

Volume II of III

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

R. Knox McMahon, Circuit Court Judge

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S.C. Supreme Court

KEITH SIMS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213330

APPENDIX

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1 defendant's yard, which was in Richland County.

2 The other witness, Ms. Davis, slash, Jenkins
3 testified that the girlfriend of Mr. Sims, that Mr.
4 Sims told her he just shot somebody. That coupled
5 with the fact that Ms. Jenkins or Davis, slash,
6 Jenkins saw when she walked out of the house at Mr.
7 Sims' residence, saw him out there trying to scrub
8 blood off the driveway clearly indicates that I
9 believe we have met our burden, as the Court knows,
10 in a light most favorable not State. So any
11 evidence, substantial evidence, direct or
12 circumstantial, is enough to send this matter to the
13 jury. The State submits that it has met that burden.
14 I believe now that it's up to the jury to decide.

15 **THE COURT:** Well, what if the defendant took the
16 position that the State -- I mean, if the Court takes
17 the position that there has been a homicide of the
18 deceased, what evidence is there that it's murder as
19 opposed to some other illegal killing?

20 **MR. BRYANT:** I believe that the testimony
21 elicited from Ms. Davis, slash, Jenkins was that
22 Natalie said through an excited utterance that Mr.
23 Sims had just murdered that person. Based upon that
24 and the statement from the defendant, Mr. Sims, that
25 he shot the person, never said -- never told Mr..

1 Elkins that it was in self-defense, I don't recall
2 him saying, just that he had shot him in his yard,
3 his yard being the defendant's yard; coupled with
4 wanting to get away from the police, wanting to flee,
5 in essence, I believe that that is sufficient to at
6 least send the case to the jury as that of murder as
7 opposed to anything else. I would submit that thus
8 far the evidence we have is enough for murder. There
9 has been nothing to suggest anything lesser being
10 submitted to the jury.

11 **THE COURT:** All right. Does the defense have
12 anything further?

13 **MS. DURANT:** No, Your Honor.

14 **THE COURT:** All right. I must respectfully deny
15 your motions. I think this is an issue in evidence
16 that there was a homicide, that there is evidence, at
17 least looking at this case most favorably to the
18 State at this point in the trial, that the defendant
19 indeed was involved in that homicide.

20 And whether or not it arises to the level of
21 murder, I think there's probably evidence that given
22 the fact that there was some considerable effort to
23 cover up this crime, that the jury could infer that
24 there was not an issue of self-defense or accident
25 and that whether or not there is a sufficient

1 provocation or anything of that nature, I think there
2 is evidence from which they could deduce that this
3 was indeed a murder. I'm not passing judgment on
4 that one way or the other. I just think in viewing
5 the evidence most favorable to the State at this
6 point I must let it go to the jury. Anything
7 further?

8 **MR. MEADORS:** Your Honor, --

9 **MS. DURANT:** No, sir.

10 **MR. MEADORS:** -- the only impeachable, he's got
11 four counts of grand larceny and three counts of
12 petit larceny.

13 **THE COURT:** Who?

14 **MR. MEADORS:** The defendant. There was seven
15 counts of burglary second degree which I believe were
16 dismissed in Newberry. But he does have those prior
17 adjudications as a juvenile, four counts of grand
18 larceny, three counts of petit larceny in January of
19 '99.

20 **MS. OWINGS:** That would be the extent of it.

21 **THE COURT:** You think that's impeachable?
22 Juvenile record.

23 **MR. MEADORS:** Yes, sir, I do.

24 **MS. DURANT:** Your Honor, we would argue of
25 course it is not impeachable because it was as a

1 juvenile. I mean, it's not --

2 **THE COURT:** What were they?

3 **MS. DURANT:** Four counts of grand larceny.

4 **THE COURT:** Grand larceny.

5 **MS. DURANT:** Three of petit larceny. Is that
6 right?

7 **MR. MEADORS:** Yes, ma'am. Of course in several
8 ways, they're within the ten years, they involve
9 crimes of dishonesty, which I think petit larceny
10 comes in also. And I think specifically the rules
11 allow it if --

12 **THE COURT:** Under 609?

13 **MR. MEADORS:** Yes, sir.

14 **THE COURT:** Grand larceny and what else?

15 **MS. DURANT:** Petit larceny.

16 **MR. MEADORS:** Your Honor, there were seven
17 burglaries --

18 **THE COURT:** Burglaries.

19 **MR. MEADORS:** -- and seven grand larcenies. The
20 burglaries were dismissed I guess as a part of a plea
21 bargain. I don't know. He got adjudicated four
22 counts of grand larceny, three counts of petit
23 larceny.

24 **THE COURT:** Four grand and three petit. All
25 right.

1 *MS. DURANT:* Your Honor, we would request that
2 they not be allowed to talk about the burglaries in
3 any way at all.

4 *MR. MEADORS:* I certainly would not do that.

5 *THE COURT:* All right. Okay. The State rests,
6 correct?

7 *MR. MEADORS:* Yes, sir.

8 *THE COURT:* Defense ready to proceed?

9 *MS. DURANT:* Yes, Your Honor.

10 *THE COURT:* Mr. Meadors, are you ready for the
11 jury?

12 *MR. MEADORS:* Yes, sir. I was just putting
13 something out. That's all.

14 *THE COURT:* Bring the jury, please.

15 (Jury in at 2:29 p.m.)

16 *THE BAILIFF:* The jury is all present, Your
17 Honor.

18 *THE COURT:* All right. Thank you very much,
19 ladies and gentlemen. I hope you had a pleasant
20 lunch. We're now ready to continue with the trial.
21 Mr. Meadors.

22 *MR. MEADORS:* Your Honor, the State of South
23 Carolina rests.

24 *THE COURT:* All right, Ladies and Gentlemen of
25 the Jury. That will conclude the case on behalf of

1 the State. The defense will now present their case.
2 Ms. Durant, you may proceed.

3 **MS. DURANT:** Thank you, Your Honor. The defense
4 would call Keith Sims.

5 KEITH A. SIMS, after being duly sworn, testifies
6 as follows:

7 **THE CLERK:** Please have a seat there, sir.
8 Speak into the microphone. State your full name for
9 the record.

10 **WITNESS:** My name is Keith Sims.

11 DIRECT EXAMINATION

12 **BY MS. DURANT**

13 **Q** Keith, are you a little nervous?

14 **A** (Nods head affirmatively).

15 **Q** You're going to have to speak into the microphone.

16 **A** Mm-hmm (affirmative).

17 **Q** The court reporter has to take it down. Are you a
18 little nervous today?

19 **A** (Nods head affirmatively).

20 **Q** Okay. Keith, how old are you?

21 **A** Twenty-two right now.

22 **Q** And where do you live?

23 **A** I stay at [REDACTED]

24 **Q** That was before this incident?

25 **A** Yes, ma'am. Now I'm incarcerated.

1 Q Okay. You're incarcerated at the Alvin Glenn
2 Detention Center?

3 A Yes, ma'am. I've been there for two years.

4 Q Who do you live with? Who were you living with
5 before this?

6 A My mom.

7 Q Your mother?

8 A Yes, ma'am.

9 Q Any brothers or sisters?

10 A My brother, my sister.

11 Q Were they living there with you at the time?

12 A At the time they was.

13 Q Who else was in the house with you then?

14 A My three nephews, my sister-in-law. All of them
15 stayed there with us. And my girlfriend.

16 Q And who was your girlfriend?

17 A Natalie English.

18 Q Natalie? Okay.

19 A Yeah.

20 Q Tell me a little bit about your family. Are you
21 close with your family?

22 A Yes, ma'am; real close with my family.

23 Q What about with your mother?

24 A Extremely close. She's my heart.

25 Q Your mother is your heart?

1 A Yes, ma'am.

2 Q Is she here today?

3 A Yes, ma'am.

4 Q How about your father?

5 A He is here, too. I'm real close with him, too.

6 Q Now, are your mother and father together?

7 A No, ma'am, they're not.

8 Q Are they living together?

9 A No. They're not living together.

10 Q Okay. But you said you are close with both of them?

11 A Yes, ma'am.

12 Q How tall are you, Keith?

13 A About five -- five-nine.

14 Q And how much do you weigh?

15 A About 165 pounds.

16 Q I'm sorry. Can you --

17 A About 165 pounds.

18 Q How much -- how big were you in December of 2003?

19 A I'd say around about 150.

20 Q About 150?

21 A (Nods head affirmatively).

22 Q Okay. In December of 2003, what were you doing?

23 Were you going to school? Working? What were you

24 doing?

25 A I was going to school. I was working at McDonald's.

1 Q At McDonald's?

2 A In Blythewood.

3 Q Okay. How long had you been working there?

4 A I had been working there a couple of months. But
5 prior to the incident I had just stopped working,
6 like a week before this incident.

7 Q Okay. You had quit working about a week before the
8 incident?

9 A Yes, ma'am.

10 Q So how did you get money, Keith? How were you
11 living? With your parents?

12 A I used to save my money from working, but my parents,
13 they used to give me money also. But I had a little
14 bank account. I used to save my money then.

15 Q Okay. Did you know Brian Anderson?

16 A Yes, ma'am.

17 Q How did you know Brian?

18 A Went to school together.

19 Q For how long?

20 A About -- about three -- about three or four years.

21 Q So you knew him that long?

22 A Yes, ma'am.

23 Q Had you known him longer than that?

24 A No. I've been knowing him ever since '99.

25 Q Okay. What was your relationship with Brian?

1 **A** Close friends. We used to go to school together.

2 **Q** Did something happen during the time that you knew
3 Brian? Did you all have some arguments,
4 disagreements?

5 **A** Yeah. We had a couple.

6 **Q** Tell me about some of those?

7 **A** One incident happened like around the corner from his
8 house. Me, Terrence Hutchinson, Michael Mayo was
9 leaving from Brian's house, and a guy named Marcus
10 Majeed and his brother --

11 **MR. MEADORS:** I'm going to object to relevance.

12 **THE COURT:** Well, I don't know.

13 **MR. MEADORS:** What year? I didn't hear what
14 year.

15 **MS. DURANT:** Pardon me?

16 **THE COURT:** He said one incident. He didn't say
17 when.

18 **MS. DURANT:** He didn't say when.

19 **MR. MEADORS:** I thought he said '98 or
20 something.

21 **THE COURT:** Overruled. Just go ahead.

22 **Q** You were telling me about this incident with you.
23 Tell me what happened.

24 **A** Me and Marcus Majeed -- me, Terrence Hutchinson and
25 Michael Mayo was at Brian's house one day and we was

1 coming around the corner. And Marcus Majeed, you
2 know, and his brother, Rahim, was flashing Terrence
3 down. So we got to the stop sign. Terrence had got
4 out. All of us got out to see what was going on.
5 And Terrence and Marcus was having words and they
6 started fighting. So --

7 **MR. MEADORS:** Objection to relevance if Terrence
8 and Marcus were having words.

9 **MS. DURANT:** Your Honor, we will get to it.

10 **THE COURT:** Overruled. Go ahead.

11 **A** Terrence and Marcus and Mayo, they was fighting. So
12 Rahim was coming at me throwing his hands up and then
13 he went by me to go help his brother. So they all
14 fought. And a girl came by and said she was going to
15 call the police, so we left and went back around to
16 Brian's house.

17 **Q** You left the fight and went to Brian's house?

18 **A** Yes, ma'am. And we got --

19 **Q** You and who?

20 **A** Me, Terrence and Mayo --

21 **Q** Okay.

22 **A** -- went back around to Brian's house. And when we
23 was at Brian's house, he was asking me why I didn't
24 help him fight. He said, "Where are your cuts and
25 bruises at?" Because Terrence and Mayo had bruises

1 on them. He asked me why I didn't fight. And
2 then --

3 Q Brian asked you that?

4 A Yes, ma'am. Brian asked me that. And then he jumped
5 on me with two of his other friends. And they broke
6 the fight up. And after that I went in the house,
7 and his mother was cleaning up my back with peroxide
8 before I called my mother to come get me.

9 Q So let me make sure I understand, Keith. You're
10 saying that because -- there was a fight?

11 A Yes, ma'am.

12 Q Involving Marcus Majeed and you and some other boys?

13 A Yes.

14 Q And you all ran? You didn't fight that much. You
15 fought some?

16 A I didn't fight.

17 Q Okay. So when you got back to Brian's house, Brian
18 got upset with you because you didn't have any cuts
19 and bruises on you?

20 A He said why didn't I help his brother and Mayo.

21 Q And Brian did what to you?

22 A He jumped on me along with Raymond and Stefan. And
23 then they broke the fight up. I went into his
24 mother's house and she was cleaning my back off with
25 peroxide because in the fight they had pulled me and

1 had scraped my back. And his mother was cleaning my
2 back. And I called my mother to come get me.

3 Q Whose mother was cleaning your back?

4 A Brian's mother.

5 Q Did you -- so Brian got angry with you and fought you
6 because you didn't fight back?

7 A Yes, ma'am.

8 Q Okay. Was that -- had you heard about any other
9 incidents involving Marcus Majeed and Brian?

10 A Yes. After that incident him and Brian, him and
11 Marcus and Brian had got into a shootout in front of
12 their house after the incident. But before that,
13 when I was in the house, Marcus had came by shooting
14 at the house.

15 **MR. MEADORS:** Objection to relevance, Marcus
16 coming by shooting.

17 **THE COURT:** I'm going to sustain that. Strike
18 that from the record. The jury disregard that
19 statement. It has nothing to do with this case.

20 Q So just talk about Marcus and Brian, not Marcus
21 shooting. What had you heard about that?

22 A So after that they had got in a shootout, Marcus and
23 Brian had got in a shootout after that.

24 Q What was your -- when you say they got in a shootout,
25 was it your understanding who had guns?

1 **MR. MEADORS:** Objection, Your Honor.

2 **THE COURT:** Hearsay. It's got to call for a
3 hearsay answer unless he knows.

4 **MS. DURANT:** May I approach, Your Honor? May we
5 approach?

6 **THE COURT:** Sure.

7 (Whereupon, a bench conference is had)

8 **THE COURT:** All right. Ladies and gentlemen, I
9 need to discuss this matter, a matter with the
10 attorneys, a matter of law. And at least you're
11 getting your exercise. I apologize for the
12 interruption, but it's important at this stage of the
13 proceedings. So I'm going to ask you to go to the
14 jury room for just a minute. I'll call you when
15 we're ready. Don't discuss the case among yourselves
16 while you're in the jury room.

17 (Jury out at 2:42 p.m.)

18 **THE COURT:** All right. Ms. -- I'm sorry. The
19 question was, "So just talk about Marcus and Brian,
20 not Marcus shooting. What had you heard about that?"
21 And then the question was: "What was your -- when
22 you say they had a shootout, was it your
23 understanding who had guns?" That's the objection.
24 On behalf of the State, what's the objection?

25 **MR. MEADORS:** Your Honor, relevancy, hearsay;

1 primarily this particular instance hearsay.

2 *THE COURT:* I will overrule the objection on the
3 grounds of hearsay; I mean, on the grounds of
4 relevance. If that somehow -- what's the defendant's
5 position as to why it's not hearsay?

6 *MS. DURANT:* Your Honor, I can change the
7 wording to what he believed, because I think key to
8 the defense in this case is what Keith believed about
9 Brian.

10 *THE COURT:* Is it being offered for the truth of
11 the matter?

12 *MS. DURANT:* Yes, sir.

13 *THE COURT:* It is?

14 *MS. DURANT:* I mean, it's being offered for his
15 state of mind, not for whether it was true or not.
16 We're not offering it for the truth. We don't know
17 whether Brian carried guns or not, but Keith believed
18 that. And we do believe that is key to his
19 self-defense, Your Honor.

20 *THE COURT:* Look at 803(3). Ms. Durant.

21 *MS. DURANT:* Yes, sir.

22 *THE COURT:* What's your position?

23 *MS. DURANT:* Your Honor, we are offering it for
24 this. We do believe it does impact his state of mind
25 because it does lead to what his state of mind was at

1 the time of the incident, Your Honor. I also would
2 like to offer a case, State v. Megler. It's a Court
3 of Appeals 2005. If I may present this to Your
4 Honor?

5 **THE COURT:** Sure.

6 (Document handed to the Court)

7 **MS. DURANT:** Your Honor, on page 9 --

8 **THE COURT:** You wouldn't give me a two-page
9 case, wouldn't you?

10 **MS. DURANT:** I'm sorry. Did I give you what?

11 **THE COURT:** I said you wouldn't give me a
12 two-page case, would you? You give me a 12-page
13 case.

14 **MS. DURANT:** No, sir. We don't want to make it
15 too easy, unfortunately.

16 **THE COURT:** What are you referring to?

17 **MS. DURANT:** On page 9 it says, if you look at
18 it, it says the Supreme Court stated that in the
19 murder prosecution of one pleading self-defense
20 against an attack by the deceased, evidence of other
21 specific instances of violence on the part of the
22 deceased are not admissible unless they are directed
23 against the defendant or if directed against others
24 where so closely connected at point in time or
25 occasion with a homicide to indicate the state of

1 mind of the deceased at the time of the incident."

2 **THE COURT:** The state of mind of the deceased.

3 **MS. DURANT:** Yes, sir. But I think it indicates
4 that he believed Brian was going to harm him, so --

5 **THE COURT:** Well, he can say that.

6 **MS. DURANT:** I think the fact that Brian was
7 involved in shootouts with other people is
8 significant to his state of mind but also indicates
9 Brian's state of mind with his carrying guns.

10 **THE COURT:** Well, we don't know that. There's
11 nothing in the record to support that. All right.
12 I'm going to allow it. I'm going to allow it but
13 under some -- I'm just not going to allow that to go
14 beyond --

15 **MR. MEADORS:** Judge, a couple of things. Number
16 one, we don't know when this happened.

17 **THE COURT:** Well, she's going to have to lay the
18 foundation for it. I understand that.

19 **MR. MEADORS:** And it's got to somehow
20 reasonably -- it's got to relate to him. He's trying
21 to come in here and say, I heard, hearsay, somebody
22 else, this guy is a bad fellow and shoots. Now
23 that's making me --

24 **THE COURT:** He's got to say that.

25 **MR. MEADORS:** But, Judge, specifically, that

1 isn't what this case holds. "State of mind of the
2 deceased at the time of the homicide or to produce
3 reasonable apprehension of great bodily harm if
4 directed at others was so closely connected at point
5 in time." We don't know when this happened. The
6 first incident he talked about, that was my other
7 objection, we don't know what year that happened.

8 **THE COURT:** I said she is going to have the lay
9 a foundation for it to show there is a reasonable
10 apprehension on behalf of this defendant. If it's --
11 I mean, I don't want to put words in anybody's mouth.
12 But if it's not related in proximity to the event,
13 then it's just antidotal. It's just a story somebody
14 told him. Go ahead. Anything further? Do you
15 understand, Ms. Durant? It's just you just can't go
16 far afield with this.

17 **MS. DURANT:** Yes, sir. I do understand that. I
18 don't know what the Court would consider close in
19 time. I have a case that says, State v. Brown, that
20 they didn't allow a prior act of violence because it
21 was 23 years earlier. And we are not talking about
22 that.

23 **THE COURT:** Well, we're talking about something
24 that -- you're just going have to lay the foundation.
25 I can't tell you what it is. All right. Bring the

1 jury, please.

2 (Jury in at 2:50 p.m.)

3 **THE BAILIFF:** The jury is all present, Your
4 Honor.

5 **THE COURT:** All right, Ms. Durant. You may
6 proceed.

7 **MS. DURANT:** Thank you, Your Honor.

8 **Q** I think you were talking about an incident between
9 Marcus Majeed and Brian and a shootout. When was
10 that?

11 **A** The shootout between them? I think it was -- it was
12 around February of 2002.

13 **Q** February of 2002?

14 **A** Yes, ma'am.

15 **Q** Did you -- had you ever seen Brian with a gun?

16 **A** Yes, ma'am.

17 **Q** Tell me about that?

18 **A** I seen him with quite a few guns, but I know he
19 had --

20 **Q** I'm sorry. You have to speak a little clearer, okay,
21 into the microphone.

22 **A** I have seen him with quite a few guns. But I know
23 one day he came to my house and was showing me a new
24 .45 that he had got. It was a chrome .45. That was
25 around in -- that might have been in like 2000, 2001,

1 right before 2002. But I have seen him on plenty of
2 occasions with guns.

3 **MR. MEADORS:** Objection to relevance.

4 **THE COURT:** Overruled.

5 **Q** Go ahead.

6 **A** I have seen him with plenty of guns before in the
7 past.

8 **Q** Can you tell me a particular incident maybe involving
9 one of your guns?

10 **A** I know one day he had stolen an SK from me. We was
11 up --

12 **Q** What is an SK?

13 **A** It's like, kind of like an assault rifle. I had
14 bought it from Best Pawns and Guns off Two Notch.
15 And me, Brian, I think Tywon Friday and Andrew was up
16 at his house one day. We was behind his house
17 shooting a gun.

18 **Q** Shooting the SK?

19 **A** Yes, ma'am. And when we had left and came to my
20 house, me, Terrence -- me -- me, Brian and Tywon, we
21 had left and came to my house. So when they parked
22 at the top of my hill, I went in the house to get my
23 cordless phone. When I was coming back out the
24 house, they was driving back down at the bottom of
25 the hill.

1 Q "They" being who? Who is "they"?

2 A Tywon and Brian. They was leaving with my SK. So I
3 called Brian and asked him why he took my gun.

4 MR. MEADORS: Objection to anything Brian would
5 say.

6 THE COURT: I understand.

7 MS. DURANT: Your Honor, --

8 THE COURT: Not what Brian said. What he said.

9 MS. DURANT: I'm sorry. What was your
10 objection?

11 THE COURT: He's anticipating something.

12 A So I called Brian to ask him why did he take my gun.
13 He said because --

14 THE COURT: That's his objection.

15 MS. DURANT: Well, Your Honor, I think it
16 best -- may we approach?

17 THE COURT: Yes, ma'am.

18 (Whereupon, a bench conference is had)

19 Q Okay. You can't say what Brian said to you. Okay?
20 You can say what was your belief. What did you
21 understand after talking to Brian?

22 A He said that --

23 Q You can't say what he said. You have to say what you
24 believed after you talked to him.

25 A That Terrence said I had owed him, still owed him

1 some money for buying the -- helping me buy the gun
2 out the pawn shop. So I was talking to Terrence and
3 I was asking him, "But I gave you all the money",
4 because he had gave me like \$100 along with the money
5 that I bought the gun from the pawn shop for it. I
6 told him, "I paid you all the money." He said --

7 **MR. MEADORS:** Objection.

8 **Q** You can't say what Terrence said.

9 **THE COURT:** You can't say what anybody else
10 said; not just Terrence, not just Brian, anybody.
11 Okay? You just ...

12 **Q** Just listen now. After talking to Terrence, what was
13 your understanding? What did you think?

14 **A** Just took my gun.

15 **Q** Who took your gun?

16 **A** Brian.

17 **Q** Did you ever get it back?

18 **A** No, ma'am.

19 **Q** Did you believe Brian had ever used a gun? I mean,
20 what is -- let's go back a minute. What was the
21 reason you didn't get it back?

22 **A** He said he wasn't going to give it back.

23 **Q** Had he ever -- did you ever hear of Brian using a
24 gun?

25 **A** No. I didn't hear him say he was using my gun, but

1 he said that he was going to --

2 Q You can't say what he said now. What was ...?

3 A He was going to do something with it.

4 Q Like what?

5 A Going to make a lick. And --

6 MR. MEADORS: Objection. Objection.

7 Q What does that mean?

8 THE COURT: Sustained.

9 A That means that he was planning on using the gun.

10 Q Wait.

11 THE COURT: Sir, sir.

12 Q You have to stop talking when it's sustained. Okay?

13 THE COURT: You just can't -- you can't say what
14 somebody else said. It doesn't matter who it is. I
15 told you once.

16 THE WITNESS: Yes, sir.

17 THE COURT: And that's just the rule. All
18 right?

19 THE WITNESS: Yes, sir.

20 THE COURT: Because that person is not here and
21 that person can't be cross examined. So you can't
22 say what somebody else said. So please try to listen
23 to your lawyer and answer the question as she asks
24 it.

25 Q After you talked to Brian about your gun, what did

1 you believe had happened to the gun?

2 **A** I don't know whether he sold it, sold it or not. But
3 I didn't -- I didn't receive it back.

4 **Q** What happened about two weeks before this incident?

5 **A** Brian and his girlfriend and two of his friends, I
6 think Benjamin Bright and Kevin, came to my house and
7 was threatening --

8 **Q** Who all was there? Who else was there?

9 **A** Benjamin Bright and Kevin and Brian's girlfriend came
10 to my house, and Brian and them was threatening me
11 over some money.

12 **Q** Was somebody else there with you?

13 **A** My brother, Derrick Ruff. He was in the yard with
14 me. And they came and threatened me about --

15 **Q** You can't say what they said. What did you think
16 that might happen?

17 **A** Thought that they was going to try to jump on me.

18 **Q** Because why?

19 **A** Over some money that I supposed to have owed to him
20 before.

21 **Q** That you owed to ...?

22 **A** Brian.

23 **Q** So you're saying today -- let me make sure I
24 understand, Keith. Okay? You're doing fine -- that
25 about two weeks before this incident on December 30th

1 that Brian and a couple of his friends and his
2 girlfriend came to your house, right?

3 A Yes, ma'am.

4 Q Is that what you said?

5 A Yes, ma'am.

6 Q And that Derrick Ruff was there?

7 A Yes, ma'am.

8 Q And that you believed Brian was going to harm you
9 because you owed him some money?

10 A Yes, ma'am.

11 **MR. MEADORS:** Objection. Testifying.

12 **THE COURT:** Overruled. Go ahead.

13 Q Let's go to the night of December 30th. Okay? Tell
14 me about that night.

15 A Terrence, John Lee and Chris Page came to pick me up
16 from my house around about 7:30.

17 Q Let me ask you about your house. Okay? Hold on one
18 second. Do you -- where do you live? Do you live in
19 town or in the country?

20 A I live in the country up Monticello.

21 Q It's in the country?

22 A Yes, ma'am.

23 Q Did you have a car?

24 A I had just sold my '79 Coupe Deville, but I used to
25 drive my mother's car.

1 **MS. DURANT:** May I approach the witness, Your
2 Honor?

3 **THE COURT:** Yes, ma'am.

4 **MS. DURANT:** May I approach?

5 **THE COURT:** Yes. I'm sorry.

6 **MS. DURANT:** Okay.

7 **Q** Do you recognize that, Keith?

8 **A** Yes, ma'am.

9 **Q** What is that?

10 **A** That's my mother's house.

11 **MS. DURANT:** Your Honor, we'd like to have this
12 marked, please.

13 **THE COURT:** Any objection?

14 **MR. MEADORS:** No, sir.

15 **THE COURT:** Mark it in evidence.

16 (WHEREUPON, Defendant's Exhibit No. 6 is marked
17 for identification and received in evidence.)

18 **Q** Can you tell me about your house?

19 **A** It's a five-bedroom house, two baths. It has like a
20 balcony porch on the front of it.

21 **Q** Is it brick or wood?

22 **A** Brick.

23 **MS. DURANT:** Your Honor, we'd like to offer
24 Defense Exhibit No. 6 into evidence.

25 **THE COURT:** It's already admitted.

1 **MS. DURANT:** Thank you. May I publish it to the
2 jury, Your Honor?

3 **THE COURT:** Sure.

4 **Q** So you lived in the country and your friends came to
5 pick you up. And what did you do?

6 **A** Got -- I left with Terrence, Chris and John Lee. We
7 was going to Terrence's birthday party. We left. We
8 left and went to John Lee's house, stopped at John
9 Lee's house and got the stereo. And we went to the
10 Adams Mark Hotel.

11 **Q** And where was that?

12 **A** Downtown.

13 **Q** Downtown ...?

14 **A** Columbia.

15 **Q** Columbia? Okay.

16 **A** Yes, ma'am.

17 **Q** Okay.

18 **A** We got to the hotel around about 9:00, me, Terrence,
19 John Lee and Chris. We played -- turned on the
20 music. We played the music. And we started drinking
21 before everybody else got there. We drunk for -- we
22 drunk for a while, listened to the music until the
23 rest of the people got there. His cousin, Tywon,
24 came. He had a cousin, John Lee, from the Army that
25 came; and some females came to Terrence's room he had

1 called to come to the party.

2 Q All right.

3 A And Terrence and them had called them to come to the
4 party. So everybody was getting along good. Around
5 about 11:00 Brian and his friend, Jay, came to the
6 party. They came to the party. Everybody was
7 shaking hands and everybody mingled for a while.
8 Everybody had drinks. I think around about 11:30 or
9 so, or 12, maybe 12:00, Brian and John Lee and John
10 Lee's friend, Jay, left. I think they was going
11 to -- he was going to take Jay home. And John Lee
12 had rode with them. Everybody else still stayed at
13 the party and we still had drinks and smoked or
14 whatnot. Around about I'd say maybe --

15 Q Excuse me. Did you receive a call while you were at
16 the party?

17 A Yes. That was around about 12:00. I had got a call
18 from my girlfriend at the time, Natalie English. And
19 we talked. She had called Terrence's cellphone. My
20 cellphone's battery was getting weak. It had just
21 went dead. So Terrence asked me how she got his
22 number. I told him I don't know. So me and her
23 talked or argued for a while 'cause she had been
24 gone -- she had been gone all that day.

25 I got off the phone with her. And everybody,

1 we're still having a good time partying. Brian came
2 back to the party around about 12 something,
3 something after 12. And everybody is still sitting
4 around having fun, talking to the females and
5 drinking. Around at like a quarter 'til 1 I asked
6 Terrence what time he was going to take me home. He
7 said he wasn't --

8 Q That's who you rode with, is Terrence?

9 A Yes, ma'am. He said he wasn't going back to the
10 country because his back brake lights had went out on
11 his Cadillac. So Brian said he'll take me home since
12 he was going to his grandfather's house, going to
13 stay the night up there. So I said okay. We didn't
14 leave until about 1 something, something after 1:00.
15 But everybody shook hands before we left the party
16 and gave each other hugs and stuff. Then we left, me
17 and Brian.

18 Q Let me stop you, Keith. You're okay. You're still a
19 little nervous?

20 A (Nods head affirmatively).

21 Q Were you carrying a gun?

22 A Yes, ma'am.

23 Q What was the reason you were carrying a gun?

24 A I have got shot at in the past. So I usually carry
25 my gun with me.

1 Q Because you were?

2 A I was -- it's a feeling that you can't explain being
3 shot at and you just hoping you don't get hit. You
4 can't really protect yourself. So I used to carry my
5 gun with me.

6 Q You were carrying your gun because you'd been shot at
7 in the past?

8 A Yes, ma'am.

9 Q Okay. So, everybody was shaking hands and you were
10 starting to leave?

11 A Yes, ma'am.

12 Q So go ahead and tell me what happened?

13 A We left the Adams Mark and --

14 Q Who was you with?

15 A Me and Brian. We left the Adams Mark in his car.

16 Q What was the reason you were with Brian?

17 A Because he was going to drop me off at home.

18 Q Did he live there? Did he live that way?

19 A He stayed like two houses up from my house. Well,
20 it's his grandfather's house. He was staying with
21 his grandfather. So he stayed right up the street.
22 So we left and went -- went up on Main to the 24-hour
23 McDonald's, went through the drive-thru to get
24 something to eat. We left McDonald's. We came down
25 the interstate and started coming up Monticello going

1 towards my house.

2 When we got in the country he stopped at a house
3 from right up the street from my house. And both of
4 us went in. Both of us went in the house. He went
5 in the back room. But around about I'd say maybe
6 five -- maybe five or ten minutes I sat on the couch
7 in the living room.

8 **Q** What was the reason you stopped at the house?

9 **A** I don't know. I was riding with him. So we went in
10 the house. I sat on the couch for about five or ten
11 minutes 'til he came out the back room. He came out
12 the back room. We went to get back in his car. When
13 we got back in his car he started talking about
14 past -- past -- past arguments, arguments that we had
15 in the past, arguments that we had in the past.

16 So, when we was leaving his house, when we was
17 leaving the guy's house, when we was leaving the
18 guy's house, he was talking about past arguments that
19 we had. He was telling me that --

20 **MR. MEADORS:** Your Honor, I'm going to object at
21 this point. It's hearsay relating back to something
22 I don't know when.

23 **MS. DURANT:** Your Honor, I think it goes to the
24 defendant's state of mind -- I mean, the victim's
25 state of mind as well as --

1 **THE COURT:** Not the victim. Go ahead. I'm
2 going to --

3 **MR. MEADORS:** Judge, I'll withdraw the
4 objection.

5 **THE COURT:** Yeah. Go ahead.

6 **A** We was talking about past arguments that we had. He
7 was telling me that he had all these -- all these
8 different guns. He started telling me about how --
9 he started telling me about how he could have then
10 have brought harm to me and my family, how he could
11 have then have brought harm to me and my family.

12 So, when we -- we was pulling up my driveway --
13 when we was pulling -- we was pulling up my driveway,
14 when we was pulling up my driveway, when we was
15 pulling up my driveway, he was telling me that I was
16 taking -- I was taking food out -- out his unborn
17 baby, out his unborn baby's mouth. He said that I
18 was taking food out his unborn baby's mouth.

19 And when he stopped the car he was telling me
20 that -- he was telling me that he was going to take
21 care of all his beefs before the New Year. He was
22 telling me that he was going to -- that he was going
23 to end all his beefs before the New Year, that he was
24 going to end all his beefs before the New Year.

25 And he was reaching underneath his seat. So I

1 thought he was fixing to -- he was fixing to grab him
2 a gun to shoot me. So I pulled out my gun. Out of
3 fear I shot.

4 Q You pulled out your gun. You thought Brian was
5 reaching for a gun?

6 A Yes, ma'am. I thought -- I thought he was reaching
7 for his gun. So I thought he was reaching for his
8 gun to shoot me and kill me. So out of fear I pulled
9 my gun out and shot.

10 Q Did you mean to kill him, Keith?

11 A No. I didn't mean to kill him. I was pulling my gun
12 out because I thought he was fixing to kill me. I
13 guess just out of -- out of fear I shot.

14 Q What did you do then? What happened? Do you need a
15 minute, Keith? May I approach, Your Honor? I just
16 want to see if there's some Kleenex.

17 **THE COURT:** Well, he's got them.

18 **MS. DURANT:** Okay.

19 Q Are you okay, Keith? Are you ready to go forward?

20 A (Nods head affirmatively).

21 Q What made you think Brian would hurt you?

22 A He have -- he had jumped on me in the past. I --
23 I've got a -- I have seen him with guns. So I
24 thought he -- I thought he had it, his gun, then.

25 Q If you were afraid of him, what made you ride home

1 with him?

2 A At that point in time we was all right.

3 Q That night?

4 A Yes, ma'am. A couple of days before this incident he
5 had came by my house and we had sit -- sit down and
6 had some drinks. And so I thought everything --
7 everything was okay.

8 Q You thought everything was okay. So what changed?

9 A I don't know.

10 Q What changed in the car? What was the main thing you
11 were afraid of Brian at that moment?

12 A Telling me -- because he was telling me he was going
13 to end all his beefs before the New Year's.

14 Q And this was December 31st?

15 A Yes, ma'am.

16 Q So what made you think Brian might have a gun under
17 the seat?

18 A I have seen him with guns before, and I have seen him
19 with guns before. And when he was reaching down, I
20 thought he was getting his gun to shoot me.

21 Q What were you feeling at that time, Keith?

22 A I was scared, thought I -- thought I was fixing to --
23 I was fixing to die.

24 Q You thought you were fixing to die?

25 A Yes, ma'am.

1 Q Did Brian have a gun?

2 A I don't know. When I got in the car, I seen -- I
3 seen that he had a little gun in his hand. So I
4 panicked. I didn't know what to do.

5 Q You realized he did not have a gun in his hand and
6 you panicked?

7 A Yes, ma'am. I saw the blood.

8 Q So what were you thinking then, Keith, when you
9 realized he didn't have a gun and that Brian was
10 dead?

11 A I had just shot an unarmed man, so I was scared.

12 Q What did you think would happen to you? What were
13 you scared of?

14 A I was scared of what people was going to think,
15 people going to try to come, try to hurt me or my
16 family behind the situation.

17 Q I'm sorry. I didn't understand. You were afraid
18 some people might try to hurt you?

19 A Or come hurt me and my family behind the situation.

20 Q What people?

21 A His friends.

22 Q You were afraid his friends might come and hurt you?

23 A Or try to hurt my family.

24 Q So what did you do, Keith?

25 A After I went in the house and I told my girlfriend

1 something happened between me and Brian.

2 Q So you told Natalie. And then what did you do?

3 (Pause)

4 Q Keith?

5 A I came out -- I came outside.

6 Q Who came outside?

7 A I did. And --

8 Q Where did you go? Did you and Natalie go somewhere?

9 A She got in her car. I got in -- I got in Brian's car

10 and I went.

11 Q Brian was in the driver's seat. What did you do?

12 A After I pushed him over a little bit.

13 Q You got in Brian's car?

14 A Yes, ma'am. I got in Brian's car. And I was -- we

15 went to Newberry.

16 Q What were you going to do?

17 A Went to tell my brother.

18 Q Your brother being ...?

19 A I went to tell ...

20 Q Who was your brother?

21 A He's not really my brother, but Derrick Ruff. I went

22 to tell him what had happened.

23 Q Did you go to Derrick's house?

24 A Yes, ma'am.

25 Q So tell me what happened? You and Natalie went to

1 Derrick's house. And then what happened?

2 **A** We told --

3 **Q** Is this hard for you, Keith?

4 **A** Yes, ma'am.

5 **Q** Stay with me for a little while. Okay? You can do
6 this. So you all -- you and Natalie went to
7 Derrick's house. And what did you do when you got
8 there?

9 **A** I woke my brother up.

10 **Q** You woke Derrick up. Where did you -- what did you
11 do with Brian? Did you take Brian's body somewhere?

12 **A** Yes, ma'am.

13 **Q** Where?

14 (Pause)

15 **THE COURT:** Ms. Durant, instruct your client to
16 answer the question. Sir, you have to answer the
17 question. Do you understand?

18 **THE WITNESS:** (Nods head affirmatively).

19 **Q** I know it's hard for you, but we have to get through
20 this. Okay? Where did you take Brian's body?

21 **A** We all tried -- we all tried to hide it.

22 **Q** You tried to hide the body. And where did you take
23 it to hide it?

24 **A** To a pond.

25 **Q** What pond? Come on, Keith. You can do this. Okay?

1 What pond did you take the body to?

2 **A** To Molly's Rock Pond.

3 **Q** Molly's Rock Pond?

4 **A** Yes, ma'am.

5 **Q** What -- so when you took the body to Molly's Rock
6 Pond and you left, where did you go from there?

7 Let's -- did you have Brian's car?

8 **A** Yes, ma'am.

9 **MS. DURANT:** May I approach the witness, Your
10 Honor?

11 **THE COURT:** Certainly.

12 **Q** Do you recognize this?

13 **A** (Nods head affirmatively).

14 **Q** What is that?

15 **A** Brian's car.

16 **Q** It's Brian's car? Is that the car you had that
17 night?

18 **A** Yes, ma'am.

19 **MS. DURANT:** Your Honor, I'd like to have this
20 marked, please.

21 **MR. MEADORS:** No objection.

22 **THE COURT:** Without objection, it's marked.

23 (WHEREUPON, Defendant's Exhibit No. 7 is marked
24 for identification and received in evidence.)

25 **Q** So this is the car you were driving that night.

1 Where did you take that car?

2 **A** Take it?

3 **Q** I'm sorry. What did you do with the car?

4 **A** We left it in Columbia.

5 **Q** Where in Columbia?

6 **A** Some apartments I think.

7 **Q** Some apartments?

8 **A** (Nods head affirmatively).

9 **MS. DURANT:** Your Honor, we'd like to offer
10 Defense Exhibit No. 7 into evidence, please.

11 **THE COURT:** It's already in evidence.

12 **MS. DURANT:** May I publish it to the jury?

13 **THE COURT:** Sure.

14 **Q** Keith, when you left the car, was it locked?

15 Unlocked? What was the situation?

16 **A** No. I don't think it was locked.

17 **Q** Pardon me?

18 **A** No. I don't think it was locked.

19 **Q** It wasn't locked when you left it?

20 **A** No, ma'am.

21 **Q** So, Keith, when you on January 1st, did -- I'm sorry.

22 Later that day did you go somewhere after you left

23 the car? Let's skip ahead a little bit. Did you

24 go -- did you -- did you talk to the police about

25 this? On January 1st did you talk to the police

1 about this?

2 **A** January 1st?

3 **Q** Keith, you have to talk into the microphone. Okay?

4 The next day.

5 **A** I think the next day --

6 **Q** Did you go to the police station? Did you talk to
7 the police? What happened?

8 **A** They said the police had came to my house looking for
9 me.

10 **Q** I'm sorry. Can you repeat that? I didn't hear you.

11 **A** They said the police had came to my house looking for
12 me.

13 **Q** And how did you know that?

14 **A** I had found out they had came to my family's house.

15 **Q** So when you found out they were looking for you, what
16 did you do?

17 **A** I went and talked to the police in Newberry.

18 **Q** Do you remember who you talked to?

19 **A** I talked to ...

20 **Q** What did you tell them, Keith, on that first day?

21 **A** I didn't -- I didn't really tell them too much.

22 They -- they was asking about what had happened.

23 **Q** So you didn't tell them what had happened in the car?

24 **A** (Shakes head negatively).

25 **Q** And why didn't you, Keith?

- 1 **A** I was scared.
- 2 **Q** You were scared to tell them the truth?
- 3 **A** Yes, ma'am.
- 4 **Q** Why were you scared to tell the police the truth?
- 5 **A** 'Cause I had -- 'cause I had shot Brian and then I
- 6 had seen he didn't have no gun.
- 7 **Q** You were scared to tell them because you realized he
- 8 didn't have a gun?
- 9 **A** Yes, ma'am.
- 10 **Q** Okay. So, were you arrested, Keith?
- 11 **A** Yes, ma'am.
- 12 **Q** Okay. And you talked to the police again on
- 13 January 2nd, correct? Do you remember that? Did you
- 14 talk to the police another time?
- 15 **A** Yes, ma'am. I talked to the police another time.
- 16 **Q** And the first two times, did you write out a
- 17 statement of any kind?
- 18 **A** No, ma'am.
- 19 **Q** The third time you talked with the police, what
- 20 happened that time?
- 21 **A** I had told them -- I had told them what happened.
- 22 **Q** You told them what happened in the car? Did you give
- 23 a statement then?
- 24 **A** Yes, ma'am.
- 25 **Q** Did you sign that statement?

1 **A** Yes, ma'am.

2 **MS. DURANT:** May I approach the witness, Your
3 Honor?

4 **THE COURT:** (Nods head affirmatively).

5 **Q** Keith, is this a copy of your statement? Is this
6 your signature on here? Is that your signature?

7 **A** Yes, ma'am.

8 **Q** If you'd read that first line. Can you read those?
9 Who was there when you gave that statement?

10 **A** Lieutenant Stan Smith from the Richland County
11 Sheriff's Department.

12 **Q** Was there somebody else there?

13 **A** I can't think of the other investigator's name.

14 **Q** Do you know there was another investigator there?
15 Can you see what his name was?

16 **A** It's not on here.

17 **Q** Okay. And who were those officers with? What county
18 were they with?

19 **A** Richland County.

20 **Q** And the first two times you were asked questions, the
21 first two times you met with the police were with
22 what department?

23 **A** Newberry.

24 **Q** Okay. So what made you give a statement on -- what
25 was the date on this? Did you see the date? Did you

1 read the date? On that first sentence, what is that
2 date?

3 A The 22nd of January.

4 Q January 22nd of the year 2004?

5 A Mm-hmm (affirmative).

6 Q Okay. So what made you give a statement that day
7 when you didn't the first two times?

8 A I wanted to tell them what had happened.

9 Q So what did you tell them happened?

10 A I told them when we had got in my driveway and Brian
11 had pulled a gun out on me.

12 Q Did you tell them Brian had a gun?

13 A Yes, ma'am.

14 Q So when you told --

15 A Yes, ma'am.

16 Q So when you talked on January 22nd you told them
17 Brian had actually pulled a gun?

18 A Yes, ma'am.

19 Q But today you're saying Brian did not really have a
20 gun. You realize that?

21 A Yes, ma'am.

22 Q So what made you decide to finally tell the truth,
23 Keith?

24 A Letting the family know what really happened.

25 Q Whose family?

1 **A** Brian's family.

2 **Q** You wanted Brian's family to know what really
3 happened?

4 **A** Yes, ma'am.

5 **Q** If you could say something the Brian's family, what
6 would you say?

7 **MR. MEADORS:** Objection, Your Honor.

8 **THE COURT:** Sustained.

9 **MS. DURANT:** Scratch that.

10 **Q** What are you feeling for Brian's family? Keith, stay
11 with me for a little while longer. Okay?

12 **A** I'm sorry that his family had to go through all that
13 pain over the years. But I was -- I was scared at
14 the time. I had done panicked. I wasn't thinking.

15 **Q** Did you mean to kill Brian?

16 **A** No. It wasn't done intentionally. It's just all
17 that happened out of fear.

18 **Q** What has your life been like since then, Keith?

19 **MR. MEADORS:** Objection.

20 **THE COURT:** Sustained.

21 **Q** How do you feel about what happened?

22 **MR. MEADORS:** Objection.

23 **THE COURT:** Sustained.

24 **Q** Don't answer that.

25 **THE COURT:** All right. Let's take about a

1 ten-minute break, ladies and gentlemen. The jury --

2 **THE BAILIFF:** Stay seated, please.

3 **THE COURT:** -- may retire to the jury room.

4 Just again don't discuss the case among yourselves
5 while you're in the jury room.

6 **MS. DURANT:** May I approach the witness, Your
7 Honor?

8 **THE COURT:** Not right now.

9 (Jury out at 3:52 p.m.)

10 **THE COURT:** Ms. Durant.

11 **MS. DURANT:** Yes, sir.

12 **THE COURT:** You can't talk to him during the
13 break.

14 **MS. DURANT:** Okay. I was just going to make
15 sure he's okay.

16 **THE COURT:** The deputies are going to take him
17 for a bathroom break. You need to use the restroom,
18 sir?

19 **MR. SIMS:** (Nods head affirmatively).

20 **THE COURT:** Good. The deputies are going to
21 take you. We'll stand at ease for about ten minutes.

22 (Whereupon, a break is taken)

23 **THE COURT:** Are you ready to proceed, Ms.
24 Durant?

25 **MS. DURANT:** Yes, Your Honor.

1 **THE COURT:** All right. Bring the jury, please.

2 **THE BAILIFF:** Be glad to, Your Honor.

3 (Jury in at 4:21 p.m.)

4 **THE BAILIFF:** The jury is all present, Your
5 Honor.

6 **THE COURT:** All right. Thank you very much.
7 Ms. Durant, you may continue.

8 **Q** Keith, when you left the car -- or when this incident
9 happened and you said you saw Brian didn't have a gun
10 in his hand, did you check under the car seat for a
11 gun?

12 **A** No, ma'am.

13 **Q** Now, you were 20 years old at this time and you
14 were -- what grade were you in school?

15 **A** Twelfth.

16 **Q** How did you do in school?

17 **A** Doing all right.

18 **Q** But you were older than the regular person in the
19 12th grade. Isn't that right?

20 **A** Yes, ma'am.

21 **Q** Did you have to repeat some grades?

22 **MR. MEADORS:** Objection. With all due respect,
23 relevance.

24 **MS. DURANT:** I'm sorry?

25 **THE COURT:** Relevance. Sustained.

1 MS. DURANT: Okay.

2 A No, ma'am. I didn't repeat no grades.

3 Q All right. Don't answer that. Don't answer that.

4 How do you feel about what happened, Keith?

5 MR. MEADORS: Your Honor, I object.

6 MS. DURANT: This is my last question.

7 THE COURT: Sustained.

8 MS. DURANT: No further questions, Your Honor.

9 Please answer any questions Mr. Meadors may have.

10 Okay?

11 MR. MEADORS: May it please the Court?

12 THE COURT: Yes, sir.

13 CROSS EXAMINATION

14 BY MR. MEADORS

15 Q Good afternoon, Mr. Sims.

16 A Good afternoon.

17 Q Just for the record, you did shoot and kill Brian
18 Anderson, correct?

19 A Yes, sir.

20 Q And you did it in Brian Anderson's car, correct?

21 A Yes, sir.

22 Q That was in your yard or your driveway at [REDACTED]

23 [REDACTED]

24 A Yes, sir.

25 Q And that's clearly in Richland County, isn't it?

1 A Yes, sir.

2 Q And you used the .9 millimeter, correct?

3 A Yes, sir.

4 Q You shot him one time?

5 A Yes, sir.

6 Q And you shot him in the face, correct?

7 A Yes, sir.

8 Q He didn't see it coming, did he?

9 A He was reaching down. I guess he didn't.

10 Q Who else was at the house that night afterwards, Mr.

11 Sims? Was your family there?

12 A Yes, sir. My family was there.

13 Q And you didn't tell any of them that this guy had

14 threatened you or you thought he was reaching for a

15 gun, did you?

16 A No, sir. I ain't want to hurt my mother.

17 Q You're now telling the jury you thought this fellow

18 was going to kill you. You initially said you

19 thought he had a gun. Well, you actually said he had

20 a gun, didn't you?

21 A Yes, sir.

22 Q You didn't tell anybody in the house that you felt

23 threatened and you thought this guy was going to kill

24 you right after it happened, did you? I hate to say

25 guy. Excuse me, mama. Brian Anderson was going to

1 kill you. You didn't tell anybody that right at the
2 house, did you?

3 **A** No, sir.

4 **Q** You immediately get Natalie up who is your girlfriend
5 and say, let's go, we've got to go get rid of this
6 body, correct?

7 **A** No, sir. I didn't say all that like that.

8 **Q** Did you get Natalie and she followed you with Brian's
9 body to Newberry?

10 **A** Yes, sir.

11 **Q** And you were sitting in the passenger's seat, right?
12 You weren't outside the car. You were sitting in the
13 passenger's seat when you fired the shot, Mr. Sims?

14 **A** Yes, sir.

15 **Q** Do you remember telling Derrick that you F'd up? I
16 mean, you told him that, didn't you?

17 **A** Yes. I think I told him that.

18 **Q** Whose idea was it to hide -- excuse me -- to dispose
19 of the body of Brian Anderson after you shot him?
20 Whose idea was that?

21 **A** I think I asked Derrick what did he think I should
22 do. He said it's best to hide it.

23 **Q** So you're saying it was Derrick's idea to hide the
24 body?

25 **A** Basically.

- 1 Q Have you ever told anybody that before?
- 2 A Nobody asked.
- 3 Q You talked to Bernard Elkins. You know Bernard,
- 4 don't you? Do you remember Bernard?
- 5 A Yes, sir.
- 6 Q You saw him at Buster Wicker's that night, right?
- 7 That would be the next night, New Year's Eve,
- 8 correct?
- 9 A Yes, sir.
- 10 Q And some police cars went flying by when you were
- 11 there at Buster Wicker's talking to Bernard Daniel
- 12 Elkins? Isn't that right? Do you remember police
- 13 cars going by?
- 14 A No, sir.
- 15 Q Well, do you remember telling Bernard the police were
- 16 after you and you had to get out of here?
- 17 A No. I asked him for a ride.
- 18 Q Do you remember telling him you shot somebody in your
- 19 yard?
- 20 A I think I did.
- 21 Q Well, that's something pretty significant. I mean,
- 22 you remember telling Bernard that you shot somebody
- 23 in your yard?
- 24 A I think so, sir.
- 25 Q Did you use the "N" word? Did you say I think I

1 shot, using the "N" word?

2 A No, sir.

3 Q And did you tell him you had to get out of there,
4 that the police were after you?

5 A No. I asked him for a ride.

6 Q You weren't going to the police department, were you?

7 A No.

8 Q You say today you'd been threatened. You didn't go
9 to the police department and tell them the night
10 after it happened, this guy, I thought he was going
11 to kill me, did you?

12 A Scared.

13 Q And you didn't tell Bernard Elkins that you felt
14 threatened, did you?

15 A No, sir.

16 Q You didn't tell Bernard Elkins that you thought the
17 fellow had a gun or he had a gun or anything, did
18 you?

19 A I didn't get into no details with him.

20 Q You never got into any details 'til you knew what the
21 State had as evidence. Isn't that true, Mr. Sims?

22 A No.

23 Q I don't think -- well, you didn't discuss it on your
24 direct, but where did you take Brian Anderson's car
25 after you left with him?

- 1 **A** I got it. I think I drove it back to Columbia.
- 2 **Q** Do you remember driving Fulmer Road, kind of your
- 3 area there off 321? That is where you live, isn't
- 4 it? The community there?
- 5 **A** Our family up there.
- 6 **Q** Perhaps your father lived there?
- 7 **A** Not at the time.
- 8 **Q** Some of your family lived up there at the time,
- 9 right, Mr. Sims?
- 10 **A** Used to stay up there.
- 11 **Q** And if you take a right off of Mary's End off of
- 12 Fulmer Road and then take an immediate right onto the
- 13 Fulmer, that takes you into a cul-de-sac where you
- 14 initially held Brian Anderson's car, doesn't it?
- 15 **A** Yes, sir.
- 16 **Q** I mean, I'm describing exactly right, aren't I?
- 17 **A** (Nods head affirmatively).
- 18 **Q** And after you had hid that car behind -- whose house
- 19 was that you hid the car behind?
- 20 **A** Nobody's house. A lady used to stay there.
- 21 **Q** It was vacant, wasn't it? I mean, nobody was there
- 22 at this time?
- 23 **A** I don't think so.
- 24 **Q** And you knew that. Isn't that why you put the car
- 25 back there?

- 1 A I wasn't really thinking.
- 2 Q After that you got in the car with Natalie, right?
- 3 A Yeah. I think so.
- 4 Q And then you go down to Boundary Street in Newberry,
- 5 didn't you?
- 6 A Yes, sir.
- 7 Q And that's where you got Derrick Ruff and his
- 8 girlfriend, Nikki?
- 9 A Yes, sir.
- 10 Q Nikki is nice, isn't she?
- 11 A Excuse me?
- 12 Q Nikki is nice, isn't she?
- 13 A Kind of.
- 14 Q You go in. You wake them up, don't you?
- 15 A I knock on the door. They answered the door.
- 16 Q Pretty early in the morning, wasn't it?
- 17 A I think it was about 2 something.
- 18 Q They didn't have anything to do with the shooting of
- 19 Brian Anderson, did they?
- 20 A (Shakes head negatively).
- 21 Q As a matter of fact, when you go up to Boundary
- 22 Street, they hadn't any idea what you had done, did
- 23 they?
- 24 A No.
- 25 Q You went there to get Derrick and Nikki to help you

1 and Natalie move the body of Brian Anderson, right?

2 **A** I asked Derrick what did he think I should do, and he
3 said hide it.

4 **Q** I understand. But prior to even seeing Derrick --
5 you're now blaming this on Derrick -- prior to
6 Derrick, you'd already hidden the body on Fulmer Road
7 before you'd even seen Derrick?

8 **A** I'm thinking it wasn't behind the house. I think it
9 was parked right there.

10 **Q** Back in that cul-de-sac, the last house on the left
11 was where you pulled the car behind?

12 **A** Yeah. But I don't think it was behind the house.

13 **Q** Well, you certainly hadn't decided to give him a
14 Christian burial at that point, had you?

15 **A** Excuse me?

16 **MS. DURANT:** Objection.

17 **THE COURT:** Overruled.

18 **Q** I said you certainly hadn't decided to give him a
19 Christian burial?

20 **A** Christian burial?

21 **Q** Yes, sir. You left him behind the house on Fulmer
22 Road, didn't you, in his car?

23 **A** I think so. Yes, sir.

24 **Q** You then go to see Derrick?

25 **A** Yes, sir.

1 Q And then after that, you all go and get some gloves,
2 correct?

3 A If I can -- yes, sir.

4 Q And you paid for that, money. Tell the Ladies and
5 Gentlemen of the Jury, was that Brian's money you
6 used to buy that?

7 A No. I had money in my pocket.

8 Q You got a gas can, too, correct?

9 A Didn't --

10 Q Somebody did at your request, didn't they?

11 A Natalie got a gas can.

12 Q Because you asked her to?

13 A I think so.

14 Q Why did you ask her to get the gas can, Mr. Sims?

15 A They said I said the car was low on gas. A lot of
16 stuff I didn't really remember until they filled me
17 in on it.

18 Q From wherever you get the gas and the gloves, you go
19 back to Fulmer Road, right, where Brian's car is?

20 A I think so, sir. Yes, sir.

21 Q At that point Nikki still didn't know what was going
22 on, did she?

23 MS. DURANT: Speculation. Objection, Your
24 Honor. That's asking for speculation on his part.

25 THE COURT: No. Not necessarily. Overruled.

1 Q What did you do when you got to Fulmer Road? And
2 wasn't at this time four of you all in the car?

3 A Yeah.

4 Q You come back into Fulmer Road right now. You left
5 the two ladies in the car and you and Derrick got
6 out, correct?

7 A That's what they said. Yes, sir.

8 Q Well, no, sir. That's what you did, isn't it?.

9 A I told you a lot of the stuff I didn't remember until
10 they had to fill me in on it.

11 Q Do you remember going to get these concrete blocks
12 right here? Can you remember picking that up?

13 A Not really. They had to tell me all this.

14 Q You drove from Columbia all the way to Newberry. How
15 did you drive?

16 A I drove I guess, sir.

17 Q And do you remember picking up this big tow -- car
18 tow from across -- and you got, if you can remember,
19 sir, you got this concrete block and this tow bar
20 across the street from where you had the car on
21 Fulmer. Isn't that right?

22 A I think so.

23 Q There are still some concrete blocks out there today,
24 isn't it?

25 A I don't know. I've been locked up two years, sir.

1 Q This other part of this tow chain is still out there,
2 isn't it?

3 A I don't know.

4 Q Where did you put the concrete block and the tow
5 chain? The concrete block and the tow chain. Excuse
6 me.

7 A I can't remember where I put them. I think they said
8 we put them either in the car or in the trunk.

9 Q Well, was that your idea?

10 A I don't know whose idea it was. I didn't really
11 remember everything that had happened. I told you
12 that, sir.

13 Q You went from Fulmer Road, came out, took a right on
14 Mary End Road, took a left on 34 and then take a left
15 and go to Molly's Rock Pond or Molly's State Park
16 Pond, don't you, sir?

17 A That's what they say. Yes, sir.

18 Q No, sir. I mean, do you say that's what happened?

19 A I can't say because I didn't remember all that.

20 Q Will you take responsibility for something?

21 A I'm not denying --

22 MS. DURANT: Objection, Your Honor.

23 A -- what happened.

24 THE COURT: Overruled.

25 A I tell you I didn't remember all that.

- 1 Q You'd been to Molly's Park before, hadn't you?
- 2 A I might have been there when I was young.
- 3 Q But it was your idea to take Brian's body to the
- 4 pond, wasn't it?
- 5 A I don't think so. I didn't remember.
- 6 Q Do you remember Derrick getting so sick from -- all
- 7 due respect to everybody in the courtroom -- the
- 8 smell that he had to get out of your car? Do you
- 9 remember that?
- 10 A I can't remember none of that. I was told that.
- 11 Q Do you remember pulling up to the parkway on Molly's
- 12 Rock Pond and Nikki -- I don't know if Derrick was in
- 13 your car or not then. Do you remember coming up then
- 14 to the parking area of Molly's Rock? Do you remember
- 15 that?
- 16 A I didn't remember hardly none of that. I was told
- 17 that's what we did.
- 18 Q Do you remember opening the door of the Crown
- 19 Victoria and Brian's body falling out?
- 20 A No, sir. I didn't remember that either. I was told
- 21 I was standing over him crying.
- 22 Q Excuse me?
- 23 A I was told I was standing over him crying.
- 24 Q Who told you that?
- 25 A Derrick.

1 Q When did he tell you that?

2 A The next day. Then he told me a lot of stuff that
3 had happened that night before.

4 Q Were you crying as you dragged his body down to the
5 pond?

6 A I can't remember that.

7 Q Did you get upset when his pants came off when you
8 pulled him down there? Did you try to fix his pants,
9 Mr. Sims? Do you remember that? Do you remember his
10 pants coming down? And do you remember having
11 trouble pulling him down there so you had to get the
12 two ladies to come help you drag his body down to the
13 pond? Do you remember that?

14 A No, sir.

15 Q Do you remember carrying these concrete blocks and
16 the tow chain down there?

17 A I didn't remember. I didn't remember none of my
18 actions.

19 Q Who pushed his body, Brian's body, off the pier at
20 Molly's Rock Pond into the water?

21 A I was told we all did.

22 Q You weren't afraid of Brian then, were you?

23 A You say was I afraid of him then?

24 Q Yes, sir.

25 A I can't say. I don't remember.

1 Q You weren't afraid of him at all, were you?

2 A I had to be afraid if I was doing all of that.

3 Q But, well, you can remember everything prior to that
4 but you can't remember anything afterwards?

5 A I remember some of the stuff.

6 Q Where did you go after you all had dumped Brian
7 Anderson's body in Molly's Rock State Park Pond?
8 Where did you go?

9 A They say we got on the interstate and I went to
10 Columbia. And I think they went to Charleston.

11 Q And let me, before I forget something, before Brian's
12 body went in the pond, who got his wallet and the 70
13 to \$80 cash out of it and kept it?

14 A They say when we was dragging him, they said that I
15 had -- I did it.

16 Q You did, didn't you?

17 A That's what they say.

18 Q You took his wallet and his 70, \$80 in money, right?

19 A They said when I was dragging him, when we was
20 dragging him and his wallet and all of the stuff came
21 out, they say I had got it.

22 Q But you don't remember that?

23 A I don't remember a lot of things that happened that
24 night.

25 Q But you can remember some stuff years prior? You

1 just can't remember any of this after, any of it?

2 You can't remember taking the body down?

3 A I was -- I was -- I guess my mind was blank. I was
4 in a state of shock.

5 Q Do you remember giving the dog tags, the CD and
6 the -- and this was later here in the tale here, in
7 the story, to the women, Natalie and Nikki, and
8 telling them to get rid of them?

9 A No, sir.

10 Q You don't deny you did that; you're just saying you
11 don't remember?

12 A I don't remember. I can't deny it but I didn't
13 remember.

14 Q And you wanted them to -- you wanted to get rid of
15 any evidence of this crime, right? I mean, that's
16 why you're getting rid of the body, why you're
17 getting rid of the dog tags with his name and his
18 girlfriend's name on it and his CD. You wanted to
19 get rid of everything, right?

20 A I guess. I don't remember.

21 Q Did you think about burning the car?

22 A No. I don't think so.

23 Q You can remember you didn't think about burning the
24 car?

25 A I don't think so.

- 1 Q Okay. They took the clothes down to Charleston to
2 throw them away, didn't they? The blood that you all
3 got on you --
- 4 A That's what they say.
- 5 Q -- from dragging, from shooting him, and then you all
6 were dragging him to the pond, you all got his blood
7 on you, didn't you? I mean, Brian got on your body
8 and your clothes, didn't he, Mr. Sims?
- 9 A I guess so.
- 10 Q And you didn't want anybody to discover that, so you
11 sent it via the ladies to Charleston, and Derrick, to
12 get rid of it, didn't you?
- 13 A That's what they say.
- 14 Q You still hadn't gone to the police, had you?
15 They're down in Charleston. Where do you take Brian
16 Anderson's car? You take it to his mama?
- 17 A (Shakes head negatively).
- 18 Q Where do you take it?
- 19 A I think I left it at some apartment.
- 20 Q Whose apartment was it?
- 21 A I don't know.
- 22 Q You don't know whose apartment it was?
- 23 A (Shakes head negatively).
- 24 Q Did you ever go see a Bernie Mack?
- 25 A I don't know no Bernie Mack.

- 1 Q You don't know where you left the car?
- 2 A I think I left it in some apartments.
- 3 Q Do you remember the name of it?
- 4 A No, sir.
- 5 Q Can you tell me how to get there, sir?
- 6 A I think it's off of Broad River.
- 7 Q They come back from Charleston, pick you up at -- but
- 8 you can remember the apartment complex was off of
- 9 Broad River from two and a half years ago?
- 10 A You said can I remember it?
- 11 Q Yes, sir. You just said where it was.
- 12 A The next day they came to pick me up at, I was right
- 13 at Bernie Mack's house.
- 14 Q That's actually the same day, isn't it? That's later
- 15 on that day. This is New Year's Eve day, right?
- 16 A No. I think it was the next day.
- 17 Q They pick you up and then you go back to your house,
- 18 [REDACTED] correct? And you all shower?
- 19 And there isn't any question you all cleaned up?
- 20 Please. I mean just yes or no, please. Do you
- 21 remember just cleaning up when you came back to your
- 22 house?
- 23 A I got in the shower.
- 24 Q And do you remember getting a brush and some kind of
- 25 substance and trying to get Brian's blood off the

- 1 driveway? Do you remember being out there scrubbing,
2 trying to get it out?
- 3 A I think so.
- 4 Q You do remember that?
- 5 A I think so.
- 6 Q And you got the brush and you tried to hide it behind
7 the house, right? Or you threw it behind the house?
- 8 A I don't think I threw it.
- 9 Q And it's after that that you went to Buster Wicker's,
10 correct?
- 11 A I think I went to Buster Wicker's that night.
- 12 Q Later on that evening?
- 13 A I think later that night.
- 14 Q And that was New Year's Eve, on into New Year's,
15 January 1st into 2004, right?
- 16 A I think so.
- 17 Q I mean, you can remember going to Buster Wicker's?
- 18 A You say can I remember going?
- 19 Q Yes, sir. You remember seeing Bernard? You remember
20 talking to Bernard?
- 21 A That's who took me from the club.
- 22 Q I'm sorry?
- 23 A Yes.
- 24 Q I didn't hear your last response, sir.
- 25 A Yes, sir.

1 Q Sorry. Bernard Elkins went and talked with the
2 police, didn't he, and told them what you told him?

3 A Yes, sir.

4 Q And you found that out, didn't you?

5 A That he went and talked to the police?

6 Q Yes, sir.

7 A The next day when I went to talk to them.

8 Q And as a matter of fact, the word was getting out.
9 It had been on the news, hadn't it? Wasn't it now on
10 the news? This is big news. A body is found at
11 Molly's Rock in the pond. It hit the press, didn't
12 it?

13 A I didn't see it on the news.

14 Q Well, word was getting out. You told Bernard they
15 were looking for you, you were on the run and the
16 police were looking for you. Do you remember telling
17 him that?

18 A I didn't tell him I was on the run.

19 Q And the first place you went to, they wouldn't let
20 you in, would they? Is that Ernest Cohen's house?
21 You knocked on the door and he said you couldn't
22 come?

23 A I don't know no Ernest Cohen. I know the first place
24 we went to was a Tina Hollings' house.

25 Q They didn't let you in, did they?

1 A Knocked on the door. I asked for Tina Hollings.

2 They said she was asleep.

3 Q When you were back at your mama's house and your
4 house at [REDACTED] after you'd come back from the
5 apartments, did you tell anybody in that house what
6 had happened?

7 A Did I tell anybody what had happened?

8 Q Did you tell your mom or anybody else, say, I had to
9 do it?

10 A Natalie had already told them I think.

11 Q Excuse me?

12 A I said Natalie had already told them.

13 Q Had told who what?

14 A Natalie had told my mama what happened.

15 Q You're telling me that Natalie had already told your
16 mom in there what happened?

17 A Yeah.

18 Q And when did she do that?

19 A I guess -- I guess as soon as they got in from
20 church.

21 Q Your mama didn't know they were hiding evidence
22 behind Refuge Temple before W. L. Bundrick gave his
23 sermon, did he? Your mama didn't know that?

24 A No.

25 MS. DURANT: Your Honor, objection. He doesn't

1 know what his mama knew.

2 **THE COURT:** I'll sustain that.

3 **Q** But they take the evidence and Brian Anderson's tags
4 and Courtney Rivers' tags and at your request hid
5 them in a dumpster right before church, didn't they?

6 **A** I can't say at my request.

7 **Q** You asked them to get rid of it?

8 **A** I don't remember asking them to get rid of that.

9 **Q** You don't remember that?

10 **A** I don't.

11 **Q** Do you remember telling them to get rid of the gun,
12 the .9 millimeter, your gun?

13 **A** I think I gave that to Nikki.

14 **Q** Do you remember telling them to get rid of it, to
15 Nikki?

16 **A** Yes, sir. Yes, sir.

17 **Q** You do remember that? And she tried to get rid of
18 it?

19 **A** I don't know. They left.

20 **Q** You gave it to her in a green shirt, didn't you?

21 **A** I think it was green. I don't know if it was a green
22 shirt. I think it was a plastic bag.

23 **Q** Now, when you went to -- and again, you didn't tell
24 Nikki, Natalie, Derrick, anybody that you felt
25 threatened or he had a gun. Not one of them right

1 there did you tell that to, do you? None of them?

2 **A** Derrick had to know what was going on.

3 **Q** You never told Derrick he had a gun or you thought he
4 had a gun, did you, sir?

5 **A** I didn't tell him exactly what happened.

6 **Q** Your brother who you went in the back room with to
7 plan, you say he was telling you how to get rid of
8 the body?

9 **A** I didn't get into real details about it.

10 **Q** Real details like somebody had a gun on me and I had
11 to do it? You call that a detail?

12 (No response).

13 **Q** On January the 1st, 2004, and you knew your name was
14 out there, didn't you? Before you went to the
15 Sheriff's Department, you knew you were a suspect?

16 **A** The police had been to my house, so I went to talk to
17 them.

18 **Q** And you talked to Sergeant Dennis and you talked to
19 Wes Boland, didn't you?

20 **A** Yes, sir.

21 **Q** They read your rights. Didn't threaten you, didn't
22 coerce you, didn't promise you. And you understood
23 your rights, didn't you?

24 **A** You said did I understand them?

25 **Q** Yes, sir.

1 A Yes, I understood them.

2 Q I mean, there's no question about that. And you even
3 initialled it and initialed them that you understood
4 them, right?

5 A Yes, sir.

6 Q And you gave them your social security number?

7 A (Nods head affirmatively).

8 Q I mean, they didn't know your social security number.
9 You gave it to them, right?

10 A (Nods head affirmatively).

11 Q You gave them your date of birth?

12 A Yes, sir.

13 Q Where you lived?

14 A (Nods head affirmatively).

15 Q And phone number, right?

16 A Yes, sir.

17 Q This is the police, right? Did you tell them, I felt
18 threatened hours after this happened, the next day I
19 felt threatened, I thought he had a gun, he had gun?
20 Did you tell them that, the police, any of them that
21 next day?

22 A No, sir. I was scared.

23 Q As a matter of fact, you gave them details about that
24 you had done something else, hadn't you? Do you
25 remember that?

1 **A** Yes, sir.

2 **Q** And as your attorney said, you and Brian were getting
3 along fine, weren't you?

4 **A** At that point in time; yes, sir.

5 **Q** He said, let me give you a ride home, save Natalie
6 from having to come out and get you. Tell them about
7 Brian the next day. Didn't you just tell them that
8 we hang out; he stays moving around a lot with his
9 girl, we went to school together? That's what you
10 told them about Brian; not threats, not past, not
11 anything, right?

12 **A** Yes, sir.

13 **Q** You told them he dropped me off, went on his way, and
14 Natalie let me in, right?

15 **A** Yes, sir.

16 **Q** You also told them that your sister-in-law had gone
17 to work, your nephews were up, your brothers were up.
18 This is when you got back. Natalie brought me to
19 Newberry in the red Grand Am. Do you remember
20 telling them that?

21 **A** Yes, sir.

22 **Q** And that was the next morning around 11:45 she took
23 me to Newberry. I apologize. Coming in at 1:30 you
24 told them Natalie was up when you got home and then
25 you had an argument but made up and then you went to

1 bed. That's what you told them that night, right?

2 A Yes, sir.

3 Q And the next morning the nephews were up and that's
4 when she took you to Newberry, correct?

5 A Yes, sir.

6 Q That's correct, isn't it?

7 A Yes, sir.

8 Q You told them, I ain't got no pistol?

9 A (Nods head affirmatively).

10 Q That was actually true then, because they had gotten
11 rid of the pistol then, hadn't they?

12 (no response).

13 Q Do you remember telling them, that's crazy, I didn't
14 kill Brian?

15 A Yes, sir. I was scared.

16 Q Do you remember maybe after they asked you, well,
17 somebody saw you in Brian's car, do you remember
18 telling them, nobody saw me driving Brian's car? Do
19 you remember telling them that?

20 A I think so.

21 Q And then you went on and told them you left the club
22 with "Scooter", went to 34 at Prosperity, sister
23 picked me up at Miller Street Apartments. I mean,
24 all that's not true, is it?

25 A Why not?

- 1 Q I'm sorry?
- 2 A Why not?
- 3 Q It is true?
- 4 A Yeah.
- 5 Q When did that happen?
- 6 A That's the same guy.
- 7 Q I'm sorry?
- 8 A That's the same guy.
- 9 Q Who is the same guy?
- 10 A "Scooter".
- 11 Q The same guy as what? I apologize. I don't know
- 12 what you're talking about.
- 13 A As Bernard.
- 14 Q Sister picked me up at Miller Street Apartments.
- 15 That didn't happen? That did happen? Did you know
- 16 "Spike Dog" like I know "Spike Dog"? Did you know
- 17 Lieutenant McCraw? You'd never met him before, had
- 18 you? He came in and talked to you on January 2nd,
- 19 didn't he?
- 20 A Yes, sir.
- 21 Q I won't go through as much, but he read your rights.
- 22 You understood those rights, right?
- 23 A (Nods head affirmatively).
- 24 Q He didn't threaten you or coerce you?
- 25 A (Shakes head negatively).

1 Q They weren't being mean to you, were they?

2 A A little bit..

3 Q Oh, they were being a little bit mean to you?

4 A Yes, sir.

5 Q But the first one -- you're saying Sergeant Dennis
6 and those were fine, but now you're saying "Spike
7 Dog" was mean to you? Sergeant McCraw?

8 A All of them had an attitude.

9 Q All of them had an attitude? You remember that?

10 A Yeah.

11 Q Do you remember talking to "Spike Dog" and telling
12 him that you and Brian had worked everything out?

13 A I can't remember that.

14 Q Do you remember telling him that when you left the
15 hotel about 1, took you home, went by McDonald's went
16 by another house; you remember the details of all of
17 that, but you can't remember taking the body down to
18 the pond, right?

19 A That was the next day. I'm thinking it might have
20 been two days after that.

21 Q When was the next day?

22 A When I talked to him.

23 Q January 2nd?

24 A Yeah. It was two days after that I think.

25 Q You told him you didn't kill Brian, didn't you?

- 1 A Yeah. I was scared.
- 2 Q You didn't tell him -- I'm sorry?
- 3 A Yeah. I was scared.
- 4 Q You didn't tell him you felt threatened, saw a gun or
- 5 didn't see a gun, did you?
- 6 A (Shakes head negatively).
- 7 Q So when he dropped you off at 1:00 to 2, you went on
- 8 inside and Natalie let you in?
- 9 A I think.
- 10 Q And to Lieutenant McCraw you said Natalie brought me
- 11 to Newberry and dropped you off and then you went to
- 12 a Willingham's house and a Lisa Mathias Wilson's
- 13 house, right?
- 14 A A Lisa who?
- 15 Q Well, you tell me. They were your words. Lisa who?
- 16 A I don't know a Lisa Mathis.
- 17 Q But that's not true, is it?
- 18 A What is not true?
- 19 Q That you did that.
- 20 A That I went there?
- 21 Q Yes, sir.
- 22 A Yeah. I went there.
- 23 Q But you were getting rid of the body at the time you
- 24 said you were doing this, right?
- 25 A He was asking about the next day when I came to

1 Newberry.

2 Q You didn't tell him you killed him. You actually
3 said, I didn't kill him. Correct? And you didn't
4 tell him about the threat?

5 A No. I lied. I was scared.

6 MS. DURANT: Objection, Your Honor. Can you
7 clarify that? What day are you talking about?

8 Q I'm talking about January 2nd Lieutenant McCraw came
9 to talk to you at the Sheriff's Department. You were
10 read your rights. You said they didn't threaten or
11 coerce you. And you talked to Lieutenant "Spike"
12 McCraw and he asked you about your education. And
13 that's the one where you actually put Richland County
14 in parentheses where you lived. Do you remember
15 that?

16 A I think so.

17 Q Now, do you remember, she asked you about talking to
18 a fellow named Stan Smith. Do you remember Stan
19 Smith?

20 A Yes, sir.

21 Q You told Lieutenant Stan Smith that Brian Anderson
22 had a gun, didn't you?

23 A Yes, sir.

24 Q Not I think he had gun, I thought he had a gun, I
25 wasn't sure. You said he had a gun?

1 **A** I lied. I was scared.

2 **Q** And you told him specifically what type of gun it
3 was, didn't you? You told him what kind of gun it
4 was?

5 **A** Yeah.

6 **Q** Tell the jury what you told him what kind of gun it
7 was?

8 **A** I told him it was a .45. But before that Derrick had
9 told me that. So I went along. I lied because he
10 didn't pull out a gun and I was scared. So I went
11 along with the lie and said that he pulled out a gun
12 on me.

13 **Q** So is this Derrick's fault now?

14 **A** I ain't blaming no Derrick. I never said it was his
15 fault. You was asking about the gun.

16 **Q** Yes, sir. You told him it was a .45?

17 **A** Yeah.

18 **Q** And you actually told him you gave it to who to get
19 rid of?

20 **A** Derrick had said I gave it to him. So I went along
21 with that.

22 **Q** No, sir. You told them that you gave the gun to
23 Derrick?

24 **A** No, sir. He was in the room.

25 **Q** Excuse me?

1 **A** I said he was in the room. He had told them that I
2 gave it to him, so I went along with that.

3 **MR. MEADORS:** Beg the Court's indulgence. Do
4 you care if I approach? With Your Honor's
5 permission?

6 **THE COURT:** Yes, sir.

7 **Q** That's your signature down there, isn't it?

8 **A** Yes, sir.

9 **"Q** What did you do with Brian's gun"?

10 **"A** I wrapped it up in a t-shirt. I gave it to
11 Derrick at his house when we first got there. I told
12 him to get rid of it or keep it if he wanted it. I
13 told him it wasn't dirty. I don't know what he did
14 with it."

15 **Q** No, sir. That's what you told them.

16 **A** I was going along with the lie. Yes, sir.

17 **Q** Where did you get your .9 millimeter from?

18 **A** I bought it from a pawn shop.

19 **Q** And did you steal it from her?

20 **A** No, sir. I didn't steal it. Natalie had bought it.

21 **Q** Well, did she lose it? Didn't you say in your
22 statement -- I'll show it to you -- that she had lost
23 it in a move?

24 **A** Yeah. I didn't want her to get in no trouble.

25 **Q** I don't understand that.

- 1 **A** I said yeah, I said it. I didn't want to get Natalie
2 in no trouble when she had bought it from them.
- 3 **Q** Natalie bought it from the pawn shop. She lost it.
4 Didn't you find it and some of her stuff when she was
5 moving?
- 6 **A** That's what I said. I didn't want her to get in no
7 trouble.
- 8 **Q** She had it to start with. Why would it get her in
9 trouble? And you all are friends, right?
- 10 **A** Yeah.
- 11 **Q** You kept it and didn't tell her you had it?
- 12 **A** That's what I said. I didn't want to get her in no
13 type of trouble.
- 14 **Q** It was her gun, wasn't it?
- 15 **A** It was her gun. She had bought it from me though.
- 16 **Q** She what?
- 17 **A** She had bought it from me.
- 18 **Q** Why? Do you remember when Stan asked you why hadn't
19 you told anybody about this before, do you remember
20 telling him, I didn't know what they had or whatnot?
- 21 **A** I think I said that. Yes, sir.
- 22 **Q** You waited to see what the evidence was against you
23 before you told your story?
- 24 **A** No. I had went to the police. Then I told them.
- 25 **Q** Do you remember telling them how you got the 70 or

1 \$80?

2 A Yes, sir. I was filled in on all that the next day.
3 So I told them.

4 Q Who filled you in on that, Mr. Sims?

5 A All of them.

6 Q Who is "all of them"?

7 A The co-defendants in the case.

8 Q Did they gather around, have a meeting and say,
9 here's what you did?

10 A No. They told me what all happened the next day
11 because I didn't remember a lot of things.

12 Q If you don't mind me approaching you again. Did you
13 take the money from Bryan? Question. Your answer is
14 what?

15 A I said yes.

16 Q You said, "When I was getting ready to throw him in
17 the water, I got his wallet to get his ID. He had
18 like 70 or \$80 in there. I gave the money to Natalie
19 for them to get some gas and food on the way to
20 Charleston"?

21 A I told them what all they told me. Yes, sir.

22 Q And do you remember when they asked you, "Why did you
23 want his ID", do you remember what you told them?
24 Please read that right there. "In case"?

25 A I said, "In case the body came up, I didn't want them

1 to know who it was."

2 Q "In case the body came back up, I didn't want them to
3 know who it was." That's why you took these concrete
4 blocks and the tow and tried to weight Brian's body
5 down, isn't it? You didn't want anybody ever knowing
6 about this, did you? As a matter of fact, if that
7 body hadn't floated up, it would still be down there
8 today, wouldn't it? You weren't ever going to tell
9 anybody about this?

10 A I can't -- I can't say.

11 Q Do you remember when Smith asked you, "Keith, if this
12 is self-defense like you're saying, why didn't you
13 report it?" Do you remember saying, "I wasn't going
14 to tell on myself or not. I didn't know what all
15 they had or not." You didn't know what the evidence
16 was, did you?

17 A I knew what the evidence was, but I was scared.

18 Q But you knew what you'd done. So when you told
19 Sergeant Dennis and Wes Boland that you didn't shoot
20 him, that was not the truth, was it?

21 A No. I was lying because when I seen he had no gun I
22 was scared.

23 Q And when you told -- I'm sorry?

24 A When I seen he had no gun I was scared.

25 Q When you saw he didn't have a gun?

1 **A** I was scared.

2 **Q** And then the second statement to Lieutenant McCraw,
3 you denied then that he had a gun, didn't have a gun.
4 You denied shooting him at all, correct?

5 **A** I told you that earlier. Yes, sir. I was scared.

6 **Q** So if he'd had a gun, you would have come forward?

7 **A** I can't say what all I would have did. Everything
8 happened so fast.

9 **Q** But you didn't tell the police officers the truth on
10 January 1st, January 2nd or January 7th when they
11 came back to talk to you. Do you remember they got
12 you in the Lexington County jail and brought you back
13 to Newberry? You again denied that you were involved
14 in the shooting of Brian Anderson, correct?

15 **A** I told you I was scared. Yes, sir.

16 **Q** You then on January 22nd, over three weeks later,
17 over three weeks later, you talk to Investigator
18 Smith and you tell him, "I saw a gun"?

19 **MS. DURANT:** Objection, Your Honor. I think
20 he's --

21 **MR. MEADORS:** Your Honor, that is not testimony.

22 **THE COURT:** Overruled.

23 **MS. DURANT:** No. I'm saying I think he's
24 harassing the witness, victim, Your Honor.

25 **THE COURT:** Overruled. Go ahead.

1 **MR. MEADORS:** Your Honor, I take exception to
2 that I was harassing the witness. I just want the
3 record to reflect that.

4 **THE COURT:** Overruled. Go ahead.

5 **Q** You told Investigator Stan Smith on January 22nd, "I
6 saw the gun. He had a gun." Didn't you?

7 **A** Because I was scared. The guy didn't have no gun, so
8 I was scared.

9 **Q** "It was a .45. I gave it to Derrick. He was going
10 to get rid of it." You even told them where to go
11 look for it in Newberry, didn't you?

12 **A** I didn't. Derrick did.

13 **Q** You sent them looking for a .45 because you thought
14 it would help your defense then, didn't you?

15 **A** Derrick took them to get his, I guess.

16 **Q** You even told Siniard over here when he came -- did
17 you tell him, too, hey, no, it's true I gave him that
18 .45? Do you remember telling him that?

19 **A** I went along with the lie. Yes, sir.

20 **Q** So that's another lie?

21 **A** That's the same thing you asked earlier. I told you
22 that.

23 **Q** It's still a lie?

24 **A** I told you that.

25 **Q** And the first time you ever said that you thought

1 there might be a gun is today. Isn't that right?

2 **A** I told the truth. Yes, sir.

3 **Q** You're telling the truth today. And she asked you
4 did you look under the seat. Why would you need to
5 do that? There wasn't a gun. You knew there wasn't
6 a gun, didn't you?

7 **A** I can't say there wasn't a gun. I didn't look under
8 there to see.

9 **Q** Oh. So you're now saying that there might be a gun?

10 **A** It might. I never looked to see.

11 **Q** But you admit you lied to Stan Smith when you told
12 him you saw the .45?

13 **A** I went along with Derrick's lie, yeah.

14 **Q** Derrick didn't shoot him, did he?

15 **A** No, sir.

16 **MR. MEADORS:** Beg the Court's indulgence. Thank
17 you, Your Honor. Beg the Court's indulgence a
18 moment.

19 (Pause)

20 **Q** Is this the gun you used to kill Brian Anderson?

21 **A** (Nods head affirmatively).

22 **Q** Is that a yes?

23 **A** Yes, sir.

24 **Q** And you were about 12 to 18 inches from him when you
25 shot him?

1 **A** I can't say how close he was.

2 **Q** And your arm was outstretched like that when you
3 fired, wasn't it?

4 **A** No, sir. It was kind of like -- like that.

5 **Q** Kind of like that?

6 **A** I was pulling it out like that.

7 **Q** Pulling it out like that. And that's where you shot
8 it?

9 **A** Like it was something like this right here.

10 **Q** So you're in the passenger's side. You pull it out
11 like that?

12 **A** Yeah. He was reaching down. I pulled it out like
13 that.

14 **Q** And at what point did it go off?

15 **A** It probably had to be like right here, something like
16 that.

17 **MR. MEADORS:** That's all.

18 **THE COURT:** Redirect?

19 **MS. DURANT:** Thank you, Your Honor.

20 REDIRECT EXAMINATION

21 **BY MS. DURANT**

22 **Q** Keith, you said you were in a state of shock that
23 night. Had you ever experienced anything like this
24 before?

25 **A** No, ma'am.

1 Q Is this the worst night you had ever had?

2 A Yes, ma'am. It happened amazingly fast, ruined my
3 whole life.

4 Q You said you were not thinking clearly?

5 A No, ma'am.

6 Q Did you want your mama to know?

7 A No, ma'am.

8 MS. DURANT: No further questions, Your Honor.

9 MR. MEADORS: Just two.

10 RECROSS EXAMINATION

11 BY MR. MEADORS

12 Q I thought you said you had been shot at before. And
13 you've got three convictions for grand larceny and
14 four for petit larceny?

15 MS. DURANT: Objection, Your Honor. Your Honor,
16 that's beyond the scope of redirect.

17 MR. MEADORS: Your Honor, she said he --

18 THE COURT: All right. Just --

19 MS. DURANT: Those are not --

20 MR. MEADORS: Those are what we agreed on before
21 could be asked, Your Honor.

22 THE COURT: I understand that. She said it's
23 beyond the scope of --

24 MR. MEADORS: Your Honor, he said he --

25 THE COURT: -- redirect. I understand what she

1 said. Ask him the question.

2 Q You've been adjudicated for three counts of grand
3 larceny and two counts of petit larceny, in Newberry,
4 haven't you?

5 A Back when I was 15.

6 Q And you did say -- she said you hadn't been through
7 this before. You did say previously you'd been shot
8 at, hadn't you?

9 A Yeah.

10 Q Is that true?

11 A Yeah. I have been shot at before.

12 Q Thank you. That's all.

13 **THE COURT:** All right. Come down, sir. Thank
14 you very much. All right, Ladies and Gentlemen of
15 the Jury. That will conclude the testimony for the
16 day. The trial will resume again at 9:30 in the
17 morning. I anticipate we'll finish this trial
18 tomorrow, but I never know. Things just don't always
19 go according to the schedule. But I do anticipate we
20 will finish tomorrow.

21 So again let me caution you not to read or watch
22 or avail yourself of any news accounts of this trial.
23 And don't discuss the case among yourselves when you
24 return to the jury room or with anyone else over the
25 evening hours. I hope you have a pleasant evening.

1 You're now excused for the day. Thank you very much.
2 Oh, wait a minute. Just hold on. We are going to
3 2-A?

4 *THE CLERK:* Yes, sir.

5 *THE COURT:* Yeah. Just come on back to your
6 jury room. I've been informed we're going to have to
7 change courtrooms tomorrow. It won't be a big
8 change. But the easiest thing for you to do is just
9 come back to the jury room. And we'll escort you to
10 one of the downstairs courtrooms. So we'll see you
11 in the morning.

12 (Jury out at 5:17 p.m.)

13 *THE COURT:* We'll stand at ease until 9:30.

14 *MR. MEADORS:* 2-A did you say?

15 *THE CLERK:* Yes, sir.

16 *THE COURT:* I understand we're going to -- just
17 for the audience, it's my understanding we are going
18 to be in 2-A tomorrow which is on the second floor
19 and it will be the courtroom under that courtroom
20 nextdoor. So, as you come in, it will be on the
21 left-hand side instead of the right-hand side on the
22 second floor. We're going to have to move out of
23 this courtroom.

24 (Whereupon, the proceedings are concluded for
25 the day, to be reconvened tomorrow morning)

Thursday, March 23, 2006

1
2 **THE COURT:** Anything of a housekeeping nature
3 that needs to be brought up before we begin?
4 Anything from the State?

5 **MR. MEADORS:** No, sir.

6 **THE COURT:** Anything from the defendant?

7 **MS. DURANT:** Well, Your Honor, we are -- have a
8 small problem this morning. Our next witness was
9 going to be Derrick Ruff.

10 **THE COURT:** Uh-huh (affirmative).

11 **MS. DURANT:** We had issued a subpoena for him.
12 Ms. Owings had talked to his attorney, had called his
13 attorney earlier this week and let him know that we
14 were planning to call him. She had tried to reach
15 his attorney this morning.

16 **THE COURT:** Where is Mr. Ruff?

17 **MS. DURANT:** He's downstairs.

18 **THE COURT:** Okay.

19 **MS. DURANT:** She has been trying to reach him.
20 We've --

21 **THE COURT:** Who is his attorney?

22 **MS. DURANT:** Tommy --

23 **MR. BRYANT:** Bellinger.

24 **MS. DURANT:** -- Bellinger.

25 **THE COURT:** Does he practice here in Columbia?

1 **MR. MEADORS:** He's in Lexington actually. He
2 was actually -- Bruce Lloyd was actually another
3 attorney in that firm who just left a couple of weeks
4 ago. Tommy Bellinger is one of the heads of that
5 firm. So I think they got the case appointed. And
6 he is representing him. He's in Lexington.

7 **MS. DURANT:** She left several messages for
8 Mr. Bellinger yesterday. He called this morning.
9 His paralegal says she's in a computer class and
10 can't reach him until 10:30.

11 **THE COURT:** Well, I'm not --

12 **MS. DURANT:** Mr. Ruff is willing to testify, but
13 we need his attorney.

14 **THE COURT:** Where is Ms. Owings?

15 **MS. DURANT:** She went to check her voice mail to
16 see if Mr. Bellinger returned her call.

17 **THE COURT:** Let her put it on the record. Bring
18 him on up. What's the State's position?

19 **MR. MEADORS:** I don't think I have a position to
20 take. I have talked to Mr. Bellinger before I talked
21 to his client and had gotten his permission to talk
22 to him. But you as far as them calling him, I did
23 not discuss that. So I don't have --

24 **THE COURT:** That's fine. I just wanted to know
25 if you had anything to say.

1 **MS. DURANT:** He was on your list. He was a
2 potential State's witness originally, right?

3 **MR. MEADORS:** Sure. Sure.

4 **THE COURT:** Did he have any objection to the
5 State calling Mr. Ruff as a witness?

6 **MR. MEADORS:** No, sir. No, sir. But I don't
7 want to speak for the defense.

8 **THE COURT:** I understand. I'm just trying to
9 get some historical background. Well, let's get Ms.
10 Owings. I'd like for her just to put on the record
11 that she's notified the lawyer. He chose not to
12 come.

13 **MS. DURANT:** May I be excused to call her, Your
14 Honor, to get her?

15 **THE COURT:** Is she just waiting up there?

16 **MS. DURANT:** She just went to her office to
17 check her voice mail.

18 **THE COURT:** Is there a phone you can use?

19 **MS. DURANT:** Yes, sir.

20 (Pause)

21 **MS. DURANT:** She's on her way, Your Honor.

22 **THE COURT:** Ms. Owings, it's my understanding
23 you've been in contact with Mr. Bellinger or
24 Ballenger who happens to be representing Mr. Ruff.
25 Is that correct?

1 **MS. OWINGS:** Your Honor, I have attempted to
2 contact him.

3 **THE COURT:** Have you ever talked to him?

4 **MS. OWINGS:** Yes, sir. I talked to him on
5 Monday or Tuesday and asked his permission to talk to
6 Mr. Ruff.

7 **THE COURT:** Uh-huh (affirmative).

8 **MS. OWINGS:** He allowed me to talk to him and
9 asked him just a few questions on speaker phone with
10 his paralegal because he was unavailable. However,
11 he was -- when I talked to him, he really wanted to
12 send someone down to advise Mr. Ruff before he talked
13 to me. When I realized the State was not going to
14 call him and I would not be able to cross examine, we
15 subpoenaed Mr. Ruff to call him as a defense witness.

16 I left Mr. Ballenger two messages yesterday
17 advising him of this. However, I have not had the
18 opportunity to check all of my messages. I've
19 accumulated a lot of them this week while I have been
20 in trial. And I don't know if he has said possibly,
21 no, you cannot talk to him, you cannot put my client
22 up.

23 **THE COURT:** Has he ever refused to allow his
24 client to take the stand?

25 **MS. OWINGS:** I don't know.

1 **THE COURT:** To your knowledge.

2 **MS. OWINGS:** Your Honor, I don't know.

3 **THE COURT:** To your knowledge, has he refused?

4 **MS. OWINGS:** No, sir.

5 **THE COURT:** Okay. You've subpoenaed him. Call
6 him.

7 **MR. MEADORS:** Judge, just out of -- you asked if
8 we had a position. I don't know if there's somebody
9 else in that firm. Just on behalf of Mr. Ballenger
10 and his firm I guess, I don't know if there's
11 somebody else in the firm that could come ever here.
12 I don't know.

13 **MS. OWINGS:** He does have a Columbia office,
14 Your Honor. For the sake of my own law license, I
15 would like to know if he left me a message saying
16 that I could not.

17 **THE COURT:** Well, I'll protect your law license.
18 It's his law license that may be in jeopardy.

19 **MR. MEADORS:** Your Honor, he has been very
20 cooperative when I called him. I think he called Ms.
21 Owings back. On behalf of him right now and his
22 client, I don't know --

23 **THE COURT:** Well, what would you have me do? I
24 mean, both of you? Do you want to stop the trial? I
25 mean, we've got subpoenas out for this man. He's

1 here. His attorney has elected to go to a computer
2 class and not come here, is what I understand. And
3 he has been given notice to be here, or at least to
4 advise his client. I don't see that Ms. Owings has
5 done anything unethical, and/or you.

6 **MS. OWINGS:** My message did say I would either
7 call him yesterday or this morning. But I don't know
8 if he left me a message.

9 **MR. MEADORS:** I would just say --

10 **THE COURT:** Well, then call your next witness.

11 **MR. MEADORS:** -- a phone call to his office, see
12 if somebody else can come. I don't have a dog in the
13 fight I guess, but I just wanted to ...

14 **MS. DURANT:** You said you had agreed for the
15 state to call him, correct?

16 **THE COURT:** That's all on the record. He has
17 agreed for the State to call him as a witness.

18 **MR. MEADORS:** I do not know if he wanted to be
19 to be here for that testimony. We never got that
20 far. But he agreed for us to do it. And I think
21 what's what Ms. Owings is worried about, giving him
22 the opportunity to be here.

23 **THE COURT:** The only other thing I can do is
24 send a Sheriff's Deputy after Mr. Ballenger or
25 Bellinger, or wherever he is, to his office.

1 **MS. OWINGS:** Mr. Meadors, I have talked to his
2 paralegal. She told me she would do her best to
3 contact him. I wasn't offered another attorney.

4 **MR. MEADORS:** And I'll sit down and hush.

5 **THE COURT:** I think that's best. Do you have
6 another witness you can call?

7 **MS. DURANT:** I do, Your Honor.

8 **THE COURT:** Well, let's move. I mean, we've got
9 a jury sitting here.

10 **MR. MEADORS:** Judge, let me say he did tell me
11 he could testify. I mean, he said he could testify,
12 was fine to do it. Tommy told me that. I didn't
13 follow the step by him not being here.

14 **THE COURT:** Do you wish for me to issue a court
15 subpoena for Mr. Ballenger?

16 **MS. DURANT:** I don't think that's necessary,
17 Your Honor.

18 **THE COURT:** I won't do it. Call your next
19 witness. Get your witness ready. I'm going to bring
20 the jury in. Just wait a minute. Ready for the
21 jury, Ms. Durant?

22 **MS. DURANT:** Yes, sir.

23 **THE COURT:** Bring the jury in.

24 (Jury in at 9:52 a.m.)

25 **THE BAILIFF:** Your Honor, the jury is present.

1 **THE COURT:** All right. Thank you. Good
2 morning, ladies and gentlemen. I hope you had a
3 pleasant evening. We're now ready to continue with
4 the trial. Ms. Durant, call your next witness.

5 **MS. DURANT:** Your Honor, the defense would call
6 Mr. Kelly Fite.

7 **KELLY FITE,** after being duly sworn, testifies as
8 follows:

9 **THE CLERK:** Please have a seat there, sir.
10 State your full name for the record.

11 **COURT REPORTER:** And I'll need you to spell your
12 last name, please.

13 **WITNESS:** Kelly Fite, F-I-T-E.

14 DIRECT EXAMINATION

15 **BY MS. DURANT**

16 **Q** Mr. Fite, good morning. Would you tell the jury
17 where you live, please, sir?

18 **A** I live in Wilburn, Georgia, which is right outside of
19 Atlanta, near Stone Mountain.

20 **Q** And what do you do, sir?

21 **A** I'm retired.

22 **Q** And what did you do before you retired?

23 **A** I worked for the Georgia Bureau of Investigation
24 crime laboratory for 31 years.

25 **Q** You said you're retired, but do you do some work now?

1 **A** I do some consulting for the prosecution and the
2 defense.

3 **Q** You worked -- I'm sorry. You said you worked for the
4 Georgia Bureau of Investigation as a -- what kind of
5 job did you have with them?

6 **A** As a firearms examiner and a crime scene
7 investigator.

8 **Q** What kind of qualifications do you have to do your
9 consulting work, Mr. Fite?

10 **A** I have a BS degree in chemistry. I worked at the
11 crime lab for 31 years. I've attended schools and
12 seminars all over the country concerning firearms and
13 firearms-related evidence and crime scene
14 investigations. I've testified in the Superior and
15 Federal courts in the Southeast about 2700 times.
16 I've examined more than 57,000 firearms, and I did
17 crime scene investigations for about 25 years and
18 probably went to 6 or 700 crime scene investigations.

19 **Q** Have you been to some special training schools?

20 **A** Yes. I've been to many schools over the 31 years.

21 **Q** And these would include schools in what?

22 **A** Firearms evidence, crime scene investigations, blood
23 pattern analysis and anything that's related to
24 firearms or firearms evidence.

25 **Q** You've testified in court how many times?

1 A About 2700 times.

2 Q And how many times have you been qualified as an
3 expert in crime scene investigation or firearms?

4 A Each time I've testified.

5 Q As a qualified expert?

6 A Yes.

7 MS. DURANT: Your Honor, we would like to offer
8 Mr. Fite as an expert in crime scene investigations.

9 THE COURT: Any Voir Dire or objections?

10 MR. MEADORS: You said -- not ballistics?

11 MS. DURANT: Crime scene investigation.

12 THE COURT: Crime scene investigation is what
13 she said.

14 MR. MEADORS: That's fine.

15 MS. DURANT: And firearms examiner. I'm sorry.

16 THE COURT: And firearms examination.

17 MR. MEADORS: No objection.

18 Q Mr. Fite, what is stippling?

19 A Stippling is a term that is also used; another term,
20 the same term, is tattooing. It's the ability of
21 gunpowder to strike human skin and either bruise it
22 or embed the gunpowder in the human skin so that it
23 will be there until the skin decomposes. So it's a
24 permanent type injury from the gunshot. It's
25 produced by the gun at close range.

1 Q So what can stippling tell you about the crime scene?

2 A If you have a stipple pattern and you can tell it's a
3 complete pattern, then you can tell basically what
4 the muzzle target distance was when the victim
5 received the tattoo pattern.

6 Q So you're saying you can tell how far the gun was
7 from the victim when it was fired?

8 A That's correct.

9 Q So with a stippling pattern of 3.5 inches in
10 diameter, how far would the gun have been from the
11 victim?

12 A And the gun, the caliber of the gun?

13 Q .9 millimeter gun.

14 A A stipple pattern of three and a half inches would be
15 a muzzle target distance somewhere between three and
16 five inches. And the way that this gunpowder is
17 deposited, if you'll think about if you had a
18 flashlight and you turned it on and you put it
19 against the wall and then you move it back and you'll
20 see how the light comes out, that's exactly the way
21 the high velocity burning and unburned gunpowder come
22 out of the muzzle of the gun and strike the target
23 and produce the pattern that we're talking about.

24 Q So it's your expert opinion then with a 3.5, the gun
25 would have been three to five inches from the

1 entrance of the bullet into the victim?

2 A Yes.

3 Q You are familiar with blood stain pattern analysis
4 also?

5 A I am.

6 Q As part of your crime scene investigations?

7 A Yes.

8 Q Are you familiar with the term back spatter?

9 A I am.

10 Q Can you tell us what back spatter is?

11 A Back spatter is a blood pattern that's produced when
12 the bullet strikes the victim. When the bullet goes
13 in, there is a fine mist of blood that comes back out
14 of the gunshot hole of entry. And this mist is very
15 small. It's high velocity. The particles are less
16 than a millimeter in diameter. And it doesn't go
17 very far from the point of entry, six inches.

18 Q So you mentioned high velocity. Would -- high
19 velocity blood stains are like a fine mist?

20 A Very fine mist, yes.

21 Q And you're saying the high velocity blood stains can
22 tell you how far the victim was from the blood
23 spatter?

24 A No. They will -- high velocity blood spatter, back
25 spatter, is just fine mist that comes out about six

1 inches and then falls away due to gravity.

2 Q So, let me make sure I understand, please, sir. The
3 high velocity back spatter would go out about six
4 inches from the victim?

5 A That's correct.

6 Q And how do you know this?

7 A Well, of the thousands of guns I've looked at that
8 were involved in shootings or homicides, many of
9 these cases were requested they do a muzzle to target
10 distance. Muzzle to target distance means how far
11 was the gun from that victim. If I had a muzzle
12 target distance of greater than six or eight inches,
13 I never found high velocity blood spatter on the gun.
14 So, that's the best indication of how far out this
15 high velocity blood spatter goes from the back
16 spatter.

17 Now, if the person is in a closed area and, say,
18 their head is next to a wall or something and they
19 get shot, you can see the collection of the high
20 velocity blood spatter. But even in intentional
21 self-inflicted gunshots like a suicide where the gun
22 is pressed against the skin, you get very little
23 blood on the gun. You get a little bit in the
24 muzzle. But if you back it up like an inch away from
25 the tissue, then you're going to have the misting on

1 the gun. But you get that gun back more than six,
2 eight inches from the victim, and you are not going
3 to have this mist.

4 Q You're familiar with a .9 millimeter gun?

5 A I am.

6 Q How many times have you shot a .9 millimeter or tested
7 one?

8 A Hundreds of times.

9 Q What can you tell us about the safety on the .9
10 millimeter?

11 A It's according to which .9 millimeter it is.

12 Q Do they have safeties on them?

13 A Yes.

14 Q What do you know -- can you tell me about the
15 safeties on those?

16 A Well, I mean, all of them, most all of the knew or .9
17 millimeters have a manual safety or a safety that's
18 disengaged itself when you pull the trigger. Most of
19 all of them have a drop safety, and some of them have
20 a magazine safety.

21 Q So how difficult is the safety to dislodge or turn
22 off, whatever the term is?

23 A Well, it's -- to disengage the safety usually is
24 easily done.

25 Q What kind of movement would it take to do that?

1 A Usually the thumb on the shooting hand if you're
2 right handed if it's a right-handed gun.

3 MS. DURANT: I have no further questions for Mr.
4 Fite. If you would please answer anything the
5 solicitor, the State would have, Mr. Fite.

6 A Thank you.

7 THE COURT: Cross examination.

8 CROSS EXAMINATION

9 BY MR. MEADORS

10 Q Good morning, Mr. Fite.

11 A Good morning, sir.

12 Q You used to be a state employee like me, didn't you?

13 A Yes, sir.

14 Q You worked for Georgia Bureau of Investigations,
15 G.B.I.?

16 A That's correct, sir.

17 Q Then you retired, and you're in private practice now?

18 A True.

19 Q You don't get paid by the state any more?

20 A No.

21 Q Now, you've testified the stippling and the
22 tattooing -- where did this crime occur?

23 A Sir?

24 Q Where did the crime occur?

25 A When did this crime occurred?

1 Q And where?

2 A The crime occurred in South Carolina.

3 Q Yes, sir. We know that. But where specifically?

4 A I do not know.

5 Q Have you reviewed any of the statements in this case?

6 A No, sir.

7 Q Defendant's statements, witnesses' statements,
8 anything?

9 A No, sir.

10 Q Do you know the victim's name?

11 A I could probably find it.

12 Q That's all right. Now, you didn't do any testing
13 yourself as far as distance with this gun, did you?

14 A No. Not this gun.

15 Q And you had the gun in your possession?

16 A I did.

17 Q And you didn't do any testing?

18 A No.

19 Q You had it in your possession last week when
20 Investigator Collins brought it to you, correct?

21 A Yes, sir. When Mr. Collins brought it to me, my main
22 interest was to check the safeties on the gun to make
23 sure that they were functional. And I did that. And
24 they were.

25 Q And how many safeties would you say are on that gun?

- 1 **A** Well, it has a manual safety that blocks the searer
2 that has a magazine safety which moves the trigger
3 bar up out of the way. It has a drop safety that
4 works in two directions. It works if you drop it on
5 the butt, and it works if you drop it on the back
6 strap of the gun.
- 7 **Q** So if the safety was off, obviously you'd have to put
8 that back on before you shot it?
- 9 **A** If the safety is engaged --
- 10 **Q** If the safety was engaged, you'd have to --
- 11 **A** Disengage it; yes, sir.
- 12 **Q** And if it -- if the clip isn't in here, you couldn't
13 fire it, correct.
- 14 **A** If the magazine is out, it won't fire.
- 15 **Q** And really you can't test this distance on flesh, can
16 you? Have you ever shot anybody to determine muzzle
17 distance?
- 18 **A** No. It's hard to find a volunteer.
- 19 **Q** And that's why it's not really exact science, is it?
- 20 **A** Blood spatter?
- 21 **Q** No, sir. I'm talking about stippling and the
22 pattern.
- 23 **A** Stippling. Stippling, at the G.B.I., we derived a
24 test that we use to duplicate stipple patterns. What
25 we use is we use six mill plastic. And the six mill

1 plastic will accept the high velocity powder pattern
2 particles and leave a dimple in the plastic that's
3 permanent. And it's very much like skin. And this
4 is what we use. And we'd fire a bracket to bracket a
5 tattoo pattern. And I've done hundreds of these
6 tests.

7 Q Would you -- is there literature out there, studies
8 that show it could be up to 18 inches?

9 A Some weapons will stipple to 18 inches. But when a
10 weapon stipples at 18 inches, the pattern is large.
11 The pattern is very sparse. And you'll notice that
12 on the outside of the pattern the stippling is not as
13 intense or as permanent as the particles next or
14 closer to the gunshot hole of entry.

15 Q And how wide was the stippling in this, the diameter?
16 What was the diameter of the stippling?

17 A Of the stipple pattern?

18 Q Stipple pattern.

19 A Three and a half inches.

20 Q You got some notes there you prepared?

21 A Only on the gun and its safeties and the trigger
22 pull.

23 Q Your Honor, I do not have these. Can I have those?

24 A Sure.

25 (Document handed to Mr. Meadors)

- 1 Q Thank you. And you're telling this jury that every
2 time it's that three and a half inch, it's going to
3 be between three to five inches every time from the
4 muzzle to the skin?
- 5 A It's going to be in that range, according to the
6 ammunition that you use.
- 7 Q And it could be more than that, couldn't it?
- 8 A I mean, if it's more, it could be very little more.
9 It's going to be in that range.
- 10 Q It could be up to up to 18 inches?
- 11 A No.
- 12 Q You can't say it wouldn't?
- 13 A No.
- 14 Q Never be up to 18 inches?
- 15 A No. If you have a defined pattern that's three and a
16 half inches in diameter, you can't get it to
17 18 inches.
- 18 Q You've seen the picture of this pattern?
- 19 A No, I haven't.
- 20 Q You haven't even looked at the picture of the
21 stippling pattern?
- 22 A I've seen a drawing of it showing I guess what the
23 doctor drew as the stipple pattern.
- 24 Q On a piece of paper?
- 25 A Yes.

1 Q You hadn't seen the actual pattern?

2 A No.

3 Q Wouldn't you want to do that?

4 A Well, I mean, if the doctor describes it as three and
5 a half inches and he's looking at it, and I would
6 suspect that he's pretty close to being right; I
7 think in most cases when any laboratory does a
8 stipple pattern, they are going on the autopsy
9 report. And that's the best information you can have
10 to duplicate a stipple pattern.

11 Q At G.B.I. don't you usually look at the stuff before
12 you testify?

13 A No. We'd look at the autopsy report.

14 Q What other injuries did he have on his body? Do you
15 know that?

16 A I do not know.

17 Q So under your testimony, three to five inches, that
18 gun would have been put right up to his head and
19 fired then, wouldn't it?

20 A That's correct.

21 Q Are you familiar with the trajectory of the
22 projectile that went into his body? Do you know
23 which way it went?

24 A Only by what I've been told. It was front to back,
25 slightly down and right to left.

- 1 Q Consistent with like this right here, three to five
2 inches with your testimony, isn't it?
- 3 A I don't understand what you're saying.
- 4 Q Can I use your head?
- 5 A Yes, sir.
- 6 Q Consistent with right here, right?
- 7 A That's correct.
- 8 Q Right here?
- 9 A Yes.
- 10 Q Was the bullet still in Brian's head?
- 11 A Yes.
- 12 Q What kind of car was it?
- 13 A I don't have an idea.
- 14 Q Have you ever looked at it?
- 15 A No.
- 16 Q Do you know where the blood was in there?
- 17 A No.
- 18 Q Do you know where the evidence has been stated the
19 victim was sitting in the car?
- 20 A No.
- 21 Q Operating condition: Good. This gun was in good
22 working order, correct?
- 23 A That's correct, sir.
- 24 Q Trigger pull consistently around 8 or so, right?
- 25 A The average is 8 pounds..

1 Q And if a gun has been sitting there a couple of
2 years, hasn't been oiled, that could cause a little
3 difference in a trigger pull, couldn't it?

4 Investigator Collins found 9. You found 8. That
5 wouldn't be inconsistent, would it?

6 A Well, this gun, the first trigger pull I did on I
7 believe was six and a half pounds. And then the rest
8 of them were around 8 or 8 and a half. The first
9 trigger pull when a gun has been sitting around, you
10 don't use that number. You record that number but
11 you don't use that number to make your calculations.
12 Because if it's been sitting there it's either going
13 to be harder or less than it would be if it were used
14 recently.

15 Q And so that's why you circled this 8. I don't know
16 if you answered my question. Your finding would be
17 consistent with Investigator Collins' finding if the
18 gun has been sitting there for a couple of years and
19 hasn't been oiled, correct?

20 A That's correct.

21 Q How long have you been retired?

22 A Six years.

23 Q And how much are you being paid today?

24 A I get \$900 to testify.

25 Q \$900 for this testimony?

1 A Yes.

2 Q And did you get paid when you looked at the gun last
3 week?

4 A No. I haven't been paid yet.

5 Q No, sir. But are you going to be?

6 A I hope.

7 Q What's that bill going to be?

8 A The total bill should be about \$1,600.

9 Q When are you going back to Georgia?

10 A Today.

11 Q Thank you.

12 THE COURT: Redirect?

13 REDIRECT EXAMINATION

14 BY MS. DURANT

15 Q Mr. Fite, do you usually get paid when you testified
16 the 2700 times? I mean, not those 2700, but as a
17 private consultant?

18 A Oh, yes. I think everybody that works should get
19 paid. And I always got paid.

20 Q Do most experts get paid, to the best of your
21 knowledge?

22 A Oh, yes.

23 Q You said the trigger pull on this gun when you tested
24 it was what?

25 A The average was eight pounds.

1 Q Eight pounds. So you tested it more than once?

2 A Yes. I tested it eight times, nine counting the
3 first pull that I did not average with the rest of
4 them.

5 MS. DURANT: No further questions, Your Honor.
6 Thank you, Mr. Fite.

7 THE COURT: Anything further? Anything further?

8 MR. MEADORS: Oh. No, sir.

9 THE COURT: May the witness be excused? Any
10 objection?

11 MR. MEADORS: No, sir.

12 THE COURT: You're free to go back to your home,
13 sir. Thank you very much. You're excused. Call
14 your next witness.

15 MS. OWINGS: May we approach, Your Honor?

16 THE COURT: Sure.

17 (Whereupon, a bench conference is had)

18 THE COURT: Ladies and Gentlemen of the Jury,
19 it's my understanding the next witness to be called
20 by the defendant is presently incarcerated. It's
21 going to take a few minutes to get him up here.

22 MS. OWINGS: We have him outside.

23 THE COURT: Just let me handle this. I'm going
24 to ask you to go to your jury room for just a minute
25 while I have to talk him because he's volunteering to

1 testify and I need to advise him of his rights before
2 he does so. You need not sit through that. It will
3 only take a minute. As soon as I am able to do that,
4 I'll call you back. Just adjourn to your jury room
5 for just a minute.

6 (Jury out at 10:15 a.m.)

7 THE CLERK: Raise your right hand, please.

8 DERRICK RUFF, after being duly sworn, testifies
9 as follows:

10 THE COURT: Have a seat, Mr. Ruff.

11	EXAMINATION

12 BY THE COURT

13 Q Mr. Ruff, I need you to listen to me for just a
14 minute. I need to talk with you before you testify.
15 All right?

16 **A** (Nods head affirmatively).

17 Q It's my understanding that your lawyer has been
18 notified that you are here. He is unable to be here,
19 but he has advised or talked to the defense lawyers
20 and told them that he has no objection to your
21 testifying, provided that I give you or tell you what
22 your rights are. Do you understand?

23 **A** Yes, sir.

24 Q Okay. You have the right to testify or not to
25 testify. Do you understand that?

1 **A** Yes, sir.

2 **Q** The Constitution of the United States gives you that
3 right and the Constitution of the South Carolina
4 Constitution gives you that right. The Fifth
5 Amendment to the Constitution of the United States
6 says that no person shall be compelled in any
7 criminal case to be a witness against himself, which
8 means that you could not be compelled to testify if
9 whatever you were testifying about had some impact on
10 your future. You couldn't be required to testify.
11 Do you understand that?

12 **A** Yes, sir.

13 **Q** Okay. This is a privilege that no one but you can
14 waive. If you want to testify I'm going to let you
15 testify, but you have to voluntarily and
16 intelligently waive your right to testify. Do you
17 understand that?

18 **A** Yes, sir.

19 **Q** Okay. Now, I assume that you've talked to your
20 lawyer somewhat before this time. Is that correct?

21 **A** Yes.

22 **Q** Okay. If you testify, if you agree to testify, of
23 course the State can ask you, or the defense can ask
24 you or the State can ask you any connected of
25 questions they want to about your involvement in the

1 crime that we are here for today. Do you understand
2 that?

3 A Yes.

4 Q Okay. And you could be cross examined about any
5 prior criminal record you might have, too. Do you
6 understand that?

7 A Yes.

8 Q Okay. I'll ask you, Mr. Ruff, if you wish to consult
9 with your lawyer any more, or are you ready to make a
10 decision about whether you wish to testify or don't
11 wish to testify?

12 A I'll testify.

13 Q You will testify?

14 A (Nods head affirmatively).

15 Q All right. You understand your rights?

16 A Yes, sir.

17 Q Okay. That's all I need to know. Thank you very
18 much. Just stay right there.

19 MR. MEADORS: Your Honor, to save time, I don't
20 know whether any potential information may be coming
21 in as hearsay or prior bad -- I'd rather proffer it
22 now and save an objection then coming out. We don't
23 have to -- I don't know what's going to come out.

24 Q All right. Well, what the -- this gentleman is the
25 solicitor for the State, Mr. Meadors. And of course

1 you know the defendant's lawyers. What Mr. Meadors
2 is talking about is that when you testify, generally
3 speaking, you cannot say what somebody else said. In
4 other words, you can testify what you know, what you
5 saw, what you heard about, not necessarily from
6 somebody else, but what somebody else told you
7 happened, you can't testify about that. You can only
8 testify about what you know.

9 **A** What I seen and what I know myself.

10 **Q** That's correct?

11 **A** Got you.

12 **Q** And as long as you understand that. And your lawyers
13 will try not to ask you questions that somebody told
14 me that so-and-so did something. Somebody told me
15 that so-and-so got so-and-so to do something, you
16 know. Because we can't -- we don't know what -- that
17 other person is not here to say whether that's true
18 or not. We just need to know what you know about
19 this case.

20 **A** Yes, sir.

21 **Q** All right? You understand? Is that clear?

22 **MR. MEADORS:** Yes, sir. With the exception of
23 course that they're co-conspirators in this case.

24 **THE COURT:** All right. Who are the other
25 individuals involved?

1 **MR. MEADORS:** Natalie English.

2 **THE COURT:** Ms. Davis and Natalie English.

3 **MR. MEADORS:** And Nikki Davis.

4 **THE COURT:** Nikki Davis.

5 **Q.** You know Natalie English?

6 **A** Yes, sir.

7 **Q** You know Nikki Davis?

8 **A** Yes, sir.

9 **Q** You know Keith Sims?

10 **A** Yes, sir.

11 **Q** Anything the four of you talked about, they can ask
12 you about that. It's just what somebody else -- I
13 don't know who it might be, but anything that the
14 four of you all were talking about, you can say what
15 he said. You can say what Nikki said or what Natalie
16 English said. You know, if you all were talking, if
17 you all were somewhere and did something and were
18 talking about it, you can say what they said because
19 everybody is in this -- sort of this case together.

20 But you can't say what Daniel Elkins said. You
21 can't say what some other person that may have come
22 along outside the four of you. So, I'm sorry. I
23 didn't -- I'm going to make that clear to you. I
24 should have made that clear to start with.

25 **MR. MEADORS:** During this conspiracy. I know

1 Your Honor was saying that, not something that
2 happened years ago or several years ago.

3 **THE COURT:** Well, we'll try to get through it.
4 All right. Are you ready for the jury?

5 **MS. OWINGS:** Yes, sir, I am.

6 **THE COURT:** The jury is going to come and sit
7 over here, and this lady, Ms. Owings, is going to ask
8 you questions. And then Mr. Meadors probably will
9 ask you questions. All right. Bring the jury.

10 (Jury in at 10:22 a.m.)

11 **THE BAILIFF:** Your Honor, the jury is present.

12 **THE COURT:** All right. Thank you very much.
13 Ladies and Gentlemen of the Jury, Mr. Ruff has
14 already been sworn to tell the truth. So I need not
15 do that again. Ms. Owings.

16 **MS. OWINGS:** Thank you, Your Honor.

17 **THE COURT:** Jim, hold on a minute. Somebody
18 move that trolly. Is that part of this --

19 **THE CLERK:** No. That does not need to be here,
20 Your Honor.

21 **THE COURT:** Well, I didn't realize it was going
22 to be that much trouble. All right, Ms. Owings.

23 **MS. OWINGS:** Thank you, Your Honor. If it
24 pleases the Court.

25 DIRECT EXAMINATION

1 BY MS. OWINGS

2 Q Good morning.

3 A Good morning.

4 Q Can you state your name for the jurors?

5 A Derrick Ruff.

6 Q And, Derrick, you need to speak in the microphone so
7 they can hear you. Okay. Derrick, where are you
8 from?

9 A Newberry.

10 Q Where have you lived?

11 A Newberry.

12 Q And tell the jury a little bit about yourself?

13 A I grew up --

14 Q Do you have any children?

15 A Yes. I have one, a little girl.

16 Q And how old is your little girl?

17 A One.

18 Q And where are you living right now, Derrick?

19 A In Newberry County jail.

20 Q How long have you been there?

21 A Twenty-six months.

22 Q And what are you there for?

23 A Accessory after the fact of murder.

24 Q Derrick, I just have a few questions for you this
25 morning. Do you know Keith Sims?

- 1 A Yes, ma'am.
- 2 Q Is he in the courtroom today?
- 3 A Yes, ma'am.
- 4 Q Can you point him out for me?
- 5 A (Witness points).
- 6 Q You need to speak, to explain where you see him so
7 the Court Reporter can get it.
- 8 A Right beside the woman in the black, the little thing
9 wrapped around his head.
- 10 Q How long have you known Keith?
- 11 A All my life.
- 12 Q When you say all your life, how long had that been?
- 13 A Twenty-four years.
- 14 Q Who's older? You or Keith?
- 15 A Me.
- 16 Q How did you meet Keith?
- 17 A In the neighborhood. We stayed in the same
18 neighborhood.
- 19 Q And this was in ...?
- 20 A Third Fourth in Newberry.
- 21 Q How you would you describe your relationship with
22 Keith?
- 23 A He is like a brother to me.
- 24 Q And you're the older brother?
- 25 A Yes, ma'am.

1 Q Is that correct?

2 A (Nods head affirmatively).

3 Q How often did you see Keith?

4 A Every day.

5 Q Did you ever live with Keith?

6 A Yes, ma'am.

7 Q So would it be fair to say that you all had a close

8 relationship?

9 A Yes, ma'am.

10 Q Did Keith look up to you?

11 A We looked up to each other.

12 Q I want to take you back to the night of two and a

13 half years ago, on December 30th of 2003. Okay? Did

14 Keith come over to your house that night?

15 A Yes, ma'am.

16 Q Do you remember when, what time?

17 A Not exactly.

18 Q Was it dark outside?

19 A Yes, ma'am.

20 Q Can you roughly tell me what time of day it was?

21 A It was probably in the early morning.

22 Q What were you doing when he came over?

23 A Asleep.

24 Q You were asleep?

25 A Yeah.

Derrick Ruff - Direct by Ms. Owings

621

- 1 Q What did Keith do when he came to your house?
- 2 A He woke me up.
- 3 Q What was his demeanor like when he came to your
- 4 house?
- 5 A He had a little scary look on his face I would think.
- 6 Q Was he upset?
- 7 A He was like -- he was in shock. And, you know, I
- 8 can't really say what he said. He looked scared to
- 9 me.
- 10 Q He looked scared?
- 11 A (Nods head affirmatively).
- 12 Q When Keith woke you up, what did you do?
- 13 A We walked in the bathroom. Then he told me he had
- 14 messed up, he wanted me to ride with him. So I put
- 15 my clothes on and we left.
- 16 Q Where did you all go?
- 17 A Fulmer Road on Highway -- on 34.
- 18 Q And then where did you go?
- 19 A I walked behind a house to a car and opened the door
- 20 and seen Mr. Anderson in the car.
- 21 Q Was Keith still upset at this point?
- 22 A Yes, ma'am.
- 23 Q Did you all ever go to a park in Newberry County?
- 24 A A park? Mollie Hill Park. No. Molly's Rock.
- 25 Q Molly's Rock Park?

- 1 **A** (Nods head affirmatively).
- 2 **Q** Whose idea was it to go to Molly's Rock Park?
- 3 **A** It was mine. Mine.
- 4 **Q** It was your idea?
- 5 **A** (Nods head affirmatively).
- 6 **Q** Before this night had you ever seen Brian Anderson
- 7 before?
- 8 **A** Yes, ma'am. He had came to the house --
- 9 **Q** Wait. Let me ask you another question. Were you
- 10 from the Monticello Road area?
- 11 **A** No, ma'am.
- 12 **Q** Did you ever live on the Monticello Road area?
- 13 **A** I mean, I had a couple of months. I wasn't --
- 14 **Q** Who did you live with on the Monticello Road area?
- 15 **A** Keith Sims.
- 16 **Q** But the majority of your life where have you lived?
- 17 **A** Newberry.
- 18 **Q** And where did you meet Keith?
- 19 **A** Newberry.
- 20 **Q** You didn't meet him on the Monticello Road area?
- 21 **A** No, ma'am.
- 22 **Q** Okay. So, before this night, had you seen Brian
- 23 Anderson before?
- 24 **A** Yes, ma'am.
- 25 **Q** Had you ever seen Brian Anderson with Keith? Yes or

1 no?

2 A No, ma'am.

3 Q No?

4 A (Shakes head negatively).

5 Q So you never hung out with him?

6 A No, ma'am.

7 Q Had you ever seen Brian Anderson threaten Keith
8 before?

9 A Yes, ma'am.

10 Q Can you tell us about that incident? And you can't
11 say what Brian said.

12 MR. MEADORS: Objection to relevance or what
13 time period.

14 Q When did you see Brian Anderson threaten Keith?

15 A Probably it was around December. It was in December.

16 Q How long before the incident with Molly's Rock Pond?

17 A Probably about a week or two.

18 Q A week or two before this incident?

19 A Yes, ma'am.

20 MS. OWINGS: May I continue, Your Honor?

21 THE COURT: Yes, ma'am.

22 MS. OWINGS: Thank you, Your Honor.

23 Q Without saying anything that you heard Brian Anderson
24 say, what happened that night?

25 A They was -- it was like -- like they wanted to try to

1 jump on him.

2 Q Okay. Let's back up. Who is "they"?

3 A Him.

4 Q Who is "him"?

5 A Brian Anderson and two other dudes. I don't know.

6 Q Did you know the other dudes?

7 A I don't know them either.

8 Q Where were you?

9 A I was sitting on the top of a car, on the back of the
10 car.

11 Q Where was the car?

12 A In the driveway.

13 Q Whose driveway?

14 A In Keith Sims' driveway.

15 Q So you were sitting on the back of the car in the
16 driveway at Keith Sims' house?

17 A Yes, ma'am.

18 Q Okay. Continue.

19 A And Keith Sims was leaning against the other car in
20 the driveway. And Brian Anderson and two more other
21 guys and some girl that been in the car with him, she
22 been inside the car with him and, you know, had a
23 couple of words. Then I stated it ain't -- I said --
24 I stated there ain't going to be no jumping.

25 Q Why did you think Keith was going to get jumped?

1 A Because the way they was -- you know, the way they
2 was --

3 MR. MEADORS: Objection. Speculation.

4 MS. OWINGS: It goes to what he believed.

5 THE COURT: Overruled. Go ahead.

6 Q Why did you think that Keith was going to get jumped?

7 A The way they was talking, you know.

8 Q Okay.

9 A And both of them gets (sic) out the car and walk
10 around the car.

11 Q Both of them. Both of who?

12 A The other two guys, the gentlemens (sic). I don't
13 know their names.

14 Q How did you know that was Brian Anderson?

15 A Because I -- he said his name, and he told me after
16 they left that that was Brian.

17 Q But you didn't know the other two men?

18 A I didn't know them.

19 Q So let's go back to where we were. I'm sorry I
20 interrupted you. So the other two guys got out of
21 the car?

22 A Yes, ma'am.

23 Q And without saying what they said, what did they do?

24 A They didn't really do nothing. They was just
25 walking, coming up close, easing up close to him.

1 And that's when I started --

2 Q Easing up close to who?

3 A Keith Sims.

4 Q So it was Brian Anderson and two other guys you don't
5 know against Keith Sims?

6 A Yes, ma'am.

7 Q Was Keith afraid?

8 A He looked like he been afraid.

9 Q He looked afraid?

10 A (Nods head affirmatively).

11 Q And once again, how long before the incident at
12 Molly's Rock Pond was this?

13 A Probably a week or two.

14 Q A week or two?

15 A (Nods head affirmatively).

16 Q Derrick, did you ever have an opportunity to talk to
17 the police after this incident at Molly's Rock Pond?

18 A No, ma'am.

19 Q Did you ever talk to the Newberry County Sheriff's
20 Department about this case?

21 A After they locked me up.

22 Q When they locked you up, you talked to them?

23 A (Nods head affirmatively).

24 Q Did you ever have an opportunity to talk to the
25 Richland County Sheriff's Department about this case?

- 1 A Yes, ma'am.
- 2 Q Do you remember who you talked to?
- 3 A No, ma'am.
- 4 Q Is anyone that you talked to in this courtroom today?
- 5 With the Richland County Sheriff's Department?
- 6 A About the case?
- 7 Q No.
- 8 A No, ma'am.
- 9 Q Could it have been Lieutenant Stan Smith that you
- 10 talked to?
- 11 A It could have been.
- 12 Q It could have been. You don't remember his name?
- 13 A I don't know his name.
- 14 Q Did you give a statement to the Richland County
- 15 Sheriff's Department?
- 16 A Yes, ma'am.
- 17 Q I beg the Court's indulgence just one minute, please.
- 18 When you spoke to the officers of the Richland County
- 19 Sheriff's Department, did you tell them that you'd
- 20 seen Brian threaten Keith?
- 21 A No, ma'am. They did not ask me.
- 22 Q They didn't ask you any questions about that?
- 23 A Not as I remember.
- 24 Q Okay. How long ago did you talk to them?
- 25 A To the officers?

1 Q Mm-hmm (affirmative).

2 A Whew.

3 Q When were you locked up?

4 A I was locked up January 5th of 2004.

5 Q About two years ago?

6 A Yes. About two years ago.

7 Q So you talked to the officers back when you were

8 locked up?

9 A Yes.

10 Q Do you remember everything you told the officers?

11 A Not everything.

12 Q Could you have told the officers that you saw Brian

13 threaten Keith?

14 A I can't remember.

15 Q You can't remember. Okay. When you talked to the

16 officers, did you also sit in with the officers while

17 they questioned Keith?

18 A Yes, ma'am.

19 Q Whose idea was that?

20 A It was mine.

21 Q And why did you think that was a good idea?

22 A I just -- I just thought, you know, or just to be in

23 there with him.

24 Q Because you were that close to Keith?

25 A Yes, ma'am.

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1 Q And once again, were you somewhat of a big brother to
2 Keith?

3 A Yes, ma'am.

4 Q I beg the Court's indulgence. Thank you, Derrick.
5 Please answer any questions the prosecutor has.

6 THE COURT: Cross examination.

7 MR. MEADORS: Beg the Court's indulgence.

8 CROSS EXAMINATION

9 BY MR. MEADORS

10 Q Good morning, Mr. Sims (sic).

11 A Good morning.

12 Q I was looking for my notes I was just taking. When
13 you testified, you weren't too worried in December
14 when this incident happened, were you?

15 A No.

16 Q You were just sitting on the car?

17 A Yes, sir.

18 Q You had been out somewhere the night before when he
19 came to come get you, didn't he?

20 A Yes, sir.

21 Q And you didn't have any part in the shooting, did
22 you?

23 A No.

24 Q And you actually he used the word mess. And thank
25 you for that. He actually used the word that started

- 1 with an "F". Did he say, I F'd up?
- 2 A Yes, sir.
- 3 Q That's the first thing he told you, isn't it?
- 4 A Yes, sir.
- 5 Q And he didn't tell you anything about being
- 6 threatened?
- 7 A No, sir.
- 8 Q Or seeing a gun, did he?
- 9 A No, sir.
- 10 Q He didn't tell his brother that right after it
- 11 happened, did he?
- 12 A No, sir.
- 13 Q He just told you, I F'd up?
- 14 A Yes, sir.
- 15 Q I mean, that's real. That's true, isn't it?
- 16 A Yes, sir.
- 17 Q And as a result of that, as a result of that, you all
- 18 went to Fulmer?
- 19 A Yes, sir.
- 20 Q Is that called the dirt road? I mean, it used to be
- 21 a dirt road, didn't it?
- 22 A Yes, it used to be a dirt road.
- 23 Q And the defendant has got family there, doesn't he?
- 24 A Yes, sir.
- 25 Q Does his father live there?

- 1 **A** Yes.
- 2 **Q** And the house behind where this car was was vacant,
- 3 wasn't it?
- 4 **A** Yes.
- 5 **Q** Do you remember?
- 6 **A** (Nods head affirmatively).
- 7 **Q** End of a cul-de-sac? It's the end of cul-de-sac? I
- 8 mean, it was at the end of a road, wasn't it?
- 9 **A** Yes, sir.
- 10 **Q** And when he came over there he told you, I've F'd up
- 11 and I've got to get rid of the body, didn't he?
- 12 **A** Yes, sir. He F'd up.
- 13 **Q** And then he said, I've got to get rid of the body,
- 14 didn't he?
- 15 **A** He -- he -- I don't believe he stated he had to get
- 16 rid of the body. He said, "Ride with me." And when
- 17 we went back there, I seen the body. And we got rid
- 18 of it.
- 19 **Q** At that point he wanted to get rid of the body?
- 20 **A** Yes, sir.
- 21 **Q** I mean, no question about; he wanted to get rid of
- 22 the body?
- 23 **A** Yes, sir.
- 24 **Q** It was his idea to get rid of the body?
- 25 **A** Yes, sir.

- 1 Q I mean, that -- and did you suggest Molly's Rock
2 Pond?
- 3 A I said Molly's Rock.
- 4 Q You didn't know Brian?
- 5 A No, sir.
- 6 Q As a matter of fact, over here -- I think she asked
7 you this incident in December, you didn't even know
8 his name but you said he introduced himself?
- 9 A No. He told me what his name was.
- 10 Q Okay. So Brian didn't -- he told you?
- 11 A Yes.
- 12 Q -- about his name? You didn't even know who these
13 other two fellows were?
- 14 A No. I didn't.
- 15 Q You'd never seen them before?
- 16 A I ain't never seen them before.
- 17 Q He didn't tell you their names, did he?
- 18 A No. He ain't tell me their names.
- 19 Q Now, when you all went to Molly's Rock Pond, you
20 didn't take the wallet and the money, did you?
- 21 A I ain't knowed nothing about the wallet and the
22 money.
- 23 Q You didn't take it?
- 24 A I didn't know anything about it.
- 25 Q Did you see the defendant take it?

- 1 A No, sir.
- 2 Q Did you get sick either on the way or somewhere on
- 3 way back with the smell of the body?
- 4 A Yes, on the way back.
- 5 Q And you got out and got back with Natalie and Nikki,
- 6 didn't you?
- 7 A Yes, sir.
- 8 Q And when you came back -- and I'm not going to go
- 9 over it -- I mean, you know what happened at the
- 10 pond, don't you?
- 11 A Yes, sir.
- 12 Q All four of you drug the body down there, didn't you?
- 13 A Yes, sir.
- 14 Q I mean, you took part in that?
- 15 A Yes, sir.
- 16 Q You wish you hadn't, don't you?
- 17 A Yeah.
- 18 Q And that's why you were charged, isn't it?
- 19 A Yes, sir.
- 20 Q You physically grabbed his body, Brian's, and took it
- 21 down to the pond?
- 22 A Yes.
- 23 Q And did you help get the concrete blocks and the
- 24 tow -- what do you call this? What do you call this
- 25 tow thing down here? Tow, car tow?

- 1 **A** Chain.
- 2 **Q** Chain. Tow chain?
- 3 **A** (Nods head affirmatively).
- 4 **Q** You helped him, the defendant, get that from Fulmer
- 5 Road, didn't you?
- 6 **A** Yes, sir.
- 7 **Q** Got it from across the street from where the car was
- 8 and put it in the Crown Vic, didn't you?
- 9 **A** Yes, sir.
- 10 **Q** Helped him carry it down to the pond?
- 11 **A** Yes.
- 12 **Q** Did you help him put it around and push it down on
- 13 Brian?
- 14 **A** Yes.
- 15 **Q** And the ladies helped you all, too, carry the body?
- 16 **A** Yeah. They helped us carry it.
- 17 **Q** When you got through, he had told you to get rid of
- 18 the stuff, hadn't he? Didn't he say, let's get rid
- 19 of all the clothes and everything? Did you have
- 20 blood on you?
- 21 **A** Yes. I had blood on me.
- 22 **Q** Tell me what the plan was when you left Molly's Rock
- 23 and you left Brian?
- 24 **A** We were going to Charleston.
- 25 **Q** Why?

1 A Just to go.

2 Q Okay. Well, when you were down there, did you have
3 an occasion to do anything? What did you all do with
4 the clothes?

5 A They threw them in the trashcan, you know. I put
6 mine somewhere else. So I ain't put mine in the
7 trashcan.

8 Q Where did you put yours?

9 A I put mine in Newberry.

10 Q Where?

11 A Under a bridge.

12 Q You didn't ever tell anybody that, did you?

13 A Nah.

14 Q What bridge?

15 A It's Molly's Rock. No. It's called -- a little park
16 called Quick Star.

17 Q Never ever, ever, ever, ever, ever, ever did the
18 defendant tell you in the bathroom at Boundary,
19 behind the thing, behind the house on Fulmer, dirt
20 road; you know where I'm talking about -- down at
21 Molly's Rock, down in Charleston that he felt
22 threatened or the guy had a gun? Never, did he?

23 A No, sir.

24 Q No, sir?

25 A He didn't go to Charleston with us.

- 1 Q I'm sorry. But when you came back and saw him?
- 2 A Yeah.
- 3 Q And Ms. Owings asked you if anybody had talked to
- 4 you. You talked to Sergeant Dennis, right? Sergeant
- 5 Dennis? You know Sergeant Dennis?
- 6 A Newberry?
- 7 Q Newberry.
- 8 A I talked to Wesley Boland and I believe Major
- 9 Gilliam. I don't really know his name.
- 10 Q I wasn't clear on her questions. But Boland and
- 11 Gilliam?
- 12 A Yes, sir.
- 13 Q And they read you your rights, right, on January 5th?
- 14 A Yes.
- 15 Q Didn't threaten you or coerce you?
- 16 A No.
- 17 Q You understood your rights, didn't you?
- 18 A No, sir.
- 19 Q As a matter of fact, you knew them from a prior
- 20 incident, didn't you?
- 21 A Yeah.
- 22 Q I mean, you knew Barry because of the burglary
- 23 convictions you have had, correct?
- 24 A Yes.
- 25 Q And you understood your rights?

1 A Yes, sir.

2 Q It's fair to say you're pretty comfortable with the
3 system. You know I don't mean that bad. I mean, you
4 know the system?

5 A Yes.

6 Q And on January 5th when you talked to him -- it might
7 have been -- this is January 5th and January 6th. I
8 believe they talked to you again on the 6th, Derrick?

9 A Yeah.

10 Q Again at Newberry?

11 A (Nods head affirmatively).

12 Q And it looks like this one maybe Robert Dennis and
13 Gilliam and not Wes?

14 A Yes.

15 Q Do you remember meeting with them?

16 A With the glasses.

17 Q That's right.

18 A Yes.

19 Q Read you your rights. They didn't threaten you or
20 coerce you, did they?

21 A No, sir.

22 Q Promise you anything?

23 A No, sir.

24 Q You signed it saying you understood your rights?

25 A (Nods head affirmatively).

- 1 Q And you did talk to them on the 6th, didn't you?
- 2 A Yes.
- 3 Q And had you all gone by to get some gloves and gas
- 4 cans prior to going --
- 5 A Yes.
- 6 Q Prior to going to the dirt road, Fulmer?
- 7 A Yes, sir.
- 8 Q And when he showed you the body, he said, I F'd up,
- 9 too, didn't he?
- 10 A Yes.
- 11 Q And on January 6th you told Sarge what happened,
- 12 didn't you?
- 13 A Yes.
- 14 Q You told Sergeant Dennis?
- 15 A (Nods head affirmatively).
- 16 Q And you gave him a written statement also, didn't
- 17 you?
- 18 A Yes, sir.
- 19 Q Telling him in detail what happened, right?
- 20 A Yes.
- 21 Q From the time he came to 219 Boundary Road to
- 22 Charleston to back, right?
- 23 A Yes, sir.
- 24 Q You never mentioned in here whatsoever that the
- 25 defendant had told you he felt threatened or that

1 there was a gun, to Newberry, did you?

2 A No, sir.

3 Q We had a little jurisdiction problem in this case,
4 didn't we? Initially there was a murder charge in
5 Newberry and you knew it happened in Richland, right?

6 A Yes, sir.

7 Q And you're not really familiar with the Monticello
8 Road, are you?

9 A No.

10 Q You're not really familiar with that area at all?

11 A No.

12 Q What do you call the area? It's 34?

13 A 34.

14 Q And that means family and friends from 34, right?

15 A Yes, sir.

16 Q That's how you identify with each other?

17 A (Nods head affirmatively).

18 Q I think she mentioned you were in an interview with
19 the defendant and Stan Smith. And we went over some
20 of that interview yesterday. You have lied -- listen
21 to me. Okay?

22 A (Nods head affirmatively).

23 Q You have lied for the defendant before, haven't you?

24 A Yes, sir.

25 Q And you have lied -- I mean, you care about him?

1 **A** Yes, sir.

2 **Q** I mean, you do. You have lied for him in this case

3 before, haven't you?

4 **A** Yes, sir.

5 **Q** Specifically, during that interview when the

6 defendant said there was a gun, you told the

7 officers, yeah, it was a .45, didn't you?

8 **A** Yes, sir.

9 **Q** And you told the officers it was a .45 because he had

10 told them, right?

11 **A** Yes, sir.

12 **Q** That the victim had, and he gave it to me, didn't

13 you?

14 **A** Yes, sir.

15 **Q** You were trying to help him, weren't you?

16 **A** Yes.

17 **Q** And you also told him that you had taken it

18 somewhere, didn't you?

19 **A** Yes, sir.

20 **Q** That you had hidden it somewhere, didn't you?

21 **A** Yes, sir.

22 **Q** And that was not true, was it?

23 **A** No. That wasn't true.

24 **Q** They actually went and found a gun, didn't they?

25 **A** No, sir. They ain't -- not to my knowledge.

1 Q You're not aware they did?

2 A No. I didn't know they found a gun. When we got
3 there, there wasn't no gun there.

4 Q When Brian got there?

5 A No.

6 Q Brian never gave you another gun?

7 A Brian? No. Keith.

8 Q Keith. I'm sorry. Keith never gave you another gun.
9 I understand that. You told officers about it?

10 A Yes.

11 Q You told them where to go look for another gun?

12 A (Nods head affirmatively).

13 Q When did you get this other gun that you were trying
14 to tell the officers about?

15 A About two or three weeks I'd been having it.

16 Q Two or three weeks prior to this incident you got a
17 gun?

18 A Yes.

19 Q From whom?

20 A Keith.

21 Q From Keith?

22 A (Nods head affirmatively).

23 Q And you told the officers that was the gun that you'd
24 gotten from him, but you'd gotten from Brian that
25 night, right?

- 1 **A** Yes, sir.
- 2 **Q** Trying to help him?
- 3 **A** Yes.
- 4 **Q** You wish you hadn't done that now, don't you?
- 5 **A** Yes, sir.
- 6 **Q** Did you actually take that gun and try to hide it
7 somewhere?
- 8 **A** Yes.
- 9 **Q** After this incident?
- 10 **A** Yes, sir.
- 11 **Q** And then you were going to tell them, hey, this is
12 where it was?
- 13 **A** No. I wasn't planning on it, you know. I just -- I
14 just told them I knew where it was.
- 15 **Q** Well, had you gone there and planned it, put it there
16 so they'd go find it?
- 17 **A** No.
- 18 **Q** Had you set a trap?
- 19 **A** No.
- 20 **Q** You had put it there previously?
- 21 **A** Just put it there.
- 22 **Q** And you'd told them you put it there after this
23 incident?
- 24 **A** Yes, sir.
- 25 **Q** And that was not true, sir?

1 A No, sir.

2 Q Specifically, when you talked to one of the officers
3 at Richland County -- and is this your statement
4 here? This is the one in Richland County
5 February 6th I believe. Do you mind if I come up
6 here?

7 A No.

8 Q That's you, isn't it, there?

9 A Yeah.

10 Q And this, when you initially -- you had told them
11 previously in that interview with the defendant that
12 he'd had the gun. And then they asked you about this
13 gun before again, right?

14 A Yes.

15 Q "Keith came and woke me up. I went to the bathroom
16 with him and he gave me a .45 and the .9?"

17 A Yes.

18 Q Told me he'd F'd up. Did you actually say you had
19 put the .45 in Zack's truck? Do you remember that?

20 A Zack's truck, no.

21 Q Zack's trunk?

22 A Trunk, yeah.

23 Q I'm sorry. "On Sunday, Monday I went to visit Zack
24 and told him I put the gun in his trunk?"

25 A Yes.

1 Q "I removed the gun and kept it 'til the next day"?

2 A The only reason I put them in his trunk because he
3 went to the club.

4 Q "I then went back and put Zack's -- in Zack's shed
5 under the hot water heater"?

6 A Yes.

7 MS. OWINGS: Objection, Your Honor. Is there a
8 question?

9 Q Did you say that?

10 A Yes, sir.

11 Q "Zack did not see me put the gun there." Did you say
12 that?

13 A Yeah.

14 Q And Trying to imply that's what you did with this
15 gun, right?

16 A (Nods head affirmatively).

17 Q And did they ask you: We have information you got it
18 three weeks before? Do you remember that?

19 A I don't remember they asking me. Oh, yeah. I did.
20 Yes, sir.

21 Q Question: "I have information Keith had given you
22 the .45 before December 31st?"

23 A Yes, sir.

24 Q And what's your answer?

25 A Yes.

1 Q What does it say?

2 A True.

3 Q "You're right." Is that what it says?

4 A (Nods head affirmatively).

5 Q "Keith gave me the .45 the week before Christmas?"

6 A Yes.

7 Q Does it say where he gave it to you?

8 A Yeah.

9 Q Please tell me?

10 A On the dirt road.

11 Q On Fulmer Road?

12 A Yes.

13 Q Beg the Court's indulgence. I don't know if it's
14 done for the record. But if you don't mind, Keith
15 Sims you saw that told you he F'd up, Keith Sims that
16 you went to Molly's Pond with, and Keith Sims said he
17 gave you two guns but now only one, is Keith Sims in
18 the courtroom, Mr. Ruff?

19 A Yes, sir.

20 Q Please point him out.

21 (Witness points)

22 MR. MEADORS: I'd like the record to reflect
23 he's pointed to the defendant.

24 THE COURT: He's identified the defendant.

25 MR. MEADORS: That's all.

1 **THE COURT:** Any redirect?

2 **MS. OWINGS:** Just a few questions, Your Honor.

3 REDIRECT EXAMINATION

4 **BY MS. OWINGS**

5 **Q** Derrick, the solicitor asked you a few questions
6 about whether or not you were afraid that night in
7 December outside at the cars at Keith's house?

8 **A** Yes, ma'am. Yes, ma'am.

9 **Q** You weren't afraid, were you?

10 **A** No, ma'am.

11 **Q** You weren't being threatened?

12 **A** No, ma'am.

13 **Q** Who was being threatened?

14 **A** Keith.

15 **Q** By whom?

16 **A** The two guys and Brian.

17 **Q** One more question, Derrick. A lot has been made
18 about the fact that you have lied before?

19 **A** Yes, ma'am.

20 **Q** Are you telling the truth today?

21 **A** Yes, ma'am.

22 **Q** Did you tell the court that it was your idea to hide
23 the body?

24 **A** Yes, ma'am.

25 **Q** Is that the truth?

1 **A** Yes, ma'am.

2 **MS. OWINGS:** No further questions, Your Honor.

3 Thank you, Derrick.

4 **THE WITNESS:** You're welcome.

5 **THE COURT:** Anything else?

6 **MR. MEADORS:** Nothing.

7 **THE COURT:** All right, sir. Thank you very
8 much. You may come down. Call your next witness.

9 **MS. DURANT:** Your Honor, may we approach?

10 (Whereupon, a bench conference is had)

11 **THE COURT:** The next witness is going to be here
12 at 11:00. So have a cup of coffee or just relax,
13 ladies and gentlemen. Go to the jury room. Don't
14 discuss the case among yourselves while you're in the
15 jury room. I told you we're going to get finished
16 today and we're going to get finished today.

17 (Jury out at 10:54 a.m.)

18 **THE COURT:** All right. Ms. Durant.

19 **MS. DURANT:** Yes, sir.

20 **THE COURT:** I'm trying to work on whatever
21 schedule we have left here. How many witnesses do
22 you have left?

23 **MS. DURANT:** I know one more, Your Honor, and --

24 **THE COURT:** I know one more. Who is that?

25 **MS. DURANT:** Well, it just came to light this

1 morning.

2 **THE COURT:** Well, who is it?

3 **MS. DURANT:** Scott McDonald.

4 **THE COURT:** Scott McDonald. And who is that?

5 **MS. DURANT:** He's with the Sheriff's Department.

6 **THE COURT:** Richland County Sheriff's
7 Department. And who else?

8 **MS. DURANT:** Possibly Stan Smith. But Ms.
9 Owings and I need to confer about that. Both would
10 be very short.

11 **THE COURT:** Stan Smith. Well, he's --

12 **MR. MEADORS:** We've got him.

13 **THE COURT:** He's not always short.

14 **MS. OWINGS:** My questions will be short.

15 **THE COURT:** And that would conclude your --

16 **MS. DURANT:** Yes, sir.

17 **THE COURT:** Are you aware of any reply?

18 **MR. MEADORS:** Potentially. But I guess Scott
19 was not on the -- Judge I, don't know. That's the
20 first time I've heard Scott McDonald. That's got to
21 be in reply to something that came up here because he
22 wasn't on the witness list. So they couldn't bring
23 him in for anything else except something that came
24 up here.

25 **THE COURT:** I'm just asking if you know of any

1 reply witness.

2 **MR. MEADORS:** I don't know what they're going to
3 say through them. So --

4 **THE COURT:** At this point you don't know of any
5 reply testimony.

6 **MR. MEADORS:** No, sir.

7 **THE COURT:** All right. The question is, do you
8 want to argue and charge? When do you want to argue
9 and charge?

10 **MR. MEADORS:** I want to do it today.

11 **THE COURT:** You are going to do it today.

12 **MR. MEADORS:** I do.

13 **THE COURT:** I said, you are going to do it
14 today.

15 **MR. MEADORS:** Oh, good. Yes, sir.

16 **THE COURT:** I'm trying to be a little more
17 precise than.

18 **MR. MEADORS:** I don't care, other than that,
19 Judge.

20 **THE COURT:** And whether or not we need to plan
21 to feed this jury. I've got to worry about them,
22 too. Jim, let's go ahead and order lunch for them.

23 **THE CLERK:** Yes, Your Honor.

24 **THE COURT:** Go ahead and break.

25 (Whereupon, a break is taken)

1 **THE COURT:** All right. Is the State prepared to
2 rest?

3 **MS. DURANT:** The defense is.

4 **THE COURT:** I'm sorry. Is the defense ready to
5 rest?

6 **MS. DURANT:** Yes, Your Honor.

7 **THE COURT:** The State have any reply?

8 **MR. BRYANT:** No, sir, Your Honor.

9 **THE COURT:** All right. My plan is to go ahead
10 and dismiss this jury for lunch, bring them back at
11 1:30. I'll take the next 30 or so minutes with you
12 and discuss charges. Any objection to that
13 procedure?

14 **MS. DURANT:** No objection, Your Honor.

15 **MR. BRYANT:** None from the State.

16 **THE COURT:** All right. Bring the jury, please.
17 You'll announce, Ms. --

18 **MS. DURANT:** Yes, Your Honor.

19 **THE COURT:** -- to the jury?

20 (Jury in at 11:29 a.m.)

21 **THE BAILIFF:** Your Honor, the jury is present.

22 **THE COURT:** All right. Ms. Durant, any other
23 witnesses?

24 **MS. DURANT:** The defense rests, Your Honor.

25 **THE COURT:** All right. Any reply on behalf of

1 the State?

2 **MR. BRYANT:** No, Your Honor.

3 **THE COURT:** All right. All right, Ladies and
4 Gentlemen of the Jury. The defense has rested. That
5 will conclude the testimony in this case. That will
6 conclude the presentation of evidence in the case.
7 Now, the remaining portion of the trial will consist
8 of the final arguments of counsel and my charge on
9 the law to you as it applies to this case. That
10 procedure or that -- if I take the final arguments
11 and the charge on the law, it's going to take
12 probably well over an hour. I know you just got up,
13 came back. But I think again the best use of your
14 time -- I'm trying to manage it as best I can --
15 would be to allow you to go to lunch now.

16 I ask you to come back at 1:30 at which time we
17 will move right into the final arguments and turn the
18 case over to you for deliberation as early in the
19 afternoon as we can. That will give you the entire
20 afternoon and as late as you want to work this
21 evening if necessary.

22 And there are going to be several issues you're
23 going to have to decide, and I'll tell you more about
24 that at 1:30 when you return. So again let me
25 caution you not discuss this case with anyone else

1 over the lunch hour or among yourselves when you
2 return to the jury room. At that time we will -- at
3 1:30 we'll conclude the trial. All right. Thank you
4 very much. You may -- you're excused now to go to
5 lunch.

6 (Jury out at 11:31 a.m.)

7 **THE COURT:** All right, counsel. Any requests to
8 charge?

9 **MS. DURANT:** Yes, Your Honor. Your Honor, at
10 this time we also would like to renew all of our
11 prior objections, Your Honor.

12 **THE COURT:** Oh, certainly.

13 **MS. DURANT:** And we also would move for a
14 directed verdict motion at this time as well.

15 **THE COURT:** All right. Respectfully denied.

16 **MS. DURANT:** And, Your Honor, we would like to
17 put on the record about the incident that we just
18 discussed in chambers --

19 **THE COURT:** Oh, certainly.

20 **MS. DURANT:** -- if this is the appropriate time.

21 **THE COURT:** Certainly. Well, I want to talk
22 about instructions before we leave for lunch.

23 **MS. DURANT:** Yes, sir. For the record, we would
24 like to say what the defense had planned to offer,
25 present another witness, Scott McDonald who is with

1 the Richland County Sheriff's Department. He was
2 going to testify about an incident that Keith
3 discussed on his direct testimony yesterday. Keith
4 said he had heard about a shootout between Brian
5 Anderson and Marcus Majeed and that he knew from that
6 shootout that Brian carried guns.

7 What McDonald would testify to was an incident
8 report from that shootout where Brian Anderson gave a
9 statement indicating that Marcus Majeed had shot at
10 his home and that Brian had a gun in his home and
11 that he did shoot into the air several times from his
12 home.

13 **THE COURT:** When was that?

14 **MS. DURANT:** This was in June of 2001, Your
15 Honor. And I think Brian Anderson gave a statement
16 in the case. The 15th day of June, 2001.

17 We were asking to present that to indicate that
18 Keith knew about the shootout. It would corroborate
19 Keith's testimony that he knew about the shootout and
20 he knew Brian had guns. Your Honor, we do understand
21 that you denied that because you felt it was --

22 **THE COURT:** Well, the State objected, too.

23 **MS. DURANT:** Yes, sir.

24 **THE COURT:** Would have objected to that line of
25 testimony. And I'll let the State state their

1 reasons. But go ahead.

2 **MR. MEADORS:** If it --

3 **MS. DURANT:** Our purpose in doing that, Your
4 Honor, was to corroborate Keith's testimony as
5 indicating what his state of mind was on the night of
6 the incident, that he had been threatened two weeks
7 prior to that and that he knew Brian had guns in the
8 past. And we felt that did go directly to Keith's
9 belief at the time of the incident, Your Honor.

10 **THE COURT:** All right. What's the State's
11 position? And this matter was taken up in chambers.
12 What was the State's objection?

13 **MR. MEADORS:** Your Honor, we did object for
14 several reasons, primarily on remoteness. This is an
15 incident that happened in June of 2001. It was not
16 directed at all toward the defendant and actually
17 wasn't directed against anybody. And as the law
18 says, as Your Honor has stated, in State v. Neckler
19 and other cases: "If directed against others, these
20 alleged specific instances of violence must be so
21 closely connected at the point of time or occasion
22 with the homicide as reasonably to indicate the state
23 of mind of the deceased at the time of the homicide
24 or produce reasonable apprehension of great bodily
25 harm."

1 Your Honor, it's a year and a half before this.
2 Brian Anderson in this case was a victim. He called
3 the police and said, somebody shot into my house. He
4 actually initiated the incident report. He had fired
5 shots in the air to scare the other folks off and get
6 the police there. He was actually trying to solve a
7 crime. He is the one that called in. Your Honor, --

8 **THE COURT:** I believe it's with a shotgun, too,
9 was it not?

10 **MR. MEADORS:** Yes, sir. And, Judge, that was a
11 year and a half prior. Half the jury panel said they
12 had guns. And I think just to bring this in a year
13 and a half before, when it wasn't directed against
14 the defendant, and say, because of this incident I
15 felt threatened is just too remote and not relevant,
16 quite frankly, Judge. And again, he called in as the
17 victim.

18 **THE COURT:** All right. Well, in chambers I
19 indicated, and I so rule now, that that testimony, if
20 that was the only purpose for calling the officer,
21 that testimony would indeed in the Court's opinion be
22 too remote both in time and in subject matter because
23 it was not directed at the defendant; and had it been
24 directed at the defendant and had it been closer in
25 time, it might have created some fear on the part of

1 the defendant that would be admissible for this jury
2 to consider. But I think it was not. So I've
3 indicated in chambers and so rule now that that
4 testimony would be inadmissible.

5 **MR. MEADORS:** Murder. I mean, if you want to go
6 over the charges.

7 **THE COURT:** Well, that's probably all you need
8 to say.

9 **MR. MEADORS:** Yes, sir.

10 **THE COURT:** Ms. Durant..

11 **MS. DURANT:** Your Honor, we would request a jury
12 charge on self-defense. I have a copy here I would
13 like to present. And as part of that, we do
14 understand that a self-defense charge can be tailored
15 to the incident, Your Honor. And we would request
16 that it would include words "accompanied by hostile
17 acts may, depending on the circumstances, establish a
18 plea of self-defense." That's citing State v. Fuller
19 at 297 SC 440 and 377 s.e.2d 328 which is quoting
20 State v. Harvey at 220 SC 506 and 68 s.e.2d 404.
21 Your Honor, I have the self-defense charge if you
22 would like for me to read that.

23 **THE COURT:** No. But I'd like you to hand it up
24 and hand it to the -- and I -- let me hear the State
25 on a self-defense charge; regardless of the language

1 it, just a self-defense charge.

2 **MR. BRYANT:** Judge, the State opposes a
3 self-defense charge. We don't believe that there is
4 sufficient testimony in the record that would entitle
5 Mr. Sims to a charge of self-defense. I believe
6 based upon what was said from the stand there is not
7 enough testimony. Clearly there's not enough
8 testimony for the charge as Ms. Durant requested. I
9 haven't seen it. But the words, "accompanied by a
10 hostile act", I don't really know what they're going
11 to say the words are.

12 **THE COURT:** Well, the words are: "I'm going to
13 settle all my disputes before the end of the year."
14 That's the words, I assume. Now, what the hostile
15 act is I don't know.

16 **MR. BRYANT:** Well, I didn't mean to cut the
17 Court off. But those words I don't think are enough
18 in and of themselves. I mean, I'm going to settle
19 all my, you know, problems or beefs before the end of
20 the day, that just means Mr. Meadors and I could make
21 up, you know, as grumpy as we've been to each other
22 during the trial; I don't think that is enough. Nor
23 do I think there has been any hostile actions shown
24 that would entitle them to the self-defense charge.
25 And the State respectfully requests that the Court

1 deny that charge.

2 **THE COURT:** All right. What's next, Ms. --

3 **MS. DURANT:** And, Your Honor, I would like to
4 add to the self-defense charge -- and I apologize --
5 the quote in State v. Burris: "A person can be
6 acting lawfully even if he's in unlawful possession
7 of a weapon if he is" -- well, we don't need that.
8 I'm sorry. I apologize.

9 The next one is voluntary manslaughter, Your
10 Honor. We are requesting a charge on that.
11 Voluntary manslaughter is the intentional killing of
12 a human being in the sudden heat of passion resulting
13 from a sufficient legal provocation.

14 **THE COURT:** I know what it is. How does it
15 apply to this case?

16 **MS. DURANT:** Well, Your Honor, we think it's an
17 alternative that Keith has testified that he was
18 terrified. He thought his life was in danger. He
19 was scared. I think he indicated enough passion or
20 fear at the moment that he could have acted out of
21 fear. I think his words were he shot him due to his
22 fear of the situation.

23 **THE COURT:** What's the State's position?

24 **MR. MEADORS:** Heat of passion, sufficient legal
25 provocation. I just don't know if there's anything

1 in the record to justify voluntary. Words alone
2 aren't enough, obviously. I just didn't think about
3 it. I didn't think they were going to request that,
4 quite frankly. I haven't had time to think about it.

5 *THE COURT:* I'm assuming they're going to
6 request everything.

7 *MR. MEADORS:* If I could just have a moment on
8 that.

9 *THE COURT:* Sure. Anything else, Ms. Durant?

10 *MS. DURANT:* Yes, sir. We are going to request
11 involuntary.

12 *THE COURT:* And anything else?

13 *MS. DURANT:* We were requesting an accident
14 charge as well, Your Honor.

15 *THE COURT:* All right.

16 *MR. MEADORS:* Judge, on those two, I don't think
17 there's any evidence that it was unintentional. I
18 specifically asked him the second question: "Did you
19 do it? Did you fire it?" He said, "Yes."

20 I got overturned in the case of State v. Leon
21 Crosby in Kershaw County where it wasn't charged.
22 And in that case --

23 *THE COURT:* Well, I got reversed on a case in
24 Richland County called State v. Reese where it was
25 not charged also.

1 **MR. MEADORS:** But in that case there was
2 evidence in there from a witness who said he told him
3 that it went off accidentally, even though the
4 defendant had said it was intentional and he did it.
5 So I think there was evidence there the court
6 obviously found, and certainly I wouldn't argue -- at
7 least not on the record for sure -- that they're
8 wrong. So there was evidence in that case.

9 In this case I don't think there's any evidence
10 that it was unintentional that you could even infer.
11 And he specifically said, "I did it. I shot him."
12 And no evidence that it accidentally went off.

13 **THE COURT:** Why should an involuntary -- tell
14 me, Ms. Durant, what is the basis for an involuntary
15 or accident charge other than just -- well, just
16 leave it at that. What's the basis for that?

17 **MS. DURANT:** Your Honor, I think he said he
18 didn't mean to kill him.

19 **THE COURT:** He didn't mean to kill him but he
20 meant to shoot him.

21 **MS. DURANT:** Well, I think he was saying that he
22 just pulled the gun out and, you know, just shot
23 unintentionally. He didn't mean to kill him.

24 **THE COURT:** That's two different things.

25 **MS. DURANT:** Well, I think when he said, "I

1 didn't mean to kill him", my interpretation of that
2 was unintentional killing.

3 **THE COURT:** Well, what's -- what if it's an
4 intentional shooting but an unintentional killing?
5 Is that an involuntary manslaughter?

6 **MS. DURANT:** Well, it says the unintentional
7 killing of another without malice that results in the
8 reckless disregard of another.

9 **THE COURT:** I think that's probably an
10 automobile case. I'm not sure. Reckless disregard.
11 I just -- I don't see the involuntary -- let me
12 preface that by saying I've been wrong before. But
13 in the Reese case there was clear testimony from the
14 defendant that he did not mean to pull the trigger,
15 that it was an accident, that he was waving the gun
16 around and it was an accident.

17 And involuntary usually are those cases where
18 the evidence is pretty clear that there was an
19 accident or that there was an unintentional shooting.
20 This case, I don't remember any such testimony. I
21 mean, the only testimony that I recall -- and I
22 certainly -- I've got a record and I can look it
23 up -- but was that he intended to shoot this man.
24 Whether he intended to kill him or not, I -- I'm
25 not -- I can't put myself inside his head. But he

1 said he was doing it to defend himself. He was
2 shooting him to defend himself or to defend his
3 mother or defend his territory, his turf, where he
4 was. I don't think there's anything that indicates
5 that he -- any testimony that would support him
6 saying his -- that position that it was not an
7 intentional shooting.

8 **MS. DURANT:** Your Honor, I think the only
9 testimony I'm basing it on is that he said, "I didn't
10 mean to kill him." And I think that's what the
11 charge is saying.

12 **THE COURT:** Well, I guess that's true in every
13 murder case. I meant to shoot him; I didn't mean to
14 kill him. I'm going to deny your request for an
15 involuntary or accident charge. I am more concerned
16 about the voluntary and self-defense charges. If you
17 have proposed instructions, I'll consider them over
18 the lunch hour.

19 **MR. MEADORS:** Judge, as far as criminal intent,
20 and we'd ask Your Honor charge your regular charges
21 on all these, if you do self-defense, just out of the
22 judicial notebook that I think we all have a copy of,
23 or whatever your standard charges are.

24 **THE COURT:** I'll give them to you.

25 **MR. MEADORS:** And as far as criminal intent just

1 being inferred from actions during and/or after, I
2 would ask for that charge.

3 **THE COURT:** Yes, sir. I have a criminal intent
4 charge.

5 **MS. DURANT:** Your Honor, if I may cite another
6 case. It says if there is -- in siting State --

7 **THE COURT:** Wait a minute. Tell me.

8 **MS. DURANT:** I'm sorry.

9 **THE COURT:** For what purpose? I mean, for what?

10 **MS. DURANT:** It's supporting the self-defense
11 charge.

12 **THE COURT:** Self-defense. Okay.

13 **MS. DURANT:** Yes, sir. It says, citing State v.
14 Hill, "If there is any evidence of self-defense, the
15 issue should be submitted to the jury upon request.
16 A trial court commits reversible error if it fails to
17 give a requested charge on an issue raised by the
18 evidence." It's citing State v. Hill, 315 SC 260,
19 433 s.e.2d 848 and 849.

20 **THE COURT:** I realize that the appellate courts
21 prefer and instruct the trial courts to let the jury
22 make those decisions. And I am certainly aware of
23 that fact, that many reverses come from failure to
24 instruct the jury and let them make the decision. So
25 I will consider -- all right. We're going to -- I --

1 all right. My clerk tells me we can deliver you some
2 proposed --

3 **MR. MEADORS:** That would be great.

4 **THE COURT:** -- jury instructions within the next
5 20 to 30 minutes. At this point I'll be glad to see
6 what you have, Ms. Durant.

7 **MS. DURANT:** If I may?

8 (Document handed to the Court)

9 **THE COURT:** The self-defense charge encompasses
10 a lot of different theories. All right. Anything
11 further?

12 **MR. MEADORS:** No, sir.

13 **THE COURT:** Let's -- what did I tell the jury?
14 1:30? Let's reconvene about 1:15 and try to make
15 some final decisions on these charges.

16 **MR. MEADORS:** Thank you, Judge.

17 **THE COURT:** All right. We'll stand at ease,
18 counsel, until 1:15.

19 (Whereupon, a lunch break is taken).

20 **THE COURT:** All right, counsel. I believe you
21 have been supplied with a proposed set of charges.
22 One exception I need to note, the defendant's good
23 character and representation was never put in
24 evidence. I've withdrawn that.

25 **MS. DURANT:** Thank you, Your Honor. Yes.

1 **THE COURT:** Other than that, Mr. Meadors, I
2 mentioned before the break that the defendant has
3 asked for a charge on voluntary manslaughter and that
4 I'll give you an opportunity to state the State's
5 position on that issue. Why don't you do that at
6 this time.

7 **MR. MEADORS:** Are there any other in dispute
8 besides that before we get to it, Your Honor?

9 **THE COURT:** Well, I don't know. I don't know
10 from the defense. Any others from the defense?

11 **MS. DURANT:** No, Your Honor.

12 **THE COURT:** Okay. You've had an opportunity to
13 look over the proposed?

14 **MS. DURANT:** Yes, sir.

15 **THE COURT:** I did not use the defendant's
16 proposed self-defense charge. I felt it was not
17 quite as comprehensive as the one the Court drafted.

18 **MS. DURANT:** Yes, sir.

19 **THE COURT:** You are satisfied with it, Ms.
20 Durant?

21 **MS. DURANT:** Yes, sir.

22 **MR. MEADORS:** Your Honor, as far as the
23 intent -- I can't seem to find it right now.

24 **THE COURT:** Oh.

25 **MR. MEADORS:** But I believe at the end, just the

1 general intent charge: "Criminal intent can rise
2 from action or a failure to act." Of course I have
3 seen it before and I think it's either at or after
4 the crime. And I'm just -- I didn't know if Your
5 Honor was going to consider arguing that.

6 **THE COURT:** Let me find that.

7 **MR. MEADORS:** I think it almost implies that in
8 that statement, but ...

9 **MS. DURANT:** Which statement are you referring
10 to?

11 **MR. MEADORS:** I'm on intent. I don't know what
12 page number it is.

13 **THE COURT:** Well, sometimes I just drop that
14 because it's really not an issue.

15 **MR. MEADORS:** That's fine.

16 **THE COURT:** I mean, that is a standard -- and I
17 usually do not -- in the murder charge, Mr. Meadors,
18 I usually don't talk about a dirk.

19 **MR. MEADORS:** Talk about what? I'm sorry.

20 **THE COURT:** About a dirk and a dagger.

21 **MR. MEADORS:** That's fine with me.

22 **THE COURT:** Or a Molotov Cocktail.

23 **MR. MEADORS:** I'm not really sure what one is.

24 **THE COURT:** I usually jump over that.

25 **MR. MEADORS:** Your Honor, could I hear their

1 argument? I didn't know what the sufficient legal
2 provocation is, in the record.

3 *MS. DURANT:* What are you talking about?

4 *MR. MEADORS:* Voluntary manslaughter. I'm
5 sorry.

6 *MS. DURANT:* Voluntary. Okay.

7 *THE COURT:* Well, we'll start off that way. Ms.
8 Durant.

9 *MS. DURANT:* Your Honor, if I may --

10 *THE COURT:* I told you I would consider
11 voluntary manslaughter. What's the defendant's
12 position with regard to that charge?

13 *MS. DURANT:* Your Honor, if I may cite some
14 cases that I have found. Citing *State v. Davis*, it
15 says: "The provocation must produce in the mind of
16 the persons ordinarily constituted the highest degree
17 of exacerbation, rage, anger, sudden resentment or
18 terror, rendering the mind incapable of cool
19 reflection." We believe that --

20 *THE COURT:* What's the cite on that?

21 *MS. DURANT:* I'm sorry.

22 *THE COURT:* It's all right. I think I --

23 *MS. DURANT:* 50 SC 54 203.

24 *THE COURT:* 50.

25 *MS. DURANT:* Yes, sir.

1 **THE COURT:** Okay.

2 **MS. DURANT:** And 27 s.e.2d 95.

3 **THE COURT:** That's all right. It's ancient.
4 I'm familiar with it. Go ahead.

5 **MS. DURANT:** We believe that Mr. Sims was
6 terrified to the point, Your Honor, he said he shot
7 out of fear. And we do believe that he was terrified
8 to the point that it did render him as being in the
9 heat of passion, incapable of cool reflection.

10 And citing State v. Jackson, I do have copies of
11 that case, Your Honor, if you'd like for me to hand
12 this up.

13 (Document handed to the Court)

14 **MS. DURANT:** State v. Jackson: "A threat of an
15 imminent deadly assault is sufficient to require
16 manslaughter discussions in a murder case." And I
17 think the fact that Mr. Sims felt that he was in fear
18 of imminent assault, he feared that he was going to
19 die, that he was going to be shot to death, was his
20 belief.

21 And I would present one more case, State v.
22 Lowery. It says: "Words coupled with threat of
23 violence will suffice. Reversing an earlier Court of
24 Appeals decision, the court overturned a murder
25 conviction for the failure to instruct on

1 manslaughter in State v. Lowery."

2 (Document handed to the Court)

3 **MS. DURANT:** In State v. Lowery: "The deceased,
4 a much larger man than the defendant, had before
5 approached him angrily about dealings with him, then
6 approached him in a menacing, threatening way, and
7 the defendant shot him in the heart at arm's length.
8 After the defendant fell, the defendant cursed him
9 and shot him in the head." It says: "Noting once-
10 again that opprobrious words alone are inadequate" --

11 **THE COURT:** Opprobrious.

12 **MS. DURANT:** Opprobrious. Thank you, Your
13 Honor. "Are inadequate provocation, the court
14 emphasizes such words accompanied by the appearance
15 of an assault - by some overt threatening act - can
16 amount to an adequate provocation."

17 I think the fact that Mr. Sims testified that
18 Brian Anderson used threatening words with him, he
19 was going to end all of his beefs before the New
20 Year, that this was New Year's Eve, and that he saw
21 him, felt that he was reaching under the seat, that
22 was a threatening act, Your Honor, to get a gun;
23 based on that we feel that we would ask for a
24 voluntary manslaughter charge.

25 **THE COURT:** All right.

1 **MR. MEADORS:** Your Honor, those facts in
2 Lowrey -- and I remember it now that you've handed it
3 to me -- were just egregious, nothing, I mean, --

4 **THE COURT:** What she says, as I understand it,
5 Mr. Meadors, is if you believe everything that the
6 defendant says; in other words, it's in the record
7 that he was in fear of something, whether it's fear
8 of his life or fear of serious injury or fear of
9 threat to his family because of the prior
10 relationship between the parties which had not
11 been -- I mean, there were prior provocations.
12 Whether they were reasonable to rise to the level of
13 a threat is a jury decision. But if there was a
14 prior history of bad blood between these two people,
15 and if you believe him, if the jury believes him and
16 feels that he could have been put in fear in the car
17 that night and that the movement of the defendant --
18 of the victim -- towards the seat or towards --
19 underneath the seat, if that's the way he did it,
20 could have caused in his mind fear. Now, if that is
21 in the record, I think I've got to give it. I think
22 that is the provocation, however slight.

23 **MR. MEADORS:** Your Honor, we take no position
24 and we understand Your Honor's ruling.

25 **THE COURT:** But it's a jury -- I think it's a

1 jury decision.

2 MR. MEADORS: Thank you.

3 MS. DURANT: Thank you, Your Honor.

4 THE COURT: All right. Anything else before we
5 bring the jury?

6 MR. MEADORS: It's happened before. I don't
7 know how long my colleague is going to argue or Mr.
8 Bryant. I just, as is my practice, will request a
9 bathroom break real quick before I argue, if you'll
10 give it to me.

11 MS. DURANT: No objection, Your Honor.

12 THE COURT: Thank you. I don't want to have to
13 excuse the jury.

14 MR. MEADORS: No, sir. I don't mind zipping in
15 and out real quick. I didn't mean that the way it
16 came out. But I will run to the bathroom real quick.

17 THE COURT: Ready for the jury?

18 MR. MEADORS: Yes, sir.

19 THE COURT: The State ready?

20 MR. MEADORS: Yes, sir.

21 THE COURT: Defense ready?

22 MS. DURANT: I'm not sure if they're all here
23 yet.

24 THE COURT: I'm sorry. It's not yet 1:30. They
25 may not all be here.

1 (Pause)

2 **THE CLERK:** All here, Your Honor.

3 **THE COURT:** All right. We've got lawyers out
4 now.

5 **THE CLERK:** Yeah. I see.

6 (Pause)

7 **THE COURT:** All right. Counsel, are you ready
8 to proceed?

9 **MS. DURANT:** Yes, Your Honor.

10 **MR. BRYANT:** The State's ready, Your Honor.

11 **THE COURT:** All right. Just have a seat. Bring
12 the jury.

13 (Jury in at 1:34 p.m.)

14 **THE BAILIFF:** Your Honor, the jury is present.

15 **THE COURT:** All right. Thank you very much,
16 ladies and gentlemen. I hope you had a pleasant
17 lunch. We're now ready to continue, conclude the
18 trial, as I said, with the final arguments of counsel
19 and my charge to you on the law of the case.

20 Now, let me say something to you, and you may
21 want to make a note of this before the final
22 arguments. The defendant is charged with murder in
23 this case. And I explained that to you at the
24 beginning of the trial and I gave you the definition
25 of murder. But keep this in mind. The defendant has

1 raised the issue of self-defense as a defense to
2 murder. If he has proven self-defense, if the State
3 has not proven that it was not self-defense beyond a
4 reasonable doubt, self-defense is what's known as an
5 absolute defense to murder. In other words, if it
6 was self-defense, if the State did not prove it was
7 not self-defense, then it could be, it could be,
8 depending on what you find, to be a defense to
9 murder. All right? And the lawyers are going to
10 talk about that in their final arguments.

11 They're also going to talk to you about
12 something called voluntary manslaughter. Now, if you
13 watch enough Law and Order you probably hear Jack
14 McCoy saying, murder one, murder two or murder three.
15 Well, we don't have that in South Carolina. We have
16 according to our statutes what are known as murder,
17 voluntary manslaughter and involuntary manslaughter:

18 Now, I have ruled that involuntary manslaughter
19 is not an issue in this case, but that voluntary
20 manslaughter -- counsel can argue to you that
21 voluntary manslaughter ought to be your verdict
22 instead of murder. It's what's known as a
23 lesser-included offense. It's not the charged
24 offense of murder, but it is subsumed within the
25 definition of murder. It is what we call a

1 lesser-included offense.

2 And the lawyers are going to talk to you about
3 that also. I didn't want you to be surprised when
4 they're talking about self-defense or when they're
5 talking about voluntary manslaughter. When I told
6 you at the beginning that the only thing we're
7 considering is murder, it is still the charge in the
8 indictment. But there are these other things that
9 you are going to be asked to consider.

10 And you -- depending on how you see the facts,
11 you can -- you could render a verdict on the charge
12 of murder or not murder or voluntary manslaughter.
13 And that will be a part of the -- a verdict form that
14 I give to you. So keep that in mind. As I said, you
15 might just make a note that they are going to talk to
16 you about what the defendant may be guilty of or not
17 guilty of, depending on how you view the facts in
18 this case.

19 So with that as a sort of an introduction, I'm
20 going to allow the attorneys to argue at this time.
21 The State will argue first and then the defendant
22 will have a chance to argue. All right.

23 **MR. BRYANT:** Thank you, Your Honor. May it
24 please the Court. Ms. Owings, Ms. Durant. Ladies
25 and gentlemen, I'm going to speak to you briefly

1 about the law in this case, and then Ms. Owings or
2 Ms. Durant will get up and speak to you about their
3 side. Then Mr. Meadors will wrap up.

4 My job is to take a few minutes to explain the
5 law in this case to you. A few days ago, I believe
6 it was Monday afternoon, I said the State has the
7 burden of proof. And we still do. We have to prove
8 beyond a reasonable doubt what happened on
9 December 31st of 2003. We have to prove that beyond
10 a reasonable doubt.

11 Simply put, our burden is met if you go back in
12 the jury room and are firmly convinced of the
13 defendant's guilt, then we've met that burden, ladies
14 and gentlemen. And I submit that the evidence has
15 shown over the past few days and this morning that
16 Keith Sims on the 31st of December of 2003 murdered
17 Brian Anderson, murdered him in Keith Sims' driveway.

18 Let's talk about murder for a few moments.
19 Murder, simply put, is the killing of any person with
20 malice aforethought, either expressed or inferred.
21 Malice aforethought simply means that Keith Sims
22 meant to pull that trigger, that he meant to kill him
23 or acted in such a manner that he knew, that he knew
24 Brian Anderson would be killed. That is malice.

25 Malice can be inferred a split second before the

1 murder. It doesn't have to be days before or minutes
2 before. It can be formed a split second, at the
3 pulling of the trigger. Malice can be inferred from
4 the use of a deadly weapon. In this case the .9
5 millimeter is a deadly weapon, ladies and gentlemen.
6 The .9 millimeter is a weapon that was put to Brian
7 Anderson's head and used to kill him.

8 You heard some testimony about accessories after
9 the fact, or I believe the word "co-conspirator" was
10 used. An accessory after the fact in this case means
11 they didn't participate in the actual murder, the
12 actual killing, but they participated in the
13 disposing or the cover-up of the victim, Brian
14 Anderson's, body.

15 You heard from a number of witnesses, ladies and
16 gentlemen, about what happened that day. You heard
17 from law enforcement people. You heard from lay
18 witnesses. You heard from some experts. And I want
19 to talk to you for a few moments about the different
20 types of evidence.

21 Basically you have direct evidence and
22 circumstantial evidence. Direct evidence is what a
23 witness sees, hears, touches or smells.
24 Circumstantial evidence is something you infer from a
25 chain of facts that are used to prove the matter.

1 But both are equal under the law, ladies and
2 gentlemen. It carries the same weight.

3 So let's talk a few minutes about the direct
4 evidence and what there was. Let's talk about Sierra
5 Jenkins, Sierra Davis, Nikki Davis and how she took
6 the stand and how she said that Natalie English told
7 her that Keith just murdered someone that night.

8 You heard from Nikki how she helped to dispose
9 of some of the items, how she helped to dispose of
10 the .9 millimeter, tried to throw it into the Broad
11 River as they were riding down the highway, how she
12 took some of the items and threw them in the Refuge
13 Temple of W. L. Bonner's church, what parts she
14 played in this.

15 You heard from members of the law enforcement
16 community from Newberry, from Dewitt, "Spike Dog"
17 McCraw about the statement he took. You heard from
18 Investigator Boland and Robert Dennis about their
19 part in this matter. All of that is direct evidence,
20 ladies and gentlemen. It's what some people saw,
21 what some people heard.

22 You heard from Mr. Elkins. He had no part in
23 this. He didn't want to be here. But he said the
24 defendant, Keith Sims, told him, I just shot -- and
25 I'm not going to use the derogatory term, but that's

1 what he told them that night at the nightclub and he
2 had to get out of there. All that is direct
3 evidence, ladies and gentlemen.

4 Credibility of the witnesses is something I want
5 you to think about. Decide who was credible, who to
6 believe, who not to believe, what part of that you
7 believe, what part of that you do not believe.

8 Along with credibility comes corroboration. How
9 do you show this happened the way the witness tells
10 you? How do you determine that? Part of that is by
11 bringing in the evidence the State did. We brought
12 in the gun. You heard Investigator Boland say it was
13 found on the banks of the Broad River, just where
14 Nikki said it was.

15 You heard about the dumpster that contained the
16 CD case, the CD, just where Nikki said it was. Even
17 Mr. Elkins' testimony was corroborated by the
18 defendant himself when he admitted telling Mr. Elkins
19 that he shot Brian Anderson that night.

20 The other evidence, ladies and gentlemen, that
21 was corroborated was about the blood stains he was
22 trying to clean up in the defendant's yard. All that
23 goes to the credibility of the witnesses, of the
24 testimony you heard.

25 Also judge their demeanor. Use that in your

1 determination of who was credible, who was not
2 credible. Judge Mr. Elkins about how he was. Judge
3 Nikki about how she was. Judge the defendant by the
4 way he acted. And tell me who was credible. Tell me
5 who was believable, ladies and gentlemen. I submit
6 thus far what you've heard proves beyond a reasonable
7 doubt that murder was committed December 31st, 2003.

8 The other type of evidence is circumstantial
9 evidence. And as I said, that's just proof of a
10 chain, kind of like links in a chain link fence. You
11 put them altogether and they form that fence. Well,
12 that's what you have. You have the DNA evidence.
13 And you heard from the DNA expert, Mr. Ortuno,
14 yesterday, or Senior Agent Ortuno. You heard from
15 Special Agent Stuckey. You heard from Investigator
16 Collins who tested the gun, the .9 millimeter that
17 was found and said that the slug that was pulled out
18 and the shell casing that was found were fired from
19 that .9 millimeter.

20 You saw the photographs that are in evidence of
21 the drag marks at Molly's Rock Pond. You saw the
22 photographs of the blood in the car at Molly's Rock
23 Pond. All that is circumstantial evidence leading to
24 proof that this was murder, ladies and gentlemen.

25 The State submits, ladies and gentlemen, and you

1 heard the judge talk about manslaughter, this is not,
2 ladies and gentlemen, a manslaughter case. But
3 manslaughter essentially is that the defendant took
4 the life of another in the heat of passion based on
5 sufficient legal provocation. Both heat of passion
6 and sufficient legal provocation must be present at
7 the time of the killing to constitute voluntary
8 manslaughter. And I know Ms. Owings or Ms. Durant
9 will touch on that.

10 This isn't manslaughter. This is murder, simply
11 put. There is no manslaughter. This isn't a
12 manslaughter case, ladies and gentlemen.

13 You're also going to be charged on the law of
14 self-defense. And you heard some testimony about
15 that. Four factors, ladies and gentlemen, for
16 self-defense. And I want to touch on them briefly.
17 The defendant must be without fault in bringing on
18 the difficulty. The defendant must have actually
19 believed he was in imminent danger of losing his life
20 or sustaining serious bodily injury, or he was
21 actually in such imminent danger.

22 If his defense is based upon belief of imminent
23 danger, a reasonably prudent person of ordinary
24 firmness and courage would have entertained the same
25 belief. If the defendant actually was in imminent

1 danger, the circumstances were such as would warrant
2 a person of ordinary prudence, firmness and courage .
3 to strike the fatal blow to save himself from serious
4 bodily harm or losing his own life.

5 And the fourth one, the defendant had no other
6 probable means of avoiding the danger of losing his
7 own life or sustaining serious bodily injury than to
8 act as he did in this particular instance.

9 Let's take them one at the time. The defendant
10 must be without fault in bringing on the difficulty.
11 Keith Sims had a .9 millimeter on his person, a .9
12 millimeter, ladies and gentlemen. He is not without
13 fault. He is at fault. That's the first prong.

14 The second prong, that he must have actually
15 believed he was in imminent danger of losing his life
16 or was actually in such imminent danger; there is
17 nothing I submit in the record to support that second
18 prong of it. There is nothing to show he was in
19 danger. Brian Anderson took him home that night.
20 Keith Sims rode with him, said everything was fine.
21 Oh, then something changes. There is no proof of
22 that, ladies and gentlemen. They can't meet that
23 second prong.

24 The third prong, a reasonably prudent person
25 wouldn't have believed that, wouldn't have believed

1 that they were in danger.

2 Finally, the fourth prong, ladies and gentlemen.
3 You don't have to act the way Keith Sims did that
4 night. You don't have to pull out a gun and shoot
5 somebody. You'd get out of the car and you'd go
6 inside. You're at home. Just get out and go in. Go
7 into your mom's house. Go into the house of your
8 close knit family, and that ends. He didn't do that.

9 I submit he can't meet any of these prongs of
10 self-defense, ladies and gentlemen. And it's our
11 burden -- please let me be clear. It's our burden to
12 prove this. And we've done that. We've proved
13 murder. We've disproved self-defense.

14 I know it's been a long trial, ladies and
15 gentlemen. I know you've heard a lot. You've got a
16 lot of evidence. I ask you to listen to Ms. Durant
17 and Ms. Owings. Listen to Mr. Meadors. Consider the
18 law as you have heard it from me and as you will hear
19 it from the judge. Because when it boils down to it,
20 this is about Brian Anderson and this is about
21 justice. Thank you for your time.

22 **MS. DURANT:** If you'll bear with us just a
23 minute. We have to set up.

24 (Pause)

25 **MS. DURANT:** Ladies and gentlemen, thank you so

1 much for your attention and time this week. It's
2 been a long week. December 31st, 2003, we were not
3 there. Brian Anderson and Keith Sims were in the
4 car. No one else knows what happened in that car.
5 Brian Anderson is not here. All we know is what
6 Keith Sims tells us because he was the only other
7 person there. And you have to make a decision and
8 you weren't there.

9 Let's go to that car. Based on Keith Sims'
10 testimony, Brian Anderson is driving the car. Keith
11 Sims is here. They get in the driveway. Keith Sims
12 has the gun in his belt. Brian Anderson is here.
13 Brian Anderson starts talking about guns, hurting
14 Keith's family, ending all of his beefs before the
15 New Year. This is December 31st. Brian Anderson
16 leans over, leans over under the seat. Keith Sims
17 pulls out his gun and shoots because he believed
18 Brian Anderson was reaching for a gun to kill him.

19 Now, that's what Keith Sims tells us. Now, what
20 evidence has been presented, what facts do we have
21 that support that? Because we have some. Let's look
22 at them. First of all, you heard about stippling.

23 **THE COURT:** Mr. Meadors, you're in front of a
24 juror.

25 **MR. MEADORS:** Oh, I'm sorry. I was going to

1 look at it and sit down, Your Honor.

2 **THE COURT:** Well, you can sit in this little
3 seat if you have to. There's a seat on the front
4 row.

5 **MS. DURANT:** There's a front row seat. First of
6 all, there was stippling. We heard testimony about
7 stippling not only from Al Stuckey, SLED's expert,
8 but also from Kelly Fite who the defense paid to be
9 here. That's true.

10 Stippling comes from that gun, small abrasions
11 caused by powder and metal fragments striking the
12 skin. That was on Brian Anderson's face. And you
13 will see the diagram of that. In this case the
14 stippling was 3.5 inches in diameter. Dr. Sexton,
15 the pathologist, told us that.

16 Now, what Dr. Sexton said was that tells us that
17 the gun he said it could have been eight inches,
18 about the length of that silver tool that was in the
19 head. I don't see it here. But it could have been
20 eight inches. He said it could have been two feet.

21 Kelly Fite says he's testified 2700 times, has
22 looked at thousands of guns, that the gun was
23 probably three to five inches from the face. So if
24 you take that together, the one was probably
25 somewhere between five to eight inches, giving credit

1 to both experts, from the face, from the face of
2 Brian Anderson where the bullet went into his cheek.

3 High velocity blood stains. You heard Al
4 Stuckey talk about that. You heard Kelly Fite talk
5 about those. It's the fine mist of blood that comes
6 out when the bullet hits the face. We know it was
7 caused by a gunshot. That's not in dispute. In
8 these type blood stains, the size of the head of a
9 pin. You will see the picture of the high velocity
10 blood stains.

11 Now, the way this supports Keith's story, Al
12 Stuckey testified that the high velocity blood stains
13 were on the inside of the passenger's seat. And
14 that's what the picture shows that you will have,
15 right down here.

16 And that means Brian Anderson, according to Mr.
17 Fite, it was actually less than 12 inches. He said
18 six that the victim's face would be from the blood
19 stains. But I think Al Stuckey said two feet to four
20 feet. Well, four feet would have been almost the
21 width of the car. So how reasonable is that? But
22 we'll consider 12 inches or less.

23 Trajectory of the bullet. Now, this came from
24 Dr. Sexton, the pathologist who has done thousands of
25 these. The path of the bullet, and you'll have the

1 diagram, went from the cheek slightly down back to
2 the brain stem. The bullet doesn't change direction.
3 Dr. Sexton said Brian's head was tilted forward
4 slightly, that that was very -- that's what he was
5 saying. He also said in his words it was very
6 possible that Brian Anderson was bending forward
7 reaching for something. Those are his words. It is
8 possible Brian Anderson was reaching, bending
9 forward, reaching for something.

10 Let's go back to the car. Considering the
11 evidence, Brian Anderson, blood stains, stippling,
12 reaching forward. That's what Keith tells us. And
13 that's what the hard, cold facts, evidence tell us,
14 that that's what happened in that car.

15 **THE COURT:** Just hold on a minute. Take that
16 whatever it is. Go ahead and get it. Take it out.
17 Go ahead, Ms. Durant.

18 **MS. DURANT:** Thank you, Your Honor. Now, that's
19 supporting, the evidence supporting Keith's
20 testimony. Keith said he shot in self-defense. He
21 said he shot because he thought he was going to die.
22 Now, let's look at the elements of self-defense. I
23 think the State has already mentioned some of them.
24 They mentioned all of them. Let's look at them
25 again.

1 The defendant without fault. There has been no
2 testimony, no evidence that Keith did anything to
3 provoke an assault of Brian Anderson. He had a gun
4 because he had been threatened just two weeks before.
5 And he was at a party with him. He was trying to be
6 friends with them. He was trying to make up with
7 him. And he did go to a party with Brian and some of
8 Brian's friends and whoever else. But he took a gun
9 with him. He was scared. He did nothing to provoke
10 any attack that night.

11 The defendant believed he was in imminent
12 danger. The key word is "believed". He did not have
13 to be in danger. Self-defense says that if the
14 defendant believed he was in imminent danger, then
15 that's self-defense.

16 Now, why would Keith believe he was in imminent
17 danger? You heard him testify. He believed Brian
18 carried a gun. He said he had seen Brian with guns
19 before. He talked about he -- he had had a gun but
20 Brian came with him; Brian took one of his guns.
21 Brian and some of his friends and Keith's friends all
22 went up behind the church to shoot a gun. They were
23 all just interested in guns. And these were
24 20-year-old young men. Or boys. Whatever.

25 Brian had threatened to hurt him. Brian and two

1 of his friends. They'd come to Keith's house and
2 threatened to hurt him. You heard Derrick say that
3 as well as Keith saying that. And Derrick said he
4 wasn't threatened but Keith was threatened. Brian
5 had threatened to hurt him.

6 Brian had hurt him in the past. You heard Keith
7 talk about there was a fight. Keith didn't
8 participate. He ran. He went back to Brian's house
9 with two other guys. What happened? Brian punched
10 him out because Keith didn't have any scars or
11 bruises where he had fought; and then his friends,
12 some of Brian's friends, jumped on him that same day.
13 You heard him testifying that Brian's mother came out
14 and helped put, tape his wounds, tend to his wounds.

15 He knew Brian could hurt him. He had done it.
16 Brian said, "I'm going to end all my beefs before the
17 New Year." December 31st. Time was running out.
18 Keith knew -- Keith believed that he was in danger.
19 A reasonable person would have believed he was in
20 imminent danger.

21 Okay. Let's look at some of the other issues.
22 Some of them are the same. The person threatens you
23 in the past. The person actually fought you in the
24 past. The person had his friends fighting you in the
25 past. This person had carried guns in the past. You

1 had seen him with guns.

2 And there's another factor. Brian had alcohol
3 and marijuana in his system. He had been to a party.
4 Now, the pathologist said they were not at the legal
5 limit for intoxication. But Dr. Sexton also said a
6 combination of the two would increase the probability
7 of intoxication. And he also said Brian was probably
8 sobering up based on what was in his eye, the level
9 of alcohol in his eye.

10 Now, wouldn't a reasonable person believe they
11 were in danger if you've got drugs and guns mixed
12 together, plus threats from the past?

13 No duty to retreat when the danger would be
14 increased. Okay. He's in the car. A car, two
15 seats. How is he supposed to retreat? If he
16 believes that Brian has a gun and is reaching for a
17 gun, is he supposed to open the door and run out and
18 get shot in the back? Wouldn't that increase his
19 danger? He was trapped in this car. He believed if
20 he opened the door and ran he could get shot in the
21 back. Plus, it was in Keith's yard. And there is no
22 duty to retreat at that point.

23 So, yes, Keith does meet the four elements for
24 self-defense.

25 Now, probably a question in your mind would be,

1 if it was self-defense, why didn't he call the
2 police? Why did he run? Why did they go to all that
3 trouble with that body? Because that was a lot of
4 blood. Why did they do that?

5 They did that based on Keith's testimony.
6 Keith -- once Brian started threatening him, Keith
7 was in a state of panic. He thought he was going to
8 die. And then when he shot him, when he realized
9 Brian did not have a gun, can you imagine the horror
10 a person must feel when they had killed someone they
11 thought was going to kill them and they thought they
12 had a gun and then to find out they did not have a
13 gun? What horror a person must feel.

14 And Keith felt that horror. He was traumatized.
15 You saw him on the witness stand. It's been two
16 years. He still can't talk about it. He is still
17 traumatized when he thinks about what happened that
18 night. He was almost speechless yesterday.

19 You heard him say he had trouble remembering
20 what happened that night. Think about that. Can't
21 trauma, when a person is traumatized, cause them to
22 forget some details of a horrible event? And he said
23 it was the most horrible experience he'd ever had in
24 his young life. He was 20 years old.

25 He also said he took the wallet from Brian's

1 pants. Now, was there reason to do that? Yes. When
2 Brian punched Keith out at his house for not
3 fighting, he said some of Brian's friends jumped on
4 him that day, too. When Derrick testified and Keith
5 testified that Brian had come to his house two weeks,
6 two weeks before this, Brian had a couple of his
7 friends with him, wouldn't Brian fear retaliation
8 from his friends? And he said that. He was afraid
9 they might kill him when they found out Brian didn't
10 have a gun that night.

11 Did you see Keith's expression change when he
12 talked about his mother? It's very obvious they are
13 close. His expression changed when he said, I didn't
14 want to tell my mother. He didn't want to hurt his
15 mother. He knew it would devastate her. He was
16 afraid. He had problems. Because we had problems
17 with Brian in the past, he feared that no one would
18 believe him when he said, I just knew Brian had a
19 gun.

20 And was he traumatized? What did Daniel Elkins
21 say? Daniel Elkins was the guy at the club, the
22 first one Keith got a ride with. He said Keith's
23 hands were shaking. And that was much later that
24 day. His hands were still shaking. It was the next
25 night. He said he looked scared. Keith was

1 traumatized by that event.

2 Let's look at another possibility. The car.
3 You have a picture of the car. And please look at it
4 very carefully. It's a white car with these big
5 purple designs on it. It's an attention getter.
6 People want to look at that car.

7 Now, what happened to the car? Keith drove the
8 car to an apartment complex based on what Nikki said.
9 The car was left there for at least a day. It was
10 taken on the early morning of December 31st. They
11 found it on the 1st. When they found the car Keith
12 said he left it unlocked. The driver's door was
13 open.

14 And remember what Keith said. He didn't look
15 under the seat to see if there was a gun. Isn't it
16 very possible that Brian did have a gun under the
17 seat and someone took it? Someone went through the
18 car and could have taken the gun. The door was open.
19 We don't know. And we will never know whether Keith
20 was absolutely right. What if Brian had had a gun
21 under that seat?

22 You know, the actions make no sense, what they
23 did after this. And I'm the first one to tell you
24 what they did to Brian's body was a horrible thing to
25 do. And Keith knows that. That's why he couldn't

1 even talk about it yesterday. He couldn't even talk
2 about taking the body to the pond. He could hardly
3 talk about what happened in the car.

4 Now, let's look at those actions. And I'm going
5 to ask you, are those actions of people that are
6 cold, calculating, planned actions; or are they
7 actions of people who are scared, desperate and not
8 thinking clearly?

9 Let's look at what they did. First of all, they
10 take the body at 1:30 in the morning. They're riding
11 around in the car with a dead person in the front
12 seat. They go to a pond. And it is a pond. It is a
13 small pond. You will have pictures. It's not moving
14 water. The body is not going to float downstream.
15 It's not a river. It's a still piece of water. And
16 it's small.

17 You know what? It's in a federal park, a public
18 park. There's a dock. People go stand on the dock
19 and look, just like Rebecca Glanville and William
20 Senn did. But did any of them take time to make sure
21 the chains were around the body, to make sure it
22 wouldn't rise to the top? Just threw it all in.
23 That wasn't planned.

24 And the gun, the .9 millimeter gun, they
25 couldn't even get it in the water. They ride over

1 the bridge, throw the gun out thinking it's going in
2 the water. It's not even in the water. Those are
3 not smart actions. Are they actions of people not
4 thinking clearly?

5 Let's look at what could possibly have been
6 going through Keith's mind when he sat in that car
7 and decided to hide that body. Let's go there for a
8 moment.

9 I've got my gun in my belt. Okay. I don't know
10 why we stopped at that house. Okay. What is Brian
11 saying? Why is he saying he's got guns? Oh, God,
12 he's talking about hurting my family. He's talking
13 about hurting me and hurting my family. He could
14 hurt us. Oh, my God, he's talking about, he's
15 talking about he's going to get rid of all these
16 beefs before the New Year.

17 Oh, he's reaching under the seat. No. Oh, my
18 God. Oh, my God, what did I do? Brian was going to
19 kill me. Brian was going to kill me. He was going
20 for a gun. Oh, God. Okay. Look at all the blood.
21 Oh, my God. Where is -- where is -- oh, God!
22 There's no gun. There's no gun! There's no gun! I
23 killed Brian. He's dead. I killed him. And there's
24 no gun! Nobody is going to believe me. They're
25 going to kill me. They will kill me. They're not

1 going to believe me. God, what am I going to do?

2 God, I can't tell my mama. Oh, my God. My mama
3 will die. I can't tell my mama. Brian's friends are
4 going to kill me. I've got to get rid of him. I've
5 got to get rid of it. There's nothing else to do.
6 There's nothing else to do. I can't tell that he
7 didn't have a gun. There's nothing else to do! I've
8 got to hide it!

9 Keith was trapped. He had no way out in his
10 mind. He was devastated. So he went to his big
11 brother, Derrick, the only person he really trusted
12 besides his mother.

13 Keith Sims is not a murderer. He did some
14 things. And what they did to Brian and his body is
15 awful. But what happened in that car and what they
16 did with the body are two different things. Keith is
17 on trial and you have to decide what happened in the
18 car. Was that murder? Was it self-defense? Or did
19 Keith react out of total fear, fear to the point of
20 passion? That is what you are deciding.

21 Please do not confuse that with what they did
22 with Brian's body. Keith is not on trial for that.
23 It was awful and Keith regrets it. He told you he
24 felt so bad for Brian's family. If Keith had meant
25 to kill Brian with malice, wouldn't he have shot him

1 in his head? Wouldn't he have shot him in his heart?
2 He sure could have. He was right there. But, no, he
3 shot him there. You don't know that's going to kill
4 somebody. He said, I didn't mean to kill him. I
5 just thought I was going to die.

6 Keith Sims is not a murderer. Ladies and
7 gentlemen, when you go to the jury room I ask that
8 you find Keith Sims not guilty of murder. Thank you.

9 **MR. MEADORS:** May it please the Court.

10 **THE COURT:** Mr. Meadors, you may proceed.

11 **MR. MEADORS:** Ms. Durant, Ms. Owings, Mr.
12 Bryant. Mr. Foreman, Ladies and Gentlemen, good
13 afternoon. I want to thank you all for being here
14 since this whole week. I want to thank each and
15 every one of you for your attention.

16 I'm not a jury watcher. I don't sit here and
17 stare, but I have looked over and seen you all have
18 been listening and you've been paying attention. I
19 want to thank you for that on behalf of everybody
20 involved: On behalf of the defendant, on behalf of
21 the victim, the victim's family.

22 This is the case of The State of South Carolina
23 vs. Keith Sims. It's not The State vs. Brian
24 Anderson. You'd think it was through the testimony
25 and their closing, putting the victim on trial.

1 Because that's what they've done.

2 You all are -- and take this the right way --
3 you all are Lady Justice. That's what you are.
4 That's what the jury is, Lady Justice. You listen to
5 the facts as they come from this witness stand. You
6 listen to the law the judge gives you. You apply the
7 law to those facts and you come back with a verdict.

8 We've all got important roles in this process.
9 Ms. Durant does. Mr. Bryant does. I do. We've all
10 got important roles. But I respectfully submit, you
11 all's role is the most important, deciding what's
12 believable and what's credible.

13 You all heard Ms. Scott when I first met you
14 all. I haven't got to introduce myself, by the way.
15 I'm John Meadors, Deputy Solicitor. I saw you all
16 this past Monday. And when Ms. Scott was in there
17 and calling the roll, there isn't a separate school
18 for you all to go to real quickly to determine how to
19 be jurors, that she puts you in real quick. But
20 you've been in that school your whole life.

21 It's what you learn from your everyday
22 experiences, from your dealings with other people at
23 home, at work, everywhere. You kind of know when
24 something is the truth or not. You know when
25 somebody is telling the truth or not. And that's

1 called your common sense.

2 You come in here and you listen. You watch
3 people's demeanor and you listen to their words and
4 you decide what's credible, what's believable. And I
5 submit to you, if you do that in this case, it won't
6 take you all long to come back.

7 Folks, it's the defendant's only day in court.
8 It's Brian Anderson's only day in court. Brian is
9 not here. He is here through me. He is represented
10 by his mom and his sister and family and friends. He
11 did speak to you though. And I want to get to you
12 later. He actually testified. Not himself of
13 course. But he testified through forensic
14 pathologist Joel Sexton. He testified through the
15 pictures and the injuries on his body that the doctor
16 was able to come in here and tell you all, this is
17 what happened to me. You all look at this. Brian
18 was here.

19 Folks, this case is about the murder of him,
20 Brian Anderson. It's also about choices and taking
21 responsibility, choices and taking responsibility.
22 On December 31st, the morning hours, early morning
23 hours of New Year's Eve, the defendant chose to kill
24 Brian Anderson. He chose. He exercised his greatest
25 power. All of us, greatest power is our power to

1 choose. He exercised his greatest power. He chose
2 to kill Brian Anderson. Taking responsibility.

3 Now, she said something interesting a little
4 while ago. Folks, let me just start talking. He's
5 taking him home. First and foremost, the victim is
6 taking him home to his residence from a party when he
7 has been out having a good time. If he was going to
8 harm him or wanted to harm him, would he take him to
9 his driveway? Wouldn't he take him to a secluded
10 place? Wouldn't he take him to a pond, somewhere
11 where nobody is there to do mischief to him? Does
12 that make any sense whatsoever? He was taking him
13 home. The victim was taking him home. Now they
14 didn't have to come get him. They were getting along
15 fine.

16 Who was angry that night? Who was upset that
17 night? I submit to you the evidence, the only
18 competent evidence, is that the defendant was. Why
19 did it happen? You know, in this state -- and he
20 mentions Law and Order -- we don't have to prove
21 motive in this case. It is not required. We don't
22 have to show why somebody did something. You just
23 can't sometimes.

24 But I'll tell you one thing. I think the motive
25 here and the reasonable inferences -- and that's all

1 we can argue to you all, is the reasonable
2 inferences. We can't get up here and argue something
3 and say something, go into detail about what a
4 defendant may or may not have said unless it came out
5 on there. I want you all to know that. That's the
6 only evidence you can take into consideration.

7 What are potential motives, even if we don't
8 have to prove motive? What are they? It might
9 simply be he had the opportunity. He could do it.
10 He could do it. He had his .9 millimeter with him.
11 I submit to you his .9 millimeter is as much a part
12 of his attire as his belt. He doesn't go anywhere
13 without it. It might be as simple as that. He had
14 the opportunity and he wanted to do it.

15 It might be for money. It could be for a
16 robbery. Do you remember when I asked him up here,
17 Did you take his money? Well, it fell out and I got
18 it. Well, no, sir. When he's confronted with the
19 statement, you sat up here right before you all were
20 fixing to dump his body in, I got his wallet out with
21 70 or \$80, right here in black and white. Well,
22 that's what they said I said.

23 Every time we catch him in something, I don't
24 remember or they said I did that. You all saw
25 several examples yesterday, and I'm going to go over

1 every one of them. Because that's really what this
2 case boils down to, is credibility, believability. I
3 agree there are only two people there that could tell
4 you what happened that night. Unfortunately, Brian
5 is not here. But the problem is, he can't tell you
6 what happened.

7 His questions to his lawyer yesterday, when he
8 was talking to him, he can't explain it. He was
9 trying to figure out again yesterday what to tell you
10 all. You can't explain some of these actions. Not
11 out of fear. Not out of worry for the family. And
12 I'm going to get to that later. Because they're
13 unexplainable. He has tried for two years and
14 changed it up 'til yesterday, up to her closing
15 argument. We may have that gun back in that car.
16 That's incredible.

17 And maybe it was just out of meanness. Maybe it
18 was just out of meanness and he was angry. No
19 evidence, no credible evidence, whatsoever the victim
20 was angry. Quite the contrary. And it's a party.
21 He had some alcohol, had some marijuana. I am
22 certainly not approving of the marijuana. He said on
23 cross we were all drinking. I think he said smoking.
24 Didn't say what. What's the reasonable inference of
25 that? They were all sitting there partying,

1 relaxing. He's taking him home.

2 I don't even think these words happened, because
3 you can't believe a thing that came out of his head.
4 But if he did say, you know, I'm going to end all my
5 beefs this year; it's New Year's Eve, maybe he's
6 trying to clean up and go straight if even anything
7 is gone wrong, which I submit there's no evidence of,
8 except him. He's trying to find anything he can to
9 justify his actions, which he can't. I submit to you
10 he didn't even say those words.

11 And the only way you've got to decide this
12 self-defense on two and four is based on his
13 credibility. And we're going to look at his
14 credibility prior to the investigation, during the
15 investigation, his actions, and up 'til yesterday so
16 you can't believe what he says based on his words,
17 because he can't come out and just tell you, I just
18 blew him away.

19 Now, when they're doing this demonstration down
20 here, this isn't Days of Our Lives where somebody
21 will have a concussion or they won't remember
22 something. You know, I don't remember who I am. I
23 can't remember what I did all this time.

24 It seemed like to me yesterday when he was up
25 there, he didn't come from this way. He said, I kind

1 of did like this. I kind of went like this and went
2 up. That's what I saw him do. And he kind of went
3 up like this. And there is that head. That's real.
4 That's real.

5 Common sense, where did the blood go? Al
6 Stuckey. It went over that way. It's kind of like
7 common sense. That's why there's bleeding over here
8 on the right. That's why there's blood splatter.
9 Spatter. Excuse me. Look at the pictures in there.
10 Look at the blood on the passenger's side. Is there
11 any question where the defendant was sitting and the
12 victim was sitting?

13 He gets shot in the head. And she just said a
14 minute ago he didn't expect that to kill him, a .9
15 millimeter to his face? Is he going to sprain his
16 ankle with it? What do you shoot a .9 millimeter in
17 somebody's face and think is going to happen? That's
18 just not -- that's not right. Taking responsibility.

19 Mr. Bryant touched on the malice. And I want to
20 talk about malice and criminal intent real quick
21 before I get to some of their smoke screens. Malice
22 and a meanness, evilness, wickedness one person shows
23 to the other. You can express: I'm going to kill
24 you; or it can be inferred by the use of a deadly
25 weapon, the .9 millimeter. That's malice. The

1 inference of malice from the use of the .9
2 millimeter, the law allows it. Take the inference.
3 That's the only way can you prove it in a lot of
4 cases. He used the .9 millimeter. He shot him.
5 That's an inference of malice.

6 Is that it? No, sir. No, ma'am. I don't know
7 if I've ever had more evidence of malice in a case in
8 my life, in my career. Evidence of malice, the
9 disposal of the body, the concrete, the tow chains.
10 How many pounds of malice is this?

11 You know, you can see malice. I'd ask all of
12 you to go back there and pick this up. You can feel
13 malice. And she wants to say here, does he get some
14 kind of credit because he didn't do a good job of
15 disposing of the body? I wrapped it around but it
16 really wasn't on there good? What does that mean?
17 He gets credit for doing a bad job of trying to hide
18 his body from his family and law enforcement?

19 The dragging. State's 18. It's almost as if
20 Brian Anderson spelled malice out on the drag marks
21 going down to that pond. When you look close enough
22 you'll see them. You'll see them.

23 Malice: Dropping his comb on the way, pants
24 coming down. Tells you through Dr. Sexton, look
25 where they bruised me. That's malice.

1 And the things he said right as he put him over,
2 cussing him as he went over the side. You heard
3 Nikki testify to that. He was talking trash to him
4 as he went over the side. Malice, meanness. And she
5 said that. It's in the record.

6 Criminal intent Your Honor will also charge you
7 on. We have to prove criminal intent. Your Honor is
8 going to charge you; it's an intentional killing of
9 another individual with malice aforethought. Mr.
10 Bryant has already told you aforethought, like some
11 other jurisdictions, premeditated. We don't have to
12 do that. It's aforethought. Aforethought can exist
13 in an instance. Pulling that trigger, that's it.
14 That's enough. Boom. Malice aforethought.

15 Criminal intent, I can't -- we can't go and open
16 up the brain of the defendant and look in there and
17 say this is exactly what he intended. I don't know
18 if I'd want us to be able to do that.

19 It's not like DNA, which clearly is not in a
20 issue. Wasn't even mentioned. That's Brian's blood
21 out there at Molly's Rock. That's Brian's blood at
22 the car. It's nobody else's. It was Brian's.
23 Brian's car.

24 We can't do a DNA -- we can't even look at the
25 x-ray like Dr. Sexton did, and I'll find it here in a

1 minute, and show the trajectory and the path, which
2 is clearly not an issue, and I'm going to get to it
3 in a minute. We can't do that with criminal intent.
4 But the law allows us, and as His Honor is going to
5 charge you all, criminal intent can be inferred by
6 the actions or the inactions of an individual.

7 There's so much criminal intent, so much
8 criminal intent. The dragging, the concrete, the tow
9 bar. You can look at actions and inactions to show
10 and infer the intent of somebody. What other intent
11 was there?

12 And she says a minute ago, you know, he just
13 couldn't tell his mother -- I love mothers. I don't
14 have mine any more. I love mothers. I would never
15 say anything bad about mothers. But I'm talking
16 about him right now. And he got up here on the
17 stand -- or she gets up here and says he couldn't
18 tell his mother. Well, yesterday he said, well, you
19 know, I think Natalie told her the next day.. That's
20 inconsistent with her argument. And I even told him,
21 I said, your mama didn't know about that the stuff
22 going in the river at Bonner's church now.

23 Criminal intent. .9 millimeter. Disposing of
24 the body itself is criminal intent. Actions during,
25 after show criminal intent. You can infer that. I

1 don't know how else -- that ought to be in the
2 dictionary under criminal intent.

3 Criminal intent. Don't tell the police. Don't
4 tell the family. Don't tell your mother. Don't tell
5 Derrick. Don't tell Nikki. Don't tell Natalie. You
6 actually heard Natalie through Nikki, which is
7 co-conspirator testimony which is allowed to come out
8 under the rules, say, "He murdered somebody." No
9 truer words were spoken in this case. How many
10 questions on cross to that? Where did you hear that,
11 Nikki? Where were you when she said it? Are you
12 sure she said that? Bingo! Because that's the
13 truth.

14 I'm briefly going to go over some what I said
15 smoke screens. When you have a good factual case, as
16 we submit the evidence is in this case, respectfully,
17 Ms. Durant doing her job will try to create smoke
18 screens and take you away from the evidence. I
19 submit respectfully some of that was done in this
20 case.

21 A few of them I have just written down. It's
22 kind of interesting. Mr. Fite this morning, he said
23 he looked at thousands of guns. I think he kind of
24 strengthened the State's case a little bit. Up close
25 and personal right there, the guy didn't have time

1 the react. I think it clearly could go on the
2 evidence. You've got two experts saying, well, it
3 could be up to 18 inches. He wants to get down to
4 three and five.

5 But when she said he looked at thousands of
6 guns, I thought it was interesting he hadn't looked
7 at this file. An expert is coming in. Fine. I
8 guess you can make what money you want to. That's a
9 lot of money. Coming in, not looking at the file,
10 not looking at the file, not looking at the
11 stippling, doesn't look at it, is going to get up
12 here and say, well, this is it all the time. That's
13 not credible. That's testimony that somebody is
14 receiving a fee for, we respectfully submit.

15 I had written down here public parks, something
16 to go back to it. And, you know, I don't know what
17 the point is there. If the concrete had kept his
18 body down, nobody would have seen him. You go miles
19 away to hide a body, that's criminal intent.

20 I don't know. You know, the only testimony we
21 had about Brian was -- and I don't think it was as
22 detailed and as elaborate and so graciously presented
23 as Ms. Durant did yesterday. You all may think
24 differently. It was that Brian had guns. There was
25 some threat. And then something happened two weeks

1 before this. Don't know who the other two guys were.
2 Derrick doesn't know who they were.

3 Derrick has admitted he lied in this case to
4 help him, about a gun. Is he going to come in here
5 now and try to help him a little bit here? Yeah,
6 sure he is. Did you feel threatened? No. I tell
7 you the other just common sense thing, that if
8 Derrick was there and his brother and his friend was
9 really getting threatened, do you think Derrick would
10 have helped him? He is going to sit back on a car?
11 That makes no sense. They're trying to tie that into
12 fit to what I guess now is there might be a gun under
13 that seat. I'm really not sure. That's not
14 credible. That's not believable.

15 Folks, I don't know what the issues in this
16 case. No motive is required. There are several
17 available. The older I get -- and I'm getting old
18 and this is all I've ever done -- I realize the facts
19 speak for themselves. They really do. And they're
20 yelling at you all in this case. The facts have
21 yelled out in this case as to what happened.

22 I'm glad I've got this here. Mr. Bryant went
23 over with you about self-defense. In my little mind
24 I've always tried to figure it's like a chair.
25 They've got to establish all four of them for it to

1 be self-defense. We've got to prove his guilt beyond
2 a reasonable doubt and that he killed him without
3 self-defense. But all four of those things have got
4 to be established. And if there's not one, it falls;
5 there is no self-defense. That's the law. And if
6 you really believe that testimony, let him go.

7 Imminent danger, must be without fault in
8 bringing on the difficulty. He came to the party
9 with a .9. Now, the judge will instruct you -- she
10 didn't even tell you, and I want you to know the
11 law -- even if you arm yourself unlawfully, if you
12 still think that you're in fear of imminent danger or
13 suffering serious bodily injury or death, if you are
14 or you think you are, you're entitled to use a gun in
15 self-defense. I'll tell you all that. That's the
16 law.

17 But in this case he came with a .9 to the party.
18 He was ready for something. He was looking for
19 trouble. He said, I take it with me all the time.
20 It's interesting, too. The comment over here, she
21 said -- I don't think she talked about it in her
22 closing -- but this was one of the most traumatic
23 nights of my life. Well, what about when you were
24 shot? Did that happen or not? And I don't know.
25 Based on his credibility, we can't tell. Brian

1 Anderson sure didn't have a good New Year's Eve that
2 year, did he?

3 His demeanor, his emotion. What happened? You
4 all heard it through several witnesses but you first
5 heard it through Nikki. And almost, credibility,
6 believability, you can look at Nikki and you can look
7 at the defendant.

8 You all know what happened. We get back to that
9 party. Again, he brings him back in his car. I'll
10 take you back home, man. Everything is fine. Gets
11 back, goes by McDonald's. I don't even know if he
12 eats. Could he have been reaching for his
13 McDonald's, to get a bag?

14 They go somewhere else. I don't know if that's
15 true or not. It doesn't matter. I think they tried
16 to interject they went somewhere, by what they're
17 arguing is a crack house. It doesn't have a thing to
18 do with this case, another smoke screen trying to get
19 you all away.

20 Go back, sitting in the driveway where the
21 defendant's family, his friends are, shoots him.
22 Now, this reenactment here of his thoughts and what
23 he was doing, you all evaluate that yourself. I know
24 what he did do. He goes into Natalie, says, come on,
25 go with me. Doesn't go to mama, doesn't go to

1 brother, sister, anybody else in there. Doesn't call
2 the police. That shows criminal intent.

3 I could be dramatic. Yes, sir. Yes, ma'am. I
4 just had a gun on me. Mama, my mama, he pulled a gun
5 on me. I had to kill him. Come here, police. I
6 think there's a gun in there. He pulled it on me
7 right now in my driveway. That's what you do.

8 No, sir. No, ma'am. Don't tell mama, get out
9 of town, let's go. Where do we go? We go to
10 brother's house. Go to Newberry, go to Boundary
11 Street, wake him up. What's wrong? I F'd up. He
12 didn't even want to say that today. You all heard.
13 He said, I messed up. I said, Mr. Ruff, what did he
14 say? He said, I F'd up. Brother, look up to. Did
15 he say he was threatened to you? No, sir. Did he
16 say he had a gun? No, sir. He didn't.

17 What did you do? We go back. Oh, I forgot one
18 part. Criminal intent. They go to Fulmer Road. He
19 goes to Fulmer Road, drops his car off behind a
20 vacant house there, the cul-de-sac. We've got a map
21 over here. I'm supposed to redact something, so I
22 can't show you now. But you'll have it back in the
23 jury room.

24 Goes to Fulmer Road, drops his car off. Then
25 Natalie takes them to Boundary. Then they get

1 Derrick. They get Nikki. They come back to
2 Boundary. All of this is going through his mind.
3 All of this is criminal intent and malice, we
4 respectfully submit.

5 She can't explain it. He couldn't explain it.
6 He wants to just say, I'm in shock, I don't remember.
7 He remembers every bit of it. He remembers certain
8 things, doesn't he? And when you catch him in
9 something, he says, well, that's what they said I
10 did.

11 After they load the concrete blocks, the tow
12 bar, they go to Molly's Pond. Now, he goes --
13 clearly my view of the evidence -- to Derrick, says,
14 man, I've got to get rid of this body. Now, did
15 Derrick say, well, here's Molly's Rock? Maybe he
16 did. But it's him who killed him, him who went to
17 Derrick and said, I've got to get rid of this body.
18 They go to Molly's Rock and you know what happened.
19 I don't need to talk about it any more.

20 And the money. You know, if it's just an
21 accident -- think about this -- or he's really in
22 danger, he's going to sit there and take his money?
23 Well, you know, he threatened me with a gun; I'm
24 going to get his money, too.

25 And another thing she said, this is what it was.

1 I forgot about it. It's been bothering me. I forgot
2 about it. The public park, she is saying a federal
3 park, why would you do it there? Well, ma'am, why
4 would you take his I.D.? If you take his I.D. and
5 you throw him down in concrete blocks in a pond, I
6 think you are trying to make sure nobody finds out
7 who it is. And he took his I.D. so nobody could find
8 him.

9 And then they leave. They go to Charleston.
10 Criminal intent. Action, inaction at the time and
11 afterwards. They go to Charleston to get rid of the
12 clothes. Not to the police. Does he tell Nikki, I
13 was threatened or had a gun? No, ma'am. No, sir.
14 Does he tell Natalie? Again, Natalie said he said, I
15 murdered somebody. Nikki said, I messed up.

16 Then they come back. He loses them. He goes to
17 an apartment complex. They go to Charleston and get
18 rid of the clothes, come back, pick him up. And you
19 all saw it yesterday. The only way to -- you
20 shouldn't even consider it as evidence, in all due
21 respect. Because the only way you can consider it in
22 this case is if you somehow believe him if he has
23 credibility. And you all saw it yesterday.

24 You all saw it yesterday when he was up here and
25 I asked him about Bernie Mack. He said, Bernie Mack?

1 I don't know Bernie Mack. Not a few minutes later he
2 said, we came back and went to Bernie Mack's house.
3 He showed you all right here, I can't tell the truth.
4 Respectfully, it's not in him. It's only in him when
5 it helps him. He is not going to tell the police
6 unless he knows what they have on him. Then I'll
7 tell a little bit more. That's not telling the truth
8 to you all right in front of you.

9 And all you have to base on whether he thought
10 he was in danger or was in danger were his words?
11 He's shown you can't believe that. That's why this
12 chair is on the ground. Not only the fact, number
13 one, in our opinion it's not met, he brought the .9,
14 he wasn't in danger of suffering serious bodily
15 injury or death. There was no gun derrick finally
16 admitted. And I'm going to try to be quick. I'm
17 trying to close. That was a lie, again goes to his
18 credibility.

19 Did he believe he was? No. And I have to say
20 no based on every other thing he's done in this case.
21 He's done nothing but lie and lie and lie and lie.
22 Why should you believe him now? You all let him go.

23 And he had no other thing to do, no other course
24 of action except to leave. Well, he's in his
25 driveway. Again, it makes no sense why Brian would

1 try to harm him there. And I don't think Brian did
2 anything. Why didn't he just get out and go on
3 inside?

4 What the case is really about, what it's really
5 about, every part of his words and his actions is
6 inconsistent with self-defense. Credibility,
7 believability, as in every case, it comes down to.

8 You all know the facts. 1-1-05, to Robert
9 Dennis, I did not do it. Not only did I not say
10 there was a gun or no gun, I did not do it. And he
11 gave some details of where he was and what he did.

12 November 2nd. And that may have actually been
13 to Wes Boland and Robert Dennis on the second. I
14 apologize. You all have got the Advice of Rights
15 form. I did not do it. One second. Here's where I
16 was. Here's where I did go. Details --

17 **MS. DURANT:** Objection, Your Honor. May we
18 approach? I'm sorry, Your Honor.

19 **THE COURT:** Yes, ma'am. What's the objection?
20 What's the objection?

21 **MS. DURANT:** May we approach?

22 **THE COURT:** What's the objection?

23 **MS. DURANT:** He said it's January 2nd, he said I
24 did not do it, but that's not what he said.

25 **MR. MEADORS:** Yes, he did.

1 **MS. DURANT:** He didn't deny it.

2 **MR. MEADORS:** He said I didn't kill him to
3 officers in Newberry.

4 **MS. DURANT:** Newberry wasn't the 2nd.

5 **MR. MEADORS:** Yes, ma'am. January 2nd.

6 **THE COURT:** You all go forward.

7 **MR. MEADORS:** You all heard the evidence. You
8 all can decide. There's an Advice of Rights sheet
9 back there. Dennis took the stand. He denied it
10 twice in Newberry, January 1st of '04, not '05. I
11 didn't do it. 02-05, I didn't do it. 07-05, I
12 didn't do it. When they went back, he was at
13 Lexington, remember, brought him back over here: I
14 did not do it. He did say it. If you all want to
15 come back and hear it from the record, do it.

16 And then we go, I did it but the victim had a
17 gun. Now, at this point he knows they know I did it.
18 He tells Stan Smith, I did it but I had a gun. So
19 all of these are wrong. And you have to judge his
20 credibility about whether he thought he was in fear
21 of imminent danger or suffering serious bodily injury
22 or death, a reasonable person would have in his
23 position?

24 And then he talks to Stan. Remember, I asked
25 him. And this is Stan Smith. And you've got it in

1 here. I asked him about his statement. January 22nd
2 I think it was. Well, I did do it and I had a gun
3 and I took it to Newberry. And I asked Derrick about
4 that. And Derrick was in the interview. You
5 remember? I said, Derrick, did you tell them that
6 you gave him a gun? Yeah, he told them -- that's
7 part of the plan -- I gave them this .45. Did you
8 tell them you took it to Newberry? I told them I
9 took it to Newberry. So you said the guy had a gun
10 and you had it and he gave it to you to get rid of
11 it? Yes, sir. Why? To help him. Did he have a
12 gun? No, sir. No, sir, he never had gun. That was
13 a lie. This is the credibility of the person you've
14 got to decide whether he was in danger of suffering
15 serious bodily injury when he just blew Brian away?

16 That was a lie. There was no gun. And where
17 did you get the gun? I actually got it three weeks
18 before this. Three weeks before the crime they are
19 now trying to say that gun was in Brian Anderson's
20 hand. And that's the gun he used. That's
21 incredible. If you want to believe him, that he
22 thought he was in danger of suffering serious bodily
23 injury or death, let him go. Because you'll have to
24 believe it on that kind of testimony which has been
25 shown to you all to be incredible. In front of you

1 all. I'm not being mean. It's just he showed it.

2 And then yesterday through one of the questions
3 of Ms. Durant, no gun yesterday. He admitted to
4 start with, well, there wasn't a gun. Because he
5 knew we had now again and proved that there wasn't a
6 gun and Derrick had even come in and given a
7 statement there wasn't really a gun. So he had to
8 come in here now and say, well, there wasn't a gun.

9 Every time up until yesterday when he is shown
10 this can't be true, he changes his story. But then
11 they change it again right in front of you all to
12 meet -- to try to meet the elements of self-defense.
13 Well, it wasn't, but if I thought it was, and if it
14 was reasonable.

15 And up 'til yesterday: Did you look under the
16 seat? Did you look under the seat? So now he's back
17 again saying, you know, it might have been. After he
18 said, I didn't do it, didn't do it, didn't do it; did
19 do it but he had a gun; well, he did do it but he
20 didn't really -- he felt like -- did do it and he
21 really had a gun, and tell -- sign it, told them he
22 had a gun; then say, well, he didn't have a gun
23 yesterday after Derrick just said that was all a lie;
24 I got the gun three weeks ago; where is the truth?
25 Where is the truth? Self-defense has got to be

1 decided on credibility, believability. It's not
2 there.

3 Bernie Mack, I don't remember him. That's what
4 they said I did. Every time something that's up
5 there he doesn't like, that's what he said. He
6 doesn't tell Nikki, doesn't tell Derrick, tells him,
7 I F'd up.

8 Bernard Elkins. You can decide this case on
9 Bernard Elkins and nobody else. You've got plenty
10 other evidence. Bernard Elkins. He's working right
11 now, I guarantee you, ten hours a day. Worked at
12 Louis Rich plant, all this other stuff. He's coming
13 out, I think it's New Year's Eve now.

14 He comes up to Bernard Elkins. If he telling
15 him I've been threatened? He pulled a gun. I
16 thought he had a gun. He said no. Were his hands
17 shaking? You know, the only thing the defendant,
18 Keith Sims, has ever been scared about or threatened
19 about was the police finding out what he did. That's
20 what he's scared about. That's what he's shaking
21 about. And he said, Bernard, I want you to take me
22 somewhere, help me get out of here.

23 If you want to talk about demeanor and
24 credibility, look at Bernard. You look at Bernard up
25 there testifying. I went home that night. I

1 couldn't sleep. That wrecks with credibility,
2 doesn't it? I told my mama. I told my mama. She
3 said, we're going to call the preacher, Johnny Mack
4 Scurry.

5 And I'm going to tell you what happened. And
6 then the case was out. It's a small community. He
7 comes down. He says, look, he told me he killed
8 somebody in Columbia last night. I took him
9 somewhere. They didn't let him in where he went.
10 But he told me he killed him. And he used that word
11 my mama told me never to use. If that ain't a word
12 that says threaten. He said, I killed that ...
13 That's mean. That's malice.

14 And he stole his gun from his girlfriend. You
15 know, the only evidence I've seen or heard about guns
16 is him. He has got the .9 millimeter. He's got this
17 .45 he gives to Derrick. Natalie supposedly was
18 moving, lost her gun. He took it. And somehow he
19 says, well, I don't want to give it back to her, I
20 don't want to get her in trouble. Does that make any
21 sense? It was her gun. That's incredible. You all
22 got to witness that right there.

23 I'm almost through. You can also look at Nikki
24 and Bernard for credibility versus the defendant.
25 Again, why didn't he tell one, two, three times to

1 the police? I tell you why. And I asked him up here
2 yesterday. It's like the wallet. When he said,
3 well, it out. But when I showed him his statement he
4 said, well, that's what they said I did, I took it
5 right before.

6 It's when Stan Smith talked to him up here in
7 the statement and he asked him, and it came out about
8 the gun, that was a lie. I said, why didn't you tell
9 him it was self-defense? He said, well, I didn't
10 know what they had yet. I didn't know what had all
11 come out. That sums up the case. Wouldn't tell,
12 wouldn't tell, doesn't tell, until he finds out what
13 we've got, and he tells a little more. That's the
14 real Keith Sims.

15 Oh, he had some gun. Oh, he threatened me.
16 What's the evidence of that? Him and just Derrick
17 and the other two, doesn't even help him.
18 Credibility, believability. He didn't know what they
19 had on him. If it's the truth, tell it. If it's the
20 truth, tell it. Bernard, it's bothering him. You go
21 tell Chief Scurry what happened. If it's the truth,
22 tell it.

23 You know one thing that just hit me last night?
24 Will may have brought this up. I don't know. If
25 there was a gun somebody pulled on you, why wouldn't

1 you try to get the gun? That doesn't make any sense
2 at all. Of course we now know there wasn't a gun.
3 He just told them that. But then he tried to hide
4 it. It was all -- that's incredible.

5 I want to close with this. You know, when Nikki
6 came up here, her day in court is coming. It's not
7 with me. She is facing her charges in Newberry. She
8 took responsibility. From day one, what did they
9 tell her? She took responsibility. I did this.
10 I've got my day in court. No, I didn't know about it
11 before. I shouldn't have gone with them then. I did
12 it. I think her testimony showed it bothered her.
13 She said, I want the families not mad at me. That's
14 real. That's credible.

15 And I want to -- I want to suggest something to
16 you yesterday. And Ms. Durant said that the
17 defendant is up here crying and showing his emotion
18 and can't get through. It's hard to tell him. I
19 think he's trying to find out what the next, the
20 right story is to say to meet these elements of
21 self-defense.

22 What does he say to you? He says to you, and
23 she asked him, why? Why now? Why all this? I want
24 to -- listen to this, please. I want you to think
25 about this when you go back there. He says, I want

1 this family to know what happened. Kind of mirroring
2 what Nikki said, wasn't it? I really want them to
3 know what happened. And that's the same individual
4 on this stand who when asked a few moments later, I
5 want to tell you. I asked him a few moments later,
6 if the body hadn't come up, would you have ever told
7 anybody? "I don't know." That's the real Keith
8 Sims.

9 He's been shot at. Not by Brian. He'd have
10 told you that. Brian has spoken to you. His
11 injuries, the stippling. Yeah, he was close. I
12 really didn't even get to see it coming. He killed
13 me. He shot me. I didn't have a gun. But I was
14 dragged, on my private parts got dragged. Do you
15 remember I asked him, he wasn't crying then, was he,
16 dragging him down.

17 In a few minutes after His Honor's charge you're
18 going to go exercise your greatest power, your
19 greatest power. And you're going to do it based on
20 not what I said, not what Ms. Durant said, but you're
21 going to do it based on the law the judge gives you
22 and the facts that came out of this witness stand.
23 And you've got to decide what's credible, what's
24 believable.

25 And we submit his words, his actions cause the

1 chair to be on the floor. There is no way you can
2 determine based on his credibility, his actions,
3 inactions what the truth is.

4 And the evidence is he shot in close range. He
5 hid the weapon. He dragged the body because he
6 didn't want anybody to find out about it because he
7 just can't explain it. And he got caught.

8 And that voluntary, that voluntary you're going
9 to be allowed to hear, I submit to you that's what
10 they want you to come back with. That's kind of what
11 they want you to come back with, voluntary
12 manslaughter, unlawful killing of another in the
13 sudden heat of passion with sufficient level
14 provocation.

15 The only passion in here was his passion not to
16 get caught, his passion to hide the body. Sufficient
17 legal provocation, that's like coming in and catching
18 your spouse with somebody and you kill them. The law
19 says, that don't justify it. You can't take a human
20 life. But there are extreme circumstances when the
21 legal provocation is sufficient you're allowed to
22 strike a fatal blow but you've still got to pay the
23 piper. That's voluntary manslaughter. Those facts
24 aren't in this case.

25 I submit that's what they want you to come back

1 with, voluntary manslaughter. I submit I'd rather
2 just as soon as I think have a not guilty. This is a
3 murder. This is a murder. When you go back and
4 return the verdict and exercise you all's greatest
5 power, please lift these up. Feel the malice. And
6 your verdict is going to speak the truth. That's
7 what the word means, truth. To speak to truth is
8 what verdict means, verdicto. I respectfully on
9 behalf of Brian Anderson ask that your verdict speak
10 the truth of guilty of murder. Thank you.

11 **THE COURT:** All right, ladies and gentlemen. It
12 now becomes my responsibility to instruct you on the
13 law of the state of South Carolina as it applies to
14 this case. The indictment in this case charges the
15 defendant with murder, as I've told you before. I
16 remind you the fact that the defendant was arrested,
17 charged, indicted is not evidence in this case,
18 cannot be considered by you as evidence of guilt in
19 this case, nor does it create any presumption or
20 inference of guilt.

21 This document which is simply the formal
22 written instrument which contains the charge made
23 against the defendant, it's the formal document by
24 which the case is brought into court.

25 I remind you that during the trial you and I

1 have certain duties to perform. As the trial judge
2 it's my responsibility to preside over the trial of
3 the case, and I also have the duty to rule on the
4 admissibility of the evidence offered during the
5 trial.

6 You are to consider only the competent evidence
7 that was presented to you. If there's any testimony
8 that was ordered stricken from the record in this
9 case during the trial, you must disregard that
10 testimony. You are to consider only the testimony
11 that's been presented from the witness stand and from
12 any exhibits that may have been made a part of the
13 record in this case.

14 I have the additional duty to charge you the law
15 applicable to this case. As the presiding judge I am
16 the sole judge of the law in this case, and it is
17 your duty as jurors to accept and apply the law as I
18 now state it to you. If you already have any idea as
19 to what the law is or what the law ought to be and it
20 does not agree with what I now tell you the law is,
21 you must abandon this idea because you're sworn to
22 accept the law and apply the law exactly as I state
23 it to you.

24 In every case tried before this court the jury
25 becomes the sole and exclusive judge of the facts of

1 the case. A trial judge cannot intimate, state,
2 comment on or make any statement to you or to a trial
3 jury about the facts of the case. Since you the jury
4 are the sole judge of the facts of the case, you are
5 not to infer from anything that I might have said or
6 done during the progress of this trial in ruling on
7 the admissibility of evidence or otherwise or
8 anything I say now during the course of this
9 instruction to you that I have any opinion about the
10 facts in this case. The law does not allow me to
11 have an opinion about the facts in any case. This is
12 a matter solely for you the jury to determine.

13 As jurors it's your duty to determine the
14 effect, value, weight and truth of the evidence
15 presented during the trial.

16 Now, the defendant has pled not guilty to this
17 indictment, and that plea puts the burden on The
18 State of South Carolina to prove the defendant
19 guilty. A person charged with committing a criminal
20 offense in South Carolina is never required to prove
21 himself or herself innocent.

22 And I charge you that this is an important rule
23 of law, that the defendant in a criminal case, no
24 matter what the seriousness of the charge may be,
25 will always be presumed to be innocent of the crime

1 for which the indictment was issued unless guilt has
2 been proven by evidence satisfying you of that guilt
3 beyond a reasonable doubt.

4 This presumption of innocence does not end when
5 you begin your deliberations, but it accompanies the
6 defendant throughout the trial and throughout your
7 deliberations until you reach a verdict of guilt
8 based on evidence satisfying you of that guilt beyond
9 a reasonable doubt.

10 The presumption of innocence it has been said is
11 like a robe of righteousness placed about the
12 shoulders of the defendant which remains with the
13 defendant until it has been stripped from the
14 defendant by evidence satisfying you of the
15 defendant's guilt beyond a reasonable doubt.

16 Presumption of innocence, in other words, is not
17 a mere legal phrase. It's not a legal theory. It is
18 a substantial right to which every defendant is
19 entitled unless you the jury are satisfied from the
20 evidence of the defendant's guilt beyond a reasonable
21 doubt.

22 Now, there are two types of evidence which are
23 generally presented during a trial: Direct evidence,
24 circumstantial evidence. Direct evidence is the
25 testimony of a person who claims to have actual

1 knowledge of a fact, such as an eye witness. It's
2 evidence which immediately establishes the main fact
3 to be proved.

4 Circumstantial evidence, on the other hand, is
5 proof of a chain of facts or circumstances indicating
6 the existence of that fact. It's evidence which
7 immediately establishes collateral facts from which
8 the main fact may be inferred. In other words,
9 circumstantial evidence is based on inference and not
10 on personal knowledge or observation.

11 But the law makes absolutely no distinction
12 between the weight or value to be given either direct
13 or circumstantial evidence, nor is a greater degree
14 of certainty required of circumstantial evidence than
15 of direct evidence.

16 You should weigh all of the evidence in the
17 case. And after weighing all of the evidence, if you
18 are not convinced of the guilt of the defendant
19 beyond a reasonable doubt, you must find the
20 defendant not guilty.

21 Well, what is a reasonable doubt at law? A
22 reasonable doubt is a kind of a doubt that would
23 cause a reasonable person to hesitate to act. Or put
24 another way, a reasonable doubt is the kind of doubt
25 that would cause a reasonable person to hesitate to

1 convict. The State has the burden of proving the
2 defendant guilty beyond a reasonable doubt.

3 Some of you may have served as jurors in a civil
4 case where you were told that it's only necessary to
5 prove a certain fact is more likely true than not
6 true, such as by the greater weight or preponderance
7 of the evidence. But in criminal cases the State's
8 proof must be more powerful than that. It must be
9 beyond a reasonable doubt.

10 Proof beyond a reasonable doubt is proof that
11 leaves you firmly convinced of the defendant's guilt.
12 There are very few things in this world that we know
13 with absolute certainty, and in criminal cases the
14 law does not require proof that overcomes every
15 possible doubt. If based on your consideration of
16 the evidence you are firmly convinced that the
17 defendant is guilty of the crime charged, you must
18 find the defendant guilty.

19 If, on the other hand, you think there is a real
20 possibility that the defendant is not guilty, you
21 must give the defendant the benefit of the doubt and
22 find him not guilty.

23 Now, necessarily, you must determine the
24 credibility of the witnesses who've testified in this
25 case. Credibility simply means believability. It

1 becomes your duty as jurors to analyze and evaluate
2 the evidence and determine which evidence convinces
3 you of its truth. In determining the believability
4 of the witnesses who have testified in this case you
5 may believe one witness over several witnesses or
6 several witnesses over one witness. You may believe
7 part of the testimony of a witness and reject the
8 remaining part of the testimony of that same witness.

9 You may believe the testimony of a witness in
10 its entirety or reject the testimony of a witness in
11 its entirety. You may consider whether any witness
12 has exhibited to you any interest, bias, prejudice or
13 other motive in this case. You may also consider the
14 appearance and manner of the witness while on the
15 witness stand.

16 Now, normally a person who is a witness cannot
17 give an opinion about his testimony. He can't give
18 opinion testimony. Normally when a person testifies,
19 they must testify as what they saw, heard or sensed
20 by smell or something of a nature. However, there is
21 an exception when someone is qualified because of
22 education or experience. They are permitted to give
23 their opinion in certain areas if the Court qualifies
24 them in that way.

25 And certainly witnesses in this case were

1 qualified in the areas of crime scene investigation,
2 fingerprint analysis and comparison, firearms
3 examination, forensic serology, DNA analysis and
4 forensic pathology.

5 To give opinion testimony in those areas, that
6 does not mean you must accept their opinion, but it
7 is evidence for to you consider in any way that you
8 consider proper.

9 Now, in order to establish criminal liability
10 criminal intent is required. It is a mental state
11 that is required to be proven beyond a reasonable
12 doubt by the State. Criminal intent is always a
13 matter that must be determined by the jury from the
14 circumstances surrounding the situation.

15 There is no way to prove intent to a
16 mathematical certainty. There is no way medical
17 science can dissect a person's brain and determine
18 what the person had in mind. So the law says that
19 criminal intent may be inferred from the
20 circumstances shown to have existed at the time and
21 place of the alleged crime. This is how you make a
22 determination of whether or not the element requiring
23 intent was present.

24 It is not necessary to establish intent by
25 direct and positive evidence, but intent may be

1 established by inference, in the same way as any
2 other fact, by taking into consideration the acts of
3 the parties and all of the facts and circumstances of
4 the case.

5 Criminal intent is a mental state, a conscious
6 wrongdoing. It is up to you to determine what the
7 defendant intended to do based on the circumstances
8 shown to have existed at that time and place. And
9 criminal intent can arise from an action or a failure
10 to act.

11 Now, as I said early in the case, the defendant
12 is charged with murder. The State must prove beyond
13 a reasonable doubt that the defendant killed another
14 person with malice aforethought. Malice is hatred,
15 ill will or hostility towards another person. It is
16 the intentional doing of a wrongful act without just
17 cause or excuse and with an intent to inflict an
18 injury or under circumstances that the law will infer
19 an evil intent.

20 Malice aforethought does not require that malice
21 exists for any particular time before the act is
22 committed, but malice must exist in the mind of the
23 defendant just before and at the time the act is
24 committed. Therefore, there must be a combination of
25 the previous evil intent and the act.

1 Malice aforethought may be expressed or
2 inferred. These terms "expressed" and "inferred" do
3 not mean different kinds of malice but merely the
4 manner in which malice may be shown to exist; that
5 is, either by direct evidence or by inference from
6 the facts and circumstances which are proved.

7 Expressed malice is shown when a person speaks
8 words or expresses hatred or ill will for another or
9 where the person prepared beforehand to do the act
10 which was later accomplished. For example, lying in
11 wait for a person or any other acts of preparation
12 going to show that the deed was within the
13 defendant's mind would be express malice.

14 On the other hand, malice may be inferred from
15 conduct showing a total disregard for human life.
16 Inferred malice may also arise when the deed is done
17 with a deadly weapon. A deadly weapon is any
18 article, instrument or substance which is likely to
19 cause death or great bodily harm. Whether an
20 instrument has been used as a deadly weapon depends
21 on the facts and circumstances of each case. And of
22 course, a pistol is a deadly weapon.

23 Now, the defendant has raised the defense of
24 self-defense. Self-defense is a complete defense;
25 and if established, you must find the defendant not

1 guilty. The State has the burden of disproving
2 self-defense by proof beyond a reasonable doubt. If
3 you have a reasonable doubt of the defendant's guilt
4 after considering all of the evidence, including the
5 evidence of self-defense, then you must find the
6 defendant not guilty.

7 On the other hand, if you have no reasonable
8 doubt of the defendant's guilt after considering all
9 the evidence, including the evidence of self-defense,
10 you must find the defendant guilty.

11 The following elements are required to establish
12 self-defense. First, the defendant must be without
13 fault in bringing on the difficulty. If the
14 defendant's conduct was the type which was reasonably
15 calculated to and did provoke a deadly assault, the
16 defendant would be at fault in bringing on the
17 difficulty and would not be entitled to an acquittal
18 based on self-defense.

19 The second element of self-defense is the
20 defendant was actually in imminent danger of death or
21 serious bodily injury or that the defendant actually
22 believed he was in imminent danger of death or
23 serious bodily injury.

24 If the defendant was actually in imminent
25 danger, it must be shown then that the circumstances

1 would have warranted a person of ordinary firmness
2 and courage to strike the fatal blow to prevent death
3 or serious bodily injury.

4 If the defendant believed he was in imminent
5 danger of death or serious bodily injury, it must be
6 shown that a reasonably prudent person of ordinary
7 firmness and courage would have had the same belief.

8 In deciding whether the defendant actually was
9 or believed he was in imminent danger of death or
10 serious bodily injury, you should consider all of the
11 facts and circumstances surrounding the crime,
12 including the physical condition and characteristics
13 of the defendant and the victim.

14 The defendant does not have to show that he
15 actually was in danger. It's enough if the defendant
16 believed he was in imminent danger and a reasonably
17 prudent person of order fair firmness and courage
18 would have had the same belief.

19 The defendant has the right to act on
20 appearances even though the defendant's beliefs may
21 have been mistaken. It's for you to decide whether
22 the defendant's fear of imminent or immediate danger
23 of death or serious bodily injury was reasonable and
24 would have been felt by ordinary person in the same
25 situation.

1 Now, words alone accompanied by hostile acts may
2 depending on the circumstances establish
3 self-defense. Evidence of prior difficulties between
4 the defendant and the victim they be considered in
5 deciding whether a threat existed, whether the
6 defendant had a reason to believe a threat existed
7 and how serious that threat was.

8 Prior instances of violence by the victim may be
9 considered in deciding whether the defendant actually
10 believed he was in imminent danger of death or
11 serious bodily injury or was actually in imminent
12 danger. And threats made by the victim may be
13 considered in determining whether the defendant
14 actually was or believed he was in imminent danger.

15 The intoxication of the victim may be considered
16 in considering whether the defendant's fear of death
17 or bodily harm was reasonable.

18 And the final element of self-defense is that
19 the defendant had no other probable way to avoid the
20 danger of death or serious bodily injury than to act
21 as the defendant did in this particular instance.

22 If the defendant was on his own property, the
23 defendant had no duty to retreat before acting in
24 self-defense.

25 A person cannot be required to make an exact

1 calculation as to the degree or amount of force which
2 may be needed to avoid death or serious bodily harm.
3 Therefore, in self-defense the defendant has the
4 right to use the force needed to avoid death or
5 serious bodily harm. The force used in self-defense
6 does not have to be limited to the degree or amount
7 of force used by the victim. The defendant has the
8 right to use so much force as appeared necessary for
9 complete self protection and which a person of
10 ordinary reason and firmness would have believed to
11 be needed to prevent death or serious bodily harm.

12 Now, as I told you earlier, if you find the
13 State has failed to prove beyond a reasonable doubt
14 that the defendant committed murder, you may consider
15 whether the State has proved beyond a reasonable
16 doubt that the defendant committed voluntary
17 manslaughter.

18 Voluntary manslaughter is included within the
19 offense of murder and it is what's known as the
20 lesser offense of voluntary manslaughter.

21 To prove voluntary manslaughter the State must
22 prove beyond a reasonable doubt that the defendant
23 took the life of another in the sudden heat of
24 passion based on sufficient legal provocation. Both
25 heat of passion and sufficient legal provocation must

1 be present at the time of the killing to constitute
2 voluntary manslaughter.

3 Sudden heat of passion may for a time affect a
4 person's self-control and temporarily disturb a
5 person's reason. The sudden heat of passion must be
6 the type that would make an ordinary person unable to
7 coolly reflect on his actions and would produce an
8 uncontrollable impulse to do violence.

9 Sufficient legal provocation must be the type
10 that would make a person of ordinary reason and
11 caution become enraged and to lose control
12 temporarily. The provocation needed for voluntary
13 manslaughter must come from some act or related to
14 the victim.

15 Words alone, however, vulgar or insulting, are
16 not enough to be legal provocation. Where a death is
17 caused by the use of a deadly weapon, the words must
18 be accompanied by some overt threatening act which
19 could have produced the heat of passion.

20 The exercise of a legal right, no matter how
21 offensive it is to another, is never sufficient legal
22 provocation for a voluntary manslaughter. If the
23 heat of passion had cooled or if there was enough
24 time between the provocation, if any, and the cooling
25 for the passion of a reasonable person to cool, the

1 killing would not be voluntary manslaughter.

2 In deciding whether a reasonable person would
3 have had enough time to cool off, you should consider
4 all the circumstances surrounding the killing. You
5 may consider the nature of the provocation, if any,
6 the defendant's mental and physical state, and the
7 circumstances and relationship between the parties.

8 Now, ladies and gentlemen, nothing I may have
9 said or done during the course of this trial has been
10 in any way intended to express or suggest a view of
11 the case or an opinion as to the facts, the weight of
12 the evidence or the credibility of the witnesses. If
13 any of my actions or words have so seemed to
14 indicate, you please disregard those words and form
15 such opinion of your own as to these matters.

16 I am required to declare the law as I've done
17 through these instructions to help and guide you to a
18 just and lawful verdict. Whether some of these
19 instructions will apply will depend on what you find
20 to be the facts. The fact that I have instructed on
21 various subjects in this case must not be taken as
22 indicating an opinion of this Court as to what you
23 should find to be the facts or as to which party
24 should be entitled to your verdict.

25 Your verdict must represent the considered

1 judgment of each juror. In order to return a
2 verdict, it's necessary that each juror agree. Your
3 verdict must be unanimous. It's your duty as jurors
4 to consult with one another, to deliberate with a
5 view to reaching an agreement if you can do so
6 without violence to your individual judgments.

7 Each of you must decide the case for himself or
8 herself, but do so only after an impartial
9 consideration of the evidence in the case with your
10 fellow jurors. In the course of your deliberations
11 do not hesitate to re-examine your own views and
12 change your opinion if convinced it is erroneous, but
13 do not surrender your honest conviction as to the
14 weight or effect of the evidence solely because of
15 the opinion of your fellow jurors or for the mere
16 purpose of returning a verdict.

17 Remember at all times you are not partisans
18 favoring one party over another. Are you judges,
19 judges of the facts. Your sole interest is to seek
20 the truth from the evidence in this case.

21 Now, Mr. Foreman, I have prepared a verdict form
22 which I will give to you with the evidence. It's a
23 simple form. It says: We, the jury, by unanimous
24 consent on the charge of murder find the defendant,
25 Keith A. Sims, guilty or not guilty. Or, we, the

1 jury, by unanimous consent on the charge of voluntary
2 manslaughter find the defendant, Keith A. Sims,
3 guilty or not guilty.

4 Once the decision has been made, if you'll sign
5 your name and date it, knock on the jury room door,
6 we will receive your verdict. I am going to ask you
7 to retire to the jury room now but do not begin your
8 deliberations until you have received all of the
9 evidence in this case. The clerk and the attorneys
10 and the bailiffs are going to gather up the evidence,
11 send it to the jury room. Once you have received all
12 of the evidence and the verdict form you may begin
13 your deliberations. Thank you very much. Please
14 retire to the jury room.

15 (Jury out at 3:25 p.m.)

16 **THE COURT:** All right, counsel. Any exceptions
17 to the charge?

18 **MR. MEADORS:** No, sir.

19 **THE COURT:** From the defense?

20 **MS. DURANT:** No, sir.

21 **THE COURT:** All right. Let's please check the
22 evidence. Billy, when you take the evidence and the
23 verdict form, bring the -- seat the alternates out in
24 the hall. I'll deal with them in a minute.

25 **THE BAILIFF:** May I approach the bench just a

1 second, Your Honor?

2 **THE COURT:** Yes, sir.

3 (Whereupon, a bench conference is had)

4 **THE COURT:** Move the evidence into the jury
5 room, including the gun.

6 **MR. BRYANT:** There is a gun and clip, no
7 bullets.

8 (Whereupon, the jury begins deliberating at
9 approximately 3:39 p.m.)

10 **THE COURT:** Do you have any objection to
11 dismissing the alternates?

12 (Pause)

13 **THE BAILIFF:** Your Honor, the alternates are in
14 the hall.

15 **THE COURT:** Did you give them the verdict?

16 **THE BAILIFF:** Yes, sir. They have it.

17 **THE COURT:** Have they got all the evidence?

18 **THE CLERK:** Yes, sir.

19 **THE COURT:** That's Ms. Villali and
20 Mr. Thompkins. Bring them in.

21 **THE CLERK:** Yes, Your Honor.

22 (Whereupon, the alternates are excused).

23 **THE COURT:** All right. We'll stand at ease
24 until we hear from the jury.

25 (Whereupon, a break is taken)

1 (Whereupon, a bench conference is had)

2 (WHEREUPON, Court's Exhibit No. 2 is marked for
3 identification.)

4 **THE COURT:** Counsel, approach the bench.

5 (Whereupon, a bench conference is had)

6 **THE COURT:** I have a note from the jury asking
7 for written statements of the witnesses. As I
8 understand it, only the Miranda warning statements
9 are in their hands. The advice of rights sheets. Is
10 that correct?

11 **MR. MEADORS:** I'm trying to think. Yeah. Yes.

12 (Pause - attorneys conferring)

13 **THE COURT:** In other words, they're asking for
14 whatever statements were made, written by the police
15 officers.

16 **MR. MEADORS:** I understand. I understand what
17 they're asking. Yes, sir.

18 **THE COURT:** Okay. They can't have this. I just
19 wanted to make sure.

20 **MR. MEADORS:** All the evidence that's been
21 presented has been presented. Yes, sir. That's --

22 **THE COURT:** They also are asking for a clear,
23 concise definition of murder, manslaughter which I
24 thought I'd provided them with.

25 **MR. MEADORS:** Crystal clear I thought, too,

1 Judge.

2 **THE COURT:** I do the best I can. Is there any
3 objection to sending the written charge of murder,
4 manslaughter back to the jury?

5 **MS. DURANT:** Your Honor, I have no objection to
6 that, if we could include self-defense along with
7 those.

8 **THE COURT:** They didn't ask for self-defense.

9 **MS. DURANT:** Even though they didn't ask for
10 that.

11 **THE COURT:** I don't think I ought to give them
12 anything they didn't ask for.

13 **MS. DURANT:** Okay. We don't object to that.

14 **THE COURT:** All right. Satisfactory to the
15 State?

16 **MR. MEADORS:** I guess that's clear and concise,
17 giving them the words.

18 **THE COURT:** If they ask for self-defense I'll
19 give them self-defense. And that may be the next
20 note.

21 (Pause)

22 **MR. MEADORS:** Your Honor, we have no opinion
23 either way quite frankly.

24 **THE COURT:** On what?

25 **MR. MEADORS:** Sending that back.

1 **THE COURT:** Sending what back?

2 **MR. MEADORS:** I thought you were --

3 **THE COURT:** I'm trying to write an answer to
4 them.

5 (Pause)

6 **THE COURT:** All right. Review this, please.

7 (Pause)

8 **THE COURT:** Any objection?

9 **MR. MEADORS:** None from the State.

10 **MS. DURANT:** No, sir.

11 **THE COURT:** All right. Mr. Whittle, if you will
12 take this to the jury. And we will stand at ease
13 until we hear from the jury.

14 **MR. MEADORS:** Thank you.

15 (Whereupon, a break is taken)

16 **THE COURT:** Ms. Durant, Mr. Meadors, the jury
17 has been out three hours. Is that correct?

18 **COURT REPORTER:** They went out at 3:39.

19 **THE COURT:** Well, within four minutes of three
20 hours. Is there any objection to asking the jury
21 Foreman what they plan to do, whether they'd like to,
22 A, continue as they are right now; B, have dinner
23 brought into them and stay; or, C, go home at some
24 hour within the next 30 minutes or so and resume
25 tomorrow. Any objection?

1 **MS. DURANT:** Just a moment, Your Honor.

2 (Pause)

3 **MR. MEADORS:** Judge, we're okay with whatever
4 option they want.

5 **MS. DURANT:** We are too, Your Honor. I think
6 it's a good idea to ask them what they are
7 comfortable with. The only concern I have if they
8 decide to go home that they not use the Internet to
9 look up any issues about legal matters.

10 **THE COURT:** All right. Well, hold the presses.
11 (Whereupon, the Court receives a note from the
12 jury)

13 **THE COURT:** "What are our options for tonight?"

14 **MR. MEADORS:** Timing is everything.

15 **THE COURT:** And also -- well, I'm not going to
16 even state this in public. You can come up and see
17 it if you wish to.

18 **MS. OWINGS:** Just for timing purposes, are you
19 going to bring them all out there or again just the
20 Foreman?

21 **THE COURT:** I'm going to just bring the Foreman
22 out.

23 **MR. MEADORS:** Okay.

24 (Whereupon, a bench conference is had)

25 **THE COURT:** Mr. Hollis, bring the Foreman, Mr.

1 Chick, please.

2 (Whereupon, the Foreman enters the courtroom).

3 **THE COURT:** Mr. Chick.

4 **FOREPERSON:** Yes, sir.

5 **THE COURT:** I don't want you to tell me about
6 anything about what's going on in the jury room. But
7 I do have your note. And I want to offer some
8 options to you which you can take to the jury, let
9 them decide.

10 First, you can continue as we are right now.
11 And we're -- everybody is here. We're waiting. I
12 mean, we will wait. That's what I meant. Secondly,
13 I can send out and have a meal brought in if you'd
14 like to continue this evening. Or, third, if the
15 jury so wishes, you can go home and come back in the
16 morning, start fresh. I think those are the three
17 options that we've discussed. And if you would
18 kindly talk that over with the members of the jury
19 and let me know what they'd like to do, we'll
20 accommodate you.

21 As far as the other request, the clerk is going
22 to -- if the jury decides to stay, we will remedy the
23 other problem.

24 **FOREPERSON:** Okay.

25 **THE COURT:** In the meantime, I'd encourage you

1 to share.

2 **FOREPERSON:** That's working.

3 **THE COURT:** Okay. Good. All right. And I'm
4 not sure about your diabetic. And whatever they need
5 we'll be glad to try to accommodate. So if you'll
6 just inquire of the jury what they'd like to do, we'd
7 be glad to accommodate you.

8 **FOREPERSON:** Thank you, sir.

9 **THE COURT:** Yes, sir.

10 (Whereupon, the Foreman exits the courtroom)

11 (WHEREUPON, Court's Exhibit No. 3 is marked for
12 identification.)

13 **MR. MEADORS:** We've had cases in the past where
14 jurors have gone home and they've looked up -- state
15 vs. Sharon Smith -- they've looked up different
16 charges, murder one as to other states.

17 **THE COURT:** All right.

18 Tired).

19 (Pause)

20 **THE COURT:** All right. Come to order, please.

21 **DEPUTY:** They're bringing the defendant up.

22 **THE COURT:** That's fine, Joe. Good. Have a
23 seat, please. The jury has indicated they want to go
24 home.

25 (Pause)

1 THE COURT: How are we going, Mr. Foreman?

2 FOREPERSON: Not.

3 THE COURT: All right. That's okay. That's --
4 you need not feel bad or guilty about that. Would
5 the jury like to go home? Is that what I understand?

6 FOREPERSON: Yes, sir.

7 THE COURT: All right. I'm going to bring the
8 defendant up and I'm going to bring the jury in.
9 I've got just some overnight instructions for them.
10 So it will be just a minute. Okay?

11 FOREPERSON: All right. Thank you.

12 MS. DURANT: Your Honor, I would request, too, I
13 know there's been a problem with the news. And we
14 would ask that they be instructed on that.

15 THE COURT: I will. TV, radio, Internet.

16 MS. DURANT: Yes, sir.

17 THE COURT: All forms of media.

18 MS. DURANT: Yes, sir. Spouses.

19 THE COURT: And riding around. All right,
20 Billy. Bring the jury.

21 THE BAILIFF: Be glad to, Your Honor.

22 THE COURT: 9:00 suit everybody?

23 MS. OWINGS: That's fine with us, Your Honor.

24 MS. DURANT: That's fine.

25 MR. MEADORS: Yes, sir.

1 **THE COURT:** The sooner the better.

2 (Jury in at 7:08 p.m.)

3 **THE BAILIFF:** The jury is all present, Your
4 Honor.

5 **THE COURT:** Thank you very much. Mr. Foreman
6 and Ladies and Gentlemen of the Jury, I've been
7 informed by your Foreman that at this stage of the
8 proceedings the jury has been unable to reach a
9 verdict. And I understand that. These are difficult
10 matters. They need to be resolved. And your Foreman
11 has indicated that he thinks, the jury thinks that
12 perhaps coming back fresh in the morning, you may be
13 able to facilitate moving ahead with this.

14 So I'm going to excuse you now. You've been
15 deliberating about three and a half hours which again
16 is not unusual. When we've got 12 people together,
17 it's hard for 12 people -- I know that -- hard for 12
18 people to agree on anything. So I'm going to excuse
19 you now for the evening and ask you to be back --
20 would it be all right if you come back at 9 in the
21 morning instead of 9:30? Or everybody comfortable
22 with that? Is that a problem with anybody? Anybody?
23 Okay. That's a problem?

24 **JUROR:** Yeah. I need to stop to the bank in the
25 morning.

1 **THE COURT:** Sir?

2 **JUROR:** I need to stop to the bank in the
3 morning.

4 **THE COURT:** Okay. How about 9:30 then?

5 **JUROR:** Yeah. That's fine.

6 **THE COURT:** Well, let's make it 9:30, just as
7 we've been going to rest of the week. I'm going to
8 ask you to do or not to do certain things. Now,
9 sometimes it's tempting to watch television, see if
10 there's anything, any news about the case, read the
11 newspapers, find out if there's any news about the
12 case. We've even had jurors who took it upon
13 themselves to investigate certain things on the
14 Internet if they chose to do so, I mean, that they
15 did, well, on their own time.

16 The important thing is to realize that you've
17 heard the testimony here. And the reason I give you
18 these cautions is so that you won't be influenced by
19 anything outside of this courtroom, outside of what
20 you have heard and seen.

21 If I had to recommend anything for you for this
22 evening it would be to go home, have a good meal,
23 talk with your spouse or family, not about the case,
24 and get a good night's sleep. Because tomorrow we're
25 going to resume. And this matter has to be resolved

1 one way or the other. So again, please heed my
2 words. Don't try -- don't read anything or listen to
3 anything or try to watch anything about the case,
4 because it is important that you not take what
5 somebody else says as what's happened in this case,
6 because you're the ones that heard it. If you read
7 somebody else's account of it, it's what they thought
8 they saw and heard. You know in your own mind what
9 you've seen and heard in this case.

10 And it would be improper to try to inform
11 yourself of something outside of this record, as I
12 said, by some sort of Internet research. I don't
13 know if it would do any -- if there's anything you
14 could research on the Internet about this or even if
15 you have any interest in doing that. But it would be
16 improper. It's just so important that your decision
17 is based on what you have seen and heard in this
18 courtroom. And so I'm sure you'll respect those
19 instructions.

20 All right. I'm going to release you now. I
21 will hold the visitors in the courtroom until the
22 jury has cleared the building just so there wouldn't
23 be any chance of you accidentally running into any of
24 them. So you're excused for the evening. I'll see
25 you back in the jury room that we're in now. We're

1 going to stay in this courtroom. At 9:30. Thank you
2 very much. Joe, can we get an escort -- don't
3 everybody point fingers -- to escort the jury out,
4 please.

5 (Jury out at 7:13 p.m.)

6 **THE COURT:** All right. I'm not going to ask the
7 members of the audience to stay here. But I'm
8 cautioning you. You're not to have any contact with
9 these jurors. You understand if I have any report
10 that anybody accidentally or intentionally tries to
11 contact any of these jurors around the building or
12 anything like that, there will be serious
13 consequences. That's all I need to say. We'll stand
14 at ease until 9:30 in the morning.

15 (Whereupon, the proceedings are concluded for
16 the day, to be reconvened tomorrow morning)

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1 Friday, March 24, 2006

2 (WHEREUPON, Court's Exhibit No. 4 is marked for
3 identification.)

4 **THE COURT:** All right. The defendant is
5 present. All right. Counsel, it's my understanding
6 the jury has reached a verdict. Are you ready to
7 receive the verdict?

8 **MR. MEADORS:** The State's ready.

9 **THE COURT:** Defense ready?

10 **MS. DURANT:** Yes, Your Honor.

11 **THE COURT:** Clerk. Bring the jury, please.

12 **THE BAILIFF:** Be glad to, Your Honor.

13 (Jury in at 2:39 p.m.)

14 **THE BAILIFF:** The jury is all present, Your
15 Honor.

16 **THE COURT:** All right. Thank you very much.
17 Mr. Foreman, has the jury reached a verdict?

18 **FOREPERSON:** Yes, Your Honor, we have.

19 **THE COURT:** Will you hand it to the clerk.

20 (Foreman complies)

21 **THE COURT:** Publish the verdict, please.

22 **THE CLERK:** Yes, Your Honor. In The State of
23 South Carolina, in the County of Richland, in the
24 Court of General Sessions, indictment number
25 2004-GS-40-1037, The State of South Carolina vs.

1 Keith A. Sims, defendant, the verdict is: We, the
2 jury, by unanimous consent on the charge of murder
3 find the defendant, Keith A. Sims, guilty. Signed
4 John Chick this 24th day of March, 2006.

5 Mr. Foreman, is this your verdict and the
6 verdict of the entire jury?

7 **FOREPERSON:** Yes, sir, it is.

8 **THE COURT:** Thank you very much. Any desire to
9 poll the jury?

10 **MS. DURANT:** Yes, Your Honor, please.

11 **THE COURT:** Please poll the jury, Mr. Clerk.

12 **THE CLERK:** Yes, sir. Ladies and Gentlemen of
13 the Jury, I now have two questions to ask you. The
14 questions will be: Was this your verdict, and is it
15 still your verdict. When I call out your name,
16 please answer yes or no.

17 John Chick, was this your verdict?

18 **JUROR:** Yes.

19 **THE CLERK:** Is it still your verdict?

20 **JUROR:** Yes.

21 **THE CLERK:** Tracey Robinson, was this your
22 verdict?

23 **JUROR:** Yes.

24 **THE CLERK:** Is it still your verdict?

25 **JUROR:** Yes.

1 THE CLERK: Wanda Loftin, was this your verdict?

2 JUROR: Yes.

3 THE CLERK: Is it still your verdict?

4 JUROR: Yes.

5 THE CLERK: Nancye Harrell, was this your
6 verdict?

7 JUROR: Yes.

8 THE CLERK: Is it still your verdict?

9 JUROR: Yes.

10 THE CLERK: Antonio Robertson, was this your
11 verdict?

12 JUROR: Yes.

13 THE CLERK: Is it still your verdict?

14 JUROR: Yes.

15 THE CLERK: Deanna Keeton, was this your
16 verdict?

17 JUROR: Yes.

18 THE CLERK: Is it still your verdict?

19 JUROR: Yes.

20 THE CLERK: Rose Page, was this your verdict?

21 JUROR: Yes.

22 THE CLERK: Is it still your verdict?

23 JUROR: Yes.

24 THE CLERK: James Kendall, was this your
25 verdict?

1 JUROR: Yes.

2 THE CLERK: Is it still your verdict?

3 JUROR: Yes.

4 THE CLERK: Michelle Parrish, was this your
5 verdict?

6 JUROR: Yes.

7 THE CLERK: Is it still your verdict?

8 JUROR: Yes.

9 THE CLERK: Cynthia Newton, was this your
10 verdict?

11 JUROR: Yes.

12 THE CLERK: Is it still your verdict?

13 JUROR: Yes.

14 THE CLERK: Anthony Anderson, was this your
15 verdict?

16 JUROR: Yes.

17 THE CLERK: Is it still your verdict?

18 JUROR: Yes.

19 THE CLERK: Barbara Smith, was this your
20 verdict?

21 JUROR: Yes.

22 THE CLERK: Is it still your verdict?

23 JUROR: Yes.

24 THE CLERK: Thank you. The jury has been
25 polled, Your Honor.

1 **THE COURT:** All right. Ladies and Gentlemen of
2 the Jury, thank you very much. Now I'm going to
3 dismiss you for -- obviously this case is over. This
4 was a difficult case. I know that. I know that by
5 the amount of time you spent deliberating this
6 matter.

7 The remaining portion of this matter will
8 consist of the sentencing of the defendant. I would
9 like to talk with you in your chambers, your jury
10 room for just a minute before that takes place.
11 That's going to take a few minutes because there's
12 some paperwork that needs to be done before that can
13 happen. So, if you'll retire to your jury room, the
14 clerk has some things he needs to talk to you about.
15 I'd like to speak to you for just a minute before you
16 leave.

17 (Jury out at 2:44 p.m.)

18 **THE COURT:** All right, ladies and gentlemen.
19 The sentencing will take place at 3:00. Stand at
20 ease.

21 (Whereupon, a break is taken)

22 **THE COURT:** Bring the jury.

23 **THE BAILIFF:** I'll be glad to, Your Honor.

24 **MS. DURANT:** Your Honor, if I may, we do have
25 some other issues for the record.

1 **THE COURT:** Hold them up just a minute. I'm
2 sorry. Go ahead, Ms. Durant. I'm sorry.

3 **MS. DURANT:** Your Honor, we do want to renew all
4 of our prior objections. And for the record, I do
5 want to say that when the charges for murder and
6 voluntary manslaughter were sent to the jury that we
7 had requested the charges on self-defense also. And
8 we want to just put that objection on the record,
9 Your Honor, that they were not sent back to the jury.

10 **THE COURT:** Well, they were not requested.
11 That's why they were not sent back. I know you
12 understand that.

13 **MS. DURANT:** Yes, sir. But for the record we do
14 want to make that objection. We also want to make a
15 motion for a new trial based on parts that the
16 self-defense charges were not sent to the jury, also
17 on the fact that the incident with the victim where
18 the victim gave a statement in June of 2001
19 indicating that he had a gun and that he had fired
20 the gun out of his house at another person, Marcus
21 Majeed, and that we were not allowed to present a
22 witness to testify to that which we think would have
23 enhanced Keith's credibility and his testimony, Your
24 Honor.

25 And we also -- I think the State impeached with

1 his juvenile record. And I think it was done on
2 recross which I think went beyond the scope of direct
3 or redirect. So, for those issues, Your Honor, we do
4 move for a new trial.

5 **THE COURT:** All right. Anything from the State?

6 **MR. MEADORS:** Just obviously, Your Honor ruled,
7 and the remoteness of that incident was involving
8 someone else to begin with. And in addition to that,
9 the victim in the case, Brian Anderson, was the one
10 who called the police on that and the police got
11 there as a result of his phone call. But the
12 objection was remoteness.

13 As far as the juvenile record, I think there was
14 a question on redirect which basically brought his --
15 said, well, you've never been through anything like
16 this before, which we felt opened the door on recross
17 to his character and that he hadn't been in trouble
18 at all. That's when we impeached him with his
19 juvenile record, and I just wanted the record to
20 reflect that.

21 **THE COURT:** All right. And the issue of not
22 sending the written charge of self-defense to the
23 jury.

24 **MR. MEADORS:** I'm sorry. I missed that. Judge,
25 it was my understanding the note just had requested a

1 concise definition of murder and manslaughter.

2 **THE COURT:** That's correct.

3 **MR. MEADORS:** And after agreement I thought
4 between the parties Your Honor's instructions were
5 sent back to them.

6 **THE COURT:** Well, I would not go so far as to
7 say there was agreement between the parties. That's
8 the way I interpreted the note from the jury, that
9 that's what they wanted. And that's what I sent to
10 them.

11 **MR. MEADORS:** Yes, sir. I'm in agreement
12 between the parties that Your Honor's instructions on
13 those two went back, is what I was --

14 **THE COURT:** On those two.

15 **MR. MEADORS:** On those two.

16 **THE COURT:** All right. Ms. Durant, I must
17 respectfully deny your motions.

18 **MS. DURANT:** Thank you, Your Honor.

19 **THE COURT:** They're on the record.

20 **MS. DURANT:** Thank you.

21 **THE COURT:** All right. Now bring the jury.
22 Three members of the jury elected to leave. I think
23 nine members of the jury elected to stay.

24 (Jury in at 3:10 p.m.)

25 **THE BAILIFF:** The jury is all present, Your

1 Honor.

2 **THE COURT:** I understood there were nine.
3 Somebody else leave? All right. Pull that door to,
4 Billy. All right, Ms. Durant, bring your client
5 forward.

6 **MS. DURANT:** May his mother come down, Your
7 Honor?

8 **THE COURT:** Certainly. All right, Solicitor.

9 **MR. MEADORS:** Very briefly, Your Honor, if it
10 pleases the Court. I obviously want to thank the
11 jury for their verdict. Standing beside me is Sharon
12 McCarra, Brian's mom. Natasha is sitting back on the
13 front row behind Mr. Bryant. And there are other
14 numerous family and friends up here. I want to thank
15 you them for being here throughout this.

16 Your Honor, Brian Anderson also had a daughter,
17 Naudia, who was born on Father's Day and will be two
18 in June I think. The jury has spoken. The facts
19 kind of speak for themselves. They love Brian and
20 they miss him and wish he was still here. Sharon.
21 Ms. McCarra may have a few words to address to the
22 Court.

23 **MOTHER OF MR. ANDERSON:** I just want to say they
24 made the right decision. My son is not here to speak
25 for himself, so I have to speak for him. And I know

1 that what was done to him was wrong. And I just hope
2 that the defendant's mother doesn't have to feel the
3 pain that I -- that I have had to feel, I have had to
4 endure. That's all I want to say.

5 **MR. MEADORS:** Your Honor, there were just for
6 the record seven different law enforcement agencies
7 in this and they worked together and cooperated. I
8 want to thank them. That's all we have.

9 **THE COURT:** All right. Ms. Durant.

10 **MS. DURANT:** Thank you, Your Honor. As the
11 testimony indicated, Keith is 22 years old and was in
12 the 12th grade at the time of the incident, Your
13 Honor. With him today is his mother who has been
14 here the entire week. She does have a disability and
15 she has been here the entire week enduring that
16 disability and discomfort, Your Honor. His father
17 was also here the entire week. He's not here today.
18 And there are some other family members, I think his
19 sister and his brother and nephews.

20 Your Honor, Keith has expressed nothing but
21 remorse from the very beginning. He has truly
22 regretted their actions that night. And as he
23 testified, this was the worst night of his life. I
24 think if he could take it back he would. He has told
25 me before court, before the trial that he really

1 hated it for Brian's family. And he has expressed
2 concern for them to me in our meetings before the
3 trial, Your Honor.

4 He -- I don't -- I think his mother would like
5 to say a few words if Your Honor would entertain
6 that.

7 **THE COURT:** Certainly.

8 **MOTHER OF MR. SIMS:** Your Honor, I do love my
9 son. I knew that this couldn't have been nothing
10 intentional for it to happen. My heart just goes out
11 to the mother from day one because I'm a mother also.
12 But I know Keith couldn't intentionally take
13 anybody's life. And especially the peoples (sic)
14 that were his friends, because he really went
15 overboard with loving peoples (sic) and loving his
16 friends.

17 And during the time that he has been
18 incarcerated I've been communicating back and forth
19 with him. And his relationship with God has got even
20 closer. He's has been filled with the Holy Spirit in
21 jail. And I had hopes that he would be there with me
22 during my disability to help take care of me.

23 **MS. DURANT:** Your Honor, we'd like to point out
24 to the Court that ne has no prior adult record, no
25 prior convictions as an adult. I think he would like

1 to address the Court, Your Honor.

2 THE COURT: Yes, sir. Mr. Sims, I'll be glad to
3 hear from you.

4 MR. SIMS: I want to let the family know I am
5 very sorry for the pain that they've gone through and
6 endured over the years. But at the time that the
7 incident happened I thought my life was on the line.
8 I'm sorry for all the pain, but I wasn't really
9 thinking clearly. I don't think I was thinking at
10 all. I'm sorry for all the pain they endured over
11 the years.

12 MS. DURANT: Your Honor, we just would request
13 the minimum sentence on murder. He is 22 years old
14 and he has expressed remorse and we would just like
15 for him to have hope that he could have some kind of
16 life some day. If Your Honor would please take that
17 into consideration.

18 THE COURT: He understands the mandatory minimum
19 sentence in this case is 30 years. Does he not?

20 MS. DURANT: Yes, sir.

21 THE COURT: Anything further from the defense?

22 MS. DURANT: No, Your Honor.

23 THE COURT: Anything further from the State?

24 MR. MEADORS: No, sir.

25 THE COURT: Well, after hearing the case and

1 hearing the evidence presented in this case, all the
2 witnesses, I do not believe this is a case that cries
3 out for the maximum sentence which as you know is
4 life without parole.

5 **MS. DURANT:** Yes, sir.

6 **THE COURT:** On the other hand, I feel that the
7 minimum sentence is not appropriate either. And I
8 say that not necessarily because of what happened in
9 the automobile but what happened after. And, Mr.
10 Sims, you put this family of this victim through
11 immeasurable pain, not just because the body was
12 disposed of but the manner in which it was disposed
13 of. You desecrated a body, a human being. And that
14 is offensive to me; it's offensive to society.

15 I'm sad that you felt that you had to carry a
16 gun in our society today. I am sad that young people
17 feel that they have to carry guns for their own
18 protection. And I don't know whether you carried it
19 for your own protection or whether you carried it to
20 tell the community that you were larger than life by
21 carrying guns or somebody that was to be reckoned
22 with by carrying a gun. I don't know. All I know is
23 a young man met an untimely young death and his
24 family is deprived of their son for the rest of their
25 lives.

1 Now, Mr. Sims, I cannot reward you with a
2 minimum sentence in this case. Therefore, the
3 sentence of the Court is you are committed to the
4 State Department of Corrections for a period of 40
5 years. Good luck to you.

6 **MR. MEADORS:** Thank you, Your Honor.

7 **MS. DURANT:** Thank you, Your Honor.

8 **THE COURT:** Court is adjourned.

9 (Whereupon, the proceedings are concluded)

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CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

I, Jenny H. Williams, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Richland County, South Carolina, on the 20th, 21st, 22nd, 23rd and 24th days of March, 2006.

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

May 22, 2006

Jenny H. Williams

Jenny H. Williams, Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEITH ANTHONY SIMS,

APPELLANT

FINAL BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge committed reversible error by allowing a State's witness to relate that a non-testifying third-party told her "Keith had murdered somebody," since this evidence violated *South Carolina Evidence Rule 802*, the rule against hearsay.

STATEMENT OF FACTS

On March 20 through 24, 2006, Keith Sims stood trial in Richland County before Judge James Johnson and a jury on an indictment charging him with the murder of his friend, Brian Anderson, who was found in a pond, chained to cement blocks, with a bullet in his head. ROA p. 8, line 13 – p. 9, line 2; ROA p. 127, line 11 – p. 129, line 24. Sims testified that he had killed Anderson in self-defense, then panicked and tried to hide the body once he realized Anderson was unarmed. ROA p. 158, line 12 – p. 163, line 11. For a similar factual scenario, see *State v. Starnes*, 340 S.C. 312, 531 S.E.2d 907 (2000). In addition to murder, the judge instructed the jury on voluntary manslaughter and self-defense. The jury nevertheless found Sims guilty as charged, and the judge sentenced him to imprisonment for forty years.

ARGUMENT

The trial judge committed reversible error by allowing a State's witness to relate that a non-testifying third-party told her "Keith had murdered somebody," since this evidence violated South Carolina Evidence Rule 802, the rule against hearsay.

The central issue in Keith Sims' case was whether he was guilty of murder or voluntary manslaughter, or not guilty because he had acted in self-defense. Sims testified that he shot Anderson in self-defense as Anderson was reaching beneath the seat of his car and Sims thought "he was reaching for his gun to shoot me and kill me." ROA p. 160, line 5 – p. 161, line 13. Sims was the only living eyewitness to the incident. The investigator who questioned Sims after his arrest testified (without objection) that Sims had invoked his right to counsel when asked, "Why did you do it? Why did you kill Brian?" ROA p. 121, line 6 – p. 125, line 14.

Derrick Ruff and Natalie English, Sims' friend and girlfriend, helped him dispose of Anderson's corpse. English did not testify at Sims' trial. (Ruff testified for the defense.) Ruff's girlfriend, Sierra "Nikki" Davis, testified over defense counsel's hearsay objection that English told her "Keith had murdered somebody." ROA p. 30, lines 13-23. The Assistant Solicitor exploited this evidence in his closing argument:

You actually heard Natalie [English] through Nikki [Davis] ... say, "He murdered somebody." No truer words were spoken in this case. How many questions on cross to that?

ROA p. 260, lines 5-10; See, also, ROA p. 267, lines 14 and 15.

South Carolina Evidence Rule 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Davis' testimony about English's out-of-court

statement that Sims had "murdered" Anderson was hearsay. See, for example, *State v. Anders*, 331 S.C. 474, 503 S.E.2d 443 (1998). Hearsay evidence is generally inadmissible. *Evidence Rule 802*; *State v. LaCoste*, 347 S.C. 153, 553 S.E.2d 464 (Ct. App. 2001).

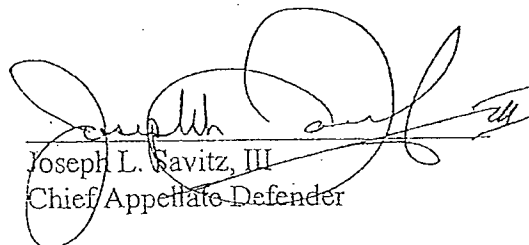
Davis' recitation of English's purported statement was inadmissible hearsay. See *State v. Davis*, 371 S.C. 170, 638 S.E.2d 57 (2006). Its admission could not have been harmless error.

Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it "could not reasonably have affected the result of the trial."

State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150, 151 (1985), quoting *State v. Key*, 256 S.C. 90, 180 S.E.2d 888 (1971). The State's case against Sims for murder was circumstantial and relied in large part on Sims' efforts to cover up the incident. See *State v. Starnes*. Sims himself testified that he shot Anderson in self-defense. See *State v. Davis*.

For this reason, the Court should reverse Keith Sims' conviction for murder and remand for a new trial.

Respectfully submitted,



Joseph L. Savitz, III
Chief Appellate Defender

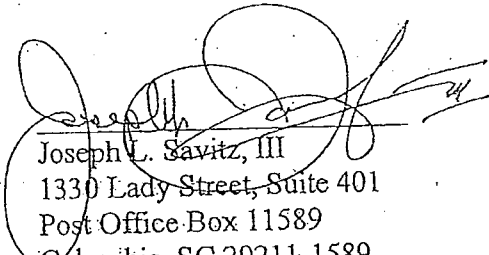
ATTORNEY FOR APPELLANT

This 22nd day of October, 2007.

CERTIFICATE OF COUNSEL

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

October 22, 2007



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

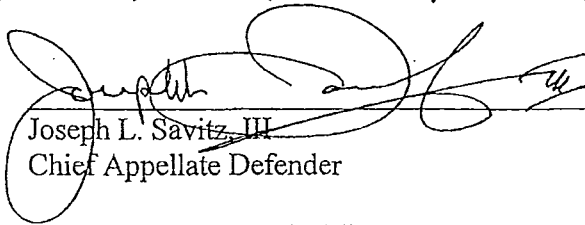
V.

KEITH ANTHONY SIMS,

APPELLANT

CERTIFICATE OF SERVICE

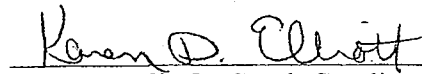
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Melody Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 22nd day of October, 2007.



Joseph L. Savitz, III
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 22nd day of October, 2007.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: March 19, 2017 .

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

The State,

Respondent,

vs.

Keith Anthony Sims,

Appellant.

FINAL BRIEF OF RESPONDENT

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The trial judge properly allowed one co-conspirator to testify to another co-conspirator's statement relating appellant's own statement of guilt when such statement was calculated to induce participation in the joint effort to dispose of the victim's body, the gun, and other evidence of murder. The statement was not hearsay, and was relevant and strongly probative evidence in appellant's murder trial. There was no error in admitting same. 10

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gun and shot "[o]ut of fear." (R. p. 160, line 6 - p. 161, line 13). He then realized that victim did not have a gun, and that he "had just shot an unarmed man...." (R. p. 163, lines 2-11). Appellant told his girlfriend, Natalie, and, after moving the victim's car, went to Newberry to Derrick Ruff's house. Natalie, Derrick, and Derrick's girlfriend, Nikki, then helped appellant to dump the body in a nearby pond, and dispose of other evidence. Appellant drove the victim's car back to Columbia and left it in an apartment complex. (R. p. 163, line 25 - p. 167, line 7; p. 195, lines 11-19).

On December 31, 2003, around 11:30 in the morning, Rebecca Glanville, then a high school student, visited Molly's Rock Park in Newberry, discovered the victim's body, face down in the water, with his pants partially off. (R. p. 3, line 16 - p. 5, line 16; p. 6, line 14-21). A diver from the Department of Natural Resources recovered the body. The body had been anchored by two concrete blocks resting on a pipe that housed a portion of a link of chain, the other part of which had been attached to the victim's left wrist. (R. p. 7, line 19 - p. 10, line 14). Investigation of the scene revealed drag marks from the parking lot toward the water. (R. p. 11, line 12 - p. 12, line 7; p. 83, lines 18-24). Investigators also recovered a "torn tag" from gloves. (R. p. 92, lines 23-25). On January 1, 2004, the victim's car was recovered at an apartment complex in Columbia. There were blood stains in front seat of the car. (R. p. 13, line 18- p. 14, line 12; p. 15, line 24 - p. 16, line 24). Based on the pattern, investigators determined the victim was in the driver's seat when he was shot. (R. p. 17, lines 1-23). After identifying the victim, investigators determined he was last at the Adams Mark at a birthday party. Appellant was developed as suspect as he was the last person seen with the victim. (R. p. 84, line 10 - p. 85, line 6). Wesley Boland, an officer with the Newberry County Sheriff's Office, left a card at appellant's mother's home. Appellant called the officer the same day. (R. p. 86, lines 20-23).

Appellant, his girlfriend Natalie, and his mother went to the Newberry Sheriff's Office. (R. p. 93, lines 18-22). Appellant was arrested and charged with murder. (R. p. 88, lines 7-10). Agent Boland testified that the investigation revealed Derrick, Natalie and Nikki had a part in the disposing of the body and other evidence. All three were charged with accessory after the fact of murder. With Nikki's help, officers recovered the gun used in the shooting. (R. p. 88, line 21 - p. 91, line 22). Richland County Sheriff's Department firearms analyst David Collins testified that the recovered gun fired the bullet that killed the victim, and also fired the shell that was retrieved from appellant's home. (R. p. 109, lines 7-20; p. 110, line 5 - p. 111, line 10). Dr. Joel Sexton performed the autopsy. Dr. Sexton testified that victim's body displayed multiple abrasions that occurred after death, consistent with dragging, (R. p. 127, lines 14-25; p. 130, lines 8-18), and "a single gunshot wound that entered... just below the lateral aspect of his right eye and passed into the skull towards the base of the skull." (R. p. 128, lines 1-4). The head wound also showed "powder tattooing and stripping" which indicated a close shot - - approximately one foot or one and one-half foot from the gun, though "probably closer." Dr. Sexton opined that "he would have certainly been rendered unconscious immediately and would probably have died in a fairly short period of time." (R. p. 128, line 5 - p. 129, line 24; p. 133, lines 16-21).

Sierra N. ("Nikki") Davis testified that appellant and his girlfriend arrived at the home that she shared with Derrick Ruff at approximately 3:00 a.m. Appellant asked Nikki to wake Derrick. Natalie was visibly upset. Natalie asked Nikki if Nikki wanted to go to Charleston and she replied she would. Shortly thereafter, appellant approached and asked if she was going, and she indicated to him that she would. He then asked if she "had any bricks or anything like that." Nikki told him to look in the backyard, which he did. All four then left together. (R. 23, line 2 -

p. 27, line 5). Natalie drove, and soon stopped at a gas station. She went inside the store. Appellant asked Nikki to check on Natalie and make sure she "was getting everything that he told them to get." (R. p. 27, lines 21-23). Natalie was purchasing "gloves and stuff..." (R. p. 27, line 24 - p. 28, line 2). They then drove to a nearby dirt road, to another home. Only Derrick and appellant left the car. The two men carried a chain and bricks to the back of the house. (R. p. 29, line 3 - p. 30, line 1). Next, Nikki saw another car. Nikki asked Natalie what was going on. Natalie told Nikki that "Keith had murdered somebody." (R. p. 30, lines 14-19). Derrick was with appellant in the second car, but left to get back in the car with Natalie and Nikki, "he said he couldn't stand the smell." (R. p. 32, lines 3-9). They continued to the park in separate cars. When appellant opened the passenger door, "the guy, he just fell out." (R. p. 33, lines 7-14). Together, they dragged the body to the pond, lifted him, and threw him into the water. (R. p. 34, line 13 - p. 36, line 2). Nikki explained the victim's pants were partially pulled down by the dragging effort. (R. p. 37, lines 5-7). Appellant had the victim's "cellphone, chain and wallet," and instructed Nikki to dispose of those item. He then left with the victim's car. (R. p. 38, lines 10-24). She, Derrick and Natalie went to Nikki's friend's house in Charleston. (R. p. 39, lines 2-14). Derrick threw away everyone's clothing and they got new clothes from the friend. (R. p. 39, line 22 - p. 40, line 8). Natalie called until she found appellant, and the three left to meet appellant in Columbia. (R. p. 40, line 13 - p. 41, line 18). They met appellant in Columbia, eventually going to appellant's house where appellant and Natalie "washed up." (R. p. 41, line 21 - p. 43, line 14). Appellant cleaned what appeared to be blood from the driveway with a brush. (R. p. 46, lines 17-24; p. 53, lines 1-10). The group returned to Derrick's home in Newberry. (R. p. 44, lines 1-12). Appellant stated "that he got everything that he needed to have got rid of and that the only thing left was to get rid of the bullet." Appellant asked Nikki to

get rid of the bullet. Appellant said he had "ditched the car... in another apartment complex area." (R. p. 44, lines 13-18). He also asked the group to get rid of his gun. (R. p. 47, lines 18-24). Appellant and Derrick left to go to a club. Natalie and Nikki left to pick up appellant's mother and go to church. Nikki threw the gun out of the window on the way to church. (R. p. 49, line 23 - p. 50, line 16). Appellant had also given them a "CD book," a dog chain, and a pair of jeans. Natalie told Nikki to throw those things into the dumpster behind the church, which she did. (R. p. 50, line 21 - p. 51, line 17). Those items were recovered. (R. p. 53, lines 5-13). (See also p. 103, line 21 - p. 104, line 12). After Natalie and Nikki learned the body had been discovered, they looked for Derrick and appellant. They found Derrick at a club, but appellant had already left with someone. (R. p. 54, line 20 - p. 55, line 11).

Derrick similarly testified that appellant came to his house in the early morning hours of December 31, 2003, saying he had "messed up." (R. p. 222, lines 3-15; p. 230, line 24 - p. 231, line 2). Derrick admitted taking part in hiding the body and other evidence. (R. p. 234, line 8 - p. 236, line 11). He testified that appellant wanted to get rid of the body. (R. p. 232, lines 15-25). Derrick testified that appellant never told him at the time that the victim had a gun, or that he was threatened. (R. p. 236, lines 17-23).

Danny Elkins, who knew appellant for many years, saw appellant in a club in the early morning hours of New Years Day 2004. Appellant asked Elkins to take him somewhere else "because the cops were looking for him." (R. p. 74, lines 1-23). Elkins left the club with appellant and tried to take him to one home but the residents would not let appellant inside. While driving to another residence, appellant admitted he has shot another man, in the head, with a 9 mm gun that he had thrown away. He said the man was in appellant's front yard, "they had been arguing all day," and appellant had shot him. Elkins became upset and made appellant

leave the car. He would later report appellant's confession. (R. p. 75, line 4 - p. 79, line 19). On cross-examination, Elkins noted that appellant was not upset when he first saw him at the club; rather appellant "part[ied] until they said the police was looking for him." (R. p. 80, lines 9-13).

Appellant admitted telling Danny Elkins that he had shot someone. (R. p. 178, lines 18-24). He admitted hiding the body in the car behind a vacant house. (R. p. 179, line 23 - p. 180, line 23). He admitted purchasing gloves that night. (R. p. 183, lines 1-3). He admitted showering and scrubbing the driveway with a brush. (R. p. 191, lines 17- p. 192, line 8). He admitted giving the gun to Nikki and asking her to dispose of it. (R. p. 195, lines 11-16). He admitted he did not tell police that he thought he shot in self-defense, and that he initially told police, three weeks later, that the victim had a gun. (R. p. 203, line 17 - p. 210, line 12). (See also R. p. 100, line 24 - p. 102, line 17; p. 108, lines 1-8).

ARGUMENT

The trial judge properly allowed one co-conspirator to testify to another co-conspirator's statement relating appellant's own statement of guilt when such statement was calculated to induce participation in the joint effort to dispose of the victim's body, the gun, and other evidence of murder. The statement was not hearsay, and was relevant and strongly probative evidence in appellant's murder trial. There was no error in admitting same.

Standard of Review:

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006). Abuse of discretion may be found where the record shows the evidentiary ruling is based on an error of law, or wholly lacks factual support in the record. *Id.* See also *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001); *State v. Preslar*, 364 S.C. 466, 472-473, 613 S.E.2d 381, 384 (Ct.App. 2005). However, even if an error is found, a reviewing court will not grant relief if such error does not result in prejudice. *Id.*

Discussion:

In this appeal, appellant argues that the trial judge erred in allowing Nikki to testify to Natalie's statement relating defendant's admission of guilt. The record shows that appellant raised a hearsay objection to Nikki's testimony that Natalie "told me, you know, Keith had murdered somebody." (R. p. 30, lines 19-22). The trial judge overruled the objection without comment. (R. p. 30, line 23). Appellant submits the trial judge erred in that Natalie's statement was hearsay and barred by Rule 802, SCRE. (Appellant's Brief, p. 5). However, Rule 802 does not bar the admission of the testimony because the statement is not hearsay as defined by our rules of evidence. Rather, Natalie's statement is, by definition, *not* hearsay, as it is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Rule

801(d)(2)(E), SCRE. There are basically two prongs to qualify the statement under Rule 801(d)(2)(E). This statement soundly meets both requirements.

First, the record must first show the existence of a conspiracy independent of the statement offered. *State v. Gilchrist*, 342 S.C. 369, 372, 536 S.E.2d 868, 869 (2000). There is certainly evidence here of the joint enterprise independent of the statement offered, not the least of which must be appellant's own admission of its existence. Appellant admitted that he shot and killed the victim. (R. p. 175, lines 17-24). And, he testified that he enlisted the aid of Natalie, Derrick and Nikki in disposing of the body, gun, and other evidence, (R. p. 163, line 25 - p. 165, line 24), and again concedes these facts in his brief to this Court. (Brief of Appellant, p. 5). Similarly, Derrick admitted the existence of the joint enterprise in his testimony. (R. p. 234, line 8 - p. 236, line 11). In fact, the record demonstrates that the fact of its existence was not questioned. Counsel for appellant did not object at all when the state requested that Derrick be instructed that he could testify to any statement made during the conspiracy, in furtherance of the conspiracy, by any of the co-conspirators. (See R. p. 215, line 19 - p. 218, line 5). Additionally, the record also shows other facts corroborated the assertion the four worked together to dispose of the body and other evidence, such as the personal items belonging to the victim, and the gun which matched the bullet recovered from the autopsy, being recovered in the places described by the co-conspirators. (See R. p. 88, line 21 - p. 91, line 22; p. 103, line 21 - p. 104, line 12). In sum, the record fully and fairly supports a finding that a joint agreement existed, and the participants acted in conformity with the goal of hiding or destroying the body and other evidence of the crime in an effort to protect or shield appellant. The record shows the evidence supports this first requirement.

Second, the record must show the statement was made “in furtherance of” or otherwise advanced the conspiracy. *Gilchrist, supra*. This statement not only was made to advance the conspiracy, it is the basis for the conspiracy, its cause and driving force. Further, the statement was made in an effort to advise Nikki of the reason for the actions in recruitment to the cause - - clearly, an objective which would advance the conspiracy. See *State v. Anderson*, 357 S.C. 514, 593 S.E.2d 820 (Ct.App. 2004)(statement “they had a lick” found to be in furtherance of conspiracy where statement induced party to go with declarant to a robbery); *Gilchrist*, 342 S.C. at 372 n.2, 536 S.E.2d at 869 n.2, quoting *United States v. Arias-Villanueva*, 998 F.2d 1491, 1502 (9th Cir. 1993)(“While mere conversation or narrative declarations are not admissible under this rule statement made to induce enlistment, further participation, prompt further action, allay fears, or keep coconspirators abreast of an ongoing conspiracy’s activities are admissible.”) See also *United States v. Roberts*, 14 F.3d 502, 515 (10th Cir. 1993)(statements made to induce participation or advise of goals admissible as statement made in furtherance of the conspiracy); *United States v. Yarbrough*, 852 F.2d 1522, 1535 (9th Cir. 1988)(statements to induce further participation admissible as in furtherance of conspiracy). Thus, the record supports this second requirement, as well.

Therefore, the statement, by definition, was not hearsay and was properly admitted. Moreover, in this case, there are two layers to the statement. The first is the statement made by Natalie. That is admissible as non-hearsay as co-conspirator’s statement for the reasons listed above. The second is the statement made by appellant which is also admissible as co-conspirator’s statement for those same reasons, specifically recalling the statement is made as the reason for the conspiracy and the confession made to the girlfriend was made in an effort to enlist her aid, but also as an admission by a party-opponent, which, again, is by definition, not

hearsay. Rule 801(d)(2)(A), SCRE. As each statement is admissible, there is no error in the admission of either.

Respondent also notes that appellant's statement was not only admissible because there was no hearsay bar, but also because his actions and reasons for those actions regarding the destruction of evidence were properly admitted against him. "The attempted destruction of evidence is regarded as a relevant incriminating circumstance." *State v. Beckham*, 334 S.C. 302, 314, 513 S.E.2d 606, 612 (1999). *See also State v. Epes*, 209 S.C. 246, ___, 39 S.E.2d 769, 777 (1946)("the concealment or the attempted destruction of a body of a person murdered is regarded as an incriminating circumstance"); *State v. Al-Amin*, 353 S.C. 405, 412, 578 S.E.2d 32, 36 (Ct.App. 2003)(same). This would necessarily involve the acts and statements of the friends in connection with the destruction of evidence as part and parcel of the evidence of destruction. Consequently, the evidence of the joint enterprise, and reason for same, were of great probative value in appellant's murder trial. At any rate, the statement complained of is not hearsay, and there is no error. However, should error be found, respondent asserts the statement is cumulative to other properly admitted evidence, and any error necessary harmless.

Appellant testified that he discovered after he shot the victim that he had shot an unarmed man, and he wanted to hide his crime. (R. p. 163, lines 2-11). He also testified that he never even attempted to assert self-defense prior to January 22, 2007, approximately three weeks later. (R. p. 209, line 9 - p. 583, line 13). Derrick confirmed this in his own testimony that appellant did not tell him that the victim threatened him or that the victim had a gun. (R. p. 231, lines 5-14). Moreover, Danny Elkins, a witness involved in neither the shooting or the conspiracy, testified that appellant confessed to him that he had shot and killed the victim, and appellant did not claim self-defense at that time either. (R. p. 76, line 5-p. 77, line 4). Therefore, the

statement to Natalie, related by Nikki, was consistent with appellant's own testimony, and merely cumulative to other properly admitted evidence. Thus, even if the admission of evidence could be deemed error, it could only be harmless in light of this record. *Gilchrist*, 342 S.C. at 373, 536 S.E.2d at 870 (where defendant makes similar statement evidencing intent, properly admitted as a statement of a party opponent, admission of hearsay statement "merely cumulative" and error in admission harmless). However, the record supports there was no error. The evidence was properly admitted, and appellant's argument to the contrary should be rejected.

CONCLUSION

For all the foregoing reasons, respondent, the State, submits that the judgment, conviction, and sentence of the lower court should be affirmed.

Respectfully submitted,

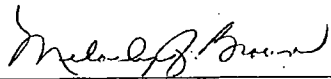
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October 2, 2007.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appellant.

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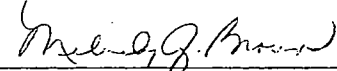
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October 2, 2007.
Columbia, South Carolina.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Keith Anthony Sims,

Appellant.

Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 4371
Heard April 8, 2008 – Filed April 17, 2008

AFFIRMED

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Henry Dargan McMaster, Attorney General, John W.
McIntosh, Chief Deputy Attorney General, Donald J.
Zelenka, Assistant Deputy Attorney General, Melody J.
Brown, Assistant Attorney General, and Solicitor Warren B.
Giese, all of Columbia, for Respondent.

ANDERSON, J.: Keith Anthony Sims appeals his murder conviction, arguing the trial judge allowed the State's witness to relate a non-testifying third party's statement, violating Rule 802, SCRE. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Sims shot and killed Brian Anderson, and with the help of Natalie English, Derrick Ruff and Nikki Davis, hid the body and attempted to hide or destroy all other evidence. On December 30, 2003, the night of the shooting, Anderson and Sims attended a birthday party, and Anderson gave Sims a ride home. The two men engaged in a conversation about their past disagreements, and Anderson spoke of taking care of his "beefs" before the New Year. Previously, the men were in a dispute over whether Sims owed Anderson money. Sims testified, during their ride home, he believed Anderson was reaching under his seat to obtain a firearm and Sims fatally wounded Anderson with a weapon he had on his person. Sims recounted the events:

We was talking about past arguments that we had. He was telling me that he had all these – all these different guns. He started telling me about how – he started telling me about how he could have then have brought harm to me and my family, how he could have then have brought harm to me and my family.

So . . . when we was pulling up my driveway, he was telling me that I was taking – I was taking food out – out his unborn baby, out his unborn baby's mouth. He said that I was taking food out his unborn baby's mouth.

And when he stopped the car he was telling me that – he was telling me that he was going to take care of all his beefs before the New Year. He was telling me that he was going to – that he was going to end all his beefs before the New Year, that he was going to end all his beefs before the New Year.

And he was reaching underneath his seat. So I thought he was fixing to — he was fixing to grab him a gun to shoot me. So I pulled out my gun. Out of fear I shot.

...

... I thought he was reaching for his gun. So I thought he was reaching for his gun to shoot me and kill me. So out of fear I pulled my gun out and shot.

When asked by his counsel whether he intended to kill Anderson, Sims replied:

No. I didn't mean to kill him. I was pulling my gun out because I thought he was fixing to kill me. I guess just out of — out of fear I shot.

Sims enlisted his girlfriend, Natalie English; his friend, Derrick Ruff; and Ruff's girlfriend, Nikki Davis, to hide the body and dispose of the remaining evidence. During her direct examination by the State, Davis proffered:

Well, it was like around 3 something in the morning and I heard a knock at the door. And I wasn't going to answer the door. I was like, Derrick's mom just kept, you know, telling me to open the door. So I went and I opened the door. And Keith came in with Natalie with his arm folded.

...

He told me to wake up "Black", which is Derrick, and I told him I can't get him up. You just — you get him up yourself, basically. So he started hitting on Derrick, you know, to get him up. And Derrick got up. ...

...

So he started hitting him to get him up. And Derrick finally got up and told him, you know, to go in the back. And they went to the back and they started talking. Which Natalie, you know, she was already in. She came. She sat –

...
So I just started rubbing her back and telling her that everything was going to be all right and stuff. And she wouldn't tell me. I kept asking her what was going on. She wouldn't tell me what was going on. And so she asked me if I wanted to go to Charleston. And I told her, yeah, I needed to go to Charleston because at the time I was two months pregnant with my daughter and I needed to get my Medicaid card and my social security card and stuff like that. So I told her, yeah, I was going to go. So I started getting dressed and stuff like that. And then at that time Keith came out first, and Derrick he was still in the kitchen or whatever. And Keith asked me whether or not I was going or not. I told him, yeah, I was going. And he asked me if they had – if we had any bricks or anything like that. So I told him, I don't know. Just go look in the backyard.

...
... And we went to a Shell station afterwards. And Derrick got out to get gas. And at the time it was just – and Natalie got out and she went in the store. And at the time it was just me and Keith inside the car. And, you know, I was joking with him and stuff, just like, why didn't you get me anything for my birthday and stuff like that. You know, he gave me \$10 for my birthday or whatever. And he told me to go inside the store to make sure Natalie was getting everything that he told them to get.

So I got out of the car and I went and I just peeked my head inside the store. And at that time she had, you know, like the

gloves and stuff like on top of the counter. So I figured that's what he told her to get. And I came back out into the car. And everybody came and they got inside the car. And then we headed to —

...

And we parked right in front of the lady's house. And I just figured that they were going to go. And so we all were going to go inside the house. But me and Natalie stayed inside the car and Keith and Derrick got out. And they started toting like this long thing I guess to a car, and a chain, you know, some bricks, just toting it to the back of the house right behind me.

...

The next thing I knew he [Sims] sped from behind the house inside of another car. And that's when I, you know, started pushing Natalie. I'm asking her what's going on? Did he steal a car or what's going on? Where did he that from and stuff like that. And then she told me, you know, Keith had murdered somebody. . . .

...

Keith dragged him out and he started to drag him by himself but I guess he couldn't do it. And Derrick started to help. And they got like just a little bit with the — he had just got a little bit with the guy and then Derrick came back and got Natalie. And Natalie told me to come on. And — and while we were — or when I got out of the car Keith was — he told me to put my socks on my hands, which I just did what he said. I put my socks on my hands. And Natalie grabbed one leg and I grabbed the other. . . .

...

We just started dragging him. And we just dragged him 'til we – we got like to this little balcony thing. And then the guy was just laying like flat on the ground. And Keith was just saying things to him. And we were just trying to get him – we were just trying to get him through.

... So he said that our next best thing was to just try to lift him up. So we lifted him up and it took a while. And we just finally got him over. And everybody just ran or walked off and never looked back. But before – while we was walking off, Keith stayed and I heard a splash. And I just walked back to the car. And they got back into the car. And Keith brought some things to the car inside a paper bag. And I looked inside the bag and there was a cellphone and a chain and the guy's wallet.

... And we left there and just kept on going. And somewhere during that time we – he [Sims] told me to get rid of it [the contents of the paper bag]. Actually he told me to get ride of it.

Sims objected to Davis being permitted to testify English said "Keith had murdered somebody," arguing it was hearsay. The trial court overruled the objection without comment.

ISSUE

Did the trial judge err in allowing one co-conspirator to testify to another co-conspirator's statement relating Sims' own statement of guilt, characterizing it as non-hearsay, and finding it was calculated to induce participation in disposing of the victim's body and other evidence?

STANDARD OF REVIEW

“In criminal cases, the appellate court sits to review errors of law only.” State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (citing State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001)); State v. Preslar, 364 S.C. 466, 472, 613 S.E.2d 381, 384 (Ct. App. 2005). The Appellate Courts are “bound by the trial court’s factual findings unless they are clearly erroneous.” Baccus, 367 S.C. at 48, 625 S.E.2d at 220 (citing State v. Quattlebaum, 338 S.C. 441, 442, 527 S.E.2d 105, 111 (2000)); Preslar, 364 S.C. at 472, 613 S.E.2d at 384.

“The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) (citing State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002)); State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006) (citing State v. Frank, 262 S.C. 526, 533, 205 S.E.2d 827, 830 (1974)); State v. Key, 256 S.C. 90, 94, 180 S.E.2d 888, 890 (1971); State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249-250 (Ct. App. 2006); Preslar, 364 S.C. at 472, 613 S.E.2d at 384 (“On review, we are limited to determining whether the trial judge abused his discretion.”). We will “not re-evaluate the facts based on [our] own view of the preponderance of the evidence but simply [determine] whether the trial judge’s ruling is supported by any evidence.” Wilson, 345 S.C. at 6, 545 S.E.2d at 829; Preslar, 364 S.C. at 472, 613 S.E.2d at 384. “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Pagan, 369 S.C. at 208, 631 S.E.2d at 265 (citing State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)); Douglas, 369 S.C. at 429-430, 632 S.E.2d at 848 (citing State v. Manning, 329 S.C. 1, 7, 495 S.E.2d 191, 194 (1997)); Funderburk, 367 S.C. at 239, 625 S.E.2d at 249-50; Preslar, 364 S.C. at 473, 613 S.E.2d at 384-385. “In order for an error to warrant reversal, the error must result in prejudice to the appellant.” Id. at 473, 625 S.E.2d at 385; Key, 256 S.C. at 94, 180 S.E.2d at 890 (“It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial.”); State v. LaCoste, 347 S.C. 153, 160, 553 S.E.2d 464, 468 (Ct. App. 2001) (“Rulings on the admissibility of evidence are within the trial court’s sound discretion and will not be disturbed on appeal absent an abuse of that

discretion resulting in prejudice to the complaining party.”) (citing State v. Hughey, 339 S.C. 439, 453, 529 S.E.2d 721, 728-729 (2000); State v. Varvil, 338 S.C. 335, 340, 526 S.E.2d 248, 251 (Ct. App. 2000)).

LAW/ANALYSIS

Sims contends the trial court erred in allowing Davis to testify regarding statements allegedly made to her by Natalie English, asserting this testimony constitutes impermissible hearsay. We disagree.

1. Hearsay

Rule 801(c) of the South Carolina Rules of Evidence defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” “Hearsay is inadmissible except as provided by statute, the South Carolina Rules of Evidence, or other court rules.” State v. LaCoste, 347 S.C. 153, 160, 553 S.E.2d 464, 468 (Ct. App. 2001) (citing Rule 802, SCRE). “Hearsay testimony is inadmissible because the adverse party is denied the opportunity to cross-examine the declarant.” State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 150 (1985). “[R]eversal is not required unless appellant was prejudiced by the error.” Mitchell, 286 S.C. at 573, 336 S.E.2d at 150.

Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it “could not reasonably have affected the result of the trial.” State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971).

Mitchell, 286 S.C. at 573, 336 S.E.2d at 150.

2. Conspiracy

Section 16-17-410 of the South Carolina Code of Laws provides:

The common law crime known as "conspiracy" is defined as a combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means.

"A conspiracy is a combination or agreement between two or more persons for the purpose of accomplishing a criminal or unlawful object, or of achieving by criminal or unlawful means an object that is neither criminal nor unlawful." State v. Gunn, 313 S.C. 124, 133-134, 437 S.E.2d 75, 80 (1993); State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001); Pinion ex rel. Montague v. Pinion, 363 S.C. 564, 566, 611 S.E.2d 271, 272 (Ct. App. 2005); State v. Crocker, 366 S.C. 394, 404, 621 S.E.2d 890, 895-896 (Ct. App. 2005) (citing S.C. Code Ann. § 16-17-410 (2003)); State v. Crawford, 362 S.C. 627, 638, 608 S.E.2d 886, 892 (Ct. App. 2005); State v. Condrey, 349 S.C. 184, 191-192, 562 S.E.2d 320, 323 (Ct. App. 2002); State v. Stuckey, 347 S.C. 484, 502, 556 S.E.2d 403, 412 (Ct. App. 2001); State v. Gosnell, 341 S.C. 627, 636, 535 S.E.2d 453, 458 (Ct. App. 2000); State v. Hammitt, 341 S.C. 638, 644, 535 S.E.2d 459, 462 (Ct. App. 2000); State v. Horne, 324 S.C. 372, 381, 478 S.E.2d 289, 294 (Ct. App. 1996) (noting the crime of conspiracy consists of an agreement or mutual understanding).

"The gravamen of the offense of conspiracy is the agreement or combination." Gunn, 313 S.C. at 133-134, 437 S.E.2d at 80; Crocker, 366 S.C. at 404, 621 S.E.2d at 896; Stuckey, 347 S.C. at 502, 556 S.E.2d at 412; Gosnell, 341 S.C. at 636, 535 S.E.2d at 458; Hammitt, 341 S.C. at 644, 535 S.E.2d at 462 ("The gravamen of conspiracy is the agreement or mutual understanding").

"An overt act in furtherance of the conspiracy is not necessary to prove the crime." Crocker, 366 S.C. at 404, 621 S.E.2d at 896. "What is needed to establish criminal conspiracy is proof [the defendants] intended to act together for their shared mutual benefit within the scope of the conspiracy charged." Stuckey, 347 S.C. at 503, 556 S.E.2d at 412-413; Buckmon, 347 S.C. at 323, 555 S.E.2d at 405; State v. Greuling, 257 S.C. 515, 523, 186 S.E.2d 706, 709 (1972) ("In criminal conspiracy it is not necessary to prove an overt act. The gist of the crime is the unlawful combination. The crime is

then complete, even though nothing further is done.”); State v. Crawford, 362 S.C. 627, 639, 608 S.E.2d 886, 892 (Ct. App. 2005).

Discussing the necessity of an agreement between co-conspirators, the South Carolina Court of Appeals elucidated:

“To establish the existence of a conspiracy, proof of an express agreement is not necessary, and direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the parties.” Id. (quoting State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001)). Evidence of direct contact or an explicit agreement between the defendants need not be shown. State v. Barroso, 320 S.C. 1, 8, 462 S.E.2d 862, 868 (Ct.App.1995), rev'd on other grounds, 328 S.C. 268, 493 S.E.2d 854 (1997). “It is sufficient to show that each defendant knew or had reason to know of the scope of the conspiracy and that each defendant had reason to believe his own benefits were dependent upon the success of the entire venture.” Id. at 8-9, 462 S.E.2d at 868.

Crocker, 366 S.C. at 404-405, 621 S.E.2d at 896; Crawford, 362 S.C. at 639, 608 S.E.2d at 892 (“Once an agreement has been reached, the crime of conspiracy has been committed; no further act need take place.”); Condrey, 349 S.C. at 192, 562 S.E.2d at 323; Stuckey, 347 S.C. 502-503, 556 S.E.2d at 412 (“However, a formal agreement is not necessary to establish a conspiracy, as the conspiracy may be proven by ‘circumstantial evidence and the conduct of the parties.’”) (quoting State v. Bultron, 318 S.C. 323, 334, 457 S.E.2d 616, 622 (Ct. App. 1995)); Gosnell, 341 S.C. at 636, 535 S.E.2d at 458 (South Carolina conspiracy law does not require proof of overt acts; circumstantial evidence may prove conspiracy.)

“To establish sufficiently the existence of the conspiracy, proof of an express agreement is not necessary, and direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the parties.” State v. Fleming, 243 S.C. 265, 274, 133 S.E.2d 800, 805 (1963) (quoting 15 C.J.C. Conspiracy § 93a); State v. Follin, 352 S.C. 235, 267, 573 S.E.2d 812, 828 (Ct. App. 2002).

"Once a conspiracy has been established, evidence establishing beyond a reasonable doubt the connection of a defendant to the conspiracy, even though the connection is slight, is sufficient to convict him of knowing participation in the conspiracy." State v. Vasquez, 341 S.C. 648, 654, 535 S.E.2d 465, 468 (Ct. App. 2000); Crawford, 362 S.C. at 636, 608 S.E.2d at 891 ("[T]he willful and intentional adoption of a common design by two or more persons is sufficient for criminal conspiracy, provided the common purpose is to do an unlawful act either as a means or an end.").

3. Co-Conspirator Exception to the Rule Against Hearsay

Rule 801(d)(2)(E) of the South Carolina Rules of Evidence defines a co-conspirator's statements, offered against another co-conspirator as non-hearsay: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

State v. Sullivan, 277 S.C. 35, 42-43, 282 S.E.2d 838, 842-843 (1981), sets forth the well-recognized exception to the rule against hearsay associated with co-conspirator's statements:

In the law of conspiracy, there is a well-recognized exception to the rule against hearsay which permits the statements of one conspirator made during the pendency of the conspiracy, admissible against a co-conspirator, once prima facie evidence of a conspiracy is proved. Thereafter, the acts and declarations of any conspirator made during the conspiracy and in furtherance thereof are deemed to be the acts and declarations of every other conspirator and are admissible against all. State v. Ferguson, et al., 221 S.C. 300, 70 S.E.2d 355 (1952).

In Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), the declarations of one conspirator made in furtherance of the objects of the conspiracy to a third party are admissible against all of the members, but only after proof that each defendant was a member of the conspiracy.

Under Glasser there was a preferred order of proof; nonhearsay which established membership in the conspiracy must precede the hearsay declarations. However, order of proof is discretionary with the trial judge and declarations made by a conspirator to a third party may be admitted in advance of evidence which would prima facie establish the existence of the conspiracy. State v. Rutledge, 261 S.C. 44, 198 S.E.2d 250 (1973); In accord: United States v. Vaught, supra.

... Moreover, once a conspiracy has been established,

“[E]vidence establishing beyond a reasonable doubt a connection of a defendant with the conspiracy, even though the connection is slight, is sufficient to convict him with knowing participation in the conspiracy. United States v. Dunn, 564 F.2d 348, 357 (9th Cir. 1977).”

United States v. Jabara, 618 F.2d 1319, 1328 (9th Cir. 1980).

State v. Gilchrist, 342 S.C. 369, 372, 536 S.E.2d 868, 869 (2000), superseded Sullivan in a footnote:

Rule 801(d)(2)(E) provides that a statement by a co-conspirator during the course and in furtherance of the conspiracy is not hearsay. Under the Federal Rules of Evidence, this same rule has been interpreted to allow admission of a co-conspirator's statement only where there is evidence of the conspiracy independent of the statement sought to be admitted. See, e.g., United States v. Asibor, 109 F.3d 1023 (5th Cir. 1997); United States v. Clark, 18 F.3d 1337 (6th Cir. 1994); United States v. Smith, 893 F.2d 1573 (9th Cir. 1990); United States v. Urbanik, 801 F.2d 692 (4th Cir. 1986).^{FN1} Here, there is no independent evidence of a conspiracy between Robertson and appellant. The fact that Robertson was indicted for criminal conspiracy is not sufficient in itself to establish a conspiracy since an indictment is not evidence of the crime charged. 41 Am.Jur.2d INDICTMENTS AND INFORMATIONS § 1.

FN1. Before enactment of the SCRE, precedent of this Court indicates that prima facie evidence of a conspiracy was required to support the admission of a co-conspirator's statement. State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981).

Further, a statement by a co-conspirator must advance the conspiracy to be admissible under Rule 801(d)(2)(E). State v. Anders, 331 S.C. 474, 503 S.E.2d 443 (1998) (admission to crime does not qualify as statement in furtherance of conspiracy).^{FN2}

FN2. As explained in United States v. Arias-Villanueva, 998 F.2d 1491, 1502 (9th Cir. 1993):

While mere conversation or narrative declarations are not admissible under this rule, statements made to induce enlistment, further participation, prompt further action, allay fears, or keep coconspirators abreast of an ongoing conspiracy's activities are admissible.

An example of a statement by a co-conspirator being inadmissible as hearsay is found in State v. Anders, 331 S.C. 474, 476, 503 S.E.2d 443, 444 (1998). In Anders, a witness overheard one of the conspirators (Simmons) say "Robert [Anders] was going to pay him big for blowing up the building." Id. Additionally, the witness heard Simmons explain how he set the fire. Id. "The trial court ruled the statements were admissible against Anders on the basis they were made by Simmons in the furtherance of a conspiracy, so as to be admissible against both Anders and Simmons." Id. The Court of Appeals ultimately affirmed in result, but "held Simmons' statement was not admissible under the co-conspirator exception since, even if made **during** the conspiracy, the statement in no way **advanced** the conspiracy." Id. at 476-477, 503 S.E.2d at 444 (emphasis in original). The Supreme Court reversed the Court of Appeals, but agreed with the characterization of the statement as not falling under the co-conspirator exception to the rule against hearsay:

We agree with the Court of Appeals' holding that Simmons' admission to the crime in no way furthered the conspiracy. Accord United States v. Posner, 764 F.2d 1535 (11th Cir.1985), cert. denied (although statements made to "allay suspicions" may be "in furtherance" of conspiracy, "spilling the beans" does not further conspiracy); United States v. Pallais, 921 F.2d 684 (7th Cir.1990), cert. denied, 502 U.S. 842, 112 S.Ct. 134, 116 L.Ed.2d 101 (1991) (casual admissions of culpability are not "in furtherance" of conspiracy and are insufficiently reliable to be considered by the jury). Accordingly, the Court of Appeals correctly ruled the statement was not admissible under the co-conspirator exception. See State v. Sullivan, 277 S.C. 35, 42, 282 S.E.2d 838, 842 (1981) (exception to rule against hearsay permits statements of one conspirator made during the pendency of the conspiracy, and in furtherance thereof, to be admitted against a co-conspirator once prima facie evidence of a conspiracy is proved); see also South Carolina Rules of Evidence, Rule 801(d)(2)(E).

Id. at 477, 503 S.E.2d at 444.

More recently, a case involving hearsay and co-conspirator's statements is State v. Anderson, 357 S.C. 514, 517, 593 S.E.2d 820, 821 (Ct. App. 2004). The State alleged Anderson conspired with Jamal Manick and Fred Moss to rob the victim. Id. at 515, 593 S.E.2d at 820. Bobby Lukie rode with Moss and Manick to the restaurant where Manick shot and killed Lamont Rappley. Id. at 516, 593 S.E.2d at 821. Similarly to the case at hand, Anderson presents a situation where a co-conspirator testified for the State¹:

At trial, Lukie testified that around 11:00 p.m. on the night of the murder, he drove by a convenience store and noticed Ross and Manick standing outside the store. Lukie stated that when

¹ Moss testified the phrase "having a lick" meant they could rob the victim. Id. at 516, 593 S.E.2d at 821.

he asked Ross and Manick what they were doing, Ross told him "they had a lick or something like that." Defense counsel objected, arguing this testimony was hearsay. The State argued the testimony was admissible as non-hearsay because the statement was made in furtherance of the conspiracy. The trial court agreed and overruled the defense's objection.

Id. at 517, 593 S.E.2d at 821. Discussing hearsay and the co-conspirator exception, the Court of Appeals inculcated:

Rule 801(d)(2)(E), SCRE, provides that "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" is not hearsay. See also State v. Gilchrist, 342 S.C. 369, 371, 536 S.E.2d 868, 869 (2000) (noting that Rule 801(d)(2)(E) allows for the admission of a coconspirator's statement where there is evidence of the conspiracy independent of the statement sought to be admitted). Here, there was evidence presented at trial that Ross and Manick conspired with [Anderson] to rob and murder the victim. The statements allegedly made to Lukie by Ross were sufficient to allow the jury to reasonably infer that the statements were made in furtherance of the conspiracy, especially in light of the fact that Lukie agreed to accompany Ross and Manick in their robbery of the victim. Accordingly, we find no error in the trial court's ruling that the statement was not hearsay.

Id.

In the case sub judice, there was evidence presented, in the form of Davis' own testimony, indicating Davis, Sims, English and Ruff had a mutual understanding and conspired to hide Anderson's body and dispose of all remaining evidence of the shooting. While Davis' testimony implies she knew nothing of Anderson's death until the statement by English, her testimony directly prior to the statement is sufficient to show she knew or should have known the scope of the conspiracy. Additionally, her conduct subsequent to English's statement proves her involvement in the conspiracy. Thus, English's statements are admissible as non-hearsay against all four

individuals, including Sims. The statement was sufficient to allow a jury to reasonably infer it was made to induce enlistment, advance participation, or prompt additional action on Davis' part in furtherance of the conspiracy to hide the details of Anderson's death, especially in light of the fact Davis was already acting in collusion with English, Sims and Ruff. Consequently, we find no error in the admission of Davis' testimony.

CONCLUSION

We rule the trial judge properly allowed one co-conspirator to testify to another co-conspirator's statement relating to appellant's own statement of guilt because the statement was calculated to induce participation in the combined and joint effort to dispose of the victim's body, the gun, and other evidence of murder. We hold the statement was NOT hearsay, but constituted relevant and admissible probative evidence in this murder. ACCORDINGLY, the conviction and sentence of the appellant are

AFFIRMED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

KEITH ANTHONY SIMS,

APPELLANT

Appeal from Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 4371

PETITION FOR REHEARING

Counsel for Keith Anthony Sims petitions for rehearing pursuant to *Rule 221(a), SCACR*, as the Court has misconstrued the nature of Natalie English's comment to Nikki Davis ("Keith had murdered somebody") as "Sims' own statement of guilt". There is no evidence Sims told English (or anybody else for that matter) that he "murdered" Brian Anderson. (The State conceded this point at oral argument.) Instead, English's statement is *her own characterization* of the incident.

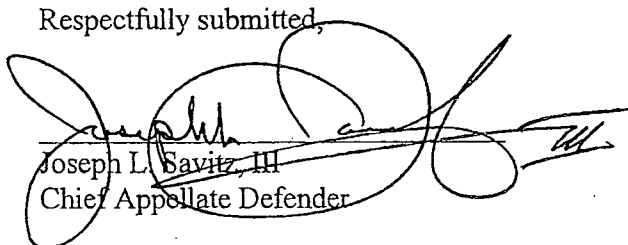
Moreover, *Rule 801(d)(2)(E), SCRE*, does not provide for the admissibility of *any* statement by a coconspirator, such as narrative declarations or casual admissions of culpability. See *State v. Gilchrist*, 342 S.C. 369, 536 S.E.2d 868 (2000), and *State v. Anders*, 331 S.C. 474, 503 S.E.2d 443 (1998). English's characterization of Anderson's death as a murder falls within this category, as it

was not technically in furtherance of the conspiracy to dispose of Anderson's body and was, ultimately, insufficiently reliable to be considered by the jury.

In short, the Court's opinion relies upon the factual premise that Sims told English he had murdered Anderson. This premise, which the State conceded was inaccurate at oral argument, was not supported by any evidence in the record or by reasonable inference from any evidence that was in the record. Absent this evidentiary support, English's claim that Sims had "murdered" Anderson was inadmissible hearsay. The error could not have been harmless, as the State's case against Sims for murder was circumstantial and Sims himself testified that he shot Anderson in self-defense. (The judge charged the jury on murder, voluntary manslaughter and self-defense.)

For this reason, the Court should grant rehearing, reverse Keith Anthony Sims' conviction for murder and remand for a new trial.

Respectfully submitted,



Joseph L. Savitz, III
Chief Appellate Defender

This 23rd day of April, 2008.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

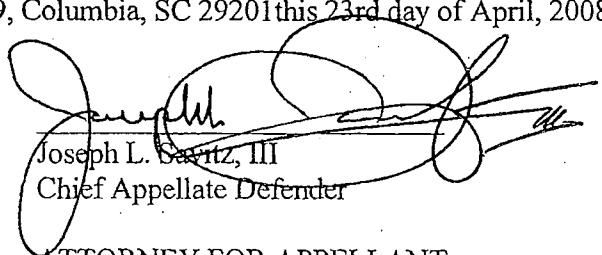
V.

KEITH ANTHONY SIMS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 23rd day of April, 2008.


Joseph L. Savitz, III
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 23rd day
of April, 2008.

Karen D. Ellery (L.S.)
Notary Public for South Carolina

My Commission Expires: March 19, 2017.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

The State,

Respondent,

v.

Keith Anthony Sims,

Appellant.

RETURN TO PETITION FOR REHEARING

On April 17, 2008, this Court issued a published opinion in the above captioned case affirming Appellant's murder conviction and sentence. On April 23, 2008, Appellant filed a Petition for Rehearing. On April 25, 2008, this Court requested Respondent file a return to the petition. This return follows.

Respondent argues "the Court has misconstrued the nature of Natalie English's comment to Nikki Davis" in that there is no evidence Sims uttered the word "murder," that this was English's "characterization" of the incident, and the statement was not made in furtherance of the conspiracy. Respondent disagrees.

As a first matter, Respondent notes there is no argument that a conspiracy to hide the body and other evidence of the crime did not exist. As shown in the opinion, there is ample evidence of same in the record.

As a second matter, Appellant appears to argue that statements that induce participation by stating the reason to act jointly and in concert, somehow transforms that statement into a mere

admission. That is not the law of this State. The Court specifically explained the difference in describing the holdings of *State v. Anders*, 331 S.C. 474, 503 S.E.2d 443 (1998) and *State v. Anderson*, 357 S.C. 514, 593 S.E.2d 820 (Ct.App. 2004). Admissions, not made in connection with any a conspiracy - - either to commit the crime or to hide the evidence, as is the case here - - are not admissible under the co-conspirator's statement exception as it is not specifically tied to the completion or furtherance of the conspiracy. Here, English's statement not only was made in order to induce enlistment into the conspiracy, it actually worked and Davis joined the conspiracy. *See State v. Anderson*, 357 S.C. 514, 517, 593 S.E.2d 820, 821 (Ct.App. 2004) ("The statements allegedly made to Lukie [advising him that they had picked out a victim to rob] by Ross were sufficient to allow the jury to reasonably infer that the statements were made in furtherance of the conspiracy, *especially in light of the fact that Lukie agreed to accompany Ross and Manick in their robbery of the victim.*") (emphasis added). Like the statement in *Anderson*, the instant statement is not a mere admission of the prior crime but a statement reflecting the very reason for the conspiracy made to another to ensure assistance and participation therein. Contrary to Appellant's assertion, pursuant to Rule 801(d)(2)(E), SCRE, the statement is, by definition, not hearsay. There is no error.

To the extent Appellant argues the co-conspirator's statement is a characterization of the admission, Respondent would first assert that is an implicit admission that a statement of guilt was made.¹ Moreover, no objection was asserted that the statement was somehow inadmissible

¹ Moreover, it is undersigned counsel's recollection from the oral argument that Appellant conceded that it was only the word "murder" that he found fault with, that any other "characterization" would be admissible without exception, i.e. shot or killed or, presumably, shot and killed an unarmed man, as Appellant testified in trial. In other words, there is no issue with the fact that Appellant killed the victim, or, for that matter, that he told English that he killed the victim.

because it was a characterization of Appellant's admission. Therefore, any such argument is procedurally barred. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003) ("Issues not raised and ruled upon in the trial court will not be considered on appeal."). Even so, that argument simply misses the mark. Appellant is not allowed to amend or disavow his co-conspirator's own statement made to another co-conspirator to the extent needed that it may match the position he ultimately decides to take in court. More specific to this action, Appellant did not deny making an admission of guilt to English, rather he clearly testified that he told English about the incident. (R. p. 163, line 25 - p. 164, line 2). Further, and importantly, he testified the very reason that he thought of hiding the body and other evidence of murder was that he realized that he had shot an unarmed man. (R. p. 163, lines 2-11; p. 169, lines 2-9). He also testified that he never even attempted to assert self-defense prior to January 22, 2007, approximately three weeks later. (R. p. 209, line 9 - p. 211, line 13). Moreover, Derrick Ruff, Appellant's close friend and also a co-conspirator in hiding evidence, testified that Appellant did not tell him that the victim threatened him or that the victim had a gun, rather, Appellant admitted he "F'd up" and that he wanted to get rid of the body. (R. p. 231, line 3 - p. 232, line 25). Respondent lastly notes that Danny Elkins, a witness neither involved in the murder or the conspiracy, testified that Appellant confessed to him that he had shot and killed the victim, but the testimony reflected that Appellant did not claim self-defense at that time either. (R. p. 76, line 5 - p. 77, line 4). With this testimony in mind, it stretches the bounds of logic to now contend that English's statement was somehow an unfair characterization. Even so, the statement is admissible as English's statement to a co-conspirator, relating an admission by Appellant of his fault in shooting an unarmed man - - the reason they would all work together to hide the evidence of the crime. There is no error.

WHEREFORE, having made its return to the petition, and for all the foregoing reasons,
Respondent submits the Petition for Rehearing should be denied.

Respectfully submitted,

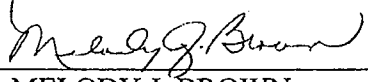
HENRY D. MCMASTER
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JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Assistant Attorney General

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By: 
MELODY J. BROWN

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ATTORNEYS FOR RESPONDENT

May 5, 2008.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

The State,

Respondent,

v.

Keith Anthony Sims,

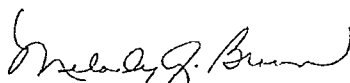
Appellant.

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the Return to Petition for Rehearing on Appellant by depositing two (2) copies of same in the United States mail, postage prepaid, addressed to his attorney of record:

Joseph L. Savitz, III, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office 11589
Columbia, South Carolina 29211-1589

This 5th day of May, 2008.



MELODY J. BROWN
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

COPY

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

RECEIVED

AUG 12 2008

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

KEITH ANTHONY SIMS,

PETITIONER

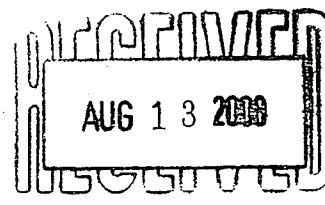
PETITION FOR WRIT OF CERTIORARI

JOSEPH L. SAVITZ, III
Chief Appellate Defender

LANELLE C. DURANT
Appellate Defender

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ATTORNEYS FOR PETITIONER



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QUESTION PRESENTED FOR REVIEW

Whether the trial judge committed reversible error by allowing a State's witness to testify that a non-testifying third-party told her "Keith had murdered somebody," since this evidence violated *Rule 802, SCRE*, the rule against hearsay.

STATEMENT OF FACTS

On March 20 through 24, 2006, Keith Sims stood trial in Richland County before Judge James Johnson and a jury on an indictment charging him with the murder of his friend, Brian Anderson, who was found submerged in a pond, with a bullet in his head. ROA p. 8, line 13 – p. 9, line 2; ROA p. 127, line 11 – p. 129, line 24. Sims testified that he had killed Anderson in self-defense, then panicked and tried to hide the body when he realized Anderson was unarmed. ROA p. 158, line 12 – p. 163, line 11. In addition to murder, the judge instructed the jury on voluntary manslaughter and self-defense. The jury found Sims guilty as charged, and the judge sentenced him to imprisonment for forty years.

On direct appeal in the Court of Appeals, Sims argued:

The trial judge committed reversible error by allowing a State's witness to relate that a non-testifying third-party told her "Keith had murdered somebody," since this evidence violated *South Carolina Evidence Rule 802*, the rule against hearsay.

The Court heard oral arguments April 8, 2008. It affirmed the conviction, holding:

[T]he trial judge properly allowed one co-conspirator to testify to another co-conspirator's statement relating to [Sims'] on statement of guilt because the statement was calculated to induce participation in the combined and joint effort to dispose of the victim's body, the gun, and other evidence of murder.

State v. Sims, 377 S.C. 598, 661 S.E.2d 122, 129 (Ct. App. 2008). In a petition for rehearing, Sims pointed out that the Court's opinion relied upon a factually-inaccurate premise:

[T]he Court has misconstrued the nature of Natalie English's comment to Nikki Davis ("Keith had murdered somebody") as "Sims' own statement of guilt." There is no evidence Sims told English (or anybody else for that matter) that he "murdered" Brian Anderson. (The State conceded this point at oral argument.) Instead, English's statement is *her own characterization* of the incident.

The Court requested a return to the petition for rehearing, which the State provided. The Court denied rehearing by order dated May 22, 2008.

Sims now petitions this Court for writ of certiorari.

ARGUMENT

The trial judge committed reversible error by allowing a State's witness to testify that a non-testifying third-party told her "Keith had murdered somebody," since this evidence violated Rule 802, SCRE, the rule against hearsay.

The only unanswered question in Keith Sims' case was whether he was guilty of murder or voluntary manslaughter, or not guilty because he had acted in self-defense. Sims testified that he shot Anderson in self-defense when Anderson reached beneath the seat of his car and Sims believed "he was reaching for his gun to shoot me and kill me." ROA p. 160, line 5 – p. 161, line 13. Sims was the only living eyewitness to the incident.

Derrick Ruff and Natalie English, respectively Sims' friend and girlfriend, helped him dispose of Anderson's body. English did not testify at Sims' trial. (Ruff testified for the defense.) Ruff's girlfriend, Sierra "Nikki" Davis, testified over defense counsel's hearsay objection that English told her "Keith had murdered somebody." ROA p. 30, lines 13-23. The Assistant Solicitor emphasized this testimony in closing argument:

You actually heard Natalie [English] through Nikki [Davis] ... say,
"He murdered somebody." No truer words were spoken in this case.
How many questions on cross to that?

ROA p. 260, lines 5-10; See, also, ROA p. 267, lines 14 and 15.

Rule 801(c), SCRE, defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Davis' testimony relating English's out-of-court statement that Sims had "murdered" Anderson was hearsay. See, for example, *State v. Anders*, 331 S.C. 474, 503 S.E.2d 443 (1998). Hearsay evidence

is generally inadmissible. *Evidence Rule 802*; *State v. LaCoste*, 347 S.C. 153, 553 S.E.2d 464 (Ct. App. 2001).

Davis' recitation of English's purported statement was inadmissible hearsay. See *State v. Davis*, 371 S.C. 170, 638 S.E.2d 57 (2006). Its admission could not have been harmless error.

Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it "could not reasonably have affected the result of the trial."

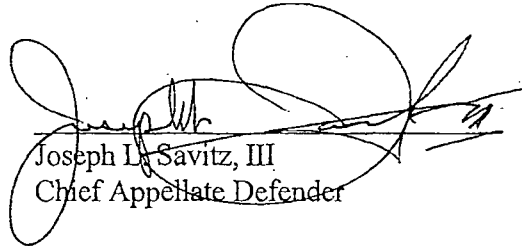
State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150, 151 (1985), quoting *State v. Key*, 256 S.C. 90, 180 S.E.2d 888 (1971). The State's case against Sims for murder was circumstantial and relied largely on Sims' efforts to cover up the incident. Compare *State v. Starnes*, 340 S.C. 312, 531 S.E.2d 907 (2000). Sims himself testified that he shot Anderson in self-defense. See *State v. Davis*.

As previously noted, the Court of Appeals mistakenly thought Natalie English had related "Sims' own statement of guilt" to Nikki Davis. In fact, there is no evidence Sims told English or anyone else that he "murdered" Brian Anderson, nor is such a finding supported by reasonable inference from any evidence in the record. In short, English – *not* Sims – characterized Anderson's death as a "murder."

Moreover, *Rule 801(d)(2)(E)*, *SCRE*, does not provide for the admissibility of *any* statement by a co-conspirator, such as narrative declarations or off-hand admissions of culpability. See *State v. Gilchrist*, 342 S.C. 369, 536 S.E.2d 868 (2000), and *State v. Anders*, 331 S.C. 474, 503 S.E.2d 443 (1998). English's characterization of Anderson's death as "murder" falls within this category, as it was not technically in furtherance of the conspiracy to dispose of Anderson's body and was by its very nature insufficiently reliable to be considered by the jury.

For this reason, the Court should grant certiorari and ultimately reverse Keith Sims' conviction for murder and remand for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joseph L. Savitz, III", is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

Joseph L. Savitz, III
Chief Appellate Defender

LaNelle C. DuRant
Appellate Defender

ATTORNEYS FOR PETITIONER

This 12th day of August, 2008.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland CountyG. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

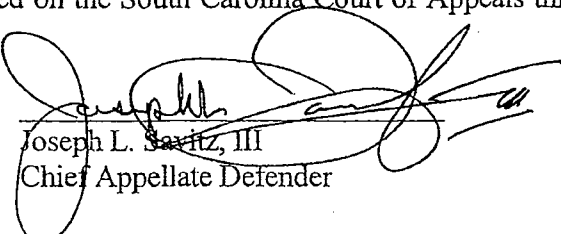
V.

KEITH ANTHONY SIMS,

PETITIONER

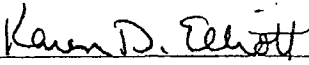
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Melody J. Brown, Esquire this 12th day of August, 2008. A copy of the petition for writ of certiorari has also been served on the South Carolina Court of Appeals this 12th day of August.


Joseph L. Sartz, III
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of August, 2008.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: March 19, 2017.



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Wanda H. Carter, Deputy Chief Attorney

August 12, 2008

Melody J. Brown, Esquire
Assistant Attorney General
Office of the Attorney General
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Columbia, South Carolina 29211

Re: The State v. Keith Anthony Sims

Dear Ms. Brown:

Enclosed are two copies of the petition for writ of certiorari and the appendix in the above case that I filed today with the S.C. Supreme Court.

If you have any questions concerning this matter, please contact me.

Sincerely,

Joseph L. Savitz, III
Chief Appellate Defender

JLS,III/kde

Enclosures



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August 12, 2008

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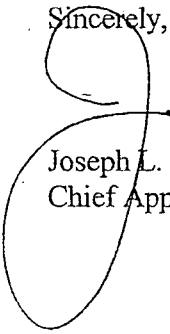
Re: Your appeal

Dear Mr. Sims:

Enclosed please find a copy of the petition for writ of certiorari and a copy of the appendix in your case that I filed today with the South Carolina Supreme Court on your behalf.

Should you have any questions concerning this matter, please contact me.

Sincerely,



Joseph L. Savitz, III
Chief Appellate Defender

JLS,III/kde

Enclosures

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

On Petition for Writ of Certiorari to the Court of Appeals
Opinion No. 4371 (S.C.Ct.App. filed April 17, 2008)

The State,

Respondent,

v.

Keith Anthony Sims,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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 The Court of Appeals correctly ruled that the trial judge properly allowed
 one co-conspirator to testify to another co-conspirator’s statement relating
 Petitioner’s own statement of guilt when such statement was calculated to
 induce participation in the joint effort to dispose of the victim’s body, the
 gun, and other evidence of murder. The statement was not hearsay, and
 was relevant and strongly probative evidence in Petitioner’s murder trial.
 There was no error in admitting same. 10

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PETITIONER'S QUESTION PRESENTED

Whether the trial judge committed reversible error by allowing a State's witness to testify that a non-testifying third party told her "Keith had murdered somebody," since this evidence violated *Rule 802, SCRE*, the rule against hearsay.

RESPONDENT'S COUNTER STATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals correctly ruled the trial judge properly allowed one co-conspirator to testify to another co-conspirator's statement relating Petitioner's own statement of guilt when such statement was calculated to induce participation in the joint effort to dispose of the victim's body, the gun, and other evidence of murder; thus, was not hearsay but relevant and strongly probative evidence in Petitioner's murder trial?

STATEMENT OF THE CASE

A Richland County grand jury returned a true-billed indictment against Petitioner, Keith Anthony Sims, in February 2004, charging him with the murder of Bryan A. Anderson. (2004-GS-40-1037). (R. p. 312-313). A jury trial was held March 20-24, 2006, before the Honorable G. Thomas Cooper, Jr.¹ Petitioner was convicted as charged. (R. p. 309, line 22, - p. 310, line 4). The judge sentenced Petitioner to forty (40) years imprisonment. (R. p. 311, lines 1-5). Petitioner appealed

After full briefing and argument, the South Carolina Court of Appeals issued an opinion affirming the conviction. (App. pp. 1-16).² Petitioner filed a petition for rehearing on April 23, 2008. (App. pp. 17-18). The State made a return to the petition on May 5, 2008. (App. pp. 21-24). The Court of Appeals denied the petition on May 22, 2008. (App. p. 26).

Petitioner now seeks review of the South Carolina Court of Appeals' opinion in this Court.

¹ The trial transcript cover page lists the judge as the Honorable James Johnson. This appears to be a simple typographical or form error as Judge Cooper introduced himself to the jury, and signed the sentencing sheet. (R. p. 2, lines 12-13; R. p. 314).

² Published at 377 S.C. 598, 661 S.E.2d 122 (Ct.App. 2008).

RESPONDENT'S STATEMENT OF FACTS

Petitioner, Keith Anthony Sims, admittedly shot, and killed, Bryan A. Anderson, in Bryan's car, in the driveway of Petitioner's home. (R. p. 175, lines 17-24). Petitioner, along with his girlfriend, Natalie English, and friends Derrick Ruff and Nikki Davis, hid the body, and attempted to hide or destroy any and all other evidence of the crime. (R. p. 163, line 25 - p. 167, line 7; p. 179, line 23 - p. 180, line 23; p. 183, lines 1-3; p. 191, lines 17 - p. 192, line 8; p. 195, lines 11-16).

Petitioner testified that he had known the victim for approximately three or four years at the time of the incident. (R. p. 137, lines 15-24). He testified that there were past difficulties between the two, and that the victim had once fought with Petitioner when Petitioner failed to aid Petitioner's brother and friends in a fight. (R. p. 138, line 7 - p. 141, line 7). Petitioner also testified that the victim had been in a "shootout" before, that he had seen the victim with a gun before, and that the victim had stolen an SK assault rifle from him. (R. p. 147, line 8- p. 150, line 18). Approximately two week before the incident, victim threatened Petitioner "[o]ver some money that I supposed to have owed to him....." (R. p. 152, lines 4-22). As to the incident, Petitioner testified that he and the victim both attended a birthday party at the Adams Mark Hotel in Columbia on December 30, 2003. The victim offered to take him home and Petitioner accepted. (R. p. 153, line 13 - p. 157, line 17). Petitioner was carrying a gun, because he had been "shot at in the past." (R. p. 157, lines 21-25). The two went to McDonald's, then stopped "in the country" near Petitioner's house. The victim went "in the back room" and Petitioner waited. When victim returned from the back of house, they left. Victim began discussing their past differences. (R. p. 159, lines 2-19). Victim indicated he would "take care of all his beefs before the new year" and reached under his car seat. Petitioner thought he was reaching for a

gun and shot “[o]ut of fear.” (R. p. 160, line 6 - p. 161, line 13). He then realized that victim did not have a gun, and that he “had just shot an unarmed man....” (R. p. 163, lines 2-11). Petitioner admittedly told his girlfriend, Natalie, and, after moving the victim’s car, went to Newberry to Derrick Ruff’s house. Natalie, Derrick, and Derrick’s girlfriend, Nikki, then helped Petitioner to dump the body in a nearby pond, and dispose of other evidence. Petitioner drove the victim’s car back to Columbia and left it in an apartment complex. (R. p. 163, line 25 - p. 167, line 7; p. 195, lines 11-19).

On December 31, 2003, around 11:30 in the morning, Rebecca Glanville, then a high school student, visited Molly’s Rock Park in Newberry, and discovered the victim’s body, face down in the water, with his pants partially off. (R. p. 3, line 16 - p. 5, line 16; p. 6, line 14-21). A diver from the Department of Natural Resources recovered the body. The body had been anchored by two concrete blocks resting on a pipe that housed a portion of a link of chain, the other part of which had been attached to the victim’s left wrist. (R. p. 7, line 19 - p. 10, line 14). Investigation of the scene revealed drag marks from the parking lot toward the water. (R. p. 11, line 12 - p. 12, line 7; p. 83, lines 18-24). Investigators also recovered a “torn tag” from gloves. (R. p. 92, lines 23-25). On January 1, 2004, the victim’s car was recovered at an apartment complex in Columbia. There were blood stains in front seat of the car. (R. p. 13, line 18- p. 14, line 12; p. 15, line 24 - p. 16, line 24). Based on the pattern, investigators determined the victim was in the driver’s seat when he was shot. (R. p. 17, lines 1-23). After identifying the victim, investigators determined he was last at the Adams Mark at a birthday party. Petitioner was developed as suspect as he was the last person seen with the victim. (R. p. 84, line 10 - p. 85, line 6). Wesley Boland, an officer with the Newberry County Sheriff’s Office, left a card at Petitioner’s mother’s home. Petitioner called the officer the same day. (R. p. 86, lines 20-23).

Petitioner, his girlfriend Natalie, and his mother went to the Newberry Sheriff's Office. (R. p. 93, lines 18-22). Petitioner was arrested and charged with murder. (R. p. 88, lines 7-10). Agent Boland testified that the investigation revealed Derrick, Natalie and Nikki had a part in the disposing of the body and other evidence. All three were charged with accessory after the fact of murder. With Nikki's help, officers recovered the gun used in the shooting. (R. p. 88, line 21 - p. 91, line 22). Richland County Sheriff's Department firearms analyst David Collins testified that the recovered gun fired the bullet that killed the victim, and also fired the shell that was retrieved from Petitioner's home. (R. p. 109, lines 7-20; p. 110, line 5 - p. 111, line 10). Dr. Joel Sexton performed the autopsy. Dr. Sexton testified that victim's body displayed multiple abrasions that occurred after death, consistent with dragging, (R. p. 127, lines 14-25; p. 130, lines 8-18), and "a single gunshot wound that entered... just below the lateral aspect of his right eye and passed into the skull towards the base of the skull." (R. p. 128, lines 1-4). The head wound also showed "powder tattooing and stripping" which indicated a close shot - - approximately one foot or one and one-half foot from the gun, though "probably closer." Dr. Sexton opined that "he would have certainly been rendered unconscious immediately and would probably have died in a fairly short period of time." (R. p. 128, line 5 - p. 129, line 24; p. 133, lines 16-21).

Sierra N. ("Nikki") Davis testified that Petitioner and his girlfriend arrived at the home that she shared with Derrick Ruff at approximately 3:00 a.m. Petitioner asked Nikki to wake Derrick. Natalie was visibly upset. Natalie asked Nikki if Nikki wanted to go to Charleston and she replied she would. Shortly thereafter, Petitioner approached and asked if she was going, and she indicated to him that she would. He then asked if she "had any bricks or anything like that." Nikki told him to look in the backyard, which he did. All four then left together. (R. 23, line 2 -

p. 27, line 5). Natalie drove, and soon stopped at a gas station. She went inside the store. Petitioner asked Nikki to check on Natalie and make sure she "was getting everything that he told them to get." (R. p. 27, lines 21-23). Natalie was purchasing "gloves and stuff..." (R. p. 27, line 24 - p. 28, line 2). They then drove to a nearby dirt road, to another home. Only Derrick and Petitioner left the car. The two men carried a chain and bricks to the back of the house. (R. p. 29, line 3 - p. 30, line 1). Next, Nikki saw another car. Nikki asked Natalie what was going on. Natalie told Nikki that "Keith had murdered somebody." (R. p. 30, lines 14-19). Derrick was with Petitioner in the second car, but left to get back in the car with Natalie and Nikki, "he said he couldn't stand the smell." (R. p. 32, lines 3-9). They continued to the park in separate cars. When Petitioner opened the passenger door, "the guy, he just fell out." (R. p. 33, lines 7-14). Together, they dragged the body to the pond, lifted him, and threw him into the water. (R. p. 34, line 13 - p. 36, line 2). Nikki explained the victim's pants were partially pulled down by the dragging effort. (R. p. 37, lines 5-7). Petitioner had the victim's "cellphone, chain and wallet," and instructed Nikki to dispose of those item. He then left with the victim's car. (R. p. 38, lines 10- 24). She, Derrick and Natalie went to Nikki's friend's house in Charleston. (R. p. 39, lines 2-14). Derrick threw away everyone's clothing and they got new clothes from the friend. (R. p. 39, line 22 - p. 40, line 8). Natalie called until she found Petitioner, and the three left to meet Petitioner in Columbia. (R. p. 40, line 13 - p. 41, line 18). They met Petitioner in Columbia, eventually going to Petitioner's house where Petitioner and Natalie "washed up." (R. p. 41, line 21 - p. 43, line 14). Petitioner cleaned what appeared to be blood from the driveway with a brush. (R. p. 46, lines 17-24; p. 53, lines 1-10). The group returned to Derrick's home in Newberry. (R. p. 44, lines 1-12). Petitioner stated "that he got everything that he needed to have got rid of and that the only thing left was to get rid of the bullet." Petitioner asked Nikki to get

rid of the bullet. Petitioner said he had "ditched the car... in another apartment complex area." (R. p. 44, lines 13-18). He also asked the group to get rid of his gun. (R. p. 47, lines 18-24). Petitioner and Derrick left to go to a club. Natalie and Nikki left to pick up Petitioner's mother and go to church. Nikki threw the gun out of the window on the way to church. (R. p. 49, line 23 - p. 50, line 16). Petitioner had also given them a "CD book," a dog chain, and a pair of jeans. Natalie told Nikki to throw those things into the dumpster behind the church, which she did. (R. p. 50, line 21 - p. 51, line 17). Those items were recovered. (R. p. 53, lines 5-13). (See also p. 103, line 21 - p. 104, line 12). After Natalie and Nikki learned the body had been discovered, they looked for Derrick and Petitioner. They found Derrick at a club, but Petitioner had already left with someone. (R. p. 54, line 20 - p. 55, line 11).

Derrick similarly testified that Petitioner came to his house in the early morning hours of December 31, 2003, saying he had "messed up." (R. p. 222, lines 3-15; p. 230, line 24 - p. 231, line 2). Derrick admitted taking part in hiding the body and other evidence. (R. p. 234, line 8 - p. 236, line 11). He testified that Petitioner wanted to get rid of the body. (R. p. 232, lines 15-25). Derrick testified that Petitioner never told him at the time that the victim had a gun, or that he was threatened. (R. p. 236, lines 17-23).

Danny Elkins, who knew Petitioner for many years, saw Petitioner in a club in the early morning hours of New Years Day 2004. Petitioner asked Elkins to take him somewhere else "because the cops were looking for him." (R. p. 74, lines 1-23). Elkins left the club with Petitioner and tried to take him to one home but the residents would not let Petitioner inside. While driving to another residence, Petitioner admitted he has shot another man, in the head, with a 9 mm gun that he had thrown away. He said the man was in Petitioner's front yard, "they had been arguing all day," and Petitioner had shot him. Elkins became upset and made

Petitioner leave the car. He would later report Petitioner's confession. (R. p. 75, line 4 - p. 79, line 19). On cross-examination, Elkins noted that Petitioner was not upset when he first saw him at the club; rather Petitioner "part[ied] until they said the police was looking for him." (R. p. 80, lines 9-13).

Petitioner admitted telling Danny Elkins that he had shot someone. (R. p. 178, lines 18-24). He admitted hiding the body in the car behind a vacant house. (R. p. 179, line 23 - p. 180, line 23). He admitted purchasing gloves that night. (R. p. 183, lines 1-3). He admitted showering and scrubbing the driveway with a brush. (R. p. 191, lines 17- p. 192, line 8). He admitted giving the gun to Nikki and asking her to dispose of it. (R. p. 195, lines 11-16). He admitted he did not tell police that he thought he shot in self-defense, and that he initially told police, three weeks later, that the victim had a gun. (R. p. 203, line 17 - p. 210, line 12). (See also R. p. 100, line 24 - p. 102, line 17; p. 108, lines 1-8).

ARGUMENT

The Court of Appeals correctly ruled that the trial judge properly allowed one co-conspirator to testify to another co-conspirator's statement relating Petitioner's own statement of guilt when such statement was calculated to induce participation in the joint effort to dispose of the victim's body, the gun, and other evidence of murder. The statement was not hearsay, and was relevant and strongly probative evidence in Petitioner's murder trial. There was no error in admitting same.

Treatment in the Court of Appeals:

The Court of Appeals held as follows:

We rule the trial judge properly allowed one co-conspirator to testify to another co-conspirator's statement relating to appellant's own statement of guilt because the statement was calculated to induce participation in the combined and joint effort to dispose of the victim's body, the gun and other evidence of murder. We hold the statement was **NOT** hearsay, but constituted relevant and admissible probative evidence in this murder.

(App. p. 16)(emphasis in original).

In his Petition for Rehearing, Petitioner complained the Court of Appeals' opinion contained a factual error: "the Court's opinion relies upon the factual premise that Sims told English he had murdered Anderson." (App. p. 18). He maintained the testimony at issue reflected Natalie's *characterization* of Petitioner's confession to her, but not the fact Petitioner made a confession of the killing. (App. pp. 17-18). The Court of Appeals rejected the argument and denied the petition. (App. p. 26).

Summary of Argument Against Granting the Petition for Writ of Certiorari:

The Court of Appeals properly held the testimony was not hearsay and was relevant, admissible, and probative evidence as it was a statement made in furtherance of an admitted conspiracy. That statement, unedited and offered as it was heard not as Petitioner wished it had been, was properly admitted. The Court of Appeals also properly rejected the argument on

rehearing of a factual error as there was no proof that Petitioner told Natalie English he had “murdered” the victim. Though this corroboration is not necessary for the admissibility issue, the record shows, by Petitioner’s own admission, there was a statement to Natalie, and that statement related to his killing the victim. (R. p. 163, line 25 - p. 165, line 12). Thus, there is neither legal or factual error in the opinion.

Standard of Review for Evidentiary Rulings:

“The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.” *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006). Abuse of discretion may be found where the record shows the evidentiary ruling is based on an error of law, or wholly lacks factual support in the record. *Id.* See also *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001); *State v. Preslar*, 364 S.C. 466, 472-473, 613 S.E.2d 381, 384 (Ct.App. 2005). However, even if an error is found, a reviewing court will not grant relief if such error does not result in prejudice. *Id.*

Discussion:

In his appeal to the South Carolina Court of Appeals, Petitioner argued that the trial judge erred in allowing Nikki to testify to Natalie’s statement relating defendant’s admission of guilt. (BOA, pp. 5-6). The record shows that Petitioner raised a hearsay objection to Nikki’s testimony that Natalie “told me, you know, Keith had murdered somebody.” (R. p. 30, lines 19-22). The trial judge overruled the objection without comment. (R. p. 30, line 23). Petitioner submitted to the Court of Appeals, and to this Court now, that the trial judge erred in that Natalie’s statement was hearsay and barred by Rule 802, SCRE. (BOA, p. 5; Cert. Petition, pp. 5-6). However, as the Court of Appeals correctly held, Rule 802 does not bar the admission of

the testimony because the statement is not hearsay as defined by our rules of evidence. Rather, Natalie's statement is, by definition, *not* hearsay, as it is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Rule 801(d)(2)(E), SCRE. (App. pp. 11-16). There are basically two prongs to qualify the statement under Rule 801(d)(2)(E). The statement at issue soundly meets both requirements.

First, the record must first show the existence of a conspiracy independent of the statement offered. *State v. Gilchrist*, 342 S.C. 369, 372, 536 S.E.2d 868, 869 (2000). There is certainly evidence here of the joint enterprise independent of the statement offered, not the least of which must be Petitioner's own admission of its existence. Petitioner admitted that he shot and killed the victim. (R. p. 175, lines 17-24). And, he testified that he enlisted the aid of Natalie, Derrick and Nikki in disposing of the body, gun, and other evidence, (R. p. 163, line 25 - p. 165, line 24), and again concedes these facts in his brief to the Court of Appeals and in his petition to this Court, (BOA, p. 5; Cert. Pet., p. 5). Similarly, Derrick admitted the existence of the joint enterprise in his testimony. (R. p. 234, line 8 - p. 236, line 11). In fact, the record demonstrates that the fact of its existence was not questioned. Counsel for Petitioner did not object at all when the state requested that Derrick be instructed that he could testify to any statement made during the conspiracy, in furtherance of the conspiracy, by any of the co-conspirators. (See R. p. 215, line 19 - p. 218, line 5). Additionally, the record also shows other facts corroborated the assertion the four worked together to dispose of the body and other evidence, such as the personal items belonging to the victim, and the gun which matched the bullet recovered from the autopsy, being recovered in the places described by the co-conspirators. (See R. p. 88, line 21 - p. 91, line 22; p. 103, line 21 - p. 104, line 12). In sum, the record fully and fairly supports a finding that a joint agreement existed, and the participants

acted in conformity with the goal of hiding or destroying the body and other evidence of the crime in an effort to protect or shield Petitioner.

Second, the record must show the statement was made “in furtherance of” or otherwise advanced the conspiracy. *Gilchrist, supra*. This statement not only was made to advance the conspiracy, it is the basis for the conspiracy, its cause and driving force. Further, the statement was made in an effort to advise Nikki of the reason for the actions in recruitment to the cause - - clearly, an objective which would advance the conspiracy. See *State v. Anderson*, 357 S.C. 514, 593 S.E.2d 820 (Ct.App. 2004)(statement “they had a lick” found to be in furtherance of conspiracy where statement induced party to go with declarant to a robbery); *Gilchrist*, 342 S.C. at 372 n.2, 536 S.E.2d at 869 n.2, quoting *United States v. Arias-Villanueva*, 998 F.2d 1491, 1502 (9th Cir. 1993)(“While mere conversation or narrative declarations are not admissible under this rule statement made to induce enlistment, further participation, prompt further action, allay fears, or keep coconspirators abreast of an ongoing conspiracy’s activities are admissible.”) See also *United States v. Roberts*, 14 F.3d 502, 515 (10th Cir. 1993)(statements made to induce participation or advise of goals admissible as statement made in furtherance of the conspiracy); *United States v. Yarbrough*, 852 F.2d 1522, 1535 (9th Cir. 1988)(statements to induce further participation admissible as in furtherance of conspiracy). Thus, the record supports this second requirement, as well. Even so, Petitioner argues the statement at issue here is a statement of culpability “not technically made in further of the conspiracy to dispose of Anderson’s body and was by its very nature insufficiently reliable to be considered by the jury.” (Cert. Petition, p. 6). However, precedent is soundly against him.

The difference between such statements and the statement at issue here is evident in the holdings of *State v. Anders*, 331 S.C. 474, 503 S.E.2d 443 (1998) and *State v. Anderson*, 357

S.C. 514, 593 S.E.2d 820 (Ct.App. 2004). In *Anders*, this Court found that a simple admission of guilt, not made in connection with any a conspiracy - - either to commit the crime or to hide the evidence, as is the case here - - is not admissible under the co-conspirator's statement exception as it is not specifically tied to the completion or furtherance of the conspiracy. The facts in that case showed that one co-conspirator admitted his participation in a conspiracy to destroy a building and his acts in completion of the goals. This Court held the statement was not made in furtherance of the conspiracy and was not admissible as a co-conspirator's statement under the rule. *Anders*, 331 S.C. at 476-77, 503 S.E.2d at 444. In *Anderson*, however, the witness testified that a co-conspirator told him "they had a lick or something like that." 357 S.C. at 517, 593 S.E.2d at 821. That statement actually induced the witness to join the conspiracy to rob the victim, thus was admissible under the rule. *Id.* Respondent notes that Petitioner simply ignores the *Anderson* precedent, even though the case is prominently discussed and relied upon in the opinion. (See App. pp. 13-15). Here, as in *Anderson*, English's statement not only was made in order to induce enlistment into the conspiracy, it actually worked and Davis knowingly aided in the destruction of evidence. The Court of Appeals properly applied the precedent to this case. (App. pp. 15-16). Contrary to Petitioner's assertion, pursuant to Rule 801(d)(2)(E), SCRE, the statement, by definition, is not hearsay.

As to the assertion that the statement was not Petitioner's actual statement, but the witnesses's characterization of that statement, (BOA, p. 6), Petitioner misreads the Court of Appeals opinion addressing same. Petitioner contends the Court "mistakenly thought Natalie English had related 'Sims own statement of guilt' to Nikki Davis." (Cert. Petition, p. 6). As a first matter, the opinion clearly reflects the Court found the statement was English's statement "relating to appellant's own statement of guilt...." (App. p. 16)(emphasis added). Moreover,

Petitioner's statement of purported error contains an implicit admission that he did, in fact, make a statement to English concerning the killing.³ Petitioner made no objection based upon an argument that the statement was somehow inadmissible because it was a characterization of Petitioner's own admission. Therefore, any such argument is procedurally barred. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003) ("Issues not raised and ruled upon in the trial court will not be considered on appeal."). Even so, that argument simply misses the mark. Petitioner is not allowed to amend or disavow his co-conspirator's own statement made to another co-conspirator to the extent needed that it may match the position he ultimately decides to take in court. More specific to this action, Petitioner did not deny making an admission of guilt to Natalie, rather he clearly testified that he told Natalie about the incident. (R. p. 163, line 25 - p. 164, line 2). Further, and importantly, he testified the very reason that he thought of hiding the body and other evidence of murder was that he realized that he had shot an unarmed man. (R. p. 163, lines 2-11; p. 169, lines 2-9). He also testified that he never even attempted to assert self-defense prior to January 22, 2007, approximately three weeks later. (R. p. 209, line 9 - p. 211, line 13). Moreover, Derrick Ruff, Petitioner's close friend and also a co-conspirator in hiding evidence, testified that Petitioner did not tell him that the victim threatened him or that the victim had a gun, rather, Petitioner admitted he "F'd up" and that he wanted to get rid of the body. (R. p. 231, line 3 - p. 232, line 25). Respondent lastly notes that Danny Elkins, a witness neither involved in the murder or the conspiracy, testified that Petitioner confessed to him that he had shot and killed the victim, but the testimony reflected that Petitioner did not claim self-

³ Moreover, it is undersigned counsel's recollection from the oral argument in the Court of Appeals that Petitioner conceded that it was only the word "murder" that he found fault with, that any other "characterization" would be admissible without exception, i.e. shot or killed or, presumably, shot and killed an unarmed man, as Petitioner testified in trial. In other words, there is no issue with the fact that Petitioner killed the victim, or, for that matter, that he told English that he killed the victim.

defense at that time either. (R. p. 76, line 5 - p. 77, line 4). With this testimony in mind, it stretches the bounds of logic to now contend that English's statement was somehow an unfair characterization. Even so, the statement is admissible as English's statement to a co-conspirator, relating an admission by Petitioner of his fault in shooting an unarmed man - - the reason they would all work together to hide the evidence of the crime.

Respondent also notes that Petitioner's statement was not only admissible because there was no hearsay bar, but also because his actions and reasons for those actions regarding the destruction of evidence were properly admitted against him. "The attempted destruction of evidence is regarded as a relevant incriminating circumstance." *State v. Beckham*, 334 S.C. 302, 314, 513 S.E.2d 606, 612 (1999). *See also State v. Epes*, 209 S.C. 246, ___, 39 S.E.2d 769, 777 (1946)("the concealment or the attempted destruction of a body of a person murdered is regarded as an incriminating circumstance"); *State v. Al-Amin*, 353 S.C. 405, 412, 578 S.E.2d 32, 36 (Ct.App. 2003)(same). This would necessarily involve the acts and statements of the friends in connection with the destruction of evidence as part and parcel of the evidence of destruction. Consequently, the evidence of the joint enterprise, and reason for same, were of great probative value in Petitioner's murder trial. At any rate, the statement complained of is not hearsay, and there is no error. However, should error be found, respondent asserts the statement is cumulative to other properly admitted evidence, and any error necessary harmless.

Petitioner testified that he discovered after he shot the victim that he had shot an unarmed man, and he wanted to hide his crime. (R. p. 163, lines 2-11). He also testified that he never even attempted to assert self-defense prior to January 22, 2007, approximately three weeks later. (R. p. 209, line 9 - p. 583, line 13). Derrick confirmed this in his own testimony that Petitioner did not tell him that the victim threatened him or that the victim had a gun. (R. p. 231, lines 5-

14). Moreover, Danny Elkins, a witness involved in neither the shooting or the conspiracy, testified that Petitioner confessed to him that he had shot and killed the victim, and Petitioner did not claim self-defense at that time either. (R. p. 76, line 5-p. 77, line 4). Therefore, the statement to Natalie, related by Nikki, was consistent with Petitioner's own testimony, and merely cumulative to other properly admitted evidence. Thus, even if the admission of evidence could be deemed error, it could only be harmless in light of this record. *Gilchrist*, 342 S.C. at 373, 536 S.E.2d at 870 (where defendant makes similar statement evidencing intent, properly admitted as a statement of a party opponent, admission of hearsay statement "merely cumulative" and error in admission harmless). However, the record here supports there was no error. The evidence was properly admitted, and Petitioner's argument to the contrary should be rejected.

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

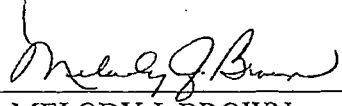
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ATTORNEYS FOR RESPONDENT

November 12, 2008.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

On Petition for Writ of Certiorari to the Court of Appeals
Opinion No. 4371 (S.C.Ct.App. filed April 17, 2008)

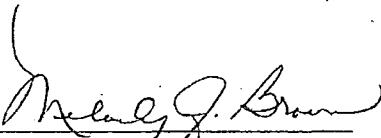
The State,	v.	Respondent,
Keith Anthony Sims,		Petitioner

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the *Return to Petition for Writ of Certiorari* on Petitioner by depositing two (2) copies of same in the United States mail, postage prepaid, addressed to his attorneys of record:

Joseph L. Savitz, III, Chief Appellate Defender
Lanelle C. Durant, Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office 11589
Columbia, South Carolina 29211-1589

This 12th day of November, 2008.


MELODY J. BROWN
Assistant Attorney General
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The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

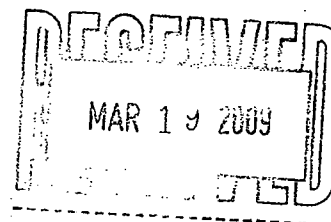
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March 19, 2009



✓ Chief Appellate Defender Joseph L. Savitz, III
Appellate Defender Lanelle C. Durant
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Sims, Keith Anthony
2004-GS-40-01037

Dear Counsel:

Enclosed is the Order granting your Petition for Writ of Certiorari in the above entitled matter.

It will be necessary for you to furnish this office with an additional thirteen (13) copies of the appendix within thirty (30) days from the date of this letter.

Brief of Petitioner should be served and filed on or before April 20, 2009. The brief is not properly filed until we have proof of service.

Brief of Respondent should be served and filed within thirty (30) days after petitioner's brief is filed. We must have proof of service. Any reply brief should be served and filed within ten (10) days after filing of respondent's brief.

Chief Appellate Defender Joseph L. Savitz, III
Appellate Defender Lanelle C. Durant
Page Two
March 19, 2009

Very truly yours,



CLERK

DES/dmh

Enclosure

cc: Assistant Attorney General Melody J. Brown
The Honorable Warren Blair Giese
The Honorable Jeanette W. McBride
The Honorable Jeanette Barber

The Supreme Court of South Carolina

The State,

Respondent,

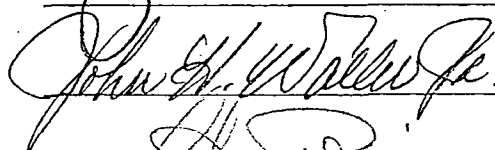
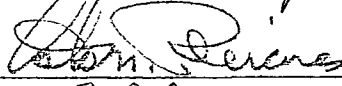
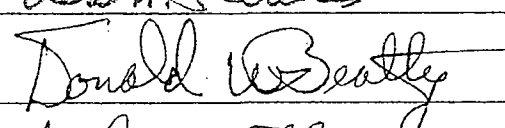
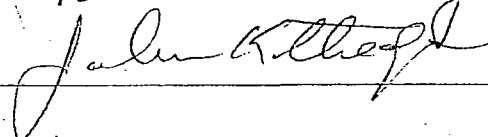
v.

Keith Anthony Sims,

Petitioner.

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in State v. Sims, 377 S.C. 598, 661 S.E.2d 122 (Ct. App. 2008). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 226(j), SCACR.

 C. J.
 J.
 J.
 J.
 J.

Columbia, South Carolina

March 19, 2009

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEITH ANTHONY SIMS,

PETITIONER

BRIEF OF PETITIONER

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED FOR REVIEW

The trial judge committed reversible error by allowing a State's witness to testify that a non-testifying third-party told her "Keith had murdered somebody," since this evidence violated *Rule 802, SCRE*, the rule against hearsay.

STATEMENT OF THE CASE

On March 20 through 24, 2006, Keith Sims stood trial in Richland County before Judge James Johnson and a jury on an indictment charging him with the murder of his friend, Brian Anderson, who was found submerged in a pond with a bullet in his head. ROA p. 8, line 13 – p. 9, line 2; ROA p. 127, line 11 – p. 129, line 24. Sims testified that he had killed Anderson in self-defense, then panicked and tried to hide the body when he realized Anderson was unarmed. ROA p. 158, line 12 – p. 163, line 11. In addition to murder, the judge instructed the jury on voluntary manslaughter and self-defense. The jury found Sims guilty as charged, and the judge sentenced him to imprisonment for forty years.

On direct appeal in the Court of Appeals, Sims argued:

The trial judge committed reversible error by allowing a State's witness to relate that a non-testifying third-party told her "Keith had murdered somebody," since this evidence violated *South Carolina Evidence Rule 802*, the rule against hearsay.

Following oral arguments, the Court affirmed the conviction, holding:

[T]he trial judge properly allowed one co-conspirator to testify to another co-conspirator's statement relating to [Sims'] own statement of guilt because the statement was calculated to induce participation in the combined and joint effort to dispose of the victim's body, the gun, and other evidence of murder.

State v. Sims, 377 S.C. 598, 661 S.E.2d 122, 129 (Ct. App. 2008). In a petition for rehearing, Sims pointed out that the Court's opinion relied upon a factually-inaccurate premise:

[T]he Court has misconstrued the nature of Natalie English's comment to Nikki Davis ("Keith had murdered somebody") as "Sims' own statement of guilt." There is no evidence Sims told English (or anybody else for that matter) that he "murdered" Brian Anderson. (The State conceded this point at oral argument.) Instead, English's statement is *her own characterization* of the incident.

The Court denied rehearing by order dated May 22, 2008.

On August 28, 2008, Sims petitioned the Supreme Court for writ of certiorari. The Court granted cert by order dated March 19, 2009.

ARGUMENT

The trial judge committed reversible error by allowing a State's witness to testify that a non-testifying third-party told her "Keith had murdered somebody," since this evidence violated Rule 802, SCRE, the rule against hearsay.

The only unanswered question in Keith Sims' case was whether he was guilty of murder or voluntary manslaughter, or not guilty because he had acted in self-defense. Sims testified that he shot Anderson in self-defense when Anderson reached beneath the seat of his car and Sims believed "he was reaching for his gun to shoot me and kill me." ROA p. 160, line 5 – p. 161, line 13. Sims was the only living eyewitness to the incident.

Derrick Ruff and Natalie English, respectively Sims' friend and girlfriend, helped him dispose of Anderson's body. English did not testify at Sims' trial. (Ruff testified for the defense.) Ruff's girlfriend, Sierra "Nikki" Davis, testified over defense counsel's hearsay objection that English told her "Keith had murdered somebody." ROA p. 30, lines 13-23. The Assistant Solicitor emphasized this testimony in closing argument:

You actually heard Natalie [English] through Nikki [Davis] ... say,
"He murdered somebody." No truer words were spoken in this case.
How many questions on cross to that?

ROA p. 260, lines 5-10; See, also, ROA p. 267, lines 14 and 15. The Assistant Solicitor's rhetoric merely underscores the trial judge's error: Hearsay is excluded *because* the absent declarant cannot be questioned.

Rule 801(c), SCRE, defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Davis' testimony relating English's out-of-court statement that Sims had "murdered" Anderson was hearsay. See, for example, *State v. Anders*, 331 S.C. 474, 503 S.E.2d 443 (1998). Hearsay evidence

is generally inadmissible. *Evidence Rule 802*; *State v. LaCoste*, 347 S.C. 153, 553 S.E.2d 464 (Ct. App. 2001).

Davis' recitation of English's purported statement was inadmissible hearsay. See *State v. Davis*, 371 S.C. 170, 638 S.E.2d 57 (2006). Its admission could not have been harmless error.

Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it "could not reasonably have affected the result of the trial."

State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150, 151 (1985), quoting *State v. Key*, 256 S.C. 90, 180 S.E.2d 888 (1971). The State's case against Sims for murder was circumstantial and relied largely on Sims' efforts to cover up the incident. Compare *State v. Starnes*, 340 S.C. 312, 531 S.E.2d 907 (2000). Sims himself testified that he shot Anderson in self-defense. See *State v. Davis*.

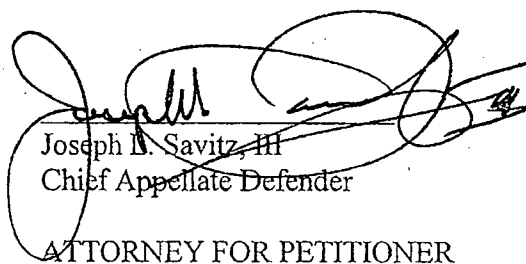
As previously noted, the Court of Appeals mistakenly thought Natalie English had related "Sims' own statement of guilt" to Nikki Davis. In fact, there is no evidence Sims told English or anyone else that he "murdered" Brian Anderson, nor is such a finding supported by reasonable inference from any evidence in the record. In short, English – *not* Sims – characterized Anderson's death as a "murder."

Moreover, *Rule 801(d) (2) (E)*, *SCRE*, does not provide for the wholesale admissibility of *any* statement by a co-conspirator, such as narrative declarations or off-hand admissions of culpability. See *State v. Gilchrist*, 342 S.C. 369, 536 S.E.2d 868 (2000), and *State v. Anders*, 331 S.C. 474, 503 S.E.2d 443 (1998). English's characterization of Anderson's death as "murder" falls within this category, as it was not technically in furtherance of the conspiracy to dispose of Anderson's body and was by its very nature insufficiently reliable to be considered by the jury.

In short, Nikki Davis testified that Natalie English told her “Keith had murdered somebody.” The State continues to acknowledge that there is no evidence Sims told English (or anybody else) that he “murdered” Brian Anderson. It nevertheless argues that “the statement to Natalie, related by Nikki, was consistent with [Sims’] own testimony, and merely cumulative to other properly admitted evidence.” Return, p. 17. To the contrary, Sims testified that he killed Anderson in self-defense and the jury was charged accordingly. Since English was unavailable for cross-examination, Sims was unable to cross-examine her about her purported characterization of the incident – at least according to Davis – as murder. This is the same type of hearsay found inadmissible in *State v. Davis*, where a State’s witness testified that an associate of the defendant told him that a shotgun he was considering buying had been used to murder the victim. Since the central issue in the case was whether Sims was guilty of murder or voluntary manslaughter or not guilty because he acted in self-defense, evidence that Sims purportedly told a non-testifying declarant that he had murdered Anderson could not have been harmless.

For this reason, the Court should reverse the Court of Appeals and remand for a new trial.

Respectfully submitted,



Joseph D. Savitz III
Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 18th day of May, 2009

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

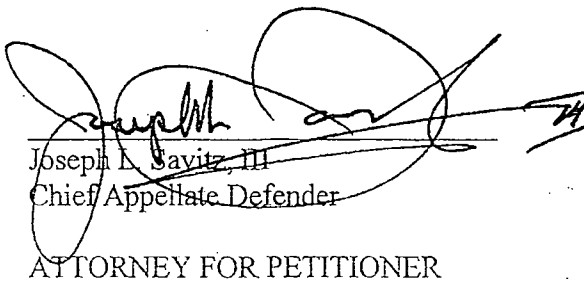
V.

KEITH ANTHONY SIMS,

APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Melody J. Brown, Esquire, this 18th day of May, 2009.



Joseph L. Savitz, III
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of May, 2009.

Karen D. Elliot (L.S.)
Notary Public for South Carolina
My Commission Expires: March 19, 2017



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Wanda H. Carter, Deputy Chief Appellate Defender

May 18, 2009

Melody J. Brown, Esquire
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Re: The State v. Keith Anthony Sims

Dear Ms. ~~Brown~~: *Melody*

Enclosed are two copies of the brief of petitioner in the above case that I filed with the S.C. Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,

Joseph L. Savitz, III
Chief Appellate Defender

JLS,III/kde

Enclosures



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May 18, 2009

Mr. Keith Anthony Sims #314569
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669

Re: Your appeal

Dear Mr. Sims:

Enclosed please find a copy of the brief of petitioner your case that I filed today with the South Carolina Supreme Court on your behalf.

Should you have any questions concerning this matter, please contact me.

Sincerely,

Joseph L. Savitz, III
Chief Appellate Defender

JLS,III/kde

Enclosures

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

On Certiorari to the Court of Appeals
Opinion No. 4371 (S.C.Ct.App. filed April 17, 2008)

The State,

Respondent,

vs.

Keith Anthony Sims,

Appellant.

BRIEF OF RESPONDENT

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PETITIONER'S ISSUE PRESENTED FOR REVIEW

Whether the trial judge committed reversible error by allowing a State's witness to testify that a non-testifying third party told her "Keith had murdered somebody," since this evidence violated *Rule 802, SCRE*, the rule against hearsay.

**RESPONDENT'S COUNTER STATEMENT OF
ISSUE PRESENTED FOR REVIEW**

Whether the Court of Appeals correctly ruled the trial judge properly allowed one co-conspirator to testify to another co-conspirator's statement relating Petitioner's own statement of guilt when such statement was calculated to induce participation in the joint effort to dispose of the victim's body, the gun, and other evidence of murder; thus, was not hearsay but relevant and strongly probative evidence in Petitioner's murder trial?

STATEMENT OF THE CASE

A Richland County grand jury returned a true-billed indictment against Petitioner, Keith Anthony Sims, in February 2004, charging him with the murder of Bryan A. Anderson. (2004-GS-40-1037). (R. p. 312-313). A jury trial was held March 20-24, 2006, before the Honorable G. Thomas Cooper, Jr.¹ Petitioner was convicted as charged. (R. p. 309, line 22, - p. 310, line 4). The judge sentenced Petitioner to forty (40) years imprisonment. (R. p. 311, lines 1-5). Petitioner appealed

After full briefing and argument, the South Carolina Court of Appeals issued an opinion affirming the conviction. (App. pp. 1-16).² Petitioner filed a petition for rehearing on April 23, 2008. (App. pp. 17-18). The State made a return to the petition on May 5, 2008. (App. pp. 21-24). The Court of Appeals denied the petition on May 22, 2008. (App. p. 26).

Petitioner filed a Petition for Writ of Certiorari in this Court on August 12, 2008. Respondent filed a return to the petition on November 12, 2008. This Court granted the petition on March 19, 2009, and directed the parties to submit additional briefs.

Petitioner filed a Brief of Petitioner on May 18, 2009. This Brief of Respondent follows.

¹ The trial transcript cover page lists the judge as the Honorable James Johnson. This appears to be a simple typographical or form error as Judge Cooper introduced himself to the jury, and signed the sentencing sheet. (R. p. 2, lines 12-13; R. p. 314).

² Published at 377 S.C. 598, 661 S.E.2d 122 (Ct.App. 2008).

RESPONDENT'S STATEMENT OF FACTS

Petitioner, Keith Anthony Sims, admittedly shot, and killed, Bryan A. Anderson, in Bryan's car, in the driveway of Petitioner's home. (R. p. 175, lines 17-24). Petitioner, along with his girlfriend, Natalie English, and friends Derrick Ruff and Nikki Davis, hid the body, and attempted to hide or destroy any and all other evidence of the crime. (R. p. 163, line 25 - p. 167, line 7; p. 179, line 23 - p. 180, line 23; p. 183, lines 1-3; p. 191, lines 17 - p. 192, line 8; p. 195, lines 11-16).

Petitioner testified that he had known the victim for approximately three or four years at the time of the incident. (R. p. 137, lines 15-24). He testified that there were past difficulties between the two, and that the victim had once fought with Petitioner when Petitioner failed to aid Petitioner's brother and friends in a fight. (R. p. 138, line 7 - p. 141, line 7). Petitioner also testified that the victim had been in a "shootout" before, that he had seen the victim with a gun before, and that the victim had stolen an SK assault rifle from him. (R. p. 147, line 8- p. 150, line 18). Approximately two week before the incident, victim threatened Petitioner "[o]ver some money that I supposed to have owed to him....." (R. p. 152, lines 4-22). As to the incident, Petitioner testified that he and the victim both attended a birthday party at the Adams Mark Hotel in Columbia on December 30, 2003. The victim offered to take him home and Petitioner accepted. (R. p. 153, line 13 - p. 157, line 17). Petitioner was carrying a gun, because he had been "shot at in the past." (R. p. 157, lines 21-25). The two went to McDonald's, then stopped "in the country" near Petitioner's house. The victim went "in the back room" and Petitioner waited. When victim returned from the back of house, they left. Victim began discussing their past differences. (R. p. 159, lines 2-19). Victim indicated he would "take care of all his beefs before the new year" and reached under his car seat. Petitioner thought he was reaching for a

Moreover, Derrick Ruff, Petitioner's close friend and also a co-conspirator in hiding evidence, testified that Petitioner did not tell him that the victim threatened him or that the victim had a gun, rather, Petitioner admitted he "F'd up" and that he wanted to get rid of the body. (R. p. 231, line 3 - p. 232, line 25). Respondent lastly notes that Danny Elkins, a witness neither involved in the murder or the conspiracy, testified that Petitioner confessed to him that he had shot and killed the victim, but the testimony reflected that Petitioner did not claim self-defense at that time either. (R. p. 76, line 5 - p. 77, line 4). With this testimony in mind, it stretches the bounds of logic to now contend that English's statement was somehow an unfair characterization, especially where Petitioner himself had expressed to another co-conspirator that he had "F'd up" and wanted to get rid of the body. Even so, the statement is admissible, as is, as a co-conspirator's statement made during the course of, and in furtherance of, the conspiracy.

Respondent also notes that Petitioner's statement was not only admissible because there was no hearsay bar, but also because his actions and reasons for those actions regarding the destruction of evidence were properly admitted against him. "The attempted destruction of evidence is regarded as a relevant incriminating circumstance." *State v. Beckham*, 334 S.C. 302, 314, 513 S.E.2d 606, 612 (1999). *See also State v. Epes*, 209 S.C. 246, ___, 39 S.E.2d 769, 777 (1946)("the concealment or the attempted destruction of a body of a person murdered is regarded as an incriminating circumstance"); *State v. Al-Amin*, 353 S.C. 405, 412, 578 S.E.2d 32, 36 (Ct.App. 2003)(same). This would necessarily involve the acts and statements of the friends in connection with the destruction of evidence as part and parcel of the evidence of destruction. Consequently, the evidence of the joint enterprise, and reason for same, were of great probative value in Petitioner's murder trial. At any rate, the statement complained of is not hearsay, and

there is no error. However, should error be found, respondent asserts the statement is cumulative to other properly admitted evidence and any error harmless.

Petitioner testified that he discovered after he shot the victim that he had shot an unarmed man, and he wanted to hide his crime. (R. p. 163, lines 2-11). He also testified that he never even attempted to assert self-defense prior to January 22, 2007, approximately three weeks later. (R. p. 209, line 9 - p. 583, line 13). Derrick Ruff confirmed this in his own testimony that Petitioner did not tell him that the victim threatened him or that the victim had a gun. (R. p. 231, lines 5-14). Moreover, Danny Elkins, a witness involved in neither the shooting or the conspiracy, testified that Petitioner confessed to him that he had shot and killed the victim, and Petitioner did not claim self-defense at that time either. (R. p. 76, line 5-p. 77, line 4). Again, English was not giving a legal opinion, but a layman's understanding of why they were aiding Petitioner. In context, the statement was consistent with Petitioner's own testimony, and merely cumulative to other properly admitted evidence. Thus, even if the admission of evidence could be deemed error, it could only be harmless in light of this record. *Gilchrist*, 342 S.C. at 373, 536 S.E.2d at 870 (where defendant makes similar statement evidencing intent, properly admitted as a statement of a party opponent, admission of hearsay statement "merely cumulative" and error in admission harmless). However, the record here supports there was no error. The evidence was properly admitted, and Petitioner's argument to the contrary should be rejected.

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the opinion of the Court of Appeals in this matter should be affirmed.

Respectfully submitted,

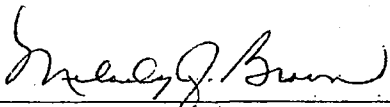
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By: 

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ATTORNEYS FOR RESPONDENT

August 12, 2009.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

On Petition for Writ of Certiorari to the Court of Appeals
Opinion No. 4371 (S.C.Ct.App. filed April 17, 2008)

The State,

Respondent,

v.

Keith Anthony Sims,

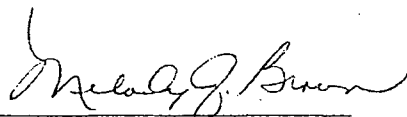
Petitioner

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the *Brief of Respondent* on Petitioner by depositing two (2) copies of same in the United States mail, postage prepaid, addressed to his attorneys of record:

Joseph L. Savitz, III, Chief Appellate Defender
Lanelle C. Durant, Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
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Columbia, South Carolina 29211-1589

This 12th day of August, 2009.



MELODY J. BROWN
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

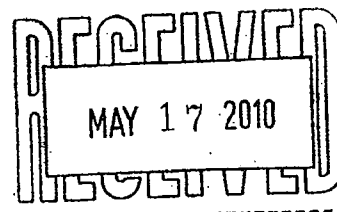
The State,

Respondent,

v.

Keith Anthony Sims,

Petitioner.



ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge.

Opinion No. 26820
Heard January 6, 2010 – Filed May 17, 2010

AFFIRMED IN RESULT

Senior Appellate Defender Joseph L. Savitz, III, and
Appellate Defender LaNelle C. DuRant, both of
South Carolina Commission on Indigent Defense, of
Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Donald J.
Zelenka, Assistant Attorney General Melody J.

Brown, Assistant Attorney General Alphonso Simon, Jr., and Solicitor Warren B. Giese, all of Columbia, for Respondent.

JUSTICE KITTREDGE: This case concerns Rule 801(d)(2)(E), SCRE, which allows in evidence as non-hearsay an out-of-court statement made by a non-testifying "coconspirator of a party during the course and in furtherance of the conspiracy." Keith Anthony Sims was convicted and sentenced for murder. Sims appealed, challenging the admission of a statement attributed to a non-testifying declarant as inadmissible hearsay. The court of appeals affirmed, and we granted a writ of certiorari to review that decision. *State v. Sims*, 377 S.C. 598, 661 S.E.2d 122 (Ct. App. 2008). The court of appeals erred in finding the challenged evidence satisfied the "in furtherance of the conspiracy" prong of Rule 801(d)(2)(E). We affirm in result, however, because the erroneously admitted hearsay was harmless.

I.

The body of Brian Anderson was found in a Newberry County pond on December 31, 2003. The body was chained to a pipe weighted down by two cement blocks. Anderson had been shot in the right eye. Marks on Anderson's body indicated he was dragged to the pond. Nearby, law enforcement agents found work gloves and packaging.

The next day, Anderson's blood-spattered car was located in the parking lot of a Columbia apartment complex. The pattern of blood stains indicated that someone in the front passenger's seat had shot Anderson while he was in the driver's seat. Anderson was last seen alive on December 30 at a party in a Columbia hotel.

Sims and Anderson were acquaintances. They left the party together around midnight in Anderson's car. Evidence pointed to Sims as the killer, and he was arrested and charged with murder. His subsequent statements to

law enforcement contained several versions of his involvement in Anderson's death.¹

During the investigation, law enforcement learned that Sims had enlisted the support of three individuals to help him dispose of Anderson's body, Sims's bloody clothes and the gun used to kill Anderson. Those three individuals were Natalie English (Sims's girlfriend), Derrick Ruff (Sims's friend), and Nikki Davis (Ruff's girlfriend). English, Ruff, and Davis were charged as accessories after-the-fact of murder.

Davis cooperated with law enforcement and led them to several pieces of critical evidence, including the gun that Sims used to kill Anderson. The information Davis provided also enabled law enforcement to recover several items that had belonged to Anderson; these items were found in a dumpster behind the church Sims's mother attends.

II.

At trial, Sims testified he and Anderson had lived near each other on Monticello Road in Richland County. Although they had occasional arguments, Sims stated they had been friends for several years. Sims testified that Anderson had "quite a few guns," and a few weeks before his death, Anderson had threatened Sims "over some money."

¹ Sims's initial statement acknowledged that Anderson had "dropped him off" after the party, but denied any involvement in Anderson's death: "I ain't got no pistol. . . . That's crazy. I didn't kill Brian." In a subsequent statement, Sims told law enforcement that he and Anderson left the party together around 1:00 a.m.; they stopped at McDonald's and a crack house before Anderson dropped off Sims. In a third statement, Sims continued to deny any involvement in Anderson's death. Sims eventually admitted to law enforcement that he shot Anderson, but contended Anderson had pulled a gun on him. At trial two years later, Sims admitted killing Anderson, who was unarmed. Sims asserted self-defense as he testified he believed Anderson was reaching for a gun.

According to Sims, around 1:00 a.m. on December 31, 2003, Anderson offered to take him home from the party. Sims contended Anderson had "a little gun in his hand" when he got into the car. Sims acknowledged that he also was carrying a gun: "I have got shot in the past. So I usually carry my gun with me." Sims testified that as they turned into his driveway:

[Anderson] was telling me that he was going to end all his beefs before the New Year. And he was reaching underneath his seat. So I thought he was fixing to . . . grab him a gun and shoot me. So I pulled out my gun. Out of fear I shot.

Sims added: "I didn't mean to kill him. I was pulling my gun out because I thought he was fixing to kill me." Sims stated he did not realize until after he had fired that "I had just shot an unarmed man, so I was scared."

Sims said that following Anderson's shooting, he told his girlfriend, English, "something happened between me and [Anderson]." Sims stated he and English drove to Newberry because he wanted to ask his friend Ruff what he should do. English drove her car, and Sims drove Anderson's car, which contained Anderson's body. After Sims and Ruff talked, they left to dispose of Anderson's body. After dumping the body in the pond, Sims testified, "we left [the car] in Columbia."

Sims acknowledged that he gave several false statements to law enforcement in January of 2004. He admitted at trial: "I lied. I was scared." Sims said he was afraid to be truthful because "I had shot Brian [Anderson] and then I had seen he didn't have no gun." On January 22, 2004, Sims acknowledged shooting Anderson but, again, his statement was not truthful: "I told them when we had got in my driveway and Brian had pulled a gun out on me." At trial, Sims admitted, "I was lying because when I seen he had no gun I was scared."

Ruff and Davis testified at trial and acknowledged helping Sims hide Anderson's body and destroy evidence. Sims's other coconspirator, English, did not testify.

Davis testified extensively regarding the events that followed Anderson's death. According to Davis, around 3:00 a.m., English and Sims knocked on the door of the home she shared with Ruff and his mother. After Sims woke Ruff, he and Sims spoke privately. Davis claimed at this point she was not aware of the killing or that her friends were planning to help Sims dispose of Anderson's body: "She [English] wouldn't tell me what was going on. And so she asked me if I wanted to go to Charleston. And I told her, yeah" Davis stated Sims searched for bricks in Ruff's yard. After leaving Ruff's home, they stopped at a gas station for English to buy "gloves and stuff."

Next, they drove down a dirt road and parked in front of a house. Davis maintained that she still was unaware of the killing or the real purpose of the trip. Shortly after Sims and Ruff exited the car, Davis observed them "toting like this long thing I guess to a car, and a chain, you know, some bricks, just toting it to the back of the house" Davis continued:

The next thing I knew he [Sims] sped from behind the house inside of another car. And that's when I, you know, started pushing Natalie [English]. I'm asking her what's going on? Did he steal a car or what's going on? Where did he get that from and stuff like that. **And then she told me, you know, Keith had murdered somebody.** But I didn't, you know—

Sims's counsel objected to this portion of Davis's testimony on the ground of hearsay. Without comment, the trial court overruled Sims's general hearsay objection.

Davis's testimony continued, stating they drove English's car to a park, where they met Sims, who had driven Anderson's car. According to Davis, as Sims opened the door to Anderson's car, "the guy, he just fell out." Although Davis contended she had been "unable to think," she admitted that she had helped Sims, English, and Ruff drag Anderson's body to the pond and throw him in.

Before leaving the park, Sims gave Davis a bag containing Anderson's cell phone, chain, and wallet. Sims then drove Anderson's car to Columbia,

while Ruff, English, and Davis drove English's car to Charleston. After arriving in Charleston, Davis disposed of the bag and Sims's bloody clothes. They promptly returned to Columbia and met Sims at a friend's apartment. Sims rejoined the group and they drove together to Newberry.

Sims told Davis to dispose of the gun, which he had wrapped in a shirt. Davis testified she and English drove to Columbia to attend church with Sims's mother. Sims and Ruff remained in Newberry. While English and Davis were driving to Columbia, Davis disposed of the gun. When they reached the church, Davis threw several items from Anderson's car into a dumpster behind the church.

Ruff testified and confirmed that he had participated with Sims, English, and Davis in hiding the body and disposing of the evidence.

The court charged the jury on murder, voluntary manslaughter, and self-defense. Sims was convicted of murder and sentenced. The court of appeals affirmed, to which we granted a writ of certiorari.

III.

Sims contends that the trial judge committed reversible error by allowing Davis to testify that English, a non-testifying third party, told her "Keith [Sims] had murdered somebody" because this evidence violated Rule 802, the rule against hearsay. The court of appeals analyzed the issue in terms of Rule 801(d)(2)(E), the coconspirator exception and found no error in the admission of the statement attributed to English.

An appellate court reviews challenges to the admission and exclusion of evidence for an abuse of discretion. *See State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."). We agree with Sims that the challenged testimony was inadmissible hearsay, but in view of the overwhelming evidence of guilt, we find the error harmless.

A.
Hearsay

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Generally, hearsay is not admissible evidence "except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE.

Because of the generic nature of Sims's hearsay objection and the trial court's one word ruling—"overruled"—we do not have the benefit of any analysis in the trial court concerning Rule 801(d)(2)(E), SCRE. The first vetting of the evidentiary challenge occurred on appeal.

B.
Coconspirator Exception to the Rule against Hearsay

A conspiracy is "a combination or agreement between two or more persons for the purpose of accomplishing a criminal or unlawful object, or achieving by criminal or unlawful means an object that is neither criminal nor unlawful. The essence of a conspiracy is the agreement." *State v. Buckmon*, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001) (internal citation omitted).

While hearsay testimony generally is not admissible, an exception is allowed when a statement is offered against a party and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Rule 801(d)(2)(E), SCRE. When a statement meets these requirements, it is considered non-hearsay.

The court of appeals concluded the challenged statement was not hearsay because it was made by one coconspirator (English) to another member of the conspiracy (Davis), and it occurred "during the course and in furtherance of the conspiracy." The court of appeals opinion concluded:

We rule the trial judge properly allowed one co-conspirator to testify to another co-conspirator's statement relating to appellant's [Sims's] own statement of guilt because the statement was calculated to induce participation in the combined and joint effort to dispose of the victim's body, the gun, and other evidence of murder. We hold the statement was **NOT** hearsay, but constituted relevant and admissible probative evidence in this murder.

Sims, 377 S.C. at 612-13, 661 S.E.2d at 130 (emphasis in original).²

The State urges us to accept the court of appeals view that Davis's statement was admissible under the coconspirator exception to the hearsay rule. We agree with the court of appeals that the evidence establishes the existence of a conspiracy and that English's purported statement to Davis was made during the course of the conspiracy.³ We part company with the court of appeals only as it relates to Rule 801(d)(2)(E)'s requirement that the statement be made "in furtherance of the conspiracy."

Concerning the "in furtherance of" prong, our law provides that "a statement by a co-conspirator must advance the conspiracy to be admissible

² The holding of the court of appeals warrants a correction and a clarification. First, the court of appeals erred in referring to English's statement to Davis as Sims's "own statement of guilt." We view this as a scrivener's error, for the coconspirator analysis in the court of appeals opinion correctly attributes the statement to English. We further clarify that Davis's status as a coconspirator was not relevant to the analysis of the admissibility of English's statement. A statement made by a coconspirator to (or overheard by) a third party who is not a member of the conspiracy may be admissible, provided the statement was made during the course and in furtherance of the conspiracy. See *State v. Anders*, 331 S.C. 474, 503 S.E.2d 443 (1998); *United States v. Shores*, 33 F.3d 438, 444 (4th Cir. 1994).

³ During oral argument, Sims's counsel acknowledged that Sims "enlisted" English, Ruff and Davis to dispose of Anderson's body and other evidence.

under Rule 801(d)(2)(E)." *State v. Gilchrist*, 342 S.C. 369, 372, 536 S.E.2d 868, 869 (2000) (internal citation omitted). "While mere conversation or narrative declarations are not admissible under this rule, statements made to induce enlistment, further participation, prompt further action, allay fears, or keep coconspirators abreast of an ongoing conspiracy's activities are admissible." *Id.* at 372, 536 S.E.2d at 869 (quoting *United States v. Arias-Villanueva*, 998 F.2d 1491, 1502 (9th Cir. 1993)).

In *State v. Anders*, a witness testified that she overheard a coconspirator of Anders say that Anders "was going to pay him big for blowing up the building." 331 S.C. 474, 476, 503 S.E.2d 443, 444 (1998). We held that "even if made **during** the conspiracy, the statement in no way **advanced** the conspiracy." *Id.* at 476-77, 503 S.E.2d at 444 (emphasis in original). In *Anders*, we noted that our jurisprudence in this area mirrored that in other jurisdictions. See *United States v. Pallais*, 921 F.2d 684, 688 (7th Cir. 1990) ("Mere chitchat, casual admissions of culpability, and other noise and static in the information stream are not admissible."); *United States v. Posner*, 764 F.2d 1535, 1538 (11th Cir. 1985) (stating a letter that "spilled the beans" regarding a tax scheme "could hardly be considered to have advanced any object of the conspiracy"). Caselaw subsequent to *Anders* remains in accord. See *United States v. Pratt*, 239 F.3d 640, 643 (4th Cir. 2001) ("Idle conversation that touches on, but does not further, the purposes of the conspiracy does not constitute a statement in furtherance of a conspiracy under Rule 801(d)(2)(E).").

While English's challenged statement was made during the conspiracy, it was not made in furtherance of the conspiracy. The statement neither advanced the conspiracy nor was intended to further induce Davis's participation in the conspiracy. English's statement that Sims had "murdered somebody" was simply part of her narrative, best described as "spilling the beans." See *Posner*, 764 F.2d at 1538. We thus conclude the statement was not admissible under Rule 801(d)(2)(E).

C.
Harmless Error

While we agree with Sims that the statement is inadmissible hearsay, we find the error harmless in view of the overwhelming evidence of guilt. "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) (citing *State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991)). "[A]n insubstantial error not affecting the result of the trial is harmless where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.'" *Id.* at 212, 631 S.E.2d at 267 (quoting *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989)).

Sims was able to fully develop a theory of self-defense by stating repeatedly: "I thought he was reaching for his gun to shoot and kill me. So out of fear I pulled my gun out and shot"; "I didn't mean to kill him. . . . I guess just out of – out of fear I shot"; and "I had shot Brian and then I had seen he didn't have no gun."

Moreover, English's statement that Sims "had murdered somebody" is properly viewed as a colloquial expression that Sims had killed Anderson, without regard to the legal niceties distinguishing murder from other forms of homicide.

The trial court charged the jury on the law of murder, voluntary manslaughter, and self-defense. During deliberations, the jury asked the court to provide a "concise definition" of only murder and manslaughter. Without objection, the court provided the jury with the written instructions, after which the jury returned a guilty verdict for murder. A careful review of the record convinces us that the murder conviction was the product of overwhelming evidence of guilt and the jury's thoughtful consideration of the law. We reject any suggestion that the jury, during the course of this four-day trial, merely assented to the "murder" reference in Davis's lengthy testimony.

IV.

In sum, because the challenged testimony was not "in furtherance of" the conspiracy, we hold the testimony was not admissible under the coconspirator exception of Rule 801(d)(2)(E). We hold, however, that the error was harmless. We affirm the court of appeals in result.

AFFIRMED IN RESULT.

PLEICONES and BEATTY, JJ., concur. TOAL, C.J., concurring in a separate opinion in which HEARN, J., concurs.

CHIEF JUSTICE TOAL: I concur in the majority's result, but respectfully disagree with its reasoning. I would hold that the trial judge did not err in allowing Davis to testify that English told her "Keith [Sims] had murdered somebody." In my view, the court of appeals correctly analyzed this issue, finding that English's statement was admissible under SCRE 801(d)(2)(e), the co-conspirator exception to the rule against hearsay. Therefore, I would affirm the court of appeals in every respect and not reach a harmless error analysis.

HEARN, J., concurs.

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

THE STATE,

v.

KEITH ANTHONY SIMS;

RESPONDENT,

COPY

RECEIVED

JUN 01 2010

SC Court of Appeals

APPELLANT

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 26820

PETITION FOR REHEARING

Pursuant to Rule 221(a), counsel for Keith Anthony Sims petitions the Court for rehearing of its finding of harmless error. In Footnote 2, the Court writes, "[T]he Court of Appeals erred in referring to English's statement to Davis as Sims' 'own statement of guilt.' We view this as a scrivener's error, for the co-conspirator analysis in the Court of Appeals' opinion correctly attributes the statement to English."

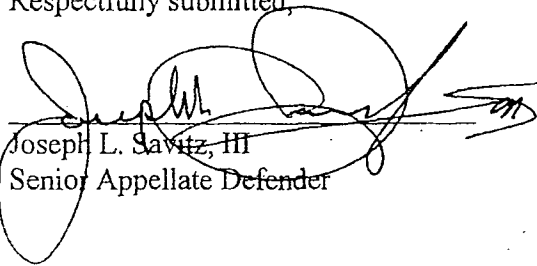
That this was not a mere scrivener's error, but reflected the Court of Appeals' understanding that Sims had admitted murdering the victim is shown by the fact the Court refers to it as Sims'

“own statement of guilt” not once but twice: First, in the body of the opinion and second, in the stated ruling of the Court found in the conclusion to the opinion. *State v. Sims*, 377 S.C. 598, 661 S.E.2d 122, 125 and 130 (Ct. App. 2008).

In finding harmless error, the Supreme Court writes, “English’s statement that Sims ‘had murdered somebody’ is properly viewed as a colloquial expression that Sims had killed Anderson, without regard to the legal niceties distinguishing murder from other forms of homicide.” If the Court of Appeals thought Sims had confessed to murdering the victim, it is doubtful Sims’ jury drew any finer distinction. Moreover, since when is “murder” a colloquial expression for “other forms of homicide” and “malice” would seem to be more than a “legal nicety.” The Court also alludes to “overwhelming evidence of guilt” of murder, but the State’s case for murder was anything but overwhelming, as the jury’s request to be reinstructed on murder and manslaughter indicates.

Inasmuch as the trial judge’s error could not have been harmless, the Court should grant rehearing, and reverse Sims’ conviction for murder.

Respectfully submitted,



Joseph L. Savitz, III
Senior Appellate Defender

June 1, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

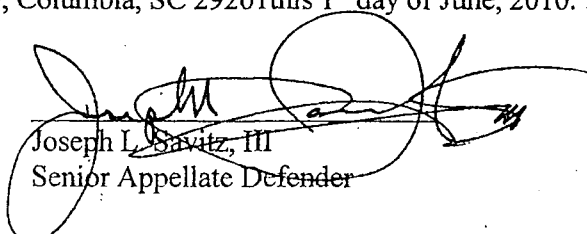
V.

KEITH ANTHONY SIMS,

APPELLANT

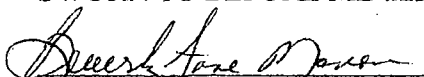
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 1st day of June, 2010.



Joseph L. Savitz, III
Senior Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 1st day of June, 2010

(L.S.)
Notary Public for South Carolina

My Commission Expires: November 9, 2019



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1060

FAX (803) 734-1488

June 24, 2010

Senior Appellate Defender Joseph L. Savitz, III
Appellate Defender LaNelle C. DuRant
South Carolina Commission
on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Sims, Keith Anthony
Case No. 2004-GS-40-01037

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

The State v. Sims, Keith Anthony
Page 2
June 24, 2010

June 24, 2010."

The remittitur is today being forwarded to the lower court.

Very truly yours,

Daniel L. Shearson
CLERK

DES/lda

Enclosure

cc: Atty General Henry Dargan McMaster
Chief Deputy Atty General John W. McIntosh
Assist Deputy Atty General Donald J. Zelenka
Assist Atty General Melody J. Brown
Assist Atty General Alphonso Simon, Jr.
Solicitor Warren B. Giese

STATE OF SOUTH CAROLINA

County of Richland

In the Court of Common Pleas

Keith A. Sims, # 314569

Full name and prison number (if any) of Applicant.

vs.

The State of South Carolina

Name of Respondent.

APPLICATION FOR
POST-CONVICTION RELIEFJENNIFER W. MCBRIDE
CLERK & G.S.

2011 MAR 24 PM 2:52

RICHLAND COUNTY
FILED**INSTRUCTIONS — READ CAREFULLY**

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

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. 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 applicant was convicted.

- Place of detention South Carolina Department of Corrections at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, S.C. 29669
- Name and location of Court which imposed sentence General Sessions Court for Richland County
- The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - 2004-GS-40-1037 (Murder)
 -
 -
- The date upon which sentence was imposed and the terms of the sentence:
 - March 24, 2006 - 40 years
 -
 -

5. 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 _____

6. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

- i. South Carolina Court of Appeals
 ii. South Carolina Supreme Court Writ of Certiorari
 iii. _____

(b) the result in each such Court to which you appealed:

- i. Denied appeal after oral argument
 ii. South Carolina Supreme Court denied writ after oral argument
 iii. _____

(c) the date of each such result:

- i. April 17, 2008
 ii. May 17, 2010
 iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

- i. Opinion No. 4371 (Hear April 8, 2008 - Filed April 17, 2008)
 ii. Opinion No. 26826 (Filed May 17, 2010)
 iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

- (a) N/A
 (b) N/A
 (c) N/A

9. 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 Appellate Counsel
 (c) Ineffective Assistance of Trial Counsel / Prosecutorial Misconduct

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

- (a) See Attached Memorandum
 (b) 11
 (c) 11

11. 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 petitions in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? NO
- (d) any other petitions, motions or applications in this or any other Court?
NO

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

(a) the specific nature thereof:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

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

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(c) the disposition thereof:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(d) the date of each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

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

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

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

(a) which grounds have been presented:

- i. N/A
- ii. N/A
- iii. N/A

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. N/A
- iii. N/A

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

- (a) Exclusive PCR ground
- (b) Exclusive PCR ground
- (c) Exclusive PCR ground

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

- (a) your arraignment and plea? Yes
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

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

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

- i. Lanelle Durant and Stacy Owings
- ii. Joseph Savitz, S.C. Appellate Defense, 1205 Pendleton Street, Columbia, S.C. 29201
- iii. Joseph Savitz (same as above)

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

- i. Trial
- ii. Direct Appeal
- iii. Petition for Writ of Certiorari

18. State clearly the relief you seek in filing this application.

That my conviction be reversed for a new trial or vacated.

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

No

STATE OF SOUTH CAROLINA

VERIFICATION

County of Richland

I, Keith Anthony Sims #314569, 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.

Keith Sims

SWORN to and subscribed before me this 18thday of January, 2011

[Signature] (L.S.)
Notary Public

My Commission Expires: May 17th, 2014

RICHLAND COUNTY
FILED
2011 MAR 21 PM 2:52
JANETTE W. MOBRIDE
C.C.P. & C.S.

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

I, Keith Anthony Sims #314569, 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 therefor.

Keith Sims

Applicant

SWORN or affirmed to and subscribed before me this

18thday of January, 2011

[Signature]
Notary Public

My Commission Expires: May 17th, 2014

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

SIMS Keith A -
00314569,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2011CP4001881

RETURN

JEANETTE W. MCBRIDE
C.C.P. & G.S.

2011 SEP 21 AM 10:10

FILED

The Respondent, making its Return to the application for post conviction relief (PCR) filed March 21, 2011, would respectfully show this Court:¹

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. The Applicant was represented by Stacy Rowell, Esquire. On March 24, 2006, following a trial, the Applicant was sentenced by The Honorable G. Thomas Cooper, Jr..

¹

<http://www4.rcgov.us/publicindex/PCCaseDetails.aspx?County=40+&Casenum=2011CP4001881&CourtType=G&CaseType=Civil&CourtAgency=40002>

State's Return - (2011CP4001881) - Applicant: SIMS Keith A

Page 1 of 5

The Applicant had been indicted and/or convicted of the following: Murder - (2004-GS-40-1037). Sentence Start Date 02/13/2004 Sentence Length 40 YRS, 0 MOS, 0 DYS ²

II.

Attached herewith and incorporated herein are the records of the Richland County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the trial transcript, and the Applicant's applicable direct appeal files. The Respondent reserves the right to amend this Return upon receipt of any relevant materials or submit an amended Return to reflect any amended allegations and/or to provide a more detailed procedural history.

Direct Appeal

The Applicant did not appeal his conviction and/or sentence.

The application for post conviction relief (PCR) was filed March 21, 2011.

III.

For the purposes of this Return, the Respondent interprets each of the Applicant's allegations to be claims that he received ineffective assistance of counsel. The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence

² <https://sword.doc.state.sc.us/scdc-public/inmateDetails.do?id=+00314569>

required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

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

IV.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied. The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held. The Respondent will coordinate with the Applicant's attorney who is, according to the Respondent's file, Charles O. Williams, III, Esquire regarding when the hearing should be set.³

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737
bpetrano@scag.gov

September 15, 2011

³ The current PCR Roster for the 5th Circuit is available at <http://www.scag.gov/criminal-litigation/postconvictionrelief>
State's Return - (2011CP4001881) – Applicant: SIMS Keith A

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

SIMS Keith A -
00314569,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2011CP4001881

CERTIFICATE OF SERVICE

JEAN R. INDRIAGO
C.P. & G.S.

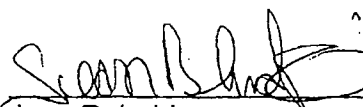
2011 SEP 21 AM 10:10

FILED

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

Charles O. Williams, III
Post Office Box 12519
Columbia, SC 29211

19
DATED September 19, 2011.


Jean R. Indriago
Legal Assistant

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2011-CP-40-1881

KEITH A. SIMS,

Plaintiff,

-vs-

TRANSCRIPT OF RECORD

STATE OF SOUTH CAROLINA,

Defendant.

August 14, 2012
Columbia, South Carolina

B E F O R E:

THE HONORABLE R. KNOX MCMAHON, Judge

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

TYNIKA CLAXTON, Esquire
CHARLIE JOHNSON, Esquire
Attorneys for the Plaintiff

ROB CORNEY, Esquire
Office of the Attorney General
Attorney for the Defendant

KRYSTAL J. SMITH
Court Reporter

I N D E X

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
1	Letter from Court Administration		17
2	Plaintiff's Brief		30

1 AUGUST 14, 2012

2 (WHEREAS this matter was scheduled for a PCR hearing, the
3 applicant appeared along with his counsel of record. The
4 hearing began at 11:18 a.m.)

5 MR. CORNEY: Mr. Keith Sims will be the next one. May I
6 approach with the packet, Your Honor?

7 THE COURT: Yes, sir.

8 MR. CORNEY: May it please the Court, Your Honor.

9 THE COURT: Yes, sir.

10 MR. CORNEY: Your Honor, this is the PCR of Keith Sims.
11 It's Docket Number 2011-CP-40-1881. Mr. Sims was true bill
12 indicted at the February 2004 term of the Richland County
13 Grand Jury for murder. He was represented by Fifth Circuit
14 public defenders Lanelle DuRant and Stacy Rowell, now -- or
15 Stacy Owings at the time, Stacy Rowell now. I believe that's
16 her married name.

17 He appeared for jury trial on March 20th, 2006, before
18 Judge Johnson I believe. That's what it says on the
19 transcript. I've been informed it may be improper -- it may
20 be an error on the front of the transcript. It does says
21 Judge Johnson on the front of the transcript. It was a five
22 day trial, after which Mr. Sims was convicted of murder as
23 indicted and sentenced to 40 years imprisonment on that
24 charge.

25 A notice of appeal was filed and an appeal was perfected

1 by order April 17th, 2008. The South Carolina Court of Appeals
2 confirmed the conviction and sentence. The petition for
3 rehearing was denied May 22nd, 2008, and the subsequent
4 petition for a writ of certiorari to the South Carolina
5 Supreme Court was -- the petition was granted, but after
6 briefing -- briefing and oral argument the conviction and
7 sentence were affirmed as well and the remittitur was issued
8 June 24th, 2010.

9 Mr. Sims filed a timely PCR application March 21st, 2011.
10 He is represented here today by Tynika Claxton and Mr. Charlie
11 J. Johnson and we have Ms. DuRant here and we're ready to go
12 forward, Your Honor.

13 THE COURT: All right. Mr. Johnson?

14 MR. JOHNSON: Thank you, Your Honor. Your Honor, at this
15 time I'd like to call Mr. Keith Sims to the stand.

16 THE COURT: All right. If you would, come around and be
17 sworn, please.

18 THE BAILIFF: Watch your step for me. Place your left
19 hand on the Bible and raise your right hand as best you can
20 for me.

21 THE COURT: Do you solemnly swear the testimony you give
22 before the Court today will be the truth, the whole truth, and
23 nothing but the truth, so help you God?

24 THE APPLICANT: Yes, sir.

25 THE COURT: All right. Thank you. Please be seated.

DIRECT EXAMINATION OF THE APPLICANT BY MR. JOHNSON

1 Once you're comfortably seated, state your full name, spelling
2 your last.

3 THE BAILIFF: Watch your step for me, please, and speak
4 into the microphone.

5 THE APPLICANT: Keith Sims, 314569, last name spelled S-
6 I-M-S.

7 MR. JOHNSON: Your Honor, may it please the Court.

8 THE COURT: Yes, sir.

9 KEITH SIMS, being first duly sworn,
10 testifies as follows:

11 DIRECT EXAMINATION

12 BY MR. JOHNSON:

13 Q: Keith, where are you presently housed?

14 A: Broad River Correction.

15 Q: And you're presently doing a 40 year term?

16 A: Yes, sir.

17 Q: On March the 20th, 2006, you went to trial; is that
18 correct?

19 A: Yes, sir.

20 Q: And what was you charged with?

21 A: Murder.

22 Q: And who was you charged with murdering? Who was the
23 victim?

24 A: Brian Anderson.

25 Q: Okay. Please tell the Court some of the circumstances

DIRECT EXAMINATION OF THE APPLICANT BY MR. JOHNSON

1 that led up to you being charged with -- well, what was the
2 circumstances that led up to you being charged with murder?
3 Just a brief synopsis; you don't have to go into a whole lot
4 of detail, but just give us a brief synopsis.

5 A: We had -- it was a five day -- it was a five day trial.
6 The jury came out twice asking ---

7 Q: Well, not -- not about that. Back on -- when -- when --
8 the murder occurred on what date? Was it ---

9 A: December ---

10 Q: New Year's Eve?

11 A: December the 30th.

12 Q: Of 2003?

13 A: Yes, sir.

14 Q: Okay. Now, you was located with the victim in a car; is
15 that correct?

16 A: No.

17 Q: Okay. Please tell us that part. What happened? Or what
18 do they allege happened?

19 A: The incident took place in my yard in Richland County.

20 Q: Okay. What happened?

21 A: He threatened me. He reached and I acted on his
22 appearance. I shot in a panic.

23 Q: And you disposed of the body later on; is that correct?

24 A: In the aftermath.

25 Q: Okay. Now, your defense was that you felt threatened; is

DIRECT EXAMINATION OF THE APPLICANT BY MR. JOHNSON

1 that correct?

2 A: Yes, sir.

3 Q: And you testified to that during the trial?

4 A: Yes, sir.

5 Q: And the State was alleging that you was not threatened?

6 A: Yes, sir.

7 Q: And that was really the only issue; correct?

8 A: Mm-hmm.

9 Q: Whether you felt threatened or whether you -- you did it
10 on your own without being threatened?

11 A: Mm-hmm.

12 Q: And was there any other witnesses for -- for -- for your
13 defense other than yourself?

14 A: No, sir.

15 Q: Did anybody testify on your behalf other than you?

16 A: No, sir.

17 Q: Okay. Now, you allege that the victim had a gun; is that
18 correct?

19 A: Yes. At the time, that's what I thought.

20 Q: Okay, but there was never a gun found or any of those
21 issues?

22 A: No. They say whenever they got the car that a gun wasn't
23 there. A gun wasn't found, but they said it looked like there
24 was a sign like somebody had been through the car.

25 Q: Okay. Now, you have met with -- with -- with both myself

DIRECT EXAMINATION OF THE APPLICANT BY MR. JOHNSON

- 1 and Ms. Claxton; is that correct?
- 2 A: Yes, sir.
- 3 Q: On numerous occasions, we went over this case with you;
- 4 correct?
- 5 A: Mm-hmm.
- 6 Q: Now, we came down to a number of issues that you want to
- 7 bring forth today; is that correct?
- 8 A: Yes, sir.
- 9 Q: It came down to, what, about six issues?
- 10 A: Six issues.
- 11 Q: Okay and we went over the issues with you prior to today;
- 12 is that correct?
- 13 A: Yes, sir.
- 14 Q: Well, let's talk about the first -- we also explained to
- 15 you what you have to prove here today; is that correct?
- 16 A: Yes, sir.
- 17 Q: Now, we -- Briefly tell what ineffective -- it's
- 18 ineffective assistance of counsel; correct?
- 19 A: Mm-hmm.
- 20 Q: And then you also have to prove that there's a reasonable
- 21 possibility that if not for the ineffective assistance of
- 22 counsel that the outcome of your trial would have been
- 23 different; is that correct?
- 24 A: Yes, sir.
- 25 Q: Okay. We also explained to you that you received 40

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1 years, but for a murder sentence you could also receive a life
2 sentence; is that correct?

3 A: Yes, sir.

4 Q: And then you are also aware that if you got a new trial
5 and you were found guilty again, a judge could actually give
6 you a life sentence; is that correct?

7 A: Yes, sir.

8 Q: And you're aware of all those things?

9 A: Yes, sir.

10 Q: And you still want to go forward?

11 A: Yes, sir.

12 Q: So let's talk about the first issue. Will you please
13 tell the Court what is your first issue as it relate to --
14 well, let me ask you this. Who was your attorney that -- that
15 -- who was the attorney that you had at trial?

16 A: Ms. LaNelle DuRant and Stacy Owings.

17 Q: Is -- is -- who is here today? Do you see one of the
18 attorneys here today?

19 A: Ms. LaNelle DuRant.

20 Q: Okay. She was the lead attorney in your case?

21 A: Yes, sir.

22 Q: Okay. Let's talk about the first issue that you have
23 asserted at trial.

24 A: My first ---

25 Q: What is that?

DIRECT EXAMINATION OF THE APPLICANT BY MR. JOHNSON

- 1 A: My first ---
- 2 Q: What is that issue?
- 3 A: My first issue is my due process rights were violated
- 4 when I was constitutionally deprived of the ability to put
- 5 forth a complete defense and the right to a fair trial.
- 6 Q: All right. Now, what -- that's all legalese. Basically,
- 7 what are you alleging did she didn't do that she should have
- 8 done?
- 9 A: I'm -- it's not against the trial attorney.
- 10 Q: Okay.
- 11 A: It was I want to show the Court that they excluded my
- 12 state of mind evidence so that prevented me from presenting a
- 13 complete defense. So that -- that violated my due process
- 14 rights.
- 15 Q: Okay. Who excluded your state of mind evidence?
- 16 A: The judge.
- 17 Q: So there was a motion or something made ---
- 18 A: No.
- 19 Q: --- as to what your state of mind was at the time that
- 20 you committed the crime?
- 21 A: Yes. At -- at trial, the strategy -- the strategy and,
- 22 what she wanted the jury to realize was what was -- what was
- 23 going on at the time that the incident happened to prove my
- 24 state of mind to the jury.
- 25 Q: And the judge did not allow that; is that correct?

DIRECT EXAMINATION OF THE APPLICANT BY MR. JOHNSON

1 A: The judge -- the judge denied it.

2 Q: And was that brought up on appeal?

3 A: No.

4 Q: So you're alleging that that should have been brought up
5 on appeal?

6 A: No, because that -- that would make it a trial -- a trial
7 court error. I -- I'm saying that it's a due process issue.

8 Q: Okay and -- and that's -- that's your first issue; is
9 that correct?

10 A: Yes, sir.

11 Q: Okay. What is your second issue?

12 A: My second issue was my lawyer was ineffective for -- for
13 not vouching to the -- the vouching by the credibility of --
14 of the witness by the solicitor.

15 Q: Okay. Please explain that a little more specifically so
16 we can understand what you mean. What specifically happened?

17 A: In that the solicitor vouched for -- for his credibility.
18 Quoting from the transcript: you -- you heard Natalie through
19 Nicky which is ---

20 Q: Now ---

21 THE COURT: What page -- what page are you on?

22 Q: What page are you talking about?

23 A: Transcript page 707.

24 THE COURT: All right.

25 A: Line 5 -- line 5 through 9.

DIRECT EXAMINATION OF THE APPLICANT BY MR. JOHNSON

- 1 Q: Okay. Hold one second. Page 707?
- 2 A: Mm-hmm.
- 3 Q: Page 5 through 9?
- 4 A: Line 5 through 9.
- 5 Q: Five through 9, all right.
- 6 A: It say: you -- you heard Natalie through Nicky, which is
- 7 a co-conspirator testimony which is allowed to come out under
- 8 the rules, to say he murdered somebody. The solicitor,
- 9 emphasis added, said: no truer words were spoken in this case.
- 10 He vouched for the -- he's vouching for the credibility of his
- 11 witnesses.
- 12 Q: And your attorney didn't object to that?
- 13 A: No, sir.
- 14 Q: And you feel that that affected -- gave credence to the
- 15 -- the witness against you. So -- so basically, you're saying
- 16 that the State vouched for the witness ---
- 17 A: Yes.
- 18 Q: --- without objection; is that correct?
- 19 A: Yes, sir.
- 20 Q: And that -- and you feel that that would have an effect
- 21 on the jury and the outcome of your trial; is that correct?
- 22 A: Yes, sir. I feel like I would have had a better outcome
- 23 in my trial if she would have objected.
- 24 Q: Okay. What's the next issue?
- 25 A: My next issue is my trial lawyer was ineffective for not

DIRECT EXAMINATION OF THE APPLICANT BY MR. JOHNSON

1 objecting to the solicitor's closing arguments that improperly
2 pitted me against the State witnesses.

3 Q: Okay. Now, what page of the transcript are we referring
4 to in that?

5 A: Transcript page 711, line 3 through 7.

6 Q: Okay.

7 A: And also transcript page 721, line 23 through 25.

8 Q: Now, what is -- what are you alleging was said that --
9 that -- that your attorney did not object to?

10 A: The Court -- the solicitor words: his demeanor, his
11 emotion, what happened, you all heard it through several
12 witnesses, but you heard -- you first heard it through Nicky
13 and all must -- credibility, believability. You can look to
14 Nicky and you can look at the defendant. You can also look to
15 Nicky and Bernard for credibility versus the defendant.

16 Q: And you felt that your attorney was ineffective for not
17 objecting to those statements; is that correct?

18 A: Yes, sir, especially when credibility was -- was crucial
19 for my case.

20 Q: And credibility was crucial because basically the only
21 evidence was your testimony because you wasn't arguing that
22 you -- that you didn't kill him; did you? Your argument was
23 the reason?

24 A: Yes.

25 Q: Is that correct?

DIRECT EXAMINATION OF THE APPLICANT BY MR. JOHNSON

- 1 A: Yes, sir.
- 2 Q: So the credibility issue was the most important issue in
3 this case, whether you were telling the truth about the reason
4 you did it; is that correct?
- 5 A: Yes, sir.
- 6 Q: Now, you felt that your attorney should have objected --
7 should have objected to that statement?
- 8 A: Yes, sir.
- 9 Q: And she did not; correct?
- 10 A: Yes, sir.
- 11 Q: And you felt that if she had objected to it that there
12 was a reasonable possibility that the outcome would have been
13 different; is that correct?
- 14 A: Yes, sir.
- 15 Q: Okay. What's the next issue?
- 16 A: My next issue is ineffective assistance of counsel slash
17 prosecutorial misconduct.
- 18 Q: Now, what is that specifically about?
- 19 A: How my lawyer was ineffective for not establishing a
20 defective indictment and I'll elaborate on how the
21 prosecutorial misconduct took place.
- 22 Q: All right. What do you feel was improper about the
23 indictment?
- 24 A: I have exhibits here that were sent to me from the Court
25 of Administration and she -- she alleged that according to the

DIRECT EXAMINATION OF THE APPLICANT BY MR. JOHNSON

1 schedule that was sent to you, the Grand Jury met on March the
2 29th, 2004, and not in February and she sent me a certified
3 court term calendar showing me on the date February the 12th,
4 2004, that no General Sessions were held in Richland County.
5 It was in Kershaw so there was no court for them to take
6 actions to true bill my indictment.

7 Q: Okay.

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

9 THE COURT: Yes, sir.

10 Q: That's what you received?

11 A: Mm-hmm.

12 Q: And this is a copy of the -- of the -- of -- of what you
13 received?

14 A: Yes, sir.

15 MR. JOHNSON: Your Honor, we have given the State a copy
16 of this exhibit that he has. We would like to make this -- I
17 guess this would be the petitioner -- petitioner's exhibit.

18 MR. CORNEY: Your Honor, I -- I understand I'll have the
19 opportunity to cross examine him on it. I guess my -- my
20 objection is on the relevance. The Grand Jury doesn't meet
21 according to General Sessions calendar. They meet when the
22 judge tells them to meet so I don't see the relevance of that.
23 I don't think that proves when the Grand Jury met or didn't
24 meet. I think it's completely irrelevant. That -- the
25 General Sessions calendar from Court Administration doesn't

DIRECT EXAMINATION OF THE APPLICANT BY MR. JOHNSON

1 set forth when the Grand Jury meets in Richland County.

2 That's -- I don't -- that's a cross examination issue and

3 that's something I'll take care of on cross examination.

4 THE COURT: You -- you may be absolutely correct in that
5 regard, Mr. Attorney General. The problem is is your
6 statement is not evidence.

7 MR. CORNEY: Absolutely, okay and that -- that's fine,
8 Your Honor.

9 THE COURT: We'll mark it.

10 MR. CORNEY: I don't mean to make expedient objections.

11 THE COURT: I don't -- I don't disagree with you
12 necessarily.

13 MR. CORNEY: Absolutely. I don't mean to make expedient
14 objections.

15 THE COURT: I think you have to put something in the
16 record.

17 MR. CORNEY: Okay. I'm sorry. I was just trying to make
18 my relevance ---

19 THE COURT: All right.

20 MR. CORNEY: --- argument.

21 MR. JOHNSON: That would be I guess Plaintiff's Exhibit
22 Number 1.

23 (Whereupon, the letter from Court Administration is
24 marked and entered as Plaintiff's Exhibit Number 1.)

25 Q: Okay, Keith, what's the next issue?

DIRECT EXAMINATION OF THE APPLICANT BY MR. JOHNSON

1 A: My next issue is violation of my due process rights by
2 unconstitutionally shifting of the burden to proof and my
3 right to a fair trial.

4 Q: All right. Let's talk about that. What specific --
5 specifically are you referring to?

6 A: I'm referring to in the charging of -- in the charging of
7 -- of my jury, the judge charged that malice may be inferred
8 from use of a deadly weapon and the Supreme Court said that
9 this is confusing and prejudicial, that the jury charge has no
10 -- a jury charge is no place for proposed ambiguity. Quoting
11 *State v. Leeville*, it say it holds that the jury should not be
12 charged that matters may be inferred from the use of a deadly
13 weapon.

14 Q: All right. Now, you know that that decision came after
15 your trial?

16 A: Mm-hmm.

17 Q: How do you -- how are you arguing to the Court now that a
18 decision that happened after your trial is related to your
19 trial?

20 A: No. This -- these -- these are old court laws. They was
21 -- they was talking about -- they said back then you can't
22 change that, but it was up on the permissible inference
23 charging concerning the use of a deadly weapon. They states
24 that that's still correct as law if the only issue presented
25 to the jury is whether the defendant has committed murder, but

DIRECT EXAMINATION OF THE APPLICANT BY MR. JOHNSON

1 not when self-defense has been charged. Then you can't take
2 the language that may appear to incorporate a qualification in
3 disjunctive term that maintains the use of a deadly weapon
4 infers as a stand-alone ---

5 Q: Okay.

6 A: --- independent statement of law.

7 Q: So your argument is that the malice that was inferred by
8 your use of a deadly weapon or a statement made was an
9 improper instruction and should have been objected to; is that
10 correct?

11 A: Yes and I -- I would ask the judge -- I would like a
12 split ruling on that ineffective assistance of counsel on my
13 -- on my counsel for not objecting to the unconstitutional
14 shifting of the burden.

15 Q: Okay. Is there any other thing related to that specific
16 issue that you want to make the Court aware of on that
17 specific issue?

18 A: No, sir.

19 Q: All right. What is the next issue?

20 A: I wanted to go -- that's one, two -- I wanted to -- I
21 wanted to go back and reiterate on the ineffective assistance
22 of counsel slash prosecutorial misconduct. It say 14-19-170
23 states that the Grand Jury must meet with General Sessions at
24 a term of court to return an indictment for a trial or case.

25 Q: So you -- so you're talking about your -- your issue

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1 concerning the indictment; is that correct?

2 A: Yes, sir, and also 14-9-210 states the solicitor must
3 submit bills of indictment to the Grand Jury while it is in
4 attendance upon the General Sessions court.

5 Q: So your issue is that the Grand Jury -- your indictment
6 was not submitted during a -- during the term -- during a
7 specific term of court or what specifically is your issue
8 about that?

9 A: That the court officer -- I was corresponding with her
10 through the mail and I was having her to look about seeing was
11 I being indicted. She said that I wasn't indicted. She sent
12 me the ---

13 Q: Well, now, nobody is objecting to it, but you really
14 can't say what someone else told you. I mean I know we're in
15 a loose hearing here, but -- but based on evidence you
16 received from the ---

17 A: Court ---

18 Q: --- from the administrator ---

19 A: Yeah. That -- that's the exhibit. She was saying that
20 no Grand Jury met and she -- and she pointed out ---

21 MR. CORNEY: Judge, Mr. Johnson is trying to make him
22 stop saying it and I was going to let him go for a minute and
23 just see where he's going with it, but it is all hearsay. I
24 mean what she said ---

25 Q: You can't -- you can't say what somebody else told you.

DIRECT EXAMINATION OF THE APPLICANT BY MR. JOHNSON

1 You received evidence that the court did not meet; is that
2 correct?

3 A: Mm-hmm.

4 Q: And as a result of that, you feel that your indictment
5 was not properly -- that you was not properly indicted; is
6 that correct?

7 A: I wasn't true billed.

8 Q: That it was not true billed?

9 A: Yes, sir.

10 Q: Okay. Is there anything else that I have not asked you
11 that you would like to make the Court aware of? Because
12 remember, this is your one chance at making sure you get
13 everything out that you're concerned about.

14 A: Mm-hmm. I wanted to go back and -- and reiterate on the
15 issue concerning my -- my state of mind issue ---

16 Q: Yes.

17 A: --- about my due process rights were violated because I
18 wasn't -- I was deprived of the ability to put forth a
19 complete defense. I wanted to go reiterate on that. It
20 states that you can't exclude a person's state of mind
21 evidence that create a tipping point of conviction. It
22 violates my due process rights to present a complete defense
23 in violating my rights to a fair trial. Self-defense is a
24 complete defense and the jury was charged that such so I am
25 entitled to present all admissible evidence to advance my

DIRECT EXAMINATION OF THE APPLICANT BY MR. JOHNSON

1 complete defense.

2 Q: You feel that you were -- that your attorney did not
3 present that evidence?

4 A: No. She -- she did.

5 Q: Okay.

6 A: But I'm saying it violated my due process rights because
7 the judge he denied it up under the wrong analysis. He denied
8 it up under prior difficulties and prior incidents of
9 violence.

10 Q: Okay.

11 A: Instead of up under the state of mind.

12 Q: All right. Now, there is one other issue that we
13 discussed that you didn't bring up and that was the issue
14 about you invoking your right to silence.

15 A: Mm-hmm.

16 Q: Do you remember that issue?

17 A: Yeah.

18 Q: How about make the Court aware of that issue. What is
19 that issue about?

20 A: My -- my trial -- my trial lawyer did not object when
21 they -- they was asking me about why didn't -- why did I want
22 to remain silent.

23 Q: Okay and that -- do you remember the page that was on?
24 That was page 422, line 4. Is that correct?

25 A: Line 4.

DIRECT EXAMINATION OF THE APPLICANT BY MR. JOHNSON

1 Q: But that was a statement made by the officer ---

2 A: Mm-hmm.

3 Q: --- and -- and not the solicitor; is that correct? Page
4 422, line 4.

5 A: Yes.

6 Q: That was a statement made by which officer? Do you see
7 that?

8 A: C. Eldon McCraw, Jr.

9 Q: Right, but he made a statement that you invoked your
10 right to remain silent?

11 A: Mm-hmm.

12 Q: And you felt that -- that the jury should have been --
13 shouldn't -- shouldn't have heard that; is that correct?

14 A: Yes, sir.

15 Q: And your attorney did not object to it; is that correct?

16 A: No, sir.

17 THE COURT: Where is that? On line 4, page 422? It
18 reads to me Sims stated that he might need an attorney.

19 MR. JOHNSON: That's correct, Your Honor. He's -- my
20 client is stating that at that point when he said he needed an
21 attorney, he was invoking his right to remain silent and that
22 the -- it's his contention that that was something that should
23 not have been said to the jury.

24 THE COURT: All right.

25 Q: Now, Keith, is there anything else?

DIRECT EXAMINATION OF THE APPLICANT BY MR. JOHNSON

1 A: Oh. I just wanted to put on the record about the
2 depriving me of presenting a complete defense, that this issue
3 was about the trial court's action impact on my constitutional
4 rights to present a complete defense.

5 Q: We ---

6 THE COURT: That's the same thing that you said before
7 ---

8 Q: That's the same thing you already said before.

9 THE COURT: --- on number one and number seven.

10 MR. JOHNSON: Right.

11 Q: It's the same thing you already said ---

12 A: Yes, sir.

13 Q: --- before. Is there anything else that you haven't said
14 before?

15 A: No, I don't think.

16 Q: Okay.

17 A: No, sir, that's it.

18 MR. JOHNSON: Your Honor, we've got -- we've got nothing
19 else for this witness.

20 THE COURT: Thank you. Mr. Attorney General?

21 MR. CORNEY: Yes, sir, Your Honor.

22 CROSS EXAMINATION

23 BY MR. CORNEY:

24 Q: Mr. Sims, you spoke with the police a couple of -- a
25 number of different times during the course of the

CROSS EXAMINATION OF THE APPLICANT BY MR. CORNEY

1 investigation into this killing; didn't you?

2 A: Yes, sir.

3 Q: Maybe about four different times is what the record will
4 reflect; does that sound about right to you?

5 A: I'm not sure.

6 Q: You have January 1st, 2004, which is the day after this --
7 the day after the shooting happened; January 2nd, 2004; January
8 7th, 2004; and January 22nd, 2004; correct?

9 A: Okay.

10 Q: And the January 2nd, the second time that you met with the
11 investigators, that was the time that Investigator McCraw that
12 he testified to on page -- I think it was 420. He said that
13 -- that's right, 420 and 421. I believe that was when Mr.
14 McCraw was testifying about the -- the -- the January 2nd
15 investigation; is that correct?

16 A: Mm-hmm.

17 Q: And I could point you to the page number where he talks
18 about that actual day that he met with you and that's on 418 I
19 believe where the actual testimony -- where his statement
20 starts where he -- down on line 12, Investigator McCraw says
21 that was on January 2nd, 2004, that he sat and talked to you;
22 correct?

23 A: Okay.

24 Q: Okay. So two more times after this -- after this
25 statement was given where you said you wanted your attorney,

CROSS EXAMINATION OF THE APPLICANT BY MR. CORNEY

1 you talked to the police two more times, January 7th and
2 January 22nd also; correct?

3 A: You said January the 20?

4 Q: I'm saying Investigator McCraw, Eldon McCraw, testified
5 as to your statement on January 2nd, 2004?

6 A: Mm-hmm.

7 Q: And that's where you said you wanted an attorney is on
8 January 2nd, 2004; correct?

9 A: Okay.

10 Q: Okay and then you met with the investigators two more
11 times and gave them -- and talked to them about this -- this
12 case on January 7th and January 22nd, 2004, as well; right?

13 A: Okay.

14 Q: Okay and those were both without ---

15 THE COURT: Wait a minute. The answer is not okay. The
16 answer is either yes or no. All okay is, is he's just having
17 a dialog with himself and somebody else and just saying a word
18 every now and then.

19 THE APPLICANT: Okay.

20 A: Yes.

21 THE COURT: Thank you.

22 Q: And if you need me to clarify the questions at all if you
23 don't understand what I'm saying or I'm talking too fast, just
24 let me know and I'll be happy to do that.

25 A: Okay.

CROSS EXAMINATION OF THE APPLICANT BY MR. CORNEY

1 Q: And -- and when you met with them on January 7th, 2004,
2 you again didn't give a written statement. You just denied
3 that you were involved in this shooting; correct? Is that
4 your recollection?

5 A: It's -- it's not my recollection.

6 Q: Okay. Well, I don't want you to testify to anything that
7 you don't specifically recall or outside of your knowledge.
8 So if that's something you don't recall, but eventually you
9 did give a statement to police and told them what had
10 happened, you had -- you had shot Brian Anderson; correct?

11 A: Yes, sir.

12 Q: Okay and that was -- that was later on and if the record
13 reflects on January 2nd -- 22nd, 2004, the last of your
14 meetings with the investigators is when you told them what
15 happened; correct?

16 A: Okay. Yes, sir.

17 Q: Yes? Okay and you didn't have an attorney at those
18 interrogations or those interviews with the investigators; did
19 you?

20 A: No, sir.

21 Q: No? Okay and in your last statement I think it was to
22 police that you -- you actually told police that you saw Mr.
23 Anderson, that he had a gun in his hand at that point in time;
24 is that right?

25 A: I can't remember whether I said I saw him, but I said

CROSS EXAMINATION OF THE APPLICANT BY MR. CORNEY

1 that he had -- he reached.

2 Q: Okay.

3 A: I thought that he had a gun.

4 Q: All right. As far as the -- the -- I think you raised on
5 page 707 the statement that the solicitor made some closing
6 saying Natalie through Nicky said that you -- you had said you
7 murdered somebody. That was one of your allegations you
8 brought up that that should have been objected to? I know
9 that's kind of a compound question so if you need me to
10 restate that ---

11 A: No.

12 Q: --- I will.

13 A: The part that I objected to was the vouching of the
14 credibility of the witness when I said -- when the solicitor
15 said no truer words were spoken in this case.

16 Q: Okay, but as far as the statement that he's talking about
17 that -- that Natalie through Nicky had said you murdered --
18 had said you said you murdered somebody, that was something
19 that your attorney objected to when it was actually said
20 during the course of the trial; correct?

21 A: I didn't see her -- or an objection to it.

22 Q: Okay and I'm not I think -- I'll just direct you to page
23 209 on the bottom right there and give you a minute to look at
24 that. Do you have a copy of the transcript up there with you?

25 A: Yeah. Yes, sir.

CROSS EXAMINATION OF THE APPLICANT BY MR. CORNEY

1 Q: And -- and if you can, flip through it and find it.

2 MR. CORNEY: And I'll direct the Court's attention there,
3 please, where the objection is and if the Court would allow me
4 just to maybe read that into the record so Mr. Sims doesn't
5 have to go flipping through there. On page 209, it starts on
6 line 18. This is Nicky -- this is Nicky Davis' testimony
7 where it says:

8 "And then she told me, you know, Keith had murdered
9 somebody, but I didn't, you know" ---

10 And Ms. Durant steps in for an objection and based on
11 hearsay and it's overruled at that point in time and allowed
12 in by the judge.

13 MR. CORNEY: And I just direct the Court's attention at
14 that point in time. I would say it was objected to and I
15 believe that's -- that's all the questions I have for Mr.
16 Sims, Your Honor.

17 THE COURT: Thank you. Thank you. Anything in redirect,
18 Mr. Johnson?

19 MR. JOHNSON: Yes, Your Honor, just a brief one.

20 THE COURT: Certainly.

21 REDIRECT EXAMINATION

22 BY MR. JOHNSON:

23 Q: Keith, your objection to that statement was not that it
24 was objected to during the trial, but that that statement was
25 said by the solicitor at closing and was not objected to; is

REDIRECT EXAMINATION OF THE APPLICANT BY MR. JOHNSON

1 that correct?

2 A: Yes, sir.

3 Q: Okay.

4 MR. JOHNSON: Also, Your Honor, my client had prepared a
5 short brief of synopsis of what happened today and he would
6 just like to make this part of the record and for the Court's
7 review. I have given it to the state attorney and they have a
8 copy of it. I'd like to make this also just part -- part of
9 the record and make it like Exhibit Number 2 for the
10 petitioner.

11 MR. CORNEY: Your Honor, I have no objection to it.
12 Honestly, I have not had a chance to read the entire thing.
13 Assuming it sets forth what he set forth and I've have the
14 opportunity to cross examine him and get all the facts in
15 based on this, I have no objection to it.

16 THE COURT: I'll allow it.

17 MR. CORNEY: I don't know what it sets forth though.

18 THE COURT: Okay. Thank you.

19 MR. JOHNSON: Thank you, Your Honor.

20 (Whereupon, the brief is marked and entered as
21 Plaintiff's Exhibit Number 1.)

22 THE COURT: Any further questions for Mr. Sims?

23 MR. JOHNSON: Your Honor, I think he has one other thing
24 he's like to -- to state.

25 Q: Keith, what's that?

REDIRECT EXAMINATION OF THE APPLICANT BY MR. JOHNSON

1 A: I had missed an issue that I wanted to present. The
2 trial court was ineffective for failing to object to the
3 erroneous admission of irrelevant evidence.

4 THE COURT: Erroneous admission of what, Mr. Sims?

5 THE APPLICANT: Irrelevant evidence.

6 THE COURT: All right.

7 Q: And what evidence was that?

8 A: The ammunition that the -- that the solicitor was pulling
9 out at trial.

10 Q: All right.

11 A: She -- she -- she originally objected after the -- the
12 judge had came back and said that he errored by allowing that
13 because it wasn't -- it -- it didn't have no relevancy to it.
14 She initially objected.

15 Q: So it was ammunition showed to the jury that was not
16 related or could not be connected to any weapon or anything
17 related to the case; is that correct?

18 A: Yes, sir.

19 Q: So when did you feel she was ineffective if she objected
20 to it?

21 A: She should have objected to it at the first opportunity
22 so the jury could have never heard of it or put a motion to
23 suppress it.

24 Q: So it was -- so your argument is not that your attorney
25 did not object to it, but that she objected to it too late?

RECROSS EXAMINATION OF THE APPLICANT BY MR. CORNEY

1 A: Yes, sir.

2 Q: Is that correct?

3 A: Yes, sir.

4 Q: And that's all you have; is that correct?

5 A: Yes, sir.

6 MR. JOHNSON: I have nothing else, Your Honor.

7 MR. CORNEY: Your Honor, I've got just one follow-up ---

8 THE COURT: Sure.

9 MR. CORNEY: --- based on that question.

10 RECROSS EXAMINATION

11 BY MR. CORNEY:

12 Q: And, Mr. Sims, that ammunition was taken out by the judge
13 at trial from evidence; right? It didn't go back to the jury
14 into the jury room when they were doing deliberations; did it?

15 A: No.

16 MR. CORNEY: Okay. That's all I have, Your Honor.

17 THE COURT: Was there -- was there a curative -- curative
18 instruction?

19 MR. CORNEY: I don't -- I don't know that there was one.

20 MR. JOHNSON: I don't believe there was, Your Honor.

21 MR. CORNEY: I don't think there was. It was taken out
22 of evidence by the judge. I don't think there was a curative
23 at that point.

24 THE COURT: Thank you. Thank you, Mr. Sims. You may
25 step down.

RECROSS EXAMINATION OF THE APPLICANT BY MR. CORNEY

1 THE BAILIFF: Watch your step.

2 THE APPLICANT: Okay.

3 (Whereupon, the witness leaves the stand at 11:49 a.m.)

4 MR. JOHNSON: Your Honor, we have no other witnesses.

5 THE COURT: Thank you, Mr. Johnson. Mr. Attorney
6 General?

7 MR. CORNEY: Yes, Your Honor. At this point, the State
8 would call LaNelle DuRant to the stand, please.

9 THE COURT: All right. You can come around.

10 THE BAILIFF: If you will, place your left hand on the
11 Bible and raise your right hand and face the judge for me,
12 please.

13 THE COURT: Do you solemnly swear the testimony you give
14 before the Court today will be the truth, the whole truth, and
15 nothing but the truth, so help you God?

16 THE WITNESS: I do, Your Honor.

17 THE COURT: Thank you.

18 THE BAILIFF: Watch your step for me.

19 THE COURT: Once you're comfortably seated, if you would,
20 give your full name, spelling your last.

21 THE WITNESS: LaNelle DuRant. It's L-A-N-E-L-L-E D-U-R-
22 A-N-T.

23 THE COURT: All right. Yes, sir?

24 MR. CORNEY: Thank you, Judge.

25 LANELLE DURANT, being first duly

DIRECT EXAMINATION OF LANELLE DURANT BY MR. CORNEY

1 sworn, testifies as follows:

2 DIRECT EXAMINATION

3 BY MR. CORNEY:

4 Q: Ms. DuRant, thank you for being here with us today. Do
5 you recall Mr. Sims' case?

6 A: Oh, yes, very much.

7 Q: Okay and have you had a chance to at least briefly flip
8 through your file of your representation of Mr. Sims?

9 A: Very briefly, yes.

10 Q: Okay. How did you become involved with Mr. Sims' case?

11 A: I was an attorney in the Public Defender's Office.

12 Originally, there was another attorney assigned to his case
13 and when he left, Mr. Sims' case was transferred to me. I
14 think that was in 2005, February of 2005.

15 Q: Okay. So you took over the case in February of 2005?

16 A: Correct.

17 Q: And Ms. Stacy Owings or Stacy Rowell was second chair for
18 you in this or how was she ---

19 A: Right. I had asked her. We always had two attorneys on
20 every case, first chair who did the primary work and a second
21 attorney who would assist, and she was assisting me.

22 Q: Okay and were you and Ms. Rowell privy to each other's
23 conversations with Mr. Sims and the documents you obtained for
24 this?

25 A: Oh, yes, yes.

DIRECT EXAMINATION OF LANELLE DURANT BY MR. CORNEY

1 Q: Do you remember meeting with Mr. Sims to discuss the
2 charges that he was facing?

3 A: Yes.

4 Q: Okay and any idea just a ballpark in the number of times
5 you might have met with him to discuss this?

6 A: Oh, there were numerous times I met with him and I met
7 with his mother. I can't pretend to tell you how many, but
8 there were numerous times. I would visit them at the jail.

9 Q: Okay and did he ever bond out on these charges or was he
10 at the -- at the county jail or the Department of Corrections
11 the entire time?

12 A: He was at the County Detention Center the entire time.

13 Q: During those meetings, did you have a chance to review
14 the indictments with him and kind of go over the charges he
15 was facing?

16 A: Right, correct.

17 Q: Okay.

18 A: We reviewed the discovery.

19 Q: Okay. Were you able to go over the potential sentences
20 he was facing on the charges?

21 A: Correct.

22 Q: Okay and this was a potential obviously life without
23 parole situation in a murder charge?

24 A: He was -- was facing life, yes.

25 Q: Okay. Were you able to discuss his version of the facts

DIRECT EXAMINATION OF LANELLE DURANT BY MR. CORNEY

1 with him in your meetings?

2 A: Yes, we did.

3 Q: Okay and not -- you don't have to get too detailed, but
4 what -- what essentially was his -- his stance on this -- on
5 the charges? Would you recall what he told you had happened
6 that night and what you could start basing your -- your case
7 on?

8 A: Well, basically what he had testified to at trial and I
9 really think that Keith believed that Brian Anderson had a gun
10 in the car and that he was reaching for a gun. There was
11 never any doubt in my mind that Keith really believed that.

12 Q: Okay and do you -- I think you mentioned a moment ago the
13 discovery file. Do you remember receiving that and being able
14 to review it?

15 A: Right, correct, yes.

16 Q: Okay. Did you have the opportunity to go over it with
17 Mr. Sims?

18 A: Yes, we did.

19 Q: Okay. Did he receive a file -- a copy of that file?

20 A: We didn't recommend that clients have an actual file
21 while they were in the jail because other people could have
22 access to it, but if they wanted one, we gave it to them. I
23 don't remember whether -- I think I sent it to him at the end
24 of the trial, the actual file. I -- I don't remember exactly.

25 Q: Okay. Do you recall anything included in the discovery

DIRECT EXAMINATION OF LANELLE DURANT BY MR. CORNEY

1 file that was noteworthy? And I know it's been a long time so
2 if you don't, that's fine, but anything in particular?

3 A: Nothing that didn't come out at trial.

4 Q: Okay. Mr. Sims had given some statements to law
5 enforcement in this -- in this case; is that your
6 recollection?

7 A: Yes.

8 Q: Okay. He had spoken with them multiple times?

9 A: Yes. I don't remember exactly until today when it was
10 discussed, but I do know he gave a statement admitting that he
11 had killed Brian Anderson.

12 Q: Okay and he had some co-defendants in this case or not --
13 not that he was tried with, but he had some other people
14 involved with the charges?

15 A: Right.

16 Q: Okay. Do you recall their -- kind of their role in the
17 whole thing and how they fit in?

18 A: Well, I think after the incident happened, Keith
19 contacted Derrick Roof, who was like a brother to him, and his
20 -- Keith's girlfriend and Derrick's girlfriend.

21 Q: Okay. Do you recall if the gun that was actually used in
22 this shooting was recovered?

23 A: I think a gun was found in the pond. I don't -- not in
24 the pond. I think it was near the pond I believe, but I don't
25 remember if it was the one actually used. I just don't

DIRECT EXAMINATION OF LANELLE DURANT BY MR. CORNEY

1 remember that.

2 Q: Okay and that was -- that was something that -- that one
3 of the co-defendants had tried to dispose of and the police
4 found it?

5 A: Right. I ---

6 Q: Is that your recollection?

7 A: I think it was found.

8 Q: And the record will -- will reflect that. Was it fair to
9 say based on your kind of review and your discussions with Mr.
10 Sims that there was no question that -- that he had -- he had
11 shot Mr. Anderson? I mean he essentially was the shooter in
12 this case?

13 A: Right. He never denied that.

14 Q: Okay. So that wasn't going to be something you contested
15 at trial. It was essentially is it self-defense or was it
16 not?

17 A: Right.

18 Q: Okay and a lot of the State's -- would it be fair to say
19 a lot of the State's presentation of their case was
20 surrounding whether or not Mr. Sims had even shot him? I mean
21 a lot of -- a lot of autopsy reports, ballistics, things of
22 those nature to prove whether or not he'd even shot him?

23 A: Right.

24 Q: Okay and so those were things that you didn't contest at
25 trial?

DIRECT EXAMINATION OF LANELLE DURANT BY MR. CORNEY

- 1 A: No.
- 2 Q: Okay. So there was a fair amount of stuff that went on
3 throughout the course of the trial that wasn't highly
4 contested that you allowed in that wasn't ---
- 5 A: Right.
- 6 Q: --- tantamount to your case?
- 7 A: Right. Since he had given a statement admitting that he
8 shot him, there was no need to object to an autopsy, those
9 kinds of reports.
- 10 Q: And, in fact, you didn't do a *Jackson v. Denno* hearing on
11 his statement either; did you?
- 12 A: No.
- 13 Q: And I think you put something on the record in that
14 regard saying that it was your intention for his statement to
15 come in?
- 16 A: Right.
- 17 Q: Okay, because that also went directly to his defense and
18 the defense theory?
- 19 A: Correct.
- 20 Q: Okay.
- 21 MR. CORNEY: I beg the Court's indulgence for just one
22 minute, Your Honor. I apologize.
- 23 THE COURT: Yes, sir.
- 24 Q: All right. Based on your discussions with -- with Mr.
25 Sims and your review of the discovery and your investigation,

DIRECT EXAMINATION OF LANELLE DURANT BY MR. CORNEY

1 how did you plan to present the self-defense theory on his
2 behalf?

3 A: Well, that Keith had known -- Keith and Brian knew each
4 other obviously and there had been prior incidents of Brian
5 having a weapon. I think we proffered testimony that an
6 officer had been involved in another case incident with Brian
7 when he had a gun and Keith knew he was -- he was known to
8 have a gun and I think there had been a fight between Keith
9 and Brian or there was an altercation, an incident not too
10 long before this.

11 So we started out with that and I think Keith said he
12 owed Brian some money and the night of the incident, they had
13 been to the party. Now, Keith did have a gun, but that was
14 not an unusual incident for young men at that time. But he --
15 he and Brian were working on their friendship. He took --
16 Brian took him home and then he said Brian started talking
17 about, you know, is -- he was clearing up some matters. You
18 know, people owed him money and Brian went in his house and
19 came back out and then they went -- he took Keith home and I
20 think Keith believed that Brian was expecting him to pay the
21 money and when they were in the car and Brian was talking that
22 way and leaned over, Keith believed he was reaching for a gun.
23 Q: Okay and a lot of the opening and closings made and a lot
24 of the I guess the defense -- the testimony that you brought
25 out was relating to Mr. Sims and his kind of state of mind,

DIRECT EXAMINATION OF LANELLE DURANT BY MR. CORNEY

- 1 his reaction to having killed this person.
- 2 A: Right.
- 3 Q: Was that -- was that ---
- 4 A: Oh, he panicked when he realized that there was not a gun
- 5 there, that he had actually killed someone.
- 6 Q: Okay and that was something that you wanted the jury to
- 7 hear?
- 8 A: Yes.
- 9 Q: That he was traumatized by this, very ---
- 10 A: Yes, he was traumatized by it, yes.
- 11 Q: Okay and the only people in the car at the time of the
- 12 shooting were Mr. Anderson and Mr. Sims?
- 13 A: Correct. There were no other witnesses to the actual
- 14 shooting.
- 15 Q: Okay. So to present the self-defense theory, it was fair
- 16 to say Mr. Sims was likely going to have to take the stand in
- 17 his defense?
- 18 A: Right. He was the only one that could tell that.
- 19 Q: Okay. Do you remember any plea negotiations that went on
- 20 with the State in this regard?
- 21 A: There was a plea negotiation.
- 22 Q: Okay. Do you remember the offer -- any offers that were
- 23 extended by the State?
- 24 A: He was offered voluntary manslaughter for 15 to 20.
- 25 Q: Okay and do you remember discussing that with him?

DIRECT EXAMINATION OF LANELLE DURANT BY MR. CORNEY

1 A: I did discuss that with him and he wanted to talk to his
2 family and in the end he said he wanted to go to trial.

3 Q: Okay. That was his decision?

4 A: Correct.

5 Q: Okay. I want to just briefly -- and this is a little bit
6 jumping out of -- out of line here, but I want to briefly ask
7 you about the indictments and in your I guess experience as a
8 -- as a former defense attorney, now appellate attorney,
9 moving to quash the indictments, is there a time period that
10 that needs to be done in when going to trial? Is there
11 anything that says so?

12 A: Well, I think before the jury is sworn you have to quash
13 -- move to quash the indictments.

14 Q: And -- and would you agree that jeopardy doesn't attach
15 until the jury is sworn in a jury trial?

16 A: Correct.

17 Q: Okay. So is there anything stopping the solicitor from
18 re-indicting a defendant or directly indicting a defendant if
19 you move to quash the indictments before the trial?

20 A: No. They would do that.

21 Q: Okay and they can -- and the solicitor can directly
22 indict as well; is that correct?

23 A: Yes..

24 Q: Okay. So moving to quash the indictments doesn't mean
25 that these charges go away forever?

DIRECT EXAMINATION OF LANELLE DURANT BY MR. CORNEY

1 A: Oh, no, no, and in a murder case they likely would re-
2 indict.

3 Q: Okay.

4 MR. CORNEY: I beg the Court's indulgence for one moment
5 and I apologize.

6 THE COURT: Yes, sir.

7 Q: I want to turn to Mr. Sims' statements that he -- he
8 referenced earlier and I think he talked about especially in
9 recross the statements and I don't know if you had a chance to
10 look at it on page 421 and 422.

11 A: Okay. I have that.

12 Q: In the statement -- and I don't know if you recall the
13 specific statement that he's testifying to, but Mr. Sims
14 essentially says that he was with Mr. Anderson that night but
15 wasn't involved in the shooting. Is that your recollection of
16 that?

17 A: Correct. I think he did deny it initially.

18 Q: Okay and -- and the actual statement I think that Mr.
19 Sims brought up in his testimony was starting on page 421 on
20 line 24 where Mr. McCraw says he asked Mr. Sims why did you do
21 it and why did you kill Brian. Do you see that in the
22 testimony?

23 A: Right, yes.

24 Q: Okay and then Mr. McCraw goes on to testify that Mr. Sims
25 became very agitated and nervous and said he may need an

DIRECT EXAMINATION OF LANELLE DURANT BY MR. CORNEY

1 attorney; correct?

2 A: Yes.

3 Q: Okay. That testimony you didn't object to on the record;
4 did you?

5 A: No, I did not.

6 Q: Okay. With your self-defense theory in mind, the fact
7 that he was -- you said -- as you testified a moment ago, you
8 wanted to show that he was under a lot of stress. He was
9 traumatized by this. Any reason you wouldn't have objected to
10 that kind of testimony?

11 A: Not really unless it happened to show, you know, the
12 self-defense.

13 Q: Okay.

14 A: I mean he never denied that eventually, but ---

15 Q: Okay.

16 A: I really can't tell you a reason.

17 Q: And that statement showing Mr. Sims immediately froze up
18 and got very nervous when they directly confronted him with
19 it, do you think that would go to the point that he was very
20 traumatized or very ---

21 A: Yes.

22 Q: --- shaken by this situation?

23 A: Yes.

24 Q: Okay. So do you think that that statement was
25 necessarily the downfall of the case or was that something

DIRECT EXAMINATION OF LANELLE DURANT BY MR. CORNEY

- 1 that -- that the jury just couldn't overlook? And I don't
2 want you to go to the jury's -- you know, think what the jury
3 was thinking ---
- 4 A: Right.
- 5 Q: --- but your opinion.
- 6 A: No. In my opinion, I do not think that hurt Keith. He
7 wanted to testify. We knew he was going to testify and we
8 knew he was going to say he had killed him so I really did not
9 think that was prejudicial to him.
- 10 Q: Okay. I think Mr. Sims also raised an allegation about
11 failing -- failing to pose a timely objection to the
12 introduction of this ammunition and I believe the -- the
13 transcript reflects that it was -- it wasn't the ammunition
14 used or that fit this gun that was used in the murder; is that
15 correct?
- 16 A: Right. It was something else.
- 17 Q: So you had -- you had objected to it on grounds of -- of
18 relevance I suppose? Is that correct? Is that your
19 recollection?
- 20 A: Right. It was irrelevant.
- 21 Q: And I believe that's on page 367 of the transcript on
22 line 2 where your objection is. You say you recall it so you
23 don't need to ---
- 24 A: Right.
- 25 Q: --- turn there if you need -- unless you want to look at

DIRECT EXAMINATION OF LANELLE DURANT BY MR. CORNEY

1 it and those -- that was all admitted over your objection;
2 correct?

3 A: Right.

4 Q: At the time?

5 A: Correct.

6 Q: All right and after the firearms expert, David Collins,
7 testified, the judge kind of reconsidered his ruling on -- on
8 admitting those items?

9 A: Yes.

10 Q: Okay and at that point in time he removed them from
11 evidence; is that correct?

12 A: If -- that's basically what I remember, yes.

13 Q: Okay. There was no curative instruction given at that
14 point in time that you recall?

15 A: I don't recall honestly.

16 Q: Okay and there was -- you didn't move for a mistrial
17 based on those having been talked about in front of the jury
18 and then taken out of evidence. Any reason why?

19 A: I -- I did not think it was sufficient enough. I just
20 didn't think it reached a level for that.

21 Q: Okay. So you didn't think that it was so detrimental
22 that ---

23 A: No.

24 Q: --- you needed to move for a mistrial?

25 A: No.

DIRECT EXAMINATION OF LANELLE DURANT BY MR. CORNEY

1 Q: Okay and would you agree that a mistrial is kind of the
2 ultimate objection or motion you can raise after a trial has
3 started? I mean the kind of catch-all, you know, fail-all
4 objection you can make?

5 A: Right and you have to have significant reasons for a
6 mistrial.

7 Q: Okay and those motions are -- are in the judge's
8 discretion in the end anyway; correct?

9 A: Correct.

10 Q: Okay. Now, as far as this inference of malice jury
11 charge that was -- that was -- that was raised by Mr. Sims,
12 are you familiar with the *Belcher* case?

13 A: Yes.

14 Q: Okay and -- and I'm sure you're familiar with that in
15 your work as an appellate attorney ---

16 A: Right.

17 Q: --- as well at the time?

18 A: Right.

19 Q: And *Belcher* was decided -- do you remember what year it
20 was -- it was decided?

21 A: I think it was 2009.

22 Q: Okay and this case was in March 2006; is that right?

23 A: Correct.

24 Q: Okay and -- and what does *Belcher* stand for that you --
25 and I don't want to put you on the spot, but -- but in your

DIRECT EXAMINATION OF LANELLE DURANT BY MR. CORNEY

1 opinion and from -- from your experience, what -- what does
2 *Belcher* stand for?

3 A: Well, basically that you cannot give the jury charge that
4 malice can be inferred from the use of a weapon if there's any
5 indication of self-defense in the case.

6 Q: Okay. So this was not a law -- this was not a case that
7 was in place at the time of Mr. Sims' trial?

8 A: No. It would apply after that, but ---

9 Q: And it was ---

10 A: --- unfortunately, we didn't have it then.

11 Q: Okay and so there was no way obviously that you could
12 have known about this case?

13 A: No.

14 Q: Okay and -- and *Belcher* was also decided to not to -- not
15 apply retroactively; is that ---

16 A: Correct.

17 Q: --- your reading of it? Do you have any idea whether it
18 applies in PCR actions or not?

19 A: I do not know the answer to that. I -- Wait, I think it
20 does not because I remember reading that just recently.

21 Q: Okay. I want to ask you just very briefly about the
22 closing arguments and -- and this will finish up my -- my
23 questions for you. As far as the solicitor commenting on the
24 credibility, you made no objection to that. Do you recall
25 why? Or do you have any stance on him being able to talk

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1 about what the witnesses had testified to and their
2 credibility in the closing argument?

3 A: Well, I think that's just part of his argument. I don't
4 -- I don't think you can say that he can't do that in a
5 closing argument.

6 Q: Okay and would you agree that kind of the -- that
7 solicitors have pretty -- or anyone has pretty wide deference
8 in what they can testify to ---

9 A: Right.

10 Q: --- in closing argument as long as it's based on the
11 facts in evidence that were presented at trial and reasonable
12 inferences that can be drawn from those facts?

13 A: Correct. Yeah, they can't introduce new evidence, but to
14 comment on what's been presented.

15 Q: Okay.

16 MR. CORNEY: I believe that's all the questions I have,
17 Your Honor.

18 THE COURT: Thank you.

19 MR. CORNEY: Thank you very much.

20 THE COURT: Thank you very much.

21 MS. CLAXTON: May it please the Court.

22 THE COURT: Thank you, Ms. Claxton.

23 CROSS EXAMINATION

24 BY MS. CLAXTON:

25 Q: Ms. DuRant, you had Mr. Sims' case approximately a year

CROSS EXAMINATION OF LANELLE DURANT BY MS. CLAXTON

1 before it went to trial; is that correct?

2 A: Correct.

3 Q: And do you feel like you did a thorough investigation
4 into his case?

5 A: I do. In fact, we had an investigator in the Public
6 Defender's Office. He took us to the crime scene. We traced
7 the path. I went to the pond myself to view it. We -- he did
8 an investigation and then I talked to several of the -- you
9 know, the expert -- I obtained a gun expert, ballistics
10 expert. Their -- I do feel that we did a thorough
11 investigation.

12 Q: Okay. You testified earlier that you wanted the jury to
13 know that Mr. Sims was traumatized and shaken?

14 A: Right.

15 Q: Do you feel that he was traumatized and shaken?

16 A: I do.

17 Q: Okay.

18 A: I do. I do feel that he -- there was no malice in him.
19 He really thought he was going to die.

20 Q: Okay. In that regard, did you get a funding order for a
21 mental evaluation for Mr. Sims?

22 A: I reviewed my record this morning and there was an
23 evaluation by Dr. Jeff McKee.

24 Q: Okay.

25 A: And -- and he said that Keith was -- he did have some

CROSS EXAMINATION OF LANELLE DURANT BY MS. CLAXTON

1 mental problems, but that he was competent and criminally
2 responsible. He could not find that he was not, but -- and I
3 asked Dr. McKee if he -- was there any way he could testify to
4 Keith being traumatized if it would have helped that, but he
5 said no, that he couldn't. That would not be part of it.

6 Q: Okay.

7 A: According to my notes in the record I have.

8 Q: Was that doctor hired by your office or by the
9 prosecutor's office? Do you recall?

10 A: It was done by the attorney that had the case originally.

11 Q: Okay.

12 A: And he obtained funding so I think it was an independent
13 evaluation through our office.

14 Q: I'm just going to ask you is there anything that you felt
15 like during the trial that you did wrong or -- or that you
16 should have done that maybe the outcome of the trial would
17 have been different for Keith?

18 A: I would like to find something because I would like for
19 Keith to have a better deal than he received and I have
20 reviewed it. I -- the fact that the judge did not let us put
21 up the witness that we had to proffer the testimony about
22 talking about the prior incident with Brian and his violence,
23 I think it would have been helpful for the jury to hear that
24 from him, but of course, the judge would not allow that. So I
25 didn't ---

CROSS EXAMINATION OF LANELLE DURANT BY MS. CLAXTON

1 Q: Can you elaborate on that?

2 A: Well, we had found this prior incident. I think there
3 was an arrest incident where Brian Anderson had been involved
4 in an altercation with -- he had pulled a gun on someone I
5 think maybe at his house. I don't remember the details of it.

6 Q: Okay.

7 A: But I think the purpose of it was to show that he could
8 be violent and that he was used to guns, that he had a weapon,
9 and it would have corroborated Keith -- Keith's testimony.
10 That was the significance of it. It would have shown that
11 Keith was telling the truth and really believed that Brian had
12 guns and could hurt him.

13 Q: And -- and the judge's decision was what?

14 A: He would not allow us to put up the witness. He did
15 allow us to proffer what we -- the witness would have said,
16 but then again the jury didn't hear that. I couldn't find
17 anything else.

18 MS. CLAXTON: I beg the Court's indulgence.

19 THE COURT: Yes, ma'am.

20 Q: Ms. DuRant, Keith Sims testified earlier that he invoked
21 his right to counsel or the officer testified that he invoked
22 his right to counsel and you didn't object to that. Do you
23 feel that that's something you should have objected to looking
24 back on it?

25 A: Well, I could ---

CROSS EXAMINATION OF LANELLE DURANT BY MS. CLAXTON

1 MR. CORNEY: I'm going to object to that. It calls for
2 hindsight. We don't look at hindsight in PCR and she -- I
3 mean she can talk about her mindset now, whether she thinks
4 that -- I mean what she thought at the time.

5 THE COURT: And Ms. DuRant has also testified to also
6 that she reviewed it hoping she would find something because
7 Keith -- she would like to see him get a better deal. So I
8 think there's an inference there. I would not allow that
9 question. You may ask your next question, Ms. Claxton.

10 MS. CLAXTON: Okay.

11 Q: Did you ask for a curative instruction when the jury
12 heard about the ammunition and -- and such? I know the judge
13 did not allow the jurors to take it back and -- and deliberate
14 on it, but did you ask for a curative instruction?

15 A: I don't remember. I don't -- I must not have if you're
16 asking me the question, but I don't remember honestly.

17 THE COURT: That last question I ruled on, you can
18 rephrase that question perhaps, Ms. Claxton.

19 MS. CLAXTON: Okay. I beg the Court's indulgence.

20 Q: So again, you -- you didn't object to the officer
21 testifying that he invoked his right to counsel when he stated
22 that at this time I'd like an attorney?

23 A: I did not object, no.

24 Q: Okay.

25 MS. CLAXTON: I beg the Court's indulgence. No further

1 questions, Your Honor.

2 THE COURT: Thank you. Redirect?

3 MR. CORNEY: No redirect, Your Honor. That's all the
4 witnesses from the State.

5 THE COURT: Thank you very much, Ms. DuRant. You may
6 step down.

7 THE WITNESS: Thank you, Your Honor.

8 (Whereupon, the witness leaves the stand at 12:14 p.m.)

9 MR. CORNEY: Your Honor, would you like us to make
10 closing arguments?

11 THE COURT: All right. Mr. Johnson?

12 MR. JOHNSON: Thank you, Your Honor, if it please the
13 Court. Your Honor, just for correction, my client, when he
14 brought up the objection about the inference, he was referring
15 to *Sandstrom v. Montana*. It's 442 U.S. 510 and 525, a 1979
16 case.

17 THE COURT: All right. Thank you.

18 MR. JOHNSON: Okay. Your Honor, in closing, as the Court
19 is aware, you very seldom can have a trial where you can point
20 to a specific incident that if not for the incident, the
21 outcome of the trial would have been different. And as well
22 as in this case, we cannot point to a specific incident that
23 says that the attorney was ineffective on one specific
24 incident that if it had not occurred, the outcome would have
25 been different.

1 It is out contention that it is a cumulative effect.
2 That it is a cumulative effect of small errors that has -- it
3 builds up to -- to such -- one error leads to another, another
4 error will lead to another to the point that it gives the jury
5 the inference that Keith was guilty.

6 His whole argument in this case was his state of mind.
7 It was a defense. He never argued that he killed the
8 individual. He -- there wasn't argument about evidence.
9 There wasn't argument about any material witnesses. There
10 wasn't an argument about what he said or what happened. The
11 whole argument was about Keith's state of mind.

12 Little inferences and little mistakes made by the
13 attorney such as not objecting to Keith invoking his right to
14 remain silent, you say, well, that's not a big thing. Well, a
15 jury -- it's our contention that a jury could look at that and
16 say that if a person was innocent, why would he want to remain
17 silent, just by allowing it and therefore it would infer that
18 Keith had something to hide.

19 The inference that -- the attorney made the inference or
20 the -- the State asked counsel a minute ago as that the
21 attorney could object to it, but it was still up to the Court
22 to make the decision on it. Well, Your Honor, we agree with
23 that, but if an attorney doesn't make an objection, the Court
24 doesn't even have the ability to make any ruling and it's our
25 -- it's our contention that the lack of objections to certain

1 issues thereby prevented the Court from making rulings that
2 could have been beneficial to Keith.

3 We have placed I think six or seven issues on the Court.
4 We've made copies of -- we have placed the exhibits that we
5 ask the Court to examine and we ask the Court to look at this
6 not as an issue by issue case, but as a number of issues, a
7 number of errors made by defense counsel during this trial,
8 even though small errors, that they have cumulative effect of
9 resulting in a jury finding Keith guilty of the murder instead
10 of finding Keith innocent of the murder.

11 THE COURT: Thank you. Thank you, Mr. Johnson.

12 MR. JOHNSON: Thank you, Your Honor.

13 THE COURT: Mr. Attorney General?

14 MR. CORNEY: Yes, sir. Judge, just to start off with,
15 with all due respect to Mr. Johnson, who I have worked with
16 many times and always enjoy working with, I would go against
17 his contention this should be cumulative error analysis for
18 proving prejudice. Our state does not recognize that that's
19 allowed in PCR at this point in time.

20 It's come back to court between the Court of Appeals and
21 the Supreme Court and *Green v. State* is one of the cases -- I
22 don't have a cite in front of me -- as well as just *Walker v.*
23 *State*, which was just decided by the Court of Appeals in
24 February of 2012 pretty much sidestepping the issue and saying
25 we're not going to recognize it at this point in time. It's

1 not something we're going to rule upon.

2 Cumulative error analysis of many little errors to prove
3 resulting prejudice based on all of them come together is not
4 a standard that our state has recognized and I would submit
5 this is directly against and is directly contrary to the
6 standard set forth in *Strickland v. Washington* and what the
7 United States Supreme Court contemplated in passing *Strickland*
8 *v. Washington*. So I don't think the Court can analyze it in a
9 cumulative error analysis to prove the prejudice type
10 situation Mr. Johnson has set forth.

11 In addition, to Mr. Johnson's comment just briefly about
12 you have to make an objection in order for the Court to rule
13 upon it, I would just briefly submit that that doesn't go to
14 deficiency; that goes to prejudice. If the objection had been
15 made, would the Court have granted it? That's the proof of
16 prejudice and that's where Ms. DuRant steps in and says it's
17 always up to the judge and there's nothing to say he would
18 have granted it. That's a prejudice analysis. Sure, you
19 can't rule on -- on a motion or objection unless it's made to
20 the Court, but whether or not the Court is going to actually
21 grant that is where the prejudice analysis comes in to those
22 objections.

23 Your Honor, just to go briefly through a couple of his
24 allegations. The indictment issue, it's my understanding
25 Richland County Grand Jury doesn't meet as scheduled in the

1 calendar General Sessions terms of court set forth by Court
2 Administration. It's my understanding the Chief
3 Administrative Judge for General Sessions sets when the Grand
4 Jury will meet.

5 However, without even taking that into consideration, if
6 there were defects in the indictment that had to be objected
7 to, they would have had to have been made under Section 17 --
8 I apologize. Very briefly, under Section 17-19-90 of the
9 South Carolina Code, any objections to move or quash the
10 indictments would have to be made before the jury is sworn and
11 under *State v. Prince*, jeopardy doesn't attach to charges only
12 -- it only attaches after the jury is sworn.

13 So a successful motion to quash an indictment cannot by
14 its very nature attach jeopardy and stop the solicitor from
15 re-indicting. There's no prejudice there. Had she moved to
16 quash the indictments, like she said, the solicitor very
17 likely on a murder charge would have re-indicted Mr. Sims and
18 brought him back for trial on the same charges. They may have
19 even directly indicted him right there on the spot for the
20 murder charge.

21 THE COURT: I'm not tracking this issue at all because
22 the Claimant's Exhibit 1 calendar indicates that General
23 Sessions was held in Richland County on the week of 9 February
24 of '04 and the indictment is true billed and signed by the
25 Grand Jury foreperson February 12th of '04, which is within

1 that term of court. So I -- I haven't been tracking that.

2 MR. CORNEY: And Your Honor very well may be. Like I
3 said, this is not an exhibit I saw before the hearing and so
4 if it fell within those dates, then -- then this exhibit
5 doesn't go to prove anything contrary to that. So I would
6 just -- I would ---

7 THE COURT: I just hadn't tracked Mr. Sims' argument in
8 that regard. Mr. Johnson can readdress it if he wants.

9 MR. CORNEY: And thank you for bringing that to my
10 attention, Your Honor.

11 THE COURT: It looks like there was a term of court in
12 Richland County, there was a term of court in Kershaw County
13 also, and down at the bottom it's got -- it's got a date -- a
14 court date indicated below and it's 2/9 through 2/13.

15 MR. CORNEY: It absolutely does, Your Honor..

16 THE COURT: I -- I guess that's so completely gone beyond
17 -- beyond -- Ms. Claxton?

18 MS. CLAXTON: I explained that to Mr. Sims prior to us
19 coming here today. He wanted to address that issue because
20 there was some other documents sent to him by the court that
21 said that the Grand Jury did not meet, but I did explain that
22 to Mr. Sims and -- and I did point that out to him.

23 THE COURT: All right.

24 MR. CORNEY: Your Honor, I would just also submit -- and
25 thank you for bringing that to my attention. Like I said, I

1 just flipped through very briefly.

2 The prejudice argument, in that regard, had it been
3 quashed, Mr. Sims would have been brought back for trial by
4 the solicitor on the murder charge regardless. It wasn't
5 stopping them from bringing the charges back on him.

6 As far as the failure to object to vouching for the
7 credibility, that's a permissible argument to be made by the
8 solicitor in that regard. I don't have the case law right in
9 front of me. I didn't know that was going to be an issue in
10 this case. It wasn't something brought to my attention before
11 today. I'd be happy to submit case law to Your Honor if you
12 would request it in that regard.

13 But the solicitor is allowed to get up and talk about the
14 credibility to be weighed by -- the credibility and the
15 evidence to be put up -- that's been put before the jury and
16 what weights they should assign to that evidence. He's
17 allowed. That's a permissible argument to be made. There's
18 no objection to be made. It's not an objectionable closing
19 argument by the solicitor and, like I said, I'd be happy to
20 submit case law in that regard.

21 As far as the malice charge, Your Honor, I'm sure Your
22 Honor is familiar with the *Belcher* case. The *Belcher* case is
23 the stand-alone case on this inference of malice from use of a
24 deadly weapon and its application where there's evidence been
25 produced to justify -- excuse a killing. *Belcher* is the case

1 and it was decided in 2010. I'm not familiar with the case
2 that Mr. Sims set forth, but I know that *Belcher* is the
3 keynote case on that inference of malice instruction to be
4 given to juries.

5 This was -- that was decided after this trial, almost
6 four years after this trial. It specifically says it does not
7 apply to PCR actions and it doesn't apply retroactively.
8 Counsel isn't required to be clairvoyant and anticipate
9 changes in the law that are coming. There's no way Ms. DuRant
10 could have known that.

11 And, Your Honor, as far as the testimony to Mr. Sims
12 invoking his right to silence that was put up by Mr. --
13 Investigator McCraw, as Ms. DuRant said, that statement would
14 have only helped his defense that he was traumatized when he
15 was directly confronted with the testimony -- or with the
16 question, why did you kill the victim in this case. After he
17 denied it -- he did not deny it. The investigators asked him
18 directly on point why did you kill. He froze up and got very
19 nervous and said I think I need an attorney.

20 Nothing after that is ever mentioned of that again.
21 There's no link to -- to the jury to say -- infer his guilt
22 based on his -- based on his statement that he wants an -- an
23 attorney. There's nothing from the solicitor to say because
24 he said this you can infer his guilt. In fact, the only
25 reason the solicitor -- the only reason the solicitor even had

1 that testimony come out was to show that in the next two
2 interrogations with police, Mr. Sims knew that he had these
3 rights and he could invoke these rights. He'd invoked them
4 previously. He'd invoked his right to stay silent -- to
5 remain silent and to have an attorney. So in his two
6 subsequent interrogations on January 7th and January 22nd when
7 he spoke with police willingly and voluntarily without an
8 attorney present, he knew he could invoke those rights.

9 And so, Your Honor, I would submit that was the reason
10 for that being brought in. It's not objectionable. It went
11 right to their defense. It wasn't prejudicial.

12 And I think that's all I have, Your Honor. The
13 introduction of the ammunition, Ms. DuRant specifically said
14 that she didn't find it objectionable to the point to make a
15 mistrial motion. It was withdrawn from evidence. It didn't
16 go back with the jury and there's just -- that -- there's just
17 no -- that doesn't go to the self-defense theory whatsoever.
18 I mean there was no question that Mr. Sims shot Mr. Anderson
19 and killed him in this regard. What -- whether it was self-
20 defense or not, that didn't affect the jury's decision in that
21 regard.

22 I believe I've talked way too long already, Your Honor,
23 so I will rest on that and the testimony presented and ask you
24 to deny the application for PCR. Thank you.

25 THE COURT: Yes, ma'am, Ms. Claxton?

1 MS. CLAXTON: One additional thing. Mr. Sims would like
2 to explain the calendar that he received from Court
3 Administration regarding the indictment.

4 THE COURT: The record is closed in that regard. I have
5 the exhibit that was placed into evidence.

6 MS. CLAXTON: Thank you, Your Honor.

7 THE COURT: All right. Thank you, thank you very much.
8 If y'all would, prepare and submit proposed orders within 15
9 days.

10 MR. CORNEY: Thank you, Judge.

11 THE COURT: All right. Thank you.

12 MR. JOHNSON: Thank you, Your Honor.

13 MS. CLAXTON: Thank you.

14 THE COURT: Thank you, Ms. DuRant. Good luck to you, Mr.
15 Sims.

16 (Whereupon, the proceedings end at 12:26 p.m.)

17

18 --- END REQUESTED TRANSCRIPT ---

19

20

21

22

23

24

25

1 STATE OF SOUTH CAROLINA)
2) CERTIFICATE
3 COUNTY OF FLORENCE)
4

5 I, the undersigned, Krystal J. Smith, Official Court
6 Reporter for the Twelfth Judicial Circuit of the State of
7 South Carolina, do hereby certify that the foregoing is a
8 true, accurate, and complete Transcript of Record of all the
9 proceedings had and evidence introduced in the hearing of the
10 above captioned case, relative to appeal, in the Court of
11 Common Pleas for Richland County, South Carolina, on the 14th
12 day of August, 2012.

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

15

16

Krystal J. Smith

17

Court Reporter

18

19 Florence, South Carolina

20 March 20, 2013

21

22

23

24

25



[EXHIBIT]

South Carolina Court Administration

South Carolina Supreme Court
Columbia, South Carolina

ROSALYN FRIERSON
DIRECTOR

MOTTE L. TALLEY
ASSISTANT DIRECTOR

1015 SUMTER STREET, SUITE 200
COLUMBIA, SOUTH CAROLINA
29201

TELEPHONE: (803) 734-1800

FAX: (803) 734-0269

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October 4, 2010

Keith Sims #314569
PCI Q-1-B-124
430 Oaklawn Rd.
Pelzer, SC 29669

Mr. Sims:

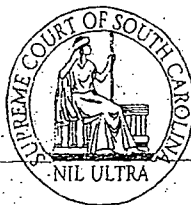
You have requested the terms of court for February 2004 for Richland County. The General Sessions term showing on the schedule for February 9, 2004 was for the entire week (Monday-Friday) of that week. For each dated at the top of the schedule that was for the entire week (Monday-Friday).

Any further information pertaining to your case may be obtained by contacting the **County Clerk of Court** where your case was heard concerning dockets, orders, motions, grand jury schedules and true bills filed in your case.

Respectfully,

South Carolina Court Administration





[EXHIBIT]

South Carolina Court Administration
South Carolina Supreme Court
Columbia, South Carolina

ROSALYN FRIERSON
DIRECTOR

MOTTE L. TALLEY
ASSISTANT DIRECTOR

September 27, 2007

1015 SUMTER STREET, SUITE 200
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TELEPHONE: (803) 734-1800

FAX: (803) 734-0269

E-MAIL: mtalley@sccourts.org

Keith Sims #314569
PCI Q2-A-201
430 Oaklawn Rd.
Pelzer, SC 29669

Dear Mr. Sims:

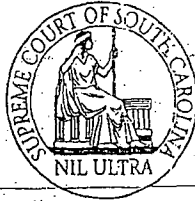
The dates at the top of the schedule are for the entire week. That judge holding court is holding court for the entire week. The Grand Jury did not meet until March 29, 2004. If you need more information please contact the Clerk of Court listed below, they would have more information pertaining to your case.

Clerk of Court
Richland County

Barbara A. Scott
PO Box 2766
1701 Main Street, Rm 205
Columbia, SC 29202

Respectfully,

South Carolina Court Administration



[EXHIBIT]

South Carolina Court Administration

South Carolina Supreme Court
Columbia, South Carolina

ROSALYN FRIERSON
DIRECTOR

MOTTE L. TALLEY
ASSISTANT DIRECTOR

1015 SUMTER STREET, SUITE 200
COLUMBIA, SOUTH CAROLINA
29201

TELEPHONE: (803) 734-1800

FAX: (803) 734-0269

E-MAIL: mtalley@sccourts.org

October 15, 2007

Keith Sims #314569
PCI Q-2-A-201
430 Oaklawn Rd.
Pelzer, SC 29669

Dear Mr. Sims:

According to the schedule that was sent to you the Grand Jury meet on March 29th, 2004 and not in February.

Information pertaining to your case maybe obtained by contacting the County Clerk of Court where your case was heard concerning dockets, orders, motions, grand juries and true bills filed in your case.

Clerk of Court Richland County
Barbara A. Scott
PO Box 2766
Columbia, SC 29202

Respectfully,

South Carolina Court Administration

[EXHIBIT]

Circuit	2/2/2004	2/9/2004	2/16/2004	2/23/2004
5	Common Pleas Richland Barber, James <u>THOMAS</u> General Sessions Richland Kinard, J. <u>MCCURDY</u> General Sessions Richland Lloyd, Reginald <u>THUEME</u> Common Pleas Non-Jury Lee, Alison <u>HELMS 2</u> <u>HELMS 3 am</u> <u>TRACY 3 pm</u> <u>HELMS 4, 5, 6</u> Common Pleas Richland Manning, L. <u>DEFREESE</u>	Common Pleas Richland Barber, James <u>LEFEBVRE</u> General Sessions Richland Cooper, G. Thomas <u>WILLIAMS</u> General Sessions Richland Williams, James <u>SHEPPARD</u> General Sessions Kershaw Manning, L. <u>DEFREESE</u> Common Pleas Richland Lloyd, Reginald <u>TRACY</u>	General Sessions Richland Johnson, James <u>NO CR NEEDED 16, 17, 18 am</u> <u>HELMS 18 pm</u> <u>NO CR NEEDED 19, 20</u> Common Pleas Non-Jury 17 Cooper, G. Thomas <u>WILLIAMS 17</u> General Sessions 17 Richland Cooper, G. Thomas <u>WILLIAMS 17</u> Common Pleas Non-Jury 18 Kinard, J. <u>MCCURDY 18</u> General Sessions 20 Richland Cooper, G. Thomas <u>WILLIAMS 20</u> Common Pleas Non-Jury 20 Cooper, G. Thomas <u>WILLIAMS 20</u>	Common Pleas Richland Barber, James <u>SHEPPARD</u> General Sessions Richland Cooper, G. Thomas <u>WILLIAMS 23, 24, 25</u> <u>TRACY 26</u> <u>WILLIAMS 27</u> Common Pleas Kershaw Kinard, J. <u>RUTLEDGE 23</u> <u>MCCURDY 24, 25, 26, 27</u> General Sessions Richland Lloyd, Reginald <u>LEFEBVRE 23</u> <u>THUEME 24, 25, 26</u> <u>THUEME 27 am</u>

Court dates are indicated below:

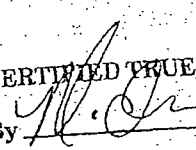
2/02/2004 - 2/06/2004

2/09/2004 - 2/13/2004

2/16/2004 - 2/20/2004

2/23/2004 - 2/27/2004

CERTIFIED TRUE COPY,

By 

South Carolina Court Administration

DOCKET NO. 2004-GS-40-1037

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2004

52

THE STATE
vs.

KEITH A. SIMS

Indictment for

MURDER

SC Code: 16-3-10
CDR Code: 0116
Class: FEL/EXM(V)

WITNESSES

(S) Inv. Howell Sinard, RCSD

ARREST WARRANT NUMBER

DP04081

ACTION OF GRAND JURY

TRUE BILL

For person of Grand Jury Date: FEB 12 2004

VERDICT

For person of Petit Jury Date:

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.

EXHIBIT
1

STATE OF SOUTH CAROLINA)

INDICTMENT

COUNTY OF RICHLAND)

At a Court of General Sessions, convened on February 11, 2004, the Grand Jurors of Richland County present upon their oath:

MURDER

That Keith A. Sims did in Richland County on or about December 31, 2003, feloniously, willfully and with malice aforethought, kill one Bryan A. Anderson by means of shooting the victim with a handgun and that the said victim died as a proximate result thereof. All in violation of SC Code of Laws § 16-3-10

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Warren B. Giese
Warren B. Giese, SOLICITOR



applicant's case". Tr.p. 390, L. 10-17.

Evidence is relevant when it logically tends to prove or disprove material fact in issue. State v. Galloway, 407 S.E.2d 662 (S.C. App. 1991); evidence is unfairly prejudicial if it has the undue tendency to suggest a decision on an improper basis. State v. Saltz, 551 S.E.2d 240 (S.C. 2001); Rule 403, S.C.R.E. The applicant submits that counsel's failure to object to solicitor's introduction of irrelevant and inadmissible evidence to jury was ineffective assistance of counsel that prejudiced his defense. Nichols v. State, 417 S.E.2d 860 (S.C. 1992).

I.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

[Standard of Review]

When ineffective assistance of counsel is alleged as a ground for relief in a PCR action, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L. Ed.2d 674, 693 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Courts use a two pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625.

In interpreting the prejudice prong, our State Supreme Court in State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (S.C. 2000), held "consistent with

existing federal precedent, that a defendant must show either deliberate prosecutorial misconduct or prejudice to make out a violation of the Sixth Amendment, but not both.” Id. 527 S.E.2d at 109. The court determined that “deliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice.” Id. 527 S.E.2d at 109.

Moreover, claims alleging that trial counsel was ineffective for failing to object to trial court errors are cognizable in a PCR proceeding. This includes failure to object to inadmissible evidence, Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001) (failure to object to hearsay); improper arguments by the prosecution, Matthews v. State, 2001 WL 1887491 (S.C. Sup. Ct., decided June 17, 2002); erroneous jury instructions, Plyer v. State, 309 S.C. 408, 424 S.E.2d 477 (1992) (counsel deficient for failing to object to improper charge on malice, which improperly shifted burden of proof from the state to defendant); or any other matter that could otherwise be reviewed on direct appeal, if not for counsel’s failure to properly preserve the issue.

Accordingly, a claim alleging that trial counsel was ineffective for failing to object to an indictment obtained through acts of perjury and gross prosecutorial misconduct, can be raised in a PCR proceeding pursuant to the Strickland standard of review.

[Perjury and Gross Prosecutorial Misconduct]

Here, Applicant argues that trial counsel provided ineffective assistance by allowing the State, without objection, to charge, convict and sentence him under an indictment obtained through willful acts of perjury and prosecutorial misconduct.

Therefore, Applicant would show this PCR Court the following:

Applicant’s bill of indictment prints that, “At a Court of General Sessions, convened on February 11, 2004, the Grand Jurors of Richland County present upon their oath.” (See Exhibit 1, Indictment). Furthermore, the indictment is affixed with a true bill stamp, and signed by Solicitor Warren B. Giese (see Exhibit 1, Indictment), who was the State Judicial Official assigned the responsibility of preparing and processing the document.

However, the evidence conclusively establishes that the information published in

the document regarding a February 11, 2004, convened Grand Jury, is in fact false. The attached, letter from the Court of Administration dated October 15, 2007 shows that in February the Grand Jury did not meet, they met March 29, 2004 (see Exhibit 1, Indictment in comparison with Exhibit 2, letter from Court of Administration). Thus, false information is contained in the State indictment, prepared and processed by Solicitor Warren B. Giese.

South Carolina law is very specific concerning matters of false information in State documents. It is an Offense Against Public Justice to Willfully give false information in a State document. S.C. Code Ann. {16-9-10, "Perjury and Subornation of Perjury" states in pertinent part:

A(2). It is unlawful for a person to willfully give false, misleading, or incompetent information on a document, record or report or form required by the law of this State.

B(2). A person who violates the provisions of subsection A(2) is guilty of a misdemeanor, and upon conviction must be imprisoned not more than 6 months or fined not less than one hundred dollars or both.

C. A person may be convicted under this section ... if he commits perjury by his own act, consent or agreement.

FIRST: it should be noted that a criminal indictment is a document required by the law of this State. In State v. Gentry, 363 S.C. 96, 610 S.E.2d 494 (2005), our Supreme Court held that an indictment is a "notice document" required by both our State Constitution and Statutory Law. See S.C. Const. Art. I. {11, and Art. V. {22. See also S.C. Code Ann. {17-19-10 (2003). ("[n]o person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a Grand Jury ..., "except in specific instances).

Therefore, for purposes of establishing an offense of perjury against public justice, a State indictment would satisfy the document requirements specified under subsection A(2), S.C. Code Ann. {16-9-10.

SECOND: it should also be noted that a County Prosecutor [Warren B Giese] is required to know the laws of this State, and has special responsibilities to see that justice is done, and is held to the highest standards of professional ethics. See Appellate Court

Rules, Rule 407, Rules of Professional Conduct, Rule 3.8 Comment. Also see Quattlebaum. In fact, the prosecutor holds a quasi-judicial position. See State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975); State v. King, 222 S.C. 108, 71 S.E.2d 793, 798 (1952) (“... He [prosecutor] must see that no conviction takes place except in strict conformity with the law, and that the accused is not deprived of any constitutional right or privilege.”)

However, instead of discharging his responsibilities in conformity with the laws of this State, Solicitor Giese, knowingly and willfully caused false information to be printed and published in Applicant’s indictment, thereby violating the provisions of {16-9-10. Thus, Solicitor Giese is guilty of committing an act of perjury against public justice, and which would by necessity also constitute gross professional misconduct. See Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects); Rule 8.4(b) (it is professional misconduct for a lawyer to engage in dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Accordingly, both perjury and gross prosecutorial misconduct are established in this case. Therefore, Applicant would show this Court the following ineffective assistance of trial counsel for not challenging the false indictment information*:

[Counsel’s Deficient Performance]

In Strickland, the Court explained that “access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Id. 466 U.S. at 685, 104 S.Ct. at 2063 (quoting Adams v. United States ex-rel, McCann, 317 U.S. 269, 275, 276, 53 S.Ct. 236, 240, 87 L.Ed. 268 (1942)), “Counsel ... has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” Id. 466 U.S. at 689, 104 S.Ct. at 2065.

A criminal attorney is constitutionally required to conduct pretrial investigation and

discovery, and file any necessary motions to suppress. See e.g. Kimmelman v. Morrison, 477 U.S. 365, 385 (1986). It was conclusively shown above that false information is contained to Applicant's true billed State indictment(s). That the false information is on the face of the indictment(s), and easily discoverable through an examination of the document. Under these circumstances, "any competent" trial attorney would have not hesitated to enter an objection, and/or move to suppress Applicant's defective indictment(s), especially given the certainty of prevailing on such a motion.

All attorneys licensed to practice criminal law in South Carolina are required to know and understand this State statutory law and rules related to the lawful return of true bill indictments(s). There it would be an untenable position for trial counsel to now claim ignorance of the law.

South Carolina criminal law sets forth clear provisions for challenging defects in the indictment. See S.C. Code Ann. §17-19-90, ("Every objection to an indictment for any defect apparent on the face thereof, shall be taken by demurrer or motion to squash such indictment before the jury shall be sworn and not afterwards"). Unquestionably, trial counsel should have utilized §17-19-90, to challenge Applicant's true bill indictment(s).

In summary, the false information is apparent on the face of the indictment, and easily discovery through an examination of the document. Accordingly, trial counsel provided a deficient performance in not entering an objection to Applicant's defective indictment(s), or moving to squash.

[Prejudice]

In interpreting the prejudice prong under a defendant's sixth amendment right to counsel, our State Supreme Court identified a narrow category of cases in which prejudice is presumed. In Quattlebaum, the Supreme Court concluded, consistent with existing Federal precedent, "... that a defendant must show either deliberate prosecutorial misconduct or prejudice to make out a violation of the Sixth Amendment, but not both. Deliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice." Id. 527 S.E.2d at 109. Our Supreme Court further determined that the focus must be on the

misconduct because the Court bears the ultimate responsibility for maintaining judicial integrity and high standards of professional conduct among the members of the bar, and for protecting and defending the constitutional rights of the accused. See e.g. Quattlebaum, 527 S.E.2d at 109.

Above, prima facie evidence was presented showing that the Prosecutor violated the provisions of {16-9-10, and thereby committed an act of perjury against public justice by willfully giving false information in Applicant's true billed indictment. Moreover, it was further established that the Prosecutor's act of perjury against public justice, would by its very nature also constitute a violation of the Rules of Professional Conduct, specifically, [Rules 8.4(b); 8.4(d); and 8.4(e)], and thereby establishing gross prosecutorial misconduct. Thus, Quattlebaum is controlling in this case, and an "irrebuttable presumption of prejudice" has been established. See Quattlebaum, 527 S.E.2d at 109.

II. CONCLUSION

Under the circumstances found in this case, Applicant's conviction and sentence cannot be allowed to stand because to do so, the State would have to now become a knowing party to the Prosecutor's acts of perjury and gross misconduct, and maintain Applicant's indictment in it's records, thereby representing those acts to the public.

Above, Applicant established a claim of ineffective assistance of trial counsel by his showing that (1) counsel's performance was deficient in failing to Object to the defective indictment, and (2) because prejudice is presumed due to the Prosecutor's acts of perjury and gross misconduct.

Accordingly, and based on the foregoing, Applicant's conviction and sentence should be overturned.

9(d)-10(d) The Applicant was denied the right to effective assistance of trial counsel by counsel's failure to object to solicitor's closing argument that improperly pitted applicant against state witness(s).

In closing argument, the solicitor improperly pitted applicant's testimony against state's chief witness as follows:

Solicitor: His (applicant) demeanor, his emotion, what happen? You all heard it through several witnesses but you first heard it through Nikki. And almost, credibility, believability, you

Can look to Nikki, and you can look at defendant.

Tr.p. 711, L. 3-7.

Solicitor: You can also look to Nikki and Benard for credibility versus the defendant.

Tr.p. 721, L. 23-25.

It was applicant's defense at trial that he killed the victim in self-defense. However, during trial Nikki Davis, who was charged as a co-conspirator in applicant's case, testified that applicant had told his girlfriend that he had "murdered the victim". Therefore, credibility was crucial issue in the case. When credibility is crucial issue in a case, improper pitting of witnesses is prejudicial and cannot be deemed harmless. State v. Benning, 524 S.E.2d 852 (S.C.App. 1999); see also Burgess v. State, 445 S.E.2d 445 (S.C. 1998).

The applicant thus submit that counsel's failure to object to solicitor's improper argument, in this instant, was ineffective assistance of counsel that prejudiced his defense. See, e.g., Green v. State, 527 S.E.2d 98 (S.C. 2000).

I. ARGUMENT

9(a)-10(a) The Applicant was denied the right to effective assistance of trial counsel by counsel's failure to object to solicitor's vouching for credibility of its witness.

In closing argument, the solicitor made the following comments regarding the testimony of its chief witness, Sierra (Nikki) Davis:

Solicitor: You heard Natalie through Nikki, which is co-conspirator testimony which is allowed to come out under the rules, say, "he murdered somebody (victim). No truer words were spoken in this case". (Emphasis added).

Tr.p. 707, L. 5-9.

Impermissible vouching by government for its witness generally occurs when prosecution's action are such that jury could reasonably believe that prosecutor is indicating personal belief in the credibility of the witness. State v. Kelly, 540 S.E.2d 851 (S.C. 2001).

Applicant submits that counsel's failure to object to solicitor's vouching for its witness was ineffective assistance of counsel and prejudice clearly flowed from counsel failure to object to the vouching warranting reversal of his conviction for murder, as Nikki Davis was solicitor's key witness and her credibility was crucial to solicitor's case as applicant presented a "self-defense defense", such that believing witness ~~was~~ only ^{of} jury could convict applicant, and Nikki Davis's credibility was questionable in light of her being charged as a co-conspirator, and her interest in providing favorable testimony for state to obtain leniency in her case. See, e.g., Gilchrist v. State, 365 S.E.2d 281 (S.C. 2002).

ISSUE > (1)

My Due Process rights were violated when I was constitutionally deprived the ability to put forth a complete defense and the right to a Fair trial. >>

At trial I motioned to admit the police report and testimony of police officer Scott McDonald where in police officer Scott McDonald documents a prior gunfire fight between Brian Anderson and an individual named Marcus Majeeed. Brian Anderson is the decedent in the present case of which I am the defendant. I testified to prior difficulties and prior incidents of violence initiated by decedent Brian Anderson against me. Most importantly I testified about my knowledge of decedent Brian Anderson gunfire fight against Marcus Majeeed and that this particular knowledge acutely influenced my state of mind to act on the appearance of Brian Anderson, physical gestures, motions and actions and gave me the right to judge Brian Anderson's conduct more harshly than in absence of this knowledge. My trial produced evidence that justified the charge of "Self-Defense". I motioned to admit the police report and testimony of police officer Scott McDonald to establish my "state of mind" in accordance with my defense strategy of my right "to act upon appearance" in defending myself and that the killing of Brian Anderson is a justifiable killing and I should not bare any criminal liability of Murder for killing Brian Anderson.

In evaluating and determining my motion to admit the police report

and determining my motion to admit the police report and testimony of police officer Scott McDonald to establish my "State of Mind" the trial court ruled the testimony of police officer Scott McDonald is "too remote both in time and in subject matter because it was not directed at the defendant and had it been closer in time, it might have created some fear on part of the defendant that would be admissible for this jury to consider (Tr. p. 655 L-22 through pg 656 L-2"

The trial court analysis determination deprived me of my "Constitutional" Due Process right to put forth a complete defense and to a fair trial. The trial judge denied the admission of police officer Scott McDonald's police report and testimony because of remoteness of time and because I was not the victim in police officer Scott McDonald police report, an individual named Marcus Majced is the victim. The fatal constitutional flaw the trial court made is that the trial court evaluated my "State of Mind" ground of admission for police officer Scott McDonald police report and testimony under the analysis of "prior difficulties" and "prior incidents of Violence" evaluative guidelines. Because the trial court evaluated my motion to admit police officer Scott McDonald police report and testimony under incorrect analysis, the resulting determination of the trial court that police officer Scott McDonald's police report and testimony is inadmissible is equally incorrect.

(2) Issue >

(2)

The flaw of trial court's evaluation and determination of denying my motion to admit the police report and testimony of police officer Scott McDonald culminates to Due Process violation because it deprived me of the ability to establish and present a complete demonstration of evidence to the jury in order for the jury to constitutionally evaluate the "reasonableness" of my action of killing Brian Anderson.

In determining and evaluating the "reasonableness" of my action of killing Brian Anderson it is necessary for the jury to determine and evaluate my "state of mind" at the moment the killing transpired. Therefore, it logically follows that absent a complete ~~and~~ evidential presentation of my "state of mind" the jury can not constitutionally evaluate the "reasonableness" of my action of killing Brian Anderson in determining whether this is a homicide or self-defense killing.

The trial court's Flaw which is not grounded in law to exclude my "state of mind" evidence, created a tipping point in my trial - a tip towards conviction, and this violates my due process rights to present a complete defense and violate my right to a fair trial. "Self-Defense" is a "complete defense". I received self-defense as a jury charge, I am entitled to present all admissible evidence to advance my complete defense, "proximity" of assault and not being the particular victim in a particular incident are not valid legal grounds to deny my motion to present evidence that goes to

Show my "State of Mind" and my reasonableness to judge Brian Anderson's conduct more harshly because of my knowledge of Brian Anderson's gun fire fight.

In summation, the trial court's actions unconstitutional prevented me from a complete demonstration of evidence to the jury in order for the jury to constitutional evaluate whether I have established that I am a "reasonable" prudent person of ordinary firmness and courage would have had the same belief "that defending oneself made killing Brian Anderson a justified killing factually and legally. The trial was not a fair trial, Applicants Due Process rights are violated, this issue is about the trial court's actions impact on my constitutional rights to present a complete defense and the trial court's actions impact on my constitutional rights to a fair trial."

State v. Nichols 481 S.E2d 377 > State v. Hill 123 S.E 817 > State v. Link scales 99 S.E2d 663 >
 State v. Fuller > State v. Davis >

Issue > Judge Violated my Due Process right when he
Unconstitutionally shifted burden of proof

The error is that the Judge had no right to instruct the Jury that they might infer malice from the mere fact of Killing with a weapon calculated to do serious bodily harm or to take life, for the reason that this is a charge on the facts contrary to the Constitution, in that it undertakes to intimate and instruct the jury what facts in the case are evidence of Malice". It was error in that after all evidence is out, the Infer of Malice from the use of a deadly weapon fades the case, and the jury must find malice, if at all, from the evidence without any aid from the court as to what weight should be attached to killing with a deadly weapon, or what inference they may draw from such. Trial Judge charges that malice is inferred from the use of a deadly weapon were unconstitutional burden shifting instructions. see "(Sandstrom v. Montana) 442, U.S. 510, 99 S. Ct. 2450, 61 L.Ed. 2d 49 (1979).

This transition resulted from the United States Supreme Court's pronouncement that "Due Process clause of the 14th Amendment is violated when a jury charge creates a mandatory presumption and impermissibly shifts the burden of proof to the defendant - (Sandstrom v. Montana) holding that "burden-shifting deprive a defendant of the "due process of law and are therefore unconstitutional." "Due Process clause" forbids a state from placing the burden on the accused to prove his actions.) For the record Your Honor not talking about "Belcher".

" Also Solicitor Meadows Rehighlighted In closing Arguments Tr.p. 703 L. 21-25