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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas

The Honorable Robert J. Bonds, Circuit Court Judge

Appellate case: 2024-001082
Common pleas case: 2020-CP-03-257

LaParis Flowers …….. Petitioner,

v.

The State of South Carolina ……... Respondent.

APPENDIX
Volume II of II

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VOLUME I

VOLUME II

THE COURT: As to State's 66 and 86, Counsel?

MR. KOGER: No objection, Your Honor.

THE COURT: Ladies and gentlemen of the jury, State's Exhibits 66 and 86 will be admitted into evidence in the trial of this case, without objection.

(Whereupon, State's Exhibit No(s). 66 marked for identification and received in evidence.)

(Whereupon, State's Exhibit No(s). 86 marked for identification and received in evidence.)

THE COURT: In evidence. You may publish, Solicitor.

MS. LEGETTE: Thank you, Your Honor.

BY MS. LEGETTE:

Q Mr. Meeh, I want to hand you in a moment what has been previously marked for identification and entered into evidence as State's Number 69 and State's Number 68, which is an outer carton for State's 68.1, 68.2, 68.3, and 68.4. Please take a moment and tell me if you recognize these items.

MS. LEGETTE: May I approach, Your Honor?

THE COURT: You may.

A Yes, I do recognize all of the these items.

BY MS. LEGETTE:

Q And what are State's 68.1, .2, .3, and .4?

A State's 68.1 is my Item 1, which is a swab from a cell phone; 68.2 is my Item 2, which is a swab from the rear middle seat cushion area; 68.3 is my Item 3, which is a swab from the front driver's seat area; 68.4 is my Item 4, which is a swab from the front passenger's seat area.

Q And what is State's Exhibit No. 69?

A This is going to take a moment. I'm sorry.

Oh, it is my Item 10.1, which is a swab from the entire exterior surface of a cartridge case, head stamped "WIN .9 millimeter Luger."

Q Okay. Now, once you examined all these items, were you able to come up with a result from your analysis?

A Yes, I was.

Q What was the result of your analysis?

A Would you like me to list the results for each item or for --

Q Well, let's start, I suppose, with Item Number 60.1, which is the, I believe, dried blood standard from Russell Smart.

A I compared that to all the items in the case. I compared it to Items 1, 2, 3, 4, and 10.1.

Items 1 and 3 matched the DNA profile of Russell Smart.

Q And what are Items 1 and -- so have continuity -- what are items -- what are your Items 1 and

3 that matched Russell Smart's DNA?

A That was the swab from the cell phone and the swab from the front driver's seat area.

Q And was there any indication on the swab from the front driver's seat area as to what that was potentially?

A It was blood, it was submitted as blood.

Q All right. And now, as it relates to Russell Smart, was there anything else that matched Russell Smart?

A Yes. Items 1 and 3 matched the DNA profile of Russell Smart. The probability of randomly selecting an unrelated individual having a DNA profile matching these items is approximately one in 370 quintillion.

Q Quintillion, how many zeroes?

A It's a match. It's a perfect match.

Q It's a match. All right.

And now, as it relates to Item Number 69 -- sorry, State's Exhibit 69.

A That was Item 10.1, my Item 10.1, which is the swab from the entire exterior surface of the cartridge case. No DNA profile was developed from that.

Q Okay. And as it relates to State's Exhibit Number 86, which is your Item, I believe, 71, the buccal swab of Tyquan Charlton.

A Yes. I compared that to Item 2, which was the

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Allendale County

Honorable Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LAPARIS SHMEL FLOWERS,

APPELLANT

APPELLATE CASE NO 2018-000099

RECORD ON APPEAL

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swab from the rear middle seat area -- seat cushion area, and that did match the DNA profile of Tyquan Charlton.

The probability of randomly selecting an unrelated individual having a DNA profile matching this item is approximately one in 810 sextillion.

Russell Smart and Brandon Lewis were excluded as contributors to that item.

Q And as it relates to that particular swab that matched Tyquan Charlton, which I believe was your Item Number 2?

A Yes, two.

Q And that was 68.2. What is that identified as being?

THE COURT: Hold on. Let him answer the question.

She's asking you if that was State's Exhibit Number 2 -- sorry, exhibit number.

A Yes, that is correct. And that is described as being swabs from the rear middle seat cushion area.

BY MS. LEGETTE:

Q And that is blood?

A Correct -- or it was submitted as blood.

Q Submitted as blood. Okay. And that matched Tyquan Charlton?

A Correct.

Q Now, let's go back to Item Number 69, which is your Item 10.1 -- State's 69, your Item 10.1. You said you got no DNA from that?

A No DNA profile was developed from that.

Q You testified earlier about touch DNA. As it relates to a shell casing, how difficult or not difficult is it to find touch DNA on items such as shell casings?

A It's extremely difficult on shell casings because there are several factors that play into that.

Number one, shell casings are usually made of brass, which degrades DNA. It's from the older dynamic test. So you often see in government buildings that the handles are made of brass, and that's so people don't set -- it kills bacteria and degrades DNA.

The second thing is that the shell casing has obviously gone through extreme heat and pressure. That all degrades DNA as well. So I would say one in a thousand or one in two thousand shell casings may make enough DNA to do a profile.

Q Is it possible for someone to handle an object and DNA not be found on it?

A Yes, it is.

MS. LEGETTE: Thank you. I have no further questions. Please answer any questions from Mr. Koger.

CROSS EXAMINATION

BY MR. KOGER:

Q Just to clarify again, State's Exhibit 69, the cartridge case, head stamped "WIN .9 millimeter Luger," there was no DNA profile developed, correct?

A Correct, sir.

Q Okay. And you don't have any type of DNA results on Mr. Flowers in these reports, correct?

A No, sir.

MR. KOGER: Thank you. No further questions.

THE COURT: Redirect.

MS. LEGETTE: None, Your Honor.

THE COURT: As to this witness.

MS. LEGETTE: We ask that he be excused, please.

MR. KOGER: No objection.

THE COURT: You may step down. You're excused. Leave my exhibits with me, take your file as soon as I can get them.

Counsel approach.

(Off-the-record discussion held.)

THE COURT: Call your next witness.

MR. HOLLEN: State calls James Green.

Thereupon,

JAMES GREEN

was called as a witness, having been first duly sworn,

was examined and testified as follows:

THE COURT: Take a seat, make yourself comfortable. Adjust the chair and microphone to your height.

Keep your file, but leave my exhibits.

THE WITNESS: Yes, sir.

THE COURT: State you full name, spell your last name, and speak up.

THE WITNESS: James Green, G-R-E-E-N.

THE COURT: Mr. Green, because of the sound in this courtroom, you're going to have to speak up. It goes straight up to the ceiling, and I actually have court reporters that's sitting where Mona is sitting right now that tell me they can't hear the witness, even with a microphone.

THE WITNESS: Yes, sir.

THE COURT: So it gets blurry. I have to remind people constantly not to mumble in this courtroom. I'm sure I won't have to do that with you, Mr. Green. Just speak up for me.

THE WITNESS: Yes, sir.

THE COURT: Your witness, Counsel. Direct examination.

MR. HOLLEN: Thank you, Your Honor.

DIRECT EXAMINATION

DIRECT EXAMINATION OF JAMES GREEN BY MR. HOLLEN

BY MR. HOLLEN:

Q Mr. Green, who do you have work for?

A I'm employed by SLED.

Q And is that commonly known as the -- well, it's the South Carolina Law Enforcement Division, SLED, correct?

A Yes, sir.

Q How long have you been with SLED?

A Since June of 2005.

Q And did you have any law enforcement experience before you went to work for SLED?

A Yes, sir. I worked for Mt. Pleasant police department. That's like in North Charleston for about three and a half years before coming to SLED.

Q And what department do you work in now?

A I'm in forensic services laboratory, in the firearms department.

Q Do you have any special education or qualifications, training, that allow you to do your job? Can you explain that to us?

A Yes, sir. When I was first hired to SLED I began a firearm and tool mark course of instruction. It's about three, three-and-half-year course of instruction. And an apprentice studying under court-qualified firearms examiners, learning to do what I do now.

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DIRECT EXAMINATION OF JAMES GREEN BY MR. HOLLEN

Q And have you testified in State court before?
A Yes, sir.
Q Ever been qualified as an expert in State court?
A Yes, sir.
Q Approximately how many times?
A Sixty-two times in the State court.
Q Exactly 62 times?
A Yes, sir.

MR. HOLLEN: Your Honor, at this time I would offer Mr. Green as an expert in the area of firearms identification.

THE COURT: Any objection to his qualifications?

MR. KOGER: No objection, Your Honor.

THE COURT: Ladies and gentlemen of the jury, you'll recall my earlier instructions concerning expert testimony. The witness is qualified in firearm identification.

Without objection, you may proceed, Solicitor.

MR. HOLLEN: Thank you, Your Honor.

BY MR. HOLLEN:

Q Mr. Green, what kind of evidence are you frequently given to test in criminal cases?
A Commonly we are given fired bullets, fired cartridge cases, and occasionally firearms for testing.
Q Before we go any further, can you describe for

me what you just referred to. You said "casings, fired casings, bullets."

What are the parts of a bullet as you -- how you identify them?

A Excuse me. My dad says he's going to Walmart to buy a pack of bullets. And what he's really referring to is a cartridge. A cartridge is a complete unfired piece of ammunition. It is composed of the bullet projectile, the cartridge case, which is just simply nothing but a container to hold the bullet, and powder, and the primer. So when a cartridge is fired, you will have a fired bullet in a fired cartridge case.

Q So the part of the bullet that is fired is the actual bullet.

A No. The part that goes down the barrel is the bullet, yes.

Q Thank you for correcting me.

Mr. Green, as you said, you tested some items in this case; is that correct?

A Yes, sir.

Q I'm going to hand you some items that have been marked for identification and entered into evidence as State's Exhibits 70.1, 70.2, 70.3, 70.4, 70.5, .6, and .7. And I'm going to ask if you recognize this.

MR. HOLLEN: May I approach the witness?

THE COURT: You may approach.

MR. HOLLEN: Thank you, Your Honor.

A Ladies and gentlemen of the jury, if you see me looking at evidence and rolling it around in my fingers, what I'm doing is when we get evidence in the firearms department, if it's big enough to mark, we will take a Dremel tool and light pencil and we scribe our lab number and item number and our initials on it. So that is what I'm doing, just looking for those.

Yes, sir. State's Exhibit 70.1 through 70.7 are the evidence items I examined in this case.

Q All right. Agent Green, what are -- can you explain to the jury, or to all of us in layman's terms, what kind of criteria you used to examine bullets, cartridges, that sort of thing?

A Yes, sir. Excuse me. The first thing we do when we get a fired piece of ammunition, whether it is a bullet or cartridge case is we examine it to make sure it is fired. It sounds very simple, but a lot of times we will get stuff that is not fired. Somebody finds a bullet on the floor when we're loading up and they submit it, say, "look to see if it's fired."

If it is fired, we will look to see if there's any trace evidence on it. Is there any possible blood on it, any body tissue that did not come from the

autopsy. Is there any wall board, plastic, some kind of building material, basic paint if it's shot into the wall.

If it serves any value, any value to a potential investigation, we will collect it. If not, we will decontaminate it or clean the bullet or cartridge casing and examine it. What we are doing is looking for class characteristics.

Class characteristics are different characteristics, whether it's a firing pen shape on a cartridge case, type of pre-case on the primer. Those are determined by the manufacturer when they are making the firearms. So they know that they want them to have these types of characteristics.

If we have multiple items, multiple bullets, as in this case, we will see class characteristics will be the rifling patterns, how many lands and grooves are in pair on the firearm. And the widths of those lands and grooves and the direction of twists. This is going to be -- if those match, one item to the next, we will look at it microscopically and see if we find a common source.

Q So different makers of different guns use different rifling patterns on the inside of a barrel; is that right?

A Yes, sir. Some share commons, like six grooves, right twists is a shared common. The class

characteristics are common. But what's not common are the individual characteristics. Those are unique to each specific firearm. It's like DNA to a firearm, or fingerprints.

There have been studies that I've taken part in where a firearm examiner does a rigor, something like a manufacturer, in getting consecutively made barrels and consecutively made slots to see if there's any kind of carry-over to include the characteristics. Because if there is a unique carry-over, it's going to be with tools made one right after the other, right after the other, right after the other.

And in those studies we found you can't differentiate if you know what you're looking for, to consecutively made firearms on those two different characteristics, if they truly are unique to a specific firearm.

Q Thank you, Mr. Green.

In this case, were you able to make any findings on the items that you were provided?

A Excuse me, yes, sir.

Q Can you, referring to the State's exhibit number, give us some information about what your findings were in this case?

A Yes, sir. State's Exhibit 70.1 was a fired

bullet. And State's Exhibit 70.7 is a fired bullet jacket.

Q And can you tell us what is the difference between a bullet and a bullet jacket?

A When you have a jacketed bullet, if you think about it like M&Ms, everybody likes M&Ms, you got the chocolate inside, and you got the candy coating shell.

Moving to the bullets now. The bullet is the candy coating. You see, the bullet jacket is the candy coating, and the core is the shell. If you take an M&M and throw it on the floor, part of the candy coating will fall off, break off. It's the same thing with bullets. If they hit something hard enough, the jacket will separate.

So State's Exhibit 70 was the bullet. It was a little damaged, but it's still the bullet, 70.1. And State's Exhibit 70.7 is just the jacket portion of the bullet.

Q Do you have any information in your report about where it states Exhibit 70.1, or from whom it was removed?

A May I look at my report?

Based on the information provided to me on the evidence log-in sheets, I have no direct knowledge. But it says it was collected from Brandon Lewis.

Q Okay. And State's Item 70.7?

A It was collected from under the rear passenger

seat.

Q And you were able to make a finding about those two items?

A Yes, sir. State's Exhibit 70.1 and 70.7 were both fired by the same firearm.

Q Were you were able to determine that those were the same firearm?

A Yes, sir.

Q Did you examine State's Exhibits 70.2, 70.3 -- just those two?

A State's Exhibit 70.2 and 70.3, yes, sir, I did.

Q And what are those items?

A State's Exhibit 70.2 is a fired bullet. And State's Exhibit 70.3 is also a fired bullet.

Q Where did -- do you have information in your report about where State's 70.2 and 70.3 came from?

A State's Exhibit 70.2 is listed from Russell Smart, and 70.3 was from the trunk of the vehicle.

Q And as far as a specific firearm, were you able to make any findings on those two items?

A No, sir. State's Exhibit 70.2 and 70.3, they were somewhat fairly damaged, and the markings on them were not -- the individual markings, they were insufficient to make a definitive call. So it was an inconclusive answer, which is a fancy word for, "I don't

know."

They share the same class characteristics as State's Exhibits 70.1 and 70.7. They very well could have been fired by the same firearm, but I was unable to tell that due to damage and linear marks.

Q Okay. There were a couple of other items in this case that you looked at; is that correct?

A Yes, sir.

Q What about State's 70.5 and 70.6?

A Okay. State's Exhibit 70.5, you probably can't even see it. It is a little tiny speck of a piece of metal, and it looks like a part of a copper jacket from a bullet. Like, that candy coated shell. But it is so small, it didn't even register on my balance -- or my scale, to give me a weight. It weighed less than .02 grains, and it was nothing -- a penny weighs 40 grams, so it weighs less than one gram. It's just a little tiny piece of something. And I was able to determine if it was a bullet fragment -- that came from someplace.

State's Exhibit 70.6, the slide as well, it's just a small-to-look-at crack, and it was inconclusive with the others. It could have been fired by the same gun as 70.1 casing, State's Exhibit 70.7, or it could have been a different firearm. It was just too damaged and too small to test.

Q Okay. So 70.5 and 70.6 are simply too small to test?

A Yes, sir.

Q What about 70.4?

A State's Exhibit 70.4 is a fired .9 millimeter Luger caliber cartridge case. It has the same caliber as State's Exhibit 70.1, 70.2, 70.3, 70.7. It's the same caliber, all .9 millimeter Luger. But this is the only fired cartridge case that I received in this case.

Q And so you can't say if that was containing one of those fired projectiles?

A Correct. It was just a fired cartridge case.

Q Were all of the items you looked at consistent with one another as far as caliber?

A On those, I can't tell the caliber. State's Exhibit 70.1, 70.2, 70.3, and 70.7 were all consistent with .9 millimeter Luger caliber.

Q Okay. So it is a .9 millimeter Luger caliber cartridge or --

A Yes, sir.

Q Okay. Were you able to make any other determinations in your expert opinion given the characteristics of the bullet? You said, rifling and right or left twists; is that correct?

A Yes, sir.

Q Did those, or do those characteristics match certain firearms?

A Yes, sir. When a firearms examiner -- excuse me, firearms manufacture is making a firearm, they actually have to provide the rifling specifications to the FBI and the ATF. They keep a running list of those.

For instance, for such as this, where a firearm examiner like myself gets a fired bullet, fired bullets, we can take the width of the rifling, according to the grooves, the direction of the twist, and the caliber, and plug that into a computer program they give us, and that will spit out the list or provide us with a list of possible firearms that we know of that have rifling specifications like those exhibited on that firearm.

We, in turn, give that list to the same agency, or the investigating agency, if it's not too large. Because sometimes I got like a nine-page list, and that's not going to help anybody.

But if it's a relatively small list, like this one, we will provide that to the agency saying, "If you are looking for a firearm, you may want to start looking under these categories."

Q Okay. Again, in your expert opinion, Mr. Green, the list of firearms that those projectiles, the cartridge casing, could have come from, are they more likely an

automatic or a revolver? And let me back up.

Can you explain the difference between those two for us?

A Yes. A revolver, if you have ever watched an old western movie, or heard somebody talk about a six-gun or a wheel gun, it's a firearm designed with multiple chambers in the cylinder. And when you pull the trigger, the gun does the work for you. It rotates the cylinder, the gun goes off. The trigger then empties the next cylinder, the gun goes off, around until you run out of ammunition. It can be five shots, six shots, some nine shots.

They all have multiple chambers and when you fire it, the cartridge case is not ejected. It stays in the gun until you open the chamber and eject yourself.

An automatic pistol is like the police and military carry now. It has a magazine. You load the cartridge in the magazine, load the pistol, pull the slide back, and go forward. It loads the cartridges into the trigger, it extracts, ejects, goes forward, keeps shooting until you run out of ammunition, until you shot.

Once again, a pistol has one chamber, and you fire it. If it's working properly, the cartridge case will be extracted and expelled or expelled.

Q And I don't want to get into specifics, but in

general, back to the question I asked before, what is your opinion on whether these items were fired from a revolver or an automatic weapon?

A I can't say for sure, because I don't have the gun, but judging by the characteristics on Items 70.4 or State's Exhibit 70.4, that was definitely fired from a pistol, based on the cartridge resting in my hand.

The bullets you can look at, fragments, the list I gave, it's about 99.9 percent semi-automatic pistol, with what I was actually provided.

Q So it would be unusual, in your opinion, for a bullet with those characteristics to have been fired by a revolver?

A Yes, sir.

Q All right. Let's talk about typical ejection patterns. Now, you said that an automatic weapon ejects the cartridge out; is that right?

A Yes, sir.

Q What is, in general, the -- what direction and where does that automatic weapon spit out the casing?

A First, that is not a test that we do at SLED because all of the variances involved. But it has a very general rule that when a cartridge case is extracted and ejected, generally it will go back and to the right.

Q So the gun is pointed in a certain direction,

the cartridge is going to go back and to the right, in general?

A Yes, sir.

MR. HOLLEN: The Court's indulgence, Your Honor.

(Pause.)

MR. HOLLEN: Mr. Green, I don't have anything further. Please answer anything Mr. Koger has.

THE COURT: Cross examination.

CROSS EXAMINATION

BY MR. KOGER:

Q But, Mr. Green, as far as your answer to the last question, "back and to the right," there also have been studies conducted that show that bullets can be ejected in other directions, correct?

A I'm sorry. Say that again.

Q I said, there are studies out there that shows that that's just a general premise about back and to the right. There have been studies out there that show that cartridges can -- can be ejected in other directions, correct?

A Oh, yes, sir. It's a very general. Back and to the right is very general.

Q Okay. All right. And you are -- I just want to clarify, you was not given a gun to do any comparison with, correct?

A That's correct.

Q All right. And as you just testified to, you can't be for sure because you didn't get a gun to compare, correct?

A Correct.

Q So you did not receive a gun in this case, to compare?

A No. All I received was State's Exhibit 70.1 through State's Exhibit 70.7.

Q Okay. And as a matter of fact, you cannot conclusively state that another gun that -- or two guns were not involved in this case, can you?

A That's correct.

Q Okay. Now, and you also said here, the .9 millimeter Luger, that is actually you mentioned that you receive a hit or something, and you came back with some other firearms, correct, for a .9 millimeter Luger?

A Like I said, well, when I put the rifling specifications into the GRC program the FBI provided to us, that is where the list and the report came from.

Q So basically, evidence in this case, or the one you identified, goes back to 62 different brands of .9 millimeter Lugers, right?

A That share those specifications, yes, sir.

Q Okay. And that is in your report?

A Yes, sir.

MR. KOGER: Thank you. No further questions.

THE COURT: Redirect.

MR. HOLLEN: Nothing further, Your Honor.

THE COURT: As to this witness.

MR. HOLLEN: I'm going to ask that he be excused.

THE COURT: Any objection, Mr. Koger?

MR. KOGER: No objections, Your Honor.

THE COURT: Mr. Green, leave my exhibits for the court reporter. Make sure she gets all of them. You get your file, and you are excused from the trial of this case. You may leave the courtroom.

THE WITNESS: Thank you, sir.

THE COURT: Thank you very much.

Madam Foreperson, ladies and gentlemen of the jury, we will stop at this point so you can have your delicious lunch, which will be served to you. Please do not discuss this case during lunch, you haven't heard all the evidence in this case. And I'll get back with you after I know that you have all had a chance to have lunch and take a break.

Please retire to your jury room at this time.

(The Jury exits the courtroom at 1:01 p.m.)

THE COURT: Counsel approach.

(Off-the-record discussion held.)

(Lunch recess.)

THE COURT: State ready to proceed?

MS. LEGETTE: Yes, Your Honor.

THE COURT: Defendant ready to proceed?

MR. KOGER: Yes, Your Honor.

THE COURT: All right. Counsel, it's my understanding that you have agreed on some sort of stipulation.

MS. LEGETTE: That's correct, Your Honor.

THE COURT: Do you want to publish it to the jury?

MR. KOGER: Yes, Your Honor.

MS. LEGETTE: Yes, Your Honor.

THE COURT: What is the stipulation?

MS. LEGETTE: That the Item Number 7, which is the bullet removed from Brandon Lewis --

THE COURT: Item Number --

MS. LEGETTE: Seven.

THE COURT: Don't give me an item, just an exhibit number.

MS. LEGETTE: Beg the Court's indulgence. I believe it's --

THE COURT: Items aren't in evidence; exhibits are. That is why I make SLED agents define -- they

love to use their item numbers.

MS. LEGETTE: The State is ready, Your Honor.

The stipulations are that State's Exhibit Number 70.1 is a bullet that was removed from the left arm of Brandon Lawrence Lewis and thereafter examined at SLED by Agent Green. That State's Exhibit Number 70.2 is the bullet removed Russell Smart and thereafter examined by Agent Green. And then that State's Exhibit-- well, SLED Item Number 60 was the blood standard of Russell Smart, but it was dried by Betty Butler from SLED and turned into State's Exhibit Number 66 and then delivered to Forensic Analyst Paul Meeh of SLED. And that the chain of custody on SLED items admitted during the trial of this case are intact.

THE COURT: Aren't they already in evidence, each one of these exhibits?

MS. LEGETTE: They are, Your Honor, but we just stipulated to the chain of custody because we didn't have the doctor come down from Augusta or any of the other chain witnesses.

THE COURT: Well, we put on the record at the beginning of this case that there was no objection to the chain of custody.

MS. LEGETTE: We did, Your Honor.

THE COURT: Do you want -- just tell me, do you want the jury to be informed of that? Is that the purpose of this stipulation?

MS. LEGETTE: Pretty much, Your Honor, that the bullet itself came out of the arm of Brandon Lewis, because we didn't have a doctor testify that he took it out of his arm. So, more or less, it was simply a way of covering all of our steps.

THE COURT: And with that --

MS. LEGETTE: The State would rest.

THE COURT: And is the Defendant going to put up any evidence?

MR. KOGER: No, Your Honor.

THE COURT: All right. Then I'm going to bring the jury back and let you publish the stipulation.

Bring us the jury, Mr. Freddy.

(The Jury enters the courtroom.)

THE COURT: Madam Foreperson, members of the jury, we will now continue with the testimony in the trial of this case.

Solicitor.

MS. LEGETTE: Thank you, Your Honor. At this time, Your Honor, the State offers Court's Exhibit Number 6 as a stipulation in the case of State versus Laparis Flowers.

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STIPULATION PUBLISHED

The State of South Carolina, by and through the undersigned attorneys, Tameaka A. Legette and Brian Hollen, and Defendant Laparis S. Flowers, individually and through his counsel of record, Joshua Koger, Junior, hereby agree and stipulate as follows: That State's Exhibit Number 70.1 is the bullet that was removed from the left arm of Brandon Lawrence Lewis and thereafter examined at SLED by Special Agent Jamie Green.

That State's Exhibit Number 70.2 is a bullet that was removed from the body of Russell Smart and thereafter examined at SLED by Special Agent Jamie Green.

That the blood standard of Russell Smart, dried by Betty Butler of SLED and turned into State's Exhibit Number 66, which was then delivered to forensic analyst Paul Meeh of SLED.

That the chain of custody on SLED items admitted during the trial of this case are intact.

Signed this day by Laparis S. Flowers, Joshua Koger, Junior, attorney for Defendant, Tameaka A. Legette and Brian Hollen.

THE COURT: Mr. Koger, has the State adequately published the stipulation to which you and your client agree?

MR. KOGER: Yes, Your Honor.

THE COURT: Ladies and gentlemen of the jury, you will have the witness stipulation in your jury room as exhibit number what?

MS. LEGETTE: It'll be Court's Exhibit Number 6, Your Honor.

THE COURT: Are you wanting it -- well, as a Court's exhibit normally, you wanting the exhibit to go to the jury?

MS. LEGETTE: Yes, Your Honor. We're marking it as State's Exhibit Number --

THE COURT: You agree it's Court's Exhibit Number 6; is that right?

MS. LEGETTE: Yes, Your Honor. We can remark it as State's Exhibit Number 87.

THE COURT: All right. Remarked as State's 87 to go to the jury; is that correct, Mr. Koger?

MR. KOGER: That's correct, Your Honor.

THE COURT: You'll have it in your jury room with you, and the stipulation and the agreement, it's an understanding that both sides agree it's not necessary to prove the fact, that they have agreed on it. And that's the purpose for the stipulation, rather than you having to hear testimony in order to conclude that fact, they agree that the fact is true.

You will have the written stipulation with you in your jury room.

(Whereupon, State's Exhibit No(s). 87 marked for identification and received in evidence.)

THE COURT: Call your next witness.

MS. LEGETTE: The State rests at this time, Your Honor.

THE COURT: Any there any matters of law that I need to take up at this time?

MR. KOGER: Yes, Your Honor.

THE COURT: Madam Foreperson, ladies and gentlemen of the jury, I'm going to ask you to go to your jury room. Please don't discuss this case. You haven't heard all the evidence. You haven't heard the arguments of the attorneys, my charge on the law. I'm probably going to be able to get you home early this afternoon. We probably won't finish until in the morning. I have some matters of law that I have to take up.

I'll let you know after I take up the matters -- they are going to take a while, I'm not going to let you sit in the jury room and be late getting home tonight, because it's going to take several hours to do the argument and charge. And I don't want that to happen to you.

So please go to your jury room, let me take up some matters of law, and I'll be back with you just as quick as I can and let you know.

(The Jury exits the courtroom at 2:13 p.m.)

THE COURT: Mr. Koger.

MR. KOGER: Your Honor, may it please the Court.

THE COURT: Come forward to the Bench. Come forward.

MR. KOGER: Yes, sir.

May it please the Court. At this time, I would ask for a directed verdict on all the charges on behalf of my client, Laparis Flowers. The State has not set forth sufficient evidence to warrant this case to be submitted to a jury.

THE COURT: Solicitor, come forward.

MS. LEGETTE: Thank you, Your Honor.

Thank you, Your Honor. I would respectfully ask the Court to deny the motion for directed verdict. The State has met its burden, Your Honor. And when the Court is ruling on a Motion for Directed Verdict, as the Court is well aware, the Court is concerned with the exhibits of evidence and not its weight.

In this case, Your Honor, we have several witnesses who have testified about the murder charge itself, with regards to the date of when the incident

occurred at, I believe it was Barton Road, at Pinewood Apartments, as well as the identification of the individual who committed the murder.

We have testimony of Jarrell Murray, who testified and identified Laparis Flowers, as being the person who he saw open fire on the car he was sitting in among with Russell Smart, Brandon Lewis, and Tyquan Charlton.

He indicated that he heard several shots before he jumped out and ran, and he actually was able to observe and see his face.

In addition, Your Honor, and that goes as far as the murder is concerned, as well as the attempted murder on Jarrell Murray's life, given that there were several shots that were actually fired.

With regards to identification from Tyquan Charlton, Tyquan Charlton also testified that he actually knew Laparis Flowers previously, that he was able to see him, observe him pull up next to the car and open fire. He also heard several shots.

Additionally, he indicated he knew Laparis Flowers previously. He also recognized Laparis Flowers's voice.

He, himself, was shot in the jaw. You heard, testimony from, I believe it was, Lish Sabb, from

EMS, who talked about how emergent his condition was, how his heart stopped on the way to -- in the transport to MCG in August.

Additionally, Dr. Fornari came into the courtroom and testified that Tyquan Charlton had been shot in the jaw, and that his condition was critical. He stabilized him and then sent him to a trauma unit.

Also, Mr. Charlton testified that his condition, his diagnosis, was that the bullet basically lodged in his neck and was crushed up. And if he moves improperly at sometime he might become paralyzed.

Additionally, Mr. Charlton testified about there being several persons in the car, including Russell Smart, who was the driver, as well as Jarrell Murray, who was inside the car on the passenger side, front passenger side, as well as himself being on the back passenger side, and Brandon Lawrence Lewis being directly across from him in the back driver's side.

The bullet that actually shot Tyquan Charlton had come by Jarrell Murray -- I'm sorry -- by Brandon Lawrence Lewis and hit Tyquan Charlton in the jaw.

Additionally, you heard testimony from, I believe it was Brandon Lawrence Lewis, who talked about the episode leading up to the Pinewood Apartments incident and what happened thereafter.

He talked about how once-- once he was shot he told Russell, "Man, I have been hit, pull off, pull off." And Russell was able to tell him, "I have been hit, too."

And then Russell began to drive away very slowly.

Based on that, Your Honor, he also talked about how there was Tyquan Charlton sitting beside him, and that Jarrell Murray had been in the front passenger seat. He talked about how Russell Smart drove away slowly, about five miles per hour, and then swerved into a yard. He jumped out and he ran because he believed someone might be coming after him. He didn't know where the persons were.

Your Honor, given the fact that there were several bullets fired, he didn't know how many bullets were fired, but there were several fired obviously, as testified to by the crime scene agent.

She indicated there were four defects to the actual vehicle itself, including the projectiles she was able to retrieve from the vehicle, the fragment and decor, as well as the projectile in the trunk, as well as the other projectiles that were recovered from the arm of Brandon Lawrence Lewis who was treated at the hospital, as well as the bullet taken

out of the left -- right lung of Russell Smart.

According to crime scene, as well as Dr. Janice Ross, the bullets were moving from left to right, and they were coming across the car.

They were moving left to right, and they not only hit Russell Smart and killed him, they also hit Brandon Lawrence Lewis, hit him in the arm and went across to hit Tyquan Charlton, nearly killing him and very likely and very easily could have killed Jarrell Murray if he had not been lucky enough to jump out and run.

You also heard from Captain Manor of the Allendale Police Department, who indicated that Mr Brandon Lewis told him who shot him, the person identified as Laparis Flowers, or Pat Pat. He then got -- let's see -- Lieutenant Matt Brown to come and see Brandon Lawrence Lewis. Brandon Lawrence Lewis then told Lieutenant Matt Brown the same thing in front of Captain Manor as well as Special Agent Jeff Croft. He told him it was Laparis Flowers, he identified Laparis Flowers as being the person who opened fire on them and shot them.

Additionally, Brandon Lawrence Lewis was able to pick Mr. Laparis Flowers out of a photo line-up, indicating he had known him for some time.

He also indicated there was Tyquan Charlton's identification of Mr. Laparis Flowers as the person who was doing the shooting. And there was Mr. Jarrell Murray identification photo line-up of Mr. Laparis Flowers as the person doing the shooting.

We also heard testimony about there being a vehicle, the white Alero that Mr. Laparis Flowers was known to drive, identified as driving, and that vehicle had GSR in that vehicle on the steering wheel, on the gear shift.

You heard testimony that the white Alero is, according to Tyquan Charlton, was a white Alero that Mr. Laparis Flowers was driving when he rolled up on them. According to Tyler Sturkie from GSR trace evidence of SLED, GSR can get on an inanimate object from being in the vicinity of where a gun was fired, or from a person who fired a gun recently or has GSR on their hands, transferring it to the actual vehicle itself.

And you also heard from Dr. Janice Ross that Russell Smart, his manner of death was homicide, and his cause of death was exsanguination due to a gunshot wound from his left arm, cutting through his chest, cutting the aorta and going into his right lung, which caused the actual murder of

Mr. Russell Smart.

Thereafter, Your Honor, given the fact that all the witnesses who testified, Jarrell Murray and I believe it was Tyquan Charlton, didn't see anyone else in the vehicle aside from Laparis Flowers.

According to the firearms expert, while he could not identify all the projectiles as being from the same gun, they were inconclusive due to damage, it is very likely that they could have been fired by the same firearm. However, we don't have a firearm to compare them to.

With regards to the possession of weapon during the commission of a violent crime, Your Honor, there were four projectiles in -- four projectiles or four defects found in the car of Russell Smart. There were several fragments found in the car, along with a projectile in the trunk as well as a projectile in the arm of Russell Smart, a projectile -- sorry -- in the chest of Russell Smart, projectile in the arm of Brandon Lewis.

And though we did not find an actual firearm, we had witnesses testify that Laparis Flowers, they actually saw the gun, saw him open fire, and that he had a weapon, and that he did discharge this causing them their injuries.

So, Your Honor, we believe we have sustained our burden in this case. We would ask the Court to deny the Motion for Directed Verdict. The venue in this matter is Allendale County, we have proved that through several witnesses over several days.

As for there being a specific intent to kill, Your Honor, he did open -- according to witnesses, he opened fire on the vehicle, firing at least four shots.

It could have been more shots, but there were at least four shots. One of those shots did kill the first target, Mr. Russell Smart, very likely could have killed Jarrell Murray, and also could have killed Tyquan Charlton. His condition was emergent, as testified to by Dr. Fornari, and EMS worker, Lish Sabb, as well as Brandon Lawrence Lewis. He also sustained a gunshot wound to the left arm.

However, unlike Russell Smart, he had a left arm shot as well, it could have easily traveled through his left arm into his left chest into his right chest and thereby killed him as well.

So, Your Honor, we believe that we have sustained our burden and ask the Court respectfully to deny the Motion for Directed Verdict and send this matter to the jury.

MOTION BY DEFENSE

THE COURT: Thank you.

Mr. Koger, your Motion for Directed Verdict, you understand that I'm required to apply the existence or non-existence of evidence at this stage. Your motion is respectfully denied. Be seated, Counsel.

And I'm going to ask you now, Solicitor and Mr. Koger, to approach the bench.

Approach the bench -- not the Clerk's bench, the Court's bench.

(Off-the-record discussion held.)

THE COURT: All right. Mr. Koger, would you and Mr. Flowers come around.

Madam Clerk, would you please swear in Mr. Flowers.

Thereupon,"

LAPARIS FLOWERS

was called as a witness, having been first duly sworn, was examined and testified as follows:

THE COURT: Come to my microphone, if you would, Mr. Flowers.

State your full name for the record.

THE WITNESS: Laparis Flowers.

THE COURT: Mr. Flowers, at this time I'm going to explain to you certain of your rights. If you do not understand anything that I say, please let me

know. If you want me to explain anything in further detail, please let me know.

You understand?

THE WITNESS: Yes, sir.

THE COURT: All right. We have now reached the stage of the trial where you may present your defense. You have the right to testify in your own behalf. However, no one, not this Court, not your attorney, not the Solicitor, no one can make you testify.

In the event you have a record for any conviction involving dishonesty or false statement or for a crime punishable by imprisonment of more than one year, and this Court determines as a matter of law that the probative value admitting this evidence outweighs its prejudicial effect to you, the Solicitor would be able to introduce this record for impeachment purposes to attack your credibility or your believability.

It is my understanding from the Solicitor that you have a previous conviction for conspiracy to commit armed robbery. Is that your understanding, Mr. Koger?

MR. KOGER: Yes, Your Honor.

THE COURT: And you have advised Mr. Flowers of

that?

MR. KOGER: Yes, Your Honor.

THE COURT: Is that everything, Solicitor?

MS. LEGETTE: Yes, Your Honor.

THE COURT: You understand that if I were to make that finding, she could bring that out if you testified, if I elected and found as a matter of law that the probative value of admitting that evidence outweighs its prejudicial effect to you.

The Solicitor, if you testified, would be able to introduce this record of yours, this conviction for conspiracy to commit armed robbery, to attack your credibility or your believability.

Do you understand that?

THE WITNESS: Yes, sir.

THE COURT: If I were to make that finding as a matter of law.

If you elect not to take the witness stand, I will charge the jury in my charge on the law to the jury that they are not to give the fact that you did not testify any consideration whatsoever, and there is to be absolutely no prejudice to you because you did not testify.

You have a constitutional right to remain silent. The burden of proof as to your guilt rests

on the State of South Carolina, and that burden of proof must be beyond a reasonable doubt.

The decision as to whether or not you testify will be left entirely up to you. You can talk with your attorney, but it is not your attorney's decision. It is your decision, and only your decision.

So the ultimate decision as to whether or not you testify in this case is entirely yours.

Would you like a moment to talk to your attorney?

THE WITNESS: No, sir. I am aware, and I wish to remain silent.

THE COURT: You do not wish to testify?

THE WITNESS: No, sir.

THE COURT: And is that your decision and no one else's?

THE WITNESS: Yes, sir.

THE COURT: And no one has promised you anything or threatened you in any manner in making that decision? In other words, it is your decision of your own free will and your own accord?

THE WITNESS: Yes, sir, I'm aware.

THE COURT: And you do not wish to testify in the trial of this case; is that correct?

THE WITNESS: That is correct, sir.

THE COURT: Thank you very much. You may return to your seat.

I'm going to bring the jury back and I'm going to say, "You've heard from the State. We'll now hear from the Defense," and my understanding is, Mr. Koger, that you will rest.

I have given the lawyers at lunch the October 25th, 2017 case of the State versus King. It is in Westlaw, it's not even -- it's 2017 Westlaw 4800004. It affects my charge. I intend to hold a charge conference with the attorneys in chambers this afternoon because I think this completely changes the charge that the State submitted to me as their proposed charge.

I invited Mr. Koger to read it, and I will discuss it in chambers since it's barely 60 days old, from the Supreme Court of South Carolina. It completely changes prior -- well, it completely changes the statute, if you read the statute literally for attempted murder, and we also have contrasted in this case with the offense of murder, which is a completely different general intent crime from attempted murder, which has now been held in the State versus King to be a specific intent crime,

which I will discuss with the attorneys in chambers, so that the charge can be made.

I have advised them in State versus Bate, which was decided at the end of last year by the Supreme Court, that if Mr. Flowers does not put up any testimony, that the Defendant will get final argument tomorrow morning.

You agree, Solicitor, that that is correct?

MS. LEGETTE: Yes, Your Honor.

THE COURT: Very well. Have I accurately stated what occurred at the bench, Mr. Koger?

MR. KOGER: Yes, Your Honor.

THE COURT: And you agreed that you would get final argument and that we need to discuss the effect of State versus King on the charge.

MR. KOGER: Yes, Your Honor.

THE COURT: Very well. Mr. Flowers, I meant to ask you this, and you're still under oath, so I want to make sure.

Did you understand everything that I went over with you about your right to testify?

THE WITNESS: Yes, sir.

THE COURT: You didn't have any questions of me about it?

THE WITNESS: No, sir.

THE COURT: Very well. Thank you very much.

Bring us the jury, Mr. Freddy.

(The Jury enters the courtroom.)

THE COURT: Madam Foreperson, ladies and gentlemen of the jury, you have now heard the evidence from the State of South Carolina. You will now hear from the Defendant.

You may call your first witness, Counsel.

MR. KOGER: Your Honor, the Defense rests.

THE COURT: Ladies and gentlemen of the jury, you have now heard all the evidence in this case, but you have not heard the closing arguments of the attorneys nor received my charge on the law.

Because it is 25 till three, and because I have to have a charge conference with the attorneys on the law, there are matters of law involving my charge that I have to take up with the attorneys in this case. We will conclude this case first thing in the morning rather than keeping you here after dark this afternoon, before you receive the case.

Now, it is drizzling rain outside. So I want everybody to be extremely careful on the roads getting home. I will get you home early today. We will start back at 10 o'clock in the morning and finish this case promptly in the morning.

I want you to be careful on the way home, and I want everybody to get here safely in the morning because there's a little chance the rain will happen the next few days. I don't know whether it'll be raining or not, but we will have some wet roads. So I want everybody to be careful.

Please be in your jury room prior to 10:00 a.m. in the morning so we can start at 10:00 a.m. and get finished, and I can get you home, ladies and gentlemen.

Thank you for your patience. Thank you for your service. I will look forward to seeing each and every one of you in the morning at 10:00 a.m.

You are now excused for the balance of today. You may leave the courtroom at this time.

Thank you very much. We'll continue tomorrow.

THE COURT: Everyone else remain seated while the jury is leaving.

(The Jury exits the courtroom at 2:35 p.m.)

THE COURT: All right. I'm going to need to -- I think my law clerk has actually given you all each a copy of the State versus King. Is that right?

MS. LEGETTE: Yes, Your Honor.

MR. HOLLEN: Yes, Your Honor.

THE COURT: Both of you, I need you to have read

this -- it's lengthy, it's about -- looks like it's about 15 -- ten or 12, 15 pages, but I need for you to be prepared to be able to discuss it when you come in.

I will go over with you in chambers both the verdict form and my entire charge in chambers so that you both will know prior to your arguments in the morning exactly what the Court intends to charge in this case so that you can tailor your closing arguments to the charge on the law that the court gives, particularly in light of the King case, which I think completely changed the charge on the law in South Carolina on attempted murder. So be prepared to discuss it.

Anything further on the record outside the presence of the jury from the State of South Carolina?

MS. LEGETTE: Not from the State, Your Honor.

THE COURT: From the Defendant?

MR. KOGER: Not from the Defense, Your Honor.

THE COURT: Mr. Koger, I'm assuming since you have rested, you renew your motion for directed verdict at the close of all the evidence, just as you made at the close of the State's case; is that correct?

MR. KOGER: That's correct, Your Honor.

THE COURT: And for the reasons that I stated, your Motion for Directed Verdict at the close of all the evidence is respectfully denied.

MR. KOGER: Thank you, Your Honor.

THE COURT: All right. Counsel, I'll call you back into chambers in just a moment, we'll have the charge conference. This Court stands adjourned until 10:00 a.m. tomorrow morning.

(Court adjourned for the day. Proceedings to continue on 1-11-2018.)

In the Court of General Sessions for the
State of South Carolina, County of Allendale

Case No.: 2014GS0300229
00231, 00232, 00233, 00234

State of South Carolina,
Plaintiff(s),
vs.
Laparis Shemel Flowers,
Defendant(s).

Transcript of Record

January 11, 2018
Allendale, South Carolina

BEFORE:
The Honorable Perry M. Buckner

THE COURT: Thank you. Good morning and please be seated.

Let the record reflect that yesterday afternoon for sometime, I had a charge conference with the attorneys involved in the trial of this case. They have agreed to the charge.

They have agreed to the verdict form. We have also agreed to the oral argument. The State will argue first. They asked for 30 minutes, which I told them is fine, followed by a closing argument by counsel for the Defendant, who will also have 30 minutes.

There was one addition to the charge this morning. They asked me to give them copies of my charge, which I was happy to do so. I have been over that addition to the charge, which involves the fact that the inference of malice is a wrongful presumption. They both agree that should be added. I met with them this morning concerning that addition in chambers.

Now, ladies and gentlemen, the courtroom is a public place, and we invite the public to be here. But we do not tolerate any emotional outbursts of any kind during trial, or when a verdict is published. If you cannot control your emotions, then I suggest

you get up and leave now, because I will not tolerate for this jury any type of emotional outburst, and I will enforce that with the contempt powers of this court.

So I better not hear any type of remark of any type, favorable or disfavorable, out of respect for the jury.

Does everyone understand that, and does anyone wish to leave at this time?

(No response.)

THE COURT: It appears everyone understands and no one wishes to leave.

Bring us the jury, please.

(The Jury enters the courtroom.)

THE COURT: Good morning, Madam Foreperson. Good morning, ladies and gentlemen of the jury. Thank you for being here on time.

We will now continue with the trial of this case. You will hear the closing arguments of the attorneys followed by my charge to you on the law which applies to this case. I ask that you listen carefully to the attorneys and the Court.

Solicitor, you may proceed.

CLOSING ARGUMENT BY THE STATE

MS. LEGETTE: Thank you, Your Honor. May it

please the Court.

THE COURT: Proceed.

MS. LEGETTE: Mr. Koger.

THE COURT: Counsel approach.

(Off-the-record discussion held.)

THE COURT: Proceed. Let -- just a moment. Let him get in position so he can see as well.

(Pause.)

THE COURT: Can everybody on the jury see the screens?

(The Jurors indicate affirmatively.)

THE COURT: Okay. You see all of this?

JUROR: Yes, sir.

THE COURT: Can you see?

MR. KOGER: I can see.

THE COURT: Come on up a little forward if you need to.

Can you see everything?

THE DEFENDANT: I can.

THE COURT: If you can't see this board right here, you let me know. Just raise your hand.

Proceed.

MS. LEGETTE: Thank you, Your Honor.

Good morning.

THE JURORS: Good morning.

CLOSING ARGUMENT BY THE STATE

MS. LEGETTE: Good morning. December the 6th, 2014 was a time to kill for Laparis Flowers. Laparis Flowers is a killer. Laparis Flowers is a killer. And on December the 6th, 2014, he went in search. He went looking for who he wanted to kill.

His intent was to steal, to kill, to murder, destroy. To steal lives, to kill, to murder, to destroy the objects of his anger.

Now, ladies and gentlemen, Mr. Flowers sits before you today cloaked in a robe of righteousness. A robe of righteousness. The trial judge is going to tell you that he sits there cloaked in that robe of righteousness until and unless the State meets its burden of proof and takes off that robe of righteousness.

I submit to you today that the robe of righteousness is already off. We have taken it off. We have snatched it off. Because beyond a reasonable doubt, you already knew.

Now, ladies and gentlemen, I really don't want to insult your intelligence, but I feel like I'm going to have to insult your intelligence this morning because there are a few things the State must go over again, and again, and again, and again.

Laparis Flowers, for his actions on

December 6th, 2014 has been charged with murder of Russell Smart, attempted murder of Tyquan Charlton, attempted murder of Jarrell Murray, and attempted murder of Brandon Lewis. Also possession of a weapon during the commission of a violent crime. That is why he's here. And that is what we believe we have proven.

It is not my intent to prosecute an innocent man. Not so. We do not prosecute the innocent, only the guilty.

Now, ladies and gentlemen, I'll tell you the words of Johnny Cochran. If you feel that it does not fit, then you must acquit. But we believe we have met the burden of proof. So let us now go forward because you have been convinced beyond a reasonable doubt. All doubt being resolved.

Now, let's talk about what we learned at trial, the Judge will ultimately tell you at the end of this case. Let's go through attempted murder. I don't want to go with murder first, this is not a normal case. It is a simple case, but I'll go over the attempted murder first. Because through the attempted murder, you will see Laparis Flowers is also guilty of the murder of Russell Smart.

So what does attempted murder require? If I'm

wrong, the trial judge will tell you what the law is. It is his province. But attempted murder just briefly.

My daddy likes math, and I really was not good at math. Y'all can see, I talk too fast, and I was transposing numbers. I'm not real good at math, but there are a few things I can do. So we are going to do a little equation this morning. We are going to take the law and apply it to the facts. For the facts, and apply it to them.

Let's start. Attempted murder requires that a defendant attempted to kill another person. In here, I have put down, Tyquan Charlton, Brandon Lewis, Jarrell Murray, with malice aforethought. And he must have had a specific intent to kill.

So what have we proven? Let's talk about the case we put before you. I want you to remember the number 13. Thirteen, some say 13 is an unlucky number. I don't believe 13 is an unlucky number. Thirteen is the beginning of something else.

You get to 12 and you finish, 13 is the beginning of something else. The beginning of a new day. A day when you get the truth.

So what 13 things do I want to discuss today? Let's look at 13 things. Tyquan Charlton's

identification of Laparis Flowers. How do you know Laparis Flowers is guilty of attempted murder?

Number one, you have his name. So we will go ahead and check off our box. It is a little simple equation, but we are going to check off our box, the Defendant. Tyquan Charlton said, "I know Laparis Flowers, I have known him for years. I saw him that night."

He said, "Y'all tried to flex on my little cousin." Y'all tried to flex on my little cousin. Is that what this is about?

You roll up, come up on people in a car, open fire because they try to flex on your little cousin? Who is that cousin? Jaqwavian. Toot. They had issues in the club. Remember? Lobster House, issue in club. Somebody said Laparis was mad. He was cussing. Toot brother might have got into it. Toot and Dee. Toot, Jaqwavian, his little cousin.

Tyquan Charlton said, "He pulled out the gun. He started shooting at us in the car. I was hit in the jaw with a bullet."

The doctor talked about how emergent his condition he was. He said the bullet lodged in his neck. If he move, he may be paralyzed. Attempted murder. He's lucky to be alive. Possible paralysis.

That's what Tyquan Charlton said.

Let's talk about Tyquan Charlton's demeanor. I noticed something. I noticed something. It seemed like Mr. Charlton came here and sat on that witness stand, Mr. Koger called it "the great equalizer." Did you see Tyquan Charlton? Did you see him stand up and look? You could tell he was afraid. Did you see his demeanor? Did you see him? He didn't want to look over there at Mr. Flowers. He didn't want to look over there because he was so afraid.

What else did Tyquan Charlton say? On December the 10th, in the hospital, with a Slurpee in his mouth, a Slurpee, Lieutenant Brown said he had a Slurpee, he was taking water out of his mouth like you have at the dentist, telling him, "It was Laparis Flowers who shot into the car where I was."

He then identified him, number two, in a photo line-up on December the 10th. And if that wasn't enough, go back to Tuesday of this week. Tuesday, he came in here and identified him one more time. That is three.

Then number four, he identified the photo line-up that he originally -- this photo line-up right here -- this one. This picture. This photo line-up, he identified as being his photo line-up,

where he picked out Laparis Flowers. That is number four.

And as if that ain't enough, number five, in open court, before all of you, with fear in his eyes and a tremble in his voice, he picked him out again in open court.

Five identifications from Tyquan Charlton. Five. Five. The same man over and over and over. I told you, I was going to insult your intelligence, but I have to.

What does that mean? Laparis Flowers is guilty. He is guilty of attempted murder of Tyquan Charlton. Remember when Tyquan Charlton was sitting in that car, on the back passenger side, bullets flying all the way across that car, all the way across that car, threw a rock at that car, into the left side jaw, the head area of Tyquan Charlton.

That means the Defendant attempted to kill. He had a specific intent -- he ain't just fired one bullet, not two bullets, not three bullets, but at least four bullets. Let me show you this car.

Can I show you this car? You see this car. Can I show you this car? Look at this car. Just look here. You got A, you got B, C, you got D. You got four defects. You got four men, at least four shots.

That is attempted murder. That is specific intent to kill.

Somebody called or texted to ask him where is Jaqwavian, that he's around at Pinewood. Laparis Flowers got in his little white car and rolled up on Pinewood where he thought he walked in and got in the back. What did he do? Opened fire. Boom. Boom. Boom. Boom. Four shots. Four men. One dead. Three survivors.

Laparis Flowers is a killer. He tried to kill Tyquan Charlton. He didn't succeed, but he is still a killer.

Let us talk about Brandon. Where is Brandon Lewis? Yeah, yeah. Brandon Lewis walked in here, y'all, and Brandon Lewis, I hated to embarrass Brandon Lewis, he came in here in shackles. I couldn't hide from you that Brandon Lewis is in Federal prison. Brandon Lewis is an inmate, has been there since 2015, he said. He will be there until 2021. He is going back there to Federal prison. Yes, he is.

What did Brandon Lewis tell you? "I know Laparis Flowers. I have known Laparis Flowers for years. I saw him that night."

Pat Pat shot into the car. Laparis Flowers

shot. I was shot in the arm. The bullet removed.

Let's talk about the inmate, the snitching, the code. It's a code. It is a code, he is sitting in prison. He has to go back. He has to go back. And because he had to go back there, he can't sit in here and identify a man and then he would have to go back and tell the boys. He has to go back to the prison. Surely they are going to ask him what he did.

He had to know that. Man, I didn't do anything, man, I didn't, man, I -- that is what the inmate Brandon Lewis came in here and did. That is what he did.

But look at this. That goes back to what he's already said, before he was an inmate, when it was fresh on his mind, when he cried.

Now, I've never been a man. Know many men. My daddy, my brother, strong men. Strong willed black men. Stand up. Large men. I don't see the men in my family cry unless it is very, very deep.

You had another black man, a man that come in here and told you that he went to see Brandon Lewis, before he got to be -- before he came. You know, code, snitch, you know, he broke down and cried when we asked him about Russell.

When he asked him about Russell, and what did

Brandon Lewis tell him? He told Detective Manor it was Laparis Flowers who shot. It was Laparis Flowers.

And then, again, on December the 6th, he said it again two times, to Lieutenant Brown from SLED. He didn't really want to, but he did. And then, the third time he identified him in the photo line-up. That is three times. That is three identifications. That is three.

This right here, this is Brandon Lewis' identification. That is the third one, y'all. That's the third identification of Brandon Lewis. Three separate identifications, all of the same man, Laparis Flowers.

I told you that robe of righteousness -- that robe of righteousness, oh, it's filthy. It is filthy. We have now taken it off, it's on the floor.

Shooter. Four young men in a car. Where was Brandon Lewis sitting? Right behind Russell. Right behind Russell. Close enough to see the man who tries to kill him.

Now, you think that attempted murder, he didn't die. He had a shot in the arm, left arm. Russell Smart got shot in the left arm. And that shot in the left arm of Russell Smart killed him. It went

through his body. It cut across his body. It cut into his aorta. It cut through his lung. It cut through to the other lung. And it killed him. And because Brandon Lewis had the same fate as he, he could have been done the same way.

Laparis Flowers tried to kill. He had the intent to kill when he opened fire on that car. There was four young men. When he pulled up, the element of surprise. They weren't even paying him attention. They were not even looking at him. The element of surprise.

He tried to kill Brandon Lewis. And what does that mean? Laparis Flowers is a killer. Laparis Flowers is a killer. Laparis Flowers does not have a robe of righteousness. Laparis Flowers does not wear a robe of righteousness. Killers don't get to wear the robe of righteousness.

He is guilty. He is guilty. We are going to just go ahead and mark off Tyquan and Brandon.

Now, let's talk about Jarrell Murray. Jarrell Murray, what did Jarrell Murray say? He said he knew Laparis Flowers. He had known him for years. He saw him that night. The car pulled up door to door. Laparis Flowers pulled out the gun. He began to shoot at us in the car.

He jumped out and ran away. Jarrell Murray sitting in a similar position as Tyquan Charlton, only the far passenger's side, and he jumped out and run, but he heard several shots. He didn't know how many. I believe Tyquan said he didn't know how many, but he heard several shots. He had four defects in that car.

Jarrell Murray. He tried to kill Jarrell Murray as well. The bullets were going straight across. Straight -- if you look at the way this car is cut up, the bullets are going straight across this car. They are head shots and they are upper body shots. That is intent to kill. The specific intent to kill. That is the intent to kill. Laparis Flowers tried to kill Jarrell Murray.

Let's talk about Jarrell Murray. The victim. Did y'all see him? I'll go back again to what Mr. Koger said about this seat, the great equalizer.

Did you see how Jarrell Murray made him feel really calm? I saw him walk in the door, keep his back straight. But when he got on the stand, he hunkered down. I could barely see him.

But did you listen? Did you listen? I could barely hear him. He almost wanted to whisper. I have seen it, I have heard it in his voice, and I

felt it. But all in one, I know when I have seen it. They sat on the witness stand and had to stand up, and I had no choice but to ask, and in his whisper, hushed tone, he told you about Laparis Flowers.

Let's talk again about how many times. How many times did he -- he said it was Laparis Flowers December 6th, 2014, to Lieutenant Matt Brown. That is one.

He identified him in a line-up on December 6th, 2014. That is two. Lookie here. And then that is the third one, y'all. That's Jarrell Murray identifying Laparis Flowers.

Then, number three, he came to court on Tuesday, sat in that equalizing box, hunkered down like a scared little boy. Jarrell Murray stood up to a killer. A face probably he'll never forget, and told you it was Laparis Flowers.

Then he turned around and identified the photo line-up that he had already seen on December 6th, as being the one that he filled out. This same one right here. I know I'm insulting your intelligence, I have no choice. No choice. Because at the end of all this, you will have no choice. I don't want to leave you with no choice. No doubt. None. And what did he do the fifth time? Sat there. I asked him,

"Do you see the man? Do you see the man who shot into that car four times? Boom. Boom. Boom. Boom. Do you see him in here?"

What did he say? "There he is. There he is in the blue. There he is." That's what he said, the the one in the blue shirt.

Five times. Five identifications. Five. What does that mean? Laparis Flowers is guilty of attempted murder of Jarrell Murray. Laparis Flowers is guilty of attempted murder of Brandon Lewis. Laparis Flowers is guilty of attempted murder of Tyquan Charlton. And because of all that, Laparis Flowers is guilty of murder of Russell Smart.

We are just going to go ahead and mark it off.

Malice. What is malice? Before we go to malice, let's talk about this. What was five plus three plus five, 13. Thirteen. Thirteen times Laparis Flowers has been identified as the shooter into that Crown Vic on December 6th, 2013. Thirteen times. You can't deny it. It is simple math. I may not have the mind of a mathematician, but even I can count to 13. Five plus three plus five equals 13.

I told you I would insult you. I am sorry, but it's 13. No denying it. He has been identified 13 times. He is guilty. He is guilty.

Now, ladies and gentlemen, what is malice? What is malice? Malice, the Judge is going to tell you what malice is. Malice is basically evil. Wicked. Depraved. And has to be aforethought. It has to be aforethought.

But malice is evil, wicked, heart bent on doing wrong, bent on doing wrong. And that is what Laparis Flowers had in his heart.

Don't be fooled by the baby face. Do not be fooled by the baby face and the little boy doe eyes. Because behind those eyes is the heart of a killer. The heart of a wicked and evil man, and that is what he did on December the 6th, 2014.

Now, listen again. Aforethought can be just before. It has to be before. Basically like you lie in wait, or you make a plan to go there.

What does he do? Best testimony was, found out where Dee was, went to Pinewood, get in the car, goes over there. He don't live there. What is he doing in Pinewood? He is looking for these men. These men that flexed on his little cousin. That is malice aforethought.

And we had discussed the specific intent to kill. His intent was to kill them. Look at Russell Smart. Look at him lying here, bullet in his arm,

cut through his heart and aorta. His intent was to kill. He just (inaudible). Russell may have pulled off.

Remember, Brandon told you, "Russell, I got hit, man, pull off." Russell said, "me, too," and he drove away at five miles an hour. He may have saved Tyquan, he may have saved Brandon, too. In his last dying breath, he drove away.

Intent to kill. He killed Russell, and he intended to kill every single soul in that car, for no other reason than they flexed. Somebody -- somebody just rived on his little cousin. That is intent to kill, he just didn't get the chance.

Now, ladies and gentlemen, let's talk about the murder. But really the murder is already done. You might as well check it off. We have been going through it the whole time. The murder, the Defendant -- my speaker is going dead. Laparis Flowers killed another person, Russell Smart, with malice aforethought.

We talked about the wickedness, the evil. You open fire in a car filled with people, and you shoot four times, head shots -- head shots, body shots, cutting across vital organs. You intend to kill them.

Malice, evil. He went looking for them. And malice can be with expressed or inferred. Expressed means basically I speak words to you, or I have ill will. Now, somebody said he was mad. He left the Lobster House angry. Cussing. He was upset. But he was prepared. He went looking for them. That can be seen as expressed malice.

Or malice can be inferred from the use of a deadly weapon. Your expert came and you saw him. He told you that he got shell casings, he got projectiles, he got bullets, he got fragments. He got cord -- a cord, which is also from a bullet.

Basically what he did was, he opened fired, shell casing, .9 millimeter. It was a .9 millimeter. A firearm. A gun. A deadly weapon. Malice is inferred with the use of a deadly weapon.

Now, that means he is guilty of murder of Russell Smart.

Let's go back one more time, because just in case you are yet still not convinced, if it's still not clear, I'm going to insult you one more time. I got to. I apologize, but I got to insult you one more time.

I direct your attention. Laparis Flowers is a killer. Identification. What do we have? Three

different dates, at three different times, at three different places. All saying the same thing, all say the same thing. All ID the same man. It is simple.

You already heard, shot and killed Russell, shot Tyquan in the face, shot Brandon Lewis in the arm, shot at Jarrell Murray.

Corroborate. Let's discuss this here. What do these other witnesses say? Look at what the witnesses all say. Even if you had to take Brandon out, Brandon says the same thing as Tyquan and Jarrell, except he pulls back because of where he lives, because when he comes from court and all of them say, how was it.

Tyquan says, and Jarrell says, and Brandon says, left the Lobster House. Left with Russell, catching a ride. Russell was driving. Tyquan in the back seat. Everybody says the same thing. Tyquan was in the back passenger seat. Everybody says, Jarrell was in the front. Everybody says Russell was driving. Everybody says Brandon was on the driver's side behind Russell.

They went to Pinewood Apartments. They all say it. They all say it. All of them. Even Brandon. He got right up to the car. They were sitting at Pinewood Apartments. The white car pulled up, the

driver window -- I'm sorry to go over it again. I know it's a little boring. I know it's boring. But you cannot leave here with any doubt. No -- beyond a reasonable doubt is authentic.

Because that is the kind of doubt to cause a reasonable man to take action. If you didn't believe what you heard from that chair you would have reasonable doubt, but I want you to leave the courtroom and feel like you didn't have a choice, that there is no doubt.

I'm going to leave it all on the floor for you, because there's no doubt. Everybody says the same thing, over and over and over, 13 times. None of them differ, they all say it.

They don't ever hear Pat Pat. Laparis. He pulled out a gun. He opened fire. They all said it.

Consistent, consistent, consistent. Except for Brandon refused to identify him in court. Consistent. Consistent. They all pick him out.

They all pick him out. One by one by one, all of them. Three line-ups, three different men, the same thing. All of them. No doubt. They took him out. Consistent.

What does it mean? Laparis Flowers is guilty. He is a guilty man. He is guilty.

Yes, I insulted you. Yes, I apologize. But it's necessary. It is needed. He is a killer.

And ladies and gentlemen, it can't because Mr. Koger is going to bring a lot of stuff up about oh, what about this and what about that? And hypothetical this and hypothetical that. But I don't want to talk about the hypothetical. I want to discuss what really happened that night. All of the rest. What happened.

The white Alero. The white Alero, let's discuss the white Alero. The white Alero belonged to Laparis Flowers. We have proof that over and over and over again, the white Alero belonged to Laparis Flowers.

Look here, his name is on the contract document found in the car. In the car of Laparis Flowers. That is his car, he and his mother's. He signed for it. Laparis Flowers.

Laparis Flowers' ID is in the trunk of the Alero. It is his car. It's his car. Laparis Flowers in his white Alero. Look at your video. Look at your video. Laparis Flowers is getting in that white Alero. He is identified by Detective Manor -- Captain Manor. He is getting in the white Alero. It is his car. His car. His Alero. It belongs to him. He drives it. He controls it.

Anybody else could not have driven it. Let's just talk about it. Let's talk about that.

Oh, somebody else drove it. And then the question, Laparis Flowers had him move it. You're knowledge in the investigation is that Laparis Flowers had him move the car.

Anyone else that drove that car only drove it because he told him to. And it is found on the property of his relative. Edith Bates, Jennifer Bates, his momma, her relative. His relative. The white Alero.

Steering wheel tells an interesting story, don't they? Let's talk about it. Look at Russell Smart. Russell Smart, gunshot residue. Laparis Flowers, gunshot residue, GSR on the steering wheel. Laparis Flowers GSR because Laparis Flowers fired the gun into the green car from his white Alero and then he drove away. Things that make you say, hmm.

The gear shift, Laparis Flowers' gear shift. His hand on the gear shift. Laparis Flowers was the shooter driving that car.

Let's forget about the hypothetical. This is not a coincidence. He wants you to believe that it is a coincidence, but it's not a coincidence. There are no such things as coincidence.

Mr. Koger said one more interesting thing. He talked about how they went to the house in north Augusta, but you didn't find anything related to this crime at my client's house.

No, sir, we didn't. No, sir, we didn't. We didn't find a gun there. I would have liked to have had a gun to bring to you to show you that the bullets matched. No gun.

No clothes. I would like to have had clothes to bring to you to show you the GSR on them, but no clothes. I would have loved to have bullets -- I'm sorry, bullet that were not fired at his house, bullets to match, or the gun.

They weren't in that house in north Augusta. They didn't find anything there. They didn't find the car there either. It is clearly his car. They didn't find the car there. No clothes there. No gun there. No bullets there.

But guess what? Those same clothes that Mr. Koger brought up to you, brought to your attention, about we didn't find them in the house, the same clothes, in the video the man who is wearing those same clothes is Laparis Flowers. Oh, yeah. There it is.

Laparis Flowers is wearing the same clothes in

the video. Those same clothes. So the police go goes to the place where the person lives looking for evidence. They went there. They didn't find the clothes that he was wearing in the video. Look at the video.

They didn't find the clothes. They didn't find the gun. They didn't find bullets. They didn't find the car at his house.

What did he do with it? Where did it all go? Where is the gun? Where is the bullets? Uh-huh. It could have been put on fire, but we foudn it. He just happened not to have his clothes in North Augusta.

He is clearly seen wearing the clothes in the video. Oh, where are the clothes at, y'all? These clothes. The clothes.

One place you would look, your house in North Augusta. And they wouldn't have found that car, but it was at his relatives' house. He ditched it. He disposed of the evidence. He disposed of the evidence. He got rid of it all. We found the car. He can't deny the car.

He can't deny it. He can't hide it away, it is his car, it is his, he drove it. And there was nothing that could be found, and if there was

something to be found it had already been cleaned. The young man had his car cleaned.

Now, ladies and gentlemen, forget about these hypothesticals. What happened is just like they said, just like they said: Jarrell Murray, Tyquan Charlton, Brandon Lewis.

Laparis Flowers, ladies and gentlemen, is a wicked and evil man. He is a killer. It's time to speak the truth.

December 6th, 2014 was a time to kill for Laparis Flowers. He went to Pinewood Apartments to kill, murder, and destroy. He did that. And now it's time to speak the truth. A verdict of guilty will speak the truth. I have insulted you today, and for that I do apologize. But I want you to leave out of this courtroom without any doubt, beyond any reasonable doubt.

Laparis Flowers, the robe of righteousness is in the garbage. Incinerated. On fire. It is over.

Speak the truth this day. Find Laparis Flowers guilty of murder, of attempted murder of Tyquan Charlton, of attempted murder of Brandon Lewis, of attempted murder of Jarrell Murray, and the weapon, because he had to use a firearm to kill. He is a killer.

Thank you.

CLOSING ARGUMENT BY THE DEFENSE

MR. KOGER: May it please the Court.

THE COURT: Proceed.

MR. KOGER: Ms. Legette, Mr. Hollen.

Laparis Flowers is not a killer. Laparis Flowers is not the shooter in this case.

Now, I admire Ms. Legette's passion, and I admire Ms. Legette's emotion. But as jurors, y'all are to listen to all of the evidence that was placed in this courtroom during this week, and also take into consideration what was not placed into evidence on this particular week.

Now, the State would have you, to bolster the case, primary, solely on identification. And I'm going to deal with that later in my closing. But this is their whole case and the entire case. And everything that was placed into evidence this week or not placed in, is taken for consideration in this case against Mr. Laparis Flowers.

He tried to minimize the fact that there was no firearm. But indeed these deeds were committed by a firearm. Out of all the pieces of evidence we had over here, and I think we had maybe about 80-some-odd pieces of evidence, no gun. No gun.

Agent Green from SLED testified to doing these steps, finding this ballistics, this case and what have you. But he also testified to that he can't even conclusively say whether it was more than one gun used on that particular night.

And then the other parties' testimony was, well, the casing of the .9 millimeter that we found, it goes back to 62 brands of guns.

Sixty-two brands of guns. A murder, three counts of attempted murder, and one count of possession of a weapon during the commission of a violent crime, no gun.

But the State wants you to really not consider that because it doesn't help their case.

Second, search warrants were issued and executed. Obviously they started video before they got the search warrant, before they approached the Magistrate for the search warrant, and they wanted to execute the search warrant. Don't let the State tell you, well, because of some clothes on a video, they really didn't want to find the clothes.

Okay. They executed a search warrant in north Augusta, as stated. No firearms, no ammunition, no magazines connected with firearms. No black sweater. No white thermal shirt. No camouflage pants. No

Nike white Air Jordans.

The Defendant's grandmother, Ms. Edith Bates, said, "Don't need a search warrant, come on in and look."

No firearm, no firearm magazines, no ammunition, no black sweater, no white thermal shirt, no camouflage pants, and no white shoes.

Don't let the State tell you, well, that is okay. That is a minor part of this case, not finding these items in the residence or the places in which Mr. Flowers were, because they were not important. They would not have gotten the Magistrate to sign the warrant to go look for them. Okay. To go look for them. That's number one.

Number two, Ms. Legette gave the number 13 as being the number in this particular case. Thirteen, that is the number. But I submit to you another important number, 48.

Forty-eight is the fourth number. Forty-eight is the time that that Oldsmobile white Alero -- and by the way, no firearms, no magazines, no ammunition, no clothes found in that Oldsmobile also.

But nevertheless, 48, that is the number. What is 48? Forty-eight hours is the time from the alleged incident until the time that the car was

secured.

Agent Brown testified to the car was secured at 3:45 a.m. That's morning, the morning hours of December 8th.

This incident happened on December 6th, around 3:15 in the morning hours. He admitted -- he agreed that the car was unsecured for 48 hours. He also said during the investigation that he know of at least one other person that drove the car, and also he didn't know who else had been in the car during that particular time.

That person that drove the car, we don't know who else he had in the car, what they had on their person, what they had on they hand, what they had on their clothes, it was 48 full hours that we don't know what kind of traffic went in and out of that car.

That is not hypothetical, that is a fact. And Agent Brown from SLED stated that. And he also stated that even though he's not the gunshot residue expert, he stated the gunshot residue can be transferred.

So let's go to the gunshot residue transfer expert. He said that, you know, gunshot residue was detected here, it was detected here, and it was

detected here. But he also said that it could be transferred. And it could be transferred very easily.

As a matter of fact, he gave the example of cooking with flour. He say, if you have flour on your hand and grab a cup, and somebody else come behind you and grab that cup, they can get trace evidence of flour on them.

As a matter of fact, over a New Year's holiday, I attempted to put some gumbo -- I wanted to watch a football game, and I had to use a little flour to get the gumbo to thicken. And flour is very messy to work with. It's the example that he used on gunshot residue.

He said it can be transferred by hand or clothing. Again, 48. Forty-eight hours, we don't know how many people was in that car or traveled through that car.

And here's another thing, too, that Agent Sturkie testified to, where I think is the most important. And I'm going to -- just excuse me for this reading off the paper this one time, but I want to get the language right, because I want to be sure.

He said several times, "No information can be provided as to the time frame in which the particles

were deposited."

No information can be provided as to the time frame in which the particles were deposited. He stated that it could have been deposited before December 6th, 2014 at 3:15. It could have been deposited after December 6th, 2014. No time frame can be provided.

Again, the State wants you to minimize that, but we can't minimize because guess what? They called Agent Sturkie, I didn't put Agent Sturkie on the stand. They called Agent Sturkie.

They put the information out there. So you can't -- you can't have -- you can't have it at least come out and then when it's not favorable, minimize it. They have to prove they case beyond a reasonable doubt. The entire case beyond a reasonable doubt.

Now, let's go to the identification because that is the major part of their case. The identification. Well, let's look into the identification.

Okay. First of all, let's start off with Brandon Lewis. Now, it's been testified to that he made an identification on December 7th, but nobody wants to talk about the first time he was talked to, four hours -- about seven hours later in a hospital on December 6th. Nobody else there. No one wanted

to talk about it. The SLED has got the lead SLED agent, Agent Brown. Yes, they talked to him, but I really don't want to talk about it. Lead SLED agent.

Okay. Detective Manor, I don't know. I wasn't inside, I don't know what they said the day before.

You know why they tried to minimize that. Because on December 6th, Brandon Lewis did not tell them what they wanted to hear. Brandon Lewis told them on December 6th, "I don't know, I couldn't identify the car, I couldn't identify the driver, I can't identify the gun." That is what he told them on December 6th. Okay. He told them that.

Now, why do you think then that back on December 7th, and even Detective Manor stated, "Well, Brandon Lewis trusts me because I have known him for a while."

Detective Manor was sent on December 7th to get a positive identification because they didn't get one on December 6th. And Detective Manor sat on that stand and tried to deny he knew nothing about the December 6th interchange between two SLED agents in Augusta, Georgia.

You have to take these things into consideration to see whether the identification was -- is out. Okay. And not -- and not under the influence of law

enforcement. You have to look at that, because the first time, you know, they trying to say the first time they talked to Brandon Lewis, he identified him. The first time they talked to Brandon Lewis, he did not identify. And that was December 6th in the hospital.

Okay. But they want you to not really -- you know, really consider that. Okay.

And here is another thing that I am going to talk about with you. The second interview, and I'm going to go to the second interview on December 7th, it was audio taped of Brandon Lewis. The interview with Ty Charlton was video taped. Okay. The interview with Jarrell Murray were audio taped. So all of the positive information that they could use, it was audio taped or video taped, but just so happened the December 6th interview in Augusta with Brandon Lewis was not video taped or audio taped.

Take those things into consideration, and this was back on December the 6th, 2014, near the time of this incident. Okay? And here is another thing, too, you have to wonder. If you want to get a true depiction, the true flavor of what was said at those the initial interviews on December the 6th, 2014, if you want to see how they responded to the question,

and it was audio taped, in relation to Mr. Murray and Lewis --

MS. LEGETTE: Your Honor.

THE COURT: Counsel approach.

(Off-the-record discussion held.)

THE COURT: Let's move along.

MR. KOGER: And testified to. There was a tape by Mr. Murray in this case, an audio tape. Okay.

All right. So you have to look at -- you have to look at that, too, when you are trying to come to a determination whether Mr. Flowers is guilty or not guilty of these particular charges.

And also, too, again, going to Mr. Charlton, Ty Charlton, now -- and this was stated by SLED agent, too, and he also answered it, too. On December 10th, when the statement was taken from him -- and there is a video tape of Mr. Charlton, too -- that he don't know how he got in the car, and he doesn't know where he got in the car. But yet he testified to an identification that he could identify Mr. Flowers on that particular day.

And, also, too, he said three times, he used the term, "I was drugged on that day."

I was drugged on that day. I was drugged on that day. Now, maybe he meant under the influence of

medication. I don't know. But basically he say, I -- you know, he say that, "I was drugged."

So you have to look at does the liability and the accuracy of that identification.

First of all, he said, "I don't know how I got into the car, I don't know where I got into the car, I was drugged on that particular day, but I can identify Laparis Flowers as the shooter.

And why -- and why are all of these identifications back on December 6th or December 7th or December 10th is the point, because that is closer to the event. That is closer to the event, and you have to take that into consideration when you trying to determine the reliability and the accuracy of these statements. You have to take that into consideration.

With Mr. Murray, again, some type of -- it's something there that, you know, they talked about the interview at the Magistrate's office, but they wasn't at -- law enforcement wasn't as forthright about where my first interaction with him. Well, we went to the house, and he didn't -- he wanted to talk, according to law enforcement, the ones that testified -- he wanted to talk in a more, I guess, private place. Didn't want cops to be at his house.

That's the reason that they give.

But then they took him right down the road. They had a Magistrate office -- offices to take him inside to talk with him. Several SLED agents spoke with him outside.

Now, you are supposed to be considerate of his wishes, supposedly at the house, according to testimony, that I don't want law enforcement at my house, I don't want, I guess, people to know, I don't want -- I just want this to be a little more private.

And then they take him to the Magistrate's office and have the interview outside. The interview outside, in daylight, with several, I would imagine, uniformed law enforcement officers.

You have to see whether that makes sense. Okay? You have to see whether that makes sense, whether there was, again, some type of influence, some type of hesitation on the part of the witnesses in this case. And that goes to their -- their accuracy and their feeling in these identifications.

Now, the State has to prove their case beyond a reasonable doubt, and that is a high burden. And they not only have to prove their case beyond a reasonable doubt, but they have to prove every element of their case beyond a reasonable doubt.

They got to prove identifications beyond a reasonable doubt. Any evidence has to be competent and proven to beyond a reasonable doubt.

And that is a very high standard. Another thing, too, when it comes to the attempted murder, again, Mr. Flowers is not the shooter, and he's not the killer.

But as Ms. Legette stated on the notebook right here, on her big pad right here, she sat out an element of attempted murder. And her interpretation of specific intent -- and, again, the Judge is going to give you the law on this case. Her interpretation of specific intent is that he had a specific intent to attempt to kill who was in that car.

But go back to testimony in this case, and this is what Ms. Legette said on -- in her closing, that this supposedly started over an argument between Mr. Jaqwavian Williams and Mr. Gray over a blown kiss in relation to Tracy Roberts. Okay.

And that because of that, that Mr. Smart appeared, showed his weight, gun was not seen, but he was taking a message that he had a weapon. Okay?

MS. LEGETTE: Objection, Your Honor. May we approach?

THE COURT: Counsel approach.

(Off-the-record discussion held.)

THE COURT: Objection sustained.

MR. KOGER: And that somehow, Russell Smart intervened in the argument Mr. Flowers would be upset that it pertained to his cousin, Jaqwavian Williams and Toot. That was about the testimony about how this thing supposedly got started. Okay?

In relation to specific intent to kill, that was said that the only person that the shooter would be after -- and, again, Mr. Laparis Flowers is not the shooter -- would be Russell Smart because there was no testimony to Jarrell Murray being involved in that altercation concerning that. There was no testimony of Brandon Lewis being involved in that altercation surrounding that. And there was no testimony that Ty Charlton was involved in that altercation surrounding that.

So specific intent. Again, Mr. Flowers is not the killer, is not the shooter. But on a matter of law, listen to the Judge's instruction on attempted murder, and make the proper decision.

You must make the decision with everything in this case, and you must decide beyond a reasonable doubt whether Mr. Flowers is guilty as charged. You look into the identifications, not just the actual

subsequent identifications, but what went behind these identifications, what came from the stand in reference to these identifications.

Look at what was said on the stand by law enforcement, and they are going to ask you what the witnesses with -- on these identifications.

Also, look at -- in these 85 pieces of evidence that was submitted here during the last three days, what was not submitted here?

No gun. The bullets that were found matched up with 62 different brands of guns. Okay.

The car being unsecured for 48 hours. Now, again, if any of that was important they would have put it in evidence. But it is important that the car was unsecured for 48 hours. And at least, from the investigation, as Agent Brown stated, at least one person had access to the car. But he doesn't know who had total access to the car. Okay.

Look at those things. Because this case is not just about the identification. This is not a case on identification. This is everything. Everything that came out that was submitted in evidence, and what they was not able to submit into evidence. This is the search for the truth, and that was what the Honorable Judge Buckner indicated to you at the

beginning. This is a search for the truth, and this journey has taken several days this week.

I need for you to go back in that jury room, as I know you will, and look at everything. Recall every piece of testimony. Not just portions of it, not just portions that are advantageous to the State, and not just portions that are advantageous to the the Defendant, but everything. And I'm confident at the end of this journey, that you will find that Laparis Flowers is not a killer, Laparis Flowers is not the shooter, Laparis Flowers is not guilty of the murder of Russell Smart. Laparis Flowers is not guilty of the attempted murder on Tyquan Charlton. Laparis Flowers is not guilty of the attempted murder of Brandon Lewis. Laparis Flowers is not guilty of the attempted murder of Jarrell Murray. And Laparis Flowers is not guilty of possession of a firearm on that particular night during the commission of a violent crime.

And I am confident you will come back and you will end this search for justice, and your verdict will be fair, it will be true. And it will be just, and it'll be not guilty on all counts for Laparis Flowers.

Thank you.

CLOSING ARGUMENT BY THE DEFENSE

THE COURT: Madam Foreperson, ladies and gentlemen of the jury, I have to do a couple of things as a matter of law before I charge the jury. Because I have to take up those things, I'm going to let you take a break.

Don't discuss the case. You haven't heard my charge yet. Don't discuss it amongst yourselves. I'm going to ask you to retire to your jury room, use the restroom, stretch your legs, talk about anything but this case.

I'm going to bring you right back, but I got to take care of a couple matters of law.

Thank you. Please retire to your jury room.

(The Jury exits the courtroom.)

THE COURT: All right. I want to put on the record, outside the presence of the jury. There were two objections during the closing arguments of the Defendant.

The first objection by the Solicitor was to the reference to a tape. I overruled that objection because there was evidence that there was an audio, and in one case a video tape, of one of the victims of the attempted murder.

The Solicitor further objected that counsel for the Defendant should not be allowed to speculate on

why the tape was not admitted into evidence or the contents of the tape. I sustained the objection as to the contents because that would be speculation. And I also sustained the objection as to why the Solicitor did not put the tape into evidence because that would also be speculation and conjecture.

Later on, in Mr. Koger's argument, the Solicitor objected a second time. This was to an argument concerning Russell Smart putting his hand in his pants.

Is that right, Solicitor?

MS. LEGETTE: Oh, yes, Your Honor. What he -- what he actually said, Your Honor, was that Russell Smart may have put his hand in his pants as having a gun, and there was no testimony in --

THE COURT: And I sustained that objection because there was no testimony as to that, and I wanted there to be a record of it, as to occurred in the bench conferences.

All right. I have been over with counsel the addition to the charge that I told you about this morning, and the reason for it being that the burden shifting presumption argument, or conclusive presumption argument, allegedly depriving the Defendant of his due process of law. And, therefore,

I intend to explain to the jury that it is not a conclusive presumption in part of my charge on murder, when I get to the point that malice can be inferred from the use of a deadly weapon.

Both lawyers have indicated to me they agree with that addition to the charge in our conference this morning.

Since you have agreed to the verdict form and you've agreed to the contents of the charge, I think we are ready to proceed.

Anything further from the State?

MS. LEGETTE: Not from the State, Your Honor.

THE COURT: From the Defendant?

MR. KOGER: Not from the Defendant, Your Honor.

THE COURT: All right. Bring us the jury, please.

(The Jury enters the courtroom.)

JURY CHARGE BY THE COURT

THE COURT: All right. Ladies and gentlemen, Madam Foreperson, it is now my duty to charge you on the law of this case.

The State of South Carolina has charged the Defendant, Laparis Flowers, with murder in Indictment Number 2014 GS 0300229; attempted murder in Indictment Number 2014 GS 0300233; attempted murder

in Indictment Number 2014 GS 0300231; a third attempted murder in Indictment Number 2014 GS 0300232; and finally, with possession of a weapon during the commission of a violent crime in Indictment Number 2014 GS 0300234.

I remind you that the fact that the Defendant was arrested, the fact that the Defendant was charged, the Defendant was indicted, is not evidence in this, nor does it create any presumption of guilt.

The indictments, ladies and gentlemen, are simply the formal written instruments which contain the charges made against the Defendant. The indictments are the formal documents by which the case is brought into this court, the Court of General Sessions of Allendale County.

Now, the Defendant has pled not guilty to each of these indictments, and that plea of not guilty puts the burden on the State of South Carolina to prove the Defendant guilty beyond a reasonable doubt.

A person charged with committing a criminal offense in South Carolina is never required to prove himself innocent.

I charge you, ladies and gentlemen, that it is an important rule of law that the Defendant in a criminal trial, no matter what the seriousness of the

charge may be, will always be presumed to be innocent of the crime for which the indictment or indictments were issued unless guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt.

The presumption of innocence does not end when you begin your deliberations, but it accompanies the Defendant throughout the trial until you, the jury, reach a verdict of guilt based on evidence satisfying you of that guilt beyond a reasonable doubt.

The presumption of innocence is not a mere legal theory, it's not just a legal phrase. It is a substantial right to which every defendant is entitled unless you, the jury, are satisfied from the evidence of the Defendant's guilt beyond a reasonable doubt.

What is a reasonable doubt in the law? A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act. The State has the burden of proving the Defendant guilty beyond a reasonable doubt.

Some of you may have served in the past as jurors in a civil case, such as a contract case or a wreck case, both examples of civil cases, where you were told as far as burden of proof that it was only

necessary to prove that a fact is more likely true than not true. We call that the burden of proof in a civil case, by the greater weight or preponderance of the evidence.

In a criminal cases, such as the case here, the State's proof must be more than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the Defendant's guilt.

There are very few things in the world that we know with absolute certainty. And in criminal cases, ladies and gentlemen of the jury, the law does not require proof that overcomes every possible doubt.

If, based on your consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crime or crimes charged, you must find him, the Defendant, guilty.

On the other hand, if you think there is a real possibility that the Defendant is not guilty, you must give the Defendant the benefit of the doubt, and find the Defendant not guilty.

Now, I remind you, the jury of this trial, you and I have had certain duties to perform. As the trial judge, it has been my responsibility to preside over the trial of the case. And I also have the duty

to rule on the admissibility of evidence offered during this trial.

You are to consider only the competent evidence before you. If there was any testimony ordered stricken from the record in this case during this trial, you must disregard that testimony. You are to consider only the testimony which has been presented from the witness stand, any exhibits which have been introduced into evidence, and you've heard me say are in evidence as a part of the record in this case, and any stipulation which may have been made by counsel during the course of the trial of this case between the parties.

I also have the additional duty, ladies and gentlemen, to charge you the law that applies to this case, as the presiding judge. I am the sole judge of the law, and it is your duty as jurors to accept and to apply the law as I now state it to you.

If any of you on this jury already have any idea or opinion about what you think the law is, or what you feel the law ought to be, and it does not agree with what I now tell you the law is, you must abandon any of your preconceived ideas or opinions because you took an oath. And in that oath you sworn, when the court reporter gave it to you at the beginning of

the trial, that you would accept and you would apply the law exactly as I now state it to you.

In every case tried in this courtroom before a jury, the jury becomes, as I told you at the outset, the sole and the exclusive judge of the facts in the case.

A trial judge such as myself cannot intimate, state, comment on, or make any statement whatsoever to a trial jury such as yourself about the facts in a case.

Since you, ladies and gentlemen of the jury are the sole judges of the facts in this case, you are not to infer anything from what I have said during the progress of this trial in ruling upon the admissibility of any evidence, or otherwise, or any objection, or anything that I say during the course of this instruction to you, that I have any opinion whatsoever about the facts in this case.

The law does not allow me to have an opinion about the facts in this case. This is a matter solely for you, ladies and gentlemen, the jury, to determine, based on evidence introduced during the trial of the case.

As jurors, it becomes your duty to determine the effect, the value, the weight, and ultimately the

truth or the believability of the evidence that's been presented during the trial of this case.

Now, there are two types of evidence generally presented in a trial. Like many things in the law, we have names for those two general types of evidence. It's called direct evidence and circumstantial evidence.

Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness to an event. Direct evidence is evidence which immediately establishes the main fact to be proved.

Circumstantial evidence, as contrasted with direct evidence, is proof of a chain of facts and circumstances indicating the existence of a fact. Circumstantial evidence is evidence which immediately establishes collateral facts from which the main fact may or may not be inferred.

Circumstantial evidence is based on inference and not on personal knowledge or personal observation.

The law makes absolutely no distinction between the weight or the value to be given to either direct evidence or circumstantial evidence, nor is a greater degree of certainty required of circumstantial

evidence than of direct evidence.

You, ladies and gentlemen of the jury, should weigh or consider all the evidence in this case, both direct and circumstantial. After considering all the evidence in this case, both direct and circumstantially, if you are not convinced of the guilt of the Defendant beyond a reasonable doubt, you must find the Defendant not guilty.

On the other hand, after weighing, hearing, deciding all the evidence in the case, both direct and circumstantial, if you are convinced of the guilt of the Defendant beyond a reasonable doubt, you must find the Defendant guilty.

Necessarily, you are going to have to determine, as I told you at the outset, the credibility, which simply means the believability of the witnesses who have testified in this case.

It becomes your duty as jurors to analyze, to evaluate the evidence, and determine which evidence convinces you of its truth and its believability.

In determining the believability of the witnesses who have testified in this case, you may believe one witness over several, or several witnesses over one witness. You may believe a part of the testimony of a witness' testimony and reject

the remaining part of the testimony of that same witness.

You may believe the testimony of a witness in its entirety or you may reject the testimony of a witness in its entirety.

You may consider whether any witness has exhibited to you any interest, any bias, any prejudice or other motive in this case. You may also consider the -- what I told you is called -- the demeanor of the witness, the appearance of the witness, the manner of the witness while the witness is on the witness stand.

Any thing that is in evidence, ladies and gentlemen of the jury, you, as the jury, have the right to consider in deciding upon the credibility or the believability of the witnesses who have testified during the trial of this case.

Now ordinarily, ladies and gentlemen, our rules of evidence do not permit witnesses to get on the witness stand and take an oath and say my opinion is so and so, because we do not allow normally witnesses to give opinions or conclusions.

An exception to our opinion rule in the rules of evidence is for those witnesses we call expert witnesses. A witness who claims by education and

training or experience, claims to have become an expert in some art, science, or profession, may give an opinion as to the subject the witness claims to be an expert in. And they also give the reasons for his or her opinion.

You should consider any expert opinion given by the witness, and like any other evidence in this case, you give it the weight you think it deserves. If you decide that an expert witness' opinion is not based on sufficient education and experience, or if you decide that the reasons given in support of the opinion are not sound, or that the opinion of the expert is outweighed by other evidence, you may disregard the opinion entirely.

An expert witness' opinion is to be given no greater weight than that of any other witness simply because the witness is an expert, and you do not have to accept an expert's opinion even though it is uncontradicted.

I charge you, ladies and gentlemen, and emphasize the fact that the Defendant did not testify in this case is not a factor for you to be considered in any way in your deliberations and in your consideration of the guilt or innocence of the Defendant.

The fact that the Defendant did not testify must not be considered by you in any manner whatsoever. A Defendant has the constitutional right to remain silent. And the assertion of your constitutional right to remain silent must not be considered by you, the jury, in your deliberations.

I repeat, under the oath which you took as a juror, you're going to draw no conclusion whatsoever from the fact that the Defendant in this case did not testify. The fact that the Defendant didn't testify should not be discussed at all in your jury room.

The burden of proof, as I stated to you, is on the State of South Carolina. The Defendant is not required to prove innocence. The burden of proof remains on the State to prove guilt beyond a reasonable doubt.

I charge you, ladies and gentlemen, and remind you, that the burden of proof in the trial of this case is on the State, and that burden of proof beyond a reasonable doubt extends to every element of the crimes charged, and I am going to go over those elements with you. And this specifically includes the burden of proving beyond a reasonable doubt the identity of the Defendant as the person who committed the crime.

Identification testimony, ladies and gentlemen of the jury, is an expression of belief or an impression by which you, as the jury, must determine the accuracy of the identification of the Defendant. You have to determine the believability or credibility of each identification witness in the same way as any other witness.

You must be satisfied as a jury beyond a reasonable doubt of the accuracy of the identification of the Defendant before you may find the Defendant guilty.

On the other hand, if after examining the testimony, you have a reasonable doubt as to the accuracy of identification, you must find the Defendant not guilty.

You have heard the words during this trial, "stipulation." A stipulation, I've told you during the trial is an agreement, an admission or a concession made in a judicial proceeding by the parties hereto or their attorneys.

Stipulations are binding upon the parties or attorneys who make them. A stipulation is an agreement, an understanding that the Court and the jury must accept the stipulation as binding upon the parties.

If counsel for the parties in this case have stipulated to any fact, or any fact has been admitted by counsel, you will regard that fact as a jury as being conclusively true as to the party or parties making the stipulation or admission.

Now, ladies and gentlemen, I told you that there were five indictments in this case, and I've got them here on my desk, and they each charge different offenses. Well, in some part they do. We have three different offenses, and then we have three that are charged the same offense.

And the Defendant, because there are multiple charges and they do allege different offenses against Defendant, I want you to understand, Defendant Laparis Flowers is charged in Indictment Number -- and I gave you at the outset of my charge -- of murder, and that is of Russell Smart.

The Defendant, Laparis Flowers, is charged in another indictment number, which I gave you at the beginning of the -- of my charge, 2014 GS 0300231, with attempted murder, and that is the attempted murder of Tyquan Charlton.

The third is, Defendant Laparis Flowers is also charged in Indictment 2014 GS 0300232, in the attempted murder of Jarrell Murray.

Fourth, the Defendant Laparis Flowers is charged in Indictment Number 2014 GS 0300233, with the attempted murder of Brandon Lewis.

And fifth and last, the Defendant Laparis Flowers, is charged in Indictment Number 2014 GS 0300234, with possession of a weapon during the commission of a violent crime.

Each charge is a separate and distinct offense, and I'm going to define them for you. You must decide each charge separately on the evidence and the law that applies to it. If you find the Defendant guilty of murder or attempted murder in this case, then you may also find the Defendant either guilty or not guilty of possession of a weapon during the commission of a violent crime.

If you find the Defendant not guilty of murder and all the attempted murders in this case, then you cannot find the Defendant guilty of possession of a weapon during the commission of a violent crime because you have to be guilty of a violent crime in order to be guilty of possession of a weapon during the commission of a violent crime.

You will be asked to write a separate verdict on a separate verdict of either guilty or not guilty for each indictment and charge following the instructions

that I'm going to give you on your verdict form, which I'll go over with you in a moment.

Now, in order to establish criminal liability, criminal responsibility, criminal intent is required. And I'm going to give you some examples of criminal intent.

Criminal intent is the mental state required to be proven by the State beyond a reasonable doubt, and it might be for any particular crime. Let me give you examples of criminal intent. It might be -- sometimes it might be purpose, it might be intent, it might be knowledge, it might be recklessness, it might be malice, it might be criminal negligence. Those are examples of criminal intent.

Criminal intent must be proven by the State beyond a reasonable doubt. Criminal intent is always a matter that must be determined by the jury from the circumstances surrounding the situation based on evidence introduced during the trial of the case.

Now, ladies and gentlemen, there is no way to prove intent to a mathematical certainty. There is no way that medical science can dissect a person's brain and determine what that person had in mind. So the law says, ladies and gentlemen, that criminal intent may be inferred from the circumstances shown

to have existed, based on evidence introduced during the trial of the case.

This, ladies and gentlemen, is how you, as the jury, make a determination of whether or not any element requiring criminal intent was or was not present.

It is not necessary to establish criminal intent by direct and positive evidence, but intent may be established by inference in the same way as any other fact by taking into consideration from the evidence the acts of the parties and all of the facts and circumstances of the case based on the evidence introduced during the trial of the case.

Criminal intent is a mental state. It is a conscious wrongdoing. It is up to you, ladies and gentlemen, the jury, to determine what the Defendant intended to do based on the circumstances shown to have existed from evidence introduced during the trial of the case.

Ladies and gentlemen, I charge you that in Indictment Number 2014 GS 0300229, all right, the Defendant, Laparis S. Flowers, is charged with the offense of murder.

For this offense, murder, the State must prove beyond a reasonable doubt that the Defendant Laparis

Flowers, killed another person with malice aforethought.

Malice is hatred, ill will, hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse, and with an intent to inflict an injury or under circumstances that the law will infer an evil intent.

Now, malice aforethought does not require the malice exist for any particular time before the act is committed, but malice or ill will, or hostility, or hatred must exist in the mind of a defendant just before and at the time the act is committed.

Therefore, there must be a combination of this evil intent, this hostility, and the act based on evidence introduced during the trial of the case.

Now, as aforethought may be expressed or inferred. These terms, express and inferred, do not mean different kinds of malice. Malice is exactly what I defined for you.

But it merely is the manner in which malice may be shown to exist. That is, either by direct evidence or by inference from the facts and circumstances which are proven based on evidence introduced during the trial of the case.

Expressed malice is shown when a person speaks

words which express hatred or ill will or hostility for another, or when the person prepares beforehand to do the act which was later accomplished.

For example, lying in wait for a person or any other act of preparation going to show that the deed was within the Defendant's mind would be expressed malice.

Malice may be inferred from conduct showing the total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon.

A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used in the death depends on the facts and circumstances of each case based on evidence introduced during the trial of the case.

The law says that if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts are proven beyond a reasonable doubt by the State sufficient to raise an inference for malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case.

And you may give it such weight as you determine it should receive, and it can be rebutted, now the evidence in this case based on your view of the evidence.

I charge you, ladies and gentlemen, that in Indictment Numbers 2014 GS 0300231, 2014 GS 0300232, and Indictment 2014 GS 0300233, the Defendant, Laparis S. Flowers, is charged with the offense of attempted murder.

In order to prove this crime, the State must prove that the Defendant attempted to kill another person with malice aforethought.

This event, attempted murder, requires a specific intent to kill another person with malice aforethought.

Malice, as I told you, imports wickedness. It springs from depravity, a wicked heart, a depraved spirit, a heart devoid of social duty, and a heart that is fatally bent on mischief.

It involves hatred. Malice involves hatred, ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse, and with an intent to kill a person.

Malice aforethought, remember as I told you for murder, does not require that malice exists for any

particular time before the act is committed. But malice must exist in the mind of the Defendant just before and at the time the act is committed.

Therefore, there must be a combination of this evil intent, or malice, and the act itself based on evidence introduced during the trial of the case.

Intent, ladies and gentlemen, means intending the result which occurs, not something that occurs accidentally or involuntarily. Attempted murder then is the attempt to kill a person with expressed malice, or more completely defined, attempted murder is the performance of an act or acts which tend but fail to kill a human being, when such acts are done with expressed malice, namely with a deliberate intention, unlawfully, to kill another human being.

I charge you, ladies and gentlemen, and in the last indictment, 2014 GS 0300234, the Defendant, Laparis S. Flowers is charged with the possession of a weapon during the commission of a violent crime. For this offense, the State must prove beyond a reasonable doubt that the Defendant was in possession of a firearm or physically displayed what appeared to be a firearm during the commission of a violent crime.

A firearm means, according to our law, any

machine gun, automatic rifle, revolver, pistol, or any weapon which will, is designed to, or may be readily converted to expel a projectile.

In order to find the Defendant guilty of possession of a weapon during the commission of a violent crime, you must first find the Defendant guilty of committing a violent crime.

I charge you, ladies and gentlemen, that under the laws of the State of South Carolina, the offenses of murder and attempted murder are violent crimes under the laws of the State of South Carolina.

The State must prove the possession of a weapon during the commission of a violent crime beyond a reasonable doubt that the weapon furthered, advanced, or helped in the commission of a violent crime.

Now, Madam Foreperson, I told you I would prepare a verdict form for you. My law clerk also wants whatever you write on this verdict form, for you to write on the indictments in the block, where it says, "verdict," and sign your name and date.

Pay absolutely no attention, Madam Foreperson and ladies and gentlemen, to the order in which I wrote the forms of verdict. We obviously had to write one in front of the other, and the order of the verdict form has no significance whatsoever.

Your verdict form has got one, two, three, four -- five pages because there are five indictments. So we have a separate verdict form on each. And I've got instructions written on the verdict form.

So let me explain it to you. The verdict form has the caption of the case at the top. It says, "State of South Carolina, County of Allendale, State of South Carolina versus Laparis S. Flowers, Defendant."

In the court of general sessions -- that is this court, ladies and gentlemen, that means criminal court -- and it gives all the indictment numbers on the verdict form at the beginning. So it gives all five indictment numbers that I have been over with you during my charge to you on the law.

And then it has the word "verdict." Now, the first question on your verdict form, "We the jury, by unanimous consent, find the Defendant, Laparis S. Flowers, in Indictment Number 2014 GS 0300229, and the first form of verdict is guilty of murder of Russell Smart. If that be your form of verdict, Madam Foreperson, you would check on the line beside that form of verdict for the entire jury.

Or the second form of verdict under the first

question, we the jury, by unanimous consent, find the Defendant, Laparis S. Flowers, in Indictment Number 2014 GS 0300235, is not guilty of the murder of Russell Smart.

If that be your form of verdict, you would check on the line for the entire jury that form of verdict. You must find one form of verdict or the other. You cannot find both. It must be either guilty or not guilty.

The second question on your verdict form, we the jury, by unanimous consent, find the Defendant, Laparis S. Flowers, in Indictment Number 2014 GS 0300231, and the first form of verdict under the second question is guilty of attempted murder of Tyquan Charlton. If that be your form of verdict, you would make a checkmark on the line beside that form of verdict.

The second form of verdict under question two is not guilty of attempted murder of Tyquan Charlton. If that be your form of verdict, you would check on the line beside that form of verdict. You must find one form of the the verdict or the other for question two. You cannot find both. Either guilty or not guilty of the attempted murder of Tyquan Charlton.

Your third question on your verdict form, we the

jury, by unanimous consent, find the Defendant, Laparis S. Flowers, in Indictment Number 2014 GS 0300232, the first form of verdict under question three is guilty of the attempted murder of Jarrell Murray. If that be your form of verdict, you would check on the line beside that form of verdict.

The second form of verdict under question three is not guilty of the attempted murder of Jarrell Murray. If that be your form of verdict, you would check, Madam Foreman, for the entire jury on the line beside that form of verdict.

You must find one form of verdict or the other for question three. You cannot find both. Either guilty or not guilty of the attempted murder of Jarrell Murray.

Question four, we the jury, by unanimous consent, find the Defendant, Laparis S. Flowers in Indictment Number 2014 GS 0300233, the first form of verdict under question four, guilty of the attempted murder of Brandon Lewis. If that be your form of verdict, Madam Foreperson, you would check on the line beside that form of verdict.

The second form of verdict under question four is not guilty of the attempted murder of Brandon Lewis. If that be your form of verdict, you would

check on the line beside that form of verdict.

You must, to question four, find one form of verdict or the other. You cannot find both. Either guilty or not guilty of attempted murder of Brandon Lewis, in question four.

At the bottom of Page 4 I have put instructions for you. I put them in bold print. If you find the Defendant, Laparis Flowers, not guilty of murder and attempted murder of Tyquan Charlton, and the attempted murder of Jarrell Murray, and the attempted murder of Brandon Lewis, and you find the Defendant not guilty of murder of Russell Smart, then you must find the Defendant in question five not guilty of possession of a weapon during the commission of a violent crime.

But if you find the Defendant either guilty of murder of Russell Smart or attempted murder of Tyquan Charlton, or the attempted murder of Jarrell Murray, or the attempted murder of Brandon Lewis, then you would need to answer question five.

Question five, which is the last page of your verdict form says, "We, the jury, by unanimous consent, find Laparis S. Flowers on the charge of possession of a weapon during the commission of a violent crime either guilty of possession of a weapon

during the commission of a violent crime," if that be your form of verdict, you would check on the line beside that, or not guilty of possession of a weapon during the commission of a violent crime. If that be your form of verdict, you would check on the line beside that.

When you have completed the verdict form and followed my instructions, you would then sign your name on the verdict form, where it says, foreperson, for the entire jury. I have already put in the date. I have already put in the location, Allendale, and I have indicated to you in italics at the bottom of the verdict form to indicate your findings by checking the appropriate line and certify the findings by your foreperson's signature.

When you reach a verdict, you would knock on your jury room door and inform the bailiff that you've reached a verdict, and we will bring you back out into the courtroom to publish your verdict.

Now, ladies and gentlemen, your verdict must be unanimous. That is, it must be the verdict of each and every one of you. All 12 of you must agree on the verdict.

Madam Foreperson, ladies and gentlemen of the jury, I have now charged you on the law in order to

try to help guide you to a just result in this case. You are the judges of the facts in this case. And based on your determination of the facts, from the evidence introduced during the trial of the case, and on the law as I've just explained it to you, you will soon begin your deliberations.

You have been selected as fair and impartial jurors. You have took an oath to fairly and impartially try and determine the facts of this case from the evidence, and when you comply with that oath, ladies and gentlemen, no one can criticize your verdict.

But you are to decide the case based solely on the testimony from the witness stand that you have heard, on any exhibits which have been introduced into evidence, and any stipulation which you may have heard.

You will have the exhibits with you. I will send them into your jury room. They will be with you during your deliberations.

And if we have an exhibit that requires equipment to play it, just write a note to me, through the bailiff, knock on the door, tell the bailiff you want to hear the exhibit, and we'll bring you back out in the courtroom and use the equipment

in the courtroom for you to listen or view the exhibit.

Do you understand?

(No response.)

THE COURT: So we won't have to try to move the equipment into the jury room, we will play it in the courtroom at your request whenever you decide.

You must decide the issues in this proceeding without any bias or prejudice for either party. You cannot allow yourself to be governed by prejudice for or against any person. You can't allow yourself to be governed by public opinion or by any other arbitrary factor, such as emotion.

You must base your decision solely on the evidence which has been introduced during the trial of the case. Both the Defendant, Laparis Flowers, and the State of South Carolina have the absolute right to expect that each of you will carefully and impartially consider all of the evidence in this case, and that you will follow the law as I have instructed to you it will be in reaching your verdict in this case.

Now, ladies and gentlemen, I'm going to ask you, if you would, at this time, my jury, please retire to your jury room. Do not begin your deliberations. It

it may be necessary for me to bring you back for some additional instruction.

When it is time for you to begin your deliberations, I will send the verdict form in to you by the bailiff along with all of the exhibits which have been introduced into evidence during the trial of the case, and have the bailiff inform you that you may then commence your deliberations.

Madam Foreperson, please do not forget that when you publish the verdict later on, after you reach a verdict in this case, that my law clerk will want you to write on the indictments, whatever words you have written on the indictments whatever words you've written on the verdict form that I have explained to you. So do not leave the courtroom without him coming to you and having you do that. He will bring it to you.

All right. Please retire to your jury room. My alternates please remain in the courtroom with me. Jury will retire to the jury room.

(The Jury exits the courtroom at 1:21 p.m.)

THE COURT: First of all, on behalf of Allendale County and this court, I want to thank all three of you. I watched you this entire week, and all a Judge can ask of a juror is that you listen and listen

carefully. And all three of you did that.

And I want you to know how much I appreciate your service, your willingness to serve. No one became ill, or for some legal reason couldn't continue. You never know when you start. I have actually had a case -- it wasn't these lawyers -- I've had a case where I had five alternates and had to use all five in three days. There's not many people get sick. Our court reporter, bless her heart, came to work sick today. And, you know, things happen. So we have to meet all.

This concludes your service for the week. I told you I was going to get you home early. I'm going to keep my word to you.

I realize that we don't pay you a lot. Did we treat you okay? I hope so. I always look for ways to try to improve it.

And I can't let you go back in the jury room. This concludes your service. I'd like you to stay, if you would like to. If you're interested in the outcome, I'd be happy for you to stay.

And sentencing, if the jury votes for conviction, will occur right after the verdict. And you can stay for that as well, if you prefer. Or if you would like to get on home to your family, I will

now send you back.

If anybody needs a work excuse, where did they need to go?

THE CLERK: Angela has them.

THE COURT: Angela has got them. See Angela. We'll give you a work excuse for serving on the jury. We're going to mail you your check in the mail, that exorbitant -- how much do we pay?

THE CLERK: Twenty-five a day.

THE COURT: Twenty-five a day. We're going to pay you $25 a day for this important service which will be mailed to you at the address you got your subpoena on. And we thank you for that service.

Anybody have a question they want to ask me about anything? Now is the time. If you got a problem or a question, ask me. Because you're off the jury now, and I can answer a question. I can't do it with a jury, but I can do it for y'all.

Everybody happy to be going home?

Thank you for your service. This concludes your service. You may leave the courtroom or remain with us as you desire. You may leave at this time.

Thank you.

(Alternate jurors dismissed from the courtroom.)

THE COURT: Everyone else remain seated while

the jury is leaving.

THE JURORS: If we're going to remain, where do we go?

THE COURT: Just have a seat anywhere you want to. We'd love to have you.

Any exceptions or additions to the Court's charge from the State of South Carolina?

MS. LEGETTE: None from the State, Your Honor.

THE COURT: From the Defendant?

MR. KOGER: None from the Defense, Your Honor.

THE COURT: I'm going to ask you both to come forward, and carefully. I know Mona has been feeling a little under the weather, but y'all got to get with Mona. I want you to certify with me on the record, you are satisfied the court reporter has all the exhibits. Go through them with her. I've got a list. She knows that. She says I'm the only Judge -- am I the only one that does that?

THE COURT REPORTER: Yep.

THE COURT: She said the rest of the judges don't even pay any attention to the exhibits. I don't understand how you try a case without that. We have had some real problems with exhibits.

My biggest problem has been the lawyers take the exhibit back to their table and put it in their

file, and give it to their investigator, and they take it home with them. And then they don't understand why the court reporter doesn't have it.

You've got some stuff leaning on your table. You better -- or on the floor, or you did have. You make sure it hasn't been introduced into evidence.

Please come forward with the court reporter and do it at this time.

(Attorneys confer with court reporter regarding exhibits.)

THE COURT: All right. Let's come to order.

Is the State satisfied that the court reporter has all the exhibits?

MR. HOLLEN: We are, Your Honor.

THE COURT: Does the State have any objection to my giving the verdict form, which I've been over with and you've approved, to the bailiff along with the exhibits and telling the bailiff they may take the exhibits and the verdict form into the jury, and telling the jury they may now commence their deliberations?

MR. HOLLEN: We have no objection, Your Honor.

THE COURT: Mr. Koger, is the Defendant satisfied that the court reporter has all the exhibits?

ALTERNATE JURORS RELEASED BY THE COURT

MR. KOGER: Yes, Your Honor.

THE COURT: Does the Defendant have any objection to my giving the bailiff the verdict form and all the exhibits and having the bailiff go to the jury room, take the verdict form and the exhibits, and tell the jury they may now commence their deliberations?

MR. KOGER: No objection, Your Honor.

THE COURT: Very well. Here's the verdict form, take all the exhibits and the verdicit form into the jury and tell them, the jury, they may now commence their deliberations and make sure they have a pad and a pen in the jury room.

THE BAILIFF: Yes, sir. All of them have it.

THE COURT: We will be at ease while we wait for the jury. If you are going to leave, give a cell number to my law clerk, because we may get a question from the jury -- I'm talking about the lawyers now. We may get a question from the jury, and we might get a verdict. I don't know when. And in order for you to know, I want you to get lunch, but dog gone it, I don't know when the jury is going to come back with anything. And we are not going to sit around here and go on the Easter egg hunt for lawyers.

So you give me a cell number. If we call you,

you better be able to get here in five minutes. So don't go too far.

MR. HOLLEN: I'm not going anywhere.

(Whereupon, the Court was in recess.)

(Jury deliberations.)

THE COURT: I understand, Counsel, that the jury has reached a verdict. Anything from the State before we publish the verdict?

MS. LEGETTE: Nothing from the State, Your Honor.

THE COURT: Anything from the Defendant before we publish the verdict?

MR. KOGER: No, Your Honor.

THE COURT: Now, ladies and gentlemen, I'm happy for you to be in the courtroom, but I will not allow any type of emotional outburst of any type when this verdict is published. If you cannot control your emotions, I'm going to ask you to get up and leave now.

If anyone has any outbursts, I'm going to enforce this rule of contempt powers in this court, and I'm going to have you arrested and held in contempt. The jury deserves respect, and I don't expect there to be any type of outburst. So if you can't control your emotions, please leave now.

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ALTERNATE JURORS RELEASED BY THE COURT

Very well. All right. Bring us the jury.

(The Jury enters the courtroom.)

THE COURT: Madam Foreperson, the jury has reached a unanimous verdict; is that correct?

THE FOREPERSON: Yes, correct.

THE COURT: Madam Clerk, you may publish the verdict.

The Defendant and counsel will rise.

THE CLERK: In the Court of General Sessions, in the town of Allendale, State of South Carolina versus Laparis Flowers: We the jury, by unanimous consent, find the Defendant, Laparis S. Flowers, in Indictment 2014 GS 03229, guilty of murder of Russell Smart.

We, the jury, by unanimous consent, find the Defendant, Laparis S. Flowers in Indictment 2014 GS 03231, guilty of attempted murder of Tyquan Charlton.

We, the jury, by unanimous consent, find the Defendant, Laparis S. Flowers, in the Indictment 2014 GS 03232, guilty of attempted murder of Jarrell Murray.

We, the jury, by unanimous consent, find the Defendant, Laparis S. Flowers, in the Indictment 2014 GS 03233, guilty of attempted murder of Brandon Lewis.

We, the jury, by unanimous consent, find Laparis

S. Flowers on the charge of possession of a weapon during the commission of a violent crime in Indictment 2014 GS 03234, guilty of possession of a weapon during the commission of a violent crime.

Ladies and gentlemen of the jury, is this your verdict?

(The Jury indicates.)

THE COURT: If this be your verdict as published by the clerk, would you indicate by raising your right hand, please.

(All jurors raise right hand.)

THE COURT: Thank you. Let the record reflect 12 hands raised.

Mr. Koger, anything further from the jury before I dismiss the jury, from the Defendant?

MR. KOGER: Yes, Your Honor. I would ask that the jury be polled.

THE COURT: Madam Clerk, I'm going to ask if you would poll the jury.

Ladies and gentlemen of the jury, the clerk is going to ask -- call your name. When your name is called, I'm going to ask you to please stand. She's going to ask you two questions.

The first question will be, "Was that your verdict as published by the clerk?" You answer yes

or no.

"And is that still your verdict?" You would answer yes or no.

Madam clerk, please poll the jury.

Counsel, Defendant, please be seated.

THE CLERK: Ms. Crystal Ward, was that your verdict?

JUROR: Yes.

THE CLERK: Is that still your verdict?

JUROR: Yes.

THE COURT: Thank you. You may be seated.

THE CLERK: Ms. Jennie Wilson, was that your verdict?

JUROR: Yes.

THE CLERK: Is it still your verdict?

JUROR: Yes.

THE CLERK: Ms. Shaqueta Wright, was that your verdict?

JUROR: Yes.

THE CLERK: Is it still your verdict?

JUROR: Yes.

THE CLERK: Ms. Mary Willingham, was that your verdict?

JUROR: Yes.

THE CLERK: Is it still your verdict?

JUROR: Yes.

THE CLERK: Mr. Darian Brooks -- Ms. I'm sorry. Was that your verdict?

JUROR: Yes.

THE CLERK: Is it still your verdict?

JUROR: Yes.

THE CLERK: Shalice Penn, was that your verdict?

JUROR: Yes.

THE CLERK: Is it still your verdict?

JUROR: Yes.

THE CLERK: Mr. Kenneth Boynton, was that your verdict?

JUROR: Yes.

THE CLERK: Is it still your verdict?

JUROR: Yes.

THE CLERK: Ms. Deborah Jones, was that your verdict?

JUROR: Yes.

THE CLERK: Is it still your verdict?

JUROR: Yes.

THE CLERK: Ms. Ciera Sanders, was that your verdict?

JUROR: Yes.

THE CLERK: Is it still your verdict?

JUROR: Yes.

THE CLERK: Mr. Kristopher Finley, was that your verdict?

JUROR: Yes.

THE CLERK: Is it still your verdict?

THE CLERK: Yes.

THE CLERK: Mr. Freddy Moore, was that your verdict?

JUROR: Yes.

THE CLERK: Is it still your verdict?

JUROR: Yes.

THE CLERK: Ms. Eva Williams, was that your verdict?

JUROR: Yes.

THE CLERK: Is it still your verdict?

JUROR: Yes.

THE COURT: Counsel, the jury has been polled, the verdict stands. Anything further from the Defendant as to the jury?

MR. KOGER: No, Your Honor.

THE COURT: Ladies and gentlemen of the jury, Madam Foreperson, I'm sending my law clerk to hand it to you right now, so that you can write the same words he's going to show you on the indictment that you wrote on the verdict form.

On behalf of Allendale County and this court, I

want to thank you for your service. This concludes your service for the entire week.

If anybody needs a work excuse for serving on the jury this week, Angela with the clerk's office, is going is to be standing outside this door right here. She will provide you with a work excuse.

We are going to send you a check. Allendale, according to the clerk, pays $25 a day. We going to be sending you a check for your service this week.

If you listened to me, you know that you are now exempt from jury service for three years, if you want to claim your exemption by work of your service this week.

Now, sometimes people are going to want to talk to you about your verdict. They try to improve the way they do business. If you want to discuss with anyone about your verdict, you can. If you don't want to discuss with anyone about the verdict, you don't have to.

If somebody tries to persist in talking to you and you don't want to talk about it, you get their name and you give it to me, and I'll handle that problem for you. You don't have to discuss with anybody about your deliberations if you desire not to do so.

I want to thank you. All a judge can do is ask the jury to listen, and that is exactly what the 12 of you did in this case. I want to thank you for your service in this case. This concludes your service in the case.

Did we treat you okay? Anybody have a problem with how you were treated on the jury? I'm always looking for ways to try to improve it. So if there's any way, you tell me about it, and I'll try to change it. I can promise you, my skin is tough, so you can give us any criticism you need.

I hope that we did treat you all right. I want to thank you for your service. I'm going to return you now to your homes and your families and your jobs with my thanks.

Now, I want you to know, when you leave here, if you'd like to stay for sentencing, all you have to do is walk around and you have got some of your fellow jurors, your alternates are on the back row, back there. They stayed after I excused them.

You can come in and have a seat on the back row, or you can watch sentencing, which will occur in just a few minutes. If you don't want to, that's fine, you can head on home.

But sentencing is going to occur in just a few

moments after I hear post verdict motions.

Does anybody have any questions they want to ask the Court about anything involving their service?

Everybody ready to get home?

I want to thank you for that service. We got everything signed out now? Thank you, Madam Foreperson for your service as foreperson, and thank you for signing these indictments.

You are now excused through this door. Everyone else remain seated while the jury is leaving.

(The Jury exits the courtroom at 1:38 p.m.)

THE COURT: Mr. Koger, are there any post verdict motions from the Defendant?

MR. KOGER: Yes, Your Honor. May it please the Court.

I move -- at this time, I move for a new trial on all of the charges that were set forth this week based upon the evidence that came out this week. It does not warrant guilty convictions on all of the the indictments.

THE COURT: Solicitor.

MS. LEGETTE: Your Honor, we would ask the Court to deny the motion and keep the verdict intact as spoken by the jury. We believe that there was adequate evidence that had gone to the jury as well

as to having convicted Mr. Flowers of these offenses.

THE COURT: Mr. Koger, I think there was -- at least I told you that at the close of the State's case and close of all the evidence, when you renewed your motions, I think there was adequate evidence to submit the case to the jury. Your motion for new trial is respectfully denied.

Mr. Koger, I'm going to ask you to bring your client as soon as -- just hold on for a minute. You see the Solicitor has got to fill out sentencing guidelines. Once she's filled it out, I'm going to ask you and your client to come forward along with the Solicitor.

Peggy, I want you to canvas -- I've got a number of victims here and families. Please explain to them the procedure, which you can do at victim's assistance office, and let me know if any of the victims wish to be heard for purposes of sentencing. I'll be happy to hear from them.

(Pause.)

THE COURT: You ready?

MS. LEGETTE: Yes, Your Honor, I believe so.

THE COURT: Mr. Koger, you and Mr. Flowers may come around for sentencing at this time.

MS. LEGETTE: If I may inquire of his address,

Your Honor. I just want to get the correct address.

THE COURT: Get it from Mr. Koger. He will get it.

I need a Social Security number and date of birth.

MS. LEGETTE: Yes, sir. I have that on there.

THE COURT: Counsel approach.

(Off-the-record discussion held.)

THE COURT: Put your bar number on there also.

All right. Solicitor, obviously, I have heard the evidence in this case, and I am familiar with the evidence in this case. I'm happy to hear from you now as the jury has spoken.

And, of course, Mr. Koger, I'm happy to hear from you and your client, if he wishes to address the Court.

And I understand from the victim assistance officer that the victims that are in the courtroom do not wish to address the court.

Is that right, Peggy?

VICTIMS ASSISTANCE OFFICER: No, Your Honor.

THE COURT: All right. Let me hear from you.

MS. LEGETTE: Thank you, Your Honor.

Your Honor, Mr. Laparis Flowers has a criminal record.

THE COURT: Let me hear it.

MS. LEGETTE: It extends back -- we even have his juvenile record. Just for sentencing, we had the juvenile record unsealed as well. We provided a copy to Mr. Koger.

As far as juvenile is concerned, he has a burglary second conviction, a burglary third conviction, and a simple assault and battery. Those were all from 2007 that stem from Allendale County.

He also had --

THE COURT: And what year was that?

THE COURT: 2007.

THE COURT: 2007. That's all juvenile?

MS. LEGETTE: They were all juveniles out of Allendale County.

In 2008, Your Honor, he had a conspiracy to commit armed robbery, which stemmed out of Charlotte Mecklenburg, North Carolina, and he ended up serving three years probation here in South Carolina, and that was in 2008.

I believe he still has a pending charge right now for something that actually happened while he was out in jail, in custody --

THE COURT: And what is that charge?

MS. LEGETTE: The charge, I believe, is assault

on a correctional officer at the Allendale County Detention Center as well as threatening a public official.

THE COURT: But he has not been convicted of that?

MS. LEGETTE: That is correct, Your Honor.

THE COURT: So it's a charge.

MS. LEGETTE: Yes, they're just charges.

Additionally, Your Honor, Mr. Flowers, while he was in custody at the Charleston County Detention Center, the gang unit at the Charleston County Detention Center has verified or validated him as a gang member while he's in house in Charleston County.

And that is gangster Disciples out of Allendale. So, Your Honor, we believe that Mr. Laparis Flowers -- you heard the evidence, we believe he is dangerous. We believe that he poses an undue threat to the community of Allendale, and to other people throughout the community, Your Honor.

Given his history with the criminal justice system, his propensity to do violence, at this time, Your Honor, we would ask the Court, humbly but respectfully, to sentence Mr. Laparis Flowers to life in prison.

Your Honor, I hate to ask that question, I hate

to ask, Your Honor, but unfortunately Mr. Laparis Flowers I've seen again and again. The three young men he almost killed, and Russell Smart who he did kill, Your Honor, those lives will forever be changed. They came in here with fear in their hearts and in their eyes. And, Your Honor, they stood up anyway.

And so I would ask this Court, Your Honor, to remand Mr. Laparis Flowers to the State Department of Corrections for the balance of his life. I don't ask you to stand on top of 30 plus 30 plus 30. But Your Honor, we have to send a message.

I would ask the court to send a message, and even if it's not life, I would ask you to send a message to the community, send a message to Laparis Flowers that these things will not be tolerated in Allendale County.

Thank you.

THE COURT: Does anyone else on behalf of the State wish to be heard?

MS. LEGETTE: No, Your Honor.

THE COURT: Mr. Koger, I'm now willing to hear from you in mitigation.

MR. KOGER: Yes, Your Honor. May it please the Court.

Mr. Flowers is 27 years of age. He received a diploma from (inaudible) Christian Academy. And as far as his employment past, he worked several jobs as a laborer. He worked security work in 2009 at MCGGRE. Most recently he was a lead person at a (inaudible) in Aiken, South Carolina.

In the courtroom here today, on behalf of Mr. Flowers, his mother, Jennifer Bates, and his father. I have known now his mother for approximately nine years. She is very supportive of Mr. Flowers, has always, from my conversations with her, and meeting with her, had Mr. Flowers' best interest at heart.

I had the opportunity to also meet with the father, Mr. Flowers, and he was very concerned about his son's plight. We talked on several occasions about how things could go this week, and, you know, we talked about how things were going at the time.

Mr. Flowers has a son that is three years of age.

THE COURT: How old is his child?

MR. KOGER: Three. Three years of age. And basically, we would ask that you would -- of course, the State has asked to send a message --

THE COURT: The State has asked for the maximum

penalty for murder, and you realize that there's a mandatory minimum for murder. And you have advised your client also that whatever sentence I give for murder, he would have to serve day for day.

MR. KOGER: Yes, Your Honor. Yes, Your Honor. And we would ask that, you know, as a Judge, because you have been a Judge for quite a while, Judge Buckner, but in balancing the aims of society and the needs of society and to send a message, a Judge also has the discretion to utilize some mercy.

And we would ask in this case take into consideration that his son is three years of age, and that he's going to miss all of his childhood, and all of his young adulthood. But you have an opportunity, Your Honor, by imposing -- by considering imposing the minimum of 30 in this particular case that may be that some type of relationship that can be there after 30 years.

Your Honor, I utilize the same request on behalf of his mother. I know his mother, and I know she is broken up about this. And now she's not hating the victims, you know, during my course of trial, of course I don't talk with the victims, the victims's family, anything like that. But I always at this point like to express my sympathy for family members

that was unfortunately the victims in this case.

So, as with any case, there are two sides, Your Honor, and seeing how to balance aims to society, the crime that was committed, but we would also like you to consider on this side of the scale, some mercy in reference to Mr. Flowers, in reference to his son, in reference to his mother.

So maybe one day she will still be able to see her son come home, and his father.

So we would ask that you would consider imposing the minimum -- the mandatory minimum in this case as opposed to life in prison.

THE COURT: Very well.

Mr. Flowers, is there anything you would like to tell me before I sentence you? I'll be happy to hear from you.

THE DEFENDANT: Yes, sir. I ask that you have mercy even though that I was found guilty by the jury by unanimous decision. Me and the deceased victim were friends, and this is a big misunderstanding, sir. That is all that I have to say, sir.

THE COURT: Anyone else wish to be heard from the Defendant, Mr. Koger?

MR. KOGER: No, Your Honor. They indicated that they would not like to speak.

THE COURT: Mr. Flowers, I have listened to the testimony in this case, and I clearly believe there was sufficient evidence for the jury to convict you.

I have listened also to the Solicitor tell me your previous criminal record, and I realize that I don't take into account the charge for which you have not been convicted, the charge of assaulting a police officer, because you haven't been convicted of that charge. But you have been convicted of burglary second, burglary third, and conspiracy to commit armed robbery as well as assault, one of which as a juvenile, and one of which as an adult. I have to take that into consideration.

The Solicitor asked me to impose the maximum penalty allowed by law. As your lawyer knows, Mr. Koger, the minimum sentence for murder is 30 years, and you have to serve each day of that.

I take into consideration your age and the fact that you have a child, and that I'm certain that your family cares deeply for you.

On the other side of that fence, I also have to think about the families of the victims that are out there. Not only the victims that survived, but the family of the victim whose life we cannot restore. Whether he was a friend of yours or not, there is a

loss of life involved here, all of which I have to balance in fashioning my sentence.

Accordingly, the sentence of the Court on Indictment 2014 GS 0300229, State versus Laparis S. Flowers, for the offense of murder, sentence of the Court is the Defendant is committed to the State Department of Corrections for a term of 45 years.

On Indictment 2014 GS 0300231, attempted murder, on Indictment 2014 GS 0300234 -- excuse me, 233, attempted murder, and on Indictment 2014 GS 03 00232, attempted murder, on the three attempted murder charges, the sentence of the Court is that you be committed to the State Department of Corrections for a term of 30 years.

Finally, on Indictment 2014 GS 0300234, possession of a weapon during the commission of a violent crime, the sentence of the Court is that the Defendant is committed to the State Department of Corrections for a term of five years. That sentence will run consecutive to the murder sentence of 45, for a total of 50 years.

The sentences of 30 years for attempted murder will run concurrent to the other charges.

Thank you very much. The jury is dismissed. This concludes this case.

MS. LEGETTE: Thank you, Your Honor.

(Whereupon, the case concluded.)

CERTIFICATE

STATE OF SOUTH CAROLINA:

COUNTY OF BEAUFORT:

I, MONA L. MANLEY, Court Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 16th day of July, 2018.

Mona L. Manley /s/
MONA L. MANLEY
Official South Carolina Court Reporter
Circuit Reporter for the 14th Circuit
(850) 893-6662
mmanley@sccourts.org

STATE OF SOUTH CAROLINA)
)
COUNTY OF ALLENDALE)

INDICTMENT

2014-GS-03-00229

At a Court of General Sessions, convened on July 23, 2015, the Grand Jurors of Allendale County present upon their oath:

Murder / Murder

That in Allendale County on or about December 6, 2014, with malice aforethought, Laparis S. Flowers did kill and murder Russell Smart by means of shooting him with a firearm, and that Russell Smart did die in Allendale County as a proximate result thereof on December 6, 2014; in violation of Section 16-3-10 of the South Carolina Code of Laws (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided

Isaac M. Stone, III
Solicitor, 14th Judicial Circuit

WITNESSES

S/A Brown, SLED ✓

WARRANT NUMBER

2014A0320100103

Date of Arrest: December 7, 2014

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

VERDICT Guilty

Foreperson of Petit Jury

Date: Jan. 11, 2018

INDICT

DOCKET NO. 2014-GS-03-00229

The State of South Carolina

County of Allendale

COURT OF GENERAL SESSIONS

July Term 2015

THE STATE

vs.

Laparis S. Flowers

Indictment for

Murder / Murder

SC Code: 16-03-0010; 16-03-0020
CDR Code:0116

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I

Hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. and G.S.

651

645

STATE OF SOUTH CAROLINA)
)
COUNTY OF ALLENDALE)

INDICTMENT

2014-GS-03-00231

At a Court of General Sessions, convened on July 23, 2015, the Grand Jurors of Allendale County present upon their oath:

Attempted Murder

That in Allendale County, South Carolina, on or about December 6, 2014, the Defendant, Laparis S. Flowers, with the intent to kill, did attempt to kill the victim, Tyquan Charlton, with malice aforethought, either express or implied; to wit: the Defendant did shoot a firearm into a car occupied by the victim, which resulted in the victim sustaining a gunshot wound; all in violation of Section 16-03-29 of the Code of Laws of South Carolina (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Isaac M. Stone, III
Solicitor, 14th Judicial Circuit

WITNESSES

S/A Brown, SLED

WARRANT NUMBER

2014A0310100135

Date of Arrest: December 9, 2014

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury 7-23-15

VERDICT Guilty

Foreperson of Petit Jury

Date: Jan. 11, 2018

INDICT

DOCKET NO. 2014-GS-03-00231

The State of South Carolina

County of Allendale

COURT OF GENERAL SESSIONS

July Term 2015

THE STATE

vs.

Laparis S. Flowers

Indictment for

Attempted Murder

SC Code: 16-03-0029
CDR Code: 3410

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I

Hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. and G.S.

653

647

STATE OF SOUTH CAROLINA)
)
COUNTY OF ALLENDALE)

INDICTMENT

2014-GS-03-00232

At a Court of General Sessions, convened on July 23, 2015, the Grand Jurors of Allendale County present upon their oath:

Attempted Murder

That in Allendale County, South Carolina, on or about December 6, 2014, the Defendant, Laparis S. Flowers, with the intent to kill, did attempt to kill the victim, Jarrell Murray, with malice aforethought, either express or implied; to wit: the Defendant fired numerous shots into a vehicle occupied by the victim; all in violation of Section 16-03-29 of the Code of Laws of South Carolina (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Isaac M. Stone, III
Solicitor, 14th Judicial Circuit

WITNESSES

S/A Brown, SLED ✓

ARREST WARRANT NUMBER

2014A0310100136

Date of Arrest: December 9, 2014

ACTION OF GRAND JURY

Per pw True Bill

Paula K Wall #2345

Foreperson of Grand Jury

VERDICT Guilty

Foreperson of Petit Jury

Date: Jan. 11, 2018

INDICT

DOCKET NO. 2014-GS-03-00232

The State of South Carolina

County of Allendale

COURT OF GENERAL SESSIONS

July Term 2015

THE STATE

vs.

Laparis S. Flowers

Indictment for

Attempted Murder

SC Code: 16-03-0029
CDR Code:3410

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I

Hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. and G.S.

649

655

650

STATE OF SOUTH CAROLINA)
)
COUNTY OF ALLENDALE)

INDICTMENT

2014-GS-03-00233

At a Court of General Sessions, convened on July 23, 2015, the Grand Jurors of Allendale County present upon their oath:

Attempted Murder

That in Allendale County, South Carolina, on or about December 6, 2014, the Defendant, Laparis S. Flowers, with the intent to kill, did attempt to kill the victim, Brandon Lewis, with malice aforethought, either express or implied; to wit: the Defendant did shoot a firearm into a vehicle occupied by the victim, which resulted in the victim sustaining a gunshot wound; all in violation of Section 16-03-29 of the Code of Laws of South Carolina (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Isaac M. Stone, III
Solicitor, 14th Judicial Circuit

WITNESSES

S/A Brown, SLED ✓

ARREST WARRANT NUMBER

2014A0310100137

Date of Arrest: December 9, 2014

ACTION OF GRAND JURY

True Bill

Paula K White 7-23-15

Foreperson of Grand Jury

VERDICT Guilty

Foreperson of Petit Jury

Date: Jan. 11, 2018

INDICT

DOCKET NO. 2014-GS-03-00233

The State of South Carolina

County of Allendale

COURT OF GENERAL SESSIONS

July Term 2015

THE STATE

vs.

Laparis S. Flowers

Indictment for

Attempted Murder

SC Code: 16-03-0029
CDR Code:3410

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I

Hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. and G.S.

657

651

STATE OF SOUTH CAROLINA)
)
COUNTY OF ALLENDALE)

INDICTMENT

2014-GS-03-00234

At a Court of General Sessions, convened on July 23, 2015, the Grand Jurors of Allendale County present upon their oath:

Weapons / Poss. weapon during violent crime, if not also sen

That in Allendale County, South Carolina, on or about December 6, 2014, the Defendant, Laparis S. Flowers, did possess a firearm or did visibly display what appeared to be a firearm or did visibly display a knife during the commission of or attempted commission of a violent crime, to wit: murder, or attempted murder, a violent crime for which he is convicted of committing or attempting to commit; in violation of Section 16-23-490, Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Isaac M. Stone, III
Solicitor, 14th Judicial Circuit

WITNESSES

S/A Brown, SLED ✓

A. EST WARRANT NUMBER

2014A0310100138

Date of Arrest: December 9, 2014

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

VERDICT Guilty

Foreperson of Petit Jury

Date: Jan. 11, 2018

INDICT

DOCKET NO. 2014-GS-03-00234

The State of South Carolina

County of Allendale

COURT OF GENERAL SESSIONS

July Term 2015

THE STATE

vs.

Laparis S. Flowers

Indictment for

Weapons / Poss. weapon during violent crime, if not also sen

SC Code: 16-23-0490
CDR Code:0549

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I

Hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. and G.S.

659

653

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEY FOR APPELLANT

This 1st day of February, 2019.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEY FOR APPELLANT

This 1st day of February, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Allendale County

Honorable Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LAPARIS SHMEL FLOWERS,

APPELLANT

APPELLATE CASE NO 2018-000099

SUPPLEMENTAL RECORD ON APPEAL

TAYLOR D GILLIAM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

ALAN WILSON
Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
P.O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

MIRANDA RIGHTS

PLACE: Allendale PD DATE: 12/07/14 TIME: 1745

BEFORE WE ASK YOU QUESTIONS, YOU MUST UNDERSTAND YOUR RIGHTS.

LF You have the right to remain silent.

LF Anything you say can be used in court as evidence against you.

LF You are entitled to talk to a lawyer now and have him present now or at any time during questioning.

LF If you cannot afford an attorney, one will be appointed for you without cost.

LF If you decide to answer questions now, without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

LF **Do you understand these rights?**

LF **Do you wish to talk to us at this time?**

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to talk now without a lawyer present. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed: [signature]

Witness: [signature]

Witness: [signature]

Form # P-022 (Rev. 7-24-06)
CALEA 1.2.3, 44.2.3

COURT'S EXHIBIT NO. 1 IDENTIFICATION/EVIDENCE DKT.# _____ DATE: _____
PENGAD 800-631-6989

2

CASE # 31-14-0117

LEAD #

VOLUNTARY STATEMENT

LAST NAME	FIRST NAME	MIDDLE NAME	AGE	D.O.B.
Flowers	LaParis	Sh Mel	24	[redacted]

NICKNAME/AKA	M / F	SSN	STREET ADDRESS
	M ☒ F ☐		

CITY	STATE	ZIP	MAILING ADDRESS IF DIFFERENT
North Augusta	SC		

HOME TELEPHONE	WORK TELEPHONE	CELL TELEPHONE	OCCUPATION
[redacted]	N/A	N/A	Security

EMPLOYER	EMPLOYER ADDRESS
Universal Protection Service	162 Fairlane Drive

DRIVER'S LICENSE NUMBER/STATE	DATE AND TIME OF INTERVIEW
	12/07/14 1800

LOCATION OF INTERVIEW: Allendale PD

INTERVIEWING AGENT	DEPARTMENT	INTERVIEWING AGENT	DEPARTMENT
M. Brown	SLED	Manor	Allendale PD

I, LaParis Flowers understand I do not have to say anything, and I volunteer the following information of my own free will, for whatever purposes it may serve. I (can) cannot read and write and completed the 10th grade in school.

I LaParis Flowers went to the lobster house at 1100 o'clock along with antron williams and Andre Lofton. We was at the lobster house just having a good time. around 2:45 Me and antron williams left the club and went to kendall Nix (girlfriend) auntie house by IGA a trailer park about 50 ft away. I gave the keys to my brother shawus gill to hold because I had no transportation. Me and my (girlfriend) Kendall Nix left to go back to North Augusta, SC because My aunte Kim called us at the club earlier saying my baby was being cranky and Jennifer Bates (Mother) stated that she was going to the hospital to see if he was okay. It takes about one hour and twenty minutes to get home - North Augusta, SC / I LaParis Flowers left the Club before any type of confrontation or dispute went down. I LaParis Flowers dont know anything or have any idea about a shooting / All the people was cool with me / Russell Smart and Alexandre Gray was just in play acted earlier talking having a good tyme with Me

Q - S/A Brown
A - L. Paris
Q - What vehicle did you drive to the Lobster House?
A - 1999 Oldsmobile Alero - white LF
Q - What conversation did you have with Kim Harley after you left the Lobster House? Aunte Kim stated that Siquivan williams
A - foot got into a dispute with russell smart N Dee gray (Alexandre) about tracy robe

I have read each page of this statement consisting of 2 page(s), each page of which bears my signature, and corrections, if any, bears my initials, and I certify that the facts contained herein are true and correct.

Date: 12-7-14 Time: 1830 LaParis Flowers
Signature of person giving voluntary statement

WITNESS: [signature] 4.00 OFF WITNESS: [signature]

I certify that I have been given a copy of this statement consisting of 2 pages.

Form # CF-002 (Rev. 7-24-06)
CALEA 1.2.3, 44.2.3

COURT'S EXHIBIT NO. 2 IDENTIFICATION/EVIDENCE DKT.# DATE:

VOLUNTARY STATEMENT
SUPPLEMENTAL

CASE # 3-14-0117

LEAD #

LaParis Flowers

Statement of, Continued

affair - and way I was I say we going home to North Augusta to check on my baby.

Q - Did you ever return to the Lobster House after you left?

A - I LaParis Flowers never return to the Lobster house after I left

Q - Did you shoot into a green Ford Crown Victoria at Pinewood Apartments?

A - I LaParis Flowers never shot or saw a green Ford Crown Victoria at Pinewood apartments

Q - Where did you go when you left Allendale?

A - North Augusta, SC 1025 apt Georgetown Villas

LF

LF

LF

LF

Date: 12-7-14 Time: 1830

Signature of person giving voluntary statement

Person giving statement to place initials behind last word of statement as appears on last page.

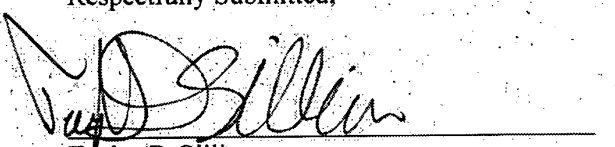
Form # CF-003 (Rev. 7-24-06)

Page 2 of 2

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Supplemental Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,



Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

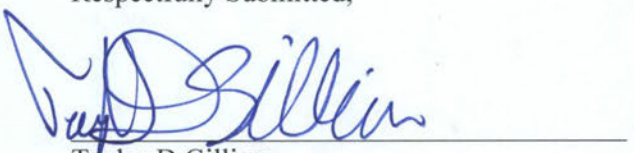
ATTORNEY FOR APPELLANT

This 8th day of February, 2019.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Supplemental Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,



Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEY FOR APPELLANT

This 8th day of February, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Allendale County

Honorable Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LAPARIS SHMEL FLOWERS,

APPELLANT

APPELLATE CASE NO 2018-000099

ANDERS BRIEF OF APPELLANT

TAYLOR D GILLIAM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in admitting three out-of-court identifications of Appellant, where the witnesses' testimony was unreliable such that one individual could not recall any specifics about the identity of the shooter, type of car driven, or gun used, where one witness was unable to recall relevant details from the evening, and where law enforcement repeatedly prodded a witness in constant pain to identify Appellant?

STATEMENT OF THE CASE

On July 23, 2015, an Allendale County grand jury indicted Appellant for one count of murder, three counts of attempted murder, and one count of possession of a weapon during a violent crime. R. 644 – 653. On January 8, 2018, Appellant proceeded to trial before the Honorable Perry M. Buckner and a jury. R. 1. Tameaka Legette and Brian Hollen served as the assistant solicitors, and Joshua Koger, Jr. represented Appellant.

Following a four-day trial, the jury found Appellant guilty as indicted. R. 624, l. 9 – R. 625, l. 4. Judge Buckner sentenced Appellant to forty-five years' incarceration on the murder charge, thirty years on each of the attempted murder charges, and five years on the possession of a weapon charge. R. 641, ll. 3 – 23. The possession of a weapon sentence was crafted to run consecutive, and the attempted murder sentences were designed to run concurrently. Id.

This brief follows.

STANDARD OF REVIEW

"[W]hether an eyewitness identification is sufficiently reliable is a mixed question of law and fact." State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) (finding show-up identification unreliable as a matter of law); see also State v. Traylor, 360 S.C. 74, 81-82, 600 S.E.2d 523, 526-27 (2004) (citing Moore and holding that photographic line-up procedure was "patently suggestive"). "Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error." Moore at 288, 540 S.E.2d at 448. "In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court." Id. Questions of law are reviewed *de novo*. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

ARGUMENT

The trial court erred in admitting three out-of-court identifications of Appellant, where the witnesses' testimony was unreliable such that one individual could not recall any specifics about the identity of the shooter, type of car driven, or gun used, where one witness was unable to recall relevant details from the evening, and where law enforcement repeatedly prodded a witness in constant pain to identify Appellant.

Relevant facts

On or about December 6, 2014, law enforcement was contacted after a car being driven by Russell Smart was found to have veered off the road. R. 62, l. 19 – R. 65, l. 8. Supposedly following an altercation at the Lobster House in Allendale, the car, which also contained Jarrell Murray, Brandon Lewis, and Tyquan Charlton, was shot into and crashed into a tree. Id. Although Appellant denied involvement with the shooting, he was arrested after witnesses identified him out of a lineup. R. 72, l. 14 – R. 74, l. 20; R. 459, ll. 18 – 24.

The trial court held a Neil v. Biggers[1] hearing and heard testimony from Charles Matt Brown, an employee of South Carolina Law Enforcement Division who assisted with the investigation after the Allendale Police Department made a request for assistance. R. 62, l. 19 – R. 63, l. 6. Brown interviewed the three men who were in the car and showed each a photographic line-up containing Appellant. R. 83, ll. 18 – 23.

Law enforcement met with Brandon Lewis twice- once on December 6, 2014 with a detective and once with Brown on December 7, 2014 at Lewis' grandmother's house. R. 84, l. 3 – R. 92, l. 8; R. 102, l. 14 – R. 103, l. 25. During the earlier interview, he was unable to describe

[1] 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d (1972).

the shooter. R. 104, l. 1 – R. 105, l. 9. Furthermore, he was unable to describe the car being driven by the shooter or the gun used by the shooter. Id. Nonetheless, an investigator repeatedly prodded Lewis to identify Appellant even though Lewis was in constant pain after having been shot. R. 106, l. 3 – R. 108, l. 8.

At the interview with Brown, Lewis was instructed "to look at the set of photographs and see if [he] could identify the person that [he is] alleging committed the specific crime in this situation, that shot into Mr. Russell Smart's vehicle." R. 88, ll. 8 – 16. Lewis indicated that he had seen Appellant before, that the two both resided in Allendale and knew each other previously. R. 89, ll. 1 – 8. Lewis identified Appellant via the lineup. R. 89, l. 9 – R. 90, l. 2.

Jarrell Murray also met with Brown on December 7, 2014. R. 92, l. 9 – R. 97, l. 22. The two met in the parking lot of the Allendale County Magistrate's Office. R. 92, ll. 14 – 18. Instructions similar to those given to Lewis were offered to Murray. R. 93, ll. 15 – 23. Murray identified Appellant. R. 93, ll. 24 – 25; R. 97, ll. 8 – 12.

Brown met with Tyquan Charlton on December 10, 2014 at the Augusta University Medical Center. R. 97, l. 23 – R. 102, l. 4. Similar to the others, Charlton was provided comparable instructions, knew Appellant, and identified him. Id. Charlton did, however, have difficulty remembering other matters, particularly how he got into Smart's car. R. 100, ll. 2 – 23.

At the conclusion of the *in camera* hearing, counsel for Appellant challenged the identification by all three men and noted that the State had not met its burden to show that the identifications should be admissible. R. 116, l. 18 – R. 119, l. 16. The trial court ruled that the "there [was] sufficient evidence to admit the identification into evidence in the trial of this case by the preponderance of the evidence." R. 121, l. 25 – R. 124, l. 14.

Discussion

"A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." Id.

In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198, 93 S.Ct. 375. Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (citing Biggers, 409 U.S. at 199–200, 93 S.Ct. 375).

South Carolina courts have held this determination should be made during an *in camera* hearing, outside of the presence of the jury. See State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (holding that generally, a trial court must hold an *in camera* hearing when the State offers a witness whose testimony identifies the defendant as a person who

committed the crime and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation); State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992) (same); see also Rule 104(c), SCRE (providing that "[h]earings on the admissibility of ... pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury"). "The purpose of the *in camera* hearing is to determine whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding the prior, out-of-court identification." Ramsey, 345 S.C. at 613, 550 S.E.2d at 297.

With regards to the identification by Brandon Lewis, the second identification was unduly suggestive following a first encounter during which Lewis was unable to identify the shooter or car and where he did not see a weapon. R. 104, l. 1 – R. 105, l. 9. He told law enforcement *he did not know who shot him.* Id. He "did not recall seeing anything or hearing anything." Id. This interview took place closer in time to the incident than the second interview where he identified Appellant. Id. At the second interview, Lewis was in constant pain and was prodded by an investigator to identify Appellant. R. 106, l. 3 – R. 107, l. 4. Lewis was hesitant to identify Appellant. R. 107, ll. 16 – 22.

Charlton's identification was equally suspect considering his inability to remember basic details from the night of the shooting. Charlton was unable to remember how he ended up at the club or even in Smart's car. R. 108, ll. 9 – 25. Notably, Charlton testified at trial that the line-up admitted as State's Exhibit 74 was incongruent to the one shown to him at the hospital. R. 260, l. 21 – R. 262, l. 25. He testified that the picture of Appellant "was up top" and not on the bottom row when he saw it in the hospital. Id. Charlton also testified that he was "doped up with the medicine" that the hospital staff had given him. R. 258, ll. 7 – 22. He also admitted to having a conviction in Barnwell County for giving false information in 2014. R. 260, ll. 5 – 9.

At trial, Lewis testified that he was unable to make an identification in the photographic line-up. R. 306, l. 23 – R. 308, l. 2. Quite notably, he did not remember making a selection in the line-up on December 7, 2014. Id. He did not recall telling law enforcement who shot him. Id. Although this was trial testimony which took place after the *in camera* hearing, it evidenced a repeated pattern of dubious claims made by witnesses to the shooting. The shooting took place around 3:20 in the morning on December 6, 2014. R. 102, ll. 21 – 23. It was dark outside, and visibility would have been less than ideal.

Charlton and Murray both identified Appellant in the courtroom at trial. R. 265, l. 20 – R. 266, l. 3; R. 286, l. 23 – R. 287, l. 13. These in-court identifications should have been inadmissible following the suggestive out-of-court identification procedures used by law enforcement which created a very substantial likelihood of irreparable misidentification.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions based upon the trial court's error in failing to exclude the prejudicial photographic lineups, out-of-court identifications and resulting in-court identifications.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of February, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Allendale County

Honorable Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LAPARIS SHMEL FLOWERS,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Laparis Shmel Flowers states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Perry M. Buckner, which was held on January 8 - 11, 2018, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Laparis Shmel Flowers.

Respectfully Submitted,

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

This 1st day of February, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Allendale County
Honorable Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LAPARIS SHMEL FLOWERS,

APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictment(s);
(2) Entire trial transcript from January 8 – 11, 2018;
(3) Court's Exhibits 1 – 5;
(4) State's Exhibits 1 – 33, 35 – 48, and 85.

I certify that this designation contains no matter which is irrelevant to this appeal.
February 1, 2019

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 1, 2019.

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Allendale County

Honorable Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LAPARIS SHMEL FLOWERS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Laparis Shmel Flowers, 375098, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 1st day of February, 2019.

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of February, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
APPEAL FROM ALLENDALE COUNTY

HONORABLE PERRY M BUCKNER, CIRCUIT COURT JUDGE

THE STATE, RESPONDENT

V.

LAPARIS S. FLOWERS, APPELLANT

APPELLATE CASE NO. 2018 – 000099

PRO SE BRIEF OF APPELLANT

LA'PARIS S. FLOWERS
APPELLANT PRO SE
LEE CORRECTIONAL INSTITUION
990 WISACKY HIGHWAY
BISHOPVILLE, SC 29010

TABLE OF AUTHORITIES

STATEMENT OF ISSUE ON APPEAL

Although the trial court considered the out of courts identifications to be admitted in trial, it failed to instruct the jury on factors to consider when determining whether accuracy of identification of defendant was proven beyond reasonable doubt. In a case where identification is crucial, it is harmless error IF general instructions focus jury on the need for proving defendant was offender beyond reasonable doubt, jury was made aware of weaknesses in identification, danger of misidentification was minimized by corroborative evidence, and court specifically told jury that when determining witness credibility. It should consider circumstances that witnesses were in. The Telfaire instructions explain that the jury be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before they may convict, Telfaire 469 F.2d at 552. Further, the jury instructions specifically inform the jury that it should consider capacity and opportunity of the witness to observe the reliability of the offender, witness own recollection, and view the strength and the circumstances under which it was made inconsistent identifications made, and credibility of the witness. A curative instruction to the jury would have overcome any potential prejudice to defendant and cured possible error. All three witnesses initially could not recall any specifics about the identity of the shooter, type of car driven, or gun used, or relevant details from the evening. Ultimately, the witness identifications were contradictory and led to defendant's conviction.

STATEMENT OF THE CASE

On January 8, 2018, Appellant proceeded to trial before the Honorable Perry M. Buckner and jury. Tameaka Leggette and Brian Hollen served as the assistance Solicitors and Joshua Knaer Jr. represented appellant. Following a four-day trial, the jury found appellant guilty as indicted. Judge Buckner sentenced appellant to forty-five (45) years incarceration on the murder charge; thirty (30) years on each of the attempted murder charges, and five (5) years on the possession of a weapon charge.

The appellant has filed a motion to file a supplemental record on appeal. Appellants motion was granted and supplemental record on appeal was considered served and filed.

Appellant's counsel filed a brief indicating that appeal is without merit and moves to be relieved as counsel. *Ander v. California*, 386 U.S. 738, 87 S. Ct. 1396. 18 L.E. 2d 493 (1967).

Appellant responds with this Pro Se submission requesting the Court consider the issues below for further briefing.

STANDARD OF REVIEW

The Sixth Circuit has held that giving the Telfaire instructions is a matter of discretion for the trial court. It has, at the same time, stressed that it needs to be given when the issue of identity is crucial, either where no corroboration of the testimony exists, or where the witness' memory faded by the time of trial, where limited opportunity for observation. State v. Boyd 620, 35, SC 269, 14 SE 620 Feb 12, 1892.

Further, courts need not inquire into the reliability of an eyewitness identification even if it was procured under suggestive circumstances. Courts employ a two-step analysis to determine the admissibility of an identification. First, the defendant must prove that the identification procedure was impermissibly suggestive. Second, the courts consider whether the testimony was nonetheless reliable. In *Neil v. Bigger*, five factors are used:

1.) the witness' opportunity to view the culprit at the time of the crime; 2.) the witness degree of attention of the crime; 3.) the witness description of the culprit prior to the identification; 4.) the witnesses level of certainty when identifying the defendant at the confrontation; and 5.) the length of time between the crime and the confrontation.

ARGUMENT ONE

1) The trial court failed to give the Holley-Telfaire instruction, which is given in cases where there is no evidence of identification except eyewitness testimony. It advises the jury on how to appraise a witness identification testimony emphasizing whether the witness had opportunity to observe the offender, how good the light was, the length of time between the offense and the identification and other factors. All three out of court identifications of appellant were unreliable yet most egregious one witness could not recall any specifics about the identity of the shooter, type of car driven, or gun used.

The identification Procedure used to obtain testimony of victim was unnecessarily suggestive. Factors to consider in determining the actual suggestiveness of the identification and whether there was a good reason for the failure to utilize less suggestive procedures. "If the photo array is unnecessarily suggestive, we determine under the totality of the circumstances whether it was so much so that it gave rise to substantial likelihood or misidentification amounting to a violation of due process reliability is the linchpin in determining the admissibility of identification testimony." Id at 1391

ARGUMENT TWO

The District Court failed to give the Holley-Telfaire instructions, which is given in cases where there is no evidence of identification except eye witness testimony. They advise the jury on how to appraise a witness identification testimony emphasizing whether the witness had opportunity to observe the offender, how good the light was, the length of the time between the offense, and the identification and other factors. *State v. Telfaire* 469 F.2d 552 ... Brandon Lewis first interview with police, he was unable to identify the shooter or car and did not see a weapon. He told law enforcement he did not know who shot him. Brandon Lewis' second identification was unduly suggestive. Lewis was in constant pain and was prodded by an investigator to identify Appellant. Lewis was hesitant to identity Appellant. (p. 107, lines 9-25). Lewis' court testimony was that he did not remember who shot him on December 6th. (p. 307, lines 1-24; p. 308, lines 1-2)

Tyquan Charlton expressed a similar difficulty in recollection with inconsistencies between trial testimony and out-of-court identifications, such that he could not recall any specifics about the evening. Most telling, the initial photo lineup shown him had appellant's photo on top but when seen at trial it had been re-arranged (!) (p262, lines 16-25) Tyquan Charlton also did not remember how he ended up in Russell Smarts car the night of the incident. (p. 269, lines 1-15) Tyquan Charlton also testified that he gave the Police / Law Enforcement false information in his past.

Jerrell Murray could not recall any specifics about the evening; witness interview was recorded as well as rehashed. (p. 94, Lines 14-25) No description was given; witness also indicated at that time he didn't know who was in the car with him. A suggestive out-of-court identification

procedure created a very substantial inustice of irreparable misidentification. "Defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive." *State v. Taylor* 360 SC 74, 81 **(where Law enforcement stated appellant named several times on recordings (see related recordings in this case)**

CONCLUSION

Appellant respectfully requests the court order a new trial based upon the trial court's error in failing to instruct jury on factors to consider when determining whether accuracy of identifications of defendant were proven beyond a reasonable doubt in case. Additionally, whether the trial court erred by allowing unreliable witness testimony in when the suggestive police procedures used denied appellant a fair trial.

Done this 14th day of **March**, 2019

LA'PARIS S. FLOWERS
APPELLANT PRO SE
LEE CORRECTIONAL INSTITUION
990 WISACKY HIGHWAY
BISHOPVILLE, SC 29010

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
APPEAL FROM ALLENDALE COUNTY

THE STATE OF SOUTH CAROLINA **Respondent** v. LA'PARIS S. FLOWERS **Petitioner**	**CASE No.** 2018 – 000099 **CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify that I have served a copy of this foregoing instrument upon the clerk of court, via properly addressed U.S. Mail, with first-class postage prepaid affixed thereto, by placing into the internal mailing system as made available to inmates for legal mail, at the State Correctional Institution Lee County. The Defendant / Petitioner / Movant further requests that a copy of this his motion be forward to all interested parties via the CM / ECF system, as he is detained, indigent, and has no other means.

Done this 14th, Day of **March**, 2019

Respectfully Submitted,

LA'PARIS S. FLOWERS #375098
APPELLANT PRO SE
LEE CORRECTIONAL INSTITUION
F4B - 2211
990 WISACKY HIGHWAY
BISHOPVILLE, SC 29010

Laparis SHMEL Flowers
Sodc 00375098
F-4 CBU Program Dorm Rm 2211
Lee County Inst
po 990 Wisacky Hwy
Bishopville Sc 29010

UNITED STATES POSTAGE
PITNEY BOWES
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Columbia Sc, 29211

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Laparis Shmel Flowers, Appellant.

Appellate Case No. 2018-000099

Appeal From Allendale County
Perry M. Buckner, III, Circuit Court Judge

Unpublished Opinion No. 2020-UP-207
Submitted June 1, 2020 – Filed July 1, 2020

APPEAL DISMISSED

Appellate Defender Taylor Davis Gilliam, of Columbia, and Laparis Shmel Flowers, pro se, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Melody Jane Brown, both of Columbia, for Respondent.

PER CURIAM: Dismissed after consideration of Appellant's pro se brief and review pursuant to *Anders v. California*, 386 U.S. 738 (1967). Counsel's motion to be relieved is granted.[1]

APPEAL DISMISSED.

LOCKEMY, C.J., and GEATHERS, and HEWITT, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

FORM 5

STATE OF SOUTH CAROLINA)
)
County of Allendale)
)
LaParis Flowers #375098)
Full name and prison number (if any) of Applicant)
)
v.)
)
State of South Carolina)
)
)
)

IN THE COURT OF COMMON PLEAS
2020-CP-03-00351

FILED FOR RECORD
2020 OCT 19 A 9:41
ELAINE BAUM
CLERK OF COURT
ALLENDALE COUNTY, S.C.

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS – READ CAREFULLY

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

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

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional Institution
990 Wisacky Hwy, Bishopville, S.C. 29010

2. Name and location of Court which imposed sentence Allendale County
Court of General Sessions, Allendale S.C.

3. Name(s) of co-defendant(s) (if any) N/A

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2014-GS-03-00234; 2014-GS-03-00239;

(b) 2014-GS-03-00231; 2014-GS-03-00232.

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) January 11, 2018, 45 years.

(b) January 11, 2018, three concurrent terms of 30yrs.

(c) January 11, 2018, 5 years consecutive.

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty ✓

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. The South Carolina Court of Appeals

ii. The Supreme Court of South Carolina

iii. _____

(b) the result in each such Court to which you appealed:

i. Appeal Dismissed

ii. Appeal Dismissed

iii. _____

(c) the date of each such result:

i. _____

ii. September 24, 2020

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. _____

ii. Ct. App. No. 2020-001271

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective Assistance of Trial counsel

(b) Ineffective Assistance of Appellet counsel

(c) _____

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

(a) See Attachment (1) pg 1.

(b) See Attachment (1) pg 2.

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO

(d) any other petitions, motions or applications in this or any other Court? No

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

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) First PCR

(b)

(c)

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea?

(b) your trial, if any? Yes

(c) your sentencing? Yes

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

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

No

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

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

i. Joshua Kegan J. Esquire
P.O. Box 2445

ii. Melody Jane Brown, Appellate
Taylor Gilliam, Appellate

iii.

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

i. Trial and Sentencing

ii. Appeal

iii.

19. State clearly the relief you seek in filing this application:

For the conviction and sentence to be vacated and set aside or, in the alternative, reversed of conviction and new trial granted.

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

STATE OF SOUTH CAROLINA)
County of Allendale) VERIFICATION

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

LaParis Flowers

SWORN to and subscribed before me this 14th day of Oct., 2020.

Notary Public (L.S.)

My Commission Expires: 09-04-29

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

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

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

LaParis Flowers
Applicant

SWORN or affirmed to and subscribed before me this 14th day of Oct, 2020.

Notary Public

My Commission Expires: 09.04.2029

Revised 3/2003

(Attachment 1, to sect. (a) of Application)

FILED FOR RECORD
2020 OCT 19 A 11:41
ELAINE SADD
CLERK OF COURT
ALLENDALE COUNTY, S.C.

RE: Flowers vs. State, Application for Post Conviction Relief.
Case No. _____

Pursuant to section (a) of the application, the Applicant asserts, as presented below, that he has received ineffective assistance of trial and appellate counsel in violation of his right to effective assistance as provided for under the U.S. Constitution 6. Amendment; and as articulated in the case of Strickland v. Washington, 104 S. Ct. 2052 (1984).

Issues Presented:

(1) Trial counsel was ineffective in failing to obtain and introduce at trial recorded evidence that would reveal more clearly the improper manner and highly suggestive identification procedure used to identify the Applicant.

(2) Trial counsel fail to interview known alibi witness in light Applicant claims of being elsWhere during the initial altercation.

(1 of 2)

(Attachment 1, continues)

(3) Trial counsel fail to request for additional jury instruction as it concern the court limited and inadequat identification testimony charge to the jury that, as a Whole, represented the prosecution case in chief.

(4) Trial counsel fail to object and perserve for appallete review the trial court use of the questionable and now prohibited infered malice charge based on the charge giving as not being sufficient to compensate for its prejudicial effect.

(5) Appellate counsel was ineffective in failing to raise the issue as to whether the new Supreme Court rule prohibiting the use of the malice charge applied to his case that was on appeal at the time.

Date: 10-14-20

I [signature]
Flowers, Lapatis #375098

(2 of 2)

STATE OF SOUTH CAROLINA COUNTY OF ALLENDALE	)	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT
LaParis Flowers, SCDC #375098, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2020-CP-03-00257 **RETURN TO APPLICATION FOR POST-CONVICTION RELIEF** (Counsel Retained)

Respondent the State of South Carolina, making its return to the application for post-conviction relief filed by LaParis Flowers (Applicant) on October 19, 2020, and received by the South Carolina Attorney General's office on October 26, 2020, would respectfully show this Court:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections. During its July 2015 term, the Allendale County Grand Jury indicted Applicant for murder (2014-GS-03-00229); three counts of attempted murder (2014-GS-03-00231; -00232; -00233); and possession of a weapon during the commission of a violent crime (2014-GS-03-00234). On January 8, 2018, Applicant proceeded to a jury trial before the Honorable Perry M. Buckner, IV. Joshua Koger, Jr., Esquire (Trial Counsel) represented Applicant. Assistant Solicitors Tameaka Legette and Brian Hollen of the Fourteenth Circuit Solicitor's Office prosecuted the case.

On January 11, 2018, following a four-day trial, the jury returned a verdict of guilty on each indictment. Judge Buckner sentenced Applicant to concurrent terms of forty five years' imprisonment for murder and thirty years for each charge of attempted murder, and a consecutive term of five years for the weapons charge.

Applicant filed a timely notice of appeal. Taylor D. Gilliam (Appellate Counsel) perfected Applicant's appeal by filing an *Anders*[1] brief. (Appellate Case No. 2018-000099). Appellate Counsel raised one issue:

> "Whether the trial court erred in admitting three out-of-court identifications of Appellant, where the witnesses' testimony was unreliable such that one individual could not recall any specifics about the identity of the shooter, type of car driven, or gun used, where one witness was unable to recall relevant details from the evening, and where law enforcement repeatedly prodded a witness in constant pain to identify Appellant?"

Applicant also filed a *pro se* brief on March 18, 2019 and an amended *pro se* brief on November 12, 2019, citing the issue on appeal as:

> "Did the trial Judge abuse his discretion by giving erroneous jury instructions regardless of the evidence presented at trial. Court may not instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon, overruling *State v. Belcher*, 385 SC 597, 685 SE 2d 802 (October 12, 2009)".

On July 1, 2020, the Court of Appeals issued an unpublished opinion dismissing Applicant's appeal. *State v. Flowers*, 2020-UP-207 (S.C. Ct. App. filed July 1, 2020). Thereafter, on July 8, 2020, Applicant filed a petition for Rehearing En Banc and raised four questions:

> 1) "Did the Court of Appeal commit an error in affirming conviction without considering the issue regarding that malice can be inferred from the use of a deadly weapon, that was raised in the supplemented brief and submitted to the Court before a decision was made to affirm based on other issues raised in initial brief?"
> 2) "Did the Trial Court commit reversible error when the Court instructed the Jury that malice can be inferred from the use of a deadly weapon – an element of Murder? (Statue S.C. Code 16-3-10)?"
> 3) "Did the Trial Court refuse to give additional charge instructions based on the agreement by both attorneys in Charge Conference?"
> 4) "Did the review in the colloquy between the Trial Court and counsel convince the Court of Appeals that the position of each

[1] *Anders v. California,* 386 U.S. 738 (1967).

> was made well known prior to the Commencement of the Charge and any further objection was required under these facts in order to preserve the right of the Defendant (5th, 6th, 14th Constitutional Amendment Right to Due Process and a fair trial)?"

By Order filed September 8, 2020, the Court of Appeals denied Applicant's petition for rehearing.

Applicant then filed a petition for writ of certiorari, dated September 17, 2020 and received by the South Carolina Attorney General's office September 21, 2020 citing the issue:

> "Whether the appeals court erred in denying Petitioner's appeal in light of the new rule made retroactive in State v. Burdette, infra, which the Petitioner claim is applicable to his case".

By Order dated September 24, 2020, the Supreme Court of South Carolina dismissed the petition for writ of certiorari under *State v. Lyles*[2]. The case was returned to the circuit court on September 25, 2020.

II. Summary of Factual History

During the early morning hours of December 6, 2014, Applicant drove alongside the vehicle parked in Pinewood Apartments, driven by Russell Smart, and containing Tyquan Charlton, Brandon Lewis, and Jarrell Murray and opened fire (Tr. 163-64). After Applicant started shooting, victim Russell Smart drove his car a brief distance, ultimately crashing into the front yard of a residence (Tr. 165). Officers responded to a call for shots fired on Barton Road, Allendale and upon arrival, officers saw a green vehicle resting against a tree with a group of people gathered around it (Tr. 181-82). Paramedics were also dispatched to the gunshot wound call and transported Mr. Smart and Mr. Charlton to Allendale County hospital (Tr. 195-96; 201).

During ambulance transport Russell Smart went into cardiac arrest and was pronounced

[2] 381 S.C. 442, 673 S.E.2d 811 (2009). The Court held that it will no longer entertain petitions for writs of certiorari where the Court of Appeals has dismissed an appeal after conducting an *Anders* review.

dead on arrival at the hospital (Tr. 202-03; 211-12). An autopsy was later performed on Russell Smart and his death ruled a homicide; he was determined to have died by exsanguination from a laceration of the aorta and lungs (Tr. 332-33). Tyquan Charlton, another occupant of the vehicle, was shot in the left mandible and upon arrival by ambulance to Allendale Hospital, was transferred to the Medical College of Georgia (MCG) in Augusta, Georgia (Tr. 213-14). Brandon Lewis was also shot. Though he initially fled the scene, he was later taken to the Allendale Hospital and then transferred to MCG (Tr. 304-306).

On December 7, 2014, Brandon Lewis was interviewed by South Carolina Law Enforcement Divisions (SLED) agents and Allendale Police and identified Applicant as the shooter in a photographic line-up (Tr. 413-20). Jarrell Murray was also interviewed on December 7, 2014, by SLED and Allendale Police (Tr. 286-90). Mr. Murray identified Applicant as the shooter and testified the same during Applicant's trial (Tr. 420-30). On December 10, 2014, victim, Tyquan Charlton was interviewed by SLED (Tr. 255-61). Mr. Charlton too identified Applicant as the shooter and testified to the same during Applicant's trial (Tr. 430-36).

III. Current Post-Conviction Relief Application

Applicant timely commenced this PCR action on October 19, 2020. Applicant asserts he is being held in custody unlawfully, alleging:

1) Ineffective Assistance of Trial Counsel
    a. "Trial counsel was ineffective in failing to obtain and introduce at trial recorded evidence that would reveal more clearly the improper manner and highly suggestive identification procedure used to identify the Applicant";
    b. "Trial counsel failed to interview known alibi witness in light Applicant claim of being elsewhere during the initial altercation";
    c. "Trial counsel fail to request for additional jury instruction as it concern the court limited and inadequate identification

testimony charge to the jury that, as a whole, represented the prosecution case in chief";

d. "Trial counsel failed to object and preserve for appellate review the trial court use of the questionable and now prohibited inferred malice charge based on the charge giving as not being sufficient to compensate for its prejudicial effect";

2) Ineffective Assistance of Appellate Counsel

a. "Appellate counsel was ineffective in failing to raise the issue as to whether the new Supreme Court rule prohibiting the use of the malice charge applied to his case that was on appeal at the time".

Applicant requests relief as follows:

> "For the conviction and sentence to be vacated and set aside or in the alternative, reversal of conviction and new trial granted".

Attached herewith and incorporated by reference are the Allendale County Clerk of Court records regarding the subject conviction; Applicant's records from the South Carolina Department of Corrections; the trial transcript; the records from Applicant's appeal, and the records of this current PCR action. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

IV. Response to Allegations of Ineffective Assistance of Counsel

Applicant alleges he is entitled to post-conviction relief based on ineffective assistance of counsel. The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant—like all other defendants—the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. *See generally* S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a *prima facie* violation of this

constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. at 687. To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Id.* at 687–88; *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690 (emphasis added). The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance" demanded of attorneys in criminal cases. *Id.* Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption

that counsel's conduct falls within the wide range of reasonably professional assistance." *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Review of counsel's actions is hallmarked by deference, as "it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689; *see also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Strickland*, 466 U.S.at 688–89; *see id.* at 691 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."). Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Id.* at 689. The ultimate question is not whether counsel's actions were reasonable, but whether there is any reasonable argument counsel satisfied *Strickland's* deferential standard.

The second, or "prejudice" prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. 466 U.S. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. *See id.* at 695 (Where a defendant challenges his conviction, he must show that there exists "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").

In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. *Id.* at 695. It is not sufficient "to show [counsel's] errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to *deprive the defendant of a fair trial.*" *Id.* at 687 (emphasis added). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

The *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690. Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both *Strickland* components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding.

Strickland, 466 U.S. at 686; *see Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding").

A. Failure to Investigate and Prepare for Trial

Applicant contends trial counsel was ineffective for failing to obtain and introduce recorded evidence at trial, failing to interview known alibi witness, and failing to request additional jury instructions. As discussed below, Respondent is presently without sufficient information to fully respond to this claim because Applicant does not indicate with any specificity what trial counsel should have obtained and introduced as evidence, who counsel failed to interview, and how Applicant was prejudiced.

"A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). "[W]hile the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Ard*, 372 S.C. at 331–32, 642 S.E.2d at 597 (internal quotation marks omitted) (emphasis omitted). However, counsel need only interview potential witnesses "when it is reasonable to do so." *Edwards v. State*, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011). "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other

defenses applicant could have requested counsel develop and present had counsel been more prepared. *Harris*, 377 S.C. at 75–76, 659 S.E.2d at 145–46 (citing *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. *Harris*, 377 S.C. at 75–76, 659 S.E.2d at 145–46. Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Id.* at 75, 659 S.E.2d at 145 (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Our Supreme Court has cautioned reviewing courts not to lose sight of the reasonableness standard regarding counsel's duty to investigate. *Ard*, 372 S.C. at 331, 642 S.E.2d at 597 (noting that "this duty is limited to a reasonable investigation"). Reviewing courts "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690. Thus, in applying the *Strickland* standard to a claim of failure to investigate, counsel's decision not to undertake a particular investigation must be evaluated with heavy deference to counsel's judgment. *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 633–34 (Ct. App. 2014).

For the above-reasons, Applicant cannot satisfy either requirement of *Strickland*, nor show trial counsel was ineffective. However, the record likely does not refute or disprove Applicant's allegations of ineffective assistance of trial counsel; therefore, the State requests an evidentiary hearing to fully resolve the issues. *See Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (providing an evidentiary hearing shall be held when a PCR application "alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court").

B. Failure to Object and Preserve Issues for Appellate Review

Applicant further asserts trial counsel was ineffective for failing to object and preserve issues for appellate review. Leaving an issue unpreserved does not automatically constitute ineffective assistance of counsel. *See Millidge v. State*, 422 S.C. 366, 374, 811 S.E.2d 769, 800–01 (2018) (stating an applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel for failing to preserve an issue); *see also id.* at 380, 811 S.E.2d at 804 ("[T]he proper inquiry for determining prejudice . . . is whether there is evidence in the record to support the trial court's finding . . . . If so, an appellate court would necessarily have affirmed the trial court's [ruling] . . . .").

Similarly, "[a]n ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." *Hough v. Anderson*, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the *Strickland* test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." *Id.*; *see Miller v. Keeney,* 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both *Strickland* prongs); *U.S. ex rel. Link v. Lane*, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from failure to object unless there is a legally supportable argument for exclusion of the evidence).

For the above-reasons, Applicant cannot satisfy either requirement of *Strickland*, nor show trial counsel was ineffective. However, the record likely does not refute or disprove Applicant's allegations of ineffective assistance of trial counsel; therefore, the State requests an evidentiary hearing to fully resolve the issues. *See Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (providing an evidentiary hearing shall be held when a PCR application "alleges specific

instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court").

V. Ineffective Assistance of Appellate Counsel

Applicant claims appellate counsel failed to raise an issue. Beyond the right to effective assistance of counsel at trial, a criminal defendant is constitutionally entitled to the effective assistance of appellate counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, (1985) (finding that to be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair). However, Appellate counsel is *not* obligated to raise every non-frivolous issue that is presented by the record. *Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990); *Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir. 2000); *cf. Jones v. Barnes,* 463 U.S. 745, 752 (1983) ("There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review."). Indeed, "[w]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray,* 477 U.S. 527, 536 (1986). "For [courts] to second-guess reasonable professional judgments and impose on [appellate] counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." *Jones*, 463 U.S. at 754.

In analyzing a claim of ineffective assistance of appellate counsel, the reviewing court applies the *Strickland* test just as it would when analyzing a claim of ineffective assistance of trial counsel. *E.g., Southerland v. State,* 337 S.C. 610, 524 S.E.2d 833 (1999). The applicant must demonstrate (1) that his "counsel's representation fell below an objective standard of reasonableness" in light of the prevailing professional norms, *Strickland*, 466 U.S. at 688, and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different," *Id.* at 694; *see Smith v. Robbins*, 528 U.S. 259 (2000) (holding that habeas applicant must demonstrate that "counsel was objectively unreasonable" in failing to file a merits brief addressing a nonfrivolous issue and that there is "a reasonable probability that, but for his counsel's unreasonable failure . . . , he would have prevailed on his appeal").

Specifically, when an applicant contends appellate counsel rendered ineffective assistance for failing to argue a specific issue on appeal, he must show failure to raise that issue was objectively unreasonable and that, but for this failure, there is a reasonable probability he would have prevailed on appeal. *Southerland*, 337 S.C. at 616, 524 S.E.2d at 836; *Anderson v. State,* 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). In applying *Strickland* to claims of ineffective assistance of counsel on appeal, however, "reviewing courts must accord appellate counsel the presumption that he decided which issues were most likely to afford relief on appeal." *Jarvis*, 236 F.3d at 164 (internal citation omitted). "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Id.* (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)).

For the above-reasons, Applicant cannot show appellate counsel was ineffective. However, the record likely does not refute or disprove Applicant's allegations of ineffective assistance of appellate counsel; therefore, the State requests an evidentiary hearing to fully resolve the issues. *See Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (providing an evidentiary hearing shall be held when a PCR application "alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court").

VI. Any Future Amendments and Invocation of Discovery Process

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, not Applicant, is the only individual authorized to file amendments to this application. *See* Rule 11, SCRCP. *Pro se* filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State pursuant to *Love v. State*, 428 S.C. 231, 834 S.E.2d 196 (2019), or, alternatively, the State will request a continuance in the matter. *Id.*, 428 S.C. at 245, 834 S.E.2d at 203 (Kittredge, J., dissenting) ("If, however, the proposed amendment . . . would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.").

If Applicant fails to file a timely and responsive amended application setting forth specific allegations for relief, the State reserves the right to move to dismiss this allegation or claim. S.C. Code Ann. §§ 17-27-10 to -160; Rule 71.1, SCRCP. *See also* Rules 15(a)–(b), SCRCP. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State. *See* Rule 15(a), SCRCP.

Pursuant to S.C. Code Ann. § 17-27-150, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, the State requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to the State well in advance of the evidentiary hearing. As noted above, the State reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to the State. *See Love*, 428 S.C. 231, 834 S.E.2d 196.

VII. Response to Any and All Other Allegations

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

VIII. Conclusion

WHEREFORE, the State respectfully requests this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel and ineffective assistance of appellate counsel.

Respectfully submitted,

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February 5, 2021

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	2020-CP-03-00257

LaParis Flowers,

Plaintiff,

vs.

State of South Carolina,

Defendant.

TRANSCRIPT OF HEARING

March 14, 2023
Beaufort, South Carolina

B E F O R E:

The Honorable Robert J. Bonds, Judge Presiding

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

Danielle Dixon, Esquire
Assistant Attorney General
For the Respondent

Tommy A. Thomas, Esquire
For the Applicant Young, Jr.

Cathy L. Young, CVR-M
Official Circuit Court Reporter
Post Office Box 4604
Beaufort, South Carolina 29903

I N D E X

P R O C E E D I N G S

* * * * *

THE COURT: All right, Attorney General, this is a case involving the Applicant, Mr. LaParis Flowers?

MS. DIXON: Yes, sir, ---

THE COURT: All right.

MS. DIXON: -- that's correct.

THE COURT: Yes, ma'am.

MS. DIXON: Your Honor, this is Danielle Dixon, Assistant Attorney General for the State of South Carolina. This is the case of LaParis Flowers v. State, Docket Number 2022-CP-03-257. Mr. Flowers is serving a 50-year sentence. He was indicated by the Allendale County Grand Jury in July of 2015 for murder, three counts of attempted murder and possession of a weapon during the -- a violent crime, and those are Indictment Numbers 2014-GS-3-229, 231, 233 and 234. These charges arose from a December 6th, 2014, fatal shooting of Russell Smart. There were three other occupants in the vehicle that Russell Smart was in, and those -- those are what the attempted murder charges came from. Mr. Flowers proceeded to a jury trial before the Honorable Perry M. Buckner, on January 8th, 2018. He was represented by Mr. Koger -- Joshua Koger.

THE COURT: Good morning.

MR. FLOWERS: Good morning, Judge.

MS. DIXON: He was convicted as indicted, and Judge Buckner sentenced him to 45 years for murder, a concurrent -- concurrent sentences of 30 years each for all of the -- each of the attempted murder charges, and a consecutive five-year sentence for the weapons charge. He filed a direct appeal and was represented by appellate defender, Taylor Gilliam. On appeal Mr. Gilliam filed a brief arguing that the Court -- well, actually Mr. Gilliam filed an Anders brief arguing that the Court erred in admitting three out of court identifications of Applicant, because the testimony was unreliable. The Court of Appeals did dismiss that appeal, pursuant to Anders. Mr. Flowers, on his own, filed a pro se petition for rehearing, which was denied. He also filed a petition for CERT in the State Supreme Court that was dismissed, because the Court does not consider petitions for CERT from Anders' opinions. The remitter was sent September 25th, 2020. This PCR application was timely filed October 19th, 2020. The State filed a return seeking an evidentiary hearing. Mr. Flowers did file an amended application, alleging ineffective assistance

of counsel for several reasons, including failure to introduce evidence that would reveal more clearly the improper and highly suggested identification procedures, failing to interview, and present testimony of alibi witnesses, failing to request additional jury charges concerning this Trial Court's limited and adequate identification testimony charge to the jury, failing to object to the Judge, instructing the inference of malice may arise from the use of a deadly -- deadly weapon, failure to introduce audio recordings of the interviews of complainant witnesses, failing to object to the improper comments of the Solicitor, and improper vouching of the Solicitor, failing to object to unsealing of juvenile records, and failing to object to comments on truth seeking language. Your Honor, it is our understanding from talking to Mr. Groves that they are not going forward on the claim about failing to introduce evidence that would reveal more clearly the improper and highly suggestive ID procedures, and also we did obtain the Family Court order of unsealing the juvenile record, and it's our understanding they are not going forward on that claim either.

THE COURT: Counsel?

MR. THOMAS: That's correct.

THE COURT: Okay, so you're not going forward, all right. All right.

MS. DIXON: And, Judge, one more I overlooked, I apologize, he did also raise a claim against appellate counsel for failing to raise an issue regarding the malice charge under the case State v. Burdette, that's 427 S.C. 490. I believe that's a 2019 opinion.

THE COURT: All right. Counsel, I'm happy to hear from you, sir.

MR. THOMAS: Do you want any opening statements, or do you just want me to move into calling witnesses?

THE COURT: I mean if you want to give me an opening statement, I'm happy to hear from you. Whatever you want to do.

MR. THOMAS: All right. I'll just move into witnesses then ---

THE COURT: That's fine.

MR. THOMAS: -- and introduce it that way. I call LaParis Flowers.

THE COURT: Hey, Mr. Flowers, good morning.

MR. FLOWERS: Good morning.

* * * * *

LaParis Flowers,

having been duly sworn,

testifies as follows:

*** * * * ***

DIRECT EXAMINATION

BY MR. DIXON:

Q. And if you could state your full name for the record, please?

A. LaParis Flowers.

Q. And are you the Applicant in this PCR case?

A. That's correct.

Q. All right, can you speak up a little bit, we just want to make sure that everybody can hear you.

A. Yes, sir.

Q. Okay. And I think you've heard the procedure history of this case from the Attorney General. Did you, in fact, have a jury trial?

A. Yes, sir.

Q. Okay. And as part of the investigation in this case, do you remember which police agency was sort of lead investigator?

A. Police agency, I know it was Allendale Police Department and agency Corteek (Ph) Manor (Ph) -- Manor.

Q. Okay. And were they assisted by SLED?

A. Yes, sir.
Q. Okay. And you pled not guilty to those charges?
A. Yes, sir.
Q. And are you still maintaining your innocence today?
A. Yes, sir.
Q. Okay. Realizing that talking about the case is not going to upset your claim of innocence, can you tell the Court what the allegations were, what the -- the State alleged that you had done?
A. The State basically stated that I -- I shot Russell Smart, Tyquan Charlton, Brandon Lewis and Jerell Murray in Allendale the wee hours of the morning in the Pinewood Apartments.
Q. Were you at the Pinewood Apartments at the time of that shooting?
A. No, sir.
Q. Okay. As part of the presentation of the case, was there evidence about you and other people being at the Lobster House in Allendale?
A. Yes, sir.
Q. Okay. And the Judge probably knows better than I do, can you explain what the Lobster House is?

A. It is basically a bar in Allendale. I think it's on Highway 301.

Q. Okay, and ---

THE COURT: That's what a restaurant, the big sign?

THE WITNESS: Yes, sir.

THE COURT: When -- when I was reading all this this weekend, I was not aware. I do pass the Lobster House sign when I'm leaving Walterboro coming to hold Court there. And so the nightclub was right there?

THE WITNESS: Yes, sir, it was ---

THE COURT: Okay.

THE WITNESS: It had a ---

THE COURT: Go ahead.

BY MR. THOMAS:

Q. And -- and did you go to the Lobster House that night?

A. Yes, sir.

Q. All right. And then how did you arrive at the Lobster House?

A. I was in my mother's car, me, Antron Williams and Andre Lofton.

Q. Okay, And when you got to the Lobster House, were there people there that you knew?

A. Yes.
Q. And who were those people?
A. Jaquavian Williams, Kendall Nix, Kimberly Williams, and a couple more people.
Q. Okay. How do you know Kendall Nix?
A. She's the mother of my child.
Q. Okay. And were you and Ms. Nix in a relationship back at this time?
A. Yes, sir, back in 2014.
Q. How do you know Kimberly Williams and Jaquavian Williams?
A. Those are my family members.
Q. And how are you related to them?
A. Cousins.
Q. Okay. And while you were at the Lobster House did anything of any significance happen?
A. No, sir, no type of altercation, nothing broke out, no -- no fights, no disputes of any -- any sort.
Q. And that's why you were there?
A. Yes, sir.
Q. Okay. And at some point did you leave the Lobster House?
A. Yes, sir. I left the Lobster House about -- between 2:00 -- 2:00 a.m. and 2:42, around ---

between that area.

Q. All right. And -- and did you leave with anybody?

A. Yes, I left with Antron Williams. Andrea Lofton, who initially came with us, he -- he had left earlier.

Q. Okay. And what about Ms. Nix?

A. Yes, I left right behind her. They went in separate cars, her as well as her cousins, and I think her -- her cousin's sister.

Q. And after you left what did you do?

A. Well, Antron Williams he was undecided at where he wanted to go at the time, so he was dating Kendall Nix cousin at the time, so he decided to go to her house. Like I said I -- I was right behind Kendall Nix, as well as her cousin. We just was in separate cars, I was right behind them, and we ended up at -- at Ashley's house. And I ended up giving the keys to my brother, and I got in the car with Kendall Nix.

Q. Where's this house where you gave the keys to your brother?

A. It's down from IGA, Old Barton Road.

Q. And then you -- did you say you got in the car with Ms. Nix?

A. Yes. My brother didn't have any transportation at the time. He even asked me could he use my car ---

Q. Uh-huh.

A. -- well, my mother's car at the time. So we were -- we all met up right there, so I gave him the keys to the car. Like I said, he didn't have any transportation at the time, and a situation was going on with my child, so we were just trying to hurry up and get out of Allendale and go, you know, see what's going on with my child.

Q. Okay. When you say your child, is this the child that you have with Ms. Nix?

A. Yes, sir.

Q. All right. And -- and what was the situation with your child?

A. My mother basically called my cousin Kimberly while we were at the bar, and said that my child was acting kind of cranky, he wasn't drinking anything. He had just had a hernia procedure as well, so we had basically agreed that we needed to go check on our child.

Q. Okay. And where did you go? Where was your child located at?

A. In North Augusta, the apartments were

Georgetown Villas.

Q. So did you ever go the Pinewood Apartments that night?

A. No, sir.

Q. All right. Was your defense an alibi defense?

A. Yes, sir.

Q. And at some point did you find out that law enforcement wanted to speak with you?

A. I think the next day what I did was, people were calling Kendall Nix's phone, stating that they might have said there was a -- a white car involved, and might have said I had something to do with it, due to the fact that Jaquavian Williams got into a dispute, when I later learned -- learned that they got into some type -- type of dispute, and so I volunteered to go to the Police Department.

Q. LaParis, I'm going to approach and show you what has been pre-marked as Applicant's Exhibit Number 1 and ask you if you can take a look at that?

A. (Reviews document.) Yes, sir, it's my initials for my Miranda rights as well as my voluntary statement.

Q. Okay. And did you -- did you sign the Miranda rights?

A. I did.
Q. And did you sign the -- the statement?
A. I did.
Q. All right. And is -- is that the statement that you gave to law enforcement?
A. Yes, sir, prior to me knowing that I would be detained and arrested, so, yes, I did.
Q. So you were not arrested at that point?
A. I wasn't arrested.
Q. At what point did they arrest you?
A. I guess after I gave a statement, and a little bit of a rundown of what took place.
Q. All right. And in that statement did you tell law enforcement about your alibi?
A. Yes.
Q. Okay.
MR. THOMAS: I would move Applicant's Exhibit Number 1 into evidence at this time.
THE COURT: Any objection?
MS. DIXON: No objection.
THE COURT: All right, admitted without objection.
(Applicant's Exhibit Number 1, Voluntary Statement, is marked and entered without objection.)
THE COURT: Can I see this document?

THE WITNESS: Yes, sir.
THE COURT: Thank you, sir.
BY MR. THOMAS:
Q. I'm going to approach and show you what's been marked as Applicant's Exhibits 2, 3, and 4 for identification purposes. And if you could take -- I realize your restraint, if you could take a second and just look at those.
A. (Reviews document.) Yes, sir, voluntary statements from Kendall Nix, Kimberly Williams, as well as a morandum *[sic]* from Jaqwavian Williams.
Q. Did you say a memorandum?
A. A memorandum, sorry.
Q. It's a memorandum of interview.
A. A memorandum of interview, yes, sir.
Q. And Mr. Williams' memorandum of interview is Exhibit Number 5; is that correct?
A. It's Applicant Exhibit Number 4.
(Applicant's Exhibit Number 4, Jaqwavian Williams' Memorandum of Interview, is marked for identification.)
Q. I'm sorry, Number 4, my apologies. And Ms. Nix is which exhibit Number; is it Number 2?
(Applicant's Exhibit Number 2, Kendall Nix Memorandum of Interview, is marked for

identification.)

A. It would be Exhibit Number 2, yes, sir.

Q. And Ms. Kimberly Williams, is that Exhibit Number 3?

A. Yes, sir.

(Applicant's Exhibit Number 3, Kimberly Williams Memorandum of Interview, is marked for identification.)

Q. All right. Are those three people here today?

A. Yes, sir.

Q. All right. And are -- are those three people able to talk about what your -- your activities were that night?

A. Yes, sir.

Q. Okay.

MR. THOMAS: I beg the Court's indulgence for a moment.

(BRIEF PAUSE)

BY MR. THOMAS:

Q. Did you testify at your trial?

A. No, sir.

Q. Was your statement -- was your statement discussed at trial?

A. No, sir.

Q. Okay. Do you remember there being a Jackson v. Denno hearing?
A. Yes, a Jackson v. Denno hearing.
Q. Okay. Was it discussed in connection with that?
A. Yes, sir.
Q. All right. Was your statement ever presented to the jury by the prosecutor or your lawyer?
A. No, sir.
Q. All right. Did Jaquavian Williams testify at your trial?
A. No, sir.
Q. Did Kimberly Williams testify at your trial?
A. No, sir.
Q. Did Kendall Nix testify at your trial?
A. No, sir.
Q. Did the jurors hear any evidence about your alibi during your jury trial?
A. The jury didn't hear anything about my alibi.
Q. All right. Was there ever any arguments made by counsel to the jurors about your alibi?
A. No, sir.
Q. All right. Did the jurors receive an

instruction on an alibi defense?

A. No, sir.

Q. Okay. Did you want to present an alibi defense?

A. Yes, sir.

Q. Did you have any discussions with your lawyer about doing that?

A. Yes, sir, several times.

Q. All right. Tell the Judge about those discussions, please.

A. He came to Allendale County Detention Center prior to us preparing for trial. I stated that -- and I gave him all of the information --

Q. Yes, sir.

A. -- of Mr. Koger prior. We actually did a few transfers for money with -- with Kendall and my mother for obtaining him as an -- an attorney, but he never -- he never -- he never reached out and contact them whatsoever. Like I said, I -- I've -- I've told -- I told him prior to us having discussions at -- when we were meeting up basically at the County Jail preparing for trial. He just constantly stated that, you know, the -- the State has to prove beyond a reasonable doubt, and he never -- he never -- he -- he never suggested -- he never

even interviewed him or -- or attempted to even reach out, but they were there all along. They were -- they wanted to -- they're here today, they wanted to testify on their -- on my behalf.

Q. When you say there were there all along, what do you mean by that statement?

A. Jaquavian went ---

THE COURT: Hold on one second, sir.

MADAM CLERK: I'm sorry.

THE COURT: She's going to adjust that microphone.

MADAM CLERK: You have to lean forward so much, I apologize, that way you don't have to. No problem.

BY WITNESS:

A. Jaquavian Williams and Kendall Nix and -- as well as Kimberly Williams was always around, basically. They -- they showed up at trial. They came to all hearings. It's just the fact of the matter that he never, you know, did his due diligence and, you know.

Q. You mentioned your mother a couple times in the testimony. Just for the record, who is your mother?

A. Jennifer Bates, she's here today.

Q. And she's here today?
A. Yes, sir.
Q. Okay.
MR. THOMAS: I beg the Court's indulgence.
THE COURT: Yes, sir.
THE WITNESS: Would you like to see these exhibits as well?
THE COURT: Yeah, hand me those, thank you, sir.
BY MR. THOMAS:
Q. That's all I have of questions at this time. If you would answer any that the Attorney General might have.

CROSS-EXAMINATION

BY MS. DIXON:
Q. Good morning, Mr. Flowers, how are you today?
A. Good morning.
Q. Before we get started, I just always want to make sure that you understand the type of relief the Court can grant you and what that ultimately means. So if the Judge agrees and gives you relief, you do understand that your charges remain?
A. That is correct.
Q. And you do understand that you could subsequently be retried for murder and three counts

of attempted murder?
A. That is correct.
Q. And do you know the maximum sentence for murder?
A. I know the minimum -- minimum is 30.
Q. Do you know the maximum?
A. I think life.
Q. Life is correct. So you do understand that if you do get relief, you can be retried on these charges, and potentially, if the jury convicts you, face life in prison?
A. That is true.
Q. Okay. And going back to your alibi defense, so tell me again, what time did you leave the Lobster House?
A. Basically, I left the Lobster House around 2:00 -- 2:00 a.m.
Q. Around 2:00? Did you say ---
A. Between 2:00 --
Q. -- 2:00 to 2:42 on direct?
A. I can't -- well, between 2:00 to 2:42.
Q. Okay, so ---
A. I -- it's been a minute and ---
Q. Right, right, absolutely. So about a 45-minute range that you left the Lobster House?

A. Yes, ma'am.
Q. And it's hard to recall today exactly when, you would agree with that?
A. Well, basically, like I said between 2:00 and 2:42 I've -- I've -- I left the Lobster House.
Q. Okay. And you left in your mother's car?
A. Yes, ma'am.
Q. And what car was that?
A. A 2000, no, maybe a 1999 Oldsmobile Alera.
Q. Which color was it?
A. White.
Q. White? Okay. Do you recall testimony that after the shooting, eyewitnesses saw a white vehicle fleeing the scene?
A. Yeah. Some of them stated that they seen a Grand Prix. They -- I mean they gave specifics about the car that actually pulled up. Some say a Pontiac Grand Prix, and a Cavalier, or something like that.
Q. Gotcha. Do you recall that it was white according to the eyewitnesses?
A. Yes.
Q. Okay. And do you know who Elizabeth Rollins is, by chance?
A. I do know her.

Q. Okay.
A. Basically, she was a doorkeeper at the time ---
Q. Uh-huh.
A. -- when I came to the club. So you had to turn over your keys as well as your ID, and the admissions fee, I guess was maybe $5, five dollars or so.
Q. Gotcha. Okay. And your testimony on direct was that there was no altercation at the club while you were there?
A. None whatsoever.
Q. No altercation in the parking lot?
A. None whatsoever.
Q. None whatsoever. Do you recall Ms. Rollins testifying that she saw you in the parking lot, and you were angry?
A. No. she -- she didn't -- I'm sorry. She didn't see me in the parking lot.
Q. Okay.
A. I was in the back of the club by the pool area. She stated, and she did testify that I looked a little angry ---
Q. Okay.
A. -- but I mean we were at a bar, and we're

drinking, so I don't -- like I said, there was never a dispute. Nothing happened at the club that night.

Q. Gotcha, and that's a fair assessment. Okay, and going back to your alibi, so you left -- your testimony today is you left in your mother's car, correct?

A. That's correct.

Q. And at some point you got out of the car and gave it to your brother?

A. That's right ---

Q. And your brother left in the car and you left with your girlfriend?

A. Yes.

Q. Do you recall whether SLED tested the car for gunshot residue?

A. South Carolina Law Enforcement Division, they did tested the car. I think either Tyler Sturkey -- they did testify that the GSR was not conclusive. They could not determine whether the GSR actually came from an actual shooting. One of the -- one of the South Carolina Law Enforcement did testify that there are points where being in the vicinity, or it's just like flour, that it can brush off in different ways, but that he described the GSR kit as well as how it transfer. It was never

conclusive that it actually came from that -- that shooting, and I think he also testified that the car was not secure within a 48-hour period, and he also testified that someone else did have the car.

Q. So these are things your lawyer brought up on cross-examination; is that how you recall it?

A. He did brought them out on cross-examination.

Q. Okay. So going back to the GSR, did the State's expert testify that they did in fact find GSR in that vehicle?

A. That is correct, but not conclusive, and not basically from the shooting.

Q. Okay. Well, I want to clarify what you mean by not conclusive. Were they saying it was not conclusive that it was GSR or not conclusive that they knew how it got there?

A. Right, not conclusive of how they -- how it got there, but ---

Q. Okay. But they did clearly say it was in fact GSR?

A. Right, from -- basically, it could be from transfer.

Q. Gotcha, okay. And going back to -- okay, so your testimony is -- all right, so you leave the

club sometime between 2:00 -- 2 o'clock and 2:42 a.m., and how long were you in the car before you got out and gave it to your brother?

A. No less than five minutes. I just gathered my things.

Q. Okay. So anywhere from 2:05 to 2:47?

A. Ma'am?

Q. Anywhere from 2:05 to 2:47 you give the car to your brother?

A. Yes, ma'am, within that -- within that time limit.

Q. Okay. And then you get in the car with your girlfriend. Do y'all go anywhere first?

A. No, we -- we head straight back to North Augusta.

Q. Straight to North Augusta. And how far of a drive is it from where you left the car with your brother to your home in North Augusta?

A. I would say an hour and 15, hour 20.

Q. An hour and 15, an hour and 20, is that if you're going the speed limit, or if you're speeding?

A. That is if you're going the speed limit.

Q. Okay. Were y'all going the speed limit?

A. Yes. It was the wee hours of the morning.

Q. Okay. So put you getting home around what

time would you say? Anywhere from 2:00, 3:00, 3:20 a.m. to 4:00 a.m.?

A. Yes. 3:00 -- between 3:20 and 4:00, somewhere in that area.

Q. Okay, okay. And do you recall discussing as a part of discovery, phone records that law enforcement had obtained from your cell phone?

A. They never -- I never had a phone at the time.

Q. Okay. Did you have a phone you were using?

A. No, just my -- my -- the -- my child's mother phone.

Q. Okay.

A. We were ---

Q. Did they get her phone records?

A. They did get her phone records. They did get Jaquavian Williams phone records ---

Q. Uh-huh.

A. -- Kimberly's phone records. And like I said nothing indicated that I was still even in that area. Like I said we was already gone.

Q. Is that -- your recollection is that the phone records corroborated your alibi?

A. That is correct.

Q. Okay.

A. I had mentioned that a few times to my attorney as well.

Q. Okay. Did you ever ask anyone to clean your mother's car?

A. My brother, he stated that I left a towel for him to clean the car, but I never left a towel for him to clean the car. There was just stuff in the car.

Q. Why do you think he said that?

A. I guess he was just trying to make sure that he had nothing to do with this, because they was coming down hard. I mean at that time I -- I think I've had already went to the police department, and volunteered to -- to talk.

Q. Okay. Do you recall whether any of the people in the car testified at trial?

A. No one testified at trial. They wasn't called, they wasn't interviewed.

Q. No one in the car, I'm sorry, let me rephrase my question. Do you recall whether anyone in the car with Mr. Smart testified at trial?

A. Yes. I think Tyquan Charleton, Jerrell Murray, and Brandon Lewis did testify.

Q. Okay. Are these people that you knew?

A. Yes, ma'am.

Q. Okay. So how -- you knew them growing up, from high school, what's the situation, from the neighborhood?

A. Well, like I said, I -- I knowed them from the area.

Q. Okay.

A. Like ---

Q. So you would agree they knew you, and you knew them?

A. Yes.

Q. Okay. And they testified to that at trial, correct?

A. Yes.

Q. Okay. And then do you recall if any of them identified you at trial as the shooter?

A. Yes.

Q. Okay. Who?

A. Brandon Lewis. He -- he made some inconsistent statements prior to him being interviewed on December the 6th and December the 7th, I -- I think.

Q. What about Mr. Charleton?

A. He didn't -- he didn't make an identification until later -- later on, I guess, because of the -- something about him being in the

hospital.

Q. Okay. Did he make an identification at trial?

A. Yes.

Q. He did identify you at trial as the shooter? And what about Mr. Murray?

A. I can't recall.

Q. You can't ---

A. I think ---

Q. -- recall? What about ---

MS. DIXON: Just a moment, Your Honor.

THE COURT: Sure, take your time.

BY MS. DIXON:

Q. You don't recall that Mr. Murray testified that he identified you in a photo lineup?

A. It's -- it's been a minute, but I -- I think all three of them tried to make an identification due to the improper police procedures and highly suggestiveness.

Q. Okay. What -- what do you think was improper and highly suggestive about the police procedures?

A. Well, once again, Brandon Lewis, he was constantly prodded by local law enforcement. Like I said, he made a statement prior, on the 6th, stated

that he didn't know -- I mean and it was fresh. I think Jerrell Murray he -- he stated that he didn't -- he didn't -- he don't know what was going on. And I think he said he -- a car pulled up, and he jumped out of the car. The -- I mean the police just -- and then South Carolina Law Enforcement, they rehashed some of the recordings. They said that they was looking out for the safety of some of the -- the witnesses and victims, and basically they -- like they tried to pressure them. They didn't even explain to them that they didn't have to pick anyone out when they gave them a photo lineup. Once again, Brandon Lewis, he stated December the 6th that he didn't -- he'd didn't -- he didn't recall any specifics. One guy even said that he don't even -- he don't even remember how he got to the club. He don't remember what led up to him being in the car, how he even got in the car. I think that was Tyquan Charleton, he said that he was drugged.

Q. Do you recall whether Mr. Koger brought that out during cross-examination?

A. I'm not sure. I think it was in his statement -- in -- in his statement.

Q. Do you recall whether he was cross-examined about that?

A. He was cross-examined.
Q. So the jury heard that?
A. The jury did hear it.
Q. So that was -- that was information they were able to consider ---
A. Yes.
Q. -- in reaching their verdict? Okay. Now, if I told you today that the record reflects that Jerrell Murray did, in fact, identify you as the shooter, would you dispute that?
A. I wouldn't dispute it.
Q. Okay. And for the record, that's page 286, lines 19 through 22. Did your lawyer ever discuss with you the possibility that your brother could have been the shooter?
A. I'm not sure.
Q. You're not sure? You don't remember having any conversations about that?
A. No, ma'am, I'm not sure. He -- I don't think he mentioned anything about my brother being the shooter.
Q. Did you mention anything to him, since you gave him the car?
A. That is -- that is one of the things that we talked about.

Q. Okay.
A. He -- he knew that, once again, that my brother had the car, but I don't think he mentioned anything about my brother being the shooter.
Q. Was he at the trial?
A. My brother was at the trial.
Q. Who subpoenaed him; do you recall?
A. The State.
Q. The State. Do you know why they subpoenaed him?
A. I guess ---
MR. THOMAS: Objection, speculation.
THE COURT: All right. I'll sustain that.
MS. DIXON: Nothing further, Your Honor. Thank you.
THE COURT: Redirect?
MR. THOMAS: Yes, sir.
BY MR. THOMAS:
Q. The -- the Attorney General asked you some questions about the other three people in the car. Mr. Lewis, Mr. Charleton, and I'm drawing a blank on the third one, but they ---
A. Jerrell Murray.
Q. Yes, Mr. Murray.
A. Yes, sir.

Q. And she asked you some questions about your -- lawyer asking them about their interviews with law enforcement; do you remember those questions?

A. Yes.

Q. All right. Were the -- at least portions of the interviews with these witnesses memorialized by audio or video?

A. Mostly by audio. And I think one of them was video.

Q. All right. And so as part of the discovery, did you have occasion to listen to the audio interview of Brandon Lewis?

A. Yes, sir.

Q. And did you listen to the audio interview of Jerrell Murray?

A. Yes, sir.

Q. And did you watch and listen to the videotaped interview of Tyquan Charleton?

A. Yes, sir.

Q. All right. And did you feel like these interviews should have been introduced at your trial?

A. They shouldn't have been interviewed. Like I said ---

Q. But did you want the audio and the video

introduced is what I'm asking.

A. Yes, sir, I wanted the audio and video introduced. I asked them several times about that.

Q. And -- and why -- why was that, that you wanted that introduced?

A. Once again, I wanted the jury to hear the -- the suggestiveness, the coercion, as well as just the improper police procedures, how they went about doing things.

Q. Okay. And -- and what were -- well, with -- and -- and with regards to Mr. Charleton, was he still under medical care at the time?

A. Yes, sir.

Q. All right. And with regards to Mr. Lewis, was he still recovering from his interview -- or his injuries?

A. Yes, on the second interview.

Q. Yeah. And do you think that seeing those and hearing those would have assisted the jurors?

A. Yes. It would have made a significant difference in the outcome of my trial.

(Applicant's Exhibit Number 5, USB Drive, is marked and entered without objection.)

MR. THOMAS: Your Honor, I have as pre-marked Applicant's Exhibit 5, which is a USB drive that has

the interview with Brandon Lewis, the interview of Jerrell Murray, and the videotaped interview of Tyquan Charleton. I don't think there is any objection to us putting this on the record.

MS. DIXON: None from the State, Your Honor.

THE COURT: All right, admitted without objection.

MR. THOMAS: Okay. It's -- it's an envelope with a USB drive inside.

THE COURT: Thank you.

MR. THOMAS: That's all the questions I have at this time.

THE COURT: All right. Thank you very much. sir.

MR. FLOWERS: Thank you, Judge.

THE COURT: You can call your next witness.

MR. THOMAS: I'd call Kendall Nix.

*** * * * ***

Kendall Nix,

having been duly sworn,

testifies as follows:

*** * * * ***

DIRECT EXAMINATION

BY MR. THOMAS:

Q. Ms. Nix, how do you know LaParis Flowers?

A. That's my son's father.
Q. And were you and Mr. Flowers ever involved in a romantic relationship?
A. Yes.
Q. And what period of time was that?
A. 2014. '13, '14.
Q. And this is the period of time that y'all had the child together, I assume?
A. Yes.
Q. Okay. I just ask you to speak up so that we can hear you, okay?
A. Uh-huh.
Q. Are you familiar with the -- the -- the day that, or the -- are you familiar with LaParis being charged with murder, attempted murder, and the weapons charge?
A. Yes.
Q. And you've -- we've heard some testimony already about the Lobster House?
A. Yes.
Q. All right. Were you at the Lobster House?
A. I was.
Q. All right. And tell the Judge how you got to the Lobster House.
A. I drove.

Q. And did you go with anybody?
A. No.
Q. And ---
A. I went with my cousin Ashley, her stepsister Neesey, and just us.
Q. Okay. And when you got there, did you see anybody that you knew?
A. Yes, I did.
Q. And who did you see?
A. I seen Kim and LaParis.
Q. Okay. When you say Kim, who do you mean?
A. Kim Williams.
Q. Okay. And did LaParis get there before you, or after you?
A. He came after me.
Q. Okay. And what was going on at the Lobster House after LaParis got there?
A. Everybody was just shooting pool, dancing, going to the bar, having a good time.
Q. And did you witness anything out of the ordinary?
A. No, sir.
Q. And at some point did you leave the Lobster House?
A. Yes. Once LaParis' mother called, Kim

Williams, and told us that my son -- well, our son, Brandon Flowers, was kind of cranky. He just had his hernia done. We had ---

Q. Just had what done?

A. Hernia.

Q. Okay.

A. We left. Went back inside. Liz had my keys, she had my license. So we went back inside to my cousin, Antron, and we left, went to Ashley's house.

Q. Okay, and where's Ashley house?

A. She stay -- well you probably, the hole in the wall, by the whole in the wall, down from IGA.

Q. Is that one of your relatives?

A. Yes.

Q. Okay. And how did you get from the Lobster House to Ashley's house?

A. I drove.

Q. All right. And who rode with you?

A. Ashley and Neesey.

Q. All right. And did LaParis come as well?

A. Yes.

Q. And how did he get there?

A. He came behind me.

Q. And -- and was anybody with him?

A. It was Tron, basically Tron.
Q. All right.
A. Uh-huh.
Q. And after y'all got to Ashley's house what happened next?
A. Tron went inside, got my phone charger. What else he got? I left my clothes there, came back to the car, Chavis came, asked LaParis can he hold the car, can he get some money from her, and that was it.
Q. All right. And who is Chavis?
A. Chavis is his brother.
Q. Okay. And after that what happened?
A. We left, went back to North Augusta.
Q. And when you say we left, who was that?
A. LaParis and I.
Q. Okay. Did you ever go to the Pinewood Apartments?
A. No, Sir.
Q. All right. I'm going to you what's been marked as identification as Applicant's Exhibit Number 2. Can you take a look at that, please?
A. (Reviews document.)
Q. Have you had a chance to look at that?
A. Uh-huh.

Q. Is that a yes?
A. Yes.
Q. I say that, because we have to help out this lady who is making a record of everything we ---
A. Okay.
Q. -- talk about. What -- what is Applicant's Exhibit Number 2? Let me ask you this. Did you sign it?
A. Yes, I did.
Q. Okay. Is that the statement that you gave to law enforcement?
A. Yes.
Q. Okay. Did you in fact talk to law enforcement?
A. Yes.
Q. All right. Did -- after LaParis was arrested, did -- did you follow-up? Did you have any knowledge of what went on with his -- his court case?
A. No, sir.
Q. Okay. Did you ever have any interactions with his attorney?
A. No, sir.
Q. All right. Were you ever interviewed by his attorney?

A. No, sir.
Q. Did you attend his trial?
A. Yes.
Q. All right, and in the statement that you gave, Applicant's Exhibit Number 2, did you -- is that consistent with the alibi that you testified about today?
A. Yes.
Q. And were you available, and would you have been willing to provide that testimony at LaParis' trial?
A. Yes.
MR. THOMAS: Thank you, Your Honor. That's all the questions I have at this time.
THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MS. DIXON:
Q. Ms. Nix, how are you today?
A. I'm good.
Q. Can you tell me, again, what time you left the Lobster House that night?
A. I probably left around 2:00.
Q. Do you recall -- you have your statement, right?
A. Yes.

Q. Can you review it, and tell me what time you told law enforcement you left?

A. (Reviews document.) Around 2:42.

Q. 2:42. Now, would you agree that your memory about what time you left was better at the time that you spoke to law enforcement than it is today?

A. It's still the same.

Q. Your memory is the same ---

A. Yes.

Q. -- today as it was, what are we, six, seven, eight years ago?

A. Yeah. Yes.

Q. The same? What time did you get there?

A. We probably got there around maybe 2:00, 2:15.

Q. 2:15, 2:00. What were you wearing?

A. I want to say I had on a black and red dress.

Q. Okay. Do you remember what the Defendant was wearing?

A. I can't.

Q. You don't remember today?

A. Uh-uh.

Q. You would agree that it's hard to remember details eight -- eight or nine years -- this

happened in what, 2014?

A. Uh-huh.

Q. So, what, eight years after the fact? You would agree that it's hard to remember details like that?

A. Uh-huh.

THE COURT: Ms. Nix, you just have to answer out loud, and speak up a little bit ---

WITNESS: Okay, I'm sorry.

THE COURT: -- so we can hear you. You're doing great, yes, ma'am, just a little louder, and yes, no, or however you want to answer the question ---

WITNESS: Okay.

THE COURT: -- okay? All right, go ahead.

MS. NIX: Okay. I'm sorry.

BY MS. DIXON

Q. Would you agree that it's easy -- that it's difficult to remember details eight, nine years after the fact?

A. Yes.

Q. And let's see, now, you said you didn't see anything out of the ordinary at the Lobster House that night?

A. No, ma'am.

Q. Okay. Did y'all -- when y'all left, was it

still open, was it closing? What was the status of the restaurant itself?

A. It was still open.

Q. They were still open?

A. Yes.

Q. So when you left they were still open ---

A. Uh-huh.

Q. -- they weren't closing down?

A. No.

Q. Okay.

THE COURT: Yes?

WITNESS: Yes.

BY MS. DIXON:

Q. And you -- and you agree that you told law enforcement that was at 2:42 a.m.?

A. Yes.

Q. And then what time did Mr. Flowers get into your vehicle?

A. 'Cause he was right after me, probably around 2:00. It was over with around 2:40 to -- probably around 2:50.

Q. 2:50?

A. Uh-huh.

Q. So maybe eight minutes after you left the club?

THE COURT: Yes?
WITNESS: Yes.
BY MS. DIXON:
Q. Okay, and then y'all drove to North Augusta?
A. Yes.
Q. Okay. And you said on direct that you never had any interactions with his attorney; is that correct?
A. Yes.
Q. You never met him before the trial?
A. I met him one time, and that was it.
Q. You met him one time?
A. Yes.
Q. Did you ever go to his office to provide payment for Mr. Flowers?
A. No.
Q. Did you ever meet his lawyer at the McDonalds in Aiken?
A. Yes.
Q. You did?
A. I did.
Q. Okay. What was the purpose of that?
A. I can't remember. I want to say a payment.
Q. To provide payment?
A. Payment.

Q. Okay.
A. Uh-huh.
Q. Was that one time? More than one time?
A. One time.
Q. Just one time?
A. Uh-huh.
Q. When you saw him did you say, "Hey, by the way, Mr. Flowers was with me?"
A. I didn't say anything to him.
Q. You didn't say anything to him?
A. No. I just provide the payment.
Q. Okay. So -- and you would agree that -- I'm sure you care about him, he's the father of your son, correct?
A. Yes.
Q. And you would want to help him in any way you could, correct?
A. It's the truth, so yes.
Q. It is the truth?
A. Uh-huh.
Q. So why not say to his lawyer, "Hey, hey, hey, I was with him. I know he didn't do this because I was with him?"
A. I didn't say it. His lawyer should have said -- should have spoken to me.

Q. But you would agree, like being the mother of his child, and being in a relationship, you probably care more about him than most people do, correct, or at least at that time?

A. Yes.

Q. Yeah. So why were you not looking out for him saying, "Hey, hey, I was with him, I was with him, he was with me. I know he didn't do it, because he was with me?"

A. But shouldn't the lawyer have said something as well ---

Q. I mean would you ---

A. -- you know with ---

Q. -- agree with me that you care about him?

A. Yes, I do.

Q. Wouldn't you want to do things to help him if you cared about him?

A. Yes.

MS. DIXON: Nothing further.

THE COURT: All right. Yes, sir.

REDIRCT EXAMINATION

BY MR. THOMAS:

Q. Did Mr. Koger ever ask you about your statement?

A. No, he didn't.

Q. All right. Did he -- obviously -- well, did he know who you are?
A. I explained who I -- who I was.
Q. I'm sorry?
A. I explained to him who I was.
Q. Okay.
A. Uh-huh.
Q. And -- and he knew your name?
A. Yes.
Q. And -- and did he know that you were at LaParis' trial? You don't know?
A. No.
Q. Okay. Okay. And there were some questions about, you know, there being a passage of time. Is there any doubt in your mind that you were at the Pinewood Apartments?
A. We wasn't at the Pinewood Apartments.
Q. All right. Is there any doubt in your mind that LaParis left the Lobster House the same time you did.
A. Yes, he left with -- behind me. Yes.
Q. Is there any doubt in your mind that he followed you to Ashley's house?
A. Yes, he was right behind me at Ashley's House.

Q. And is there any doubt in your mind that he rode with you to North Augusta?

A. We went back to North Augusta together, I drove.

Q. All right, thank you.

MR. THOMAS: That's all the questions I have.

THE COURT: All right, thank you very much, ma'am.

WITNESS: Uh-huh.

THE COURT: Yes, sir?

MR. THOMAS: I would call Jaqwavian Williams.

MR. WILLIAMS: How you doing, Your Honor?

THE COURT: Hey, sir. Good.

* * * * *

Jaqwavian Williams,

having been duly sworn,

testifies as follows:

* * * * *

DIRECT EXAMINATION

BY MR. THOMAS:

Q. Mr. Williams, do you know LaParis Flowers?

A. Yes, sir.

Q. And how do you know him?

A. That's my cousin.

Q. All right. And are you familiar with the --

the night that we're here to talk about?
A. Yes, sir.
Q. All right. And were you at the Lobster House that night?
A. Yes, sir.
Q. And tell us, well, how did you get to the Lobster House?
A. I walked.
Q. You say you walked?
A. Yes, sir.
Q. Was it a -- were you ---
A. From my grandma's house, 376 Old Barn Road.
Q. All right. I need you to slow down and speak up a little bit, okay?
A. I left walking from my grandmother's house on 376 Old Barn Road.
Q. Okay. And is that, I assume, within walking distance of the club?
A. Yes -- yes, sir.
Q. Okay. And when you got there what was going on at the club?
A. Everybody was playing pool, a big party. It was packed in there that night.
Q. And did you see people that you know there?
A. Yes, sir, a good bit.

Q. I'm sorry?
A. A good bit of people.
Q. All right. Did you see LaParis there that night?
A. Yes, sir.
Q. Did you see Kendall Nix?
A. Yes, sir.
Q. Kimberly Williams, was she there?
A. Yes, sir. Yes, sir, that's my mom.
Q. Okay, that's your mother?
A. Yes, sir.
Q. Okay. Did you see anybody else that you know there?
A. Tron, Big Bubba, everybody, a lot of people.
Q. All right. All right, who's Tron?
A. Who he was with.
Q. Okay, and ---
A. Big Bubba, they was all playing pool.
Q. Okay. And at some point were you aware when LaParis left?
A. Yes, sir, I was right there.
Q. And can you tell the Judge about LaParis leaving?
A. We was standing by the pool table. He just won a game. He was waiting on Bubba to pay him his

money. My momma came and approached and said Auntie Jennifer had called about Braylen, and him and Kendall left the club. They left out. We was right by the bar.

Q. Okay. Do you know somebody named Tracy Roberts?

A. Yes, sir.

Q. All right. And somebody -- I'm not sure I'm going to say this right, but Mr. Gray.

A. Yes, sir.

Q. How do you say his first name?

A. Aldeondre, I think.

Q. Aldeondre? All right. Were they there that night?

A. Yes, sir.

Q. Did something happen between you and Mr. Gray?

A. No, sir. We passed each other a couple of times in the club. Me, Russell, and Papi didn't even talk, and nothing happened with Mr. Gray until after the fact, like after the club was all the way over.

Q. Okay. Was LaParis there at that point?

A. No, sir, they was gone. The club was still going on.

Q. All right. And so what happened with Mr. Gray?

A. After the club was over, my momma was waiting on some food. Tracy was parked out in the field. Her and Keisha was in the truck. As we approach my mom car, she opened the truck door and she was saying something. She spoke or whatever.

Q. When who opened the door?

A. Tracy Roberts.

Q. Okay.

A. So she found -- she got my attention, I spoke back, I blew a kiss, and that's when Mr. Gray came from out the back of the club. I guess he saw whatever was going on, and he got mad.

Q. All right. Did y'all actually get into a fight?

A. No, sir.

Q. Did you have reason to think that anybody was armed that night?

A. No, sir.

Q. Okay. Were the police called because of this?

A. Yes, sir. Mr. Smart, when he came to see what was going on -- when he came from around the back of the club, he came to get Deondre and put him

in the car before the police arrived.

Q. Okay. All right. And did you leave?

A. Yeah, I left with my mother, my uncle, and my cousin, Ulysses Grant.

Q. And where did you go?

A. We went back to my grandmother house.

Q. Okay. Were you aware that this incident between you and Mr. Gray was used to argue ---

A. No, sir. He didn't even come in, he probably was back there by the door.

Q. Okay.

A. We didn't even come in close contact with each other.

Q. So you -- you didn't have any reason to try to get back at ---

A. Uh-uh.

Q. -- or get even with Mr. Gray?

A. I was waiting on my momma to get her food so we could leave.

Q. Okay. And as part of this case, did you talk with SLED?

A. Yes, sir.

Q. All right. I'm going to show you what's marked as Applicant's Exhibit Number 4, and just ask if you've reviewed that?

A. (Reviews document.) Yes, sir.
Q. And what is -- is -- is that a summary of what you told SLED?
A. Yes, sir.
Q. Okay, I'll take that back.
MR. THOMAS: All right. That's all the questions I have at this time.
THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MS. DIXON:
Q. Mr. Williams, how are you doing today?
A. How you doing, ma'am? I'm all right.
Q. Doing all right? So you -- you do recall talking to SLED, correct?
A. Yes, ma'am.
Q. Do you recall telling SLED that Russell Smart walked up and started kind of ---
A. Yeah, when he approached, yeah, like he was clutching, yes, ma'am.
Q. Tugging at his waistband?
A. Yeah.
Q. What did you take that to mean?
A. I mean it ain't hard, yeah.
Q. What ---
A. Basically, I felt like he -- he was

clutching, like letting me know he had something.

Q. So he was trying to show you, I'm -- I'm -- I'm armed, I've got something?

A. I wouldn't say show me, but he was protecting who he was with.

Q. And so that's how you interpreted his gesture?

A. Yeah. When he came out the back, yeah.

Q. So he did, in fact, do that outside of the club?

A. Yeah, he ran up holding his waistline.

Q. Okay. And where was Mr. Flowers at this time?

A. They was gone. The club was over. Like all this happened out there after the fact like ---

Q. Gotcha. So he had already left the club?

A. Yes, ma'am.

Q. Okay. So he, okay, so he was not there for that? So he didn't leave with you?

A. No, ma'am.

Q. Okay. Did you see him any more that night?

A. Not after the pool -- after they was on the pool table.

Q. Okay. Did you talk to him on the phone that night?

A. No, ma'am. I didn't talk ---
Q. No more?
A. -- to him no more until after SLED picked me up and interviewed me that next morning, and he was ---
Q. Did you receive any text messages from him?
A. No, ma'am.
Q. Any Facebook, Messenger, or Instagram ---
A. Nothing, nothing, I ---
Q. -- or any other social media?
A. I gave all that to SLED, nothing.
Q. Okay. Did you send him any kind of message?
A. No, ma'am.
Q. No? Okay. And your testimony is you left with your mother?
A. Yes, ma'am.
Q. You went home?
A. Yes, ma'am.
Q. You didn't see him ---
A. Cameras, everything was out there, everything out there.
Q. Okay. And what time did you leave?
A. The club? We was out there until it was over. My mom was waiting on food. Everybody was gone. I think Ms. Liz still was out there, the

security, the police officer, but the club was over with.

Q. The club was over? What time was that?

A. It was -- it was early morning. It was -- it was late, it was pretty early. I can't give you no direct time. I know it was late.

Q. Okay. So you don't remember?

A. It had to been like between 3:00, because I think when they picked me up from my grandma's, it wasn't even 6 o'clock that morning yet, so it was between -- yeah, about 3:00, 4:00, somewhere up in there.

Q. Okay. So you have no idea. What time did you last see Mr. Flowers?

A. When he left out the club with Kymberly.

Q. What time was that?

A. It was earlier, and the club still was packed and going on, so I couldn't give you a direct time.

Q. So you don't -- you don't remember what time you last ---

A. No, ma'am.

Q. -- saw him?

A. Not the time.

MS. DIXON: Nothing further.

THE COURT: Anything else, Counsel?

MR. THOMAS: No, no redirect.

THE COURT: Thank you, sir.

WITNESS: Yes, sir.

MR. THOMAS: At this time I call Kimberly Williams.

* * * * *

Kimberly Williams,

having been duly sworn,

testifies as follows:

* * * * *

DIRECT EXAMINATION

BY MR. THOMAS:

Q. Ms. Williams, do you know LaParis Flowers?

A. Yes, sir.

Q. How do you know LaParis?

A. He's my cousin, but I call him my nephew.

Q. Jaqwavian Williams who just testified, do you know him?

A. That's my son.

Q. Okay. And are you familiar with the day that we're here to talk about?

A. Yes, sir.

Q. All right. And were you at the Lobster House that evening?

A. Yes, sir.
Q. All right. How did you get to the Lobster House?
A. I drove.
Q. Where were you coming from?
A. My grandmama's house.
Q. All right. Do you remember about what time you got there?
A. No, sir.
Q. All right. When you -- when you -- did anybody ride with you?
A. No, sir.
Q. All right. When you got there to the Lobster House, did you see anybody that you know?
A. I seen a lot of people. It was packed. It was a big party they had that night, and the whole club was packed. It was packed.
Q. Was that a typical night, or was it unusually packed?
A. No, it's -- it's always packed.
Q. Okay.
A. It's always packed.
Q. All right. Well, at some point did you see your son there?
A. Yes.

Q. All right. And at some point did you see LaParis there?
A. Yes.
Q. And at some point did you see Kimberly Nix?
A. Kendall. Yes.
Q. I'm sorry. Kendall Nix, my mistake.
A. Yes, sir.
Q. All right. Tell me about when you recognized that your son Jaqwavian was there.
A. When I got to the club and I went in and it was just packed. I seen all of them. All of them been in there. They was around the pool table. Some of them on the dance floor. It -- they was in the club.
Q. Okay. And at some point was there ever a time that you had a conversation with LaParis and Kendall?
A. Yes, when -- well, she my cousin, but I call her my sister. When Jennifer ---
Q. When you say she, your talking about?
A. Jennifer Bates, LaParis' mother.
Q. Okay.
A. She had called my phone, and she had asked me, "Was Kendall and LaParis at the club?" I said, "Yeah." She said "You need to tell them they need

to get back to North Augusta, because Braylen acting up, he -- he won't take his bottle. I don't know what wrong with him, he's just crying or whatever." So I went in the club and I told -- I said, "Y'all need to go," I said, "'cause Jennifer said Braylen acting up, and he -- he hollering, he won't take his bottle or nothing," and they left.

Q. Okay. And do you remember about what time that was?

A. No, sir.

Q. Do you know if they left together, separately, or anything about that?

A. No, sir. 'Cause once I went in the club and tell them -- told them, they both left out the club, but I never did go back out the club.

Q. Okay.

A. I was still in the club. I just went and told them ---

Q. All right.

A. -- what she said.

Q. And -- and you're sure that they left?

A. Yes.

Q. Okay. At some point that evening, early morning the next day, was there an incident involving your son, or anybody else?

A. Well, like -- like my son stated, it's somewhere where you could order food, party, and all. I had ordered me something to eat. So we all went out the door, and when we went out the door, the club was about to close, but, you know, whoever ordered the food, they could go back inside and get the food. So when we went to my car, my son, and my cousin told -- and my brother told me that they was going to catch a ride back with me to Grandmama Edith's house. So during that time, I like -- I don't know these kids' name, but one of the guys had said something to Toot, and Toot didn't say nothing, and the other ---

Q. All right, who -- who's Toot?

A. Oh, Jaqwavian. I call him Toot. I'm sorry.

Q. That's his nickname?

A. Yes.

Q. Okay.

A. And the other guy, Russell, he -- like Jaqwavian said he was like -- he has -- and I'm the one who called the police ---

Q. Okay.

A. -- 'cause I was scared. I'm the one who called the police. I called 911, and I told them, I said, "There's a shooting out here to the Lobster

House." I said, "Y'all need to send the police." but I lied, because it take Allendale Police Department so long to get to stuff, if something do happen, you know what I'm saying, and it was so many young kids out there with guns and everything. So the police came, and one of the officers, he was like, "Everybody leave the club, everybody leave the club now." Liz Roland*, is the one who y'all mentioned earlier, she is my first cousin. She was at the door. She's the one who collects the money and everything at the bar. And so I said, "Well, I've got my food." He said "I don't care nothing about your food. Y'all better leave now, or we're gonna lock you up." So at that point, I left the food and everything, and me, my son, and my brother, and my cousin had went around the corner to my grandmama Edith's house. And during the time when we was at my grandmama Edith's house, a car passed by and just went to shooting. I called 911 again. I said, "They're over here on 376 Old Barton Road, they're shooting." They said, "Ma'am, don't call, we ain't got time for that, because we had to go to another shooting."

Q. Okay.

A. And that was it.

Q. All right. This incident, this situation where one of the people was tugging at his waistband, was LaParis at the club at that point?
A. No, sir.
Q. Was Kendall at the club at that point?
A. No, sir.
Q. All right, and you said you were the one who called the police?
A. Yes, sir.
Q. All right. Did you -- were you interviewed by law enforcement?
A. SLED, yes, sir.
Q. Okay. I want to show you what's been marked as Applicant's Exhibit Number 3 and ask if you can identify that?
A. (Reviews document.) Yes, sir.
Q. And what is that?
A. A statement.
Q. All right. And whose statement is that?
A. Mine.
Q. And is that the statement that you gave to SLED?
A. Yes, sir.
Q. All right.
MR. THOMAS: I'd move Applicant's 3 into

evidence, Your Honor.

THE COURT: Any objection?

MS. DIXON: No objection.

THE COURT: All right. Applicant's 3 admitted without objection.

(Applicant's Number 3, Kimberly Williams' Statement, is marked and entered without objection.)

BY MR. THOMAS:

Q. All right. Were you ever interviewed by Mr. Koger?

A. No, sir.

Q. All right. If he had wanted to interview you, would you have talked to him?

A. Yes, sir.

Q. All, right. Were you -- were you at LaParis' trial?

A. Yes, sir.

Q. All right.

A. I missed work.

Q. I'm sorry?

A. I missed work.

Q. All right. Did you testify?

A. No, sir.

Q. Would you have testified if you had been asked?

A. Yes, sir.
Q. Okay.
MR. THOMAS: That's all the questions I have at this time, Your Honor.
THE COURT: All right, thank you. Cross-examination?

CROSS-EXAMINATION

BY MS. DIXON:
Q. Ms. Williams, just briefly, you said that you were at the Lobster House that night, or you went to the Lobster House after you got a phone -- letting -- from somebody saying that Mr. Flowers and ---
A. Uh-uh.
Q. No?
A. No, ma'am.
Q. Okay.
A. I went to the Lobster House that night ---
Q. Okay.
A. -- to go out to the party.
Q. Gotcha. And while ---
A. Yes, ma'am.
Q. -- and while you were there you received a phone call?
A. Yes, his mother called and said -- asked was

LaParis and Kendall in the club, and I told her, "Yeah," and she told me to go in there and tell them that they needed to come to North Augusta, because the baby was acting out, wouldn't take his bottle, sick, or whatever.

Q. Gotcha. And I believe you testified on direct, you don't know what time that call ---

A. No.

Q. -- came in? No recollection of that. And after they left, did you see him anymore that night?

A. No, ma'am.

Q. Did not see him anymore that night.

A. No, ma'am.

Q. So all you can testify to here today is that, at some point in time that night, he left the club, and you did not see him again.

A. Yes, ma'am.

MS. DIXON: Nothing further.

THE COURT: Anything else?

MR. THOMAS: No, sir.

THE COURT: All right, great. Thank you, ma'am.

MR. THOMAS: Just as a matter of housekeeping. I think I moved one, three, and five into evidence. I would move two and four into evidence as well.

MS. DIXON: No objection, Your Honor.

THE COURT: All right. So one, two, three, four, and five were admitted without objection. Is that correct?

MR. THOMAS: That's correct.

(Applicant's Exhibit Numbers 1, 2, 3, 4, 5 were entered without objection.)

MS. DIXON: That's correct.

THE COURT: All right. Thank you.

MR. THOMAS: And at this time we would rest, Your Honor.

THE COURT: All right. Proceed.

MS. DIXON: Your Honor, the State would call Joshua Koger.

THE COURT: All right. Mr. Koger come on around sir.

* * * * *

Joshua Koger, Jr.,

having been duly sworn,

testifies as follows:

* * * * *

DIRECT EXAMINATION

BY MS. DIXON:

Q. Mr. Koger, how are you today?

A. I'm doing well.

Q. Great. And briefly, how many years have you

been doing criminal law?

A. Approximately 28-1/2 years.

Q. Gotcha, okay, and how did you become involved in Mr. Flowers' case?

A. Well, this is my third time representing Mr. Flowers.

Q. Okay.

A. I first became acquainted with Mr. Flowers in a 2009 case in Barnwell. He was a co-defendant of my -- he was represented by Mr. Walters, but we did a trial in Barnwell, a murder trial, and got a not guilty. Three years later, he retained me to do an armed robbery in Allendale with some other robbery. There was a jury trial, we got not guilty on that particular charge. In 2014 he was charged with another murder, and we were preparing to go to trial on that one, but the Friday before we were supposed to go to trial, the Solicitor's Office dismissed that charge, so this would be my fourth time representing him.

Q. Did you get involved in this case pretty early in the -- I mean shortly after his arrest?

A. And, again, I don't have the benefit of my notes because I couldn't locate my notes. I have my investigative file. As I can recall, I got involved

I think maybe, initially, he had a -- he had a bond issue, but I got involved. I don't know if I got involved right after it happened, but I got involved ---

Q. Okay.

A. -- soon thereafter. I -- I think Mr. Plexico, the Public Defender, was initially appointed to him, and I took over for him.

Q. And let's see, do you recall the State's evidence, briefly, against Mr. Flowers?

A. Yes.

Q. What was the evidence? What was the most critical evidence in your opinion?

A. Well, from -- from going through at the time the investigative file was, of course, the identification. You know, the -- the identification, not by someone that -- by people that didn't know him, but people that were somewhat familiar with him. Also the gunshot residue in the car, even though I thought we had a very effective cross. Gun shot residue in the car that belonged to his mother. That was -- that something there. As far as, again, just, you know, the identification and gunshot residue in the car, and he being, you know, the timeframe is kind of -- is kind of

compressed, but just -- Allendale is not a big city, so you could probably get to any point of Allendale within five to ten minutes.

Q. Gotcha, okay. And in terms of the evidence, did you review all of that with Mr. Flowers?

A. Yes, I did.

Q. Okay. And is there anything specific he asked you to investigate?

A. He -- we met a couple of times after he was put back in Allendale, and something happened at the jail in Allendale. He was transported to Charleston, and I think I might have visited him three times in Charleston. He talks about an alibi, but to be quite honest, because I don't have the benefit of my notes, I cannot -- I cannot recall.

Q. Okay.

A. I -- I cannot recall.

Q. Do you recall whether he asked you to speak to any of the witnesses that testified today?

A. Well, I -- I cannot recall again. I know I met Ms. Nix, she said once, I -- I thought it was more than that, but -- but we did -- we did meet that one time at the -- at the McDonald's in Aiken. As far as Jaqwavian, he had -- of course, he had a statement in discovery, and Ms. Kim. I don’t -- I

-- I don't recall being asked to talk with them.

Q. Okay. When you met with Ms. Nix, did she ever mention to you that he was with her that night?

A. No, it was -- it was brief. She didn't.

Q. It was brief? Okay. Do you recall phone records?

A. I know that I remember seeing a subpoena for phone records, I think by Dylan Hightower, but I -- I do not recall phone records. The gist of what I was preparing on the case, we had to get passed this identification. So, basically, that was a big part of it, and, you know, as far as on cross-examining those witnesses on the stand.

Q. Okay.

A. So that -- so that was a big part of it, and trying to shape the identification.

Q. Gotcha. And do you call Mr. Lewis' testimony at trial?

A. I recall Mr. Lewis -- what I recall about him is that he was in prison I think in Virginia.

Q. Uh-huh.

A. And I think that he was reluctant to make an identification on the stand, I suppose, because he didn't want to go back to prison in Virginia and be considered a snitch, but I do, you know, again,

without the benefit of my notes, I do vaguely recall that testimony.

Q. So is it your recollection that he did not actually identify Mr. Flowers as the shooter at the trial itself?

A. He was very reluctant. So if -- so what is born out in the transcript is what it was.

Q. And do you recall cross-examining Charleton about his prior statement to law enforcement?

A. Yes.

Q. Do you recall cross-examining him about whether he told law enforcement he was drugged when he talked to them?

A. Yes.

Q. Do you recall asking Mr. Charlton whether he was -- had ever lied to law enforcement before?

A. Yes, if that's reflected in the transcript, yes.

Q. Okay. And let's see, do you recall also cross-examining Mr. Murray?

A. Yeah. I recall cross-examining Mr. Murray, because I think his -- his interview was done a little different. I think what I remember about Mr. Murray, it was done, I think, on the outside in front of the Magistrate's Office, and I think we

went -- we went down the line of questioning that -- that was maybe some form of -- of intimidation by law enforcement, being that he was not taken inside to be interviewed, that he was being interviewed in the parking lot. I think that was the one with Mr. Murray.

Q. And in terms of the lineup itself, do you recall the lineup?

A. I recall the lineup.

Q. Do -- did you have any concerns with the lineup itself?

A. I didn't have any, of course, I had Neil vs. Biggers, but as far as the lineup, there was nothing as far as there was -- everyone was of the same complexion. There was nothing that was highly suggested by the lineup.

Q. And then I believe the testimony we heard earlier today was that Mr. Flowers got into Ms. Nix's car at Ashley's house.

A. Yes.

Q. And do you recall, I believe Ms. Nix said that that was maybe about eight minutes after she left the Lobster House.

A. According to her testimony today.

Q. According to her testimony today. And do

you know, based on your investigation in this case, do you know about how far Ashley's house was from Pinewood Apartments where the shooting occurred?

A. Again, without the benefit of my notes, again, but if it's within that vicinity, it couldn't -- it couldn't be no more than ten to fifteen minutes.

Q. Ten to 15 minutes.

A. But, again, without the benefit of my notes, I wouldn't know.

Q. All right. Do you recall what time the responding officer said he was first dispatched?

A. I think it was like maybe 2:59, 3 o'clock, or something.

Q. Okay.

MS. DIXON: All right, nothing further from the State.

WITNESS: Thank you.

THE COURT: Cross-examine?

CROSS-EXAMINATION

BY MR. THOMAS:

Q. If -- if I understand your testimony correctly, you -- your -- your memory, your ability to testify here today is limited by the fact that you don't have your notes.

A. Well, actually, I -- I have the investigative file, and I thought my notes was in my investigative file ---

Q. Okay.

A. -- but I don't, but my notes are not in there.

Q. Okay. And when you say -- okay, so your notes are not in there?

A. Notes -- notes that I would have had, you now, my opening notes, my closing notes, my notebook, and what I split in half, each direct and cross, you know, things of that nature, that's not in there.

Q. All right. Now, you -- you received discovery in this case?

A. Of course.

Q. Okay. Now, I'm going to show you Applicant's Exhibit Number 1. Can you take a look at that please?

A. (Reviews document.) Okay.

Q. All right, would you agree that you received that in discovery?

A. Yes.

Q. And that's LaParis' statement?

A. That's correct.

Q. Okay. And I think you -- you mentioned earlier that there was a Neil vs. Biggers hearing; is that right?

A. From -- if it's reflected in the transcript, it -- the transcript bears it out.

Q. All right. So you don't recall?

A. Okay. Again, just like other -- other person testimony, it's been a minute, it's been a minute.

Q. All right, I understand, it's been a minute. Do you recall if there was a Jackson v. Denno hearing?

A. Yes.

Q. All right. And -- and did the Jackson vs. Deno hearing relate to LaParis' statement, which is Applicant's Exhibit ---

A. I think that was the only statement he gave.

Q. Okay.

A. Yes.

Q. All right. Even though there was a Jackson v. Denno hearing -- well, let me -- let me ask this. Do you recall the ruling from the Jackson v. Denno hearing?

A. That it was voluntarily -- that -- that it was not coerced, it was voluntarily given. I mean

there was a waiver of rights on here.

Q. Okay.

A. He signed the waiver.

Q. All right, so -- so Judge Buckner ruled that the statement was admissible if the State decided to use it?

A. Correct.

Q. Is that correct? Okay. Do you recall whether LaParis' statement ever got in front of the jury?

A. Well, it didn't, but as far as with LaParis, you know, he's never really -- we've never really discussed him taking the stand.

Q. Okay.

A. Right.

Q. All right.

A. I mean he -- he never indicated that he wanted to take the stand.

Q. I gotcha.

A. Yeah.

Q. But my question is, was his statement introduced in front of the jury by the government?

A. No.

Q. It was not?

A. It was not.

Q. Okay. All right, I want to ---
A. To the best of my recollection, I don't think it was.
Q. All right. I want to show you Applicant's Exhibit Number 2. Do you recognize that as Kendall Nix's statement that came from the discovery, and the interview that was conducted with her by SLED?
A. That's correct.
Q. All right. I think a minute ago you -- you testified that -- well, and -- and you received Ms. Nix's statement in discovery?
A. In discovery.
Q. Okay. And I think you testified that you met Ms. Nix during the course of your representation.
A. At least once. I thought it was more than once, but at least once.
Q. All right. Did you interview Ms. Nix about her statement that's Applicant's Exhibit Number 2?
A. No, I didn't.
Q. Okay. Do you recall whether Ms. Nix was at the trial?
A. I -- she was -- from what I can remember at the trial, and Mr. Flowers did not point out any of these persons, I remember his mother being at the

trial every day.

Q. Okay. Do you recognize his mother here today?

A. Yes.

Q. Okay. Do you recall whether or not Ms. Nix's name came up in -- on the witness list in the voir dire in front of the jury?

A. If it's reflected in the transcript, because I -- I cannot recall.

Q. Okay.

A. If it reflected in the transcript, then of course.

Q. Okay. I want to show you what's been admitted as Applicant's Exhibit Number 3 and ask if you could take a look at that?

A. (Reviews document.) Okay.

Q. All right. And do you recognize that as Kimberly Willams' statement?

A. That's correct.

Q. And, actually, if -- if you look at the top, it actually has Kimberly, it also has the name Harley Williams.

A. Correct.

Q. Okay. And you received that in discovery?

A. That's correct.

Q. All right. And did you interview Ms. Williams?

A. No, I didn't.

Q. Do you know if Ms. Williams was at the trial?

A. She was not pointed out to me.

Q. Would you have recognized her on your own?

A. I mean the only -- only way I would have recognized Ms. Williams, if Mr. Flowers said, "This is Ms. Williams." The only person I recognized from -- because -- because I had dealings with his mother over the last seven years, would have been his mother.

Q. Would you have recognized Ms. Nix at the trial without her being pointed out?

A. Not -- I met her one time, so -- so she probably would have been -- have been needed to been pointed out.

Q. Okay. Do you know whether or not Kimberly Williams, also referred to as Kimberly Harley Williams, if her name appeared on the witness list, and was called out during voir dire?

A. If it's reflected in the transcript, again, then that's -- yeah.

Q. But you don't ---

A. But I don't -- but I don't recall.
Q. Okay. You have no independent recollection.
A. Right.
Q. All right. I want to show you what's been marked as Applicant's Exhibit Number 4 and ask you to take a look at that.
A. (Reviews document.) Okay.
Q. Do you recognize that to be the SLED memorandum of interview of Jaqwavian Williams?
A. That's correct.
Q. All right. Did you interview Jaqwavian Williams?
A. No, I didn't.
Q. Do you know if Jaqwavian Williams was at LaParis' trial?
A. Only if he had been pointed -- pointed out.
Q. Do you know whether or not Jaqwavian Williams' name appeared on a witness list, and was announced in voir dire before picking a jury?
A. Now, I think because he had such a unique name, I'm not sure. I think it might have been on the witness list, but I'm not sure.
Q. Okay. But we can agree that you didn't interview Ms. Nix?
A. Correct.

Q. That you didn't interview Kimberly Williams.
A. Correct.
Q. That you did not interview Jaqwavian Williams.
A. Correct.
Q. All right. Do you have the transcript with you?
A. I -- I think the Attorney General.
Q. Okay. Well, let me -- let me just ask you this, do you -- do you have any recollection about the opening statements, with regards to whether or not the trial judge instructed or commented to the jurors about the trial being the search for the truth?
A. Other than what's in the transcript. Again, I don't have any -- again, it's been, what, trial of five or six years ago.
Q. Okay.
A. But if it's in the transcript, then it -- it occurred.
Q. All right. And do you remember whether or not the Solicitor in either opening statements, or closing arguments, or both talked about the trial being a search for the truth?
A. I -- I think a number of solicitors use

that, so it wouldn't be surprising if it's used, but I cannot independently, you know, recall, but if it's in the transcript, then that's what it is.

Q. All right. And do you recall whether or not in your opening statement, or your closing argument, or both, if you talked about the jurors having a role in seeking the truth?

A. Without my notes I can't independently confirm, but if it's in the transcript, it's in the transcript.

Q. Okay. Are you aware, do you know whether or not, that search for the truth, comments by a Judge, an argument, is objectionable or not?

A. Okay. I did not -- if the transcript reflects that I did not object to it, I did not object to it.

Q. Okay. Are you aware that that's objectionable? Are you?

A. It -- it depends. It depends on the context.

Q. Okay. Are you aware of the case of State v. Michael Beaty, B-E-A-T-Y. Are you aware of that?

A. No, I'm not.

Q. You're not aware of that case?

A. No.

Q. Since you're not aware of that case, let me ask you this, do you remember when the -- when LaParis' trial was?

A. I think it was in January of 2018 something.

Q. Okay. So since you're not aware of the Beaty case, are you aware of the -- the first opinion in the Beaty case came out in December -- on December 29 of 2016?

A. Okay. Wasn't aware.

Q. You weren't aware of that?

A. No.

Q. Do you recall having any discussion with the judge about the Beaty case?

A. No discussion with -- in this trial, right?

Q. Yes, sir.

A. No.

Q. Okay.

A. No discussion with that.

Q. All right. To your understanding, what circumstances is it objectionable for the court to comment on the role of jurors in seeking the truth and seeking that justice is done between the parties?

A. It is, you know, it is used. It is used by prosecutors. It is used by defense attorneys --

Q. Okay.

A. -- in -- in closing, and -- and objecting during opening and closing statement is a discretionary call.

Q. I understand, but what I'm asking is, is -- are you aware, and I'm talking about a judge at this point.

A. Right.

Q. I'm talking about a judge telling jurors that their role is to seek the truth, and ensure that justice is done between the parties. Are you aware of when that would be objectionable?

A. I -- I'm not aware. I would assume that would be on a case-by-case basis, but I'm not aware.

Q. Okay. And what would make it a case-by-case basis?

A. Well, the search for the truth, I mean basically the judge made this statement before he gave the jury instructions. I mean I don't have the benefit of the transcript.

Q. Okay.

A. I mean when he ---

Q. Well, let's -- he made a statement to that effect.

A. Okay. When?

Q. In his opening instructions, and ---

A. Okay.

Q. -- and I will tell you that that statement in his opening instruction is very similar, if not identical, to the statement that was involved in the Beaty case.

A. Okay.

Q. All right? And are you aware of when it would be appropriate to object to that statement by the judge?

A. Okay. I'm not.

Q. Okay. All right. All right. Do you recall in the trial during closing arguments, the Solicitor arguing, "That it's not my intent to prosecute an innocent man. Not so, we do not prosecute the innocent, only the guilty?"

A. Okay. If it's ---

Q. Do you remember that statement?

A. If it's in the transcript.

Q. Okay. If it's in the transcript, you wouldn't dispute it, sir?

A. No, of course not.

Q. All right. And if I tell you that there is no objection to that in the transcript, you wouldn't dispute that either would you?

A. No. I would not.

Q. All right. Do you think that that statement is objectionable?

A. Well, again, it -- again, you have to -- you're -- you're appearing before a jury, okay?

Q. Uh-huh.

A. You're giving a closing -- a closing before a jury. Okay, I think that we -- that we went -- that we had the last argument, because we didn't put up any -- we didn't put up any evidence as far as any exhibits or anything, so I had the right in this case, and as in a lot of my cases, I had the right to the last argument. So, basically, it's a -- it's a strategic call, because especially with the right to last argument, I can -- the jury gets to hear me last.

Q. All right. All right. And I'm not -- I'm not asking you about evidence at this point. What I'm asking you about at this point is whether or not you're aware of any case law regarding whether or not it would be objectionable for a prosecutor to state, "It is not my intent to prosecute the innocent. Not so, we do not prosecute the innocent. Only the guilty."

A. I was not aware, but being in the position

that I had the -- the last argument, I could -- I could clean up and cure in my closing statement if in fact, that was objectionable.

Q. Okay. You don't see that that is a -- as a statement by the prosecutor about the prosecution's belief in -- in the guilt of Mr. Flowers?

A. Well, if the law said it -- it's objectionable, it's objectionable. I did not object to it, but I had the right to last argument in this case.

Q. Okay. All right. Okay, I'm gonna read you what appears, well, on -- on page 555 of the transcript, the Solicitor starts talking about Brandon Lewis. Brandon Lewis was one of the people who got shot ---

A. Right.

Q. -- and he survived.

A. Right.

Q. And he was the one who was in custody at the time of the trial.

A. That's correct.

Q. He was actually in federal custody.

A. I think from Virginia.

Q. Okay. And do you -- do you recall that Mr. Lewis had given inconsistent statements prior to

trial?

A. Yeah. I think we cross-examined him on that.

Q. Okay. And ---

A. And he was reluctant on the stand.

Q. And -- and he was reluctant on the stand.

A. Right.

Q. All right. Do you recall whether Mr. Lewis ever testified one way or the other, "I'm reluctant, because I don't want to be branded a snitch, and get killed in prison."

A. I don't know. If it's in the transcript, it's in the transcript. I don't know whether that was something that I discussed with Mr. Flowers or whether he actually said it. I cannot independently recall, but if it's in the transcript, then the transcript is correct.

Q. Okay. Well, I'm going to read you page 556, beginning at line two, and going through line 12. "Let's talk about the inmate, the snitching, the code. It's a code. It's a code. He is sitting in prison. He's got to go back. He has to go back, and because he has -- had to go back, he can't sit in here and identify a man, and then he would have to go back and tell the boys. He has to go back to

the prison. Surely they're going to ask him what he did. He had to, you know, man, I didn't do anything man, I didn't man. That is what the inmate Brandon Lewis came in here and did. That's what he did," and you didn't object to that.

A. That's correct.

Q. Do you see that as an argument by the Solicitor vouching for Brandon Lewis?

A. Well, I don't have the -- I don't have my closing to -- to be a comparison to, but I'm sure that I clean that up -- I clean it up on my closing.

Q. All right.

A. It's obvious to the jury that -- that he was detained because I think he came in with prison garb.

Q. But -- but I'm asking whether or not you see this statement by the prosecutor as a way of vouching for Brandon Lewis because he's afraid in prison?

A. Well, as -- as a judge instruct a jury that what is that -- what lawyer say on opening -- what a lawyer say on opening, and what a lawyer say on closing, it's not -- it's not evidence, it's their version, it's their version of what happened, their story, so ---

Q. All right. Are you aware of any case law where Solicitor makes an argument, and our Appellate Courts have found that to be an improper argument that should have been excluded? Are you aware of any case law about it?

A. I -- I -- I -- I'm aware of those rulings.

Q. Okay.

A. The actual case name, no, I'm not aware of the case names, but I am aware of rulings.

Q. All right. Give me an example of one of those rulings, please.

A. I mean -- I mean I am aware that that can happen.

Q. All right. Can you give me an example of one of the times that the Supreme Court of South Carolina has ruled that a prosecutor's closing argument was improper, and should not have been heard, or should not have been allowed?

A. Well, it has happened.

Q. All right.

A. Right.

Q. I'm -- I'm asking ---

A. Yeah.

Q. -- if you can give me one example?

A. No, I can't.

Q. Okay. All right. As you testified earlier about cross-examining Brandon Lewis, Jerrell Murray, and Tyquan Charlton, ---

A. Yeah.

Q. -- right?

A. I cross-examined them, right.

Q. Okay. And as part of discovery you received the audio interview of Brandon Lewis, didn't you?

A. That's correct.

Q. And as part of the discovery you received the audio interview of Jerrell Murray?

A. Correct.

Q. And as part of discovery, you received the video-taped interview of Tyquan Charlton?

A. Correct.

Q. All right. And were those interviews played for the jury?

A. No.

Q. Okay.

A. But -- but I felt that I effectively, and I think Mr. Flowers agreed -- agreed at the time, that we -- that we effectively cross-examined those witnesses on the stand.

Q. But yet you're also aware that LaParis has indicated today that he thought those interviews

should be introduced so that the jurors could actually evaluate the interactions between those witnesses and law enforcement.

A. But we also discussed the fact because Mr. Flowers never seriously indicated to me as far as a part of strategy that he wanted to take the stand.

Q. Okay.

A. You know, introducing those, we would have -- and we -- and we -- and we talked about that right to last argument too.

Q. Okay.

A. Okay?

Q. All right.

A. And he -- he -- he never indicated to me during trial, when the witnesses was on stand, that he wanted those -- those CDs, or what have you, introduced into evidence.

Q. Is -- is -- LaParis Flowers, is he trained as a lawyer?

A. Huh?

Q. Is he trained as a lawyer?

A. No, he's not.

Q. All right. Is he trained in the rule of evidence?

A. No, he's not.

Q. Okay. And ---

A. But he -- but he participated in his legal strategy.

Q. All right. Did he tell you not to play this?

A. He did not indicate that he wanted it played.

Q. Okay. All right, in your closing argument, and you mentioned several times that you had the last argument ---

A. Right.

Q. -- and the record reflects that?

A. Right.

Q. In your closing argument, you were not able to argue that LaParis had an alibi, were you?

A. Correct.

Q. And the reason you were not able to argue that LaParis had an alibi, was because you didn't present any evidence of an alibi defense.

A. That's correct.

Q. And you weren't able to argue the demeanors of Brandon Lewis, Jerrell Murray, Tyquan Charlton, and the law enforcement interviews -- interviewers, you were not able to argue about that in closing because the -- the -- the audios were not in -- in

evidence.

A. No, we argued the inconsistencies, and we -- and we -- and we -- we argued, based upon the cross, that their own witnesses, and -- and another thing about winning the strategy with the alibi, you know ---

Q. Uh-huh.

A. -- as far as putting other witnesses to state what Mr. Flowers supposedly had, and he not take the stand to say that where he was -- that he was not where this thing started, you know, that's, you know, that's a strategic decision before the jury, because Mr. Flowers never indicated that he wanted to take the stand to say I was not there.

Q. Okay.

A. And I know it's -- it's his Fifth Amendment right, but, again, to put other witnesses on the stand, and the defendant to not take the stand, and to say, "I was not here but there," you know, that's a strategic call.

Q. All right. And are you trying to suggest, I -- and I want to make sure I understand.

A. Right.

Q. Are you trying to suggest that you cannot present an alibi defense if the accused doesn't

testify?

A. No, I'm not suggesting, but it is ---

Q. Okay.

A. -- stronger -- it is stronger if the person -- if the person take the stand -- if this person say, "Well, he was with me."

Q. Uh-huh.

A. And the other person say, "Well, he was with me." If that person doesn't take the stand, you know, it could weaken an alibi defense.

Q. And ---

A. It could.

Q. And you made that decision without interviewing a single alibi witness, didn't you?

A. Ms. -- I met Ms. Nix once.

Q. And you didn't interview her about the alibi.

A. No. And she didn't mention about -- she -- she did not mention, say "Mr. Koger, you know he was with me."

Q. All right. Sir, do you know whether or not you have a duty to investigate?

A. Of course I have a duty to investigate.

Q. All right, and -- and -- and yet you never asked ---

A. And I investigated this case.

Q. And yet you never asked Ms. Nix about her statement to law enforcement, did you?

A. No, I didn't.

Q. Okay. You don't have the transcript in front of you, do you?

A. Not in front of me.

Q. All right. I'm going to represent to you on page 587 of the record, beginning at line 15, Judge Buckner says, "I want to put on the record outside the presence of the jury there were two objections during the closing arguments of the defendant. The first objection by the Solicitor was to the reference to a tape. I overruled the objection because there was evidence that there was audio, and in one case, a videotape of one of the victims of the attempted murder. The Solicitor further objected that counsel for the defendant should not be allowed to speculate on why the tape was not admitted into evidence or the contents of the tape. I sustained the objection as to the contents because that would be speculation, and I also sustained the objection as to why the Solicitor could not put the tape into evidence, because that would have also been speculation and conjecture." And that takes us

to line six on page 588. Does that refresh your memory that you attempted to argue the contents of the tapes to the jurors?

A. If it's in my closing then I did it. I -- I don't -- I don't have a copy of the transcript. If I'm provided a copy of my closing statement and my transcript, I can read through it, and I can tell you, but if it's in the transcript, it's in the transcript.

Q. All right. You would have been able to argue about the contents of those audio and video statements had they been introduced, wouldn't you?

A. Had they been introduced.

Q. Wouldn't be speculation then, right?

A. It would not have been, but I think that, again, without the benefit of seeing my closing of what I argued, I mean, basically, if it's in the transcript, it's in the transcript.

Q. Okay. And then on 588 picking up at line seven. "Later on in Mr. Koger's argument the Solicitor objected a second time. This was to an argument concerning Russell Smart putting his hand in his pants; is that right, Solicitor?" And the Solicitor states at line 12, "Oh, yes, Your Honor, what -- what he actually said, Your Honor, was that

Russell Smart may have put his hands in his pants and having a gun, and there was no testimony in." And then the judge begins speaking in line 16, "And I sustained the objection because there was no testimony as to that, and I wanted there to be a record of it as to occurred in the bench conference." I think what he's trying to say is what's occurred in the bench conference. And I think we talked earlier about the statements of Ms. Williams and her son Jaqwavian Williams ---

A. Right.

Q. -- and -- and they did touch in their testimony earlier about this situation with Russell Smart tugging on his pants, didn't they?

A. Correct.

Q. And had Ms. Williams and Jaqwavian testified, you would have had their role in presenting LaParis' alibi, right?

A. Well, according to the testimony, and I guess the testimony mirrored what they had in their statement. They didn't have ---

Q. Okay.

A. -- time. I mean, basically, I think, you know I think they stated that -- that -- I think -- well, I'm not going to -- I heard testimony with Mr.

Williams that she, you know, they had left the -- Mr. Flowers left the club, I think with Mr. Williams ---

Q. Okay.

A. -- left the club, and she didn't know where he went at that point, and ---

Q. All right.

A. -- Mr. Williams went home with his mother, and he didn't know where Mr. Flowers went from that point.

Q. All right. And did -- did you hear him testify that -- that Mr. Flowers had left before this incident with Russell Smart?

A. Right. Right.

Q. And, had they testified, this objection would not have been sustained, would it?

A. Okay.

Q. Do you agree with that?

A. I agree with that.

Q. All right. Now, you've mentioned several times about your closing argument. Do you have a copy of the transcript with you here?

A. I don't have a copy, but I think that ---

Q. I'll tell you what, your closing argument starts on page 572 of the transcript.

A. Okay.

Q. And you can scroll through my iPad, if you want.

A. Okay.

Q. And what I would like for you to do is tell me what was so powerful about your closing argument that it was worth giving up an alibi defense.

A. Give me a couple minutes, sir.

Q. Sure. Take your time.

A. (Reviews document.) Okay. I had a chance.

Q. All right. And what was so powerful in your closing argument that it was worth not presenting an alibi defense.

A. I point out every -- every inconsistency that we -- that we brought out in trial. I went back and pointed out every inconsistency to try to tie it -- to try to tie it up and say that the State has not met their burden of proof in this case beyond a reasonable doubt. I dealt with identification, I dealt with not firing, not having -- not finding a firearm. I think they did something that match up, what, 62 different types of guns. I mean everything, and, again, I don't have my notes, but, basically, that's what I do, and I try to tie it up on closing.

Q. Okay.

A. And -- and those things that -- that the State objected to it, the jury still heard it.

Q. Okay. So the jury hearing you argue about evidence that was never introduced, that was more powerful than actually presenting that evidence; is that what you're saying?

A. No, I'm saying that the combination of everything that we -- that -- that came out during the trial.

Q. Okay.

A. Everything.

Q. All right. Not finding the gun, and the inconsistencies between the witnesses, those -- those are what you were relying on to justify giving up an alibi defense?

A. And also, too, I think that the car being unattended for 48 hours, and also, too, even though there was gun shot residue in the car, I think if I'm not mistaken, he was not a gunshot residue expert. So we went in, you know, even Mr. Flowers stated on the stand ---

Q. Uh-huh.

A. -- but those things, right, I felt that that was -- that was, at least I thought it was enough

to, you know, to create reasonable doubt.

Q. All right, and now -- and then your testimony here today is -- is that justified giving up calling alibi witnesses and presenting an alibi defense?

A. Well, it -- it -- it seems like in the testimony, the one, the -- that the one alibi witness, because the -- because the other two cannot, you know, they -- they -- they left, you know, probably what Mr. Flowers would consider a primary alibi witness would have been Ms. Nix, if they, you know, had gone to, you know, North Augusta. So I wouldn't consider Ms. Kimberly and -- and Jaqwavian to be an alibi witness.

Q. Okay. All right. You mentioned the identification, and the -- the judge gave an instruction on eyewitness identification. Did you ever -- do you ever consider requesting a supplemental instruction on that which would include the Neil vs. Biggers criteria for the jurors to consider?

A. Well, the transcript reflect that he gave -- that he just gave a standard instruction on that?

Q. He -- he gave an instruction that the jurors had to determine beyond a reasonable doubt.

A. Okay.

Q. Well, hold on just a second. Judge instructed, "Identification testimony, ladies and gentlemen of the jury, as an expression of a belief or an impression by which you, as the jury, must determine the accuracy of the identification of the Defendant. You have to determine the believability and credibility of each identification witness in the same way as any other witness. You must be satisfied as a jury beyond a reasonable doubt that the accuracy of the identification of the Defendant before you may find the Defendant guilty. On the other hand, if after examining" ---

THE COURT: Well, slow down just a little bit.

MR. THOMAS: I'm sorry.

THE COURT: That's all right.

MR. THOMAS: "On the other hand" ---

THE COURT: Hold on a second.

MR. THOMAS: Okay.

THE COURT: Are you standing up for a reason?

MS. DIXON: Yeah, I just wanted to see if he could tell us what page he's reading from.

MR. THOMAS: I'm sorry, I'm -- I'm at 600, lines one through 15.

THE COURT: All right, that's fine.

MS. DIXON: Sir, thank you.

THE COURT: Just read a little slower because we've got a court reporter.

MS. DIXON: All right.

BY MR. THOMAS:

Q. At line 12, "On the other hand, if after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the Defendant not guilty." Did you ever consider having the judge charge the Neil vs. Biggers factors?

A. If -- obviously, I didn't, if -- if that was the one. You know, I didn't request an additional or another identification instruction.

Q. Okay.

MR. THOMAS: I beg the court's indulgence for a moment.

THE COURT: Yes, sir.

BY MR. THOMAS:

Q. Do you recall, in the trial, whether or not there was any discussion about the inference of malice may arise from the use of a deadly weapon?

A. There was a discussion.

Q. Okay. Do you remember the nature of that discussion?

A. I don't remember the nature. Is it reflected in the transcript?

Q. Well, and -- and I'm -- there -- there -- there is some discussion in the transcript.

A. Uh-huh.

Q. I want to ask you a couple of questions. Are you familiar with the State v. Belcher case regarding the inference of malice?

A. I have -- I am, I've heard it.

Q. You've heard it?

A. Yeah.

Q. All right.

A. I've heard about it.

Q. And are you familiar with State v. Burdette regarding the inference of malice?

A. I think one is a -- is a more recent case, right?

Q. That's Burdette.

A. Right.

Q. Okay. If the judge -- well, if -- if the judge charged -- let me just go to page 607. Actually, starting on page 606, at line eight, the Judge instructs malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a

deadly weapon. A deadly weapon is an article, instrument, or substance, which is likely to cause death and great bodily harm. Whether an instrument has been used in the death depends on the facts and circumstances of each case based on the evidence introduced during the trial of the case. The law says that if one intentionally kills another with a deadly weapon, the implication of malice may arise. If the facts are proven beyond a reasonable doubt by the State sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact taken into consideration by you, the jury, along with other evidence in the case. Then the Judge says on page 7, lines one through four, "and you may give it such weight as you determine it should receive and it can be rebutted. Now the evidence of this case based on your view of the evidence." Did you consider the fact that this -- that LaParis would have to rebut an inference to be burden shifting?

A. I didn't consider that.

Q. Do you think it could be?

A. It could be.

MR. THOMAS: That's all I have at this time, Your Honor. Thank you.

THE COURT: Any redirect?

MS. DIXON: Nothing further from the State for this witness. We do have an additional witness appearing by WebEx, and he's on standby.

THE COURT: Okay. Thank you, sir.

WITNESS: Okay, thank you.

THE COURT: All right. Whatever you need to do, or ---

MS. DIXON: Do you mind, Your Honor, if I take a quick just five-minute break?

THE COURT: Let's take a break.

MS. DIXON: Thank you, and I will let them know.

THE COURT: So why don't you try to set that up, and we'll take a break and come back in here, okay?

MS. DIXON: Oh, Your Honor, was your -- I brought my laptop for ---

THE COURT: Well, he just opened it, so however y'all want to do it.

MS. DIXON: Okay.

(RECESS)

THE COURT: Attorney General, you can call your next witness.

MS. DIXON: May it please the Court, the State calls Taylor Gilliam.

THE COURT: All right.

MS. DIXON: And for the record he's appearing via WebEx.

THE COURT: All right. You want to go ahead and swear him in?

* * * * *

Taylor Gilliam,

having been duly sworn,

testifies as follows:

* * * * *

THE COURT: All right, can you hear me, sir?

MR. GILLIAM: Yes, Your Honor, I can hear you.

THE COURT: All right. Great, thank you. Your witness.

DIRECT EXAMINATION

BY MS. DIXON:

Q. Yes, sir. Mr. Gilliam, how are you today?

A. Doing great, how are you?

Q. I'm doing well, thank you. Just real quickly, how long have you been an appellate defender?

A. I started in June of 2016, so almost seven years.

Q. And during that time have you exclusively done criminal appeals?

A. To include PCR appeals, but, yes.

Q. Okay. And what do you recall about Mr. Flowers' case?

A. In preparing for today's hearing, I reviewed the Anders brief on file, as well as the court records, we call it C-TRAC, the South Carolina appellate case management system, and I reviewed that to sort of see the procedural history of how my representation of him on direct appeal began and concluded.

Q. And can you tell the Court, briefly, what is an Anders brief?

A. Certainly. An Anders brief comes from the name of a case, if I'm not mistaken, Anders v. California, that allows an appointed counsel to raise an issue during a direct appeal that an attorney believes does not have merit, but due to the individual appellant's right to counsel on appeal, a brief has to be submitted on their behalf. So, ordinarily, an Anders brief contains one issue. I have seen an Anders brief that contains two. Typically, there is one, and what happens following an Anders brief is that the Court of Appeals writes the appellate a letter and advises them of their right to file a pro se response within about 45 days. They can take extensions, and following that

time a review is conducted internally with the Court of the entire record. It's important to know that I believe in concert with the Anders brief, the entire trial transcript is sent over as the record on appeal, so that the Court of Appeals can conduct its own review of the record in order to determine if there are any issues on appeal that the appellate defender or the appellate attorney may have missed. And if that occurs, we call it globally bucking, B-U-C-K-I-N-G, but what will happen is, if the Court of Appeals sees issues that the attorney should have raised, it could be more than one, then the Court of Appeals will issue an order directing the attorney to brief that issue or those issues.

Q. Gotcha. And do you submit an affidavit along with this brief?

A. Yes. I forgot that, but yes. I submit an affidavit attesting to my belief that there are no issues of arguable merit, and I ask the Court of Appeals to be relieved following their review of the record.

Q. And do you recall from your representation if there were any issues that Mr. Flowers spoke to you about or wanted you to raise?

A. Yes. A review of my files including

telephone log and written correspondence for Mr. Flowers, indicates that he wanted me to raise the issue of the jury charge, that I suspect has been a topic of conversation at this hearing already; but essentially, that the inferred malice charge can no longer be given following the issuance of our State Supreme Court's opinion, State v. Burdette, B-U-R-D-E-T-T-E, written by Justice James in 2019. The timing of my Anders brief was that it was filed on February 1st of 2019. State v. Burdette came out on July 31st, 2019, and then rehearing was denied, meaning that the opinion was final on September 27th, 2019. So due to a paragraph near the end of that opinion, and the citation for Burdette is 427 S.C. 490, and near the conclusion of the opinion it was 50. Our ruling today is effective in this case and in those cases, which are pending on direct review or are not yet filed, so long as the issue is preserved. And so Mr. Flowers called me, he had a family member call me, and he wrote me and asked for me to raise the issue of the inferred malice jury charge in his case.

Q. And in your opinion was that issue preserved?

A. That issue was unpreserved in my opinion

based on a couple of citations to the trial transcript. Beginning with page 546 of the transcript, where the Trial Judge referenced a charge conference, and indicated specifically that there was an objection for an issue raised by trial counsel as to presumption or burden shifting. There is not a whole lot of context there. That was on lines 13 to 20. I can read that, if you'd like, or I can move onto the next page citation.

Q. You can move onto the next.

A. Okay. Following that on page 589 of the trial transcript, beginning on line one, the Judge indicates what -- I don't know if we have a male or a female judge, I don't want know, let's see, Judge Buckner. What he indicated what he was going to charge on page 589, and then, finally, the malice charge given on page 606, lines eight to 11, and then importantly on page 620 the Judge asks, as all judges do following the charge, the instructions to the jury, "Any exceptions or additions to the Court's charges from the State?" The State says, "None," "And then from the Defendant?" And the defense counsel says, "No objection or additions to the charge." So that led me to believe that this issue was not raised and ruled upon by the Trial

Judge, such that I could raise in good faith in a brief at the South Carolina Court of Appeals.

Q. And did you discuss with Mr. Flowers filing an amended brief or whether that was something you could pursue?

A. He asked me to withdraw the brief at one point. That was the primary topic of discussion. My response to him on that telephone call on February 10th of 2020 was that if the Court of Appeals thought that this issue was preserved, they would direct me to brief it. I repeatedly informed him that it was not preserved. The call did not end well. He was unhappy with me. There were a couple of follow-up telephone calls, and I sent him a letter indicating that I was not going to withdraw my Anders brief or file an amended brief. And I do think that it is important to recognize that Mr. Flowers did successfully get this issue before the Court of Appeals on his own through the Anders procedure. Looking at C-TRAC, the Appellate Court filings, he filed a motion on November 12th, 2019, to amend his pro se response, and the Court granted that motion, the Court of Appeals did later on in November 2019. So the Court of Appeals was undoubtably aware of the Burdette issue. Had it

been preserved, I imagine they would have directed me to brief it. That's perhaps speculation on my part, but the Court of Appeals affirmed his convictions and never did ask me to brief the malice jury instruction issue.

Q. So you were never asked to brief anything in this case?

A. Not by the Court of Appeals, no.

Q. And then just to clarify for the record, did Burdette come out before Mr. Flowers' trial or after his trial?

A. It came out after his trial while his direct appeal was pending before the South Carolina Court of Appeals.

Q. Okay. And then going to that last paragraph, I believe you were reading from it earlier about what that opinion applies to. Does the Court go onto mention anything about PCR?

A. Yes. The Court cites Griffith v. Kentucky, G-R-I-F-F-I-T-H, a United States Supreme Court opinion, for the proposition that a new rule is to be applied retroactively pending on direct review or not yet final. The very next sentence following that parenthetical, Justice James Wright's quote "However, today's ruling will not apply to

convictions challenged on post-conviction relief."

A. All right. Thank you, Mr. Gilliam.

MS. DIXON: I have nothing further from the State.

THE COURT: Cross-examine?

CROSS-EXAMIANTION

BY MR. THOMAS

Q. Yes, sir. Can you hear me all right?

A. I can, yes.

Q. All right. I want to go back to page 546 of the transcript, and I think -- were you referring to lines 13 through 20?

A. Yes. Yes, sir.

Q. All right. Do you understand what that discussion is all about on page 546?

A. To the extent that it references a charge conference that's not on the record, not entirely, and to the extent that the Judge's reading of the Judge's remarks suggests that he believes the inference of malice is a wrongful presumption, yes, that -- that doesn't square with the charge as given, but again there was no subsequent objection or motion by trial counsel.

Q. Okay. And well that's what I want to talk about, because we're talking about Burdette a lot

today, of course, Burdette was based on Belcher, correct?

A. Yes, that's right.

Q. And Belcher was decided before Mr. Flowers' trial.

A. That's correct, yes, sir.

Q. And I think you already testified that Burdette was decided after you filed your Anders brief, but before Mr. Flowers' appeal concluded.

A. Yes, that's correct, Belcher came out in 2009.

Q. Okay. And ordinarily, if a conference takes place, a charge conference or any other conference takes place off the record, anything that's discussed in that has to be put on the record, or you don't get the benefit of it as the appellate lawyer; is that fair to say?

A. Yes, sir. Of course, some additional context that you didn't ask for, as an appellate lawyer, like when counsel submits as a Court's exhibit, his or her proposed instruction to the jury.

Q. All right. And it's -- it's not clear whether there was a proposed instruction submitted, and I'm still talking about, you know, page 546,

lines 13 to 20; is that right?

A. Yes, sir.

Q. But the Judge does say that both parties agree that should be added, right?

A. Yes, sir.

Q. And the sentence before that says, "I've been over that addition to the charge, which involves the fact that the inference of malice is a wrongful presumption." Do you understand what that statement means without any more explanation?

A. I'm going to say no with some speculation. You could infer, I hate to use the word infer here, but you could infer that the Judge is referencing Stanko from 2013 or Belcher. It's not abundantly clear from that one sentence, I hate to say.

Q. Okay. All right. And I want to go back to 5 -- let's go to 588, all right ---

A. Uh-huh.

Q. -- and I'm looking at line 20. Do you see where it says, "I've been over with counsel the additional charge that I told you about this morning, and the reason for it being that the burden shifting presumption argument or conclusive presumption argument allegedly depriving the defendant of his due process of law." Do you see

that?

A. Yes, sir.

Q. And then on the next page, he says, "And, therefore, I tend to explain to the jury that it is not a conclusive presumption and part of my charge on murder. When I get to that point the malice can be inferred from the use of a deadly weapon;" is that right?

A. Yes, sir.

Q. All right. So is it fair to say at this point, the Judge and counsel aren't really talking about Belcher?

A. That they are, or are not?

Q. Are not.

A. There is no reference explicitly to the case law, and it's hard to tell ---

Q. Uh-huh.

A. -- what exactly it is that they are referencing, yes, sir.

Q. But they are talking about a burden shifting presumption argument?

A. That's correct, yes, sir.

Q. Okay. And I think the -- let's see, the jury instruction is on 606, I believe.

A. That's what mine looks like as well, yes,

sir.

Q. All right. And so -- so what I'm -- what I'm looking at in 606, beginning at line eight, going over to 607, ending at line four is whether the Judge in charge said, "Inferred malice may arise when the deed is done with a deadly weapon." And that -- what I'm quoting there is on lines nine through 11, and then at 12 to 17 the Judge explains what a deadly weapon is, and then when you get to line 18, the Judge says, "That if one intentionally kills another with a deadly weapon, the implication of malice may arise." And then he explains that that's simply an evidentiary fact, and then on 607 he says, "And you may give it such weight as you determine it should receive, and it can be rebutted." I take that to mean that the inference of malice can be rebutted.

THE COURT: Yes, ma'am. Is there an objection?

MS. DIXON: Uh, no.

THE COURT: All right, go ahead.

BY MR. THOMAS:

Q. Do you interpret it that way?

A. Yes, sir. The Judge doesn't reference any sort of presumption, but it does outright suggest that the inference can be rebutted, that's correct.

Q. Does -- is that -- do you consider that instruction to be burden shifting?

A. I do think it is improper in light of Burdette, and particularly the section of Burdette regarding the continuing validity of the inferred malice instruction in South Carolina.

Q. Okay.

A. I do think it's a charge on the facts, and if that instruction were to be given in a criminal trial today raised on appeal, it would likely be reversible error. As to whether it is burden shifting, if you'll give me a second to re-read it, I think I can provide an answer.

Q. Okay.

A. Yes, sir. I do think that is burden shifting, particularly in light of the language that it's rebutted, because the problem arises if a defendant is not testifying how is he or she supposed to rebut that presumption other than cross-examination, so, yes, sir, I -- I would opine that that is burden shifting.

Q. All right, and -- and just so I want to make sure we're on the same page, I -- I think we would agree that post-Burdette, the Judge is not going to talk about an inference of malice from the use of a

deadly weapon at all, correct?

A. Yes, sir.

Q. All right, but separate from that is an issue of whether or not the defense has to rebut an inference; is that right?

A. Just in general outside the context of a malice instruction, perhaps, yes, sir.

Q. Okay. And of course going back to In Re: Winship and other cases, I mean it's been very clear that the State has the burden of proving every element, correct?

A. I agree with that proposition, without knowing the details of that case, yes, sir.

Q. Okay. And, of course, in the -- in the charge conference, such that it was placed on the record at 588 and 589, there is some discussion about a burden shifting instruction and the fact that that would not be proper, wasn't there?

A. Yes, sir. That was referenced by the Trial Judge.

Q. Okay. Do you think that that discussion by the Trial Judge was sufficient to preserve the burden shifting aspect of that instruction for appellate review?

A. No, sir, particularly based on the question

following the instruction to the jury on page 620 regarding any exceptions or additions based on my understanding of rules of preservation that the burden fell on counsel to, at that point and time, say, "Your Honor, we object, or subject to our prior objection, as discussed in chambers," if that was in fact the objection. That's a long way of saying, no, I do not believe it was adequately preserved.

Q. All right. So in order to have briefed the burden shifting aspect of that instruction, what would you have needed in the record that is not there?

A. An objection on page 620 following -- a contemporaneous objection, following the Judge's instructions to the jury where he asks, "Any exceptions or additions by the State, and then by the defense," it would have fallen to counsel to, at that point in time, say, "Your Honor, we object, based on the in-chambers discussion, or based on Belcher, or Stanko, in order to give the Trial Judge an opportunity to fix what then an appellate attorney would argue was a mistake. He or she has to be given that opportunity in order for me or another attorney to argue to the Court of Appeals, that he or she erred in giving that instruction;

because had the counsel objected, then there could have been a subsequent charge, or a way to somehow remedy the instruction that the Judge gave.

Q. All right. Setting aside Belcher and Stanko for a moment, would an objection that said, "You know, Your Honor, we object to having to rebut an inference of malice as burden shifting," would that have been sufficient for you to raise that issue on appeal?

A. Possibly.

Q. Okay. And, of course, the more specificity that was made with that objection, the better it would be for you and the appellate record?

A. That's correct, yes, sir. There are no magic words, we know that, but the more specificity, the better.

Q. All right. And if there had been an objection that rebutting the inference of malice was something that LaParis had to do, if there had been a sufficient objection, would you have raised that issue on appeal?

A. Yes, sir, I would loved to have raised that issue on appeal.

MR. THOMAS: Thank you, sir, that's all I have.

THE COURT: Anything else?

MS. DIXON: Just a few -- I'm sorry, Your Honor.

THE COURT: Go ahead.

REDIRECT-EXAMINATION

BY MS. DIXON:

Q. Just a few things, I want to make sure we're not comparing apples to oranges here. Will you -- do you have a copy of the transcript?

A. I'm looking at it electronically, yes.

Q. Can you look at pages 439 and 4 -- I'm sorry, 539 and 540?

A. I've got to pull it up. Yes, I've got it.

Q. And do you see the Court referencing a case that just came out called State v. King -- well, it just came out at the time of this trial, called State v. King, and according to the Court that came out October 25th, 2017?

A. Yes. The citation to King is 422 S.C. 47, and I see the reference at the bottom of page 539 of the transcript.

Q. Are you familiar with State v. King?

A. I am not familiar enough to discuss it in any great detail, but I do have the opinion pulled up.

Q. Gotcha. Can you just tell briefly does that case address the issue of whether malice can be

inferred from the use of a deadly weapon?

A. That sounds an awful lot like specificity.

Q. Would you agree that State v. King is the case, where the Court discusses whether malice can be applied in attempted murder under the 2010 criminal statute?

A. When reviewing it before beginning my testimony, I did see that there was discussion of the 2010 Omnibus Act, and I will accept your representation as to what the case holds.

Q. And then in terms of State v. Burdette, again, just to clarify, that came out after applicant's trial?

A. Yes.

Q. And that opinion expressively says it does not apply to PCR?

A. Yes. I -- I do believe that that sentence would apply more squarely to an applicant who would raise the issue in a post-conviction relief application. Years after Burdette, Mr. Flowers was in a unique position, where his case was pending on direct while, during, at, I don't know which preposition is right, at the time that Burdette came out. So I don't know if a review of Griffith v. Kentucky, the United States Supreme Court opinion,

would be insightful. I acknowledge the sentence about how the Burdette proposition will not apply in post-conviction relief, but Mr. Flowers' case was a little different in that it was pending on direct at the time that the opinion came out. However, the malice issue was unpreserved, in my opinion.

Q. Okay.

MS. DIXON: Nothing further from the State.

THE COURT: Anything else?

MR. THOMAS: No, sir.

THE COURT: All right. Thank you, sir.

WITNESS: Thank you for letting me testify remotely, Your Honor.

THE COURT: Yes, sir. All right.

MS. DIXON: Your Honor, we don't have any other witnesses. I do have argument. I think we've got a lot of legal issues that might need to be kind of ferreted out.

MR. THOMAS: Before we do that, I -- I want to just take up one thing just for housekeeping. The -- there was some discussion about the Michael Beatty case, State v. Beatty ---

THE COURT: Right.

MR. THOMAS: -- and that was -- I'm trying to find the case number, that was appellate case number

2015-00718. There is a, I guess, a little wrinkle in the sense that this is a case where a rehearing was granted, and so there was an opinion that was issued on December 29th of 2016 that the bar would have been noticed on, and that was the law in South Carolina at the time, and of course Beaty addressed both the closing arguments and the truth seeking.

THE COURT: Right.

MR. THOMAS: Rehearing was granted and the opinion was reissued on or about April 25th of 2018, which would have been after Mr. LaParis' trial. The -- materially though, the part about the search for the truth didn't change between the first opinion and the second opinion. There was some tweaking on the argument issue, and I just wanted to make certain that the record reflects that when I was asking questions about Beaty, and it was the opinion that was in place at the time of the trial and not the final opinion, and I have copies from C-TRAC and copies of the opinion that you can look at. I mean I don't know that ---

THE COURT: That's fine.

MR. THOMAS: -- we need to put the paper in the record as long as we reference the Supreme Court's website.

THE COURT: Yes, sir.

MR. THOMAS: And with regards to argument, it would be my preference that we could submit post-hearing briefs if that would be -- assist the court.

THE COURT: I'd rather go ahead and just hear your argument.

MR. THOMAS: Okay.

THE COURT: I prefer to do that.

MR. THOMAS: Okay.

THE COURT: Unless you can get -- well, I'd rather just go ahead and hear the argument.

MR. THOMAS: Okay.

MS. DIXON: I'm prepared, Your Honor, if you'd like for me to go. I don't know what order you want.

MR. THOMAS: Well I can -- I can -- I can go now.

MS. DIXON: Okay.

THE COURT: Okay.

MR. THOMAS: I just want to pull up and have my application in front of me.

ARGUMENTS BY MR. THOMAS

I think, you know, one of the big issues, and I'm looking at paragraph 11(a)(2) of the PCR application is regarding interviewing and presenting

the testimony of alibi witnesses. You have as exhibits one through four the interviews, three are witness statements, and one is A memorandum of interview, clearly showing the fact that LaParis had an alibi was something that came up as part of the investigation of law enforcement. The testimony is, is that LaParis was aware not only of his statement, but these other statements from the discovery. Mr. Koger testified that he did receive those in discovery. I think when you look at the guidelines, and I think in Strickland v. Washington, and also in Padilla v. Kentucky, they cite to APA Criminal Justice Guidelines, as well as the National Legal Association guidelines for indigent defense, or appointed counsel. Consistently, the guidelines talk about the duty of a lawyer to conduct an investigation into possible defenses. I think it is undisputed on this record Mr. Koger did not interview Ms. Nix, even though that he had contact with her and had her statement. It’s undisputed that he did not interview Ms. Williams, and it’s undisputed that he did not interview Jaqwavian Williams. The three of them together, I think, present sort of the sequence of events from the evenings with regard to LaParis' alibi, and those

could be presented regardless as to whether or not LaParis testified or not. And so we think that certainly this is not something that has been conjured up over the years, this was something that was readily available to trial counsel at the time, and the ineffectiveness is not conducting the investigation. That's a -- the first part of deficient performance, and, therefore, it was also deficient for not presenting this. When you look at the record, you know, the jury was not out for very long based on the -- the times in the record. They were not out for very long, and that was because they didn't have anything to consider in the way of a defense that they would have been able to have had this alibi defense been presented. Also -- and this is just sort of a little side note, but some of the objections that were sustained made by the Solicitor that were sustained would not have been sustained, I'm talking about the closing argument on behalf of Mr. Flowers, had these witnesses testified, particularly, Mr. Williams and Ms. Williams, had they testified and been able to present the sequence of events as they remember them from that night. And certainly the prejudice is, is that had this alibi been presented, you know, there is a

probability that the result of the case would have been differently. There was some suggestion in some of the questioning about well maybe there was something in the file, phone records or something like that. You didn't hear any testimony from trial counsel or any witness of the State that there was any evidence that would have conclusively refuted this alibi. You know, and they had -- if -- if they had it, they had the opportunity to present it, and there's no evidence of that. Paragraph 11(a)(3), simply there, you know, I do believe trial counsel should have asked for the -- the jurors to be instructed on the Neil v. Biggers factors, because this shooting incident happened in a very quick period of time, even though they knew LaParis -- there's a question as to whether or not they had an opportunity to identify him. The 11(a)(4) is failing to object the inference of malice, uses of a deadly weapon. I -- I -- I get the issue as far as the timing of Belcher before the trial and Burdette after the trial, but what we also were focusing on in paragraph 11(a)(4) is everybody recognized that there was a wrongful presumption, but rather than either deleting the inference or handling it in some other way, the jury, the Judge said he was going to

explain that it was not a conclusive presumption, and that when instructing that malice can be referred from a deadly weapon, and, of course, he did not use the language presumption. He used the language inference, but he clearly told the jurors that that was something that could be rebutted, and that was burden shifting. We raise this as an issue of failure to object and also an issue for not briefing it. You know, if you find that it's a burden shifting instruction, then either trial counsel and the colloquy with the Judge and the discussions, and on the record preserved it for an appeal, or it didn't. If it didn't preserve it for an appeal, then there should have been a specific objection. If it did preserve it for appeal, then appellate counsel should have briefed it. I tend to think that it was not well preserved for appeal, but I didn't want to leave open that loose end for the State to argue that we didn't raise the issue that appellate counsel should have raised something that was -- was preserved. The 11(a)(5) is failing to introduce evidence -- into evidence the audio recordings of the interviews of the complaining witnesses. That's the thumb drive that you have in evidence. It's true that there was lots of

questions about that. One example with regards to Mr. Lewis, I think the question was asked, "Well, weren't you prodding Mr. Lewis to give a name to identify somebody?" And the answer was, "Well, we don't think we were prodding him." Well, if you actually listen to the interview with Mr. Lewis, they're pretty intent on getting him to name somebody. The jurors would have had that to consider. I believe it was -- well, one -- one witness -- one of the attempted murder victims was not actually shot, one of them was. The one that was actually shot, when you see the interview, you see him in the hospital. He was shot in the jaw, and he has a neck brace on, and you can make some -- you sort of reach some conclusions as about what, you know, state of mind he could be in because of the medical treatment he was receiving, and, you know, what he was going through at the time. And I think that the argument is, is there's a problem and there's some inconsistencies in this identification, and the police are prompting or prodding these people to name somebody, LaParis in particular. If you actually listen to these recordings, and actually look at the interview, the one that's videotaped, that would have corroborated the

arguments and the questioning that was being made. With regard to 11(a)(6), there's two references to the State's closing argument that we feel are objectionable. I think the little eye, four little eye is, I guess, somewhat similar to the Oscar Fortune case. I guess that did come out after this case, but I don't think it broke any new law, that whenever a Solicitor gets up and says, "That we don't prosecute the innocent, we just prosecute the guilty," and particularly when they reference it in the first person in that manner, they're vouching for their own case, and they're implying that they know something about the case that has not been presented to the jury; and in fact, you know, there were some objections sustained because people were arguing about what had not been presented to the jury. So a reasonable juror would probably infer "Hey, that solicitor knows something we don't, and the -- the State is telling us that he's guilty." With regard to the second one, and this -- this is what's in the application is a summary of what transpires on, I guess, several pages, but Brandon Lewis was one of the attempted murder complaining witnesses. He was the one that was -- at least part of his interview, part of the -- one of the

interviews with him was recorded, and that's what is in Exhibit 5. Mr. Lewis eventually said he didn't know anything about the person that shot him, and didn't name LaParis, even though he knew LaParis, and that came out. Then you have this interview where they're prodding him to give a name, and when he finally does name LaParis. And then he comes to Court, and he testifies that he never identified LaParis, and he doesn't make an identification in Court. And so then the State was allowed to present evidence through their investigator of the statements that Brandon Lewis actually made. And under our law that can be admitted and considered as substantive evidence. And so then you have this situation that Brandon Lewis had been arrested, and it might have been a gun charge. It doesn't matter what it was. He was serving a five-year federal sentence. He was brought to Court. When he was brought to Court and he may have been shackled, but he was brought in in prison gear. He gives his testimony, and then he never testifies, "Hey, I'm not going to talk today, because of some snitch code." Then you have the Solicitor in closing argument, you know, vouching for Brandon Lewis, "Hey, you know, forget what he said here today, just

go with the fact the officer said he did identify him at one point, because he's just trying to protect himself." That's something outside the record, it's vouching for him, and it also is implying that the State knows something that they're sharing with the jurors through closing, because the jurors didn't hear it during the trial. 11(a)(7) we withdrew, and there's two 11(a)(7)s. So we withdrew -- we withdrew the juvenile records that came up in sentencing because we have, in fact, been presented with the order from the Family Court Judge. The second 11(a)(7) has to deal with the Judge's comments in the opening instructions to the jury, with regards to the search for the truth, as well as the fact that both the State and the defense parroted the Judge's instructions -- or not really instructions, but opening remarks about the search for the truth. Both sides parroted that language in their opening statements, in their closing arguments. And, of course, you know, the Beaty decision sort of put to rest whether or not those instructions were important. I mean it was a matter of controversy before then, but the Beaty decision put that to rest, and that's why I point to the fact that the first Beaty opinion had come out several

months before this trial. And it specifically -- and you could probably pull up, I know you could pull up the record on appeal in Beaty. What was issued in Beaty was the -- the instruction that the -- the Judge gave in Beaty was the instruction that was in the 2015 charge book that was given to the Circuit Court judges, and the objection was made at trial to that. The instruction that Judge Buckner gave in this case is almost identical, if not identical, to that charge that was given in Beaty, with regard to the search for the truth, to find the true facts, to ensure that justice is done between the -- the parties. And so, in fact, I think it's misspelled, but Judge Buckner at some point makes a reference to the Beaty decision with regard to the order of closing arguments, but, of course, the decision dealt with the truth seeking and ensuring that justice was done. And so I think that everybody was on notice that that was objectionable, and by extension of that, neither side should really be arguing that your job is to find the truth, jurors. When in fact, the jurors job is to determine whether or not the State has met their burden of proof beyond a reasonable doubt. And if they haven't, they don't have to figure out what the

truth really is. There's just sometimes where, unfortunately, in our justice system we never really know what the truth is. And so there should have been an objection to that, and there should have been, you know, the objections to the State's argument, and the defense should not have argued that. They should have stuck to arguing the burden of proof. And I think this also -- I haven't specifically pled cumulative error I don't think; but when you look at the truth seeking versus -- and compare it with the burden shifting instructions and closing arguments, I think that acted together to lower the burden of proof for the State, and even shift the burden to LaParis to have to disprove or to rebut inference of malice. I expect to hear an argument about, you know, the strategy here was -- was to maintain closing argument. I know you've been practicing for a long time, and I'm stating the obvious of what's on, you know, what the practice is, but the practice in South Carolina, prior to the first Beaty decision in a lot of cases in a lot of jurisdictions, if not everywhere, was that the State either opened on the law and reserved their factual argument for the final argument, or the defense opened it fully, and then the State did their full

closing argument. And under either scenario, the defense did not have a chance to hear the State's argument and make an argument responding to that. With the -- the Beaty decision, you know, that -- that was the issue that was raised in Beaty, that the Solicitor was supposed to open fully, but they didn't. The Solicitor sandbagged, had their prepared PowerPoint argument as their final argument, and then there was no opportunity for the defense to respond. That procedure was no longer valid after Beaty. After Beaty, if you -- even after the first decision, the defense was going to get a full and fair opportunity to respond to the State's closing argument. And then if the defense had presented evidence, the State had a limited right to reply to new things that were raised. And I do think that Judge Buckner, I think it's spelled wrong, it's spelled like State v. B-E-T-E or something in the record, but I think that they were referring to the Beaty decision, and how it applied to, you know, the order of closing arguments. And, quite frankly, and you've -- you've heard the testimony and had a chance to read the record. I just don't see where there can ever be a valid strategic decision to waive presenting evidence of a

defense when that defense is not going to get in front of the jury in some other manner. That you waive presenting that defense just to keep final argument, but to limit what you're able to argue, and that's -- that's what happened here. And if that -- if that's what they -- if that's what they argue, I -- I asked Mr. Koger, "What was so powerful about your closing argument that it was worth giving up presenting an alibi defense?" He had an answer, but I don't think it was an answer that amounted to a valid or strategic decision. I think I have covered all of the -- the grounds that we've gone forward on. If you have any questions, I'd be happy to answer them.

THE COURT: No, sir, thank you.

MR. THOMAS: Thank you.

THE COURT: Ms. Dixon?

MS. DIXON: Thank you, Your Honor, may it please the Court?

ARGUMENTS BY MS. DIXON

BY MS. DIXON: As to the alibi defense, as Your Honor knows, under State v. Strickland, in addition to proving deficiency, the applicant has the burden of proving prejudice, and prejudice under Strickland is designed -- is defined as a reasonable likelihood

that the outcome would have been different. The State submits that the alibi testimony presented today was at best weak. I'm not even sure it actually established an alibi, but to the extent it did, Your Honor would have to weigh what the likelihood that testimony would have had on the jury's ultimate decision in light of the other evidence the State presented, which includes three identifications by witnesses, one of which actually identified the Defendant by his nickname Pat Pat. There was also the circumstantial evidence of the gunshot residue being found in the car that the applicant actually admitted he was driving that night; and then in terms of the alibi defense, two of the witnesses couldn't testify what time they last saw him at the club, all they could say was that at some point he left, they didn't see him again that night. The other person did testify to there was actually a gap in time between her leaving the club and then him getting in the car with her, and, of course, the timeframes as to when all of this occurred was, you know, the testimony from the defense, Mr. Flowers, was anywhere from 2:00 to 2:42, which is a pretty broad range. We would submit that this was not even an alibi, but you

know, at best maybe a weak alibi, and due to the weakness of it, it is not reasonably likely that the outcome would have been different if these witnesses had been presented to the jury. Moving onto the instruction regarding the inference of malice, and I think it's important to read the transcript and see the context of what the parties were discussing. The Court did at some point mention the State v. King case, and that was a case that had just come out prior to this case -- and give me just a moment. The site for that is 422 S.C. 47. The issue in State v. King is whether under the 2010 attempted murder statute malice could be, well, initially, it was whether malice, or intent, could be transferred, but in the context of determining that, because attempted murder is a specific intent crime, intent cannot be transferred. The Supreme Court went and took it a step farther and said, "Because of this malice cannot be inferred from an attempted murder charge." So, basically, what the Supreme Court said in King was, "You can no longer charge inferred malice when charging attempted murder." And if you look at the attempted murder charge here, that is correct and consistent with King. The issue in State v. Burdette, which was also discussed today,

was whether malice could be inferred from the use of a deadly weapon, and they did charge as part of the murder charge, not the attempted murder, but the murder charge, that malice can be inferred due to the use of a deadly weapon, and, of course, that was consistent with the law that existed at the time of this trial. And those cases I would cite State v. Stanko 402 S.C. 252. That's a 2013 case, and also State v. Belcher 385 S.C.597. That's a 2009 case. These were cases that existed before Burdette, and under those cases, courts could charge inference from the use of a deadly weapon as long as no evidence was presented that would reduce, mitigate, excuse, or justify the homicide. Of course, here the State submits there was no evidence presented that would reduce, mitigate, excuse, or justify, the homicide, and so the charge was, in fact, proper under the law as it existed at the time of the trial, and we would also just note for the record Teamer v. State, that is 416 S.C. 171, and in that case the Court found that counsel was not deficient for failing to object to an instruction that had not yet been found improper by the Appellate Courts.

Moving onto the failure to admit into evidence the audio recording. Of course, I'm sure Your Honor

is familiar with Rule 613(b), which allows the admission of inconsistent statements. And I believe the State would submit Your Honor should review these to determine whether they were consistent or inconsistent. To the extent they are consistent with the trial testimony, we submit they were not admissible. Of course, as has been noted today, Mr. Lewis at trial denied knowing who the shooter was, and the State did, at that point, introduce extrinsic evidence of his statement. Moving onto improper comments by the Solicitor, I would cite Simmons v. State, "Improper comments do not automatically require reversal if they are not prejudicial to the defendant. The applicant has the burden of showing he did not receive a fair trial, because of the alleged improper argument. The relevant question is whether the Solicitor's comment so infected the trial with unfairness as to make a resulting conviction a denial of due process." The State would submit that this statement by the Solicitor did not so infect the trial with unfairness as to make the conviction a denial of due process.

Moving onto the improper vouching claim, Your Honor, we would cite to, first of all, State v.

Shuler, that's 344 S.C. 604, that's a 2000 case; and that case defines improper vouching as when the prosecution places the government prestige behind the witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony. We would submit that is not what happened here. This was not a personal assurance of Mr. Lewis' veracity. And then the other case that we would cite here would be Smith v. State, that's 375 S.C. 507, that's a 2007 case. It basically said, "A solicitor can state his version of the testimony and comment on the weight given such testimony. However, a solicitor may not vouch for the credibility of the State's witness, based on personal knowledge, or other information outside the record." So it does allow the solicitor to state his version of the testimony and comment on the weight to be given. And here we would just submit that the evidence here was corroborated by the testimony, or was a reasonable inference to be drawn by the evidence and testimony presented at trial.

Moving onto the issue, regarding the truth seeking language, the State acknowledges that Beaty

did exist at the time of this trial. So there was a directive from our courts at that time to stop using this truth seeking language. However, we would note that Beaty was not reversed. The reason being that the Court found Beaty failed to prove prejudice. There was another case that's much older that kind of raises a similar issue. That is State v. Aleksey, and that is 343 S.C. 20. And in that case the Court looked at the truth seeking language and ultimately decided that because it was not charged with the reasonable doubt portion of the jury charge, that it did not have the effect of shifting the burden of proof. We would submit here that any truth-seeking language that was done during opening statements by the parties certainly would not constitute part of the reasonable doubt jury charge. And then, Your Honor, my review of the record shows that the Court did make a statement on page 596. "It becomes your duty as jurors to analyze, to evaluate the evidence, and determine what evidence convinces you of its truth and believability," and then it goes on to talk about in determining the believability of witnesses who have testified, you may believe one over several." Basically, this is given as part of the credibility charge, and if you

look at State v. Aleksey, that was a similar situation where it was given as part of the credibility charge, and the Court there ultimately found there was no reversable error, so we would submit that the applicant cannot demonstrate prejudice from the failure to object to this truth-seeking language. And, finally, in terms of the cumulative error argument, and I apologize, I was not on notice that this was going to be raised today, but my recollection is there is a case, and it may be Nance v. Osment, that basically has questioned whether South Carolina Court -- Courts have ever even recognized this cumulative error doctrine. Not sure that it has been actually recognized by our Courts.

THE COURT: All right, thank you.

MR. THOMAS: Can I briefly respond?

THE COURT: Briefly, yes, sir.

MR. THOMAS: Yes.

REBUTTAL ARGUMENT BY MR. THOMAS

BY MR. THOMAS: With regard to prejudice, with regard to presentation of the alibi, I think Your Honor should look at Smalls v. State where they talk about proving prejudice under Strickland and looking at the specific errors. They also talk about the

strength of the State's case, and they talk about overwhelming evidence being where you have DNA that proves guilt, or you have a confession that proves guilt, or you have something so compelling that it cannot be refuted, and we don't have that here. I think the testimony has been that there was problems with the eyewitness identification testimony that I think, with everything else, is not so compelling. And it is a complete alibi because Ms. Nix testified that they left at the same time, and LaParis followed her, and they arrived at the same time. They were together the rest of the evening. State v. King is a red herring. We have not raised an issue with regards to the attempted murder instruction. Burdette is also a red herring. What we've raised is that the instruction that was given for the murder charge was a burden shifting charge, and counsel has long been on notice to object to anything that shifts the burden. I think that the cases that they cited with regards to improper argument actually support our position. And when you look at how the truth seeking language was used in this case by the prosecution, particularly when you look at how they used it in the closing argument, I think we've met our burden of proof that

that reduced our shift in the burden of proof in this case.

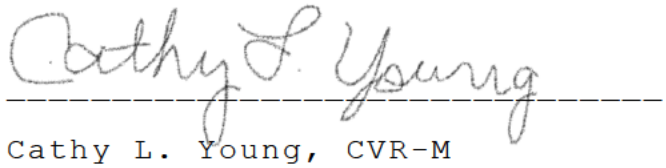
THE COURT: All right. Thank y'all very much. I'll give y'all a decision or let you know something probably by the end of the week.

- - -END OF TRANSCRIPT- - -

CERTIFICATE OF REPORTER

I, Cathy L. Young, CVR-M, for the Fourteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appear, in the Circuit Court for Beaufort County, South Carolina, on the 14th day of March, 2023.

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



Cathy L. Young, CVR-M
Court Reporter and Notary
Public in and for South Carolina
My Commission expires: 3-28-2029

STATE OF SOUTH CAROLINA COUNTY OF ALLENDALE	)	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT
LaParis Flowers, SCDC #375098, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2020-CP-03-00257 **ORDER OF DISMISSAL**

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by LaParis Flowers (Applicant) on October 19, 2020. On March 14, 2023, an evidentiary hearing convened before the Honorable Robert J. Bonds. Applicant was present and represented by E. Charles Grose, Jr., Esquire. Assistant Attorney General Danielle Dixon represented Respondent. Following a thorough review of the records before this Court and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections serving an aggregate fifty-year sentence. In July 2015, the Allendale County Grand Jury indicted Applicant for murder (2014-GS-03-00229); three counts of attempted murder (2014-GS-03-231, -232, -233); and possession of a weapon during the commission of a violent crime (2014-GS-03-234). On January 8, 2018, Applicant proceeded to a jury trial before the Honorable Perry M. Buckner, IV. Joshua Koger, Jr. represented Applicant. Assistant Solicitors Tameaka Legette and Brian Hollen prosecuted the case. The jury convicted Applicant as indicted, and Judge Buckner sentenced Applicant to concurrent terms of forty-five years for murder and thirty years for each

charge of attempted murder, and a consecutive term of five years for the weapons charge.

Applicant filed a timely notice of appeal. Appellate Defender Taylor D. Gilliam perfected Applicant's appeal by filing an Anders[1] brief. The Court of Appeals dismissed the appeal pursuant to Anders. Applicant filed a petition for rehearing *en banc*, which was denied. Thereafter, he filed a petition for writ of certiorari in the South Carolina Supreme Court, which was dismissed pursuant to State v. Lyles.[2] The remittitur was sent September 25, 2020.

SUMMARY OF TRIAL TESTIMONY

At trial, Deputy Jim Evans testified he responded to a shots-fired call at a bar called the Lobster House around 3:00 a.m. on December 6, 2014. He spoke with security, who relayed they had no reports of gunfire. Deputy Evans stated about fifteen or twenty minutes later he responded to another shots-fired call, this time on Barton Road. When he arrived, he noticed a green vehicle against a tree with a crowd of people gathered around. Deputy Evans stated two men were inside the vehicle—the driver and another person in the rear driver's side; both were slumped over and unresponsive. (Tr. 181-83, 189).

According to medical personnel, victim Russell Smart passed away before making it to the hospital. (Tr. 211). Another victim, Tyquin Charton, was shot in the jaw and suffered life-threatening injuries. (Tr. 204-05, 211-12). A third victim, Brandon Lewis, was treated for a gunshot wound to his arm. (Tr. 214).

Tracy Roberts testified she was at the Lobster House that night but did not see Applicant. (Tr. 219). She stated her boyfriend Aldeandre Gray (nickname Dee) got mad at Jaquavian Williams (nickname Toot; hereinafter "Jaquavian") as they were leaving. (Tr. 219-20). Roberts

[1] Anders v. California, 386 U.S. 738 (1967).
[2] 381 S.C. 442, 673 S.E.2d 811 (2009) (holding the Court will not entertain petitions for writs of certiorari where the Court of Appeals has dismissed an appeal after an Anders review).

left the club without Gray. (Tr. 220). She testified Jaquavian later called and asked if she knew where Gray was; she told him he had gone to Pinewood Apartments. (Tr. 221). She stated Jaquavian was still mad at Gray. Roberts testified Jaquavian later texted her and said, "I hope Russell okay." (Tr. 222). Roberts testified Jaquavian and Applicant were cousins. (Tr. 224).

Elizabeth Rollins testified she was working at the door of the Lobster House that evening; she recalled seeing Jaquavian and Smart arguing. (Tr. 237). Rollins stated she asked Jaquavian's mother, Kimberly Flowers,[3] to take him outside. (Tr. 237). She stated the club closed around 2:30 a.m. (Tr. 237). Rollins recalled seeing Applicant that night; she said he became angry and went outside. Rollins stated Smart went outside around the same time. (Tr. 238-41).

Tyquin Charlton testified he was at the Lobster House that evening; he recalled seeing Smart, Gray, Jarrell Murray, Lewis, and Applicant. (Tr. 246-47). Charlton testified he initially left with his brother but later got in Smart's green Crown Victoria. (Tr. 247-48). He testified Smart was driving, Murray was in the front passenger seat, and Lewis was in the back with Charlton. (Tr. 248-49). Charlton stated Gray was initially in Smart's car, but Gray got out as Charlton got in. (Tr. 249). He stated they drove to Pinewood Apartments. (Tr. 250). While they were at Pinewood, Chalton testified Applicant drove up in a white Alero, pulled up "driver's door to driver's door," and said, "Y'all trying to flex on my little cousin." (Tr. 254-55). Charlton testified Applicant pulled out a gun and began shooting. (Tr. 256). He stated he next remembered waking up in the hospital; law enforcement spoke to him but he was medicated at the time. (Tr. 258). Charlton stated he told law enforcement that Applicant shot him. He explained he had known and Applicant for a couple of years and knew him "pretty good." (Tr. 260-61). He recalled picking Applicant from a photo-lineup. (Tr. 264).

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[3] At the PCR hearing, Jaquavian's mother stated her name was Kimberly Williams. She will be referred to hereinafter as "Kimberly."

Murray recalled leaving the Lobster House that morning with Smart, Charlton, and Lewis. He testified a white car pulled up while they were at Pinewoods Apartments and the driver began shooting. Murray clarified Applicant—whom he had known "quit a while"—was the shooter. (Tr. 279-86). Murray also identified Applicant from a photo lineup. (Tr. 290).

Lewis likewise recalled leaving the Lobster House that morning with Smart, Charlton, and Murray. He stated Gray was initially in the car with them but got out after he and Smart "had some words." (Tr. 298-302). Lewis stated that while they were at Pinewood, somebody pulled up and began shooting at them. (Tr. 302). He claimed he did not know the shooter. (Tr. 307-08).

Captain Quatique Manor testified he obtained surveillance videos from the Lobster House and identified Applicant entering a white Oldsmobile, "maybe an Alero."[4] (Tr. 308-13). He stated he spoke to Lewis shortly after the shooting, and Lewis identified Applicant as the shooter and selected Applicant from a lineup. (Tr. 314-18). Likewise, Lieutenant Matt Brown stated he spoke to Lewis, and Lewis identified Applicant as the shooter. (Tr. 412-14, 417). Lieutenant Brown stated he also spoke to Murray and Charlton; they both identified Applicant as the shooter and selected him from lineups. (Tr. 420-36).

Agent Haley Nelson testified she processed a white Alero and discovered paperwork with Applicant and his mother's name. (Tr. 371-74). Agent Nelson swabbed the Alero for gunshot residue, and Tyler Sturkie, an expert in trace evidence, determined the Alero contained gunshot residue. (Tr. 375, 477-80).

[4] The video was entered into evidence.

ALLEGATIONS RAISED AND RELIEF SOUGHT

Applicant timely commenced this PCR action on October 19, 2020, alleging he is being held in custody unlawfully for the following reasons:

1) Ineffective Assistance of Trial Counsel
   a. "Trial counsel was ineffective in failing to obtain and introduce at trial recorded evidence that would reveal more clearly the improper manner and highly suggestive identification procedure used to identify the Applicant";
   b. "Trial counsel failed to interview known alibi witness in light Applicant claim of being elsewhere during the initial altercation".
   c. "Trial counsel fail to request for additional jury instruction as it concern the court limited and inadequate identification testimony charge to the jury that, as a whole, represented the prosecution case in chief';
   d. "Trial counsel failed to object and preserve for appellate review the trial court use of the questionable and now prohibited inferred malice charge based on the charge giving as not being sufficient to compensate for its prejudicial effect".
2) Ineffective Assistance of Appellate Counsel
   a. "Appellate counsel was ineffective in failing to raise the issue as to whether the new Supreme Court rule prohibiting the use of the malice charge applied to his case that was on appeal at the time."

Respondent filed a return requesting an evidentiary hearing. On November 10, 2022, Applicant amended his application to allege:

a. Ineffective assistance of trial counsel:

   i. Failed to obtain and introduce at trial evidence that would reveal more clearly the improper and highly suggestive identification procedures used to identify Flowers;

   ii. Failed to interview and present testimony of an alibi;

   iii. Failed to request additional jury instructions concerning the trail court's limited and inadequate identification testimony charge to the jury that, when taken as a whole, represented the prosecution case in chief;

   iv. Failed to object to the charge that malice may arise from the use

of a deadly weapon;

v. Failed to introduce into evidence audio recordings of the interviews of complaining witnesses;

vi. Failed to object to improper comments during closing argument;

vii. Failed to object to the unsealing of Flowers' juvenile records without an order from a Family Court Judge;

viii. Failed to object to improper truth-seeking language;

b. Ineffective assistance of appellate counsel:

i. Failed to raise the issue of whether the new Supreme Court rule prohibiting the use of the malice charge applied to his case that was on appeal at the time.

At the PCR hearing, counsel Applicant indicated he was no longer going forward on allegations related to (1) trial counsel's failure to introduce evidence that would reveal more clearly the highly-suggestive identification procedure and (2) the unsealing of the juvenile record.[5] This Court finds Applicant has waived issues (a)(i) and (a)(vii), as set forth above, and dismisses those claims with prejudice. Applicant proceeded on the remaining claims raised in his amended application.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the plea transcript in its entirety and has heard the testimony at the PCR hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony.[6] After a careful review based on the Strickland standard set forth below, this Court finds Applicant has failed to carry his burden of proof. Below are this Court's findings of facts and conclusions

[5] Counsel for Applicant agreed with Respondent that they had obtained the Family Court order unsealing the juvenile records.
[6] This Court will reference PCR testimony where relevant below.

of law as required by section 17-27-80 of the South Carolina Code (2017).

Ineffective Assistance of Trial Counsel

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). An applicant alleging ineffective assistance of counsel must prove "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 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813. "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." Watson v. State, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Strickland, 466 U.S. at 687–88; Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625. "A PCR applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial." Dalton v. State, 376 S.C. 130, 136, 654 S.E.2d 870, 873 (Ct. App. 2007). To prove prejudice following a guilty plea, the applicant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Alibi

Applicant first contends counsel was ineffective for failing to obtain and introduce evidence of a known alibi. This Court finds Applicant has not shown counsel was ineffective in this regard.

At the PCR hearing, Applicant testified he was not at Pinewood Apartments at the time of the shooting. He acknowledged being at the Lobster House earlier that evening with Jaquavian Williams, Kendall Nix, and Kimberly. Applicant stated Nix was the mother of his child, and while they were at the Lobster House, they received a call indicating their child was cranky. Applicant testified he left the Lobster House with Antron Williams between 2:00 and 2:42 a.m., and there were no altercations or fights while he was at the Lobster House. Applicant stated he left at the same time as Nix and left right behind her, although they were in separate cars. He explained,

> Antron Williams he was undecided at where he wanted to go at the time, so he was dating Kendall Nix cousin at the time, so he decided to go to her house. Like I said I was—I was right behind Kendall Nix, as well as her cousin. We just was in separate cars, I was right behind them, and we ended up at—at Ashley's house. And I ended up giving the keys to my brother, and I got in the car with Kendall Nix.

Applicant stated he had been driving his mother's car—a white Alero. After he gave his brother the car, he rode with Nix to their home in North Augusta.

Applicant testified the following day Nix received phone calls from people "stating that they might have said there was a—a white car involved, and might have said I had something to do with it, due to the fact that Jaquavian Williams got into a dispute, when I later learned—learned that they got into some type—type of dispute, and so I volunteered to go to the Police Department." He testified he spoke with police and provided an alibi, and they did not arrest him at that time. During his testimony, Applicant entered his statement as well as statements from Nix, Kimberly,

and Jaquavian. He stated he did not testify at his trial and none of those witnesses testified. Applicant stated he wanted to present an alibi defense and spoke with his lawyer about it, but his lawyer never contacted the witnesses. According to Applicant, counsel "just constantly stated that . . . the State has to prove beyond a reasonable doubt." Applicant stated Jaquavian, Nix, and Kimberly were at his trial, but counsel never "did his due diligence."

On cross-examination, Applicant acknowledged police found gunshot residue in the car he was driving that night. When asked whether he ever asked anyone to clean the car, he replied, "My brother, he stated that I left a towel for him to clean the car, but I never left a towel for him to clean the car. There was just stuff in the car." Although Applicant initially stated he did not recall discussing with counsel whether his brother could have been the shooter, when asked whether he mentioned anything to counsel about his brother being the shooter, he replied, "[T]hat is one of the things that we talked about." Applicant recalled the State had subpoenaed his brother to his trial. Applicant agreed he knew Charleton, Murray, and Lewis from living in the area. He acknowledged all of them identified him as the shooter, although he claimed it was due to improperly suggestive police procedures.

Nix testified she was at the Lobster House that evening, and she learned her son was acting cranky. She stated she left the Lobster House with "Ashley" and "Neesy" and drove to Ashley's house. Nix testified Applicant left behind her with "Tron." When asked what happened when she arrived at Ashley's house, Nix testified, "Tron went inside, got my phone charger. . . . I left my clothes there, came back to the car, [Applicant's brother] came, asked [Applicant] can he hold the car, can he get some money from her, and that was it." She stated she and Applicant then drove to North Agusta. Nix testified she never went to Pinewood Apartments that evening. Although she initially testified she never spoke with trial counsel or interacted with him, she later

acknowledged meeting him at a fast-food restaurant to provide payment. Nix admitted she did not tell trial counsel she could provide an alibi for Applicant.

Nix initially testified she left the Lobster House around 2:00 a.m. After reviewing her statement to police, she testified she told law enforcement she left round 2:42 a.m. She stated Applicant left the Lobster House at the same time she did, "was right behind [her] at Ashley's house," and they left together to go to North Augusta.[7]

Jaquavian, Applicant's cousin, recalled seeing Applicant and Nix at the Lobster House that night. He stated Applicant and Nix left while Jaquavian was still at the club. Jaquavian recalled Gray getting mad at him, but he stated Applicant had already left at that time. Jaquavian stated he left the Lobster House with his mother, his uncle, and his cousin Ulysses Grant and went to his grandmother's house. He did not see Applicant that night after Applicant left the club.

Kimberly, Jaquavian's mother, stated she was also at the Lobster House that night. She stated she saw Applicant and Nix, but they left after learning their son was acting cranky. Kimberly did not see them once they exited the club and did not know if they left together or separately. Kimberly stated she did not see Applicant again that night after he left the club.

Joshua Koger (trial counsel) testified the State's evidence included three witnesses who were familiar with Applicant that identified him as the shooter, and gunshot residue recovered from Applicant's car. He stated the identifications were his primary concern, and he sought to impeach the identifications through cross-examination. Counsel did not have any concerns about

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[7] In her supplemental statement to police, which was signed at 7:12 pm on December 7, 2014, Nix stated,

> After leaving the club around 2:42 am, I went and drop my cousin and her stepsister off. Stayed there and 10 mins later LaParis pull up and drop Tron off, he then gave Chavis the keys and we went back to North Augusta. He then said he tired of everybody lien [sic] and if something happen take care of his child. This is the correction to my first statement.

This was entered into evidence at the PCR hearing as part of Exhibit 2.

the lineup itself being unduly suggestive.

Counsel testified the timeframe for the shooting was somewhat compressed but Allendale is not a big city, "so you could probably get to any point of Allendale within five to ten minutes." He did not recall Applicant mentioning an alibi defense during his representation, and he testified Applicant never indicated that he wanted to testify. Although counsel acknowledged an alibi could be presented without a defendant testifying, he stated it weakened an alibi defense if the defendant did not take the stand.

Trial counsel believed he met Nix on more than one occasion and stated she never mentioned that she was with Applicant that night. He recalled seeing Jaquavian and Kimberly's statements in discovery but stated Applicant never asked him to speak to them. Counsel recalled Applicant's mother being at trial but stated Applicant did not point out any other individuals at trial. He further stated he would not have known Kimberly or Jaquavian if Applicant had not pointed them out. Counsel agreed he did not interview Nix, Kimberly, or Jaquavian. He stated he did not consider Kimberly or Jaquavian to be alibi witnesses.

This Court finds credible counsel's foregoing testimony that Applicant never raised to him a defense of alibi, Applicant never indicated he wanted to testify, Applicant never asked him to speak to witnesses, Nix did not mention being with Applicant that night, and Applicant did not point out anyone at trial to counsel. This Court finds not credible Applicant's testimony that he told counsel he had an alibi. Based on the foregoing, this Court finds counsel's defense strategy was reasonable within prevailing professional norms, and counsel was not deficient for not pursuing an alibi defense. Although counsel had witness statements from Nix, Kimberly, and Jaquavian, those statements in and of themselves were insufficient to put counsel on notice of a potential alibi defense. This Court notes Nix signed a supplemental statement the same night she

signed her original statement clarifying Applicant arrived at Ashley's house ten minutes after she did. Based on counsel's credible testimony that Allendale is not a large city and "you could probably get to any point of Allendale within five to ten minutes," Nix's statement that there was a ten-minute gap before Applicant met her after leaving the club, and the fact Applicant never mentioned an alibi defense to counsel, this Court finds counsel was not deficient for not further pursuing an alibi defense. In other words, had Applicant truly had an alibi defense, this Court finds he would have brought that to counsel's attention. Counsel thus was not deficient for not pursuing an alibi when Applicant never informed him of his alibi.

Likewise, this Court finds the testimony of Kimberly and Jaquavian did not create an alibi defense. Kimberly and Jaquavian both stated they did not see Applicant after he left the Lobster House that morning—making their testimony insufficient to establish an alibi. Thus, Applicant did not prove prejudice from counsel's failure to call them as witnesses at trial

Further, this Court had the opportunity to view Applicant and Nix's testimony at the PCR hearing and finds their testimony concerning an alibi to be self-serving and not credible. Although Nix testified Applicant followed her when she left the club, in a supplemental statement signed the same night as her original statement, she indicated she "drop[ed her] cousin and her stepsister off, stayed there and 10 minutes later [Applicant] pull[ed] up and drop[ped] Tron off." This statement contradicted her PCR testimony that Applicant was "right behind me at Ashley's house," and this Court finds her PCR testimony in this regard not credible. This Court further finds that based on the evidence presented at trial—including three witness identifications and evidence of gunshot residue in the car Applicant admitted he was driving—it is not reasonably likely the outcome would have been different had Applicant presented the alibi defense he presented at the PCR hearing. Thus, Applicant did not prove prejudice, and this claim is denied.

Jury Charge – Biggers factors

Applicant next contends counsel was ineffective for failing to request additional jury instructions concerning the trial court's limited and inadequate identification testimony charge to the jury that, when taken as a whole, represented the prosecution case in chief. Specifically, he contends counsel should have asked for the jury to be instructed on the factors from Neil v. Biggers. This Court finds Applicant has not shown counsel was ineffective in this regard.

"In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification." State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012). "Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." Id. .(citing Neil v. Biggers, 409 U.S. at 198.

> Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

Id. (citing Biggers, 409 U.S. at 199-200).

Initially, Biggers concerns the *admissibility* of an identification—which is part of the court's gatekeeping role. Applicant has not pointed to any case that requires a judge to charge these factors to a jury, and this Court is not aware of any. Thus, counsel's failure to request the court charge the Biggers factors does not fall below prevailing professional norms, and Applicant

did not prove deficiency.

Likewise, this Court finds that here, where the eyewitnesses all testified they knew Applicant prior to the shooting, it is not reasonably likely the outcome would have been different had the court charged the Biggers factors. Notably, this Court finds that applying the Biggers factors to these identifications would not make it more likely the identifications would have been excluded. For that same reason, it is not reasonably likely the jury would have reached a different conclusion had the court charged the Biggers factors here when all the victims knew Applicant. Cf. Liverman, 398 S.C. at 142, 727 S.E.2d at 428 (finding the court's failure to conduct a Biggers hearing was harmless when the witness "knew Petitioner before the shooting and [his] identification was sufficiently reliable because he identified Petitioner by his nickname to Investigator Gray prior to the suggestive police orchestrated show-up," and "a review of [the witness's] trial testimony indicates that his in-court identification of Petitioner as the shooter originated not from any taint associated with the suggestive show-up but from [his] prior association with Petitioner and his observation of Petitioner at the time of the shooting"). Thus, Applicant did not prove prejudice, and this claim is denied.

Jury Charge – Malice Inference

Applicant asserts counsel was ineffective for failing to object to the charge that malice can be inferred from the use of a deadly weapon, which he contends improperly shifted the burden of proof because the court stated the inference could be rebutted. Applicant contends the trial judge and parties agreed "the inference of malice is a wrongful presumption," but rather than deleting the inference instruction, the trial court instructed the jury it is not a conclusive presumption. This Court finds Applicant has not shown counsel was ineffective in this regard.

Prior to charging the jury, the court stated, "I have been over the addition to the charge,

which involves the fact that the inference of malice is a wrongful presumption. They both agree that should be added. I met with them this morning concerning that addition in chambers." (Tr. 546). Later, the court stated,

> I have been over with counsel the addition to the charge that I told you about this morning, and the reason for it being that the burden shifting presumption argument, or conclusive presumption argument, allegedly depriving the Defendant of his due process of law. And, therefore, I intend to explain to the jury that it is not a conclusive presumption in part of my charge on murder, when I get to the point that malice can be inferred from the use of a deadly weapon. Both lawyers have indicated to me that they agree with that addition to the charge in our conference this morning.

(Tr. 588-89). As part of the murder charge, the court charged the jury:

> Malice may be inferred from conduct showing the total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon.
>
> A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used in the death depends on the facts and circumstances of each case based on evidence introduced during the trial of the case.
>
> The law says that if one intentionally kills another with a deadly weapon, the implication of malice may arise . If facts are proven beyond a reasonable doubt by the State sufficient to raise an inference for malice to your satisfaction this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in this case.
>
> And you may give it such weight as you determine it should receive, and it can be rebutted, now the evidence in this case based on your view of the evidence.

(Tr. 606-07).

Under the law that existed at the time of Applicant's trial, the trial court's charge was proper. Although an instruction that malice can be inferred from the use of a deadly weapon is no longer good law in South Carolina, the case prohibiting this charge came out *after* Applicant's

trial. See State v. Burdette, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019) ("A jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence—that the deed was done with a deadly weapon—and it should no longer be permitted.").[8] At the time of Applicant's trial, this charge was permissible when no evidence was presented that would reduce, mitigate, excuse, or justify the homicide. See State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) ("[W]here evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon.", overruled by Burdette, 427 S.C. at 490, 832 S.E.2d at 575). Here, no evidence was presented that would reduce, mitigate, excuse, or justify this homicide, making this charge proper at the time of Applicant's trial. Because this charge was proper at the time of trial, counsel was not deficient for failing to object. See Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) ("[T]he PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se. This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law.").

Further, at the time of Applicant's trial, courts charging that malice may be inferred from the use of a deadly weapon were also required to charge the "permissive inference" charge from State v. Elmore,[9] which provided:

> We suggest the following charge:
>
> The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts are proved beyond a

[8] The Burdette court acknowledged it was overruling precedent and found its ruling "will not apply to convictions challenged on post-conviction relief." 427 S.C. at 505, 832 S.E.2d at 583.
[9] 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), and overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019).

> reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.
>
> We caution the bench, that hereafter only slight deviations from this charge will be tolerated.

The Court here charged the permissive inference charge using substantially the same language as Elmore. (Tr. 606-07). This was a proper charge under the law that existed at the time of trial, and counsel was not deficient for not objecting.[10] Thus, Applicant has not shown counsel was ineffective in this regard, and this claim is denied.

Failed to introduce recorded interviews

Applicant contends counsel was ineffective for not introducing into evidence recordings of interviews of the complaining witnesses. This Court finds Applicant has not shown counsel was ineffective in this regard.

Counsel testified extensively about his cross-examination of the witnesses and his attempt to impeach them. He further testified that had he introduced the videos, he would have lost the last-closing argument—which he discussed with Applicant. This Court finds the transcript itself shows counsel effectively cross-examined Carleton and Murray, and his performance in this regard was reasonable within prevailing professional norms.[11] (Tr. 266-73, 276, 291-97). This Court

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[10] Applicant's argument that the parties recognized this as a wrongful presumption is misplaced. Although the Court initially referenced a "wrongful presumption," it later referred to the presumption as "not a *conclusive* presumption." This is consistent with the Court's Elmore charge, and in context, this may have been what the parties were referencing. Alternately, this Court notes State v. King had recently been decided, wherein the Court found attempted murder is a specific intent crime and questioned whether malice could be inferred in attempted murder. State v. King, 422 S.C. 47, 64 n.5, 810 S.E.2d 18, 27 n.5 (2017). Applicant faced three charges for attempted murder, so the court may have been referencing this when it stated "wrongful presumption." Notably, in charging attempted murder, the trial court charged it was a specific intent crime that required "expressed malice." The Court did not charge malice could be inferred for attempted murder. (Tr. 607-08). Ultimately, the charge was proper under the law that existed at the time of trial, and counsel thus was not deficient for not objecting.

[11] Lewis never identified Applicant as the shooter at trial. (Tr. 298-308).

further finds credible trial counsel's testimony at the PCR hearing that he decided not to attempt to enter the recordings because he had effectively impeached the witnesses through cross-examination, he wanted to preserve his right to close last, and he discussed this strategy with Applicant. This Court finds counsel's decision to impeach the witnesses through cross-examination rather than attempting to enter the recordings was reasonable within prevailing professional norms. Thus, Applicant did not prove deficiency.

Likewise, Applicant did not prove prejudice. Specifically, Applicant did not point to what portion of the recordings could have been used to further impeach the witnesses and thus did not show a reasonable likelihood that they would have been admitted had counsel sought to admit them. See Rule 613(b), SCRE ("Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2)."). Finally, based upon counsel's effective cross-examination of the witnesses, this Court finds it is not reasonably likely the recording itself would have changed the outcome. Thus, Applicant did not prove prejudice, and this claim is denied.

Failed to object to improper comments

Applicant argues counsel was ineffective for not objecting to the solicitor's improper comments during closing argument. Specifically, Applicant avers counsel should have objected when the solicitor argued, "It is not my intent to prosecute an innocent man. Not so. We do not

prosecute the innocent, only the guilty." (Tr. 550). Likewise, Applicant contends counsel was ineffective for not objecting when the solicitor improperly vouched for Lewis, an inmate in federal custody, including but not limited to argument about the snitching code. (Tr. 555-57). This Court finds Applicant has not shown counsel was ineffective in this regard.

"A solicitor's closing argument must not appeal to the personal biases of the jurors. In addition, the argument may not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010). "On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Id. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Id. "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.

Initially, the solicitor's comment about the snitching code did not constitute improper vouching and thus was not objectionable. See State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) ("Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony."); State v. Busse, 439 S.C. 104, 111, 886 S.E.2d 208, 212 (2023) ("[A]

prosecutor is expected to comment on the credibility of the witnesses when making a closing argument. Far from improper, . . . doing so is one of the fundamental responsibilities of a lawyer."). Thus, this Court finds counsel was not deficient for not objecting, and Applicant likewise cannot show any resulting prejudice.

Further, although the solicitor's statement "We do not prosecute the innocent, only the guilty" may have been improper, this Court finds it did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. This statement was a passing statement at the beginning of a closing argument that spanned twenty-three pages. On balance, this statement did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. See Darden v. Wainwright, 477 U.S. 168 (1986) (finding solicitor's references to capital defendant as "an animal" whose head he wished had been blown off with a rifle were improper but did not so infect the trial with unfairness as to violate due process). Thus, Applicant did not prove prejudice, and this claim is denied.

Failed to object to truth-seeking language

Applicant contends counsel was ineffective for failing to object to improper truth-seeking language during the court's opening comments, the State's opening statement, and the State's closing argument. Applicant further contends counsel was ineffective for making improper comments during his opening statement and closing argument. This Court finds Applicant has not shown counsel was ineffective in this regard.

Prior to trial, the Court made the following comment to the jury:

> An actual trial is a fundamental part of our democracy. It is a search for the truth in an effort to make sure that justice is done between parties before the court.
>
> Searching for the truth and trying to make sure that justice is done is often slow. It is often very deliberate. It is often repetitive. It is

> the exact opposite of what you may have seen on television or seen in a movie or read a book.

(Tr. 141). During opening, the solicitor argued:

> Our job is to find the truth in this case. That's what we are going to give you. We are not hiding anything. We are going to tell you what happened, and you are going to know what happened. At the end of this case, the truth is going to come out.
>
> The truth is that on the morning of December 6th, Laparis Flowers killed Russell Smart. He shot Tyquan Charlton, he shot Brandon Lewis, and he almost shot Jarell Murray.

(Tr. 169). In response, trial counsel argued,

> As stated from the bench, and from the Solicitor's office, this is a search for the truth. And the search for the truth starts right here. And it starts in this chair right here. In this witness chair right here.
>
> I often call it the great equalizer, because in this chair everyone is the same. Presidents are the same. Senators are the same. And hard working laborers are the same. When they sit in this chair, they are all the same, because it is a search for the truth in this particular chair right here.
>
> And it doesn't' matter how many witnesses one side have over the other. . . . That does not matter, because in this courtroom, as in any other courtroom in this state and in this country, it is the search for the truth.

(Tr. 171). Trial counsel concluded, "And when you find those not guiltys on those charge, you would have rendered a true and just verdict." (Tr. 173).

In closing, the solicitor argued:

> So what have we proven? Let's talk about the case we put before you. I want you to remember the number 13. Thirteen, some say 13 is an unlucky number. I don't believe 13 is an unlucky number. Thirteen is the beginning of something else.
>
> You get to 12 and you finish, 13 is the beginning of something else. The beginning of a new day. A day when you get the truth.
>
> So what 13 things do I want to discuss today? Let's look at 13 things.

(Tr. 551). The solicitor concluded:

> Laparis Flowers, ladies and gentlemen, is a wicked and evil man. He is a killer. It's time to speak the truth.
>
> December 6th, 2014 was a time to kill for Laparis Flowers. He went to Pinewood Apartments to kill, murder, and destroy. He did that. And now it's time to speak the truth. A verdict of guilty will speak the truth. I have insulted you today, and for that I do apologize. But I want you to leave out of this courtroom without any doubt, beyond any reasonable doubt.
>
> Laparis Flowers, the robe of righteousness is in the garbage. Incinerated. On fire. It is over.
>
> Speak the truth this day. Find Laparis Flowers guilty of murder, of attempted murder of Tyquan Charlton, of attempted murder of Brandon Lewis, of attempted murder of Jarrell Murray, and the weapon, because he had to use a firearm to kill. He is a killer.

(Tr. 571). In response, trial counsel argued:

> This is the search for the truth, and that was what the Honorable Judge Buckner indicated to you at the beginning. This is a search for the truth, and this journey has taken several days this week.
>
> I need for you to go back in that jury room, as I know you will, and look at everything. Recall every piece of testimony. Not just portions of it, not just portions that are advantageous to the State, and not just portions that are advantageous to the Defendant, but everything. And I'm confident at the end of this journey, that you will find that Laparis Flowers is not a killer, Laparis Flowers is not the shooter, Laparis Flowers is not guilty of the murder of Russell Smart. Laparis Flowers is not guilty of the attempted murder on Tyquan Charlton. Laparis Flowers is not guilty of the attempted murder of Brandon Lewis. Laparis Flowers is not guilty of the attempted murder of Jarrell Murray. And Laparis Flowers is not guilty of possession of a firearm on that particular night during the commission of a violent crime. And I am confident you will come back and you will end this search for justice, and your verdict will be fair, it will be true. And it will be just, and it'll be not guilty on all counts for Laparis Flowers.

(Tr. 585-86). At the PCR hearing, trial counsel testified solicitors often used that language at trial.

Initially, Applicant has not provided any law at the time of Applicant's trial that prohibited

attorneys from arguing truth-seeking language. Although Beaty,[12] Aleksey, and Daniel found such language improper by courts, they did not prohibit attorneys from making such arguments. See State v. Beaty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018) ("[A] trial judge should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes best serves its perception of justice. We instruct trial judges to avoid these terms and any others that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant's guilt beyond a reasonable doubt."); State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) ("[W]e have urged trial courts to avoid using any 'seek language when charging jurors on either reasonable doubt or circumstantial evidence . . . . (emphasis added)); State v. Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) ("[W]e instruct the trial judge to remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is "just" or "fair" to all parties." (emphasis added)); cf. Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) ("[T]he PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se. This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law.").

Ultimately, Applicant bears the burden of proving his allegations. Here, he has not proven deficiency from counsel's failure to object to the solicitor's use of this language. Likewise, because counsel's statements were responsive to the solicitor's statements, this Court finds

[12] Although Beaty was published after Applicant's trial, the Supreme Court had issued a similar opinion in Beaty prior to Applicant's trial. See State v. Beaty, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016).

Applicant did not show counsel's use of truth-seeking language fell below prevailing professional norms here. Thus, Applicant did not prove deficiency.

Further, to the extent counsel was deficient for not objecting to the court's preliminary remarks, this Court finds it is not reasonably likely an objection would have changed the outcome. Importantly, although the court made truth-seeking statements in its opening comments, Applicant has not shown that the court used similar language during its charge. Thus, it is not reasonably likely these comments shifted the burden of proof and made the jury believe Applicant had to disprove the State's case. See Aleksey, 343 S.C. at 20, 538 S.E.2d at 248 (finding that although truth-seek language by the court was not appropriate, it did not shift the burden of proof when it was not given in conjunction with the charge on the State's burden of proof); id. at 28-29, 538 S.E.2d at 252-53 ("There is not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt. The trial court's instructions concerning seeking the truth were given in the context of the jury's role in determining the credibility of witnesses. The remarks were prefaced by a full instruction on reasonable doubt and followed by an additional exhortation to bear in mind the State's heavy burden of proof." (footnote omitted)).

To prevail on an ineffective assistance of counsel claim, Applicant must show *both* deficiency and prejudice. Under Aleksey, it is not reasonably likely the outcome of this trial would have been different had counsel objected to this language. Cf. Beatty, 423 S.C. 26, 32-34, 813 S.E.2d 502, 505-06 (2018) (finding defendant not prejudiced by court's pretrial comments that a trial is a search for the truth and the jury's role is to render true and just verdict and determine true facts when these comments "were a mere statement to the jury and not a charge on the law" and "the remarks were not linked to either the reasonable doubt or the circumstantial evidence

charges"). Likewise, for the same reason, this Court finds it is not reasonably likely the solicitor's comment or counsel's comments shifted the burden of proof and affected the outcome. Thus, Applicant did not prove prejudice.

Ineffective Assistance of Appellate Counsel

A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy. . ." Jones v. Barnes, 463 U.S. 745, 754 (1983).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. Courts thus must consider (1) whether appellate counsel's performance was deficient, and (2) whether the applicate was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Applicant asserts appellate counsel was ineffective for not raising the issue of whether the new Supreme Court rule prohibiting the use of the malice charge applied to his case, which was on appeal at the time. Specifically, Applicant contends the trial court instructed the jurors that an inference of malice may arise from the use of a deadly weapon. (Tr. 606-07). He contends the

Supreme Court decided State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019) while his appeal was pending. Applicant contends the charge was improper and shifted the burden of proof. He further contends the trial court and counsel agreed "the inference of malice is a wrongful instruction," but rather than deleting the inference instruction, the court "decided to explain to the jury that it is not a conclusive presumption." This Court finds Applicant did not prove appellate counsel was ineffective in this regard.

This argument was not preserved; thus, appellate counsel was not deficient for not raising it.[13] Because this argument was not preserved, appellate counsel was not deficient for not raising it, and it is likewise not reasonably likely the outcome would have been different had appellate counsel raised this issue. See Burdette, 427 S.C. at 505, 832 S.E.2d at 583 ("Our ruling today is effective in this case and in those cases which are pending on direct review or are not yet final, *so long as the issue is preserved.*" (emphasis added)). Thus, Applicant did not prove appellate counsel was ineffective, and this claim is denied.

CONCLUSION

Based on the foregoing, this Court concludes Applicant has not established any constitutional violations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. See Rule 203, SCACR. Applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). If Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule

[13] Further, as set forth above, this charge was proper under the law that existed at the time of Applicant's trial—making trial counsel's failure to object not deficient.

71.1(g), SCRCP. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and

2. Applicant shall be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 21 day of Sept, 2023.

ROBERT L. BONDS
Presiding Judge
Fourteenth Judicial Circuit

Walterboro, South Carolina

The Grose Law Firm, LLC

305 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.
Phone: 864-538-4466 Fax: 864-538-4405
E-mail: charles@groselawfirm.com
Web: GroseLawFirm.com

December 4, 2023

The Honorable Elaine Sabb
Clerk of Court, Allendale County
PO Box 126
Allendale, SC 29810-0126

Re: *LaParis Flowers v. State of South Carolina*
Case Number 2020-CP-03-00257

Dear Ms. Sabb:

Enclosed for filing please find Mr. Flower's Rule 59(e), SCRCP Motion, along with a certificate of service.

Because this is a post-conviction relief case, I understand there is not a filing fee and electronic filing is not applicable.

Thank you for your attention to this matter. Please let me know if I can answer any questions or provide additional information.

With kindest regards, I am

Yours very truly,

s/*E. Charles Grose, Jr.*
E. Charles Grose, Jr.

cc: The Honorable Robert J. Bonds (via email and US Mail)
Danielle Dixon, Esquire (via email only)
Mr. LaParis Flowers (via US Mail Only)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	14th JUDICIAL CIRCUIT
COUNTY OF Allendale	)	
	)	CASE NO.: 2022_-CP-03_00257
	)	
LaParis Flowers, SCDC# 375098	)	**MOTION AND ORDER INFORMATION**
Plaintiff,	)	**FORM AND COVERSHEET**
vs.	)	
	)	
State of South Carolina	)	
Defendant.	)	

Plaintiff's Attorney:	Defendant's Attorney:
Charles Grose, Bar No. 66063	Danielle Dixon, Bar No. _____
Address:	Address:
305 Main Street, Greenwood, SC 29646	SC Attoreny General's Office
Phone: 864-538-4466Fax _____	Phone: _____ Fax_____
E-mail: charles@grsoelawfirm.com Other: _____	E-mail: DanielleDixon@scag.govOther: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☒ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Rule 59e, SCRCP Motion
Estimated Time Needed: 30 Minutes Court Reporter Needed: ☒ **YES**/☐ **NO**

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

s/E. Charles Grose, Jr. December 4, 2023
Signature of Attorney for ☒ Plaintiff /☐ Defendant Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT: $_____
☒ EXEMPT:
(check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE CODE _____
☐ Other:	Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF ALLENDALE	)	
	)	Case No. 2022-CP-03-00257
LaParis Flowers, SCDC# 375098, Applicant,	)	
	)	**Rule 59(e), SCRCP Motion**
vs.	)	
	)	
State of South Carolina, Respondent.	)	
	)	
_____	)	

Pursuant to Rule 59(e), SCRCP, LaParis Flowers moves this Court for an order reconsider the written order dated September 29, 2023, withdraw that order, and issue an order granting him post-conviction relief ("PCR").[1]

I. STANDARD OF REVIEW.

Under the first prong of *Strickland v. Washington*, a defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." 466 U.S. 668, 688 (1984). "The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal quotations omitted). "If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy." *Freiburger v. State*, 413

[1] According to the Public Index, the order was filed on October 11, 2023; however, the stamp on the order is not legible. The Clerk of Court did not serve this order on counsel. Undersigned counsel written notice of entry of this order on Wednesday, November 22, 2023, by obtaining a copy from the Clerk of Court for Allendale Clerk of Court. This motion is timely, pursuant to Rule 5, SCRCP.

S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015); *cf*. *Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002).

The second prong of *Strickland* requires a defendant establish this deficiency prejudiced him. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id. "*In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018)[2] (citing *Strickland*, 466 U.S. at 695-96 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case)).

The appellate court's "standard of review in PCR cases depends on the specific issue before" it. *Mangal v. State*, 421 S.C. 85, 91-92, 805 S.E.2d 568, 571 (2017) ("*Mangal I*"). The appellate court will "defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them." *Id*. This Court will "not defer to a PCR court's rulings on questions of law." *Id*. "Questions of law are reviewed de novo, and [the appellate court] will reverse the PCR court's decision when it is controlled by an error of law." *Id.*

II. LEGAL AUTHORITY.

A. Threshold Matter: Violation of Section 17-27-80 and Separation of Powers.

The procedure followed by the PCR court denied Mr. Flowers his right to have his PCR claims adjudicated by a judicial officer. "S.C. Code Ann. § 17-27-80 (1976), requires the PCR court to 'make specific findings of fact, and state expressly its conclusions of law, relating to each

[2] *See also Thompson v. State*, 423 S.C. 235, 245, 814 S.E.2d 487, 492 (2018) (adhering to *Smalls*).

issue presented.'" *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991). *See also Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). This Court did not do that, but rather delegated that responsibility to the Attorney General's Office. Such delegation of a judicial branch function to the executive branch violates the separation of powers required by S.C. Const. Art. I, § 8. *See, e.g., State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012).

This Court singed the proposed order of dismissal, drafted by the Attorney General's Office, without making a single change other than the formatting.[3] Addressing section 17-27-80 in the context of a capital post-conviction relief case, the Supreme Court "strongly encourage[d] PCR judges to draft their own findings of fact and conclusions of law." *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). Section 17-27-80, however, makes no distinction between capital and non-capital cases.

The Supreme Court continuously expresses frustration with the validity of final orders in PCR cases. In *Kevin S. Epting v. State*, Appellate Case No. 2017-000696, on November 21, 2019, at 11:17 – 13:05,[4] one Justice referred to the Attorney General's Office drafting the final PCR order as "the classic case of the fox guarding the henhouse," observed PCR applicants have the right to have their issues litigated and called on the criminal defense bar "to fix this problem." Another Justice stated the entire Court shares these concerns.

In *Fishburne v. State*, the Supreme Court recognized the significant issues involved in drafting PCR orders:

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[3] The State's proposed order is attached as Exhibit A.

[4] http://media.sccourts.org/videos/2017-000696.mp4 (last viewed June 22, 2020). *Epting* involved the Attorney General's Office drafting the final order, the PCR judge signing the order that failed to address all the issues, and the applicant's attorney not filing a Rule 59(e), SCRCP motion. On December 4, 2019, this Court dismissed *certiorari* as improvidently granted.

> [B]ecause the United States Constitution's Sixth Amendment guarantee to a defendant's right to effective assistance of counsel is engrained in PCR cases, we cannot continue to permit a party's procedural shortcoming—such as the failure to file a Rule 59(e) motion—to prevent this Court from remanding claims of ineffective assistance of counsel when the PCR court's order does not comply with section 17-27-80.

427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019). *Fishburne* set a lofty goal for "[t]he preparation and finalization of a PCR order [to be] a collaborative effort." 427 S.C. at 516, 832 S.E.2d at 589 (2019). The final order in this case was not a "collaborative effort," but rather the final order is an advocacy position drafted by "the fox guarding the henhouse," rather than true judicial findings of fact and conclusions of law.

B. Failure to Investigate – Alibi.

Mr. Flowers alleges his trial counsel was ineffective for failing to investigate by failing to interview and present testimony of known alibi witnesses in light of Mr. Flowers claim of being elsewhere during the confrontation. This Court resolves this claim by comparing the credibility of trial counsel's testimony verses Mr. Flowers's testimony regarding whether Mr. Flowers ever told trial counsel about the alibi defense. Order, p. 11. The order of dismissal, however, never addressed trial counsel's duty to conduct an independent investigation of available defenses. "[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case." *Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (internal quotations and citations omitted) (emphasis original). Once this Court considers trial counsel's independent duty to investigate, the need to find deficient performance under the first prong of *Strickland* becomes apparent. Here, trial counsel admitted he did not interview the witnesses and failed to offer any strategic reason for not conducting an independent investigation.

In order to determine the prevailing professional standards, court look to publication such as the National Legal Aid and Defender Association Performance Guidelines for Criminal Defense Representation, the American Bar Association Standards for Criminal Justice, Defense Function, and state and local bar association publications. *Padilla,* 559 U.S. at 367–68. In July 2013, the South Carolina Commission on Indigent Defense adopted performance standards for Public Defenders and Assigned Counsel in non-capital cases.[5] Guideline 4.1, regarding the duty to investigate, requires trial counsel to interview the accused, interview potential witnesses, and "obtain and secure all evidence favorable to the client."

Additionally, the order of dismissal states, "[T]he testimony of Kimberly and Jaquavian did not create an alibi defense" and, therefore, Mr. Flowers did not prove prejudice from counsel's failure to call them as witnesses at trial." Order, p. 12. In doing so, this Court overlooks the fact that these witnesses, combined with the testimony of Ms. Nix, established an alibi defense.

Weldon v. State, 436 S.C. 69, 870 S.E.2d 183 (Ct. App. 2021) is instructive. The Court of Appeals found prejudicial, deficient performance in trial counsel's failure to call alibi witnesses despite "minor discrepancies" in the witnesses' testimony. *Id*. 436 S.C. at 83, 870 S.E.2d at 190. Thus, the order of dismissal's comparison of Ms. Nix's PCR testimony and her written police statement is misplaced. *Weldon* also rejected the notion that reserving final argument is a valid trial strategy. *Id*. Here, PCR counsel asked trial counsel to point to something in his closing argument that justified not calling witnesses or presenting evidence, and trial counsel could not do so.

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[5] https://sccid.sc.gov/docs/SCCID%20%20Performance%20Standards%20(Non-Capital)%20for%20Public%20Defenders%20and%20Assigned%20Counsel%20as%20adopted%20by%20SCCID%206-7-2013%20with%20revised%20Preamble%208-22-2013.pdf (last viewed Dec. 4, 2023).

By acknowledging the vulnerability of the prosecution's witnesses to cross-examination, the order of dismissal implicitly acknowledges that the State did not present an overwhelming case of guilt against Mr. Flowers. *Smalls*, *supra*. *Welden* is also instructive on this Court's reliance on gunshot residue evidence found in the car. *Weldon* examined the prosecution's evidence—including DNA evidence—and concluded the State's did not present "'overwhelming evidence' such that it precludes a finding of prejudice." 436 S.C. at 84, 870 S.E.2d at 191 (citing *Smalls*). Just as in Welden, "[h]ad even one of [Mr. Flowers'] alibi witnesses testified, there is a reasonable probability the result at trial would have been different." Id. 436 S.C. at 85, 870 S.E.2d at 191.

C. Jury Instruction – Identification.

Mr. Flowers alleged his trial counsel was ineffective for "failing to request additional jury instructions concerning the trial court's limited and inadequate identification testimony charge to the jury that, when taken as a whole, represented the prosecution case in chief." The order of dismissal states Mr. Flowers "has not pointed to any authority that requires a judge to charge [the *Neil v. Biggers*, 409 U.S.] factors to a jury. Order, p. 13. Although *Neil* concerned admissibility of an identification, that case also placed counsel on notice of the factors jurors could consider when deciding the reliability of an identification. Additionally, the General Sessions Charge Book published by Court Administration at the time of Mr. Flower's jury trial contained the following pattern instruction:

Identification

> An issue in this case is the identification of the defendant as the person who committed the crime charged. The state has the burden of proving identity beyond a reasonable doubt.9 you must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict the defendant.
>
> Identification testimony is an expression of belief or impression by a witness. You must determine the ccuracy of the identification of the defendant. You must

> consider the believability of each identification witness in the same way as any other witness. You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense. This will be affected by things like how long or short a time was available, how far or close the witness was, the lighting conditions, and whether the witness had the chance to see or know the person in the past. Once again, i instruct you the burden of proof on the state extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the crime. If, after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

General Sessions Instructions, 2015, pp. 45-46.

D. Jury Instruction – Inference of Malice.

Mr. Flowers alleges his trial counsel was ineffective for

> [f]ailing to object to the trial judge instructing the jurors an inference of malice may arise from the use of a deadly weapon. Tr. 606-07. In addition to this charge being an improper instruction by the trial judge, the charge given in this case shifted the burden of proof to the Mr. Flowers by stating the inference "can be rebutted." The trial judge and counsel for the parties agreed "the inference of malice is a wrongful presumption" (Tr. 546), but rather than deleting the inference instruction, the trial judge decided "to explain to the jury that it is not a conclusive presumption in the part of [the trial court's charge on murder" when instructing "that malice can be inferred from the use of a deadly weapon." 588-89.

The order of dismissal states Mr. Flowers "argument that the parties recognized [the instruction given] as a wrongful presumption is misplaced." Order, p. 17, n. 10. This finding of fact is not supported by the plain reading of the trial record.

The order of dismissal relied on *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), not being decided until after Mr. Flowers' jury trial, but it well established law concerning the improper inference charges and comments on the facts. This instruction constitutes an error of law because it "is an improper court-sponsored emphasis of a fact in evidence," *State v. Burdette*, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019). "The law to be charged to the jury is determined by the evidence presented at trial. *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "The

purpose of a jury instruction is to enlighten the jury and to aid it in arriving at a correct verdict." *State v. Blurton*, 352 S.C. 203, 207-08, 573 S.E.2d 802, 804 (2002). "A jury charge is no place for purposeful ambiguity." *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009), *holding modified and extended by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). Our Supreme Court consistently rejects jury instructions that constitute "an improper court-sponsored emphasis of a fact in evidence." *Burdette*, 427 S.C. at 503, 832 S.E.2d at 582 (abolishing "jury instruction that malice may be inferred from the use of a deadly weapon"). *And see, e.g., State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016) (instructing the jury on statute, providing that testimony of the victim need not be corroborated in prosecutions for criminal sexual conduct, was an impermissible charge on the facts); *State v. Cheeks*, 401 S.C. 322, 737 S.E.2d 480 (2013) (a jury instruction that "actual knowledge of the presence of a drug is strong evidence of intent to control its disposition or use" is improper as an expression of the judge's view of the weight of certain evidence); *State v. Hughey*, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) (charging specific examples of voluntary manslaughter is "a direct charge on the facts" because it "elevates the specific facts of the case") *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009); *State v. Grant*, 275 S.C. 404, 272 S.E.2d 169 (1980) (improper to instruct jurors that flight raises an inference of guilt).[6]

[6] S.C. Const. Art. V, § 21 provides, "Judges shall not charge juries in respect to matters of fact, but shall declare the law." Our Supreme Court sometimes resolves these cases under our state's constitution. *See*, e.*g., Stukes, Hughey, State v. Bagwell*, 201 S.C. 387, 23 S.E.2d 244, 249 (1942) ("A Judge cannot express in his charge, or intimate any opinion as to the weight or the sufficiency of testimony of an accomplice without violating the prohibition of the Constitution as to charging upon the facts."). On other occasions, our Supreme Court resolves these cases under its "policy-making role under the common law." *Burdette*, 427 S.C. at 503, 832 S.E.2d at 582.

This paragraph cites criminal cases; however, our Supreme Court also rejects inference instructions in civil cases. *See, e.g.*, *Finch v. Atlanta & C. Air Line Ry.*, 87 S.C. 190, ___, 69 S.E. 208, 209 (1910) ("What inferences may be drawn from the circumstances appearing on the trial,

E. Failure to Introduce Recorded Interviews.

Mr. Flowers alleged his trial counsel was ineffective for failing to introduce into evidence audio recordings of the interviews of the complaining witnesses so the jurors. The order of dismissal contains three fatal flaws.

First, the record does not support the finding that the trial "transcript itself shows counsel effectively cross-examined Carleton and Murray." Order, p. 17. The prior inconsistent statements prove otherwise. These recorded statements also demonstrate how law enforcement was trying to get these witnesses to make statements implicating Mr. Flowers.[7]

Second, the PCR record does not support the order of dismissal finding that trial "counsel's decision to impeach the witnesses through cross-examination rather than attempting to enter the recordings was reasonable" and counsel "wanted to preserve his right to close last." As seen above, PCR counsel asked trial counsel to point to something in his closing argument that justified not calling witnesses or presenting evidence, and trial counsel could not do so. *See Weldon, supra.*

Third, the order of dismissal misplaces reliance on Rule 613(b), SCRE regarding the admissibility of extrinsic evidence to prove prior inconsistent statements. Order, p. 18. Trial counsel did not make an effort to comply with the rule, so this portion of the order is merely

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from the direct evidence, from the manner of the witnesses, the introduction of evidence, or the failure to introduce it-all are for the jury. The Constitution does not allow the presiding judge to state the evidence, much less does it allow him to single out any particular act or omission of the defendant, and instruct the jury that, if that appears, then they may infer that the defendant was negligent."); *Yarborough v. Southern Ry.*, 78 S.C. 103, ___, 58 S.E. 936, 937 (1907) ("The circuit judge laid down in the charge of the proposition that the jury might properly infer the consent of the railroad company to the placing of property on its platform from the fact that an agent has notice of its being placed there and makes no objection. In view of the issues made on the trial, we think this was a charge on the facts.").

[7] The audio recordings were introduced at the PCR hearing. The order of dismissal does not even state whether the PCR judge reviewed the recordings.

speculation. Second, compliance with the rule is low threshold before the prior statement is admissible. *See, e.g., State v. Bixby*, 388 S.C. 528, 698 S.E.2d 572 (2010).

F. Failure to Object to Improper Closing Arguments.

Mr. Flowers alleged his trial counsel was ineffective for failing to object to two improper comments of the Solicitor during closing arguments: (i) "It is not my intent to prosecute an innocent man. Not so. We do not prosecute the innocent, only the guilty," (Tr. 550) and (ii) improper vouching regarding Brandon Lewis, an inmate in federal custody at the time if the Mr. Flower's trial, including the but not limited to the snitching code (Tr. 555-57).

Beginning with the later, the order of dismissal acknowledges "the solicitor's statement 'We do not prosecute the innocent, only the guilty' may have been improper." Order, p. 20. This argument is prosecutorial misconduct is patently improper and extremely prejudicial because it infected Mr. Flowers' trial with unfairness. The order of dismissal ignores *Fortune v. State*, 428 S.C. 545, 837 S.E.2d 37 (2019), which ordered a new trial based on similar misconduct.

Turning to the later, the order of dismissal overlooks the Solicitor's direct comment on the credibility of the witness. "Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony." *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001). That is exactly what happened here. The Solicitor discussed the "snitch code"—what was not before the jurors—to argue why the jurors should discount Lewis's failure to identify Mr. Flowers.

G. Failure to Object to "truth seeking" language.

Mr. Flowers alleges his trial counsel:

> Fail[ed] to object to the trial judge's improper comments regarding the jurors' role in seeking the truth (Tr. 145, 173), failing to the Solicitor's improper opening statement regarding the jurors' role in seeking the truth (Tr. 173), making improper comments to the jurors during the defense's opening statement regarding the jurors' role in seeking the truth (Tr. 175-76), failing to object to the Solicitor's improper closing argument regarding the juror's role in finding the truth (Tr. 551, 571), and making improper comments to the jurors during the defense's closing argument regarding the jurors role in seeking the truth (Tr. 585-86).

The order of dismissal implicitly acknowledges trial counsel's deficient performance under the first prong of *Strickland* by acknowledging *State v. Danmiels*, 401 S.C. 251, 737 S.E.2d 473 (2012), and the first opinion in *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018), which was filed on December 29, 2016, prior to Mr. Flower's jury trial. Order, p. 23. *Daniels* and *Beaty* made it clear that such an instruction by the trial court is burden shifting and, therefore, objectionable. The order, however, states Mr. Flowers "has not provided any law at the time of [his] trial that prohibited attorneys from arguing truth-seeking language." Order, pp. 22-23. It is well settled that trial counsel has an obligation to object to improper closing arguments. *See, e.g., Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010); *State v. Northcutt,* 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007); *State v. Linder,* 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). Nevertheless, the Solicitor's emphasizing the trial judge's erroneous instruction compounded the prejudice to Mr. Flowers.

H. Appellate Counsel.

Mr. Flowers alleges his trial counsel was ineffective for

> Failing to raise the issue of whether the new Supreme Court rule prohibiting the use of the malice charge applied to his case that was on appeal at the time. The trial judge instructed the jurors an inference of malice may arise from the use of a deadly weapon. Tr. 606-07. The Supreme Court decided *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019) on July 31, 2019 while Mr. Flowers' direct appeal was still pending. In addition to this charge being an improper instruction by the trial judge, the charge given in this case shifted the burden of proof to the Mr. Flowers by stating the inference "can be rebutted." The trial judge and counsel for the parties agreed "the inference of malice is a wrongful presumption" (Tr. 546), but rather

> than deleting the inference instruction, the trial judge decided "to explain to the jury that it is not a conclusive presumption in the part of [the trial court's charge on murder" when instructing "that malice can be inferred from the use of a deadly weapon." 588-89.

The order of dismissal rejects this claim because "[t]his argument was not preserved for appeal. This concision ignores the colloquy between the trial court and counsel about this improper inference.

III. CONCLUSION.

For the foregoing reasons, this Court should issue and an order reconsider the written order dated September 29, 2023, withdraw that order, and issue an order granting him post-conviction relief.

IT IS SO MOVED.

Respectfully Submitted,

By s/*E. Charles Grose, Jr.*

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December 4, 2023
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF ALLENDALE	)	
	)	Case No. 2022-CP-03-00257
LaParis Flowers, SCDC# 375098,	)	
Applicant,	)	
	)	**Rule 59(e), SCRCP Motion**
vs.	)	
	)	
State of South Carolina,	)	
Respondent.	)	
	)	
_____	)	

I certify that I have served a copy of this pleading on opposing counsel, by emailing at copy to counsel, at their AIS email address, as reflected below:

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December 4, 2023
Greenwood, South Carolina

Exhibit A

STATE OF SOUTH CAROLINA COUNTY OF ALLENDALE	)	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT
LaParis Flowers, SCDC #375098, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2020-CP-03-00257 **ORDER OF DISMISSAL**

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by LaParis Flowers (Applicant) on October 19, 2020. On March 14, 2023, an evidentiary hearing convened before the Honorable Robert J. Bonds. Applicant was present and represented by E. Charles Grose, Jr., Esquire. Assistant Attorney General Danielle Dixon represented Respondent. Following a thorough review of the records before this Court and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections serving an aggregate fifty-year sentence. In July 2015, the Allendale County Grand Jury indicted Applicant for murder (2014-GS-03-00229); three counts of attempted murder (2014-GS-03-231, -232, -233); and possession of a weapon during the commission of a violent crime (2014-GS-03-234). On January 8, 2018, Applicant proceeded to a jury trial before the Honorable Perry M. Buckner, IV. Joshua Koger, Jr. represented Applicant. Assistant Solicitors Tameaka Legette and Brian Hollen prosecuted the case. The jury convicted Applicant as indicted, and Judge Buckner sentenced Applicant to concurrent terms of forty-five years for murder and thirty years for each

charge of attempted murder, and a consecutive term of five years for the weapons charge.

Applicant filed a timely notice of appeal. Appellate Defender Taylor D. Gilliam perfected Applicant's appeal by filing an Anders[1] brief. The Court of Appeals dismissed the appeal pursuant to Anders. Applicant filed a petition for rehearing *en banc*, which was denied. Thereafter, he filed a petition for writ of certiorari in the South Carolina Supreme Court, which was dismissed pursuant to State v. Lyles.[2] The remittitur was sent September 25, 2020.

SUMMARY OF TRIAL TESTIMONY

At trial, Deputy Jim Evans testified he responded to a shots-fired call at a bar called the Lobster House around 3:00 a.m. on December 6, 2014. He spoke with security, who relayed they had no reports of gunfire. Deputy Evans stated about fifteen or twenty minutes later he responded to another shots-fired call, this time on Barton Road. When he arrived, he noticed a green vehicle against a tree with a crowd of people gathered around. Deputy Evans stated two men were inside the vehicle—the driver and another person in the rear driver's side; both were slumped over and unresponsive. (Tr. 181-83, 189).

According to medical personnel, victim Russell Smart passed away before making it to the hospital. (Tr. 211). Another victim, Tyquin Charton, was shot in the jaw and suffered life-threatening injuries. (Tr. 204-05, 211-12). A third victim, Brandon Lewis, was treated for a gunshot wound to his arm. (Tr. 214).

Tracy Roberts testified she was at the Lobster House that night but did not see Applicant. (Tr. 219). She stated her boyfriend Aldeandre Gray (nickname Dee) got mad at Jaquavian Williams (nickname Toot; hereinafter "Jaquavian") as they were leaving. (Tr. 219-20). Roberts

[1] Anders v. California, 386 U.S. 738 (1967).
[2] 381 S.C. 442, 673 S.E.2d 811 (2009) (holding the Court will not entertain petitions for writs of certiorari where the Court of Appeals has dismissed an appeal after an Anders review).

left the club without Gray. (Tr. 220). She testified Jaquavian later called and asked if she knew where Gray was; she told him he had gone to Pinewood Apartments. (Tr. 221). She stated Jaquavian was still mad at Gray. Roberts testified Jaquavian later texted her and said, "I hope Russell okay." (Tr. 222). Roberts testified Jaquavian and Applicant were cousins. (Tr. 224).

Elizabeth Rollins testified she was working at the door of the Lobster House that evening; she recalled seeing Jaquavian and Smart arguing. (Tr. 237). Rollins stated she asked Jaquavian's mother, Kimberly Flowers,[3] to take him outside. (Tr. 237). She stated the club closed around 2:30 a.m. (Tr. 237). Rollins recalled seeing Applicant that night; she said he became angry and went outside. Rollins stated Smart went outside around the same time. (Tr. 238-41).

Tyquin Charlton testified he was at the Lobster House that evening; he recalled seeing Smart, Gray, Jarrell Murray, Lewis, and Applicant. (Tr. 246-47). Charlton testified he initially left with his brother but later got in Smart's green Crown Victoria. (Tr. 247-48). He testified Smart was driving, Murray was in the front passenger seat, and Lewis was in the back with Charlton. (Tr. 248-49). Charlton stated Gray was initially in Smart's car, but Gray got out as Charlton got in. (Tr. 249). He stated they drove to Pinewood Apartments. (Tr. 250). While they were at Pinewood, Chalton testified Applicant drove up in a white Alero, pulled up "driver's door to driver's door," and said, "Y'all trying to flex on my little cousin." (Tr. 254-55). Charlton testified Applicant pulled out a gun and began shooting. (Tr. 256). He stated he next remembered waking up in the hospital; law enforcement spoke to him but he was medicated at the time. (Tr. 258). Charlton stated he told law enforcement that Applicant shot him. He explained he had known and Applicant for a couple of years and knew him "pretty good." (Tr. 260-61). He recalled picking Applicant from a photo-lineup. (Tr. 264).

[3] At the PCR hearing, Jaquavian's mother stated her name was Kimberly Williams. She will be referred to hereinafter as "Kimberly."

Murray recalled leaving the Lobster House that morning with Smart, Charlton, and Lewis. He testified a white car pulled up while they were at Pinewoods Apartments and the driver began shooting. Murray clarified Applicant—whom he had known "quit a while"—was the shooter. (Tr. 279-86). Murray also identified Applicant from a photo lineup. (Tr. 290).

Lewis likewise recalled leaving the Lobster House that morning with Smart, Charlton, and Murray. He stated Gray was initially in the car with them but got out after he and Smart "had some words." (Tr. 298-302). Lewis stated that while they were at Pinewood, somebody pulled up and began shooting at them. (Tr. 302). He claimed he did not know the shooter. (Tr. 307-08).

Captain Quatique Manor testified he obtained surveillance videos from the Lobster House and identified Applicant entering a white Oldsmobile, "maybe an Alero."[4] (Tr. 308-13). He stated he spoke to Lewis shortly after the shooting, and Lewis identified Applicant as the shooter and selected Applicant from a lineup. (Tr. 314-18). Likewise, Lieutenant Matt Brown stated he spoke to Lewis, and Lewis identified Applicant as the shooter. (Tr. 412-14, 417). Lieutenant Brown stated he also spoke to Murray and Charlton; they both identified Applicant as the shooter and selected him from lineups. (Tr. 420-36).

Agent Haley Nelson testified she processed a white Alero and discovered paperwork with Applicant and his mother's name. (Tr. 371-74). Agent Nelson swabbed the Alero for gunshot residue, and Tyler Sturkie, an expert in trace evidence, determined the Alero contained gunshot residue. (Tr. 375, 477-80).

[4] The video was entered into evidence.

ALLEGATIONS RAISED AND RELIEF SOUGHT

Applicant timely commenced this PCR action on October 19, 2020, alleging he is being held in custody unlawfully for the following reasons:

1) Ineffective Assistance of Trial Counsel
   a. "Trial counsel was ineffective in failing to obtain and introduce at trial recorded evidence that would reveal more clearly the improper manner and highly suggestive identification procedure used to identify the Applicant";
   b. "Trial counsel failed to interview known alibi witness in light Applicant claim of being elsewhere during the initial altercation".
   c. "Trial counsel fail to request for additional jury instruction as it concern the court limited and inadequate identification testimony charge to the jury that, as a whole, represented the prosecution case in chief';
   d. "Trial counsel failed to object and preserve for appellate review the trial court use of the questionable and now prohibited inferred malice charge based on the charge giving as not being sufficient to compensate for its prejudicial effect".
2) Ineffective Assistance of Appellate Counsel
   a. "Appellate counsel was ineffective in failing to raise the issue as to whether the new Supreme Court rule prohibiting the use of the malice charge applied to his case that was on appeal at the time."

Respondent filed a return requesting an evidentiary hearing. On November 10, 2022, Applicant amended his application to allege:

a. Ineffective assistance of trial counsel:

   i. Failed to obtain and introduce at trial evidence that would reveal more clearly the improper and highly suggestive identification procedures used to identify Flowers;

   ii. Failed to interview and present testimony of an alibi;

   iii. Failed to request additional jury instructions concerning the trail court's limited and inadequate identification testimony charge to the jury that, when taken as a whole, represented the prosecution case in chief;

   iv. Failed to object to the charge that malice may arise from the use

of a deadly weapon;

v. Failed to introduce into evidence audio recordings of the interviews of complaining witnesses;

vi. Failed to object to improper comments during closing argument;

vii. Failed to object to the unsealing of Flowers' juvenile records without an order from a Family Court Judge;

viii. Failed to object to improper truth-seeking language;

b. Ineffective assistance of appellate counsel:

i. Failed to raise the issue of whether the new Supreme Court rule prohibiting the use of the malice charge applied to his case that was on appeal at the time.

At the PCR hearing, counsel Applicant indicated he was no longer going forward on allegations related to (1) trial counsel's failure to introduce evidence that would reveal more clearly the highly-suggestive identification procedure and (2) the unsealing of the juvenile record.[5] This Court finds Applicant has waived issues (a)(i) and (a)(vii), as set forth above, and dismisses those claims with prejudice. Applicant proceeded on the remaining claims raised in his amended application.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the plea transcript in its entirety and has heard the testimony at the PCR hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony.[6] After a careful review based on the Strickland standard set forth below, this Court finds Applicant has failed to carry his burden of proof. Below are this Court's findings of facts and conclusions

[5] Counsel for Applicant agreed with Respondent that they had obtained the Family Court order unsealing the juvenile records.

[6] This Court will reference PCR testimony where relevant below.

of law as required by section 17-27-80 of the South Carolina Code (2017).

Ineffective Assistance of Trial Counsel

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). An applicant alleging ineffective assistance of counsel must prove "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 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813. "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." Watson v. State, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Strickland, 466 U.S. at 687–88; Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625. "A PCR applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial." Dalton v. State, 376 S.C. 130, 136, 654 S.E.2d 870, 873 (Ct. App. 2007). To prove prejudice following a guilty plea, the applicant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Alibi

Applicant first contends counsel was ineffective for failing to obtain and introduce evidence of a known alibi. This Court finds Applicant has not shown counsel was ineffective in this regard.

At the PCR hearing, Applicant testified he was not at Pinewood Apartments at the time of the shooting. He acknowledged being at the Lobster House earlier that evening with Jaquavian Williams, Kendall Nix, and Kimberly. Applicant stated Nix was the mother of his child, and while they were at the Lobster House, they received a call indicating their child was cranky. Applicant testified he left the Lobster House with Antron Williams between 2:00 and 2:42 a.m., and there were no altercations or fights while he was at the Lobster House. Applicant stated he left at the same time as Nix and left right behind her, although they were in separate cars. He explained,

> Antron Williams he was undecided at where he wanted to go at the time, so he was dating Kendall Nix cousin at the time, so he decided to go to her house. Like I said I was—I was right behind Kendall Nix, as well as her cousin. We just was in separate cars, I was right behind them, and we ended up at—at Ashley's house. And I ended up giving the keys to my brother, and I got in the car with Kendall Nix.

Applicant stated he had been driving his mother's car—a white Alero. After he gave his brother the car, he rode with Nix to their home in North Augusta.

Applicant testified the following day Nix received phone calls from people "stating that they might have said there was a—a white car involved, and might have said I had something to do with it, due to the fact that Jaquavian Williams got into a dispute, when I later learned—learned that they got into some type—type of dispute, and so I volunteered to go to the Police Department." He testified he spoke with police and provided an alibi, and they did not arrest him at that time. During his testimony, Applicant entered his statement as well as statements from Nix, Kimberly,

and Jaquavian. He stated he did not testify at his trial and none of those witnesses testified. Applicant stated he wanted to present an alibi defense and spoke with his lawyer about it, but his lawyer never contacted the witnesses. According to Applicant, counsel "just constantly stated that . . . the State has to prove beyond a reasonable doubt." Applicant stated Jaquavian, Nix, and Kimberly were at his trial, but counsel never "did his due diligence."

On cross-examination, Applicant acknowledged police found gunshot residue in the car he was driving that night. When asked whether he ever asked anyone to clean the car, he replied, "My brother, he stated that I left a towel for him to clean the car, but I never left a towel for him to clean the car. There was just stuff in the car." Although Applicant initially stated he did not recall discussing with counsel whether his brother could have been the shooter, when asked whether he mentioned anything to counsel about his brother being the shooter, he replied, "[T]hat is one of the things that we talked about." Applicant recalled the State had subpoenaed his brother to his trial. Applicant agreed he knew Charleton, Murray, and Lewis from living in the area. He acknowledged all of them identified him as the shooter, although he claimed it was due to improperly suggestive police procedures.

Nix testified she was at the Lobster House that evening, and she learned her son was acting cranky. She stated she left the Lobster House with "Ashley" and "Neesy" and drove to Ashley's house. Nix testified Applicant left behind her with "Tron." When asked what happened when she arrived at Ashley's house, Nix testified, "Tron went inside, got my phone charger. . . . I left my clothes there, came back to the car, [Applicant's brother] came, asked [Applicant] can he hold the car, can he get some money from her, and that was it." She stated she and Applicant then drove to North Agusta. Nix testified she never went to Pinewood Apartments that evening. Although she initially testified she never spoke with trial counsel or interacted with him, she later

acknowledged meeting him at a fast-food restaurant to provide payment. Nix admitted she did not tell trial counsel she could provide an alibi for Applicant.

Nix initially testified she left the Lobster House around 2:00 a.m. After reviewing her statement to police, she testified she told law enforcement she left round 2:42 a.m. She stated Applicant left the Lobster House at the same time she did, "was right behind [her] at Ashley's house," and they left together to go to North Augusta.[7]

Jaquavian, Applicant's cousin, recalled seeing Applicant and Nix at the Lobster House that night. He stated Applicant and Nix left while Jaquavian was still at the club. Jaquavian recalled Gray getting mad at him, but he stated Applicant had already left at that time. Jaquavian stated he left the Lobster House with his mother, his uncle, and his cousin Ulysses Grant and went to his grandmother's house. He did not see Applicant that night after Applicant left the club.

Kimberly, Jaquavian's mother, stated she was also at the Lobster House that night. She stated she saw Applicant and Nix, but they left after learning their son was acting cranky. Kimberly did not see them once they exited the club and did not know if they left together or separately. Kimberly stated she did not see Applicant again that night after he left the club.

Joshua Koger (trial counsel) testified the State's evidence included three witnesses who were familiar with Applicant that identified him as the shooter, and gunshot residue recovered from Applicant's car. He stated the identifications were his primary concern, and he sought to impeach the identifications through cross-examination. Counsel did not have any concerns about

[7] In her supplemental statement to police, which was signed at 7:12 pm on December 7, 2014, Nix stated,

> After leaving the club around 2:42 am, I went and drop my cousin and her stepsister off. Stayed there and 10 mins later LaParis pull up and drop Tron off, he then gave Chavis the keys and we went back to North Augusta. He then said he tired of everybody lien [sic] and if something happen take care of his child. This is the correction to my first statement.

This was entered into evidence at the PCR hearing as part of Exhibit 2.

the lineup itself being unduly suggestive.

Counsel testified the timeframe for the shooting was somewhat compressed but Allendale is not a big city, "so you could probably get to any point of Allendale within five to ten minutes." He did not recall Applicant mentioning an alibi defense during his representation, and he testified Applicant never indicated that he wanted to testify. Although counsel acknowledged an alibi could be presented without a defendant testifying, he stated it weakened an alibi defense if the defendant did not take the stand.

Trial counsel believed he met Nix on more than one occasion and stated she never mentioned that she was with Applicant that night. He recalled seeing Jaquavian and Kimberly's statements in discovery but stated Applicant never asked him to speak to them. Counsel recalled Applicant's mother being at trial but stated Applicant did not point out any other individuals at trial. He further stated he would not have known Kimberly or Jaquavian if Applicant had not pointed them out. Counsel agreed he did not interview Nix, Kimberly, or Jaquavian. He stated he did not consider Kimberly or Jaquavian to be alibi witnesses.

This Court finds credible counsel's foregoing testimony that Applicant never raised to him a defense of alibi, Applicant never indicated he wanted to testify, Applicant never asked him to speak to witnesses, Nix did not mention being with Applicant that night, and Applicant did not point out anyone at trial to counsel. This Court finds not credible Applicant's testimony that he told counsel he had an alibi. Based on the foregoing, this Court finds counsel's defense strategy was reasonable within prevailing professional norms, and counsel was not deficient for not pursuing an alibi defense. Although counsel had witness statements from Nix, Kimberly, and Jaquavian, those statements in and of themselves were insufficient to put counsel on notice of a potential alibi defense. This Court notes Nix signed a supplemental statement the same night she

signed her original statement clarifying Applicant arrived at Ashley's house ten minutes after she did. Based on counsel's credible testimony that Allendale is not a large city and "you could probably get to any point of Allendale within five to ten minutes," Nix's statement that there was a ten-minute gap before Applicant met her after leaving the club, and the fact Applicant never mentioned an alibi defense to counsel, this Court finds counsel was not deficient for not further pursuing an alibi defense. In other words, had Applicant truly had an alibi defense, this Court finds he would have brought that to counsel's attention. Counsel thus was not deficient for not pursuing an alibi when Applicant never informed him of his alibi.

Likewise, this Court finds the testimony of Kimberly and Jaquavian did not create an alibi defense. Kimberly and Jaquavian both stated they did not see Applicant after he left the Lobster House that morning—making their testimony insufficient to establish an alibi. Thus, Applicant did not prove prejudice from counsel's failure to call them as witnesses at trial

Further, this Court had the opportunity to view Applicant and Nix's testimony at the PCR hearing and finds their testimony concerning an alibi to be self-serving and not credible. Although Nix testified Applicant followed her when she left the club, in a supplemental statement signed the same night as her original statement, she indicated she "drop[ed her] cousin and her stepsister off, stayed there and 10 minutes later [Applicant] pull[ed] up and drop[ped] Tron off." This statement contradicted her PCR testimony that Applicant was "right behind me at Ashley's house," and this Court finds her PCR testimony in this regard not credible. This Court further finds that based on the evidence presented at trial—including three witness identifications and evidence of gunshot residue in the car Applicant admitted he was driving—it is not reasonably likely the outcome would have been different had Applicant presented the alibi defense he presented at the PCR hearing. Thus, Applicant did not prove prejudice, and this claim is denied.

Jury Charge – Biggers factors

Applicant next contends counsel was ineffective for failing to request additional jury instructions concerning the trial court's limited and inadequate identification testimony charge to the jury that, when taken as a whole, represented the prosecution case in chief. Specifically, he contends counsel should have asked for the jury to be instructed on the factors from Neil v. Biggers. This Court finds Applicant has not shown counsel was ineffective in this regard.

"In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification." State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012). "Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." Id. .(citing Neil v. Biggers, 409 U.S. at 198.

> Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

Id. (citing Biggers, 409 U.S. at 199-200).

Initially, Biggers concerns the *admissibility* of an identification—which is part of the court's gatekeeping role. Applicant has not pointed to any case that requires a judge to charge these factors to a jury, and this Court is not aware of any. Thus, counsel's failure to request the court charge the Biggers factors does not fall below prevailing professional norms, and Applicant

did not prove deficiency.

Likewise, this Court finds that here, where the eyewitnesses all testified they knew Applicant prior to the shooting, it is not reasonably likely the outcome would have been different had the court charged the Biggers factors. Notably, this Court finds that applying the Biggers factors to these identifications would not make it more likely the identifications would have been excluded. For that same reason, it is not reasonably likely the jury would have reached a different conclusion had the court charged the Biggers factors here when all the victims knew Applicant. Cf. Liverman, 398 S.C. at 142, 727 S.E.2d at 428 (finding the court's failure to conduct a Biggers hearing was harmless when the witness "knew Petitioner before the shooting and [his] identification was sufficiently reliable because he identified Petitioner by his nickname to Investigator Gray prior to the suggestive police orchestrated show-up," and "a review of [the witness's] trial testimony indicates that his in-court identification of Petitioner as the shooter originated not from any taint associated with the suggestive show-up but from [his] prior association with Petitioner and his observation of Petitioner at the time of the shooting"). Thus, Applicant did not prove prejudice, and this claim is denied.

Jury Charge – Malice Inference

Applicant asserts counsel was ineffective for failing to object to the charge that malice can be inferred from the use of a deadly weapon, which he contends improperly shifted the burden of proof because the court stated the inference could be rebutted. Applicant contends the trial judge and parties agreed "the inference of malice is a wrongful presumption," but rather than deleting the inference instruction, the trial court instructed the jury it is not a conclusive presumption. This Court finds Applicant has not shown counsel was ineffective in this regard.

Prior to charging the jury, the court stated, "I have been over the addition to the charge,

which involves the fact that the inference of malice is a wrongful presumption. They both agree that should be added. I met with them this morning concerning that addition in chambers." (Tr. 546). Later, the court stated,

> I have been over with counsel the addition to the charge that I told you about this morning, and the reason for it being that the burden shifting presumption argument, or conclusive presumption argument, allegedly depriving the Defendant of his due process of law. And, therefore, I intend to explain to the jury that it is not a conclusive presumption in part of my charge on murder, when I get to the point that malice can be inferred from the use of a deadly weapon. Both lawyers have indicated to me that they agree with that addition to the charge in our conference this morning.

(Tr. 588-89). As part of the murder charge, the court charged the jury:

> Malice may be inferred from conduct showing the total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon.
>
> A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used in the death depends on the facts and circumstances of each case based on evidence introduced during the trial of the case.
>
> The law says that if one intentionally kills another with a deadly weapon, the implication of malice may arise . If facts are proven beyond a reasonable doubt by the State sufficient to raise an inference for malice to your satisfaction this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in this case.
>
> And you may give it such weight as you determine it should receive, and it can be rebutted, now the evidence in this case based on your view of the evidence.

(Tr. 606-07).

Under the law that existed at the time of Applicant's trial, the trial court's charge was proper. Although an instruction that malice can be inferred from the use of a deadly weapon is no longer good law in South Carolina, the case prohibiting this charge came out *after* Applicant's

trial. See State v. Burdette, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019) ("A jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence—that the deed was done with a deadly weapon—and it should no longer be permitted.").[8] At the time of Applicant's trial, this charge was permissible when no evidence was presented that would reduce, mitigate, excuse, or justify the homicide. See State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) ("[W]here evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon.", overruled by Burdette, 427 S.C. at 490, 832 S.E.2d at 575). Here, no evidence was presented that would reduce, mitigate, excuse, or justify this homicide, making this charge proper at the time of Applicant's trial. Because this charge was proper at the time of trial, counsel was not deficient for failing to object. See Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) ("[T]he PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se. This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law.").

Further, at the time of Applicant's trial, courts charging that malice may be inferred from the use of a deadly weapon were also required to charge the "permissive inference" charge from State v. Elmore,[9] which provided:

> We suggest the following charge:
>
> The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts are proved beyond a

[8] The Burdette court acknowledged it was overruling precedent and found its ruling "will not apply to convictions challenged on post-conviction relief." 427 S.C. at 505, 832 S.E.2d at 583.

[9] 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), and overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019).

> reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.
>
> We caution the bench, that hereafter only slight deviations from this charge will be tolerated.

The Court here charged the permissive inference charge using substantially the same language as Elmore. (Tr. 606-07). This was a proper charge under the law that existed at the time of trial, and counsel was not deficient for not objecting.[10] Thus, Applicant has not shown counsel was ineffective in this regard, and this claim is denied.

Failed to introduce recorded interviews

Applicant contends counsel was ineffective for not introducing into evidence recordings of interviews of the complaining witnesses. This Court finds Applicant has not shown counsel was ineffective in this regard.

Counsel testified extensively about his cross-examination of the witnesses and his attempt to impeach them. He further testified that had he introduced the videos, he would have lost the last-closing argument—which he discussed with Applicant. This Court finds the transcript itself shows counsel effectively cross-examined Carleton and Murray, and his performance in this regard was reasonable within prevailing professional norms.[11] (Tr. 266-73, 276, 291-97). This Court

[10] Applicant's argument that the parties recognized this as a wrongful presumption is misplaced. Although the Court initially referenced a "wrongful presumption," it later referred to the presumption as "not a *conclusive* presumption." This is consistent with the Court's Elmore charge, and in context, this may have been what the parties were referencing. Alternately, this Court notes State v. King had recently been decided, wherein the Court found attempted murder is a specific intent crime and questioned whether malice could be inferred in attempted murder. State v. King, 422 S.C. 47, 64 n.5, 810 S.E.2d 18, 27 n.5 (2017). Applicant faced three charges for attempted murder, so the court may have been referencing this when it stated "wrongful presumption." Notably, in charging attempted murder, the trial court charged it was a specific intent crime that required "expressed malice." The Court did not charge malice could be inferred for attempted murder. (Tr. 607-08). Ultimately, the charge was proper under the law that existed at the time of trial, and counsel thus was not deficient for not objecting.

[11] Lewis never identified Applicant as the shooter at trial. (Tr. 298-308).

further finds credible trial counsel's testimony at the PCR hearing that he decided not to attempt to enter the recordings because he had effectively impeached the witnesses through cross-examination, he wanted to preserve his right to close last, and he discussed this strategy with Applicant. This Court finds counsel's decision to impeach the witnesses through cross-examination rather than attempting to enter the recordings was reasonable within prevailing professional norms. Thus, Applicant did not prove deficiency.

Likewise, Applicant did not prove prejudice. Specifically, Applicant did not point to what portion of the recordings could have been used to further impeach the witnesses and thus did not show a reasonable likelihood that they would have been admitted had counsel sought to admit them. See Rule 613(b), SCRE ("Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2)."). Finally, based upon counsel's effective cross-examination of the witnesses, this Court finds it is not reasonably likely the recording itself would have changed the outcome. Thus, Applicant did not prove prejudice, and this claim is denied.

Failed to object to improper comments

Applicant argues counsel was ineffective for not objecting to the solicitor's improper comments during closing argument. Specifically, Applicant avers counsel should have objected when the solicitor argued, "It is not my intent to prosecute an innocent man. Not so. We do not

prosecute the innocent, only the guilty." (Tr. 550). Likewise, Applicant contends counsel was ineffective for not objecting when the solicitor improperly vouched for Lewis, an inmate in federal custody, including but not limited to argument about the snitching code. (Tr. 555-57). This Court finds Applicant has not shown counsel was ineffective in this regard.

"A solicitor's closing argument must not appeal to the personal biases of the jurors. In addition, the argument may not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010). "On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Id. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Id. "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.

Initially, the solicitor's comment about the snitching code did not constitute improper vouching and thus was not objectionable. See State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) ("Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony."); State v. Busse, 439 S.C. 104, 111, 886 S.E.2d 208, 212 (2023) ("[A]

prosecutor is expected to comment on the credibility of the witnesses when making a closing argument. Far from improper, . . . doing so is one of the fundamental responsibilities of a lawyer."). Thus, this Court finds counsel was not deficient for not objecting, and Applicant likewise cannot show any resulting prejudice.

Further, although the solicitor's statement "We do not prosecute the innocent, only the guilty" may have been improper, this Court finds it did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. This statement was a passing statement at the beginning of a closing argument that spanned twenty-three pages. On balance, this statement did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. See Darden v. Wainwright, 477 U.S. 168 (1986) (finding solicitor's references to capital defendant as "an animal" whose head he wished had been blown off with a rifle were improper but did not so infect the trial with unfairness as to violate due process). Thus, Applicant did not prove prejudice, and this claim is denied.

Failed to object to truth-seeking language

Applicant contends counsel was ineffective for failing to object to improper truth-seeking language during the court's opening comments, the State's opening statement, and the State's closing argument. Applicant further contends counsel was ineffective for making improper comments during his opening statement and closing argument. This Court finds Applicant has not shown counsel was ineffective in this regard.

Prior to trial, the Court made the following comment to the jury:

> An actual trial is a fundamental part of our democracy. It is a search for the truth in an effort to make sure that justice is done between parties before the court.
>
> Searching for the truth and trying to make sure that justice is done is often slow. It is often very deliberate. It is often repetitive. It is

> the exact opposite of what you may have seen on television or seen in a movie or read a book.

(Tr. 141). During opening, the solicitor argued:

> Our job is to find the truth in this case. That's what we are going to give you. We are not hiding anything. We are going to tell you what happened, and you are going to know what happened. At the end of this case, the truth is going to come out.
>
> The truth is that on the morning of December 6th, Laparis Flowers killed Russell Smart. He shot Tyquan Charlton, he shot Brandon Lewis, and he almost shot Jarell Murray.

(Tr. 169). In response, trial counsel argued,

> As stated from the bench, and from the Solicitor's office, this is a search for the truth. And the search for the truth starts right here. And it starts in this chair right here. In this witness chair right here.
>
> I often call it the great equalizer, because in this chair everyone is the same. Presidents are the same. Senators are the same. And hard working laborers are the same. When they sit in this chair, they are all the same, because it is a search for the truth in this particular chair right here.
>
> And it doesn't' matter how many witnesses one side have over the other. . . . That does not matter, because in this courtroom, as in any other courtroom in this state and in this country, it is the search for the truth.

(Tr. 171). Trial counsel concluded, "And when you find those not guiltys on those charge, you would have rendered a true and just verdict." (Tr. 173).

In closing, the solicitor argued:

> So what have we proven? Let's talk about the case we put before you. I want you to remember the number 13. Thirteen, some say 13 is an unlucky number. I don't believe 13 is an unlucky number. Thirteen is the beginning of something else.
>
> You get to 12 and you finish, 13 is the beginning of something else. The beginning of a new day. A day when you get the truth.
>
> So what 13 things do I want to discuss today? Let's look at 13 things.

(Tr. 551). The solicitor concluded:

> Laparis Flowers, ladies and gentlemen, is a wicked and evil man. He is a killer. It's time to speak the truth.
>
> December 6th, 2014 was a time to kill for Laparis Flowers. He went to Pinewood Apartments to kill, murder, and destroy. He did that. And now it's time to speak the truth. A verdict of guilty will speak the truth. I have insulted you today, and for that I do apologize. But I want you to leave out of this courtroom without any doubt, beyond any reasonable doubt.
>
> Laparis Flowers, the robe of righteousness is in the garbage. Incinerated. On fire. It is over.
>
> Speak the truth this day. Find Laparis Flowers guilty of murder, of attempted murder of Tyquan Charlton, of attempted murder of Brandon Lewis, of attempted murder of Jarrell Murray, and the weapon, because he had to use a firearm to kill. He is a killer.

(Tr. 571). In response, trial counsel argued:

> This is the search for the truth, and that was what the Honorable Judge Buckner indicated to you at the beginning. This is a search for the truth, and this journey has taken several days this week.
>
> I need for you to go back in that jury room, as I know you will, and look at everything. Recall every piece of testimony. Not just portions of it, not just portions that are advantageous to the State, and not just portions that are advantageous to the Defendant, but everything. And I'm confident at the end of this journey, that you will find that Laparis Flowers is not a killer, Laparis Flowers is not the shooter, Laparis Flowers is not guilty of the murder of Russell Smart. Laparis Flowers is not guilty of the attempted murder on Tyquan Charlton. Laparis Flowers is not guilty of the attempted murder of Brandon Lewis. Laparis Flowers is not guilty of the attempted murder of Jarrell Murray. And Laparis Flowers is not guilty of possession of a firearm on that particular night during the commission of a violent crime. And I am confident you will come back and you will end this search for justice, and your verdict will be fair, it will be true. And it will be just, and it'll be not guilty on all counts for Laparis Flowers.

(Tr. 585-86). At the PCR hearing, trial counsel testified solicitors often used that language at trial.

Initially, Applicant has not provided any law at the time of Applicant's trial that prohibited

attorneys from arguing truth-seeking language. Although Beaty,[12] Aleksey, and Daniel found such language improper by courts, they did not prohibit attorneys from making such arguments. See State v. Beaty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018) ("[A] trial judge should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes best serves its perception of justice. We instruct trial judges to avoid these terms and any others that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant's guilt beyond a reasonable doubt."); State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) ("[W]e have urged trial courts to avoid using any 'seek language when charging jurors on either reasonable doubt or circumstantial evidence . . . . (emphasis added)); State v. Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) ("[W]e instruct the trial judge to remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is "just" or "fair" to all parties." (emphasis added)); cf. Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) ("[T]he PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se. This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law.").

Ultimately, Applicant bears the burden of proving his allegations. Here, he has not proven deficiency from counsel's failure to object to the solicitor's use of this language. Likewise, because counsel's statements were responsive to the solicitor's statements, this Court finds

[12] Although Beaty was published after Applicant's trial, the Supreme Court had issued a similar opinion in Beaty prior to Applicant's trial. See State v. Beaty, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016).

Applicant did not show counsel's use of truth-seeking language fell below prevailing professional norms here. Thus, Applicant did not prove deficiency.

Further, to the extent counsel was deficient for not objecting to the court's preliminary remarks, this Court finds it is not reasonably likely an objection would have changed the outcome. Importantly, although the court made truth-seeking statements in its opening comments, Applicant has not shown that the court used similar language during its charge. Thus, it is not reasonably likely these comments shifted the burden of proof and made the jury believe Applicant had to disprove the State's case. See Aleksey, 343 S.C. at 20, 538 S.E.2d at 248 (finding that although truth-seek language by the court was not appropriate, it did not shift the burden of proof when it was not given in conjunction with the charge on the State's burden of proof); id. at 28-29, 538 S.E.2d at 252-53 ("There is not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt. The trial court's instructions concerning seeking the truth were given in the context of the jury's role in determining the credibility of witnesses. The remarks were prefaced by a full instruction on reasonable doubt and followed by an additional exhortation to bear in mind the State's heavy burden of proof." (footnote omitted)).

To prevail on an ineffective assistance of counsel claim, Applicant must show *both* deficiency and prejudice. Under Aleksey, it is not reasonably likely the outcome of this trial would have been different had counsel objected to this language. Cf. Beatty, 423 S.C. 26, 32-34, 813 S.E.2d 502, 505-06 (2018) (finding defendant not prejudiced by court's pretrial comments that a trial is a search for the truth and the jury's role is to render true and just verdict and determine true facts when these comments "were a mere statement to the jury and not a charge on the law" and "the remarks were not linked to either the reasonable doubt or the circumstantial evidence

charges"). Likewise, for the same reason, this Court finds it is not reasonably likely the solicitor's comment or counsel's comments shifted the burden of proof and affected the outcome. Thus, Applicant did not prove prejudice.

Ineffective Assistance of Appellate Counsel

A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy. . ." Jones v. Barnes, 463 U.S. 745, 754 (1983).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. Courts thus must consider (1) whether appellate counsel's performance was deficient, and (2) whether the applicate was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Applicant asserts appellate counsel was ineffective for not raising the issue of whether the new Supreme Court rule prohibiting the use of the malice charge applied to his case, which was on appeal at the time. Specifically, Applicant contends the trial court instructed the jurors that an inference of malice may arise from the use of a deadly weapon. (Tr. 606-07). He contends the

Supreme Court decided State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019) while his appeal was pending. Applicant contends the charge was improper and shifted the burden of proof. He further contends the trial court and counsel agreed "the inference of malice is a wrongful instruction," but rather than deleting the inference instruction, the court "decided to explain to the jury that it is not a conclusive presumption." This Court finds Applicant did not prove appellate counsel was ineffective in this regard.

This argument was not preserved; thus, appellate counsel was not deficient for not raising it.[13] Because this argument was not preserved, appellate counsel was not deficient for not raising it, and it is likewise not reasonably likely the outcome would have been different had appellate counsel raised this issue. See Burdette, 427 S.C. at 505, 832 S.E.2d at 583 ("Our ruling today is effective in this case and in those cases which are pending on direct review or are not yet final, *so long as the issue is preserved*." (emphasis added)). Thus, Applicant did not prove appellate counsel was ineffective, and this claim is denied.

CONCLUSION

Based on the foregoing, this Court concludes Applicant has not established any constitutional violations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. See Rule 203, SCACR. Applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). If Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule

[13] Further, as set forth above, this charge was proper under the law that existed at the time of Applicant's trial—making trial counsel's failure to object not deficient.

71.1(g), SCRCP. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and

2. Applicant shall be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS ___ day of _____, 2023.

_____
ROBERT J. BONDS
Presiding Judge
Fourteenth Judicial Circuit

_____, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF ALLENDALE	)	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT
LaParis Flowers, SCDC #375098, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2020-CP-03-00257 **Respondent's Return to Applicant's Rule 59(e), SCRCP Motion**

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by LaParis Flowers (Applicant) on October 19, 2020. On March 14, 2023, an evidentiary hearing convened before the Honorable Robert J. Bonds. Applicant was present and represented by E. Charles Grose, Jr., Esquire. Following the hearing, Judge Bonds issued an order denying relief and dismissing the application with prejudice. Applicant has now filed a motion to reconsider the Order of Dismissal. Respondent submits the Order of Dismissal properly applied the law and considered the evidence before it, and Applicant failed to identify anything the order overlooked or misapprehended. Thus, Respondent requests the Court deny this motion.[1]

Standard of Review

Respondent submits the Order of Dismissal properly cited to and applied Strickland v. Washington, 466 U.S. 688 (1984), which is the seminal case for evaluating claims of ineffective assistance of counsel.

Alleged violation of section 17-27-80 and Separation of Powers

Applicant first contends the PCR court delegated its judicial authority to the Office of the

[1] Respondent concedes this motion is timely. The Clerk of Court did not serve the filed order on Respondent, and Respondent did not obtain the filed Order until November 30, 2023.

Attorney General by having the Assistant Attorney General draft a proposed order. He contends this practice violated both section 17-27-80 of the South Carolian Codea and the separation of powers. This argument lacks merit.

Initially, the Order itself fully complies with section 17-27-80, which requires the court to "make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." The Order meticulously addresses each issue raised in Applicant's amended application other than allegations (a)(i) and (a)(vii), which were expressly waived by Applicant at the PCR hearing. Applicant did not expressly raise any other issues at the PCR hearing, and he does not raise any additional issues in this motion that were not addressed in the Order. Thus, the Order fully complies with section 17-27-80.

Further, the procedure employed by the PCR court in having the Assistant Attorney General draft a *proposed* order did not violate section 17-27-80 or separation of powers. Critically, the *proposed* order itself is simply that—a *proposed* order. It has no legal bearing whatsoever until signed by the judge and filed by the clerk of court. In fact, the PCR judge was free to change the order or even completely change his ruling prior to the filing of the order. See Russell v. Wachovia Bank, N.A., 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006) ("An order is not final until it is entered by the clerk of court; and until the order or judgment is entered by the clerk of court, the judge retains control of the case."). By signing the order and forwarding it to the Clerk of Court for filing, the judge adopted the rulings as his own—i.e, he made "specific findings of fact, and state[d] expressly [his] conclusion of law, relating to each issue presented," as required by section 17-27-80. Further, because the judge was free to change the order or even change his ruling prior to filing the order, it strains credibility to suggest that having the prevailing party draft a *proposed* order violated separations of powers.

Finally, our appellate courts have recognized the common practice of having prevailing parties draft proposed orders. In Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992) the South Carolian Supreme Court did not ban the drafting of proposed orders by attorneys. To the contrary, the Court set out the preferred process: "***Counsel*** preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to the issuance of the order, and the PCR judge should carefully review the order prior to signing it." Id. at 256, 423 S.E.2d at 128 (emphasis added). Likewise, in the capital case of Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004), the Court did not ban the practice of prevailing parties submitting a proposed order: "Although we sternly encourage PCR judges to draft their own findings of fact and conclusions of law ***in death penalty cases***, we also acknowledge that in all other cases, ***it is common practice*** for judges to ask a party to draft a proposed order for the sake of efficiency." Id. at 365, 601 S.E.2d at 341 (emphasis added). More recently, in Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (1029), our Supreme Court again recognized—without condemning or prohibiting—the common practice of having the prevailing party draft a proposed order:

> The preparation and finalization of a PCR order is often a collaborative effort. ***We recognize the prevailing party often prepares a proposed order of the PCR court.*** When counsel for either side prepares the proposed order, the order must include findings of fact and conclusions of law as to all issues raised by an applicant. A copy of the proposed order should be transmitted to opposing counsel. Opposing counsel should promptly review the proposed order and alert preparing counsel and the PCR court as to any deficiencies in the proposed order. Because the PCR judge will ultimately be signing the order, the PCR judge must carefully review the proposed order to ensure it includes appropriate findings of fact and conclusions of law as to all issues raised. Once a proposed order is finalized, signed by the PCR judge, filed, and served upon the parties, the parties should thoroughly review the final order to make sure all issues raised were adequately addressed as required by section 17-27-80 and Rule 52(a); if they were not, a timely Rule 59(e) motion should be filed, requesting the PCR court to address the appropriate issues.

Id. at 516, 832 S.E.2d at 589-90 (internal citation omitted) (emphasis added). In fact, the rules of civil procedure contemplate attorneys submitting proposed orders to the court: "***Any party proving a proposed order, proposed findings of fact or conclusions of law, or proposed judgment or other paper to the court for its consideration*** in any pending matter shall serve the same on all counsel of record at the same time and by the same means." Rule 5(b)(3), SCRCP (emphasis added). Additionally, "[t]he commentary to South Carolina Appellate Court Rule 501, Canon 3 B(7)(e) provides that '[a] judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.'" Hall, 360 S.C. at 364, 601 S.E.2d at 341 (second alteration in original)).

The Order complies with section 17-27-80 because it addresses every issue raised with specificity—the primary issue Courts addressing orders in noncapital PCRs have been concerned with. See, e.g., Fishburn, Pruitt, supra. Further, the procedure of having prevailing counsel draft a proposed order is a commonly recognized practice in our State that does not violate section 17-27-80. Likewise, because the judge can change his ruling any time prior to filing the signed order, having the prevailing party draft a *proposed* order does not violate separation of powers.

Alibi

Applicant next contends the PCR court overlooked trial counsel's duty to conduct an independent investigation of available defenses. Although counsel has a duty to conduct an independent investigation, the standard for evaluating effective assistance of counsel is reasonableness under prevailing professional norms. Here, where counsel credibly[2] testified that Applicant never raised to him a defense of alibi, Applicant never indicated he wanted to testify,

[2] The PCR court found counsel's testimony on this point credible. It likewise found Applicant's testimony that he told counsel about an alibi to be not credible.

Applicant never asked counsel to speak to witnesses, Nix did not mention being with Applicant that night, and Applicant did not point out any potential witnesses at trial to counsel, counsel acted reasonably under prevailing professional norms by not investigating or otherwise pursuing an alibi. Nix herself admitted at the PCR hearing that she did not tell trial counsel she could provide an alibi. Further, Nix's statements to police did not indicate she could provide an alibi for Applicant, and the statements of Kimberly and Jaquavian likewise did not put counsel on notice of an alibi. As the PCR court found, if Applicant had truly had an alibi defense, he would have brought this to counsel's attention. The PCR court's order contains adequate support for its finding that Applicant did not prove deficiency.[3]

Further, the PCR court properly concluded it is not reasonably likely the testimony presented at the PCR hearing would have changed the outcome of trial. Notably, Kimberly and Jaquavian's testimony—which was merely that they saw Applicant at a club the evening prior to the shooting—did not establish an alibi or otherwise make it more likely than not that Applicant was innocent of this crime. Likewise, although Nix testified at the PCR hearing that Applicant followed her when she left the club, in a supplemental statement to police signed the same night

[3] Applicant's reliance on standards promulgated by Public Defenders and Assigned Counsel to support his allegation of deficiency is misplaced. (Mot. 5). Although courts may look to such standards to inform decisions related to prevailing professional norms, these standards in and of themselves do not define effectiveness under the Sixth Amendment. The Sixth Amendment standard is ultimately governed by Strickland and its touchstone of reasonableness under prevailing professional norms. See, e.g., Bobby v. Van Hook, 558 U.S. 4, 8 (2009) ("Strickland stressed, however, that 'American Bar Association standards and the like' are 'only guides' to what reasonableness means, not its definition." (quoting Strickland, 466 U.S. at 688)); Nix v. Whiteside, 475 U.S. 157, 165–66 (1986) ("Under the Strickland standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel. When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct . . . . In some future case challenging attorney conduct in the course of a state-court trial, we may need to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the state in statutes or professional codes, and the Sixth Amendment, in defining the proper scope and limits on that conduct.").

Nevertheless, based on counsel's credible testimony that Applicant never mentioned an alibi or asked him to interview specific witnesses, counsel's investigation here did not violate Guideline 4.1 of performance standards of Public Defenders and Assigned Counsel in non-capital cases.

as her original statement, she indicated she "drop[ed her] cousin and her stepsister off, stayed there and *10 minutes later [Applicant] pull[ed] up* and drop[ped] Tron off." (emphasis added). This statement contradicted her PCR testimony that Applicant was "right behind me at Ashley's house," making her PCR testimony inherently not credible. Critically, the PCR court was able to judge the demeanor and credibility of Applicant and Nix at the PCR hearing and found their testimony about Applicant's newly-created alibi defense not credible. The PCR court properly found that based on the evidence presented at trial—including three witness identifications and evidence of gunshot residue in the car Applicant admitted he was driving—it is not reasonably likely the outcome would have been different had Applicant presented the alibi defense and witnesses he presented at the PCR hearing.

Finally, Applicant's reliance on Weldon v. State, 436 S.C. 69, 870 S.E.2d 183 (Ct. App. 2021), is misplaced. Critically, the attorney in Weldon was aware of the alibi defense in advance of trial and had spoken to both the defendant and his family about it. Notwithstanding this, counsel did not call any witnesses at trial, and at the PCR hearing he could not recall or articulate a strategic reason for not calling them. Here, counsel's reason for not presenting an alibi was clear—counsel was never informed by Applicant or anyone else that he had an alibi. Without being aware of an alibi, counsel cannot be deficient for not presenting an alibi. Thus, the PCR court properly found Applicant did not prove this claim.

Jury Charge – Biggers factors

Applicant next contends the PCR court erred in finding counsel was not ineffective for failing to ask the Court to charge the Neil v. Biggers factors to a jury. For the first time in this Rule 59(e) motion, Applicant points to the identification charge in the General Sessions Charge Book to support his contention that counsel was ineffective. Respondent submits this late

allegation is untimely and should not be considered.

Further, this contention lacks merit. Again, the Strickland standard for effectiveness is *reasonableness under prevailing professional norms*. Prevailing professional norms do not require attorneys to ask judges to charge the Biggers factors—especially when Biggers itself is concerned with the admissibility of an identification that is the result of "*an otherwise unduly suggestive identification procedure*." State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012) (citing Biggers, 409 U.S. at 199-200) (emphasis added). Here, nothing suggests the witnesses' identification of Applicant *from photographic lineups* was unduly suggestive—especially when the three witnesses knew Applicant and identified him as the shooter *prior to* being shown the photographic lineups. (R. 83-102). Applicant still has not pointed to any case that requires a judge to charge the Biggers factors to a jury. Thus, Applicant failed to prove that counsel's failure to request the court charge the Biggers factors was below prevailing professional norms or deficient. Likewise, the PCR court properly found that here, where the eyewitnesses all testified they knew Applicant prior to the shooting, it is not reasonably likely the outcome would have been different had the court charged the Biggers factors.

Jury Charge – Malice Inference

In arguing counsel was ineffective for failing to object to the inferred malice charge, Applicant attempts to take a statement by the trial court judge *outside the presence of the jury*[4] to obscure the real issue: whether the charge inferred-malice charge itself was improper *at the time of Applicant's trial* and whether counsel thus was ineffective for not objecting to it. The Court

[4] Although the trial court referenced a "wrongful presumption" when discussing jury charges, it is not clear from the transcript which charge it was discussing at that time. (R. 546). Because State v. King, 422 S.C. 47, 64 n.5, 810 S.E.2d 18, 27 n.5 (2017) was decided less than three months before Applicant's trial, it is reasonable to assume the parties were discussing the fact that inferred-malice should no longer be charged with attempted murder—for which Applicant was also on trial.

should not fall for this trap.

Here, the PCR court properly concluded that the inferred-malice charge was a proper charge at the time of Applicant's trial. Although an instruction that malice can be inferred from the use of a deadly weapon is no longer good law in South Carolina, the case prohibiting this charge came out *after* Applicant's trial. See State v. Burdette, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019) ("A jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence—that the deed was done with a deadly weapon—and it should no longer be permitted."). At the time of Applicant's trial, this charge was permissible when no evidence was presented that would reduce, mitigate, excuse, or justify the homicide. See State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) ("[W]here evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon.", overruled by Burdette, 427 S.C. at 490, 832 S.E.2d at 575). Here, no evidence was presented that would reduce, mitigate, excuse, or justify this homicide, making this charge proper at the time. Because this charge was proper at the time of trial, counsel was not deficient for failing to object. See Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) ("[T]he PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se. This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law.").

Further, at the time of Applicant's trial, courts charging that malice may be inferred from the use of a deadly weapon were also required to charge the "permissive inference" charge from State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983), overruled on other grounds by

State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), and overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). The Court here charged the permissive inference charge using substantially the same language as Elmore. (Tr. 606-07). This was a proper charge under the law that existed at the time of trial, and counsel was not deficient for not objecting. Finally, Applicant's attempt to argue the law was well-established that the inferred-malice instruction was an improper comment on the facts is directly refuted by our Supreme Court in Burdette, wherein it acknowledged it was overruling precedent and found its ruling "*will not apply to convictions challenged on post-conviction relief*." 427 S.C. at 505, 832 S.E.2d at 583 (emphasis added). Thus, the PCR court properly denied this claim.

Failed to introduce recorded interviews

Applicant contends the PCR court erred in finding counsel ineffective for not introducing into evidence recordings of interviews of the Brandon Lewis, Jarrell Murray, and Tyquan Charleton. He contends the Order contains three flaws: (1) the record does not support the finding that counsel effectively cross-examined Carleton and Murry, (2) the record does not support the finding that counsel's decision to impeach the witnesses through cross rather than admitting the recordings was reasonable, and (3) the Order misplaces reliance on Rule 613(b). However, counsel testified extensively at the PCR hearing about his cross-examination of the witnesses and his attempt to impeach them. He further testified that had he introduced the videos, he would have lost the last-closing argument—which he discussed with Applicant. Again, the standard under Strickland is reasonableness under prevailing professional norms, and Respondent submits a review of the transcript shows counsel effectively cross-examined Carleton and Murray.[5] (Tr. 266-73, 276, 291-97). Notably, counsel credibly testified at the PCR hearing that he decided not

[5] Lewis never identified Applicant as the shooter at trial. (Tr. 298-308).

to attempt to enter the recordings because he had effectively impeached the witnesses through cross-examination, he wanted to preserve his right to close last, and he discussed this strategy with Applicant. This was a reasonable strategy. Although the desire to preserve final closing argument is not conclusive of whether counsel articulates a valid strategy, the preservation of last argument is a valid factor for an attorney to consider when determining whether to introduce evidence. Obviously the materiality of such evidence is important, but when the evidence has a low probative value—as here, when counsel *effectively impeached the witnesses through cross*—the decision to forego introducing evidence in order to preserve last argument can be a reasonable strategy. Here, counsel's decision was valid and reasonable under prevailing professional norms, and the PCR court properly found Applicant did not prove deficiency.

Likewise, as the Court found, Applicant did not point to what portion of the recordings could have been used to further impeach the witnesses and thus did not meet his burden of proving prejudice. Counsel did not even seek to play the recordings at the hearing; he merely introduced them into evidence, expecting the Court to comb through the recording to determine what portions of them Applicant believed should have been used for impeachment. Again, Applicant has the burden of proving his case, and where he merely introduces a recording and conclusively alleges it shows prejudice, he does not meet his burden. Finally, the PCR court properly found it is not reasonably likely the recordings would have been admitted had counsel sought to admit them. See Rule 613(b), SCRE ("Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior

statement, extrinsic evidence that the prior statement was made is inadmissible. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2)."). Thus, the PCR court properly denied this claim.

Failed to object to improper comments

Applicant argues the PCR court erred in finding counsel was not ineffective for not objecting to the solicitor's improper comments during closing argument. Specifically, Applicant avers counsel should have objected when the solicitor argued, "It is not my intent to prosecute an innocent man. Not so. We do not prosecute the innocent, only the guilty." (Tr. 550). Likewise, Applicant contends counsel was ineffective for not objecting when the solicitor improperly vouched for Lewis, an inmate in federal custody, including but not limited to argument about the snitching code. (Tr. 555-57).

The PCR court properly found the first statement—while it may have been improper—did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. Unlike the multitude of improper statements in Fortune, this statement was a single, passing statement at the beginning of a closing argument that spanned twenty-three pages. On balance, this statement did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. See Darden v. Wainwright, 477 U.S. 168 (1986) (finding solicitor's references to capital defendant as "an animal" whose head he wished had been blown off with a rifle were improper but did not so infect the trial with unfairness as to violate due process).

Finally, the PCR court properly found the solicitor's comment about the snitching code did not constitute improper vouching and thus was not objectionable. See State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) ("Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness'

veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony."); State v. Busse, 439 S.C. 104, 111, 886 S.E.2d 208, 212 (2023) ("[A] prosecutor is expected to comment on the credibility of the witnesses when making a closing argument. Far from improper, . . . doing so is one of the fundamental responsibilities of a lawyer."). As noted in Busse, a prosecutor *can* comment on the credibility of witnesses during closing argument. Thus, the PCR court properly found counsel was not deficient for not objecting, and Applicant likewise did not show any resulting prejudice.

Failed to object to truth-seeking language

Applicant's argument here focuses only on the truth-seeking language in the solicitor's closing argument. In sum, he contends counsel has a duty to object to improper closing argument, and the solicitor "emphasizing the trial judge's erroneous instruction compounded the prejudice to Mr. Flowers." (Mot. 11). However, Applicant still has not pointed to any law at the time of Applicant's trial that prohibited attorneys from arguing truth-seeking language. Although Beaty,[6] Aleksey, and Daniel found such language improper by *courts*, they did not prohibit attorneys from making such arguments. See State v. Beaty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018) ("[A] ***trial judge*** should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes best serves its perception of justice. We instruct ***trial judges*** to avoid these terms and any others that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant's guilt beyond a reasonable doubt."

[6] Although Beaty was published after Applicant's trial, the Supreme Court had issued a similar opinion in Beaty prior to Applicant's trial. See State v. Beaty, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016).

(emphasis added)); State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) ("[W]e have urged ***trial courts*** to avoid using any 'seek language when charging jurors on either reasonable doubt or circumstantial evidence . . . . (emphasis added)); State v. Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) ("[W]e instruct the ***trial judge*** to remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is "just" or "fair" to all parties." (emphasis added)); cf. Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) ("[T]he PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se. This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law.").

Ultimately, Applicant bears the burden of proving his allegations. Here, he has not proven deficiency from counsel's failure to object to the solicitor's use of this language. Likewise, because counsel's statements were responsive to the solicitor's statements, the PCR court properly found Applicant did not show counsel's use of truth-seeking language fell below prevailing professional norms. Thus, Applicant did not prove deficiency.

Finally, the PCR court properly found it is not reasonably likely an objection to the court's preliminary remarks would have changed the outcome. Here, the court did not use truth-seeking language during its charge; thus, it is not reasonably likely these comments shifted the burden of proof and made the jury believe Applicant had to disprove the State's case. See Aleksey, 343 S.C. at 20, 538 S.E.2d at 248 (finding that although truth-seek language by the court was not appropriate, it did not shift the burden of proof when it was not given in conjunction with the charge on the State's burden of proof); id. at 28-29, 538 S.E.2d at 252-53 ("There is not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the

burden of proof beyond a reasonable doubt. The trial court's instructions concerning seeking the truth were given in the context of the jury's role in determining the credibility of witnesses. The remarks were prefaced by a full instruction on reasonable doubt and followed by an additional exhortation to bear in mind the State's heavy burden of proof." (footnote omitted)).

To prevail on an ineffective assistance of counsel claim, Applicant must show *both* deficiency and prejudice. Under Aleksey, it is not reasonably likely the outcome of this trial would have been different had counsel objected to this language. Cf. Beatty, 423 S.C. 26, 32-34, 813 S.E.2d 502, 505-06 (2018) (finding defendant not prejudiced by court's pretrial comments that a trial is a search for the truth and the jury's role is to render true and just verdict and determine true facts when these comments "were a mere statement to the jury and not a charge on the law" and "the remarks were not linked to either the reasonable doubt or the circumstantial evidence charges"). Likewise, for the same reason, it is not reasonably likely the solicitor's comment or counsel's comments shifted the burden of proof and affected the outcome, and the PCR court properly found Applicant did not prove prejudice.

Ineffective Assistance of Appellate Counsel

In arguing the PCR court erred in finding appellate counsel was not ineffective, Applicant again attempts to confusticate the issue by referencing an unclear remark by the trial court about a "wrongful presumption." Again, it is not clear from the transcript *which charge* the court was referencing when it stated "wrongful presumption," and the most likely inference—since King had been decided less than three months before—was that the trial court was indicating that "implied malice" is a "wrongful presumption" on an attempted murder charge. This charge had nothing to do with whether the court could charge inferred malice from the use of a deadly weapon as part of a murder charge. In short, this passing reference was insufficient to preserve this issue for appeal;

thus, appellate counsel was not ineffective for not raising it.

Conclusion

Based on the foregoing, the Court should DENY Applicant's motion to reconsider.

Respectfully Submitted,

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December 14, 2023

STATE OF SOUTH CAROLINA)
COUNTY OF Allendale)

COURT OF COMMON PLEAS

Case # 2020 CP 05 00257

Applicant / Petitioner

vs.

State of South Carolina,

Respondent.

ORDER

This post-conviction relief case came before the court for a hearing. Having now heard this matter, the court orders as indicated herein.

_____ 1. The application for post-conviction relief is hereby: _____denied _____granted _____under advisement; a formal order will be filed (see below - No.6)

X 2. Motion(s) was/were heard in this case and the court orders:

X The motion to dismiss and/or for summary judgment is hereby _____granted denied _____under advisement based upon the _____statute of limitations and/or _____the successive nature of the application or _____other reason as follows: Rule 59(e) SCRCP motion denied

_____ 3. A conditional order of dismissal was previously filed in this case. Upon review of the matter, the court finds:

_____ Good cause as to why the case should not be dismissed has been shown in response to the order of dismissal; therefore, a hearing on the merits of the application shall be scheduled.

_____ The court has considered the response to the conditional order of dismissal and finds that good cause has not been shown or _____no response has been filed to the conditional order of dismissal; therefore, the application is hereby dismissed.

_____ 4. The application was freely, voluntarily, and intelligently withdrawn as indicated on the record; therefore, this case is dismissed _____ with prejudice _____ without prejudice.

5. Other: _____

_____

_____ 6. The court further orders:

_____ The _____Attorney General _____Applicant's counsel is directed to submit to the court a proposed order and to serve the order on opposing counsel within _____days.

_____ Both sides are directed to submit proposed orders to the court and to serve the orders on each other within _____days.

_____ The court does not request proposed orders.

IT IS SO ORDERED.

Date: 6/25, 2024

Walterboro, S.C.

Court Reporter:

Robert J. Bonds
Presiding Judge

Rev 08/08/01