

Volume II of II

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Florence County
Thomas A. Russo, Circuit Court Judge

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S.C. Supreme Court

DEVODUS ROUSE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2013-000474

APPENDIX

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Carolyn WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 236

1 A. Yes.

2 Q. All right. When did you go back home?

3 A. I didn't, actually I went there to get my clothes and
4 I went back to my mom's house.

5 Q. Okay. So you went back to your house to get your
6 clothes?

7 A. I went the next day.

8 Q. The next day, okay. When did you talk to law
9 enforcement for the first time regarding this?

10 A. January the 3rd.

11 Q. January the 3rd, the next day?

12 A. Uh-huh.

13 Q. Did anything else happen that evening, or in those
14 early morning hours that you can recall that you need
15 to tell the jury it happened?

16 A. On January the 3rd?

17 Q. January 2nd.

18 A. On the second, no.

19 Q. Anything happen January 3rd?

20 A. Well, on January 3rd, that's when I went to get my
21 clothes, and came back to my mom's house. Detective
22 Caraway and what's his name, Garwin?

23 Q. Godwin.

24 A. Yeah. They came by my mom's house and we went down
25 to --- we came here to be questioned, to do a

Carolyn WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 237

1 statement.

2 Q. Okay. And did you have any problems doing that?

3 A. No.

4 Q. Okay. Did you tell them exactly what happened?

5 A. Yes, the same thing, that I am sitting here telling
6 the jury now, and everybody else that what's my
7 statement.

8 Q. Okay. And was that statement even true?

9 A. Yes.

10 Q. And was it accurate and complete and detailed as best
11 as you could recollect?

12 A. Yes.

13 Q. This is the best to your recollection today that you
14 told this jury?

15 A. Yes.

16 Q. This is very very important. When you heard the
17 shot, are you absolutely positive who was in your
18 house?

19 A. Yes.

20 Q. You are positive Douglas Washington was in your
21 house?

22 A. Yes.

23 Q. You are positive that Travis James, also known as
24 Gusto was in your house?

25 A. Yes.

Carolyn WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 238

1 Q. And are you positive Cory was in your house?

2 A. Yes.

3 Q. Is Cory still around?

4 A. No, Cory was shot back in September of '08.

5 Q. And can you tell us who does Quandeline have children
6 with?

7 A. Yes, Travis James.

8 Q. Okay. And is that the grand baby that you were
9 referring to was at the house?

10 A. Yes.

11 Q. The one that Tatica took care of while you went to
12 the hospital?

13 A. Yes.

14 Q. And can you tell us when you found out that
15 Quandeline and Brandon Timmons, had romantic
16 relationship going on?

17 A. It was on my birthday, January the 3rd.

18 Q. Where did you get that information?

19 A. From Quandeline.

20 MR. CLEMENTS: Beg The Court's indulgence.

21 THE COURT: Yes, sir.

22 (PAUSE)

23 Q. Ms. Washington, did anyone leave before the ambulance
24 got there and law enforcement got there?

25 A. Yes.

Carolyn WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 239

1 Q. Who?

2 A. Doug.

3 Q. And how did he leave?

4 A. He left in the truck that they came in.

5 Q. Okay. Did you see anybody go with him?

6 A. No.

7 Q. No one else left?

8 A. No, I didn't see anyone else.

9 Q. Okay. And you didn't see anybody else out in the
10 yard with Brandon before he was shot?

11 A. No, I didn't.

12 Q. Where were you during that time?

13 A. When, when he got shot?

14 Q. Yes, when you heard the gun shot?

15 A. I was in the kitchen.

16 MR. CLEMENTS: Okay. Please answer any questions,
17 Mr. Heron may have.

18 MR. HERON: Your Honor, may we approach.

19 THE COURT: Sure.

20 (Whereupon, a bench conference was held in the
21 presence of the jury but out of the hearing of the jury.)

22 THE COURT: Let the record show that we have had a
23 bench conference and during that bench conference a
24 general request was made as to lunch at this particular
25 time. Obviously, I recognize the rule that ordinarily we

Carolyn WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 240

1 do not split a witness, but I think this is a circumstance
2 where we can do this.

3 Ms. Washington, give me your attention. I am going
4 to take a lunch receipt here, and while the jury and The
5 Court is away and you are away during lunch do not talk to
6 anyone about this case. You cannot talk to the Solicitor
7 or any officer about this case. You can't talk to your
8 family about this case. You cannot talk about this case,
9 because it is important that I preserve the integrity of
10 your testimony. Do you understand?

11 MS. WASHINGTON: Yes, sir.

12 THE COURT: Do you recognize that this is a Court
13 Order that you cannot discuss the case at all with anyone
14 during the lunch break?

15 MS. WASHINGTON: Yes.

16 THE COURT: And you do assure The Court, you will
17 abide by that instruction?

18 MS. WASHINGTON: Yes.

19 THE COURT: Thank you. Is that suitable with The
20 State?

21 MR. CLEMENTS: It is, Your Honor.

22 THE COURT: Is that suitable with Defense?

23 MR. HERON: It is, Your Honor.

24 THE COURT: Jurors, I need to remind you about not
25 discussing the case among yourselves. Obviously, you

Carolyn WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 241

1 cannot do that, and you cannot discuss it with anyone
2 else.

3 Additionally, today there has been television
4 coverage in the courtroom. I allowed that The Court rule
5 where I issued a written Order to that effect. I don't
6 know when they put things on television only the Lord's
7 knows. Anyway, don't watch any television while you are
8 away, please, do not do that.

9 And let's talk about the time to return. 1:30, can
10 you be back at 1:30, everybody, 1:30. Okay. Come right
11 through here. No one leaving now but the jury. Catch
12 them the elevator. No one but the jury.

13 (Whereupon, the jury exits the courtroom at
14 12:15 p.m.)

15 THE COURT: Anything from The State you need to be
16 on the record before we take the lunch receipt?

17 MR. CLEMENTS: No, Your Honor.

18 THE COURT: Defense?

19 MR. HERON: No, Your Honor.

20 THE COURT: 1L39.

21 MR. HERON: Thank you, Your Honor.

22 THE COURT: Thanks.

23 (Whereupon, a lunch recess was taken from 12:15
24 p.m. until 1:28 p.m.)

25 THE COURT: Thank you, please be seated. State

Carolyn WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 242

1 ready to proceed.

2 MR. CLEMENTS: Your Honor, we have one housekeeping
3 matter, and they are looking for our witness.

4 THE COURT: Okay.

5 MR. CLEMENTS: Your Honor, we put the 911 cassette
6 tape, into evidence.

7 THE COURT: Yes.

8 MR. CLEMENTS: At this time I would like to have the
9 digitized version 911 call marked as a Court Exhibit, so
10 if in the event the jury wants to hear it again, they have
11 it, and it's more ease with this than the tape.

12 THE COURT: Counsel?

13 MR. HERON: That's fine.

14 THE COURT: Okay. That is approved.

15 MR. CLEMENTS: Thank you, Your Honor.

16 THE COURT: Thank you.

17 MR. CLEMENTS: No, but if they want to come back and
18 want to hear the tape you have it.

19 WHEREUPON, COURT'S EXHIBIT

20 NUMBER 5 WAS MARKED AND

21 ADMITTED INTO THE RECORD.

22 THE COURT: Now ready to proceed?

23 MR. CLEMENTS: Your Honor, we're ready to proceed
24 but I don't know where the witness is. You told them all
25 to be back at 1:30. I haven't seen her since.

CAROLYN WASHINGTON - CROSS EXAMINATION BY MR. HERON 243

1 THE COURT: See if anybody is out in the hallway
2 there.

3 MR. CLEMENTS: They're coming up, Your Honor.

4 THE COURT: Okay.

5 MR. CLEMENTS: Thank you.

6 THE COURT: All right, bring the jury out.

7 (Whereupon, the jury enters the courtroom at
8 1:30 p.m.)

9 THE COURT: By the way, we got heat now.

10 MADAM COURT REPORTER: Thank you.

11 THE COURT: Ms. Washington, you remain under oath,
12 you understand that?

13 MS. WASHINGTON: Yes, sir.

14 THE COURT: Cross exam, counsel.

15 MR. HERON: Thank you.

16 CROSS EXAMINATION BY MR. HERON

17 Q. Ms. Washington, before we get started, you've never
18 seen this young man sitting to my right, have you?

19 A. No, sir.

20 Q. Okay. Ms. Washington, I am going to ask you a series
21 of questions, and I know that some of these questions
22 will be difficult for you. At any point and time you
23 need a break just let me know, but it is important
24 that we go step by step. You gave a recorded to the
25 law enforcement, is that right?

CAROLYN WASHINGTON - CROSS EXAMINATION BY MR. HERON 244

1 A. Yes, I did.

2 Q. As a matter of fact, it was printed up for you in a
3 transcript like this?

4 A. Yes.

5 Q. Now preparing for your testimony you reviewed the
6 testimony that you gave from the statement in the
7 transcript, is that right?

8 A. I looked over it, but pretty much I remember
9 everything because, it's mine.

10 Q. Well if remember everything, why didn't you tell this
11 jury about Doug's plan to rob Brandon?

12 A. Because that question wasn't asked of me.

13 Q. We'll get back to that. Doug is your nephew?

14 A. Yes, he is.

15 Q. Doug Washington is your nephew.

16 A. Yes.

17 Q. Quandeline is your daughter.

18 A. Yes.

19 Q. Tell the jury how Travis James fits in your
20 relationship with your --- does he have any kind of
21 relationship with any member of your family?

22 A. Like I stated before, he has two kids from my
23 daughter, but he doesn't come by. He don't get his
24 kids or anything. So I'm faithfully stuck with them
25 all the time so.

1 Q. So Travis James has two children with your daughter,
2 Quandeline, is that right?

3 A. Quandeline, yes.

4 Q. Quandeline, I'm sorry. Now Quandeline is dating
5 Brandon, is that right?

6 A. That is what I found out on January the 3rd, yes.

7 Q. But they were keeping that a secret, is that right?

8 A. I assume so, because I didn't know anything about it.

9 Q. When Doug came in the house was he yelling or
10 anything?

11 A. Yelling?

12 Q. Uh-huh.

13 A. He was talking to Quandeline about some guy that ask
14 something about her or something but --

15 Q. Didn't he say something to the effect that the boy
16 out back was trying to play me?

17 MR. CLEMENTS: Your Honor, I would object, hearsay,
18 in this instance.

19 THE COURT: What do you say to that, Counsel?

20 MR. HERON: I'll rephrase it.

21 Q. Now when Brandon got your home he looked --- well
22 when he came in and talked with you, he spoke with
23 you didn't he. He talked with you. You ask him if
24 he wanted some cheese toast, is that right?

25 A. Yes, I did.

CAROLYN WASHINGTON - CROSS EXAMINATION BY MR. HERON 246

1 Q. Now please describe how Brandon looked after he saw
2 Doug Washington, Cory Byrd, and Travis James?

3 A. Well like I say, I see Brandon a lot, and by looking
4 in his eyes, yes, he had looked like he was
5 frightened, scared of something. But I don't know
6 what basically, you know, caused him to look like
7 that. But, no, he wasn't his normal self.

8 Q. But he was fine until they got there?

9 A. They was already there when he pulled up.

10 Q. Now, did you tell Brandon that Doug and Cory and
11 Travis had a plan to rob him?

12 A. No, why would I tell him something like that when I
13 didn't even know. I'm not a street girl. I don't
14 meet in streets. I don't hear what basically be said
15 in the streets.

16 Q. Okay. But the day after the shooting you heard
17 something to that effect didn't you?

18 A. Yes, I did.

19 Q. Okay. As a matter of fact, the day after the
20 shooting Doug Washington came over to your house
21 didn't he?

22 A. To my house?

23 Q. Yes, ma'am.

24 A. Marion Street house?

25 Q. I should rephrase it.

1 A. Yes.

2 Q. Did Doug Washington talk with you the day after the
3 shooting?

4 A. Yes, he did at my grandmother's --- I mean, at my
5 mother's house. At his grandmother's house, yes.

6 Q. Okay. And again, Doug is your nephew?

7 A. Yes, he is.

8 Q. Now, didn't Doug when he came in to see you wasn't he
9 concerned about what you had told law enforcement?

10 A. Yes.

11 MR. CLEMENTS: Objection, Your Honor.

12 THE COURT: I sustain the objection. That is
13 quintessential hearsay.

14 Q. What did you tell Doug when you came --- when he came
15 to see at your grandmother's house the next day?

16 A. Well, he was asking about Brandon, you know, what is
17 going on, you know, with Brandon. Cause just like I
18 let him know that Brandon died that night before that
19 morning. So that basically, you know, the
20 conversation that we had, and like I said I don't
21 know anything. I said I don't whether they had
22 anything to do with it, but if they did they need to
23 come clean, so I don't know. But I knew for a fact
24 that Doug, Gusto, and Cory was inside the house that
25 night.

CAROLYN WASHINGTON - CROSS EXAMINATION BY MR. HERON 248

1 Q. Ms. Washington, isn't it true that you told Doug
2 Washington the day after the shooting that you had
3 heard that he wanted to rob Brandon Timmons. Didn't
4 you tell Doug Washington that?

5 A. Yes, I did. Yes, I did heart that from someone else.
6 Yes, I did. So whether that I heard it not, you
7 know, that night when they was at the house, no, I
8 didn't know anything, because if I did, he would have
9 never walked out that door.

10 Q. And the reason you went to law enforcement is you
11 were concerned that law enforcement was looking at
12 you as a possible suspect to have something to do
13 with the crime, isn't that true?

14 A. No. I went and what I did I went to give my
15 statement or what I seen that night. I would never
16 be a suspect.

17 Q. But had you heard some word on the street that the
18 police were looking for --

19 MR. CLEMENTS: Your Honor, I object --

20 THE COURT: I sustain the objection to that,
21 counsel, we can't have street talk.

22 Q. Now isn't it true, Ms. Washington, that when you
23 heard that gun shot you said and I quote, I hope Doug
24 is not out there shooting?

25 A. No, I did not say that.

1 Q. You didn't say that?

2 A. No, I didn't.

3 Q. Now, who was in the kitchen with you?

4 A. Cory.

5 Q. Cory. And where is Doug at?

6 A. Doug was standing at my room door with Quandeline.

7 Q. With Quandeline. I thought the room was up front,
8 in the front of the house?

9 A. It is, but if I look out my kitchen, I can see into
10 my bedroom.

11 Q. Okay. And you're cooking your cheese toast, you
12 eating your cheese toast?

13 A. No, I wasn't eating in the kitchen. I never got a
14 chance to eat my cheese toast. When I went back
15 there the next day the same plate was still sitting
16 in the house with the cheese toast.

17 Q. Okay. So what were you doing when Cory came into the
18 kitchen?

19 A. Just standing there at my den door. We were
20 conversating.

21 Q. Isn't it true that after Brandon left all three, Doug
22 Washington, Travis James, and Cory Byrd, followed him
23 outside, isn't that true?

24 A. No.

25 Q. That didn't happen?

CAROLYN WASHINGTON - CROSS EXAMINATION BY MR. HERON 250

1 A. No, that did not happen.

2 Q. Okay.

3 A. Because they was already outside when Brandon pulled
4 up in the yard. After Brandon came into the house
5 then Brandon on his way back --- they already back in
6 the house when Brandon was on his way back out the
7 door. So when Brandon went out the door and the door
8 closed no one never went back out the door. The door
9 closed. I know when my front door open and shut,
10 because it make a noise. So, therefore I would have
11 known if somebody in that house had went back out.

12 Q. Now after you heard the gun shot isn't it true that
13 Doug Washington was standing at the front door
14 preventing people from going out?

15 A. No, he wasn't he was at my room door.

16 Q. Okay. DO you have a copy of your transcript of your
17 statement?

18 A. Yes, I do. Okay.

19 Q. Wasn't he preventing your daughter from leaving out
20 the front door of the house?

21 A. Yes, but when the gun shot went off I can't really
22 tell you whether they stayed in bedroom conversating,
23 or they done had made it the front door. So they
24 heard the gun shot probably the same time I did.

25 Q. All right, let's talk about your front door and where

1 the gun shots were. I think you told Mr. Clements
2 that this was the front of Brandon Timmons' car, it's
3 somewhere about here, is that right?

4 A. No. It was further up.

5 Q. Further up --

6 A. Because he started --

7 Q. All right, tell me when to stop.

8 A. Right there.

9 Q. So these are the front steps to your house right
10 here?

11 A. Uh-huh.

12 Q. Okay. Did you see those bullets laying outside your
13 house?

14 A. No.

15 Q. Okay. Let me show you this picture that the police
16 took.

17 A. I wasn't concerned about the bullet that night, I was
18 concerned about the body that was laying there.

19 Q. Okay. And we'll talk about that. But State's
20 Exhibit 9, I am showing you. That is a picture of
21 your front steps, is that right?

22 A. Yes, it is.

23 Q. Now State's Exhibit 10, see these markers right here?

24 A. What are those?

25 Q. Take a closer look at them. I am going to show you

CAROLYN WASHINGTON - CROSS EXAMINATION BY MR. HERON 252

1 what has been marked as State's Exhibit 12. What
2 does that appear to be to you?

3 A. That's a bullet.

4 Q. Okay. Does that look like a loaded bullet?

5 A. I can't really say, cause I don't anything about
6 bullets. I don't even look at bullets.

7 Q. Okay. All right. Now, if this 2, this is 2 and 2 is
8 right there. How would you describe the relationship
9 of the bullet to your front steps? This is a picture
10 of your steps?

11 A. Okay, the bullet is right next to the step.

12 Q. Right next --- so if this pen cap was a bullet and
13 these are your steps --

14 A. Uh-huh.

15 Q. Could I put my pen cap right here, and be pretty
16 close to where the bullet was?

17 A. Yes.

18 Q. I put it right there. Now, Number 3 is also --- is
19 that pretty close to your steps?

20 A. Yes, it is.

21 Q. And I'll show you State's Exhibit 13, is that a empty
22 bullet, casing of a bullet?

23 A. Yes.

24 Q. And again, that is almost right next to the steps,
25 isn't it?

1 A. Uh-huh.

2 Q. Okay. Have you ever seen anybody fire a gun?

3 A. No.

4 Q. Okay. Not on TV?

5 A. Yeah, on TV, but not in person.

6 Q. Okay. So again, if this is the front of your steps,
7 and there is one live bullet right here, and one
8 empty bullet right here, and Brandon's car is right
9 here, is that right?

10 A. Uh-huh.

11 Q. And Brandon is over there?

12 A. Yes.

13 Q. Okay. Now, let's talk about what happened after the
14 shooting. Was Doug stopping you all from going out
15 the house?

16 A. He was stopping my daughter.

17 Q. If I wanted to go from here, and let's imagine this
18 is the front of your steps, how long do you think it
19 would take to get to the front if this was your
20 steps. I could get there pretty, couldn't I?

21 A. Okay. If this is the step then that is my door where
22 he is.

23 Q. Okay. So if this is the front step, I'd be right
24 here, in your house, is that right?

25 A. Yes.

CAROLYN WASHINGTON - CROSS EXAMINATION BY MR. HERON 254

1 Q. Now, when you went outside and you saw Brandon on the
2 ground, tell us what happened then?

3 A. When I seen Brandon on the ground I went over there
4 and I looked at him and then I started panic, so I
5 know something already had happened to him. So
6 that's when I realized his car still was running and
7 I got in his car, and that's when I tried to pull the
8 seat up. And that's when I realized Doug was getting
9 in the car with me. Then we went on with the
10 ignition with the car he turned it off, took the keys
11 and then the phone --- his cell phone fell from
12 somewhere and I was like, yes, I got a cell phone to
13 use. And then I was going to use the cell phone to
14 call 911, but then he took the phone from me. So
15 after that I jumped out the car and that's when I
16 started really panicking, because I know I need to
17 call someone to help him, because he was just laying
18 there on ground.

19 Q. Long story short, your nephew was preventing you from
20 calling 911 to save somebody that was bleeding, dying
21 on your front lawn, isn't that true?

22 A. Yes, he prevented me from calling 911.

23 Q. As a matter of fact, when you tried to get in Brandon
24 Timmons' car after he snatched --- let me back up.
25 He snatched the phone out of somebody's hand in the

1 house, when they were coming out, is that right?

2 A. Yes, it was me. He snatched the phone from me.

3 Q. Okay. So you had the house phone --

4 A. I don't have a house phone, it was a cell phone, we
5 don't have a cell phone.

6 Q. Okay. So you had a cell phone coming out of your
7 house, Doug snatches the phone, you get in Brandon
8 Timmons' car, because you see its running and want to
9 go to the convenient store, dial a pay phone --

10 A. Yes.

11 Q. Doug Washington, gets in the passenger side of his
12 car, snatches the keys out of the ignition, is that
13 right?

14 A. Yes.

15 Q. A cell phone drops, you pick up the cell phone
16 because you think you can use that to call 911, and
17 Doug Washington snatches that from your hand to,
18 isn't that right?

19 A. Yes.

20 Q. And isn't it also true that after Doug Washington
21 found out the police were on the way, law enforcement
22 was on the way he sped away, he sped away so fast
23 that he almost ran over Brandon Timmons, isn't that
24 true?

25 A. Well, I can't actually say he ran over him, run over

CAROLYN WASHINGTON - CROSS EXAMINATION BY MR. HERON 256

1 him, because my focus was on Brandon.

2 Q. Did you see Doug Washington leave?

3 A. I seen when the truck took off but I didn't actually
4 see him. He got in the truck ---

5 Q. How close was he to running over Brandon when he
6 left?

7 A. It was space enough between for him to go around ---

8 Q. We talking a foot, we talking three feet, we talking
9 ten yards, how close?

10 A. Brandon was over here

11 Q. Okay. How close was it do you think Doug was when he
12 drove away to hitting Brandon?

13 A. I don't --- I can't say because I didn't see, you
14 know, that happening.

15 Q. Let's talk about Cory Byrd and Travis James. What
16 are they doing at this time when you are out there,
17 wrestling with Doug?

18 A. Standing on the porch.

19 Q. Standing on the porch. When you ask them for their
20 help what did they do?

21 A. Nothing.

22 Q. Just stood on the porch.

23 A. Yes.

24 Q. And they're friends with Doug Washington, isn't that
25 right?

CAROLYN WASHINGTON - REDIRECT EXAMINATION BY MR. CLEMENTS257

1 A. Yes, sir.

2 Q. They came over there with Doug Washington that night,
3 isn't that right?

4 A. Yes.

5 MR. HERON: Can I have a moment?

6 THE COURT: Yes, sir.

7 (PAUSE)

8 MR. HERON: Ms. Washington, I don't have any more
9 questions.

10 THE COURT: Redirect?

11 MR. CLEMENTS: Just briefly, Your Honor, thank you.

12 REDIRECT EXAMINATION BY SOLICITOR CLEMENTS

13 Q. Ms. Washington, I know it's been tough for you, we're
14 almost done. Let me use this as the car. Is this
15 about in about the right spot?

16 A. Yes.

17 Q. Can you tell me again where I'm standing about where
18 Brandon's body was?

19 A. Go over a little bit. Right up in there.

20 Q. Head this direction, feet that direction?

21 A. Head that away.

22 Q. Head this way.

23 A. Yes.

24 Q. Feet that way?

25 A. Yes.

CAROLYN WASHINGTON - REDIRECT EXAMINATION BY MR. CLEMETNS258

1 Q. So like this?

2 A. Yes.

3 Q. Were his arms out or by his side, do you recall?

4 A. I can't recall. I can't recall how his arms were.

5 Q. You heard the testimony of the doctor, right. He was
6 shot on the left?

7 A. Yes.

8 Q. Went in here, exited here?

9 A. Yes.

10 Q. One last thing. I am going to ask you to step down,
11 with the Judge's permission, and speak up loudly for
12 me. This is State's Exhibit 1. When you heard the
13 gunshot where approximately were you standing in your
14 house?

15 A. This is the --

16 THE COURT: Ma'am, you got to be louder than that.

17 A. This is the living room here. Then you have the den,
18 and the kitchen. The kitchen ain't but so big. And
19 then you got a little back area back here. So I was
20 right here in the kitchen.

21 Q. Who else is in the kitchen?

22 A. Cory, he was standing like right there beside the
23 refrigerator.

24 Q. Where was Gusto?

25 A. He was standing by the fireplace in the living room.

CAROLYN WASHINGTON - REDIRECT EXAMINATION BY MR. CLEMETNS259

1 The living room is right down there.

2 Q. Is the fireplace on this wall, this wall, this wall?

3 A. It's on this wall.

4 Q. You had a window right here you could look out of?

5 A. Yes..

6 Q. A window right here you could look out of?

7 A. Yes..

8 Q. Where was Quandeline?

9 A. In the bedroom that is on this side, the first
10 bedroom.

11 Q. This corner, right here?

12 A. Yes.

13 Q. A window there she could look out of?

14 A. Yes.

15 Q. Window there she could look out of?

16 A. Yes.

17 Q. Were was Doug?

18 A. He was standing like in the doorway of my bedroom.

19 Q. The doorway to the bedroom in the hall?

20 A. Yes.

21 Q. Where was Antoinette?

22 A. In her bedroom back here.

23 Q. And you are sure that is where everybody was
24 positioned --

25 A. Yes.

CAROLYN WASHINGTON - RE-CROSS EXAMINATION BY MR. HERON 260

1 Q. -- positioned when you heard the gun shot?

2 A. Because when Brandon left to go out the door, the
3 door never opened back. I came out of the kitchen to
4 may sure, you know, who is still in the house, you
5 know, so everybody was still like in the place that I
6 seen them.

7 Q. So after Brandon left, you said the door never opened
8 again --

9 A. The door never opened again.

10 Q. -- for anybody to exit or come back in?

11 A. Or come back in.

12 Q. Thank you. That's all the questions I have.

13 THE COURT: Re-cross?

14 RE-CROSS EXAMINATION BY MR. HERON

15 Q. It is your testimony, Ms. Washington, that you saw
16 everybody in the house --

17 A. Yes, I did.

18 Q. -- Including Quandeline that is in the bedroom, Doug
19 is in the den, Cory Byrd is here --

20 A. Doug is at the door way.

21 Q. You saw everybody?

22 A. Yes, I did.

23 MR. HERON: No further questions.

24 THE COURT: Next witness, please.

25 MR. CLEMENTS: At this time, Your Honor, we call

ANTOINETTE BURGESS - DIRECT EXAMINATION BY MR. CLEMENTS 261

1 Antoinette Burgess.

2 ANTOINETTE BURGESS

3 BEING DULY SWORN TESTIFIES AS FOLLOWS

4 CLERK OF COURT: Please be seated. State your full
5 name for the record.

6 MS. BURGESS: Antoinette Burgess.

7 DIRECT EXAMINATION BY MR. CLEMENTS

8 Q. Ms. Burgess, where do you live?

9 A. Now?

10 Q. Yes, ma'am.

11 A. [REDACTED]

12 Q. Is that in Florence?

13 A. Uh-huh.

14 Q. And on the 2nd of January of 07 where did you live?

15 A. At [REDACTED].

16 THE COURT: Ma'am, you got to speak up now. We are
17 required to take down every single word. Help us. Help
18 us.

19 A. [REDACTED].

20 Q. That is much better.

21 A. Okay.

22 Q. And who do you live with on [REDACTED]

23 A. My mother, Carolyn Washington, my sister Quandeline
24 W. [REDACTED], and my aunt, Tatica W. [REDACTED].

25 Q. And were there any children or babies living there?

ANTOINETTE BURGESS - DIRECT EXAMINATION BY MR. CLEMENTS 262

- 1 A. Yes.
- 2 Q. Who?
- 3 A. My sister baby, my niece.
- 4 Q. Your niece. And who is the mother of your niece?
- 5 A. Quandeline W. [REDACTED].
- 6 Q. Who is the father of your niece?
- 7 A. It was my nephew. She was pregnant with my niece.
- 8 Q. Okay.
- 9 A. My nephew's father?
- 10 Q. Yes.
- 11 A. Travis James.
- 12 Q. What is he also known as?
- 13 A. Gusto.
- 14 Q. Are you aware, or do you have any personal knowledge
- 15 from January 2, '07, did you sister Quandeline have
- 16 another boyfriend?
- 17 A. No, sir.
- 18 Q. You didn't have any knowledge of that?
- 19 A. No, sir.
- 20 Q. Did you find out later that she was seeing someone?
- 21 A. Yes, sir.
- 22 Q. And who was that?
- 23 A. When or who?
- 24 Q. Who?
- 25 A. It was Brandon.

ANTOINETTE BURGESS - DIRECT EXAMINATION BY MR. CLEMENTS 263

1 Q. When did you find that out?

2 A. The same day my mother found out which was January
3 the 3rd.

4 Q. Okay. All right. Do you recall what you were doing
5 and what time you got home January 1st?

6 A. Uh-huh.

7 Q. Please tell the jury?

8 A. We got home round about maybe 11:30, and I got ready
9 for ready because I had to be work at 4:30.

10 Q. Where were you working at that time?

11 A. At McDonald's.

12 Q. Okay. So you went to bed?

13 A. Uh-huh.

14 Q. Where is your bedroom, where do sleep?

15 A. Where?

16 Q. Yeah, what part of the house?

17 A. Back in the back.

18 Q. Okay. How many bedrooms in the house?

19 A. Two.

20 Q. All right. And you slept in the back bedroom?

21 A. Uh-huh.

22 Q. Is that where you went to bed that night?

23 A. Yes, sir.

24 Q. Okay. When you went to bed, as best you can recall,
25 who was in the house?

ANTOINETTE BURGESS - DIRECT EXAMINATION BY MR. CLEMENTS 264

1 A. My mother and my sister and my nephew.

2 Q. And that's it?

3 A. Uh-huh.

4 Q. Okay. Can you recall when you woke up?

5 A. Yeah. My mother woke me up.

6 Q. Your mother woke you up?

7 A. Uh-huh.

8 Q. And what was going on when she woke you up?

9 A. A lot of commotion.

10 Q. A lot of commotion?

11 A. Yes.

12 Q. Okay. I am repeating what you say because --

13 A. Okay, I'm trying.

14 Q. I need for you to speak loudly, okay.

15 A. Okay.

16 THE COURT: Ms. Burgess, please speak up for us now.

17 We got to take down what you say, please.

18 A. I am going to try to. My voice is --

19 THE COURT: Okay.

20 Q. A lot of commotion?

21 A. Uh-huh.

22 Q. All right, when you woke up turn to this jury and
23 tell his jury what you did and what happened as best
24 you remember.

25 A. I remember my mom waking me up and saying that I had

ANTOINETTE BURGESS - DIRECT EXAMINATION BY MR. CLEMENTS 265

1 to get up, because Brandon was on the ground. So I'm
2 looking like --- I'm looking for Deek, because I
3 don't know what's going on. I'm sleep. They waking
4 me up out of my sleep. So I go to the door I see
5 everyone in the yard. My mom ---

6 Q. Who do you all see in the yard?

7 A. I recall seeing Cory, Travis on the porch. I think
8 my mom and Quandeline on the ground by Brandon. And
9 I think my Aunt and Shadonna they had pulled up.

10 Q. Okay.

11 A. I think. And so just --- everyone was panicking,
12 screaming, I mean there was a lot of commotion.

13 Q. Okay. Everybody was making noise and --

14 A. Uh-huh.

15 Q. Travis and Cory too?

16 A. No, they was just standing like --

17 Q. Anything unusual about their demeanor?

18 A. They just looked at --- I don't want to say
19 frightened. They just look scared, I guess.

20 Q. Okay. Do you know what happened, did you ever hear a
21 gun shot yourself?

22 A. No, cause I was sleep.

23 Q. Okay. What did you do then?

24 A. Well, as I recall I think they done had called the
25 911 call, and I'm not sure everyone was still with

ANTOINETTE BURGESS - DIRECT EXAMINATION BY MR. CLEMENTS 266

1 the commotion, arguing and everything. So that's
2 when I pick up the phone and I call, because I guess
3 the ambulance took forever to get there so I pick up
4 and call one more time, because everyone was
5 screaming, yelling at each other; so ain't no telling
6 what could have went on next. So I called back to
7 let them know to bring an officer, because I had some
8 dudes in my yard and they were, you know, arguing,
9 arguing with us. We trying to get help and they
10 wasn't helping me.

11 Q. What dudes were those who were arguing?

12 A. Travis, Cory, Doug.

13 Q. All right. And were you there when Doug left? Did
14 you see Doug leave?

15 A. I can't recall.

16 Q. You can't recall. Well do you recall who was
17 arguing?

18 A. It was all them, just yelling.

19 Q. Okay.

20 A. Just all of them.

21 Q. All right. And why did you tell 911 you had
22 disorderly dudes in your yard?

23 A. Because no telling what could have led to, you know,
24 next with them being there. And we don't know what's
25 going on. You know, Brandon is on the ground, we

ANTOINETTE BURGESS - DIRECT EXAMINATION BY MR. CLEMENTS 267

1 trying to get help, and they're not trying to help
2 us, something else could have occurred, you know.
3 The ambulance didn't come yet. The police didn't
4 came, so that's why I made a second call.

5 Q. okay.

6 A. To make sure someone was on the way.

7 Q. What dude was making noise or causing the commotion?

8 A. I mean it was everyone, I mean everybody.

9 Q. Doug?

10 A. Everybody. Everybody who was there.

11 Q. All right. What happened next after you called 911?

12 A. I can't remember. They came, I guess they came, the
13 ambulance came and I think they took Brandon in the
14 ambulance. They left and I think that we was on our
15 way to the hospital.

16 Q. Okay. And after going to the hospital did law
17 enforcement ever want to talk to you or come talk to
18 you?

19 A. I think later.

20 Q. Later. Do you recall how long later?

21 A. It was after my mother and my sister came up here to
22 make their statement and everything.

23 Q. Did you come at the same time they did or later?

24 A. No, I came in later.

25 Q. Okay. But you don't know who was in the house when

ANTOINETTE BURGESS - DIRECT EXAMINATION BY MR. CLEMENTS 268

1 the gun shot went off, right?

2 A. Huh-uh, I was asleep.

3 Q. Okay. And you never heard the gunshot?

4 A. Huh-uh.

5 MR. CLEMENTS: All right. Beg, The Court's
6 indulgence for a moment.

7 Q. Ms. Burgess, is that all you know about this
8 incident. Is that all you remember?

9 A. Yeah.

10 Q. Anything else you know of, of your own personal
11 knowledge about what happened that night. Not what
12 somebody told you but what you know or observed?

13 A. No, I just know from what when I woke up --- when my
14 mom woke me up.

15 MR. CLEMENTS: Okay. Please answer any questions
16 Mr. Heron may have.

17 CROSS EXAMINATION BY MR. HERON

18 Q. Ms. Burgess, you have never seen this young man
19 sitting on my right have you?

20 A. No.

21 Q. Now were you concerned when Doug as fighting with
22 your mom over the phone and over the keys?

23 A. Uh-huh.

24 Q. Tell the jury why you were concerned?

25 A. Because --

ANTOINETTE BURGESS - DIRECT EXAMINATION BY MR. CLEMENTS 269

1 THE COURT: Speak up, please.

2 A. Why I was concerned? Because we know Doug and we
3 know how he acts, so that is why I was concerned.

4 Q. Tell the jury how he acts and why you were concerned.

5 A. I mean, I couldn't say why he was acting like that
6 that night, but we know from him, you know, he acts

7 --

8 Q. Ms. Burgess, if I could help you out. Have you ever
9 given a statement to law enforcement?

10 A. Yeah, about how he gets aggressive sometimes, yeah.

11 Q. He gets aggressive sometimes?

12 A. Yeah.

13 Q. Do you remember exactly what you told law
14 enforcement?

15 A. And, I was afraid, yeah, I was afraid that you know,
16 he was going to end up fighting my mother. That's
17 why I done the second call --- that 911 call that I
18 did.

19 Q. And why were you afraid he was going to get
20 aggressive with your mother?

21 A. Because, we was trying to get help and he wasn't
22 helping me.

23 Q. Ms. Burgess, isn't it a fact that you told law
24 enforcement that he hit women before, as a matter of
25 fact, he's hit your grandmother before.

ANTOINETTE BURGESS - REDIRECT EXAMINATION BY MR. CLEMENTS270

1 A. Well not actually hit, he threw a chair.

2 Q. He threw a chair at your grandmother?

3 A. Yeah, but it didn't hit her.

4 Q. And isn't it a matter of fact that you told law
5 enforcement that Doug would hit any girl?

6 A. Yeah.

7 Q. Okay. How are you related to Doug?

8 A. That's my cousin.

9 Q. Doug is your cousin. Did you see Doug leaving that
10 night, or was he already gone when --

11 A. I can't recall.

12 MR. HERON: I don't have any other questions.

13 THE COURT: Redirect.

14 REDIRECT EXAMINATION BY MR. CLEMENTS

15 Q. You didn't see Doug hit anybody that night did you?

16 A. No. No, sir.

17 Q. Okay. He was just fussing and carrying on?

18 A. And arguing.

19 Q. And arguing.

20 A. Ain't no telling what could, you know, have lead
21 next.

22 Q. Nobody hit anybody?

23 A. No, huh-uh.

24 MR. CLEMENTS: Okay. Thank you, Ms. Burgess, that's
25 all I have.

QUANDELINE WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 271

1 MS. BURGESS: You're welcome.

2 THE COURT: Re-cross?

3 MR. HERON: Nothing, Your Honor.

4 THE COURT: Next witness?

5 MR. CLEMENTS: Your Honor, at this time we would
6 like to call Quandeline W. [REDACTED]

7 QUANDELINE W. [REDACTED]

8 BEING DULY SWORN TESTIFIES AS FOLLOWS

9 CLERK OF COURT: Please be seated. State your full
10 name for the record.

11 MS. WASHINGTON: Quandeline Latrice W. [REDACTED].

12 DIRECT EXAMINATION BY MR. CLEMENTS:

13 Q. Ms. Washington, where do you live?

14 A. Where do I live now?

15 Q. Yes, ma'am.

16 THE COURT: Ma'am, you've to speak up and a little
17 slower. Now we got to take down everything. Please help
18 us.

19 A. [REDACTED].

20 Q. And who do you live with there?

21 A. My grandmother.

22 Q. Your grandmother?

23 A. Yes, sir.

24 Q. Is that Ms. Carolyn Washington's mother?

25 A. Yes, sir.

QUANDELIN WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS272

1 Q. Okay. And where did you live January 2, 2007?

2 A. [REDACTED]

3 Q. Ms. Washington, do you and Travis James have any
4 children together?

5 A. We have two kids.

6 Q. What are their names?

7 A. Zackwon and Traekwon.

8 Q. And how old are they?

9 A. Four and five.

10 Q. Four and five, okay. Do you recall what happened
11 when you got home close to midnight on January 1,
12 2007?

13 A. Yes, sir.

14 Q. Will you please tell this jury what you remember went
15 on that night and early that morning?

16 A. We all had came from grandma house, and I was in the
17 house getting ready for bed.

18 Q. When you say all of us, can you tell us each person?

19 A. Carolyn Washington, Antoinette Burgess and myself and
20 my kids.

21 Q. Okay.

22 A. And we got ready for bed or whatever like that. My
23 momma was in there I guess she cooking her some
24 cheese toast or whatever, and I went in her room to
25 talk on the phone and the next thing you know Doug,

QUANDELINE W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS273

1 Cory, and Travis, they come over there all of them in
2 the house.

3 Q. Who were you talking on the phone with, do you
4 recall?

5 A. With my daughter daddy.

6 Q. Okay.

7 A. And I was on the phone with him and I was in the room
8 and they was just, you know, everybody was walking
9 through and talking or whatever like that. Then
10 Brandon comes over there, and we talk for a minute he
11 was like he'll come back and get me, because I'm
12 suppose to leave with him. And he was like he would
13 come back and get me or whether like that. SO I was
14 like all right. So he left and I just happened to be
15 nosie, just to peep out the door to see what was
16 going on. And I seen --- I look outside, Cory is
17 still in the kitchen now with my mamma eating cheese
18 toast. Brandon he outside talking to Doug and
19 Travis, but there was somebody else out there to. I
20 never knew who it was. There were three of those out
21 there talking to Brandon. I knew it was cold outside
22 so I was like I'm going back in the house or whatever
23 like that. I thought he was straight --- he was
24 talking to him. So when I went back in the house,
25 Doug, and Gusto they came back in the house too. So,

QUANDELIN W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS 274

1 I'm on the phone. And, Gusto was standing and Travis
2 was standing there by the fireplace. I went in there
3 on my phone and Doug standing right there to me about
4 something. I can't recall what it as. My mamma
5 she's at where she say she at in the kitchen. The
6 next thing you know I heard a gunshot after that.
7 So I looked at Doug and said I said know there ain't
8 no firecracker, and me and Doug looking at each
9 other right now. Because I was like I know that
10 ain't no firecrackers. So I had then looked out
11 the window ---

12 Q. All right. Can you tell us on State's Exhibit 1
13 here, what area of the house were you and Doug
14 standing in? This is the front porch.

15 A. -I'm in my momma room. I in my momma bed, and Doug he
16 like right there by the door.

17 Q. At the front of the house?

18 A. In this area.

19 Q. And where was Gusto?

20 A. He was like by the fireplace.

21 Q. By fireplace?

22 A. Yeah, in the living room.

23 Q. Can you see any doors you can see in those areas?

24 A. Are you talking about where Doug was standing right
25 here?

QUANDELIN W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS 275

1 Q. From the bedroom --

2 A. Can I see over there?

3 Q. Yeah.

4 A. No, I can't see over there. But when I came from out
5 there was after I heard the gunshot, I seen him by
6 the fireplace.

7 Q. Okay.

8 A. And I --- cause when the gunshot went off, me and
9 Doug look at each other, and you know at the first of
10 the year everybody be doing firecracker --

11 Q. Yeah.

12 A. -- or whatever like that. I was like I know there no
13 firecrackers, and we look at each other, and the next
14 thing you know I look out the window, and see
15 somebody dropping Brandon's body, and digging in his
16 pockets. I mean by the time I came outside --- he
17 was so slow that when I came outside I could still
18 see him running around the side of the house.

19 Q. Okay.

20 A. Doug still behind me now, Doug wasn't never outside.

21 Q. Doug wasn't never outside?

22 A. No, when I came outside I still seen him --- whoever
23 --- run around the house.

24 Q. All right. What --- This person running around the
25 house, what did he have on? How was he dressed if

QUANDELINE W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS276

1 you know and could tell?

2 A. I know I seen a black hoodie, probably some blue
3 jeans.

4 Q. Okay.

5 A. But I know --

6 Q. Dark clothes?

7 A. Uh-huh, dark clothes.

8 Q. You recognize him at all?

9 A. No, I seen the car was like by the bush. All I know
10 is I seen somebody and by the time I came down the
11 steps I seen somebody running around the house.

12 Q. Is that on the driveway side the house or the Lawson
13 Street side of the house?

14 A. The Lawson Street, side of the house.

15 Q. Is there any doubt in your mind when that gunshot
16 went off that Doug was in the house?

17 A. Me and Doug looked at each other and I said I know
18 that is not no firecracker. I we looking at each
19 other when the gunshot goes off. I looked out the
20 window I seen Brandon's body dropping.

21 Q. Okay.

22 A. And somebody opening up his pockets.

23 Q. Now why did Brandon come over there?

24 A. To come get me.

25 Q. Okay. Did you all have a relationship --- a romantic

QUANDELIN W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS 277

1 relationship?

2 A. Yes, sir.

3 Q. Okay. Was that knowledge known to anybody else, or
4 were you kind of keeping that secret?

5 A. Just kind of like a secret, but he always take me to
6 work or whatever like that. So anybody knows about
7 that.

8 Q. Okay. So you didn't let anybody know that, right?

9 A. No, sir.

10 Q. And Travis didn't know that?

11 A. I assume he didn't know.

12 Q. Okay. All right. Where was Cory during this time,
13 do you remember Cory being there?

14 A. Yes, sir. He kept finding my mama. He was in the
15 kitchen with her eating cheese toast.

16 Q. Okay. No doubt that those three individuals were in
17 that house when you heard the gunshot?

18 A. I know we was in the house. When I heard that
19 gunshot they was in the house.

20 Q. All right, he heard the gun shot, you and Doug looked
21 each other and you said I know there ain't no
22 firecrackers.

23 A. Yes, sir. That's what I said.

24 Q. Then what did you try to do?

25 A. I try to go out the door, and he was like why would I

QUANDELIN W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS 278

1 want to go out there if somebody is shooting at you.

2 Q. Who is he?

3 A. Doug.

4 Q. So Doug was trying to prevent you from going out the
5 door?

6 A. Yes, sir.

7 Q. Did he do anything other than say that or did he
8 physically try to keep you from going out the door?

9 A. He wasn't like no physical cause I was screaming at
10 the time so it was just like he had his hand up.

11 Q. He had his hands up?

12 A. Not both his hands. One hand like, why would I want
13 to go out there if somebody is shooting.

14 Q. Okay. Did you go out there anyway?

15 A. Uh-huh. That is when I seem somebody running around
16 the side of the house.

17 Q. Okay. And where you the first person out the house?

18 A. Yeah, my momma she ain't seen him run around the side
19 of the house, but seen him but she was right behind
20 me though.

21 Q. All right. And who was behind her coming out?

22 A. I can't recall.

23 Q. Okay. When you went out, you came out on the porch,
24 right?

25 A. Yes, sir.

QUANDELIN W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS 279

1 Q. All right. This is State's Exhibit 10, can you point
2 out to these jurors you heard the gun shot did you
3 look out any windows?

4 A. Yes, sir.

5 Q. Which windows?

6 A. Yes, sir.

7 Q. Which windows?

8 A. I look out these windows right here.

9 Q. Okay.

10 A. That window right there.

11 Q. All right. And then you tried to get out which
12 door?

13 A. That door right there.

14 Q. All right. And would that take you a matter of
15 seconds or how long?

16 A. It wouldn't take me that long cause my momma room
17 right there. Like I can --- it's the living room
18 and her room and it wouldn't have took me that
19 long. That's how I seen somebody running around
20 the house.

21 Q. Okay. All right, and you said Travis was standing
22 at the fireplace, where in the house would that be?

23 A. Right by the wall --- By that wall in the living
24 room.

25 Q. Okay. Could he look out that window and see if he

QUANDELIN W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS

1 heard something?

2 A. He could have if he would have looked.

3 Q. Okay. And which side of the house did the person
4 run around?

5 A. This side of the house, by that bush.

6 Q. That side of the house around that buss?

7 A. Uh-huh.

8 Q. Okay. All right. Now how many doors are there?
9 You know you have the regular old big wooden doors,
10 you got storm doors, you got screen doors. How
11 many doors there on your momma's house?

12 A. Okay, we got that door right there and this one on
13 the back porch. That's it.

14 Q. Okay. But the front --- no storm door no screen
15 door?

16 A. It's got a screen door right there though.

17 Q. Okay.

18 A. You can hear when it slams because it's loud.

19 Q. Okay. So you got the screen door and then the
20 wooden door?

21 A. Uh-huh.

22 Q. All right. I am going to show you State's Exhibit
23 9 here, it shows the steps and the porch. And what
24 is that right there?

25 A. That's the screen door.

QUANDELINE W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS1

1 Q. That's the screen door, okay. And you came through
2 that door, did you come on down those steps or did
3 you stop on the porch?

4 A. I came down the steps.

5 Q. All right.

6 A. When I got there and seen what I seen out the
7 window I went straight to him when I got outside.

8 Q. You went straight to Brandon?

9 A. Yes, sir.

10 Q. All right. Through the window is that were you saw
11 the guy --

12 A. Yes.

13 Q. -- let the body drop?

14 A. Apparently when he shot him he must have fell on
15 him, so when he let him drop down, and I seen him
16 when he drop and start going in his pockets.

17 Q. Okay. Now let's say this is the door, this is the
18 porch, these are the steps coming down. And best
19 as you can recollect your perception, tell me where
20 I am standing about where Brandon would have been.
21 You tell me where?

22 A. These are the steps?

23 Q. Those are the steps.

24 A. You got to go back some. About right there.

25 Q. About right here?

QUANDELIN W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS2

1 A. Yeah, something like that.

2 Q. All right. Feet towards you or head towards you?

3 A. Feet towards facing the house towards me.

4 Q. He's laying how?

5 A. Laying his arms beside him, if I a not mistaken,
6 and he was laying there.

7 Q. On his back, on his side or ---

8 A. On his back.

9 Q. Okay. All right. You say you came straight off
10 the steps and went straight to him?

11 A. I came straight --- straight out the door straight
12 down the steps and then straight to him.

13 Q. Were you paying attention to anything that might
14 have been around there?

15 A. When I hit the steps I look around that's when I
16 see somebody around the house, but I'm not going to
17 go chase nobody so I just --- I seen him around the
18 house and then that's when I went over there to see
19 if he was all right.

20 Q. Okay. And what did you think was wrong with him?

21 A. I don't know. I don't know what I wrong. I
22 thought like he just --- like whoever did just had
23 hit him with something like punch him or something,
24 I ain't know til I had went up his back and that's
25 when I seen the blood on my hands.

QUANDELIN W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS3

1 Q. Okay.

2 A. Cause I didn't know he was shot, but I heard the
3 gunshot.

4 Q. All right. How hard --- how much effort did Doug
5 make trying keep you from going out the door?

6 A. I mean he strongest enough not to even let nobody
7 come out the door but we got out the door. We went
8 out there. It was quick enough for me to see
9 somebody running around the house.

10 Q. Okay. So would the answer then be not very much
11 effort, a lot of effort or medium effort?

12 A. Not that much effort.

13 Q. Not that much effort. Did you stop and think, man,
14 that's a gunshot maybe I shouldn't run out there,
15 might be more gunshots. Did you think about that?

16 A. No, I ain't thought about that.

17 Q. Okay. You were just thinking about checking on
18 Brandon?

19 A. Yes, sir.

20 Q. All right. Now, you went to Brandon, what did you
21 say to the others, and what did you say to Brandon?

22 A. What I say when I went outside to him?

23 Q. Yeah. When you went to him what were you saying to
24 him or to anybody else. What were saying, if
25 anything?

QUANDELIN W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS4

1 A. Oh, I was just --- I was just telling him to get
2 up, get up, get off the ground. I know you all
3 right, get up, get up.

4 Q. Was there any response?

5 A. No, sir.

6 Q. What, if anything, did you say to the other people
7 that were there?

8 A. I didn't really say too much to them. I was still
9 down there with him.

10 Q. Did you ask anybody for any help or anything?

11 A. I was just screaming. I probably did say somebody
12 help me get him up, somebody help me get him up.

13 Q. You were screaming?

14 A. Yeah, I was screaming, yelling and crying.

15 Q. During that time did you notice or recollect what
16 anybody else was doing?

17 A. Not really, but I know Gusto, Travis, and Cory was
18 on the porch, and I don't know where everybody else
19 was doing.

20 Q. You don't know where everybody else was or what
21 they were they doing?

22 A. No, I was down there on the ground.

23 Q. So you don't know anything about what happened with
24 the car running or anything like that?

25 A. The keys --- I heard them arguing but I didn't see

QUANDELINE W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS

1 all the rest of that episode, and all that other
2 stuff, but I looked --- I was on the ground the
3 whole trying to pick him up and, you know, I ain't
4 but so big, but I was down there a long time trying
5 to pick him up. And it did the ambulance a long
6 time to get there.

7 Q. How big was Brandon? Do you know about how tall he
8 was?

9 A. Yeah.

10 Q. Tall as me, shorter than me, taller than me?

11 A. I don't know if he tall has you but about --- he's
12 kind of a little shorter than you a little bit.

13 Q. Okay. Close to the same size?

14 A. Yeah, close to the same.

15 Q. All right. Did you notice anything what anybody
16 else was doing?

17 A. No, I ain't --- well I just heard a lot of arguing
18 and stuff, but I didn't really care cause I wasn't
19 paying no attention to them.

20 Q. Okay.

21 A. I just wanted to know who ran around the house and
22 like why he did it for.

23 Q. Okay. Brandon came in the house --- I am going to
24 back up that a little bit. First let me ask you
25 this. Show you State's Exhibit 16. Is that

QUANDELIN WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS6

1 anything you recognize or you're familiar with?

2 A. Is it like his charm?

3 Q. Who's charm, Brandon's?

4 A. Yeah, it look like charm.

5 Q. All right. And do you know where this was found or
6 picked up?

7 A. No, I don't know where it was found or who picked
8 it up or whatever like that.

9 Q. Okay. And you didn't notice the bullets or pay any
10 attention to any bullets on the ground or anything
11 did you?

12 A. No, sir.

13 Q. Okay. All right, let's back up a minute. The
14 first group of people came to the house, who was
15 that again?

16 A. Travis, Cory and Doug.

17 Q. All right. And do you know how that came up to the
18 house? Do you know how they got there?

19 A. I just know the truck was black. I don't know what
20 kind of truck it was til --- when I heard it in
21 here.

22 Q. Okay. And that's how they got to the house?

23 A. Yes, sir.

24 Q. When they came in the house they all came in
25 together or not?

QUANDELINE W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS 87

1 A. All of them came in together, I believe.

2 Q. Okay. And then who came after they came?

3 A. After they got there --

4 Q. Yeah.

5 A. -- Brandon had came.

6 Q. Brandon came?

7 A. Yes, sir.

8 Q. Did they start to leave or not, if you recall,
9 prior to him coming, or how did that --- explain
10 for us who came, in what order they came and left?

11 A. Well Cory as still in the kitchen talking to my
12 momma or whatever, she was cooking. Me and Brandon
13 were in the den talking and I just --- Travis and
14 Doug they somewhere in the front. I don't know
15 where they was at during that time when I was
16 talking to him. But I know when he said he was
17 about to go, Brandon said he was about go. He left
18 outside but when I peeped out the door it Cory in
19 the kitchen and Doug, Travis and somebody else
20 talking to Brandon outside in the front yard. And
21 then it was so cold I went back in the house. But
22 I don't know about the part ---

23 Q. You stepped outside then to?

24 A. I had stepped outside then but I don't know who
25 like the third person was that was out there

QUANDELIN W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS88

1 talking. I just know it was somebody else out
2 there.

3 Q. Could you see them in the dark at all?

4 A. Oh, no, I couldn't see him.

5 Q. Okay. All right. And they all came back in or
6 not?

7 A. Yeah, they came back in. Travis, I guess after
8 Cory left, I don't where Cory --- Cory was like ---
9 I don't know he kept talking to my momma like I
10 say, I don't know. Travis and Cory and Doug came
11 back in at this time. Brandon suppose to done been
12 gone, but apparently he wasn't. I'm in the house
13 on my cell phone. Doug talking to me. Travis by
14 the fireplace and Cory was still in the kitchen
15 with my momma.

16 Q. All right. And that's when you punished a gun
17 shot?

18 A. Yeah, that's when I heard that gun shot.

19 Q. Are you absolutely sure Travis, Cory, and Doug,
20 were in that house when that gunshot went off?

21 A. I am positive that they was in that house.

22 Q. Okay. All right. And you and Brandon have a
23 relationship together, right?

24 A. Yes, sir.

25 Q. Okay. You don't have any friends to reward or any

QUANDELINE W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS9

1 enemies too punish, in this thing, right?

2 A. No, sir.

3 MR. CLEMENTS: Okay. Beg, The Court's indulgence.

4 THE COURT: All right, sir.

5 (PAUSE)

6 Q. Quandeline, you and Brandon were keeping your
7 relationship kind of secret or not?

8 A. We was, yes, sir.

9 Q. Okay. He came to pick you up, isn't that what you
10 testified too earlier?

11 A. Yes, sir.

12 Q. And then when he got ready to leave what did he
13 tell you?

14 A. He said he'll be back because being that Travis is
15 my kid's father he didn't want to, you know,
16 dissect him any kind of way even though me and
17 Travis wasn't talking at that time. He still don't
18 want to get --

19 Q. Okay. So it had him kind of acting not normal?

20 A. Well he was like he would come right back like
21 after, you know, they leave.

22 Q. Okay. All right. And when you saw somebody out
23 there in the yard talking, you said you couldn't
24 tell who it was because it was in the dark?

25 A. Yes, sir.

QUANDELINE W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS

1 Q. Could you tell enough about them to see how they
2 compared to the figure you saw running around the
3 corner of the house or not?

4 A. I know he had on black. I know that. But I just
5 know he was, you know, he's dark but I know he had
6 on black though, cause I looked out there and I was
7 wondering like who was the other person cause I
8 know Cory in house. Cause I'll real nosey so like
9 when I look outside and saw Travis, Doug, and the
10 other person talking, I didn't know who the other
11 person was, but I seen him though.

12 Q. All right. Did they look similar or did they not
13 look similar to the figure you saw running around
14 the corner of the house after the gun shot?

15 A. It could have been it.

16 Q. It could have been it?

17 A. It could have been --

18 Q. But you can't say --

19 A. All I seen was the black hoodie hitting the bush,
20 like, you know when you're running you duck and you
21 can't really tell how --

22 Q. All right. Ms. Washington, can you tell us about
23 what you did when you went to the hospital?

24 A. We went to the hospital --- I can't really tell
25 you. I know we had found out he had died. When we

QUANDELIN W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS1

1 went to the hospital I was crying, everybody was
2 crying, but I didn't have really too much to say to
3 his family like that cause I felt like, you know,
4 they had in the house, and they don't want us
5 around them.

6 Q. Okay. When you left to go to the hospital had the
7 police gotten there before you left?

8 A. I can't recall.

9 Q. You can't recall?

10 A. No, sir.

11 Q. When did you talk to the law enforcement?

12 A. The next day.

13 Q. The next day?

14 A. Yes, sir.

15 Q. Did you come in and give a full statement?

16 A. Yes, sir.

17 Q. Okay. All right, and Ms. Washington, I have to ask
18 you this. You have been in trouble with the law
19 before?

20 A. Yes, sir.

21 Q. Do you have a probationary sentence for assault and
22 battery of high and aggravated nature?

23 A. Yes, sir.

24 Q. And did you have a fine for malicious injury to
25 personal property?

QUANDELIN W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS 2

1 A. Yes, sir. But it's paid up.

2 Q. Have you paid it?

3 A. Yes, sir.

4 Q. Okay. And you had a ticket for driving without a
5 license?

6 A. Yes, sir.

7 Q. Okay. And driving under suspension?

8 A. Yes, sir.

9 MR. CLEMENTS: All right. Please answer any
10 questions Mr. Heron may have.

11 CROSS EXAMINATION BY MR. HERON

12 Q. While we're talking about it, Ms. Washington,
13 whatever happen with the charge --

14 MR. CLEMENTS: Your Honor, may we approach the
15 bench.

16 THE COURT: All right.

17 (Whereupon, a bench conference was held in the
18 presence of the jury but out of the hearing of the
19 jury.)

20 THE COURT: Let the record show that we have had a
21 bench conference, and as a consequence of that a query
22 will be positive.

23 Q. Ms. Washington, whatever happen to the charge that
24 you were arrest for intimidation of Court
25 officials, jurors, or witnesses, back in 2007?

QUANDELIN W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS

1 A. It was intimidation of a witness, and I had ---
2 when I was locked cause I was locked up for four
3 months so when --- when my public defender that I
4 had he just went in and got it --- he just had it
5 on to my probation sentence. I just paid
6 everything, but no, the girl was like I was calling
7 her or something, harassing her and I wasn't
8 suppose to be talking to her.

9 Q. So you plead guilty to intimidating a witness?

10 A. I believe that what my probation and everything ---
11 he just told me don't worry about it.

12 Q. Okay. Solicitor ask you, you don't have any
13 friends to reward or enemies to punish. Do you
14 remember him asking you that?

15 A. I remember him asking that.

16 Q. Doug Washington is your cousin; is that right?

17 A. Yeah.

18 Q. Okay.

19 A. But that still wouldn't make a difference I still
20 ain't gonna sit here on this stand and lie. I know
21 I seen Doug in the house.

22 Q. Let's talk about that. Isn't it a fact, Ms.
23 Washington, that you told law enforcement that Doug
24 was coming back into the house all of sudden?

25 A. I didn't say he was coming in the house I said he

QUANDELIN W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS 94

1 was coming back from the door. He was coming back
2 from the door, and I got to go out and he held me
3 up, whatever y'all want to call it. But he never
4 was outside.

5 Q. He was never outside?

6 A. He went outside after the fact. He wasn't outside
7 during --- when that gunshot went off. And if
8 that's in that statement then it's wrong, cause I
9 never said he was outside. If I'm looking at this
10 man standing next to me and I am going to ask him
11 was that a firecracker, either way it goes, I seen
12 Doug when that gun shot went off.

13 Q. Okay. Do you remember --- did the Solicitor's
14 office provide you with a copy of your statement?

15 A. I got it. My momma got it.

16 MR. HERON: Your Honor, may I approach the
17 witness?

18 THE COURT: Sure.

19 Q. Just for the jury, Ms. Washington, let's read some
20 of it. I have highlighted some portions and I've
21 also underlined them. You said, Doug, he came in
22 the house and he was hollering about something. I
23 don't know, something. He was hollering about
24 something going on. I mean wherever he just came
25 and I was like I don't want to hear that, you know,

QUANDELIN W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS 95

1 because and the officer said --

2 A. That right there was before the fact, before the
3 gunshot thing.

4 Q. Okay.

5 A. That what all that was. Even when it was gone, I
6 know Doug was in the house when that gunshot went
7 off.

8 Q. Okay. And Doug is your cousin. Let's read on.

9 A. Doug is my cousin, but I ain't gonna sit up on the
10 stand and lie.

11 **THE COURT:** Listen, you got to slow down. She is
12 over here trying to get down every single word. Just
13 take it slow and easy here, now. Slow and easy.

14 Q. All right. Ms. Washington, let me read this
15 statement right here. I want you to read along
16 because if I am reading something wrong I want you
17 to tell the jury I am reading something wrong,
18 okay. You say, it's Washington right there, is
19 that your name?

20 A. That's me.

21 Q. Okay. And I got highlighted --- and this is your
22 whole statement. Something about something about
23 the boy black trying to play me. So he was
24 hollering about that and saying that, you know, he
25 ain't gonna --- he ain't gonna have nobody out

QUANDELIN W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS 6

1 there talking tash or something like that. But,
2 you know, them be excuses for then to give a reason
3 to do things. Isn't that what that statement says?

4 A. That's what it says, but I don't know what that got
5 to do with what I said about that gunshot going off
6 and I was in the house --- I mean me and Doug was
7 in the house together.

8 Q. Let's read --

9 A. -- No matter what you see in there and you know
10 they were saying Doug was outside when the gunshot
11 went off.

12 Q. Okay. Are you finished?

13 A. Yeah, I'm finished.

14 Q. Okay. Let's read on. And it says, so after that
15 --- after that what happened. Doug came to the
16 house hollering --- and I got it underlined --- he
17 went back outside. Isn't that what you told law
18 enforcement?

19 A. This was before the fact of the gun shot. See, you
20 aren't listening. You looking at --- you not
21 listening. All that what you talking about is
22 before the gunshot. When that gun shot went off I
23 was looking at Doug.

24 Q. I thought you were talking on the phone?

25 A. I was talking on the phone, then I look at Doug and

QUANDELINE W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS 97

1 say I know that ain't no firecracker.

2 Q. Okay. Do you know where Cory was?

3 A. Cory was in the kitchen.

4 Q. You saw him?

5 A. I know he was in the kitchen because when the
6 gunshot went off everybody went outside.

7 Q. All your relatives were in the house?

8 A. All of us was in the house. It's not the point
9 about my relatives. I'm not going to sit up here
10 and --- Y'all want to give me a lie detector test,
11 I will pass it with flying colors because I'm not
12 lying.

13 Q. Okay. You're saying that from your bedroom you saw
14 Cory Byrd --

15 A. I know that Cory was back there, cause he was in
16 there and he's back there. I know he was in the
17 house.

18 Q. Okay. And I saw Travis James?

19 A. I saw Travis when I came out the room after I heard
20 the gunshot. When I heard the gunshot, I looked
21 out the window and seen dude, whoever, dropping his
22 body and that's when I looked at --- I looked at
23 Doug. I tried to get out. Travis was standing by
24 the fireplace.

25 Q. Let's talk about that. I am glad you brought that

QUANDELIN W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS 98

1 up. You said you saw somebody dropping his body?

2 A. Holding him like that and dropping his body. I
3 looking out the window and I seen this and he ---
4 and apparently he was so slow cause when I went
5 outside he was just now running around the house.

6 Q. Have you ever told law enforcement that you saw
7 somebody dropping anybody --

8 A. -- I told them that. I told them that. It might
9 be in there but I told them that.

10 Q. It might not be in there. Is it possible that it's
11 not in there because you never said it?

12 A. I did say --- I did tell them that. I told them I
13 looked out the window seen his body being dropped
14 and somebody digging in his pockets. They even had
15 that on the news.

16 Q. You said you told law enforcement that you saw
17 somebody dropping his body?

18 A. I don't know --- but that's what I seen though. I
19 seen somebody dropping his body. I mean the dude
20 must be --- when Brandon died he must be fell on
21 him and when I seen him let him down like that. I
22 ain't gonna lie on the stand, now. I ain't going
23 to lie. You going to twist this stuff how you want
24 to, but I ain't gonna lie on the stand.

25 MR. HERON: Can I approach the witness, Your

QUANDELIN W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS 9

1 Honor?

2 THE COURT: Sure.

3 Q. I want to give you your whole statement.

4 A. I got my own statement.

5 Q. I want you to find in that statement where you say
6 anything about anybody dropping Brandon, Brandon
7 falling on somebody. I want you to point for this
8 jury of twelve people, point to where you said that
9 in that statement, please.

10 A. I don't know what part to be looking at, because
11 there is so much in this statement.

12 Q. I will give you as much time as you need to read,
13 but I can probably can save you some time --

14 A. -- Well I thought I told them. How this statement
15 made --- I don't know --- I don't have nothing to
16 do with that but I know I said it. However this
17 statement made. But even though it has the matter
18 of the fact, I'm still looking at Doug when the gun
19 shot went off. I did see his body really drop too.
20 You ain't got to switch my story around.

21 Q. You're looking at Doug, you were looking outside --

22 A. -- I look at the window first --- no, when the
23 gunshot went off, I look at Doug and I say I no
24 that ain't no firecracker. I look out the window
25 and I was seeing his body drop. Okay. Cause I

QUANDELIN W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS

1 said I seen his body drop, yeah, I seen his body
2 drop. After that I went to try to get past Doug,
3 you know, I be pushing or whatever back there.
4 Then I seen Travis standing by the fireplace. I
5 went outside and I see single dude running around
6 the corner beside the bush.

7 Q. Was he running?

8 A. Yeah, he was running. He couldn't have been
9 running to fast though cause I seen him when I came
10 out the house.

11 Q. My question was he running or walking fast?

12 A. He was, I guess, jogging. He had to be jogging if
13 he was still over that slop.

14 Q. Well didn't you tell law enforcement it didn't look
15 like he was in much of a hurry?

16 A. Yeah, I mean running, jogging, he was still trying
17 to get away. He --- I assume, I mean, after you
18 shot somebody you ain't going to stay there for
19 people to come outside.

20 Q. Did you also assume that you wouldn't want anybody
21 to come outside after you done shot somebody?

22 A. What you mean?

23 MR. CLEMENTS: Calls for speculation, Your Honor,
24 objection.

25 MR. HERON: I will withdraw the question.

QUANDELIN W. [REDACTED] - DIRECT EXAMINATION BY MR. CLEMENTS 1

1 Q. Ms. Washington, don't you believe that your cousin
2 Doug Washington has something to do with the
3 shooting?

4 MR. CLEMENTS: Objection, calls for speculation,
5 Your Honor.

6 THE COURT: Which?

7 MR. HERON: I am asking her personal opinion, Your
8 Honor, based on everything she saw.

9 THE COURT: That, of course, violates the rule in
10 terms of personal knowledge. You can't have an opinion
11 emanating from a lay witness. That is a rule violation.

12 MR. HERON: It can also go to her motive for
13 testifying, Your Honor.

14 THE COURT: Positive query, let me hear it then I
15 will rule. Do not answer until I rule.

16 Q. Ms. Washington, don't you believe that your cousin
17 Doug Washington had something to do with the
18 shooting?

19 THE COURT: I will let her answer that.

20 A. You mean do I believe --- I don't really --- I
21 believe that, but I know he wasn't in it. I mean
22 if he had something to do with it, he wasn't
23 outside when that gunshot went off. He wasn't
24 outside. So it's not how I will it's not what I
25 believe it's what I know and I know he wasn't

QUANDELINE W. [REDACTED] - REDIRECT EXAMINATION BY MR. HERON 02

1 outside.

2 Q. You believe he had something do with it?

3 A. I said it's not how I feel. I mean if I believe
4 that it's my belief, but I know he --- I know he
5 wasn't outside when that gun shot went off is what
6 I know. This is what I know. This is what I know.
7 I mean what I feel like or what I believe.

8 MR. HERON: I don't have any more questions, Your
9 Honor.

10 REDIRECT EXAMINATION BY MR. CLEMENTS

11 Q. Ms. Washington, do you have a copy of your
12 statement?

13 A. My momma got it.

14 Q. It's page four of your statement, it starts right
15 there behind three dots. Can you read those
16 sentences through that highlighted part please?
17 Read it to yourself first, and if that is what you
18 told law enforcement, then please read it to us.

19 A. It say, I look out the window and seen whoever it
20 was --- somebody in a black hoodie on, dropping
21 --- letting Brandon fell to the ground and they go
22 in his pockets.

23 Q. And that's what you told law enforcement?

24 A. I thought I told them that too, yeah, that what I
25 told them.

QUANDELIN W. [REDACTED] - RE-CROSS EXAMINATION BY MR. HERON 03

1 Q. And that is what you're telling us today?

2 A. Yes, sir.

3 MR. CLEMENTS: No further questions.

4 THE COURT: Re-cross?

5 RE-CROSS EXAMINATION BY MR. HERON

6 Q. And you also said that you saw the same person go
7 into Brandon's pockets?

8 A. The same person that run around the house?

9 Q. Uh-huh.

10 A. Yeah, I couldn't tell the height cause when you're
11 running you gonna be ducking. Do you know how to
12 run?

13 Q. And at that the same you're looking at this person
14 you're looking at Doug, you're looking at Cory --

15 A. -- No, they was still in the house. Me and my mom
16 was the first ones outside. When I came outside
17 was running down the steps I happen to look that
18 way because I'm seeing something move, so I look
19 and see somebody running by the side of the house.
20 That's when I went over to Brandon, I'm not going
21 to chase or whatever on the side of the house.

22 Q. Did you see the empty bullets --- the bullets
23 outside the front door?

24 A. No, I ain't seen no bullets.

25 Q. Okay. And did you see Doug stopping Ms. Washington

QUANDELINE W. [REDACTED] - RE-CROSS EXAMINATION BY MR. HERON 04

1 from running away from the scene?

2 A. What you mean stopping?

3 Q. Let me ask you this. Did you see Doug leave the
4 scene?

5 A. He said he left because he's on probation, and he
6 can't be around that kind of stuff.

7 Q. When he left, did he almost run over Brandon?

8 A. I didn't see --- See, I don't know who you got that
9 from, because I ain't seen that.

10 MR. HERON: Okay. I don't have any other
11 questions.

12 THE COURT: Anything further?

13 MR. CLEMENTS: Nothing further, Your Honor.

14 THE COURT: All right, next witness, please, or is
15 it going to be a lengthy witness?

16 MR. CLEMENTS: Going to be a lengthy witness, Your
17 Honor.

18 THE COURT: All right, recess time.

19 (Whereupon, a recess was taken from 2:45 p.m.
20 until 2:55 p.m.)

21 THE COURT: Thank you, please be seated. The
22 State ready?

23 MR. CLEMENTS: The State is ready, Your Honor.

24 THE COURT: Defense?

25 MR. HERON: Yes, Your Honor.

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 305

1 THE COURT: Bring them out.

2 (Whereupon, the jury enters the courtroom at
3 2:55 p.m.)

4 THE COURT: Mr. Solicitor?

5 MR. CLEMENTS: Your Honor, we would like to call
6 Travis Sentell James, also known as Gusto.

7 THE COURT: All right.

8 TRAVIS S. JAMES

9 BEING DULY SWORN TESTIFIES AS FOLLOWS

10 CLERK OF COURT: Please be seated and state your
11 full name for the record.

12 MR. JAMES: Travis Sentell James.

13 MADAM COURT REPORTER: How do you spell our middle
14 name?

15 MR. JAMES: S-E-N-T-E-L-L.

16 DIRECT EXAMINATION BY MR. CLEMENTS

17 Q. Mr. James, you are also known as Gusto?

18 A. Yes, sir.

19 Q. All right. And how old are you, Mr. James?

20 A. Twenty-seven.

21 Q. Where do you live, Mr. James?

22 A. [REDACTED], Florence.

23 Q. Okay. And how long have you lived on Maxwell
24 Street?

25 A. About fifteen-years, fourteen-years, something like

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 306

1 that.

2 Q. Prior to that where did you live?

3 A. In Darlington in Brockington Heights.

4 Q. Okay. Do you know Devodus Rouse?

5 A. Yes, sir.

6 Q. What do you call him?

7 A. Von.

8 Q. Von. How long have you called Mr. Rouse?

9 A. I mean since he was a little boy.

10 Q. Okay. Were you with charged on this indictment?

11 A. Yes, sir, I was charged with misprison of a

12 felonly.

13 Q. Do you know what misprison of a felony is?

14 A. Yes, sir, that I had knowledge of a crime and

15 didn't come forth with the information.

16 Q. Okay. Is that charge still pending?

17 A. Yes, sir.

18 Q. All right. Have you had convictions of breaking of

19 the law in the past?

20 A. Yes, sir. I had a possession of marijuana charge

21 in 99 or 2000 something. And then one time me and

22 my baby momma got into it and I had to plead to a

23 CDV.

24 Q. All right. For that possession of marijuana would

25 that court date have been September 17, 2001?

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 307

1 A. Yes, sir.

2 Q. That Criminal Domestic Violence, would that court
3 date have been October 24, 2006?

4 A. Yes, sir.

5 Q. You are here today --- You realize you're under
6 oath, is that correct?

7 A. Yes, sir.

8 Q. You're here today to testify on the same indictment
9 that you're charged with, right?

10 A. Yes, sir.

11 Q. Now what if any deal have you been offered by The
12 State, to get up here to tell the truth, other than
13 to plead to the misprision and recommendation of
14 probation?

15 A. There wasn't no deal.

16 Q. All right.

17 A. I mean it's just that as long as I told the truth
18 about the charge or whatever that probation would
19 be recommended.

20 Q. Would it be fair to say or not fair to say that
21 what you are being given the opportunity to do is
22 to tell what you should have told the first time?

23 A. Yes, sir.

24 Q. Now, Mr. James, did you know Cory Byrd?

25 A. Yes, sir, that was one of my best friends.

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 308

1 Q. That is one of your best friends?

2 A. Yes, sir.

3 Q. And you lost Mr. Byrd, didn't you?

4 A. Yes, sir.

5 Q. Did you know Douglas Washington?

6 A. Yes, sir.

7 Q. Known him for a long time?

8 A. Since I was dealing with my baby momma, yes, sir.

9 Q. All right. And who's your baby momma?

10 A. Quandeline W. [REDACTED]

11 Q. Okay. Did you know Brandon Timmons?

12 A. Yes, sir.

13 Q. Did you know there was anything romantic going on
14 between Brandon and Quandeline?

15 A. No, sir. I didn't obtain knowledge til --- nothing
16 about them until he had done passed, and the talk
17 came out or whatever.

18 Q. Now you're here today because you were subpoenaed?

19 A. Yes, sir.

20 Q. What did you tell me about how you felt about
21 testifying?

22 A. That's I'm really scared, because, I mean Cory was
23 my friend and what not, and I know that he had
24 cooperated with the law enforcement officers or
25 whatever and he had, you know, he got killed for

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 309

1 what --

2 MR. HERON: I object, Your Honor, I mean what does
3 this have to do with the fact that he is testifying. I
4 mean if he's alluding to what I think he's alluding to
5 that's --

6 THE COURT: I sustain the objection at this time,
7 Mr. Solicitor, unless you can connect it up, by direct
8 nexus.

9 MR. CLEMENTS: Your Honor, I think I can be clear
10 enough --- may we approach the bench before I step in a
11 hole.

12 THE COURT: Sure.

13 (Whereupon, a bench conference was held in the
14 presence of the jury but out of the hearing of the
15 jury.)

16 THE COURT: All right, let the record show that
17 we've had a bench conference, and we will proceed with
18 query.

19 Q. Now you told me that you were scared because Cory
20 cooperated and he got killed. Is that correct, yes
21 or no?

22 A. Yes, sir.

23 Q. All right. And where you not persuaded that Cory's
24 death was investigated and there was no connection
25 between these two events that law enforcement knew

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 310

1 of?

2 A. Yes, sir.

3 Q. Okay. Are you still scared?

4 A. Yes, sir.

5 Q. Are you going to tell me the truth?

6 A. Yes, sir.

7 Q. Now, Travis, we want the whole truth. Don't try to
8 make yourself look good, bad, indifferent, just
9 tell the truth. I want to know what happened, who
10 you were riding, what you were riding in, when you
11 met up with Devodus Rouse on New Year's Day, 2007.
12 Please tell the jury.

13 A. Okay. Well me and my home boy, Cory, --- Cory had
14 called me, I was at my momma house, and he said
15 that he had a smoked with us a little, and Doug my
16 home boy had picked me up from my momma house. We
17 hung out a little bit.

18 Q. Mr. James, now you speaking up good and loud and
19 clear, but The Court reporter has got to take down
20 every word you say. Can I ask you to slow down.

21 A. Yes, sir.

22 Q. I know you're nervous, but speak slowly, okay?

23 A. All right. Well it was my home boy Doug's birthday
24 and we was hanging and drinking a little bit or
25 whatever and Cory said he wanted to go to

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 311

1 Darlington so that he could go see his son so went
2 to Darlington, so he went and go could go see his
3 son, and I pretty much go see his son. I stopped
4 by Brockington Heights cause I had found out that
5 my home boy Chris Goodson had just got out of jail,
6 and I went by there and I was talking to him or
7 whatever. And while I was talking to Chris Goodson
8 then Von he came from the back of the projects and
9 he walked up on the truck that we was talking at or
10 what not. I mean he conversate with a little bit
11 and then he asked for a ride to Florence.

12 Q. All right. And where did he want to go in
13 Florence?

14 A. He said something about he was going to see girl or
15 something, I mean who I don't know. I don't know
16 who he was going to see.

17 Q. But you all didn't ride around in the truck?

18 A. You mean was he riding around with us?

19 Q. Yeah, the four of you together?

20 A. Yes, sir. I mean from Darlington to Florence, yes,
21 sir.

22 Q. Did you all do anything while you all where riding
23 in the truck?

24 A. No. Like the statement that I heard earlier, if I
25 could address that. There wasn't nobody shooting

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 312

1 no coke. I mean we was drinking and I smoked ---
2 me and him smoked a blunt --- a blunt together but
3 Doug only smoke weed. But me and him smoked a
4 blunt together, me, him and Cory, but it wasn't no
5 cocaine being shooted in that truck though.

6 Q. Okay. All right, when you got to Florence where
7 did you go?

8 A. First we went to Carolyn's mother house which is
9 Doug's grandmother.

10 Q. All right. Where is that located?

11 A. On Maxwell Street.

12 Q. Close to where you live?

13 A. Yes, sir.

14 Q. And about what time of the evening was that, do you
15 recall?

16 A. You talking about --- No, this was night time when
17 we went to Doug grandmother house.

18 Q. What time of the night?

19 A. It was maybe a little bit after 10:30, maybe 11:00,
20 going on 12:00, something up in that area. I know
21 it wasn't --- it wasn't quite 12:00 yet.

22 Q. All right. Do you know how long you stayed there?

23 A. Maybe about fifteen, twenty minutes because his the
24 grandmother came outside, and was like it was time
25 for us to leave out her yard or whatever.

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 313

1 Q. Were you all being loud?

2 A. Probably so because we were drinking and cutting
3 the fool.

4 Q. Okay. Where did you go next?

5 A. When we left there that is when we --- First we
6 went to the store and I got a pack of cigarettes,
7 and then we went to Carolyn's house.

8 Q. All right. When you got to Carolyn's house, do you
9 know about what time it was?

10 A. It had to be a little bit after 12:00. Had to be,
11 because it was a like 11:00 something when we got
12 back to Florence.

13 Q. When you got to Carolyn's house, where is Carolyn's
14 address?

15 A. I think it was --- I know it was Marion Street.
16 The address I think you all said [REDACTED]

17 [REDACTED]

18 Q. Do you know if it is on the corner?

19 A. Yeah, it right there across from the little
20 retirement home or something across the street from
21 it, but I know that it was Marion Street. The
22 white house on Marion.

23 Q. All right. Do you recognize State's Exhibit 10?

24 A. Yes, sir, that is the house that's Carolyn's and
25 Quandeline stays at.

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 314

1 Q. Okay. Now, when you got to Carolyn's house where
2 did you pull up at?

3 A. Not on the side where as like when you were showing
4 the thing. Not on the side that Lawson is on but
5 the opposite side.

6 Q. Okay. What kind of vehicle were you in?

7 A. In a Rodeo. It was a gray Rodeo.

8 Q. A gray Rodeo?

9 A. Yes, sir.

10 Q. Could it have been a Passport?

11 A. Oh, yeah, I mean that is the same thing, ain't it.
12 A Rodeo and Passport the same thing.

13 Q. Six of one half dozen of another. Do you know what
14 brand name it was?

15 A. No, sir, I just know it was a gray --- I thought it
16 was a Rodeo, but it could have been a Passport. I
17 mean they both of them look just a like.

18 Q. Who all was in that car when you got to Carolyn's
19 house?

20 A. Me, Doug, Cory, and Von.

21 Q. How long from the time you reached Carolyn's house
22 back to the time you all first all four got in the
23 vehicle together, about how long of a passage of
24 time was that?

25 A. Maybe forty minutes to an hour or something.

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 315

1 Q. Forty five minutes to an hour, maybe, you been
2 riding around together?

3 A. Yes, sir.

4 Q. All right. Can you recall whether or not did you
5 ever hear Devodus Rouse say anything about doing a
6 lick, or doing some dirt, or needing to get some
7 money?

8 A. I mean I can't really --- I mean I'm not sure. I
9 can't really say that he did, but I trying to think
10 I remember something of the nature. I can't really
11 say though.

12 Q. You're not sure?

13 A. No, sir.

14 Q. Can you remember all the conversations you all had
15 during that time?

16 A. No, sir, like I say, we was drinking or whatever.

17 Q. All right. What does doing a lick, or doing some
18 dirt mean?

19 A. A robbery.

20 Q. Okay. When you got to Carolyn's house, do you
21 recall who actually was driving the truck at that
22 time?

23 A. Cory.

24 Q. Cory?

25 A. Yes, sir. Doug was on the passenger side, and if I

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 316

1 ain't mistaken, I was behind Cory and Von was
2 behind Doug.

3 Q. Do you have a license?

4 A. No, sir.

5 Q. Cory got a license?

6 A. Yes, sir.

7 Q. Or had a license?

8 A. Yes, sir, he did.

9 Q. How about Doug, do you know if he had a license at
10 that time?

11 A. No, not to my knowledge he don't.

12 Q. Okay. When you got there you pulled up in the
13 driveway, how far up in the driveway did you pull.
14 Did you pull all the way beside the house, or was
15 part of the truck still in front of the house, or
16 do you recall?

17 A. We pull up --- we pull up all the way up on the
18 side of the house.

19 Q. Okay.

20 A. We wasn't like in the driveway.

21 Q. Okay. All the way to the back or just.---

22 A. No, not only the way to the back, but just like
23 medium dirt --- not all the way at the back but not
24 at the front neither.

25 Q. Okay. So right beside the house?

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 317

1 A. Yes, sir.

2 Q. What did you do after you stopped the truck?

3 A. Well Cory got out first. Then me and Doug and Von
4 were still outside at the time, and then me and
5 Doug got out of the car. Von got out the car and
6 he walked around the house this way. He said that
7 --- well he told us that he was fixing get ready to
8 leave his ride was on the way. He ask him if he
9 was coming in the house and he was like, no, his
10 ride is on the way.

11 Q. Okay. What was the purpose for coming to Carolyn's
12 house?

13 A. Cory had wanted to come --- to come see Carolyn,
14 and I figured since we was already there it was a
15 new year I hadn't seen my kids get I just was, you
16 know, checking in to see my kids or whatever.

17 Q. Was Cory kind of sweet on Carolyn?

18 A. Honestly, yes, sir.

19 Q. Okay. So who all went in the house?

20 A. Me and Doug. Cory was already in the house like I
21 said and then me and Doug came in the house.

22 Q. Where was Cory to your knowledge?

23 A. Cory was in the back with Carolyn.

24 Q. Where in the back, do you know?

25 A. In the kitchen.

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 318

1 Q. Okay. Are you real familiar with that house?

2 A. No, I'm not real familiar with it, but I done been
3 in there enough times that I could answer like
4 where everything was, or whatever.

5 Q. All right, we'll see if you can.

6 A. Okay.

7 Q. I am going to show you what has been marked as
8 State's Exhibit Number 1. Use this and let you
9 point. Where --- this is the porch, these are the
10 steps, this is the house, okay. Can you tell the
11 jury to your knowledge where was the kitchen?

12 A. The kitchen had to be ---

13 **THE COURT:** Mr. James, you got to speak up now.

14 A. The kitchen had to be like back in the corner back
15 there somewhere.

16 Q. All right. What was on the Lawson Street side of
17 the house, do you know?

18 A. This was Carolyn's room like right here in this
19 area right here, and then there was another room
20 back there. I can't say whether there is something
21 right there. I know the living --- well it's
22 called the living room --- once you walk through
23 the den the living room is like right in that area
24 before you get to the kitchen.

25 Q. All right. Is there a fireplace in that house?

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 319

1 A. Yes, sir.

2 Q. In what room?

3 A. Like in the living room as soon as you come in the
4 house.

5 Q. As soon as you come in the house?

6 A. Yes.

7 Q. Which side as you come in, the right or the left?

8 A. The right.

9 Q. Okay.

10 A. Yes, sir.

11 Q. All right, when you went in the house who did you
12 speak with?

13 A. I walked back into the room where Quan was, and I
14 seen that --- I asked about the kids, was the kids
15 there. She said that the kids was sleep so I after
16 that I snuck back out the room cause, I mean, me
17 and her ain't had the kind of relationship no more
18 and the whole purpose like I said for me being over
19 there after Cory went there was to check on the
20 kids.

21 Q. All right. Where did you go then?

22 A. We sat in the living room for a little while. Well
23 I mean I stayed in the living room part for a
24 little while cause like there was no furniture or
25 nothing in the front part of the house so, you

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 320

1 know, I'm just like really like standing up, you
2 know, walking back and forth. And Doug came from
3 out the room with Quan and me and him walked
4 outside directly in front of the house.

5 Q. All right. Cory come outside?

6 A. No, sir, Cory ain't never had came outside.

7 Q. All right. Did Quandeline poke her head outside or
8 not?

9 A. I mean I don't remember her poking her head
10 outside, she could have but --

11 Q. Did anybody else come up to the house?

12 A. No, sir.

13 Q. Okay.

14 A. Oh, no, you mean --- yeah, Brandon pulled up while
15 me and Doug as outside directly in front of the
16 house.

17 Q. Y'all right in front of the house?

18 A. Right on the porch part.

19 Q. On the porch?

20 A. Yes, sir. Well not on the porch but like off of
21 the porch right there in front of the ---

22 Q. Like if this is the steps --- the steps right here
23 was steps to the house where you all like --

24 A. -- Like right there --

25 Q. Right there?

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 321

1 A. We was directly in front of the house.

2 Q. Was Von still outside in the yard during this time?

3 A. I didn't see him, no, sir.

4 Q. Okay. About how long were you out there, a minute,
5 seconds?

6 A. Probably about two or three minutes and that's when
7 Brandon had pulled up.

8 Q. Okay. All right. When Brandon pulled up, tell me
9 to your perception --- that's the steps right there
10 --- tell me when I get to about how far his car
11 got?

12 A. Probably about right up in there.

13 Q. About right here?

14 A. Yes, sir, if that's the steps right there. It was
15 real close, yes, sir.

16 Q. Okay. What happened after he pulled up and
17 stopped?

18 A. He got out of the car. He walked up to me and Doug
19 and he was like Happy New Year or whatever. We
20 talked, and he asked me if Ron Dale in the house
21 which is his cousin, and I be like I'm not sure
22 because I didn't never like walk into the back of
23 house at that time, which I didn't. You know what
24 I'm saying. But I was like I'll go in there and
25 see.

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 322

1 Q. Did he leave the car running, or did he switch it
2 off, or do you remember?

3 A. I can't recall whether he switched the car off or
4 not.

5 Q. Okay. So you went in the house to check for Ron
6 Dale?

7 A. Yes, sir. I walked in the house --- no, if I'm not
8 mistaken, I think he walked in the house in front
9 of me. Yeah, he walked in the house in front of me
10 and then me and Doug walked in the house behind
11 him. By the time me and Doug got in the house he
12 was already in the kitchen talking to Carolyn so I
13 was walking back into her room. I mean not into
14 her room but into the front room in the house.

15 Q. The front bedroom?

16 A. Yes, sir.

17 Q. Okay. And what did you do then?

18 A. I ain't did nothing. I mean Doug walked in the
19 room with Quan, and I was still standing in the
20 living room waiting on Cory to come from the back
21 talking with Carolyn or whatever so that they could
22 drop me off at home.

23 Q. Okay. How long did Brandon stay?

24 A. He didn't stay long at all. It wasn't even five
25 minutes. It was basically like he was in and out.

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 323

1 Q. All right. Did you see him when he walked out to
2 leave?

3 A. Yes, sir. I seen him when he walked out to leave I
4 was standing like in between --- in between the
5 living room and the den area.

6 Q. Okay. And where was Quan?

7 A. In the living room, in the first room --- in the
8 room that as soon as you walked in the house which
9 was Carolyn's room.

10 Q. All right. In the bedroom --- the front bedroom?

11 A. Yes, sir.

12 Q. Where was Doug?

13 A. He walked back in the room with her. I mean, I
14 assume they start back conversating or whatever
15 they was talking.

16 Q. All right. And what did Brandon do?

17 A. He walked on out the house.

18 Q. Did anybody follow him out the house?

19 A. No, sir.

20 Q. No one?

21 A. No, sir. I was with --- if someone would have
22 followed him out the house, I would have been the
23 one that had to have seen it cause like I say I was
24 like in the den area --- in between the den and the
25 living room so I would have seen anybody if they

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 324

1 would have walked out the house.

2 Q. Okay. Tell this jury what happened next.

3 A. After Brandon walked outside, I'd say roughly
4 probably about three or four minutes, we heard a
5 gunshot and after we heard a gunshot or whatever
6 Quan --- I mean, yeah, Quan and Doug came like back
7 towards the living room area, and I walked up
8 towards the --- from back by the fireplace toward
9 the window.

10 Q. Did you look out the window?

11 A. Yes, sir.

12 Q. What did you see out of the window?

13 A. I seen the person running off.

14 Q. Okay. Do you know which direction he ran in?

15 A. I want to say --

16 Q. Don't tell me what you want to say, tell me only if
17 you know.

18 A. No, sir, then. I just --- I seen --- I seen the
19 person starting to flee.

20 Q. Okay. Do you know who that person was that was
21 outside?

22 A. At that time, no, sir.

23 Q. Who was the only person that you knew of that had
24 been out there?

25 A. I mean the only person that I knew of that was

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 325

1 outside when we went in the house was Von.

2 Q. Okay. What did Von have on that night, if you
3 recall?

4 A. I want to say he had on a black jacket with a
5 hoodie on it and some blue jeans.

6 Q. Are you sure?

7 A. Yes, sir. Yes, sir. He did have on a black jacket
8 with some blue jeans.

9 Q. All right. The person you that you saw running off
10 could you tell what they had on or not?

11 A. Yeah, I know that they had on dark colored jacket,
12 yes, sir, black jacket.

13 Q. It was dark colors?

14 A. Yes, sir.

15 Q. Okay. Could you tell for sure what kind of
16 clothing other than dark?

17 A. No, sir.

18 Q. Okay. What did you see in regards to Brandon, what
19 did you see?

20 A. When I walked outside Brandon --

21 Q. When you first looked out the window.

22 A. He was just laying on the ground.

23 Q. Did you see him fall or drop?

24 A. No. I didn't see him fall, no, sir.

25 Q. Okay. Were you right at the window when the shot

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 326

1 was fired, or were you across the room by the
2 fireplace?

3 A. I was across the room by the fireplace. I got to
4 the window about the same time that what they was
5 talking about with Doug and Quan had took the --

6 Q. At the door?

7 A. Yes, sir.

8 Q. Okay. So they would have looked out the window
9 quicker than you?

10 A. Yes, sir.

11 Q. All right. When Quan and Doug got to the door, did
12 you notice anything about them going out the door?

13 A. What do you mean when you say that?

14 Q. What did they do, if anything, if you recall?

15 A. Oh, well, Quan was trying, you know, go out the
16 door but Doug was like, no, you know what I'm
17 saying. Why you trying to go out the door for when
18 we just heard a gunshot or whatever.

19 Q. Okay. Did he let Quan out the door?

20 A. Yes, sir, I mean I can't --- Yes, sir, he left her
21 go right after that.

22 Q. And who went out the door next?

23 A. I know Quan was the first person out the door, and
24 I want to say maybe -- I want to say Carolyn was
25 the second person to go out the door and then after

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 327

1 Quan and Carolyn went out the door then Doug, me
2 and Cory was right behind them.

3 Q. All right. What did you see out there?

4 A. When I walked out the door?

5 Q. Yes, sir.

6 A. I looked out --- I looked down on the ground --- I
7 mean I seen him on the ground or whatever, and I
8 didn't see no blood or nothing so at the time I
9 assume that, you know, maybe he was knocked out or
10 whatever cause I didn't see no blood.

11 Q. What were you saying, if anything, to everybody?

12 A. That he was probably just knocked out. I even
13 touched his neck or whatever and his neck was still
14 beating so he still had a pulse so I really did
15 just think that he was just knocked out.

16 Q. All right. What did you notice about his eyes, if
17 anything, if you remember?

18 A. I can't recall.

19 Q. How did you feel while all of this was going on?

20 A. I mean at first it wasn't really nothing. Like I
21 say I thought he was just knocked out, but when
22 Quan went to go pick him up and then she seen that
23 is was blood there then I got scared then and I
24 backed up and that's when I went on the porch.

25 Q. Well you had heard a gunshot and there he was

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 328

1 laying on the ground that didn't cause you concern
2 he might have been shot?

3 A. No, cause like I said we didn't see no blood.
4 Nobody didn't see no blood so I assume that maybe,
5 you know, the person just hit him or something.

6 Q. And you didn't see the person over him, did you?

7 A. Did I see the person over him?

8 Q. You didn't see the person over him ---

9 A. Oh, no, I seen him when he run --- Yes, sir, I
10 didn't see the person over him, no, sir.

11 Q. What did you notice about Carolyn, if anything,
12 what was she trying to do?

13 A. Trying to call --- I mean she was just for one, you
14 know, she was hollering or whatever, and she was
15 hollering. Well everybody like screaming and
16 hollering and panicking or whatever. It was just
17 like a bunch of commotion was going on.

18 Q. Did you see Carolyn try to call anyone or not?

19 A. No, I can't say that.

20 Q. Did you see her and Doug get in an argument or
21 anything?

22 A. I mean, like I said, there was a lot of commotion
23 going on or whatever, but I mean they could have
24 been arguing or whatever, but I can't say offhand
25 say they was arguing or what they was arguing about

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 329

1 or whatever because then I would be lying. I
2 didn't hear what they was arguing about or
3 whatever.

4 Q. Did you see anybody get in the car?

5 A. You talking about Brandon's car?

6 Q. Yes.

7 A. Oh, yes, sir, I seen Brandon --- I seen Carolyn
8 get in the driver's seat and yeah, I seen Doug get
9 in the passenger seat.

10 Q. Did you --- Were you able to observe what they were
11 doing this time?

12 A. No, sir, I was on the porch. I was --- really my
13 --- after I seen that Mr. Timmons was shot ---
14 after I knew that he was shot, I was just really
15 like seeing what was going on with him or whatever,
16 just paying attention to Quan really.

17 Q. Well, how did you know he was shot?

18 A. Cause like I say when she went to go pick him up I
19 was still on the ground then like right beside her,
20 and when she like went to go try to lift him up,
21 and she mover her hands and she start hollering and
22 I seen the blood on her hands, and when I seen the
23 blood on her hands that's when I back backed to the
24 porch.

25 Q. And you know what then when you saw the blood?

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 330

1 A. Yes, sir.

2 Q. What did you do?

3 A. Oh, I knew that he had been shot.

4 Q. Now let's be consistent with what we've done so
5 far. This is the steps.

6 A. Yes, sir.

7 Q. And you were up on the porch quite some time,
8 right?

9 A. Yes, sir.

10 Q. Can you tell me where I'm standing in about the
11 approximately the spot away from the steps where
12 Brandon would have been away from the steps of [REDACTED]

13 [REDACTED] Tell me, I'm going to keep
14 moving until you tell me to stop.

15 A. Come closer. Probably some place up in this area
16 right here from the steps. Stop right there.
17 Yeah, about right there, sir.

18 Q. Were the feet towards the house or away from the
19 house?

20 A. The feets were towards the house. His head --- his
21 feets was towards the steps, his feets was this way
22 and his head was --

23 Q. Back that way?

24 A. Yes, sir.

25 Q. All right. I got a tough question to ask you now.

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 331

1 A. All right.

2 Q. You know this man has been shot, laying here in the
3 yard, did you do anything to help, try to render
4 aid, yes or no?

5 A. I can answer the question, but I would like to
6 explain my answer to, please.

7 Q. Please do. We all want to hear it.

8 A. No, sir, I didn't. But the reason that I didn't
9 cause the understanding that I always got when a
10 person get shot that you don't suppose to move the
11 body cause make a change of moving --- making the
12 bullet mover or whatever. That's what Cory was
13 saying. That why he wasn't helping any. I was
14 like, you know, at first I was like come on let's
15 help him, he was like no, and he pulled me back and
16 he was like don't move him cause if you move him it
17 might make the bullet move.

18 Q. Well did you tell them that, not to move him?

19 A. Yes, sir.

20 Q. Did they pay you any attention?

21 A. No, sir.

22 Q. Are you sure they even heard you in the commotion?

23 A. Maybe they didn't. That what I'm saying, maybe
24 they didn't hear me but I can't say that though.

25 Q. Well, did you make any effort yourself to call 911?

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 332

1 A. I didn't have no phone to call 911 with.

2 Q. All right. Did you see anybody get stopped from
3 trying to call 911?

4 A. I think so, yes, sir.

5 Q. And why didn't you try to help them to call 911?

6 A. Cause after all that to be honest, like I said, I
7 was real scared. I just stayed where I was at,
8 because I was scared.

9 Q. Okay. But you didn't run away?

10 A. No, sir, I stayed --- I stayed at the scene of the
11 crime.

12 Q. What happened next?

13 A. The police came, the ambulance came.

14 Q. Who came first, the ambulance or the police, or do
15 you know?

16 A. I think --- I can't recall.

17 Q. You can't recall?

18 A. I can't recall if the ambulance or the police came
19 first, no, sir.

20 Q. But they both came --

21 A. -- Yes, sir --

22 Q. -- pretty quick?

23 A. Yes, sir.

24 Q. And what did the ambulance do?

25 A. They got Mr. Timmons.

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 333

1 Q. All right. Did you know him as Mr. Timmons, or did
2 you know him as Brandon?

3 A. Brandon.

4 Q. Okay. They got Brandon and took him to the
5 hospital?

6 A. Yes, sir.

7 Q. What did the police do?

8 A. They stayed out there and they was looking for
9 stuff. I even pointed out stuff that I seen, like
10 I seen the charm on the ground. I show them where
11 his charm was and I seen --

12 Q. -- Okay. Let's me stop you right there. Let me
13 show you something. Let me stop you right here. I
14 am going to show you State's Exhibit 16, is that
15 the charm you are talking about?

16 A. Yes, sir.

17 Q. Is that the first place you saw it on the post up
18 there or did you see it on the ground first?

19 A. No, I seen it on the ground.

20 Q. Okay. All right. Do you know picked it up and put
21 it on the post?

22 A. No, sir.

23 Q. Okay. All right. But it was on the ground first?

24 A. Yes, sir, I am positive it was on the ground.

25 Q. All right. These are the steps down here, where

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 334

1 abouts on the ground was it, closer to over here,
2 or closer to the steps, or do you recall exactly?

3 A. Like closer to where he was.

4 Q. Closer to where Brandon was?

5 A. Not exactly where he was, but it was closer.

6 Q. Kind of in between --

7 A. -- Yes, sir --

8 Q. -- closer to Brandon's body than the steps?

9 A. Yes, sir.

10 Q. Okay. Did law enforcement talk to you?

11 A. Yes, sir.

12 Q. Do you know which law enforcement officer talked to
13 you first?

14 A. No, sir.

15 Q. Was it a uniformed officer or --

16 A. Oh, yes, sir, it was a uniformed officer.

17 Q. Who did you tell him you were?

18 A. I told him that my name was Travis Johnson.

19 Q. Travis Johnson?

20 A. Yes, sir.

21 Q. Now why did you do that?

22 A. Because I was scared. I mean to be honest about
23 the all situation, I ran through so much bad luck,
24 and I done been to jail for so many different
25 things that I was accused of, I was just --- I was

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 335

1 just scared, and I figured that, you know, with us
2 being there and whatnot that --- basically, I was
3 just scared.

4 Q. When did you tell the truth of who you were, or did
5 somebody point it out who you were?

6 A. Officer Lee Davis came up on the scene and he know
7 me personally.

8 Q. Okay. All right. Did he ever ask you why you gave
9 them a fake name?

10 A. No, sir, he ain't never --- he ain't never approach
11 me about he situation or nothing. This right here
12 is the one of the first times that I was asked this
13 question.

14 Q. Okay. About giving that fake name?

15 A. Yes, sir.

16 Q. All right. How long did you stay there at the
17 scene?

18 A. Until Officer Lee Davis, told me and Cory that we
19 could go.

20 Q. Do you know about how long that was? Was it an
21 hour, two hours, hour and a half, five minutes, you
22 got any idea?

23 A. Maybe about an hour.

24 Q. About an hour?

25 A. Yes, sir.

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 336

1 Q. About an hour had passed since the ambulance had
2 gone, or a little more than an hour since the
3 ambulance had gone?

4 A. Probably a little more than an hour since the
5 ambulance had gone.

6 Q. Okay. All right. Now, you stayed, right?

7 A. Yes, sir.

8 Q. Cory stayed?

9 A. Yes, sir. Me and Cory, yes, sir, we stayed.

10 Q. Now Doug left?

11 A. Yes, sir.

12 Q. Did you notice Doug leaving?

13 A. Yeah, he was like he got --- he got the h-out of
14 here, cause he don't suppose to be around this kind
15 of stuff or what not. He was like he on probation
16 and he don't suppose to be around that it, so he
17 was like he got to get up out of there.

18 Q. How did he leave?

19 A. In the crack head truck.

20 Q. Okay. And did you notice if he about ran over
21 anybody or anything getting out?

22 A. No, all of that was bull. He ain't almost hit
23 Brandon or nothing like that.

24 Q. Okay.

25 A. No, sir.

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 337

1 Q. All right. But did he leave in a hurry?

2 A. Yes, he did but wasn't no place close to where
3 Brandon was. There wasn't no way possible that he
4 could have even had hit Brandon from where Brandon
5 was.

6 Q. Okay. Now after Investigator Davis told you and
7 Cory you all could leave, how did you leave?

8 A. We walked.

9 Q. Where did you go?

10 A. We walked down Darlington Street, and we was on our
11 way to the house.

12 Q. All right, whose house?

13 A. Well I was on my way home and he was on his way
14 home.

15 Q. All right. Walking down Darlington Street did you
16 run into anybody you knew?

17 A. Yes, sir, that was when his girlfriend ---

18 Q. Who's he?

19 A. Devorse, Von, his girlfriend come pick us up.

20 Q. On what street?

21 A. Directly across from --- in between Darlington and
22 like going into North Florence, like the bridge
23 coming down this way --

24 Q. He was headed to McLeod Hospital?

25 A. Yes, sir.

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 338

1 Q. Okay. Did she take you up there?

2 A. Yes, sir.

3 Q. All right. Did you all flag them down or did they
4 see you?

5 A. They seen us. I mean at first when he was calling
6 --- when Von was calling my name I was thinking
7 that it was my home boy, Doug, I didn't know who it
8 was. But when me and Cory got up close on the car
9 that's when we seen that it was him and Farhonda.

10 Q. All right. What kind of car were they in, if you
11 recall?

12 A. I can't remember the car, sir.

13 Q. Okay. An SUV, a sedan?

14 A. No, it was a --- no, it was a --- it wasn't no SUV
15 or nothing like that but ---

16 Q. Just a regular car?

17 A. Yes, sir.

18 Q. Okay. Did you and Cory get in the car?

19 A. Yes, sir, we did.

20 Q. Did you have any conversations with Von then?

21 A. Yes, sir.

22 Q. What did Von say?

23 A. Soon as me and --- soon as me and Cory got in the
24 car the first thing that Von said, before we could
25 say anything --- Cory was already was like he

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 339

1 wanted to talk to my people, because that was the
2 only person that was there. But before we could
3 say anything he was like boy's dead, boy's dead.
4 And I was like what do you mean boy's dead, what
5 boy. And he said Brandon was dead. And I asked
6 him I said how you know that like that and when he
7 turned around --- when he turned to like really
8 talk to me that is when I notice that he a scratch
9 on his face or what not.

10 Q. Okay. And you ask him what he meant did he respond
11 to you?

12 A. Yeah, I mean --

13 Q. -- You ask him how he knew?

14 A. Yes, sir.

15 Q. What did he tell you?

16 A. He told me, he said it was either him or me.

17 Q. He said it was either him or me?

18 A. Yeah, that's the first thing he said. He said it
19 was either him or me. And I ask him, I say, what
20 do you mean it was either him or me, and he was
21 like, like I said it was either him or me. He was
22 like, what you told the police, and was like I
23 ain't say nothing. I was like I didn't really say
24 nothing or whatever and he left it at that. He was
25 like where Doug stay, and I showed him where Doug

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 340

1 stay too.

2 Q. All right. Did he tell you how he knew that
3 Brandon was dead?

4 A. Cause he said, he went to the hospital.

5 Q. Okay. What did he say anything to explain further
6 what he meant by it was him or me?

7 A. That --- he went on to tell us that he had robbed
8 Brandon, and that he had his chain, and that like
9 he said it was either him or me. Said that he had
10 grabbed at his gun, so it was either him or me.

11 Q. All right. Did he say he got anything else off of
12 him other than just the chain?

13 A. I can't even recall, but I do know --- I remember
14 for sure I him saying that he had his chain.
15 Rather he said anything else or not, I'm not sure.

16 Q. Did he --- Did you see the chain?

17 A. No, sir, I ain't never had seen the chain.

18 Q. Did he tell you whether or not he picked up
19 Brandon's gun?

20 A. Oh, yes, sir.

21 Q. What did he tell you about that?

22 A. That's why he had wanted to go to Doug's house.

23 Q. Why?

24 A. Because he said that he had left Brandon's gun in
25 the truck, and he needed to know where the truck

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 341

1 was.

2 Q. So he put the gun in the truck before he ran away?

3 A. I assume, I don't know, but that's what he said
4 though. Said that he needed to talk to Doug
5 because he left the gun in the truck. That's all I
6 know.

7 Q. Okay. So then what did you all do?

8 A. I ain't understand --- Did you say what did we do?

9 Q. You told him where Doug lived and then what did you
10 do?

11 A. Oh, we went to Doug's house.

12 Q. You went to Doug's house?

13 A. Yes, sir.

14 Q. All right. And what happened then?

15 A. Well he got out and he went --- and him and Doug
16 were sitting --- like Doug walked to the front of
17 his house, and Von walked up to him and I just, you
18 know, I don't know what they talked about or
19 whatever, but I seen Doug make a hand gesture like,
20 you know, like they had a little conflict or
21 something like maybe, I don't know, but like him
22 and Doug had a little conflict.

23 Q. All right. And did they do this inside the house
24 or did they walk away on the outside of the house?

25 A. No, they was directly in front of Doug's --- right

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 342

1 there in front of Doug's girlfriend house.

2 Q. Okay. And after that what did Von do?

3 A. He got back in the truck, and he said for us to go
4 on home, like on Ame Street where we had got the
5 truck from.

6 Q. Did you all go back to Ame Street?

7 A. Yes, sir.

8 Q. And what did you all do at Ame Street?

9 A. We ain't did nothing. Cory got out --- Well me and
10 Cory got out. He had said something about the
11 jacket or something to. He had said something
12 about a jacket or something and Cory got out and
13 got the jacket and he gave them him his jacket. He
14 got out for a second or two, and, you know, I guess
15 just trying to figure out whether we was going to
16 say something or not, and after that he had left
17 with --

18 Q. Did you all get the jacket?

19 A. Yes, sir.

20 Q. Did you see anything about a gun then?

21 A. No, sir, I never did see a gun.

22 Q. All right. What happened after that?

23 A. After we got his jacket, like I said, we went back
24 to Cory grand mamma house and then we got out the
25 car and he start asking question like what we said

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 343

1 or whatever and --- no, no, I'm lying, I'm lying.
2 We was in the car, and that's when he said whatever
3 he was saying about what had happened what we said
4 or whatever, and he was asking and then he was
5 saying something about Cory because Cory was like
6 you talking around your girl or whatever and he was
7 like yes, she's straight but he was like what about
8 you. And Cory was like I'm straight, I'm straight.
9 I don't even know you. He just kept saying I don't
10 know, I don't even know you, like that or what not.

11 Q. Okay. Meaning what?

12 A. That we don't --- I mean that he wasn't going to
13 say who he was, that he didn't know him.

14 Q. Okay. And how did you feel at this time?

15 A. Real scared.

16 Q. All right. Did you ever talk to law enforcement
17 later?

18 A. Yes, sir.

19 Q. Did you come clean and tell them everything or not?

20 A. No, sir, I didn't.

21 Q. Why not?

22 A. Because I was scared. This man knows --- like I
23 said earlier he knew me for a long time. He know
24 where my brother stay. He know where my mother
25 stay, and I didn't want to put nobody at risk that,

TRAVIS JAMES - DIRECT EXAMINATION BY MR. CLEMENTS 344

1 you know, he be sitting up here and he telling me
2 he just killed somebody. Who to say if I was to
3 say that he did or whatever that he wouldn't try to
4 come get me.

5 MR. CLEMENTS: Now, I want to beg The Court's
6 indulgence for a moment. Be right back with you.

7 (PAUSE)

8 THE COURT: Yes, sir.

9 Q. Travis, tell this jury again what you are charged
10 with?

11 A. Misprision of a felony.

12 Q. That is what you are indicted for?

13 A. Yes, sir.

14 Q. Have we told you we expect you to plead to this
15 charge?

16 A. The only thing that was said in matters to this
17 charges that if I did right thing, which is what I
18 should have done from the beginning, that you would
19 recommend probation for me. That's it, nothing
20 else.

21 Q. Are you telling the truth here today?

22 A. Yes, sir.

23 MR. CLEMENTS: All right. Please answer any
24 questions Mr. Heron might have.

25 CROSS EXAMINATION BY MR. HERON

1 Q. Mr. James, you've got a couple of other charges
2 that were pending against you. You've got a ---
3 let me ask you about an armed robbery with a deadly
4 weapon charge. Were you charged with that?

5 A. I was charged with that, but in the process of
6 being told about the warrant --- because they did
7 investigation, and they did find, which I sat in
8 jail for forty-five-days, but they found out that I
9 wasn't the person that did the crime, but all those
10 charges are being dropped.

11 Q. But my question is, there are pending an armed
12 robbery with a deadly weapon charge pending against
13 you is that right?

14 A. To my knowledge last that I knew I was supposed to
15 had been got that charged resolved.

16 Q. Okay. How about assault and battery with intent to
17 kill charge. Is that one going away to?

18 A. The only thing that is on my record is a possession
19 of marijuana, and a CDV. All the rest of that
20 stuff is done been throwed out, and my innocence
21 has been proven on them.

22 Q. So the assault and battery with intent to kill is
23 that still pending or in the process --

24 A. To my knowledge --- To my knowledge all them
25 charges are supposed to be done. The only charges

TRAVIS JAMES - CROSS EXAMINATION BY MR. HERON 346

1 that I have is misprison of a felony, and I got a
2 drug charge.

3 Q. So if they are not listed as dismissed, you would
4 have the misprison of a felony, you would have an
5 armed robbery with a deadly weapon, and you would
6 have an assault and battery with intent to kill
7 charge still pending, if they are still pending?

8 A. Yes.

9 Q. That would be three charges pending you against as
10 you sit here today?

11 A. Yes.

12 Q. Now you referred to Doug as your home boy, is that
13 right?

14 A. Yes.

15 Q. Okay. Has Devodus Rouse tried to contact you since
16 this incident happened?

17 A. I'm not --- I mean in jail, you know, and like you
18 were saying about him trying to be moved or
19 whatever, I don't have no knowledge of that. But I
20 do know that he was trying get moved on my
21 rotation.

22 Q. He was trying to get away from you?

23 A. No, he wasn't. For one, he was on the whole
24 opposite side at first, and he got moved on my
25 rotation. And once he found out that he couldn't

1 come out for break at the same time that I did,
2 because when you know when you go to jail for
3 murder you can't get out any way, I assume that's
4 why he probably tried to get moved. But, if trying
5 to get moved away from me why he got from the
6 opposite of the pod to the exact same rotation I
7 was on.

8 Q. Okay, let's don't be talking about what he was
9 thinking.

10 A. No, I'm not saying what he was saying I was just
11 answering the question.

12 Q. Okay. Did you try --- Did you try to get away from
13 him on rotation? Did you request a law enforcement
14 official out there that you wanted to --

15 A. Yeah, I am assuming that why they moved him.

16 Q. Because you requested it?

17 A. Yeah, because I said that I didn't want him on my
18 rotation, because I already know how he was going
19 to try to come at me.

20 Q. Okay. Now you also testified on direct that there
21 was no mention of any kind of robbery while you
22 were in the truck or none that you remember?

23 A. No, sir, not to my recollection on that.

24 Q. Okay. Now the place that you were going to, did
25 Devodus know anybody there?

TRAVIS JAMES - CROSS EXAMINATION BY MR. HERON 348

1 A. To my knowledge --- I mean --- he done --- he done
2 seen my baby momma before, that wasn't the first
3 time. When he went over there that wasn't the
4 first time. He done seen my baby momma before. As
5 a matter of fact, one time when --- I hope I ain't
6 incriminating myself, but one time when I had a
7 smoke of pot when I was dealing drugs my baby mamma
8 was driving for me, and she dropped him off in
9 Darlington.

10 Q. Okay. So that night you all were drinking, you
11 said that somebody's grandma asked you all to leave
12 because you all were getting loud and you all had
13 been drinking?

14 A. Yes, sir.

15 Q. Okay. But said you weren't using any cocaine?

16 A. No, there was no cocaine.

17 Q. But you referred to the truck, I think as the crack
18 truck?

19 A. Yeah, crack and cocaine is two different --- I mean
20 it comes from same thing, but crack is a form that
21 is made from coke.

22 Q. Okay. Now where you there when they gave the guy
23 the crack or the cocaine for the truck?

24 A. No, I wasn't there.

25 Q. You weren't there for that, okay. And you didn't

1 see who shot Brandon, is that right?

2 A. No, I didn't.

3 Q. Did you see Doug stopping people from coming out
4 the house?

5 A. Yeah, I seen when he walked from out the room with
6 Quan, and him and Quan came to the door. Cause
7 like I said I was right there in the living room.

8 THE COURT: She didn't get that. Repeat that
9 again. Speak up now and real slow, got to get every
10 word.

11 A. I'm sorry. Repeat the question. Repeat the
12 question again, please.

13 Q. Did you see Doug stopping people from coming out
14 the house?

15 A. Yes.

16 Q. And if this is the front --- Well, let me ask you
17 this. Do you see where the gun --- the shells ---
18 the bullet shells were on the ground?

19 A. No, I ain't never seen no bullet shells. The only
20 thing that I know ---

21 THE COURT: Keep your voice.

22 A. The only thing that I noticed was the charm that
23 was on the ground. I didn't see no --- to my
24 knowledge, I don't remember seeing no bullets ---
25 no bullet casings.

TRAVIS JAMES - CROSS EXAMINATION BY MR. HERON 350

1 Q. I am going to show you what's been marked as
2 State's Exhibit 13. Can you tell the jury what
3 that is?

4 A. A bullet.

5 Q. Is it an empty bullet?

6 A. Yes.

7 Q. And I am going to show you what's been marked as
8 State's Exhibit 12. What is that a picture of?

9 A. A live bullet.

10 Q. A live bullet. And State's Exhibit 15, is that
11 drug baggie?

12 A. Yes.

13 Q. Okay. Have you ever bought any drugs from Brandon?

14 A. No.

15 Q. I am going to show you what's been marked as
16 State's Exhibit 10. If you look on there, does two
17 and three look like they're pretty close to the
18 steps, if this is two and this is three. Does that
19 look like pretty close to the steps?

20 A. Yes.

21 Q. As a matter of fact two bullets --- if this was the
22 step, the two bullets look like they would be
23 appropriately about right here?

24 A. Yes.

25 Q. How long would it take me to get from the front of

1 the steps to the house? Could I do it like that?

2 MR. CLEMENTS: Your Honor, I think that calls for
3 speculation so we object to that.

4 MR. HERON: Your Honor, I am asking him about the
5 physical --- Well let me ask this --- I will rephrase
6 it, Your Honor.

7 Q. How far is it from the steps to the front door?

8 A. Not far at all. Not from the steps to the front
9 door.

10 THE COURT: Keep your voice up.

11 A. Not far at all.

12 Q. Could you say one and a half steps?

13 A. Maybe, yeah.

14 Q. Would you watch me do a demonstration. Could I be
15 in the front door that quick?

16 A. Yeah, I guess, yeah.

17 Q. And if I was running I could probably be there
18 quicker than that couldn't I?

19 A. Yes.

20 Q. And, did you see if Devodus had a gun in the car
21 with you all in on the way over there?

22 A. No, I ain't never --- I ain't see him with no gun
23 on the way over there.

24 Q. Are you related to Doug, or is he just a good
25 friend of yours?

TRAVIS JAMES - CROSS EXAMINATION BY MR. HERON 352

1 A. That my people.

2 Q. Doug?

3 A. Yeah.

4 Q. He's your boy?

5 A. Yeah.

6 Q. Okay. And you didn't tell --- This is the first
7 time you are telling this story is that right?

8 A. Yes.

9 Q. You told something to law enforcement at the scene
10 that you thought a guy with dread locks was running
11 down the road. Do you remember telling them that?

12 A. No, I can't recall nothing about saying nothing
13 about with nobody with dread locks.

14 Q. Okay. But you remember giving them the wrong name
15 at the scene?

16 A. Yes, I remember saying my name --

17 **THE COURT:** Keep your voice up.

18 A. Yes, I remember saying that my name is Travis
19 Johnson.

20 Q. Okay. And you never --- You didn't give law
21 enforcement --- According to your testimony you
22 didn't give them a truthful statement, is that
23 right?

24 A. At first, no.

25 Q. Were you and Doug planning on robbing Brandon

1 Timmons?

2 A. Me and Doug would not have no reason to rob ---
3 without disrespecting him, Brandon wouldn't really
4 have nothing for me and Doug to rob him for. We
5 know him personally, and I know he was working at
6 the Boys and Girls Club, and I also know that, you
7 know, not being disrespectful he was a momma's boy.
8 His momma, use to help him out, you know, with
9 stuff so what would we gain from robbing him.

10 Q. Well drug dealers have money don't they?

11 A. See, he's trying to be made out to be something
12 that he wasn't. He wasn't no drug dealer. Maybe
13 that was something that he was trying out or what
14 not but that man use to work at the Boys and Girls
15 Club. He was not a drug dealer.

16 Q. You say he didn't have any money for you guys to
17 rob?

18 A. Yeah, what would he have that we could gain from?

19 Q. Did he have some LCD screens in his car on the back
20 of the seat, do you remember seeing that?

21 A. I couldn't say, I don't know nothing about no LCD
22 nothing.

23 Q. Well we know he had a cross on, is that right?

24 A. Yes.

25 Q. A gold cross, is that right?

TRAVIS JAMES - CROSS EXAMINATION BY MR. HERON 354

1 A. Yes.

2 MR. HERON: Beg, The Court's indulgence.

3 (PAUSE)

4 Q. How long --- This happened back in the beginning of
5 2007, is that right?

6 A. Yes.

7 Q. And how often do you and Doug hang out from the
8 beginning of 2007 --

9 A. We didn't hung out too long because right after
10 this he went to jail and he just coming home so we
11 wasn't hanging out at all.

12 Q. Okay. But you talk to him?

13 A. No. The whole time he was in jail, no.

14 Q. Okay. If you let me finish my question, and I'll
15 give you an opportunity to answer. Does that sound
16 fair?

17 A. Okay. But I just answering your questions, sir.

18 Q. Okay. Now when he got out of jail --- when did he
19 get out of jail?

20 A. I can't recall when he got out. I didn't even know
21 that he was out when he first got out. I found out
22 like a couple of days later, but I don't even ---
23 since this happened I don't really hang around in
24 the area where I use to hang and that's around my
25 momma house. I see Doug whenever I go to mother

TRAVIS JAMES - CROSS EXAMINATION BY MR. HERON 355

1 house or what not. The majority of the time I be
2 with my girlfriend.

3 Q. How long and if you can give me your best guess has
4 Doug been out of jail?

5 MR. CLEMENTS: Your Honor, that calls for
6 speculation and I --

7 THE COURT: Unless he knows.

8 A. I don't know.

9 THE COURT: Ask him if he knows.

10 A. I ain't keeping up with Doug to find out any of
11 that. I don't know.

12 Q. Well you been sitting on that side of the courtroom
13 all week; isn't that right?

14 A. No, I wasn't sitting on this side the courtroom all
15 week. Yesterday afternoon was the first time I was
16 in here.

17 Q. And you are telling --- Well, let me ask this.
18 Have you and Doug talked about your testimony
19 today?

20 A. No.

21 Q. He's your home boy and you all haven't --- He
22 hasn't mentioned anything to you about your
23 testimony, is that what you are telling this jury?

24 A. No.

25 MR. HERON: Okay. Thank you.

TRAVIS JAMES - CROSS EXAMINATION BY MR. HERON 356

1 MR. CLEMENTS: Mr. James, that's all the questions
2 I have, and I would ask that he be released from his
3 subpoena, Your Honor.

4 MR. HERON: It's fine with me, Your Honor.

5 THE COURT: All right, thank you. Are you are
6 free to go.

7 Mr. JAMES: Thank you.

8 MR. CLEMENTS: Your Honor, it will be as least as
9 long as Mr. James'.

10 THE COURT: All right, jurors, we have this
11 choice. We can take a short recess and then try to
12 finish some of this testimony, or we can stop now. I do
13 not have any strong feelings about that other than we
14 got to keep going at some point to finish this case.
15 Now tomorrow we are going to have to have the arguments
16 and charge, and various other things like that, motions.

17 MR. CLEMENTS: For housekeeping purposes, Your
18 Honor, we have two witnesses left, and one I think I can
19 complete by reasonable time. I just thought because
20 that witness will be lengthy maybe everyone might need a
21 short break.

22 THE COURT: Let me see what the jurors --- Do you
23 jurors want to stop here take a short break, and then
24 come back and hear some testimony? Let's see if I can
25 get a consensus. Short break and then come back. All

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 357

1 right, short recess and then we'll come back.

2 MR. CLEMENTS: Thank you, Your Honor.

3 (Whereupon, a recess was taken from 4:15 p.m.
4 until 4:28 p.m.)

5 THE COURT: All right, you ready, Mr. Solicitor?

6 MR. CLEMENTS: Your Honor, The State's ready.

7 THE COURT: Ready Defense?

8 MR. HERON: Yes, Your Honor.

9 THE COURT: All right, Mr. Solicitor.

10 MR. CLEMENTS: Your Honor, the next witness we
11 would call would be Mr. Douglas Washington.

12 DOUGLAS WASHINGTON

13 BEING DULY SWORN TESTIFIES AS FOLLOWS

14 CLERK OF COURT: Please be seated and state your
15 full name for the record.

16 Mr. WASHINGTON: My name is Doug Washington.

17 THE COURT: You got to speak up now so ---

18 Mr. JAMES: Doug Washington.

19 DIRECT EXAMINATION BY MR. CLEMENTS

20 Q. Mr. Washington, I am going to ask you to do a
21 couple of things for me that are very important,
22 okay?

23 A. All right.

24 Q. Number one is I want you to speak up loudly and
25 clearly but also I want you to speak up slowly.

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 358

1 The Court reporter has got to take down everything
2 you say. Sometimes we tend to get excited in here
3 and when I get excited I talk real fast so I am
4 going to ask you to do what I have a hard time
5 doing that is to speak slowly.

6 A. Okay, I will.

7 Q. All right. Mr. Washington, first off, I notice you
8 got crutches up there. What did you do?

9 A. I was trying to play basketball and I twist my
10 ankle. I stepped on somebody else's foot and twist
11 my ankle.

12 Q. Okay. That happened this weekend?

13 A. Right, yes, sir.

14 Q. All right. And Mr. Washington, you are charged on
15 this indictment, aren't you?

16 A. Yes, sir.

17 Q. What are you charged with?

18 A. Resisting arrest and misprison of a felony.

19 Q. Misprison of a felony?

20 A. Yeah.

21 Q. Do you know what that is?

22 A. As far as my lawyer explain it to me, it like
23 having acknowledge of a crime that took place and
24 didn't report it.

25 Q. All right. And you have got a pending charge of

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 359

1 resisting arrest, is that right?

2 A. Yes, sir.

3 Q. Does that or does that not have anything to do with
4 when you came to report to your probation agent and
5 they wanted to talk you about this incident and you
6 ran away?

7 A. Yes, sir.

8 Q. And then they told you to stop and you started
9 running?

10 A. Yeah, I started running, yes, sir.

11 Q. Okay. And they charged you with resisting arrest
12 for that?

13 A. Yes, sir.

14 **THE COURT:** Keep you voice up now.

15 A. Yes, sir.

16 Q. Do you have any other pending charges?

17 A. Yeah, I got a CDV charge.

18 Q. You got a CDV charge. Is it pending or you plead
19 guilty to it?

20 A. It's pending.

21 Q. Pending. In what Court?

22 A. General Sessions.

23 Q. General Sessions?

24 A. Yes, sir.

25 Q. Okay. All right. Now what has The State ask you

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 360

1 to come and do today?

2 A. They just told me --- basically they just told me
3 to just tell the truth.

4 Q. All right. And have we made any kind of plea offer
5 to you in regards to if you tell the truth?

6 A. All you say is you are going to recommend probation
7 but ain't no guarantee I'm going to get it.

8 Q. All right. And that's on the CDV and on the --

9 A. Resisting arrest, but if I plead to the misprision
10 of a felony.

11 Q. Misprision of felony and CDV. Didn't we tell you
12 that the officer told you that he would dismiss the
13 resisting arrest charge if you told the truth?

14 A. Yes, sir.

15 Q. Now what happens if you don't tell the truth?

16 A. I be lying.

17 Q. All right. And is The State offering you anything
18 to tell ---

19 A. No.

20 Q. -- but if you don't tell the truth?

21 A. No, I am doing this on my own free will.

22 Q. All right. And Mr. Washington, you've been in
23 trouble with the law before haven't you?

24 A. Oh, yes, I got a book.

25 Q. You got a book?

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 361

1 A. I got a book of charges.

2 Q. All right. Do you mind us going over those with
3 the jury?

4 A. It don't matter, it's all in the past.

5 Q. All right. Do you have a conviction with a YOA
6 sentence for assault and battery with intent to
7 kill, discharging a firearm into a dwelling --

8 A. Yes, sir.

9 Q. -- in 1998?

10 A. Yes, sir. I was like sixteen or something like
11 that.

12 Q. You were sixteen years old?

13 A. Yeah.

14 Q. You've had some driving offenses, is that correct?

15 A. Yes, sir.

16 Q. Failure to stop for a blue light conviction?

17 A. Yes, sir.

18 Q. And giving false information?

19 A. Yes, sir.

20 Q. And you have a resisting arrest, all of that in
21 2002?

22 A. Yes, sir. Yeah.

23 Q. Some more driving offenses, is that correct?

24 A. Yes, sir.

25 Q. And then in 2006 do you have a conviction for

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 362

1 pointing and presenting a firearm?

2 A. Yeah, yeah, I think so, yeah.

3 Q. All right. And in 2006 also at the same time you
4 got a criminal domestic violence high and
5 aggravated, and you got jail time suspended to time
6 served probation, is that correct?

7 A. Yes, sir.

8 Q. Did you complete probation on that successfully, or
9 did you have to go back to jail?

10 A. No, sir, all because of this incident right they
11 had violated my probation so I had to do a prison
12 sentence.

13 Q. All right. Now, I have here there is an armed
14 robbery with a deadly weapon from 2006, is that ---
15 with no disposition, is that charge still pending
16 to your knowledge or was it dismissed on plea or
17 other charges?

18 A. Not to my knowledge. I think they had found the
19 couple who did that or whatever and they dropped it
20 against me.

21 Q. Got to speak slow.

22 THE COURT: She can't take it down unless you
23 speak up now. Please help us in that regard.

24 A. All right. As far as my knowledge, sir, they found
25 the couple the couples who were involved in that,

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 363

1 so they dropped the charges against me.

2 Q. And prosecuted someone else?

3 A. I don't. I know they dropped against me.

4 Q. Okay. And other than driving offenses, all the
5 other convictions you've got we told the jury about
6 today that you know of?

7 A. Yes, sir.

8 Q. All right. The CDV second you told me about, that
9 is pending --- that I didn't know about actually
10 --- that's December 17th, is that when that
11 occurred?

12 A. Yes, sir. I mean you had mentioned that last week
13 when --

14 Q. You told me about it last week and I forgot about
15 it. Part of your deal is that you've got to plead
16 to that, plead to misprison of a felony is that
17 correct?

18 A. As far as for that probation you just told me to
19 plead to the misprison of a felony. The resisting
20 arrest and CDV.

21 Q. All right. All right, well, all we promise though
22 is that you get a probationary sentence if you are
23 telling the truth is that correct?

24 A. Yes, sir, it is.

25 Q. Now, I want you to look at this jury and I want you

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 364

1 to tell them the truth.

2 A. All right, I will.

3 Q. You've heard some of the testimony in this case so
4 far is that correct?

5 A. Yes, sir.

6 Q. You've heard Mr. Rouse's statement?

7 A. Yeah, yeah, yeah, I caught that.

8 Q. You caught that?

9 A. Yes, sir.

10 Q. I want you to look at this jury, and I am going to
11 ask you this question, and I want to know the
12 truth. Did you shoot Brandon Timmons on January 2,
13 2007? Look at this jury and answer.

14 A. No, no, no, sir, I didn't.

15 Q. Did you see who shot Brandon Timmons on January 2,
16 2007?

17 A. No, sir. I didn't.

18 Q. Did you later to come to have any knowledge about
19 who shot Brandon Timmons on January 2, 2007?

20 A. Yes sir, I did.

21 Q. All right. And we want to get to that in a little
22 bit, but first I want to see what you have to say
23 about what you were doing on January 1, 2007. Did
24 you have a license?

25 A. No, sir.

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 365

1 Q. Do you have a car?

2 A. No, sir.

3 Q. Do you sometimes use other people's cars --- kind
4 of rent from them, or you renting from them?

5 A. On that particular day Cory did that.

6 Q. Cory did that. Cory Byrd?

7 A. Cory Byrd, uh-huh. Yeah --

8 Q. Do you know what a smoker's whip is?

9 A. Yeah, that's a person who do drugs and rent their
10 car for either money or drugs for a certain period
11 of time or whatever.

12 THE COURT: She is missing your statement. You
13 got to slow down and speak a little louder. She has got
14 to take down everything.

15 MR. CLEMENTS: Back up from the mic a little bit
16 and speak slowly.

17 THE COURT: Speak up, please.

18 A. All right.

19 Q. What is a smoker's whip?

20 A. That is a person who do drugs or whatever and they
21 rent their car out for either drugs or money for a
22 certain period of time.

23 Q. All right. Keep answering like that. Don't get to
24 close to the microphone it will get distorted a
25 little bit. Speak up and speak slowly. Mr.

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 366

1 Washington, on January 1st --- First let me ask you
2 this. Do you know Cory Byrd?

3 A. Yes, sir.

4 Q. How long had you known Cory Byrd?

5 A. I really --- actually I didn't know him that long
6 because I met him through Travis.

7 Q. And is that Travis James?

8 A. Travis James, yes, sir.

9 Q. Also known as Gusto?

10 A. Yes, sir.

11 Q. How long have you known Gusto?

12 A. I mean I know Gusto for a while, years.

13 Q. Months, years?

14 A. Years, yeah.

15 Q. Years?

16 A. Yes, sir.

17 Q. Did you know Brandon Timmons?

18 A. Yes, sir. I mean my family and his family, you
19 know, my aunt --- my aunt got a baby from his
20 uncle, so yeah, I know him pretty good.

21 Q. All right. Did you know Devodus Rouse?

22 A. No, I don't know him.

23 Q. All right, when did you meet him?

24 A. I mean I met him the night the incident took place.

25 Q. And where did you meet him?

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 367

1 A. We went to Darlington to the projects or whatever,
2 and he jumped in the truck with us asking for a
3 ride or whatever to go back to Florence.

4 Q. And when you say we, can you tell this jury who we
5 was?

6 A. Me, myself, Doug Washington, Travis Sentell James
7 and Cory Byrd.

8 Q. All right. And did you all give him a ride?

9 A. Yes, sir.

10 Q. On the way from Darlington to Florence did you all
11 have much conversation?

12 A. I mean not that I know of cause it was my birthday
13 and I was celebrating my birthday so, you know, I
14 fell a sleep for a little minute.

15 Q. Okay.

16 A. But as far as conversation go, I can't remember no
17 conversation.

18 Q. Let me ask you this specifically, whether you heard
19 this or not. Did you hear Devodus or anybody say
20 anything about doing a lick or doing some dirt?

21 A. No, no, sir.

22 Q. Can you say that it wasn't said?

23 A. I mean I can't say that I said it --- I mean I
24 can't say that I heard that or I heard that being
25 said because like I said I was --- I dozed off for

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 368

1 a minute.

2 Q. All right.

3 A. I was intoxicated.

4 Q. You were intoxicated?

5 A. Yeah, do you understand?

6 Q. When you left Darlington and came to Florence where
7 did you go?

8 A. I mean I know I woke up at my grandma house. I
9 don't know where he went after we left Darlington,
10 but I woke up at my grandmother's house.

11 Q. All right. And where does your Grandmamma live?

12 A. On Maxwell Street in Florence, South Carolina.

13 Q. On Maxwell Street?

14 A. Yes, sir.

15 Q. How long were you at your Grandmamma's house?

16 A. I wasn't too long because I guess we was making too
17 much noise so she came the door and do what she do,
18 she ran us out the yard.

19 Q. All right. And do you know about what time it was?

20 A. No, it was late though. It had to be close to
21 12:00, could have been past 12:00, I don't know.
22 It was late though.

23 Q. Okay. And you left your Grandmamma's house do you
24 know where you went next?

25 A. Yeah, we went to Carolyn house, cause Cory wanted

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 369

1 to holler at Carolyn because I think he had just
2 came home like a week or two or before that or
3 whatever and he had some past dealing so, you know,
4 he wanted to talk to her.

5 Q. He wanted to talk to Carolyn?

6 A. Yeah.

7 Q. And is that your aunt?

8 A. Yes, sir.

9 Q. And where is that house located?

10 A. On the block of [REDACTED] --- I mean not Maxwell,
11 Marion Street.

12 Q. [REDACTED]?

13 A. Yes, sir.

14 Q. Is that in the middle of the block, is that on the
15 corner?

16 A. I mean Marion Street that's a long street so I am
17 going to say that about --- that is like the
18 middle. I mean but the house is located on the
19 corner. It's on the corner of Lawson and Marion
20 Street.

21 Q. All right. Now when you got there who was all
22 riding in the truck when you got there at Carolyn's
23 house?

24 A. My --- Myself, Douglas Washington, Cory Byrd was
25 driving, Gusto was in the seat behind him, and that

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 370

1 Von dude over there he sitting behind me.

2 Q. All right. Do you see Von in the courtroom?

3 A. Yeah, he's sitting on there, right there.

4 Q. Can you describe what his clothes are?

5 A. I mean he look like he got on a black shirt with a
6 little white collar.

7 MR. CLEMENTS: All right. Let the record reflect
8 that the witness has identified the Defendant.

9 THE COURT: It will.

10 Q. Mr. Washington, you got to Carolyn's house what did
11 you do?

12 A. I think Cory went --- yeah, Cory went in the house
13 by himself. And me and Gusto we was just standing
14 outside talking, you know, smoking cigarettes, you
15 know what I mean.

16 Q. What did Von do?

17 A. I can't remember.

18 Q. Did you invite him to come in?

19 A. Yeah, yeah, we ask him to come in the house but he
20 was like there was no need because he was on the
21 phone with his ride.

22 Q. Okay. And did you and Gusto go in the house?

23 A. Yes, sir.

24 Q. When you went in the house who was there that you
25 saw?

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 371

1 A. I saw my cousin Quandeline. I saw my Aunt Carolyn.
2 And, oh, yeah, my other little cousin which Qaun's
3 son, Little Chunky.

4 Q. Little Chunky?

5 A. Yeah, Little Chunky.

6 Q. Was he sleep or where was he?

7 A. I can't remember. I think he was sleep but I woke
8 im up because I was playing with them.

9 Q. Okay. Who's son is that?

10 A. That is Quandeline and Travis, Travis James.

11 Q. All right. And what room did you go in the house?

12 A. I went in all of them. I went to the kitchen first
13 and I think I went to the den and I ended up in the
14 bedroom with Quan, and me and her was just
15 conversating or whatever.

16 Q. All right, there was some testimony you came in
17 hollering about something or talking about some boy
18 or something. Do you remember what all that was
19 about?

20 A. I mean it wasn't nothing major though, I was just
21 some work play, you know, people saying whatever
22 about her and I was just letting her know, you
23 know, you got to watch who you deal with cause, you
24 know, everybody don't respect you like they suppose
25 to.

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 372

1 Q. All right, so there some boy talking junk about
2 her?

3 A. Yeah --- Yes, sir.

4 Q. All right. Now while you were there at the house
5 did anybody else come to the house?

6 A. Yeah, Brandon.

7 Q. Brandon?

8 A. Yeah --- yeah, Brandon did --- Brandon came.

9 Q. And are you familiar with Brandon's car? Do you
10 know what kind of car he drives?

11 A. Oh, yes, sir, cause I use to drive the car. He
12 tell me to make sure his mamma didn't see me or
13 whatever. I use to take him on his job and all.

14 Q. What kind of car did he have?

15 A. A gold Maxima with some realms on it.

16 Q. Gold Maxima with some realms?

17 A. Yes, sir.

18 Q. Where did he pull the car up in the yard?

19 A. To the front of the house. He always parked it ---

20 Q. Always parked in front of the house?

21 A. That's his park, yeah.

22 Q. And where were you all parked at?

23 A. On the --- like if you're going into the yard you
24 will be on the right side of the house.

25 Q. Is that where the driveway is?

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 373

1 A. Yeah, you can call it that.

2 Q. Okay.

3 A. Cause you can't go on the other side.

4 Q. What kind of truck were you all in?

5 A. It was a --- it was a gray --- a gray --- either a
6 gray Rodeo or a gray Passport.

7 Q. What kind of car are those?

8 A. SUV.

9 Q. SUV?

10 A. Yes, sir.

11 Q. All right. When Brandon came in, did you speak to
12 him?

13 A. Oh, yeah, I told him Happy New Year and he returned
14 the same time and told me Happy Birthday.

15 Q. Okay.

16 A. And I was surprised he remembered that or whatever.

17 Q. Where did he go from there?

18 A. He went in the house. See at the time --- now let
19 me say this right there --- at the time when he
20 pulls up me and Travis was on the porch, and he was
21 like, well if fixing to run in the house for a
22 minute. So me and Travis we was discussing about
23 leaving or whatever and trying to rush Cory so we
24 could go. So at that time Travis went in the house
25 to go get Cory. I continued to smoke a cigarette

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 374

1 and when I got finished with the cigarette I went
2 in the house behind him.

3 Q. All right. Where did you go when you back in the
4 house?

5 A. I mean I went to no specific room. I was just
6 running all around house. That my aunt house, you
7 know, but I ended up in the bedroom.

8 Q. All right.

9 A. I think I woke the baby up, I was playing with the
10 baby.

11 Q. And who were you talking with in the bedroom?

12 A. Me and my little cousin Quandeline.

13 Q. All right. Where you there, did you notice or
14 observe Brandon leave, walk out the door?

15 A. Yes, sir, cause he shook my hand before he left.

16 Q. He went out which door?

17 A. The front door.

18 Q. All right. After he went out the front door what
19 did you do?

20 A. I stayed in the house. I stayed where I was at.
21 That when me and Quan was having our little
22 discussion about the dudes talking bad about her or
23 whatever.

24 Q. All right. And after he shook your hand and went
25 out the front door what room, were you in?

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 375

1 A. I was in the same room, the front bedroom.

2 Q. I am going to show you State's Exhibit Number 1.

3 Can you point out to me what area of the house that
4 was in?

5 THE COURT: Keep your voice up.

6 A. All right.

7 Q. The steps and the porch there at the front. This
8 is the front of the house.

9 A. Oh, this right here got to be the room right there.

10 Q. Right there?

11 A. That got to be the front room, yeah.

12 Q. All right. You ever seen --- that diagram been
13 shown to you before?

14 A. You talking about this picture right here?

15 Q. State's Exhibit Number 1, yes.

16 A. Did I ever see that?

17 Q. Have I ever shown that to you?

18 A. No, sir.

19 Q. All right. You were talking with Quandeline in
20 that front bedroom?

21 A. Yes, sir.

22 Q. Brandon had gone out the house?

23 A. Yes, sir.

24 Q. What is the next thing of any significance that you
25 noticed, or observed, or heard?

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 376

1 A. We heard a gun shot?

2 Q. How do you know it was a gunshot?

3 A. I mean you can distinguish the difference between a
4 gunshot and a fire cracker cause it was real loud,
5 and plus that ain't uncommon in the hood no way as
6 far as New Year Day goes. Everybody shooting their
7 gun or whatever.

8 Q. All right. And when you heard the gunshot, who was
9 with you, if anyone?

10 A. Oh, yeah, I was in the room with Quan and her baby,
11 and the rest of them they was around there doing
12 whatever they was doing.

13 Q. All right. When you heard that gun shot what did
14 you do?

15 A. I froze up for a minute. I ain't --- I ain't --- I
16 ain't did no reaction to be honest. I just --

17 Q. Did you look out the window?

18 A. I ain't did nothing.

19 Q. Did Quan look out the window?

20 A. I mean I think she did, yeah. I think she did.

21 Q. All right. What happened next?

22 A. She --- I mean she attempted to make her way
23 outside and I hindered her from doing it.

24 Q. You held her up in the door?

25 A. Yeah.

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 377

1 Q. How did you do that?

2 A. I mean I just kept blocking her path. I can't
3 remember exactly how I did it. I know I ain't
4 really grab her in no physical like no way to try
5 to harm, just cause of the simple fact she was
6 pregnant at the time so I'm like that ain't logical
7 thinking. So, why you going go outside and you
8 pregnant and you just heard gunshot.

9 Q. All right. Did you relent and let her go outside?

10 A. I mean eventually, yeah. I ain't held up her that
11 long cause there weren't nothing I could do about
12 it.

13 Q. All right. And did you notice where was Gusto
14 during all of this time, if you know?

15 A. Oh, yeah, he --- he was in the front room just, I
16 don't know, I guess he was feeling the effects of
17 celebrating my birthday, I don't know, he was just
18 dazed, standing there looking crazy.

19 Q. Do you know where Cory was?

20 A. Yeah, Cory, you know, Cory had a little thing for
21 Carolyn so, you know, he was back there trying to
22 do what he do.

23 Q. All right. Quandeline went out the door, did you
24 notice who went out the door next?

25 A. Me. Had to be, I think that I was right after her.

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 378

1 Me or Carolyn --- I think it was me though. We
2 ain't went out the door at the same time. It was
3 either me or her.

4 Q. You are her being Carolyn?

5 A. Carolyn, yeah, Carolyn.

6 Q. All right. Did you notice anybody trying to use
7 the phone?

8 A. I mean not at the time because when we first bust
9 out the door, me and Quan went straight to Brandon
10 so, you know, we was tending to him and that when I
11 heard Carolyn with all that commotion and all that.

12 Q. Did you ever try to take the phone from her?

13 A. I took it from her because my thought process was
14 why you going to call the police and wait on the
15 ambulance when his car is stilling running and all
16 we had to do was put him the car. That what I was
17 thinking.

18 Q. So you tried to take the phone from her?

19 A. I took it.

20 Q. All right. Then what did she do?

21 A. I believe --- yeah, she ran to the car.

22 Q. And did she get in?

23 A. Yeah, she got in and I got in with her.

24 Q. And what did you try to do?

25 A. I stopped her from leaving the scene.

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 379

1 Q. Why?

2 A. Cause like I said, my thought process is, you know,
3 here's a man on the ground, okay, you heard a
4 gunshot so I mean anybody with common sense can put
5 two and two together so why wait on the ambulance
6 when we could just take him to the hospital.

7 Q. And did you all get in an argument?

8 A. I mean, yeah, we --- yeah, yeah.

9 Q. And, what were you saying to them? Were you trying
10 to explain that to them or not?

11 A. Yeah, I was --- yeah. I'm like ain't no need. See
12 my thing is what you going to leave for anyway.
13 What you going to do go get the police and come
14 back with the police, I mean that didn't make sense
15 to me, you didn't have no phone.

16 Q. Were you still intoxicated at this time?

17 A. Yeah --- Yes, sir.

18 Q. So they started trying to tend to Brandon?

19 A. Yeah, we all were.

20 Q. Did you think he was shot?

21 A. I mean not at the time cause ain't nobody notice no
22 blood but he was in --- I don't know he was just
23 --- he was just looking. He was just looking. I
24 ain't know what to think to be honest.

25 Q. He was just looking?

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 380

1 A. He was just looking.

2 Q. His eyes were open?

3 A. Yeah, he ain't had no facial expression or nothing
4 he was just looking.

5 Q. I was standing --- Quan was standing --- I mean
6 Quan was on her knees, and it was like we had him
7 --- we had him smothered, you know, all us was
8 standing around him so I'm like, man say something,
9 you know. I mean, if you all right, say something,
10 but he wasn't responding in no kind of way.

11 Q. And you heard a gun shot and knew he was not
12 responsive?

13 A. Yes, sir.

14 Q. So what did you think?

15 A. I mean I figured he got shot, but at the same time
16 there was down there looking for blood but at the
17 time they didn't find it.

18 Q. All right. Did you see anyone run off?

19 A. No, sir.

20 Q. You didn't stick around did you?

21 A. No, no sir.

22 Q. Why not?

23 A. Cause I --- as far as, you know, my probation
24 states I can't be around that type of activity or
25 my probation would be violated.

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 381

1 Q. You didn't have anything to do with it did you so
2 why were you worried about probation?

3 A. Cause if it came up that I was even present they
4 can violate me on that alone.

5 Q. So what did you do?

6 A. I left.

7 Q. How did you leave?

8 A. I left in that same truck we came in.

9 Q. Did you leave kind of in a hurry?

10 A. Yeah, yeah. Yes, I did.

11 Q. Where did you go?

12 A. First I went to return the truck back, and then I
13 went to my baby mamma house.

14 Q. And did you ever get knowledge about who shot
15 Brandon Timmons?

16 A. Yes, sir.

17 Q. Where did you get knowledge of that from, what
18 person?

19 A. I mean a while --- a while --- a while after that
20 they came to my house. I mean as far as who I am
21 talking about it was Cory Byrd, Travis James, and
22 that Von dude over there. All of them came to my
23 house in a little black car.

24 Q. Now, did you notice anything in that truck when you
25 were taking that truck back?

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 382

1 A. I mean not at the time. Not at the time. But once
2 I parked it, and I was getting out the truck, yeah.

3 Q. What was in that truck?

4 A. A little pistol, a gun.

5 Q. What kind of gun?

6 A. I mean what --- it was a gun.

7 Q. I am going to show you what's been marked as
8 State's Exhibit Number 22.

9 A. Oh, yeah. For the record, that's it right there.

10 Q. Are you sure about that, or does it looks like it?

11 A. I'm positive. I can see that with my eyes closed.

12 Q. What did you do with that gun when you found that
13 gun in that truck?

14 A. I mean that night I had hid it.

15 Q. Why?

16 A. Cause I ain't no --- it's a gun, I don't suppose to
17 be around them guns no way just for the simple fact
18 I'm on probation.

19 Q. Did anyone come to you looking for that gun?

20 A. Yes, sir.

21 Q. Who?

22 A. That Von dude over there.

23 Q. And where did he find you at?

24 A. He found me at my baby mamma house.

25 Q. Did he know you well enough to know where your baby

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 383

1 mamma's lived?

2 A. No, sir. He required that information from Travis
3 because he was the only person who knew. Cory
4 didn't even know.

5 Q. All right. Did he get out the car and come talk to
6 you?

7 A. Yeah, but Cory beat me to the scene first. Cory
8 came to me first and he was like don't give it to
9 him, but I ain't no what he was talking at the time
10 until he walked up to me and ask me where his gun
11 was at. I told him I ain't had no gun, I ain't
12 know what he was talking about.

13 Q. Was that true?

14 A. No, I lied.

15 Q. Why did you lie?

16 A. Cause I mean --- I lied cause I ain't --- for me
17 from my understanding I felt like he shot him. He
18 killed Brandon, you know. I wasn't fixing to give
19 him that gun.

20 Q. And did he tell you anything about he shot Brandon?

21 A. Yeah, he said that when he was walking up. Like
22 man, I got to get that, man, and I was like for
23 what? Dude dead. Dude dead. I'm like who, he's
24 like that Brandon dude in the car. I said you shot
25 him and he was like yeah. So I caught on right

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 384

1 then and there, I'm like you can't get that I don't
2 even have that. You need to go check with that man
3 or whoever vehicle that was. He say you left it
4 the truck and I said if you left it in the truck I
5 said if you left it in the truck then that's where
6 it still is, but I lied, I had it.

7 Q. What did you end up doing with it, selling it?

8 A. No, I gave it away. And then, you know, later on
9 the due was like he sold it or whatever and I told
10 him he had to give me some of that money though.

11 Q. Now you lied about the gun. You gave it away and
12 somebody sold it. Did you get some of the money
13 from it?

14 A. Yeah, I got a little bit.

15 Q. Did --- Did Von, ever tell you why he shot Brandon?

16 A. He said he was in the process of robbing him and
17 Brandon had reached for his gun or whatever. He
18 said he just shot him.

19 Q. What did you do next, or what did they do next
20 after he told you --- after you told him that the
21 gun must still be in the truck?

22 A. I guess they went looking for it but like my baby
23 mamma she don't play all that commotion around I
24 guess we was being loud out there given the simple
25 fact it was late so, you know, noise is going

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 385

1 travel at night, that late and early in the morning
2 anyway, so I told them they had to leave. You all
3 got get around here with that.

4 Q. What did you do next? Did you ever go to law
5 enforcement and talk to them?

6 A. No, no, I ain't never went to them. Not right then
7 and there.

8 Q. Did you know they were looking for you?

9 A. Not at the time?

10 Q. All right. Is that something --- let's be honest
11 now, would have voluntarily wanted to talk to them?

12 A. No, cause that would have --- not saying that if
13 they would have violated my probation I would have
14 got a prison sentence, but just by me doing that
15 they can violate my probation. Not saying the
16 violation you can go to prison or whatever but it's
17 a chance.

18 Q. Let me ask you this. What is the philosophy you
19 hold, or kind of where you hold where you come up
20 as far as getting into somebody else's business, or
21 staying out of their business, or staying out of
22 something, or volunteering information?

23 A. I mean that is just something you don't do. I mean
24 no matter what kind of case it is but especially a
25 murder, I mean would you want to be involved in a

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 386

1 murder, and then the murderer still running free, I
2 mean.

3 Q. Did you come to find out anything about when he was
4 arrested?

5 A. Who, you talking about him?

6 Q. Mr. Rouse, yes. Did you get knowledge about him
7 being arrested?

8 A. Later on down the line. I think I was in
9 Charleston, because my daddy had surgery or
10 something. I know it was right after I got
11 arrested.

12 Q. Once he was arrested you didn't feel like it would
13 be a good thing for you to come forward with this
14 information?

15 A. No, sir. I still --- my whole --- my whole outlook
16 on the case was, on the whole event that took place
17 was, I didn't want no involvement with that.

18 Q. Wasn't Brandon a friend of yours though?

19 A. Yes, sir.

20 Q. How do you feel about that now?

21 A. I mean I feel bad but at the same time I'm
22 correcting my mistake right now.

23 Q. Is there any doubt where you were when the gunshot
24 went off?

25 A. No, sir.

DOUGLAS WASHINGTON - DIRECT EXAMINATION BY MR. CLEMENTS 387

1 Q. Is there any doubt who came looking for that gun?

2 A. No, sir.

3 Q. Is there any doubt in your mind that Devodus Rouse
4 told you he shot Brandon?

5 A. No, sir, he came out and said it.

6 MR. CLEMENTS: Beg, The Court's indulgence.

7 THE COURT: All right.

8 Q. Mr. Washington?

9 A. Yes, sir.

10 Q. Do you realize that Mr. Rouse and Mr. Heron are
11 trying to say you killed Brandon Timmons?

12 A. Yes, sir. I heard that from his statement.

13 Q. You are not here just to try to protect yourself
14 are you?

15 A. No, I ain't the one being charged with murder, I
16 mean I can understand his defense though, but there
17 ain't no logical --- that ain't no logical defense
18 to me when everybody was saying where I was.

19 Q. And do you understand you are still facing
20 misprison of a felony charge?

21 A. Yes, sir.

22 Q. And the resisting arrest?

23 A. And the CDV.

24 Q. The officer said he would drop.

25 A. Yes, sir.

DOUGLAS WASHINGTON - CROSS EXAMINATION BY MR. HERON 388

1 Q. Have you been promised anything other than The
2 State will recommend probation for you telling the
3 truth?

4 A. No, sir.

5 Q. Any guarantee you're going to get probation?

6 A. No, sir.

7 Q. And you're telling this jury the truth?

8 A. Yes, sir, I am.

9 Q. Did you shoot Brandon Timmons?

10 A. No, sir.

11 Q. To your knowledge and your belief who shot Brandon
12 Timmons?

13 A. That Von dude over there.

14 MR. CLEMENTS: Please answer any questions Mr.
15 Heron may have.

16 MR. HERON: Just a moment, Your Honor.

17 THE COURT: Yes.

18 (PAUSE)

19 CROSS EXAMINATION BY MR. HERON

20 Q. Mr. Washington, I was trying to write it down as
21 you all went through but if I could I just want to
22 go through your past criminal history briefly.

23 A. All right.

24 Q. You got two counts of criminal domestic violence,
25 is that right?

DOUGLAS WASHINGTON - CROSS EXAMINATION BY MR. HERON 389

1 A. I think that's where they made the mistake at. I
2 ask who, but I thought I was supposed to plead to
3 one, they dropped the other.

4 Q. Okay. SO you got at least one?

5 A. At least one, yeah.

6 Q. And criminal domestic violence that's when you hit
7 your spouse or girlfriend?

8 A. I mean they say you can just raise your voice or
9 you all can indulge in an argument and that's
10 criminal --- that's Criminal Domestic there.

11 Q. Okay. You got two counts of giving false
12 information is that right?

13 A. I know I got one.

14 Q. Okay. You got one count of assault and battery
15 with intent to kill is that right?

16 A. Yeah, that's what I pled to.

17 Q. Okay. You got one count of pointing and presenting
18 a firearm is that right?

19 A. Yes, sir.

20 Q. And you got two counts of discharging a firearm
21 into a dwelling, somebody's house?

22 A. I know I still have one cause all that came from
23 one case, you know.

24 Q. Okay, so you got at least one where you shot into
25 somebody's house with a gun?

DOUGLAS WASHINGTON - CROSS EXAMINATION BY MR. HERON 390

- 1 A. Yeah, that's what I pled to.
- 2 Q. Did Devodus know Brandon Timmons to your knowledge?
- 3 A. Not that I know of.
- 4 Q. Okay. Did you know Brandon Timmons was going to be
- 5 at [REDACTED] that night?
- 6 A. No, sir.
- 7 Q. You said Brandon has some realms on his car?
- 8 A. Yeah. Yes, sir.
- 9 Q. Did he have some LCD monitors in the back seat?
- 10 A. What is that, TV?
- 11 Q. Yeah, TV's is that what you all call them?
- 12 A. Yeah. You talking about in the little headrest?
- 13 Q. Yeah.
- 14 A. Yeah, he had them but they ain't even work.
- 15 Q. Okay. So he had two of those.
- 16 A. I think he had three.
- 17 Q. Did you ever buy any drugs from Brandon?
- 18 A. No. Brandon don't sell drugs. I don't even know
- 19 where you all get that from.
- 20 Q. Okay. Well there that night did you see the drugs
- 21 in his car?
- 22 A. No, I ain't had time to do that cause like I said I
- 23 was trying to prevent my aunt from leaving so, you
- 24 know, we in the car searching for the keys. I
- 25 ain't got time --- I wasn't looking for no drugs no

DOUGLAS WASHINGTON - CROSS EXAMINATION BY MR. HERON 391

1 way.

2 Q. Okay. Let's talk about why you were preventing
3 your aunt from leaving. Now if I heard your
4 testimony right and please correct me if I'm wrong
5 because I don't want to put words in your mouth.

6 A. I will.

7 Q. You testified that the reason you snatched the
8 phones from your aunt's house --- from your aunt's
9 hand, because you thought you all could just take
10 Brandon to the hospital yourself, is that right?

11 A. Yes, sir. I mean I thought they could have took
12 him. I wasn't going.

13 Q. So when your aunt gets in the car why would you
14 snatch the keys out of the car?

15 A. Cause she was fixing to leave. I was trying to
16 stop her from leaving.

17 Q. Okay. And so when she got another phone to try to
18 call 911 for help, you snatched that phone out of
19 her hand?

20 A. I know I snatched the first one.

21 Q. You don't remember snatching the second phone out
22 of her hand?

23 A. I mean if she said I did then it's a possibility
24 that I did. Like I said, I was intoxicated.

25 Q. All right. You said this happened on New Year's

DOUGLAS WASHINGTON - CROSS EXAMINATION BY MR. HERON 392

1 Eve?

2 A. No, it had to be New Year's Day, that's my
3 birthday.

4 Q. Okay. And you say it wasn't uncommon in that
5 neighborhood for gun shots or anything like that.
6 Do you remember seeing if any people --- Were
7 people outside in that neighborhood --- is that
8 common for people to be walking outside?

9 A. You talking about that time of night like --

10 Q. Uh-huh.

11 A. Did I see anybody walking around?

12 Q. Uh-huh.

13 A. No, my only concern was to tend to Brandon. I
14 wasn't looking for nobody else.

15 Q. I'm talking about when you got there you didn't see
16 anybody in the neighborhood walking around or
17 anything?

18 A. No, sir.

19 Q. Okay. You said there was no talk in the car on the
20 way to the house about doing any kind of crime or
21 anything like that is that right?

22 A. No, sir.

23 Q. And we've already established that Mr. Rouse didn't
24 even know that Brandon Timmons was going to be
25 there is that right?

DOUGLAS WASHINGTON - CROSS EXAMINATION BY MR. HERON 393

1 A. No, none of us did.

2 Q. Okay. You didn't know so I mean how else could
3 anybody else know; is that right?

4 A. You're right.

5 THE COURT: Speak up now.

6 A. You right.

7 Q. Now have you been here for the whole trial?

8 A. No, today is my first day.

9 Q. Okay. Did you talk to Travis James earlier?

10 A. I mean we spoke. That's my home boy.

11 Q. Now that gun ---

12 MR. HERON: Can I approach the witness, Your
13 Honor.

14 THE COURT: Yes.

15 Q. Now who's gun is this?

16 A. I mean I don't know.

17 Q. Well I thought you told this jury that Von or
18 Devodus told you that it was Brandon's gun?

19 A. I mean but if that's --- yeah, that's what I did
20 say. I don't know if this is Brandon gun or not,
21 he could have been lying to me.

22 Q. Okay. So this was the gun that was in your truck
23 when you drove off?

24 A. Yes, sir.

25 Q. Okay. What happened to the gun that did the

DOUGLAS WASHINGTON - CROSS EXAMINATION BY MR. HERON 394.

1 shooting?

2 A. I mean you got to ask him that.

3 Q. Ask him that. So if he would have put the victim's
4 gun in there so you could drive off with it but
5 keep his gun?

6 A. I mean if that's was me, I would have kept both of
7 them. I mean but if I had a make a choice I would
8 have kept the one that I actually did the crime
9 with.

10 Q. It's funny you said that. You would have kept both
11 of them. As a matter of fact when you heard 911
12 was being called you hit the road?

13 A. Yes, sir. No, not, not, not immediately.

14 Q. But you drove pretty fast away from the scene isn't
15 that right?

16 A. I mean I guess I left in a hurry. I ain't gonna
17 speed.

18 Q. I'm sorry, I didn't mean to cut you off. Do you
19 remember where Brandon's body was when you left?

20 A. He was laying in the yard.

21 Q. Okay. Did you back out or did you go forward
22 coming out?

23 A. I had to back out first then go forward.

24 Q. Okay. Do you remember which way you went on the
25 street when you finally got to going?

DOUGLAS WASHINGTON - CROSS EXAMINATION BY MR. HERON 395

1 A. You mean like as far as did I go straight, right or
2 left?

3 Q. Let me do this if I can. Let me show you State's
4 Exhibit 1. If I heard your testimony right, please
5 correct me if I'm wrong. You all parked on this
6 side of the house is that right?

7 A. Yeah, if that's the porch

8 THE COURT: Keep your voice up.

9 A. Yeah, that's it --- that's it over there. That's
10 the right side.

11 Q. For the record, you are pointing to the right side
12 of the house. Now when you got on the road did you
13 this way or did you go this way?

14 A. I went that way.

15 Q. You went this way?

16 A. Yes, sir.

17 Q. Okay. And you didn't see Brandon's body when you
18 were backing out?

19 A. I already knew where his body was at so I wasn't
20 looking for his body.

21 Q. And were you drunk?

22 A. Yeah, I was a little intoxicated, yeah.

23 Q. Okay. Now the day after the shooting isn't it true
24 that you went to your Aunt Quandeline's house to
25 talk with her?

DOUGLAS WASHINGTON - CROSS EXAMINATION BY MR. HERON 396

1 A. No, sir.

2 Q. Okay. So I should be more specific. Did you talk
3 to your aunt the next day?

4 A. Yeah, later on that night, next afternoon or
5 something, yeah. I talked to all of them.

6 Q. I think you said she was at her grandfather's
7 house. I should have said Grandfather's house.

8 A. No, my Grandmother house, that's her mother's
9 house.

10 Q. Okay. What did you all talk about and why did you
11 go over there?

12 A. I mean I always go over there. I go over there
13 every day to check on my Grandmamma. I mean as far
14 --- I was just trying to require knowledge, you
15 know what I'm saying, what happened, what took
16 place.

17 Q. Mr. Washington, isn't it true you went over there
18 and told them that you had heard that your name had
19 got caught up in this and you wanted to know what
20 they were telling police?

21 A. I don't remember saying nothing like that.

22 Q. You don't remember saying that?

23 A. I wouldn't have no reason to say nothing like that.

24 Q. Did you also say that you had heard that Ms.
25 Washington was telling the police that you and

DOUGLAS WASHINGTON - CROSS EXAMINATION BY MR. HERON 397

1 Gusto were going to rob Brandon Timmons, do you
2 remember saying that?

3 A. As far as all that knowledge right there we
4 obtained that like after he done been killed, like
5 days, it could have been weeks after that. I ain't
6 never heard that in the streets --

7 Q. Okay.

8 A. -- until after he got murdered.

9 Q. Okay. But did you go over there the next day and
10 talk to your aunt, and say, I heard that you all
11 have been telling police that I --- that me and
12 Gusto were going to rob Brandon, do you remember
13 tell her that?

14 A. I wouldn't have not reason to say that because I
15 didn't get that information that quick.

16 Q. Okay. Let me ask you this. Did you and Gusto have
17 a plan to rob Brandon?

18 A. No, that --- that's like I said that was my friend,
19 man, I mean I use to drive his car. I mean as far
20 when that took place we had stopped --- we had went
21 on our way, but every time I saw him he spoke and
22 did the same.

23 Q. As a friend you would let bleed out on the yard,
24 that's a friend that you let bleed out and didn't
25 let anybody call law enforcement. That's the

DOUGLAS WASHINGTON - CROSS EXAMINATION BY MR. HERON 398

1 friend you snatched somebody's keys when they were
2 trying to get them help, that same friend?

3 A. I mean as far as how all that was going. That
4 didn't --- Yeah, that took ten or twenty minutes,
5 all this happened real fast and then his own cousin
6 came so, you know, they was fixing to put him in
7 her truck.

8 Q. You said everybody said that you were in the house
9 is that right?

10 A. That's where I was.

11 Q. Isn't it true that everybody that said you were in
12 the house is related to you?

13 A. No.

14 Q. Who's not related to you?

15 A. Cory Byrd?

16 Q. Is he your home boy to?

17 A. I mean I knew him. We had just started hanging but
18 like I said I met him through Travis.

19 Q. So it's Travis James and all your relatives said
20 that you were in the house?

21 A. Yes, sir.

22 MR. HERON: Your Honor, can I have just a second.

23 THE COURT: Sure.

24 (PAUSE)

25 Q. Now the Solicitor has also said that you are going

DOUGLAS WASHINGTON - CROSS EXAMINATION BY MR. HERON 399

1 to plea to a misprison of a felony is that right?

2 A. Yes, sir.

3 Q. And you are going to get --- you are going to have
4 a recommendation of probation?

5 A. Yes, sir.

6 Q. Probation, a slap on the wrist?

7 A. As far as, I mean --

8 Q. -- I mean you've done probation before is that
9 right?

10 A. Yeah, I mean I tried but I violated it.

11 Q. Okay. And there is no jail time associated with
12 probation?

13 A. Yeah, I just came home from prison.

14 Q. Okay. Has he charged you --- Has the Solicitor's
15 Office charged you with murder?

16 A. No, sir.

17 Q. Has the Solicitor's Office charged you with
18 accessory before the fact?

19 A. No, sir.

20 Q. Has the Solicitor's Office charged you with
21 accessory after the fact?

22 A. I think that was our initial charge but they
23 changed it for some reason, I don't know why. I
24 know that's what we got arrested for.

25 Q. And you agree with me murder is the most serious

DOUGLAS WASHINGTON - CROSS EXAMINATION BY MR. HERON 400

1 charge that you can catch, is that right?

2 A. As far as what initial charge that you speak of.

3 Q. As far as the crime. I mean murder is the most
4 serious crime you can commit is that right?

5 A. I mean from my knowledge murder for hire is the
6 worse cause you paying somebody to kill somebody.

7 Q. Okay. Now you have shot a gun before is that
8 right?

9 A. That's what I pled to.

10 Q. Okay. Are you familiar with automatic guns?

11 A. Yes, sir.

12 Q. Okay. If you load a clip in an automatic gun and
13 you put one in the chamber, what is one in the
14 chamber?

15 A. You ready to do.

16 Q. I'm ready.

17 A. We said that earlier.

18 Q. Ready to pull the trigger and go, right?

19 A. Yes, sir.

20 Q. If you pull back the slide on an automatic gun and
21 there is one in the chamber, what happens to that
22 bullet?

23 A. It depends on what type of condition your weapon
24 in. Some guns it will jam up and then it will have
25 two in there, but if it's in good condition it will

DOUGLAS WASHINGTON - REDIRECT EXAMINATION BY MR. CLEMENTS

1 jump out and the bullet that you cocked it will
2 replace that one.

3 Q. So a live bullet will fall on the ground, right?

4 A. Yes, sir.

5 MR. HERON: I don't have any other questions, Your
6 Honor.

7 THE COURT: Redirect.

8 **REDIRECT EXAMINATION BY MR. CLEMENTS**

9 Q. Mr. Washington?

10 A. Yes, sir.

11 Q. Mr. Heron, ask you about everybody in that house
12 was either your home boy or kin to you?

13 A. Yes, sir.

14 Q. Do you know, or have knowledge that Quandeline
15 Washington was romantically involved with Brandon
16 Timmons?

17 A. No, sir, we --- we --- we obtained that knowledge
18 later on. Like after the fact, we heard a whole
19 lot of stuff but, you know, a bunch of coincidence.

20 Q. You observed Quandeline that night. Tell me about
21 her demeanor. Was she upset or not?

22 A. As far as what had happened to Brandon?

23 Q. Yes.

24 A. Everybody was upset.

25 Q. All of them were upset, right?

DOUGLAS WASHINGTON - REDIRECT EXAMINATION BY MR. CLEMENTS 92

1 A. Yes, sir.

2 Q. And did you think that because they were so upset
3 that they all cared about Brandon deeply?

4 A. Yeah, all of us, yeah, yes, sir.

5 Q. And if they cared for Brandon deeply why would they
6 try to cover up for his murder?

7 MR. HERON: Your Honor, calls for speculation.

8 THE COURT: I sustain the objection.

9 MR. HERON: Thank you.

10 MR. CLEMENTS: I will withdraw the question.

11 THE COURT: Sustained.

12 Q. One last thing, Mr. Washington.

13 A. All right.

14 Q. Mr. Heron asked you about are you familiar with an
15 automatic and pulling the slide back.

16 A. Yes, sir.

17 Q. And I believe you said the bullet drops on the
18 ground if you pull the slide back.

19 A. If one is already in the chamber.

20 Q. Is that really accurate, that it just drops on the
21 ground?

22 A. Naw, it will pop up.

23 Q. It goes flying out.

24 A. Yeah, it ---

25 Q. It ejects it, right?

DOUGLAS WASHINGTON - REDIRECT EXAMINATION BY MR. CLEMENTS 93

1 A. Yeah, it depends on what kind of condition your
2 weapon in.

3 Q. All right. But it will go flying out?

4 A. Yeah.

5 MR. CLEMENTS: Okay. I don't have any further
6 questions.

7 THE COURT: Recross?

8 Mr Heron: I don't have any other questions, Your
9 Honor.

10 THE COURT: You may step down.

11 MR. CLEMENTS: Your Honor, our next witness we
12 would call would be fairly lengthy.

13 THE COURT: All right. Jurors, tomorrow, I plan
14 to get you this case for a decision. Once you get the
15 case for decision I am going to keep you together then.
16 So when you come tomorrow, we will give you the case for
17 decision and once that case is given to you, of course,
18 I keep the jury together until they reach a verdict. So
19 make plans to stay tomorrow in regard to the possibility
20 of late discussions if that is necessary. Just give you
21 that general information as to your activities and the
22 use of your services tomorrow.

23 Please do not discuss the case with anyone. Please
24 do not let anyone discuss it with you. If anyone
25 discusses it with you, you must report that directly to

DOUGLAS WASHINGTON - REDIRECT EXAMINATION BY MR. CLEMENTS⁹⁴

1 The Court. Please understand the gravity of that kind
2 of consequence.

3 As I told you earlier, there is television news
4 media coverage on this case. Do not watch any news
5 tonight. Do not watch any news. Just miss one night
6 for me, please, so that we will not have any difficulty
7 in that regard.

8 I hope you have a good night's rest. I would like
9 to start at 9:00 tomorrow, 9:00 tomorrow. And, Ms.
10 Court Reporter, you note says that you will not be hear
11 tomorrow so I will have another court reporter, okay.

12 Have a good night's rest everyone. See you 9:00
13 tomorrow.

14 **BAILIFF:** Anyone have coats, pocketbooks or other
15 belongings in the jury room go get them now, please.
16 Others, go out the door there.

17 (Whereupon, the jury exits the courtroom at
18 4:55 p.m.)

19 **THE COURT:** Mr. Solicitor, you have one more
20 witness, is that correct?

21 **MR. CLEMENTS:** That is correct, Your Honor.

22 **THE COURT:** Counsel for defense. Have you discuss
23 with this Defendant in detail his Fifth Amendment
24 privileges?

25 **MR. HERON:** I have, Your Honor.

DOUGLAS WASHINGTON - REDIRECT EXAMINATION BY MR. CLEMENT#95

1 THE COURT: Have you discussed those to the point
2 that a decision has been made in that regard?

3 MR. HERON: I think we have, Your Honor.

4 THE COURT: Okay. Do you desire for The Court to
5 take it up with him at this time, or do you want to wait
6 til tomorrow?

7 MR. HERON: If you would like, Your Honor, if that
8 will save us some time tomorrow, that's fine with me.

9 THE COURT: Is that suitable with you now?

10 MR. HERON: Yes. Yes, sir, it is, Your Honor.

11 THE COURT: Okay. Come around, sir.

12 CLERK: Do you want him sworn?

13 THE COURT: Yes.

14 DEVODUS ROUSE

15 BEING DULY SWORN TESTIFIES AS FOLLOWS

16 CLERK OF COURT: Do you want him to sit down and
17 have a seat in the witness chair.

18 THE COURT: Yeah, have a seat.

19 CLERK OF COURT: State your full name for the
20 record.

21 Mr. ROUSE: Devodus Anthony Rouse.

22 THE COURT: Mr. Rouse, listen to me closely.
23 Listen to me carefully. If you do not understand ask
24 me to explain it to you and I will. Do you understand
25 that?

DOUGLAS WASHINGTON - REDIRECT EXAMINATION BY MR. CLEMENT#96

1 Mr. ROUSE: Yes, sir.

2 THE COURT: Now speak up so everyone can hear you.

3 Mr. ROUSE: Yes, sir.

4 THE COURT: You have the absolute right not to
5 testify under the Constitution, do you understand that?

6 Mr. ROUSE: Yes, sir.

7 THE COURT: That is called a Fifth Amendment
8 Privilege, do you understand that?

9 Mr. ROUSE: Yes, sir.

10 THE COURT: That provision of the Constitution
11 says that a Defendant is not required to testify. A
12 Defendant is not required to take the stand. A
13 Defendant will not be compelled to testify under any
14 circumstances. Do you understand that?

15 Mr. ROUSE: Yes, sir.

16 THE COURT: I tell you now that if you do take the
17 stand, and you do desire to testify, that you must
18 answer all questions that I rule a proper question. Do
19 you understand that?

20 Mr. ROUSE: Yes, sir.

21 THE COURT: Have you discussed with your counsel
22 in detail the Fifth Amendment Privilege of not
23 testifying or testifying?

24 Mr. ROUSE: I don't understand you, sir.

25 THE COURT: Have you talked to your lawyer about

DOUGLAS WASHINGTON - REDIRECT EXAMINATION BY MR. CLEMENTS 97

1 the Fifth Amendment Privilege that you do not have to
2 testify?

3 Mr. ROUSE: Yes, sir.

4 THE COURT: Have you talked to him about the fact
5 that you have the right to testify if you want to?

6 Mr. ROUSE: Yes, sir.

7 THE COURT: Have you made a decision in regard to
8 testifying or not testifying?

9 Mr. ROUSE: I am not testifying.

10 THE COURT: You are not testifying?

11 Mr. ROUSE: No, sir.

12 THE COURT: Is that decision not to testify made
13 freely and voluntarily?

14 Mr. ROUSE: Yes, sir.

15 THE COURT: Have you discussed this decision with
16 your counsel in detail?

17 Mr. ROUSE: Get me to understand what you are
18 talking about, sir?

19 THE COURT: Have you talked to your lawyer in
20 detail about your decision not to testify?

21 Mr. ROUSE: Yes, sir.

22 THE COURT: Are you satisfied with your
23 discussions with your lawyer?

24 Mr. ROUSE: Yes, sir.

25 THE COURT: Do you understand now that you are

DOUGLAS WASHINGTON - REDIRECT EXAMINATION BY MR. CLEMENTS 98

1 evoking your Fifth Amendment Privilege not to testify,
2 and that is what you want to do?

3 Mr. ROUSE: Yes, sir.

4 THE COURT: Would you like to ask The Court and
5 questions about your Fifth Amendment Privilege?

6 Mr. ROUSE: No, sir.

7 THE COURT: You understand that completely?

8 Mr. ROUSE: Yes, sir.

9 THE COURT: And you are satisfied with your
10 discussions with counsel about this?

11 Mr. ROUSE: Yes, sir.

12 THE COURT: Thank you. Counsel, are you satisfied
13 with my query to him?

14 MR. HERON: I am, Your Honor.

15 THE COURT: Thank you. You may go back.

16 THE COURT: All right. Tomorrow, counsel, we will
17 proceed with the last witness for The State. Will you
18 have any witnesses in this matter, counsel for defense?

19 MR. HERON: We do not, Your Honor.

20 THE COURT: Okay. And in that regard there will
21 be a reversal insofar as the order of closing argument.
22 You will get the privilege to close.

23 MR. HERON: Thank you, Your Honor.

24 THE COURT: Yes. Mr. Solicitor, you understand
25 that, of course?

DOUGLAS WASHINGTON - REDIRECT EXAMINATION BY MR. CLEMENTS 9

1 MR. CLEMENTS: Certainly, Your Honor.

2 THE COURT: Yes. Anything we need to put on the
3 record before we take the night hiatus?

4 MR. CLEMENTS: Nothing from The State, Your Honor.

5 THE COURT: Defense?

6 MR. HERON: Nothing, Your Honor.

7 THE COURT: 9:00 tomorrow. Thanks.

8 MR. CLEMENTS: Thank you, Your Honor.

9 (Whereupon, The Court concludes its business
10 for the day at 4:55 p.m.)

11 -- END OF REQUESTED TRANSCRIPT --

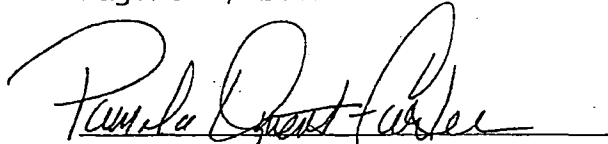
CERTIFICATE OF REPORTER

410

I, the undersigned, Pamela Ozment-Cartee, official court reporter for the Fourth Judicial Circuit of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in of General Sessions, Florence County, South Carolina, on the 12th and 13th day of January 2009.

I do further certify that am neither, of kin, counsel, nor interest of any party hereto.

August 1, 2009



Pamela Ozment-Cartee
Circuit Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Ralph King Anderson, Jr., Special Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT

V.

DEVODUS ROUSE,

APPELLANT

INITIAL ANDERS BRIEF OF APPELLANT

JOSEPH L. SAVITZ, III
Senior Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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TABLE OF AUTHORITIES

Cases

<i>Jackson v. State</i> , 355 S.C. 568 , 586 S.E.2d 562 (2003)	6
<i>State v. Burkhardt</i> , 350 S.C. 252, 565 S.E.2d 298 (2002)	5
<i>State v. Jackson</i> , 384 S.C. 29, 681 S.E.2d 17 (Ct. App. 2009).....	5
<i>State v. Slater</i> , 373 S.C. 66, 644 S.E.2d 50 (2007)	6
<i>State v. Wigington</i> , 375 S.C. 25, 649 S.E.2d 185 (Ct. App. 2007)	5

STATEMENT OF ISSUE ON APPEAL

The trial judge committed reversible error by failing to instruct the jury on self-defense.

STATEMENT OF THE CASE

On January 12 through 14, 2009, Devodus Rouse stood trial in Florence County, before Judge Ralph King Anderson Jr. and a jury, on an indictment charging him with the murder of his romantic rival, Brandon Timmons. The State's case against Rouse was largely circumstantial: he was the only one of several suspects in the yard with Timmons when he was shot.

Although Rouse did not testify or offer any evidence, his defense was that another suspect, Douglas Washington, had killed Timmons. Based on Rouse's description of the incident to his girlfriend, Farhonda Pompey, who testified for the State, the judge instructed the jury on voluntary manslaughter in addition to murder. The jury found Rouse guilty of manslaughter, and the judge sentenced him to imprisonment for twenty-five years.

ARGUMENT

The trial judge committed reversible error by failing to instruct the jury on self-defense.

In addition to providing the basis for a charge on voluntary manslaughter, the testimony of Farhonda Pompey relating what Rouse had told her about the incident also supported a charge on self-defense. According to Pompey, Rouse stated, "When I walked up on [Timmons], he pulled out a gun." Tr. p. 70 lines 4-7. Rouse never said anything about robbing Timmons. Tr. p. 70 lines 18-24. When Timmons pulled out his gun, he and Rouse began to fight. Tr. p. 75 lines 23 and 24. "The next day he had a bruise above his right eye," Pompey continued. Tr. p. 78 lines 4-10. Rouse told Pompey that he shot Timmons because "[i]t was him or me." Tr. p. 74 lines 12-14.

"If there is any evidence of record from which it can be reasonably inferred that an accused justifiably inflicted a wound in self-defense, then the accused is entitled to charge the law of self-defense." *State v. Wigington*, 375 S.C. 25, 649 S.E.2d 185, 188 (Ct. App. 2007). A trial judge's refusal to charge self-defense under such circumstances is reversible error. *State v. Jackson*, 384 S.C. 29, 681 S.E.2d 17 (Ct. App. 2009).

The State bears the burden of disproving self-defense beyond a reasonable doubt. *State v. Burkhardt*, 350 S.C. 252, 565 S.E.2d 298, 303 (2002).

To establish self-defense in South Carolina, four elements must be present:

- (1) The defendant must be without fault in bringing on the difficulties;
- (2) the defendant must have been in actual eminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in eminent danger of losing his life or sustaining serious bodily injuries;
- (3) if his defense is based upon his belief of eminent danger, defendant must show that a reasonably prudent person of

ordinary firmness and courage would have entertained the believe that he was actually in eminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and

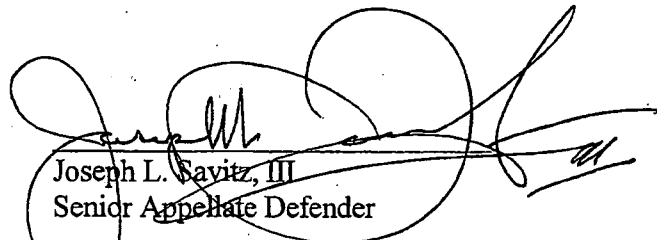
(4) The defendant had no other probable means of avoiding the danger.

State v. Slater, 373 S.C. 66, 644 S.E.2d 50, 52 (2007).

In essence, Rouse told Pompey that he shot Timmons in self-defense after Timmons pulled a gun on him without reason. Yet defense counsel inexplicably agreed with the State that a charge on self-defense would be "inappropriate." Tr. p. 125 line 5- tr. p. 126 line 25. Since counsel arguably failed to preserve the judge's failure to charge self-defense, the Court of Appeals may require Rouse to raise this issue on post-conviction relief as part of an allegation of ineffective assistance of counsel. See, for example, *Jackson v. State*, 355 S.C. 568, 586 S.E.2d 562 (2003).

If not, the Court should reverse Devodus Rouse's conviction for voluntary manslaughter and remand for a new trial.

Respectfully submitted,



Joseph L. Savitz, III
Senior Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of February, 2010.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County

Ralph King Anderson, Jr., Special Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT

V.

DEVODUS ROUSE,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Devodus Rouse states:

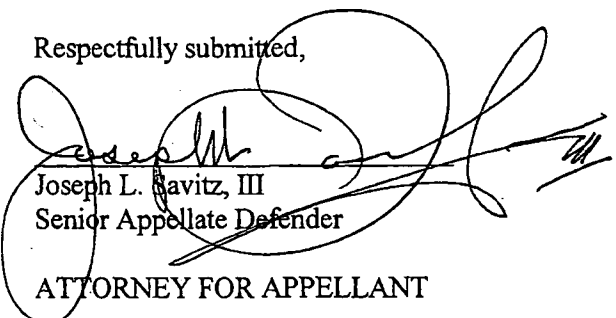
1. He is Senior Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Ralph King Anderson, Jr., which was held on January 12-13, 2009, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Devodus Rouse.

Respectfully submitted,


Joseph L. Savitz, III
Senior Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of February, 2010.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
Ralph King Anderson, Jr., Special Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT

V

DEVODUS ROUSE,

APPELLANT

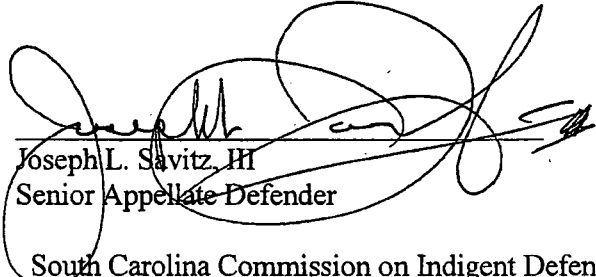
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Trial transcript
- (2) True-billed indictment

I certify that this designation contains no matter which is irrelevant to this appeal.

February 8th, 2010



Joseph L. Savitz, III
Senior Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

Attorney for Appellant

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Ralph King Anderson, Jr., Special Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT

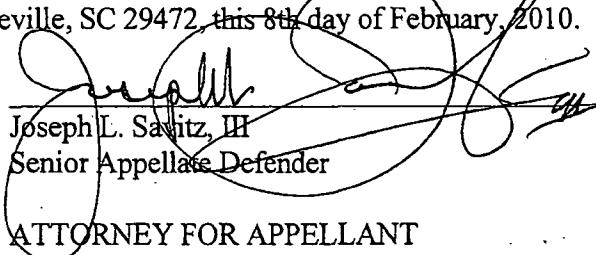
V.

DEVODUS ROUSE,

APPELLANT

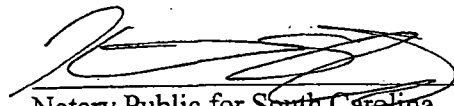
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and on Devodus Rouse, #332635 at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 8th day of February, 2010.


Joseph L. Savitz, III
Senior Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of February, 2010.


Notary Public for South Carolina

(L.S.)

My Commission Expires: July 1, 2010.

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State,

Respondent,

v.

Devodus Rouse,

Appellant.

Appeal From Florence County
Ralph King Anderson, Jr., Special Circuit Court Judge

Unpublished Opinion No 2011-UP-274
Submitted May 1, 2011 – Filed June 8, 2011

APPEAL DISMISSED

Appellate Defender Joseph Savitz, III, of Columbia,
for Appellant.

Attorney General Alan Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant
Deputy Attorney General Salley W. Elliott, all of
Columbia; and Solicitor Edgar Clements, Jr., of
Florence, for Respondent.

PER CURIAM: Devodus Rouse appeals his conviction for voluntary manslaughter, arguing the trial court erred by failing to instruct the jury on self-defense. After a thorough review of the record and counsel's brief pursuant to Anders v. California, 386 U.S. 738 (1967), and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), we dismiss the appeal and grant counsel's motion to be relieved.¹

APPEAL DISMISSED.

FEW, C.J., HUFF and THOMAS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

June 28, 2011

REMITTITUR

The Honorable Connie Reel-Shearin
180 N. Irby St., MSC-E, Rm. B11
Florence, SC 29501-3456

Re: The State v. Rouse, Devodus
2008-GS-21-00849

Dear Ms. Reel-Shearin:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

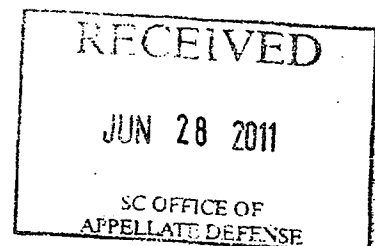
Sincerely,

V. Claire Allen
V. Claire Allen
Deputy Clerk of Court

VCA/tf

cc: Devodus Rouse, # 332635
Senior Appellate Defender Joseph L. Savitz, III
Assistant Deputy Attorney General Salley W. Elliott

CLOSING LETTER SENT
ON 6/14
Attorney initials VJA
Assistant initials PDS



FORM 5

a011-CP-21-158

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

County of FlorenceDevodus Rouse #332635

Applicant

State of South Carolina

CERTIFIED A TRUE COPY APPLICATION FOR
Devodus Rouse POST-CONVICTION RELIEF
 CLERK OF COURT C.P. & G.S.
 FLORENCE COUNTY, S.C.

INSTRUCTIONS TO READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Corr. Inst. P.O. Box 205, Ridgeville, SC
29472
2. Name and location of Court which imposed sentence
Florence County, General Sessions
3. Name(s) of co-defendant(s) (if any)
XXXXXX N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(2) 2008-Ga-21-849 (voluntary manslaughter)

For the term upon which sentence is imposed and the terms of the sentence:

DIR (35)
January 14, 2009 (30 years)

Check whether a finding of guilty was made:

- (a) after a plea of guilty _____
 (b) after a plea of not guilty trial by jury _____
 (c) after a plea of nolo contendere _____

Did you appeal from the judgment of conviction or the imposition of sentence?

yes

If you answered Yes to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. affirmed

ii. _____

iii. _____

(c) the date of each such result:

i. unknown

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results.

i. unknown

ii. _____

iii. _____

If you answered No to (7), state your reasons for not so appealing:

(a) n/a

10. State briefly the grounds on which you base your allegation that you are being held in custody unlawfully.

- (a) ineffective assistance of counsel,
- (b) denial of Due Process
- (c) denial of 6th & 14th Amendments U.S. Constitution

11. State concisely and in the same order the facts which support each of the grounds set out in (10).

- (a) see attached memorandum in support
- (b) same as above
- (c) same as above

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? no
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (3)? no
- (d) any other petitions, motions or applications in this or any other Court? no

13. If you answered Ayes to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. n/a
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. n/a
 - ii. _____
 - iii. _____

i. _____
 (c) the disposition thereof

i. n/a

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. n/a

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. none

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

first filing for post conviction relief

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. n/a

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. n/a

ii. _____

iii. _____

16 If any ground for relief has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented.

(a) first filing for post conviction relief

(b) _____

(c) _____

17 Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? n/a, plea of not guilty

(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

18 If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Lee Heron, Esquire

Florence County Bar

ii. above referenced was counsel during trial & sentencing

iii. South Carolina Office of Appellate Defense on direct appeal

(b) the proceedings at which each such attorney represented you:

i. trial and sentencing

ii. _____

iii. direct review

State clearly the relief you seek in filing this application.

vacate sentence and conviction and remand for new trial.

Are you now under sentence from any other court that you have not challenged?

no

Revised 3/2003

STATE OF SOUTH CAROLINA

VERIFICATION

County of Dorchester

I, DEVODEN A. ROUSE, being duly sworn upon my oath, depose and say that I have subscribed to the for-going 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.

DEVODEN A. ROUSE

SWORN to and subscribed before me this 16th day of June 2011.

Sylvia Jones (L.S.)
Notary Public

My Commission Expires 1/24/2010

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE

CA/No. 2008-GS-21-849

Devodus Rouse #332635 -- Petitioner.

-Vs-

State of South Carolina -- Respondent.

MEMORANDUM OF LAW IN SUPPORT OF
POST CONVICTION RELIEF APPLICATION
PURSUANT TO S.C. CODE ANN.
§§ 17-27-20 THROUGH 17-27-160

Devodus Rouse
SCDC# 332635

/s/ DEVODUS A. ROUSE

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

) IN THE COURT OF COMMON PLEAS

)

Devodus Rouse #332635

) Indict. No. 2008-GS-21-849

Petitioner,

)

-Vs-

) MEMORANDUM OF LAW IN SUPPORT OF

State of South Carolina

) POST CONVICTION RELIEF APPLICATION

Respondent,

) PURSUANT TO S.C. CODE ANN. §§

17-27-20 THROUGH 17-27-160

COMES NOW, Devodus Rouse, above captioned Petitioner, pro-se respectfully seeking relief in this Honorable Court pursuant to S.C. Code Ann. §17-27-20 through 17-27-160, claiming that his Sixth Amendment right to the effective assistance of trial counsel was violated during trial, including but not limited to his Fourteenth Amendment right to a fair trial that is protected under the Federal Constitution.

Petitioner believes through the issues presented, statement of facts and citations of authorities relied on he will show unto this Court his entitlement to the requested relief sought herein.

Respectfully Submitted,

/s/ DEVODUS A. ROUSE

Devodus Rouse #332635

ISSUE (A) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE SOLICITOR'S IMPROPER CLOSING?

FACTS

Petitioner asserts that he was denied the effective assistance of trial counsel when counsel failed to object to the Prosecution's improper closing that undeniably used you and forms of the word you before the jury in closing summation that would have lead a reasonable jurist to imagine themselves in the shoes of the defendant and or the victim depending on the jurists interpretation of the argument. This is known as the Golden Rule Argument, which in certain instances constitutes reversal of the conviction. In the instant case the following argument was recorded:

And Farhonda heard him. It was him or me. Travis said he told us that; It was him or me.

Well you're not entitled to a charge on the law of self-defense if you're robbing somebody and they try to defend themselves and you shoot them.

Because you're robbing somebody, they got a right to defend themselves. Somebody tries to rob you, you've got a right to defend yourself. (Tr.p.155, L.1-12).

Murder is: The taking of human life with malice aforethought. And if you're robbing somebody and you use a deadly weapon, malice is inferred. [Tr.p.155, L.16-20].

If you kill somebody when you're robbing them, that's not in the heat of passion. [Tr.p.156, L.9-10].

If you're robbing somebody and they pull a gun to defend themselves, you can't claim that as legal provocation. [Tr.p.156, L.14-16].

DISCUSSION

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the juror's passions or prejudices, and its content should stay within the record and reasonable inferences to it." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); accord Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); see also State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999) ("A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors."); State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981) (holding because the solicitor's duty is not to convict the defendant but to see justice done, the solicitor's closing argument must be "carefully tailored" to not appeal to the personal bias of jurors nor calculated to arouse his passion or prejudice"); State v. Rudd, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct.App.2003) (A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors.")

Specifically, the solicitor asking the jurors to put themselves in the place of the victim is improper and constitutes

reversible error. State v. McDaniel, 320 S.C. 33, 38, 462 S.E.2d 882, 884 (Ct.App.1995). This is known as the Golden Rule Argument. The Golden Rule Argument "ask[s] the jurors to become advocates for the plaintiff or victim and to ignore their obligation to exercise calm and reasonable judgement." Black's Law Dictionary, 700 (7th ed.1999); see also John W. Reis, Improper Jury Argument: Gilding the Lustre of the Golden Rule, 69 Jan Fla. B.J. 60, 60 (1995) ("The traditional notion of the Golden Rule, though not contained in any rule of evidence or procedure, holds that a lawyer shall not urge the jury members, either in a civil or criminal case, to imagine themselves or their family members or friends in the place of the offended litigant or victim and to render their verdict from that perspective.).

Although the forbiddance of Golden Rule Arguments began in civil trials to hinder the plaintiff from urging the jury to put itself in the place of the victim in order to obtain higher damages, the prohibition has [now] been made applicable to criminal actions. 75A Am.Jur.2d Trial § 650 (1991); see Lucas v. State, 335 So.2d 566, 568 (Fla.Dist.Ct.App.1976)(holding that "[t]he technique of asking jurors to place themselves in the position of the victim has been held to be improper in both criminal and civil case).

The Golden Rule argument suggesting to jurors as it does that they put themselves in the shoes of one of the parties is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." 75Am

Am. Jur. 2d Trial §650 (1991). Regardless of the nomenclature used, any argument that importunes the jurors to place themselves in the victim's shoes is disallowed, Golden Rule Argument. Johnson v. State, 263 Ga. App. 443, 587 S.E.2d 775, 781 (2003).

Golden Rule Arguments are generally improper and may constitute reversible error. State v. McHenry, 276 Kan. 513, 78 P.3d 403, 410 (2003); see also State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440, 476 (N.C. 2002) (Arguments that ask jurors to place themselves in the victim's shoes are improper") Velocity Express Mid-Atlantic, Inc v. Hugen, 266 Va. 188, 585 S.E.2d 557, 565 (2003) (ruling plaintiff's repeated request to the jury that it apply the Golden Rule were prejudicial and constituted reversible error").

In the instant case the Solicitor calculated his closing argument in a prejudicial manner by the terms used, of you and the form of the word you would lead a reasonable jurist to place themselves in the role of the victim or the Petitioner. Regardless of what interpretation the jury used to consider the verdict against Petitioner the importation of the language used was improper and could have easily mislead the jury in rendering their verdict. Petitioner asserts that he was denied his Sixth Amendment right to the effective assistance of counsel and as a result of counsel's failure to object Petitioner was also denied his Fourteenth Amendment right to a fair trial.

For the aforementioned reasons, Petitioner respectfully prays this Honorable Court will grant a new trial.

ISSUE (B) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTION'S IMPROPER BOLSTERING THAT RESULTED IN IMPERMISSIBLE VOUCHING FOR A STATE'S WITNESS?

FACTS

Petitioner asserts that he was denied the effective assistance of trial counsel, when counsel failed to object to the State's bolstering of a State's witness, that later resulted in impermissible vouching that denied Petitioner his right to a fair trial.

Petitioner asserts that the State impermissibly "bolstered" Doug Washington's testimony during trial and later relied on Washington's testimony and vouched for the credibility of his testimony before the jury.

The following colloquy was recorded during Doug Washington's testimony:

Q. All right. Now what has the State asked you to come and do today?

A. They just told me -- basically they just told me to just tell the truth.

Q. Mis prison of a felony and CDV. Didn't we tell you that the officer told you that he would dismiss the resisting arrest charge if you told the truth?

A. Yes, sir.

Q. Now what happens if you don't tell the truth?

A. I be lying.

Q. All right. And is the State offering you anything to tell --

A. No.

Q. -- but if you don't tell the truth?

A. No, I am doing this on my own free will.
[Tr.p.359, L.25, p.360, L.1-21].

Coming after the Prosecution successfully argued the following to the jury without object from counsel, as was recorded:

Mr. Heron's going to get up here and say: Well, Doug knew all about it. He tried to keep them from going outside. Doug had an explanation for that, that kind of makes sense to me. Maybe he knew there was a robbery taking place. [Tr.p.147, L.10-17].

But Doug said: Yeah, he put the gun in the truck. And he wanted the gun back. And I lied to him. [Tr.p.147, L.23-25].

But he lied. He had the gun. And he got rid of it, got some money out of it. That kind of stuff happens on the street. And he lied about that. [Tr.p.148, L.7-10].

But I believe he's telling the truth now.
[Tr.p.148, L.18-19].

And he was getting up there telling the truth. [Tr.p.148, L.25, p.149, L.1].

But we said we'd recommend it if he'd just get up there and tell the truth. And I believe he told the truth, finally. He told the truth about getting rid of the gun. [Tr.p.149, L.20-25].

DISCUSSION

In State v. Kelly, 343 S.C. 350 (2001), the Court found an assistant solicitor "improperly bolstered" a witness' credibility through improper questioning. While the assistant solicitor in Kelly did not assert he had personal knowledge his witness was testifying truthfully, he "improperly phrased his question." 343 S.C. at 69 n.12, 540 S.E.2d at 861 n.12.

The Court found the jury could have interpreted or perceived the assistant solicitor held the opinion the witness was in fact telling the truth. Id. at 369, 540 S.E.2d at 860 (emphasis original). The witness' testimony therefore, carried with it the imprimatur of the government, and "this bolstering" may have induced the jury to trust the State's judgement about the witness.

In United States v. Walker, 155 F.3d 180 (3rd Cir.1998), the Court of Appeal for the Third Circuit discussed generally the concept of vouching: "Vouching constitutes an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury.... A prosecutor's vouching for the credibility of a government witness raises two concerns: (1) such comments can convey the impression that evidence not presented to the jury but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and (2) the prosecutor's opinion carries with it the

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imprimatur of the Government and may induce the jury to trust the Government's judgement rather than its own view of the evidence. Id at 184 (citations omitted). Simply put, "vouching occurs when the prosecution comments on a witness' credibility in it's opening statement or closing argument. See Id 155 P.3d 185-87)(good discussion law on vouching). Interestingly in the instant case, the prosecution "bolstered" its case by "vouching" for the credibility of Doug Washington's testimony, but the prosecution also targeted improper questioning of Doug Washington as well. At least one court has held that this type of questioning is improper. See Mitchell v. State, 549 P.2d 96 (Oklahoma App.1976)(where the prosecutor asked the witness whether they had "talked about this case" and witness responded "Yes, sir. You instructed me to tell the truth," the court found improper bolstering). The questioning used by the Prosecution in the instant case mirrors that of Mitchell supra. Yet in the instant case the Prosecution goes one step further. After the improper bolstering the Prosecution successfully "vouches" for Doug Washington as well. The result is a multi-fauceted tangle that denied Petitioner his right to fair trial.

Bolstering occurs when one item of evidence is "improperly used" by a party to [add credence] or [weight] to some earlier unimpeached piece of evidence offered by some party. Sledge v. St. of Texas Cr.App., 686 S.W. 127, 128. In the instant case, it cannot be denied that the Prosecution's improper bolstering

questions to Doug Washington, that later opened the door and set the stage for the prosecution to successfully "vouch" for Washington's testimony during closing argument. Surely counsel should have objected.

For the aforementioned reasons and violations of Petitioner's Sixth and Fourteenth Amendment rights, Petitioner respectfully prays that this Honorable Court will grant the requested relief of a new trial.

ISSUE (c) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S JURY INSTRUCTIONS THAT IMPERMISSIBLY SHIFTED THE BURDEN IN VIOLATION OF THE DUE PROCESS CLAUSE?

FACTS

Petitioner asserts that he was denied the effective assistance of trial counsel when counsel failed to object to the trial Court's jury instructions on malice that shifted the burden of proof, and as a result Petitioner was denied his Fourteenth Amendment right to a fair trial.

The Trial Court's jury instructions on malice is as follows:

Murder is defined as: the willful, felonious, killing of a human being by a human being with malice aforethought; that malice being either expressed malice or implied malice. [Tr.p.205, L.14-18].

Malice is a legal term implying wickedness and excluding just cause or excuse. It is the doing of a wrongful act intentionally and without just cause. [Tr.p.206, L.7-10].

Malice may either be expressed or implied. [Tr.p.206, L.14-15]

Implied malice is when circumstances demonstrate a wanton or reckless disregard for human life; or a reasonably prudent person would have known that according to human experience, there is a plain and strong likelihood that death would follow the contemplated act. The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. [Tr.p.206, L.25, p.207, L.1-9].

DISCUSSION

In a long line of cases, culminating in Yates v. Evatt, 111 S.Ct. 1884 (1991), the United States [Supreme Court] has recognized that the prosecution "must prove every element of the crime charged beyond a reasonable doubt. In re Winship, 397 S.Ct. 158 (1970).

The burden of proof on any element cannot be shifted to the defense, because doing so decreases the State's burden of proving the crime beyond a reasonable doubt. As early as 1975, the [Supreme Court] considered a Maine Rule which required the defendant charged with murder to prove that he acted in the heat of passion in order to reduce the homicide to manslaughter. The Court determined that a State could not shift the burden of proof on any element of the crime to the defendant. Mullaney v. Wilbur, 421 U.S. [684, at 701], (1975). The Court found the risk described to be intolerable and reversed Wilbur's conviction.

The Supreme Court overturned a conviction in Sandstrom v. Montana, 442 U.S. 510 (1979). Montana law provided that a person could be charged with deliberate homicide when that person "purposely or knowingly" caused the death of another and, at Sandstrom's trial, the trial judge instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts. Sandstrom, supra at 512.

After considering Sandstrom's argument, the Court agreed that the effect of that was to shift the burden of proof to Sandstrom on a critical element of the offense, (that he purposely or knowingly killed another person). The Court again noted that a

State must prove every element of the crime charged beyond a reasonable doubt and that the defendant cannot be required to prove any element of his defense or disprove any element of his crime. A "reasonable juror might have interpreted the instructions either as a conclusive presumption or as a burden shifting presumption, but either interpretation, the Court rendered the instruction unconstitutional.

The [Supreme Court] was confronted with another burden shifting jury instruction in Francis v. Franklin, 471 U.S. 307 (1985). The Court found that the use of a "rebuttable" presumption was also unconstitutional for the same reasons set forth in Sandstrom, supra.

The defendant there was charged with malice murder and his sole defense was that he lacked the requisite intent to kill. The Court focused on, and held unconstitutional (2) two sentences of the trial judge's jury instructions; as follows: "the acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intent the natural and probable consequences of his acts, but the presumption may be rebutted." Francis v. Franklin, supra at 311. The Franklin, Court evaluate both conclusive and rebuttable mandatory presumptions and concluded that both place the burden of persuasion on the defendant. Franklin, supra at 314.

Both types of presumptions were deemed unconstitutional because they relieved the State "of the affirmative burden of

persuasion on the presumed element" by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding. Franklin, supra at 355. [S]uch shifting of the burden of persuasion with respect to a fact the State deems so important that it must be either proved or presumed, is impermissible under the Due Process Clause. See Patterson v. New York, 432 U.S. 197, 215 (1977). As part of it's decision the Court refused to find that a presumptive jury instruction is cured if the jury is told that the presumption may be rebutted by the defendant. The Court noted that such an instruction does not cure the violation of the Due Process Clause because telling the jury that the defendant may rebut the presumption only serves to shift the burden of proof more firmly to the defense.

In deciding Francis v. Franklin, supra, the Court relied on it's decision in Mullaney v. Wilbur, just as the Court did in Sandstrom. But more importantly, all three cases relied on the bedrock constitutional principles set forth in In re Winship, supra ("that a state must prove every fact of every element of the crime charged beyond a reasonable doubt, and mandatory burden shifting jury instructions relieves the State of that burden of proof in violation of the Due Process Clause protected under the Fourteenth Amendment).

Shortly after Franklin was decided a South Carolina Case began winding it's way through the appeals process on its way to consideration by the United States Supreme Court. Dale Robert

Yates was convicted of murder and sentenced to death. His direct appeals were denied at all levels. See State v. Yates, 310 S.E.2d 805 (1982), cert. denied, Yates v. South Carolina, 462 U.S. 1124 (1983).

Yates then filed a petition for writ of habeas corpus to the South Carolina Supreme Court. Yates claimed that the trial court erred in charging the jury... "that malice is implied or presumed from the use of a deadly weapon, because that presumption relieved the State of its burden of proof on an essential element of the crime. His application was denied summarily by the Court. Yates then filed an appeal to the United States Supreme Court in 1985. That Court remanded his case to the South Carolina Supreme Court for reconsideration in light of Francis v. Franklin, supra, see Yates v. Aiken, 474 U.S. 896 (1985). On remand of the Yates case the Supreme Court of South Carolina noted that the jury instructions at Yates' trial suffered from the same infirmities present in State v. Elmore, 308 S.E.2d 781 (1983), and addressed in Francis v. Franklin, supra. Yates, 349 S.E.2d 84 (1986).

The Court neglected to consider Yates in light of Francis, however, and questioned only whether its previous decision in Elmore should be applied retroactively. After deciding that Elmore would not be applied retroactively, the Court affirmed Yates' conviction.

Yates again appealed to the United States Supreme Court. In a second decision issued early in 1998, the Court briefly

recounted the procedural history of Yates, against the background of the decision in Sandstrom, Elmore, Franklin and In re Winship. The Court noted that the South Carolina opinion apparently concluded that Franklin was not to be applied retroactively because it had announced a new rule of law. The Supreme Court disagreed saying Franklin was merely an extension and reaffirmation of its prior decisions. The Yates opinion concluded since the [Supreme Court of South Carolina] has considered the merits of the federal claim, it has a duty to grant the relief that federal law requires. Yates v. Aiken, 484 U.S. 211 (1988). Again the South Carolina Supreme Court refused to vacate Yates' conviction finding that the charge used was harmless error. Yates v. Aiken, 391 S.E.2d 530 (1989). Once again Yates appealed this denial to the United States Supreme Court. In its third review of his conviction, the United States Supreme Court set aside Yates conviction without a third remand to the South Carolina Supreme Court. Yates v. Evatt, 500 U.S. 391.

Based on case law there is no doubt the malice instructions given in the instant case were unconstitutional, mandatory and burden shifting. The trial Court's charge that the implied malice from the use of a deadly weapon constitutes a conclusive presumption and warrants reversal of the conviction. In the instant matter, it is readily apparent the jury was willing to convict, but just on what offense. Once the jury was told malice could be implied from the use of a deadly weapon the jury had to look no further than the deadly weapon in order to hang a guilt

verdict on. Petitioner's claim was that of self-defense, as was succinctly set forth in the trial that it "was either him or me".

Petitioner asserts that he was denied the Sixth Amendment right to the effective assistance of trial counsel when counsel failed to object and preserve this meritorious issue for direct review. Had counsel of lodged an objection there is a reasonable probability the results of the trial, and possibly the appeal would have been different.

For the aforementioned violations, Petitioner respectfully prays this Court will grant the requested relief of a new trial.

CONCLUSION

WHEREFORE, Petitioner respectfully believes that through the issues presented, statement of facts and citations of authorities relied on he has shown unto this Honorable Court he is entitled to the requested relief sought herein. That this Court will grant the requested relief of a new trial.

Respectfully Submitted,

/s/ DEVODUS A. ROUSE
Devodus Rouse #332635

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Devodus Rouse #332635, 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.

DEVODUS A. ROUSE
applicant

SWORN or affirmed to and subscribed before me this

16th day of June, 2011

Syllha Jones
Notary Public

My Commission Expires: 1/24/2018

JUN 16 2011

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF FLORENCE)

C.A. NO. ~~11-CP-21-158~~~~David R. Rouse~~)

S.C.D.C. No. #332635,)

Applicant,)

RETURN

VS.)

State of South Carolina,)

Respondent.)

In response to the post-conviction relief application filed June 20, 2011. Respondent would show this Court:

I.

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Florence County Clerk of Court's orders of commitment. Applicant was indicted at the April 2008 term of the Florence County Grand Jury for murder. ~~He Lee Heron, Esquire~~ represented Applicant. On December 8, 2008, a jury convicted Applicant of voluntary manslaughter. The Honorable Judge Ralph King Anderson sentenced Applicant to twenty-five years imprisonment. Applicant appealed his conviction.

Applicant was represented on appeal by Joseph L. Savitz, Esquire, who submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals dismissed the appeal in an unpublished opinion (2011-UP-274) on June 8, 2011. The remittitur was issued on June 28, 2011.

For the purpose of this Return, the Respondent attaches and incorporates the Clerk of Court's records, the South Carolina Department of Corrections records and the trial transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. ~~Ineffective assistance of counsel;~~
2. ~~Denial of Due Process;~~
3. ~~Denial of Sixth and Fourteenth Amendments to the U.S. Constitution.~~

III.

The State submits Applicant's allegation that he received ineffective assistance of counsel is without merit. For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996). In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result at trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed

ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). The State submits that the Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that is expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, supra; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Nevertheless, the allegation probably raises a question of fact which may not be conclusively refuted by the record and therefore requires that an evidentiary hearing be convened. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant's other allegations appear to be claims that should have been raised, if at all, on appeal. Therefore, they are not proper for a PCR application and should be dismissed. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975).

V.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VI.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code §17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and

not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VII.

WHEREFORE, having made Return, the Respondent requests that this Court hold an evidentiary hearing.

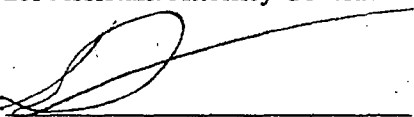
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

DAVID SPENCER
Senior Assistant Attorney General

By 

ATTORNEYS FOR RESPONDENT

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Telephone: (803) 734-3727

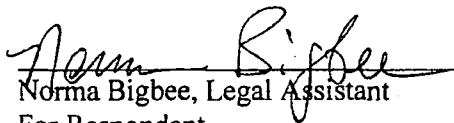
September 17, 2011.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE	)	
	)	
	)	2011-CP-21-158
	)	
DEVODUS ROUSE, #332635	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Frank C. Swaggard, Esquire
403 Second Loop Rd.
Florence, SC 29504

DATED this 19th day of September, 2011.


 Norma Bigbee, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE	)	CASE NO. 2011-CP-21-1583
	)	
DEVODUS ROUSE,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	TRANSCRIPT OF RECORD
	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Defendant.	)	
	)	

October 15, 2012
Florence, South Carolina

B E F O R E:

THE HONORABLE THOMAS A RUSSO, Judge

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

TRISTAN SHAFFER, Esquire
Attorney for the Plaintiff

TYSON ANDREW JOHNSON, SR., Esquire
Attorney for the Defendant
Office of the Attorney General

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>

(No Exhibits Presented)

1 OCTOBER 15, 2012

2 (WHEREAS this matter was scheduled for a post-conviction
3 relief hearing, the applicant appeared along with his
4 counsel of record. The hearing began at 11:05 a.m.)

5 THE COURT: Your Honor, this is Devodus Rouse versus
6 South Carolina. It's 11-CP-21-1583. Mr. Rouse was indicted
7 for murder. H. Lee Herron represented him. On December the
8 8th, 2008, a jury convicted him of voluntary manslaughter.
9 Judge Ralph King Anderson sentenced him to twenty-five years
10 imprisonment.

11 He did appeal his conviction. His appeal was handled by
12 Mr. Savitz, who submitted a brief pursuant to *Anders v.*
13 *California* and the Court of Appeals dismissed the appeal and
14 he's here today represented by Mr. Shaffer. So at this point
15 I would turn it over to Mr. Shaffer.

16 THE COURT: All right. Mr. Shaffer?

17 MR. SHAFFER: Good morning, Your Honor.

18 THE COURT: Good morning.

19 MR. SHAFFER: Very briefly, just to give you a factual
20 background of the case, I believe that what -- what will come
21 out is that -- that the State alleged that he had shot a Mr.
22 Timmons, Brandon Timmons. The State's theory of the case
23 primarily from the transcript was that -- that it was -- he
24 was attempting to rob him at the time. There is testimony in
25 the transcript that he had stolen some -- I believe it was

1 Five, ineffective assistance of counsel for failing to
2 object to Brant's -- to -- when Brant testified to matters
3 which he had no personal knowledge of.

4 Six is ineffective assistance of counsel for failure to
5 object to hearsay and confrontation to Brant's recitation of
6 the SLED results.

7 Seven is ineffective assistance of counsel for failing to
8 object to vouching comments made during the State's closing
9 argument. I believe you can find that approximately at page
10 148, line 18, through 149, line 25. I believe that's -- that
11 would encompass the -- the area that would have -- it would be
12 in.

13 Eight is ineffective assistance of counsel for failure to
14 object to comments made during the closing argument which says
15 defense counsel is blowing smoke.

16 Nine, ineffective assistance of counsel for failing to
17 object to comments on defendant's right to remain silent.

18 Ten, ineffective assistance of counsel for failing to
19 allow the 9-1-1 call in.

20 Eleven, ineffective assistance of counsel for failure to
21 object to the voluntary manslaughter instruction being given.

22 Twelve, ineffective assistance of counsel for failing to
23 object to hearsay in Lee Davis' testimony.

24 Thirteen, ineffective assistance of counsel for failure
25 to object to Davis' testimony that initially Rouse did not

1 want to talk to investigators.

2 Fourteen is ineffective assistance of counsel for failing
3 to object to Happ's opinion and how cooperative people were at
4 the scene, which essentially I argued was a vouching issue.

5 In addition to our -- our primary issues today are the
6 failure to raise the self-defense claim or failure to ask for
7 a self-defense charge. Also -- and I actually -- it was in
8 Mr. Savitz's brief on that.

9 The -- the other issue is related to the -- is the
10 failure to object to the involuntary manslaughter charge being
11 given and an additional one, which is sort of corollary to
12 that, that the conviction is in violation of due process
13 because the State failed to present any evidence of voluntary
14 manslaughter beyond a reasonable doubt.

15 The -- essentially, I think the -- well, we'll go into
16 the facts in just a moment, but those are the issues I
17 primarily plan on addressing today. Those three are the main
18 ones I'll focus on. Other ones, if the Court would like, I
19 can just raise giving cites in a brief or a memorandum, Your
20 Honor.

21 THE COURT: That's all right.

22 MR. SHAFFER: I already have one prepared, but it's a
23 little unfair to drop it on him the day of the -- the hearing.

24 THE COURT: Okay. All right.

25 MR. SHAFFER: Thank you, Your Honor.

DIRECT EXAMINATION OF H. LEE HERRON BY MR. SHAFFER

1 THE COURT: Okay.

2 MR. SHAFFER: Our first witness is going to be Mr.
3 Herron.

4 THE COURT: All right. Mr. Herron, if you would, come
5 around and be sworn, sir.

6 THE CLERK: Please place your left hand on the Bible and
7 raise your right hand. Do you swear or affirm the testimony
8 you give in this case will be the truth, the whole truth, and
9 nothing but the truth, so help you God?

10 THE WITNESS: I do.

11 THE CLERK: Please be seated and then state your name for
12 the record.

13 THE WITNESS: My name is Henry Lee Herron, H-E-R-R-O-N.

14 H. LEE HERRON, being first duly
15 sworn, testifies as follows:

16 DIRECT EXAMINATION

17 BY MR. SHAFFER:

18 Q: Mr. Herron, you were trial counsel for Mr. Rouse during
19 his trial; correct?

20 A: Yes, sir.

21 Q: Okay. How did you become counsel?

22 A: I was appointed.

23 Q: Okay.

24 A: Actually, I think Mr. Hoffmeyer was his original counsel
25 and for whatever reason I was assigned to Mr. Rouse's case

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1 after Mr. Hoffmeyer got out of the case.

2 Q: Okay and at -- at this point how -- how long had you been
3 practicing?

4 A: What year was this? I'm -- I'm sorry.

5 Q: I don't know myself.

6 A: 2009?

7 Q: 2009.

8 A: I had passed the bar in 2005.

9 Q: Okay. Now, was there a -- was there an offer on this
10 case prior to going to trial?

11 A: I believe Mr. Clements had offered to plea straight up.
12 I don't ---

13 Q: Straight up to murder?

14 A: Straight up to murder, yes, sir.

15 Q: Okay and during the trial, did the offer change at all?

16 A: We were -- I talked to Mr. Rouse -- well, we -- I talked
17 to Mr. Rouse off and on about the offer and me basically going
18 to the State and maybe proposing something. Mr. Rouse's
19 response was he didn't do it and he was not going to plead to
20 anything.

21 During trial while the jury was deliberating, Mr. Rouse
22 was sitting back in his cell and I asked permission to go see
23 him and I basically said, you know, Devodus, I think we need
24 to see if there was an offer of something because I didn't
25 like the way things were going and he said no and before I

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1 could even say anything else, they came back with the verdict
2 and that was the end of that conversation.

3 Q: Okay. Now, what -- do you remember what you would have
4 asked for for his -- around how much time would you have asked
5 for voluntary manslaughter or would you have asked for murder?

6 A: I probably -- yeah, I probably would have asked for --
7 well, anything other than murder.

8 Q: Okay.

9 A: Whatever they would have offered, I would have taken that
10 to Mr. Rouse. Obviously, with the murder charge, it was a
11 mandatory minimum of thirty so anything I could do to get him
12 off the mandatory minimum of thirty I was going to try to do.

13 Q: Do you think at that point you would have accepted a -- a
14 voluntary manslaughter plea?

15 A: Mr. Rouse's story to me the entire time we had numerous
16 discussions was he didn't do it, he didn't have anything to do
17 with it, he's not going to plead to something he didn't do,
18 and that was the end of that.

19 Q: Okay.

20 A: And I never try to push clients one way or the other. I
21 just try to be a good lawyer and say look, these are the
22 possibilities that can happen. You can either be found guilty
23 or you can plea to a lesser included charge or the jury could
24 find you not guilty, so.

25 Q: Okay. Now, did -- how long had you had the case prior to

DIRECT EXAMINATION OF H. LEE HERRON BY MR. SHAFFER

- 1 going to trial?
- 2 A: Can you refresh my memory when the trial was and I can
- 3 tell you?
- 4 Q: Of course. It was January 12th, 2009.
- 5 A: 2009?
- 6 Q: Yes.
- 7 A: I requested discovery it looks like February the 6th,
- 8 2008, so about a ---
- 9 Q: About a year?
- 10 A: A little over a year, yeah.
- 11 Q: And during that time, was Mr. Rouse out on bond or ---
- 12 A: No, he was in jail.
- 13 Q: Okay.
- 14 A: In Effingham.
- 15 Q: How many times do you believe you saw him?
- 16 A: I really can't remember. I know it was more than five or
- 17 six times off and on and especially when it came time
- 18 approaching for trial. I think I was out there -- actually,
- 19 now that -- now that I'm thinking of it, I actually had to
- 20 take him a change of clothes and I had to go to Walmart and
- 21 buy him some clothes and we had talked a lot leading up to
- 22 trial about what was going to happen and any potential
- 23 witnesses that he -- that we could possibly have to call and
- 24 about his statement and all that other stuff.
- 25 Q: Okay.

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1 A: I knew it was going to trial.

2 Q: Okay and did -- during that time he never expressed a
3 request to actually plead guilty?

4 A: No, never, and like I said, his whole story to me was he
5 didn't have anything to do with it and wasn't going to plead
6 to something and I was looking back at some of the letters
7 that -- between him and Attorney Hoffmeyer and it seemed like
8 he made -- he had remained pretty consistent on "I didn't do
9 it" and not -- not just to me, but also to Mr. Hoffmeyer.

10 Q: Okay. Now, what was going to be your defense at trial?

11 A: He didn't do it.

12 Q: Okay.

13 A: And I actually thought we had a pretty good case because
14 -- I don't know if you want me to go into the facts.

15 Q: Oh, yeah, of course.

16 A: The facts were he had ridden to I think Mr. Timmons' --
17 it wasn't Mr. Timmons' house, but to a house and Mr. Rouse
18 knew nobody at the house. He was riding with some other co-
19 defendants. I don't remember the names, but the -- the
20 undisputed testimony was Mr. Rouse knew nobody at the house
21 and that he was sitting outside.

22 Well, Mr. Timmons had walked into the house and when he
23 walked into the house, he saw Mr. Rouse's co-defendants and
24 everybody's testimony was Mr. Timmons looked worried at that
25 point and my whole theory was, well, he's not worried about

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1 Mr. Rouse. He had never seen Mr. Rouse, never met Mr. Rouse.
2 He was worried that these guys that he knew, who were with Mr.
3 Rouse, were at the house and he started acting real scared.
4 So my theory of the case was Mr. Rouse didn't rob him or kill
5 him; it was the guys that he was acting afraid of at the house
6 at the time. That's what -- that was our theory of the case.

7 Q: Okay. What was the State's theory of the case?

8 A: That Mr. Rouse tried to rob Mr. Timmons and that he was
9 waiting outside and then when Mr. Timmons walked outside that
10 he tried to rob him and I think they're basically saying it
11 was a set-up, that they had all went over there with the
12 intent to rob Mr. Timmons.

13 Q: Okay and do you remember Ms. Pompey's testimony? Feronda
14 [phonetic] Pompey?

15 A: If that was his girlfriend, then I ---

16 Q: Yes, that's right.

17 A: I vaguely remember. I believe she gave a statement to --
18 to law enforcement and in that statement I think she said
19 something about the night of the shooting that Mr. Rouse had
20 said it was, quote, either him or me, and she had given him --
21 if I'm not mistaken, she had given Mr. Rouse a ride to the
22 hospital because Mr. Rouse wanted to go to the hospital where
23 the guy was at -- where Mr. -- Mr. Timmons was sent -- and to
24 check on him and I think Mr. Rouse actually went into the
25 emergency room and went into the hospital and then came back

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1 and I think he said to Ms. Pompey the dude's gone or he's gone
2 or something like that.

3 Q: Okay. Do you ---

4 A: And I ---

5 Q: Do you have a copy of the transcript with you?

6 A: I have the supplemental.

7 Q: The supplemental?

8 A: I got it.

9 Q: And I apologize. There's -- I have a supplemental, I
10 have a regular and then I also have a record on appeal
11 somewhere. On page 76 of the one you have, is that Ms.
12 Pompey's testimony?

13 A: No, sir. I've got Mr. Brant on 76.

14 Q: All right.

15 MR. SHAFFER: May I approach?

16 THE COURT: Yes, sir.

17 Q: Okay. I'm showing you page 76 of the -- it just is the
18 actual transcript and it's the one done by -- there were two
19 court reporters in this case. It's the one done by Eugene
20 Buckner. Could you read line 6 from -- from 6 to 19?

21 A: Yes, sir. Line 6 says:

22 Answer: He said he walked up on him.

23 Question: And that?

24 Answer: And that Brandon pulled out a gun.

25 Question: He didn't say anything about he was trying to

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1 rob him?

2 Line 11. Answer: No. He -- I -- I don't know.

3 Question: You don't remember?

4 Answer: But he did say -- he say he walked up on him and
5 Brandon pulled out a gun.

6 Question: But did he say he took some weed and a
7 necklace off of him?

8 Answer: Yes, sir.

9 Question: Or a chain?

10 Answer: Yes, sir.

11 Q: Thank you very much. Now, Mr. Rouse did not testify at
12 his trial; did he?

13 A: No, sir.

14 Q: Okay. Based off the -- the -- the passage you just read,
15 do you believe you would be entitled to a self-defense charge?

16 A: I don't want to get confused because there was a
17 statement -- I don't know if it came into the trial -- where
18 Ms. Pompey said that Devodus said that he tried to rob him and
19 it was -- or excuse me. He said he pulled a gun out on him
20 and it was either him or me. I think they were talking about
21 Doug in that, if I'm not mistaken. Aren't they talking about
22 Doug in that what we just read? Doug tried to rob him or Doug
23 pulled a gun on him?

24 Q: Um ---

25 A: Because I think Ms. Pompey's testimony at trial was a

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1 little different than her recorded statement. That's why I
2 don't -- I -- I'm not trying to confuse you.

3 Q: I believe they're talking about him -- Mr. Rouse. You're
4 saying that Doug also gave a similar statement?

5 A: No. I thought what we read was -- I just read a portion
6 of it so I'm not sure. I thought they were talking about
7 Doug.

8 Q: Okay. I'll actually hand you this back. Actually, I'm
9 going to show you 74 of this same transcript ---

10 A: Mm-hmm.

11 Q: --- and I want you to read 12 through 13 and then we'll
12 go back to what we just talked about.

13 A: Okay. On page 74, 12 through 13.

14 Question: Okay. Did Devodus ever tell you anything
15 about that? It says it was him or me.

16 Answer: Yes, sir.

17 Do you want me to keep reading?

18 Q: Okay.

19 A: Or just ---

20 Q: That -- that's sufficient.

21 A: Okay.

22 Q: If you could, look over that -- that area a little bit.

23 I believe I'm three pages from where you had just read and

24 tell us if you believe that's talking about Doug or if it's a
25 statement made by ---

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1 A: He is talking about -- she is -- was talking about
2 Devodus.

3 Q: Okay and -- and that includes the previous statement you
4 read; correct?

5 A: That's right. That's right. They were -- she was
6 talking about Devodus.

7 Q: Okay. Based off of those statements, do you believe that
8 he was -- he would have been entitled to a self-defense
9 charge?

10 A: Just based on those statements alone, maybe, but we
11 wouldn't have put on any evidence that it was self-defense
12 because Mr. Rouse's story to me the entire time up to and
13 during trial was he didn't have anything to do with it. So my
14 old boss used to say you had to dance with the one that
15 brought you so I didn't want to get in front of a jury and
16 say, ladies and gentlemen of the jury, Mr. Rouse didn't do it;
17 it was somebody else, but just in case you do believe it was
18 him, give us a self-defense charge.

19 I think -- I think that's -- I think a jury would see
20 it's kind of silly and I think I would have lost all
21 credibility with a jury to on the one hand say he didn't have
22 anything to do with it, which is what Mr. Rouse's story to me
23 was the entire time, and then for me to say but just in case
24 you think he did have something to do with it, it was in self-
25 defense. And I just didn't think that was a smart strategy

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1 and that's why we didn't ask for a self-defense charge.

2 Q: But would you agree with a statement that just because
3 you have an instruction or law is charged doesn't mean you
4 have to argue it?

5 A: I agree with that.

6 Q: Okay.

7 A: But my understanding of self-defense was we were going to
8 have to put up some kind of evidence and I also think I'm
9 under some kind of -- I've got to take my client to -- I can't
10 make up a defense that my client has not told me about and he
11 hasn't given me any kind of self-defense argument to make. So
12 I just didn't want to ask for one and then not basically have
13 the goods to back it up with and, again, I think that would
14 have rained -- it would have seemed silly to a jury and I
15 think I would have lost all credibility with the jury.

16 Q: Okay. Just to follow that up one more time, you -- you
17 said that your understanding of self-defense is that you would
18 have had to put something up in order to get it?

19 A: No. To be successful, I think we would have to give the
20 jury a little bit more than that one statement, especially --
21 I don't know what I did on cross examination because I'd asked
22 Mr. Rouse about that statement and he said that that was --
23 she was -- that was an incorrect statement, that he had never
24 said that. So I can't -- I mean I guess I could have said
25 that it was -- that she said it was self-defense so it was

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1 self-defense and then argue that he didn't have anything to do
2 with it. I just -- I didn't see where that made sense and Mr.
3 Rouse had, again, maintained to me all along, quote, I didn't
4 have anything to do with it; I'm not pleading to something he
5 didn't have anything to do with, not that it was self-defense
6 or anything like that.

7 Q: But you -- and you were outside the presence of the jury
8 whenever the charge conference took place; correct?

9 A: Yes, sir.

10 Q: So a jury could have -- you know, foreseeably, they could
11 have been charged on self-defense yet you would have had no
12 know -- I mean the jury would have had no knowledge that you
13 requested that?

14 A: They wouldn't have had any knowledge, but they would
15 basically be given an instruction I didn't -- that I wasn't
16 planning on arguing. I didn't have anything to argue with
17 other than that one statement and the rest of the trial was I
18 was pointing the finger at everybody else. So I -- again,
19 technically, yeah, could I argue self-defense? Maybe
20 technically that would be a true statement, but in reality I
21 think that would have been silly.

22 MR. SHAFFER: The Court's indulgence.

23 Q: That him or me statement, was that also backed up by
24 Travis who testified?

25 A: I can't remember.

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1 Q: Okay.

2 A: I only -- I only remember Devodus and Feronda Pompey,
3 which I think was his girlfriend, and this was in her
4 statement she had given to law enforcement. She had made that
5 statement that Devodus had said that it was either him or me
6 and I think that's the only person that he had given that
7 statement to. I could be wrong, but that's just -- I reviewed
8 it quickly yesterday and that's the only one that stuck out
9 was Ms. Pompey's statement.

10 Q: I'm handing you the same transcript I handed you before.
11 Page 133, I want you to read lines 6 through 17.

12 A: Yes, sir. Line 6. "We had professors in trial advocacy
13 that were also practicing lawyers and they would come in and
14 they would teach us how to try our case. One of them told me
15 -- he said if you've got the facts, you argue the facts. If
16 you got the law, you argue the law. If you ain't got either
17 one of them, you better blow smoke."

18 Q: Okay and that was the solicitor stating that; correct?

19 A: Yes, sir.

20 Q: Okay. Now, did he -- do you think he was referring to
21 your defense?

22 A: Yeah.

23 Q: Okay and your defense basically was to make them prove
24 their case; is that right? That someone else had done it?

25 The theme of it was someone else had done it, but essentially

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1 you were just making them prove their case; right?

2 A: Well ---

3 Q: You didn't put up any witnesses; correct?

4 A: No, I didn't put on any witnesses, but during cross
5 examination I thought I made it abundantly clear that --
6 again, what we discussed earlier about Brandon going to the
7 house and him being scared of everybody that was there and he
8 had never met Devodus. So yeah, I cross examined everybody
9 and that was my underlying theme that Mr. Rouse didn't know
10 Brandon and Mr. Rouse didn't know anybody at the house and Mr.
11 Rouse didn't do it.

12 Q: Do you think that that comment was a proper comment that
13 the solicitor made concerning your defense?

14 A: I've made similar. I mean whether it was proper, I
15 didn't find it objectionable at the time. I -- I've used
16 similar comments. It's usually when you have the law on your
17 side, you argue the law or beat the law. If the facts are on
18 your side, you beat the facts. And if neither is on your
19 side, you beat the table is what I've always heard. So I mean
20 I -- I probably could have objected to it, but I didn't think
21 at the time it was objectionable.

22 Q: But you never objected?

23 A: No, sir.

24 Q: Okay. I'm going to show you ---

25 MR. JOHNSON: Your Honor, I just want to object to the

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1 manner of question. If he has a question, he should ask him
2 the question and if he doesn't remember, then he can refresh
3 his recollection. Having him read parts of the transcript, I
4 don't think that's proper questioning.

5 THE COURT: And I don't -- and I don't even have that
6 transcript. I don't know.

7 MR. SHAFFER: Okay. I apologize.

8 Q: Do you remember where he stated on page 146, lines 1
9 through 3, that they talked to Doug, which match -- matched up
10 with what we think happened and what I'm convinced happened
11 and now you've got to decide what happened.

12 A: Was that during Mr. Clements' closing argument?

13 Q: Yes.

14 A: I don't remember him saying that, but if that's in the
15 transcript, I'm sure that's what he said.

16 Q: Okay. Do you believe that -- that that comment was
17 proper? What -- here you go. I'll -- I'll refresh your
18 recollection.

19 A: Yeah. Which line are we on? Your question is do I think
20 that's proper?

21 Q: Yes.

22 A: I don't see anything improper with it. He's basically
23 just reviewing the evidence as he believes it to be.

24 Q: You don't believe it's vouching for the -- the evidence?

25 A: If he said -- yeah, technically yeah, it probably could

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1 be considered vouching. Again, I didn't see a purpose in
2 objecting.

3 Q: Do you remember where he said is he all that credible of
4 a person? No, he's not a credible person. I believe he's
5 telling -- but I believe he's telling the truth now. Do you
6 believe that that's vouching?

7 A: Yeah, technically, if that's what he said. Yes, sir.

8 Q: Do you remember the -- specifically what the solicitor
9 stated concerning voluntary manslaughter in his closing
10 argument?

11 A: No, sir.

12 Q: If I showed you the transcript at page 155, lines 23,
13 through 156, line 20, do you believe it would refresh your
14 recollection?

15 A: Yes, sir.

16 Q: Okay.

17 A: Do you want me to read it aloud?

18 Q: Yes, if you could.

19 A: You said line 23? Voluntary manslaughter?

20 Q: Yes.

21 A: Okay. "Voluntary manslaughter I believe Judge Anderson
22 is going to tell you is the taking of a human life in the heat
23 of passion with legal provocation. What's the heat of
24 passion? The judge -- I'm going to tell you about that.
25 What's the legal provocation? The judge is going to tell you

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1 about that." Do you want me to keep reading?

2 Q: Yeah.

3 A: "I would submit to you if you kill somebody when you're
4 robbing them, that's not the heat of passion and that's not a
5 legal provocation when they defend themselves to shoot.
6 That's murder. If you're robbing somebody and they pull a gun
7 to defend themselves, you can't claim that as a legal
8 provocation. You can't claim it as the heat of passion I
9 don't think. If you find that way, then you find Devodus
10 Rouse guilty of voluntary manslaughter." Keep going?

11 Q: Okay. Yes, if you don't mind.

12 A: Oh. "If you believe his statement it was him or me and
13 you think, well, you know, he had to shoot him, well, then
14 find him guilty of voluntary manslaughter." Do you want me to
15 keep going?

16 Q: Yeah.

17 A: I'm sorry.

18 Q: Yes, until the end of that voluntary manslaughter.

19 A: "But if you think, wait a minute, he was robbing him,
20 that wasn't the heat of passion, that wasn't legal
21 provocation, then you find him guilty of murder. There's a
22 lot more I can say" -- excuse me. "There's a lot more I want
23 to cover about what the witnesses said and didn't say, but I
24 know you've heard it all. Compare what they said, compare
25 what you think is accurate and true, and what everybody

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1 confirms and what is not contradicted between witnesses, and
2 reach a verdict that speaks the truth. Reach a verdict that
3 makes sense. You don't have to have direct evidence in every
4 case. The judge is going to tell you that there is no
5 distinction between the weight of direct evidence and
6 circumstantial evidence." Do you want me to keep going?

7 Q: No, that's ---

8 A: Okay.

9 Q: --- sufficient. Thank you very much. What is the legal
10 provocation in this case?

11 A: I don't think there was any and if you want me to explain
12 ---

13 Q: Yeah.

14 A: --- my thinking on that, I believe the State made a
15 mistake when they asked for voluntary manslaughter in the
16 charge. I didn't think the evidence was there and my thinking
17 with that -- and I have talked to Devodus about this. I said,
18 well, I'll -- I'm -- it's not my obligation to object to when
19 the State makes a mistake. My job is to my client and if they
20 make a mistake that helps my client, I'm going to tell him. I
21 think me and Mr. Rouse discussed that and I said, well, now
22 you don't have thirty years sitting on the table, now you've
23 got two outs. You've got one out would be not guilty and the
24 other out would be involuntary manslaughter.

25 So I think they gave him -- they made a mistake because I

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1 don't -- didn't see the legal provocation there other than the
2 "him or me" thing, but that wasn't our theory of the case. So
3 even though the State made a mistake, I didn't object to it
4 because it helped my client and at the end of the day that's
5 -- it really helped him because the jury came back with not
6 guilty of murder, but found him guilty of voluntary
7 manslaughter.

8 Q: You're assuming that the jury would have come back guilty
9 on murder if there wasn't voluntary manslaughter?

10 A: No. What I told Mr. Rouse was you would be taking a
11 chance of either a mandatory minimum of thirty or not guilty
12 or somewhere in-between and if that was me sitting where Mr.
13 Rouse was, I would -- basically I would want all three
14 because, like I said, two of them save you from the mandatory
15 minimum of thirty, a voluntary manslaughter conviction or a
16 not guilty verdict.

17 I mean I think I stated this. I wanted him to be found
18 not guilty. I think we -- I mean I've got an ego just like
19 everybody else. I like to win cases. So I think I did
20 everything I could to -- to prove that the jury would find him
21 not guilty, but I told him, you know, it's -- nobody knows
22 what a jury is going to do. But I told him that if he's found
23 guilty of murder, then I know what a judge has to do. The
24 judge would have to sentence him to at least a minimum of
25 thirty.

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1 And it was Judge Anderson's first trial back from the
2 Court of Appeals and I had heard stories. So I told Mr. Rouse
3 that I think that he would be in for a very stiff sentence if
4 the jury would have found him guilty of murder. But that --
5 we -- we discussed that because I do remember thinking to
6 myself the State made a mistake.

7 Q: Okay. When did you first note the State had asked for
8 voluntary manslaughter?

9 A: That's the thing. We -- I -- that was never even -- they
10 never offered voluntary manslaughter and during the -- it was
11 actually -- I'm going off memory, but I think it was actually
12 during the charging conference where Mr. Clements had said I
13 think, Your Honor, it warrants a voluntary manslaughter charge
14 and I was thinking to myself, no, it doesn't, but if you want
15 to give him one, then by all means do that.

16 And I -- and I had actually used that against them in
17 closing argument when I said, you know, this case started out
18 as a murder case and now all of a sudden the State is saying,
19 well, maybe it wasn't murder and I said -- you know, I tried
20 to demonstrate to the jury that showed that the State had some
21 hesitance in their own mind of whether or not this was
22 actually murder, but they changed that at the last moment. So
23 I -- I'm pretty sure I made that argument to the jury.

24 Q: But you -- you testified that you discussed this with Mr.
25 Rouse?

DIRECT EXAMINATION OF H. LEE HERRON BY MR. SHAFFER

1 A: When it -- yeah.

2 Q: Okay. Where did you discuss it with Mr. Rouse?

3 A: It was either sitting at the table or it was during a
4 recess we had discussed it and I had basically -- I don't
5 remember our exact conversation, but I do remember thinking to
6 myself, oh, they just made a big mistake.

7 Q: All right.

8 A: Now, I could have objected to it, but again, objecting to
9 it would have -- would have meant it would have been murder or
10 nothing.

11 Q: Do you remember what ---

12 MR. SHAFFER: And, Your Honor, if possible, I would like
13 to have him actually read just -- it's two pages of
14 transcript. It sets up my questions so then ---

15 THE COURT: Well, let him read it to himself.

16 MR. SHAFFER: Okay.

17 THE COURT: He doesn't have to read it into the record.
18 Let him read it to himself to refresh his memory and then you
19 can ask him questions regarding that.

20 Q: If you can, read 115, the underlined section, all the way
21 to the end of 116.

22 (Whereupon, there is a pause in the proceedings as the
23 witness complies.)

24 A: I got it.

25 Q: Okay. Do you remember the part that said -- the Court

DIRECT EXAMINATION OF H. LEE HERRON BY MR. SHAFFER

1 asked you if you -- you agreed with the voluntary
2 manslaughter?

3 A: Mm-hmm.

4 Q: And you said you had no objection?

5 A: Right. No, sir.

6 Q: Okay. Did y'all take a break at any point during that
7 time?

8 A: I can't remember.

9 Q: Okay. Do you know if you -- do you remember if you
10 talked to Mr. Rouse in-between that time period?

11 A: I can't remember.

12 Q: Okay. In your -- in your view, what does the State have
13 to prove in order to convict somebody for a -- what level of
14 proof is there in a criminal trial?

15 A: What level of proof?

16 Q: Yeah.

17 A: Beyond a reasonable doubt.

18 Q: Okay and -- well, first of all, do you think that that's
19 a constitutional requirement or do you think it's merely a
20 state law requirement?

21 A: I believe it's both.

22 Q: Okay. Do you believe that they proved voluntary
23 manslaughter beyond a reasonable doubt?

24 A: I don't think -- I -- I think we presented the evidence
25 that ---

DIRECT EXAMINATION OF H. LEE HERRON BY MR. SHAFFER

1 THE COURT: What -- what's the relevance with that
2 question? What does it matter what the lawyer thinks?

3 MR. SHAFFER: Your Honor, you're probably correct. It
4 probably is not appropriate.

5 THE COURT: I mean all lawyers think the jury gets it
6 wrong if they lose.

7 MR. SHAFFER: Your Honor, it probably is not an
8 appropriate question.

9 THE COURT: All right.

10 MR. SHAFFER: The Court's indulgence.

11 Q: Do you remember coming to Mr. Rouse and saying he --
12 whenever you came to him to discuss a possible plea, do you
13 remember saying that you might be able to get him in the
14 twelve to thirteen year range?

15 A: I don't know if I said that, but I think I might have
16 said something like I would hope they would offer twelve to
17 thirteen or maybe the judge would sentence him to twelve to
18 thirteen for the voluntary manslaughter. I wanted to get a
19 recommendation of twelve to thirteen. So I don't -- I'm not
20 sure exactly what I said to him, but obviously I wanted to get
21 him the least amount of time, but be able to not insult the
22 Solicitor's Office and say, hey, give my guy probation. I
23 wanted to say, hey, would you consider something like that.
24 So I may have said something like that to him.

25 Q: And that was for voluntary manslaughter?

DIRECT EXAMINATION OF H. LEE HERRON BY MR. SHAFFER

1 A: Mm-hmm.

2 Q: It would have been for?

3 A: Yes, sir.

4 Q: You couldn't have pled him to murder obviously for that?

5 A: Not -- not for that, no.

6 Q: Okay.

7 A: And that was another reason why I was glad that voluntary
8 manslaughter came in because it gave us something to negotiate
9 on.

10 MR. SHAFFER: Your Honor, I have no further questions at
11 this point.

12 THE COURT: All right. Mr. Johnson, any questions for
13 this witness?

14 CROSS EXAMINATION

15 BY MR. JOHNSON:

16 Q: Mr. Herron, I'm going to ask you some questions about the
17 self-defense discussion that Mr. Shaffer had with you just now
18 regarding whether or not a self-defense charge would have been
19 appropriate. What is your understanding of what you need to
20 request a self-defense charge?

21 A: You can't start a fight and then midstream claim self-
22 defense if you were the initial aggressor. I think the
23 evidence that the State had presented was that Mr. Rouse had
24 robbed Mr. Timmons and so I didn't think a self-defense charge
25 would have been appropriate or I don't think the jury would

CROSS EXAMINATION OF H. LEE HERRON BY MR. JOHNSON

1 have agreed with a self-defense and you also need -- you can't
2 be the initial aggressor and you need the other person to be
3 the one that's aggressive towards you. It's self-defense.
4 You are defending yourself against somebody trying to do harm
5 to you and I didn't hear or see any evidence that anybody had
6 tried to do anything to Mr. Rouse.

7 Q: So if you asked for self-defense, probably the objection
8 would have been there is no evidence of self-defense?

9 A: I didn't see any evidence of it, no, sir.

10 Q: All right.

11 A: And again, my client had always maintained all along "I
12 didn't do it."

13 Q: Well, that's -- that's the other thing I was going to ask
14 you about is did he ever indicate that -- did Mr. Rouse
15 indicate that he would testify in order to support a self-
16 defense charge?

17 A: That's the thing I find confusing. Mr. Rouse's story all
18 along was "I did not do it." It was never "I did it, but
19 here's why" or "I did it and he attacked me first." It was "I
20 did not do it." So I didn't see how I could make a defense up
21 out of my mind and say, oh yeah, well, let's ask for self-
22 defense when the story I was getting all along from my client
23 was "I didn't do it." So that's why I didn't ask for a self-
24 defense charge and, again, I think the jury would have thought
25 that would be a little silly.

CROSS EXAMINATION OF H. LEE HERRON BY MR. JOHNSON

1 Q: When you're formulating your trial strategy, at what
2 point did self-defense -- did you rule against any kind of
3 self-defense defense strategy?

4 A: Self-defense was never on the radar and the reason it
5 never came up was because all along Mr. Rouse said, "I didn't
6 do it so I'm not going to say I did it." Self-defense, you're
7 putting yourself at the scene. You're putting yourself as
8 being the one that's shooting and you're saying, but here's
9 the reason why I shot him.

10 The story that Mr. Rouse told me all along was he was
11 never at the scene, he never did -- he was never the one that
12 did the shooting. So if -- if I argue self-defense, I'm
13 saying to the jury, oh yeah, well, he's the one that did the
14 shooting, but here's why. So the story I was getting all
15 along was this was not a self-defense case; it was simply "I
16 didn't do it."

17 Q: Now, the other line of questions. Mr. Shaffer dealt with
18 the voluntary manslaughter charge and I didn't hear this
19 directly from him, but I got the gist of he feels like perhaps
20 -- or someone feels that you should have kept out the
21 voluntary manslaughter possibility and that then it would have
22 been an either guilty or not guilty of murder. What went into
23 your decision when you saw that, in your words, the State had
24 made a mistake? They had the voluntary manslaughter charge.
25 What were you thinking in terms of why to not object to that,

CROSS EXAMINATION OF H. LEE HERRON BY MR. JOHNSON

1 to let the jury make that determination?

2 A: Part of the transcript that -- Mr. Clements had said
3 during the transcript that -- he said this to the judge:
4 "Judge, I'm struggling with whether or not to ask for a
5 voluntary manslaughter charge." I was never struggling with
6 it because I didn't see the evidence there. He said he was
7 struggling with it, but he asked for it anyway.

8 At that point in time I think, you know, I had to make a
9 decision of whether or not to make it an all or nothing case,
10 you know, all guilty for a mandatory minimum of thirty or all
11 not guilty, and just it was my trial strategy that if I'm
12 giving him voluntary manslaughter, not only did -- I could use
13 that against him in closing being that he had asked for a
14 voluntary manslaughter and I could say to the jury, look, this
15 guy doesn't even really think that it was murder or he's
16 hesitant because now he's asked for voluntary manslaughter
17 when this case was started as a murder case. So I said, well,
18 I could use that against him, but even if the jury comes back,
19 that gives him two outs from saving him -- saving him from the
20 mandatory minimum thirty and not guilty or conviction on
21 voluntary manslaughter.

22 Q: So if we looked at that issue from the question of did
23 you fail to investigate potential for self-defense, then your
24 answer would be what?

25 A: I couldn't have investigated something that my client had

CROSS EXAMINATION OF H. LEE HERRON BY MR. JOHNSON

1 said never occurred.

2 Q: All right. There -- there was some question by Mr.
3 Shaffer about vouching comments made by the State during
4 closing and I wrote down what he asked you did you think it
5 was about and he had you read the segment from the transcript
6 and then he asked you did you think it was about you. I wrote
7 down your answer was, well, technically. Do you remember
8 that?

9 A: Mm-hmm.

10 Q: All right. Is that still what you think about it?

11 A: Yeah and just because something is objectionable doesn't
12 mean you have to object. I think objections can throw off the
13 rhythm of the trial and sometimes it brings attention to
14 things that might -- may have been lost on the jury when you
15 say objection and the jury automatically starts paying
16 attention. So I think sometimes it can do as much harm as it
17 could good.

18 Q: Actually, I wrote down "technically, but not harmful" was
19 the ---

20 A: Mm-hmm.

21 Q: --- complete quotation. Technically it was, but it
22 wasn't harmful. Are there some things you've just got to let
23 go when you're thinking about whether to object?

24 A: I think so. This isn't law school. This is the real
25 world and, you know, you can look at a transcript and say, oh,

CROSS EXAMINATION OF H. LEE HERRON BY MR. JOHNSON

1 I should have objected to this, I should have objected to
2 this, and a trial can quickly become a series of objections if
3 you want it to be, but again, I don't think juries like
4 objections and sometimes, like I said, they bring more
5 attention to something that you might just want to get on past
6 and -- and not let the jury dwell too much on it.

7 Q: And then next chronologically on the omitted claim,
8 failure to object to voluntary manslaughter instruction. Why
9 -- why would one object? Doesn't that give you another out in
10 terms of what the jury can ---

11 A: That's the thing that confuses me. Again, I -- I think
12 the State made a mistake. Well, Mr. -- Mr. Clements is a fine
13 lawyer, of course, and he even said during his request to the
14 judge, Judge, I'm struggling with it, but I think I want to
15 ask for a voluntary manslaughter. I was like, well, great.
16 That gives me, like I said, another out.

17 Q: My understanding of what happened was -- and you can tell
18 me if this is correct or not -- but you basically used their
19 error against them to try to help Mr. Rouse?

20 A: Mm-hmm.

21 Q: They made a mistake, but you turned that around and took
22 it and made it into a positive for the defense of the case?

23 A: I tried to. Obviously, I guess -- I guess you could
24 argue it was successful because the jury didn't find him
25 guilty of murder. So when the case started out, it was a

CROSS EXAMINATION OF H. LEE HERRON BY MR. JOHNSON

1 murder case. When the case ended up, he was found guilty of
2 voluntary manslaughter, so.

3 Q: And when -- when the solicitor says that they are going
4 to ask for a voluntary manslaughter charge or he said that
5 he'd gone back and forth, does this indicate to you that
6 they've got some degree of hesitance or ---

7 A: That's -- yeah.

8 Q: --- maybe they are thinking about what kind of a case
9 they had?

10 A: Exactly and my thought was, well, if he thinks that could
11 be a valid theory, then I'm going to say, look, ladies and
12 gentlemen of the jury, and I can't remember exactly what I
13 said, but I'm pretty sure I said something to them to the
14 effect that, you know, this started out as a murder trial and
15 then all of a sudden after all the testimony, now they're
16 saying it possibly could have been voluntary manslaughter.
17 How sure are they of anything if, you know, it starts out one
18 way and now they're going to change horses so to speak?

19 Q: And just last question. Did Mr. Rouse ever indicate to
20 you that this was a case of self-defense?

21 A: Never at all was that ever discussed, never brought up,
22 never.

23 Q: Thank you.

24 A: And can I just say if he would have brought it up, then
25 obviously we would have argued it.

REDIRECT EXAMINATION OF H. LEE HERRON BY MR. SHAFFER

1 Q: Thank you. Please answer any other questions Mr. Shaffer
2 may have for you.

3 MR. SHAFFER: Just a few.

4 REDIRECT EXAMINATION

5 BY MR. SHAFFER:

6 Q: Mr. Herron, what is murder?

7 A: The voluntary killing of -- murder?

8 Q: What is murder?

9 A: Voluntary killing of another human being with ill will
10 with malice aforethought.

11 Q: With malice aforethought?

12 A: Mm-hmm.

13 Q: And what is voluntary manslaughter?

14 A: Killing someone in the heat of passion. It just
15 basically lacks the -- I guess the willful part of murder.

16 Q: It lacks the malice; correct?

17 A: Mm-hmm.

18 Q: Okay. I guess there's sort of two -- well, I'll save
19 that for an argument, but -- okay. When -- when you actually
20 agreed to -- when you actually agreed to or -- or did not
21 object to the voluntary manslaughter charge, do you
22 specifically remember discussing that before you agreed to it
23 with Mr. Rouse?

24 A: Before trial and maybe before charges because of Ms.
25 Pompey's testimony, I think I discussed something about

REDIRECT EXAMINATION OF H. LEE HERRON BY MR. SHAFFER

1 voluntary with Devodus and I told him I didn't think that was
2 the way to go. But to be honest with you, I can't remember
3 exactly when that discussion took place, but I told him
4 basically that -- at some point in time, I do remember telling
5 him that I thought the State made a mistake and that I didn't
6 think we should object to it.

7 Q: Okay. Could it have happened after?

8 A: Yes. Yeah, it could have happened after.

9 Q: Okay.

10 MR. SHAFFER: No further questions.

11 THE COURT: Anything further.

12 MR. JOHNSON: No, sir.

13 THE COURT: Thank you very much. Sir, you may step down.

14 (Whereupon, the witness leaves the stand at 11:59 a.m.,
15 tripping down the step.)

16 MR. SHAFFER: Are you okay?

17 THE WITNESS: (Laughing) That first step is a doozy. I
18 think I just ruptured a disk, Judge.

19 THE COURT: I don't know who the county attorney is, but
20 you might want to see him.

21 THE WITNESS: I think it's -- I think it's Malloy.

22 MR. SHAFFER: It is Malloy.

23 THE COURT: All right. Mr. Shaffer, you may call your
24 next witness.

25 MR. SHAFFER: The applicant calls Devodus Rouse.

DIRECT EXAMINATION OF DEVODUS ROUSE BY MR. SHAFFER

1 THE COURT: All right. Sir, if you would, please come
2 around to be sworn. Be -- be careful as you come over here.
3 I don't know what is going on over there, but -- all right.

4 THE CLERK: Please place your left hand on the Bible and
5 raise your right hand as much as possible. Do you swear or
6 affirm the testimony you give in this case will be the truth,
7 the whole truth, and nothing but the truth, so help you God?

8 THE APPLICANT: I do.

9 THE CLERK: Please be seated and then state your name for
10 the record.

11 THE APPLICANT: Devodus Rouse.

12 DEVODUS ROUSE, being first duly
13 sworn, testifies as follows:

14 DIRECT EXAMINATION

15 BY MR. SHAFFER:

16 Q: All right, Mr. Rouse, you're currently serving how many
17 years?

18 A: Twenty-five.

19 Q: And what's that sentence for?

20 A: Manslaughter.

21 Q: Okay and you were originally tried for murder?

22 A: Yes, sir.

23 Q: Okay and you were represented by Mr. Herron?

24 A: Yes, sir.

25 Q: Okay. When did you first meet Mr. Herron?

DIRECT EXAMINATION OF DEVODUS ROUSE BY MR. SHAFFER

1 A: After my first lawyer hitted some trouble.

2 Q: Okay. Do you know how long before the -- the trial that
3 was?

4 A: No, sir.

5 Q: Okay. How many times do you remember meeting him prior
6 to trial?

7 A: About five or six times.

8 Q: Okay and he discussed your case with you?

9 A: Yes, sir.

10 Q: What did he tell you about murder?

11 A: Well, he -- he basically told me murder was -- he didn't
12 really break it down to me too good. He basically just was
13 telling me that how much time it hold and stuff like that. He
14 was telling that they ain't never offered no plea agreements
15 or none of that sort of thing.

16 Q: Okay and they never offered any plea agreement to you?

17 A: Not to my knowledge.

18 Q: Okay. If you could, speak up just a little bit. I'm
19 having some trouble hearing you. Now, do you remember him
20 talking to you about voluntary manslaughter?

21 A: He didn't really say too much like when it was going on.
22 The only thing he had told me, like he said, that they was
23 going to put that on the table and he was like, well, really
24 you ain't -- it's supposed to be murder or nothing because you
25 ain't got no voluntary manslaughter case, but he was like if

DIRECT EXAMINATION OF DEVODUS ROUSE BY MR. SHAFFER

1 he do put it out there, he said, well, I'm going to use it to
2 my advantage and I'm going to attack it at the end.

3 Q: Okay. So he did say he was going to use it to his
4 advantage?

5 A: Mm-hmm.

6 Q: Okay. Do you remember talking to him about self-defense?

7 A: I remember talking to him like one time about self-
8 defense when I was on lock-up and I explained the situation to
9 him and he was telling me -- he was like, well, you can't --
10 you can't use that if you were -- you were saying that --
11 saying that -- how you were saying that you ain't had no parts
12 in it, you ain't been there. It was that I ain't never told
13 him that I wasn't there. I did told him that I was there and
14 I did explain the situation to him what was going on, but he
15 was like the best -- the stronger argument was fighting
16 through trial without the self-defense. But I brought it to
17 his attention and explained to him what was going on.

18 Q: Okay and your recollection of the night of the shooting,
19 what happened?

20 A: Well, the night of the shooting like -- like they said, I
21 don't know nobody in the house. I caught a ride from
22 Darlington to Florence.

23 Q: Excuse me. I -- I actually asked the wrong question to
24 you. What -- what did you tell Mr. Herron concerning the
25 night of the incident?

DIRECT EXAMINATION OF DEVODUS ROUSE BY MR. SHAFFER

- 1 A: I told Mr. Herron that night I rode with them to Florence
2 because I was going to my aunt's house and everybody went out.
3 So I didn't know nobody in the house so I stayed in the car
4 talking on the phone and Travis came back out and when Travis
5 came back out, he asked me -- he was like, come in for a
6 while. We're going to be in for a minute and I was like, all
7 right, when I get off the phone, I'm going to come in. So
8 when I did get out the car ---
- 9 Q: And Travis was one of the people in the house? He's not
10 the guy who got shot; correct?
- 11 A: No.
- 12 Q: Okay. Go ahead.
- 13 A: When I did get out the car to go like I was going in the
14 house, Brandon was coming out the house and when he was coming
15 ---
- 16 Q: Brandon is the person who got shot?
- 17 A: Mm-hmm.
- 18 Q: Okay.
- 19 A: And when he was coming out the house, he gave me a look.
20 So when he gave me a look, it was like he was walking towards
21 me and we was going the same way so when he reached to pull
22 out a weapon, me and him get into a little scussle and I'm
23 trying to keep him from shooting me and trying to pull his
24 other weapon at the same time and I don't know how I did it,
25 but he -- I don't know how it happened. The only thing I know

DIRECT EXAMINATION OF DEVODUS ROUSE BY MR. SHAFFER

1 is the gun that I had was jammed up and the gun that he had he
2 was trying to shoot me with the gun he had. The other gun was
3 jammed up and that's how that bullet ended up on the ground
4 because the gun was jammed and somehow I had to hold him from
5 shooting with his other gun and get this other gun from jammed
6 up.

7 Q: Okay. What -- did you take the -- well, during your
8 trial, there came a time whenever he talked to you about
9 possibly pleading; is that correct?

10 A: The last day of my trial.

11 Q: Okay and what did he tell you?

12 A: He told me that he could get me either three -- I mean
13 get me either twelve or thirteen years if I go ahead and take
14 the plea. He also met with my mama and talked to my mama and
15 my aunt about the same thing. I told my mama I wasn't going
16 to take it. My mama was like, well, if that would be the time
17 that he's saying that you would get, I said I'm not going to
18 plead to that because that's still a lot of time. I'm not
19 going to do it and my aunt basically told my mama and was
20 like, if he don't want to do it, don't force him to do it.
21 But he tried to get my mom and my aunt to get me to plead to
22 it, but I wouldn't.

23 Q: Okay and you -- you said you did not -- were not willing
24 to take that plea of voluntary manslaughter?

25 A: No.

DIRECT EXAMINATION OF DEVODUS ROUSE BY MR. SHAFFER

1 Q: Okay and do you remember him saying that it was a
2 voluntary manslaughter plea?

3 A: I just remember him telling me to take the plea to
4 twelve, thirteen years.

5 Q: Okay.

6 A: I know he said it wouldn't be the murder. I don't
7 remember if he said voluntary manslaughter. The only thing I
8 remember him saying that day was I wouldn't be pleading to a
9 murder.

10 MR. SHAFFER: The Court's indulgence. No further
11 questions, Your Honor.

12 THE COURT: Mr. Johnson?

13 CROSS EXAMINATION

14 BY MR. JOHNSON:

15 Q: So, Mr. Rouse, you were hoping that you'll get the
16 opportunity to go back and have a new trial for this matter;
17 is that right?

18 A: Correct.

19 Q: And you understand that you would be facing murder
20 charges?

21 A: Correct.

22 Q: Okay. With regard to what you told Mr. -- Mr. Herron,
23 that you got out of the car, Brandon gave you a look?

24 A: Yeah. Like when I was getting out the car, he was coming
25 out the house and I been going up towards the stairs and he

CROSS EXAMINATION OF DEVODUS ROUSE BY MR. JOHNSON

1 was coming down and he gave me a look and he walked up like he
2 walked up on me or whatever. We were going in the same
3 direction. When he coming out, I'm going in.

4 So when he gave me that look, it just -- we done have
5 problems in the past before. I don't know if his mom or the
6 family remember or whatever, but we did have problems before
7 where he threatened my life, told me he was going to do
8 something to me behind the same -- same girl, Pompey, and me
9 and him had get into it in his yard. I think that was 2002,
10 2001, but his mom had called the police and said somebody came
11 in her yard and her son and the person had a confrontation and
12 the person hit her son and ran off.

13 Q: So when he gave you that look, what did you do?

14 A: So when he gave me that look, he was walking up towards
15 me so we -- we -- we get in a scussle. We get in a scussle,
16 but he was pulling out his weapon.

17 Q: Had you pulled your weapon already?

18 A: No.

19 Q: So both weapons jammed?

20 A: No. I don't know about his gun. He ain't never shoot
21 his gun. Me and him get in a scussle. Only the gun that I
22 had jammed.

23 Q: So ---

24 A: The gun he had, I don't know if it jammed or not because
25 he never shot the gun.

CROSS EXAMINATION OF DEVODUS ROUSE BY MR. JOHNSON

1 Q: So he pulled your -- what kind of handgun was it?

2 A: I don't remember what kind of gun.

3 Q: And that jammed?

4 A: Yeah, it jammed.

5 Q: And then ---

6 A: Because when I was scussling with him trying to keep him
7 from shooting me, I was trying to shoot him in the process,
8 but the gun jammed so I had to scussle with him to keep him
9 from shooting me with this gun and somehow -- I don't know how
10 the bullet even get in the chamber. I'd be storying if I tell
11 you how I unjammed that gun because I don't know even to this
12 day.

13 Q: Now, when you -- when you said that Mr. Herron tried to
14 get you to plead, what did you tell him? Did you tell him no,
15 no way?

16 A: I told him no. I'm not going to plead. So he tried to
17 get my mama and I tell my mama no, I'm not going to plead and
18 my aunt told my mom that don't force him to do something that
19 he don't want to do.

20 MR. JOHNSON: I think that's all the questions I have,
21 Your Honor.

22 THE COURT: Anything further, Mr. Shaffer?

23 MR. SHAFFER: Just one.

24 REDIRECT EXAMINATION

25 BY MR. SHAFFER:

26

REDIRECT EXAMINATION OF DEVODUS ROUSE BY MR. SHAFFER

1 Q: Did you want to face a voluntary manslaughter charge?

2 A: No, sir. I never asked for that.

3 Q: Okay and you never asked for a plea for one either; did
4 you?

5 A: No, sir.

6 Q: Okay.

7 MR. SHAFFER: No further questions, Your Honor.

8 DIRECT EXAMINATION BY THE COURT

9 THE COURT: Did you ever -- did you ever ask Mr. Herron
10 why based on the story you just gave why he wasn't asking for
11 self-defense?

12 THE APPLICANT: No, sir. He just told me the other --
13 well, what he told me, the other stuff that we was going to
14 fight, we was going to go straight up on the murder. He tell
15 me he had a better chance on that because it ain't be no
16 evidence, ain't no eye-witnesses, no physical evidence. So it
17 was like we had a better chance of just doing it like that how
18 we fight it.

19 THE COURT: Did you ever tell him you had nothing to do
20 with it which is why you didn't want a self-defense argument
21 or ---

22 THE APPLICANT: No, sir.

23 THE COURT: --- or charge?

24 THE APPLICANT: No, sir.

25 THE COURT: All right. Anything further, Mr. Johnson?

DIRECT EXAMINATION OF H. LEE HERRON BY MR. JOHNSON

1 MR. JOHNSON: I just have one follow-up question if I can
2 recall Mr. Herron.

3 THE COURT: Sure. All right. Well, let me get --
4 nothing further for Mr. Rouse?

5 MR. JOHNSON: No, sir.

6 THE COURT: All right. Mr. Rouse, I'm going to get you
7 to step down. You're -- you're excused from the stand and
8 I'll -- Mr. Herron, you come back and take the stand and
9 remember, sir, that you are still under oath, please. Be
10 careful over there.

11 (Whereupon, the applicant leaves the stand at 12:10 p.m.
12 and Mr. Herron retakes the witness stand.)

13 DIRECT EXAMINATION

14 BY MR. JOHNSON:

15 Q: Mr. Herron, you heard the testimony that Mr. Rouse just
16 gave regarding that he claims that he gave you a factual basis
17 for a self-defense defense. Do you remember this?

18 A: No, sir. That was the first time I ever heard anything
19 like that.

20 Q: Meaning today in court is the first time?

21 A: Today in court is the first time I've ever heard him say
22 anything about self-defense or getting into a scuffle or
23 anything like that.

24 Q: So he never mentioned this to you?

25 A: Not only did he not mention it to me, there's a letter in

DIRECT EXAMINATION OF H. LEE HERRON BY MR. JOHNSON

1 the file that he wrote Jim Hoffmeyer writing, quote, I didn't
2 have anything to do with it and I'm not going to plead to
3 anything. So, like I said, again his story had remained
4 pretty consistent all along that he didn't have anything to do
5 with it.

6 Q: All right. Thank you, sir. Please answer any questions
7 Mr. Shaffer might have.

8 THE COURT: Mr. Shaffer?

9 MR. SHAFFER: No questions, Your Honor.

10 THE COURT: Thank you very much, sir. You may step down.

11 (Whereupon, the witness leaves the stand at 12:11 p.m.)

12 THE COURT: Mr. Shaffer?

13 MR. SHAFFER: Your Honor, that's all the witnesses we
14 have. I would like to argue this, to present an argument if
15 you ---

16 THE COURT: All right. Let me ---

17 MR. SHAFFER: --- would like.

18 THE COURT: Well, let me first see if Mr. Johnson is
19 going to call any additional witnesses.

20 MR. JOHNSON: No, Your Honor.

21 THE COURT: All right. I'll be happy to hear from both
22 counsels with regards to any closing remarks.

23 MR. SHAFFER: Your Honor, the State has two problems with
24 this case. The self-defense claim, I believe that there was
25 evidence in the record to support self-defense, whether --

1 whether Mr. Herron was going to argue it or not. His
2 reasoning for not asking for the charge was that he wasn't
3 going to argue for it. Essentially, it would have given the
4 client another out. Obviously, they believe that he -- he had
5 shot Mr. Timmons. It would have given them the possibility,
6 should they have believed that he did it, it was either him or
7 me and then Mr. Timmons pulled out the gun first whenever he
8 walked up to him. If they would have believed that, then it
9 likely would have given him another out.

10 I don't know if the jury would have believed that or not,
11 but there's a reasonable probability that they would have. So
12 I believe that that is the first issue with the case is that
13 self-defense was not requested even though -- I -- I don't
14 believe it's valid trial strategy not to ask for it because
15 you're not going to argue it.

16 THE COURT: Well, let me ask you a question. Do you
17 think it's appropriate for an attorney under the Rules of
18 Ethics to ask for defense charges that they -- that they don't
19 have any belief in?

20 MR. SHAFFER: I believe it's appropriate whenever the
21 evidence supports that charge. When there is some evidence in
22 the record to support it, I believe that it is appropriate.
23 The test for whether or not to ask for a charge or whether or
24 not instruction should be given in self-defense is whether or
25 not there's any evidence in the record to support it. I

1 believe that clearly there was evidence in the record to
2 support it because she said he walked up on him, he pulled the
3 gun, you know, and at that point it was him or me, so he's
4 dead.

5 THE COURT: That was the testimony of Ms. ---

6 MR. SHAFFER: Ms. Pompey.

7 THE COURT: --- Pompey.

8 MR. SHAFFER: His girlfriend and it was actually, you
9 know, I guess hearsay or a statement. Not actually hearsay,
10 but it was actually from the defendant who had relayed that to
11 her. That's ---

12 THE COURT: But that was testified before the jury?

13 MR. SHAFFER: Yes, Your Honor. I believe that based off
14 of that, there would have been a reasonable basis for asking
15 for it because essentially the test is that whether or not you
16 believe it, the test is whether or not there's any evidence in
17 the record to support it. That's the first one. I think that
18 for ease I'll let Mr. Johnson respond to that and then I'd
19 like to address my second main point.

20 THE COURT: All right. Mr. Johnson?

21 MR. JOHNSON: Well, I may have misunderstood something
22 that Mr. Shaffer said, but at the outset I would say the State
23 had no burden of proof today. It's the applicant's burden of
24 proof and the burden is pretty steep. He's got -- just for
25 all of our defenses, the following will be a general

1 framework.

2 Under *Strickland v. Washington*, the applicant has got to
3 prove that -- that counsel made an error and that but for
4 counsel's error, there's a reasonable probability that the --
5 that the result at trial would have been different and
6 *Strickland* and other courts have further defined that a
7 reasonable probability is a probability sufficient to
8 undermine the competence of the outcome of the trial.

9 So just responding to this one point that was made
10 regarding the self-defense charge, the testimony was that
11 there was no -- there was no evidence of self-defense. Mr.
12 Rouse never approached Mr. Herron and said this is what
13 happened; I want you to allege self-defense. Your Honor, you
14 heard the testimony was that Mr. Herron heard this for the
15 first time today.

16 And there's great language in *Strickland* regarding the
17 duty of a PCR Court and really the difficulty at this stage is
18 to avoid looking at what counsel should have done with the
19 benefit of hindsight. To reconstruct the circumstances of the
20 challenged conduct, the -- the duty of the Court is to
21 evaluate the conduct in the light of what he knew at the time,
22 not in the light of what we know now or maybe what we wish
23 that we would have done.

24 So in the light of what Mr. Herron knew at the time, it's
25 clear that he -- within the Rules of Ethics, he only argued

1 the defense that was available to him and he -- he saw that
2 the State had made an error and actually turned that around
3 completely and was able to use it for the benefit of Mr.
4 Rouse. So that's our response on that material.

5 THE COURT: All right.

6 MR. SHAFFER: Your Honor, I believe that a lot of Mr.
7 Johnson's comments will be echoed in my -- in my second part
8 of my argument, which is concerning the voluntary manslaughter
9 charge. The -- the issue with voluntary manslaughter is that
10 it is really a two-pronged issue. One, we're alleging
11 ineffective assistance of counsel. Second, we were also
12 alleging that the conviction itself is violative of due
13 process in the fact that the State failed to present any
14 evidence that -- that he -- he committed voluntary
15 manslaughter, much less evidence beyond a reasonable doubt.
16 There is -- there is effectively no evidence that he committed
17 voluntary manslaughter. It's been stated by the trial
18 attorney. More or less, it's argued throughout the state. It
19 was conceded by Mr. Spencer prior to him -- via e-mail prior
20 to him not taking over the -- or handing the case over to Mr.
21 Johnson.

22 But there's no evidence of provocation anywhere in the
23 record. There's no evidence of -- of heat of passion
24 additionally. The -- the problem is is that according to the
25 State's theory is that it was an armed robbery and he shot him

1 during an armed robbery, someone defending themselves during
2 an armed robbery is not legal provocation. Additionally, and
3 we have *State v. Shuler* to show that. That's S-H-U-L-E-R, 344
4 S.C. 604, and I'll actually hand the Court -- the Court a copy
5 of that and opposing counsel.

6 THE COURT: Thank you, sir.

7 MR. SHAFFER: If you look on page 14 of that opinion, it
8 says first as a matter of law -- or excuse me, 15 is where I
9 actually want to cite there, 15, bottom of the page. It's
10 highlighted for the Court and for opposing counsel. It says:
11 "A victim's attempt to resist or defend himself from a crime
12 cannot -- cannot satisfy the sufficient legal provocation
13 element of voluntary manslaughter."

14 Here, the State's whole theory is that he -- he was
15 trying to defend himself in an armed robbery situation. The
16 defendant was -- or that the applicant was attempting to rob
17 the alleged victim. Here, you know, that obviously cannot
18 satisfy the -- the legal provocation section according to our
19 law. Additionally, there's absolutely no evidence of heat of
20 passion and the courts over the last about three years have
21 certainly made a clear distinction that each of those elements
22 need to be evaluated individually.

23 There's *State v. David Smith*, which I'll hand the Court
24 and opposing counsel, and I'm reading from the fourth page of
25 that opinion and right under the South Carolina -- or I

1 believe it's headnote 9. It says: "For a defendant to be
2 entitled to voluntary manslaughter, there must be both
3 sufficient legal provocation and heat of passion at the time
4 of the killing."

5 In -- in this case, it said according to Smith he was not
6 enraged or he was not enraged or incapable of cool reflection
7 or acting under an incontrollable evident impulse to do
8 violence. Because of the absence of any evidence of heat of
9 passion, the trial court properly declined voluntary
10 manslaughter charge. Similarly here, there is absolutely no
11 evidence. I'd also like to hand the ---

12 THE COURT: Let me -- I don't mean to interrupt you, but
13 let me ask ---

14 MR. SHAFFER: I apologize.

15 THE COURT: Let me ask you this because I don't know if
16 we're going down a road that isn't proper for this hearing. I
17 -- I know this case was appealed and it went through the Court
18 of Appeals. I don't know if that issue was addressed by the
19 Court of Appeals as to the validity of the -- the conviction
20 based on the evidence, but it's impossible for me to make that
21 call because I -- I don't have all the evidence in front of
22 me. I don't know what was -- I don't know what evidence the
23 State put up in this case.

24 MR. SHAFFER: Your Honor, I -- I do apologize. I thought
25 the Court was provided a copy of the transcript of the entire

1 record.

2 THE COURT: I've got ---

3 MR. SHAFFER: Generally, the Court does have them in most
4 cases.

5 THE COURT: I've got the supplemental record on appeal.

6 MR. SHAFFER: I'm happy to hand up a copy of the other
7 transcript on this case - this -- this had actually come from
8 the Attorney General's Office -- for your review.

9 THE COURT: All right.

10 MR. SHAFFER: Your Honor, my -- my basis is -- I actually
11 have a constitutional tie-in to the -- because of the fact
12 that this was alleged or that this was consented to at -- at
13 the trial court, I believe that it would be improper for the
14 -- the appellate court attorney to actually raise the issue.
15 Should that not be the case or should the Court not find that
16 alternatively, I alleged ineffective assistance of appellate
17 counsel for failing to raise it.

18 I would pass up *State v. Starnes*, which is another case
19 of the point that concerning legal provocation. Both of these
20 are in the last -- I think one is the end of 2010; one is the
21 beginning of 2011 case from the Supreme Court. And in this
22 case, the -- the alleged victim actually pointed a gun. There
23 was testimony that the alleged victim pointed a gun at the
24 defendant and threatened him or made him scared.

25 The Court said while that may be -- that may or may not

1 be sufficient legal provocation, that it certainly wasn't
2 evidence of heat of passion and they give a very detailed
3 analysis of what sufficient legal provocation -- I mean what
4 heat of passion is. Not every case where there's fear is
5 there necessarily sufficient legal -- I mean sufficient heat
6 of passion and I believe that both *Starnes* and *Smith* sort of
7 stand for the proposition that similarly in this case there's
8 absolutely no evidence in the record of -- of heat of passion.

9 Now, the State has -- or Mr. Herron said essentially that
10 the reason he did not object was trial strategy. Trial
11 strategy for the ineffective assistance of counsel claim --
12 I'll go back to the constitutional claim in a moment, but --
13 or the due process claim in a moment, but for the ineffective
14 assistance of counsel claim, trial strategy is only valid if
15 it's based off of -- based off of a correct interpretation of
16 the law. Clearly, an interpretation that would allow a jury
17 to make a finding that was not -- was not justified by any
18 legal principle, which is finding him guilty when there's
19 absolutely no evidence of it, clearly that is not a -- a valid
20 trial strategy because it's based off of an inaccurate
21 interpretation of the law. That goes to the ineffective
22 assistance of counsel part of the claim.

23 Regarding the due process claim, I would like the Court
24 to consider *State v. Cooley* and I'm handing up a copy of *State*
25 *v. Cooley*, which is 342 S.C. 63. In *State v. Cooley*, you have

1 a situation where it's a direct appeal standpoint, but the
2 solicitor asked for a -- asked for a in -- voluntary
3 manslaughter charge. In this situation, the -- the defense
4 counsel actually objected to the voluntary manslaughter
5 charge. The Court decided that essentially that there was no
6 evidence of voluntary manslaughter and that it required --
7 that the law required that there must be some evidence
8 presented in order for the charge to be given, that it was
9 reversible error to -- to give a charge when there's
10 absolutely no evidence of it.

11 And they make one point that I'd like to bring to the
12 Court's attention. It's actually the last paragraph of the --
13 the -- the opinion. It says: "Since the jury heard no
14 evidence of legal provocation, defendant's voluntary
15 manslaughter conviction suggests that the jury may have
16 compromised between murder and involuntary manslaughter or
17 accident in reaching its verdict. As such, it is fair to
18 assume that at least one member of the jury may have believed
19 that the State's position that the defendant murdered the
20 victim by shooting her with a shotgun in the face at close
21 range.

22 However, due to an error in granting the solicitor's
23 request for a voluntary manslaughter charge, the defendant
24 will not face the jury of his peers on the charge of murder
25 again. This is a cautionary tale for solicitors of the

1 pitfalls of requesting a potential compromise charge which is
2 unsupported by evidence. Although there is -- the result is
3 an unsatisfactory one, this is a situation controlled by
4 precedent of the United States Supreme Court which cannot be
5 ignored."

6 Essentially, what they're saying is that constitutional
7 precedent says that you cannot have someone convicted of a
8 charge when they fail to present any evidence of it. Even if
9 it was valid trial strategy, which we certainly don't believe
10 it is, I believe that the Constitution says that his
11 conviction must be overturned regardless and I believe that's
12 all I have, Your Honor.

13 THE COURT: All right. All right, Mr. Johnson?

14 MR. JOHNSON: That's a lot to respond to, Your Honor.
15 I'm just going to try to keep it simple and stick to the few
16 points I can. In these -- in these cases, fortunately for the
17 State, all trial counsel has to do is articulate a reasonable
18 trial strategy and what determines what is reasonable and what
19 is not is not only do you have to look at the law, but you've
20 got to look at the facts. It was a reasonable trial strategy
21 because of what his -- his client told him and more
22 importantly what he failed to tell him because his client
23 never said this is a self-defense case.

24 He never said that. If he'd said that, then you may be
25 able to come in here and say, well, it was -- it was

1 unreasonable trial strategy to ignore what Mr. Rouse said, but
2 he never said this was a self-defense case. He never gave him
3 the facts to -- to argue anything besides those things in the
4 argument.

5 In this case -- and I appreciate Mr. Shaffer's going
6 after it, but these are -- these are trial issues. He's
7 trying to retry the case here in PCR and that's not what this
8 is about. You can't do that.

9 So just looking at the things that Mr. Herron failed to
10 do or should have done differently that have somehow
11 prejudiced Mr. Rouse's case and so I interpret what Mr.
12 Shaffer is saying is -- tell me if I'm wrong here and I'm sure
13 he will, but I interpret what he's saying is if Mr. Herron had
14 only kept out the voluntary manslaughter charge, then we would
15 have been found not guilty. We're saying, you know, thank
16 goodness he did have the -- for Mr. Rouse's sake, the
17 voluntary manslaughter charge because he -- he got -- instead
18 of being found guilty of murder, he was found guilty of
19 manslaughter.

20 The more reasonable likelihood is that had he not gotten
21 the voluntary manslaughter charge, the jury would have come
22 back with a murder conviction. So he's in a much better
23 position now than if Mr. Herron had done what they say he
24 should have done.

25 THE COURT: Let me ask -- I'm very limited on what I have

1 in front of me, but, Mr. Shaffer, in your PCR application I'm
2 assuming you did not allege ineffective assistance of
3 appellate counsel in this application; is that correct?

4 MR. SHAFFER: No, Your Honor. I actually moved under I
5 think it's Rule 15 of the South Carolina Rules of Civil
6 Procedure to orally amend based off evidence presented.

7 THE COURT: Well, here's the problem with that is that
8 doesn't give the State any opportunity to properly prepare and
9 respond because I'm assuming -- I guess -- I guess here's what
10 I'm saying and -- and I may even be asking a question so, Mr.
11 Johnson, listen carefully so anyone can respond. I -- I think
12 I'm -- I'm bound to address the issues that are before me on
13 this application.

14 You raise an interesting point regarding appellate
15 defense strategy or whatever, but I mean I know you're --
16 you're moving to amend your application at this point to
17 include that, but that precludes the State from being able to
18 sit down and talk with appellate counsel and have appellate
19 counsel here to respond to allegations and all that. So I
20 don't think I can allow that amendment at this stage and I
21 don't know what I'm going to do at this stage, but -- because
22 I'm going to -- I'm going to look at the matters that you've
23 passed up. But if -- if I were to deny this application, I
24 don't think that precludes him -- am I right or wrong -- from
25 bringing an application? I don't know.

1 I guess my point is I have to decide this case based on
2 the application in front of me. I don't know that I can --
3 and I -- and I appreciate your -- your motion to amend to
4 include defense counsel -- or excuse me, appellate counsel's
5 ineffective assistance, but I don't -- I don't think I can
6 allow that at this stage -- at this late stage. We're --
7 we're already through the -- the -- the PCR hearing and it
8 doesn't allow the State any opportunity to be heard on that.

9 So my whole question on that is that's what I'm asking
10 because I don't have your application I don't think in full
11 here, but that was not part of the application before the
12 Court when we began this hearing; correct?

13 MR. SHAFFER: The Court's indulgence. Your Honor, I
14 don't believe it's in front of the Court prior to the -- the
15 motion to amend. I understand the -- the Court's position on
16 that. I would like to say that I don't believe that it
17 actually would be properly preserved, first of all. So I -- I
18 didn't allege that Mr. Savitz was ineffective because of the
19 fact that it was specifically waived. I think that they would
20 have found that if he had raised this issue on appeal that it
21 would not have been properly preserved.

22 THE COURT: Because it wasn't objected to?

23 MR. SHAFFER: Yes, Your Honor. That's the reason that I
24 didn't ---

25 THE COURT: So ---

1 MR. SHAFFER: I did not raise that.

2 THE COURT: So that's part of your claim for ineffective
3 assistance on behalf of Mr. Herron for not objecting and
4 preserving that for appellate review?

5 MR. SHAFFER: Yes, Your Honor.

6 THE COURT: Okay.

7 MR. SHAFFER: But additionally, if the Court would allow
8 it, I'd like to clarify something that Mr. Johnson had said.
9 He -- he claimed that essentially what we're only here for is
10 -- you know, I'm paraphrasing this -- is basically the
11 ineffective assistance of counsel claim. That's not the
12 extent of what PCR covers, Your Honor.

13 Under 17 -- 17-27-28(1), it specifically allows you to
14 challenge that the conviction or sentence was in violation of
15 the Constitution of the United States or the constitutional
16 laws of the state. I believe that because of the fact that
17 this raises to a due process issue and the fact that he was
18 convicted whenever there was absolutely no evidence --
19 convicted of voluntary manslaughter despite no evidence in the
20 record to support it that it is proper under PCR to add that
21 and that's actually a separate issue. I guess it's issue
22 number 14(a) and (b). There -- there are two separate
23 analyses that the Court should do on that.

24 And I also believe that the -- one thing that I had
25 expected the State to argue -- and I'd like to ahead and put

1 this on the record. I expected the State to argue essentially
2 -- and Mr. Herron did present some evidence basically that
3 somehow the defendant waived it -- waived his constitutional
4 right to be convicted under -- whenever there was no evidence
5 against him by -- by consenting to it, but that waiver I
6 believe was after he -- Mr. Herron said that he -- my
7 recollection is he said that he couldn't tell exactly when Mr.
8 Rouse had said that -- had agreed with him. I believe that
9 was his testimony that he didn't determine when. He said that
10 he did not know that it was before then.

11 I believe that that to some extent would cause problems
12 with the waiver. I believe regardless -- I don't think you
13 can -- you can waive your -- your right whenever there's --
14 for trial strategy purposes. This -- and I understand this
15 creates a real problem and it's a problem that is predicted I
16 guess in that *Cooley* case, which is saying, solicitors, don't
17 ask for charges that you are think are compromises because
18 that's what will happen. It will get overturned. This is one
19 of the prime examples of why, you know, essentially they --
20 you should only ask for what was being charged.

21 THE COURT: Yeah. I mean I think *Cooley* basically is
22 sending a message to solicitors that -- and it was used in the
23 *Cooley* case as an example and that is you -- you charged Mr.
24 *Cooley* with -- with murder. You basically thought that you
25 might -- I guess basically I'm just paraphrasing as well

1 obviously -- is basically that you did a shotgun approach and
2 threw up some lesser included offenses that weren't supported
3 by the evidence and so therefore you -- because of double
4 jeopardy, you can now not come back on him for murder, but
5 you'd have to -- if you do retry him, you're going to have to
6 retry him for voluntary manslaughter essentially is what the
7 Court said.

8 MR. SHAFFER: Yes, Your Honor. I believe that's correct.

9 THE COURT: Yeah.

10 MR. JOHNSON: May I be heard ---

11 THE COURT: Yeah.

12 MR. JOHNSON: --- in response on that, Your Honor?

13 THE COURT: Mm-hmm.

14 MR. JOHNSON: The section of the statute that Mr. Shaffer
15 quoted, if I understand correctly, this is a whole other
16 section of the statute dealing with when the sentence has
17 expired or is otherwise illegal and there's a whole body of
18 PCR case law on that. This is not that case. This -- this
19 case would not fit within the statute, but -- but to say that
20 if you have an unconstitutional result that therefore it's
21 shoehorned in by virtue of the other section, I don't think
22 that would be a valid argument.

23 So when I argued that we're looking at ineffective
24 assistance of counsel, I want to contrast that with it because
25 we're not retrying the case and we're not looking at issues

1 that were proper for appeal. Those issues we're not looking
2 at today.

3 Now, getting to the appeal, I think ---

4 THE COURT: But ---

5 MR. JOHNSON: --- the Court had a question.

6 THE COURT: Yeah, I did because I guess I think one of
7 his arguments is -- dealing with Mr. Herron is that because
8 you didn't object to the voluntary manslaughter, you basically
9 precluded that from being heard on appeal because it wasn't
10 preserved.

11 MR. JOHNSON: It still appears to be a valid trial
12 strategy to get him a conviction for voluntary manslaughter
13 when otherwise he would have been looking at a murder
14 conviction. So it seems that almost like a circular reasoning
15 to say it wasn't preserved for appeal because he didn't
16 object. Well, he didn't object because he really got him
17 something good. He got Mr. Rouse a much more favorable result
18 so he would not have objected.

19 It really -- it really is sort of trying to back door an
20 argument that doesn't make sense at all to say that this --
21 this wasn't preserved for appeal because he didn't object.
22 Well, he was thinking -- Mr. Herron was thinking, well, I'm
23 not going to object because this is good for my client.
24 That's why it's not heard on appeal.

25 But the Court had a question about the standard as I

1 perceived it to be, the standard of appellate defense, and I
2 just wanted to speak to that just briefly ---

3 THE COURT: Yes, sir.

4 MR. JOHNSON: --- if I could. Appellate counsel is not
5 required to raise every possible appealable issue. Appellate
6 counsel under *Thrift v. State* -- that's 302 S.C. 535, 302 S.C.
7 535. *Thrift v. State* stands for this proposition that
8 appellate counsel has a professional duty to choose from among
9 potential issues according to their merit and this is based on
10 how appellate counsel perceives those issues. If they
11 perceive them to be -- it's another subjective decision.

12 Appellate counsel can perceive these to be issues of
13 merit and therefore take them up or meritless issues, and so
14 it's appellate counsel's duty to choose among those where the
15 strategic decision to exclude certain issues on appeal is
16 based on their reasonable professional judgment -- reasonable
17 professional judgment. The failure to appeal those issues, if
18 they appear to be errors, is not ineffective assistance of
19 counsel.

20 And it's not in this case and in this case Mr. Savitz
21 filed, if I'm not mistaken, an *Anders* appeal and the Court
22 would have been free to review all other potential issues.
23 They still did not find in Mr. Rouse's favor so I just -- I'm
24 not seeing any merit in the appellate or the constitutional
25 argument that just was presented by counsel.

1 THE COURT: All right.

2 MR. SHAFFER: Your Honor, if I can briefly respond? The
3 -- the State is assuming that it would be actually preserved
4 in order for the Court to reach that opinion. The problem is
5 is that it wasn't preserved in this court case. It was
6 specifically waived. In order for something to be preserved
7 on appeal, it has to be raised and ruled upon by the trial
8 court. An objection has to be raised and ruled upon.

9 I -- *Gregory Daniels* is the only case I can think of that
10 says that. That was last week and, Your Honor, I believe that
11 you were the trial attorney for that or trial -- I mean you
12 were the presiding judge, Your Honor.

13 THE COURT: Mm-hmm.

14 MR. SHAFFER: And it certainly said that the objection
15 was not raised and ruled upon; therefore, it's not preserved.
16 So I don't think we even get to ineffective assistance of
17 appellate counsel. If we were to get that, I guess this is
18 the issue that we would take up on -- on federal habeas under
19 that Arizona case. I can't think of the name of it, but --
20 and say that I was ineffective for it.

21 But essentially, one other thing I'd like to respond to
22 that the State said, which was he got a more favorable result
23 than he would have. That's presuming that the jury would have
24 found him guilty of murder, which is presuming that the jury
25 would have found beyond a reasonable doubt that he -- that

1 somehow he, you know, killed him with malice aforethought.

2 The jury found the opposite and I'm not going to invade the
3 province of the jury. In fact, they found that there was no
4 malice necessary in order to find him guilty of involuntary.
5 They specifically found the killing was with no malice.

6 I'm not going to invade the province of the jury and make
7 assumptions as to what the jury would or would not have done.
8 I don't think that that's the proper place for me. Similarly,
9 I don't think it's the proper place for Mr. Johnson to go or
10 anyone else to assume that the jury would have done something.
11 I think the courts should only try to stay out of that.

12 Essentially, what we're left with is, you know, he was
13 convicted. He was acquitted of murder. He was convicted of
14 voluntary manslaughter and there's absolutely no evidence that
15 he committed voluntary manslaughter under South Carolina law.

16 MR. JOHNSON: May I be permitted a brief response?

17 THE COURT: Yeah.

18 MR. JOHNSON: I can be quick. I'm just going to respond
19 to one thing that Mr. Shaffer said; it's unfair for either of
20 us to assume. There is a case that, in a PCR, counsel is
21 presumed to have rendered effective assistance and so this is
22 a legal presumption that the applicant has got to overcome.
23 So we would just argue that they have failed to overcome that.

24 But I am entitled to make an assumption and so is the
25 Court that counsel rendered effective assistance unless

1 there's probative, relevant evidence to overcome that.

2 THE COURT: All right. Well, gentlemen, I'm going to
3 take this matter under advisement. I've got a lot of reading
4 to do here. I will look at what's been submitted and I'll get
5 you an answer shortly.

6 MR. JOHNSON: May we submit a proposed order, Your Honor?

7 THE COURT: Yeah. As a matter of fact, I would
8 appreciate it if -- if you would do that. Just submit a
9 proposed order to your position and in the meantime I'll be
10 looking at these matters. Okay?

11 MR. SHAFFER: Thank you, Your Honor.

12 MR. JOHNSON: Thank you, Your Honor.

13 THE COURT: Thank y'all very much.

14 MR. SHAFFER: You do have -- you do have both the
15 supplemental record -- I mean you have the supplemental record
16 on appeal and the transcript?

17 THE COURT: All right. I've got the -- I'm assuming what
18 you passed me was the complete transcript?

19 MR. SHAFFER: Yes, Your Honor.

20 THE COURT: Okay. I've got that. I've got what is
21 referred to here as a supplemental record on appeal. I've got
22 that and then I have several matters here that I think Mr.
23 Rouse submitted, as well as ordered by Howard King, and just
24 various orders throughout the case.

25 MR. SHAFFER: Thank you, Your Honor.

1 THE COURT: All right.

2 (Whereupon, the proceedings end at 12:43 p.m.)

3 --- END REQUESTED TRANSCRIPT ---

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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 Florence County, South Carolina, on the 15th
12 day of October, 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 May 29, 2013

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STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

FILED

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

2012 NOV -6

AM 11:30

Devodus Rouse, # 329874,

CONNIE REED-SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

2011-CP-21-1583

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

RECEIVED: A TRUE COPY
JAN 14 2012
CLERK OF COURT
FLORENCE COUNTY, S.C.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed June 20, 2011. Respondent made a timely Return. The Court convened an evidentiary hearing into the matter on October 15, 2012, at the Florence County Courthouse. The Applicant was present at the hearing and was represented by Tristan Shaffer, Esquire. Tyson Andrew Johnson, Sr., Esquire of the South Carolina Attorney General's Office represented Respondent.

At the hearing, the Applicant testified on his own behalf. Also testifying was H. Lee Herron, Esquire. This Court had before it the PCR Application, the State's Return, the records of the County Clerk of Court, the transcript, and the Applicant's records from the South Carolina Department of Corrections.

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Florence County Clerk of Court's orders of commitment. Applicant was indicted at the April 2008 term of the Florence County Grand Jury for murder. H. Lee Herron, Esquire represented Applicant. On December 8, 2008, a jury convicted Applicant of voluntary manslaughter. The

Honorable Judge Ralph King Anderson sentenced Applicant to twenty-five years imprisonment.

Applicant appealed his conviction.

Applicant was represented on appeal by Joseph L. Savitz, Esquire, who submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals dismissed the appeal in an unpublished opinion (2011-UP-274) on June 8, 2011. The remittitur was issued on June 28, 2011.

ALLEGATIONS

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel;
2. Denial of Due Process;
3. Denial of Sixth and Fourteenth Amendments to the U.S. Constitution.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80.

Ineffective Assistance of Counsel

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a

preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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 v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, 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, supra). 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 trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Failure to raise the defense of self defense

Applicant testified his counsel was ineffective because he failed to raise a self defense claim.

as Applicant had asked him to do. Counsel indicated the notion of claiming self defense was "never even on the radar" as Applicant never asked him to raise the defense or gave him the factual basis to do so. Counsel testified "never at all was that discussed... never." Counsel testified that he would have needed some evidence of self defense to avail his client of the defense, both in jury charges and in argument. Counsel testified Applicant insisted he wasn't at the scene, and in his mind "you can't use it if you say you weren't there."

Counsel testified that his client's refusal to testify would have made that defense difficult if not impossible. Also, counsel indicated that a self defense claim would have been inconsistent with the known facts, as he felt the jury would have likely believed that the Applicant can't start a fight then claim self defense. Counsel testified, "I can't make up a defense my client hasn't told me about and hasn't given me evidence to make." This Court finds counsel credible, and does not find Applicant credible. The evidence based on the testimony of the parties was that counsel's not raising a self defense argument was based on reasonable trial strategy. Therefore this Court does not find Applicant's argument persuasive, and trial counsel's position is well taken. This Court finds counsel's trial strategy was reasonable and further finds counsel's performance was not deficient. Applicant has not established that Counsel's conduct fell below a reasonable standard of performance, or that his case was therefore prejudiced. I find that counsel's performance was not deficient under these circumstances. Therefore this Court finds the Applicant's claim to be without merit, and it is therefore denied.

Failure to object to voluntary manslaughter charge

In a case where Applicant was originally charged with murder but then later convicted of

voluntary manslaughter, Applicant testified his counsel was ineffective for failing to object to the jury charge on voluntary manslaughter. Applicant couples this with an additional argument that the State failed to prove voluntary manslaughter. Counsel testified that since his client was charged with murder, realizing the ability to provide the jury with a lesser alternative to a murder conviction was actually a very effective outcome for his client, in the light of the alternative which was a murder conviction. Counsel indicated he felt that the State suggesting the jury charge for manslaughter was an error that he and his client were able to capitalize on. Essentially counsel used the State's mistake to his client's advantage, and he also felt the charge indicated the State had some doubt as to whether it could prove a murder case. Counsel testified he naturally would have asked for voluntary manslaughter or anything other than murder. Applicant was in fact then convicted of voluntary manslaughter rather than murder. Applicant's claim in this regard has no merit and is hereby denied and dismissed.

I find that counsel's performance was not deficient under these circumstances. Applicant failed to overcome the presumption that counsel rendered effective performance. In reaching this conclusion, this Court finds counsel's testimony credible and gives it great weight. This Court does not find Applicant's testimony credible. For these reasons, I find that counsel was not ineffective with regard to his conduct of the trial. I find that counsel was not deficient in this respect, nor was applicant prejudiced by any alleged deficiency. Further, I find counsel's trial preparation and actions were reasonable under prevailing professional norms, and therefore this claim is denied.

Other Allegations

No other allegations were raised or testified to at the PCR hearing. Therefore, any additional

allegations raised in the PCR Application or amendment are deemed waived because no evidence was presented.

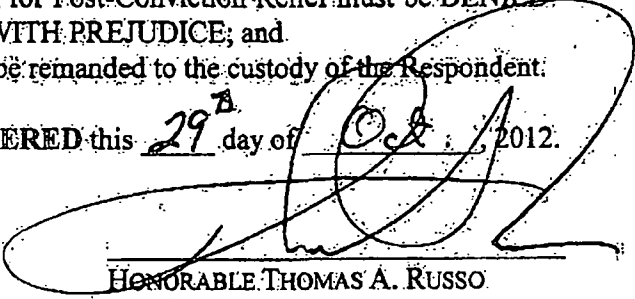
CONCLUSION

Based on the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief is denied and dismissed with prejudice.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be DENIED AND DISMISSED WITH PREJUDICE; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 29th day of Oct, 2012.


HONORABLE THOMAS A. RUSSO
Presiding Judge
12th Judicial Circuit

Florence, South Carolina.

FILED
2012 NOV -6 AM 11:30
CONNIE REEL-SHEARIN
CCJP & CS
FLORENCE COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

) IN THE COURT OF COMMON PLEAS
) FOR THE TWELFTH JUDICIAL CIRCUIT

) Case No.: 2011-CP-21-1583

Devodus Rouse #332635

) MOTION TO RECONSIDER

vs.

THE STATE OF SOUTH CAROLINA

Defendant.

Applicant through his attorney, Tristan Shaffer, respectfully request that this Court reconsider its order dismissing his PCR claim. On November 1, 2012, Applicant submitted, via email, a proposed order which outlined three of the primary arguments raised by Applicant during the evidentiary hearing. *See* Attachment A; Attachment B. Applicant respectfully requests that this Court reconsider his case. To support this motion Applicant shows the following:

A. Self-Defense

In the order of dismissal this Court found that Trial Counsel was not ineffective for failing to raise the defense of self-defense. Although a similar allegation was argued at the hearing, Applicant's primary claim was that Counsel was ineffective for failing to request that the jury be instructed on the law of self-defense. *See* Attachment B.

"The law to be charged must be determined from the evidence presented at trial." *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). A trial court should charge self-defense if there is any evidence in the record "from which it can be reasonably inferred" that the accused acted in self-defense. *State v. Wigington*, 375 S.C. 25, 649 S.E.2d 185, 188 (Ct.App. 2007).

At trial, Pompey testified that Applicant had stated that Timmons pulled a gun on Applicant. ROA 70, ll. 4-7. According to Pompey's testimony Applicant then shot Timmons because it was "him or me." ROA 74, ll. 12-14. From this testimony, it can reasonable be inferred that Applicant shot Timmons in self-defense. *See Wigington, supra*.

Despite the fact that Applicant would have been entitled to charge on self-defense, Trial Counsel failed to request the instruction because he did not intend to argue self-defense during his closing argument. Trial Counsel's strategy of not asking for a self-defense instruction is objectively unreasonable. *See State v. Roseboro*, 317 S.C. 292, 454 S.E.2d 312 (1995) (holding invalid the trial attorney's strategy not to request an alibi charge "because he felt the alibi testimony 'did not come off too well in front of the jury.'"). Therefore, Trial Counsel was deficient in failing to request a self-defense charge in Applicant's case.

B. Ineffective Assistance of Counsel for Failing to Object to Voluntary Manslaughter

This Court found that trial counsel was not ineffective for failing to object to the lesser included offense of Voluntary Manslaughter. Applicant contends that Counsel that Trial Counsel's Strategy was objectively unreasonable.

Trial Counsel testified that there is no evidence in the record which would support a charge of voluntary manslaughter. Trial Counsel testified that he believed it was in Applicant's best interest to allow the jury to consider voluntary manslaughter. However, this strategy invited the jury to ignore the law and render what might have been a compromised verdict in violation of Applicant's right to Due Process. *See State v. Wharton*, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009); *see also, State v. Cooley*, 342 S.C. 63, 536 S.E.2d 666 (2000). Therefore Trial Counsel's strategy was objectively unreasonable.

Moreover, whether or not Trial Counsel believed he was acting in Applicant's best interest is irrelevant. Just as an attorney cannot choose whether or not a client pleads guilty or goes to trial; similarly an attorney cannot waive his client's rights and expose him to a lesser included offense when there is no evidence to support the lesser charge.

C. Applicant's Conviction Violates his Right to Due Process

In its Order of Dismissal, the Court failed to address whether Applicant's conviction for Voluntary Manslaughter was in violation of the Constitution when the State failed to present any evidence of Voluntary Manslaughter.

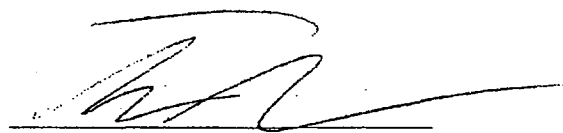
The Fifth, Sixth, and Fourteenth Amendments require that the State must prove each element of a crime beyond a reasonable doubt. *See State v. Brown*, 360 S.C. 581, 595, 602 S.E.2d 392, 400 (2004) ("[T]he United States Supreme Court recently has re-emphasized the constitutional protections of surpassing importance contained in the Fourteenth Amendment's due process clause and the Sixth Amendment right to a jury trial, which indisputably entitle a defendant to a jury determination that he is guilty of every element of the crime which he is charged, beyond a reasonable doubt." (internal quotations omitted)); *see also, In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *see also, Jackson v. Virginia*, 443 U.S. 307, 314, 99 S.Ct. 2781 (1979) ("A meaningful opportunity to defend, if not the right to trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused."); *see also Thompson v. City of Louisville*, 362 U.S. 199, 80 S.Ct. 624 (1960) ("[I]t is a violation of due process to convict and punish a man without evidence of his guilt.").

Applicant's conviction is in violation of his right to due process and his right to a fair trial. At trial, the State failed to present any evidence of heat passion. *See State v. Smith*, 391 S.C.

408, 413, 706 S.E.2d 12, 15 (2011). Simply put Applicant may not be punished for voluntary manslaughter when the State did not present any evidence that he committed voluntary manslaughter. *See Thompson, supra*.

Based on the foregoing reasons, Applicant respectfully request this Court reconsider its order of dismissal.

Respectfully Submitted,



Tristan Shaffer
Attorney for Applicant
P.O. Box 176
Chapin, SC 29036
(803) 467-2586
shafferlawfirm@gmail.com

ATTACHMENT A



Tristan Shaffer <tristan.m.shaffer@gmail.com>

Proposed orders for Montarrio Graham and Devodus Rouse

Tristan Shaffer <tristan.m.shaffer@gmail.com>

Thu, Nov 1, 2012 at 7:20 AM

To: "Russo, Thomas A. Law Clerk (Brian Yost)" <TRussoLC@sccourts.org>

Cc: Andrew Johnson <ajohnson@scag.gov>

Brian,

I apologize for the delay. Attached is the proposed order which took me a great deal longer than expected.

Thank you for consideration of this order.

[Quoted text hidden]

Tristan M. Shaffer



Rouse Proposed order Final Draft.doc

74K

ATTACHMENT B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE	)	
	)	Case No.: 2011-CP-21-1583
Devodus Rouse #332635	)	
	)	[PROPOSED] ORDER GRANTING
	)	POST-CONVICTION RELIEF
vs.	)	
	)	
THE STATE OF SOUTH CAROLINA	)	
	)	
Defendant.	)	
	)	

This matter comes before the Court by way of Applicant, Devodus Rouse's application for post-conviction relief (PCR).

This Court has reviewed the PCR hearing testimony. The Court also reviewed relevant portions of the trial transcript. Moreover, the Court had access to all records concerning the case that were available at the Florence County Clerk of Court.

After a thorough review of all evidence in this case this Court grants post-conviction relief in this case base upon the reasons set forth in this order.

PROCEDURAL HISTORY

On April 10, 2008, Applicant was indicted for Murder by the Florence County Grand Jury. On January 12, 2009, Applicant was called to trial before the Honorable Ralph King Anderson and a jury. Applicant was represented by H. Lee Herron and the State was represented by Solicitor Edgar Clements.

On January 14, 2009, the jury acquitted Applicant of murder, however the jury found Applicant guilty of the lesser included offense of voluntary manslaughter. Applicant was sentenced to twenty-five years.

Applicant filed a timely notice of appeal. For his appeal Applicant was represented by Joseph Savitz who filed a brief pursuant to *Anders v. California*, 386 U. S. 738, 87 S.Ct. 1396 (1967). On June 8, 2011, Applicant's appeal was dismissed by the Court of Appeals in an unpublished opinion. See 2011-UP-274 (Ct. App. 2011).

On June 20, 2011, Applicant filed an application for post-conviction relief. The State filed a return on September 20, 2011. An evidentiary hearing was convened on October 15, 2012. Applicant was represented by Tristan Shaffer and the State was represented by Tyson Andrew Johnson, Sr.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed witnesses, passed on their credibility, and weighed the testimony accordingly. Further this Court reviewed relevant portions of the Clerk of Court's records regarding Applicant's convictions. Moreover, this Court has reviewed Applicant's trial transcript and has heard argument from counsel. Pursuant to S.C. Code § 17-27-80, this court makes the following findings of fact and conclusions of law:

At trial, the State's theory of the case was that Applicant murdered Brandon Timmons during an alleged armed robbery. ROA 134, 22-24; ROA 155, l. 5 – 157, l.7; ROA 164, ll. 2-6. The State called witnesses to try and establish that Applicant had robbed Timmons. Supp. ROA 78, ll. 9-14; Supp. ROA 315, ll. 4-19; Supp. ROA 340, ll.5-20; Supp. ROA 367, ll. 18-25; Supp. ROA 384, ll. 16-21; ROA 70, l. 2 – 71, l. 12.

Two of the State's witnesses testified Applicant told them that Timmons pulled a gun on Applicant and Applicant shot him because it was "him or me." ROA 74, ll. 12-14; Supp. ROA 339 ll. 15-17. However, there was no evidence that Applicant shot Timmons because he was

enraged or incapable of cool reflection. Moreover, there was no evidence that showed Applicant shot Timmons while acting on an uncontrollable impulse to do violence.

During the trial, Trial Counsel attempted to show that Applicant did not shoot Timmons. Trial Counsel instead argued that some other person must have killed Timmons. Trial Counsel did not argue that Timmons was shot in self-defense, nor did he argue that the shooting was actually voluntary manslaughter.

At the conclusion of the evidence a charge conference was held on the record. The State requested the jury be instructed on the law of voluntary manslaughter. ROA 115, l. 10 – 117, l. 16. Trial Counsel knew that the State had not presented any evidence that would justify a charge of voluntary manslaughter. However, Trial Counsel did not object to the voluntary manslaughter charge because Trial Counsel believed that it was in Applicant's best interest to consider the lesser included offense. At some point after¹ the charge conference, Trial Counsel advised Applicant that Trial Counsel believed it was in Applicant's best interest to allow the jury to consider voluntary manslaughter. This Court does not find that Applicant asked or ever knowingly or voluntarily consented to be tried for voluntary manslaughter.

At the charge conference, Trial Counsel also did not request a charge on self-defense. ROA 125, l. 3 – 126, l. 25. Trial Counsel did not believe a self-defense charge is necessary because he did not intend on arguing that Applicant shot Timmons in self-defense.

During jury deliberations, Trial Counsel asked Applicant if he would plead guilty to voluntary manslaughter. Trial Counsel would later testify and this Court finds that during jury deliberations Applicant refused to consider admitting guilt to voluntary manslaughter.

¹ During his PCR testimony, Trial Counsel stated that he advised Applicant that he believed having the jury considering voluntary manslaughter was in Applicant's best interest. However, Trial Counsel was uncertain when this conversation took place. After viewing Trial Counsel's testimony and reviewing the record of the charge conference, this Court finds that this conversation occurred after the charge conference.

After several questions and an Allen charge, the jury acquitted Applicant of murder and convicted Applicant of voluntary manslaughter. ROA 215, l. 12 – 239, l. 1. Even after the verdict the State maintained that Applicant murdered Timmons. ROA 250, ll. 5-9. During the sentencing hearing the Solicitor opined that he believed the voluntary manslaughter verdict was a “compromise.” ROA 251, ll.2-3.

Despite the lack of any evidence of voluntary manslaughter, Trial Counsel moved for a new trial under the “thirteenth juror doctrine” because there was insufficient evidence that Applicant shot Timmons. ROA 248, ll. 3-19. Trial Counsel did *not* argue that there was no evidence that Applicant was acting in sudden heat of passion, nor did Trial Counsel argue the voluntary manslaughter conviction violated Applicant’s right to due process. Applicant was sentenced to 25 years.

I. Counsel was ineffective by failing to object to the Trial Court instructing the jury that it could consider the lesser included offense of Voluntary Manslaughter.

A. The jury should not have been instructed on the lesser included offense of voluntary manslaughter when there is no evidence to support the finding

“Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation *State v. Wharton*, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). In order for a judge to charge voluntary manslaughter there must be some evidence of both sufficient legal provocation and heat of passion. *State v. Smith*, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011); *see also*, *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) (“The law to be charged must be determined from the evidence presented at trial.”).

The evidence presented at Applicant’s trial did not support a jury instruction on voluntary manslaughter. Although there was testimony that Timmons pulled a gun on Applicant, alone, this

is insufficient to give rise to an instruction on involuntary manslaughter. *See State v. Starnes*, 388 S.C. 590, 597, 698 S.E.2d 604, 608 (2010) (“[A] defendant is not entitled to voluntary manslaughter merely because he was legally provoked.”); *see also, State v. Pittman*, 373 S.C. 527, 576, 647 S.E.2d 144, 170 (2007). Merely being afraid is not enough to justify an instruction for voluntary manslaughter; a person must be “acting under an uncontrollable impulse to do violence and be incapable of cool reflection as a result of the fear.” *See Starnes*, 388 S.C. at 599, 698 S.E.2d at 609. This Court finds that the State failed to present any evidence Applicant acted in sudden heat of passion. There is no evidence that applicant was even fearful of Timmons. Instead testimony in the record shows that Applicant made a conscious decision to shoot Timmons after he pulled a gun. Therefore the evidence at trial did not warrant a conviction for voluntary manslaughter.

B. Trial Counsel rendered deficient performance by failing to object to the lesser included offense of voluntary manslaughter, when Trial Counsel’s strategy concerning voluntary manslaughter was objectively unreasonable.

In order for post-conviction relief to be granted based off ineffective assistance of counsel an applicant must prove that counsel was deficient and that he was prejudiced by counsel’s performance. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Even strategic decisions made by counsel are deficient when they are objectively unreasonable. *See Sanchez v. State*, 351 S.C. 270, 276, 569 S.E.2d 363, 365-366 (2002). Courts have found that a trial strategy is objectively unreasonable when it is based upon a misunderstanding of the law. *See e.g. Dawkins v. State*, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001) (“Since the testimony was inadmissible hearsay, counsel’s failure to object to the introduction of that evidence fell below an objective standard of reasonableness.”); *Matthews v. State*, 350 S.C. 272, 565 S.E.2d 766, 767 (2002) (“[C]ounsel cannot assert trial strategy as a defense for failure to object to

comments which constitute an error of law and are inherently prejudicial.”); *Gallman v. State*, 307 S.C. 273, 414 S.E.2d 780 (1992) (“[W]e hold that trial counsel’s failure to discern the prejudicial effect of the judge’s comments and interpose the appropriate objections downgrades his representation to a level below an objective standard of reasonableness).

Trial Counsel testified, and this Court finds that there is no evidence in the record which would support a charge of voluntary manslaughter. Trial Counsel believed it was in Applicant’s best interest to allow the jury to consider voluntary manslaughter. However, this strategy invited the jury to ignore the law and render what might have been a compromised² verdict in violation of Applicant’s right to Due Process. *See* Section II *infra*. Therefore this Court finds that this strategy was objectively unreasonable.

C. Applicant was prejudiced by Trial Counsel’s deficient performance.

“To establish prejudice, the applicant must show, but for counsel’s errors, there is a reasonable probability that the result of the trial would have been different.” *Sanchez*, 351 S.C. at 275, 569 S.E.2d at 365. For this issue, Applicant has clearly established prejudice. Had Trial Counsel objected, there is a reasonable probability that the jury would not have considered the lesser included offense of voluntary manslaughter. Furthermore, if the Trial Court overruled Trial Counsel’s objection there is a reasonable probability that Applicant’s direct appeal would have led to a reversal. *See Wharton*, 381 S.C. at 215, 672 S.E.2d at 788 (“While Wharton may have been in a rage and acting under a sudden heat of passion, there is no evidence of sufficient legal provocation. Accordingly, we hold that the trial court erred in charging the jury on voluntary

² This Court notes that after more than five hours of deliberations the jury was deadlocked. ROA 222, ll. 2-19. After an Allen Charge and being recharged on the law of murder and voluntary manslaughter, the jury acquitted Applicant of Murder but convicted him of Voluntary Manslaughter.

manslaughter.” (Internal citation omitted)); *see also*, *State v. Cooley*, 342 S.C. 63, 536 S.E.2d 666 (2000).

The State has argued that Applicant would have been convicted of murder if Trial Counsel had not consented to the lesser included offense of voluntary manslaughter. This Court does not agree. This Court will not invade the province of the jury by assuming Applicant would have been convicted of Murder. This Court speculates, without holding, that it is probably more reasonable that the jury would have been deadlocked on murder and a mistrial would have occurred if voluntary manslaughter had not been charged. ROA 222, ll. 2-19 – 239, l. 1. Regardless of what the Court, State, or Applicant believe would have happened if the jury did not consider voluntary manslaughter, this Court finds that Applicant has met his burden by showing “but for counsel’s errors, there is a reasonable probability that the result of the trial would have been different.” *See Sanchez, supra*.

Moreover, The Court would call the State to the attention to the following comments made by Chief Justice Toal in *Cooley*:

Since the jury heard no evidence of legal provocation, Defendant’s voluntary manslaughter conviction suggests that the jury may have compromised between murder and involuntary manslaughter or accident in reaching their verdict. As such, it is fair to assume that at least one member of the jury may have believed the State’s position that Defendant murdered Victim by shooting her with a shotgun in the face at close range. However, due to the error in granting the solicitor’s request for a voluntary manslaughter charge, Defendant will not have to face a jury of his peers on the charge of murder again. This is a cautionary tale for Solicitors as to the pitfalls of requesting a potential “compromise”³ charge which is unsupported by the evidence. Although the result is an unsatisfactory one, this situation is controlled by the precedent of the United States Supreme Court which we cannot ignore.⁴

³ During the sentencing hearing the Solicitor opined that he believed the voluntary manslaughter verdict was a “compromise.” ROA 251, ll.2-3.

⁴ *Cooley*, 342 S.C. at 70, 536 S.E.2d at 670.

In Sum, this Court finds that Trial Counsel was ineffective in failing to object to the lesser included offense of voluntary manslaughter and that Applicant was prejudiced by Trial Counsel's deficient performance. Therefore, this Court grants this application for post-conviction relief for this issue.

II. Applicant's conviction for Voluntary Manslaughter is in violation of the Due Process Clause of the Fourteenth Amendment.

A. Post Conviction relief is the proper forum to address the constitutional issues raised by Applicant.

"Post-conviction relief processes created by the states are the result of the United States Supreme Court's determination that the Fourteenth Amendment may require the states to afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees." *Al-Shabazz v. State* 338, S.C. 354, 363, 527 S.E.2d 742, 746 (1999). "A petitioner may allege constitutional violations in PCR proceeding, unless the issue could have been raised by direct appeal." *Gibson v. State*, 329 S.C. 37, 41, 495 S.E.2d 426, 428 (1998); *see Riddle v. Ozmint*, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006) ("We are concerned here not with the routine PCR issue of whether trial counsel was ineffective, but instead with the question whether prosecutorial misconduct denied petitioner's due process right to a fair trial."); *see also*, S.C. Code §17-27-20(a)(1).

Applicant alleges that his right to due process was violated when he was convicted of Voluntary Manslaughter after the State failed to present any evidence of his guilt. Trial Counsel did not object to the jury being instructed that they could consider the lesser included offense of voluntary manslaughter. Trial Counsel never moved for a directed verdict on voluntary manslaughter. Therefore, Applicant's Appellate Counsel would have been procedurally barred from raising this issue on direct appeal. *See State v. Passmore*, 363 S.C. 568, 583, 611 S.E.2d

273, 281 (Ct. App. 2005) (“The General rule of issue preservation states that if an issue was not raised and ruled upon below it will not be considered for the first time on appeal.”); *see also*, *State v. Nichols*, 325 S.C. 111, 120-121, 481 S.E.2d 118, 123 (1997) (An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review.”).

Likewise, Trial Counsel’s post-trial motions did not preserve this issue for appellate review. After the jury came back with the verdict, Trial Counsel also moved for a new trial. Trial Counsel’s argued there was insufficient evidence that Applicant shot Timmons. Trial Counsel never specifically argued the due process issue. *See State v. Byers*, 392 S.C. 438, 444, 710 S.W.2d 55, 58 (2011) (“For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented ... and with sufficient specificity to inform the circuit court judge of the point being urged by the objector.”). However, even if the post-trial motion would have covered Applicant’s due process claim, this issue was previously waived, and therefore, the due process claim was not preserved for appellate review. *See State v. Holmes*, 320 S.C. 259, 464 S.E.2d 334 (1995) (“Because a new trial motion may not be used to raise an evidentiary issue for the first time appellant’s argument is not preserved for review.”); *see also*, *State v. Robinson*, 238 S.C. 140, 150, 119 S.E.2d 671, 676 (1961) (“We have also held that a defendant may not reserve vices in his trial, of which he has notice as here, taking his chances of a favorable verdict, and in case of disappointment, use the error to obtain another trial.”) (*overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *cf. I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (Requiring contemporaneous objections, “prevents a party from keeping an ace card up his sleeve-intentionally or by chance-in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.”).

Therefore, Applicant's due process issue was not preserved for appellate review because Trial Counsel did not raise this issue during the trial. As a result this Court may properly consider this issue on PCR. *See Gibson, supra*.

B. Applicant's conviction is in violation of the Fourteenth Amendment because the State presented no evidence that Applicant committed Voluntary Manslaughter.

The Fifth, Sixth, and Fourteenth Amendments require that the State must prove each element of a crime beyond a reasonable doubt. *See State v. Brown*, 360 S.C. 581, 595, 602 S.E.2d 392, 400 (2004) ("[T]he United States Supreme Court recently has re-emphasized the constitutional protections of surpassing importance contained in the Fourteenth Amendment's due process clause and the Sixth Amendment right to a jury trial, which indisputably entitle a defendant to a jury determination that he is guilty of every element of the crime which he is charged, beyond a reasonable doubt." (internal quotations omitted)); *see also, In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *see also, Jackson v. Virginia*, 443 U.S. 307, 314, 99 S.Ct. 2781 (1979) ("A meaningful opportunity to defend, if not the right to trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused."); *see also Thompson v. City of Louisville*, 362 U.S. 199, 80 S.Ct. 624 (1960) ("[I]t is a violation of due process to convict and punish a man without evidence of his guilt.").

This Court finds that Applicant's conviction is in violation of his right to due process and his right to a fair trial. As noted in section I-A *supra*, at trial the State failed to present any evidence of heat passion. *See Smith, supra*. Furthermore as stated in section I-C *supra*, this Court finds that Applicant was prejudiced by the jury considering voluntary manslaughter. Therefore, this Court grants the application for post-conviction relief on this issue.

III. Trial Counsel was ineffective for failing to request that the jury be instructed on the law of self-defense.

“The law to be charged must be determined from the evidence presented at trial.” *Knoten, supra*. A trial court should charge self-defense if there is any evidence in the record “from which it can be reasonably inferred” that the accused acted in self defense. *State v. Wigington*, 375 S.C. 25, 649 S.E.2d 185, 188 (Ct.App. 2007).

At trial, Pompey testified that Applicant had stated that Timmons pulled a gun on Applicant. ROA 70, ll. 4-7. According to Pompey’s testimony Applicant then shot Timmons because it was “him or me.” ROA 74, ll. 12-14. From this testimony, it can reasonable be inferred that Applicant shot Timmons in self defense. *See Wigington, supra*.

Despite the fact that Applicant would have been entitled to charge on self-defense, Trial Counsel failed to request the charge because he did not intend to argue self-defense during his closing argument. This Court finds Trial Counsel’s strategy of not asking for a self-defense instruction to be objectively unreasonable. *See State v. Roseboro*, 317 S.C. 292, 454 S.E.2d 312 (1995) (holding invalid the trial attorney’s strategy not to request an alibi charge “because he felt the alibi testimony ‘did not come off too well in front of the jury.’”). Therefore, Trial Counsel was deficient in failing to request a self-defense charge in Applicant’s case.

This Court also finds that Applicant was prejudiced by Trial Counsel’s failure to request a self-defense charge. “To establish prejudice, the applicant must show, but for counsel’s errors, there is a reasonable probability that the result of the trial would have been different.” *Sanchez*, 351 S.C. at 275, 569 S.E.2d at 365. After reviewing the trial transcript as a whole, this Court finds a reasonable likelihood that Applicant would have been found not guilty if the jury had been instructed on self-defense. The Court notes that the jury must have put great weight on Ms. Pompey’s testimony because they asked to rehear it during deliberations. ROA 220, ll. 4-8.

Cognizant, without wholly relying upon, the defunct voluntary manslaughter verdict, this Court also finds there exists a reasonable probability that the jury might have believed the version of the facts Applicant told Pompey. Therefore, this Court finds that Counsel was ineffective for failing to request a self-defense charge, and would grant this application for post-conviction relief on this issue.

IT IS THEREFORE ORDERED that this Application for Post-Conviction Relief is granted; and Applicant's conviction and sentence shall be vacated.

AND IT IS SO ORDERED.

The Honorable Thomas Russo
Circuit Court Judge

This _____ day of _____, 201__

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

Devodus Rouse, # 329874,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2011-CP-21-158

DENIAL OF
MOTION TO RECONSIDER

FILED
2013 FEB -6 PM 12:06
CONNIE REEL-DEARIN
CLERK OF COURT
FLORENCE COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief filed June 20, 2011. Respondent made a timely Return. The Court convened an evidentiary hearing into the matter on October 15, 2012, at the Florence County Courthouse. The Applicant was present at the hearing and was represented by Tristan Shaffer, Esquire. Tyson Andrew Johnson, Sr., Esquire of the South Carolina Attorney General's Office represented Respondent. The Court denied Applicant's allegations and dismissed his Application.

Subsequent to the hearing, Applicant timely filed and served a "Motion to Reconsider." In the Motion, the Applicant argues that the Final Order of Dismissal fails to find Counsel was ineffective for failing to request that the jury be instructed on the law of self-defense; that the trial strategy of failing to object to the lesser included offense of Voluntary Manslaughter was objectively unreasonable, and Applicant's conviction for Voluntary Manslaughter was in violation of the Constitution. In presenting these arguments, Applicant has presented no justification for disturbing the Dismissal of the case and the prior Order.

CERTIFIED: A TRUE COPY
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

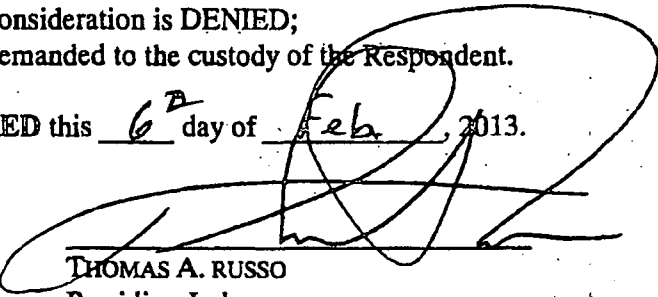
This Court hereby affirms the findings and conclusions in the Order of Dismissal and concludes that the Order sufficiently addresses the relevant issues. Accordingly, the Applicant's Motion is DENIED.

AND, IT IS SO ORDERED this 6th day of Feb, 2013.

IT IS THEREFORE ORDERED:

1. That the Motion for Reconsideration is DENIED;
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 6th day of Feb, 2013.


 THOMAS A. RUSSO
 Presiding Judge
 12th Judicial Circuit

Florence, South Carolina.

FILED
 2013 FEB -6 PM 12:06
 CONNIE REEL-SHEARIN
 C.C.P. & G.S.
 FLORENCE COUNTY, SC

CERTIFIED: A TRUE COPY
Connie Reel Shearin
 CLERK OF COURT C.P. & G.S.
 FLORENCE COUNTY, S.C.

182

WITNESSES

LT. JAMES RODGERS

FPD

Davis

County of

FLORENCE

JWL

COURT OF GENERAL SESSIONS

PROS:

JWL

D/O:

01-02-2007

ARREST WARRANT NO.

J395973 (1); J395967 (2), J395968 (2),

J395969 (2).

ACTION OF GRAND JURY

JURY

VERDICT

[Signature]
Foreman of Grand Jury

Foreman of Petit Jury

Date:

DOCKET NO. 2008 - GS - 21 - 00849

The State of South Carolina,

County of

FLORENCE

JWL

COURT OF GENERAL SESSIONS

APRIL

TERM

2008

THE STATE

vs.

COREY LEE BYRD ... 7512 N. 1st St. ...

TRAVIS SENTELL JAMES

DEVODUS ANTONIO ROUSE

DOUGLAS EVERT WASHINGTON

Indictment for

MURDER

AND

MISPRISION OF FELONY

RECEIVED 10 FEB 11 11

INDICTMENT FOR

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

MURDER AND MISPRISION OF FELONY

At a Court of General Sessions, convened on APRIL 10, 2008, the Grand Jurors of FLORENCE County present upon their oath:

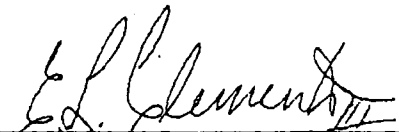
COUNT ONE - MURDER

That DEVODUS ANTONIO ROUSE did in FLORENCE County on or about January 02, 2007, violate Sections 16-03-0010, 0020 and 16-01-0060 of the Code of Laws of South Carolina (1976), as amended, in that he did feloniously, wilfully and with malice aforethought kill one Brandon Timmons, by means of shooting him with a gun, and that the said Brandon Timmons did die as a proximate result thereof.

COUNT TWO - MISPRISION OF FELONY

That COREY LEE BYRD, TRAVIS SENTELL JAMES AND DOUGLAS EVERT WASHINGTON did in FLORENCE County on or about January 02, 2007, violate Common Law and Section 17-25-0030 of the Code of Laws of South Carolina (1976), as amended, in that they did withhold information and/or evidence from the Florence Police Department, a law enforcement agency of this State, by having knowledge of who robbed, or attempted to rob, and shot Brandon Timmons, thus engaging in criminal neglect.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

UP TO 30 YEARS

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATE

FLORENCE

AKA:

Race:

Sex:

Age:

DOB:

SS#:

Address:

City, State, Zip:

DL#

SID#

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

TO:

VOLUNTARY MANSLAUGHTER

in violation of § 16-3-30

of the S.C. Code of Laws, bearing CDR Code #

0217

☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ Mandatory GPS☐ §17-25-45(CSC w/minor 1st or Lewd Act)The charge is: ☐ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury, _____ (defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

S. L. Deven...

Solicitor

Defendant

Attorney for Defendant

SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

PTUP _____

Total: \$ _____ plus 20% fee: \$ _____

_____ days/hours Public Service Employment

Payment Terms: _____

Obtain GED ☐☐ set by SCDPPPS _____

Attend Voc. Rehab. or Job Corp. _____

Recipient: _____

May serve W/E beginning _____

Substance Abuse Counseling ☐

*Fine:

\$14-1-206 (Assessments 107.5%)

\$

\$14-1-211(A)(1) (Conv. Surcharge)

\$100

\$

\$14-1-211(A)(2) (DUI Surcharge)

\$100

\$

\$56-5-2995 (DUI Assessment)

\$12

\$

\$35.13 (Public Def/Prob)

\$500

\$

\$73.3, 1B TP (Law Enforce. Funding)

\$25

\$

\$33.7, 1B TP (Drug Court Surcharge)

\$100

\$

\$50-21-114(BUI Breath Test Fee)

\$50

\$

\$56-5-2942(J) (Vehicle Assessment)

\$40/ea

\$

3% to County (if paid in installments)

\$

\$90.11 TP (SCCA Surcharge)

\$5

\$

TOTAL

\$

Random Drug/Alcohol Testing ☐

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$

Beginning

\$

paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP☒ Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

Court Reporter:

SCCA/217 (07/2008)