did not hang around with the Mack brothers; knew that their
16 reputation was pretty tough guys; generally stayed with his
17 family; periodically went over to Farmington Apartments and
18 saw the young lady that he was talking about, Shonda. His
19 mother would come bring him down. His mother would bring
20 him back. But on this particular weekend he didn't have a
21 ride back. He had been there since Friday and he wanted to
22 get back.

23 He was at the Farmington Apartments. The Mack
24 brothers were there hanging out, but not with him, because
25 do you remember he said he didn't want them hanging with

1 him. And a discussion came up about that they were going to
2 Charlotte and could he give -- could they give him a ride to
3 Charlotte and he would pay for their gas.

4 Now, let's go through the statements very briefly
5 to show you how a lot of what Terrell Addison says is
6 supported in the evidence that they gave in their
7 statements, because what we have in this case, which we may
8 not have in a lot of statements, we actually have the
9 written statements that are in evidence. So you are not
10 going to have to guess as to what they said. They are
11 actually here that you can look back at.

12 The trip up was uneventful until they got to
13 Lancaster, and Terrell said they started talking about
14 hitting that Domino's. And, you know, he didn't want to
15 have anything to do with it. They got into Rock Hill. He
16 told you about Dontavious kicking that alarm. He told you
17 that he was going to his brother's. He wanted to get in
18 touch with his mother and couldn't. He was going to go to
19 his brother's to see if his brother had any money that he
20 could pay them. That he didn't have any money when he came
21 back out and he told them that, and then and there is when
22 everything started to change. The mood got ugly. They, as
23 you say -- there was some I think some testimony about the
24 fact that they had come up here nothing. They had come up
25 here for blank. "You didn't have the money, you promised us

1 the money, you were going to get the money," and they got
2 angry. And there is evidence in these -- in the testimony
3 from Dontavious and Davorius that they did get angry. It's
4 not just something that Terrell Addison came up with. They
5 were mad. They were angry. It was only after he said he
6 didn't have the money that this discussion came up about
7 robbing the place in Rock Hill.

8 Now, again, they are blaming Terrell and they are
9 blaming Ben. They are once with all the ideas, but who made
10 the decision to go ahead and rob the BP station?
11 Dontavious. And at that point Terrell told you that they
12 were upset, and which has been verified by them that they
13 were upset and angry.

14 And the discussions came about that "you have to
15 go get us the money. You are going to have to go with
16 Dontavious into that store and you are going to go ahead and
17 have to help us."

18 Well, ladies and gentlemen, at that point Terrell
19 told you he was confronted with a dilemma. Is he going to
20 go ahead and go into the store with them, or is he going to
21 be subjected to serious bodily harm, or even worse? Did he
22 have a choice? Was that threat imminent? Was that threat
23 real? Was it reasonable? And I suggests to you it was.
24 Terrell thought it was. He thought it was that evening that
25 these guys were not happy with him. He didn't see that he

1 had any other place to go. They had guns. The guns --
2 obviously by that time I think there is no question he said
3 that the guns were demonstrated and shown at that time, so
4 he knew that they were armed, because now they were talking
5 about robbing a place.

6 The BP station was picked by Dontavious. And you
7 can tell from the testimony and the way Terrell described
8 it, that he wasn't even the first one that they wanted to
9 go. Dontavious wanted Ben Stewart to go, but then they
10 turned around and said "no, you are going to go. You know,
11 you are the one that didn't come up with any money. Now we
12 have got to get back to Hartsville. We don't have any money
13 to get back to Hartsville." So there was a discussion about
14 him going into there.

15 Now, we are going to go just briefly through all
16 this discussion there at that time about who got the masks
17 out of the car, where did the masks come from, where did the
18 guns come from.

19 Ladies and gentlemen, there is not one consistent
20 version of where the masks and the guns came from and who
21 had the masks and what kind of guns there were. There is
22 not a consistent version about it among any of the
23 individuals. But Terrell told you that Ben Stewart gave
24 Dontavious the .380 and Dontavious -- Davorius had the .38;
25 that they started walking towards the store. He did not

1 have a gun on him, and there is no evidence that he did,
2 other than the word of that individual that he had a gun on
3 him. But they both had guns. And, ladies and gentlemen,
4 guns in those hands, that puts you in a dangerous position.
5 You ought to be afraid. You ought to be afraid that you
6 could get shot, because as we found out just a few minutes
7 later, Dontavious Mack had no problem killing an innocent
8 man.

9 So was he capable of hurting and maybe taking the
10 life of Terrell Addison? Well, you know he was, because he
11 took the life of Ned Marshall. Had no hesitation. As a
12 matter of fact, I'll go into it briefly, he bragged about it
13 afterwards when he got back down to Hartsville. He was
14 bragging about it.

15 Now, Terrell told you he went into that store
16 reluctantly, didn't want to be there, and you look at the
17 video. I'm sure the State is going to play the video again,
18 and certainly it will be in the evidence room for you -- in
19 the jury room for you, for you to review. You look at the
20 tape. On that tape it is clear that Terrell Addison is just
21 standing there. He's not touching anything. He's not doing
22 anything. He has no weapon in his hand. He's not saying
23 anything. Again, I'll go through those statements in a
24 little bit to show you why, but that video merely
25 demonstrates that Terrell Addison is standing in that -- in

1 front of the counter when the person who is doing all of the
2 robbery, all of the control, telling Mr. Marshall where to
3 go and what to do, is Dontavious Mack.

4 I submit to you that that video supports what
5 Terrell Addison says. I submit to you that it does, because
6 if he was a willing participant in the robbery, he would
7 have been doing a lot more. He would have been assisting
8 Dontavious. He would not have been the one that they would
9 have yelled at later to say "you didn't grab the man," and
10 everybody get angry at him. The solicitor suggested
11 yesterday, well, it was a robbery and he punked out. There
12 was no evidence of that. Look at the video and see if that
13 man is a willing participant in that armed robbery.

14 When the shots rang out, when everything started
15 going down, he was out the door. And as he told you,
16 Davorius Mack was running towards the store and Dontavious
17 Mack was behind him, what was he going to do? They would
18 him to get in the car, somebody had just been shot, we are
19 going back to Hartsville. Of course, you remember the rest
20 of the story there.

21 Ladies and gentlemen, I want to go through some of
22 the statements with you briefly to show you how it supports
23 what Terrell Addison's version of what happened that night,
24 how he was unwilling, had no intent, and was forced and
25 coerced to go into that store when Dontavious Mack was

1 committing that armed robbery.

2 First of all, let me go -- let's talk about the
3 first version of what Dontavious and Davorius said to
4 anybody. Do you remember when he was at the hospital? Now
5 the State has argued, well, they were separated and really
6 couldn't get to, you know, talk. They really couldn't come
7 up with a story. Well, think about this. Davorius --
8 Dontavious is in the hospital in the emergency room. He
9 tells the police -- he comes up with a story, and it's not
10 just a simple story. It's a pretty complicated story that
11 he was over at the Farmington Apartments, I believe it was;
12 that he was near building D; that a white car, a Buick Le
13 Sabre drove by. They even had some University of South
14 Carolina tag on it, or something to that effect. He wasn't
15 quite sure. The window opened and seven to nine shots were
16 fired. That's elaborate. Not just "I was riding around and
17 somebody started shooting at me." A white car, a Buick, at
18 the D apartment -- behind the D apartments in the Farmington
19 Apartments.

20 Now, that's the version he gives the police. Of
21 course, there is no evidence of that. They go out there and
22 look. Then they talked to Davorius and they said "well, you
23 come out here. We want to talk to you about what happened.
24 Do you know what happened?"

25 He said "oh, yeah, yeah. I was with my brother.

1 We were at the Farmington Apartments. We were coming out of
2 building D, near building D, and a white Buick drove by,
3 dropped the window and started firing seven to nine shots,
4 somewhere in that range."

5 Now, isn't it -- first of all, that didn't happen.
6 Okay, we all know that. But isn't it amazing how the two of
7 them got their stories exactly together as to what did
8 happen, and what they were going to tell the police? So if
9 you don't think that these two are capable of collusion and
10 bringing their stories together, then it doesn't make any
11 sense. They did collude. They colluded at the first
12 opportunity they could and told a story that's not
13 believable.

14 Let's talk about Davorius first.

15 These statements are in evidence, so you can read
16 them. One of the statements he gave was to Hartsville
17 Police Department on October 10th about the shooting, and he
18 talks about he was at the Farmington Apartments, just like I
19 said. He gives a statement to that effect. Davorius --
20 Dontavious had already given the statement over at the
21 hospital.

22 Then on the 18th Davorius is questioned again.
23 Let's go over just a couple little things about what he
24 said. Now, this is supposed to be -- by the way, ladies and
25 gentlemen, when you talk to the police officers, it's

1 supposed to be a truthful statement. Okay. You look at the
2 statement. It's going to be in evidence.

3 On the 18th he said "a few days ago I was at my
4 girlfriend's house and Terrell came over and told me that my
5 brother Dontavious Mack had gotten shot." Now, a completely
6 different statement that was given on the 10th, but putting
7 it on Terrell again that Terrell came over to his house in
8 the morning and told him that his brother Dontavious had
9 been shot.

10 He went over to see Dontavious in the emergency
11 room and he said that he and Terrell were at the Farmington
12 Apartments when he got shot in the back and that someone in
13 a Buick had shot him. "I had heard in the past other people
14 had been shot by somebody in a white Buick, so I felt like
15 my brother was telling the truth." I mean, it doesn't get
16 any better than this. It's right here in writing what he
17 was telling everybody how he was lying to the police. Not
18 only lying about the shooting at the Farmington Apartments,
19 but Terrell Addison had nothing to do with that.

20 "I asked my brother how did he slip up and get
21 shot, and I went out and started looking for the white
22 Buick." I mean, these people are not dumb. They are pretty
23 street smart.

24 "I had never talked with him again about being
25 shot."

1 Now, do you remember when Davorius Mack got on the
2 stand and said "I have known Terrell Addison since we were
3 children," that he knew them well? Dontavious said "I
4 didn't really know him well at all. We didn't hang out."
5 So there is a little bit of a discrepancy there.

6 But Davorius says in this statement on the 18th,
7 this lifelong friend that he's had down in Hartsville, "I
8 have known Terrell about three or four months." Now, how do
9 you square that, ladies and gentlemen? Doesn't that create
10 a reasonable doubt about the credibility of this individual?

11 Well, it doesn't stop there. Let's go onto the
12 19th. Another statement the next day to police, supposedly
13 telling the truth. As a matter of fact, this is the one
14 that in his plea agreement he is saying "I'm telling the
15 truth." I mean, not only is he telling the police that, but
16 he signed a plea agreement with the State saying "this is
17 the truth."

18 "I went to start the car that was stolen that I'm
19 charged with. The color of the car is what I call a
20 champagne. The first time I saw the car was Monday, about
21 3:45 after school at the Hartsville High. I was walking
22 with a girl and Ben and Terrell pulled up and asked me where
23 my brother was." Ladies and gentlemen, this is supposed to
24 be the truth in the plea agreement.

25 Then he goes to on to say, "okay, I want to stop.

1 I want to get this right." So in the middle of the
2 statement, the police are probably calling him on this, he
3 says "I'm want to stop. I want to get this right."

4 So then he says, and he writes in this, and again
5 this is in evidence for you to look at, "Terrell was with my
6 brother in the store. Not me. I was in the car. Terrell
7 was driving the car."

8 Now, ladies and gentlemen, Terrell Addison never
9 drove the car. Never drove the car. Dontavious told you
10 that. You see, sometimes when you are trying to -- when you
11 tell a lie and you are trying to pass it off as the truth,
12 you are not going to get it all right. When you are telling
13 a lie, every time that you tell it, it's going to get a
14 little bit different, because there is nothing to go back
15 to. The back to is the truth. So what happens here is this
16 is like a stream of consciousness lying to whatever they
17 have to lie about.

18 "Terrell was driving the car." Well, you know
19 that's not true. First of all, Terrell Addison doesn't even
20 have a driver's license. Second of all, Terrell Addison was
21 never driving the car, by Dontavious', his version himself.
22 Terrell -- he drove the car the whole time. He was not
23 driving the car.

24 And then Davorius starts backing off on that
25 during his testimony about how often he was driving the car.

1 "Well, then -- "well, he only drove the car for a few
2 minutes up in Rock Hill." It still contradicts what
3 Dontavious said. You know why? Because it's a lie.

4 Then he said in this statement, continuing on,
5 "Terrell said he needed to get back home to Rock Hill."
6 Does that sound familiar? That's what Terrell Addison told
7 you.

8 Then he goes back to this. "The first time I saw
9 the car, Ben and Terrell rode up in it and Terrell was
10 driving, so I think Terrell stole the car." Now, we know
11 that's not true from his own admission when he got
12 cross-examined. He stole the car. Or, let's put it this
13 way. I can't say he stole the car, but he got the car by
14 giving crack cocaine to the owner of the car. That's what
15 he told us, or the person has had the car. He gave him
16 crack so he could use the car. He did that on Saturday,
17 which would have been the 7th. Of course, we know the car
18 wasn't stolen until the 9th, because that information has
19 been put in the record. We also know that so he couldn't
20 have had it on the 7th.

21 The story about him giving crack for it is
22 probably not true either, because on the 9th he has it, but
23 he is saying that the first time he saw the car is when
24 Terrell rode up with Ben and Terrell was driving, "so I
25 think Terrell stole the car." Completely contradicts his

1 testimony in here in court about how he got the car.

2 And, ladies and gentlemen, what's significant
3 about this is he is so willing to put this whole thing on
4 Terrell Addison, even in a statement, that he represents in
5 his plea agreement that's filed in the court is true. But
6 he says it's not true. This is not true. He's now admitted
7 it was not true.

8 "We were riding around Rock Hill. Terrell was
9 driving." Ladies and gentlemen, that's not true. It's not
10 true. Again, everything goes to Terrell. Everything goes
11 on Ben. Nothing on the Mack brothers. Nothing on Davorius
12 and Dontavious. They haven't done a thing.

13 "Terrell says let's do something." Sure. Terrell
14 says let's do something.

15 "Terrell wanted to rob Domino's." Well, you have
16 heard testimony from one of them that it was Ben Stewart
17 that wanted to rob Domino's.

18 "Terrell wanted to jack someone. Donte said we
19 are going home. You sent me here on a blank mission."
20 Again, let's put it on Terrell. Let's put it on Ben
21 about who is talking about these robberies and going to
22 commit a robbery.

23 "Terrell told him to pull in the apartments." I
24 mean, how much of this can you possibly believe, when you
25 know that most of it is not true from contradictions and

1 other testimony and contradictions in other statements.

2 Here is what he says. "Donte said to Ben you come
3 with me." That's Ben Stewart.

4 "Ben gives Donte the gun and then Terrell popped
5 the trunk." Ladies and gentlemen, you know, these are
6 little things, but little things mount up to big things. We
7 now know from the testimony that Terrell never popped the
8 trunk. Terrell never went into the trunk. Dontavious said
9 he got the stuff out of the trunk, but he is still willing
10 to put it on Terrell in this statement.

11 Now, this supports what Terrell Addison says as
12 well. "When they came out, him and Terrell were arguing.
13 Donte said you didn't grab the dude like I told you. Donte
14 said we got to get back" -- "he told us to tell everybody
15 that we got shot at Farmington and so we went to the
16 hospital in Hartsville." So the story starts merging right
17 there when they get back in the car. But it's no question
18 here, and this is supported by what Terrell Addison told
19 you, that they were mad at him, because Donte told him to
20 grab the dude and he didn't do it, and he didn't grab the
21 dude. And the reason he didn't grab the dude is because he
22 didn't want to be there in the first place.

23 He also supports what Terrell said where he says
24 "Donte says to Terrell in the car why did you not grab the
25 dude? You're the reason I got shot."

1 Well, there is another statement goes on again.
2 Fourth statement by Davorius Mack. This is what he's
3 talking about what happens after the hospital and this is
4 what I want you -- like you to listen to this, too. "After
5 the hospital Ben and Terrell got in the car." I'm sorry,
6 this is after they went to Monday Bishop's. "Ben and
7 Terrell got in the car that they drove to Rock Hill and I
8 drove Ryan's car. They followed me to Tasha's house. I
9 went in the house and I don't know where Ben and Terrell
10 went. I think they wanted to get rid of the car, but I
11 stayed at Tasha's."

12 Ladies and gentlemen, that is a lie, because as
13 you know from his developed testimony on the witness stand,
14 he had the car. He took it back to the hospital -- to the
15 hospital emergency room and he left it in the parking lot of
16 the hospital emergency room. And when he came out and saw
17 the police were there, he hopped a ride home with someone
18 else. Truthful statements? No way.

19 Then you have Dontavious. Well, none of this
20 would have happened without Dontavious Mack. Let's face
21 that. Ned Marshall would be alive and none of these boys
22 would be here in this courtroom.

23 Dontavious says after, he's, of course, originally
24 giving them this whole story about the Farmington
25 Apartments, "it wasn't a stolen car because we had the

1 keys." I mean, just a little bit -- you know, got caught
2 there a little bit, but this is what's important. "Terrell
3 asked Davorius to take him home so he could get some money.
4 He said his house is in Rock Hill and that he would get some
5 money there to pay for the ride. I told Davorius I would
6 drive because he didn't have a license." Well, he's telling
7 you who is driving the car. Davorius was the one that
8 picked him up. You look at the statement here. What's
9 important there again is that supports Terrell Addison's
10 story about going to Rock Hill. He wanted to go home. He
11 was going to pay for the gas. That was the deal, that he
12 was going to pay for the gas. They had said they were going
13 on their way to Charlotte and they would drop him off.

14 "Terrell" -- now, here is Dontavious now starting
15 to put on it Terrell. "Terrell was talking about shooting
16 out the windows of this car. Ben wanted to rob Domino's. I
17 told him no, you better not do that." They are good
18 samaritans. Dontavious Mack. "I told him no, you don't
19 want to do that." Do you believe that?

20 If you had to pick the one person in all this
21 crowd who was going to commit an armed robbery and kill
22 somebody, it would have been Dontavious Mack.

23 "Ben and Terrell were talking about jacking them
24 dudes in the Capris." Not the Mack brothers. They don't do
25 anything.

1 Now, here is real important. It's in his
2 statement. "When we were in Rock Hill, Terrell got out and
3 said he would be right back." Do you remember that? They
4 denied that they ever stopped anywhere for Terrell to go try
5 and get some money. Here he says "Terrell got out and said
6 he would be right back. He was gone a few minutes. He came
7 back and he was wearing a black jacket, black pants, and
8 black shoes."

9 Well, ladies and gentlemen, you know, there is
10 always some lies in all of Dontavious'. Maybe some of it is
11 truths. He wasn't wearing black shoes. He was wearing blue
12 and white sneakers, as you saw on the video.

13 "He came back and got -- and then so he came in.
14 He and Ben talked -- "he and Ben talked about robbing the
15 store." This is Dontavious talking now, that Terrell and
16 Ben were talking about robbing the store, not the Macks.

17 "Ben and Terrell were saying to each other come
18 on, let's do it. Then they wanted me and my brother to rob
19 a store on the way home." So, again, what he's asking you
20 to do is to believe that Ben and Terrell are the organizers
21 and leaders of the entire venture that evening and that Ben
22 and Terrell are telling them what to do. They are telling
23 the Mack brothers what to do. That's what you have to
24 believe in this case to believe that Terrell Addison is
25 guilty, that they were directing -- Ben and Terrell were

1 directing Dontavious and Davorius.

2 All right. So now he gets to where they were
3 going into the BP station. "So now it's me and Terrell.
4 Terrell said come to me. Come on with me. I was mad."
5 This is Dontavious talking. "I was mad because Terrell had
6 gotten us all the way down here and lied to us about getting
7 the money for the ride." You heard Terrell say that. This
8 is Dontavious saying that.

9 "Ben had his .380. He got it out of the trunk."
10 Well, that completely contradicts what Davorius has said and
11 Dontavious has said on the stand, "and handed it to him.
12 Terrell had a .38. He took the .38 to the store." Well,
13 first of all, let me just point out again there is no
14 evidence that there was a .38 in the store whatsoever.

15 Dontavious described that .38 as a black revolver.
16 Davorius described it on the witness stand as a gray
17 revolver with a wooden handle. Reed Allen described that
18 .38 -- or it was either a .38 or a .357, that was silver.
19 So I'm going to ask you this. How could they all be
20 describing the same gun and all three of them have a
21 different description of the gun? Dontavious says it's a
22 black .38. Davorius says it's gray with a wooden handle,
23 and Reed Allen says it's silver.

24 And what's significant about Reed Allen's
25 statement, which is what people always do with cooperating

1 witnesses and agree to testify. They always try to make
2 their story better when they get on the witness stand. The
3 good -- the interesting thing about Reed Allen is that in
4 his statement to the police that he gave back in October of
5 2006, he doesn't mention that Terrell Addison had a weapon
6 at all. It's not in the statement. You heard the
7 cross-examination yesterday. He never mentioned anything
8 about Terrell Addison having a weapon. But yet when he gets
9 on the witness stand, he's seen is discovery, and he wants
10 to make case a little bit better so he can get a better
11 deal, he goes up and he tells you that he had a .38. The
12 problem is he describes a completely different gun than
13 everybody else does, which makes him a liar as well.

14 "Went into the store. We were supposed to get the
15 money. I wasn't in my right mind." He admitted he was on
16 Ecstasy.

17 Now, here is where I think it gets interesting.
18 The person who says that Terrell and Ben were directing
19 everything and coming up with everything says "I told him to
20 go get the money." This is Dontavious speaking, and he's
21 speaking about Mr. Marshall. "I told him to go get the
22 money. I took him to the counter. I told Terrell to grab
23 the man. The man wanted to go ahead and get the money and I
24 told him no, I will get the money. I don't know why I
25 started shooting, but he shoot at me and I started shooting

1 him back. I was shooting kind of behind me. I told Terrell
2 to grab the man." He's the one giving all the orders. He's
3 the one giving all the instructions, but yet Terrell and Ben
4 are the ones that -- are the ones insisting on committing
5 the acts.

6 But this is also one of those beautiful statements
7 where you are trying to search for the truth, whether or not
8 the truth is really coming out. "I think maybe Terrell and
9 I may have swapped guns, but when we got to the store I had
10 the .380 and he had the .38." Now, let me ask you this. He
11 got all tripped up on this on the witness stand. If Terrell
12 Addison had the .38 and Ben Stewart gave Davorius -- I mean
13 Dontavious the .380, how would it have been that they would
14 have had to switch the guns? How would Dontavious have ever
15 gotten the .38? What this shows you is, ladies and
16 gentlemen, he can't remember from one minute to the next
17 what was happening out there. But it would make no sense if
18 Terrell Addison had a .38, that Dontavious would have had it
19 and would have had to switch with Terrell Addison to get the
20 .380 and give him back the .38. Think about that for a
21 minute.

22 "After they left, my brother was coming towards
23 the store." Exactly what Terrell Addison said. "I drove
24 myself to the hospital in Hartsville. The police came and I
25 told them that I got shot in Farmington. I told them I took

1 some E pills."

2 One other thing. "Terrell had two other masks. I
3 was wearing one of the masks. Terrell was wearing a
4 bandana."

5 Do you remember that whole stuff about the masks?
6 First of all, it started off with Dontavious saying "I
7 didn't see the masks." Then it started when we got on
8 cross-examination "where did the masks come from?"

9 "Well, they were in the car when I got in the car
10 in Hartsville."

11 Then we got to the situation where he in Rock Hill
12 decided to go in and steal the gloves and the masks and put
13 them in the trunk. How many different versions of the truth
14 can you possibly have? But here in the statement he is
15 saying Terrell had the masks. Again, they do everything
16 they can to put it on someone else.

17 And then you have -- we cross-examined him about
18 that letter he wrote where he said -- wrote it to Mr.
19 Thompson, that everything he had told the police in all of
20 those four -- in all of his statements, whatever statements
21 he made, was a lie; that Ben Stewart did the shooting; that
22 Ben Stewart and Terrell went in the store and did the
23 shooting; that the way he got shot was he was running up to
24 the store when Mr. Marshall started firing the gun and he
25 got shot in the back. But Ben and Terrell were the ones in

1 the store.

2 And the only reason he ever gave a statement at
3 all admitting that he was the killer in the matter was
4 because the captain had told him he wouldn't get charged
5 with murder, it was self-defense. Does that make any sense?
6 Does that appeal to your common sense?

7 Two other mentions about -- two other things I
8 would like to mention about Dontavious, to show you the
9 character of the individual that you are dealing with, him
10 and his brother, and you have heard some other things about
11 them. You heard about their prior record, about the two of
12 them assaulting someone when they were twelve years old;
13 what they have done in the jail; the escape. I'm not going
14 into that all. That you heard it all. But remember we
15 brought in here Tiyone Evans and Johnetta Evans. Well,
16 first of all, Johnetta Evans told you that that incident
17 that Dontavious denied about coming to her house and pulling
18 a gun on her and threatening her was true, that he did, and
19 she signed the warrant against him.

20 The other thing she said is that when he came in
21 the house, he showed her the .38 -- I mean, the wound that
22 he had gotten from the .380, and he also showed her and told
23 her some things about what happened and then she overheard
24 the conversation between him and Tiyone, her husband. And
25 that went sort of like this, and I'll just kind of -- the

1 way the questioning came out. This is what Donte told
2 Tiyyone, overheard by Johnetta the evening he got out of
3 jail. This is the night of the 10th, the evening of the
4 10th. "Well, we went to the store in Rock Hill and robbed
5 it. We were high on Ecstasy. My brother Davorius was
6 beating the man and I got him to stop. Then we was leaving
7 the store and a man shot me in the back." And then he like
8 "I shot the finger." Do you remember it? That's the
9 evidence from the pathologist. "And the man fell to the
10 ground. Then something just told me to kill him." Does
11 that sound like the words of a mild mannered individual, or
12 a killer? It's the words of a killer. "Then something just
13 told me to kill him."

14 "Then Donte said he just turned around and started
15 shooting the man with the .380." That's your Dontavious
16 Mack. Johnetta said everybody in Hartsville is scared to
17 death of him. Everyone. He carries guns. He has a
18 reputation for violence.

19 Her husband Tiyyone got on the stand and he said
20 "well, you know, I don't think -- it's kind of interesting
21 how sometimes you get some things you want to hear and other
22 things you don't want hear? Do you remember Tiyyone said
23 "well, I don't think Dontavious would hurt anybody." But
24 yet Dontavious just told him he had killed a man in cold
25 blood. So that doesn't make a whole lot of sense.

1 But what he did say was this, and he told you, the
2 ladies and gentlemen of the jury, number one, their
3 reputation is that they are thugs. They carry guns, they
4 being Dontavious and Davorius.

5 "We were on the way back from Charlotte." Now,
6 why is that important? Who said that the reason he got in
7 the car was because those guys were going to Charlotte and
8 they were going to drop him off in Rock Hill? Terrell
9 Addison. Here is where he says that he mentioned Charlotte,
10 where Dontavious mentioned Charlotte. "We were on our way
11 back from Charlotte and we stopped at the store. We robbed
12 the store and I killed the old man working there. The old
13 man shot me in the back and I turned around and shot him. I
14 know my first shot blew his f'in finger off. Then I
15 unloaded the rest of the shots in the MF and killed him.
16 Donte said that his brother Davorius and Mack, Davorius,
17 "Bubba" and a dude named Ben were with him and he used a
18 .380."

19 Well, what's interesting about both of those
20 statements is they never mentioned Terrell Addison, but we
21 know Terrell Addison was there. We know Terrell Addison was
22 in the store. But this just shows you that character of the
23 individuals you are dealing with that the State is asking
24 you to rely on to sustain the conviction for murder.

25 I submit to you, ladies and gentlemen, that these

1 people are not worthy of belief whatsoever.

2 Ladies and gentlemen, the judge is going to charge
3 you about certain principles of law. I'm not going to go
4 ahead and get into that, because we have gone over his
5 charge and I know what he's going to charge you on the law
6 and you are going to understand what the law is after the
7 judge concludes with his charge, but a couple of things I
8 would like to mention.

9 Number one, Terrell is charged under a theory of
10 accomplice liability. He is not charged as being the
11 shooter in the case. The theory of accomplice liability is
12 that if you are present aiding and abetting someone and as a
13 natural and probable consequence of what you do, or a
14 natural probable consequence of the act, someone is killed
15 in the commission, then the hand of one and the hand of all
16 theory comes into place and you are just as responsible.
17 That is a general principle of law, that even though you are
18 not the person who does the shooting, if you are -- if you
19 present aiding and abetting, if you are intentionally there,
20 willingly there, if you are participating in aiding and
21 abetting and providing comfort to the person, the law of the
22 hand of one, the hand of all says that all are equally
23 responsible.

24 But, remember, Terrell Addison, please remember at
25 all times, is not the one who did the shooting. We know

1 that. The only way that he can be found guilty at all is if
2 you find, as the way the judge describes to you, the law of
3 accomplice liability and whether or not he is responsible
4 under the law of accomplice liability. And he will explain
5 to you the different elements of accomplice liability and
6 what one has to show.

7 The judge will also tell you -- in addition to the
8 fact that the State has to prove that the homicide was a
9 natural and probable consequence of the acts that the
10 parties agreed to do, if you believe that Terrell Addison
11 willingly and intentionally was participating in those acts,
12 the judge will also tell you that there are certain
13 principles of law that you have to consider.

14 Mere presence at the scene of a crime is not
15 sufficient to convict someone, under any theory of the law.

16 Merely associating with people who commit a crime
17 does not provide liability for that person to be convicted
18 of a crime.

19 Even mere knowledge that someone is committing a
20 crime does not make one responsible and guilty of committing
21 the crime.

22 There are three basic principles: Mere knowledge,
23 mere presence, and mere association are not in and of itself
24 sufficient to convict someone of a crime.

25 In order to find someone guilty, the State must

1 prove beyond a reasonable doubt not only that the defendant
2 was present, that he knew of the conduct, but that he
3 provided assistance in it. Willingly provided assistance,
4 and that he had the intent to aid in the assistance of the
5 crime.

6 I believe the judge will tell that you intent,
7 criminal intent, is a necessary element of every crime.

8 There must have been a common design or intent to
9 commit the crime, and the crime must have been committed
10 pursuant to that plan with the person aiding and abetting
11 some overt act. The burden is on the State to prove all of
12 those elements.

13 The judge will tell you another principle of law,
14 which is what we are relying on in this case. The judge
15 will tell you that there is a defense known as duress or
16 coercion. If you find by a preponderance of the evidence --
17 the burden is on the defendant to prove it, but if you find
18 from a preponderance of the evidence, which is not, by the
19 way, the standard of beyond a reasonable doubt, because in a
20 preponderance of the evidence you just have to show the
21 greater weight of the evidence. And the standard of proof
22 beyond a reasonable doubt, you have to go past the
23 reasonable doubt standard before you can rely on it. The
24 preponderance of the evidence is more of a civil standard.

25 But if you find from the preponderance of the

1 evidence that the person acted under duress or coercion,
2 then that is an absolute defense to the crimes that are
3 charged in these indictments.

4 The judge will give you -- he will define coercion
5 and duress to you. But to establish that, the coercion must
6 be present, imminent, and of such a nature as to induce a
7 well grounded apprehension of death or serious bodily harm
8 if the person who is under coercion or under duress does not
9 complete the act. There must be no other reasonable way,
10 other than committing the crime, to escape the threat of
11 harm. The fear of serious bodily harm or death must be
12 reasonable.

13 Ladies and gentlemen, I submit to you that based
14 upon what you have heard about what happened that evening,
15 that Terrell Addison was coerced, that he was under duress,
16 that he was not a willing participant, that he was not
17 intentionally and willingly participating in those events.
18 And if you find that, then that is a defense to this crime,
19 or all those crimes.

20 The judge will also tell you that in determining
21 whether or not one had a reasonable fear or apprehension of
22 death or serious bodily harm, that you can consider evidence
23 about what the defendant knew about the persons who coerced
24 him, or threatened him, or caused him to act under duress.

25 You can consider whether or not that person knew

1 of their reputation in the community and whether they knew
2 of specific acts of violence committed by the person.

3 I believe he will tell you that the defendant knew
4 that the person who was threatening him had a violent
5 reputation, you may consider that in determining whether his
6 knowledge made his fear of serious bodily injury or death
7 reasonable under the circumstances.

8 Terrell Addison told you on the stand that he
9 didn't hang around with the Mack brothers and he knew of
10 their reputation. He knew they were people who carried
11 guns. He knew they were people with violent acts. Why he
12 got in that car that night, heaven only knows, but he got a
13 ride home. He decided to get in the car with him and take a
14 ride home, but that does not mean that Terrell Addison
15 adopts the acts of Dontavious and Davorius Mack. What it
16 means is that he unfortunately put himself in a position
17 when he couldn't get the money, that these two thugs, these
18 people who would not hesitate to hurt anyone, these people
19 who would not hesitate to kill anyone, told him "you're
20 going in that store with me." And Terrell went in the
21 store. Yes, he did, but he didn't go willingly.

22 And, ladies and gentlemen, I submit to you that
23 video bears out that Terrell Addison was not a willing
24 participant in that robbery.

25 If you find from the evidence that Terrell Addison

1 did go in that store acting under coercion or duress and
2 that there was no other reasonable alternative than him
3 doing what they required him to do, then the law says that
4 you must find him not guilty. You would be doing your job
5 as jurors and fulfilling your oath as jurors just like
6 anybody else would be doing when they sit in a jury box in
7 the State of South Carolina, or anywhere in the country.

8 It is a privilege to do what I do. I love
9 practicing law. I know the judge does and the solicitors
10 do. Mr. Snow does. We are here week in and week out. This
11 is what we do. This is what we love. This may be your
12 first experience ever in a courtroom, maybe your first
13 experience in criminal court, but you get to see what
14 happens in your government and your system, what goes on
15 over here. Next week we will be involved in other cases.
16 Next month we will be involved in other cases. You will go
17 on in your every-day lives doing whatever it is that you do
18 at home, or work, with your name, but today is the most
19 important day in the life of Terrell Addison. We all move
20 on, but your decision today affects him forever.

21 What I would ask you to do, ladies and gentlemen,
22 is go back in with your careful consideration to the
23 evidence in this case, or the lack of evidence. I ask you
24 to go back there and not put aside what happened that night
25 at the BP station, because it was awful, it was tragic, it

1 was unnecessary, a waste of a good human life, but put it
2 aside to the extent that you can rationally decide whether
3 or not Terrell Addison was responsible for what happened in
4 that store that night; or was Dontavious Mack, the killer,
5 the one that was responsible for what happened in the store
6 that night. That's all I can ask you to do.

7 It's a privilege appearing before you. It's
8 always, as I told you, a privilege to appear in Rock Hill.
9 I ask you to do this. This is -- jury service is not a game
10 or a contest. It's not a question in a courtroom of what
11 side wins and what side loses. That's the way our sports
12 event are. We all like winners. None of us like losers,
13 but in a courtroom it's not that way. It's not a game.
14 It's not a contest. In a courtroom everybody has to win.
15 And people win when justice is done. If your verdict speaks
16 the truth, then justice is done, then we all have won. And
17 I submit to you that in this case justice would be served,
18 we would all win, if Terrell Addison was found not guilty.
19 Thank you.

20 THE COURT: Counsel?

21 MR. SNOW: May I approach, judge, just for a
22 minute?

23 THE COURT: Yes.

24 (Whereupon, the lawyers approached the bench for
25 an off-the-record discussion)

1 THE COURT: Mr. Foreman, ladies and gentlemen of
2 the jury, some people need a break at this point, and so we
3 are going to go ahead and take a short recess and I'll allow
4 you to refresh yourselves too, but we will do that very
5 briefly. We will take about five minutes, or so, to do
6 that. So please retire to the jury room and do not begin
7 discussing this case. We are not ready yet. Thank you.

8 (The following takes place outside the presence of
9 the jury panel)

10 THE COURT: Let's just take about five minutes and
11 come back and try to get resumed.

12 (Whereupon, proceedings were recessed)

13 (Whereupon, proceedings were reconvened)

14 THE COURT: All right, counsel, ready to proceed?

15 MR. BRACKETT: The state is.

16 THE COURT: Please bring the jury back in, ma'am.

17 (The following takes place in the presence of the
18 jury panel)

19 THE COURT: Yes, sir, Mr. Snow.

20 MR. SNOW: Yes, sir. If it please the court?

21 THE COURT: Counsel.

22 MR. SNOW: Mr. Swerling, solicitors.

23 Misery loves company.

24 Ben Stewart is not guilty of any of the charges,
25 any of the hodge-podge of charges that the solicitor's

1 office charged him, that the State has charged him with.
2 Ben Stewart is not guilty, because the State has failed to
3 meet its burden of proof beyond a reasonable doubt.

4 Ben Stewart is not guilty because he simply was
5 not there, simply did not conspire with anyone, did not give
6 anyone a gun. He doesn't have an eloquent defense.

7 Members of the jury, I'll tell you, as I thought
8 about the things I wanted to say to you last night, early
9 this morning, I wanted to make sure I got everything down,
10 so I'm going to refer to my notes. I'm not as eloquent,
11 certainly not as seasoned as Mr. Swerling. Even though I
12 got the beard, the grayer beard, I'm not as eloquent as
13 these gentlemen, either of these attorneys, but it's
14 important enough that I want to make sure I get everything
15 that I wanted to say to you. So if you would just bear with
16 me, I'm going to take my time, because this is an important
17 case. It's an important case, and I will move along as
18 quickly as possible, but it's important that I give you
19 these details and these facts.

20 Thank you on behalf of Ben Stewart, first. I
21 mean, you sat here all week and you have been very patient,
22 and I have looked at the jury the entire week and everyone
23 is always paying attention. Everyone has been alert. I
24 think you realize how serious this is, and I appreciate the
25 sacrifices that you are making. You are away from your

1 family, away from your work, away from your home, and we
2 spent some long hours together. So thank you very much.

3 Let me just tell you about Ben Stewart. Now,
4 there are times during this case that certainly we wanted to
5 say things and we wanted to get up and yell and scream and
6 all that, but there are rules that we have to apply to. And
7 I'll tell you this, though. In this case Ben Stewart is the
8 person you haven't heard anything -- any -- anything about
9 violence. There is no evidence that he's involved with
10 violence. There is no evidence that he has a history of
11 carrying guns. No history of assaults. You have heard none
12 of that.

13 Now, I'm not going to go through the presumption
14 of innocence. The judge will tell you. I think Mr.
15 Swerling did a good job talking about that, but that's
16 certainly important. He has -- he's presumed to be
17 innocent.

18 The burden of proof. Mr. Swerling talked about
19 that. The burden of proof, of course, is very important as
20 well. The burden of proof is beyond all -- it's beyond a
21 reasonable doubt. Beyond a reasonable doubt. What does
22 that mean? If you hesitate to act, if you hesitate to
23 convict, I would submit to you then that you must find Mr.
24 Stewart not guilty.

25 Now, the burden of proof, that's on the State.

1 Mr. Stewart doesn't have to say a word. He doesn't have to
2 say anything. We don't have to present anything. That
3 is -- these principles, I would submit to you, are the
4 cornerstone of our system. I believe it makes our system
5 the best in the world. I believe it makes our system work.
6 And certainly these are principles that everyone is entitled
7 to, regardless of age, sex, regardless if they have hair,
8 bald, big, tall, short. Regardless if they're from
9 Pennsylvania, regardless if they are from North Carolina,
10 South Carolina, it doesn't matter. We are all entitled to
11 these principles.

12 Now, let's just talk about the story of what
13 happened here. And I'm going to go over some things and I'm
14 going to try to recite them as best I can, as I recall them.
15 Throughout this trial I tried to take notes. I don't want
16 to make a mistake. I don't want to mislead you about
17 anything that I heard or that's in evidence.

18 Now, the evidence shows that on or about October
19 10th, 2006, there were three men named Dontavious Mack,
20 Davorius Mack, and Terrell Addison. Together they robbed
21 and caused the death of Mr. Ned Marshall. Now, that's
22 what's in fact. That's who went to the BP station. That's
23 not in dispute.

24 On or about the 11th of 2006, Johnetta Evans, do
25 you remember she took the stand yesterday, and that is the

1 one who called and made a report to the police that the two
2 Mack brothers were involved with the robbery, that they were
3 involved with the shooting.

4 On October 12th, Ms. Evans gives a written
5 statement to the Rock Hill police. I believe it was
6 Detective Haire who took that report. She put everything in
7 writing.

8 October 12th -- excuse me, October 18th Mr. Mack,
9 Davorius Mack, gives another story to the police.

10 Well, let's just go back. Do you remember the
11 Mack brothers telling an elaborate story at first? They
12 tell the story about all the drive-by shooting, the getting
13 shot, the one guy had some dreadlocks, the other had a .22.
14 They go into great detail. They go into an elaborate story,
15 and this is a story that fooled the Hartsville police. They
16 spent hours going out, manpower hours, going out to this
17 crime -- this alleged crime scene. And that's when you get
18 reports -- a phone call from Ms. Wheeler, Ms. Wheeler --
19 Evans.

20 Now, on October 18th, 2006, Davorius Mack gives
21 another statement to the police. Do you remember that?
22 This story contradicts the previous statement.

23 October 19th, Dontavious, the older brother, he
24 gives another statement. He gives another statement to the
25 police. Now, this statement implicates Mr. Addison. That

1 statement contradicts the previous story still, but doesn't
2 mention Ben Stewart.

3 On October 19th, another statement from Davorius
4 Mack. This story contradicts the previous statement, but
5 doesn't mention Ben Stewart. Well, it does mention Ben
6 Stewart.

7 Now, on the 19th you notice, ten days, nine days
8 after this, the name Ben Stewart starts to rise. Before
9 that there is no mention of Ben Stewart. But the two
10 brothers start to mention his name. Now, why is that? I'm
11 not certain, but I can tell you what the evidence I think
12 shows. Ben Stewart is from where? He's from Pennsylvania.
13 He's here visiting his sister.

14 Now, on October 20th, an arrest warrant -- or on
15 or about October 20th, an arrest warrant is issued for
16 Terrell Addison. Now, by this time at some point Ben
17 Stewart has returned to Pennsylvania unaware of any
18 robberies, any warrant.

19 Now, remember this also. The Mack brothers grew
20 up in Hartsville. Terrell Addison's home is in Rock Hill,
21 but he frequents Hartsville, and that's in evidence. He
22 parties there. He spends weekends there, sometimes
23 weekdays, and we know that. And he does know these men.
24 And according to their own statements, I think he testified
25 that maybe they are cousins of some sort, so they know each

1 other.

2 Ben Stewart, on the other hand, there is no
3 connection. He doesn't even live here. He visits his
4 sister. He's here in October of 2006 visiting his sister.
5 He's here on vacation.

6 Well, from their own testimony they don't really
7 know Ben Stewart. They say that. Well, they I think Mr.
8 Addison even mentions "well, I met him the day before this
9 incident." He doesn't really know Ben Stewart. No one
10 knows Ben Stewart, because he's just here on vacation.

11 Misery loves company.

12 Let's talk about the State's case a little bit.
13 We have talked about -- Mr. Swerling went and talked about
14 all of the inconsistencies, and I think you probably are
15 tired of that, because I think you observed all the
16 inconsistencies, but I need to talk a little bit about the
17 State's case.

18 Now, their case against Mr. Stewart is kind of
19 built around the testimonies, the mountain of lies and
20 half-truths that the two brothers are telling. The Mack
21 brothers, both convicted and will serve, keep in mind,
22 lengthy sentences for the related armed robbery and murder
23 of Mr. Marshall.

24 Now, these are the brothers that concocted this
25 story, their elaborate story, remember that they took the

1 officers off the street, went down to the apartments and
2 they looked for hours. Could not find anything to comply
3 with this original story.

4 Now, let's talk about -- and I will get back to
5 the brothers in a minute, but I want to mention Mr. Addison.
6 Now, surprise witness. Not literally surprise, but
7 certainly he was here, but certainly a surprise. What did
8 the story come from? Before he was arrested, went into
9 custody, no mention of Ben Stewart. No mention of this
10 duress. Now, he testified. He went on the stand. Now, did
11 you believe him? No. Do you believe the Boy Scout act?
12 No. "Yes, sir. No, sir." Did you believe that? I don't
13 think that you did.

14 Ben's story were okay up to the point he got -- I
15 guess he had to jump on the bandwagon a little bit to tell
16 you "yeah, Ben Stewart gave Dontavious a gun."

17 Or do you remember on direct? He said -- when Mr.
18 Swerling asked him a question, he said Dontavious got out of
19 the car, went around and got the gun from Mr. Stewart. But
20 when the solicitor asked him a question, he said Mr. Stewart
21 hands the gun up to him. That's a big difference.

22 Then he also says, after I questioned him again,
23 he says no, Dontavious reaches back to get the gun in the
24 back seat to get it. Still, another inconsistency. That's
25 very important.

1 Now, do remember he also is testifying. He's
2 telling you, well, they have ridden all the way from
3 Hartsville, you hear mention of Ben Stewart. He didn't say
4 anything. He doesn't say anything. All of the sudden Ben
5 Stewart appears. Poof. He appears there, according to him,
6 a gun -- first he said the gun is in his lap. Then he said
7 the gun is not in his lap. Then he doesn't see the gun. He
8 wants to jump on the bandwagon. He sat here all this time,
9 has looked at the video, heard the evidence against him,
10 seen the evidence against him and decide "well, I have got
11 to get some of the this off me."

12 And you heard him. He testified. I asked him, I
13 said, "well, tell us, did you just make all this up?" He's
14 listened to the testimony. He has the benefit of listening
15 to testimony all week long.

16 Now, let's get back to the older brother, the
17 other Mack brother, one of the State's witnesses.
18 Davorius -- I mean Dontavious, sometimes referred to as
19 Donte. He's admitted to this offense and he's serving a lot
20 of time. I think there is no dispute about that. It's a
21 serious matter for him. Now, he's a person -- that's
22 undisputed. He's the person that physically shot Mr.
23 Marshall. And I don't think there is a heart -- there's not
24 a heart in this courtroom that doesn't go out to the
25 Marshall family, their friends, for what they are suffering.

1 That's a serious matter a terrible loss to them, but let's
2 talks about who is at fault here.

3 Now, you heard and observed Donte. He was on the
4 stand for a good little while. And I think we have already
5 talked about his inconsistencies in his statement and his
6 lies, but we've also talked about what? Him possessing
7 firearms; guns; his reputation as a thug. Even his close
8 friends said his reputation is a thug. Mr. Evans. I asked
9 Mr. Evans "is Mr. Dontavious Mack the kind of man that needs
10 to borrow a gun?" What did he say? "No", because he's
11 possessed guns. He has guns.

12 It doesn't make any sense -- I submit to you it
13 doesn't make any sense that Mr. Stewart, who has -- there is
14 no history, no mention that he's ever had guns before this
15 case. The police never told you that. They didn't say he
16 had guns, possessed guns. But Dontavious, he doesn't need
17 to borrow a gun. It's like telling Betty Crocker, you know,
18 Betty Crocker needs to borrow a bowl, a cooking bowl. He
19 doesn't need a gun. He has guns.

20 And so do you remember this is -- Dontavious is
21 also the one that's been convicted of assault of a high and
22 aggravated nature. He's also the one that you were told
23 that pulled a gun out and threatened Ms. Evans. Where did
24 that gun go? Why would he need a gun? He doesn't need a
25 gun, because he has one. He has guns, in fact, and he's

1 admitted to having guns.

2 He's the person that you see on the video that
3 goes into the BP station, well lit, bold and bad and robs
4 the place and fatally shoots Mr. Marshall. He's the person
5 that -- did he appear to be a person that needs a gun to
6 borrow a gun, or does he look like someone who handles guns
7 all the time?

8 And I also asked him -- I asked Donte, do you
9 recall? I asked him why did he tell his elaborate story to
10 the Hartsville police? And I asked him "are you trying --
11 were you trying to play them," and he said "yes."

12 Members of the jury, unfortunately he's trying to
13 play you too. He's trying to play all of us.

14 Oh, let me also mention this. He's the one also
15 that assaulted a man because this guy owed him money.

16 You bet your bottom dollar that Dontavious is in
17 misery. Nobody wants to serve time in prison, or a lengthy
18 sentence. He will never have the same opportunities that
19 you and I have here, opportunities to walk in the park, to
20 gather with our loves ones whenever we choose; to talk on
21 the phone when we choose; to go see a movie when we choose;
22 to go to the mall when we choose. That's misery, and we
23 know that misery loves company.

24 Now, he's also the person that asked "well, do
25 you -- "do you care about the waste of time for the police

1 officers, the time they wasted?" And he says "I didn't care
2 enough to think about that."

3 Let's talk about the brother. You have kind of
4 double trouble with the brother. This brother didn't think
5 enough to care, because I asked him that. He didn't think
6 enough to care. He didn't think about this elaborate story.
7 Now, he told you four different stories. He submitted four
8 difference stories in to the police. Four different
9 stories. And out of all of them, I think he mentioned Ben
10 Stewart on the third one, around the 19th that his name
11 comes up. You notice that? Friends, Mr. Evans, the
12 Dontavious, Donte start to mention? Had they been
13 conversing about this? I don't know, but they know he's in
14 Pennsylvania and they know he's going back, because that's
15 where he's from.

16 And do you remember, I asked Davorius about a knot
17 that Mr. Stewart put on his head? Now, when I asked him
18 that, he didn't deny it. He just said "what fight?" He
19 didn't say there wasn't a fight. Now, he's a tough guy, so
20 he's not going to admit that he jumped on the wrong person
21 and got a knot beside his head. He's also the person, with
22 his brother, that is at the scene of the crime. That's not
23 in dispute. He's pled guilty already. He's at the scene.
24 He tells you that.

25 Now, we need to talk about his guilty plea. Let's

1 talk about his guilty plea for a little bit. Just bear with
2 me. His guilty plea. Now, do you remember he's given two
3 other statements before that, right? These are two
4 statements that the State kind of wants you to ignore, but
5 you can't do that. You have got to take the good with the
6 bad.

7 The plea agreement only mentions two statements;
8 the 19th and the 27th. Well, do you remember the 19th? We
9 explored that. Even the story on the 19th that he has put
10 in his plea agreement went before the court and said "I'm
11 telling the truth. I swear this time." There are lies in
12 that one.

13 There are also lies in the 27th.

14 This is the two key witnesses for the State. Do
15 you remember? The two brothers that brings you double
16 trouble.

17 Now, do you remember he also testified. He
18 testified that if he knew he was going to Rock Hill, he
19 would have brought a gun with him. Well, he doesn't have to
20 look too far for a gun, does he, because his brother has a
21 gun. His brother carries guns. He also admits that he has
22 used guns before. He has seen guns before. He's fired
23 guns. He's admitted to that.

24 Now, he's also admitted -- he's been in custody
25 since the latter part of October of 2006. He came straight

1 out and said "yeah, I'm in misery." And, what, misery loves
2 company.

3 Something that I definitely want to mention to
4 you, and I know it came out in the State's case. They were
5 talking about this number, and I believe that the young
6 lady's name is Makisha or Krisha Johnson. And there is some
7 testimony that this was a woman -- at least a phone number
8 was related to her. This was a woman that Mr. Stewart had
9 some encounter with, but they tried to make her out to be
10 the girlfriend of Mr. Stewart, because -- do you know why
11 they did that? Because some -- I think it was either
12 Donte's phone or Davorius' phone called that number. I'm
13 not quite sure what that means, but -- I don't know what the
14 two brothers were doing, but they were calling this number
15 when they were in Rock Hill. No mention of Mr. Stewart's
16 phone, cell phone, calling her. No mention of that.

17 And they also mentioned that Davorius and -- one
18 of the brothers called Mr. Reed, but not Mr. Stewart's
19 phone.

20 Now, Mr. Reed is somewhat of an interesting
21 witness and he's important. He's important, because what
22 did you hear? Mr. Reed is the person that allegedly these
23 guys, the morning after, at some point -- well, I'm not sure
24 what time, they come to his house. Now, what he says that's
25 important, and you have to listen to and watch his statement

1 very carefully, and Reed -- do you remember his statement,
2 his testimony, and we talked about that and that's
3 important, because what he does say is that "well, at some
4 point that morning these guys came to my house." And I
5 asked him, I said "did they come together?" He goes "no, it
6 appears that they came separately, because they didn't come
7 in the door together," which even goes to Mr. Addison'
8 testimony. He said "yeah, Ben arrived there later. We had
9 already gotten there." Ben arrived.

10 Now, we know there is some discussion. You know,
11 that's not in dispute. There is -- there is some
12 discussion. But do you remember what he said? He said they
13 talked about Donte, Dontavious, getting shot. They never
14 mentioned anything about a robbery. No one ever mentions
15 that. In fact, I asked direct a question. He said no,
16 there was no mention of a robbery. No mention of a killing.
17 The only things he mentions is about a gun in a
18 conversation.

19 Now, even -- and he never says this gun is the
20 .380 that was involved. No connection whatsoever. But what
21 he does say -- now, this is a Tuesday morning, I believe.
22 He says "I had been drinking. I had beer and something
23 else." He's consumed something else. I'm not sure how good
24 his memory is at this point, but this is about pretty early
25 in the morning, on a Tuesday morning. He's not working.

1 He's somewhere at home, drinking early. I don't know what
2 that means.

3 And I asked him, I said "well, was there any
4 mention of a conspiracy that Ben was involved?" No mention
5 of that. No mention of anything.

6 Well, I would submit to you that Mr. Stewart was
7 twenty years of age at the time. And that as -- twenty
8 years of age at the time. And under the laws of South
9 Carolina at the time, someone under twenty-one years of age
10 could not have a firearm. Now that rule has been changed,
11 but at the time if Mr. Stewart -- if Mr. Stewart had
12 possessed a firearm, that would be illegal. But let's talk
13 about it now and move on. There is no mention whatsoever in
14 that statement, in that statement, or in his testimony that
15 Ben was involved. Ben comes later, talks about a gun. We
16 could speculate what that means, but I know one thing that
17 it doesn't mean. That statement -- that interaction doesn't
18 mean nothing about a conspiracy. No one ever mentioned that
19 while Ben was present. Ben never mentions that. You may
20 not like that, but there is nothing going on there that was
21 illegal. Certainly not illegal right now.

22 Now, this is what's interesting. You heard
23 discussions at the house. Do you remember that morning?
24 And this thing is important. This is important. Monday and
25 Val. There was discussion about Monday and Val, who is also

1 at the house. Now, that's in evidence. Mr. Reed -- Mr.
2 Reed Allen was the one that discussed -- that said that.
3 Well, again, Mr. Stewart doesn't have to prove anything, but
4 you think, though, you think that we would have heard
5 testimony from either Monday or Val. Val certainly could
6 have possibly cleared this whole thing up, but I don't think
7 there was any mention of her. Who has a resources to bring
8 her here? Who has the recourses to order her here to hear
9 what she has to say? There's not a statement from her. No
10 mention of her. That is the one person that could have
11 cleared this whole thing up involving my client, but you
12 never hear any mention of her. You better believe if she
13 had something that would have implicated my client, what do
14 you think? They would ordered her to be here. Someone
15 would have found her.

16 Now, at the beginning of the case I talked about
17 the State's hodge-podge of charges that kind of reminds me
18 of my sister's, you know, soup, stew, if you will, where she
19 would put everything in. You know, a little bit of this, a
20 little bit of that, a little bit of leftovers from here, a
21 little bit of leftovers from the refrigerator, fish, fish
22 heads and chicken feet, everything, hoping that her younger
23 siblings would enjoy it, would find something that we could
24 hold on to. Good person, but wasn't very good. Nothing
25 stuck. Hodge-podge.

1 And it's no elaborate defense, except Ben Stewart
2 wasn't there, didn't conspire, wasn't involved.

3 But it's important that I mention what is in
4 evidence and what the State does have. Now, the State can't
5 avoid this or minimize it. They have tried to, but they
6 can't do that. What does the forensic evidence show?
7 Nothing for Mr. Stewart. Nothing for Mr. Stewart. Nothing
8 for Mr. Stewart.

9 Allegedly in this -- this is the car, remember?
10 The car that we made a big deal out of. This is the car
11 that had Dontavious Mack in it, Davorius Mack, Terrell
12 Addison, and allegedly Ben Stewart. Well, what do we have?
13 The forensics does not connect Ben Stewart at all to this
14 car. Now, this is a car that was driven from Hartsville to
15 Rock Hill. While in the car, Mr. Addison testified these
16 guys were drinking, smoking. No evidence. Where is the
17 evidence? They may try to minimize it, but you can't avoid
18 that. It's a science, and that's something that we had to
19 observe. It's something sophisticated people collected.
20 Trained people with fourteen years of experience collected
21 and took to the lab, where smart people could look at this
22 stuff. It's not all -- you know, we may not be able to
23 understand, but what do they say? And they rely on this,
24 but there is no evidence.

25 Now, let's talk about -- and I'll talk a little

1 bit about the fingerprints. Now, there were several latent
2 fingerprints and palms that were taken. A match was made to
3 Davorius and Mr. Addison. No doubt about that. No
4 fingerprints to Dontavious. But, remember, he's the one
5 that had on the gloves in the store, didn't he? You saw
6 that more than once. He has on gloves. No evidence that
7 Mr. Stewart had on any gloves, is there? Uh-uh. No
8 fingerprints.

9 Now, this is allegedly the man who has been in and
10 out of the car, who has been drinking in the car, been
11 smoking in the car, has ridden in the car for hours. Now,
12 they took over twenty items that were submitted for DNA
13 matching. Ben's DNA was not matched to any items submitted.
14 Moreover, out of the items examined for Ben's DNA, Ben's DNA
15 was conclusively excluded. No question. His DNA is not in
16 the car. His DNA was not collected.

17 Now, let's talk about -- I want to make sure I get
18 this right so you understand it. However, the items
19 examined for the others DNA, there was no conclusion made
20 regarding the inclusion or exclusion of Dontavious,
21 Davorius, or Terrell. In other words, they could have been
22 a contributor, or not. Now, I don't know what that means,
23 but I know they are relevant. Does that have anything to do
24 with it? I'm not a scientist. Maybe they had something to
25 do with it, maybe not. Maybe that's why it came back

1 inconclusive. It came from somebody. But we don't even
2 need that to put them in this case. What do we have? We
3 have testimony from them. We have testimony from Mr.
4 Addison that he was there, but there is no evidence that Ben
5 Stewart was there.

6 And if that's not enough, let's talk about
7 Johnetta Evans. She told you that she heard clearly,
8 crystal clear, that when these guys were discussing the two
9 brothers, the one had brought the double trouble, that you
10 hear no mention of Ben Stewart. No mention of Ben Stewart.
11 You hear that name sometime later as part of a concocted
12 scheme. You heard that name much later, but no independent
13 person.

14 Now, let's talk about also that I think is
15 important. Do you remember Ms. Qiauna Efrid? That's the
16 lady that took her time out, that the State certainly can't
17 hide from, because she has nothing to do with this case.
18 She doesn't have a dog in this fight. She came here. She
19 put her hand up and testified, and testified truly. She
20 lives out there where the car is parked. The first thing
21 she told you, what did she hear? She heard three voices.
22 She was specific. Three voices, three car doors slam.
23 Dontavious, Davorius, Mr. Addison. No, not four, but three.
24 You have to remember this. Now, neither of you have nothing
25 to do with it.

1 She testified the next day. We asked her to come
2 back. She took her time from work and came back and she
3 testified that her window was up, that her apartment is
4 maybe ten feet from the car. Now, remember, Davorius says
5 while Mr. Addison and Dontavious were at the store, he's
6 having a discussion with Mr. Stewart. Do you remember that?
7 He testified to that. Ms. Efird says she didn't hear any
8 discussions, that she probably would have heard it. Her
9 window is three feet away -- or ten feet away. She doesn't
10 hear that. There is no discussion.

11 And the State also asked well, did you see this,
12 did you see that?

13 Well, also remember, and this is very key, that
14 they also testified that at this time Mr. Stewart is outside
15 the car running around. This concoction is made up whenever
16 to lie. But she didn't the say that, does she? No, what
17 she sees is -- what she hears is three people talking, three
18 people coming, slamming the car door. Nobody yelled "Ben,
19 get in the car." She didn't say that, but they tell you
20 that that's what happened.

21 Mr. Addison tells that you that, after he listens
22 to all week long that's what happened, after he had the
23 benefit of sitting here.

24 If that wasn't enough, Ms. Evans, she wasn't
25 enough. Ms. Warner, another witness that the State tried to

1 minimize or get around. She came here from work. She
2 testified under oath, what? She saw two people running to
3 the car and gets in the car. Yeah, two people. Nobody
4 running around yelling "Ben, get in the car." She hears two
5 voices, maybe two voices, she indicates. Not quite sure,
6 but does not say she hears four voices. Certainly doesn't
7 hear anyone say "Ben, get in the car."

8 Now, of course, the State asked her "could you see
9 in the car?

10 "No."

11 But what's important is what she saw or didn't see
12 outside the car. She didn't see anybody running around away
13 from the car, like they testified to, like double trouble
14 and now a third one. She didn't see that. Now, these are
15 witnesses that had -- they have no dog in this fight. They
16 came here to tell you the truth. Clean witnesses. DNA.
17 Clean witnesses. Can't get around that.

18 And one other question that I want -- one other
19 thing I want to mention. Do you remember when I asked Mr.
20 Addison "have you sat here and tailored your statement, your
21 testimony, to fit what you heard?" At first he said "yes."
22 Then he quickly says "no." Y'all think about that. And I'm
23 sure the solicitor will tell you what solicitor did to him
24 about his credibility. Would you believe that? No, I don't
25 think so.

1 The State has the burden in this case. These are
2 serious charges, and I'm asking you to have faith in the
3 witnesses that have no dog in this fight. Have faith in the
4 DNA. Don't rely on people who have something to gain from
5 this. It is too serious to rely on inconsistency lies,
6 people who have something to gain from this. It's too
7 serious. This will affect his liberty. That will affect
8 his liberty. I don't have to tell you how serious they are.
9 Serious. Rely on what you can rely on, what tells you. The
10 science testimony from witnesses who have nothing to do with
11 this.

12 I won't have the benefit of coming back and
13 testifying -- or talking to you again. Now, my good
14 colleagues here, they have taken note of what I have said
15 and they will have an opportunity, and there is nothing
16 wrong with that. That's fair game. They have had an
17 opportunity to listen to what I had to say and they will
18 probably come back and say "well, find a little hole." And
19 I will be sitting there wanting to get up and tell you "no,
20 no, no. Remember this and remember that." I can't do that,
21 even though I want to. We will be sitting there wanting to
22 respond. I cannot do that.

23 I'm asking you, I'm asking you -- begging you,
24 well, listen to the evidence. Trust what the evidence has
25 said, not witnesses that have something to gain from this.

1 And even Mr. Reed had a little to again. We have nothing to
2 prove. The judge will instruct you of that.

3 Misery loves company. Ben Stewart is not guilty
4 of any of these charges, these allegations. Ben Stewart is
5 not guilty, because the State has failed to meet their
6 burden beyond a reasonable doubt, the kind of doubt that
7 would cause you to scratch your collective heads to
8 hesitate. He's not guilty, because he simply wasn't there.
9 Why they picked him, I don't know, but the evidence says he
10 wasn't there. And I'm asking you to listen to the evidence,
11 believe the evidence, and listen to the judge when he tells
12 you the law.

13 Thank you so much for your time and your patience.

14 MR. BRACKETT: It's going to take me just a couple
15 of minutes to get my computer set up. Do you want to stay
16 in here, if you want, Your Honor, or if anybody needs a
17 break, we can.

18 THE COURT: It's going to take a few minutes for
19 the solicitor to set up and get his equipment going. Does
20 anybody need a short recess while we are doing that, or do
21 you want to go ahead?

22 (No response)

23 THE COURT: Raise your hand if you need a short
24 recess.

25 MR. BRACKETT: Well, let's just go.

1 THE COURT: Take your time to do what you need to
2 do, solicitor.

3 MR. BRACKETT: Yes, sir.

4 (Off the record)

5 (Back on the record)

6 MR. BRACKETT: May it please the court?

7 THE COURT: Solicitor.

8 MR. BRACKETT: Counsel.

9 MR. SWERLING: Yes.

10 MR. BRACKETT: The last thing that Ned Marshall
11 did before he died on October 10th on the floor of the BP
12 convenience store on Celanese Road in Rock Hill, the last
13 thing that he did before he laid down for the last time was
14 solve this case. The last act of Ned Marshall was to set in
15 motion a chain of events that would solve this crime.

16 You can't see it here too well. You will have
17 this picture back there. I tried showing it before.

18 Hold on just a second.

19 At about here on this picture. It's much more
20 visible in this one that you will have back in the jury
21 room.

22 This is State's Exhibit 15, is the bullet hole.
23 Mr. Marshall fired this gun and caused that Dontavious Mack
24 ran out of the store. Once that bullet hole was put into
25 Dontavious Mack's back, he had no choice but to go to the

1 hospital. And once he went to the hospital, the doctors at
2 the hospital had no choice but to call the law, because they
3 have to report shootings under these circumstances. And
4 they knew that. They knew that before they ever got back to
5 Hartsville. They knew that they would have to explain the
6 bullet hole in Dontavious Mack's back, so they concocted the
7 Farmington story. They came up with a drive-by and said
8 "that is how Dontavious Mack got shot in the back and that's
9 what we are going to tell the police in Hartsville when they
10 come to the emergency room and ask us how he got shot."

11 Now, I'm going to come back to that in a minute,
12 but what this case comes down to are two questions, because
13 really Mr. Addison's defense has resolved all of the other
14 things that we might have to prove. Was Mr. Addison even
15 there? We don't have to prove that. He's admitted he's
16 there. Was he wearing a mask? We don't have to prove that.
17 He has admitted he was. The only issue that y'all really
18 have to resolve is was Mr. Addison acting voluntarily or was
19 he under duress.

20 As far as Mr. Stewart, I said Mr. Stewart's only
21 question is was he present. And I have that in quotation
22 marks, and I have it in quotation marks for a reason,
23 because there is two ways - legal presence, and what that
24 means, and I'll explain that when I get to the law in a
25 little while; and then the present in the sense that Mr.

1 Snow argues present, in trying to say we haven't proved he
2 was even in the car, that he was even in Rock Hill that
3 night, that we have failed to prove that. I submit that we
4 have.

5 Then the only question we contend that you have to
6 decide is was he present in the sense of present at the
7 scene of the crime, such that that would make him a
8 principal, and I'll explain that in a minute, and thus
9 guilty of murder; or did he just aid the principle murderer,
10 which was Dontavious Mack? Did he just aid Mr. Mack, and,
11 therefore, is only an accessory, that he's an accessory
12 before the fact to murder and armed robbery? Because if you
13 decide he wasn't present, then you convict him of accessory,
14 if you think he aided and abetted the crime. But if you
15 think that his location there at the Northwoods Apartments
16 and providing the gun was sufficiently close to the BP to
17 count as being present at the scene of the crime, then you
18 can convict him of murder.

19 You cannot convict him of both. You cannot be
20 both present at the scene of the crime and an accessory
21 before the fact.

22 So our contention is the only thing that you have
23 to decide is was he legally present. We submit that we have
24 clearly proven that he was physically present at the car.

25 Now, how did we do that? The case for the State -

1 Dontavious, Davorius, and Reed Allen. These were the first
2 three witnesses out of the gate.

3 Let me just say something at the outset about
4 Dontavious, Davorius, and Reed Allen, particularly
5 Dontavious and Davorius, because I don't think Reed was that
6 bad. But Dontavious and Davorius, I didn't pick them to be
7 my witnesses. I didn't want to bring them into this
8 courtroom and sit them down in that witness chair. That
9 wasn't my call. I'm not the one who decided to come to Rock
10 Hill and rob the BP and shoot Mr. Marshall with Dontavious
11 and Davorius Mack. That wasn't my decision. That was Mr.
12 Addison's decision and Mr. Stewart's decision. They are the
13 ones who decided that the people you had to hear from in
14 this case were the Mack brothers. That was their call, not
15 mine. I can't help who they chose to conspire with. I'm
16 stuck with the Mack brothers too, and they're not good.

17 Everybody else. The police and the citizens. The
18 citizens are a little bit important. The police did a great
19 job, but basically this case was solved on the tip of
20 Johnetta Evans and Tiyone and the statements of Dontavious
21 and Davorius and Reed Allen.

22 Now, let's take each of these folks in turn,
23 Dontavious and Davorius, particularly.

24 Mr. Swerling and Mr. Snow did a fine job of
25 pointing out all the little inconsistencies and telling you,

1 you know, "well, you said this thing on this statement and
2 this thing on another day."

3 And Mr. Snow, "you told the police in Hartsville
4 that you were shot at Farmington, and you knew they were
5 going to go down to Farmington Apartments and waste their
6 time trying to investigate a drive-by that never happened.
7 Dontavious, shame on you. How could you do that to those
8 poor Hartsville police officers?"

9 Do you really think that Dontavious, sitting there
10 in the emergency room in Hartsville with the police officer
11 in front of him, knowing in his mind that he just shot and
12 killed a man in Rock Hill, really had a hard time? Do you
13 think he had a crisis of conscience at that moment and went
14 "I can kill a man, but I just can't lie to these police
15 officers about how this bullet ended up in my back." Of
16 course he's going to tell them that it was some bogus
17 explanation. He can't tell them the truth. And they want
18 to act like this is some big, oh, this -- "you can't trust
19 him. He lied to the Hartsville police." So what? He was
20 trying to cover his butt. Of course he lied to them.

21 He's a murderer. He's a thug. He carries guns.
22 He's a bad dude and he's in jail for the rest of his life
23 without parole. Thank God, because that's right where
24 Dontavious Mack belongs.

25 Mr. Swerling, Mr. Snow, they point out all these

1 little inconsistencies in their statements, but you know
2 what? The one thing that they couldn't do, the one thing
3 that they couldn't do? Mr. Swerling stood up here for
4 almost an hour talking about how they are trying to put it
5 on Terrell, trying to put it on Ben, the whole -- put it on
6 Terrell, put it Ben. They colluded. He and Davorius
7 colluded to put this whole thing on Terrell and Ben.

8 But the one thing that makes Dontavious' final
9 statement to the police, the one he gave to the Rock Hill
10 Police Department and is listed as State's Exhibit 3, the
11 one thing Mr. Swerling and Mr. Snow could not explain, and
12 they could come back up here -- and Mr. Snow said "I don't
13 get to come back up and respond." They can tell you all day
14 long, and they will never, ever, ever be able to explain why
15 when Dontavious finally gave it up, he put the murder weapon
16 in his hand. If he's telling a lie, don't you think that
17 Ben Stewart would have been the guy who was shooting Mr.
18 Marshall in the store? Why? If he's colluding?

19 I mean, suppose that Davorius and Donte had a
20 moment or two together and they said "all right, we got to
21 come up with a plan. The cops know about this BP thing.
22 They are about to come in and question us. What we going to
23 tell them."

24 "Okay, I got it. We will say that you went in and
25 shot them."

1 "Yeah, that works for me."

2 "Okay. You tell them that you went in and shot
3 him and I'll tell them that you went in and shot him."

4 Do you think that's what they really did? Or do
5 you think maybe they were confronted with the evidence and
6 they just gave it up? I mean, when they gave it up, they
7 told the truth, generally, about what happened. Not in
8 every specific. And is every detail corroborated between
9 Dontavious' statement and Davorius' statement? Who was
10 driving? Did they go to Tasha's apartment before they went
11 to the hospital or after they went to the hospital? Did he
12 get the bandana out of the trunk? Did his hair parted to
13 the right or to the left? Did he have a sausage biscuit or
14 was it a ham biscuit? Who cares? What difference does that
15 make? He said they went in the store and "my brother. My
16 brother killed that man."

17 Dontavious said "I went in the store. I killed
18 that man. I killed that man." He sat in this chair, in
19 this courtroom in front of you, in front of each and every
20 one of you and said "I am a murderer. I killed Ned
21 Marshall. I held the gun. I pulled the trigger. I pointed
22 it at him and I took that man's life. I did it."

23 And they said "oh, but you can't trust him. You
24 can't trust his statement in court here today. You can't
25 trust him and here is why. This is why you can't trust him,

1 because he's trying to help his brother Davorius. He's
2 going to get credit for Davorius by coming in here to
3 testify."

4 It's a fair argument. It's a fair argument, but
5 what was he getting back in October of 2006, when he made
6 the same statement to the Rock Hill Police Department? What
7 was he getting then? Nothing. No deal had been cut. He
8 had just been arrested. He just told the truth. He didn't
9 have any reason, except he wanted to unburden himself. He
10 knew it was over and he just gave it up and he put the gun
11 in his hand. He threw himself in the jackpot. And he
12 put -- Terrell was there and he put his own brother back in
13 the car. He got him mixed up in the middle of it and said
14 "I got the gun from Ben."

15 Davorius said the same thing. He put his brother
16 in the store with the gun killing the man. When he
17 testified, he said "oh, he's going to get a deal. He wants
18 a break on his charges." Of course he does. He's a human
19 being. He doesn't want to go to jail for any longer than he
20 has to. Is he going to lie to protect himself? Dah? These
21 are thugs. Yeah, he's going to lie to protect himself, but
22 they can't explain why on 19 October 2006, before he ever
23 had any deal at all, he said the same thing; "my brother
24 went in the store." He can't explain it.

25 They're not smart. Mr. Swerling says they are

1 street smart. They're not. The story about the Farmington
2 Apartments, what did you hear Lieutenant Rudick from
3 Hartsville say about that? What did he tell you? He said
4 "well, we were there about 7:30, eight o'clock in the
5 morning, just after breakfast, and we pretty much knew that
6 was crap by about twelve. We had that worked out by lunch,
7 because there was absolutely no evidence to support it."

8 They were too stupid to say it was one shot, which
9 might be believable and maybe nobody heard it. Instead they
10 had four guys leaning out of a car with semiautomatic
11 weapons and rifles and firing multiple times, should have
12 made enough racket to wake up the entire neighborhood in the
13 middle of the night. They weren't thinking. They are not
14 smart. They can't come up with a story that's believable
15 and credible and can stand the test of investigation. They
16 can't do it. They are just not that smart.

17 But this one did. This one did. On the 27th when
18 Davorius said "this is what we did with the gun. We went
19 over and we saw that guy name "Wise". I don't know what his
20 name is, but I can show you where he lives." And then at
21 that time Mr. Stewart gave the .380 over to "Wise" in a bag
22 and he put it under a bush and blah, blah, blah, and they go
23 to Hartsville and puts that in the statement on the 27th.

24 And they go and talk to Reed Allen. Reed Allen
25 didn't know they were showing up. They talked to him on the

1 27th, the same day Davorius told them where the gun was.
2 They walk in on Reed and go "hey, how are you doing? I want
3 to talk to you about something that happened three weeks
4 ago," and Reed goes "oh, my God. I'm an idiot. I'm an
5 idiot. Why did I take that gun? I'll tell you about it. I
6 got to get myself out of this. I was a fool." And then he
7 tells them the same thing that Davorius told them, that Ben
8 shows up with a plastic bag with some tape, some cloth items
9 in it, puts it under a bush, and a few days later he gives
10 it back to Ben. "Did Ben go get it? Did he go get it?"
11 Who cares. The substance of the story is what matters. The
12 substance of the story.

13 And by the way, they made a point a few minutes
14 ago, Mr. Snow did, about saying "well, why didn't they call
15 Val?" Where did they say that they were? They were at
16 Monday Bishop's apartment. Who is Monday Bishop? Monday
17 Bishop is Ben Stewart's sister and she was there too. How
18 far wouldn't she drive to come here to court?

19 MR. SWERLING: Objection. Burden shifting.

20 MR. BRACKETT: No, Your Honor, he chose to put up
21 a defense.

22 THE COURT: Overruled.

23 MR. BRACKETT: How far wouldn't she drive to come
24 here to say things didn't go down that way? She was right
25 there too.

1 Davorius Mack. Many of the same things that apply
2 to Dontavious apply to Davorius. I spoke to them
3 interchangeably. Neither one of these guys are anybody that
4 you would want for your friend. Neither one of these guys
5 are the kinds of people that you hang out with.

6 Terrell, when he was on the stand, he's talking
7 about "they are trouble. Yeah, I knew they were dangerous."
8 Everybody knows what bad guys they are. Well, trouble
9 follows them around. They carry guns. They shoot people.
10 They rob places. You know, just being around them is like
11 being around an unstable grenade. You never know when it's
12 going to go off and trouble is going to blow up on you, too,
13 so it's best to stay away from them. "They're bad news. I
14 always knew they were trouble. That's why I got a ride home
15 with them that night."

16 He admitted right up front, Davorius did, that the
17 statements that he made to the Hartsville police department
18 were flat out lies. He said that. Of course, they were.
19 They all talk about the Farmington drive-by.

20 Garbage one. Garbage two. Useless. They're
21 lies.

22 Davorius' second statement, this one here. It's
23 dated the 19th. It starts out being junk. "There was a
24 car. We were walking down the street. We were going to my
25 friend Tequila's house," this, that, and the other, blah,

1 blah, blah. "Okay, stop right now. I want to get this
2 right." He stops, literally. Read the statement. The
3 first page of it right there. He says "I stay on the block
4 until like it's about nine p.m. and I went to Natasha's at
5 222 Clarence Circle. They came," and the sentence stops
6 right in the middle. It's almost as if you are just sitting
7 there in the room with Davorius when he has that moment of
8 going, "okay, this is a load and they know it. I got to
9 tell them the truth." They literally stopped the sentence
10 right in mid type. I mean, you can see the detectives
11 going -- and as Davorius, the light goes off and he just
12 says "I'm just going to give it up."

13 And then they start the next paragraph. "Okay,
14 stop. I want to get this right," and then he just jumps
15 right into the robbery. "Terrell was with my brother in the
16 store, not me. I was in the car. Terrell was driving the
17 car. Ben was in the back." And it just goes on and he
18 gives it up, right there at the end.

19 "Donte says to Terrell in the car why did you not
20 grab the dude? You are the reason I got shot. Terrell say
21 you had already shot the dude in the hand. That's why I
22 ran. They said they didn't get no money, and I know my
23 brother didn't have any money on him at the hospital."

24 He admits right in there that his brother was the
25 shooter. That has a ring of truth to it, if you want to

1 talk about the truth, when you give up your brother. When
2 you are Dontavious and you give up yourself, that's the
3 truth. When you are saying "I'm the shooter" -- when you
4 are saying "my brother was the shooter," that is when you
5 are telling the truth.

6 Nobody has given one good explanation. There is
7 not one good reason in evidence that you can point to as to
8 why they would want to put anything on Terrell or Ben.

9 One little detail we threw in right at the end was
10 about the rim shop. Davorius' testimony. It's not in his
11 statement, but he mentions it when he's on the stand.
12 "Yeah, we stopped at a rim shop and we kicked the door
13 trying to break in and the alarm went off, so we ran."

14 And Officer Lambert said "as a matter of fact,
15 there was an alarm call at Sounds on Wheels on Cherry Road,"
16 the rim shop.

17 Reed Allen, he's the littlest guy in the entire
18 thing. I went over him a little bit. He's the smallest
19 fish in the pond. He is absolutely -- he is not in Rock
20 Hill. He has the least to lose. He did one stupid thing
21 and he immediately made it right. When the police
22 confronted him, he gave it up right away. He didn't try to
23 come out with one story. "Yes, they came over," and
24 substantially what he told is what he said on the stand.

25 I don't know why he didn't mention a .38 in

1 Terrell Addison's waistband until he got on the stand.
2 Maybe they didn't ask him when they interviewed him. All
3 they were there to talk to him about was the .380, the
4 murder weapon that they were looking for, so they could get
5 bullets to match up the bullets that they found in the
6 store. But there is no question, the consistency between
7 the statement on October 27th, 2006, and the testimony from
8 the stand. "They came to my house. They had the gun in the
9 bag and some cloth items that were in the bag. I hid it and
10 Ben Stewart came back later and got it from me."

11 There he is right there, pointing out.

12 We've heard the testimony from Detective Haire.
13 He prepared that lineup and said "do you see the other guy
14 that was in there?" So there is no question that he
15 identified Terrell Addison as being one of the people that
16 came to his apartment. The only thing that's wrong on that
17 is the day. It says 10-28, and he corrected that. That was
18 a mistake. He signed it on 10-27. The same day that he
19 signed the statement, 10-27-2006, he signed that picture of
20 Terrell Addison and says "yeah, that's the guy. I have seen
21 him around before. I recognize him. He was the one with
22 the .38 in his waistband. He was the one that came there
23 with Davorius and Ben."

24 What did the police do? Well, as I mentioned a
25 few minutes ago, this case was solved by a tipster.

1 Johnetta Evans and Tiyone Evans had talked to Dontavious
2 Mack. Remember? And Mack took the stand and said "yeah, I
3 talked to them." And they called the police.

4 And based on that, Brian Rudick calls over to the
5 York County Sheriff's Office and says "you guys got a
6 convenience store robbery shooting?" The sheriff's office
7 says "we don't, but the Rock Hill city police do." They get
8 in touch with Detective Haire and Captain Thickens and it's
9 on. They are down to Hartsville.

10 All the forensics and the interviews are
11 consistent on the important points. If they were all
12 consistent in every regard, it would almost be more
13 suspicious. If everything was right on point, everybody was
14 separated, the defendant gave the identical stories, it
15 would -- it would almost sound like the Farmington drive-by
16 story. There is going to be differences of whose -- did
17 they get the bandana out of the trunk or did they have it in
18 his pocket? I mean, these are small things. Who we went in
19 the store, that doesn't change. That is consistent. And
20 now you know it's a fact, because Dontavious, the shooter,
21 has come into the courtroom and told you "yeah, I was the
22 one guy." And Terrell Addison has come in and told you that
23 he was the other.

24 They did a thorough investigation. You saw from
25 the crime scene testimony that Mike Williams -- they

1 couldn't -- there was no evidence that they did not look for
2 in that store, but at the time they were searching through
3 that store, with the blood still on the floor and wet, they
4 didn't have any information about who did it, so they didn't
5 know what was going to be important later, but they
6 collected every single thing they could. Found multiple
7 fragments of bullets scattered throughout the store. Took
8 swabs, gathered hair, fibers. Anything at all that they
9 could find that could possibly help them solve this case
10 they were on.

11 Now, let's talk a little bit about Qiauna. Do you
12 remember, it's not ten feet away. Her apartment is -- we
13 are standing with our back to her building and this is the
14 wall that they climbed over. That's where the footprint was
15 found. And then about ten or fifteen feet past that is
16 where their car was parked. She is asleep when she hears
17 the noise. But what does she tell you? Her window was
18 open. And she talked about the trash can banger. Well, I
19 don't know who the trash can banger is, but I appreciate the
20 fact that he was out there banging on that, because you know
21 what? It makes Qiauna Efird a little more attentive that
22 night, because she thought it was the notorious trash can
23 banger coming back with a ball bat and beating on her
24 dumpster again, and she was determined to find out what it
25 was all about. Instead of just laying there going what's

1 that all about, she thought she was going to go see if she
2 could see who the trash can banger was that night, so she
3 got up out of her bed and she went to the windows in her
4 house to look and see what was causing the noise.

5 What did she say? She heard two voices coming
6 from off on one side and one voice off towards where the car
7 was. And the two voices over on the side over here, one
8 voice says "hurry up, man." The other voice says "I'm
9 shot." Then the voice over by the car says "hurry up, get
10 in the car."

11 "Hurry up, man," does that sound like somebody who
12 is under duress, or does that sound like somebody who is
13 willingly cooperating with the guy who was shot? Does that
14 sound like somebody who was being forced to do something?
15 He's telling him to hurry up. He's just as anxious to get
16 out of there as the guy who is shot. The guy who is shot is
17 lagging behind because he's shot. He doesn't know how bad
18 he's hurt. Does that sound like an uncooperative person, or
19 does that sound like somebody who was freely and voluntarily
20 joined the robbery at the time?

21 Now, without question, the best witness for the
22 State, without question, the best witness for the State was
23 Mr. Addison. He did a fine job, a wonderful job testifying,
24 and we are going to go through his testimony in detail.

25 You will recall he took the stand and basically

1 told you good guy, goes there every weekend and hangs out
2 with the family. You know, maybe meets a girl, but nothing
3 really bad. He stays away from those Mack boys, because
4 everybody knows they are trouble, but that night he decided
5 he needed a ride and they were heading that way, so he asked
6 if he could hitch a ride and said that he would give them a
7 little bit of money if they would be kind enough to take him
8 home to Rock Hill.

9 He never disputed that he was there at the store
10 that night. They act like that's something that you should
11 go "well, gosh, he is believable. He didn't dispute that.
12 You know, he could have disputed that," like that's
13 something that should enhance his credibility with y'all.
14 You know, the reason he didn't dispute that he was there was
15 because he couldn't dispute that he was there. He's got
16 those shoes on, and you will have some pictures back here.
17 I just pulled a couple of them. This is State's Exhibit 20.
18 These are blowups, photos that we printed off. They are not
19 scanned in. I don't have them blown up on the screen. They
20 are kind of blurry and fuzzy anyway because they are pulls
21 from a video, so they are not like a regular picture. But
22 State's Exhibit 20, that you haven't seen yet, is just a
23 pull of Mr. Addison and his shoes, which you will also have
24 back there, the shoes that Detective Haire saw on his feet
25 when he -- which he was kind enough to put on his feet

1 before he turned himself in at the Rock Hill Police
2 Department, and Mr. Haire went "I think I have seen those
3 shoes before." And he goes back and looks at the video and
4 goes "I'll be taking those shoes and putting them in a brown
5 bag and we will be carrying those to court and to show the
6 jury one day," because those shoes look the same. That's
7 one reason why he knew we could prove he was there.

8 The other reason why was because you heard the
9 testimony of Mike Williams, the retired forensic guy, and he
10 came in and told you "we lifted Terrell's fingerprint off
11 the car that they drove down to Rock Hill." So what's he
12 going to say? You know, how could he come in here and go "I
13 don't know these Mack guys. I just -- I don't like them. I
14 don't know them. They are bad news. They are dangerous. I
15 don't know." How can he deny, when his fingerprint is on
16 the car that the murderer drove from Hartsville to Rock
17 Hill, and the car is back in Hartsville with his fingerprint
18 on the door jamb?

19 So when he comes in here and stands up and goes
20 "he never denied that, he's a believable guy." Of course he
21 didn't deny it. If he would have done that, we would have
22 hammered him, we would have beat him like a drum with that
23 fingerprint and those shoes. He couldn't deny it.

24 Now, his testimony, I spent a good bit of time and
25 I wasn't really rough with him. I didn't get in his face.

1 I just asked some questions. And for the first five or ten
2 minutes I let him answer and say whatever he was going to
3 say. Do you recall? And then every time he tripped up and
4 he showed that he had a memory that's only about five
5 minutes long. It reminded me almost of that movie. There
6 was a movie about ten years ago, Memento. Memento movie it
7 was called. The guy couldn't remember anything for more
8 than five minutes, so he had to write it on his arm and make
9 notes, because he only had like a little short memory.

10 He couldn't remember from one minute to the next
11 what he was saying. He would say on the one hand -- and I
12 just wrote a couple of things down. I would call him on it
13 and he would try to "oh, oh, hold on. Wait a minute." He
14 would say he drove every weekend since he was ten.

15 And then I would say, "well, do you know how to
16 get to Hartsville from Rock Hill."

17 "Oh, no, I don't know how to get there. I don't
18 know how to get there."

19 And then later on he said, "oh, we took 121 up to
20 Mcbee, and then over to Lancaster, and down out of Lancaster
21 down 5." It was like "come on man. You either know the way
22 to get there or you don't."

23 Whatever was convenient that he had to say at the
24 moment is what he said, but he couldn't remember that it
25 contradicted something he had said three minutes before.

1 He talked about how the Mack brothers were the
2 devil and how bad they were. He talked about what
3 dangerous guys they were and how big of a family he has in
4 Hartsville, but he's going to get in the car in the middle
5 of the night, after midnight, with the dangerous Mack
6 brothers, people that you don't even want to be around
7 because bad things just happen around these people? He's
8 going to ride to Rock Hill with them and indebt himself to
9 them with money he doesn't have in his pocket?

10 Let's -- at some point I stopped calling him on
11 it, and this is really -- this is -- ladies and gentlemen,
12 out of his own mouth he's hung himself. We are going to
13 step through this, but when we are done, I think you will
14 agree there is no question as what he's saying cannot be
15 right. No question at all.

16 First of all, his times are wrong. He said that
17 he met up with them, first he said twelve, but then he said
18 eleven earlier, so we weren't really sure when they left out
19 of Hartsville, but let's just assume, because I asked him
20 "did you have a watch? Did you have a cell phone? Was
21 there any way that you could know the times," and he said
22 no. He so no watch, no cell phone. He wasn't really sure
23 of the time. We will give him the benefit of the doubt, but
24 he said that it was around 2:00, 2:30. If that they left
25 out of there at eleven. It take two hours. They got here

1 at one. If they left out of there at twelve and it takes
2 two hours, they got here at two. It wasn't long afterwards
3 that they got here that they went to the rim shop. But
4 Brian Lambert, the officer who testified, said they got the
5 call at about 4:09. So his time is off two hours there.

6 He said they rode around Rock Hill for about an
7 hour and a half. Which even if they got here at two, that
8 puts it at about 3:30, but we know that Mr. Marshall wasn't
9 shot until about 4:30. So he's off by an hour there. We
10 don't really know where they were or what they were up to,
11 and who cares who was driving? Who cares? What difference
12 does that make?

13 He says he calls his momma, but he couldn't get an
14 answer. You got to remember now, he's just innocent Terrell
15 Addison. He's just a Boy Scout on his way home and he
16 hasn't done anything wrong and he doesn't want to be around
17 these Mack brothers any longer than he has to. Now all he
18 has to do is find the fifty dollars he owes them so he can
19 part ways and head on back to his wholesome life.

20 He calls his momma, he says. Only one problem
21 with that. He said he didn't have a cell phone. The only
22 cell phone we know of in the car was Dontavious Mack's cell
23 phone. We have those records. Right here. And we know all
24 the calls that were made from that phone the late morning,
25 late evening of the 9th, early morning of the 10th,

1 throughout the time period in question, and there is only
2 one telephone call that was made in an 803 area code,
3 because, you see, Hartsville is over there close to the
4 coast and they're in the 843 area code. So every other
5 phone call that was made is 843, except one, [REDACTED] 6769.
6 That phone call was made at 12:46 a.m.. Well, that would be
7 about the time he would be looking for his momma, maybe, to
8 find that fifty dollars. So maybe that's his momma. That's
9 the phone call that he's talking about, except for one small
10 problem. Do you remember the officer from the detention
11 center who came up and testified to the record of his
12 visitors who he had on his call list? Number five, Scottia
13 Haile. Relationship? Friend. She lives over on Swinging
14 Tree Lane in York, and there is the phone number, [REDACTED] 6769.
15 [REDACTED] 6769. That's not his momma's phone number. He never
16 called his momma. He just made that up. No evidence of a
17 phone call to his momma at all.

18 Now, he's with the dangerous Mack brothers. He
19 owes them money he doesn't have. He stops, he comes up
20 Cherry Road after the rim shop job that doesn't work. The
21 alarm has gone off, so they run down Cherry Road right there
22 where Celanese runs into Cherry. Right there near is a Home
23 Depot there and a Zaxby's and some other stuff. They turn
24 left down Celanese and they go down. About two miles, or
25 so, on the right is an apartment complex called Heather

1 Heights, and that's where his brother is staying with his
2 brother's girlfriend. He says "well, hold on just a minute.
3 Pull into Heather Heights. I'm going to go see my brother."
4 He says he stays there for twenty to thirty minutes with his
5 brother and can't find fifty dollars, so he goes back down
6 to the car.

7 Does any of this make sense? You are scared of
8 these guys. They're dangerous. You owe them money. You
9 don't have the money. Your brother says he doesn't have the
10 money. Do you think that he could have come up with another
11 plan besides going downstairs and getting in the car with
12 them? "Do you think your brother could have maybe helped
13 you out a little bit? Would you have called the police?
14 Would you have tried to call your momma? Would you have
15 said open up the back window, I'm going to drop out and run
16 through the woods"? Didn't do any of that. Probably didn't
17 even stop and see his brother at the Heather Heights
18 apartments. I submit to you that that probably never
19 happened.

20 He said because of that, right after that is when
21 they forced him to rob the store. They run up Celanese
22 Road. It's only about a mile or two up Celanese before you
23 get to the Northwoods Apartments on the right there. They
24 pull into the Northwoods Apartments, which if you are
25 familiar is actually down in a little bit of a dip to the

1 right, but it's a good bit up from before you get to the BP,
2 but you pull in there, and you will have this map back
3 there. It's an aerial shot that shows -- this is State's
4 Exhibit 70 and it shows the relationship and the distance.
5 Here is Northwoods. This is Celanese. There is the BP.
6 And this is where Ms. Efird said she saw their car parked
7 right there. You will have State's 70 back there with you.

8 He said they forced him to rob the store. Pulled
9 into Northwoods Apartments. He said it was only a few steps
10 to get from where they parked.

11 Again, there was some business of who had the
12 guns. Did he give it to him? Did he reach across? You
13 know, this is a smoke screen and distraction. What do you
14 think they are going to remember about that two and a half
15 years later? Do you fully expect them to have total recall
16 of every single silly detail of whether he reached across
17 him to get the gun? Did he get the bandana out of the
18 trunk? Did he get the gun out of the trunk? Who cares?
19 Ned Marshall is dead. Somebody shot him. There was a gun
20 in there, a .380 that was fired several times that took his
21 life. Went right through his aorta. That much we know is
22 true. That much is not in dispute. These other little
23 things that they want to distract you with of
24 inconsistencies that they are trying to make matter don't
25 matter at all.

1 One thing that does, though, is that he definitely
2 testified that it was only a few steps and it only took him
3 ten to fifteen seconds to get from where they were to the
4 BP, he and Dontavious, running together. You have got the
5 testimony. It's a four hundred yard distance. More than
6 four hundred yards. And when you look at it --

7 Pay attention to this. They're over in this
8 parking lot here. There is one, two, three buildings and a
9 giant field in between where they are and where they are
10 going. No way that you can see from here through these
11 buildings as to what's going on at the BP.

12 He says Dontavious had a .380. He recognized it
13 as a .380. Apparently Davorius and Dontavious aren't the
14 only people familiar with guns.

15 Ten to fifteen seconds to get to the BP. There is
16 the map right there that shows it being four hundred yards.

17 And I'll show you this. This is the route that
18 they figured they took, based on the evidence that they
19 found, and they measured that off to be 1,225 feet, which is
20 twenty-five feet father than four hundred yards.

21 Now, what did they say happened when they got
22 there? Terrell says that they go to the back of the store
23 and that Dontavious takes him -- he is here. Dontavious
24 walks him around this corner. And down a little bit
25 further, you see where the windows start here, and there is

1 the door there? On the other side there is windows and the
2 door. You will have photographs of the store. You will see
3 there is another door, and that's the door on this side over
4 here that Terrell came in. This is the door Dontavious came
5 in, but he leaves him right over here. And then Dontavious
6 runs back around the store and his instructions are "you
7 wait here," wearing that dark hoodie and baseball hat under
8 this brightly lit canopy right here with the giant
9 fluorescent lights in the middle of the night. "You stand
10 there with your hoodie up and your mask on your face in the
11 bright light and wait for me to come around the other side
12 of the store. And let's hope that nobody drives by and
13 wonders just what in the world is a guy doing standing
14 outside under the bright light of the BP with a bandana
15 across his nose." But all that aside, that's Terrell's
16 story. He's going to stand over on the other side of the BP
17 right there, waiting until he sees Dontavious come running
18 in. And when he sees Dontavious running in, that's his cue
19 to run in himself from the other side. "We'll take him from
20 both sides."

21 And I asked him specifically, "when you went in
22 the store, did you go straight in the door to the position
23 we see you at on the video?

24 "Yes.

25 "You didn't stop anywhere? You didn't linger in

1 the door? You didn't stand at the door for any period of
2 time? You went straight there?

3 "Yes, I did."

4 All right. Why is that important? Well, we will
5 get to that in a second.

6 One thing I do want you to note, and you will have
7 this back there, you heard the testimony of Mike Williams.
8 This is crime scene tape right here. And the crime scene
9 tape runs all the way around. That's a police car there.
10 And it runs right over here to that light pole, but it's
11 tied off of, Mike Williams said, right in front of these two
12 public pay telephones that are located about, oh, maybe
13 thirty feet, or so, from the side of the building. These
14 two accessible public pay phones that are right there at the
15 edge of the parking lot, thirty feet from where our friend,
16 Mr. Addison, is standing with his hoodie on, but nothing
17 that he could do to stop this thing from going down. Then
18 right over there are the public telephones. You will have
19 the photographs back there to see.

20 He's waiting for Dontavious to go back around
21 there. He went straight in the store. He didn't stand in
22 the store.

23 Now, in order to understand what the significance
24 of the pay phones and what I'm about to go through next is
25 I'm going to stop for a second and tell you a little bit

1 about duress. I know Mr. Swerling did, but, in short -- and
2 you will hear this from the judge. He's the judge of the
3 law. Y'all are the judge of the facts. You decide what
4 actually happened. He tells you what the law is and you
5 decide whether -- based on what you believe happened,
6 whether either of these gentlemen are guilty of any crime.

7 But he's going to tell you what duress is, and
8 he's going to say basically that duress is coercion that's
9 going to reasonably put a person in fear of imminent danger
10 of death or serious injury, and that that person has no
11 other option but to commit the crime. And that's important,
12 because the law says if you have a choice, if there is any
13 other action that you could take, other than to commit the
14 crime, you must do it. You can't say you were under duress
15 if you have something else you could do to avoid doing that,
16 to get away, to avoid committing the crime, because the law
17 requires you not to commit the crime, if you can do that.
18 So it's not duress if you had an alternative course of
19 action and you failed to take it.

20 And that this must be proved to you -- we have the
21 burden of proof. You are going to hear a lot about that,
22 and you have heard a lot about it already, but this is one
23 thing in the case that we don't have to prove. We don't
24 prove that there wasn't duress. They have to prove that
25 there was. They have to prove it by a preponderance of the

1 evidence.

2 So let's take a look, and I'm going to do this
3 real quick out of my power point, and show you -- and do you
4 see that? Let me back it up just a second.

5 Okay. The door is opening. 4:58:15 roughly he's
6 at the door and should have been visible to Mr. Addison,
7 who, under his testimony, is on the other side. Basically
8 if this camera was me and those are my eyes looking at that
9 door, Mr. Addison was several feet behind me through another
10 door out into the breezeway of the convenience store.
11 4:58:15 is when you first see him at that door.

12 4:58:43 is when you first see Mr. Addison.

13 Now, that's a difference of twenty-eight seconds.
14 Twenty-eight seconds from when we first saw Dontavious Mack
15 at the door there. That doesn't count the time that it took
16 Dontavious Mack to run around the store to get to that door.
17 All that time, twenty-eight seconds. Let's just forget
18 about the time that it took him to run around the store. We
19 will just cancel that out and say twenty-eight seconds that
20 Terrell Addison, by his own testimony and the indisputable
21 evidence of this tape, has standing on the other side of
22 that convenience store by himself, this eighteen year old
23 kid who used to be a running back when he was in high
24 school. How far do you think he could have run in
25 twenty-eight seconds? Do you think that he could have made

1 it to the Harris Teeter and said "my God, there is a robbery
2 going down across the street. Call the police right now."

3 The law doesn't require him to be a hero and risk
4 his life by maybe going to those pay phones. He could have
5 done that. They were right there in front of him. They're
6 clearly visible to him. He could have done that, but
7 maybe -- just assuming that he was under duress for a
8 second, maybe at that point he would have been, "well, what
9 if Dontavious looks out the window and sees me on the phone?
10 He could come out and come after me." Okay, he doesn't have
11 to be a hero, but he does have to run. He does have to
12 avail himself of the other alternative, which is to get out
13 of there, to find another way besides helping Dontavious rob
14 Ned Marshall. Go get help. The Harris Teeter, open
15 twenty-four hours a day, sitting right across the street.
16 This eighteen year old running back had twenty-eight seconds
17 to go find help as he stood there waiting to go in the store
18 and do his part.

19 And I don't care. I don't care if he stood there
20 and wandered back and forth, whether he laid hands on Ned
21 Marshall that night or not. What do you think his presence
22 in that store meant to Ned Marshall, standing there, wearing
23 his dark hat with his blue bandana? That was one more
24 person that Ned Marshall had to worry about. One more
25 person that he didn't know as to whether he meant him harm

1 or not. He was working together with Dontavious Mack to rob
2 that store. And I assure you, with his heart pounding in
3 his chest and his mouth dry, Ned Marshall took no comfort
4 from the fact that Terrell Addison was standing there with
5 his hoodie and his blue hat and his bandana across his nose.

6 Whether he had a gun or not, you can't see in the
7 video. It's not that clear. It's not like the videos that
8 you take at home. But if he had his hand in his pocket,
9 what do you think Ned made of that? Does he know what he's
10 got? He knows he's there and part of the deal, because he's
11 wearing a mask. He was in the middle of it up to his
12 eyeballs.

13 If that isn't enough, let me show you one more. I
14 want you to take a look at this. A full length shot. There
15 is Terrell. Dontavious is behind the counter. And there
16 goes Mr. Marshall, shot in the legs, probably falling down
17 on the ground. Now, where is Mr. Terrell Addison? He's at
18 the door.

19 According to Mr. Swerling, he got out of there the
20 first sign of trouble, because he didn't really want any
21 part of this in the first place, because he's an upstanding
22 citizen and a good guy.

23 Let's watch what this good guy does. What's he
24 doing? Is he running? Is he running? He ain't running.
25 He's going nowhere. Nobody is standing next to him right

1 now while he's holding the door open for his buddy
2 Dontavious, who is running out of the store. Forced to do
3 this?

4 Twenty-eight seconds. That's how long Terrell
5 Addison had. Twenty-eight seconds he had to avoid going
6 into the store and participating in the robbery.
7 Twenty-eight seconds to do what the law required him to do,
8 to run to get help, to not participate in this.

9 He knew where he was. As a matter of fact, what
10 did he testify? His momma lives over on Berryhill. It's
11 the street that runs off of Evanport, which runs off of
12 Indian Hook. Right? He knows exactly where he's at.

13 His brother, supposedly, according to his own
14 testimony, whether you believe this or not, is just a mile
15 and a half or two up the street at the Heather Heights
16 Apartments.

17 She works a good job, your mom does. She works at
18 Wells Fargo and makes a good living. Works Monday through
19 Friday, the day shift. She's probably home asleep that
20 night, wouldn't you think? Do you think that she could
21 have, do you think that she would have, do you think that
22 she would have found fifty dollars that night if he had
23 showed up at the door at two o'clock or three o'clock in the
24 morning and said "I got these crazy guys outside. I owe
25 them fifty dollars, or they are going to kill me or make me

1 rob a store if I don't find fifty dollars, momma." Do you
2 think that she would have found it? He didn't do that,
3 though. He didn't do that, because, ladies and gentlemen,
4 he was right where he wanted to be, right in the thick of
5 the action.

6 What else did he say? He ran out the door. And
7 you saw on the video he held it open for nine seconds. And
8 why couldn't he run? Well, he said "Davorius was right
9 there. If I go out the door" -- "oh, there is Davorius.
10 Got nowhere to go. Got the devil behind me and the deep
11 blue sea in front of me. I'm between a rock and a hard
12 place. I still got to do what they got to say, I mean,
13 because I'm under duress and they are armed and dangerous."

14 He says -- he told me that Davorius was maybe from
15 me to the witness stand. You can use your best
16 recollection, but it wasn't far. Ten, twenty feet. He says
17 he was just past the pumps. There is pumps there and pumps
18 there. You pick whichever one you believe you want. I
19 don't care. It doesn't matter whether he was right there or
20 right there. I think under a fair reading of it, he had to
21 be about right there, because the door is right there, and
22 that's the closer pump. So that's where Davorius, the
23 deadly, dangerous Davorius Mack is standing, armed and ready
24 to do him harm, standing right there. No choice but to run,
25 so they run. They shoot straight down there, all three of

1 them, Davorius up front, Dontavious in the back, both of
2 them got guns.

3 All of that sounds compelling, believable, but for
4 one small problem. That is the car wash. That's the hill.
5 And step down lower and you will see on this again, there is
6 the BP. This is this big field here that they're running
7 across, and this is the road right here. We are looking
8 back up towards from this road here towards the BP. They
9 run down here. And what did the forensic people tell you
10 they found on that road? Shoe prints. Now, we got Davorius
11 in front, we got Terrell in the middle, and Dontavious in
12 the back, and they are running through what must have been a
13 wet field, because they got mud on their shoes. And when
14 they get to that freshly laid blacktop, the mud comes off
15 and leaves a print, that you have seen the pictures of and
16 you heard tell of. You heard expert testimony about what it
17 all means, except for one small problem. One set of tracks
18 and two sets of tracks.

19 So one of two things is true. Either Terrell
20 isn't telling the truth about Davorius being there, or
21 Davorius really is the devil, because he don't even leave
22 footprints. One of those two has to be true. I submit it's
23 the former and Davorius was never at the BP. He didn't make
24 it that far. One, two sets of footprints. Two guys.
25 Dontavious and Terrell. That, ladies and gentlemen, I

1 submit is the nail in the coffin of Terrell Addison.

2 There is absolutely no question. Irrefutable.

3 He's got twenty-eight seconds on the other side. He should
4 have, could have run, didn't run. And here you have got no
5 question in your mind, there is only two sets of footprints
6 there. By his testimony there should be three.

7 Ben Stewart. Poor Ben Stewart. Poor, poor Ben
8 Stewart. Everybody says Ben was there, even his
9 co-defendant at trial here. Even Terrell Addison, who
10 obviously isn't that bright and accomplished a liar, even
11 Terrell Addison sat down and thought about it and said "ah,
12 I would like to help old Ben out and say he wasn't there.
13 Nobody will believe me if I try to sell that story to the
14 jury." Even he realized that he had to put Ben Stewart
15 there at the car handing the gun over. Everybody says that
16 he was there - Dontavious, Davorius. Reed Allen says he had
17 the gun. He gave to it him later on, and now at trial his
18 co-defendant, Terrell Addison, takes the stand and
19 testifies, "yeah, Ben Stewart was there."

20 Johnetta Evans said Donte said nothing about Ben,
21 but Tiyone said that Donte mentioned Ben. And, of course, I
22 submit to you when Dontavious was talking to Tiyone in
23 Hartsville, he was bragging about this. He said that
24 Davorius was the one who did the robbery with him and was
25 beating on the man and that he had to pull him off of the

1 man and then he shot him. You have got the video. You know
2 that's not true. And you heard from everybody. Even
3 Terrell admits that Davorius wasn't in the store. We know
4 that it was Terrell. So that story is a complete lie. He's
5 just puffing to Tiyone to try to make himself look tough and
6 he decides to throw a bone to his brother to make him look
7 tough too.

8 Mr. Snow said "there is no forensic evidence to
9 show that Mr. Stewart was in that car at all - no DNA, no
10 fingerprints, no fibers, no hair, nothing to show that Ben
11 Stewart was in that car." Well, guess what, there is no
12 forensic evidence to show that Dontavious was in that car.
13 No DNA, no fingerprints, no hair fiber, nothing to show that
14 he was in there. Yet nobody disagrees that Dontavious was
15 in that car. No doubt he was in that car, and he was in
16 that car and bleeding. He had a bullet hole in his back,
17 and we didn't find any of his blood in there. None of his
18 DNA. No DNA of Dontavious found in that car. No
19 fingerprints of Dontavious.

20 What did the officer say about fingerprints? It
21 doesn't work like it does on CSI. There is no magic dust
22 that you could flip it over the crime scene and make the
23 killer's name appear. It doesn't work that way. You don't
24 always leave a fingerprint every time that you touch
25 something. Sometimes, and especially inside the car, that's

1 the hardest place to find a fingerprint. It is frequent,
2 more often than not, I believe Detective Williams testified,
3 that you do not find fingerprints more frequently. So I
4 submit to you just because they didn't find anything in
5 there does not mean that Ben Stewart was not in the car.
6 The only question about that is whether he's a principal or
7 an accessory.

8 What's accessory before the fact? You are an
9 accessory before the fact of any crime if you aid, counsel,
10 assist, abet, and encourage someone else to go and commit
11 the crime, and then that person goes out and actually
12 commits the crime that you knew that they were going to do
13 and that you aided them in doing. If you do that and you
14 are not present at the scene of the crime, then you are an
15 accessory before the fact of whatever crime it was.

16 Grand larceny, stealing a car, if I give you a
17 shimmy and a key and I say "this is the key to so and so's
18 car. He lives across town here. Here is the key. Here is
19 the shimmy. You can open up the door" and dah, dah, dah,
20 use the key and it's the valet key, start it right up and
21 drive it back here. The guy appears with the car. You are
22 an accessory before the fact to grand larceny, because you
23 weren't present at the car when he actually stole it.

24 Now, the question here -- and when we say present,
25 there is two types.

1 Actual presence. I am actually present in this
2 courtroom.

3 There is constructive possession (sic), which
4 means you are not physically at the location, but you are so
5 close by and your actions and what you have done and being
6 that close by, that it is virtually as if you were there.
7 That's called constructive possession (sic).

8 And that's going to be the decision that you
9 really have to make about that.

10 Truly was Ben Stewart an accessory before the fact
11 or was he present at the BP under the theory of constructive
12 presence? Was he so close at four hundred yards away? He
13 handed them the gun that they used to kill Ned Marshall.
14 Was he so close, that that amounts to constructive presence
15 at the scene, and that's your decision.

16 I venture no position. I'm not going to try to
17 push you one way or the other. You guys work that out.
18 That's something that you have to decide. It's close. It
19 could go either way and I leave that up to you.

20 Again, this is essentially it. Principal aiding
21 and abetting. That's why Terrell is only charged with
22 murder. He's not charged with accessory before the fact,
23 because there is no question he was in the store. He's a
24 principal to it. He is present in the store aiding and
25 abetting during the commission of a crime. He's a

1 principal.

2 Do you think that Ben Stewart's presence four
3 hundred yards away amounts to presence in the store, or is
4 he an accessory?

5 You are going to hear about the hand of one,
6 accomplice liability or vicarious liability. It's another
7 legal concept.

8 The hand of one is the hand of all. A crime is
9 committed by two or more people acting together towards a
10 common criminal purpose. The act of one is the act of all.
11 The hand of one is the hand of all. In other words, it's no
12 defense to say "I'm not the guy who pulled the trigger that
13 killed Ned Marshall." If you were an active participant in
14 the underlying crime to the felony of armed robbery and
15 during the course of that armed robbery somebody dies, you
16 kill somebody, you are just as guilty as the guy who pulled
17 that trigger, whether your hand is on the gun or not.

18 You have heard much talk about reasonable doubt.
19 There is no magic formula. I wish there was. I wish you
20 could define reasonable doubt to a mathematical certainty,
21 but you can't. Nobody can assign a percentage to it and say
22 you have got to be eighty-seven percent sure and ninety-two
23 percent sure. There is not -- it's not that kind of a
24 theory.

25 Reasonable doubt, you are going to hear, is the

1 kind of doubt that leaves you firmly convinced of the
2 defendant's guilt.

3 You have heard everything. You have seen the
4 evidence. You saw -- you saw them standing over there by
5 himself for twenty-eight seconds, even under his theory.
6 You saw the two tracks leading away, where there should have
7 been three, if he was telling the truth. I think you firmly
8 believe it. I'll try to make sure that you -- you know, you
9 don't understand that you -- don't get confused about --
10 again, we can't prove anything beyond all doubt. We would
11 have to have video cameras set up everywhere filming at all
12 times and show you. You just don't have that. You don't
13 have it. It's impossible to prove anything beyond all
14 doubt. All you can do is ask yourself am I firmly
15 convinced? Does this evidence leave me firmly convinced of
16 the guilt of Ben Stewart and the guilt of Terrell Addison?

17 This hesitate to act business? You know, I
18 stopped and got a cup of coffee on my way here today, and
19 I'm trying to lose weight. We all are. I'm standing there
20 and go, huh, do I want to use the skim milk or do I want to
21 use the Half and Half? Well, that didn't mean I have a
22 reasonable doubt about whether I wanted a cup of coffee. I
23 hesitated. I chose the Half and Half. I admit that. I did
24 it. But that's not the kind of hesitation we are talking
25 about. Everybody hesitates when making an important

1 decision. You do it during an important decision. They put
2 chairs in that jury room for a reason - to sit down and
3 deliberate and think about the evidence, and you decide what
4 does this evidence convince me of, and am I convinced by
5 this evidence, and I submit there is no question.

6 Mr. Marshall showed up for work that day at about
7 three in the morning. He opens the door. He walks in and
8 locks it behind him and goes about the business of trying to
9 set the store up and get it ready for the day's business.
10 He walks in and there is his card. He was name at the top.
11 They told you his nickname was -- Mr. Corn testified
12 everybody knew him by "Pie", all the customers, everybody
13 that came in the store. He clocked in at 3:04.

14 This case is important. It's important for the
15 defense. Their liberty is at stake. There is no question
16 about that.

17 We have the burden of proof, and I submit to you
18 that we have carried it. A big tragedy was done on October
19 the 10th, 2006, and it continues to reverberate through the
20 lobby of these people who sat patiently in this courtroom
21 Monday, Tuesday, Wednesday, Thursday, and now today, as they
22 sit waiting for justice, justice to be done for their loss,
23 and this case is important for them too.

24 I submit to you, ladies and gentlemen, Ned
25 Marshall's life was taken by these two men for less than

1 five dollars. He died on the floor of the BP that morning
2 for less than five dollars. They didn't get out of there
3 with anything.

4 And it's hard to stand in judgment of another man,
5 but justice must be served and truth must be spoken and
6 people have to answer for what they have done. These men,
7 they have done a terrible thing. A terrible thing. They
8 have taken a good man, removed him from this community.
9 They have torn this family and these good people up, and
10 justice must be done.

11 I ask you to find them guilty.

12 Find Terrell Addison guilty of murder. He's a
13 murderer. Just like Dontavious, he knew what he was doing.
14 He made his choices, and now he's got to pay.

15 Find Ben Stewart guilty either as a murderer or an
16 accessory before the fact of murder. He made his choice.
17 He didn't care when he gave that .380 over to Dontavious
18 whether or not somebody was going to die from a bullet that
19 was in the cartridge that night, but somebody did, and the
20 time has come to pay. Find these men guilty. Thank you.

21 THE COURT: Madam Clerk, if you would cut the
22 lights on, please.

23 Mr. Foreman, ladies and gentlemen of the jury,
24 that concludes the final arguments of counsel. It's time
25 for me to instruct you with regard to the law that applies

1 to the issues in this case.

2 We have been quite awhile with the arguments, and
3 my instruction on the law is probably going to be close to
4 an hour in length, so would you like to take a short break
5 before we do that? If you need a break, raise your hand.
6 Raise your hand. Some do. I want you to be able to listen
7 carefully to this instruction, so I'm going to go ahead and
8 take -- we will take about five minutes, and please refresh
9 yourselves when you break and we will come back in and
10 start.

11 (The following takes place outside the presence of
12 the jury panel)

13 THE COURT: Let's take about five quick minutes at
14 this time.

15 (Whereupon, proceedings were recessed)

16 (Whereupon, proceedings were reconvened)

17 MR. BRACKETT: Your Honor, we have got a redacted
18 copy. Where we have the entire thing photocopied. State's
19 Exhibit 4, it's got a redaction in there regarding the
20 reference in there that we wanted out. And we will take the
21 real State's Exhibit 4, the original version to have blue
22 ink on it, and return that to the court reporter, it's not
23 to go back to the jury.

24 THE COURT: No, that will be a court exhibit at
25 that point.

1 MR. BRACKETT: State's Exhibit 4, the original
2 copy with the blue ink is also marked as Court's Exhibit 6
3 and it's put aside and it won't go back to the jury.

4 THE COURT: Okay. Counsel, ready to proceed?

5 MR. BRACKETT: The State is ready.

6 MR. SWERLING: Yes, sir.

7 THE COURT: Mr. Williams, stick your head out the
8 door and tell everybody that wants to be in here during the
9 charge to come in not. I'm going to let the door open or
10 close. Nobody is going in or coming out during the charge.

11 THE BAILIFF: Yes, sir, Your Honor.

12 THE COURT: Mr. Snow, when the jury comes in, we
13 had not told them that Mr. Stewart had rested his case, and
14 so I'm simply going to mention that and have you confirm
15 that, that we did that before we started arguments. I will
16 let them know that.

17 THE BAILIFF: Your Honor, no one is outside.

18 THE COURT: All right. Then somebody be at the
19 door and make sure no one goes out or comes in during the
20 charge.

21 THE BAILIFF: Yes, sir.

22 THE COURT: Thank you.

23 Please bring the jury in.

24 (The following takes place in the presence of the
25 jury panel)

1 THE COURT: All right. Mr. Foreman, ladies and
2 gentlemen of the jury, before we started final arguments,
3 counsel -- or the defendant, Ben Robert Stewart, had rested
4 its case. I don't think that was done in your presence, but
5 counsel -- Mr. Snow, is that correct? Mr. Stewart had
6 rested his case, is that correct?

7 MR. SNOW: That's correct.

8 THE COURT: Thank you.

9 (Whereupon, at 1:40 p.m., the Court gave the jury
10 panel their jury instructions)

11 THE COURT: Now, Mr. Foreman, ladies and gentlemen
12 of the jury, it's now time for me to charge you, that is to
13 say instruct you, with regard to the law that applies to the
14 issues in this case.

15 In this case the State charges Terrell Antonio
16 Addison with several offenses. They charge him with the
17 offense of murder, also armed robbery, kidnapping,
18 possession of firearm during the commission of a violent
19 crime, and criminal conspiracy.

20 They also charge the defendant Ben Robert Stewart
21 with several offenses. They charge him with the offense of
22 murder, accessory before the fact to murder, armed robbery,
23 accessory before the fact to armed robbery, kidnapping,
24 accessory before the fact to kidnapping. And they also
25 charge him with accessory after the fact to armed robbery,

1 kidnappings and murder, and/or murder. And they charge him
2 with criminal conspiracy and also with possession of a
3 firearm during the commission of a violent crime.

4 Now, to these charges each defendant has pled not
5 guilty, which then places upon the State the burden of
6 proving the defendant guilty of each of these charges beyond
7 a reasonable doubt.

8 I charge you that a person charged with committing
9 a criminal offense in South Carolina is never required to
10 prove himself innocent.

11 I charge you that it is a vital important rule of
12 law that a defendant in a criminal trial, no matter how
13 great or serious may be the offense for which he's charged
14 must always be presumed innocent, until his guilt has been
15 proved beyond a reasonable doubt.

16 This presumption of innocence remains with the
17 defendant at all times throughout the trial and is only
18 removed when, and if, the State has proved guilt beyond a
19 reasonable doubt. For it is your solemn duty, ladies and
20 gentlemen, if not clearly convinced of guilt beyond every
21 reasonable doubt, to the contrary, to find a defendant not
22 guilty.

23 Now, Mr. Foreman, ladies and gentlemen of the
24 jury, in this case the defendant, Ben Robert Stewart, has
25 chosen not to testify in his case.

1 I instruct you and emphasize to you that the fact
2 that a defendant does not testify in his own behalf in a
3 criminal trial is not a factor to be considered by you in
4 any way in your deliberation. You must not consider the
5 fact that the defendant has chosen not to testify when you
6 determine the guilt or innocence of the defendant. It must
7 not be considered by you in any manner whatsoever, either
8 against or for the defendant.

9 A defendant has the Constitutional Right to remain
10 silent. The assertion of that Constitutional Right cannot
11 and must not be considered by you in your deliberations.

12 Under your oath then you are to reach no inference
13 and draw no conclusion whatsoever from the fact that this
14 defendant did not testify. The fact that he did not testify
15 should not even be discussed in your jury room.

16 The burden of proof, as I have stated to you is
17 upon the State. It is not the burden of the accused to
18 prove his innocence. The burden of proof remains upon the
19 State to prove guilt beyond a reasonable doubt.

20 Again, I emphasize the fact that a defendant did
21 not testify is not a factor to be considered by you in
22 determining the guilt or innocence of the defendant or in
23 any other aspect of your deliberations.

24 So the State has the burden of proving each
25 defendant guilty beyond a reasonable doubt.

1 What is a reasonable doubt? Now, some of you may
2 have served as jurors in civil cases, where you were told it
3 was only necessary to prove a fact is more likely true than
4 not, such as by the greater weight or preponderance of the
5 evidence. However, in criminal cases, the State's proof
6 must be more powerful than that. It must be beyond a
7 reasonable doubt.

8 Ladies and gentlemen, proof beyond a reasonable
9 doubt is proof that leaves you firmly convinced of the
10 defendant's guilt.

11 There are very few things in this world that we
12 know with absolute certainty, and in criminal cases the law
13 does not require proof that overcomes every possible doubt.

14 A reasonable doubt may also be described as the
15 kind of doubt that would cause a reasonable person to
16 hesitate to act.

17 If you have such a doubt as to the guilt of a
18 defendant, then he would be entitled to a verdict of not
19 guilty.

20 Reasonable doubt may arise from evidence which is
21 in the case, or from the absence or lack of evidence in the
22 case.

23 If, based on your consideration of the evidence,
24 you are firmly convinced that a defendant is guilty of the
25 crime charged, you must find him guilty.

1 If, on the other hand, you think there is a real
2 possibility that he is not guilty, you must give him the
3 benefit of the doubt and find him not guilty.

4 You alone must make the determination of whether
5 or not reasonable doubt exists as to the guilt of a
6 defendant.

7 Mr. Foreman, ladies and gentlemen of the jury,
8 there are two types of evidence which are generally
9 presented during a trial: Direct evidence and
10 circumstantial evidence.

11 Direct evidence is the testimony of a person who
12 asserts or claims to have actual knowledge of a fact, such
13 as an eyewitness.

14 Circumstantial evidence is proof of a chain of
15 facts and circumstances indicating the existence of a fact.

16 The law makes absolutely no distinction between
17 the weight or value to be given to either direct or
18 circumstantial evidence, nor is a greater degree of
19 certainty required of circumstantial evidence than of direct
20 evidence.

21 You should weigh all the evidence in the case.
22 After weighing all the evidence, if you are not convinced of
23 the guilt of a defendant beyond a reasonable doubt, you must
24 find the defendant not guilty.

25 Mr. Foreman, ladies and gentlemen of the jury, you

1 have heard the testimony of a witness who has special
2 knowledge, skill, or -- really witnesses who have special
3 knowledge, skill, experience, training or education in a
4 particular field, who have given opinions in that field as
5 to matters in which they are skilled.

6 In determining the weight to be given such
7 opinions, you should consider the qualifications and
8 credibility of the expert witnesses and the reasons given
9 for their opinion. You are not bound by such opinions.
10 Give to them the weight, if any, you deem them entitled.

11 Mr. Foreman, ladies and gentlemen of the jury,
12 under the Constitution of South Carolina you are the finders
13 of the facts in this case. I do not have the right to pass
14 upon the facts, or even to express any opinion I might have
15 as to the facts, nor, may I suggest in any way what I may
16 think about the guilt or innocence of a defendant. You
17 should form no opinion in that regard from anything that I
18 may have said or any ruling I have made during the course of
19 the trial.

20 As the sole judges of the facts in this case you
21 are also necessarily the sole judges of the credibility or
22 believability of each of the witnesses that have testified
23 during the course of the trial.

24 Now, there are a number of factors which you may
25 consider in arriving at your assessment as to a particular

1 witness' credibility or believability. Some factors I'm
2 going to list for you, and should you think of other factors
3 that you believe also ought to be considered when you go
4 back into the jury room on the question of credibility, then
5 you should consider those factors as well, but you may
6 consider the demeanor of the witness from the witness stand.
7 What was that witness' manner of appearance? Was the
8 witness straightforward in answering questions or hesitant
9 in responding to questions? Simply put, do you believe the
10 witness was telling the truth or not telling the truth?

11 Do you believe that the witness knew of what that
12 witness testified or did not know of what that witness
13 testified?

14 You may consider whether or not the testimony of a
15 witness is consistent or inconsistent with that witness' own
16 testimony or with other evidence or testimony presented
17 during the course of the trial.

18 You may also consider how the witness came to know
19 the facts to which he or she testified.

20 You may consider the opportunity that a witness
21 had to observe or hear; that is, to perceive the existence
22 of a fact by means of their senses.

23 You may also consider whether or not a witness is
24 biased or prejudiced. That simply means do you find that a
25 particular witness had some reason to come into court and

1 testify one way or another to help or hurt one side or the
2 other?

3 You may also consider whether or not the testimony
4 of a witness was strengthened or weakened by other testimony
5 or other evidence presented during the course of the trial.

6 Now you as the finders of the facts in this case
7 and you as the judges of the credibility or believability of
8 each of the witnesses that have testified may believe as
9 much or as little of what a witness testifies to as you deem
10 appropriate.

11 You may believe all of what a witness says, you
12 may believe none of what a witness says, or you may believe
13 only part of what a witness says.

14 You may believe one witness as against several, or
15 several as against one.

16 Whatever your good judgment and common sense tells
17 you is the most believable testimony is the testimony that
18 you should accept, and reject that testimony which you find
19 not to be credible or believable.

20 Mr. Foreman, ladies and gentlemen of the jury, the
21 same Constitution that makes you the finders of facts in
22 this case makes me the sole and only instructor in the law.
23 You must accept as correct the law that I charge and apply
24 to the law the evidence as you find it and reach your
25 verdict. Put aside any conceptions you may have had as to

1 the law before coming here today, and accept the law as I
2 instruct it to be.

3 You, for purposes of your duty as jurors today,
4 should not be concerned about what the law ought to be, but
5 what I charge you the law is now in this state.

6 Mr. Foreman, ladies and gentlemen of the jury, I
7 charge you with regard to criminal intent. Criminal intent
8 is a necessary element of each crime that must be proved by
9 the State beyond a reasonable doubt.

10 Criminal intent is always a matter that must be
11 determined by the jury from the circumstances surrounding
12 the situation.

13 There is no way to prove intent to a mathematical
14 certainty. There is no way medical science can dissect a
15 person's brain and determine what he had in mind, so the law
16 says that criminal intent may be inferred from the
17 circumstances shown to have existed. This is how the jury
18 makes a determination of whether or not the element
19 requiring intent was present.

20 Criminal intent is a state of mind, which operated
21 jointly with an act is the commission of a crime. Criminal
22 intent is a mental state, a conscious wrongdoing.

23 So it is up to you, the jury, to determine what a
24 defendant intended to do, based on the circumstances shown
25 to have existed.

1 I tell you that the State must prove criminal
2 intent beyond a reasonable doubt, just as the State must
3 prove every element of the offense by a reasonable doubt.

4 It is not necessary to establish intent by direct
5 and positive evidence, but intent may be established by
6 inference, in the same way as any other fact, by taking into
7 consideration the acts of the parties and all of the facts
8 and circumstances of the case.

9 While the State may prove motive, it is
10 unnecessary that the State do so. However, the State must
11 prove intent.

12 Mr. Foreman, ladies and gentlemen of the jury,
13 there has been some testimony concerning possible sentences
14 with regard to some of the witnesses who have testified. I
15 instruct you that possible punishment is not a matter for
16 your concern. The only reason the witnesses were allowed to
17 be asked about possible punishment is with regard to how it
18 might affect their credibility with regard to motive or
19 bias, and that's the only reason they were allowed to ask
20 about possible punishment, but you are not concerned about
21 possible punishment. That's a matter for the court to
22 determine.

23 Your concern is with guilt or innocence. You must
24 decide whether the State has proven the elements of each of
25 these criminal offenses beyond a reasonable doubt. And

1 therefore, the guilt or innocence, that's your only concern
2 in this case.

3 I'm going to charge you with regard to specific
4 cases with which the defendants are charged in this case.
5 You are not going to have these instructions written down
6 for you back in the jury room, so you are going to have to
7 call on your collective memories as to what I instruct you
8 the law is.

9 However, once you begin your deliberations, if you
10 are confused about some of it, or all of it, for that
11 matter, if you need to be re-instructed on anything
12 regarding the law, if you will let the bailiff know through
13 a message, then I'll bring you back out and recharge you or
14 reinstruct you on anything that you are not sure about, but
15 what I would ask you to do at this time is to listen
16 carefully as I go through these offenses.

17 First of all I'm going to charge you with regard
18 to murder.

19 Murder is the willful felonious killing of a human
20 being by another human being with malice aforethought, that
21 malice being either express malice or inferred malice.

22 Malice is hatred, ill will, or hostility towards
23 another person. It is the intentional doing of a wrongful
24 act without just cause or excuse and with an intent to
25 inflict an injury or under circumstances that the law will

1 infer an evil intent.

2 Malice aforethought may be expressed or inferred.
3 These terms express or inferred do not mean different kinds
4 of malice, but merely the manner in which malice may be
5 shown to exists; that is, by direct evidence or by inference
6 from the facts and circumstances which are proved.

7 Express malice is shown when a person speaks words
8 which express hatred or ill will for another, or when the
9 person prepared beforehand to do the act which was later
10 accomplished. For example, lying in wait for a person, or
11 any other acts of preparation going to show that the deed
12 was within the defendant's mind would be express malice.

13 Malice is said to be expressed where there is
14 manifested a violent, deliberate, intention unlawfully to
15 take away the life of another human being.

16 Now, malice is inferred where one intentionally --
17 or may be inferred where one intentionally and deliberately
18 does an unlawful act which he or she then knows to be wrong
19 and in violation of his duty to another and where no excuse
20 or legal provocation appears and when the circumstances
21 attending a killing show an abandoned heart, a malignant
22 heart, fatally bent upon mischief.

23 Malice may be inferred from conduct showing a
24 total disregard for human life.

25 Inferred malice may also arise when the deed is

1 done with a deadly weapon.

2 A deadly weapon is any article, instrument, or
3 substance which is likely to cause death or great bodily
4 harm.

5 The following are examples of instruments which
6 may be deadly weapons: A pistol, a shotgun, a rifle, a
7 knife, a slingshot, metal knuckles, a razor, gasoline,
8 firebomb, etcetera.

9 If facts are proved beyond a reasonable doubt
10 sufficient to raise an inference of malice to your
11 satisfaction, this would simply be an evidentiary fact, to
12 be taken into consideration by you, the jury, along with
13 other evidence in the case, and you may give it such weight
14 as you find it should receive.

15 You, as jurors, are free to accept or reject this
16 permissive inference, depending on your view of the facts.
17 In other words, if such conduct results directly in the
18 death of another and if such conduct was so culpable and
19 inexcusable, so aggravated and grossly reckless as to show
20 an active intentional disregard of the consequences of human
21 life, thus denoting a malignant spirit, a heart devoid of
22 social duty and fatally bent on mischief, inference of
23 malice may arise.

24 Furthermore, it is not just carelessness, not mere
25 recklessness, or a passive indifference to the safety of the

1 others. This conduct, when it shows a deliberate and
2 intentional design to so use or employ or handle a deadly
3 weapon or dangerous instrumentality, so as to endanger the
4 life of another or of others, without just cause or excuse,
5 may be sufficient to raise this inference.

6 However, it is for you, the jury, to decide beyond
7 a reasonable doubt whether upon all the facts and
8 circumstances of this case the alleged use of a deadly
9 weapon demonstrated such an intentional disregard for human
10 life that malice may be inferred from the use of a deadly
11 weapon. And is for you, the jury, to decide what weight
12 should be given this fact.

13 And it will be observed, ladies and gentlemen,
14 that there must be malice aforethought.

15 While the law does not require that malice shall
16 exists for any particular length of time before the
17 commission of the act, it must be a forethought. There must
18 be a combination of the previous evil intent and the act
19 producing the fatal result.

20 If the evidence should show under what
21 circumstances the fatal injury was inflicted, then you, the
22 jury, would have to determine whether under such
23 circumstances the act was malicious.

24 The law says if one intentionally kills another
25 during the commission of a felony, the inference of malice

1 may arise.

2 The facts, if proved beyond a reasonable doubt
3 sufficient to raise an inference of malice to your
4 satisfaction, this inference again would be simply an
5 evidentiary fact to be taken into consideration by you, the
6 jury, along with the other evidence in the case, and you may
7 give it such weight as you determine it should receive.

8 I'll talk to you now as to armed robbery. What is
9 armed robbery?

10 The crime of armed robbery includes all the
11 elements of larceny and robbery.

12 First, I will explain to you what is meant by
13 larceny and then robbery and then armed robbery.

14 What is larceny?

15 I charge you that there are four elements which
16 must be present and established beyond a reasonable doubt to
17 make out the crime of larceny. These four elements are as
18 follows:

19 One, is that there was a taking.

20 Two, that the taking was of the personal property.

21 Third, that after being taken, the property was
22 carried away.

23 Fourth, that the taking and carrying away of the
24 property was done with the intent to steal.

25 Now, what is robbery?

1 Robbery includes each of the four elements I have
2 just explained.

3 In addition to these four elements, two other
4 elements are necessary to make out the crime of robbery.
5 Those elements are that the property must be taken from the
6 person of another or in his presence, and that the taking
7 and carrying away of the property must have been
8 accomplished by placing the other person in fear by violence
9 or threats of violence so as to make that person surrender
10 the property without their consent and against their will.

11 Therefore, the crime of armed robbery includes all
12 the elements of larceny and robbery.

13 In order to make out the crime of armed robbery,
14 however, an additional element must be proved. The robbery
15 must have been committed while armed with a deadly weapon.
16 The person committing the robbery must have had or used a
17 deadly weapon which he obtained possession of the property
18 or placed one possessing the property in fear in order to
19 obtain the property.

20 Section 16-11-330(a) of the South Carolina Code of
21 Laws, 1976, as amended, provides that a person convicted of
22 the crime of robbery while armed with a pistol, dirk,
23 slingshot, metal knuckles, razor, or other deadly weapon
24 commits an armed robbery.

25 Now, I charge you with regard to the offense of

1 kidnapping. What is kidnapping?

2 Each defendant has been charged by the State with
3 the offense of kidnapping.

4 Section 16-3-910 of the South Carolina Code of
5 Laws, 1976, as amended, provides as follows:

6 Whoever shall unlawfully seize, confine, inveigle,
7 decoy, kidnap, abduct, or carry away any other person by any
8 means whatsoever without authority of law shall be guilty of
9 kidnapping.

10 The State must prove to you beyond a reasonable
11 doubt that Ned Marshall was unlawfully seized, confined,
12 decoyed, kidnapped, abducted, or carried away by a defendant
13 by some means and without authority of law before you can
14 return a verdict of guilty as to the offense of kidnapping.

15 If the State fails to prove to you beyond a
16 reasonable doubt that the defendant committed the offense of
17 kidnapping, then you must find the defendant not guilty.

18 Each of the elements of kidnapping must be proved
19 by the State beyond a reasonable doubt before a verdict of
20 guilty can be returned.

21 The elements are, again, there must be some act or
22 conduct on the part of the kidnapper which results in
23 taking, carrying away, seizure or detention of the victim.

24 The taking, carrying away, seizure or detention
25 must have been accomplished without any lawful warrant or

1 authority before; that is, it must have been unlawful.

2 And then the taking, carrying away, seizure or
3 detention must have been accomplished by force and against
4 the will of the victim. In other words, the victim must not
5 have consented in a legally valid manner.

6 While the use of physical force or violence would
7 satisfy this requirement, such physical force or violence is
8 not essential to the commission of the crime of kidnapping.
9 For kidnapping it is sufficient that a threat is used, if it
10 of sufficient force to put an ordinarily prudent person in
11 fear of his or her personal safety.

12 I charge you now with regard to the offense of
13 possession of a firearm or knife during the commission -- or
14 excuse me, firearm during the commission of a violent crime.

15 The defendants in this case are also charged with
16 possession of a firearm during the commission of a violent
17 crime.

18 Section 16-23-490 of the South Carolina Code of
19 Laws, states as follows: If a person is in possession of a
20 firearm, or visibly displays a firearm, during the
21 commission of a violent crime and is convicted of committing
22 or attempting to commit a violent crime as defined in
23 Section 16-1-60 of the South Carolina Code, 1976, as
24 amended, he is guilty of this offense.

25 Now, Section 16-1-60 of the South Carolina Code

1 provides a statutory list of violent crimes in South
2 Carolina to include the crimes of murder, armed robbery,
3 kidnapping, accessory before the fact of murder, accessory
4 before the fact of armed robbery, and accessory before the
5 fact of kidnapping.

6 You may not consider the charge of possession of a
7 firearm during the commission of a violent crime, unless you
8 first find the defendant guilty of either murder, armed
9 robbery, kidnapping, or accessory before the fact of murder,
10 armed robbery or kidnapping.

11 If you do not find a defendant guilty of at least
12 one of those charges, then you would find him not guilty on
13 this charge and would not consider it in your deliberations.

14 In other words, a defendant must be found guilty
15 of a violent crime and the State must have proved that the
16 defendant was in position of a firearm during the commission
17 of a violent crime, in this case either murder, armed
18 robbery, kidnapping, or accessory before the fact to one of
19 those three offenses before you may find the defendant
20 guilty of this charge.

21 Now, in this case Ben Robert Stewart is charged
22 with the offense of accessory before the fact, accessory
23 before the fact to murder, armed robbery, and also to
24 kidnapping.

25 I instruct you now with regard to that charge.

1 There are three elements that must be proved by the State
2 beyond a reasonable doubt in order to justify the conviction
3 of the defendant as an accessory before the fact.

4 The State must prove that the defendant advised,
5 agreed, urged, or in some way aided or abetted some other
6 person to commit the offense.

7 Two, the defendant was not present when the
8 offense was committed.

9 And third, some principal actually committed the
10 crime.

11 The State must prove the principal is guilty or
12 the accessory may not be convicted.

13 An accessory before the fact is one who, though
14 not the chief factor in the offense nor present at its
15 performance, is in some way concerned with it before the
16 fact. One who is absent at the time of the offense, yet
17 agreed, advised, urged, or in some way aided or abetted
18 another person to commit the crime.

19 An accessory before the fact is one who was not
20 present actually or constructively at the time when a felony
21 was committed, but who agreed, advised, urged, or in some
22 way aided or abetted another to commit it and he is equally
23 guilty with the principal.

24 Now, Mr. Foreman, ladies and gentlemen of the
25 jury, there are two methods of being present, and -- well,

1 I'll get into that more in a minute.

2 Let me explain to you what aid means. Aid means
3 to help, promote the course, or accomplishment of, to give
4 support to, or to give assistance to.

5 Abet means to encourage or appear to favor or
6 support.

7 In order to render one guilty as an accessory
8 before the fact, he must have had the requisite criminal
9 intent. Such person must have the same intent as the
10 principal. However, since he need not necessarily have
11 intended the particular crime committed by the principal, an
12 accessory is liable for any criminal act which in the
13 ordinary course of things was the natural or probable
14 consequence of the crime that he procured, advised, aided,
15 or abetted another to commit.

16 The fact that the crime is not committed in a
17 particular way designated by the procurer or conspirator
18 does not prevent him from being liable as an accessory
19 before the fact.

20 The concept of an accessory before the fact has
21 been held to presuppose some prearrangement with respect to
22 the commission of the crime in question.

23 The mere fact that a person with knowledge that
24 another intends to commit a crime, acquiesces in its
25 commission, will not, provided he does nothing to procure,

1 aid, or abet the bringing about the commission of the crime,
2 render him an accessory before the fact.

3 The mere fact that the defendant had knowledge of
4 an intended crime on the part of another and conceal the
5 same or failed to prevent it would not render the defendant
6 an accessory before the fact.

7 Now, I instruct you with regard to accessory after
8 the fact.

9 An accessory after the fact is one who is knowing
10 a felony to have been committed receives, relieves,
11 comforts, or assists the felon.

12 Three elements must be proved by the State beyond
13 a reasonable doubt before the defendant may be found guilty
14 of accessory after the fact.

15 First, a felony or crime has been completed; that
16 is to say, fully accomplished or performed.

17 Second, the defendant must have knowledge that the
18 principal committed the felony.

19 And third, the defendant must harbor, aid, or
20 assist the principal with the intention of aiding the
21 principal to escape detection or arrest.

22 Absence from the scene of the crime is not an
23 element of the offense of accessory after the fact.

24 Mere presence at the scene does not preclude you
25 from finding the defendant guilty as an accessory after the

1 fact, but a defendant became involved after commission of
2 the substantive offense.

3 It is possible for one to have been present at the
4 scene of the crime and subsequently, or thereafter, to
5 become an accessory after the fact.

6 If you find the defendant was merely present at
7 the scene of the crime and did not participate in the crime,
8 but became involved after the commission of the crime, you
9 may find the defendant guilty of being an accessory after
10 the fact.

11 An accessory after the fact is one who knows that
12 the principal has committed a completed felony and assists
13 him with the intention of facilitating his escape from
14 arrest, conviction, or punishment. Although the actions of
15 the person who is charged with being an accessory after the
16 fact may have aided or assisted the principal to escape
17 detection or arrest, this is not sufficient in itself to
18 find the defendant guilty of accessory after the fact.

19 In addition to this, the State must prove that the
20 defendant acted with the intention or purpose of assisting
21 or aiding the principal to escape detection or arrest.
22 Thus, if a person is charged with being an accessory after
23 the fact did not intend that his action, aid, and assists
24 the principal to escape detection or arrest, then he's not
25 an accessory after the fact, even though his acts, in fact,

1 may have resulted in aiding or assisting the felon to escape
2 detection or arrest.

3 In order to render a person guilty as an accessory
4 after the fact, he must have had actual knowledge at the
5 time he aided or assisted the principal that the principal
6 had committed the felony. It is sufficient if the defendant
7 had reasonable grounds to believe that the offender
8 committed a felony. Assistance must have been rendered with
9 the intent to enable the felon to escape detection or
10 apprehension.

11 Mere acts of caring which relieve or comfort a
12 felon, but do not hinder his apprehension and conviction,
13 nor aid in his escape, will not render one as an accessory
14 after the fact.

15 Mere silence as to one's knowledge of the crime
16 with no intent to aid the felon, or mere failure to inform
17 law enforcement does not make one an accessory after the
18 fact.

19 There must be some affirmative act tending toward
20 concealment of the commission of the crime or refusal to
21 give information to the commission of the crime when it is
22 sought by the officials of the person having such knowledge.

23 Denial of knowledge of a crime when questioned by
24 a law enforcement would not render the person an accessory
25 after the fact.

1 It is not necessary that there should have been
2 any formal criminal charge against a felon in order to
3 render one who furnished him assistance as an accessory
4 after the fact.

5 It is not necessary that the aid furnished be
6 effective to enable the felon to escape all or part of his
7 punishment.

8 The defendants are also charged with the crime of
9 criminal conspiracy.

10 The crime of conspiracy is a combination between
11 two, or more, persons for the purpose of accomplishing
12 either a criminal or unlawful object by whatever means, or
13 an object, which is neither criminal nor unlawful, by
14 criminal or unlawful means.

15 If two, or more, persons agree to unite in a
16 common purpose to commit a criminal act, they conspire.

17 A conspiracy is a combination between two, or
18 more, persons to do an unlawful act, or to do a lawful act
19 by criminal or unlawful means.

20 I charge you that there can be no conspiracy when
21 one individual acts by and for himself only.

22 To become a party to a conspiracy, a person must
23 combine with someone else to affect the object of the
24 conspiracy by the means agreed upon. A common design or
25 plan is essential to the charge of conspiracy.

1 To establish conspiracy, it is necessary, first,
2 that an agreement to commit the offense alleged in the
3 indictment be established.

4 What is required for an agreement? It's a shared
5 single criminal objective, not just similar or parallel
6 objective between similarly situated people. What is needed
7 is proof that they intended to act together for their shared
8 mutual benefit within the scope of the conspiracy charge.

9 The State must prove further that one, or more, of
10 the parties engaged in the agreement committed some act to
11 affect the object of the conspiracy as alleged in the
12 indictment.

13 Although the offense of conspiracy may be complete
14 without proof of an overt act, such acts may nevertheless be
15 shown, since from them an inference may be drawn as to the
16 existence and object of the conspiracy.

17 To constitute conspiracy it is not necessary that
18 two, or more, persons meet and enter into an express or
19 formal agreement to do an unlawful act, or that they should
20 directly by words or in writing unite between themselves as
21 to what unlawful object is to be, or what the details of the
22 plan are, or by what means that an unlawful combination is
23 to be made effective.

24 It is sufficient if two, or more, persons in any
25 manner, or through any contrivance, positively or tacitly

1 come to a mutual understanding to accomplish a common and
2 unlawful design. In other words, when an unlawful end is
3 sought to be affected, when two, or more, persons get
4 together for the common purpose of accomplishing that end
5 and work together in any way in furtherance of the unlawful
6 scheme, each of those persons becomes a member of the
7 conspiracy.

8 Success or failure of a conspiracy is immaterial,
9 but before any person can be found guilty of the charge of
10 conspiracy, it must appear beyond a reasonable doubt that
11 the conspiracy was formed and that the particular person was
12 an active party to it.

13 Although the offense of conspiracy may be
14 committed without proof of overt acts, such acts again may
15 nevertheless be shown.

16 Here the conspiracy itself constitutes the
17 offense, and it must appear from the evidence beyond a
18 reasonable doubt before a defendant may be convicted that he
19 was a party to the conspiracy.

20 The mere fact that the defendant named may be
21 engaged in the performance, if any, of the acts charged in
22 the indictment, such as overt acts, it is not of sufficient
23 evidence to convict him of conspiracy. You may not convict
24 the defendant of conspiracy on that fact alone, but it is
25 necessary to show that the defendant was a party to the

1 conspiracy, an unlawful agreement, before he is guilty of
2 conspiracy.

3 The evidence and proof of the conspiracy may be
4 circumstantial.

5 The terms overt acts, as I have used, means an act
6 committed by one, or more, of the conspirators as alleged in
7 the indictment.

8 Now, mere presence or mere association is not
9 enough to prove conspiracy. Two, or more, persons must come
10 to an understanding to accomplish an unlawful design.

11 I charge you, ladies and gentlemen, that the State
12 of South Carolina is required to prove all the material and
13 essential allegations of this charge beyond a reasonable
14 doubt before you can find a defendant guilty of criminal
15 conspiracy.

16 Mr. Foreman, ladies and gentlemen of the jury, the
17 defendant, Terrell Antonio Addison, has raised in this case
18 the defense of coercion or duress.

19 What is coercion or duress?

20 Coercion or duress is when a person makes another
21 person commit a crime against someone else's person or
22 property by the threat of immediate physical violence.

23 The coercion or duress must be present -- excuse
24 me, must be present, imminent, and the type -- let me start
25 over with that paragraph.

1 The coercion or duress must be present, imminent,
2 and of the type to create a well-grounded fear of death or
3 serious bodily harm if the act is not done. The fear of
4 injury must be reasonable.

5 Coercion or duress is not a defense if there is
6 any reasonable way, other than committing the crime, for the
7 defendant to escape the threat of harm.

8 If you find the defendant was -- if you find the
9 defendant committed the crime under duress, you must find
10 the defendant not guilty.

11 The defendant has the burden of proving he acted
12 under duress or coercion by a preponderance of the evidence.

13 In order to determine if the defendant's
14 appreciation was -- well, excuse me, apprehension was well
15 grounded and his fear of death or serious bodily injury were
16 reasonable, you may consider evidence of what the defendant
17 knew about the person, or persons, he alleges coerced him.
18 You may consider if he knew of their reputation for violence
19 in the community and whether he knew of specific acts of
20 violence committed by this person, or persons.

21 I charge you that if a defendant knew that the
22 person who was allegedly threatening him had a violent
23 reputation or had committed violence acts, you may consider
24 whether this knowledge made the defendant's alleged fear of
25 serious bodily injury or death reasonable under the facts

1 and circumstances of this case.

2 Mr. Foreman, ladies and gentlemen of the jury,
3 again I'm going to charge you now with regard to accomplice
4 liability. It's not easy to understand, but, again, please
5 listen carefully as I go through that.

6 If two or more persons combine together to commit
7 an unlawful act, such as robbery, and in the execution of
8 that criminal act a homicide is committed by one of the
9 actors as a probable or natural consequence of the acts done
10 in pursuance of the common design, all present participating
11 in the unlawful taking are as guilty as the one who
12 committed the fatal act.

13 The common purpose may not have been to kill and
14 murder, but if it was unlawful, as, for instance, to break
15 in and steal, and in the execution of this common purpose a
16 homicide is committed by one as a probable or natural
17 consequence of the acts done in pursuance of the common
18 design, then all present participating in the unlawful
19 common design are as guilty as the slayer.

20 If a crime is committed by two, or more, people
21 who are acting together in committing a crime, the act of
22 one is the act of all.

23 A person who joins with another to accomplish an
24 illegal purpose is criminally responsible for everything
25 done by the other person which occurs as a natural and

1 probable consequence of the act done in carrying out the
2 common plan and purpose.

3 For example, two people can be guilty of killing
4 another person when only one of the two had a gun, there was
5 only one bullet, and only one of the two fired the shot that
6 caused the death.

7 If two, or more, people are together, acting
8 together, assisting each other in committing the offense,
9 the act of one is the act of all; or as it is sometimes
10 said, the hand of one is the hand of all.

11 I charge you further that mere presence with
12 another person or persons who are engaged in criminal
13 conduct with a person or persons who subsequently engage in
14 criminal conduct is not sufficient to show an intent to aid
15 that conduct.

16 Similarly, the mere fact that a defendant may have
17 associated with such person, or persons, does not
18 necessarily establish proof of an intent to aid criminal
19 conduct by such person, or persons.

20 Mere knowledge that another person, or persons,
21 intend to engage or engaged in criminal conduct is not
22 sufficient to show an intent to aid that conduct.

23 In order to show that defendant is guilty, the
24 State must prove two things beyond a reasonable doubt.

25 First, that the defendant knew of the illegal

1 conduct.

2 And second, that the defendant affirmatively
3 provided aid to assist in the commission of the crime with
4 the intent that the act would assist the commission of
5 crime.

6 In order to show the defendant is guilty, the
7 State must prove beyond a reasonable doubt not only that the
8 defendant was present, but also that the defendant knew of
9 the illegal conduct and that the defendant provided aid to
10 assist the commission of the crime with the intent that the
11 aid would assist the commission of the crime.

12 Intent is also a necessary element, for there must
13 have been a common design or intent to commit the crime and
14 the crime must have been committed pursuant to that plan
15 with the person aiding and abetting by some overt act.

16 The burden is on the State to prove every element
17 of the crime charged, including intent.

18 Now, prior knowledge that a crime is going to be
19 committed, without more, is not sufficient to make a person
20 guilty of that crime.

21 Mere knowledge that another person is going to
22 commit a crime, even if the defendant is present when the
23 crime was committed, is not sufficient to convict the
24 defendant as a principal.

25 Guilt as a principal is shown by actual or

1 constructive presence at the scene as a result of prior
2 arrangement. Therefore, a finding of a prior arranged plan
3 or common scheme is necessary for a finding of guilt as a
4 principal.

5 The State must prove beyond a reasonable doubt by
6 competent evidence the theory of the hand of one is the hand
7 of all.

8 A principal in a crime is one who either actually
9 commits the crime or who is present, aiding, abetting, or
10 assisting in committing the crime.

11 When a person does an act in the presence of and
12 with the assistance of another, the act is done by both.

13 Where two or more, acting with a common plan or
14 intent, are present at the commission of a crime, it does
15 not matter who actually commits a crime. All are guilty.
16 The hand of one is the hand of all.

17 Now, Mr. Foreman, ladies and gentlemen of the
18 jury, I charge you that presence may be in one of two ways.

19 In addition to actual presence, the law recognizes
20 constructive presence.

21 Constructive presence is defined as -- and it may
22 be predicated of a person who, though not on the very spot
23 where the crime was committed, was near enough to be counted
24 by the -- excuse me, counted present by the law who is
25 actively cooperating with another who is actually present.

1 Present at the commission of a crime means to be
2 sufficiently near to aid and abet and assist in the
3 commission of the crime. However, mere presence at the
4 scene of a crime is not sufficient to convict one as a
5 principal on the theory of aiding and abetting.

6 Intent is also a necessary element, for there must
7 have been a common design or intent to commit the crime, and
8 the crime must have been committed pursuant thereto with the
9 person aiding and abetting by some overt act.

10 Intent means intending the result which actually
11 occurs. Not accidentally or involuntary.

12 Intent may be shown by acts and conducts of the
13 defendant and other circumstances from which you may
14 naturally and reasonably infer intent.

15 The State must prove these elements beyond a
16 reasonable doubt.

17 Mr. Foreman, ladies and gentlemen of the jury,
18 mere presence is not enough, and the defendant cannot be
19 found guilty on any charge solely because he was merely
20 present at the scene of a crime.

21 To be found guilty, a person must personally
22 commit the crime, or be present at the scene and
23 intentionally take a role in the commission of the crime.

24 Mr. Foreman, ladies and gentlemen of the jury,
25 there are two defendants in this case. Each is charged with

1 several offenses. Whatever verdict that you find, it does
2 not have to be same as to both defendants. You can take
3 each -- you take each defendant, consider the evidence as to
4 him and write your verdict in accordance and in conformity
5 with the evidence in the case and the instructions I have
6 given you and will give you hereafter.

7 Where more than one person is charged with a
8 crime, if the evidence warrants it, you may convict one and
9 acquit the other; or you may acquit both; or you may convict
10 both. It would depend upon your view of the testimony and
11 evidence which you alone are to pass upon.

12 Mr. Foreman, ladies and gentlemen of the jury,
13 there are multiple charges against each defendant in this
14 case. They are not to be prejudiced by the fact that there
15 are several counts against them today. You are to consider
16 each charge separately. Consider the evidence separately
17 for each offense. Therefore, if the evidence warrants it,
18 you may convict a defendant on all counts, on one and not
19 the others, and so on, or you can find a defendant not
20 guilty on all counts. You arrive at your verdict of guilty
21 or not guilty for each charge alleged in this case.

22 Now, Mr. Foreman, ladies and gentlemen of the
23 jury, nothing that I may have said or done during the course
24 of this trial has been in any way intended to express or
25 suggest a view of the case, an opinion as to the facts, the

1 weight of the evidence, or the credibility of the witnesses.
2 If any of my actions or words have seemed to so indicate,
3 you will disregard such. Form your own opinion as to these
4 matters.

5 You have been selected as fair and impartial
6 jurors, sworn to impartially try and determine the facts of
7 this case. And when you have complied with your oath to do
8 so, then no one will have a right to criticize your verdict
9 and you will have fully discharged your duty as jurors.

10 You are to decide this case according to the
11 testimony you have heard from the lips of the sworn
12 witnesses, along with other evidence introduced during the
13 course of the trial.

14 I charge you that as jurors you must decide the
15 issues in this proceeding without bias and without prejudice
16 to any party. You cannot allow yourself to be governed by
17 sympathy, by prejudice, by passion, by public opinion, or
18 any other arbitrary factor. Both the State and each
19 defendant has the right to expect that each of you will
20 carefully and impartially consider all of the evidence in
21 the case and you will follow the law as I have explained it
22 to you.

23 Mr. Foreman, ladies and gentlemen of the jury,
24 whatever your verdict in this case is, it must be your
25 unanimous verdict. All twelve jurors must agree on the

1 verdict, which the foreperson would be authorized to write
2 on each of the charges against each of the defendants.

3 Now, Mr. Foreman, I charge you that once you begin
4 your deliberations, that you maintain some order in those
5 deliberations, that all who wish to participate and to be
6 heard in those deliberations be allowed to do so.

7 If for any reason any members of the jury panel
8 take a break from deliberations, all should take a break.
9 By that I mean all twelve jurors should be present and
10 deliberating when deliberations are going on.

11 Now, when you go back to your jury room, all of
12 the exhibits that have been admitted into evidence would be
13 brought back to you for you further to consider and examine.

14 If there is something that can't be played and is
15 part of an exhibit, we cannot provide that back to you, we
16 will bring you -- upon your request we can bring you back
17 out in the courtroom and play it back in here, if you don't
18 have the ability to do it in the jury room, or upon your
19 request we can do that.

20 Now, Mr. Foreman, I have prepared for your use in
21 the jury room a verdict form for each of the charges against
22 each of the defendants in this case.

23 Now, as to the defendant Terrell Antonio Addison,
24 I want to go through the charges against him on the verdict
25 forms.

1 First, on the charge of murder, there are two
2 possible verdicts which appear on the verdict form. They
3 are as follows:

4 "We, the jury, find the defendant Terrell Antonio
5 Addison guilty of murder."

6 Second possible verdict which appears on the
7 verdict form is "we, the jury, find the defendant Terrell
8 Antonio Addison not guilty."

9 The second one is as to armed robbery, and the
10 possible verdicts appear in the same order.

11 As to kidnapping, they appear in the same order.

12 As to possession of a firearm during the
13 commission a violent crime, they appear in the same order.

14 And on the criminal conspiracy charge, they appear
15 in the same order.

16 As to the defendant Ben Robert Stewart, there are
17 additional charges with regard to Mr. Stewart. I'll go
18 through those verdict forms.

19 First as to murder, there are two possible
20 verdicts which appear on the verdict form.

21 The first reads as follows: "We, the jury, find
22 the defendant Ben Robert Stewart guilty of murder."

23 The second possible verdict, "we, the jury, find
24 the defendant Ben Robert Stewart not guilty."

25 Now, there is same form but -- the verdict -- the

1 possible verdicts appear in the same order on accessory
2 before the fact to murder.

3 Armed robbery.

4 Accessory before the fact to armed robbery.

5 Kidnapping.

6 Accessory before the fact to kidnapping.

7 Accessory after the fact to armed robbery
8 kidnapping and/or murder.

9 Criminal conspiracy.

10 And possession of a firearm during the commission
11 of a violent crime.

12 Now, the order in which the possible verdicts
13 appear on the verdict form means absolutely nothing and you
14 should infer nothing from it. I have to prepare the verdict
15 forms in some order. I do it the same way every time, but
16 the order in which the possible verdicts appear on the
17 verdict form means nothing. Again, you should infer nothing
18 from it.

19 What you should do, Mr. Foreman, as to each of
20 these charges against each of the defendants, you should
21 deliberate and consider them separately.

22 Once the jury has reached a unanimous verdict as
23 to each of these charges, you will simply then go to the
24 verdict form on that charge, find the verdict which the jury
25 has unanimously agreed upon. You will simply then put a

1 checkmark by a blank beside that particular verdict. Sign
2 your name on the line above the word foreperson's signature.
3 Date it.

4 Once you have done that to all of the charges,
5 then you will simply knock on the door, let the bailiff know
6 that you have reached a verdict and I will bring you back
7 out to receive those verdicts.

8 Now, as to -- I'll explain it further with regard
9 to Mr. Stewart. You are instructed to consider the
10 principal charge first, that is to say, murder, armed
11 robbery, and kidnapping, and determine whether or not the
12 State had proven the elements of each of those offenses
13 beyond a reasonable doubt.

14 If you find the defendant guilty on those charges,
15 then you would not consider or make any finding on the
16 accessory both before the fact of those charges, nor on
17 accessory after the fact to those charges.

18 If you consider the principal charge of murder,
19 armed robbery, and kidnapping, and you find the defendant
20 not guilty on those three charges, then you would go next to
21 the charges of accessory before the fact and accessory after
22 the fact and consider those.

23 Now, again, you wouldn't consider the accessories,
24 before or after the fact to these charges, if you find the
25 defendant guilty, Mr. Stewart, on these principal charges.

1 If you find him not guilty on these three
2 principal charges, then you would go to the accessory
3 charge.

4 If you find him guilty on those charges, you would
5 not even consider or make any finding on the accessory
6 charges, before or after the fact.

7 But if you find him not guilty on those charges,
8 then you would consider the accessory before and after the
9 fact and make a finding as to each of those charges, whether
10 the State had proven the elements of those offenses beyond a
11 reasonable doubt.

12 Again, if you have any question about that, once
13 you begin deliberations, upon your request send me a note
14 out and I can bring you back out and clarify anything you
15 want me to clarify.

16 We have taken the liberty of ordering lunch for
17 you. I hope you like pizza, because that's about the only
18 thing we can get in fairly short order. We have already
19 ordered it. Hopefully -- it may be here by the time that
20 you get back to the jury room. I hope it is. If it's not,
21 it will be here very shortly, if it's not already here. We
22 ordered it when I started my instructions, so it -- we were
23 trying to make sure it's hot for you whenever we started
24 deliberating.

25 I'm going to ask you, if you will, at this time to

1 retire to the jury room, but do not yet begin your
2 deliberations. I have to give counsel an opportunity to
3 request additional instructions on the law. If additional
4 instructions are requested and I deem them necessary, I will
5 bring you back out and give you those additional
6 instructions. It follows then that we should make sure that
7 all instructions are complete before you would begin
8 deliberations.

9 If no other instructions are necessary, I will
10 send to you by means of the bailiff the verdict forms, the
11 exhibits that have been admitted into evidence for your
12 consideration, and instructions to begin deliberating.
13 Please do not begin deliberating until you get that
14 instruction.

15 Now, I'm going to ask you, if you will, at this
16 time to retire to the jury room, all except the alternates.
17 At this time I'll ask the alternates not to go into the jury
18 room, but wait just outside the courtroom door for further
19 instructions.

20 Oh, one other thing. Let me tell you this
21 additional fact. My clerk just reminded me. If you are
22 deliberating on these charges and you became divided and you
23 send the court a note out telling me that you are divided,
24 please do not tell me how you are divided. I do not want
25 numbers, in other words. If you are divided, you can tell

1 me that, but please do not give me the manner in which you
2 are divided, if you will. I do not want to know that.
3 Okay.

4 Thank you. Please retire to the jury room.

5 (Whereupon, at 2:35 p.m., the jury retired to the
6 jury room, awaiting instructions to begin deliberations)

7 THE COURT: Exceptions or requests for additional
8 charges, from the State?

9 MR. BRACKETT: No exceptions or additions from the
10 State.

11 THE COURT: From the Defendant Addison?

12 MR. SWERLING: No, Your Honor.

13 THE COURT: From the defendant Mr. Stewart?

14 MR. SNOW: None, Your Honor.

15 THE COURT: Good. Gentlemen, would you check the
16 exhibits and make sure that only those that were admitted
17 into evidence go back to the jury.

18 MR. BRACKETT: Yes, sir.

19 (Off the record)

20 (Back on the record)

21 (Whereupon, at 2:43 p.m., the jury was instructed
22 to begin deliberations)

23 THE COURT: We will have to have somebody stay
24 with them, though. Let's take them -- we will take the two
25 alternates down to the other jury room and leave them in

1 here so they can take them their food and they will stay
2 there while the jury is deliberating in case we have a
3 problem, so that's what we will do. I guess we will need
4 somebody to stay down there, out the door with them. All
5 right. After we -- we may use somebody from the security to
6 be able to that maybe.

7 All right. If you will --

8 THE CLERK: I'll take them down and I'll --

9 THE COURT: Well, bring them in and let me tell
10 them what we are doing so they don't get confused.

11 (Whereupon, the alternate jurors were brought into
12 the courtroom)

13 THE COURT: You all stand just right there.

14 Let me tell you what we are going to do.

15 As it turned out, we made it all the way through
16 the trial without an emergency developing with regard to one
17 of the first twelve jurors chosen. So at this point it will
18 not be necessary for you to participate in deliberations to
19 help reach a verdict. However, because this has been a week
20 long trial, we want to keep you here in the event we still
21 have a problem with one of the jurors and we had to
22 substitute somebody in. And so what we are going to do is
23 put you in a separate room, separate jury room, by
24 yourselves and give you some food for lunch and just ask you
25 to stay in there until we notify you. And we will have

1 somebody out there, a bailiff, if you need something or
2 somebody, if you need something in there. But that's what
3 we are going to do. So the bailiff will show you the way
4 down there. We will bring you some food, and if you will
5 just hang out there until we tell you different. Okay?
6 Thank you.

7 (Whereupon, the alternate jurors were taken out of
8 the courtroom)

9 THE COURT: All right. Counsel, we will be
10 adjourned. If you want to go get something to eat or
11 something, if you will just leave a cell phone or something
12 where we can get back in touch with you.

13 (Whereupon, at 2:45 p.m., proceedings adjourned,
14 pending the verdict of the jury panel)

15 (Whereupon, at 3:55 p.m., proceedings were
16 reconvened)

17 THE COURT: All right, bring the jury in.

18 (Whereupon, at 3:57 p.m., the jury returned to the
19 courtroom)

20 THE COURT: Mr. Foreman, ladies and gentlemen of
21 the jury, of course I had your original note asking for Reed
22 Allen's written statement, and it was not admitted into
23 evidence. I sent you note back in a sentence saying it was
24 not admitted into evidence and couldn't provide it to you at
25 this point.

1 You then asked could we have a transcript of Reed
2 Allen's testimony. And we don't have that transcribed in
3 written form at this point. It would have to be
4 transcribed, but what we can do is replay it for you,
5 whatever portion, or all of it for that matter, that you
6 want. And we are going to replay it for you. The court
7 reporter has a recording. He can replay the testimony. But
8 I believe his testimony is probably an hour or so in length.

9 Is there any particular portion that you are
10 interested in, or are you -- would you like to have it all
11 played back for?

12 JURY FOREMAN: I think mostly the part about the
13 handing over of the gun, the question --

14 THE COURT: What about if we start where -- I
15 believe the testimony will be that started at on direct
16 examination where they arrived at the house, where some of
17 them arrived at the house. Is that where?

18 JURY FOREMAN: Yes.

19 THE COURT: Go from there.

20 JURY FOREMAN: Yes.

21 THE COURT: That would be okay.

22 Let's replay that portion then.

23 (Whereupon, the court reporter replayed the
24 requested testimony to the jury panel)

25 THE COURT: If you need -- whatever you want to

1 play. If you want to stop, we can stop it and see if that's
2 enough.

3 JURY FOREMAN: Okay.

4 THE COURT: Is that good?

5 JURY FOREMAN: Yes, thank you.

6 THE COURT: Any more?

7 JURY FOREMAN: No.

8 THE COURT: Thank you. Please then, if you will,
9 retire back to the jury room and resume deliberating)

10 (Whereupon, at 4:12 p.m., the jury panel returned
11 to the jury room to continue deliberations)

12 THE COURT: All right. We will make this a court
13 exhibit.

14 (Jury Note marked as Court's Exhibit No. 7 for
15 identification).

16 All right, we will be at ease.

17 MR. SNOW: Judge, may we approach?

18 THE COURT: Yes.

19 (Whereupon, the lawyers approached the bench for
20 an off-the-record discussion)

21 THE COURT: Okay, Mr. Snow.

22 MR. SNOW: Your Honor, I'm going to -- my
23 client -- on behalf of my client I'm going to object to just
24 hearing that portion of the playback, judge. We feel that
25 it's necessary for the jury to hear the entire testimony and

1 certainly the cross-examination. They only get a portion of
2 the State's version, not necessarily our version, so I would
3 have to object to that, judge.

4 THE COURT: Well, your objection is noted for the
5 record.

6 The problem is I'm not the one who determines what
7 they want to hear. They are. They heard all the testimony
8 from the beginning during the trial. And this is -- they
9 have requested me to replay -- they wanted something
10 replayed back. I didn't know what they were looking for.
11 You didn't know what they were looking for, and we started
12 playing it. I planned to play it all the way through until
13 they until they didn't want to hear it any more. They are
14 the one that decided they didn't need to hear any more.
15 They heard what they needed to hear. They have already
16 heard it all before, okay, and they wanted it played back.
17 I mean, I can't tell what to listen to, and I'm not going
18 to -- if they tell me they heard what they wanted to hear,
19 they don't want to -- they don't need to hear any more, then
20 it's not up to me to say no, you are going to listen to all
21 of it. Now -- I mean, that's just the way it is. They
22 heard it all during the trial. And if they say -- they
23 heard whatever it is they want to hear. I'm not going to
24 make them listen to more than they want to hear. Okay. If
25 they request to hear more, I will be glad to play it for

1 them. Nothing I can do about that. They decide what they
2 want to hear.

3 MR. SNOW: Thank you, judge.

4 THE COURT: All right.

5 (Whereupon, at 4:15 p.m., proceedings were
6 recessed, pending the verdict of the jury panel)

7 (Whereupon, at 5:14 p.m., proceedings were
8 reconvened)

9 THE COURT: Counsel, I think I'm going to
10 reinstruct them on criminal conspiracy at this point,
11 and then we can talk just a little bit more about the other
12 request.

13 All right.

14 (Whereupon, at 5:15 p.m., the jury panel returned
15 to the courtroom)

16 THE COURT: Mr. Foreman, ladies and gentlemen of
17 the jury, I have a couple of notes from you. One was a
18 question concerning possession of a firearm during the
19 commission of a violent crime. I have not responded to that
20 yet. I'm still looking at it, and I have got your other
21 note out while I was doing that.

22 JURY FOREMAN: Okay.

23 THE COURT: Pardon me?

24 JURY FOREMAN: Okay.

25 THE COURT: I'm going to address your second

1 question at this point, and then I will address the other
2 one as soon as I have had a chance to look at it.

3 But with regard to the criminal conspiracy that
4 you requested, can I reinstruct you with regard to criminal
5 conspiracy, is that right?

6 JURY FOREMAN: Yes, sir.

7 THE COURT: I'm going to do that at this time,
8 reinstruct you just as I did before.

9 With regard to criminal conspiracy, the crime of
10 conspiracy is a combination between two, or more, persons
11 for the purpose of accomplishing either a criminal or
12 unlawful object by whatever means, or an object which is
13 neither criminal nor unlawful by criminal or unlawful means.

14 If two, or more, persons agree to unite in a
15 common purpose to commit a criminal act, they conspire.

16 A conspiracy is a combination between two, or
17 more, persons to do an unlawful act, or to do a lawful act
18 by criminal or unlawful means.

19 I charge you that there can be no conspiracy when
20 one individual acts by and for himself only.

21 To become a party to a conspiracy, a person must
22 combine with someone else to affect the object of conspiracy
23 by the means agreed upon.

24 A common design or plan is essential to the charge
25 of conspiracy.

1 To establish conspiracy, it is necessary first
2 that an agreement to commit the offense alleged in the
3 indictment be established.

4 What is required for an agreement is shared single
5 criminal objective. Not similar or parallel objectives
6 between similarly situated people. What is needed is proof
7 that they intended to act together for their shared mutual
8 benefit within the scope of the conspiracy charge.

9 The State must prove further that one, or more, of
10 the parties engaged in the agreement committed some act to
11 affect the object of the conspiracy as alleged in the
12 indictment.

13 Although the offense of conspiracy may be complete
14 without proof of an overt act, such acts may, nevertheless,
15 be shown, since from them an inference may be drawn as to
16 the existence and object of the conspiracy.

17 To constitute a conspiracy, it is not necessary
18 that two, or more, persons meet and enter into an expressed
19 or formal agreement to do an unlawful act, or that they
20 should directly, by words or in writing, unite between
21 themselves as what the unlawful object is to be or what the
22 details of the plan are or by what means the unlawful
23 combination is to be made effective.

24 It is sufficient if two, or more, persons in any
25 manner or through any contrivance positively or tacitly come

1 to a mutual understanding to accomplish a common and
2 unlawful design.

3 In other words, when an unlawful end is sought to
4 be affected and two, or more, persons get together for the
5 common purpose of accomplishing that end and work together
6 in any way in furtherance of the unlawful scheme, each of
7 those persons becomes a member of the conspiracy.

8 The success or failure of the conspiracy is
9 immaterial, but before any person can be found guilty of the
10 charge of conspiracy, it must appear beyond a reasonable
11 doubt that the conspiracy was formed and that the particular
12 person was an active party to it.

13 Although the offense of conspiracy may be
14 committed without proof of overt acts, such acts may,
15 nevertheless, be shown.

16 Here the conspiracy itself constitutes the offense
17 and it must appear from the evidence beyond a reasonable
18 doubt before the defendant may be convicted that he was a
19 party to the conspiracy.

20 The mere fact that the defendant named may be
21 engaged in the performance of any of the acts charged in the
22 indictment, such as overt acts, is not sufficient evidence
23 to convict him of a conspiracy. You may not convict the
24 defendant of conspiracy on that fact alone, but it is
25 necessary to show that the defendant was a party to the

1 conspiracy to an unlawful agreement before he is guilty of
2 conspiracy. The evidence and proof of the conspiracy may be
3 circumstantial.

4 The term overt acts, as I have used it, means an
5 act committed by one, or more, of the conspirators as
6 alleged in the indictment.

7 Mere presence or mere association is not enough to
8 prove conspiracy. Two, or more, persons must come to an
9 understanding to accomplish an unlawful design.

10 I charge you, ladies and gentlemen, the State of
11 South Carolina is required to prove all the material and
12 essential allegations of this charge beyond a reasonable
13 doubt before you can find the defendant guilty of
14 conspiracy.

15 All right. Thank you.

16 Please, if you will retire back jury room and
17 resume deliberations.

18 I'll try to get you an answer to your question on
19 the other shortly. Thank you.

20 (Whereupon, at 5:21 p.m., the jury panel returned
21 to the jury room to continue deliberations)

22 THE COURT: We will make this a court exhibit. I
23 don't know the -- I'll tell you what. Let's make this one
24 first and then that one second, please.

25 (Jury Note marked as Court's Exhibit No. 8 for

1 identification)

2 (Jury Note marked as Court's Exhibit No. 9 for
3 identification)

4 THE COURT: Meet with me in just a minute and we
5 will discuss it a little bit further. I want to give some
6 more thought to it.

7 (Whereupon, at 5:22 p.m., proceedings were
8 recessed, pending the verdict of the jury panel)

9 (Whereupon, at 5:41 p.m., proceedings were
10 reconvened)

11 THE COURT: All right, counsel, I had a question
12 now for the jury, which states as follows: "For the charge
13 of possession of firearm during the commission of a violent
14 crime, does the hand apply", which, okay, would be
15 accomplice liability.

16 And frankly for the record's sake, we have had a
17 lot of discussion about this and haven't found specific
18 South Carolina authority one way or the other on that issue.
19 And the solicitor was able to get the case from a different
20 jurisdiction which seems to imply that it would be, however.
21 And so the court has decided to go ahead and answer that
22 question in the affirmative, yes, realizing, of course,
23 obviously if they do convict on that charge, we still could
24 take it up at later time, if counsel wishes to do that. But
25 I understand, and I will certainly give counsel an

1 opportunity to object to my sending this reply, affirmative
2 reply, back to them..

3 MR. SWERLING: Thank you, Your Honor.

4 We would well you, I would take exception to
5 answering the question in the affirmative since -- it would
6 be my position that someone could not be guilty of
7 possessing of a weapon during a violent crime under
8 accomplice liability theory, hand of one hand of all. It
9 would have to be under an actual or constructive possession
10 theory, because it's a personal -- it's a possession issue.
11 So I guess when I say personal, it's a possession issue, so
12 I'll leave it there.

13 THE COURT: Okay, Mr. Snow?

14 MR. SNOW: Yes, Mr. Stewart would join in that
15 motion and an objection to it.

16 THE COURT: Let me say this to you. I realize
17 part of my thinking about this is that there are facts on
18 the record certainly which would support a finding of either
19 actual or constructive possession, depending upon which
20 defendant we are talking about. There is facts on the
21 record which would support that.

22 But the court -- although I instructed the jury on
23 constructive presence, I didn't instruct them on
24 constructive possession. Nevertheless, I think there are
25 facts on the record that not -- that depend upon which

1 defendant -- well, really for both defendants. There is
2 testimony and evidence on the record which would establish
3 actual possession by each of them, and also constructive
4 possession by each of them. So -- so, you know, there is
5 evidence on the record to support that, in any event, if
6 that's what's required, but I understand your position and
7 we got that on the record and we will see what happens.

8 But I'm going to send this back to the jury. This
9 is Court Exhibit No. 8.

10 MR. SWERLING: And it simply says yes, Your Honor?

11 THE COURT: Yes, and I signed it.

12 MR. BRACKETT: Thank you, Your Honor.

13 (Whereupon, at 5:45 p.m., proceedings were
14 recessed, pending the verdict of the jury panel)

15 (Whereupon, at 6:00 p.m., proceedings were
16 reconvened)

17 MR. SWERLING: Judge, can we approach one second?

18 THE COURT: Yes, sir.

19 (Whereupon, the lawyers approached the bench for
20 an off-the-record discussion)

21 THE COURT: All right, ladies and gentlemen that
22 are in the courtroom, we have a verdict in these cases. I
23 don't have no idea what the verdicts are, but -- and we are
24 going to bring the jury out and receive those verdicts.
25 Whatever the verdicts are, we are going to respect those

1 verdicts.

2 When the verdicts are read, please do not display
3 any emotions here in the courtroom, outward emotions, if you
4 will. If you need to do that, please wait until you get
5 outside of the courthouse to do that. We need to respect
6 the jury's verdict, and I cannot allow anyone to have any
7 kind of emotional display here in the courtroom, so please
8 do not do that, whatever the verdicts may be. All right.

9 Thank you. Please bring the jury in.

10 (Whereupon, at 6:04 p.m., the jury panel returned
11 to the courtroom to report its verdict)

12 THE COURT: Mr. Foreman, have you and the jury
13 reached a unanimous verdict in these cases?

14 JURY FOREMAN: Yes, we have.

15 THE COURT: Would you please hand the verdict
16 forms up to the bailiff?

17 All right, the clerk will please publish the
18 verdicts.

19 THE CLERK: The State of South Carolina versus
20 Terrell Antonio Addison, with indictment 2007-GS-46-00671
21 for murder, we, the jury, find the defendant Terrell Antonio
22 Addison guilty of murder.

23 Signed by the foreperson this day.

24 In 2007-GS-46-00672, we, the jury, find the
25 defendant Terrell Antonio Addison guilty of armed robbery.

1 Signed by the foreperson this day.

2 2007-GS-46-00676 for kidnapping, we, the jury,
3 find the defendant Terrell Antonio Addison guilty of
4 kidnapping.

5 2007-GS-46-00670 for criminal conspiracy, we, the
6 jury, find the defendant Terrell Antonio Addison guilty of
7 criminal conspiracy.

8 Signed by the foreperson this day.

9 2007-GS-46-00673, possession of a firearm during
10 the commission of a violent crime, we, the jury, find the
11 defendant Terrell Antonio Addison guilty of possession of a
12 firearm during the commission of a violent crime.

13 Signed by the foreperson this day.

14 The State of South Carolina versus Ben Robert
15 Stewart, with indictment number 2007-GS-46-02526, accessory
16 before the fact of murder, we, the jury, find the defendant
17 Ben Robert Stewart guilty of accessory before the fact of
18 murder.

19 Signed by the foreperson this day.

20 2007-GS-46-02528, accessory before the fact of
21 armed robbery, we, the jury, find the defendant Ben Robert
22 Stewart guilty of accessory before the fact of armed
23 robbery.

24 Signed by the foreperson this day.

25 2007-GS-46-2530, accessory before the fact of

1 kidnapping, we, the jury, find the defendant Ben Robert
2 Stewart guilty of accessory before the fact of kidnapping.

3 Signed by the foreperson this day.

4 2007-GS-46-2535, accessory after the fact of armed
5 robbery, kidnapping and murder, we, the jury, find the
6 defendant Ben Robert Stewart guilty of accessory after the
7 fact of armed robbery, kidnapping and/or murder.

8 Signed by the foreperson this day.

9 2007-GS-46-2531, criminal conspiracy, we, the
10 jury, find the defendant Ben Robert Stewart guilty of
11 criminal conspiracy.

12 Signed by the foreperson this day.

13 2007-GS-46-2532, possession of a firearm during
14 the commission of a violent crime, we, the jury, find the
15 defendant Ben Robert Stewart guilty of possession of a
16 firearm during the commission of a violent crime.

17 Signed by the foreperson this day.

18 2007-GS-46-2529, kidnapping, we, the jury, find
19 the defendant Ben Robert Stewart not guilty.

20 Signed by the foreperson this day.

21 2007-GS46-46-2527, armed robbery, we, the jury,
22 find the defendant Ben Robert Stewart not guilty.

23 Signed by the foreperson this day.

24 2007-GS-46-2525, murder, we, the jury, find the
25 defendant Ben Robert Stewart not guilty.

1 Signed by the foreperson this day.

2 If this so be your verdicts, so say you all by
3 raising your right hand.

4 Let the record show all affirmed.

5 THE COURT: Any questions of the jury panel from
6 the State?

7 MR. BRACKETT: None from the State, Your Honor.

8 MR. SWERLING: Yes, sir.

9 THE COURT: From the defendant?

10 MR. SWERLING: Yes, sir, we would ask for a
11 polling.

12 THE COURT: All right. The clerk will please poll
13 the jury.

14 THE CLERK: If you all could please stand.

15 Number 187, Terry Rolla, is this your verdict?

16 JUROR NUMBER 187: Yes, it is.

17 THE CLERK: Is it still your verdict?

18 JUROR NUMBER 187: Yes, it is.

19 THE CLERK: You can have a seat.

20 Number 39, Elizabeth Carlisle, is this your
21 verdict?

22 JUROR NUMBER 39: Yes.

23 THE CLERK: Is this still your verdict?

24 JUROR NUMBER 39: Yes.

25 THE CLERK: You can have a seat.

1 No. 215, Mary Thompson, is this your verdict?

2 JUROR NUMBER 215: Yes.

3 THE CLERK: Is this still your verdict?

4 JUROR NUMBER 215: Yes.

5 THE CLERK: Number 140, Mary McClure, is this your

6 verdict?

7 JUROR NUMBER 140, yes.

8 THE CLERK: Is this still your verdict?

9 JUROR NUMBER 140: Yes.

10 THE CLERK: Number 175, Thomas Rawling, is this
11 your verdict?

12 JUROR NUMBER 175: Yes.

13 THE CLERK: Is this still your verdict?

14 JUROR NUMBER 175: Yes.

15 THE CLERK: Number 12, Elouise Baldwin, is this
16 your verdict?

17 JUROR NUMBER 12: Yes.

18 THE CLERK: And is this still your verdict?

19 JUROR NUMBER 12: Yes.

20 THE CLERK: Number 51, Noel Cruz, is this your
21 verdict?

22 JUROR NUMBER 51: Yes.

23 THE CLERK: Is this still your verdict?

24 JUROR NUMBER 51: Yes.

25 THE CLERK: Number 108, Patricia Jackson, is this

1 your verdict?

2 JUROR NUMBER 108: Yes.

3 THE CLERK: Is it still your verdict?

4 JUROR NUMBER 108: Yes.

5 THE CLERK: Number 29, Henrietta Brown, is this
6 your verdict?

7 JUROR NUMBER 29: Yes.

8 THE CLERK: Is this still your verdict?

9 JUROR NUMBER 29: Yes.

10 THE CLERK: Number 23, Mary Boatwright, is this
11 your verdict?

12 JUROR NUMBER 23: Yes.

13 THE CLERK: Is this still your verdict?

14 JUROR NUMBER 23: Yes.

15 THE CLERK: Number 73, James Fox, is this your
16 verdict?

17 JUROR NUMBER 73: Yes.

18 THE CLERK: Is this still your verdict?

19 JUROR NUMBER 73: Yes.

20 THE CLERK: Number 94, Debra Hess, is this your
21 verdict?

22 JUROR NUMBER 94: Yes.

23 THE CLERK: Is this still your verdict?

24 JUROR NUMBER 94: Yes.

25 THE CLERK: Thank you.

1 THE COURT: Any other questions of the jury panel?

2 MR. SWERLING: No, sir.

3 THE COURT: All right.

4 Mr. Foreman, ladies and gentlemen of the jury
5 panel, this will conclude your services in this case. It
6 will also, or course, conclude your services for the week.

7 I would like to take this opportunity to thank you
8 for your service this week. We certainly understand your
9 being here all week and the many hours that we have worked
10 this week, that it required you to be away from your work,
11 your jobs, your family, and other things that you feel are
12 important for you to be doing, and we do not take that
13 sacrifice for granted. We certainly appreciate your being
14 here and the sacrifices that you have made this week to help
15 make our justice some work. We appreciate that very much.

16 I think I told you at the beginning of the week
17 that those who serve on a jury this week would find out how
18 important the jury function is and really how difficult a
19 jury's decision is in these cases. I'm sure you appreciate
20 that now. But, again, I want to thank you very much for
21 your service. We deeply appreciate your service and
22 sacrifice. You are free to go at this time.

23 A check will be put in the mail for your service
24 this week in due course. In a very short time a check will
25 be put in the mail for your service this week as jurors.

1 And, again, you are free to go at this time, all except the
2 foreperson. Sir, I'll need to get you to come up and sign
3 off on the indictments themselves for us, if you will.
4 Everyone else is free to go.

5 Now, does anybody need anything for your employer
6 to show that you required to be here this week, or you have
7 your jury summons? Anything that you need other than that
8 to show that you were required to be here this week?

9 (No response)

10 THE COURT: So we can get it. All right.

11 Now, I'm going to ask -- well, it's still a little
12 bit light outside, so I think you will be all right, as far
13 as the parking lot is concerned. Does anybody feel like
14 they need somebody to accompany them out to the parking lot?
15 We have several men here as well.

16 All right. Thank you. You are free to go at this
17 time. Again thank you very much.

18 (Whereupon, at 6:13 p.m., the jury panel was
19 discharged)

20 THE COURT: The alternates can go. I certainly
21 want to thank the alternates for your service this week.
22 Thank you very much.

23 Counsel, I will be glad to hear you with regard to
24 any motions that you might wish to make at this time.

25 MR. SWERLING: Judge, on behalf of Mr. Addison, we

1 would respectfully move for a motion for new trial based on
2 all the motions and objections that we made during the
3 course of the trial, as well as the motion we made at the
4 conclusion of the State's case and at the conclusion of all
5 the evidence.

6 And as well, Your Honor, we would ask the court to
7 consider setting aside the verdict on the possession of the
8 weapon during a violent crime, based upon the objection we
9 made to the charge at the time.

10 THE COURT: All right. Thank you, sir.

11 Of course, your motion is noted for the record and
12 the court would deny those motions for the same reasons I
13 gave earlier. I feel that the verdicts are supported by the
14 evidence -- the jury verdict is supported by the evidence in
15 the case.

16 Insofar as the possession of a weapon during the
17 commission of a violent crime, I will take that issue under
18 advisement and rule in that a little later after I have had
19 a chance to do some research.

20 Mr. Snow?

21 MR. SNOW: Judge, we too would ask for a motion
22 for a new trial on this case, judge. Certainly, as you
23 know, we are -- all objections relative to any of the
24 information that came in subsequent to -- during the trial,
25 as well as after the trial, any information relative to

1 testimony or a replay. We would ask that, as well as the
2 motion to set aside the possession of a firearm in the
3 commission of a crime.

4 THE COURT: As to the motion for to set aside the
5 verdict in the possession of a weapon during the commission
6 of a violent crime, I will take that under advisement and
7 rule on it a little later, after I have had a chance to
8 study that particular one.

9 As to the other issues, let me address
10 specifically the issue with regard to playing back testimony
11 for the jury. I want to be sure the record is clear on
12 this. I had note from the jury which requested that certain
13 testimony be played back. That of Reed Allen. And we
14 weren't sure what they wanted. We thought they didn't want
15 the identification testimony, so I think we skipped over
16 that, and then we started. And I asked them did they want
17 to start at the time some persons arrived at his house that
18 night. And I think that's beginning where it was with
19 regard to the weapons, and they said yes, that's where they
20 wanted to start, and so that's where we started. And I
21 think we played a little bit of it and that's where they
22 wanted it to start.

23 I was sitting here prepared to go as long as they
24 wanted to, insofar as testimony is concerned, but they made
25 signs that they didn't need to hear any more. They heard

1 what they needed to hear. Therefore, of course, I'm not
2 going to say -- they heard what they needed to hear on the
3 replay. They heard it the first time. And if they heard
4 what they wanted to hear on the replay, then I'm not going to
5 make them sit here and replay something that they don't need
6 or don't want. Okay?

7 And I can certainly understand why a defendant who
8 feels that some more of that testimony might be more
9 favorable to him, we would want to hear it all, but that was
10 not my decision. That was the jury's decision.

11 If I was instructing them on the law that applies,
12 I might very well give them more law than what they have
13 actually requested, if I deem it necessary or it's necessary
14 to do it in fairness, but that's not my course on replaying
15 testimony. That's the jury's decision. They wanted to hear
16 all, part, or whatever they want, but that's what we did.

17 Okay, so I'm going to deny your motion on that and
18 I'm going to deny your other motions for new trial based on
19 the same reasons I gave earlier. I'm denying them.

20 Yes, sir, solicitor.

21 MR. BRACKETT: And on that one issue, of course,
22 Your Honor, the other concern from the State's perspective
23 would be that since they are dealing with you directly, if
24 you were to go ahead and play some additional testimony, I
25 think that the jury might reasonably conclude that you

1 particularly wanted them to hear that and it might be a
2 comment on the evidence from the court, perceived as a
3 comment on the evidence from the court.

4 THE COURT: That's certainly possible. Once they
5 all said they didn't need to hear any more, I think it's
6 incumbent upon me then to stop and let them resume their
7 deliberations. All right. The record I think is clear on
8 that position.

9 Okay, anything else? Any other motions you wish
10 to make?

11 MR. SWERLING: Not at this time, Your Honor.

12 THE COURT: I'll give you a few minutes to get
13 yourselves together before we do anything with regard to
14 sentencing.

15 MR. SNOW: May we approach?

16 THE COURT: Yes, sir.

17 (Whereupon, the lawyers approached the bench for
18 an off-the-record discussion)

19 MR. SWERLING: Judge, could we step out for a few
20 minutes?

21 THE COURT: Yes, sir.

22 We will be at ease for a few minutes.

23 (Whereupon, proceedings were recessed)

24 (Whereupon, proceedings were reconvened).

25 MR. SWERLING: Judge, these are some letters that

1 they asked me to pass up. A couple from e-mails.

2 (Off the record)

3 (Back on the record)

4 THE COURT: Solicitor?

5 MR. BRACKETT: If it please the court, Your Honor,
6 as it appears that the defendant's have their family up here
7 already, maybe we will let them go first, and we can have
8 the -- some family and friends of the victim in the
9 courtroom. Only a couple of them will come up, but since
10 they have already got their folks up here, maybe we will let
11 them go first.

12 THE COURT: That's fine.

13 Mr. Swerling, you say something for Mr. Addison
14 first, please.

15 MR. SWERLING: That would be fine, Your Honor.

16 Judge, of course, you have heard a little bit
17 about Mr. Addison regarding his testimony. He's twenty.
18 He's going to be twenty-one years of age in April.

19 His mom is Fran Kennedy and his dad is Darryl
20 Kennedy. His mother works at Wells Fargo and his father
21 works at Frito Lay. Actually Darryl is his stepdad, but he
22 has raised him since like five years of age. His biological
23 father is Gary Addison, who has been here during the course
24 of the week. He's from Hartsville and works for the City of
25 Hartsville.

1 Judge, they would like to address you briefly, and
2 then I can just give you a little bit of summary of what I
3 would like to present as well.

4 This is first is Fran and Darryl Kennedy, his
5 parents, Your Honor.

6 THE COURT: Okay. All right. Please proceed.

7 FRAN KENNEDY: Judge, to everyone in the courtroom
8 on behalf of my son. First of all to the family, we have
9 been thinking about the family as well from day one as long
10 as -- and thinking about Terrell and all that has happened.
11 So we -- you know, we're sorry to y'all, as well as our son.

12 I would like to ask the judge to please have mercy
13 on my son. He came to jail at seventeen, eighteen years
14 old, just as a young boy. Yes, he's made mistakes. So have
15 we all, but he's a good kid. I raised him well. I know I
16 did, and I put things into him where he has a big heart. He
17 has a big heart. He just sometimes finds himself, you know,
18 in the wrong place at the wrong time. And I just ask you to
19 look at the fact that he can be rehabilitated. I know he
20 can, because I know the things that's gone on in his life,
21 that if he had gotten the necessary help, he wouldn't -- he
22 probably wouldn't be in the courtroom today, because he
23 wouldn't ask no one for a ride without knowing, you know,
24 about them and knowing that, you know, was safe to do so.
25 So I ask you to have mercy on him. And, you know, if you

1 can, give him a chance to be rehabilitated.

2 THE COURT: Thank you, ma'am.

3 Yes, sir.

4 DARRYL KENNEDY: Your Honor, I want to repeat what
5 my wife said to the Marshall family. We are sorry. We are
6 sorry on behalf of Terrell. I just want you guys to know
7 that. I feel your pain. I have been feeling it for two and
8 a half years. And I just pray to God that your whole family
9 could have some closure for this situation.

10 And, judge, I just, you know, reiterate what my
11 wife said. Once again, I just, you know, ask you to please,
12 you know, have some mercy on Terrell. Like my wife said, we
13 have done the best we can to raise him, and we just ask that
14 you would have mercy on him, please.

15 THE COURT: Thank you, sir.

16 MR. SWERLING: Judge, I think we have one person,
17 a friend from neighborhood.

18 If you would step forward and identify yourself
19 for the court reporter.

20 STACY LOWERY: My name is Stacy Lowery. My
21 address is 1258 Berryhill Court.

22 Terrell was very much an active part of our
23 neighborhood. I'm here on behalf of the neighborhood, the
24 community. I have watched him sit with my four year old and
25 help her to learn. I have got a seventeen year old

1 daughter. I could count on him to walk her home from
2 baby-sitting so she wouldn't be alone in the neighborhood.

3 He's been nothing but a stand-up guy. I am an
4 overwhelmingly over-protective mother. He would have been
5 nowhere near my two daughters if I didn't have faith in him.
6 There is not a doubt in my mind that he can come out and be
7 a successful productive part of society. I know it. I do.
8 He has helped me do yard work. He has helped me start my
9 car. And not just me, but other members of the
10 neighborhood. Well liked, well respected, a good kid.

11 At seventeen years old, you are not growing --
12 done growing yet. You know, you are not even done growing
13 yet. I realize that that was a huge mistake, but I don't
14 think at seventeen years old, not even done growing, still
15 of a high school age, that you can be held accountable for
16 the rest of your life for any kind of mistake or matters, no
17 matter how huge this is.

18 I know that he meant something to my family. I
19 know that there are other families in the community liked
20 him too. I'm not here as friend. I'm here as a neighbor,
21 as someone who believes in him and knows that he can make
22 something of himself. And I strongly feel the longer he is
23 away from us, those odds are going down. They will work
24 against him. I would like to see him get his education. I
25 would like to see him be somebody. The longer he's away

1 from the people who love him, the less likely that is to
2 happen, and I think you know that too. Thank you for
3 letting me speak.

4 THE COURT: Yes, ma'am.

5 MR. SWERLING: All right.

6 Judge, just briefly. I think we brought out the
7 fact he went to Northwestern High School, Seldon Middle
8 School, Ebinezer Elementary School and West Hartsville
9 Elementary. His church is the Greater Life Ministry.

10 When I started representing Terrell and got a lot
11 of his background, judge, and we got quite a bit of medical
12 records, what appears to me and what I think the court -- I
13 would like the court to know, not as an excuse, but in the
14 way of mitigation, is that Terrell, from a very early age,
15 suffered with a lot of emotional problems. He starting --
16 and I think -- I would like to point out the fact that I
17 think the Kennedys did about everything they could do. I
18 just kind of want to give you a little history. This is not
19 just something that we are bringing up tonight. This has
20 been a lifelong kind of problem.

21 Back in 2003, he was admitted to Three Rivers in
22 Columbia. His parents put him in there because he was
23 having some emotional issues. He continued with counseling,
24 with Dr. Julius Meyer at Carolina counseling Center after
25 that.

1 He was admitted -- his parents admitted him to
2 in-patient treatment at Presbyterian Hospital. He was
3 treated by Dr. Steven Sutherland, again, for these emotional
4 issues that he was confronting, these demons that he had and
5 things that he was -- I'm sure did not want to have, but
6 they were there.

7 All during these different treatments he was
8 getting medicines, such as Adderall, Risperdal, Depakote,
9 Wellbutrin, of ever them significant type of prescriptions
10 for the problems that he was having.

11 He also had outpatient treatment by Dr. Barrar at
12 the Providence Behavioral Health Center.

13 He was -- his parents admitted him again in
14 September of 2003, back at Three Rivers, with Dr.
15 Schnackenburg. I spoke with Dr. Schnackenburg, as well as
16 some of these other medical providers about some of the
17 problems that he was having.

18 He also continued with treatment up until 2004,
19 with Dr. Kelly Hobgood over at Catawba Mental Health Center,
20 who I also spoke with, and counseling -- he was being
21 counseled by Dr. Sanders.

22 So, judge, just to let you know, a real effort was
23 made by the parents to help him deal with his emotional
24 problems, and unfortunately the emotional problems are still
25 there. He's still having to deal with these demons, and I

1 think they have affected Terrell throughout his life, and
2 will continue to affect him until they get him some control
3 and someone is able to deal with the issues that he has.

4 He has tried to work throughout. Back in 2000 to
5 2005, he worked at a car wash. He wasn't trying to get a
6 free ride. In 1999, he was working at O'Shay's Domestic
7 Services on and off until 2005. And then I think he told
8 you during his testimony in 2006, he was working at DSMI
9 loading furniture on trucks.

10 Judge, we put those character letters that you
11 have been able to look at, people -- different people who
12 have wanted to speak on Terrell's behalf who could not be
13 here.

14 Judge, with respect to his prior history, you did
15 hear about the -- there was a juvenile conviction or
16 adjudication at the age of fifteen. It involved a school
17 teacher, and he was given six months probation and one
18 twenty-four hour weekend at the Moss Judicial Center.

19 And he also was charged, in 2003, with possession
20 of marijuana. And he was court ordered at that time for an
21 evaluation at DJJ as a result of that.

22 So, judge, I think what you have before you is you
23 have a young man who had some issues he had to deal with.
24 He unfortunately has found himself on October 10th in a very
25 bad position and a very tragic result came about as a result

1 of that.

2 Judge, I would remind you and ask you to consider
3 that on the video, and I think Mr. Brackett made a good
4 point during his closing, that the fact that he was in the
5 store was intimidating and threatening to Mr. Marshall, and
6 I'm not minimizing that, but I would ask the court to
7 consider the fact that Dontavious Mack was the one that did
8 the shooting and killed him. And from the video it appears
9 that Mr. Addison, at least, did not draw a weapon, did not
10 have a weapon and did not try to assault Mr. Marshall or
11 take anything from Mr. Marshall.

12 So, while on the one hand it does not excuse his
13 guilt under the law as the jury has found it, I would ask
14 you to consider that in mitigation when you impose sentence.

15 THE COURT: All right, sir. Thank you.

16 Mr. Addison, is there anything that you wish to
17 say to the court?

18 DEFENDANT ADDISON: I just want to say I'm sorry
19 to the family. I really am sorry. I mean, I wanted really
20 to say something to the family, that while I'm here -- you
21 know, my testimony, the circumstances, and I wanted to say
22 sorry, and I hope you all are blessed. I'm sorry. Thank
23 you.

24 THE COURT: Now, as to Mr. Stewart then.

25 Please give your name for the record.

1 TONYA CARROWAY: My name is Tonya Carroway.

2 Ben is my cousin and we're from Hartsville, South
3 Carolina, and we want to give our condolences to the family.
4 And, you know, God bless you.

5 We know that -- we are sorry about what happened,
6 but we want to ask mercy, God's mercy and your mercy and the
7 mercy -- you know, just have mercy, not only on Ben, but on
8 all of them, because they are kids.

9 And I know that you had a loss, but, you know,
10 just keep going on and on and on. We all are suffering
11 right now. We all hurt right now. All of us are hurting.
12 You are hurting and we are hurting. Someone was taken away
13 from you, and now we have got somebody standing here, you
14 know, and it keep going on and on, and it's not going to
15 bring back, you know, what happened, but it don't stop our
16 love. We love you and we are sorry, but, you know, it can't
17 bring him back. And we just -- I just want you to know that
18 we love you. We are very sorry for what happened and we
19 just want your mercy, the court's mercy upon both of these
20 children, because they are children, but they are yet still
21 alive. And their lives -- their whole lives, you know,
22 don't need to be taken away from them. They wasn't the one
23 that pulled the trigger. It wasn't even proven that some
24 was there. You know, they don't have no proof of that, you
25 know, he was there. But somebody else pulled the trigger

1 and now he's standing here, you know, for his life. And
2 right now his life is -- you know, could be taken away and
3 it wasn't proven. And we are just asking the mercy of the
4 court, the same as they love theirs, we love him, and we
5 just ask you to have mercy.

6 THE COURT: Thank you, ma'am.

7 MR. SNOW: May it please the court, Your Honor,
8 for the record Kenneth Snow for the defendant.

9 Your Honor, this is certainly and indeed a sad day
10 for this county. It's certainly it's a sad day for my
11 client.

12 He's certainly -- I talked to him about
13 mitigation, Your Honor. My client didn't want to speak
14 about these -- his past. He's had troubles. He certainly
15 has reasons that he could cite for some of his issues, but
16 he is certainly one of the brightest clients I have ever
17 dealt with. He has confronted all the challenges he's had
18 in this system with certainly dignity. He has been a man
19 throughout this whole process. He has never said anything,
20 any ill will about the family. He has never had any ill
21 will about the system. He understands that the solicitors
22 had a job to do. The only thing he wanted to do was
23 certainly go through this process, as he's entitled to,
24 judge.

25 The only thing he would tell me about himself

1 personally is that he had a daughter and that he loved her
2 very much, and that he had a family that he loved very much,
3 and he was in pain for them. Not for himself, but in pain
4 for them.

5 I don't think anyone, any of these young men
6 anticipated what happened to Mr. Marshall, and it's
7 certainly a sad day for the family, and all of our hearts go
8 out to the family, but he's told me that he was willing to
9 accept whatever responsibility -- whatever consequences
10 that's brought to him.

11 I know this is, again, a sad day for him.
12 Certainly it's a sad day for all of us. And certainly I
13 know this is not a pleasure for the court, but this is part
14 of our system and this is part of what we go through and we
15 accept those consequences, judge.

16 So I would ask the court to consider, of course,
17 my client's position in this matter, and I would ask
18 certainly that the court to understand the facts as the jury
19 has determined them, and I would ask the court to consider
20 all that he has also been through and his family will go
21 through as mitigation, judge.

22 THE COURT: Thank you, counsel.

23 Mr. Stewart, anything that you wish to say to the
24 court?

25 DEFENDANT STEWART: Just -- I just -- I just

1 wished that we wouldn't be wasting everybody's time coming
2 out here and coming to court.

3 Like Terrell was explaining, I'm sorry for the
4 loss of Mr. Marshall, to your family, and if I could do
5 anything to help it out, I wish I could help the family on
6 behalf of Mr. Marshall, because I know how it is when
7 someone dies and you can't get them back. And just like
8 y'all want justice, like that's normal for anyone, they want
9 justice for their family. And I just wish I could do
10 something that makes their family feel better.

11 And I'm sorry for my family, for bringing my
12 family out here and putting them through this embarrassment,
13 for going through trial, because my mother raised me as --
14 my momma raised me good.

15 And I'm sorry for putting an embarrassment on my
16 sister and my family that came down here from Philadelphia
17 to South Carolina for me, but this is nonsense.

18 I'm just sorry for the judge, that you had to sit
19 up there and sentence us for things like this. That's it.

20 THE COURT: Thank you, sir.

21 Solicitor?

22 MR. BRACKETT: If it please the court, Your Honor,
23 as I indicated, there are members from the Marshall family
24 that are present in the courtroom and would like to
25 approach.

1 MR. SWERLING: Judge, would you like us to step
2 back over here?

3 THE COURT: Yes.

4 MR. BRACKETT: Mr. Ned Marshall wishes to address
5 the court. He is the son of the victim Ned Marshall. And
6 with him is his mother, the wife of Ned Marshall.

7 NED MARSHALL: The first thing I would like to say
8 is since I got to hear from the moms here, is that I'm with
9 my mom right now. My heart goes out to these mothers having
10 to be a part of this. I know that I have been with my mom
11 since she called me -- well, actually the coroner called me
12 and woke me up at six o'clock on October the 10th. I want
13 to say it was about six o'clock, and she told me her name.
14 And I said -- it was Ms. Sabrina Gast. And I said "have you
15 talked to my mom?" She said "I'm here with your mom right
16 now, son, but I need you to come down to Rock Hill. She's
17 not -- she's not able to speak." And she's asked me to
18 speak today, Your Honor, and I'm going to try my best to say
19 what we have talked about.

20 I -- I want to say that I have heard some
21 information regarding this case. My dad -- my dad died in
22 this -- in this situation. He got off one shot. And I
23 just -- I don't know, I just keep thinking about what if he
24 hadn't of gotten that shot off, if he hadn't have been able
25 to, as he was laying there dying get that shot off? Would

1 we be here today? Would there be justice? Would we have
2 ever known who did it? For ten days we didn't know
3 anything.

4 Now I have got -- I have met the Mack brothers and
5 I have been here before for them and I have had to forgive
6 them. It was a process that I went through to forgive them,
7 and the family is -- different family members, I'm speaking
8 on behalf of all of us. We are at different places right
9 now, but we wanted justice for the Mack brothers.

10 And I wanted to say that we've had a cost put on
11 us. We are victims. We have had to pay the ultimate price.
12 Dad is gone. I can't go visit him. I can't talk to him.
13 She's alone. She's lost forty-three pounds since October
14 the 10th, 2006. She's alone.

15 When I had my wife's pants hemmed this week, the
16 man that hems her pants, hemmed her pants, I told him why I
17 was here and I needed to get something done to help my wife,
18 because we didn't know how long the trial would go, and he
19 said "I know your mom." He said "she comes in here
20 sometimes and usually spends about an hour and a half." And
21 I just realized how effected she's been by this. She will
22 drop clothes off to be altered and stay an hour and a half.
23 Her soul mate is gone. Forty-nine years they were married.
24 I'm fifty. My dad was twenty-one years old when I was born.
25 I was close to him.

1 We have waited twenty-eight months for closure.
2 Twenty-eight months for closure. I pray that the family on
3 their side will have some closure. I pray that all these
4 people behind us that have supported us, some friends and
5 family, have some closure.

6 But I got to say that I -- there's points in the
7 trial that I didn't know that there was going to be justice.
8 I didn't know that I truly had the faith to believe in
9 justice. We had to trust this jury with this and they have
10 spoken. And we, as a family, collectively, have been with a
11 lot of unknowns out there. We didn't know for a long time
12 where certain people in this case were. We had to wait a
13 long time for certain people to be located and so forth. We
14 have had a lot of opportunity to lose faith. And throughout
15 it all, the law enforcement people -- I want to thank
16 everybody - the solicitor's office, the detectives, the --
17 all the law enforcement people that have given their time
18 and their expertise to try to bring justice to this case.

19 I want to speak on behalf of our family that we
20 don't have hatred in our heart, but we want justice. And I
21 feel like we got a little closure today. And my heart goes
22 out to their families.

23 We can't go visit my dad. I can't show him my
24 grandson, his first great-grandson. Every Thanksgiving and
25 every Christmas there is a place there where he would have

1 been.

2 And I keep thinking, as I hear these young men
3 talking, I wish so much as they drove around, I wish one of
4 them had just said "let's don't do this." Let's turn back
5 now. We can't turn back time. We are -- we have had to
6 pay. My dad was basically given a death sentence. And I
7 know these guys aren't up for that.

8 But on behalf of my mom, I think I have addressed
9 everything that I felt like I needed to do that we talked
10 about, and I trusted the law enforcement and this court and
11 everybody associated with it to get us to this point. And
12 there was times in these last five days where I have had to
13 sit there and I -- I didn't know what to think. I just had
14 to have faith. Faith is believing in things that you can't
15 see. And I have faith that whatever you do will be right.
16 I have gotten this far through this system and we will get
17 closure through this system. Thank you.

18 THE COURT: Thank you.

19 MR. BRACKETT: Your Honor, Mr. Thompson has the
20 criminal histories for both of the defendants.

21 MR. THOMPSON: Mr. Addison, Your Honor, to get a
22 full kind of picture of his background, he does have some
23 things that are juvenile that he went through arbitration to
24 get for acts against property, disturbing schools, and that
25 was in 2002.

1 In 2003, he did have a threatening the life of a
2 teacher. This was a female school teacher who was fifty-two
3 years old and who -- she escorted him from the class for
4 disturbing it, where he threatened to shoot her with a gun.

5 And also in 2003, that same day, he was charged
6 and convicted of disturbing schools out of that same event.

7 Later in 2003, charged and convicted of possession
8 of marijuana. So he also has marijuana convictions.

9 And then 2006, a marijuana conviction as an adult.

10 And then we come to the crime we have today, and I
11 would like to point out to the court, as the defense so
12 amply pointed out on some of the co-defendants, he hasn't
13 been a model person down in the detention center. This is
14 someone who has caused many disturbances, and I won't go
15 over the minor ones, but there are many.

16 On April 5th of '07, he was written up for
17 threatening another inmate.

18 And in the same month, a little bit later,
19 destruction of property.

20 On June 11th of '07, he was written up with
21 another inmate for an assault on an inmate. He was written
22 up, him and a guy name Smarr, at that point was written up
23 because when they popped the cell doors to another inmate,
24 the two of them ran into that cell, slammed the door behind
25 them and began to beat him. They had to pull them out of

1 that cell, and the victim in that case, the other inmate,
2 was bleeding from the mouth when they --

3 MR. SWERLING: Judge, I'm not sure it's
4 appropriate for him to bring in matters that are not matters
5 of conviction when a defendant is facing sentence.

6 THE COURT: Well, I think they are matters the
7 court can consider appropriate for considerations, and I'll
8 allow it.

9 Continue.

10 MR. THOMPSON: On August of '07, he was placed in
11 a restraint chair for repeatedly kicking the door without
12 stopping, even after being told many times.

13 Later that same month flooding his cell.

14 And then I believe a day after that, that same
15 month, once again, flooding his cell and then yelling
16 threats to officers, "you know, come here and see what you
17 get. I got something for you. You just put your hands on
18 me." They ended up having to send a team in to extract him
19 from the cell, where he had to be dry stunned with a taser
20 to make him comply.

21 December of '07, threatening another inmate.

22 There is other small things and I won't touch
23 those, but it kind of gives you an idea of the things that
24 he's had in the time that he's been in our detention center.
25 He hasn't been the model person. He hasn't been the kind

1 and good person that some people I think would have the
2 court to believe.

3 As to Ben Stewart, Your Honor, it gets even worse.

4 His juvenile record from Philadelphia, Your Honor,
5 shows in 2001, he was convicted of a drug offense.

6 In 2003, he was convicted of possession of an
7 instrument of crime and robbery.

8 Then when he -- as an adult here in the Carolinas
9 he was on bond for a failure to stop for a blue light when
10 this event would have happened. It was pending in
11 Hartsville at the time.

12 After he fled from our state, when warrants were
13 issued for his arrest, law enforcement repeatedly contacted
14 his family to try and find out where he was and repeatedly
15 received no one knew where Ben Stewart was. Even contacting
16 people in Philadelphia, no one knew where Ben Stewart was.
17 But Ben Stewart was caught in Philadelphia on January 27th,
18 2007. And he wasn't caught because of this warrant. He was
19 caught because he car jacked someone there, and he has now
20 been convicted of that.

21 On February 12th of 2008, he entered a guilty plea
22 and was convicted of robbery, threatening immediate serious
23 injury, and with robbery of a motor vehicle.

24 The fact pattern of that case, Your Honor, he was
25 by himself. He once again had a pistol, and very likely the

1 same pistol that he may have had during this crime. He
2 approached two women, one sixty-five and one in her fifties,
3 or around fifty. He asked a cigarette of one of them. When
4 one handed a cigarette to the other, he then demanded money.
5 He jumped into the car when she tried to let her friend back
6 into the car. He jumped into it, put the gun to their head,
7 threatening them at that time, and, according to the witness
8 statement, said "give me your fucking money," and they said
9 they didn't have any money. He said "well, get out of the
10 fucking car." And then they tried to get out with taking
11 the keys with them. He jumped out and took the keys back
12 from her, putting a gun to her head, saying "give me the
13 fucking keys or I'll blow your head off." This is the type
14 of person we are dealing with in Ben Stewart. He acted on
15 his own to be violent. And his prior convictions for
16 robbery, and this conviction for robbery here, and then the
17 convictions today show what kind of person Ben Stewart is.

18 So I bring that to the attention of the court,
19 because that is very disconcerting to the State and we feel
20 he's someone who should not be released.

21 MR. BRACKETT: Your Honor, you have heard a great
22 deal about the defendants. And, of course, in the trial of
23 a case you learn a lot more than you do just from reading
24 the facts at a guilty plea, for example. A lot more detail
25 comes out that you're unaware of. A great number of things

1 that we learned from Mr. Terrell Addison's testimony.

2 One thing that we haven't really touched on is a
3 little bit more about Mr. Marshall, and I just want to say a
4 few words, because it has struck me, and it certainly did
5 around the time and throughout the trial of this case, or
6 throughout the life of this case as it's been in the office,
7 there has never been a few weeks that went by that somebody
8 didn't ask me about this case. There are so many people in
9 York County, and Rock Hill particularly, who knew Mr.
10 Marshall, who had nothing but glowing things to say about
11 what a fine man he was; how many of them knew him just from
12 being at the BP; how many people told me that they went to
13 that store just because of Mr. Marshall; how he had certain
14 habits and mannerisms when they came through. He would
15 always ask them -- he would be working a crossword puzzle
16 and he would say "I need a five-letter word for." Everybody
17 knew him and he was just a stellar citizen, just a fine,
18 fine man taken from the community. And I think it's fitting
19 and proper to consider those qualities and characteristics
20 that he had.

21 And, of course, you heard from his son, and I have
22 no doubt, because I have dealt with his family for the last
23 two and a half years. This has just devastated them.
24 It's -- it's -- that's an understatement, particularly
25 Sandra. She's just been absolutely devastated by the loss

1 of her husband. I lack the eloquence to sufficiently
2 apprise the court on the magnitude of the loss to Sandra of
3 her beloved husband.

4 Clearly this is a terrible crime, what happened,
5 and I take nothing away from what the family said. There
6 are losers on both sides of the aisle. They're always are.
7 This courtroom is awash in tears of the family of Ben
8 Stewart, the family of Terrell Addison, and the Marshall
9 family. And the people that are responsible for all of
10 those tears are Mr. Stewart and Mr. Addison. Their
11 decisions that they made, they are the architect of the
12 misfortune and the sadness of their families and the
13 Marshall families.

14 And I know Dontavious Mack was the triggerman, and
15 I certainly respect the implications that come with that.
16 However, the law is the law and the hand of one is the hand
17 of all, and these people did combine, conspire, and
18 confederate to commit the terrible crime that brings us here
19 now. And there is no question that a terrible sentence is
20 appropriate in the circumstances such as these, and we would
21 ask the court to impose a sentence on Mr. Stewart,
22 particularly Mr. Stewart with his record. He has an eight
23 to sixteen year sentence from Pennsylvania. We don't think
24 that he should be getting credit for the time that he has
25 here in South Carolina while he does his time in

1 Pennsylvania. Those are separate crimes. He menaced two
2 different victims with a gun and he shouldn't be getting
3 credit. He should have stayed on this sentence while he
4 serves that sentence. In other words, we would ask for
5 consecutive sentencing for Mr. Stewart, consecutive to the
6 sentences currently imposed in the State of Pennsylvania.

7 We trust the court will impose the sentence in its
8 wisdom that does justice in this case.

9 THE COURT: All right. Thank you, sir.

10 All right, bring the defendants around, please.

11 MR. SWERLING: Judge, if I could just add one
12 thing?

13 THE COURT: Yes, sir.

14 MR. SWERLING: As far as the charge, though, I
15 just wouldn't want the court to get the impression that he
16 actually had a weapon when he threatened the teacher. It
17 was more in the abstract about a weapon that he would, but
18 there was no when involved, as far as I understand the
19 records.

20 THE COURT: Okay.

21 Well, let me say before sentencing, this is, of
22 course, the most difficult part of a judge's job is having
23 to impose sentences, particularly stiff sentences and
24 long-term sentences, particularly with young people, but
25 that's part of the job and the most difficult part of my

1 job.

2 My sympathies go out, of course, to the family of
3 Ned Marshall. And I can see -- you know, we have been going
4 through this for awhile now. I went through bond hearings.
5 I sentenced the shooter in this case to a life sentence,
6 which I think was appropriate, and I have been involved in
7 it. Honestly, just coming into court these several times
8 that I have been here, I have seen what devastation it's had
9 on the family. I can see it just in the times that they
10 have been in here. My sympathies go out to you and your
11 loss. I know -- I'm sure Mr. Marshall was a fine man, based
12 on everything Mr. Brackett said. And anything else I have
13 heard about him, I'm sure he was a fine man.

14 And my heart goes out also to the family. I know
15 it's very difficult. My sympathies always go out more to
16 the family of a defendant who has willingly been involved in
17 the crime. Families have to pay the price for it as well
18 and you have my sympathies as well.

19 Be that as it may, justice has to be done in these
20 cases, or nobody has a faith in the justice system. And
21 so --

22 And let point out that in giving these sentences,
23 I think the appropriate sentence was given to the shooter,
24 especially given the facts and circumstances of the case of
25 life without parole. I think that was an appropriate

1 sentence. He will never get out of prison. But I believe
2 these two young men deserve a little less than that. I
3 believe they deserve a long sentence, given the facts as I
4 heard them in this case. Nevertheless -- and I'm going to
5 sentence them the way I think is appropriate.

6 I would point out to everyone, including the
7 families, these are no-parole offenses, which means that
8 they basically are going to serve the sentences that they
9 are getting. And so -- but given their age and their
10 involvement in this and what they did, I'm taking that into
11 consideration as well.

12 And I might say I didn't believe any of their
13 stories. I think they were all working together. It might
14 not start out that way when we left Hartsville, but I think
15 by the time they got in Rock Hill they were looking for a
16 place to say rob and steal. They rode around here two or
17 three hours doing that, and I think that's clear to me. I
18 think they were all in cahoots and working together. I
19 don't have any doubts about that.

20 All this business about duress and coercion and
21 that, I don't believe any of that stuff at all. Certainly
22 the jury didn't believe it, and that's the most important
23 thing, because they found them guilty and didn't buy that
24 defense.

25 In any event, in case number 2007-GS-46-671,

1 Terrell Antonio Addison, having been found guilty by a jury
2 of murder, the sentence of the court is he be committed to
3 the State Department of Corrections for a determinate term
4 of thirty years. He's given credit for any jail time he has
5 served.

6 In case number 2007-GS-46-672, Terrell Antonio
7 Addison, having been found guilty by a jury of armed
8 robbery, the sentence of the court is to be committed to the
9 State Department of Corrections for a determinate term of
10 ten years. This sentence to run consecutive to the sentence
11 on the murder charge. He's given credit for time served.

12 Case number 2007-GS-46-676, Terrell Antonio
13 Addison, having pled -- having been found guilty by a jury
14 of kidnapping, the sentence of the court is to be committed
15 to the State Department of Corrections for a determinate
16 term of ten years. This sentence is to run concurrent, and
17 he's given credit for time served.

18 Case number 2007-GS-46-673, Terrell Antonio
19 Addison, having been found guilty by a jury of possession of
20 a firearm during a violent crime, the sentence of the court
21 is to be committed to the State Department of Corrections
22 for a determinate term of five years. This sentence is
23 concurrent. He's given credit for time served.

24 Case number 2007-GS-46-670, Terrell Antonio
25 Addison, having been found guilty by a jury of criminal

1 conspiracy, the sentence of the court is to be committed to
2 the State Department of Corrections for a determinate term
3 of five years. This sentence is concurrent. He's given
4 credit for time served.

5 As to Ben Robert Stewart. In case number
6 2007-GS-46-2526, Ben Robert Stewart, having been found
7 guilty by a jury of accessory before the fact to murder, the
8 sentence of the court is to be committed to the State
9 Department of Corrections for a determinate term of thirty
10 years. This sentence to run consecutive to the sentence he
11 is now serving in Pennsylvania, which I understand is eight
12 to, what?

13 MR. BRACKETT: Eight to sixteen years.

14 THE COURT: At any rate, this will run consecutive
15 to that and he will serve this sentence when he finishes
16 serving that sentence. He's also given credit for time
17 served.

18 Case number 2007-GS-46-2535, Ben Robert Stewart,
19 having been found guilty by a jury of accessory after the
20 fact to murder, armed robbery and kidnapping, the sentence
21 of the court on this charge is to be committed to the State
22 Department of Corrections for a determinate term of ten
23 years. This sentence is concurrent. He's given credit for
24 time served.

25 Case number 2007-GS-46-2528, Ben Robert Stewart,

1 having been found guilty by a jury of accessory before the
2 fact to armed robbery, the sentence of the court is to be
3 committed to the State Department of Corrections for a
4 determinate term of twenty years. This sentence is to run
5 concurrent and he's given credit for time served.

6 Case number 2007-GS-46-2530, Ben Robert Stewart,
7 having been found guilty by a jury of accessory before the
8 fact of kidnapping, the sentence of the court is to be
9 committed to the State Department of Corrections for a
10 determinate term of ten years. This sentence is concurrent.
11 He's given credit for time served.

12 Case number 2007-GS-46-2531, Ben Robert Stewart,
13 having been found guilty by a jury of criminal conspiracy,
14 the sentence of the court is to be committed to the State
15 Department of Corrections for a determinate term of five
16 years. This sentence is to run concurrent. He's given
17 credit for time served.

18 In case number 2007-GS-46-2532, Ben Robert
19 Stewart, having been found guilty by a jury of possession of
20 a weapon during the commission of a violent crime, the
21 sentence of the court is to be committed to the State
22 Department of Corrections for a determinate term of five
23 years. This sentence to run concurrent, and he's given
24 credit for time served.

25 MR. BRACKETT: Thank you, Your Honor.

1 MR. SWERLING: Thank you.

2 THE COURT: I was just going to ask that, as I
3 usually do in these kind of cases, maybe if we can have the
4 families of the victims and the defendant to leave
5 separately, if you wish to do that.

6 If the family of the victim wish to leave, leave
7 first. If you want to go ahead and leave now, you can do
8 that.

9 MR. BRACKETT: Thank you, Your Honor.

10 MR. THOMPSON: Thank you, Your Honor.

11 MR. SWERLING: Thank you, Your Honor.

12 (END OF REQUESTED TRANSCRIPT OF RECORD)

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CERTIFICATE

I, the undersigned, Michael R. Watts, Official Court Reporter for the Sixteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for YORK County, South Carolina, on the 23rd, 24th, 25th, 26th, 27th days of February, 2009.

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

AUGUST 12, 2009



Michael R. Watts
Circuit Court Reporter

FORM 5

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

County of YORK

) 2013 CP46-3731

Ben Robert Stewart, HK-9369

V.

) APPLICATION FOR
) POST-CONVICTION RELIEF

State of South Carolina

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 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. Applicant 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: SCI-Frackville, 1111 Altamont Blvd., Frackville, PA 17931.
2. Name and location of Court imposing sentence: York County Court of General Sessions,
1675 1G Highway, York, SC 29745.
3. Name(s) of co-defendants Dontavious Mack, Davorius Mack and Terrell Addison.
4. The indictment numbers upon which and the offenses for which sentence was imposed:
 - a. 2007-GS-46-2525, murder
 - b. 2007-GS-46-2526, accessory before the fact to murder
 - c. 2007-GS-46-2527, armed robbery
 - d. 2007-GS-46-2528, accessory before the fact to armed robbery
 - e. 2007-GS-46-2529, kidnapping
 - f. 2007-GS-46-2530, accessory before the fact to kidnapping
 - g. 2007-GS-46-2531, criminal conspiracy

CERTIFIED TRUE COPY
 2013 DEC 10 AM 10:57
 DAVID HAMILTON
 CLERK OF COURT
 YORK COUNTY, SC

FILED-RECEIVED
 2013 DEC -9 PM 3:42
 DAVID HAMILTON
 C.C.P. & GS
 YORK COUNTY, SC

- h. 2007-GS-46-2532, possession of a firearm during the commission of a violent crime.
 - i. 2007-GS-46-2533, possession of a stolen vehicle
 - j. 2007-GS-46-2535, accessory after the fact.
5. The date upon which sentence was imposed and terms of the sentence:
- a. Sentenced imposed on February 27, 2009.
 - b. An aggregated term of 30 years was imposed by the Honorable Lee S. Alford.
6. A finding of guilt was made following a trial by jury before the Honorable Lee S. Alford.
7. An appeal was taken from the judgment of conviction and imposition of sentence.
8. Appeal was taken to The Court of Appeals of South Carolina.
- a. The result is the appeal was **Dismissed** on December 12, 2012; citation Unpublished Opinion No. **2012-UP-651**.
9. If you answered "no" to (7), state your reasons for not so appealing.
10. Concisely stated the grounds my allegations are based upon, my custody is unlawful are:
- a. Appellate counsel was ineffective in failing to cite trial court error in denying a directed verdict because guilt beyond a reasonable doubt could not be established on the evidence adduced.
 - b. Appellate counsel was ineffective for failing to raise the issue that no rational jury could have found guilt beyond a reasonable doubt on the evidence adduced at trial.
 - c. Appellate counsel was ineffective in failing to raise Due Process was denied because the evidence adduced at trial violated the *Winship* rule of establishing proof of every element of the crime charged beyond a reasonable doubt.
 - d. Trial counsel was ineffective on the Sufficiency of the Evidence Motion.
 - e. Trial counsel was ineffective for failing to conduct a proper investigation.
 - f. Trial was counsel ineffective for failing to use compulsory process to call witnesses on Applicant's behalf to offer relevant, material, pertinent and exculpatory evidence.

g. Trial counsel was ineffective for failing to put the prosecution's case to meaningful adversarial testing, such that there was an actual breakdown of the adversarial process during trial.

h. Applicant was denied effective assistance of trial counsel, and a fair trial due to the **cumulative effects** of counsel's ineffectiveness:

i. Trial counsel was ineffective in misstating the evidence.

W. H. Wilson ————— (BS) —————
W. H. Wilson ————— (BS) —————

l. The Solicitor knowingly used perjured testimony.

m. It was prosecutor misconduct in suppressing *Brady* material, i.e., Monday Bishop's exculpatory statement to the Solicitor.

n. The Solicitor knowingly misstated the evidence to mislead the jury and the court on closing argument.

11. Stated concisely in the same order as the facts which support each of the grounds set forth in ¶ (10) are:

a. The trial court committed error in denying a directed verdict because guilt beyond a reasonable doubt could not be established on the evidence adduced and Appellate counsel, Wanda H. Carter, Esq, (hereafter, Ms. Carter) was ineffective in not raising this issue .

b. That no rational jury could find guilt beyond a reasonable doubt on the evidence adduced at trial and Ms. Carter, appeal counsel was ineffective in failing to raise this issue.

c. Appeal counsel was ineffective for failing to raise that due process within the meaning of In Re Winship was denied because proof beyond a reasonable doubt of every essential element of the crime was not established based on the evidence of record.

d. Defense counsel Mr. Snow was ineffective in arguing the Sufficiency of the evidence motion by not citing evidence of record to support the motion such as the DNA excluded Applicant and therefore, it would be physically impossible for Applicant to have been present to commit the crimes charged.

e. Defense counsel, Mr. Kenneth Snow, (hereafter Mr. Snow) failed to properly Investigate this matter because he failed to interview Applicant's sister, Monday Bishop and her friend Val Hudson, who were present at Monday's apartment at the time that Reed Allen, claimed that the Applicant called Monday and Monday gave her phone to Reed and **Applicant told Reed he needed a favor** (*Record of Appeal pp 525:24-25; 526:2-4; 549:10-19*). And subsequently, Reed alleged that Applicant asked him to "put it up" (i.e., the murder weapon) (*Record of Appeal pp 550:20-21*). And that Applicant gave Reed a bag with a gun and some clothing items in it and Reed left the apartment and **"threw it under a bush"** (*Record of Appeal 534:8-9*).

Had Mr. Snow interviewed Monday Bishop and called Monday to the witness stand she would have testified that Reed was lying; that she never put him on her phone to speak to Applicant on the night in question, nor did Applicant have a conversation with Reed, nor did Applicant give Reed a bag that Reed took outside, hid it, and returned to Monday's apartment (*See attached Affidavit of Monday Bishop, Exhibit A-1, ¶¶5-7,10-11,16,20-21,24-25,27*). Had Mr. Snow interviewed Monday Bishop and called Monday to the witness stand she would have likewise testified that, neither Davorius Mack (*Record of Appeal 350:15, 19-20; 352:3-6, 21-24; 385:4-7*) nor Terrell Addison (*Record of Appeal 891:1-4; 892:8-11, 13-25*) came to her apartment on the night in question (*See attached Affidavit of Monday Bishop, Exhibit A-1, ¶¶7,11,19, 26-28*).

f. Mr. Snow was ineffective for failing to interview Val Hudson and call Val Hudson, who was present on the night in question with Monday Bishop and Reed Allen. Had Mr. Snow interviewed and called Val to testify, she would have said that no one came to the apartment after her, Monday and Reed, except Ben, and that Ben did not talk to Reed Allen or give him a bag that he took outside of the apartment and returned without the bag. (*See attached Affidavit of Val, Exhibit A-2, ¶¶10, 22-25*).

Mr. Snow confirms his own ineffectiveness for failing to call Monday Bishop and Val Hudson during his closing argument when he rhetorically said to the jury during closing argument:

...Mr. Stewart doesn't have to prove anything, but you think, though, you

think that we would have heard testimony from either Monday or Val. Val certainly could have possibly cleared this whole thing up, but I don't think there was any mention of her. Who has the resources to bring her here? Who has the recourse to order her here to hear what she has to say? There's not a statement from her. No mention of her. That is the one person that could have cleared this whole thing up involving my client, but you never hear any mention of her. You better believe if she had something that would have implicated my client, what do you think? They would ordered her to be here. Someone would have found her. (*Record of Appeal at 1069*).

The above statement directly from the mouth of trial counsel clearly demonstrates the Mr. Snow did not know or perform his role as defense counsel, to use Compulsory Process to subpoena those witnesses, and if necessary Petition the Court for funds to assure the presence of those witnesses.

(NOTE: Monday Bishop was present for every day of the trial, See Affidavit of Monday Bishop, Exhibit A-1, ¶(4).

The failure of Mr. Snow to put this essential testimony before the jury was fatal to a fair trial, and denied Effective Assistance of Counsel and the right to Compulsory Process under the 6th Amendment U.S.C.A., and Art I, §14, South Carolina Constitution, Due Process and Equal Protection of the Laws under the 14th Amendment U.S.C.A., and Art I, §3, South Carolina Constitution. That the jury heard testimony from Reed Allen, Davorius Mack and Terrell Addison that Applicant gave Reed a bag with a gun in it to "put up" or otherwise to hide it, in Applicant's sister's, Monday Bishop's apartment, in Monday's and Val's presence, and neither Monday nor Val refuted the testimony, **compelled** the jury to give **undue weight** to the testimony that Applicant allegedly gave Reed a bag with a gun to hide for Applicant, while simultaneously causing the jury to disregard the DNA, the scientific evidence that should have trumped the fabricated, self-serving testimony implicating Applicant. What else could the jury think but that if the defense did not call Monday and Val, what Reed Allen, Davorius Mack and Terrell Addison testified to must be true!

Moreover, the Solicitor capitalized on the failure to call Monday Bishop in his closing argument when he said"

...Ben's sister...How far wouldn't she drive to come here to court?
How far would she drive to come here to say things didn't go down
that way? She was right there too. (*Record of Appeal at 1113*).

Another telling fact in support of the point that Applicant was prejudiced by failing to call Monday Bishop and Val is the jury's note requesting a re-reading of Reed Allen's testimony; see (*Record of Appeal pp. 1214-15*). In addition, the failure to investigate resulted in the jury and judge being under the false impression that Monday's apartment was actually Reed Allen's apartment. See (*Record of Appeal pp. 1214-15*) which reads in pertinent part: ... "And I asked them did they want to start at the time some persons arrived at **his house that night**" (**emphasis my own**). This is trial judge Alford apprising opposing counsel of the jury's request of a read back of Reed Allen's testimony; the "**his house**" comment refers to Reed Allen who was merely an infrequent visitor at Monday Bishop's apartment (See *Affidavit of Monday Bishop, Exhibit A-1, ¶13*). Moreover, this gave the jury the false— inaccurate impression— that Reed and Applicant were around each other often and had a relationship such that Applicant would trust Reed enough to ask him to do such a thing, a thing that virtually anyone else would have done for themselves.

Mr. Snow had several sources of information to know that Monday Bishop and Val were present at the time that Reed Allen, Davorius Mack and Terrell Addison alleged that Applicant gave a bag with a gun in it to Reed Allen to hide. For example, he had the statement(s) of Reed Allen, Davorius Mack and Terrell Addison; he had ready access to Applicant and his notes from Applicant's interviews; he had or should have had Monday Bishop's statement to the York County Solicitors who came to her apartment to interview her, one of whom she recognized during the trial (See *Affidavit of Monday Bishop, Exhibit A-1, ¶31*); and at trial when and after the testimony was offered, was enough time for Mr. Snow to do his job. Again, Monday Bishop was present for every day of the trial and was ready, willing, able and even eager to testify (See *Affidavit of Monday Bishop, Exhibit A-1, ¶13*).

g. Mr. Snow was ineffective in failing to make the trial an adversarial process. Applicant incorporates by reference the entirety of ¶11, inclusive as if set forth verbatim herein in support of Mr. Snow's failure to put the prosecution's case to adversarial testing, which denied a fair and impartial trial and produced an unreliable verdict.

h. The cumulative effects of Mr. Snow's ineffectiveness was fatal to the defense case; he made

a gaggle of critical errors that handed the prosecution an undeserved conviction where proof was not established beyond a reasonable doubt on every essential element of the crimes charged. For example, failing to investigate potential witnesses (Exh. A-1.2), failing to use compulsory process that permitted the prosecution to capitalize on close that if Reed Allen was lying, Monday Bishop would have driven any distance to refute that testimony (**Record of Appeal 1113**) For being inept regarding DNA excluding Applicant by not objecting to the prosecutor's close when he purposefully misstated the evidence that DNA and fingerprints of Dontavious Mack was not found in the vehicle, and because Applicant's DNA and fingerprints were not found did not mean he was not in the car (**Record of Appeal 1140-1141**).

The forensic evidence demonstrated that every defendant's DNA and fingerprints was either found or could not be included or excluded (**Record of Appeal 749-751**) in the vehicle except the Applicant's fingerprints and DNA. This incontrovertible physical fact, unbelievably, was trumped by the false, self-serving testimony that Applicant was present in the vehicle and supplied the murder weapon. Trial counsel did not raise and argue the **Incontrovertible Physical Facts Doctrine** in the Motion challenging the Sufficiency of the Evidence, which enabled the trial judge to wrongly deny the directed verdict of acquittal pursuant to the Incontrovertible Physical Facts Doctrine; appellate counsel failed to raise this error on appeal and instead filed an Anders Brief!

i. Trial counsel was ineffective for misstating the evidence by saying that Monday Bishop's house was Reed Allen's house and bolstered Reed's testimony and gave the false impression that Applicant was a guest in Reed's home, which implied a trust and relationship that did not exist.

j. The Solicitor knowingly used perjured testimony.

k. The Solicitor committed prosecutor misconduct by suppressing Brady material; namely the exculpatory statement of Monday Bishop.

l. The Solicitor knowingly misstated the evidence to rescue a failed prosecution by falsely conflating that the failure to find Applicant's fingerprints and DNA in the vehicle did not mean that Applicant was not in the car because Dontavious Mack's fingerprints (**he wore gloves Record of Appeal 743**) and DNA was not found either. The real truth is Applicant was **excluded** from being a possible

contributor (**Record of Appeal 749-751**) and Dontavious could not be included or excluded (**Record of Appeal 749-750**).

- a. Any petition in a State Court under South Carolina? Yes.
- b. Any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes.
- c. Any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.
- d. Any petitions, motions or applications in this or any other Court? Yes.

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

a. The specific nature thereof:

- i. Writ of Habeas Corpus filed 02/06/2009 (Pre-trial).
- ii. Notice of Appeal, filed 04/09/2009 (from judgment and sentence)
- iii. PCR Application: Motion for Transcripts and Appointment of Counsel, filed 02/11/2010.
- iv. Motion for Extension of Time to File Response to Ander's Brief and Motion For Transcripts, filed 02/14/2010.
- v. Pro-se Appellant's Brief, filed 08/21/1012
- vi. Writ of Habeas Corpus, filed 11/16/2012
- vii. Petition for Rehearing & Memorandum in Support, filed 12/24/2112.
- viii. Petition to Withdraw Petition for Rehearing, filed 01/23/2013.

b. The name and location of the Court in which each was filed:

- i. York County Court of General Sessions, P.O. Box 649, York, SC 29745-0649
- ii. South Carolina Court of Appeal, P.O. Box 11629, Columbia, SC 29211
- iii. York County Court of General Sessions, P.O. Box, 649, York, SC 29745-0649
- iv. South Carolina Court of Appeal, P.O. Box 11629, Columbia, SC 29211

- v. South Carolina Court of Appeal, P.O. Box 11629, Columbia, SC 29211
 - vi. York County Court of General Sessions, P.O. Box, 649, York, SC 29745-0649
 - vii. South Carolina Court of Appeal, P.O. Box 11629, Columbia, SC 29211
 - viii. South Carolina Court of Appeal, P.O. Box 11629, Columbia, SC 29211
- c. The disposition thereof:
- i. Denied
 - ii. Dismissed
 - iii. Dismissed because direct appeal was still pending; counsel was appointed and transcripts provided.
 - iv. Applicant was provided pre-trial transcripts and granted extension of time to file brief Appellant's Brief.
 - v. Direct Appeal Dismissed.
 - vi. Dismissed
 - vii. Motion to Withdraw Request for Rehearing; moot motion was already heard.
 - viii. Denied
- d. The date of each such disposition:
- i. 02/23/2009
 - ii. 12/12/2012
 - iii. 07/01/2012
 - iv. 02/25/2012
 - v. 12/12/2012
 - vi. 01/25/2013
 - vii. 01/25/2013

13. Has any grounds 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.**

14. If you answered "yes" to (14) identify:

- a. Which grounds have been presented:
- b. The proceeding in which each ground was raised:

15. 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. Issues not previously raised could not be raised except under **Post Conviction Relief**.

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

- a. Your arraignment and plea? **Yes**
- b. Your trial, if any? **Yes**
- c. Your sentencing? **Yes**
- d. Your appeal, if any, from the judgment of conviction or the imposition of sentence?

Appeal counsel filed an Anders letter and was granted permission to withdraw.

- e. Preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? **No**

17. If you answered "yes" to one or parts of (17), list:

- a. The name and address of each attorney who represented you:

- i. Kenneth D. Snow, Esq., 229 South Brevard Street, Suite 300, Charlotte, NC 28202; ph. (704) 358-0026; fax (707) 358-0229

- ii. James C. Cox, Jr., Esquire, 311 W. Home Avenue, Hartsville, SC 29550-4127; phone (843) 332-1531.

- iii. Wanda H. Carter, Deputy Chief Appellate Defender, 1330 Lady Street, Suite 401, Columbia, SC 29201; Tel: 803-734-1343; Fax: 803-734-1397.

- b. The proceeding at which each such attorney represented you:

- i. Pretrial and trial
- ii. Post-trial (was paid \$5,000 but did not actually prosecute my appeal).

iii. Direct appeal

18. State clearly the relief you seek in filing the application:

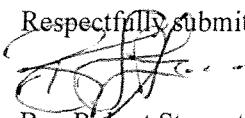
- a. Appoint counsel pursuant to §17-27-60.
- b. Permission to proceed *In Forma Pauperis*
- c. Right to discovery pursuant to §17-27-150 in post-conviction relief proceeding.
- d. Evidentiary Hearing via Closed Circuit Television pursuant to §17-27-80 where trial counsel and appellate counsel are compelled to justify their stewardship of this case and the court can review the denial of motion for direct verdict for insufficiency of the evidence.
- e. Reversal of conviction for insufficiency of the evidence and discharge from custody. Or in the alternative:
- f. Reversal of the judgment of conviction because no rational trier of fact could find guilt beyond a reasonable doubt on the evidence adduced at trial and grant a new trial.
- g. Reversal of the judgment of conviction because guilt beyond a reasonable doubt of every essential element was not established at trial and grant a new trial.
- h. Reversal of the judgment of conviction due to a breakdown in the adversarial process and grant a new trial.
- i. Reversal of the judgment of conviction because ineffective assistance of counsel is plain on the face of the record and grant a new trial.
- j. Reversal of the judgment of conviction due to the cumulative ineffectiveness of counsel and grant a new trial.
- k. Reversal of judgment of conviction due to intentional prosecutor conduct to rescue a failed prosecution—bar retrial and discharge from custody.

19. Are you now under the sentence of any other court that you have not challenged?

a. Court of Common Pleas, Philadelphia, PA.

Dated: November 21, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ben Stewart", is written over the text "Respectfully submitted,".

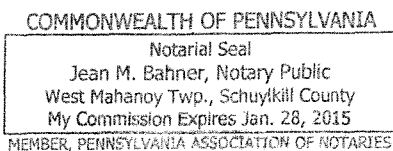
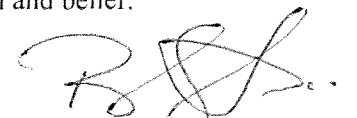
Ben Robert Stewart HK-9369
SCI-Frackville
1111 Altamont Blvd.
Frackvill, PA 17886-1021

Commonwealth of Pennsylvania

County of SchuylkillSTATE OF CAROLINA) ⁸²County of YORK)

VERIFICATION

I, Ben Robert Stewart, 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 allegation therein set forth are true upon information and belief.

Ben Robert Stewart HK-9369
 SCI-Frackville
 1111 Altamont Blvd.
 Frackville, PA 17931

SWORN or affirmed to and subscribed before me

this 26th day of November, 2013

Jean M. Bahner
 Notary Public

My Commission Expires 1/28/2015

STATE OF SOUTH CAROLINA)

County of YORK)Ben Robert Stewart, HK-9369)

V.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2013CP46-3731

DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

2013 DEC 10 AM 10:57

CERTIFIED TRUE COPY

FILED-RECEIVED
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DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

MEMORANDUM OF LAW COVER SHEET

This is an Application pursuant to South Carolina's *Uniform Post-Conviction Procedure Act, §17-27-20 et. seq.*, to vindicate my rights to effective assistance of counsel at trial and on appeal and a fair trial that comports with due process and equal protection of the laws; neither of which were extended to the Applicant during the entire course of the proceedings.

This is a case where DNA evidence exonerated the Applicant, yet due to many factors, including ineffective assistance of counsel and prosecutor misconduct, incredible, false and self-serving testimony seeking leniency for the defendants who committed these terrible crimes were allowed to trump conclusive and reliable DNA evidence collected and testified to by the state's forensic expert witness that Applicant could not have been present and therefore could not have participated in these crime!

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
County of <u>YORK</u>	)	
	)	
<u>Ben Robert Stewart, HK-9369</u>	)	
	)	
V.	)	
State of South Carolina	)	

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STATE OF SOUTH CAROLINA

County of YORKBen Robert Stewart, HK-9369

V.

State of South Carolina

) IN THE COURT OF COMMON PLEAS

)

) CONCLUSION OF FACTS AND

) MEMORANDUM OF LAW IN SUPPORT

) OF APPLICATION FOR

) POST-CONVICTION RELIEF

)

)

FILED-RECEIVED
 2013 DEC -9 PM 3:12
 DAVID HAMILTON
 CLERK OF COURT
 YORK COUNTY, SC

I, Ben Robert Stewart, *pro se*, *In forma pauperis*, Applicant, advances this Memorandum of Law, in support of my application under §17-27-40, for Post-Conviction Relief, pursuant to §17-27-20, *et seq.*, to redress grievances, correct a miscarriage of justice and vindicate rights of a factually innocent person. *Pro se* petitions should be liberally construed.

SUMMARY OF ARGUMENT

Applicant contends that prosecutor misconduct combined with counsel so inept, that he bungled every phase of trial except pointing out the DNA excluded Applicant denied a fair trial. He failed to challenge the prosecution's case and indeed aided the prosecution's case, such that there was a breakdown in the adversarial process within the meaning of the second prong of United States v Cronin, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 1884) and in Nance v Ozmint, 367 S.C. 547, 626, S.E.2d 878 (2006); counsel was ineffective in several other respects.

Also, the Trial Court erred as a matter of law by allowing the case to go to the jury when there was insufficient evidence to find or infer guilt beyond a reasonable doubt. In addition, the testimonial evidence offered was incredible as a matter of law because it related to events which could not have occurred under the laws of nature; i.e., Applicant could not have provided the murder weapon because the DNA/fingerprints collected from the vehicle used in the crime excluded Applicant as being present in the vehicle. Taken singly, in toto, i.e., cumulatively, the errors were pervasive and had a negative effect on the entire trial and resulted in a breakdown in the adversarial process, conviction of a factually innocent person and an unreliable verdict that should not be permitted to stand in a just, lawful, and civilized society!

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 DAVID HAMILTON
 CLERK OF COURT
 YORK COUNTY, SC

JURISDICTION

Jurisdiction is conferred upon this Honorable Court pursuant to §17-27-20(a)(1)(4)(6), *et seq.*, because Applicant has been convicted and sentenced for a crime and *avers* that the conviction was in violation of the Constitution and laws of the United States or the Constitution and laws of this State; and the conviction is otherwise subject to collateral attack.

I. PROCEDURAL HISTORY

Please see the Application for Post-Conviction Relief for the procedural history.

II. APPLICABLE LAW & STANDARD OF REVIEW

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000).

The Sixth Amendment of the United States Constitution requires that a criminal defendant receive *effective* assistance of counsel at trial, United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Nance v. Ozmint, Director South Carolina Department of Corrections, 626 S.E.2d 878, 367 S.C. 547, 352 (2006); on appeal, Evitts v Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985), Douglas v Calif., 372 U.S. 353 (1963); Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990), and on collateral review, Ryan v Martinez, 132 S.Ct. 1309 (2012).

To prevail on an ineffectiveness claim, "[P]etitioner must meet the standard established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)." In order to establish a claim of ineffective assistance of counsel, the PCR applicant must show that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but

for counsel's errors, the result of the trial would have been different. Caprood, *supra*, 338 S.C. at 109, 525 S.E.2d at 517 citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Ard, 372 S.C. at 331, 642 S.E.2d at 596; Strickland, *supra*. "Furthermore, when a defendant's conviction is challenged, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." Ard, *supra* (quoting Strickland v. Washington, 466 U.S. 668, 695, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Applicant contends that this standard is met in the Application and supporting Memorandum of Law because, except for trial counsel's unprofessional errors in not objecting to the Solicitor's improper closing argument in equating the **exclusion of Ben Stewart** based on the lack of his DNA/fingerprints in the car and the **inability to exclude or include Dontavious Mack** as being equivalent; and botching the Sufficiency of the Evidence Motion, such as failing to argue that the DNA evidence was fatal to the state's case because it excluded Applicant as a passenger in the vehicle and in the words of the forensic expert: "no chance that it is Ben" (**Record of Appeal at 751**) and not raising and arguing the **Incontrovertible Physical Facts Doctrine**; this failure **unduly** influenced the court to credit testimony that Applicant was present in the vehicle and provided the gun for a robbery that ended in a murder.

Counsel's unprofessional errors of failing to make reasonable investigations, interview potential witnesses, subpoena them and present exculpatory testimony and otherwise failing to put the state's case to adversarial testing, the jury would have had a reasonable doubt respecting guilt and the outcome of the trial would have been different. Walker v State, 397 S.C. 226, 236 (~~2011~~) citing Edwards v State, 392 S.C. 449, at 456, 710 S.E.2d 60 at 64

(2010); Lounds v State, 380 S.C. 454, 670 S.E.2d 646 (2008); Caprood, supra, 338 S.C. at 109, 525 S.E.2d at 517 citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

On the law governing Sufficiency of the Evidence the Supreme Court reviews denial of directed verdict motion, it views evidence in light most favorable to nonmoving party, and if there is any direct or substantial circumstantial evidence which reasonably tends to prove guilt of accused or from which guilt may be fairly and logically deduced, refusal by trial judge to direct verdict is not error. State v. Brown, 360 S.C. 581, 591, 596, 602 S.E.2d 392, 397, 400 (2004); State v. Copeland, 468 S.E.2d 620 (S.C., 1996); State v. Stokes, 299 S.C. 483, 386 S.E.2d 241 (1989); State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989); State v. Irvin, 270 S.C. 539, 243 S.E.2d 195 (1978); Jackson v Virginia, 443, US 307, 319, 99 S.Ct. 2781, 2789 (1979); In re Winship, 397 U.S. 358, 362, 90 S.Ct. 1068, 1071, 25 L.Ed.2d 368 (1970).

Also, the law governing the Due Process Clause of the 14th Amendment of the United States Constitution and the South Carolina Constitution Art I, §3 confers the right of Due Process in criminal trials which entails that guilt is proven beyond a reasonable doubt by proving every essential element of the crime charged. See In re Winship, 397 U.S. 358, 362, 90 S.Ct. 1068, 1071, 25 L.Ed.2d 368 (1970).

The Jackson v Virginia inquiry has three prongs: (1) aimed at determining whether there has been an independent constitutional violation—i.e, a conviction based on evidence that fails to meet the Winship standard (establishing every element of the crime beyond a reasonable doubt). Second, the sufficiency of the evidence review authorized by Jackson v Virginia is limited to “record evidence”. Third, the Jackson, inquiry focuses on whether a

rational decision to convict or acquit was made. See Herrera v Collins 506 U.S. 390, 404, 113 S.Ct 853, 861 1993).

The law governing triers of fact as unreasonable for not rejecting testimony that asserts facts that are physically impossible, is incredible or contrary to the laws of nature and in contraventions of human experience is viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v Virginia, 443, US 307, 319, 99 S.Ct. 2781, 2789 (1979).

The law governing prosecutor misconduct is U.S. v Berger, 295 U.S. 78 (1935); Brown v State, 383 S.C. 506, 516, 680 S.E.2d 909, 914 (2009). Berger, and Brown imposes the duty on prosecutors to refrain from improper methods calculated to produce a wrongful conviction; to seek justice and not just to win convictions.

III. APPEAL COUNSEL WAS INEFFECTIVE IN NOT RAISING TRIAL COURT ERROR ON APPEAL FOR DENYING A DIRECTED VERDICT BECAUSE GUILT BEYOND A REASONALBE DOUBT COULD NOT BE ESTABLISHED ON THE EVIDENCE ADDUCED!

Wanda H. Carter, Deputy Chief Appellate Defender was appellate counsel; she filed an *Anders* Brief in this case and was grossly ineffective on the face of the record, Evitts, supra; Robbins v Smith, 125 F.3d 831 (9th Cir. 1997), for failing to cite error on the trial court for denying the Sufficiency of the Evidence Motion or otherwise failing to *sua sponte* direct a verdict of acquittal because the evidence presented to the jury was insufficient as a matter of law to find guilt beyond a reasonable doubt. See e.g., Jackson v Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); Brown v State, 383 S.C. 506, 680 S.E.2d 909 (2009); State v. Copeland,

468 S.E.2d 620 (S.C.1996). *State v. Stokes*, 299 S.C. 483, 386 S.E.2d 241 (1989); *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989); *State v. Irvin*, 270 S.C. 539, 243 S.E.2d 195 (1978); *In re Winship*, *supra*. In *Brown*, 383 S.C. 506, .

The evidence relied on to implicate Applicant was testimony by Dontavious Mack, Davorius Mack and Terrell Addison claiming Applicant was present in the vehicle in Rock Hill, SC and provided a gun with full knowledge that it would be used to rob the BP gas station. (See Record of Appeal pp.: 188, 279, 339, 876). On the other hand, conclusive evidence that Applicant was not present in the vehicle and therefore could not have provided the gun as testified to is the analysis report of DNA testing from the South Carolina Law Enforcement Department (SLED) that excluded Applicant from being in the vehicle ("...no chance it is Ben") (See Record of Appeal 749-751) and that Applicant's fingerprints were not found in the vehicle. (See Record of Appeal 740, 747). The DNA evidence exposed the state's witnesses for the liars that that are and renders their testimony, incredible, unbelievable, contrary to laws of nature and human experience and should have been rejected as a matter of law. See e.g., *Commonwealth v. Santana*, 460 Pa. 482, 333 A.2d 876 (1975); *Colna v. Northern Metal Co.*, 242 F.2d 546, 549 (3rd Cir. 1957); *Commonwealth v. Karkaria*, 533 Pa. 412, 625 A.2d 1167 (1993). In *Santana*, *supra*, a narcotics officer testified that he observed Santana come out of a door where narcotics was later found. The door was found to be locked by deadbolt that needed a key on both sides; no key was found on Santana or anywhere in the vicinity. The Pennsylvania Supreme Court reversed:

It would appear from the undisputed facts that the door to the second floor apartment had been secured by a dead lock; that although allegedly within the unobstructed view of the officers, appellant was not seen closing the door, fastening the lock, or discarding the key. Further, no key was found when he was searched, nor was any key recovered from the area. We thus conclude that the statement of the officer that appellant was observed actually leaving the room,

should have been rejected by the triers of fact. "It is settled law in Pennsylvania that testimony in conflict with the incontrovertible physical facts and contrary to human experience and the laws of nature must be rejected, . . ." Colna v. Northern Metal Co., 242 F.2d 546, 549 (3rd Cir. 1957). Santana, supra.

In the instant case, that Applicant was excluded from being in the vehicle by the DNA analysis and the fingerprint analysis (**Record of Appeal 740, 747, 749-751**), the trial court was compelled to conclude that the testimony of Dontavious Mack, Davorius Mack and Terrell Addison was/is false, was in conflict with physical and scientific laws, contrary to human experience and should have been rejected. See e.g., Commonwealth v Robinson, 817 A.2d 1153, 1158 (2003) holding:

Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law."

Robinson, supra at 1158.

Notwithstanding the fact that Solicitor Brackett in his closing argument misstated the evidence and mislead the jury and apparently the trial judge as well when he falsely claimed that no DNA or fingerprint evidence was found for Dontavious as well as Ben:

Mr. Snow said "there is no forensic evidence to show that Mr. Stewart was in the car at all – no DNA, no fingerprints, no fibers, no hair, nothing to show that Ben Stewart was in that car." Well, guess what, there is no forensic evidence to show that Dontavious was in that car. No DNA, no fingerprints...nothing to show that he was in there. Yet nobody disagrees that Dontavious was in that car. No doubt he was in that car, and he was in the car bleeding...No DNA of Dontavious found in that car. No fingerprints of Dontavious...So I submit to you just because they didn't find anything in there does not mean that Ben Stewart was not in the car...**Record of Appeal 1140-1141**,

It is outright disingenuous and totally false and misleading to argue that Dontavious was excluded by the DNA and fingerprint analysis as was the case with Ben Stewart. The BP video showed Dontavious wearing gloves (**Record of Appeal 747**) and explains why his fingerprints

were not found. As for the DNA, **Dontavious was not excluded**, but **Ben Stewart was excluded**:

The DNA obtained from item 18 is a mixture of at least two individuals. No conclusion can be made regarding the **inclusion or exclusion** of Dontavious Mack, Terrell Addison, or Davorious Mack as possible contributors to this mixture... Basically that means that the sample – there was something there in the DNA sample that was submitted, but there was not enough of a sample to verify whose it belonged – or who exactly the DNA belonged to. (**Record of Appeal 747; also see pg. 749**).

Based on the foregoing, Dontavious, Davorius and Terrell was not **specifically included** as contributors, but more importantly, Dontavious **could not be specifically excluded**. Therefore, the prosecutor committed prosecutorial misconduct in equating on close that no forensics were found on Dontavious but nobody disagrees that he was in the car; this is a very subtle distinction which easily mislead the court and jury. The prosecution should not be permitted to have it both ways, i.e., successfully use forensics to implicate but discount forensics when it exonerates. The forensic expert testified it was “**no chance that it was Ben’s DNA**” in the car (**Record of Appeal 751**).

To draw an analogy, the judge and the jury accepting this testimony is like accepting testimony that a person ran a mile in 30 seconds when the world record for the one mile run is held by Morocco’s Hicham El Guerrouj who lowered the mark to 3:43.13 on July 7, 1999. See <http://trackandfield.about.com/od/worldrecords/tp/Men-s-World-Records.htm>

Legal and scientific information was widely available to Trial Counsel and Appellate Counsel establishing that, testimony is insufficient as a matter of law to convict someone when scientific evidence proved that it would be impossible for the accused to have committed the crime. The Innocence Project catalogued the 311 exonerations to date based on DNA evidence

nationwide; one of these exonerations was the case of Perry Mitchell that occurred in Lexington, SC. The Innocence's Project account follows:

In the late evening of December 29, 1982, a seventeen year old girl was dragged into the woods and raped at knifepoint. These woods were located near Perry Mitchell's home in Lexington, South Carolina. A week later, Mitchell was arrested on the grounds that he somewhat fit the description the girl had given of her attacker and lived "yards away" from the scene of the crime. Mitchell maintained his innocence and said that he had been visiting an elderly neighbor's home on the night of the crime, when he heard someone scream. Mitchell also said that after visiting with his elderly neighbor, he went to a party next door that was attended by about ten to fifteen people... The evidence against Mitchell at trial consisted of the victim's identification and erroneous serological testimony. A forensic analyst testified that semen from the crime scene showed blood group markers consistent with Mitchell's blood group. He said 35% of the population shares Mitchell's blood type and could have been the contributor, but then incorrectly stated that "you would probably have to cut that by another 50% because we're dealing with males..." Mitchell's direct appeal was unsuccessful. Twelve years later, in 1996, the Circuit Court granted Mitchell a hearing on his second post-conviction relief application, which claimed that he had a right to have a DNA test. Mitchell's lawyer asked that DNA tests be performed on the victim's underwear to see if the semen sample matched Mitchell's profile. Testing was completed in June 1998 by Cellmark Diagnostics. Mitchell was excluded from being the depositor of semen on the victim's underwear. Following these test results, Circuit Judge James Johnson Jr. granted Mitchell a new trial. The state did not try him again. Mitchell was released in (sic) August 4, 1998, after being wrongfully incarcerated for nearly fifteen years.

http://www.innocenceproject.org/Content/Perry_Mitchel.php

In the instant case, like the Perry Mitchell saga, where the semen on the victim's underwear excluded Mitchell from being the depositor of that semen and trumped the victim's testimony that Mitchell raped her, the scientific DNA and fingerprint evidence in the instant case (See Record of Appeal at 749-751 and 740, 747) respectively, excluded Applicant from being present in the vehicle used to commit the crime, and therefore, trumped the testimony of the prosecution's witnesses that Applicant provided the gun used to rob BP and murder Mr.

Marshall. An inescapable consequence of this is that essential element(s) of the crimes, i.e. that Applicant was present in the vehicle and knowingly provided the murder weapon was not proven

beyond a reasonable doubt, as required by the Due Process Clauses of the United States and South Carolina's Constitutions. See, e.g. *In Re Winship*, 397 U.S. 358, 326, 90 S. Ct. 1068, 1071, 25 L.Ed. 2d 368 (1970); *Evans-Smith v Taylor*, 19 F.3d 899 (4th Cir. 1994).

The instant case is distinguishable from the Perry Mitchell case because Mitchell was an honest misidentification; while in the instant case the testimony was based on a frame-up of an innocent person to curry favor and receive lighter sentences for the defendants. For example, Dontavious Mack accused Applicant of being the shooter and admitted that he lied to get Applicant in trouble (See Record of Appeal 222:7-11, and 223:3-12, respectively). Cf. the holding in *Wright v West*, 112 S.Ct. 2482, 2492, where the 4th Circuit's holding that there was insufficient evidence to convict was Reversed; 931 F.2d 262 (1991) 505 U.S. 277, 295 (1992). The United States Supreme Court concluded that the case against *West* was strong. Two weeks after the burglary 15 of the stolen items were found in West's home and he failed to offer specific information of how he acquired the items. He contradicted himself, was vague and evasive and failed to produce any other supporting evidence. "...the trial record contained sufficient evidence to support West's conviction". Id at 2493, 505 U.S. 298. The instant case is distinguishable from *Wright v West* because the testimonial evidence in the instant case was weak and contradictory ^(b7) and was trumped by the forensic evidence that excluded Applicant from being present at the time and scene of the crime.

Also Cf. *Evans-Smith v Taylor*, *supra*, where the Fourth Circuit reversed the District Court and reversed Evans-Smith's conviction for murdering his wife holding:

We conclude, however, that the evidence assessed in its entirety and in the light most favorable to the prosecution is not sufficient to persuade any rational trier of fact of the petitioner's guilt beyond a reasonable doubt, that Evans-Smith's conviction on the evidence therefore violated his constitutional right to due process, and that he is entitled to the relief sought in this habeas corpus proceeding. *Evans-Smith* at 910.

The instant case is distinguishable from *Evans-Smith*, because *Evans-Smith* was a circumstantial case. However, there was insufficient evidence to persuade any rational trier of fact to find Applicant guilty beyond a reasonable doubt based on the lack of DNA and fingerprint evidence which should have trumped the testimony. Note:

Dontavious said Applicant got the gun out of the trunk and gave it to him; Davorius said Applicant had the gun on his lap and passed it over the seat; and Terrell said he never saw the gun until minutes before the crime (**Record of Appeal 279, 338, 873 respectively**). Couple those contradictions with the contradiction between pretrial statement and trial testimony of Reed Allen (**Record of Appeal 526, 542-543, 552-553**)(**Exhibit A-3**). How can this and other contradictory and inconsistent testimony be allowed to trump reliable scientific evidence. Expounding on the relevance, veracity, and reliability of DNA evidence Chief Justice Roberts wrote: "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty". See *District Attorney's Office for the Third Judicial District, et. al. v. Osborn*, No. 08-6. Argued March 2, 2009—Decided June 18, 2009. Accordingly, the verdict in my case is absurd and should not be permitted to stand. Credible DNA standing alone renders any testimonial evidence insufficient as a matter of law to convict a person of a crime. The prosecution credited the DNA evidence to implicate the defendants in this case, so it cannot now be allowed to discount the same DNA to prevent the exoneration of Applicant.

If there is doubt as to whether motion for directed verdict on ground of insufficiency of evidence to sustain charge in indictment was properly made will be solved in favor of the appealing defendant. See e.g., *State v. Cody*, 186 S.E. 165 (S.C.1936). Applicant respectfully submits that **the evidence of record is insufficient beyond all doubt** and the matter should be resolved in Applicant's favor. *Id.*

IV. ON THE EVIDENCE ADDUCED AT TRIAL, "NO RATIONAL JURY" COULD HAVE FOUND GUILT BEYOND A REASONABLE DOUBT AND APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE ON APPEAL!

The review of the constitutional sufficiency of evidence to support a criminal conviction is governed by *Jackson v Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979), which requires a reviewing court to determine whether viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See, e.g., *U.S. v Nevils*, 598 F.3d 1158, 1163-1164 (9th Cir 2010) citing *Jackson, supra*. Applicant contends that no rational trier of fact could have found the essential elements of the crimes charged beyond a reasonable doubt on the evidence presented.

In the instant case the evidence presented to implicate Applicant was testimony of Davorius Mack, Terrell Addison and Dontavious Mack; the testimony essentially said that Applicant provided the murder weapon. (See Record of Appeal at 350:15, 19-20; 352:1, 24-25; 439:9-14; 514:9-18; 529:9-17; 534:7-17; 891:5-7, 23-24; 892:8-11, 13-25). This evidence standing alone, on its face, appears to place Applicant in the vehicle and knowingly provided the murder weapon to Dontavious Mack. The testimony of Reed Allen, Terrell Addison and Davorius Mack standing alone on its face appears to have Applicant disposing the murder weapon by giving it to Reed Turner Record on Appeal 350:15; 19-20; 352:1, 3-6. 529:9-17; 534:7-17; 891:5-7, 23-24; 892:8-11, 13-25). This so-called disposal of the weapon testimony will be further clarified and elaborated in the Ineffective Assistance of Counsel section, *infra*.

However, in addition to the state's witnesses providing testimony that placed Applicant in the vehicle and providing the murder weapon, the prosecution likewise offered testimony and forensic DNA and fingerprint evidence by the State's investigator, Mike Williams, to identify the

perpetrators of the heinous crimes in this case. See e.g., State v. James, 179 S.E.2d 41 (S.C., 1971) (Where results of tests or analyses are offered to prove essential element of crime or connect defendant directly with commission of crime, such results must be substantiated by person who conducted tests or analyses). The video evidence conclusively proved Dontavious Mack and Terrell Addison committed the crimes. See (Record of Appeal at 739) and the DNA evidence could not exclude or include Dontavious, Davorius and Terrell. See (Record of Appeal at 749). On the other hand, the same DNA and fingerprint evidence testified to by investigator Mike Williams conclusively proved that Applicant was not present in the vehicle (Record on Appeal 740:3-14; 747:3-16; 749:11-24; 751:8-17) and therefore, could not have provided the murder weapon as alleged and falsely testified to. Just as the forensic evidence included or did not exclude them, it excluded Applicant and therefore, the evidence of record was insufficient as a matter of law to sustain Applicant's conviction. See e.g., Commonwealth v Robinson, 817 A.2d 1153, 1158 (2003) holding:

Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law."

Robinson, supra at 1158; *Santana, supra*; *Colna, supra*.

Under the test established in Jackson v Virginia, the court erred by failing to direct a verdict of acquittal, because the testimonial evidence that Applicant was present in the vehicle and provided the murder weapon is insufficient as a matter of law because of the DNA and fingerprint evidence, and Incontrovertible Physical Fact Doctrine, would make it impossible under the laws of nature for Applicant to provide the murder weapon when the physical facts established that Applicant was not even present in the vehicle. See Santana, supra; in Santana, a narcotics officer testified that he saw Santana leave a room where narcotics were found resulting

in *Santana's* conviction for possession. However, the door to the room was deadbolt locked and needed a key to get in or out. Moreover, no key to the door was found on *Santana* or in the area. The court held that it was not possible for the officer to have seen *Santana* leave the locked room and the testimony should have been rejected as incredible and contrary to the laws of nature and human experience.

The testimony that Applicant was present in the vehicle and provided the murder weapon should likewise be rejected because the incontrovertible and unassailable physical facts of the DNA and fingerprint evidence conclusively proved that Applicant was not in the vehicle should have compelled the trial court to reject the testimony as incredible and unbelievable and in contravention of the laws of nature and human experience and directed a verdict of acquittal due to insufficiency of the evidence. *Santana, supra*. Also see *CJS TRIAL § 411*, (Evidence that is in conflict with indisputable physical facts or laws of nature is not sufficient to take the case to the jury; A plaintiff is not entitled to go to the jury if evidence in his or her behalf consists of alleged facts and inferences that are inherently impossible and contrary to well-established physical laws or where the physical facts are of such character as to make the evidence unbelievable). See cases from several jurisdictions on this point: *Evans v. Briley*, 277 S.E.2d 184 (Va.,1981)(When physical evidence demonstrates conclusively that oral testimony upon which plaintiff relies is incredible, it is proper for trial court to remove case from jury); *Cahill v. Liswood*, 401 N.Y.S.2d 843 (N.Y.App.Div.2.Dept.,1978) (On motion to dismiss complaint at close of plaintiff's case, test is not whether a plaintiff's verdict would have to be set aside as contrary to weight of credible evidence, but whether trial court could hold that there was no rational process by which jury could have found for plaintiff); *LaGuardia v. Lantz*, 501 P.2d 1341 (Colo.App.,1972) (Where testimony introduced by plaintiff is shown by physical facts and

surroundings to be so inherently improbable that no reasonable person can accept it as true or possible, case should be taken from jury); Commonwealth Life Ins. Co. v. Auxier, 470 S.W.2d 335 (Ky.,1971) (A plaintiff is not entitled to go to the jury if evidence in his behalf consists of alleged facts and inferences which are inherently impossible and contrary to well-established physical laws, or where the physical facts are of such character as to make the evidence unbelievable); Kirkpatrick v. Butler, 483 P.2d 790 (Ariz.App.Div.1,1971) (Where undisputed physical evidence is such that to believe oral testimony, one is required to disregard natural law of physics, the oral testimony is not sufficient to give rise to jury question); Phoenix Ins. Co. of Conn. v. Wisconsin Southern Gas Co., 173 N.W.2d 610 (Wis.,1970) (Incredible evidence", which is evidence of a type insufficient to authorize submission of case to jury is evidence in conflict with uniform course of nature or with fully established or conceded facts); Peterman v. Darby, 419 S.W.2d 747 (Ky.,1967) (Plaintiff is not entitled to go to jury if his evidence consists of statements of alleged facts which are inherently impossible and at variance with well established physical laws, or where certain physical facts are of such character as to make that evidence unbelievable); Johnson v. Moore, 146 N.W.2d 599 (Minn.,1966) (Where admitted or conclusively proved physical facts demonstrate to a certainty the total failure of the testimony upon which plaintiff's case depends, or the falsity thereof, a verdict should be directed for the defendant). A directed verdict of acquittal should have been granted to Applicant in this case.

V. APPLICANT WAS DENIED DUE PROCESS OF LAW BECAUSE THE EVIDENCE PRESENTED AT TRIAL VIOLATED THE WINSHIP RULE BY NOT ESTABLISHING PROOF BEYOND A REASONABLE DOUBT

Applicant contends that Due Process under the United States and South Carolina Constitutions was violated in this case because proof beyond a reasonable doubt of every essential element of the crimes charged were not established based on the evidence

presented at trial. Again, the evidence relied on to implicate Applicant was testimony by Dontavious Mack, Davorius Mack and Terrell Addison that Applicant was present in the vehicle in Rock Hill, SC and provided a gun with full knowledge that it would be used to rob the BP gas station. (See **Record of Appeal pp.: 188, 279, 339, 876**). On the other hand, conclusive evidence that Applicant was not present in the vehicle and therefore could not have provided the gun as testified to is the analysis report of DNA testing from the South Carolina Law Enforcement Department (SLED) that excluded Applicant from being in the vehicle (See **Record of Appeal 749-751**) and that Applicant's fingerprints were not found in the vehicle and the vehicle had not been cleaned or washed. (See **Record of Appeal 740, 747**). See *In Re Winship*, 397 U.S. 358 (1970):

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *Id.*

The prosecution failed to establish the essential element that Applicant was in the vehicle that the murder weapon was claimed to be passed from Applicant to Dontavious Mack because the prosecution's DNA and fingerprint evidence and expert witness' testimony excluded Applicant from being present in the vehicle. See (**Record of Appeal 740, 747, 749-751**). Also see *Brown v State*, 383 S.C. 506, 680 S.E.2d 909 (2009); *Dervin v State*, 386 S.C. 164, 687 S.E.2d 712 (2009); *State v. Brown*, 360 S.C. 581, 602 S.E.2d 392 (2004). In *Brown v State*, 383 S.C. 506, the court held there was insufficient evidence to convict and ordered Brown's released. In the instant case, the testimonial evidence was insufficient as a matter of law because the most essential element of the crime: presence in the vehicle, was not proved beyond a reasonable doubt because the forensic evidence trumped the testimony and rendered it unbelievable.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

To obtain post-conviction relief based on the alleged denial of effective assistance of counsel under the Sixth Amendment, the applicant must satisfy the two-prong test set out in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lorenzen v State, 657 S.E.2d 771, 376 S.C. 521, 529 (2008); Edmond v. State, 341 S.C. 340, 346, 534 S.E.2d 682, 685 (2000). First, the applicant must show that trial counsel's performance was deficient based on a standard of "reasonableness under prevailing professional norms." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant "must demonstrate that this deficiency prejudiced him to the point that he was deprived of a fair trial" Walker v State, 397 S.C. AT 235.

The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases; standard is whether counsel's assistance was reasonably effective considering all the circumstances viewed as of the time of counsel's conduct. Alvin Watson, Jr., V State of South Carolina, 287 S.C. 356, 358 338 S.E.2d 636, 638 (1985); Strickland v. Washington, 466 U.S. 668 (1984)

In the instant case, Applicant contends that trial counsel, Mr. Kenneth Snow (hereafter Mr. Snow) was so lacking in every phase of his stewardship of this case that Applicant should be awarded a direct verdict of acquittal based on Sufficiency of the Evidence and the holding in Jackson v Virginia, 443 U.S. at 319, 99 S.Ct. 2781, and the **Incontrovertible Physical Facts Doctrine**, which holds: where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the

evidence is insufficient as a matter of law. See e.g., *Commonwealth v. Robinson*, 817 A.2d 1153, 1158 (Pa. Super. 2003); *Commonwealth v. Karkaria*, 533 Pa. 412, 625 A.2d 1167 (1993); *Commonwealth v. Santana*, 460 Pa. 482, 333 A.2d 876 (1975); *Colna v. Northern Metal Co.*, 242 F.2d 546, 549 (3rd Cir. 1957).

a. **Ineffective on the Sufficiency of the Evidence Motion**

Mr. Snow on the motion for a directed verdict said nothing to support the motion and never mentioned the murder charge but appeared to argue against the kidnapping and armed robbery:

May it please the court, Your Honor, at this time we move the court for A directed verdict in favor of my client, Mr. Stewart...Even viewing the the evidence most favorable to the State...we believe the State has failed to create an issue for the jury...And I would argue in general for all these particular cases, particularly the kidnapping; I feel that the kidnapping charge certainly is not a natural occurrence of any conspiracy or any armed robbery. I would ask the court to consider that, in particular, and just move for a directed verdict.

Record on Appeal at 841-842.

In the instant case, the testimonial evidence, false and self-serving testimony, was allowed to trump the scientific DNA evidence collected by the prosecution's own forensic investigator that **excluded** Applicant as being present in the vehicle used to commit the **crime**, but did not **exclude** the other defendants. See Record of Appeal at 740:3-14; 749-751 (no DNA or fingerprint evidence matched Ben Stewart; no chance that it's Ben, respectively)

b. **Ineffective in Failing to Object to Improper Closing Argument**

The Solicitor on close purposely misstated the evidence to improperly mislead the jury to discount DNA and fingerprints that **excluded Ben Stewart** from being present in the car by conflating as equivalent the inability to **include or exclude Dontavious Mack's** presence in the car based on DNA/fingerprints (Record of Appeal at 740:3-14; 749-751). Note:

Mr. Snow said “there is no forensic evidence to show that Mr. Stewart was in the car at all – no DNA, no fingerprints, no fibers, no hair, nothing to show that Ben Stewart was in that car.” Well, guess what, there is no forensic evidence to show that Dontavious was in that car. No DNA, no fingerprints...nothing to show that he was in there. Yet nobody disagrees that Dontavious was in that car. No doubt he was in that car, and he was in the car bleeding...No DNA of Dontavious found in that car. No fingerprints of Dontavious...So I submit to you just because they didn’t find anything in there does not mean that Ben Stewart was not in the car...**Record of Appeal 1140-1141. Also see Exhibit A-3).**

Compare evidence of record with Solicitor Brackett’s comments and any objective observer will agree that he grossly misstated the evidence with the intent to mislead the court and jury, prejudice Applicant and deny Due Process, a fair trial and a true verdict. See *U.S. v Berger*, 295 U.S. 78 (1935); *Mincey v. State*, 444 S.E.2d 510 (S.C., 1994) Note:

The DNA obtained from item 18 is a mixture of at least two individuals. No conclusion can be made regarding the **inclusion or exclusion** of Dontavious Mack, Terrell Addison, or Davorious Mack as possible contributors to this mixture...Basically that means that the sample – there was something there in the DNA sample that was submitted, but there was not enough of a sample to verify whose it belonged – or who exactly the DNA belonged to. (**Record of Appeal 747**).

Based on the foregoing, Dontavious, Davorius and Terrell could not **specifically be included** as contributors, but **also could not be specifically excluded**. Therefore, the prosecutor committed prosecutorial misconduct in equating on close that no forensics were found on Dontavious but nobody disagrees that he was in the car. The prosecution should not be permitted to have it both ways, i.e., use forensics to implicate but discount forensics when it exonerates. The forensic expert testified it was “**no chance that it was Ben’s DNA**” in the car (**Record of Appeal 751**). Counsel was ineffective in failing to object to these improper, prejudicial comments. *Strickland, supra*; *Brown v State*, 383 S.C. 506, 680 S.E.2d 909 (2009). In *Brown, supra*, South Carolina Supreme Court reversed the lower court who had found that counsel was ineffective for failing to object to impermissible comments on close by the solicitor on the ground that the comments were impermissible but Brown failed to prove that there was a

reasonable probability that but for the error the result of the trial would have been different.

Brown, supra, 383 S.C. at 518, 680 S.E.2d at 915. In the instant case but for counsel's failure to object there is a reasonable probability that the result of the trial would have been different. The solicitor's conflating as equivalent that because Applicant's DNA and fingerprints were not found did not mean he was not in the car and Dontavious Mack's DNA and fingerprints were not found and no one doubts he was not in the car is a misstatement of the facts, i.e., the evidence was that Applicant was **excluded** by the forensic evidence and Dontavious could not be **included or excluded**. In the context of the record, i.e., all codefendants testified that Applicant was present and provided the murder weapon, this remark was fatally prejudicial, mislead the court and jury and denied Due Process and a fair trial. Therefore, the court should reverse the conviction for prosecutor misconduct and ineffective assistance of counsel for failing to object.

c. INVESTIGATION

Your Applicant further contends that trial counsel was ineffective in failing to adequately investigate the case and ascertain the applicable law. Had Mr. Snow known the applicable law, he would have known that it was his duty as advocate to subject the state's case to adversarial testing, *Cronic, Supra; Nance, supra*. Moreover, Mr. Snow would have known that it was his duty to call witnesses favorable to the defense and not imply as he did on close that the prosecution failed to produce exculpatory and favorable testimony and statements from Monday Bishop and Val Hudson:

...Mr. Stewart doesn't have to prove anything, but you think, though, you think that we would have heard testimony from either Monday or Val. Val certainly could have possibly cleared this whole thing up, but I don't think there was any mention of her. Who has the resources to bring her here? Who has the recourse to order her here to hear what she has to say? There's not a statement from her. No mention of her. That is the one person that could have cleared this whole thing up involving my client, but you never hear any mention of her. You better believe if she had

something that would have implicated my client, what do you think? They would (sic) ordered her to be here. Someone would have found her. (*Record of Appeal at 1069*).

It was indefensible and inexcusable that Mr. Snow did not defend the Applicant's interests, did not discharge his duty to investigate to ascertain the availability of potential witnesses to interview under his duty to provide Constitutionally effective assistance of counsel within the meaning of *Strickland*, *supra*; *Lounds*, *supra*. He utterly failed to conduct a reasonable investigation by failing to even interview Monday Bishop (hereafter Monday), who was present at the time and location that Reed Allen (hereafter Reed), Davorius Mack (hereafter Davorius) and Terrell Addison (hereafter Terrell) testified that Applicant gave Reed the murder weapon to hide (**Record on Appeal 350:15, 19-20; 352:1, 24-25; 439:9-14; 514:9-18; 529:9-17; 534:7-17; 891:5-7, 23-24; 892:8-11, 13-25**). Incredibly, Monday travelled from Hartsville, SC with her mother, Earline Nelson and was present every day of trial; yet Mr. Snow failed to avail the defense of this critical, indispensable testimony! *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008). In *Lounds*, *supra* the Court held that Lounds' attorney failed to adequately prepare for trial by failing to interview potential witnesses. *Id* at 460. Mr. Snow likewise failed to interview indispensable witnesses. See **Exhibit A-1, Monday Bishop's Affidavit**.

Also, Mr. Snow failed to interview Lawanda (Val) Hudson (hereafter Val) who was also present at the time and location that Reed (**Record on Appeal 529:9-17; 531:24**), Davorius (**Record on Appeal 350:15; 19-20; 352:1, 3-6**), and Terrell (**Record on Appeal 891:1-7, 23-24; 892:8-11, 13-25**), testified that Applicant gave Reed the murder weapon to hide. Also see **Exhibit A-2, Lawanda (Val) Hudson's Affidavit**.

Had Mr. Snow interviewed Monday (See Monday Bishop **Exhibit A-1, Affidavit**) and (Lawanda "Val" Hudson **Exhibit A-2, Affidavit**) these two witnesses would have refuted testimony that Applicant gave Reed the murder weapon to hide. Moreover, Monday and Val would have refuted testimony that Davorius and Terrell were present in Monday's house on the

night in question (Exhibit A-1, ¶¶11, 18, 19, 27, 28 and 'A-2, ¶¶3, 4, 7, 8, 12, 14, 15).

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." *Walker v State*, 397 S.C. 226, 236 (2012), citing *Edwards v State*, 392 S.C. 449, at 456, 710 S.E.2d 60 at 64 (2010); *Lounds v State*, 380 S.C. 454, 670 S.E.2d 646 (2008). Mr. Snow failed miserably in regard to undertaking a **reasonable investigation** in failing to interview Monday and Val and calling them to testify!

In *Lounds v State*, *supra*, the matter was reversed and remanded for a new trial because, as in the instant case, trial counsel failed to perform a reasonable investigation, *Id*, 380 S.C. 454, 460-463 (2008). Applicant implores the court to grant an evidentiary hearing via video conferencing and order Mr. Snow to articulate a valid reason for not interviewing Monday and Val under the circumstances, applicable law and facts of this case; applicant submits that it is impossible under the facts and circumstances of this case for Mr. Snow or anyone else to articulate an objectively strategic reason for not interviewing Monday and Val. Like counsel in *Lounds*, *supra*, the facts, testimony, circumstances and the trial transcripts "inescapably point to the conclusion that" Mr. Snow "simply had not adequately prepared the defense case". *Id*, at 380 SC 463. Mr. Snow's performance was not within the range of competence demanded of attorneys in criminal cases. See *Strickland*, *supra*; and *Alvin Watson v South Carolina*, 287 S.C. 356, 338 S.E.2d 636 (1985) where counsel was ruled ineffective for failing to inform *Watson* of his right to have a jury impaneled to consider a recommendation of mercy. Also see *Walker*, *supra*; *Edwards*, *supra*; *Lounds*, *supra*.

Again, Mr. Snow failed miserably in this regard because he knew that Monday and Val was present and their testimony would destroy the credibility of this critical testimony alleging

Applicant passed off the murder weapon. See **Record of appeal at 1069**. Even though he failed to properly investigate at the outset, Mr. Snow still had ample opportunity to interview Monday at the start of trial or as late as when the state rested its case; because Monday was in the courtroom for the entire trial. See Monday Bishop **Exhibit A-1, ¶4**.

d. COMPULSORY PROCESS

Mr. Snow was ineffective in failing to utilize compulsory process to subpoena witnesses to offer favorable evidence on Applicant's behalf. Applicant incorporates by reference ¶c, above as if written verbatim and in its entirety to support allegations that Mr. Snow failed to subpoena Monday and Val to offer favorable evidence bearing on guilt and innocence and the credibility of the prosecution's witnesses.

The 6th Amendment of the U.S. Constitution and South Carolina Constitution Art I, § 14, confers the right of compulsory process to obtain witnesses on the defense's behalf. Those same rights were likewise denied under the South Carolina Constitution, namely, Art. I §3, *Due Process and Equal Protection*; and Art. 1 §14, of the *United States Constitution*.

In the instant case, Mr. Snow subpoenaed two witnesses, Qiauna Efrid (was a prosecution witness) and Anna Warner who provided nothing helpful to the defense (See Record on Appeal pp 972-975 & 976-978 respectively). Apparently Mr. Snow tried to show via Ms. Efrid that only three people were present in the parking lot and therefore Applicant was not one of them. With Ms. Warner he also tried to show that it was less than four people present. But in both instances the witnesses said that they could not see well enough to say with any certainty who or how many people were in the parking lot. On the other hand Mr. Snow, in his own words, failed to secure relevant and favorable testimony available from Monday (See **Exhibit A-1 Affidavit**) and Lawanda (Val) (See **Exhibit A-2 Affidavit**):

...Mr. Stewart doesn't have to prove anything, but you think, though, you think that we would have heard testimony from either Monday or Val. Val certainly could have possibly cleared this whole thing up, but I don't think there was any mention of her. Who has the resources to bring her here?

Who has the recourse to order her here to hear what she has to say? There's not a statement from her. No mention of her. That is the one person that could have cleared this whole thing up involving my client, but you never hear any mention of her. You better believe if she had something that would have implicated my client, what do you think? They would ordered her to be here. Someone would have found her. (*Record of Appeal at 1069*).

There is no reasonable basis for Mr. Snow to forego first of all interviewing Monday and Val, and issuing subpoenas and eliciting testimony bearing on the credibility of Reed Turner, the prosecution's most important witness. Mr. Brackett, the Solicitor capitalized on this failure to call Monday and Val as witnesses and falsely bolstered the credibility of Reed Allen:

...Ben's sister...How far wouldn't she drive to come here to court?
How far would she drive to come here to say things didn't go down
that way? She was right there too. (*Record of Appeal at 1113*).

Mr. Snow, by his unprofessional errors of failing to investigate and produce this testimony, bolstered Reed's credibility and influenced the jury to believe this incredible testimony of a person who the jury questioned his veracity by requesting a read back of his testimony "of handing over the gun" (*Record of Appeal at 1193-1194 & Court's Exhibit #9*). The testimony of Monday Bishop and Lawanda (Val) Hudson would have shed much needed light on Reed Allen's unchallenged, un-refuted testimony. Furthermore, the failure to refute Reed's testimony influenced the jury to discount the fact that Applicant was **excluded based on DNA and fingerprints evidence in the vehicle** where every other defendant was **either included, or was unable to be included or excluded**. See *Record of Appeal at 740, 747, 749-751*. There is a reasonable probability that the errors affected the outcome, and without the errors there would have been a different outcome; i.e., Applicant would have had a directed verdict of acquittal due to insufficient evidence or acquittal by the jury. See *Strickland, supra; Lounds, supra; Walker, supra; Edwards, supra*. A reasonable probability is a probability sufficient to undermine the reliability of the outcome. See *Strickland, supra*, at 2068, 406 US 693. "In other words, [the applicant] must show that 'the factfinder would have had a reasonable doubt respecting guilt.'" *Id.* (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052). This standard has been met!

In *Lounds, supra*, the South Carolina Supreme Court reversed and ordered a new trial when counsel in that case failed to call witnesses to testify for the defense:

As to the prejudice resulting from counsel's deficient performance, we believe Petitioner clearly was prejudiced by Newell's failure to subpoena and call witnesses who would have supported petitioner's own testimony at trial. Moreover, the jury's questions during deliberations indicates it also struggled with whether petitioner was guilty of kidnapping. Thus, we find that if additional witnesses had confirmed petitioner's there is a reasonable likelihood the result of the trial would have been different on the kidnapping count. *Id* at 380 SC 463.

The instant case is distinguishable from *Lounds, supra* in that your Applicant did not testify. However, the testimony of Monday and Val would have destroyed Reed, Davorius and Terrell's testimony alleging that Applicant gave Reed the murder weapon to hide; casting more doubt on already doubtful testimony and would have put the case in a whole different light. In the instant case the jury likewise struggled with testimony of Reed Alien (Record of Appeal 1193-1194) who claimed that Applicant gave him the murder weapon to hide (Record on Appeal 514:9-18, 531:24; 534:711). His pretrial statement was utterly contradictory *vis-à-vis* his trial testimony:

I got a home phone call from Ben Stewart. I been knowing Ben for two or three months. Because he is not from here, he don't stay down here for one, he's from Philadelphia. Ben calls me and he asked me to do something for him. He didn't go into detail over the phone. Eventually when he got there, I want to say at least two people were with him...This was at Monday Bishop's place. Val was there too...Ben told me to stash the bag. I went across the parking lot to the next apartments and slid the bag under a bush. I was by myself. I walked back and told Ben where the bag was. Then they all left...Next I got a call from Ben saying he need to get the bag from me. I got the bag and took it to him...When I handed the bag to Ben I could tell it was still the same way as when I put it under the bush...Everything was still in the bag - the gun, gloves, and skully (Reed Allen's Statement to Rock Hill Police Department, 10/27/06. **Exh. A-3**).

When Reed's pretrial statement is compared to his trial testimony the home phone call became Monday's phone, and him getting a call from Ben to retrieve the bag and gun, is that he did not get it and give it to him but he knows that he got, but did not actually see him get it. See (Record on Appeal 526, 542-543, 569-570, 553 respectively).

Had Mr. Snow called Monday and Val to refute that testimony the result of the trial would have been different. *Strickland, supra; Lounds, supra*. Counsel's unprofessional errors served to bolster the doubtful, but uncontested testimony of Reed, Davorius and Terrell regarding the murder weapon being given to Reed to hide by the Applicant. The jury was basically compelled to believe testimony that Applicant passed the murder weapon when Monday and Val who were present but did not testify to the contrary. *Lounds, supra*. The Solicitor capitalized on this egregious error on close telling the jury that if it was not true Monday would drive any distance to set the record straight (**Record on Appeal 1113**).

Mr. Snow himself proves that his competence was far below the standard demanded of attorneys in criminal cases, *Watson v State of South Carolina, supra*, during his close to the jury when he apparently failed to realize that it was his duty to bring the favorable testimony of Monday and Val before the jury, and to request funds to do so if necessary instead of attempting to shift that duty to the prosecutor. See (**Record of Appeal at 1069**).

It is plain on the face of the record to any objective observer that Mr. Snow utterly failed to provide effective assistance of counsel within the meaning of *Strickland v. Washington, supra; Watson, supra; Lounds, supra; Cronic, supra; Nance, supra*.

e. FAILURE TO TEST THE PROSECUTION'S CASE

Mr. Snow utterly failed to hold the prosecution to its burden of proof of guilt beyond a reasonable doubt. See *Victor v Nebraska, 511 U.S. 1 (1994)*. In *United States v Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 1884) and the holding in *Nance v Ozmint*, 367 S.C. 547, 626, S.E.2d 878 (2006) it was ruled that "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of *Sixth Amendment* rights that makes the adversarial process itself presumptively unreliable. *Cronic, supra; Nance v*

Ozmint, supra. Your Applicant respectfully submits that Mr. Snow entirely failed to subject the prosecution's case to meaningful adversarial testing by allowing testimony that Applicant passed the murder weapon to Reed Allen in his sister's house in her and Val's presence, yet neither of them was called to refute that testimony is tantamount to Monday and Val confirming that the testimony of Reed, Davorius and Terrell was true! Your Applicant further submits that Mr. Snow failed to investigate and prepare this case for trial because he apparently thought from day one that he could induce Applicant to plead out. See **Exhibit A-5**, letter from defense counsel, Mr. Snow dated February 17, 2009, stating in part, "I recommend you accept this plea." His view expressed in the letter expressing his view that testimony of Davorious Mack, Dontavious Mack and Reed Allen "creates a great challenge to your defense and acquittal", conclusively demonstrates that he did not do his homework in investigating the case, locating witnesses, exercising compulsory process to present exculpatory testimony from Monday Bishop and Lowanda (Val) Hudson), opposing the above mentioned testimony. Recall the Solicitor capitalizing on close of the failure of Monday Bishop to testify. See *infra* at 24:

...Ben's sister...How far wouldn't she drive to come here to court?
How far would she drive to come here to say things didn't go down
that way? She was right there too. (*Record of Appeal at 1113*).

Monday and Val's testimony coupled with the the DNA would have put this case in a much different light. I am convinced that if Mr. Swerling had represented me I would have got justice in this case.

Even worse though, it appears that Mr. Snow failed to understand, as Chief Justice John Roberts does: "DNA testing has an **unparalleled** ability both to exonerate the wrongly convicted and to identify the guilty". See District Attorney's Office for the Third Judicial

District, et. al. v. Osborn, No. 08-6. Argued March 2, 2009—Decided June 18, 2009; emphasis

my own. Adequate representation by Mr. Snow would have shredded the state's weak case and won a deserved acquittal. Applicant incorporates by reference §§I-VI inclusive of this Memorandum of Law as though it was set-forth verbatim herein in support of this argument.

f. CUMULATIVE EFFECT OF COUNSEL'S INEFFECTIVENESS

Applicant incorporates by reference §§ IV-VI inclusive as if set forth verbatim herein as support for the cumulative effect of trial counsel's ineffectiveness regarding failing to make proper investigation; ascertaining the applicable laws, interviewing potential witnesses, failing to use compulsory process to subpoena witness who were, available, ready, willing and eager to provide exculpatory testimonial evidence on Applicant's behalf and otherwise failing to make the trial an adversarial process. See *Nance v Frederick*, 358 S.C. 480, 596 S.E.2d 62 (2004).

i. Misstating the evidence!

Mr. Snow was ineffective in misstating the evidence that events occurred at Reed Allen's house when in fact it was Monday Bishop's house (Record on Appeal 350:15, 19-20; 352:1, 24-25; 439:9-14; 514:9-18; 529:9-17; 534:7-17; 891:5-7, 23-24; 892:8-11, 13-25). Applicant was prejudiced because it falsely bolstered Reed's testimony and falsely implied that he and Applicant knew each other well and would be close enough for Applicant to ask him to hide the murder weapon. *Strickland, supra*.

g. PROSECUTOR MISCONDUCT

i. Knowingly using perjured testimony!

The prosecutor plays a unique role in our criminal justice system; that role imposes the duty to refrain from improper methods calculated to produce a wrongful conviction; to seek justice, not convictions. *U.S. V Berger*, 295 U.S. 78 (1935); *Brown v State*, 680 S.E.2d 909 (S.C. 2009) In the instant case the prosecutor purposely used improper methods calculated to

secure a tainted conviction of Applicant by **suborning the perjured** testimony of Dontavious Mack, Davorious Mack, Terrell Addison and Reed Allen. How is this so? Because the prosecution knew that the DNA and fingerprint evidence exonerated Applicant and thus the aforementioned testimony could only be false. It is plain to see that the prosecution on direct of investigator Mike Williams had him testify based on a report that did not exclude Applicant, but failed to question him on the report that did exclude Applicant (**Exh. A-4**). According to the investigator on cross, "...there is no chance that it is Ben..." (**Record of Appeal 749-751**).

ii. Failing to disclose Brady material!

Two Solicitors, including Mr. Brackett interviewed Monday Bishop at her home in Hartsville, SC and suppressed her exculpatory statement to them that the events testified to as transpiring at her house by Reed Allen, Davorious Mack and Terrell Addison was false. See **Exhibit A-1, Monday Bishop Affidavit.**

In Brady v. Maryland, 373 U.S. 83 (1963) the court held:

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. . . See Kyles v Whitley, 514 U.S. 419, 440-441, 434-435, 115 S.Ct. 1555 (1995).

In the instant case the prosecution was acting in bad faith in withholding the statement as evidenced by his falsely bolstering the credibility of Reed Allen's testimony by stating that if Reed's testimony was false that Monday would have drove any distance to refute the testimony that Ben gave Reed the murder weapon to hide or dispose of. See (**Record of Appeal at 1113**).

Applicant will contemporaneously seek discovery of the suppressed, exculpatory statement taken from Monday Bishop, see § 17-27-150 and also seek a subpoena to have Mr. Brackett explain

the circumstances surrounding his decision to suppress this exculpatory evidence. Moreover, Monday was present each day of trial. See **Monday Bishop Affidavit**.

iii. **Knowingly Misstating the Evidence on Closing Argument!**

On several occasions the prosecution knowingly and intentionally misstated the evidence on close that prejudiced Applicant and influenced the judge and jury to discount the exculpatory forensic evidence and credit the **incredible and unbelievable testimony** that Applicant provided the murder weapon to Dontavious Mack and disposed of it through Reed Allen.

“Mr. Snow said ‘there is no forensic evidence to show that Mr. Stewart was in the car at all –no DNA, no fingerprints, no fibers, no hair, nothing to show that Ben Stewart was in that car.’ Well, guess what, there is no forensic evidence to show that Dontavious was in that car. No DNA, no fingerprints...nothing to show that he was in there. Yet nobody disagrees that Dontavious was in that car. No doubt he was in that car, and he was in the car bleeding...No DNA of Dontavious found in that car. No fingerprints of Dontavious...So I submit to you just because they didn’t find anything in there does not mean that Ben Stewart was not in the car”...**Record of Appeal 1140-1141.**

It is outright disingenuous, totally false and misleading to argue that Dontavious was **excluded** by the DNA and fingerprint analysis as was the case with Ben Stewart. The BP video showed Dontavious wearing gloves (Record of Appeal 747) and explains why his fingerprints were not found. As for the DNA, Dontavious was **not excluded**, but Ben Stewart was **excluded**:

The DNA obtained from item 18 is a mixture of at least two individuals. No conclusion can be made regarding the inclusion or exclusion of Dontavious Mack, Terrell Addison, or Davorious Mack as possible contributors to this mixture...Basically that means that the sample – there was something there in the DNA sample that was submitted, but there was not enough of a sample to verify whose it belonged – or who exactly the DNA belonged to. (Record of Appeal 747; also see pg. 749).

Based on the foregoing, Dontavious, Davorius and Terrell could not **specifically be included** as contributors, but also could not be **specifically excluded** (Record of Appeal 749-

751). Therefore, the prosecutor committed prosecutorial misconduct in equating on close that no forensics were found on Dontavious but nobody disagrees that he was in the car. The prosecution should not be permitted to have it both ways, i.e., use forensics to implicate but discount forensics when it exonerates. The forensic expert testified it was “no chance that it was Ben’s DNA” in the car (Record of Appeal 751). These impermissible remarks were pervasive and so infected the entire trial with unfairness that the resulting conviction denied due process.

See Brown v State, 383 S.C. 506, 517, 680 S.E.2d at 917; Berger, supra; Mincey, supra. In Mincey, trial counsel failed to object to prejudicial closing argument falsely insinuating that Mincey had intimidated witnesses not to testify against him.

VII. EVIDENTIARY HEARING

South Carolina's PCR Statute grants the unfettered right to an evidentiary hearing to all PCR applicants. See Uniform Post-Conviction Procedure Act § 17-27-80. In Leamon v State, 363 S.C. 432, 611 S.E.2d 494 (2005) the Supreme Court ruled that even if you are confined in another state, as is the Applicant, the one year statute for Post-Conviction still applies. Because Applicant is confined in the Commonwealth of Pennsylvania, Due Process mandates the hearing is via video conferencing; a practice that has become quite common.

VIII. VIDEO CONFERENCING

SCI-Frackville has agreed to accommodate the Honorable Court of South Carolina by making its video conferencing facilities available for my evidentiary hearing when scheduled. See (Exhibit A-6). Counselor, Ms. Newberry, of SCI-Frackville contact information is as follows: 1111 Altamont Boulevard, Frackville, PA 17931-2699 (570) 874-4516.

In the United States District Court for the District of South Carolina Magistrate Judge George C. Kosko conducted an evidentiary hearing on a Post-Conviction Motion to vacate. See Jose R. Ortiz v United States of America, 2006 U.S. Dist. Lexis 28461 (D.S.C. May 3, 2006). Also see Bernard Martin v United States of America, 2012 U.S. Dist. Lexis 119416 (S.D. W. Va., May 3, 2011); United States of America v. Leroy Baker, 836 F.Supp. 1237; 1993 U.S. Dist. Lexis 16363 (E.D. North Carolina, 1993); Estate of Hezekiah Harvey v. Roanoke City Sheriff's Office, et al., 2007 U.S. Dist Lexis 71511 (W.D. Virginia, Roanoke Division, September 26, 2007); Vilchez v Holder, 682 F.3d 1195 (9th Cir. 2012). Due Process in the instant application for post-conviction relief compels this Court to order an evidentiary hearing via video

conferencing so that timely litigation of this matter is provided to prevent the loss or unavailability of essential witnesses and the substantial prejudice that will result. For example, Val Hudson is ailing and nearly incapacitated and could very well succumb to her ailments in the very near future. Justice delayed is justice denied! Her testimony, in the words of defense counsel, Mr. Snow "Val certainly could have possibly cleared this whole thing up,...". (*Record of Appeal 1069, Exhibit A-2*). The *Fourteenth Amendment's due process clause* guarantee of fundamental fairness" requires the state to take steps to assure that criminal defendants have a fair opportunity to present their defense. See e.g., *Ake v. Oklahoma*, 470 U.S. 68, 76-77, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). An evidentiary hearing via video conferencing will permit truth and justice to prevail.

CONCLUSION AND RELIEF

Applicant's conviction cannot be reconciled with the facts of this case, the applicable law, and evidence-based peer-reviewed scientific research. Nor can this conviction be reconciled with legal standards regarding proof beyond a reasonable doubt, proof beyond a reasonable doubt of every essential element of the crime, sufficiency of the evidence, the adversarial system, the duty of a prosecutor to seek justice and not just conviction, and effective assistance of counsel. As the court explained in *Ard v Catoe*, 372 S.C. 318, 642, S.E.2d 590 (2007) (Waller, J.) because of the strong presumption that counsel did provide adequate assistance, in order to prove effective assistance of counsel, it must be shown that "(1) counsel's performance was deficient and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Id.* at 596. Deficient performance includes the trial counsel's failure to perform his/her duty to conduct a reasonable investigation, which requires that "at a minimum, counsel has the duty to interview potential witnesses and to make an independent

investigation of the facts.”” *Ard*, at 597, 372 S.C. 331-32 (citing *Troedel v Wainwright*, 667 F.Supp. 1456, 1461 (S.D. Fla. 1986), *aff’d* 828 F.2d 670 (11th Cir. 1987); *Lounds*, *supra*).

The failure of defense counsel to effectively capitalize on the DNA evidence that **excluded** Applicant as a perpetrator of these crimes constitutes gross deficiencies in performance in this case. As Chief Justice John Roberts so aptly wrote: “DNA testing has an **unparalleled** ability both to exonerate the wrongly convicted and to identify the guilty”. Reliable DNA evidence should always trump testimonial evidence, and should do so in this case. The 311 exonerations nationwide to date reported by the Innocence Project (see page nine *infra*) is testament of the frailty and likely unreliability of testimony, especially, as here, when leniency is being sought for criminal behavior. Therefore, there is a reasonable probability that, but for counsel’s errors, including failing to object to the prosecution’s misstatement of the evidence on close that equated the **exclusion** of Applicant’s DNA and the inability to **include or exclude** Dontavious Mack’s DNA as the same, and failing to investigate and call Monday Bishop and Lawanda (Val) Hudson to counter Reed Allen’ testimony, that the prosecution capitalized on close by saying if Reed was lying Monday would drive any distance to set the record straight, See(*Record of Appeal at 1113*) page 24 *infra*, the result of the trial would have been different. Accordingly, the following relief is requested:

- a. Appoint counsel pursuant to §17-27-60.
- b. Grant permission to proceed *In Forma Pauperis*
- c. Grant the right to discovery pursuant to §17-27-150.
- d. Grant an evidentiary Hearing via Closed Circuit Television pursuant to §17-27-80

where trial counsel and appellate counsel are compelled to justify stewardship of this case, and the Solicitor is compelled to explain his suppression of **Brady**, material i.e., Monday Bishop’s

statement to him, and so that the court can review the denial of motion for direct verdict for insufficiency of the evidence, and to consider and determine whether any rational jury could find guilt on the evidence adduced at trial, and to consider and determine whether every essential element of the crimes charged were established beyond a reasonable doubt and to consider and determine whether the complained of instances of prosecutor conduct so infected the trial that Applicant was prejudiced and a fair trial was denied.

e. Reverse the conviction for insufficiency of the evidence and discharge from custody. Or in the alternative:

f. Reverse the judgment of conviction because no rational trier of fact could find guilt beyond a reasonable doubt on the evidence adduced at trial and grant a new trial.

g. Reverse the judgment of conviction because guilt beyond a reasonable doubt of every essential element was not established at trial and grant a new trial.

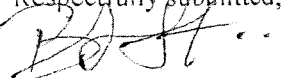
h. Reverse the judgment of conviction due to a breakdown in the adversarial process and grant a new trial.

i. Reverse the judgment of conviction because ineffective assistance of counsel is plain on the face of the record and grant a new trial.

j. Reverse the judgment of conviction due to the cumulative ineffectiveness of counsel and grant a new trial.

k. Reverse the judgment of conviction due to intentional prosecutor misconduct to rescue a failed prosecution—bar retrial and discharge from custody.

Respectfully submitted,


Ben Robert Stewart HK-9369
SCI-Frackville
1111 Altamont Blvd.
Frackville, PA 17886-1021

STATE OF SOUTH CAROLINA

County of YORKBen Robert Stewart, HK-9369

V.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2013 CP 46-3731

MOTION REQUESTING DISCOVERY

MOTION FOR DISCOVERY

NOW COMES Ben Robert Stewart, the Applicant herein, being duly sworn under oath and the penalties for perjury deposes and says:

1. That I am the Applicant herein and moves this Honorable Court pursuant to §17-27-150
2. I am applying for Post-Conviction Relief contemporaneously with this discovery request.
3. I am wrongly convicted in violation of due process of law/effective assistance of counsel.
4. The Applicant needs to discover exculpatory material the prosecution failed to disclosed in violation of Brady v. Maryland, 373 U.S. 83 (1963); more specifically, the statement of my sister Monday Bishop to Solicitor Brackett wherein she refuted the allegations that Applicant gave a gun to Reed Allen in her home to dispose of.
5. The suppression of this statement infected the entire trial and there is a reasonable probability that with the statement, the outcome of the trial would have been different.

Applicant likewise needs Court **exhibit #9** relating to jury request for read back of testimony.

WHEREFORE, Applicant prays that discovery is granted to permit justice to have a chance to prevail.

Dated: November 25, 2013

Ben Robert Stewart, HK-9369
SCI-Frackville
1111 Altamont Blvd.
Frackville, PA 17886-1021

YORK COUNTY, SC
CLERK OF COURT
DAVID HAMILTON
2013 DEC 10 AM 10:57
CERTIFIED TRUE COPY

FILED-RECEIVED
2013 DEC -9 PM 3:42
DAVID HAMILTON
C.C.P. & GS.
YORK COUNTY, SC

STATE OF SOUTH CAROLINA)

County of YORK)Ben Robert Stewart, HK-9369)

V.)

State of South Carolina)

) IN THE COURT OF COMMON PLEAS

CERTIFIED TRUE COPY
 2013 DEC 10 AM 10:58
 DAVID HAMILTON
 CLERK OF COURT
 YORK COUNTY, SC

La

PROOF OF SERVICE

I, BEN ROBERT STEWART, HK-9369, hereby certify that I am timely submitting my Application for Post-Conviction Relief, within the one year time frame, and in accordance with the Mailbox Rule for incarcerated litigants, I will place in the mailbox at SCI-Frackville, on the date listed below, in accordance with the South Carolina Post Conviction Relief Statute, one copy of my Application for Post-Conviction Relief, one copy of my Table of Exhibits and Table of Cases, one copy of my Memorandum of Law in Support, one copy of my Motion for Discovery via certified mail return receipt requested addressed to Clerk of York County South Carolina Court of General Session 1675 1G Highway, York, SC 29745 for filing and service upon the respondent.

P.O. Box 649, York, SC 29745-0649

Dated this 26th day of November, 2013.

[Signature]
 Ben Robert Stewart HK-9369
 SCI-Frackville
 1111 Altamont Blvd.
 Frackville, PA 17931

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 2013 DEC -9 PM 3:42
 DAVID HAMILTON
 C.C.P. & GS
 YORK COUNTY, SC

STATE OF SOUTH CAROLINA

County of YORKBen Robert Stewart, HK-9369

V.

State of South Carolina

) IN THE COURT OF COMMON PLEAS

) 2013 CP 46-3731

) CONCLUSION OF FACTS AND

) MEMORADUM OF LAW IN SUPPORT

) OF APPLICATION FOR

) POST-CONVICTION RELIEF

)

)

TABLE OF EXHIBITS

EXHIBIT

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DAVID HAMILTON
C.C.P. & CS
YORK COUNTY, SCDAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC2013 DEC 10 AM 10:58
CERTIFIED TRUE COPY

EXHIBIT A-1

Monday Bishop Affidavit Dated January 4, 2013 (three pages) 21,22,23,28,30

IN THE STATE OF SOUTH CAROLINA

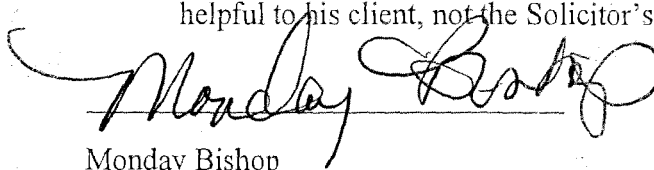
AFFIDAVIT

I, MONDAY BISHOP, hereby swear or affirm under penalties for perjury pursuant to §16-9-10, et seq. *South Carolina Code* that the following statements are true and correct upon belief or information:

1. Currently, I reside at [REDACTED], Hartsville, SC 29550.
2. I have read the testimony given by Davorious Mack, Terrell Addison and Reed Allen in preparation for my affidavit. I will refute their testimony by page(s) and line(s).
3. I am competent to offer the affidavit herein to provide relevant, probative and exculpatory testimony of events that occurred at my apartment on the night in October, 2006, a few days after my mom's and brother's birthday on October 5th, that Reed Allen and claimed that my brother Ben Stewart gave him a bag with a gun in it to "put up", and Terrell Addison and Davorious Mack claimed that they were in my apartment on the night in question and witnessed my brother give Reed Allen a bag with a gun in it.
4. I am the sister of Ben Robert Stewart and was present for Ben's entire trial and was eager to refute the false testimony of Reed Allen regarding the events that he falsely claimed occurred at my house ([REDACTED] Washington Street, Apt. [REDACTED], Hartsville, SC 29550) allegedly bearing on the murder of Ned Marshall, a BP employee in Rock Hill, SC.
5. Ben's lawyer did not talk to me or my friend Val who was with me and Reed at my house on the night in question to ask us whether Reed was telling the truth when he claimed that my brother Ben gave him a bag with a gun in it at my house on that night.
6. Had Mr. Snow called me to testify I would have said the following:
7. (pg. 350:15, 19-20) Davorius was not in my apartment on the night in question or at any other time.
8. (pg. 352: 3-6) I incorporate ¶7 by reference herein as if written verbatim
9. (pg. 509:11-16) I was not in a relationship with Reed.
10. (pg. 515:9-25) Ben did not say anything to Reed and did not give him a bag, gun or anything.
11. (pg. 523: 22) On the night in question no one came to my house after me, Val and Reed came back from having drinks except my brother Ben.

12. (pg 524: 7-10) Reed Allen was a friend; me and him has never been in a relationship!
13. (pg. 524:15-19) Reed did not really know my brother because he wasn't down South long and Reed Allen used to come to my place only now and then.
14. (pg. 526: 3-8) It wasn't early in the morning, me, Reed and Val had just come back to my house from having a couple of drinks and it could not possibly have been that late.
15. (pg. 526: 14-19) My brother called me to see if I was home because he did not have a key to get in the house.
16. (pg. 527: 2-5) I did not give my phone to Reed to talk to my brother because Reed don't know my brother like that and my brother called to see if I was home so he could get in the house. After we talked he came straight there and arrived by himself; he spoke and went in the room and closed the door.
17. (pg. 527: 9-15) Yes; me Reed and Val had just came to my house that night after leaving from having some drinks. Val is a friend of both of us.
18. (pg. 528:5) That's a lie! No one was with my brother when he came; he was alone. I was lying on my couch, Val was lying on my other couch and Reed was basically pacing up and down until he finally sat down and went to sleep in the chair.
19. (pg. 530, 19-25) No one came to my house that night but my brother Ben. I don't know who the Terrell boy is and never saw him until I saw him in court. I was in my living room, the first room when you walk in my house.
20. (pg. 531: 24-25) No; this conversation did not happen and Ben did not give Reed anything.
21. (pg. 532:10-21) No! Ben passed nothing to Reed. No, Ben did not ask or tell Reed to put a gun up.
22. (pg. 533:24-25) No! Ben did not give anything to Reed.
23. (pg. 534:1-7) Reed did not walk out my door at any time that night.
24. (pg. 549:10-16) Reed did not speak to Ben on my phone.
25. (pg. 551:10) Ben did not give anything to Reed.
26. (pg. 891:1-2, 6-24) I incorporate ¶19 by reference herein as if written verbatim that Terrell was never in my apartment.
27. (pg. 892:1-2) Neither Davorious or Terrell was in my apartment that night or at any other time; and Reed did not go into the backroom with Ben.

28. (pg. 892:8-25) This is a lie because Davorius and Terrell were not in my apartment that night or at any other time.
29. (pg. 893:9-16) I incorporate ¶28 by reference herein as if written verbatim. Furthermore, Ben never left the apartment that night after coming in.
30. (pg. 961:14-24) I incorporate ¶28 by reference herein as if written verbatim.
31. That the Rock Hill Solicitors came to my apartment and questioned me but apparently chose not to call me to the witness stand because what I said conflicted with what Reed Allen, Davorius Mack and Terrell Addison said.
32. It seemed to me that when Mr. Snow said that Val and me could clear things up if we were called as witnesses and that Solicitor would have called us if we would implicate Ben, but did not because we would say the opposite so the Solicitor did not call us. I thought that this is Mr. Snow's job as Ben's lawyer to call witnesses with information helpful to his client, not the Solicitor's job.



Monday Bishop

Hartsville, SC 29550

Sworn before me this 4th day of January, 2013

Felicia T. Boone

EXHIBIT A-2

A-2 Lawanda (Val) Hudson Affidavit Dated February 22, 2013 (two pages) 21, 23

IN THE STATE OF SOUTH CAROLINA

AFFIDAVIT

I, Lawanda Valeen Hudson, hereby swear or affirm under penalties for perjury pursuant to §16-9-10, et seq. *South Carolina Code* that the following statements are true and correct upon belief or information:

1. Currently, I reside at [REDACTED], Hartsville, SC 29550; phone [REDACTED].
2. In making this affidavit, I read the testimony of Reed Allen, Davorious Mack, and Terrell Addison. My testimony will comment by page(s) and line(s).
3. I provide this affidavit to tell the truth of what happened at my friend Monday Bishop's place on the night in October, 2006, when Reed Allen, who had been partying with us, lied that Monday's brother Ben Stewart gave him a gun in a bag to hide for him.
4. I also provide this affidavit to say that Davorious Mack and Terrell Addison did not come to Monday's place that night and are lying when saying they was there and Ben gave Reed a gun.
5. Ben's lawyer did not talk to me about what happened on that night.
6. If Ben's lawyer had asked me what happened and called me to testify in court I would have said:
 7. (pg. 350:15, 19-20) Davorious did not come to Monday's place that night because I was there all night long.
 8. (pg. 515:9-25) When Ben came he did not talk to Reed and did not give him anything.
 9. (pg. 524:15-19) Reed did not know Ben like that cause at the time we all just met Ben when Ben came down from Philly to visit and Reed hardly ever was around us cause we would be from my house to Monday's house. Monday was never in a relationship with Reed Allen he just liked her.
 10. (526:14-19) Monday said she had to go let Ben in cause he did not have a key to get in

the house so we went straight there from leaving the spot we hung out at to have drinks from time to time.

11. (527:2-5) Monday never passed her phone to Reed when we left the juke joint because I would have seen her do it.

12. (527:9-16) Yes me (Val), Reed, Ben and Monday was the only ones at Monday's place.

13. (pg. 528:5) No one came in with Ben that night; he was by himself and he did not talk to anybody.

14. (pg. 530, 19-23) Ben was the last and only person who came to Monday's place that night. Me and Monday was on the couch and Reed was walking back and forth from the living room to the kitchen to the living room. None of this stuff happened.

15. (pg. 534) We never saw, knew or heard anything about a gun because no gun was passed around.

Lowanda Valeen Hudson

Lowanda Valeen Hudson

[REDACTED]
Hartsville, SC 29550

Sworn before me this 22 day of February, 2013

Felicia T. Bore

EXHIBIT A-3

Reed Allen Statement dated October 27, 2006 (Four pages)

STATE OF SOUTH CAROLINA)
CITY OF ROCK HILL :
ROCK HILL POLICE DEPARTMENT)

PAGE 02

PERSONALLY appears before me: Heed Allen, who
deposes and says: "I make this statement of my own free will and accord, without reward or
hope of reward. I have not been mistreated or threatened in any way. All of the above is the truth,
the whole truth, and nothing but the truth, so help me God.

I have read or had read to me the above statement consisting of () page(s) and have received
a copy of this statement."

Heed W. Allen
(SIGNATURE)

J. Chisham
(WITNESS)

SWORN AND SUBSCRIBED BEFORE ME
THIS 27th DAY OF Oct. 2006

Bruce D. Haele
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 10-1-2014

STATEMENT PREPARED BY: J. Thickens
DATE: 10-27-06 TIME: 0840 PM

State of South Carolina
City of Rock Hill
Rock Hill Police Department

Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in Court. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of appointing you a lawyer, but one will be appointed by the Court for you if you wish. If you wish, you may answer questions without the presence of a lawyer and you may stop answering any time you desire until a lawyer is present.

J. Thompson
(Witness)
Reed Allen
(Signed)

I have read or had read to me the statement of my rights shown above. I understand what my rights are and I am willing to make a statement. I do not want a lawyer at this time. I understand and know what I am doing. I know that the person(s) talking with me is a police officer and I understand what he is talking about.

J. Thompson
(Witness)
Reed Allen
(Signed)

PERSONALLY appears before me: Reed Allen, who after
being duly sworn deposes and says: My name is: Reed Allen
Date of Birth: [REDACTED] Social Security Number: [REDACTED]
My address is: [REDACTED]
Place of Employment: none
Home Phone Number: [REDACTED]

State of South Carolina)
City of Rock Hill :
Rock Hill Police Department)

PERSONALLY appears before me: Reed

Allen _____, who after being duly sworn deposes
and says: "My name is": Reed Allen

Date of birth: Social Security Number: -

My address is: , Hartsville,
SC _____

Place of Employment: none

Home Telephone Number:

Work Telephone Number:

I completed 10 years in school and I can (X) cannot () read and
write English. And I have my GED.

I am not on any medication and I have never had any treatment for any
psychological problems or anything.

Within the last two week period, I know it was still dark that day, I got a
home phone call from Ben Stewart. I been knowing Ben for two or three
months. Because he's not from here, he don't stay down here for one, he's
from Philadelphia. Ben calls me and he asked me to do something for him.
He didn't go into detail over the phone. Eventually when he got there, I want
to say at least two people was with him. I remember seeing Bubba, Ben, a
younger guy who is a black male - he was smaller than me, pretty thin with
no build, maybe 18 or 19, very little if any facial hair. When they came in
the door they was saying Dante got shot, they didn't say where it happened.
This was at Monday Bishop's place. Val was there too. It was just me val
and Monday sitting around drinking but I wasn't drunk. Beer or something
like that. Ben say I need you to do something for me. He sounded rather
dramatic, like hyper.

I said I'm at the house. When they come in the door with the news Dante got
shot, Bubba and Ben trying to talk at the same time. Everything was already
bagged up - it was in a transparent plastic bag. I could see the guin through
the bag. It was an automatic, like two tones of gray, or two-tonish. Also
there was black gloves and a skully cap. Ben told me to stash the bag. I went
across the parking lot to the next apartments and slid the bag under a bush. I
was by myself. I walked back and told Ben where the bag was. Then they all
left. During the next two days, maybe a little longer, I checked to see the bag
was still under the bush. I never moved the bag again.

Next I got a call from Ben saying he need to get the bag from me. I got the bag and took it to him, it was at nighttime, and Ben came to the apartment complex. When I handed the bag to Ben I could tell it was still the same way as when I put it under the bush. Everything was still in the bag – the gun, gloves, and skully.

As far as me stashing the bag for Ben, I did that but not knowing the seriousness of what happened. From what I heard in Hartsville, Dante, Ben, the word was also Bubba was there (Davarius Mack) did a robbery gone bad, and they say a guy got killed. By that time the gun in the bag was long gone. I heard Dante shot the guy and confessed to it. I talked to Ben about a week ago. I think his girlfriend Kat is putting him up in Pine Ridge.

The guy I pointed out in the lineup shown to me tonight is the same guy who was with Ben and Bubba when they came to Monday's house gave me the bag with the gun in it.

Heed W Allen

EXHIBIT A-4

A-4 South Carolina Law Enforcement Division Forensic Services Laboratory Report

SLED (six pages) 9,13,18-20

SOUTH CAROLINA LAW ENFORCEMENT DIVISION**FORENSIC SERVICES LABORATORY REPORT**

1131

MARK SANFORD
GovernorROBERT M. STEWART
*Chief*Det. Bruce D. Haire
Rock Hill Police Department
120 East Black Street
Rock Hill, SC 29730**DNA ANALYSIS**
August 14, 2007
SLED LAB: L06-14451
Your Case No: 0610100534
Incident Date: 10/10/2006
[V] James Marshall
[S] Dontavious Mack
[S] Terrell Addison
[S] Davorius Mack
[S] Brian Jenkins
[S] Paul Jenkins
[S] Brook Robinson

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case have been or will be conducted by any other laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division**SEROLOGY ANALYSIS****Items Submitted:****Results of Examinations:**

6	Swab from floor behind counter	6	Blood indicated. See DNA analysis.
7	Swab from floor behind counter	7	Blood indicated. See DNA analysis.
8	Swab from floor behind counter	8	Blood indicated. See DNA analysis.
9	Swab from floor behind counter	9	Blood indicated. See DNA analysis.
10	Swab from counter top	10	Blood indicated. See DNA analysis.



1132

Items Submitted:

Results of Examinations:

11	Swab from side of cigarette rack	11	Blood indicated. See DNA analysis.
12	Blood standard from James Marshall	12	See DNA analysis.
14	Swab from driver's inside door handle	14	See DNA analysis.
15	Swab from front passenger's inside door handle	15	See DNA analysis.
16	Swab from rear passenger's inside door handle	16	See DNA analysis.
17	Swab from driver's side rear passenger's inside door handle	17	See DNA analysis.
18	Swab from steering wheel	18	See DNA analysis.
19	Swab from gear handle	19	See DNA analysis.
21	Oral swabs from Dontavious Mack	21	See DNA analysis.
26	Straw (yellow)	26	See DNA analysis.
27	Straw (red & white striped)	27	See DNA analysis.
28	Hair from front passenger seat area	28	See DNA analysis.
29	Hair from front passenger seat area	29	No hair suitable for STR PCR DNA analysis.
30.1	Cigarette butt	30.1	See DNA analysis.
30.2	Cigarette butt	30.2	See DNA analysis.
41	Oral swabs from Terrell Addison	41	See DNA analysis.
42	Oral swabs from Davorius Mack	42	See DNA analysis.



1133

DNA ANALYSISITEMS ANALYZED:

- 12 Blood standard from James Marshall
- 21 Oral swabs from Dontavious Mack
- 41 Oral swabs from Terrell Addison
- 42 Oral swabs from Davorius Mack

- 6 Swab from floor behind counter
- 7 Swab from floor behind counter
- 8 Swab from floor behind counter
- 9 Swab from floor behind counter
- 10 Swab from counter top
- 11 Swab from side of cigarette rack
- 14 Swab from driver's inside door handle
- 15 Swab from front passenger's inside door handle
- 16 Swab from rear passenger's inside door handle
- 17 Swab from driver's side rear passenger's inside door handle
- 18 Swab from steering wheel
- 19 Swab from gear handle
- 26 Straw (yellow)
- 27 Straw (red & white striped)
- 28 Hair from front passenger seat area
- 30.1 Cigarette butt
- 30.2 Cigarette butt

EXAMINATIONS

DNA analysis was performed on the items above. The results of Short Tandem Repeat (STR) PCR DNA analysis are shown in Table 1.

RESULTS

The DNA profile developed from items 6, 9, 10 and 11 matches the DNA profile of James Marshall. The probability of randomly selecting an unrelated individual having a DNA profile matching these items is approximately 1 in 74 trillion.



August 14, 2007

1134

The partial DNA profiles developed from items 8, 14, 16, and 19 are insufficient for reliable interpretation.

The DNA obtained from item 18 is a mixture of at least two individuals. No conclusion can be made regarding the inclusion or exclusion of Dontavious Mack, Terrell Addison or Davorius Mack as possible contributors to this mixture.

The DNA obtained from item 15 is a mixture of at least two individuals. Davorius Mack cannot be excluded as possible contributor to this mixture.

The partial DNA profiles developed from items 26 and 30.2 are from an unidentified male individual. The partial DNA profile developed from item 26 has been entered into the Combined DNA Index System (CODIS).

The DNA obtained from item 30.1 is a mixture of at least two individuals. Davorius Mack and the contributor of DNA to items 26 and 30.2 cannot be excluded as possible contributors to this mixture. The probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately 1 in 22 thousand.

No DNA profile was developed from item 17 and 28.

No human DNA was detected on items 7 and 27.

Note: Any remaining evidence and/or packaging will be returned to the requesting agency.



Kenneth L. Bogan
Forensic Scientist

cc: York County Solicitor's Office



Table 1 - Identifier

Items	D8S1179	D21S11	D7S820	CSF1PO	D3S1358	THO1	D13S317	D16S539	D2S1338	D19S433	vWA	TPOX	D18S51	D5S818	FGA	Amelogenin
12 James Marshall	13,14	30	10	11,12	14,16	6,8	11,12	12	17,18	14,16,2	17,19	8	14,15	10,11	22,24	XY
21 Dontavious Mack	13,14	29,35	8	10,12	15,17	7	12	9,12	19,24	13,15,2	15,16	8	16,18	11,13	23,28	XY
41 Terrell Addison	13,14	29,30	10,12	10,13	17,18	7,8	11,12	8,11	21,23	11,15,2	15,18	8	16,18	8,11	23,24	XY
42 Davorius Mack	14,15	28,35	8	11,12	15,17	7	12	9,10	19,24	13,14	15,20	6,8	16	11,12	23,28	XY
6 Swab from behind counter	13,14	30	10	11,12	14,16	6,8	11,12	12	17,18	14,16,2	17,19	8	14,15	10,11	22,24	XY
8 Swab from behind counter	-	-	-	-	(14)	-	-	-	-	-	-	-	-	-	-	-
9 Swab from behind counter	13,14	30	10	11,12	14,16	6,8	11,12	12	17,18	14,16,2	17,19	8	14,15	10,11	22,24	XY
10 Swab from counter top	13,14	30	10	11,12	14,16	6,8	11,12	12	17,18	14,16,2	17,19	8	14,15	10,11	22,24	XY
11 Swab from cigarette rack	13,14	30	10	11,12	14,16	6,8	11,12	12	17,18	14,16,2	17,19	8	14,15	10,11	22,24	XY
14 Swab from driver's door handle	-	-	-	-	-	-	-	-	-	(14)	-	-	-	-	-	X(Y)
15 Swab of front passenger's door handle	(14),(15)	-	-	-	15,(17)	7	-	-	-	(13),(14)	-	-	-	(11),(12)	Inc	XY



Table 1 – Identifier

Items	D8S1179	D21S11	D7S820	CSF1PO	D3S1358	TH01	D13S317	D16S539	D2S1338	D19S433	vWA	TPOX	D18S51	D5S818	FGA	Amelogenin
16 Swab of rear passenger's door handle	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	(X)
17 Swab of driver's side rear door handle	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
18 Swab of steering wheel	(10),(13)	-	-	-	14,15, (17)	(7),(8)	(12),(13)	-	-	(14)	-	(8)	-	(11)	-	X,(Y)
19 Swab of gear handle	(14)	-	-	-	(15),(17)	(7)	-	-	-	14	-	-	-	(11)	-	(X)
26 Straw (yellow)	13,15	29,30	10,11	7,10	15,16	7,8	10,13	10,11	19	11,12	16,17	8	17,19	12,13	Inc	XY
28 Hair	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
30.1 Cigarette butt	13,14, 15	28,29, 30,35	8,10, 11	7,(10), 11,12	15,16, 17	7,8	10,12, 13	9,10, 11	19,24	11,12, 13,14	15,16, 17,20	6,8	16,17, 19	11,12, 13	Inc	XY
30.2 Cigarette butt	13,15	29,30	10,(11)	7,10	15,16	7,8	10,13	10,11	19	11,12	16,17	8	(17)	12,13	Inc	XY

() = alleles between 75 and 149 rfu

- = no results

Inc = Inconclusive



1375136

EXHIBIT A-5

A-5 Letter from Counsel Kenneth Snow dated *February 17, 2009* 27

Kenneth D. Snow*
kennsnow@cobleandsnowlaw.com
*also licensed in South Carolina

C. Jennifer Coble
jennifercoble@cobleandsnowlaw.com

February 17, 2009

Mr. Ben Stewart
York County Detention Center
1675-3A York Hwy.
York, South Carolina 29745

RE: Plea Offer

Mr. Stewart:

As we have discussed on several occasions, the State of South Carolina has offered to dismiss the Murder and Accessory Before the Fact to Murder charges in exchange for your guilty plea to Accessory Before the Fact to Armed Robbery and a few other lesser charges (the lesser charges are negotiable). The State will recommend a cap of 25 years to run concurrent with your sentence in the Commonwealth of Pennsylvania. In the alternative, the State will agree to a straight 20 years to run concurrent with your Pennsylvania Time. You would be required to testify truthfully regarding your involvement and your co-defendants' involvement in the present case.

I recommend you accept this plea. While there are good facts and bad facts in this case, I believe the bad facts substantially outweigh the good facts. Specifically, I anticipated the State will introduce the testimony of Davorious Mack, Dontavious Mack, and Reed Allen as part of their case. I am particularly concerned with the testimony of Reed Allen since his statement tends to corroborate to a significant degree Davorious' and Dontavious' assertion of your involvement. I believe this evidence creates a great challenge to your defense and acquittal. In addition, it appears you have no alibi witness who will testify as to your whereabouts at the time of the robbery and murder of Ned Marshall.

Ben, I know this is not an easy decision and I do understand your personal concerns. However, the challenges you face as to your defense and the exposure to a life sentence without chance of parole is extremely troublesome. Therefore, it is my opinion that you accept this plea.

Sincerely,

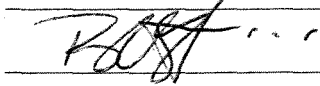
COBLE & SNOW, LLP

Kenneth D. Snow, Esq.

Ben Stewart: _____ Date: _____

EXHIBIT A-6

A-6 SCI-Frackville agreeing to host Video Conferencing for the South Carolina Court.....32

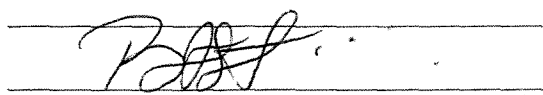
Form DC-135A		Commonwealth of Pennsylvania Department of Corrections	
INMATE'S REQUEST TO STAFF MEMBER		INSTRUCTIONS Complete items number 1-8. If you follow instructions in preparing your request, it can be responded to more promptly and intelligently.	
PAGE 1 OF 2			
1. To: (Name and Title of Officer) SUPERINTENDENT: MS. TRITT		2. Date: JULY 4, 2013	
3. By: (Print Inmate Name and Number) BEN STEWART-HK9369  Inmate Signature		4. Counselor's Name MRS. NEWBERRY 5. Unit Manager's Name MS. MIRANDA	
6. Work Assignment N/A		7. Housing Assignment B-A-48	
8. Subject: State your request completely but briefly. Give details.			
IN REGARDS TO THIS INMATE NAMED ABOVE. I HAVE A ACTIVE CASE IN SOUTH CAROLINA AND WITHOUT THE HELP OF FAMILY I AM CONSIDERED INDIGENT. BESIDES THAT I DO NOT WANT TO BURDEN THE COUNTY WITH EXPENSES AND USE OF MAN POWER.			
UNDER PROVISIONS OF Pa. R. Civ.P 1930.03 AND Title 23, PA.C.S.A. §4342(j), I respectfully request THAT A TELEPHONIC/ VIDEO CONFERENCE BE HELD AS SUCH FACILITIES ARE AVAILABLE AT SCI FRACKVILLE.			
THE FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES OF RULE 30. (b) (4) states; the parties may agree methods taken by TELEPHONE OR OTHER MEANS. MY CASE IS IN SOUTH CAROLINA AND IN THIS STATE, I AM FILING A PCR, UNDER THE UNIFORM POST CONVICTION PROCEDURE ACT, (Act), S.C.Code Ann. §§ 17-27-10 to 120 (1985) AND THESE RULES AND PROCEDURES apply also. THE REASON I'M REQUESTING THIS IS BECAUSE THE STATE OF SOUTH CAROLINA HAS NO DUTY NOR AUTHORITY TO ENSURE THE APPLICANT PRESENCE AT THE SCHEDULED POST CONVICTION HEARING". HOWEVER, THE APPLICANT IS ENTITLED TO A EVIDENTIARY HEARING ON ALLEGATIONS OF INEFFECTIVE COUNSEL", CLAYTON v. STATE, 278 S.C. 655, 301 S.E.2d. 133 (1983)". OTHERWISE JUST FILING A PCR, WITHOUT INFORMATION FROM THIS PRISON STATING THAT IT WOULD ACCOMADATE ME WITH A VIDEO CONFERENCE, THE COURT WOULD DISMISS MY CLAIM WITHOUT PREJUDICE Next pg.			
9. Response: (This Section for Staff Response Only)			
This Instituhm can accomodate & have you participate in a videoconference once one is scheduled in South Carolina			
To DC-14 CAR only ☐		To DC-14 CAR and DC-15 IRS ☐	

Staff Member Name

Print

Newberry Act Date 7/12/13

Sign

Form DC-135A	
INMATE'S REQUEST TO STAFF MEMBER	
PAGE 2 of 2 BEN STEWART HK9369	Commonwealth of Pennsylvania Department of Corrections
INSTRUCTIONS Complete items number 1-8. If you follow instructions in preparing your request, it can be responded to more promptly and intelligently.	
1. To: (Name and Title of Officer) SUPERINTENDENT: TRITT	2. Date:
3. By: (Print Inmate Name and Number)	4. Counselor's Name
 Inmate Signature	5. Unit Manager's Name
6. Work Assignment	7. Housing Assignment
8. Subject: State your request completely but briefly. Give details. UNTIL I RETURN TO THE STATE OF S.C. which CAN BE BETWEEN 8-16 years. I HAVE TO FIRST RECEIVE NOTICE THAT SUCH PROCEDURES ARE ACCEPTED HEAR THEN FILE WITH THE COURT THAT THIS PRISON WILL. AGAIN, WITHOUT NOTICE FROM THIS PRISON MY PCR WOULD BE DISMISS BECAUSE THE COURT WOULD NOT BE ABLE TO GO FORWARD WITH FACT-FINDING MY CLAIMS. I believe THAT MY ATTENDANCE IN THIS FASHION IS ESSENTIAL TO BEING ABLE TO ANSWER QUESTIONS, PRESENT MY CASE AND PROVIDE PROMPT LEGAL VIEWS. I ALSO BELIEVE THAT THE USE OF THIS FORMAT WILL EXPEDITE THE HEARING TO THE ADVANTAGE OF THE COURT AND MYSELF. THANK YOU FOR YOUR TIME AS TO THIS MATTER, _ _ AND I PRAY THAT YOU GRANT MY REQUEST FOR TELEPHONIC/ VIDEO CONFERENCE. RESPECTFULLY REQUESTED, _ _ BEN STEWART-HK9369 BEN ROBERT STEWART X	
9. Response: (This Section for Staff Response Only)	
To DC-14 CAR only ☐	To DC-14 CAR and DC-15 IRS ☐

Staff Member Name _____ / _____ Date _____
Print Sign

STATE OF SOUTH CAROLINA	)		
	)	IN THE COURT OF COMMON PLEAS	
COUNTY OF YORK	)		
	)		
	)	2013-CP-46-3731	
Ben Robert Stewart,	)		
	)		
Applicant,	)		
	)		
v.	)	RETURN AND MOTION TO DISMISS	
	)		
State of South Carolina,	)		
	)		
Respondent.	)		
	)		

The Respondent, making its Return to the Application for post-conviction relief filed on December 9, 2013, would respectfully show this Court:

I.

The Applicant is confined in the Pennsylvania Department of Corrections. Applicant was indicted at the July 2007 term of the York County Grand Jury for accessory before the fact to murder (2007-GS-46-2526), accessory before the fact to armed robbery (2007-GS-46-2528); accessory before the fact to kidnapping (2007-GS-46-2530), criminal conspiracy (2007-GS-46-2531), possession of a firearm during the commission of a violent crime (2007-GS-46-2532), and accessory after the fact to murder, armed robbery, and kidnapping (2007-GS-46-2535). Kenneth D. Snow, Esquire, represented him.

On February 27, 2009, Applicant proceeded to trial pursuant to which the jury found him guilty as indicted for the above referenced offenses. The Honorable Lee S. Alford sentenced him to confinement for a period of thirty (30) years for accessory before the fact to murder, twenty (20) years for accessory before the fact to armed robbery, ten (10) years for accessory before the fact to kidnapping, five (5) years for criminal conspiracy, five (5) years for the weapon charge,

and ten (10) years for accessory after the fact to murder, armed robbery and kidnapping. All sentences imposed are concurrent to each other, except for the thirty year sentence which runs consecutive to Petitioner's Pennsylvania sentence.

A timely Notice of Appeal and a brief pursuant to Anders¹ was filed on the Petitioner. The South Carolina Court of Appeals dismissed the appeal by written Order on December 12, 2012. State v. Stewart, 2012-UP-651 (filed December 12, 2012).

2010-CP-46-0661

The Petitioner subsequently filed an application for post-conviction relief (PCR) on February 16, 2010. The State filed its Return and Motion to Dismiss without prejudice on or about June 24, 2010. The Petitioner raised the following issues in his first PCR:

1. "Judicial error, their(sic) was no plea, only a conviction."
2. "Judicial error, trial by ambush within both partys(sic)."
3. "DNA evidence exonerates being linked to convicted charges."
4. "Ineffective Assistance of Counsel."
5. "Petitioner needs transcripts to perfect appeal process and or any denfence(sic)."

This Court issued a Conditional Order of Dismissal on July 1, 2010 as the Petitioner had a pending direct appeal and lacked standing as he is incarcerated within the Pennsylvania Department of Corrections. This Court also gave the Petitioner twenty days, from receipt of the Conditional Order of Dismissal, by which to respond with factual and legal reasons why the PCR action should not be dismissed in its entirety. The Petitioner was served with the Conditional Order of Dismissal via Registered Mail on December 19, 2011. The Petitioner made no

¹ Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

Response to the Conditional Order of Dismissal and this Court entered a Final Order of Dismissal without prejudice on April 26, 2012².

2012-CP-46-4229

Applicant subsequently filed a Petition for Writ of Habeas Corpus with the York County Clerk of Court on December 10, 2012. In that document, the Applicant raised the following grounds for relief:

1. "The petitioner has reached the age of seventy-six years and six months which clearly places him in the category of 'geriatric' and considering the medical conditions described [in his petition], it is clear that the petitioner, upon being thoroughly examined and his medical records examined, would certainly be declared physically and permanently disabled."

The Respondent made its Return and Motion to Dismiss on or about January 25, 2013. By Order of Dismissal dated January 28, 2013 and filed February 6, 2013, the Honorable John C. Hayes, III, dismissed the petition with prejudice.

II.

In his current application for post-conviction relief, the Applicant alleges that he is being held unlawfully for the following reasons:

1. "Appellate counsel was ineffective in failing to cite trial court error in denying a directed verdict because guilt beyond a reasonable doubt could not be established on the evidence adduced."
2. "Appellate counsel was ineffective for failing to raise the issue that no rational jury could have found guilt beyond a reasonable doubt on the evidence adduced at trial."
3. "Appellate counsel was ineffective in failing to raise Due Process was denied because the evidence adduced at trial violated the *Winship* rule of establishing proof of every element of the crime charged beyond a reasonable doubt."
4. "Trial counsel was ineffective on the Sufficiency of the Evidence Motion."
5. "Trial counsel was ineffective for failing to conduct a proper investigation."

² As noted in the Final Order, the Petitioner has one year from the time he is transferred to the custody of South Carolina to file an application for PCR as he is in Pennsylvania's custody and cannot be transported for a hearing pursuant to Clayton v. State, 278 S.C. 655, 301 S.E.2d 133 (1981).

6. "Trial counsel was ineffective for failing to use compulsory process to call witnesses on Applicant's behalf to offer relevant, material, pertinent and exculpatory evidence."
7. "Trial counsel was ineffective for failing to put the prosecution's case to meaningful adversarial testing, such that there was an actual breakdown of the adversarial process during trial."
8. "Applicant was denied effective assistance of trial counsel, and a fair trial due to the **cumulative effects** (emphasis added by Applicant) of counsel's ineffectiveness."
9. "Trial counsel was ineffective in misstating the evidence."
10. "The solicitor knowingly used perjured testimony."
11. It was prosecutor misconduct in suppressing *Brady* material, i.e., Monday Bishop's exculpatory statement to the solicitor."
12. The solicitor knowingly misstated the evidence to mislead the jury and the court on closing argument."

For the purposes of this Return, the Respondent incorporates the records of the York County Clerk of Court, the appellate records, the Applicant's records from the Department of Corrections, and the prior PCR records by reference. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

The Respondent submits that the Applicant lacks standing to bring this post-conviction relief application at this time. According to the information provided by the Applicant, he is incarcerated in the Pennsylvania Department of Corrections. Respondent has no duty or authority to ensure Applicant's presence at a scheduled hearing should one be granted, while he is incarcerated out of state. Clayton v. State, 278 S.C. 655, 658, 301 S.E.2d 133, 134 (1981). Accordingly, Respondent submits the current PCR application should be summarily dismissed without prejudice to the Applicant's right to file another application when he returns to state custody. Id. Respondent further submits that the statute of limitations applies to Applicant and begins to run once he is returned to this jurisdiction. See Carter v. State, 337 S.C. 17, 522 S.E.2d 342 (1999).

IV.

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

V.

WHEREFORE, Respondent moves to summarily dismiss the application because the Applicant lacks standing to bring the action while he is incarcerated outside of South Carolina.

Respectfully submitted,

ALAN WILSON
Attorney General

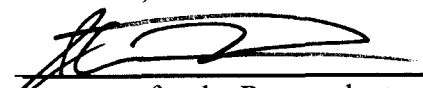
JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. CROOM HUNTER
Staff Attorney

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for the Respondents

Columbia, South Carolina
February 28, 2014

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

2013-CP-46-3731

Ben Robert Stewart,

Applicant,

v.

AMENDED RETURN

State of South Carolina,

Respondent.

FILED-RECEIVED
2015 JUL 24 AM 11:42
DAVID REDDINGTON
C.C.P. & CS
YORK COUNTY, SC

Respondent, making its Return to the Application for post-conviction relief filed on December 9, 2013, would respectfully show this Court:

I.

Applicant is presently confined in the Pennsylvania Department of Corrections. Applicant was indicted at the July 2007 term of the York County Grand Jury for accessory before the fact to murder (2007-GS-46-2526), accessory before the fact to armed robbery (2007-GS-46-2528); accessory before the fact to kidnapping (2007-GS-46-2530), criminal conspiracy (2007-GS-46-2531), possession of a firearm during the commission of a violent crime (2007-GS-46-2532), and accessory after the fact to murder, armed robbery, and kidnapping (2007-GS-46-2535). Kenneth D. Snow, Esquire, represented him.

On February 27, 2009, Applicant proceeded to jury trial pursuant where he was found guilty as indicted for the above referenced offenses. The Honorable Lee S. Alford sentenced him to confinement for a period of thirty (30) years for accessory before the fact to murder, twenty (20) years for accessory before the fact to armed robbery, ten (10) years for accessory before the fact to kidnapping, five (5) years for criminal conspiracy, five (5) years for the weapon charge,

and ten (10) years for accessory after the fact to murder, armed robbery and kidnapping. All sentences imposed are concurrent to each other, except for the thirty year sentence which runs consecutive to Applicant's Pennsylvania sentence.

A timely Notice of Appeal and a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), was filed on the Applicant. The South Carolina Court of Appeals dismissed the appeal by written Order on December 12, 2012. State v. Stewart, 2012-UP-651 (filed December 12, 2012).

2010-CP-46-0661

Applicant subsequently filed an application for post-conviction relief (PCR) on February 16, 2010, alleging he was being held unlawfully for the following reasons:

1. "Judicial error, their(sic) was no plea, only a conviction."
2. "Judicial error, trial by ambush within both partys(sic)."
3. "DNA evidence exonerates being linked to convicted charges."
4. "Ineffective Assistance of Counsel."
5. "Petitioner needs transcripts to perfect appeal process and or any denfence(sic)."

The State filed its Return and Motion to Dismiss without prejudice on or about June 24, 2010. The Honorable Lee S. Alford issued a Conditional Order of Dismissal dated July 1, 2010 and filed July 6, 2010, as the Applicant had a pending direct appeal and lacked standing as he is incarcerated within the Pennsylvania Department of Corrections. Judge Alford also gave the Applicant twenty days, from receipt of the Conditional Order of Dismissal, to respond with factual and legal reasons why the PCR action should not be dismissed in its entirety. The Applicant was served with the Conditional Order of Dismissal via Registered Mail on December

19, 2011. The Applicant made no Response to the Conditional Order of Dismissal, and Judge Alford entered a Final Order of Dismissal without prejudice on April 26, 2012.

2012-CP-46-4229

Applicant subsequently filed a Petition for Writ of Habeas Corpus with the York County Clerk of Court on December 10, 2012. In that document, the Applicant raised the following grounds for relief:

1. South Carolina waived extradition from Pennsylvania.
2. Mental illness/incompetence.

The Respondent made its Return and Motion to Dismiss on or about January 25, 2013. By Order of Dismissal dated January 28, 2013 and filed February 6, 2013, the Honorable John C. Hayes, III, dismissed the petition with prejudice.

II.

In his current application for post-conviction relief, the Applicant alleges that he is being held unlawfully for the following reasons:

1. "Appellate counsel was ineffective in failing to cite trial court error in denying a directed verdict because guilt beyond a reasonable doubt could not be established on the evidence adduced."
2. "Appellate counsel was ineffective for failing to raise the issue that no rational jury could have found guilt beyond a reasonable doubt on the evidence adduced at trial."
3. "Appellate counsel was ineffective in failing to raise Due Process was denied because the evidence adduced at trial violated the *Winship* rule of establishing proof of every element of the crime charged beyond a reasonable doubt."
4. "Trial counsel was ineffective on the Sufficiency of the Evidence Motion."
5. "Trial counsel was ineffective for failing to conduct a proper investigation."
6. "Trial counsel was ineffective for failing to use compulsory process to call witnesses on Applicant's behalf to offer relevant, material, pertinent and exculpatory evidence."
7. "Trial counsel was ineffective for failing to put the prosecution's case to meaningful adversarial testing, such that there was an actual breakdown of the adversarial process during trial."

8. "Applicant was denied effective assistance of trial counsel, and a fair trial due to the **cumulative effects** (emphasis added by Applicant) of counsel's ineffectiveness."
9. "Trial counsel was ineffective in misstating the evidence."
10. "The solicitor knowingly used perjured testimony."
11. It was prosecutor misconduct in suppressing *Brady* material, i.e., Monday Bishop's exculpatory statement to the solicitor."
12. The solicitor knowingly misstated the evidence to mislead the jury and the court on closing argument."

For the purposes of this Return, the Respondent incorporates herein and by reference the records of the York County Clerk of Court, Applicant's records from the Department of Corrections, and the prior PCR records. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent contends that Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Id. 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. 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).

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. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

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

IV.

The allegation that appellate counsel was ineffective is without merit. Respondent contends that Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to

make appellate proceedings fair. Id. Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. Id. Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Respondent submits that Applicant cannot satisfy either requirement of the Strickland v. Washington test with regard to the ineffectiveness claims against appellate counsel. However, the allegation of ineffective assistance of appellate counsel probably raises questions of fact that cannot be conclusively refuted by the record. Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Applicant also alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post-conviction relief, but rather a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on

appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Therefore, Respondent submits this allegation should be summarily dismissed.

VI.

Respondent denies each allegation that is not expressly admitted, qualified or explained.

VII.

WHEREFORE, Respondent requests an evidentiary hearing for the purpose of determining whether the Applicant's trial and appellate counsel were ineffective.

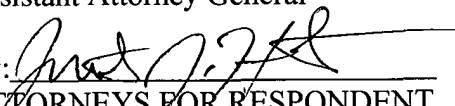
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

JUSTIN J. HUNTER
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

July 28, 2015

STATE OF SOUTH CAROLINA **FILED-RECEIVED**
COUNTY OF YORK 2021 NOV 29 PM 2: 58 IN THE COURT OF COMMON PLEAS
BEN STEWART, DAVID HAMILTON, CASE NO.: 2013-CP-46-3731
C.C.C.P. & GS
Applicant, YORK COUNTY, SC
v.)
STATE OF SOUTH CAROLINA,) **AMENDMENT TO APPLICATION**
Respondent.) **FOR POST CONVICTION RELIEF**

Applicant, by and through his undersigned attorney, hereby amends his application for Post-Conviction Relief filed December 9, 2013. This amended complaint adopts and includes all grounds in this original application and the supporting documents filed on December 9, 2013 including the Conclusion of Facts and Memorandum in Support of PCR application and the Memorandum of Law in support of PCR. Applicant seeks to have his conviction and sentence vacated. Applicant, further alleges that the court gave an improper jury charge for Murder and further alleges as additional grounds regarding a claim of ineffective assistance of counsel as follows:

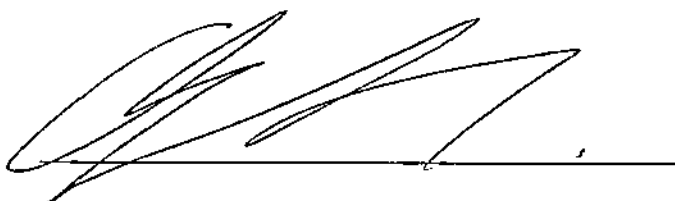
1. Applicant's trial counsel, Kenneth Snow, failed to discuss a defense strategy with applicant.
2. Applicant's trial counsel, Kenneth Snow, failed to review evidence with Applicant or provide a copy of the evidence to applicant.
3. Applicant's trial counsel, Kenneth Snow, failed to properly investigate the case.
4. Applicant's trial counsel, Kenneth Snow, failed to obtain information from Monday Bishop or to call her as a witness for the defense.

5. Applicant's trial counsel, Kenneth Snow, failed to obtain information from Lawanda Val Hudson or to call her as a witness for the defense.
6. Applicant's trial counsel, Kenneth Snow, failed to properly argue the issue of Applicants competence to stand trial.
7. Applicant's trial counsel, Kenneth Snow, failed to interview the witness Reed Allen
8. Applicant's trial counsel, Kenneth Snow, failed to object to a leading question by the solicitor to Dontavious Mack, "ben didn't want to go in he gave you the gun" (p 188, line 12) and 'he gave you the gun, he knew you were robbing the BP station" (p188, line 18).
9. Applicant's trial counsel, Kenneth Snow, failed to object to hearsay by Davorius Mack, "he told me to come to girlfriends house, "take Terrel Addison home" (p333, line 21-23) and Terrel Addison saying "lets stick" (p338, line 21).
10. Applicant's trial counsel, Kenneth Snow, failed to object to Reed Allen's hearsay statement "Ben Stewart told me to put gun up"(p515, line 12-18).
11. Applicant's trial counsel, Kenneth Snow, failed to object to Reed Allens hearsay "I heard something about Donte being shot" (p529, line 4).
12. Applicant's trial counsel, Kenneth Snow, failed to object to Reed Allens hearsay statement "Ben Stewart told me to put gun up' (p532, line 14).
13. Applicant's trial counsel, Kenneth Snow, failed to object to hearsay following question if someone is "asking Terrell about putting his gun up?", "did Stewart or Mack ask him?", followed by the response 'it could have been" (p535, lines 2, 23).
14. Applicant's trial counsel, Kenneth Snow, failed to object to testimony from Lt. Rudick regarding suspected "straw and crack cocaine" in car. (p 650, lines 17-19).

15. Applicant's trial counsel, Kenneth Snow, failed to make a sufficient pre-trial motion to sever the trials of Ben Stewart and co-defendant Terrell Addison and Addison testified that "Ben gave the gun to Dontavious" (p 942, line 16-19).
16. Applicant's trial counsel, Kenneth Snow, failed to object to the jury charge for Murder that included the instruction that inferred malice "may arise when the deed is done with a deadly weapon" (p1160, line 25, p 1161, line 1).
17. The court gave an improper jury charge for Murder that included the instruction that inferred malice "may arise when the deed is done with a deadly weapon" (p1160, line 25, p 1161, line 1).
18. The court failed to charge constructive possession regarding accomplice liability or hand of one hand of all for the charge of Possession of a Firearm During the Commission of a Violent Crime (p1203, line 22-25) following a jury question regarding this (p1201-1202).
19. Applicant's Appellate counsel Joseph Savitz and Wanda Carter, failed to appeal these issues regarding the improper jury charges.

Furthermore, the Applicant requests that he be permitted to Amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application. See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006).

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a horizontal line and a small flourish at the end.

OLA JOHNSON
Attorney for Applicant
P.O. Box 549
Lexington, SC 29071
803-360-8692 Phone
olajohnsonlaw@gmail.com

This 24 day of November, 2021.

FILED-RECEIVED

STATE OF SOUTH CAROLINA NOV 29 PM 2: 18

COUNTY OF YORK

DAVID HAMILTON

C.C.C.P. & GS

BEN STEWART,

YORK COUNTY SC

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

CASE NO.: 2013-CP-46-3731

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

I, Ola Johnson, hereby certify on that on November 24, 2021, I served a copy of the
AMENDMENT TO APPLICATION FOR POST CONVICTION RELIEF on William H. Ray,
Assistant Attorney General by Email and U.S. Mail to the following address:

William H. Ray, Asst. Attorney General

SC Attorney General's Office

P.O. Box 11549

Columbia, S.C. 29211

Date

11-24-21

OLA JOHNSON

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 DAVID HAMILTON
 C.C.C.P. & GS
 YORK COUNTY, SC

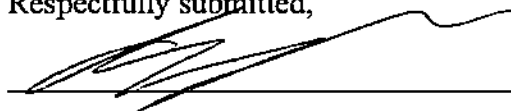
STATE OF SOUTH CAROLINA)
 COUNTY OF YORK) IN THE COURT OF COMMON PLEAS
 SIXTEENTH JUDICIAL CIRCUIT

Ben Stewart,) **CASE NO.: 2013-CP-46-03731**
)
 Applicant,)
)
 v.) **SECOND AMENDMENT TO**
) **APPLICATION**
) **FOR POST CONVICTION RELIEF**
 STATE OF SOUTH CAROLINA,)
)
 Respondent.)
 _____)

Applicant, by and through his undersigned attorney, hereby amends his application for Post-Conviction Relief filed December 9, 2013. This amended application adopts and includes all grounds in the original application and the supporting documents filed on December 9, 2013 including the Conclusion of Facts and Memorandum in Support of PCR application and the Memorandum of Law in support of PCR and the Amendment to Application for Post Conviction Relief filed November 29, 2021. Applicant further alleges as additional grounds regarding his claim of ineffective assistance of counsel as follows:

1. Applicant's counsel, Kenneth Snow, failed to challenge the indictment for Applicants pistol charge.
2. Applicant's counsel, Kenneth Snow, failed to challenge the time served credit that would allow Applicant to receive credit from his original arrest date in Pennsylvania on 1-27-07.
3. Applicant's counsel, Kenneth Snow, failed to challenge the Applicants removal to South Carolina under the Agreement on Detainers S.C. Code 17-11-10 Art. VI, Sec. b. based on the mental health history of Applicant
4. Furthermore, the Applicant requests that he be permitted to Amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application. *See Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006).

Respectfully submitted,



OLA JOHNSON

Attorney for Applicant

P.O. Box 549

Lexington, SC 29071

803-360-8692 Phone

olajohnsonlaw@gmail.com

This 25 day of November, 2022.

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Ben Stewart)

Applicant,)

v.)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

CASE NO.: 2013-CP-46-03731

CERTIFICATE OF SERVICE

I, Ola Johnson, hereby certify on that on November 25, 2022, I served a copy of the SECOND AMENDMENT TO APPLICATION FOR POST CONVICTION RELIEF on Zachary Jones, Assistant Attorney General by Email and U.S. Mail to the following address:

Zachary Jones, Asst. Attorney General

SC Attorney General's Office

Rembert Dennis Building

PO BOX 11549

Columbia, SC 29201

11.25.22
Date


OLA JOHNSON

1 STATE OF SOUTH CAROLINA.

2 -----x

3 BEN ROBERT STEWART,

Case numbers

4 Applicant,

2007-GS-46-2526

5 -against-

2007-GS-46-2528

6 STATE,

2007-GS-46-2530-32

7 Respondent.

2007-GS-46-2535

8

9 -----x

10 York, S.C.

11 April 17, 2023

12 B E F O R E:

13 HONORABLE EUGENE GRIFFIN

14

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

16 OLA JOHNSON,

17 Attorney for the Applicant

18

19 ZACHARY JONES

20 Attorney for the Respondent

21

22 Aileen Butler

23 Official Court Reporter

24

25

1			<u>I N D E X</u>		
2	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
3	Ben Stewart				
4	Mr. Johnson	3			
5	Mr. Jones		12		
6	Monday Bishop				
7	Mr. Johnson	14			27
8	Mr. Jones		19		
9	Willy Thompson				
10	Mr. Jones				
11	Mr. Johnson				
12	Kenneth Snow				
13	Mr. Jones				
14	Mr. Johnson				
15	Kevin Brackett				
16	Mr. Jones				
17	Mr. Johnson				
18					
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1	<u>E X H I B I T S.</u>			
2	<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVD</u>
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1 MR. JONES: This is matter of Ben Robert Stewart
2 versus the State of South Carolina, case number
3 2013-CP-46-3731. My name is Zachary Jones for the
4 State of South Carolina. Mr. Stewart is present and
5 represented by his attorney, Ola Johnson.

6 Mr. Stewart was indicted at the July 2007 term
7 York County Grand Jury for accessory before the fact
8 for murder, case number 2007-GS-46-2526; accessory
9 before the fact of armed robbery, case number
10 2007-GS-46-2528; accessory before the fact of
11 kidnapping, case number 2007-GS-46-2530; criminal
12 conspiracy, 2007-GS-46-2531; possession of a firearm
13 during the commission of a violent crime,
14 2007-GS-46-2532, and accessory after the fact to
15 murder, armed robbery and kidnapping, 2007-GS-46-2535.

16 He was represented at trial by Kenneth Snow. On
17 February 27, 2009 Mr. Stewart proceeded to a jury
18 trial pursuant to which he was found guilty as
19 indicted for the above referenced offenses.

20 The Honorable Lee S. Alford sentenced him to
21 confinement for a period of 30 years for accessory
22 before the fact of murder, 20 years for accessory
23 before the fact of armed robbery, ten years for the
24 accessory before the fact of kidnapping, five years
25 for criminal conspiracy, five years for the weapons

1 charge and ten years for accessory after the fact to
2 murder, armed robbery and kidnapping.

3 All sentences imposed were to run concurrently to
4 each except for the thirty-year sentence which was to
5 run consecutively to Mr. Stewart's Pennsylvania
6 sentence.

7 THE COURT: Which is not related, but what is the
8 Pennsylvania sentence?

9 MR. JONES: Your Honor, I don't know off the top
10 of my head.

11 THE COURT: All right. We will find out in a
12 moment.

13 MR. JONES: Eight to sixteen according to
14 Solicitor Brackett who is present here.

15 A timely Notice of Appeal and brief pursuant to
16 Anders v California was filed on behalf of Mr.
17 Stewart. The South Carolina Court of Appeals
18 dismissed the appeal by written order on December 12,
19 2012 and Mr. Stewart has since filed this post
20 conviction relief application. With that I will turn
21 over to Mr. Johnson.

22 THE COURT: All right Mr. Johnson.

23 MR. JOHNSON: Thank you, Your Honor. My client
24 Mr. Stewart wants to address the court with some
25 concerns he had.

1 THE COURT: All right. Good morning Mr. Stewart.

2 MR. STEWART: Good morning, sir. How you doing?

3 THE COURT: I'm doing well. What's going on.

4 MR. STEWART: I have a few concerns --

5 THE COURT: The lady right, here Miss Butler, she
6 has got to hear you. She is taking down what you are
7 saying to me and if she can hear you I'll be certain
8 to hear you.

9 MR. STEWART: All right. I had a concern
10 regarding my claims being raised. I had initially
11 filed a motion for discovery along with my application
12 of PCR, my memo, memoranda of law. Since then I had
13 requested for a statement where investigators from the
14 solicitor's office had questioned an essential witness
15 in my case, which is my sister. She is present today.
16 Along with this request, I believe it was number nine,
17 I received the jury note but I never received the
18 statement from my sister. So that was one of my
19 issues.

20 Also, with Judge Alford and Mr. Thompson,
21 solicitor Mr. Willy Thompson I was wanting them to be
22 present also because you have prosecutorial misconduct
23 claim and I have a trial for error claim as well
24 regarding a misstatement of the facts where -- where
25 the judge was under the false impression that I had

1 went to one of the co-defendant's house when I had
2 actually went to my sister's house and the solicitor
3 had misstated the same fact and my attorney as well
4 has misstated the same fact. So I was wanting them
5 present as well just to show you because the applicant
6 has the burden of establishing a claim and they are
7 not here.

8 THE COURT: Judge Alford is not -- you can't call
9 him as a witness. Do you understand that?

10 MR. STEWART: No, I didn't.

11 THE COURT: Okay. He has a picture over there on
12 the wall. He has since retired and he's fully
13 inactively retired. Meaning he doesn't come to court.
14 Some judges come and hold a little bit here and there.
15 He's totally retired and enjoying his grandchildren I
16 hope. And Mr. Thompson is not practicing law here. I
17 think he's in Colorado. That's why he's not here.
18 He's out in the Rocky Mountains, I believe.

19 MR. JONES. If I may, the State was planning to
20 call Mr. Thompson, understanding he is ready to
21 participate via the court's virtual courtroom.

22 THE COURT: All right. Let's go back to Mr.
23 Stewart. You were concerned about this. Judge Alford
24 wouldn't be much -- he's not allowed to testify as a
25 witness either way. So there's no harm there. Your

1 attorney is here. I see him sitting in the front row.
2 Mr. Thompson is available by virtual platform, webex
3 type situation on the screen here in the courtroom.
4 Would you be able to go forward today if they're
5 available in that fashion?

6 MR. STEWART: Yes, but I haven't received -- I
7 haven't received the statement. I had received the
8 court's exhibit, but I never got the statement.

9 THE COURT: Your sister's statement?

10 MR. STEWART: Yes, sir. I had requested Brady
11 violation in 2012 along with my PCR and since 2012 I
12 have been coming back to court, coming back to court
13 and it's been a ride.

14 THE COURT: Let me ask you this. You got the
15 statement obviously because you know about it.

16 MR. STEWART: No, the only thing that I know is
17 that prior to going to trial like two or three days my
18 sister had told me that the solicitor's office along
19 with an investigator had came to her house and, you
20 know, asked her some questions and wrote down a
21 statement for her and that was like two or three days
22 prior to trial. During the same time I had filed pro
23 se writ of habeas corpus requesting to get my case
24 dismissed and I think like two days after she done
25 that, talked to investigators, they sent me by

1 certified mail because she didn't have a copy machine
2 but once it was sent she told me it came and I always
3 took note of that, and I said did we ever get that
4 statement because, you know, I had asked Mr. Snow if
5 she received it and he said he would find out. So,
6 you know, once I looked through my transcript I saw
7 that, you know, on my witness list that with my sister
8 was --

9 THE COURT: You have got to speak up.

10 MR. STEWART: -- was a key factor regarding --
11 regarding me being exonerated or was helpful. So, I
12 had asked well -- well, I had actually got in contact
13 with my sister and my other witness to try a get them
14 to file affidavits. I had present today filed my
15 memoranda of law and with that I had filed a motion to
16 discovery and we just been waiting to get discovery.
17 We had got the exhibit but never got the discovery.

18 THE COURT: All right. Your lawyer told me you
19 had some concerns. What are you asking me for?

20 MR. STEWART: Brady violation. The statement --
21 the actual statement. I got a letter stating this is
22 you know the exhibits. But I didn't request exhibits.
23 I requested one exhibit. I didn't request the other
24 additional exhibits. I just need the statement.

25 THE COURT: Your sister's statement?

1 Mr. Stewart: Yes, sir. It was a Brady violation.

2 THE COURT: Mr. Johnson, do you know if they
3 reduced it to writing. You weren't at the trial
4 obviously?

5 MR. JOHNSON: I don't have the statement. I have
6 not received a response from the trial attorney. I
7 obviously was going to ask the trial attorney about
8 that. About whether or not he received such a
9 statement, but after going through the process -- I
10 think there's been three AG's assigned, but there was
11 a previous attorney general where we filed the motion
12 for discovery and did get the discovery material, but
13 I don't have that statement provided to me either and
14 I'm not sure what Mr. Snow is going to say in response
15 to a question about that. But we did go forward and
16 list the information about one of the grounds being
17 not calling Monday Bishop because she's here to
18 testify. And in the transcript, in the trial Mr. Snow
19 talked about on closing the fact the State could have
20 called Monday Bishop or Val Hudson and could have
21 cleared the whole thing up. So he's kind of pointing
22 to that as potentially important evidence, the
23 testimony in his closing. So I would use that as
24 grounds for ineffective assistance of counsel for him
25 not exploring that. But I don't have any witness

1 statement.

2 THE COURT: Okay. All right, he's given a fairly
3 succinct presentation of what he believes was a
4 violation. Is that part of your case you're going to
5 pitch today?

6 MR. JOHNSON: Well, Your Honor, I was going to put
7 in here -- I put in my second amended, second amended,
8 that it was ineffective for him not to pursue those
9 witnesses. I don't have -- I'm not sure what Mr. Snow
10 is going to say about whether or not he received a
11 statement, but he said he clearly knew about the
12 existence of the witnesses, and so I don't know what
13 he going to say. If he said I received the statement
14 or if he says, well, I never received it so I don't
15 know if it exists. You know, I'm stuck with what I
16 got.

17 THE COURT: I don't know the facts of the case,
18 but an accused sister -- and she's not part of the
19 victim's side of things -- seems like she would be
20 very available to counsel for her brother.

21 MR. JOHNSON: Right. And that's the whole point.
22 She was. That is my understanding. Her testimony is
23 going to be she made herself available to Mr. Snow.
24 She made it quite obvious to him that she was going to
25 be a valuable witness and he did not pursue it.

1 THE COURT: Are we going to go forward this
2 morning?

3 MR. STEWART: I have one more question.

4 THE COURT: Go ahead.

5 MR. STEWART: Along with my sister she wasn't the
6 essential witness. The essential witness is deceased.
7 Her name is Val Hudson. That's who my trial attorney
8 had quoted in his closing statement and that's why I
9 initially raised in my PCR that he had quoted that she
10 could have possibly -- Mr. Snow had stated that Val
11 Hudson could have possibly cleared this whole thing up
12 regarding me being involved in the case. And I had
13 got an affidavit from Val Hudson and my sister
14 regarding, you know, their knowledge of what took
15 place and for ten years I've been alerting the court I
16 have filed a response. I had filed a reply. I had
17 filed a writ of mandamus.

18 THE COURT: All right. I got that, but your whole
19 premise in your applications is had these two people
20 testified the whole outcome would have been totally
21 different?

22 MR. STEWART: Correct.

23 THE COURT: That's what I thought you were saying.

24 MR. STEWART: I have one more thing.

25 THE COURT: All right.

1 MR. STEWART: Val Hudson had actually -- she had
2 died. She had passed away, three years ago, four
3 years ago and I have an obituary. But, you know, I
4 was wanting to get her affidavit in the record. You
5 know because I believe she was an essential witness
6 and I was showing due diligence getting to court and
7 coming to court and I was ready, you know, trying to
8 get her here. I even had a couple hearings where I
9 was going to represent myself pro se and they wouldn't
10 allow me. I knew that she was sick. I was --

11 THE COURT: I got that. So she didn't get called
12 --

13 MR. STEWART: No, sir.

14 THE COURT: -- by your lawyer?

15 MR. STEWART: No.

16 THE COURT: Similar to your sister?

17 MR. STEWART: Yes, sir, she didn't.

18 THE COURT: Anything else?

19 MR. STEWART: No.

20 THE COURT: Okay. All right, Mr. Johnson, you
21 intend to call how many witnesses?

22 MR. JOHNSON: Just Miss Bishop.

23 THE COURT: Let's get going.

24 MR. JOHNSON: Yes, sir. We call Mr. Stewart.

25 THE COURT: Come up here.

1 BEN ROBERT STEWART, having been duly sworn by the
2 clerk of court testified as follows:

3 MR. JONES: Your Honor, before we start, my
4 witness, Willy Thompson, is in the webex courtroom but
5 was unable to hear anything.

6 THE COURT: In my courtroom?

7 MR. JONES: I believe, so, yes, sir.

8 THE COURT: On the computer?

9 MR. JONES: Yes, sir.

10 THE COURT: Normally my law clerk does that. All
11 right. Let's stand at ease for a second until she
12 comes back.

13 Mr. Thompson, can you hear me?

14 MR. THOMPSON: Yes.

15 THE COURT: Mr. Thompson, I will let you mute
16 yourself and you just stand by.

17 Mr. Stewart has been placed under oath. Mr.
18 Johnson.

19 MR. JOHNSON: Thank you, Your Honor.

20 DIRECT EXAMINATION

21 BY MR. JOHNSON:

22 Q Mr. Stewart, can you name the attorney who represented
23 you in this matter at trial?

24 A Yes, Kenneth Snow.

25 Q All right. And just for the record, when you --

1 starting with some of the grounds that you listed in your
2 original application. Could you describe why you you feel
3 appellant counsel was ineffective for failing to appeal the
4 court in denying the directed verdict motion? Can you talk
5 about that?

6 A Yes. Could I start from the top how I believe my whole
7 --

8 Q Wherever you feel like you need.

9 A Okay. I said I filed issues under the rules of
10 ineffective assistance of counsel regarding his failure to raise
11 and argue incontrovertible physical facts doctrine or theory,
12 wherever the defendant's DNA was found in the vehicle, accept my
13 DNA. I said appeals counsel was ineffective for failing to
14 raise judicial error for failing to sua sponte find as a matter
15 of law that based on incontrovertible physical fact doctrine or
16 theory, that the testimony was insufficient to convict in light
17 of my DNA not being present in the vehicle.

18 The other issues are that trial counsel was inept
19 regarding investigating the case, determining the applicable
20 law, interviewing witnesses and failing to exercise my right to
21 compulsory process to refute testimony from co-defendants that I
22 gave murder weapon to a co-defendant in in my sister's
23 apartment. I said I have sworn notarized affidavits from my
24 sister and her friend that I came to her apartment alone on the
25 night and did not give him a bag with a gun in it to hide. Note

1 my sister was present during every day of trial.

2 MR. JONES: Your Honor, this is going beyond the
3 scope of the question that was asked.

4 THE COURT: All right, kind of guide him along.
5 You know the application.

6 Q Okay, Mr. Stewart, let's kind of focus now. You had an
7 argument appellant counsel was ineffective for failing to argue
8 lack of due process. Can you talk about that?

9 A Yes. I was basically talking about the Winship
10 standard. In regards Winship it was a case that deals with
11 finding a person guilty of each essential element of the crime
12 charged beyond a reasonable doubt. And as I stated earlier and
13 in my lawyer's investigation, you know, I had thought that no
14 physical evidence put me at the crime scene. No eye-witness
15 testimony put me at the crime scene. I was, you know, basically
16 exonerated from the DNA, the fingerprints, the shoe prints.

17 The solicitor's office they had requested that they take my
18 DNA. The solicitor's office requested that they had my DNA and
19 they said that was my DNA because it came from an unidentified
20 male individual. So once I took the DNA test you know, I didn't
21 hear anything until the day of trial. I didn't hear the results
22 of my DNA test until the day of trial and that's when I looked
23 over and I asked him, well, what happened with my DNA and he
24 showed me the piece of paper and I was like, well, if I was
25 exonerated why didn't you ask for a motion to dismiss. He said

1 that was my DNA, it was un identified male individual and they
2 said it was mine. So once I took the DNA test it exonerated me.
3 It was four people and I was suppose to be the fourth
4 perpetrator and it was an identified male individual. I didn't
5 understand why once they took my DNA and they said I was
6 exonerated who was the fourth perpetrator. You know, that's not
7 my job. I didn't know.

8 Q I don't mean to cut you off. It was your allegation
9 you also stated appellant counsel was ineffective for failing to
10 raise issue that no rational jury could have found the defendant
11 guilty beyond a reasonable doubt. That is related to what you
12 just testified about?

13 A Yes, sir.

14 Q And also, your allegation, trial counsel failed to
15 effectively argue directed verdict motion. Does that go into
16 that same area of evidence?

17 A Yes, it does.

18 Q Okay.

19 A Hold on.

20 Q Go ahead.

21 A But with that, on the motion for directed motion - for
22 the motion to directed verdict, I believe Mr. Snow only argued
23 against kidnapping charge and I'm going to trial for a murder
24 charge. He only argued for one charge. He just said that he's
25 going to basically agree with Mr. Swerling's position and not my

1 position, but Mr. Swerling's position and just argue against the
2 kidnapping charge rather than a murder charge and he didn't
3 state no law or no evidence to support it or nothing. He didn't
4 say that, you know, the DNA exonerated me from being present at
5 the crime scene or conflicting statements or, you know,
6 eye-witnesses out there that contradicted how many people that
7 said that was in the car.

8 Two witnesses Qiauna Efrid and Ann Warner and both of them
9 witnesses both said, that it was up to two to three people that
10 they heard. One of said that they heard two car doors slam and
11 then they heard the car turn on. Another one said they looked
12 in the car and said they'd only seen three people and they were
13 the state's witnesses.

14 Q Okay. And this also relates to your allegation, trial
15 counsel was effective for failing to call Monday Bishop and Val
16 Hudson. What was the nature of that viable evidence?

17 A In Mr. Snow's -- in my trial attorney's closing
18 argument he brought to my attention that -- I wasn't trained in
19 the law. I'm not train in law. He brought to my attention that
20 Val could have possibly cleared the whole thing up involving his
21 client stated ver -- verbatim and once I looked into it I got in
22 contact with my sister and I asked her first I was talking to
23 her about the investigators that had came to our house prior to
24 me going to trial and then I asked her she could she get in
25 contact with Val and she said she could. And I said okay, well

1 my lawyer thought that Val could have possibly cleared me in my
2 entire case because she was a neutral party. She wasn't my
3 sister and she wasn't, you know, to the state. So I was like,
4 I looked at it the same way. So I got an affidavit from Val
5 and, you know, Val corroborated his testimony. Everything that
6 he said.

7 It's been ten years since I looked at it but I know it
8 wasn't nothing damaging to me. It was said the truth that I
9 came in the house and I went in my room and sleep. That's all I
10 remember reading. I have it though if the judge or anyone want
11 to see it.

12 Q And as far as Val Hudson -- and also the attorney
13 referenced the testimony of Miss Bishop on closing as well,
14 correct?

15 A Yes, sir.

16 Q Monday Bishop is your sister?

17 A I'm not sure if he really referred to my sister. The
18 only thing I remember is Val. I know he said Val for a fact.

19 Q Monday Bishop is your sister?

20 A Yes, Monday Bishop is my sister.

21 Q And in the amended application where I incorporated
22 what you had filed and I referenced something entitled
23 conclusion of facts, memorandum of law, and support of
24 application for post conviction relief. You included the
25 affidavit for Lawanda Valeen Hudson in that didn't you?

1 A Yes, sir.

2 MR. JOHNSON: And Your Honor, at this point I
3 would ask the Court to allow me since she has passed
4 away and not here to testify if the Court would allow
5 me to Reed that into the record because it has been
6 filed and referenced.

7 MR. JONES: Your Honor, the State objects. This
8 is inadmissible hearsay and does not fall within any
9 hearsay exception.

10 THE COURT: I think for the purpose of this
11 hearing I want to hear it so I can make that ruling.

12 MR. JOHNSON: Thank you judge.

13 Mr. Stewart I'm going to recite. I will Reed out
14 loud the affidavit you filed with Lawanda Valeen
15 Hudson.

16 "In the State of South Carolina, Affidavit. I,
17 Lawanda Valeen Hudson, hereby swear of affirm under
18 penalties for perjury pursuant to 16-9-10, South
19 Carolina Code that the following statements are true
20 and correct upon belief or information.

21 1. Currently, I reside at [REDACTED],
22 Hartsville, South Carolina, 29550. Phone
23 [REDACTED].

24 In making this affidavit I Reed the testimony --
25 I Reed the testimony of Reed Allen, Davorious Mack and

1 tell Terrell Addison. My testimony will comment by
2 pages and line. I provided this affidavit to tell the
3 truth of what happened at my friend, Monday Bishop's
4 place on the night in October, 2006, when Reed Allen,
5 who had been partying with us, lied that Monday's
6 brother, Ben Stewart, gave him a gun in a bag to hide
7 for him.

8 I also provided this affidavit to say that
9 Davorious Mack and Terrell Addison did not come to
10 Monday's place that night and are lying when saying
11 they was there and Ben gave Reed a gun.

12 Ben's lawyer did not talk to me about what
13 happened on that night. Ben's lawyer had asked me
14 what happened and testify in court I would have said,
15 page 315, 19-20, Davorious did not come to Monday's
16 place that night because I was there all night long.
17 Page 515, 9-25. When Ben came he did not talk to Reed
18 and did not give him anything.

19 Page 524, 15-19, Reed did not know Ben like that
20 because at the time we all just met Ben. When Ben
21 came down from Philly to visit and Reed hardly ever
22 was around us cause we would be from my house to
23 Monday's house. Monday was never in a relationship
24 with Reed Allen. He just liked her.

25 526, 14-19, Monday said she had letting to let go

1 -- to go let Ben in cause he did not have a key to get
2 in the house. So we went straight there from leaving
3 the spot we hung out at to have drinks from time to
4 time.

5 527, 2-5, Monday never passed her phone to Reed
6 when he left the juke joint because I would have seen
7 her do it it.

8 527, 9-16, Yes me, Val, Reed, Ben and Monday was
9 the only one at Monday's place.

10 Page 528, 5, no one came in with Ben that night.
11 He was by himself and he did not talk to anybody.

12 Page 530, 19-23, Ben was the last and only person
13 that came to Monday's place that night. Me and Monday
14 was on the couch and Reed was walking back and fourth
15 from the living room to the kitchen to the living
16 room. None of this stuff happened.

17 Page 534, we never saw, knew or heard anything
18 about a gun because no gun was passed around.

19 Signed, Lawanda Valeen Hudson, [REDACTED]
20 [REDACTED], Hartsville, South Carolina, 29550. Sworn on
21 February 22, 2013.

22 Can I give this to the judge, a copy of both of
23 these?

24 THE COURT: I have them in the application.

25 MR. JOHNSON: Yes, that's in the original.

1 THE COURT: I got it already.

2 MR. JOHNSON: Thank you, judge.

3 Q Mr. Stewart, to continue, you said in your original you
4 filed that trial counsel failed to object to prosecutor's
5 statement regarding DNA evidence on closing. Can you kind of
6 expand on that a little bit?

7 A Yes, also I had forgot because I didn't have my notes
8 out, but regarding my appellant attorney, she also filed an
9 Ander's brief. She filed Ander's brief on my behalf and I just
10 wanted to note that. But you say you wanted me to explain what
11 now?

12 Q Did ineffective trial counsel fail to object to
13 prosecutor's statement regarding DNA on closing?

14 A Oh, yes. Regarding the DNA?

15 Q Yes, sir.

16 A I said the solicitor knowingly misstated the evidence.

17 Q Basically you're indicating he misstated the evidence.
18 How did he do it?

19 A On closing the State had misstated the evidence
20 regarding the inability -- the inability or the positive of
21 whether or not the DNA was mixed -- was a mixture he said
22 verbatim -- this chains. One second.

23 MR. JOHNSON: Your Honor, if I can pass him a copy
24 of the transcript, if that's okay for me to pass that
25 up for him to reference it.

1 THE COURT: I think that will be fine. He's got a
2 lot of documents in his hand.

3 Q Mr. Stewart, I'm going to pass you up number three of
4 three volumes of the transcript of trial and you could reference
5 that if you need to refresh your memory about what the solicitor
6 said about DNA?

7 A From what you have it says Mr. Snow said there is no
8 forensic evidence to show that Mr. Stewart was in that car at
9 all. No DNA, no fingerprints, no fibers, no hair. Nothing to
10 show Ben Stewart was in that car. Well, guess what? There is
11 no DNA, no fingerprints, no hair, no fiber, nothing to show that
12 -- that he was there. Yet nobody disagrees that Dontavious Mack
13 was in the car. No doubt he was in the car. He was in the car
14 and bleeding and had a bullet in his back and we didn't find any
15 blood there. No DNA was found of Dontavious. No fingerprints.
16 What did the officer say about the fingerprints. It doesn't
17 work like that.

18 Q And you feel like there should have been an objection?

19 A Yes, I believe that it was -- it definitely was wrong
20 because he misstated the evidence where he used the equating of
21 whether or not his DNA or fingerprints was in the car and it
22 actually was in the car. He said no DNA, no fingerprints of
23 Dontavious was found, but on the DNA fingerprint analysis his
24 fingerprints wasn't on there because he had gloves on and that's
25 in the record and I stated that in my memoranda of law. But his

1 DNA was found in the car and his brother's DNA was found in the
2 car and Terrell DNA was in the car, but my DNA wasn't found in
3 the car. So that was -- you know, he misstated the evidence
4 when he said that, you know, they found his fingerprints wasn't
5 in there. He just basically tried to shift it saying that it
6 was okay to say that their DNA was in there when they needed it
7 but then turned around and discounted it when I -- when I said
8 there was no DNA on me. So that wasn't fair. He couldn't be
9 permitted to use it both ways. Use DNA to convict but then turn
10 around and then say no, it doesn't matter because Mr. Stewart
11 don't have DNA in the case.

12 So, you know, I felt as though Mr. Snow should have
13 objected to the misstatement of the evidence.

14 Q Okay. Your Honor, I am going to move on to the -- I
15 filed two amended applications here. So I will move on to the
16 first one here filed November 29, 2021. In this I incorporated
17 and adopted the application filed by the applicant originally.
18 Number one, on that amendment to application.

19 Mr. Stewart, can you talk about whether or not Mr. Snow
20 failed to discuss a defense strategy with you?

21 A Well, prior to trial I me and had him had sat down with
22 the solicitor's office, Mr. Thompson and I can't remember
23 someone else. But we actually sat down and we was talking to
24 them about me possibly taking a plea and I was headstrong on
25 trying to get my case dismissed based on my mental disability.

1 I was trying to get my case thrown out under the interstate
2 agreement on detainers violation. The IAD violation. I don't
3 know the law. You know, I'm not a lawyer, but I was looking
4 into trying to file a pro se motion. As far as my strategy went
5 with my trial I just knew that DNA was suppose to help me
6 because the solicitor said in the pretrial that this is the
7 person who done it. So I said okay.

8 At first I was refusing to take the DNA test but then I
9 said -- the other lawyer I had named Michael -- Michael
10 Matthews, he said just take the test and if it's not you you're
11 good. I said okay. I took the test and I was exonerated. So I
12 was assuming some good results from that and I thought that --
13 you know, he was going to use the DNA or lack of evidence, of
14 insufficient evidence or something like that, you know,
15 pertaining to my defense. You know, I didn't know the law, but
16 I knew that DNA evidence definitely exonerated me from being a
17 participery. (Sic)

18 Q So he didn't discuss the strategy with you?

19 A No, sir.

20 Q Okay. And did he fail to review evidence with you or
21 provide you a complete copy of the evidence?

22 A No, another attorney prior to him had gave me
23 discovery.

24 Q Did Mr. Snow review evidence with you?

25 A Yes, we actually sat down and went over the evidence.

1 Q Okay. Do you feel he fail to properly investigate the
2 case?

3 A I do.

4 Q Tell me about that?

5 A Well, I think he realized that during trial it was at
6 the end of trial, but during the end of trial that Val could
7 have possibly cleared the whole thing up. Those were his words
8 and he should have called her. I believe had he called Val or
9 had he rebutted Mr. Thompson stating that my sister testimony
10 she would have drove any distance. Because he stated that.
11 What sister wouldn't come to trial and testify on behalf of her
12 brother and she actually came and she was there every day at
13 trial. So I felt as though that, you know, as a defense
14 attorney I would call her.

15 Q Are you talking about Monday Bishop?

16 A Yes, sir.

17 Q Your sister?

18 A Yes, sir.

19 Q So you made it clear to him that she was a available
20 witness?

21 A Yes. They actually spoke. They actually spoke and she
22 told him that she was willing to testify. My mom said she
23 didn't know anything about the case, but my sister said well, I
24 was there. If you need me I'll talk to them and during -- I
25 think like in the middle of my trial I'll talked to her and she

1 said he said he will call me. I said okay and that was really
2 the end it.

3 Q So he failed to call Monday Bishop as a witness?

4 A Yes, sir.

5 Q He failed to obtain information from Lawanda Val Hudson
6 and call her as witness?

7 A Yes, sir.

8 Q Okay. And did Mr. Snow ever -- did Mr. Snow ever
9 interview Mr. Reed Allen?

10 A Not to my knowledge. As far as my investigation go
11 after him I didn't see that he investigated anything because he
12 said from the looks of Reed Allen he's corroborating all my
13 co-defendant testimony when in my view that they didn't. I don't
14 believe Reed testimony corroborated any evidence because of the
15 physical evidence and the eye-witnesses; Miss Warner -- Ann
16 Warner and Qiauana Efrid. Those were two woman in the
17 neighborhood or an apartment complex, I believe. They
18 exonerated me and the inconsistencies from the statements I
19 think exonerated me. So, you know, I really believe that I had
20 a better chance.

21 Q So just to be clear, Reed Allen was someone that
22 testified for the State against you and put you there at the
23 scene and provided testimony about the firearm that was used and
24 exchanging that with you?

25 A Yes.

1 Q And his testimony, part of it was about this exchange
2 of the weapon taking place back at the residence with Miss
3 Monday Bishop and Miss Val Hudson being there?

4 A Correct.

5 Q Okay. And that's who Reed Allen was. Go ahead.

6 A And the plea agreement I had noted as an exhibit that
7 Mr Snow didn't believe that I had a chance for acquittal. He
8 stated that in his plea agreement. So when I looked at that I
9 was like, you know, I was blown away. I say wow. This is case
10 where there's no physical evidence. I have all contradiction
11 evidence. All contradiction statements. I have co-defendant
12 saying I got a gun out of a trunk. I have a co-defendant saying
13 I never had a gun. I had a co-defendant saying that I had a gun
14 inside of the car. So, you know, all of these inconsistencies
15 along with the physical evidence it through me off. So you know
16 -- you know, it didn't sit right as far as defense strategy.

17 Q Okay. Mr. Stewart I'm going to go into some more kind
18 of details about what was said at the trial and some of the
19 things that your attorney did or failed to do.

20 Do you recall Mr. Snow talking to you about why he failed
21 to object to leading question by the solicitor, Dontavious Mack,
22 "Ben didn't want to go in. He gave you the gun." Page 188,
23 line 12, and "He gave you the gun. He knew you were robbing the
24 BP station" page 188, line 18. Did Mr. Snow ever kind of
25 justify to you why he failed to object to that?

1 A No, he did not.

2 Q Okay. That was followed by, did he discuss with you
3 his failure to object to hearsay by Davorious Mack saying, "He
4 told me to come to girlfriend's house. Take Terrell Addison
5 home." Page 333, line 21-23, and Terrell Addison saying, Let's
6 stick." Page 338, line 21. Did you have a conversation with Mr.
7 Snow about that?

8 A No.

9 Q Okay. Did Mr. Snow ever talk to you about the reason
10 for his failure to object to Reed Allen's hearsay statement, "
11 Ben Stewart told me to put gun up" page 515, line 12-18. Did he
12 discuss that with you?

13 A No.

14 Q Did Mr. Snow talk to you about his failure to object to
15 Reed Allen's hearsay, "I heard something about Donte being
16 shot." Page 529, line 4?

17 A No, he did.

18 A Okay. Did Mr. Snow talk to you about his failure to
19 object to Reed Allen's hearsay statement, "Ben Stewart told me
20 to put the gun up", page 532, line 14?

21 A No.

22 Q Did Mr. Snow talked to you about why he failed to
23 object to hearsay following question, "If someone is asking
24 Terrell about putting his gun up, did Stewart or Mack ask him."
25 Followed by the response, "It could have been." Page 535, 2,23?

1 A No.

2 Q Okay. Did attorney Snow explain why he failed to
3 object to testimony from Lt. Rudick regarding suspected "straw
4 and crack cocaine" in car, page 650, lines 17-21?

5 A No.

6 Q Okay. Discuss -- do you feel that Mr. Snow fail to
7 make a sufficient pre-trial motion to sever the trials between
8 you and your co-defendants and especially considering the
9 testimony of Addison, "Ben gave the gun to Dontavious" page 942,
10 line 16-19. Did you have a conversation or did he justify as to
11 why did not make a sufficient pre-trial motion to sever the
12 cases?

13 A I remember my pretrial motion regarding severance but I
14 don't believe he was my attorney. I think Mr. Matthews was my
15 attorney.

16 Q Did he raise it at all?

17 A Not to my knowledge. I don't know.

18 Q Okay. And did Mr. Snow discuss with you his reasons
19 for his failure to object to jury charge for murder that
20 included the instruction that inferred malice "May arise when
21 the deed is done with a deadly weapon," one 1160, line 25. Page
22 1161, line one?

23 A No, he didn't.

24 Q Okay. And did he discuss with you why the court failed
25 to charge constructive possession regarding accomplice liability

1 or hand of one, hand of all for the charge of possession of a
2 firearm during the commission of a violent crime, page 1203,
3 line 22-25, following a jury question regarding this on page
4 1201-1202?

5 A No, he didn't.

6 Q Okay. And did you receive any information from
7 appellant counsel, Savitz or Carter, regarding failure to appeal
8 issues regarding improper jury charges?

9 A No, I didn't.

10 Q Okay.

11 MR. JOHNSON: Judge, I'm moving to the second
12 amendment application that I filed. That's clocked in
13 November 29th of 2022.

14 A Mr. Ola, can I ask something regarding Reed Allen?

15 MR. JOHNSON: Judge?

16 THE COURT: You consult with him.

17 MR. JOHNSON: Judge, I'm just going to approach
18 him.

19 THE COURT: Sure.

20 Q Mr. Stewart, on the second amended application as we
21 proceed to that. Your time served credit, time served issue, do
22 you feel -- or did Mr. Snow discuss with you why he failed to
23 argue to the court that you should receive credit from January
24 27, 2007 when your original arrest date in Pennsylvania opposed
25 to the dates that are listed now on the SCDC website showing you

1 were getting credit on December 27, 2009 on the charges, accept
2 for the murder -- accessory murder ending 2526 where your start
3 date is listed as November 23, 2015.

4 Did Mr. Snow discuss with you why he did not argue for you
5 to receive more time served credit dating back to that
6 Pennsylvania arrest?

7 A No, he never objected to it.

8 Q Okay. And did Mr. Snow ever discuss with you or
9 justify his failure to properly argue or challenge your removal
10 to South Carolina under the agreement on detainers under section
11 South Carolina Code 17-11-10 based on mental health history?

12 A No, he actually abandoned the claim I had filed pro se.

13 Q Okay. Are there any details of the evidence that you
14 you feel Mr. Snow failed to prepare for or discuss with you?

15 A Yes. In pretrial prior to going to trial I had filed
16 emergency writ habeas corpus with the circuit and I had raised
17 about five grounds regarding a violation of the interstate
18 agreement on detainers. Specifically, article 6(B). It states,
19 no provision of this agreement, and no remedy made available by
20 this agreement, shall apply to any person that is adjudged to
21 be mentally ill.

22 Prior to trial a month -- no, October. October I had
23 pretrial motion where I was relieving appointed counsel and I
24 had told him that I was receiving social security disability for
25 mental illness and he had alerted the solicitor, the solicitor's

1 office and in open court.

2 I have the transcript where Mr. Thompson had explained
3 that it will behoove the court if they had jurisdiction. It
4 would behoove the court if I could show adequate information
5 that I was on social security that they wouldn't know if they
6 had jurisdiction to try my case here in South Carolina. I have
7 the transcript right here. It was a Union County hearing. I
8 had ordered those transcripts in pretrial. So I had filed the
9 petition in pretrial and we had that hearing moments before
10 trial. Mr. Snow didn't raise that claim. He raised that I
11 should have received a pre-transfer hearing in Pennsylvania. I
12 don't why he done that because I actually had a pre-transfer
13 hearing in Pennsylvania. And I had actually refused to
14 voluntary waiver to extradition to South Carolina. What had
15 actually happened was they waited eight years for me to get
16 sentenced because I had plead guilty. They waited and then they
17 requested again from me from the Department of Corrections. And
18 then they requested from me again I had told them no, but she
19 said you can sign write here where it says you want appointed
20 counsel or you want to hire an attorney. And I had filled in
21 the box and said I wanted an attorney named Mr. Scoot and they
22 had used that as me executing IAD transfer.

23 However, once I got down here I had had filed my writ and
24 alerted the court and Mr. Snow just didn't do it.

25 Q Okay. And the final -- just to be accurate though, do

1 you remember having an evaluation and receiving a copy of the
2 report finding you competent?

3 A Yes, I had got an evaluation.

4 Q Okay.

5 A But regarding the act it doesn't -- it don't say that
6 whether or not the person is competent to go to trial. Whether
7 or not the person is mentally ill. It says mentally ill, all --
8 all acts of congress or statutes must be liberally construed not
9 to -- I mean, to effectuate it's purpose. That's Article 9
10 under IAD.

11 Also under Dwyer verses Sims it says that any party in
12 conjunction -- independently in its act they must adhere to --
13 it says, any party in conjunction or in agreement with the party
14 state they must not alter or amend the intended meaning. So the
15 State had used the position to find me competent and disregard
16 the fact that I was actually under social security disability.
17 I had provided my actual psychiatric evaluation from the
18 Pennsylvania bureau of disability determination and I got that
19 evaluation here from the doctor.

20 My sister had actually talked to him a few months ago,
21 about a nine, ten months ago. I believe I talked to you about
22 the doctor and this is the doctor that okayed me for social
23 security disability.

24 What had happened was in Pennsylvania when South Carolina
25 had originally asked for me in that first request it was denied

1 because social security had actually came to the hearing and
2 told them that they couldn't have extradition to bring me down
3 here and I didn't know that until I had looked up the docket
4 entries in Pennsylvania and I had seen that I was illegally
5 brought to South Carolina. I didn't find that out until
6 probably about three or four years ago. But I have all the
7 information here available. You know, I have my psychiatric
8 evaluation from the Pennsylvania Board of Disability. It shows
9 that I'm getting on disability. It showed that I was okay to
10 get on disability and it shows that it is a violation of IAD
11 article 6 section B.

12 Q Okay. Mr. Stewart thank you I appreciate it.

13 A One more thing.

14 Q Go ahead.

15 A I had looked into the record. I had copy -- I had
16 received copies from my entire general sessions file just to see
17 if he had actually amended the PCR. You know, wondering why he
18 didn't raise the claims that I wanted raised and I have took
19 copies of the entire file. I got my receipt right here. It
20 says that I have got copies from my entire file from my general
21 sessions and I wanted to see, you know, they didn't think it was
22 that bad, but I had actually saw that didn't even amend the
23 petition. So I was wondering how can he raise these claims if
24 my petition wasn't even amended and that through me through a
25 loop. Why would you be able to raise a claim and amend the

1 petition, but you didn't even amend it in court. You didn't
2 even file it with the clerk's office. I got the receipts right
3 here. I got the entire file. I have, you know, I caught him
4 saying he can't say that he tried to amend it.

5 Q Just lastly, I wanted judge, this is one last question
6 about the previous allegation.

7 You had stated in there that there should have been an
8 objection to the judge's statement and I'm referencing page
9 1214. This is lines 16 through 18 and it says -- and I ask
10 them, did they want to start the time some persons arrived at
11 his house that night and you seem to raise that that would be
12 the judge referencing his house implying where Reed Allen was
13 residing. Can you go into what you feel was objectionable about
14 that?

15 A Okay. Yes. What had happened was the jury had asked
16 for a read back -- the jury had asked for a read back of Reed
17 Allen's testimony regarding me coming to the house. When Judge
18 Alford had explained that he was referring to Reed Allen's house
19 or at least that's how it was explained, that he was referring
20 to Reed Allen's house and from that moment that he said that, my
21 own attorney has stated -- and it was misstatement because I was
22 actually at my sister's house. I actually came to my sister's
23 house. I got a right to be at my sister's house.

24 It started from there after Judge Alford had misstated it,
25 you know, mistakenly because he don't got discovery. He's just

1 sitting there listening like everyone else. After he quoted the
2 facts wrong my own attorney got up and stated that I was at
3 Reed's house. I didn't understand that. But, he said that.

4 Q You feel that he was characterizing the evidence
5 stating that it was Reed Allen's home when it was your sister's
6 home?

7 A Yes, sir.

8 Q And you're saying Mr. Snow failed to object to that?

9 A I'm saying he failed to object to that. I'm saying he
10 ineffective for stating that and I'm saying it really prejudiced
11 me once Mr. Thompson got up as well and he -- it was
12 prosecutorial misconduct when he misstated the evidence when he
13 new better. That didn't happen in my case. You know, he done
14 the wrong thing. He misstated the evidence?

15 MR. JOHNSON: Judge, I have no more questions.

16 THE COURT: All right, Mr. Jones, anything.

17 MR. JONES: I have no questions for this witness.

18 THE COURT: Okay. You can step down.

19 MR. JOHNSON: Your Honor, we call Monday Bishop.

20 MONDAY BISHOP, called as a witness, was sworn by
21 the clerk and testified as follows:

22 DIRECT EXAMINATION

23 BY MR. JOHNSON:

24 Q Miss Bishop, how are you related to the applicant, Mr.
25 Stewart?

1 A He is my little brother.

2 Q Miss Bishop, he's your brother?

3 A Yes.

4 Q Okay. And now when this whole thing happened and there
5 was an investigation and then a trial, did Mr. -- did you
6 communicate with Mr. Snow, his attorney, about that night and
7 what evidence or testimony you could provide?

8 A Yes, I did.

9 Q Okay, and what did you tell him?

10 A I told him exactly what happened that night and it's no
11 way that my brother could have been at the scene or whatever and
12 he told me one day during the trial period that whatever if I
13 testified for my brother and did I think Val would be able to
14 testify for him during trial. I told him yes. I contacted Val.
15 She said she will and he never ever called me to come to the
16 stand or anything that week and I kept reaching out to him and
17 he just like brushed it off and I had let my brother know all
18 that too.

19 Q So, did you ever provide a written statement?

20 A A written statement, no, with Mr. Snow?

21 Q Or the police or anybody?

22 A No.

23 Q Okay. Who came to talk to you from law enforcement or
24 solicitor?

25 A The solicitor Thompson. He came to my house one

1 morning. It was early one morning. It's been a long time now.

2 Q Okay.

3 A He questioned me did I think my brother was there and I
4 told him there is no way possible that he could have been there
5 because the night that he called me to open the door for him
6 when I was out. This place that I was at it was like right
7 there on the street on the same block that I live on and that's
8 like half a mile from where I live at and it didn't take me long
9 to get to the house, you know. And it didn't take him long to
10 get there once I got there so it was no way possible.

11 Q And did you have some opinion about whether or not you
12 had seen any transaction with a gun being passed to your
13 brother?

14 A I told him no, because first of all, Donte or Dovorious
15 -- whatever his name -- they weren't first been in the house
16 from the start. So all that was bogus.

17 Q And did you talk about whether or not who did or did
18 not come to your house after they went out?

19 A Yes. Are you talking about did I talk to with Thomas
20 (sic)?

21 Q Well, who did you tell about it, the solicitor or Mr.
22 Snow?

23 A Well, I had spoke -- it's been so long ago. Don't
24 quote me. I don't want to say the wrong thing, but I talked to
25 Snow about it and I told him that they never came to my house.

1 I would have known if they came to my house. I slept on the
2 couch. I stayed in the living room that night, me and Val and
3 Reed. Reed don't live there so I don't know why they even said
4 that did at my house. Reed stay at Lincoln Avenue. Like I said
5 down the spot from where we was that night.

6 Q And did you provide information about whether or not
7 you did or did not give a phone to Reed to talk to your brother?

8 A No, I never gave Reed no phone because first of all,
9 Reed didn't get there until we was about to go home.

10 Q And about whether or not your brother had a key. Had
11 to call you to get in?

12 A I told Val that. I didn't even tell Reed that. He
13 just left out and walked with us.

14 Q Okay. And so you had a pretty strong opinion about
15 whether or not these telephone conversations took place in your
16 house or Reed passed a gun or had a conversation?

17 A They didn't even know each other like that. Reed use
18 to be out there hanging out in the apartments just like
19 everybody else. I do hair and I would have him like -- he'll go
20 pick my son up from the boys and girls club. We were friends.
21 We was cool.

22 Q Well, thank you. And you said you didn't reduce it to
23 writing but you did speak to Mr. Snow about it?

24 A I did. Yes.

25 Q Okay. Thank you.

1 MR. JOHNSON: No more questions Your Honor.

2 THE COURT: Mr. Jones, do you have any questions
3 might have some.

4 THE COURT: Stay seated. Any questions?

5 MR. JONES: Beg the court's indulgence. Just very
6 briefly.

7 CROSS EXAMINATION

8 BY MR. JONES:

9 Q Miss Bishop, I believe you said you slept in the living
10 room?

11 A Yeah, me and Val was in the living room. That's where
12 I fell asleep at that night.

13 Q All right, no further questions.

14 THE COURT: Now you may step down.

15 MR. JOHNSON: Those all the witnesses, judge.

16 THE COURT: All right, we will take a brief break.

17 (WHEREUPON, there was a brief recess.)

18 MR. JONES: Your Honor, I'm planning to call Willy
19 Thomspen first. Let me just arrange a microphone in
20 front of the screen to have a microphone. Whatever
21 will help the court reporter to take it down.

22 There was one document I was hoping to have him
23 identify. I don't know how you prefer me to do that.

24 THE COURT: I think you are not on the screen, but
25 you can hold it up in front of my law clerk's screen

1 in front of the bench.

2 WILLIAM THOMPSON, having been duly sworn by the
3 clerk of court testified as follows:

4 THE COURT: All right, Mr. Jones, your witness.

5 MR. JONES: Thank you, Your Honor.

6 DIRECT EXAMINATION

7 BY MR. JONES:

8 Q Good morning Mr. Thompson.

9 A Good morning.

10 Q Just briefly, can you describe the investigation that
11 you conducted in this case concerning witnesses from the
12 Hartsville area?

13 A Yes. I went once to the Hartsville with one of our

14 Q Sorry. He is breaking up.

15 MR. JONES: Can we will put him on on the phone
16 because he is breaking up.

17 MR. BRACKETT: Willy can you hear me?

18 MR. THOMPSON: Yes.

19 Q All right. Thank you, Mr. Thompson. Do you recall
20 speaking with a Monday Bishop?

21 A Yes, I do.

22 Q All right. When did that conversation take place?

23 A I'm sorry.

24 Q One minute. Can you hear me now Mr. Thompson? Mr.
25 Thompson, can you hear me?

1 A Yes, I can hear you. Thank you.

2 Q All right. Very good. Can you recall the circumstances
3 when you spoke to Monday Bishop?

4 A Yes. As a matter of fact I can. We had started the
5 trial at that point in time. I believe we were at least doing
6 pretrial things. Miss Bishop had come to the court house and we
7 realized she was there. She was someone that we were not able
8 to visit in Hartsville. We did not see her there. So I went to
9 speak with her at that point in time with an investigator and I
10 can't remember exactly which investigator went with me. It may
11 have been Detective Haire with the Rock Hill Police Department.
12 But we spoke to her there at the court house very quickly
13 because we didn't have much time. I took notes
14 contemporaneously with the interview of her at that point in
15 time and she really was unable to provide any detailed
16 information for us.

17 Q One second Mr. Thompson. Mr. Thompson, do you
18 recognize -- do you recognize this document I'm holding up to
19 the camera now?

20 A Yes, I do.

21 Q Would these be the notes of that conversation?

22 A Those are my notes, yes.

23 Q Do you recall the substance of those notes?

24 A Yes, I do.

25 Q One second.

1 MR. JONES: Your Honor, I would like to have this
2 marked as State's Exhibit Number One.

3 THE COURT: All right, come forward and have the
4 court reporter mark it and then go back and ask that
5 question.

6 (WHEREUPON, State's Exhibit One was received for
7 identification.)

8 Q Mr. Thompson, can you describe what she told you at
9 that conversation?

10 A Yes. When I was speaking with Miss Bishop she said she
11 had been sleeping the night that this had occurred. Had been
12 drinking. That Val Hudson was with her. I asked her if Reed
13 was there. If Mr. Reed was there. She said she thinks so but
14 couldn't be completely sure. I asked her what other people were
15 there as far as the other people charged in the case and she
16 said she doesn't know if they came or not. She does not
17 remember the day that Donte was shot, and of that is Mr. Mack,
18 the principle who had shot Ned -- Ned Marshall in this crime.
19 She could not remember that day according to what she was saying
20 at that point in time.

21 She said that Ben Stewart had denied this incident to her.
22 She said she does not hang out with Ben and his friends. That
23 she was too old for that. She no longer would put up with the
24 type of things that they were doing.

25 Q So did you testify that this conversation occurred in

1 the courtroom on the day of trial?

2 A Yes, it would have been either in the courtroom or just
3 outside of the courtroom and it would either been the day of
4 trial or very soon thereafter like the next morning or something
5 like that because we did the some of the pretrial things. So it
6 would have happened within that and, you know, I remember
7 distinctly that it happened when we were starting the trial and
8 I also remember these notes would have been in with all my other
9 notes that were on the pad of when the trial was actually going
10 on. So clearly these notes were taken at the time the trial was
11 happening or beginning.

12 Q All right. Was Mr. Snow present?

13 A I don't believe Mr. Snow was present with my
14 conversation with Monday Bishop.

15 Q But he was present in the courtroom during the trial?

16 A Yes, he was. During that time Mr. Snow relaid to us
17 that he thought he might call Miss Bishop at some point during
18 the trial and of course we did not think that would be an issue
19 because after having talked with her didn't seem like she knew
20 much of anything that would be helpful in the trial. But
21 ultimately Mr. Snow at some point during the trial came to us
22 and said he didn't think Miss Bishop would be helpful to him
23 either so he was not going to call her.

24 Q All right. And did you ever obtain any other
25 statements from Monday Bishop?

1 A No, I did not. That would have been the only time that
2 I spoke with her.

3 Q You don't recall having any other interviews with her?

4 A No.

5 Q Do you recall -- I believe you were listening to her
6 testimony earlier?

7 A Yes.

8 Q Do you recall her saying that you came to her house
9 early in the morning?

10 A Yes, I recall her saying that.

11 Q Does that -- do you recall going to her house?

12 A No, I do not recall ever speaking with her in
13 Hartsville. And again, I was with an investigator. The
14 investigator in those situations would be the one taking the
15 notes. In addition, we would leave our cards with every person
16 that we spoke with that was a lay witness and we clearly did not
17 do that with her. I did speak with her before the trial and
18 there would be no other reason to speak with her if I had
19 already spoken to her.

20 Q So do you recall her saying that Ben didn't do it or
21 that Donte or Davorious never came to her house or any other way
22 refuting any of the testimony?

23 A Well, I know that she had told us that Ben had told her
24 he did not do it. That he denied having done it. But other
25 than that that's the only thing that she really said about Ben

1 other than the fact that she doesn't really hang out with him
2 and his friends and she didn't know if they had come that night
3 or not because she didn't remember the night that Donte was
4 shot.

5 As far as going to her house we did not do that and
6 actually speak with her there. We may have tried to attempt to
7 go to her house and see if she was there, but at the time we
8 were there in Hartsville we did not speak with her.

9 Q All right. Do you recall the issue at the beginning of
10 trial of Mr. Stewart's competency see coming up?

11 A Yes.

12 Q All right. And can you briefly discuss whether he was
13 found competent?

14 A Yes. Clearly he was found competent. There was a
15 report to that effect from the Department of Mental Health. His
16 attorney prior to Mr. Snow had brought up his competency at a
17 hearing that we did. I believe it was Michael Matthews who
18 represented him at that point had mentioned to me. We were
19 actually asking as well that he be evaluated based on what Mr.
20 Matthews had said because it's been my experience if the
21 attorney at any point thinks there should be some competency
22 question it's better to have the test done than wait and
23 especially in this situation where we he had someone coming from
24 out of state who had filed with the interstate compact and asked
25 us to try the case. But at that time in that hearing it was

1 clear that the defendant did not want to be evaluated at that
2 point in time. He was very clear to the court that he did not
3 want to be evaluated and the court at that time, it was Judge
4 Alford said he would leave it up to the next attorney to decide
5 if an evaluation was necessary and ultimately I think Mr. Snow
6 out of an abundance of caution doing his due diligence went
7 ahead and we had one scheduled just to make sure there wouldn't
8 be an issue with that.

9 Q All right. Thank you. You mentioned something about
10 the issue of the interstate agreement on detainers being
11 discussed during that hearing. Can you go into more detail
12 about that?

13 A Yes. We weren't completely over that. I left with the
14 court a number of pieces of paperwork. The agreement itself it
15 was a request by the department for us to try him within 180 day
16 period. That's in that particular document required by that
17 agreement.

18 In addition to that, we received a continuance that day
19 because -- well, for a number of reasons. The defendant
20 switched attorneys that day. We were making sure that we would
21 be able to have accommodated the attorney's schedules both the
22 new attorney and Mr. Swerling. Mr. Swerling I know had a trial
23 that would take up part of the time that we had wanted to
24 schedule it. So we made sure that we covered that that day.
25 And as well I believe the hearing that we did pretrial, I quoted

1 a number of cases that allowed us not just to have the
2 continuance but allowed us to have the defendant there even if
3 there was any defect in the paperwork itself, which I don't
4 believe there was any defect and I think the court found that at
5 the beginning of the trial. But the case law was clear that
6 basically once you had the body there for the trial it didn't
7 really matter how the body came there.

8 So I think that all bases were covered on that aspect of
9 bringing the defendant to be tried as well as the charges that
10 he faced and any issue regarding that. We covered that with
11 case law as well in the transcript at that time too.

12 Q All right. Do you recall the -- well, let me put it
13 this way. Did Mr. Stewart's co-defendants testify at the trial?

14 A Yes, they did. As a matter of fact all of them did.

15 Q And did any of them implicate Mr. Stewart in the
16 commission of the crime?

17 A All of them did and this was a situation to me as a
18 trial attorney who had done this for a long time. I practiced
19 29 years in South Carolina and was with the solicitor's office
20 that entire time. Before this trial it had never happened and
21 since this trial it never happen. And I'm going to guess it
22 will never happen again. In my career the actual shooter in the
23 case Dontavious or Dante as he went by Dante Mack, had already
24 been convicted and sentenced to a life sentence at that point in
25 time. And he also testified as to what happened and we could

1 not offer him anything and we were very clear that we would not
2 offer anything for himself or for his brother. And he said I
3 believe in his testimony that he hoped this would somehow help
4 his brother. But he testified and I thought it was very, very
5 credible. I had never seen this happen before, someone who
6 actually did the shooting to come forward and admit what he had
7 done. In addition to what each other person had done including
8 his brother in the commission of this crime. So I found that
9 very compelling. But in addition to that, Mr. Addison the
10 co-defendant on trial in this case also testified and he also
11 implicated Ben Stewart in the crime itself. So in addition to
12 the other witnesses, Mr. Reed, and the other Mack brother they
13 also testified and showed the guilt of Ben Stewart during that
14 trail. So I felt that at this point we were quite confident
15 that we were going to have have a conviction in this case no
16 matter what, because the evidence at that point I felt was truly
17 overwhelming.

18 Q All right.

19 MR. JONES: Thank you Mr. Thompson. I think that
20 is all the questions I you have for you at this time.

21 MR. THOMSPON: All right.

22 MR. JONES: Your Honor, I would like to introduce
23 this as into evidence as State's Exhibit One.

24 THE DEFENSE: No objection to that. We just ask
25 for a copy of it.

1 THE COURT: Okay. State's Exhibit One will be
2 admitted into evidence and provided to defense
3 counsel.

4 (WHEREUPON, State's Exhibit One was received in
5 evidence.)

6 THE COURT: All right, Mr. Johnson.

7 CROSS EXAMINATION

8 BY MR. JOHNSON:

9 Q Mr. Thompson.

10 A Yes.

11 Q This is Ola Johnson. I was appointed to represent Mr.
12 Stewart on this PCR. Mr. Thompson, I got State's Exhibit Number
13 One that you indicated these were notes that were taken by you
14 in the courtroom talking to Miss Bishop?

15 A Yes, either in the courtroom or right outside I
16 believe.

17 Q Okay. Contrary to her testimony, you're saying you
18 didn't go to her house and talk to her?

19 A No, I did not talk to her at her house.

20 Q Okay. You just testified earlier that this was not
21 done in the presence of Mr. Stewart's attorney?

22 A No. I don't believe it was in front of him. No.

23 Q Okay. And did you give him a copy of these notes
24 detailing Miss Bishop statements?

25 A No.

1 Q Did you communicate the contents of this to his
2 attorney at all?

3 A I don't recall communicating this to the attorney at
4 all. These were -- it's basically she said she didn't know
5 anything and so there was no need for me to tell that to Mr.
6 Stewart who had already told me he was possibly going to call
7 her during that period of time. So I knew he had spoken to her
8 as well.

9 Q Well, it says here in the exhibit, "Sleeping. Had been
10 drinking". Is that to indicate Miss Bishop was she had been
11 drinking?

12 A Yes.

13 Q And then it says Val Hamilton.

14 A Right.

15 Q What is that referencing?

16 A I think she was saying that Val Hamilton was there that
17 night.

18 Q Okay. And says, " Reed there. Thinks so. Doesn't
19 know if they come or not. Does not remember they " -- something
20 shot --

21 A Does not remember Dante shot is what that says.

22 Q Okay. So then it says Ben denies this to her. You're
23 indicating that she indicated to you that Mr. Stewart denied
24 involvement?

25 A Correct.

1 Q And it says, "She does not hang out with Ben and his
2 Friends. She is too old for that." Indicating that she was not
3 around his crowd?

4 A Correct.

5 Q Okay. And so the testimony of Mr. Reed, it says Reed
6 was there, and Reed was that person that talked about the
7 exchange with the pistol?

8 A Right.

9 Q So he testified at trial the exchange at Monday
10 Bishop's house about this conversation with Mr. Stewart and the
11 exchange of the pistol with Mr. Stewart that was the murder
12 weapon, correct?

13 A Correct.

14 Q So the fact that Miss Monday Bishop stated here she
15 does not hang out with Ben and his friends. She was too old for
16 that. She kind of indicated that she was not hanging out with
17 them but Mr. Reed said that she was there. Would this somehow
18 be contrary to his testimony?

19 A No, not at all because she had said she thought Mr.
20 Reed was there, which certainly is something that meshes with
21 what Mr. Reed had said. And, you know, the blanket statement
22 she gave, she really doesn't hang out with his friends, I took
23 that to mean she didn't hang out with the friends, the other
24 friends because I was asking her at that time about the other
25 people who were involved in the case; Terrell Addison, the Mack

1 brothers. That sort of thing. So I did not think that would
2 really be contradictory.

3 Q Okay. So moving on to the discussion of the competency
4 issue. You talked about a mental eval was done to find
5 competence to stand trial, but that would not really be --
6 actually that wouldn't be the same as defining mental illness
7 for purposes of that statute, correct?

8 A Well, I would think it would because really a lot of
9 people have a mental illness. It's really truly in the criminal
10 justice system and the way I've always understood it, are they
11 competent to stand trial. So is the mental illness so severe
12 that they can not assist their attorney and do the things that
13 they need to do under the various tests that we have. So, no, I
14 don't feel that's an issue at all because once someone is found
15 competent -- and quite honestly having talk to the defendant
16 myself with Mr. Snow and having heard him in front of the Judges
17 and even hearing him today it's clear that he does not have any
18 type of mental illness that would prevent him from being able to
19 understand what is going on or to assist in his representation.
20 So I feel that there was really never a question of that other
21 than whatever he had told the attorneys about some prior
22 diagnosis.

23 Q Well, you're lawyer. You're not a doctor, correct?

24 A That is correct.

25 Q Okay. And the statute I was referencing 17-11-10 that

1 talks about mental illness. It doesn't say excluding people who
2 are found competent, correct?

3 A Correct, but I think again, as a lawyer, you have to
4 take that for -- you know, how we deal with it in the court
5 system all the time and that is, is someone competent to stand
6 trial because you can't just say someone has a mental issue and
7 therefore we can never try them because that would be most
8 defendant's I would believe who commit bad crimes often times we
9 know that they often do have mental illness. A lot of people do
10 and never commit a crime at all. So I think that it really
11 comes down to competency to make that determination.

12 Q All right, sir -- let's see. Now, you're the solicitor
13 on this September 17, 2008 hearing regarding the removal of the
14 detainer. Do you have copy of that transcript?

15 A I don't have a copy of it in front of me, no.

16 MR. JONES: Your Honor, we stipulate as to the
17 content of that transcript.

18 A I can may be pull it up if you give me just a second. I
19 think it was sent to me in an email.

20 Q Okay.

21 A But I will be reading it off my be phone so that could
22 problematic. Yes, I see it.

23 Q Okay. I'm reading. I'm looking at page seven.

24 A All right.

25 Q And when go down to page seven. I'm starting at the

1 end of line seven. Page seven, line seven.

2 A Okay.

3 Q I believe it's you speaking. You said because even
4 under this interstate agreement we're required to show that he's
5 not mentally ill. He's competent to stand trial or else this
6 agreement doesn't apply at all and I don't know that we have a
7 jurisdiction to try him on this case if this agreement does not
8 apply. So that's what you said?

9 A Yes.

10 Q Okay.

11 A Yes, again as you can see I'm concentrating on
12 competency even in that statement because that is what we always
13 consider in these cases is the competency. So I equated that
14 with mentally ill.

15 Q Okay.

16 MR. JOHNSON: Judge, I don't think I have any more
17 questions. I just want to make something clear on the
18 record. I received a copy of exhibit one.

19 Judge, can I talk to my client?

20 THE COURT: You may.

21 MR. JOHNSON: Judge, we just wanted to make it
22 clear -- judge, I just want to make it clear that
23 exhibit one I received that today. It does appear to
24 be some notes and the witness testified that he was
25 solicitor who got those at trial or right before trial

1 in the hallway maybe, and I know that my client had
2 included that in the original application that I
3 adopted when I filed my amended application about
4 failure to comply Rule five and Brady. So at this
5 time I would state to the Court that seems like
6 something that we would move forward on with failure
7 to comply with failure to comply with Rule five since
8 that was something that was not provided to Mr. Snow
9 according to the state.

10 THE COURT: Okay. Your record is preserved on
11 that issue.

12 MR. JOHNSON: Yes, sir. I have no more questions,
13 Your Honor.

14 THE COURT: All right. Any redirect?

15 MR. JONES: No redirect, Your Honor.

16 THE COURT: Very well. All right. We're finished
17 with Mr. Thompson. He can listen in through the webex
18 without the benefit of the telephone.

19 MR. JONES: Yes, Your Honor.

20 THE COURT: All right. Call your next witness.

21 MR. JONES: The State calls Kevin Brackett.

22 KEVIN BRACKETT, called as a witness, was sworn by
23 the clerk and testified as follows:

24 DIRECT EXAMINATION

25 BY MR. JONES:

1 Q Good morning, Mr. Brackett.

2 A Good morning.

3 Q Do you recall the factual background of this case?

4 A I do.

5 Q Can you discuss basically what the incident was? What
6 these charges arose out of?

7 A Certainly. My name is Kevin Brackett. I'm the
8 solicitor for the Sixteenth Circuit and I was solicitor at the
9 time this case was tried. I along with my then Deputy Solicitor
10 Willy Thompson who we just heard from tried this case in
11 February of '09 and it pertained to the armed robbery and murder
12 of a convenience store clerk in the City of Rock Hill in October
13 of 2006, Ned Marshall, the clerk at the convenience store BP at
14 the corner of Celanese and India Hook Road was found deceased on
15 the floor at about four o'clock in morning by a newspaper
16 carrier. The police were called. It was whodunit. They had no
17 information at that time.

18 There was some security footage tape. Ultimately what
19 transpired in the investigation they discovered that the
20 perpetrators had come in. Two individuals robbed and shot Mr.
21 Marshall. Left him dying on the floor and Mr. Marshall was able
22 to fire one shot from his 22 striking one of the assailants in
23 the back as he fled the store, and ultimately it was that bullet
24 in the back of what turned out to be Dontavious Mack, the
25 shooter in this case that resulted in the breaking of the case

1 because they had to go to hospital in Hartsville. These people
2 were from Hartsville and they went to the hospital and
3 ultimately the police reached out to Rock Hill and the whole
4 thing unraveled. So that was basically what the case was about.
5 After it all shook out everybody had plead guilty including
6 Dontavious Mack who plead guilty straight away and received a
7 life sentence without parole.

8 I believe in the previous fall prior to trial, sometime in
9 the fall of '08 everybody had plead guilty except Mr. Stewart
10 and individual named Terrell Addison. Mr. Stewart was
11 represented by Mr. Snow and Terrell Addison was represented by
12 Jack Swerling and we proceeded to trial on those cases in
13 February '09.

14 A Can you recall what the involvement of Mr. Stewart in
15 this crime was alleged to be?

16 A Yes. Mr. Stewart had traveled from Hartsville with
17 Dontavious and Davorius Mack and Terrall Addison and had
18 connections with Rock Hill and gotten a ride with them back.
19 What we came to learn is they did been traveling around. They
20 were looking for some place to rob and ultimately they settled
21 on the BP. There were four of them in the car and Mr. Stewart
22 is the one who had the 380 semiautomatic pistol that was used by
23 Dontavious to shoot Ned Marshall. They parked nearby the
24 convenience store and it was ultimately decided that just
25 Dontavious and Terrell Addison would go into the store but Ben

1 Stewart had the 380 and provided the weapon to Dontavious that
2 was used to kill Ned Marshall.

3 Q Thank you. Did you interview any witnesses from the
4 Hartsville specifically Monday Bishop or Valerie Hudson?

5 A No, I did not participate in any of the interviews. I
6 did not go to Hartsville at any point in time. I know an
7 affidavit was executed by Monday Bishop at some point indicating
8 that I had come to her apartment and interviewed her but I never
9 did. I never went to Hartsville and I never spoke to her.

10 Q Did you ever obtain a statement from her either you or
11 law enforcement?

12 A Not to my knowledge. Not a formal written statement.
13 I understand that Mr. Thompson spoke with her. I remember she
14 was present in the courtroom during the trial. She came to
15 court every day and there was some discussion at some point by
16 Mr. Snow that she may or may not be a witness. So at some point
17 I knew she was interviewed but nothing came of it. She had no
18 information based on Mr. Thompson's interview of her and then
19 ultimately Mr. Snow confirmed that she would not provide any
20 information. She had no information that would be useful in
21 defense of Mr. Stewart so she was not called by the defense
22 either.

23 Q Thank you. Can you briefly discuss the nature of the
24 DNA evidence and the fingerprint evidence in this case as it
25 relates to Mr. Stewart?

1 A Yes, ultimately the car that they drove to Rock Hill
2 was discovered and processed by law enforcement to determine
3 whether or not there was any evidence, any forensic evidence
4 that might be use useful in the investigation and ultimate
5 prosecution.

6 Some DNA samples were gathered from the car but they were
7 mixtures and there was no conclusive DNA found in the car that
8 did conclusively link anybody to the car. The results indicated
9 that were a mixture from which for example Davorius Mack could
10 not be excluded. But did not say Davorius Mack's DNA was found,
11 Ben Stewart's DNA was found or Dontavious Mack's DNA was found.
12 There was no conclusive DNA results.

13 There were fingerprints found in the car. I believe Terrell
14 Addison and maybe the Mack's but not Mr. Stewart's. They
15 weren't found in the car.

16 Q All right. You heard Mr. Thompson testify about the
17 testimony of the co-defendants in this case. Would you agree
18 that was ultimately what resulted in the convictions for Mr.
19 Stewart?

20 A Yes, the evidence against Mr. Stewart was overwhelming.
21 Everybody seemed to realize that I think accept Mr. Stewart.
22 Mr. Stewart had left the state shortly after this incident and
23 went up to Philadelphia and he remained at large and we were
24 searching for him. Ultimately we apprehended him. He was
25 apprehended in Pennsylvania after he was arrested for a

1 carjacking up there and Pennsylvania would not send him back to
2 South Carolina until they had disposed of their case. So we had
3 the sort of extended back and fourth. I'm not sure, but I want
4 to say it was like maybe late spring of '08 before Mr. Stewart
5 was returned to South Carolina after he had been sentenced to
6 eight to sixteen years on the carjacking case and then we were
7 able to proceed with the prosecution of the case. Dontavious
8 Mack was determined to be the shooter. He acknowledged that and
9 plead guilty and received a life sentence as I said with no
10 agreement that he come back and testify. There was nothing to
11 that effect. Mr. Mack was one of the most damning witnesses
12 against Mr. Stewart because he had nothing to gain. His
13 testimony as Mr. Thompson said was very compelling because it
14 provided no benefit for him. It wasn't going to change his
15 sentence or his situation whatsoever. But he was very straight
16 forward and put himself right there. Put himself as the
17 shooter. Everybody who testified -- all the other co-defendants
18 including Mr. Addison, his co-defendant, who was on trial with
19 him testified and they all put Mr. Stewart right in the thick of
20 it.

21 There was some mention of a severance motion earlier.
22 There wasn't a Bruton issue so there wouldn't have been a
23 severance. There was no statement from Mr. Addison that we were
24 going to use against Mr. Stewart that he then would not be able
25 to cross examine him on. That wasn't an issue. And in fact Mr.

1 Addison did testify so he was able to cross examine Mr. Addison.
2 So there was no grounds for a severance.

3 Q Were you aware of any exculpatory evidence that was not
4 turned over to Mr. Snow?

5 A No.

6 Q Thank you Solicitor Brackett. I'll turn it over to Mr.
7 Johnson.

8 MR. JOHNSON: Your Honor, just briefly.

9 CROSS EXAMINATION

10 BY MR. JOHNSON:

11 Q Solicitor, did you testify there was no DNA -- are you
12 a former solicitor?

13 A I'm the current solicitor.

14 Q You're the current solicitor. Did you say there was no
15 DNA from the car?

16 A No, I said the DNA that was found was like a mixture
17 which was not conclusively established as the DNA of any of the
18 participants. In other words, there was know blood smear found
19 in the car that a DNA expert wrote a report saying this is the
20 blood of Dontavious Mack one in 42 trillion, you know, chance of
21 mistake. The kind of results that you get where it's clearly
22 this is his blood. There was nothing like that. The best we
23 had as I recall was there was a DNA swab of a doorknob, for
24 example. Each of the interior door handles and the steering
25 wheel and maybe the shifter and sometimes they do the mirror,

1 but as I recall all of them said that it was like a mixture of
2 people and Davorius Mack could not be excluded.

3 Q Solicitor, when you said on your report where it says
4 no conclusion can be made regarding the inclusion or exclusion
5 of the individuals, would that be considered a match in your
6 interpretation of it?

7 A No, it just says they can't exclude somebody. They
8 can't say that it wasn't them which sometimes DNA can do that.
9 DNA can sometimes say it is definitely this person and sometimes
10 it can say it is definitely not this person. What they did say
11 as I recall was, is that they couldn't exclude somebody. Which
12 is really not a match and not helpful in saying whether somebody
13 was in the car which was the point that was being raised is
14 that, you know, the fact that Mr. Stewart's DNA was not found in
15 the car is not conclusive on the issue of if he was ever in the
16 car because you can be in a car and not leave DNA.

17 Q To be clear solicitor, did you guys have any specific
18 information about where all the co-defendants were seated in the
19 car?

20 A I don't recall that we did, but I can't say for sure.

21 Q And you have no solid DNA evidence linking my client to
22 interior of that car?

23 A We had no solid DNA evidence linking anybody to the
24 interior of that car and that was my point in closing.

25 MR. JOHNSON: No other questions.

1 THE COURT: Any redirect?

2 MR. JONES: No redirect, Your Honor.

3 THE COURT: You may step down.

4 MR. JONES: Your Honor, the State would call Ken
5 Snow.

6 THE COURT: Mr. Ken Snow come forward and be
7 sworn.

8 MR. STEWART: May I object sir.

9 THE COURT: Mr. Johnson.

10 MR. JOHNSON: Your Honor, I'm not sure what my
11 client is doing. He seems to be wanting to object to
12 something.

13 THE COURT: Well, place Mr. Snow under oath and I
14 guess will have a talk with Mr. Stewart.

15 KENNETH SNOW, called as a witness, was sworn by
16 the clerk and testified as follows:

17 THE COURT: All right, Mr. Stewart.

18 MR. STEWART: Judge, I would like to object to Mr.
19 Brackett's testimony regarding mixtures, the mixtures
20 of the DNA in regards to State versus Ford. I believe
21 it's a 1990 case. It spoke about how mixtures of DNA
22 are positive and he misstated the record again like
23 his closing statement when he was under the false
24 impression that just because someone's DNA is mixed
25 with someone else's DNA is not a positive match. But

1 in any event, it actually is a positive match when
2 someone else's DNA is combined.

3 THE COURT: I understand your statement and I
4 understand his as well. The DNA in that car wasn't
5 very helpful in doing anything in this case as I
6 understood it. It didn't say anybody can be
7 conclusively be seated in that car. It said nothing.

8 MR. STEWART: What it actually said was that no
9 conclusion could be made on excluding.

10 THE COURT: Or including them. It goes both ways.

11 MR. STEWART: Right, but it was an item or two --
12 I think one or two items that they conclusively proved
13 that it was I believe Donte Mack.

14 THE COURT: And Donte testified in your trial.

15 MR. STEWART: Yes, sir.

16 THE COURT: So I don't understand why you're
17 focused on the DNA issue. It seems to be nonissue.

18 MR. STEWART: Okay. What I'm saying is in closing
19 they had used the same inclusion and exclusion
20 scenario and said just because they have inclusion and
21 exclusion it doesn't mean that I wasn't there because
22 nothing was shown of mine. See what I'm saying?

23 THE COURT: I don't see what your saying.

24 MR. STEWART: Okay.

25 THE COURT: They didn't use DNA evidence to put

1 you in the car or to not put you in the car.

2 MR. STEWART: They actually did, sir.

3 THE COURT: No, they didn't. They couldn't have.

4 MR. STEWART: I know, that's my standpoint today,
5 sir.

6 THE COURT: They didn't need DNA. The other four
7 guys in the car said you were in the car. All four of
8 them.

9 MR. STEWART: They said I was in the car on all
10 four different versions though.

11 THE COURT: All right. I got your objection.
12 That's one of your application points. So it's in
13 here. I'm looking for facts at trial not what you
14 arguing was semantical. How it was said and how it's
15 said and how you hear it, the tone of voice and what's
16 cast out there. I think you're hung up on what you
17 heard as opposed to what was said. It was a general
18 statement.

19 MR. STEWART: No, I'm actually looking at it
20 scientifically.

21 THE COURT: I got your objection. You need to be
22 seated. We need to move on.

23 MR. JONES: Thank you, Your Honor.

24 DIRECT EXAMINATION

25 BY MR. JONES:

1 Q Thank you Mr. Snow. How long have you been practicing
2 law?

3 A Now probably about 23, 24 years.

4 Q And about what proportion of that has been criminal
5 law?

6 A Ninety-nine percent.

7 Q All right. Do you recall this case?

8 A Very well.

9 Q Do you recall how you began representing Mr. Stewart?

10 A Yes, I do.

11 Q All right. Could you discuss that briefly for the
12 court.

13 A My recollection that I got a call from the court, from
14 the clerk or even the judge saying they needed a lawyer to
15 represent young man who was charged with murder and the trial
16 was coming up pretty shortly. It was clear that there would not
17 be a continuance in the matter but I had about -- I think about
18 two months maybe to get prepared for the case. I recall at that
19 time I wasn't as busy and at that time I was also single so
20 money wasn't the issue. I could close down my practice somewhat
21 and devote my time to pretty much primarily that case.

22 Q All right. And in preparation for that case did you
23 ever have a chance to speak to Monday Bishop?

24 A Yes, I spoke with Miss Bishop my recollection a number
25 of times. Back at that time we had a good relationship. I

1 thought we communicated well.

2 Q Did she ever give you any exculpatory information?

3 A If she had I would have certainly put her on the stand
4 if I thought it was helpful to the case. My recollection it
5 either wasn't helpful or either it was going to be perjury. I
6 don't recall there was anything that was ethical that she could
7 have provided that would have been helpful to her brother's
8 case.

9 Q Did you ever interview Val Hudson?

10 A I don't recall interviewing Val Hudson. I do recall
11 sending an investigator or someone to serve a subpoena on Miss
12 Hudson. I don't recall if she avoided the subpoena, but I don't
13 recall her being here.

14 Q And Monday Bishop was present at the trial?

15 A She was here.

16 Q And Val Hudson was not?

17 A Was not.

18 Q Did you have a chance to speak to Monday Bishop again
19 during the trial at any point?

20 A Oh, very much. I spoke with her many times before
21 court. In fact one of the main reasons I think I engaged in
22 conversation with her because the State had offered I thought a
23 good plea and I spoke with her and after I spoke with her
24 brother and I asked her to please, please talk with your
25 brother. Try to get him to take this plea. It's a horrible

1 case and she just said no, it's his choice.

2 In fact right before the jury was impaneled I asked --
3 looked at my client, talk to her and I looked at her and she
4 look right across. I could see like it was yesterday. She
5 looked and said it's his choice. That was her mouth.

6 Q Why did you feel that this case was going to be a tough
7 case?

8 A Well, because he -- he relied on the DNA. He talked
9 about DNA quite a bit and the lack of DNA and I told him that
10 there are witnesses lined up that were going to put him there
11 including potentially I think Mr. Addison who was going to be
12 tried at the time. I can recall that he believed that Mr.
13 Addison was not going to put him in the car. But my
14 recollection is Mr. Addison's defense was duress and I explained
15 to my client that Mr. Addison was going to likely going to have
16 to tell the truth about everything but if he lied about that
17 then the jury would certainly not believe he was under any
18 duress.

19 Mr. Swerling is a good lawyer and he's going to ask that
20 question whether you were there and so -- in fact even in the
21 back when they were locked up before the trial started Mr.
22 Stewart yelled. They were kind of chuckling about it and asked
23 Mr. Addison if he was going to have his back and Mr. Addison
24 responded --

25 MR. STEWART: Object to that. Object to that.

1 That's hearsay. He's lying.

2 THE COURT: All right. I'll have some order in
3 here. If your going to act up Mr. Stewart -- you can
4 talk to your lawyer. You can write him a note. He
5 will have an opportunity to cross examine that
6 witness.

7 MR. STEWART: All right.

8 THE COURT: But you need to quiet down and speak
9 to him in a more quieter tone.

10 MR. JOHNSON: Your Honor, I would object at this
11 point in time to hear say testimony.

12 MR. JONES: This is not offered for the truth of
13 matter.

14 THE COURT: I understand. Overruled. He can
15 answer the question.

16 A We were -- this was just before the trial started. The
17 reason I practice law today is because I wanted to help young
18 man out. I tried to get Mr. Stewart to consider the plea and he
19 said no. Mr. Addison has my back he will not say I was in the
20 car and I said you're making a mistake. Don't put your lot with
21 his. And he yelled -- I can't remember the exact words -- to
22 Mr. Addison you have my back and Mr. Addison yelled back, I got
23 your back. Kind of chuckled about it. And I he left shaking my
24 head and shaking my head and --

25 Q And ultimately what was Mr. Addison's testimony at

1 trial?

2 A Well, I remember this -- something like this. The
3 imagine that came from Hartsville. They came or they drove
4 around and I think they may have stopped at one other place and
5 robbed that place. But I remember his testimony that they got
6 to this particular convenience store and he had testified -- in
7 fact at that point he had testified all the way about them
8 coming from Hartsville and riding around and no mention of my
9 client and in fact I was like, wow, he's not going to mention.
10 Maybe my client is right, he's not going mention him. And then
11 when they got to the store, before they went in and attempted to
12 rob the store he continued to talk about going into the store
13 with the other co-defendant and then I believe Mr. Swerling
14 said, his attorney said, what happened before you went into the
15 store. And so, that's when Ben gave me the gun and I recall my
16 client kind of dropped his head.

17 Q So would you characterize the DNA and fingerprint
18 evidence against your client as either nonexistent or not
19 important to the case?

20 A It was an nonissue and in fact I certainly may have
21 tried to make it out as an issue but it was nonissue when it
22 came down to everything else because we had to deal with four
23 other witnesses that put him there. That talked about his
24 involvement and I tried to explain that to my client. Tried to
25 explain it to his sister that was something that even though the

1 DNA didn't put him there eyewitness testimony puts him there.

2 Q And one of the State's witnesses I believe was Reed
3 Allen?

4 A Yes.

5 Q Do you recall what Reed Allen said about the
6 involvement of Mr. Stewart?

7 A In summary, I believe Mr. Allen said Mr. Stewart gave
8 him a gun after the situation happened. Gave him the gun and
9 maybe something else and told him to hide it. Something to that
10 effect.

11 Q And had either Monday Bishop or Val Hudson or anyone
12 else given you a reason to attack Mr. Reed's testimony?

13 A If I had gotten any credible information that I thought
14 was helpful I would have called them. Certainly Miss Bishop was
15 here and I don't recall any time where she said, put me on the
16 stand. Put me on the stand. Again, we had good communication.
17 She knew I was fighting for her brother.

18 Q Did you hear the testimony regarding the notes taken by
19 Mr. Thompson on the day of the trial?

20 A I heard that testimony.

21 Q Did anything in those notes strike you as having been
22 -- if you had known about it, you would have thought it was
23 helpful to your case?

24 A No, because I think the notes indicated that she wasn't
25 awake or she was drinking at the time so I don't think it would

1 be helpful.

2 Q All right. Since the trial has any information come --
3 any new information come to light to you regarding something that
4 may have been withheld by the solicitor or by law enforcement
5 regarding your client's guilt?

6 A No, not at all. We had -- you know, I respect those
7 prosecutors. We fight and they know I was on the other side,
8 but they were professional and we had a professional
9 relationship. They're doing their job and I was doing mine. I
10 think they respected I was fighting for my client.

11 Q Did you see any grounds to object to any of the
12 solicitor's statements about the DNA evidence?

13 A At that time, no. I mean, I don't recall anything I
14 could have objected to and maybe so, this is 10, 12 years later.
15 I'm probably more a seasoned lawyer now. Perhaps I would have
16 objected, but certainly nothing that would have effected the
17 outcome of the case.

18 Q Did you meet with Mr. Stewart to discuss defense
19 strategy and the evidence against him.

20 A A number of times. As I said earlier, I basically
21 closed my practice for at least two months, a month and a half
22 to focus primarily on this case.

23 Q Did you have any concerns about Mr. Stewart's
24 competency?

25 A Not at all. Mr. Stewart is -- even at that time was a

1 very engaging client. Intelligent. He may not be a lawyer, but
2 he's an intelligent young man. We had a good relationship. We
3 communicated. He told me what he thought. I told him I
4 disagree. I tried to provide strategy for him. I tried to
5 point out the things that I thought was going to effect his
6 case. But at no time did I feel that he did not understand me.
7 He's a very bright young man.

8 Q Did you see any grounds to request a severance of Mr.
9 Stewart's trial from the trial of his co-defendant, Terrell
10 Addison?

11 A No, I don't recall at that time whether there was any
12 grounds. Still today in fact. What I do recall is that Mr.
13 Stewart again indicated that Mr. Addison was going to help him.
14 So why would I sever the case if he, my client, is gung ho that
15 the co-defendant is going to help him. Not hurt him.

16 MR. JONES: Beg the Court's indulgence.

17 Q Mr. Snow, do you recall the dates or the month this
18 case was tried?

19 A I believe it was February.

20 Q Of 2009?

21 A 2009.

22 Q All right. At that time did you know of any law
23 regarding the inferred malice jury instruction for the use of a
24 deadly weapon?

25 A No, I didn't.

1 Q Did you -- never mind. I think that is all questions I
2 have for you Mr. Snow. Thank you.

3 THE COURT: All right Mr. Johnson.

4 MR. JOHNSON: Thank you, Your Honor.

5 CROSS EXAMINATION

6 BY MR. JOHNSON:

7 Q Mr. Snow, I just wanted to touch back on something you
8 said. Did you testify that Terrell Addison said when asked,
9 that Mr. Stewart gave him a gun?

10 A Something to that effect. I don't know exactly what he
11 said but he certainly indicated that Mr. Stewart had the gun and
12 gave someone a weapon to go into the store.

13 Q Attorney Snow, I got the transcript here and I don't
14 want to -- I'm not trying to confuse or trick anybody, but it
15 doesn't it appear to be in transcript. Is it possible that was
16 not said?

17 A Perhaps not that way, but he indicated that Mr. Stewart
18 was there.

19 Q He said he was there?

20 A I don't remember the exact words, but it was clear that
21 he indicated that Mr. Stewart was there.

22 Q Okay, and just to move on. The discussion with -- all
23 right. Attorney Snow, I just wanted to touch briefly on some of
24 these points we made. Do you feel during your directed verdict
25 motion was that limited to one of the charges or do you feel

1 like you touched upon all the charges when you made that motion?

2 A I don't recall. It's been so long ago.

3 Q About the investigation of the case, did you hire an
4 investigator to work on the case?

5 A I did not hire an investigator. I did not feel there
6 was any need to hire an investigator since I didn't think there
7 was anybody else to interview until later on in the case. I
8 think that's when we had one other interview. One other person
9 that we may have thought was helpful, but other than that there
10 was no other individual need or I felt no need to hire an
11 investigator.

12 Q Did you inquire if Reed Allen would be willing to talk
13 to you?

14 A I don't recall whether I inquired or not. I know Mr.
15 Allen was also being represented by counsel at the time.

16 Q Okay. Did you recall in your closing argument stating
17 that the State could have cleared this up if they had called Val
18 Hudson or Monday Bishop? Do you remember saying that in your
19 closing?

20 A I may have probably trying to make an argument to do
21 the best I could at the time because we were deeply in trouble.

22 Q Did those two witnesses give you any statements that
23 were helpful to the defense?

24 A I'm sorry.

25 Q Val Hudson or Miss Monday Bishop, did they give you

1 information that was helpful to the defense?

2 A No.

3 Q But you didn't sit down with them and go into detail
4 and ask about the case, is that right?

5 A Well, I spoke with Miss Bishop a number of times. So
6 she certainly had the opportunity to tell me anything about her
7 brother that I thought was credible. I don't...

8 Q Okay. And you're saying this exhibit one that were the
9 notes provided today, as notes from the solicitor with the
10 interview with Miss Bishop, that was something that was never
11 provided to you?

12 A I can't say that. I don't recall one way or the other.

13 Q You don't have a copy with you?

14 A I don't have a copy with me, no.

15 Q And do you recall the closing argument from the
16 solicitor about DNA? Do you feel like they misstated the
17 evidence in the presence of one subject or absence of a subject
18 based on the DNA?

19 A I honestly don't recall that.

20 Q The trial strategy, did you get into a discussion with
21 Mr. Stewart at all to discuss a defense strategy?

22 A Of course.

23 Q What was that?

24 A Well, as I recall, pretty much we talked about the lack
25 of the DNA. That was probably -- even though the State had

1 other evidence, that's probably the strongest thing we had
2 because his department DNA was not in the car. His fingerprints
3 were not in the car. I think there were even cigarettes that
4 were found in the car that did not have his DNA. So, I tried to
5 focus on lack of the DNA as much as I could, but it was hard to
6 obviously overcome four witnesses that said he was there -- or
7 three witnesses clearly said he was there and one witness said
8 he gave him the gun afterwards.

9 Q Kind of into the details of the trial. Do you recall a
10 statement or do you remember making the determination why you
11 failed to object to a leading question by the solicitor to
12 Dontavius Mack, saying Ben didn't want to go in. He gave you
13 the gun. Do you recall why you did not object to that as a
14 leading question?

15 A I don't recall. I don't know if I thought that was a
16 leading question at the time, but I don't recall the context of
17 the other questions around that. That would have been helpful.

18 Q Or the statement he gave you the gun. He knew you were
19 robbing the BP station, do you recall that?

20 A I don't recall that necessarily.

21 Q Okay. Do you recall failing to object to hearsay by
22 Davorius Mack saying he told me to come to girlfriends house.
23 Take Terrall Addison home or Terrall Addison saying let's stick,
24 do you remember that?

25 A I don't recall that.

1 Q Do you remember failing to object to Reed Allen's
2 hearsay statement, "Ben Stewart told me to put the gun up"?

3 A I don't recall that.

4 Q And do you recall failing to object to Reed Allen's
5 hearsay, I heard something about Donte being shot?

6 A I don't recall. It has been a while and certainly I
7 may have. Yeah, it's been a long time. I don't recall any of
8 those questions specifically.

9 Q Okay. Do you recall failing to object to Reed Allen's
10 hearsay statement, Ben Stewart told me to put the gun up?

11 A I don't recall that.

12 Q Do you recall failing to object to hearsay following
13 question, if someone is, "Asking Terrell about putting the gun
14 up. Did Stewart or Mack ask him," followed by response, "It
15 could have been." Do you recall failing to object to that or
16 why you failed to object as hearsay?

17 A I don't recall. I will say this. We had a week of
18 trial. During the entire week there were a lot of questions
19 that were asked and certainly I don't know of any trial lawyer
20 that can say that they've never missed an objection. What I
21 will say though, I don't know of anything that I may have not
22 done effected the outcome of the case. I don't believe anything
23 I've done or any mistake I may have made, if you deemed it of
24 missing an objection, I don't believe it effected the outcome of
25 the case. I believe what effected the outcome of the case is

1 the State had a very strong case. The State had four witnesses
2 that clearly implicated Mr. Stewart and this was all talked
3 about with Mr. Stewart up until the very minute the jury was
4 impaneled.

5 Q Okay. Do you recall failing to object to testimony
6 from a Lieutenant Brudick (phonetics) regarding "Suspected straw
7 and crack cocaine in the car." I got the transcript if you want
8 to Reed it?

9 A I don't recall. I don't recall it. I would imagine
10 Mr. Swerling didn't object to it either. So there were two
11 lawyers and I don't know even if that was even directed towards
12 my client. Because keep in mind as to that, the drugs found in
13 the car, my client's position was he was not in the car. So I
14 don't think -- I probably did not even think about objecting to
15 something that was irrelevant to our defense. Remember my client
16 was not in the car according to our defense.

17 Q Did you fail to make a pretrial motion or do you recall
18 failing to renew a motion to sever the cases, to have them tried
19 separately?

20 A I don't recall. I wouldn't say I failed to do so. I
21 can tell you that again Mr. Addison -- Mr. Stewart thought Mr.
22 Addison would help him. So I thought that contradicted what he
23 wanted. He wanted Mr. Addison to testify that he wasn't there.
24 Wasn't in the car. Wasn't involved.

25 Q All right. And the charge was given about murder,

1 inferred malice with the use of a deadly weapon, but your
2 understanding of the law at that time was that law had not come
3 down yet about banning that charge about inferred malice?

4 A Yeah, that was not the law at that time.

5 Q Okay. Do you recall the Court failing to charge
6 constructive possession regarding accomplice liability under
7 hand of one, hand of all for the possession of a firearm and a
8 jury question coming back about that? Do you remember that
9 discussion?

10 A I don't remember that.

11 Q And do you remember the issue of time served? Did you
12 not argue or bring up the issue -- the potential credit dating
13 back to Mr. Stewart's Pennsylvania arrest under that statute
14 17-11-10 regarding his mental health history and that you did
15 not challenge them going forward with extradition and putting
16 them on trial based on that statute having an exception for
17 those that are mentally ill. Did you not pursue that?

18 A I don't recall that.

19 Q You never made that motion?

20 A Not that I recall. I don't recall any -- I don't
21 recall again a whole lot of conversation about something that I
22 took -- that I thought was immaterial to his trial. I remember
23 things that I thought were material, but I don't remember that.

24 Q Well, do you remember he was evaluated?

25 A I -- my recollection was refreshed as I prepared -- as

1 I prepared for this case. Yes, this hearing. I don't believe I
2 was the lawyer involved with the -- I don't recall whether -- I
3 remember some discussion of that and I may have requested his
4 evaluation out of an abundance of caution.

5 Q But you didn't renew the motion possibly challenging
6 his removal and being placed on trial if it was handled
7 previously?

8 A I don't recall renewing the motion. No.

9 Q Okay. You made no pretrial motion to dismiss or amend
10 the claim based on that? Based on the history of mental illness
11 and that statute?

12 A I don't recall. I don't believe I did. I don't
13 recall.

14 Q You don't recall. Okay. How did you raise that claim
15 during the proceedings?

16 A I'm sorry.

17 Q Did you raise it at all?

18 A I don't recall.

19 Q Okay. Mr. Snow, do you recall Mr. Stewart filing a
20 petition for emergency writ of habeas prior to trial?

21 A I don't recall that.

22 Q Okay, but did you -- and so you don't recall doing
23 anything to amend or add to that filing?

24 A I don't recall the motion.

25 MR. JOHNSON: Okay. Thank you. No more questions

1 Your Honor.

2 THE COURT: Any redirect?

3 MR. JONES: Just very briefly.

4 REDIRECT EXAMINATION

5 BY MR. JONES:

6 Q Mr. Snow, regarding the directed verdict issue, do you
7 recall whether Mr. Stewart was eventually acquitted of murder and
8 kidnapping as a principal?

9 A No. Well, he was not acquitted. He was not -- I don't
10 believe he was convicted as a principal.

11 Q So, regarding his remaining charges as to the accessory
12 before the fact and accessory after the fact, did you believe
13 that there was any evidence when viewed in the light most
14 favorable to the State that would support a conviction?

15 A I believe it was substantial evidence.

16 Q So do you believe that making a directed verdict motion
17 would have changed outcome?

18 A I don't believe it would have changed outcome.

19 Q All right. That's all I have thank you.

20 THE COURT: All right, you may step down.

21 MR. SNOW: May I be excused, Your Honor?

22 THE COURT: Suits me.

23 MR. JOHNSON: Judge, my client is trying to make a
24 statement to the Court I believe.

25 THE COURT: All right. Is that all the witnesses

1 by the State?

2 MR. JONES: Your Honor, the State rests and if you
3 want to have closing statements then that is fine with
4 me.

5 THE COURT: The State has presented it's three
6 witnesses. Now Mr. Johnson, Mr. Stewart want to make
7 a statement he is welcome to do it.

8 MR. STEWART: Your Honor, I actually want to talk
9 about -- what I actually wanted to shed light on was I
10 didn't get all my questions up that I wanted to speak
11 to Mr. Snow about regarding my representation with my
12 pretrial motion. I said didn't actually get a chance
13 to get all of my claims out that I wanted to speak to
14 Mr. --

15 THE COURT: Your lawyer went over your original
16 application, your amended application and your second
17 amended application as far as I understand it.

18 MR. STEWART: Yes, but regarding putting the
19 evidence out there, I don't believe that I got
20 everything out there because the testimony that was
21 presented at my trial and the testimony that I'm
22 trying to explain today you know it's hard. It's a
23 hurdle because I have been in PCR for ten years. I've
24 been going back and forth to court for ten years and I
25 had Val available and I even had all my co-defendants

1 besides Addison, the one I went to trial with, willing
2 to come to my PCR hearing on behalf of me. I had Mr.
3 Reed Allen come two or maybe three of my PCR hearings
4 trying to actually tell the truth and during trial he
5 had actually recanted his testimony. He said that he
6 don't even remember if I ever gave him a gun. He
7 don't even remember if I came and got a gun. He said
8 he don't even know if I came to the house. That was a
9 lie. I came to the house and I went to sleep. But he
10 was here numerous times trying to come, you know, and
11 testify, you know, to the truth.

12 I wanted to shed light on Mr. Snow's
13 representation under -- I don't want to start speaking
14 cases and stuff -- but you know, cumulative -- I'm not
15 a lawyer. I don't know if it's cumulative or cuative
16 (sic) effect. You know that I believe that my
17 attorney raised a whole lot of errors and he even just
18 lied to me on the stand and said I was saying that I
19 was thinking that someone will have my back when I
20 actually told him that I was innocent of this crime.
21 Why would I say someone has got my back if I'm
22 innocent of the crime. I don't understand that.
23 Frustrated me he was saying that in court.

24 Other than that, that's really about it. I just
25 wanted to make sure I get all my claims on record. If

1 I'm allowed to elaborate now, could I put them in
2 number order or can I put them in alphabetical order.
3 Issue I wanted to make sure I get all things in your
4 record if possible.

5 THE COURT: But what you are claiming as I
6 understand is the four guys who testified that now
7 since in some fashion said, you know what, what we
8 said in that trial is all a bunch of lies and you
9 really weren't there and you didn't do anything.

10 MR. STEWART: No, they actually had an agreement
11 and I had saw it when I was in trial but he didn't
12 give me a copy of it and I saw the agreement with my
13 own eyes. It looked like one or two pages.

14 THE COURT: An agreement as to what?

15 MR. STEWART: It was some type of agreement from
16 Dante that received a life sentence to his younger
17 brother and I know his younger brother went home about
18 three or four years ago. He was in the same jail. We
19 spoke to each other. He said he was going to file an
20 affidavit on me and then he just never done it.

21 THE COURT: That's -- what you're telling me is
22 all stuff your lawyer didn't know.

23 MR. STEWART: He actually knew because he had the
24 agreement at trial.

25 THE COURT: Regarding Dante, the brother who was

1 convicted and getting life or plead and got life and
2 his little brother?

3 MR. STEWART: His little brother got like 10 or 15
4 years or 20 years or something like that. And I had
5 saw the agreement.

6 THE COURT: Let me ask you this, this wasn't
7 brought up, but I heard Mr. Snow say and then Mr.
8 Matthews was mentioned in the trial. Represented you
9 some and whether you were offered some sort of plea to
10 some charges of some sort, short of going to trial and
11 as I understand it you weren't interested in any kind
12 of offer. You wanted a trial because there was no DNA
13 in the car. That you were solely focused on that. Is
14 is that unfair? That's kind of what I heard.

15 MR. STEWART: When you're innocent it's hard to
16 plead. I've done a lot of dumb stuff. I done that
17 crime in Pennsylvania. I'm not afraid to admit it
18 because I learning from my mistakes. I've learned
19 from my mistakes. I've been in prison 16 years. I was
20 foolish. I was stupid. I was retarded. I acted like
21 my mother didn't even raise me right, but I didn't do
22 this crime right here. And I spoke to Mr. Snow and
23 Mr. Thompson regarding that. I told them my strengths
24 that I believe that, you know, was right. The State
25 had forensic -- the forensic analysis guy got on the

1 stand and said there was no chance it's Ben Stewart's
2 DNA. He said that.

3 THE COURT: All I'm telling you is the DNA wasn't
4 conclusive against you or for you. I understand that
5 question and your real strong on that. Your DNA is
6 not found in that car, but you got four people under
7 oath testifying in court saying the man was with us.
8 We had a long trip from Hartsville and we did several
9 things on the way and on the way back he was with us
10 then. You were there testimony wise to the other four
11 co-defendants.

12 MR. STEWART: Right, and all their testimonies are
13 contradiction. All of them they lied. He never even
14 asked for a suppression hearing.

15 THE COURT: How can you suppress that?

16 MR. STEWART: Because they all made more than one
17 statement. Dante originally said that he went in the
18 store with Addison and they robbed the store. He said
19 that -- he said he got a gun out of the trunk. That's
20 what he said.

21 THE COURT: All right, but you can't suppress.
22 That's a factual question.

23 MR. STEWART: Okay.

24 THE COURT: If it's a factual question that means
25 a jury, 12 people and alternate or two get to listen

1 and they hear it all and they weigh the evidence and
2 decide whether considering all that the State has the
3 burden of proof to proved the guilt of Addison and as
4 to you and it appears that was presented, and the jury
5 weighed the evidence. What you're talking about is
6 credibility, which is not a lawyer issue. That's a
7 witness issue. A factual question that the jury
8 determined and you came in on the wrong side of that.

9 MR. STEWART: Right, and he again turned around
10 that same night that he made that statement and turned
11 around and said I was the shooter and I got shot. He
12 actually said that I was shooter and I got grazed by
13 the bullet. Then his brother made six statements.

14 THE COURT: I know, but again, you don't have the
15 standing to challenge or suppress co-defendant's
16 statement. You testified you got them in there and
17 they can say whatever they're going to say and your
18 lawyer had an opportunity to cross examine them.
19 Well, you've given an inconsistent statements before
20 because the statements are in. So I don't understand.

21 I want you it make your record as to what you want
22 the court to consider as errs by Mr. Snow because that
23 you got to do that for me and I'm having a hard time
24 following the DNA argument. I really am because the
25 DNA didn't say you were there. It didn't say you

1 couldn't have been there. The State didn't really
2 rely on DNA evidence because my observation is that
3 juries like forensic stuff. They like stuff that
4 looks like on TV. This case didn't have a whole lot
5 of forensic, DNA, fingerprints. Five guys went to a
6 place. They all said, except for you. Kind of what
7 happened. That's not fancy, shiny, bright scientific
8 evidence. That's just old fashion testimony.

9 You make your record. I'm not going to sit here
10 and debate with you. I'm telling you what I'm
11 listening for. What deficiencies did Mr. Snow make on
12 your behalf.

13 MR. STEWART: Okay, I'll start from the top.

14 THE COURT: You got them written down?

15 MR. STEWART: Yes, sir.

16 MR. JONES: And just so, I wanted to make clear if
17 Your Honor has a copy of Mr. Stewart's I believe the
18 original application which has a memorandum of law
19 attached to it. It should be in the packet, Your
20 Honor

21 THE COURT: I don't have the packet in front of me
22 because I can't read and listen at the same time.

23 MR. STEWART: Okay. Evidence relied on to
24 implicate me is testimony from Dontavious, Davorius
25 and Terrell Addison claiming I was present in vehicle

1 in Rock Hill, South Carolina and provided a gun with
2 full knowledge that it would be used to rob a BP
3 station and on the other hand conclusive evidence that
4 I was not present in the vehicle and therefore could
5 not have provided the gun as testified to is the
6 analysis report for DNA testing from the South
7 Carolina law enforcement department, SLED, that
8 excluded applicant from being in the vehicle.

9 Stating no chance it was Ben. On record of appeal on
10 pages 749 to 751 and that my fingerprints was not
11 found in the vehicle. No DNA evidence exposed the
12 State relies on rendering their testimony incredible,
13 unbelievable and contrary to the laws of nature in
14 human experience. Based on the foregoing it stated
15 that -- it stated that the DNA obtained from items 18
16 is mixture of at least two individuals.

17 THE COURT: All right. All right. Now, look
18 here. You're reading kind of your summary of the
19 facts. I want to know what Mr. Snow did wrong. I
20 think I'm pretty versed on the law. What did Mr. Snow
21 do wrong?

22 MR. STEWART: All right. I believe that he failed
23 to test the prosecutors case for adversary testing.
24 Such as reasoning and arguing that the DNA excluded me
25 from being present in the vehicle --

1 THE COURT: Okay. There you go.

2 MR. STEWART: -- based on the testimony that was
3 provided. I'm stating under the Winship rule that he
4 didn't, you know, fully investigate the facts of the
5 case and I'm stating that under Nance versus Ozmen
6 (phonetics) where counsel broke down the adversary
7 process --

8 THE COURT: All right, I got that one. He didn't
9 fully cross examine on DNA. Go ahead, next thing.

10 MR. STEWART: And he aided the State when he
11 allowed them to misstate the record and misstated the
12 record as well when they said I went to Reed Allen's
13 house when actually I went to my sister's house. I'm
14 saying he's ineffective for failing to investigate to
15 get in contact with my sister and Val and call them as
16 a witness.

17 THE COURT: He testified he talked your sister
18 three or four times and she was present during the
19 entire trial.

20 MR. STEWART: Right. He failed to call her and
21 the State capitalized on that when they said that my
22 sister why she isn't here today to testify. She would
23 drive any distance to refute this false testimony
24 against him, why didn't he call her to the stand. So
25 they was allowed to testify and they were allowed --

1 not testify. They were allowed to rebut that they
2 didn't call her. Yet she was there. Why didn't he
3 call her as a witness?

4 THE COURT: I think he said kind of why his
5 decision to not call her is she would not give helpful
6 testimony to your case because she was at her house.
7 She had been drinking. She was with the other lady
8 who is now deceased and that's about it.

9 MR. STEWART: Your Honor, I believe in this
10 position that I was in any testimony that was not
11 incriminating would have been helpful because she said
12 she didn't see him give me no weapon. She didn't give
13 no weapon and she watched it and Val corroborated her
14 testimony and that was the essential witness he was
15 talking about, Val Hudson. He didn't actually say my
16 sister. He was talking about Val. He said Val could
17 have possibly cleared this whole thing up in his
18 closing argument and he failed to call her as witness.

19 THE COURT: Okay. All right. Next issue.

20 MR. STEWART: My interstate detainer's claim. I
21 had raised in pretrial and he said he couldn't
22 remember. Mr. Thompson he remembered it because he
23 said that he didn't know if they had jurisdiction to
24 trial my case.

25 THE COURT: No, what he said was that interstate

1 --

2 MR. STEWART: I have the transcript.

3 THE COURT: I will tell you what Mr. Thompson
4 said. He said along the lines of we had a struggle
5 with Pennsylvania getting you here. Once we had you
6 here we had jurisdiction. You don't understand all
7 the nuances of the law. Once he got you here he can
8 try you. That's what he did. So it wasn't an issue.
9 The question your wanting was, do you get credit for
10 those days you were up there before you got down here
11 because they had asked for you. I think that's a
12 valid question.

13 MR. STEWART: May I enlighten you?

14 THE COURT: Well, without getting so far down the
15 rabbit hole, be concise. You're presenting an
16 excellent case. I want to commend you how organized
17 you are. So tell me concisely what you're talking
18 about.

19 MR. STEWART: All right. Prior to me coming from
20 Pennsylvania South Carolina had requested me to be
21 transported to South Carolina. We had a -- we had a
22 pre-transfer hearing in Pennsylvania where social
23 security had actually came to the hearing and denied
24 it. A year had lapsed. I had got sentenced on the
25 charges that I actually committed. While I was in the

1 Department of Corrections there they requested for me
2 again. I didn't actually sign a waiver, but they took
3 it as me signing a waiver and I was down here. So
4 once I was down here I had filed my emergency writ of
5 habeas corpus telling them that I didn't actually sign
6 a waiver. I was telling them that I had filed in my
7 petition that I was mentally ill under Article 6
8 section B and that I was accepted under social
9 security disability. I was getting disability. I had
10 told my attorney and my attorney had told Mr.
11 Thompson.

12 At this particular hearing I was relieving my
13 attorney. My attorney explained my diagnosis was
14 Cyclothymic disorder and he explained the problems and
15 things like that that I have. Mr. Thompson replied
16 that it would be a problem. He didn't know whether or
17 not the State had jurisdiction and he would basically
18 in my words he would challenge it to say that I was
19 competent to stand trial. I had done my own
20 investigation and did my petition and tried to get it
21 dismissed based off of that. We had the hearing on
22 the same day at trial. We started just before we did
23 the jury. And he didn't explain none of the claims
24 that I had raised in my habeas corpus. In fact, he
25 raised the claim that I actually had a pre-transfer

1 hearing and I even have a letter right here that
2 states that we had a pre-transfer hearing on this day
3 and I refused to voluntarily waive extradition. So I
4 was wanting my attorney to ask him how could you have
5 not amended my petition when you raising a whole
6 different issue that wasn't even raised in the
7 petition in the first place. He never asked. I guess
8 he forgot both of them. So I was just under the
9 impression that I'm wanting to get, you know, my
10 claims out there. You know, I've been holding on to
11 these things for 15 plus years. I think I got a right
12 to do it.

13 THE COURT: I'm not sure I'm following why that's
14 an issue now.

15 MR. STEWART: I had read in Busch versus Muncie
16 (phonetics). It's a federal case in federal district
17 and it talks about an IAD violation must prove a
18 fundamental miscarriage of justice for it to be
19 cognizable or claim under collateral proceedings. And
20 I'm contending that prior to me going to trial I had
21 raised this in my direct appeal that I was talking
22 psychiatric medication. I was taking Prozac. It was
23 making me jittery. I had alerted the judge and I had
24 told the judge. I had told my attorney that I was
25 taking psychiatric medication and Judge Alford had

1 told me -- he asked me, was it my position that I was
2 incompetent. I said I don't know. I'm not a judge.
3 I mean, I said I don't know. I'm not a doctor. He
4 said, all right, I'm basing my opinion on your
5 evaluation. So on my direct appeal it wasn't objected
6 to it. It was but it wasn't. I had raised it and my
7 attorney had filed an Anders brief. I didn't know the
8 law but I had raised it. I said based on my mental
9 illness and protection under IAD that I was required
10 by me going to trial, being convicted, proving
11 prosecutorial misconduct, proving ineffective
12 assistance of counsel it amounted to a fundamental
13 miscarriage of justice.

14 THE COURT: I didn't hear anything about your
15 argument that there was prosecutorial misconduct other
16 than you think they characterized the DNA clusivity or
17 inclusivity or whatever that term that you've been
18 tossing around is that they misused that.

19 MR. STEWART: No, not exactly. I was basically
20 spinning off of the fact that -- off of this -- this
21 habeas corpus that I had done pretrial that, you know,
22 I'm sorry to say it I believe it was colluded.

23 THE COURT: Okay. I don't think that's an issue.
24 I think you're off base on that.

25 MR. STEWART: Okay. Well, what I had took from it

1 --

2 THE COURT: You make your record, but you're off
3 base.

4 MR. STEWART: Well, what I was taking from that,
5 my attorney he didn't probably raise these claims. He
6 didn't amend it. He didn't amend. The State was
7 ready for this particular claim and why would they be
8 talking about a pre-transfer hearing when everybody
9 knew I had pre-transfer hearing. I'm assuming that
10 Mr. Brackett and Mr. Thompson already known I had a
11 pre-transfer hearing.

12 THE COURT: But I think those issues you're
13 talking about are whether or not Pennsylvania could
14 send you, or hold you, or keep you or whether South
15 Carolina can come get you and all that sort of stuff.
16 Not whether you were innocent or guilty of doing this.
17 When do we get him and what is the process for getting
18 him here. We need him because we got three other
19 co-defendants that we're dealing with --

20 MR. STEWART: Right.

21 THE COURT: -- and Pennsylvania you all kind of
22 holding us up. Can we get him from you and if not
23 then what are we waiting on. And so, you were finally
24 brought down here after some delay.

25 MR. STEWART: Yes.