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Jan 15 2026

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Horry County Court of Common Pleas
The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2025-000602

Nicholas J. McIver, # 00376157,.....Petitioner,

v.

State of South Carolina,.....Respondent.

APPENDIX - VOLUME II

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¹ This Appendix incorporates the documents incorporated in the Record on Appeal that was filed in Petitioner's direct appeal (App. Case No. 2018-000824) and considered by the lower court.

1 A: Amanda and Nick was up front, and me and Freeman was in
2 the back.
3 Q: So, Amanda was driving, right?
4 A: Yes.
5 Q: Mr. McIver was beside her in the front passenger seat.
6 A: Yes.
7 Q: Were you behind Amanda or behind McIver?
8 A: McIver.
9 Q: And Freeman was behind?
10 A: Amanda.
11 Q: Amanda. So, do you remember the ride from the Lancer
12 back up to ---
13 A: No, I slept the whole ride.
14 Q: Okay. Do you remember any stops?
15 A: We stopped at a Taco Bell and they were walking back out
16 when I sat up to look at them.
17 Q: Okay. But mostly you were tired?
18 A: Yes.
19 Q: You had pretty much spent the evening partying?
20 A: Yes.
21 Q: Okay. And the day before at the beach?
22 A: Yes.
23 Q: So, you were probably wore out. What, what was the mood
24 of the people in the car; was it happy, was it ---
25 A: They all seemed fine.

1 Q: Did you see any tension?
2 A: No.
3 Q: If there had been tension, would y'all have gotten them
4 to ride with you?
5 A: No.
6 Q: Did there come a time when they dropped you off at your
7 house?
8 A: Yes.
9 Q: Or, I'm sorry, your aunt's house?
10 A: Yes.
11 Q: About what time, do you remember?
12 A: It was before noon.
13 Q: Okay. Did you see them leave?
14 A: Yes.
15 Q: Where was everyone sitting when they left?
16 A: The same spot.
17 Q: Nobody moved?
18 A: No.
19 Q: And McIver still sitting in the front seat?
20 A: Yes, sir.
21 Q: And Freeman was still sitting behind Amanda?
22 A: Yes.
23 Q: Did -- I think you told us this already, but did they
24 express intentions of what they were gonna do?
25 A: Go back to the beach, Myrtle Beach.

1 Q: And what was the plan for you?

2 A: To go hang out with family at the beach.

3 Q: And then after that?

4 A: Go back to my aunt's house and then Amanda was gonna pick
5 me up later on.

6 Q: Did that ever happen?

7 A: No.

8 Q: Did you ever see Amanda again?

9 A: No.

10 Q: How did you find out she had been killed?

11 A: Through my aunt.

12 Q: Did the police come by and talk to you?

13 A: Yes.

14 Q: Did you tell them what you could?

15 A: Yes, sir.

16 Q: Did you, in fact, give them some pictures from your
17 phone?

18 A: Yes.

19 Q: The police came?

20 A: Yes.

21 Q: When the police came and talked to you, did you -- I'm
22 sorry, I know it's difficult, Tabetha, but when the police
23 came and talked to you, who was there? When the police came
24 and talked to you ---

25 A: Who was there?

1 Q: Yeah.

2 A: My mom, my dad, my aunt, my uncle, their parents, my
3 kids, my niece.

4 Q: When you say your aunt and your uncle, was that Amanda's
5 parents?

6 A: Yes.

7 Q: And their parents would be Amanda's grandparents?

8 A: Yes.

9 Q: During the time you were with the defendants and Amanda,
10 did you see or hear anything that made you think something
11 awful like this would happen?

12 A: No, sir.

13 Q: Do you remember what everyone was talking about?

14 A: No.

15 Q: Did you go to Amanda's funeral?

16 A: Yes.

17 Q: Where was she buried?

18 A: She wasn't; she was cremated.

19 Q: Once again, when you were in close contact with Terrell
20 Freeman, when you hugged him at the Holiday Sands and laid in
21 his lap, did he have a gun on him?

22 A: No, sir.

23 Q: Thank you. Please answer any questions the defense has.

24 THE COURT: Mr. Bellamy?

25 MR. BELLAMY: May it please the Court, Your Honor?

1 CROSS EXAMINATION OF TABETHA OXENDINE BY MR. BELLAMY:

2 Q: Ms. Oxendine, I know it's difficult for you being here,
3 but I've got some questions I have to ask you. I hope you
4 understand that I've got a job to do and that sort of thing.

5 There was no prior contact or plan to meet Mr. Freeman or
6 Mr. McIver before you came from Shallotte, was there?

7 A: No.

8 Q: Okay. And as you stated, this was a purely random
9 meeting?

10 A: Yes.

11 Q: And everything was consensual, there was no force,
12 coercion, or anything of that nature, correct?

13 A: All but the videoing.

14 Q: Well, let's talk about the video. Mr. McIver, was he
15 hiding in the closet? He was in the room with you when you
16 were having sex?

17 A: I didn't see him.

18 Q: Well, the video would probably be the best evidence of
19 that, would it not?

20 A: I didn't know it was about the video until afterwards.

21 Q: My point being ---

22 A: Until they brought it up.

23 Q: I understand. But the video itself would probably
24 reflect whether you knew someone was in the room or not, would
25 it not?

1 A: I guess.

2 Q: Okay. And Mr. McIver and Mr. Freeman didn't try to --
3 they told you where they were from, correct?

4 A: Yes.

5 Q: There was phone numbers exchanged, correct?

6 A: Yes.

7 Q: Names given and Mr. McIver's name is Jacob, Nicholas
8 Jacob McIver.

9 THE COURT: Was that a question?

10 MR. BELLAMY: I'm sorry, Judge.

11 BY MR. BELLAMY:

12 Q: No one tried to hide their identity, did they?

13 A: I guess not.

14 Q: Okay. And they didn't try to hide where they were
15 staying because they took you over there, did they not?

16 A: Yes.

17 Q: And the room at the Lancer Motel isn't two rooms; it's a
18 single room, is it not?

19 A: Yes.

20 Q: And a video was made there, correct?

21 A: I guess.

22 Q: And that's just a single room, but you're saying you
23 didn't know Mr. McIver was in the room?

24 A: He was in the bathroom when it was going on. I didn't
25 know the door was open.

1 Q: Okay. But again, the video would be the best evidence of
2 that, wouldn't it?

3 A: I guess.

4 Q: Okay. And everybody or Ms. Fisher was okay with Mr.
5 McIver riding back, correct?

6 A: Yes.

7 Q: And because y'all had only, I guess, planned to stay one
8 night, she needed to go get more clothes, correct?

9 A: Yes.

10 Q: To come back to the beach.

11 A: Yes.

12 Q: And she was getting those clothes because she was gonna
13 spend another night at the beach with these two people, right?

14 A: Yes.

15 Q: And you sensed no tensions, nothing?

16 A: No.

17 Q: And you got dropped off at 9:45, I -- is that correct?

18 A: Yes, about that time.

19 Q: And then they would've had to have left your residence or
20 where you were staying and go to where Ms. Fisher was staying,
21 correct?

22 A: Yes.

23 Q: And then leave there and go back to the beach?

24 A: Yes.

25 Q: Okay. Now, the solicitor has asked you several times

1 about he didn't have a gun, he didn't have a gun. Did you put
2 your hands -- you don't know 100 percent sure whether he had a
3 gun or didn't have a gun, do you?

4 A: The way I was hugging on him and everything, I did not
5 feel a gun.

6 Q: You didn't feel one. So, you don't think he had one?

7 A: I don't think.

8 Q: But did you put your hands in his pockets or anything?

9 A: I was laying on his lap, so I was on his pocket.

10 Q: Okay. So, but do you know if he had it in his back
11 pocket; you wouldn't have known it, would you?

12 A: That I don't -- that I don't know.

13 Q: You wouldn't have known it, would you?

14 A: No.

15 Q: Okay. So, you're making some assumptions, aren't you,
16 Ms. Oxendine?

17 A: Just answering your questions; I don't know.

18 Q: I'm asking you the question are you making some
19 assumptions about whether he did or didn't?

20 A: I guess; I don't -- yeah.

21 Q: Okay. Now, you also used your phone to photograph them,
22 did you not?

23 A: Yes.

24 Q: They knew you had photographs of them, correct?

25 A: Yes.

1 Q: Okay. So, when the police came to you to let you know
2 what happened, you had a lot of information that you could
3 give to them about who was with Ms. Fisher right before
4 whatever happened, didn't you?

5 A: Yes.

6 Q: You had names? Ma'am?

7 A: Yes.

8 Q: You had phone numbers?

9 A: Yes.

10 Q: And you even had a photograph of these people that they
11 knew that -- Mr. McIver knew you had?

12 A: Yes.

13 Q: You knew where they were from?

14 A: Yes.

15 Q: You knew what kind of car they were driving, at least
16 generally, right?

17 A: Yes.

18 Q: So, it wasn't very hard for law enforcement to figure out
19 who these people were, was it?

20 A: No.

21 Q: Ms. Oxendine, did you ever hear Mr. McIver talk to Mr.
22 Freeman about doing any harm to Ms. Fisher?

23 A: No, I didn't.

24 Q: Or to yourself?

25 A: No.

1 Q: It's a fact that if it was anything like that at all,
2 they wouldn't have been riding back to North Carolina with
3 you, would they?

4 A: Hu-huh, (negative response).

5 MR. BELLAMY: Court's indulgence?

6 THE COURT: Yes, sir.

7 BY MR. BELLAMY:

8 Q: Again, Ms. Oxendine, I apologize for you being here and
9 me having to question you about these things that are very
10 personal. I don't have any further questions.

11 THE COURT: All right.

12 Mr. Spratlin?

13 MR. SPRATLIN: Thank you, Your Honor.

14 CROSS EXAMINATION OF TABETHA OXENDINE BY MR. SPRATLIN:

15 Q: Good morning, Ms. Oxendine?

16 A: Good morning.

17 Q: I'm Martin Spratlin. I represent Terrell. I just have a
18 couple of questions for you. I know as Mr. Bellamy and the
19 solicitor stated, this is tough on you. I appreciate you
20 being here answering my questions.

21 When Mr. Bellamy asked you a question about did Nick ever
22 say anything about threatening or harming Amanda. Did you
23 ever hear Terrell say anything threatening or harming Amanda?

24 A: No, sir.

25 Q: And if you did, obviously that would've put you on alert,

1 wouldn't it?

2 A: Yes.

3 Q: And you had no reason to be on alert around Terrell,
4 right?

5 A: No.

6 Q: In fact, Terrell seemed like a great guy?

7 A: Yes.

8 Q: You were hugging on him, y'all got all -- you got along
9 great?

10 A: Yes.

11 Q: Never felt anything on Terrell to cause you to be
12 concerned?

13 A: No, sir.

14 Q: Never felt a weapon, a gun, knife, anything like that?

15 A: No, sir.

16 Q: Now, Ms. Oxendine, did you have a phone at the beach?

17 A: Yes.

18 Q: Okay. Why was Amanda's phone used to call Terrell rather
19 than yours?

20 A: Mine went dead.

21 Q: Yours went dead, so you didn't have -- you had a phone,
22 but you didn't have access to it?

23 A: No, it was dead.

24 Q: Now, so were you using Amanda's phone or was Amanda using
25 it?

1 A: Both of us, back and forth.

2 Q: So, some of the phone calls to Terrell, could've come
3 from you?

4 A: Yes.

5 Q: Do you remember if you were the first one to call Terrell
6 or Amanda?

7 A: I don't -- I wasn't -- I really don't remember.

8 Q: All right. But you were -- you and Terrell were
9 obviously kinda together during this whole incident, right?

10 A: Yes.

11 Q: Now, I know that you said that Nick may've said something
12 along the lines of he went to school with you or something
13 like that, right?

14 A: Yes.

15 Q: Did Terrell say he ever knew you before?

16 A: No.

17 Q: Did you ever know Terrell before?

18 A: No.

19 Q: Do you think before this night you'd ever laid eyes on
20 him in your entire life?

21 A: No.

22 Q: Now, Ms. Oxendine, I'm gonna ask some questions that are
23 -- are very intimate and I apologize for this, but I think
24 it's important that we get the full story for this jury here
25 today. All right? When y'all were all in the hotel room, was

1 it the front or the back bedroom that you and Terrell were in?

2 A: The front.

3 Q: The front. So, both Amanda and Nick, if they were to go
4 -- not be in the room, they'd have to be in the back bedroom,
5 right?

6 A: Yes.

7 Q: So, in order to get to and from the back bedroom, they
8 would've had to walk by you and Terrell being intimate?

9 A: Yes.

10 Q: Do you remember if they in fact did walk past you and
11 Terrell?

12 A: I don't remember.

13 Q: You don't remember?

14 A: Huh-uh, (negative response).

15 Q: Okay. And you were drinking a lot that night, right?

16 A: Yes.

17 Q: And you were doing some other drugs, right?

18 A: Yes.

19 Q: So, your judgement might not and your memory might not be
20 the greatest?

21 A: Right.

22 Q: Okay. Y'all stayed at your hotel for a couple of hours,
23 right?

24 A: Yes.

25 Q: All together, mostly you and Terrell together?

1 A: Yes.

2 Q: Were Amanda and Nick supposedly in the back bedroom?

3 A: Yes.

4 Q: Was the door open or closed?

5 A: It was cracked.

6 Q: Cracked, okay. Now, at some point, you and Nick leave

7 that hotel room, right?

8 A: Yes.

9 Q: And y'all go back to the boys' room at the Lancer?

10 A: Yes.

11 Q: Just you and Nick?

12 A: To get the cooler, yes.

13 Q: I'm sorry?

14 A: To get a cooler.

15 Q: To get a cord. I understand this is difficult, Ms.

16 Oxendine, but isn't the real reason that you and Nick went

17 back there is that you were going to have sex with Nick as

18 well?

19 A: No.

20 Q: So, you never went there to have sex with Nick where

21 Amanda couldn't see?

22 A: No.

23 Q: All right. So, your plan was to go to the hotel, the

24 Lancer, with Nick, right?

25 A: Yes.

1 Q: To get the cord?
2 A: The cooler.
3 Q: This is the only time you and Nick are alone, right?
4 A: Yes.
5 Q: All right. And your plan is, I assume then to get the
6 cord and come back to where Terrell is, right?
7 A: Yes.
8 Q: All right. But then Terrell actually goes and joins
9 y'all over at the Lancer, right?
10 A: Yes.
11 Q: And there are obviously videos of you doing stuff at the
12 Lancer as well, right?
13 A: Yes.
14 Q: And all of that was consensual, right?
15 A: Yes.
16 Q: I know it's difficult, but are you sure you didn't go
17 over there for the purpose ---
18 A: I'm positive.
19 Q: --- of having sex with Nick?
20 A: I'm positive.
21 Q: Okay. Because Amanda was interested in Nick, right?
22 A: Yes.
23 Q: So, it would've hurt her if you had sex with Nick?
24 A: I guess, yes.
25 Q: It's a fair assessment, you're, I mean -- all right.

1 Now, you come back alone from the Lancer back to the hotel,
2 right?

3 A: Yeah.

4 Q: All right. You then, I presume, go back to your room,
5 right?

6 A: Yes.

7 Q: And you talk with Amanda, right?

8 A: Yes.

9 Q: And then you -- let me get the exact time. You actually
10 come back to the room about 6:54 in the morning, right?

11 A: Yes.

12 Q: Give or take. And in fact, you left with Nick at 6:18 in
13 the morning, right?

14 A: I guess, yeah.

15 Q: Give or take, roughly. So, is it safe to say you were at
16 the boys' hotel room for approximately -- let me do some quick
17 math here; it's not my strong suit -- about 46 minutes?

18 A: I guess, yeah.

19 Q: All right. That wouldn't be a false statement, right?

20 A: Right.

21 Q: You come back to the hotel room and did Nick leave a T-
22 shirt or something there?

23 A: Yeah.

24 Q: All right. So, at some point, the boys are coming back
25 to the hotel where y'all are, right?

1 A: Yes.

2 Q: And that's to get the shirt that Mr. McIver left or Nick
3 left -- or Jacob as you knew him, left in the room?

4 A: Yes.

5 Q: All right. Now, have you had a chance, has the
6 solicitor's office or anyone ever showed you any videos from
7 this -- involving your time at the Holiday Sands?

8 A: No.

9 Q: All right. So you've never seen the surveillance
10 footage, right?

11 A: (Inaudible.)

12 COURT REPORTER: Excuse me, answer aloud, please.

13 A: No.

14 MR. SPRATLIN: I'm sorry, Ms. Dixie.

15 BY MR. SPRATLIN:

16 Q: Now, when Terrell and Nick get back to your hotel room,
17 they pull up in their -- the pickup truck, right?

18 A: Yes, sir.

19 Q: Did you know whose truck it was?

20 A: No.

21 Q: Okay. But they pull up in a truck?

22 A: Yes.

23 Q: Terrell is driving, right?

24 A: Yes.

25 Q: All right. And you and Terrell are pretty immediately

1 friendly again, right?

2 A: Yes.

3 Q: Hugging, right?

4 A: Yes.

5 Q: Pretty -- pretty intimate?

6 A: Yep.

7 Q: At first, watching that video, you seemed to be a little

8 upset with Terrell, right?

9 A: No.

10 Q: You weren't -- Amanda didn't tell you that Terrell told

11 her that you and Nick were having sex?

12 A: No, I didn't have sex with Nick.

13 Q: So, Amanda never saw -- did Amanda ever express to you

14 that she thought you and Nick were having sex?

15 A: No.

16 Q: Because if she did or she thought that, she would be

17 upset?

18 A: Yes.

19 Q: And she would be upset with you, right?

20 A: Yes.

21 Q: And she'd probably be upset with Nick?

22 A: Yes.

23 Q: Now, after collecting the shirt, after kinda saying your

24 goodbyes, from watching the video, is that a fair assessment

25 that the boys -- Nick and Terrell then leave?

1 A: Yes.

2 Q: Okay. And the next time you see Nick or Terrell is over
3 at their hotel, right?

4 A: Yes.

5 Q: And you and Amanda actually come over there, right?

6 A: Yes.

7 Q: Get in Amanda's car, drive over to their hotel room?

8 A: Yes.

9 Q: And that's when a decision is made that these guys can
10 just drive along with y'all to North Carolina, right?

11 A: Yes.

12 Q: And now you said that Amanda and Nick were in the front,
13 right?

14 A: Yes.

15 Q: And you and Terrell were in the back, correct?

16 A: Yes, sir.

17 Q: All right. And you said that you were sleeping?

18 A: Yes.

19 Q: You were actually sleeping on Terrell's lap basically,
20 right?

21 A: Yes.

22 Q: Laying across him pretty much?

23 A: Yes.

24 Q: At that time, you never felt anything that caused you to
25 be concerned?

1 A: No.

2 Q: Didn't feel a weapon of any kind?

3 A: No.

4 Q: And Terrell seemed happy, you seemed happy, right?

5 A: Yes.

6 Q: And how did Amanda seem?

7 A: Fine.

8 Q: How did Nick seem?

9 A: Fine.

10 Q: When they dropped you off, they dropped you off, I

11 believe you said at the beach house?

12 A: Yes, my aunts.

13 Q: All right. Just to verify State's Exhibit 61, that's the

14 beach house?

15 A: Yes.

16 Q: Okay. And now, you said that the plan was or your

17 present sense impression of where they were going next was to

18 Amanda's house, right?

19 A: They were supposed to be going back to Myrtle Beach. I

20 didn't know they were going to her house.

21 Q: Okay. Didn't know they were gonna stop by to get clothes

22 for Amanda or anything like that?

23 A: No.

24 Q: All right. So, nobody told you that?

25 A: No.

1 Q: Would it be unusual or surprising for Amanda to do that;
2 would that be out of the ordinary?

3 A: Not really.

4 Q: Okay. Because she didn't really have a whole lot of
5 clothes in Myrtle Beach, right?

6 A: No.

7 Q: Because y'all were coming for one night, right?

8 A: Yes.

9 Q: You were gonna go back the next morning and go hang out
10 at the beach?

11 A: Yes.

12 Q: So, no need for her to pack a lot of clothes?

13 A: No.

14 Q: Didn't know she was going to be hanging out for an extra
15 day?

16 A: Right.

17 Q: And your plan was to come back to Myrtle Beach that
18 night, right?

19 A: Yes.

20 Q: And your -- I'm assuming you were going to meet up with
21 Terrell again, right?

22 A: Yes.

23 Q: Because you had a good time?

24 A: Yes.

25 Q: No issues, no complaints?

1 A: No.

2 Q: You said you went over to the Lancer the first time to
3 get a phone cord?

4 A: No, it was a cooler.

5 Q: I'm sorry, what?

6 A: A cooler.

7 Q: Cooler, okay. Was it a blue cooler?

8 A: I guess, I can't really remember.

9 Q: So, Terrell Freeman is pushing a cooler out the door when
10 he leaves the Holiday Sands to go back to the Lancer where you
11 are, can you explain why you ---

12 A: They were supposed to have a cooler -- no, we went to get
13 the cooler together.

14 Q: Okay. Did you ever bring a cooler back to the hotel
15 room?

16 A: No, because I left by myself.

17 Q: One more time, Ms. Oxendine. I understand that this
18 might be embarrassing for you, but isn't it true, you went
19 over to that hotel ---

20 A: No, it's not, no.

21 Q: --- room -- all right. Thank you.

22 BY THE COURT:

23 THE COURT: Redirect?

24 MR. DEBUSK: Nothing, Your Honor, thank you.

25 THE COURT: All right, ma'am, you may step down.

1 MR. DEBUSK: May we have a moment, Your Honor?

2 THE COURT: Yes, sir.

3 MR. DEBUSK: May I consult with Madam Court Reporter one
4 moment?

5 THE COURT: Yes.

6 All right. Further witnesses by the state?

7 MR. DEBUSK: No, Your Honor. At this time, the state
8 rests. Thank you.

9 THE COURT: All right. Very good.

10 Are there matters of law that you wish the Court to
11 address at this time, Mr. Bellamy?

12 MR. BELLAMY: Yes, sir, Your Honor.

13 THE COURT: Mr. Spratlin?

14 MR. SPRATLIN: Yes, Your Honor.

15 THE COURT: All right. Very good.

16 All right, ladies and gentlemen, at the end of the
17 state's presentation, this case, every criminal case that
18 there are matters of law that the Court must discuss with
19 counsel regarding the matter at hand. Obviously, I have to do
20 that outside your presence and so I'll send you to your jury
21 room. It will take a little bit of time, but we'll call you
22 back out as quick as we can.

23 Thank you very much.

24 (REPORTER'S NOTE: Jury exits courtroom. The following takes
25 place outside the presence of the jury.)

1 MOTIONS:

2 THE COURT: All right. So, motions, Mr. Bellamy?

3 MR. BELLAMY: I believe Mr. Spratlin will go first for
4 these motions, Your Honor.

5 THE COURT: All right.

6 Mr. Spratlin?

7 MR. SPRATLIN: Yes, Your Honor, I have no objection to
8 going first in regards to these motions and these motions
9 only. Your Honor, my client is charged with four offenses.
10 He is charged with, and this is a motion for a directed
11 verdict in regards to the lack of evidence on the state's case
12 from which any reasonable juror could find my client guilty of
13 the offenses as charged under the appropriate laws.

14 If I may proceed, Your Honor?

15 THE COURT: Yes, sir, go ahead.

16 MR. SPRATLIN: Thank you. My client is charged with
17 three or four charges. First off and the most seriously of
18 all, murder, the unlawful killing of another with malice
19 aforethought. He is also charged with kidnapping. Unlawfully
20 confining, inveigling, decoying, kidnapping, or abducting
21 another person. He is also charged with the possession of a
22 weapon during the commission of a violent crime. I assume
23 that being either the murder or the kidnapping. Furthermore,
24 Your Honor, he is charged with grand larceny value \$2,000 to
25 \$10,000.

1 Now, under the laws of the State of South Carolina as I
2 understand them, Your Honor, and I understand the Court is
3 much more knowledgeable about this than me, there are two ways
4 that the state can prove a defendant guilty. One is they can
5 prove that he was in fact the principal. That is that he, by
6 his own actions, for example, with the murder and the facts
7 specific to this case, used a gun to shoot Ms. Fisher causing
8 her death or used a gun, or however else, kidnapped Ms. Fisher
9 or stole the car.

10 Regarding the ability to prove that my client was the
11 principal, first and foremost, Your Honor, there is no direct
12 evidence in the record showing any witness testimony, any
13 forensic evidence, anything proving or even insinuating that
14 my client shot Ms. Fisher or that he kidnapped her, no direct
15 evidence. The state could also seek to prove it and it could
16 go to the jury if the state has proven or presented
17 substantial circumstantial evidence. In this matter, Your
18 Honor, there are no circumstances that the state has shown, no
19 circumstantial evidence which would raise to the level of
20 substantial circumstantial evidence that my client was in fact
21 the person who shot, that my client was in fact the person who
22 kidnapped, that my client had possession of a weapon during
23 the commission of a violent crime. There is no circumstantial
24 evidence that would rise to the level of substantial
25 circumstantial evidence in regards to him being a principal of

1 any of those offenses, Your Honor.

2 Now, I stated that one way the state could prove my
3 client guilty was to the principal, showing that he was in
4 fact the principal actor in this case. The other theory is
5 what is commonly referred to as hand of one hand of all. Your
6 Honor, I understand that this Court is well aware of the law,
7 but I do have a case that I would like to hand up, more for,
8 not so much as facts of the case, but the Appellant Court's
9 interpretation of the law of the theory hand of one hand of
10 all. This is *State v. Kareem Harry*, a case that Your Honor
11 tried in Trial Court. If I could approach and hand copies to
12 co-counsel, the state, and Your Honor?

13 THE COURT: Yes, sir.

14 MR. SPRATLIN: As I stated, Your Honor, my -- my use of
15 this case is not geared towards the facts specific to this
16 case as I believe they are sufficiently different than this
17 case or sufficiently different than this trial for this case
18 to be of any benefit. However, I do think it is of great
19 benefit under the law and analysis section located on the
20 third page of the handout, which I highlighted for the Court,
21 co-counsel, and the state. The doctrine of accomplice
22 liability arises from the theory that the hand of one is the
23 hand of all. Under this theory, one who joins with another to
24 accomplish an illegal purpose is liable criminally for
25 everything done by his confederate incidental to the execution

1 of the common design and purpose. Where two persons combine
2 to commit an unlawful act in its execution a homicide is
3 committed as a probable or natural consequence thereof, all
4 present and participating in the unlawful act are as guilty as
5 the one who committed the fatal act. And then it goes on to
6 say, Your Honor, except in rare situations, a person
7 committing an unlawful act is legally responsible for all
8 natural or necessary consequences thereof. One combining
9 confederating with others to accomplish an illegal purpose is
10 criminally liable for everything done by either him or his
11 confederates which follows incidentally in the execution of a
12 common design as one of the probable and natural consequences
13 though not intended as a part of the original design or common
14 plan.

15 The common purpose may have been to kill and murder but
16 if it was unlawful, as for instance -- the common purpose may
17 not have been to kill or murder, but if it was unlawful as for
18 instance to break in and steal, and in the execution of this
19 common purpose a homicide is committed by one as a probable or
20 natural consequence of the acts done in pursuance of a common
21 design, then all present and participating in the unlawful
22 common design are as guilty as the slayer.

23 The theory of hand of one hand of all, Your Honor, does
24 not just mean that someone was merely present. It does not
25 mean that there was -- that you were present in the car when

1 an individual shot, rather the onerous is on the state to
2 prove either by direct evidence or circumstantial evidence
3 that my client, Terrell Freeman, had a common scheme or plan
4 to commit a crime with another perpetrator assuming -- for
5 arguendo in this case, Nicholas McIver. There has been zero
6 evidence presented to this Court of any common scheme or plan
7 to commit a crime. In fact, Investigating Officer Owen Lynam
8 even stated to the testimony that he had no information and
9 saw nothing turned up in his investigation that showed that
10 there was a common scheme or plan at the time that gunshot was
11 fired and Ms. Fisher was murdered, no harm, no ill will meant
12 by my client. Even though my client was in that car, Your
13 Honor, he had to have agreed to commit a crime with Nicholas
14 McIver, for arguendo sake, Nicholas McIver being the shooter,
15 such that it was a natural consequence that this woman got
16 shot. And, Your Honor, there has been no evidence, an absence
17 of evidence completely from the state, showing that.

18 Rather, what I believe the state is gonna rely on in
19 response to my directed verdict motion is the incident after
20 that fact, the actions after the fact. The fact that a
21 witness pointed and stated that my client or two individuals
22 in the car -- they could not even identify who those
23 individuals were -- were pulling or pushing the victim out of
24 the car. And I believe the state is also most likely going to
25 rely on the actions of my client after the fact, fleeing from

1 the scene and going to the hotel room and then going to North
2 Carolina.

3 Your Honor, I have another case I would like to hand up
4 and hand to opposing counsel, *State v. Richard Brandon Lewis*,
5 403 S.C. 345. If I could approach?

6 THE COURT: Yes, sir.

7 MR. SPRATLIN: Your Honor, this case actually deals with
8 a conviction that occurred under a statutory aiding or
9 abetting in child abuse that is a statutory crime. However,
10 the relevant portions reference cases that dealt with the
11 common law hand of one hand of all, and so I believe that the
12 Court's logic and reasoning in this case, even though it is a
13 case based on a statutory conviction, would be relevant to our
14 discussion here today.

15 I would direct the Court -- I think I gave you the wrong
16 one. I would direct the Court to the end page of the --
17 includes the word conclusion. It's the fifth page. In this
18 case, Your Honor, it's a child homicide case where the person
19 who was convicted was present in the home and he had
20 subsequently had a suicide attempt and also fled and I believe
21 lied about some of his information to the police officers.
22 The state said that he was liable for failure to act, first
23 and foremost. The Court stated that the state -- an overt act
24 is required to be held liable for aiding and abetting, which
25 necessarily excludes the possibility of being held liable for

1 failure to act. Basically establishing that the state is
2 required to prove some overt act on my client's part that he
3 was in fact aiding or abetting Nicholas McIver in the murder
4 or any other crime, which the natural consequence of the crime
5 was the death of Amanda Fisher. I have heard no evidence,
6 seen no evidence before this Court today or the three days
7 prior which would in any way through direct evidence or
8 substantial circumstantial evidence shows that my client did
9 any act before the murder which aided or abetted Nicholas
10 McIver. He was, in terms of the Court, merely present.

11 The state also relied in *State v. Lewis*, Your Honor, on
12 the flight of the defendant. The Appellant Court in this case
13 stated that the state also asserts Lewis' flight and suicide
14 attempt are sufficient evidence to withstand a directed
15 verdict. We disagree with the state's contention under these
16 facts. The state did not present any evidence on an overt act
17 or the requisite state of mind of aiding and abetting, and
18 thus evidence of flight and a suicide attempt alone will not
19 suffice to withstand a motion for a directed verdict. And the
20 case they reference is *State v. Odom*. I have that case
21 available if the Court would like to see it, but it does
22 redress the common law hand of one hand of all.

23 Regarding just an overview of the law, Your Honor, that
24 -- that it simply ends overview of the law in regards to hand
25 of one hand of all and what the state has to prove to convict

1 my client as an accessory under the theory of hand of one hand
2 of all.

3 The state has proven by direct evidence and
4 circumstantial evidence of a substantial nature that my client
5 was present at the scene. I submit to the Court that there
6 also is direct evidence that my client was seen either pushing
7 or pulling, and they have proven that my client drove back to
8 the hotel, got out, and eventually left in the pickup truck.
9 They have also proven that there was contact between either
10 voice mails or some sort of telephonic contact between
11 Nicholas McIver and my client after this incident occurred,
12 after both were on the road back to supposedly North Carolina.
13 However, Your Honor, that's where it ends. There is no
14 evidence that there was any sort of a fight at the K&W. There
15 is no evidence that there was any sort of a fight in the
16 parking lot or any time prior to the parking lot of which my
17 client was aware. There is no evidence that there was any
18 other crime intended that led to the death of Amanda Fisher
19 other than the crime of murder or voluntary manslaughter or
20 involuntary manslaughter or however the gun discharged. There
21 is no other crime. There is absolutely no evidence, direct or
22 substantially circumstantial, which shows that these two
23 individuals agreed to commit any crime together, let alone the
24 murder. And I agree, the state does not have to prove the
25 murder. The state does not have to prove that they agreed to

1 commit a murder. They could prove that they agreed to commit
2 any crime the natural consequence of which was Amanda Fisher's
3 death and that would be sufficient for the case to go to the
4 jury, but they haven't done that.

5 I also believe that the state is gonna look at the fact
6 that a grand larceny was committed and my client drove away or
7 rode away in the car. Drove or rode, not sure where. There's
8 no evidence in the record about where he was, what he did,
9 once that car left K&W.

10 In regards to that, Your Honor, as Detective Lynam
11 testified on the stand, nothing in his investigation -- and I
12 have not heard -- I know this investigation is not all
13 encompassing, but I have also not heard any evidence presented
14 to this Court that there was any agreement or any kind of
15 attempt to take that vehicle prior to that gunshot. The
16 murder was accomplished as soon as that gun went off.
17 According to Dr. Proctor, death was imminent if not immediate.
18 He can't say how long she lived, if she was still alive when
19 the gun went through her head. There's no evidence that my
20 client agreed to take the car or came up to an agreement to
21 take the car, and then the actual consequence of that or that
22 death was even a consequence of that. Grand larceny occurred
23 after the death. So, it cannot be the crime upon which the
24 state relies on for hand of one hand of all because there has
25 to be an agreement under the law before the murder for there

1 to be hand of one hand of all. Taking the car, leaving,
2 helping get the truck back, contact, that is all evidence of
3 accessory after the fact to which my client is not charged.
4 Could be but he's not.

5 The state has failed to meet its burden in this case,
6 Your Honor. They have failed to present any direct evidence
7 that my client conspired to commit a crime with the
8 codefendant. They have also failed to present any substantial
9 circumstantial evidence that my client conspired to commit a
10 crime with the codefendant, any crime whatsoever, the natural
11 consequence was Amanda Fisher's death. For that reason, I
12 would ask the Court to direct a verdict in favor of Defendant
13 Freeman on the charges of murder, kidnapping, and possession
14 of a weapon during the commission of a violent crime.

15 Thank you, Your Honor.

16 THE COURT: All right.

17 Mr. Bellamy, let me hear your argument, please?

18 MR. BELLAMY: May it please the Court, Your Honor, and I
19 don't want to just rehash what Mr. Spratlin says but,
20 likewise, I make a motion for a directed verdict of acquittal
21 for Mr. McIver. I think it is clear -- I'm not gonna go
22 through and the legal standard the Court has for review at
23 this point. The Court knows that. But I do want to talk
24 about some facts and lack of evidence.

25 It's clear in this case the state is relying upon the

1 hand of one is the hand of all. There is no direct or
2 circumstantial evidence to establish that my client shot
3 anybody that day as the principal. And quite frankly in most
4 of these hand of one cases, we do have evidence who's the
5 principal and who would be guilty as under the hand of one
6 hand of all. I submit to you in this case, we don't have the
7 evidence as to who is the principal. You've got two people
8 there, so what evidence has been presented of the hand of one
9 is the hand of all.

10 The law is there must be a knowing agreement by two or
11 more parties to engage in another separate unlawful act.
12 There's been no evidence whatsoever of any agreement, plan,
13 anything between these parties to commit this other unlawful
14 act. I submit the state will argue that it's kidnapping.
15 There's been no evidence from any witness here that there was
16 any kidnapping at all. I don't know what the state's gonna
17 say in response to this, but I believe they may rely on the
18 fact that after, that there was contact and that there were
19 things done to hide, to cover up this, but those are things
20 after. I submit to the Court that the evidence must be -- and
21 they're wanting you to infer, to make that leap of faith that,
22 if you do something after the fact, well you must've had a
23 plan before.

24 And to that point, I would say the circumstances of this
25 case in total are such that this is a random act, that because

1 everything that happens here indicates that this was a spur of
2 the moment event, middle of the day, parking lot, Kings
3 Highway, you burn the car in a residential neighborhood at 4
4 o'clock in the afternoon with kids running around. There is
5 nothing circumstantially to suggest that there was some sort
6 of plan, no hidden identities, giving names, phone numbers,
7 taking pictures. Everything in this case points to this being
8 a random act, which then puts it on the state, the burden to
9 bring to this Court, to this jury, some evidence that there
10 was some plot, plan, scheme, conspiracy to commit some other
11 crime before the fact. And as Mr. Spratlin said, there is
12 evidence and I've told the jury that this may be an accessory
13 case after the fact, but there is absolutely no evidence to
14 point to anything before the fact. The conduct of my client
15 in North Carolina, I submit to the Court does not suggest that
16 he had an agreement with Mr. Freeman. He may have after the
17 fact, which may implicate both of them in that situation.
18 But, there is no direct evidence or substantial circumstantial
19 evidence, Your Honor, to suggest that this is anything other
20 than a random act by one of these parties and that the state
21 has failed to bring this Court evidence to establish who did
22 what and we would simply be asking this jury to speculate
23 and/or guess as to what happened, and that's why we have this
24 point in the trial where the Court can intervene and direct a
25 verdict. And on behalf of my client, Mr. Freeman, excuse me,

1 Mr. McIver, I would ask the Court to direct a verdict of not
2 guilty on the charges of murder, kidnapping, possession of a
3 weapon during a violent offense. We would submit that the
4 state has met their burden on the grand larceny.

5 Thank you, Your Honor.

6 THE COURT: All right, Solicitor, your argument please?

7 MR. DEBUSK: Your Honor, there is direct evidence on the
8 record that the defendants were with the victim leaving
9 Supply, North Carolina; direct evidence in the form of video
10 on the record that they were together in the victim's car
11 after she was killed, at the Lancer Hotel; there's direct
12 evidence that the two of them both, together, participated in
13 pulling her out of the car within seconds, not days after, not
14 minutes after, within seconds with the shot being fired of
15 pulling her out of the car and throwing her on the ground at
16 the K&W parking lot. There is evidence on the record that as
17 to Mr. McIver that, (a), Mr. Freeman was not armed; and (b),
18 there is video record of him taking what appears to be a gun
19 out of his waistband and sticking it in the truck when they
20 returned to the Lancer.

21 It is unavoidable here that someone in that car put a gun
22 against -- in contact with the victim's head and pulled the
23 trigger shooting her and killing her. That she pulled over
24 during a -- there's circumstantial evidence in that she pulled
25 over with a gun to her head into the parking lot and was

1 kidnapped. There -- the immediacy of the joint act of pulling
2 her out of the car, the immediacy of it is it's more than just
3 after the fact of flight. It is immediate participation in
4 taking her out of the car while she was probably still moving,
5 according to the witnesses who saw her in the parking lot.

6 There is substantial circumstantial evidence of
7 kidnapping in that she pulled over with a gun to her head.
8 There's substantial circumstantial evidence to go to either of
9 them for being the gunman -- it's more substantial for Mr.
10 McIver, that they were present aiding and abetting each other,
11 that they fled the scene together, that they remained in
12 contact. And although flight by itself cannot be substantial
13 circumstantial evidence, it can be part of substantial
14 circumstantial evidence. Helping at the scene, helping in
15 flight, going to North Carolina, destroying the evidence, the
16 leading of the contact of Mr. Freeman from Mr. McIver's phone,
17 of being the only two in a position to have committed this
18 murder, and one of the two of them had to be the gunman. And
19 while the evidence is better that McIver was the gunman, they
20 were both participating in it immediately after the shot was
21 fired and that is substantial circumstantial evidence of
22 murder, kidnapping, of course grand larceny, and possession of
23 a weapon, Your Honor.

24 THE COURT: All right. Any brief reply, Mr. Spratlin?

25 MR. SPRATLIN: Real briefly, Your Honor. Regarding the

1 kidnapping, the evidence -- there is no substantial
2 circumstantial evidence that the reason Ms. Fisher pulled over
3 into the K&W parking lot was because there was a gun to her
4 head. That is pure speculation and conjecture on the part of
5 the state. She parked in a spot normally, according to the
6 witnesses. There was no screeching of tires heard by anybody
7 on the scene including the only individual who was outside at
8 the time, Mr. Kenneth Thompson. There is absolutely no
9 evidence, especially no substantial circumstantial evidence
10 from which this Court could find and a jury could find that
11 she had a gun to her head when she pulled over in that car or
12 that she was in anyway kidnapped. The evidence is up to
13 speculation and conjecture. It could just have easily had
14 been, as Dr. Proctor testified to, immediate when the gun went
15 against her head that the shot was fired. No time for a
16 kidnapping. No time for her to recognize.

17 As far as the individuals pulling her out of the car or
18 pushing her out of the car that the state mentioned, in
19 regards to that, there's been no testimony about how long
20 Kenneth Thompson's attention was diverted to Highway 17 when
21 he heard the pop. He said he looked to Highway 17 and then he
22 noticed an individual being pulled out of a car.

23 I understand, Your Honor, that the circumstantial
24 evidence is just as good as direct evidence, except that it
25 needs to be substantial for a case to go to the jury. The

1 direct evidence the solicitor eluded to are the videos, that
2 both puts individuals at the scene of the crime. That is
3 evidence that they were both in the car, direct evidence they
4 were both in the car, does not have any bearing as far as
5 direct evidence on whether or not the murder occurred.

6 The state has failed to meet their burden, Your Honor. I
7 -- you cannot have a case where there are two people in the
8 car, we don't know what happened, but it looks like they're
9 both acting together after the fact, so let's just charge them
10 both with murder and let it go to the jury and sort it out.
11 That is not appropriate under the law. For that reason, I
12 would ask the Court to direct the verdict in favor of my
13 client.

14 Thank you.

15 THE COURT: Anything else, Mr. Bellamy?

16 MR. BELLAMY: Just very briefly. I think what the
17 state's argument, again, is a theory that lacks facts as to
18 the kidnapping. They must establish some evidence of
19 kidnapping. Solicitor DeBusk indicated that the gun was held
20 to her head as she pulled over. There is absolutely no
21 evidence or circumstances that suggests that, and without that
22 this is a case that we should not ask the jury to speculate.
23 And very respectfully, I would ask the Court to direct a
24 verdict of not guilty on the three charges that we have
25 referenced.

1 Thank you.

2 THE COURT: Solicitor, let's look at the kidnapping. And
3 this is what the Court would charge to the jury, the defendant
4 being charged of kidnapping, the state must prove beyond a
5 reasonable doubt that the defendant knowingly and unlawfully
6 seized, confined, inveigled, decoyed, kidnapped, abducted, or
7 carried away another person without authority of law. To do a
8 thing unlawfully is to do it willfully against the law.
9 Knowingly means with knowledge, consciously, not accidentally.
10 Seize means to take hold of suddenly or forcibly confine, or
11 forcibly, suddenly or forcibly. Confine means to limit,
12 restrict, or enclose within bounds, imprison or shut or keep
13 in. Inveigle means to lure, entice, lead astray by false
14 representation, promises, or other deceitful means. Decoy
15 means to lure, buy, or as if buy -- hold on a second -- as if
16 by decoy. A decoy is something to entice a person into a
17 trap. Kidnap is to remove a person against his will by
18 unlawful force or by fraud. Abduct means to carry off
19 secretly or by force for an illegal purpose. Carry away means
20 to remove. The state does not have to prove that the
21 defendant did all of these things. Instead, if you find
22 beyond a reasonable doubt that the defendant did any of these
23 things, you may find the defendant guilty of kidnapping.
24 Something done without authority of law is something which the
25 law does not sanction, permit, allow, condone, or provide

1 justification for. The kidnapping does not have to be for any
2 personal or monetary gain, for any illegal purpose, but may be
3 for any reason whatsoever.

4 What is the evidence that either of these defendants
5 kidnapped the victim?

6 MR. DEBUSK: Your Honor, it's circumstantial. She had a
7 gun against her head because of the contact wound. The minute
8 the gun is against her head, she is seized. She is not
9 allowed to move.

10 THE COURT: So that's what you're relying upon is that
11 ---

12 MR. DEBUSK: And also the circumstances of pulling off of
13 the highway into the K&W parking lot indicating that the gun
14 had been to her head before she pulled over.

15 THE COURT: There's no evidence of that. So, that's --
16 that's just mere speculation. The only thing -- and so what
17 you're arguing is at the instant the gun was placed against
18 her head, that's a kidnapping?

19 MR. DEBUSK: She was seized; she was confined.

20 THE COURT: For that immediate millisecond before the
21 bullet enters her head, she was kidnapped; that's what you're
22 saying?

23 MR. DEBUSK: However long the gun was against her head,
24 Your Honor.

25 THE COURT: All right.

1 MR. DEBUSK: We'd argue ---

2 THE COURT: For whatever period of time the gun was
3 against her head, it's a contact wound, whether it's for just
4 a millisecond before the bullet enters or whatever, for
5 whatever time that is ---

6 MR. DEBUSK: She's seized.

7 THE COURT: She was seized and kidnapped.

8 MR. DEBUSK: Right.

9 THE COURT: All right.

10 What say you to that, Mr. Spratlin?

11 MR. SPRATLIN: There's no evidence that she was seized,
12 Your Honor. There's no evidence that she wasn't free to move.
13 The fact that a gun is against her head for a millisecond
14 doesn't restrict her freedom or her ability to move.

15 THE COURT: All right, Mr. Bellamy?

16 MR. BELLAMY: May it please the Court, Your Honor? Your
17 Honor, there's simply no evidence that this was not
18 simultaneous, that she even had any idea to have thought that
19 I am not free to move. Again, it's pure speculation and that,
20 again, is at this point why a directed verdict I think is
21 appropriate because it is too speculative and it is a theory.

22 Thank you, Judge.

23 THE COURT: All right. Thank you.

24 All right. We'll take a short break.

25 Thank you very much.

1 RECESS

2 *****OFF THE RECORD*****

3 (On the Record.)

4 BY THE COURT:

5 THE COURT: All right, in this matter, the two
6 defendants, Nicholas Jacob McIver and Terrell Freeman, have
7 been charged by the State of South Carolina with the crimes of
8 murder, kidnapping, possession of a weapon during the
9 commission of a violent crime, and grand larceny value 2,000
10 to 10,000. The defendants have made a motion for a directed
11 verdict on the three charges of murder, kidnapping, and
12 possession of a weapon during the commission of a violent
13 crime. Regarding those three charges, the directed verdict by
14 -- standard by the Court is such that a defendant would be
15 entitled to a directed verdict when the state fails to produce
16 evidence of the offense charged. As the Trial Judge, I am
17 concerned with the existence of evidence, not with weight, not
18 its credibility, not its believability, that's solely for the
19 jury to consider. My job is to decide whether or not the
20 evidence exists. If there's any direct evidence or
21 substantial circumstantial evidence reasonably tending to
22 prove the guilt of the accused, then the case should be
23 submitted to the jury.

24 Now, a directed verdict motion should be granted when the
25 evidence merely raises suspicion that the accused is guilty of

1 the crime charged. The Trial Court is charged with the duty
2 of granting a directed verdict motion when the jury would be
3 speculating as to the guilt of the accused or where the
4 evidence is sufficient only to raise mere suspicion of guilt,
5 and suspicion implies a belief or opinion as to guilt based
6 upon facts or circumstances which do not amount to proof.

7 In this particular matter, it is clear that the state is
8 relying upon a combination of direct and circumstantial
9 evidence. And in regards to circumstantial evidence, the
10 Court is using the standard that to the extent that the state
11 relies on circumstantial evidence, all of the circumstances
12 must be consistent with each other and, when taken together,
13 point conclusively to the guilt of the accused beyond a
14 reasonable doubt. If the circumstances merely portray the
15 defendants' behavior as suspicious, the proof has failed.

16 In this particular matter regarding the charge of
17 kidnapping, the Court finds that the state has failed to
18 produce or present any direct evidence nor any circumstantial
19 evidence on that standard that I just read, that the jury
20 could rely upon to prove the defendants guilty of that crime.
21 To submit the crime of kidnapping to the jury, would call upon
22 them to engage in pure speculation to engage in theory.
23 Clearly, freedom can be restrained even for an instant, but
24 the victim must be aware -- the victim must be aware if they
25 are to be restrained under the definition of kidnapping, which

1 I read earlier, they've got to be aware they have been
2 confined, seized, laid hold of in some fashion. Understanding
3 this is a contact wound and right now I'm engaging in pure
4 speculation because there is no evidence. The victim --
5 clearly there's two people in the car other than the victim.
6 That's clear from the evidence. There's no contradiction of
7 that; there's two people in the car. They're in the K&W
8 parking lot. The victim could've had her head turned towards
9 the K&W and the front seat passenger could've put the gun up
10 against her head and killed her instantly, or she could've
11 been looking straight ahead and the person in the backseat
12 could have put a gun up beside her head and killed her
13 instantly because that's how the evidence shows regarding the
14 entrance and exit wound. There's no evidence that other than
15 it being a contact wound that the defendant or that the victim
16 was aware of being kidnapped. They have to be aware of it.
17 There has to be some seizing and it can be even for an
18 instant. No question, putting the gun up beside somebody's
19 head -- I mean, if you're facing them and you put a gun up
20 beside their head and they know about it, they're seized, even
21 for an instant. If that's all it takes to pull the trigger,
22 an instant, they're seized, they're kidnapped. There's no
23 question about that. But, there's no evidence of that in this
24 particular case. There was no injuries that the medical
25 examiner, pathologist, Dr. Proctor, testified to, there's no

1 injuries to the victim other than the fatal wound. There's no
2 evidence of bruising, scraping, anything. He basically said
3 she was -- as best you can say that, the victim was fine
4 obviously except for the fatal wound. So, there's just no
5 evidence that the victim was aware. And, so I would call upon
6 the jury to speculate, engage in trying to come up with some
7 theory, and that's -- that cannot happen.

8 So, I'm directing a verdict as to the crimes of
9 kidnapping as to the -- as to both defendants, Mr. Nicholas
10 Jacob McIver and Mr. Terrell Freeman.

11 As to the crimes of the other two, the murder and the
12 possession of a weapon during the commission of a violent
13 crime -- the defendants have not made a directed verdict
14 motion as to the other charge, the grand larceny valued 2,000
15 to 10,000. But as to the two charges of murder and possession
16 of a weapon during the commission of a violent crime, the
17 Court declines to grant the motion for a directed verdict.
18 And the reasons for that being and I'm relying upon -- I'm
19 gonna highlight some facts here, okay? These are not the only
20 facts the Court is relying upon. I'm relying upon all of the
21 evidence that's been presented in this matter. But, regarding
22 those crimes, you've got a timeline. This all occurred on
23 July 9th, 2016. Approximately 1:09 A.M., the victim checks
24 into the Holiday Sands. 2:49 A.M., the victim and Mr. Freeman
25 are talking. 2:53 A.M., all four are at the Holiday Sands.

1 3:16 A.M., all leave the Holiday Sands. 3:52, the victim and
2 Mr. McIver are going in a room. 3:58, Freeman and Oxendine go
3 in the room. 4:40 A.M., the victim changes clothes, leaves
4 the room. 6:16 -- 6:18, the victim leaves to go north on the
5 -- I'm sorry -- at 4:40 the victim leaves the room.
6 Thereafter, at -- the defendant or the victim, Ms. Oxendine,
7 comes back to the hotel, Holiday Sands. The victim and Ms.
8 Oxendine meet the individuals, the defendants in this case.
9 They speak to them at 7:41 A.M. The victim is there and the
10 Malibu is at the Lancer Motel. 8:06 A.M., all four of them
11 leave in the victim's car. 9:45 A.M., Ms. Oxendine is left at
12 the residence in Shallotte, North Carolina. At 11:15 A.M.,
13 the murder occurs. There are two males that are seen by an
14 eyewitness pulling and pushing the victim out of her vehicle,
15 what appears to be the vehicle, the white car. The victim's
16 vehicle is at the Lancer Motel in the possession of both
17 defendants at 11:56 A.M. At 12:10, the vehicle, Mr. McIver
18 leaves. After 12:10, there are outgoing phone calls from Mr.
19 McIver to Mr. Freeman at 12:10, 12:11, 12:15, 12:17, 12:25,
20 12:26, 12:30. Incoming call to Mr. McIver from Freeman at
21 12:38 lasting five minutes and 49 seconds. Another call at
22 12:44 lasting two minutes and 48 seconds. Another call at
23 1:06, three minutes and seven seconds. Another call at 1:16,
24 one minute, 35 seconds. At 1:45, Mr. McIver stops and gets
25 gas in Bennettsville, uses the victim's credit card. 1:54, he

1 leaves the gas station. At 3:00 P.M., McIver is at the Sunoco
2 in Marshville with the victim's car and had the victim's car
3 in Bennettsville also and has the victim's car, uses the
4 victim's credit card. Between 4:00 and 4:52, there's seven
5 phone calls between them. 4:06, the Malibu is burned. The
6 timeframes that appears to be an hour, approximately, by a
7 MapQuest. An hour and 38 minutes from the Lancer Motel to
8 Bennettsville, an hour and nine minutes from the Bennettsville
9 to Marshville, 37 minutes from Marshville to where the car was
10 burned. There's evidence that Mr. McIver, what the jury could
11 find by looking at the video -- and again, it's up to the jury
12 to make this decision, but they certainly could find that he
13 is -- has a weapon at the Lancer Motel when both of them were
14 in possession of the victim's car after the murder. This is
15 immediately after, after the murder. There's flight from the
16 scene of the crime from the State of South Carolina,
17 possession of the victim's car after she's dead, and
18 destruction of evidence, and communications.

19 No question a murder occurred. The circumstantial
20 evidence is clear, if the evidence is believed by the jury,
21 that these are the only two individuals that could have
22 committed the murder. The timeline does not allow for any
23 other two individuals to have been involved in the murder.
24 Looking at the timeline, clearly with the victim and the car
25 beforehand, clearly with the car of the victim immediately

1 afterwards, the timeframes that would engage in travel from
2 Shallotte to the K&W and from the K&W to the Lancer Motel,
3 it's -- there's no evidence, there's certainly circumstantial
4 evidence, there's no evidence that any other two individuals
5 could've been involved in the murder.

6 So, regarding the charges of murder and possession of a
7 weapon during the commission of a violent crime, I do find
8 that under the theory of hand of one hand of all, that these
9 charges should be submitted to the jury. And the defendants'
10 motions, Mr. McIver's motion and Mr. Freeman's motion, for
11 those two charges are denied. And obviously, there was no
12 motion as to the grand larceny charge.

13 All right. So, with that then, we are -- the state has
14 rested its case. At this point in time, Mr. Bellamy, is your
15 client, Mr. McIver, ready for the Court to inquire of him as
16 to whether or not he -- to advise him of his constitutional
17 rights and whether or not he wishes to testify in this case?

18 MR. BELLAMY: He is, Your Honor.

19 THE COURT: All right. Very good. If you would then
20 stand up and place him under oath, Madam Clerk.

21 CLERK: Please raise your right hand.

22 NICHOLAS JACOB MCIVER, HAVING BEEN
23 SWORN TESTIFIES AS FOLLOWS:

24 MR. BELLAMY: Speak up so they can hear you.

25 THE COURT: All right. You can put your hand down. All

1 right. Now, Mr. McIver, we have reached the stage of the
2 trial where you can present a defense. Now, I'm going to
3 explain to you a specific right and certain of your
4 constitutional rights. At this point in time and during our
5 discussion, if there's anything you do not understand, you
6 don't understand what I'm asking you, what I'm saying, you've
7 got a question about it, you want to ask a question, you need
8 to indicate that to me. You've got to raise your hand, you've
9 got to tell your attorney, Mr. Bellamy, but in some way,
10 you've got to affirmatively indicate to me you've got a
11 question or you need to ask a question or there's some issue;
12 do you understand that?

13 MR. MCIVER: Yes, sir.

14 THE COURT: Are we in agreement there?

15 MR. MCIVER: Yes, sir.

16 THE COURT: All right. Very good. Now, again, we've
17 reached the stage of the trial where you can present your
18 defense. You do have the right to claim the protections given
19 to you by the Fifth Amendment to the Constitution of the
20 United States of America and that constitution states in part
21 that no person shall be compelled in any criminal case to be a
22 witness against themselves. That means nobody can make you
23 testify. You can testify if you choose to do so, if you want
24 to do so, but nobody can make you do that; do you understand
25 that?

1 MR. MCIVER: Yes, sir.

2 THE COURT: All right. Now, if you decided to testify,
3 you'll be subject to the same rules that you've seen all the
4 other witnesses in this case. You'd be examined or asked
5 questions by your attorney, Mr. Bellamy. You'd be cross
6 examined by Mr. Spratlin. You'd be cross examined by the
7 state as to any matters that -- the facts in this case and any
8 matters that the Court would deem relevant to this particular
9 matter. Do you understand that?

10 MR. MCIVER: Yes, sir.

11 THE COURT: Is there a -- does the defendant have a
12 criminal record that the state would be asking him about?

13 MR. DEBUSK: Your Honor, he has a number of charges from
14 North Carolina, but they all appear to be misdemeanors. In
15 North Carolina, it's my understanding, misdemeanors carry one
16 year, but none of them appear to be crimes of dishonesty, Your
17 Honor.

18 THE COURT: All right. So, you do not believe there are
19 any convictions that he has in the state of North Carolina
20 that were punishable by imprisonment for more than one year or
21 they are not crimes of dishonesty?

22 MR. DEBUSK: Correct, Your Honor.

23 THE COURT: All right. Very good.

24 All right. If you decide to testify, Mr. McIver, that's
25 got to be your decision. You can ask your attorney and get

1 his advice, you can ask a family member and get their advice,
2 but it's your decision; you understand that?

3 MR. MCIVER: Yes, sir.

4 THE COURT: All right. And you've got to make that
5 decision, understanding the protection given to you by the
6 Fifth Amendment of the Constitution of the United States. If
7 you decide not to testify, if that was your choice, I would
8 instruct the jury, they cannot give that fact that you did not
9 testify any consideration whatsoever. I tell a jury they
10 can't talk about it, they can't mentally use it in their
11 deliberations. I tell them it's not part of this case.

12 Now, before I ask you what you want to do, did you
13 understand what we talked about?

14 MR. MCIVER: Yes, sir.

15 THE COURT: Do you want to ask your attorney any
16 questions or anyone else any questions before I ask you what
17 you want to do?

18 MR. MCIVER: No, sir.

19 THE COURT: Do you wish to testify in this case?

20 MR. MCIVER: No, sir.

21 THE COURT: Thank you very much. You can have a seat.

22 All right, Mr. Spratlin, is your client, Mr. Freeman,
23 ready for the Court to inquire as to his constitutional rights
24 and right to testify?

25 MR. SPRATLIN: Yes, Your Honor, subject to one issue. At

1 the beginning of this trial, there was a *Jackson v. Denno*
2 hearing that was delayed until the point my client made a
3 decision to testify.

4 THE COURT: Yes, sir.

5 MR. SPRATLIN: I have discussed with him -- I believe
6 that he would have a right to know the results of that hearing
7 prior to making the decision. However, I have discussed with
8 him my belief on his statement and its admissibility, and he
9 wishes to waive any sort of determination by the Court as to
10 the voluntariness of his confession -- or not a confession, it
11 was actually just a culpatory or exculpatory culpatory
12 statement.

13 THE COURT: All right. Very good. All right. And is
14 that correct, Mr. Freeman?

15 MR. FREEMAN: Yes, sir.

16 THE COURT: All right. Very good. Place him under oath
17 please.

18 CLERK: Please raise your right hand.

19 TERRELL FREEMAN, HAVING BEEN SWORN
20 TESTIFIES AS FOLLOWS:

21 THE COURT: All right. Now, Mr. Freeman, you obviously
22 had the benefit of me talking to Mr. McIver, but I will be
23 going over the same process with you. We've reached a stage
24 in the trial where you can present a defense and I'm gonna
25 explain to you certain of your constitutional rights. If at

1 any point in time, you don't understand what we're talking
2 about, you've got a question about it, there's any
3 uncertainty, you've got to indicate that to me. As I said,
4 you can raise your hand, you can tell your attorney, but
5 you've got to affirmatively let me know you've got a question
6 or there's something that you need to talk about. We in
7 agreement there?

8 MR. FREEMAN: Yes, sir.

9 THE COURT: All right. Very good. Again, we've reached
10 the stage of the trial where you can present your defense.
11 And again, you are granted the protection given to you by the
12 Fifth Amendment to the Constitution of the United States of
13 America. And again, that says no person shall be compelled in
14 any criminal case to be a witness against themselves.
15 Meaning, nobody can make you testify. You can do so. It's
16 your choice if you want to testify or not. Do you understand
17 that?

18 MR. FREEMAN: Yes, sir.

19 THE COURT: All right. Now, in that regard, if you
20 decided to testify, you'd be subject to the same rules.
21 You've seen the other witnesses that have testified in this
22 case. And in this matter, if you testify, you'd be asked
23 questions by your attorney, Mr. Spratlin. You'd be cross
24 examined and asked questions by Mr. Bellamy and you'd be cross
25 examined and asked questions by the state as to any matters

1 the Court would deem relevant or proper in this -- in this
2 case. Do you understand that?

3 MR. FREEMAN: Yes, sir.

4 THE COURT: Does this defendant, Solicitor, Mr. Freeman,
5 have any record that you would be asking him about?

6 MR. DEBUSK: Yes, Your Honor. In the State of North
7 Carolina in 2008, a voluntary manslaughter; from the State of
8 Virginia, in 2007, manufacturing, sale and possession of a
9 controlled substance felony level for which he received
10 probation, which was revoked on December 9th of 2008 bringing
11 it within 10 years. So, that should be within 10 years, Your
12 Honor.

13 THE COURT: All right. Very good. Do you disagree, Mr.
14 Spratlin, that those two charges are ones that the state can
15 ask about?

16 MR. SPRATLIN: No, Your Honor, just with the drug charge.
17 I think it was just a possession. I don't think it was
18 manufacture, but other than that, it is completely correct.

19 THE COURT: Now, how that would take place, Mr. Freeman
20 is if you testified the state would be allowed to ask if you
21 were convicted of that crime on that certain date and time and
22 if you agreed that you were convicted of that crime at that
23 certain date and time, that would be the end of it.
24 Obviously, if you denied it, then the state would be able to
25 present further proof that it actually occurred. You

1 understand that?

2 MR. FREEMAN: Yes, sir.

3 THE COURT: All right. If you decide to testify, again,
4 it's your decision to testify. You can get your advice from
5 your attorney, you ask him questions, get his advice, if you
6 want to ask a family member and get their advice but it's your
7 decision as to whether or not you testify. You understand
8 that?

9 MR. FREEMAN: Yes, sir.

10 THE COURT: And if you decided not to testify, I would
11 instruct the jury they can't give that any consideration
12 whatsoever, tell them they can't talk about it in the jury
13 room, they can't use it mentally to make a decision, it's not
14 part of this case. Do you understand everything we've talked
15 about?

16 MR. FREEMAN: Yes, sir.

17 THE COURT: Before I ask you what you want to do, you
18 want to ask your attorney or a family member any questions?

19 MR. FREEMAN: No, sir.

20 THE COURT: Do you wish to testify in this case?

21 MR. FREEMAN: No, sir.

22 THE COURT: Very good, sir. Thank you very much. Have a
23 seat.

24 BY THE COURT:

25 THE COURT: All right. Mr. Bellamy, would there be

1 presentation of any defense evidence other than what we've
2 already just now covered?

3 MR. BELLAMY: No, sir, Your Honor.

4 MR. SPRATLIN: No, Your Honor.

5 THE COURT: All right. So, at this point in time then
6 for the purpose of this trial, obviously we'll do it again in
7 front of the jury, but for the purpose of this trial, on
8 behalf of your client, Mr. Bellamy, then the defense rests for
9 Nicholas Jacob McIver; is that correct?

10 MR. BELLAMY: Yes, sir, Your Honor.

11 THE COURT: And as to your client, Mr. Spratlin, Mr.
12 Terrell Freeman, the defense rests; is that correct?

13 MR. SPRATLIN: Yes, Your Honor.

14 MOTIONS:

15 THE COURT: At this point in time then, Mr. Spratlin, Mr.
16 Bellamy, do you wish to renew your motions that you made at
17 the end of the state's case?

18 MR. BELLAMY: Yes, sir, Your Honor.

19 MR. SPRATLIN: Yes, sir, Your Honor.

20 THE COURT: Is there any additional argument that you
21 would like to make, Mr. Spratlin?

22 MR. SPRATLIN: Your Honor, my only additional argument
23 would be that since the kidnapping has been removed from the
24 equation, there is no other crime that the state has proven or
25 has even alleged to have been proven that the hand of one hand

1 of all would apply and the natural consequence of which
2 could've been the murder.

3 THE COURT: Mr. Bellamy?

4 MR. BELLAMY: Likewise, Your Honor, it's the state's
5 theory of this case as they've presented it is that the
6 kidnapping is that crime that in order to accomplish the
7 natural consequence would have been the murder. Your Honor,
8 has directed a verdict there, so I do not believe that
9 they're, at this point, under their theory because there is no
10 evidence direct or circumstantial that my client was the one
11 who shot. Clearly, it's a 50/50 shot for the jury to guess,
12 flip a coin. So, based upon the fact that the kidnapping is
13 no longer available to the jury, we do not think that the
14 murder should go as well.

15 Thank you, Your Honor.

16 THE COURT: Solicitor?

17 MR. DEBUSK: Your Honor, the murder itself can be a crime
18 and they can be present, aiding and abetting each other in the
19 murder. The murder itself is sufficient to support present
20 aiding and abetting and accomplice liability.

21 THE COURT: I respectfully decline to grant the
22 defendants' renewed motions for directed verdict as to the
23 charges of murder and possession of weapon during the
24 commission of a violent crime.

25 MR. SPRATLIN: Yes, Your Honor.

1 THE COURT: Further motions on behalf of your client, Mr.
2 Bellamy?

3 MR. BELLAMY: No, sir, Your Honor.

4 THE COURT: Mr. Spratlin?

5 MR. SPRATLIN: No, Your Honor.

6 BY THE COURT:

7 THE COURT: All right, sir. We need to discuss the jury
8 charge and then go over the verdict form, but I don't want to
9 keep the jury waiting. It's a quarter of 12:00. The -- would
10 you want the Court to send the jury, tell them to go to lunch
11 and have them come back at some point in time, you know, 1:30
12 or whatever time it would be, and then we would go into the
13 closing arguments and charge on the law.

14 So, the state have a position on that?

15 MR. DEBUSK: That's sounds good, Your Honor.

16 THE COURT: Mr. Bellamy?

17 MR. BELLAMY: Yes, sir, Your Honor; that would be good.

18 MR. SPRATLIN: That's acceptable, Your Honor.

19 THE COURT: All right. Very good. All right. So, let's
20 call the jury in and what we'll do is -- what we'll do is I
21 will ask you, Mr. Bellamy, what's the position of the defense
22 and you can tell me that the defendant, Mr. McIver, rests.
23 The same thing for you, Mr. Spratlin. And then I will excuse
24 them for lunch. All right?

25 MR. BELLAMY: Yes, sir, Your Honor.

1 THE COURT: Thank you.

2 Go ahead and bring the jury in.

3 MR. BELLAMY: Your Honor, will you explaining to the jury
4 on the kidnapping that that ---

5 THE COURT: I'll do that. I will.

6 (REPORTER'S NOTE: Jury enters courtroom.)

7 THE COURT: All right. What is the position of the
8 defendant, Mr. McIver, Mr. Bellamy?

9 MR. BELLAMY: Your Honor, at this time, on behalf of my
10 client, Mr. McIver, the defense rests.

11 THE COURT: And, Mr. Spratlin, what is the position of
12 the defendant, Mr. Freeman, at this point in time?

13 MR. SPRATLIN: The defense rests, Your Honor.

14 THE COURT: All right. Very good.

15 All right, ladies and gentlemen, two things. One, in the
16 discussion of the matter with the attorneys, the Court has
17 removed the crime of kidnapping from your consideration. You
18 will not be making a decision as to the crime of kidnapping.
19 You will be making a decision as to crimes of murder,
20 possession of a weapon during the commission of a violent
21 crime, grand larceny value 2,000 to 10,000. These will be
22 presented to you.

23 At this point in time, you have received all of the
24 evidence in this case. There will be no more evidence
25 presented to you in this particular matter. What remains in

1 this case are the closing arguments of the attorneys and then
2 the charge on the law. At that point in time, I will give you
3 the law that you will apply to the facts and evidence you have
4 heard in this particular case.

5 There are still a few things that I need to review with
6 the attorneys. I have to go over the basic elements of the
7 charge with them and so they know exactly what it is that I'm
8 going to be instructing you so that might affect their closing
9 argument in some fashion.

10 I'm going to excuse you until 1:30, so that I have time
11 to go over all those factors with the attorneys and give them
12 some break before they start their closing arguments. So,
13 1:30 we'll resume. We'll have the closing arguments of the
14 attorneys, I'll give you the charge on the law, and then I'm
15 going to submit the case to you for your deliberations and
16 unanimous decision on the three charges that remain.

17 So, with that, you're excused until 1:30.

18 Thank you very much.

19 (REPORTER'S NOTE: Jury exits courtroom. The following takes
20 place outside the presence of the jury.)

21 THE COURT: All right, gentlemen, what we'll do is we'll
22 reconvene at 1:15, I'll go over the charge with you at that
23 point in time and if y'all will hold on for a second, we'll
24 give you a copy of the proposed verdict form so you'll have a
25 chance to look at it, and if there's any exceptions, deletions

1 or corrections that you want to suggest to the Court, then
2 you'll have the opportunity to do so. And obviously, if
3 there's anything y'all want to suggest to me about the charge,
4 you know, now is the time to present that to me if there is
5 any. All right. Thank you.

6 MR. DEBUSK: Thank you.

7 THE COURT: With that, I'll see you back at 1:15. All
8 right?

9 MR. BELLAMY: Thank you, Judge.

10 THE COURT: Thank you.

11 RECESS

12 *****OFF THE RECORD*****

13 (On the Record.)

14 CHARGE CONFERENCE:

15 THE COURT: All right, gentlemen, we had recessed and I
16 told you I'd go over the charge that the Court intends to give
17 to the jury in this matter and -- so, I'll just go over it
18 briefly and y'all can talk to me about anything you want to
19 add or change.

20 Obviously, we'll talk to them generally about what we
21 always talk to them about, credibility and believability of
22 witnesses. We did have a minor testify, so obviously I'll
23 tell the jury the same sort of thing that we told them earlier
24 that, you know, they have to consider the child's age, ability
25 to observe, remember facts, ability to understand, and whether

1 the child understood the seriousness of appearing as a witness
2 in the trial and understood the questions and had a good
3 memory and knew the difference between lying and telling the
4 truth.

5 As I told the defendants, I'll charge the jury about the
6 defendants did not testify, and I will tell the jury that that
7 cannot be considered in their deliberations in any way. They
8 can't use it in their consideration of the matter, they can't
9 use it mentally.

10 There was a stipulation by the parties and I'll the jury
11 that a stipulation is an agreement made in a judicial
12 proceeding by the parties, it's binding upon them, and it's an
13 agreement and understanding that they must accept if the
14 parties have stipulated to it.

15 Direct and circumstantial evidence, obviously direct
16 evidence and testimony of the person who asserts or claims to
17 have actual knowledge of a fact. Circumstantial evidence,
18 proof of a chain of facts and circumstances indicating the
19 existence of a fact. As I indicated to you, I will charge
20 them to the extent the state relies on circumstantial
21 elements, all of the circumstances must be consistent with
22 each and, when taken together, point conclusively to the guilt
23 of the accused beyond a reasonable doubt. If the
24 circumstances merely portray the defendants' behavior as
25 suspicious, the proof has failed, and obviously that the

1 burden rests upon the State of South Carolina to prove the
2 defendants guilty of the crimes charged beyond a reasonable
3 doubt whether the state relies on direct or circumstantial
4 evidence.

5 Presumption of innocence. Reasonable doubt, the kind of
6 doubt that would cause an ordinary, reasonable person to
7 hesitate to act. Charge them the law of murder. The state
8 must prove beyond a reasonable doubt the defendants killed
9 another person with malice aforethought, and then define
10 malice and malice aforethought, expressed or inferred.

11 Possession of a weapon during the commission of or
12 attempt to commit a violent crime. The state has to prove
13 beyond a reasonable doubt the defendant was in possession of a
14 firearm or visibly displayed what appeared to be a firearm
15 during the commission of a violent crime. Murder is a violent
16 crime and the state must prove beyond a reasonable doubt that
17 the weapon further advanced or helped the commission of the
18 crime.

19 Grand larceny value 2,000 to 10,000. The defendant --
20 the state must prove beyond a reasonable doubt the defendant
21 took and carried away the property of another against the will
22 or without the consent of the person. The slightest removal
23 even for an instant is enough. The state has to prove beyond
24 a reasonable doubt that the defendant intended to permanently
25 deprive the owner of the property the value was more than

1 2,000 but less than 10,000.

2 Define mere presence. At the scene of the crime is not
3 sufficient to prove someone guilty, describe that. The hand
4 of one charge that I previously read to y'all at the very
5 beginning, that's the one I am going to use in this particular
6 matter.

7 The verdict form, I think we passed that out to you. The
8 state have any comments on the verdict form?

9 MR. DEBUSK: No, Your Honor. I was wondering if I need
10 to get a copy of or hear the hand of one hand of all charge.

11 THE COURT: Okay. It's the same one I read to everybody
12 at the very beginning of the case, but I'll read it to y'all
13 again.

14 MR. DEBUSK: Thank you, Your Honor.

15 THE COURT: If a crime is committed by two or more who
16 act -- who are -- and obviously before this, I'm gonna be
17 charging mere presence. So, I'll charge mere presence before
18 I read this to the jury. If a crime is committed by two or
19 more people who are acting together in committing a crime, the
20 act of one is the act of all. The person who joins with
21 another to commit an unlawful act is criminally responsible
22 for everything done by the other person which happens as a
23 probable or natural consequence of the acts done in carrying
24 out the common plan and purpose. The act of one is the act of
25 all or as it is sometimes said, the hand of one is the hand of

1 all. Prior knowledge that a crime is going to be committed
2 without more, is not sufficient to make a person guilty of
3 that crime. Mere knowledge that another person is going to
4 commit a crime, even if the defendant is present when the
5 crime is committed, is not sufficient to convict the defendant
6 as a principal. Guilt as a principal is shown by actual or
7 constructive presence at the scene as a result of prior
8 arrangement. The state must prove beyond a reasonable doubt
9 by competent evidence the theory of the hand of one hand of
10 all. Principal in a crime is one who either actually commits
11 the crime or who is present, aiding, abetting, or assisting in
12 committing the crime. When a person does an act in the
13 presence of and with the assistance of another, the act is
14 done by both. Where two or more acting with a common plan or
15 intent are present at the commission of a crime, it does not
16 matter who actually commits the crime, all are guilty. The
17 hand of one is the hand of all. Present at the commission of
18 a crime means to be sufficiently near to aid, abet, assist in
19 the commission of the crime. However, mere presence at the
20 scene of a crime is not sufficient to convict one as a
21 principal on the theory of aiding and abetting.

22 MR. DEBUSK: Thank you, Your Honor.

23 THE COURT: That's my intention.

24 All right. As to the verdict form, did you have any
25 comments as to the verdict form, Solicitor?

1 MR. DEBUSK: No, Your Honor.

2 THE COURT: As to the verdict form, did you have any
3 comments, Mr. Bellamy?

4 MR. BELLAMY: No, sir, Your Honor.

5 THE COURT: Mr. Spratlin?

6 MR. SPRATLIN: No, Your Honor.

7 THE COURT: All right. As to the charge itself, is there
8 anything else from the state?

9 MR. DEBUSK: No, Your Honor.

10 THE COURT: From your client, Mr. Bellamy?

11 MR. BELLAMY: Nothing other than what had been submitted
12 by Mr. Spratlin on the flight.

13 THE COURT: All right. And Mr. Spratlin?

14 MR. SPRATLIN: Yes, Your Honor, the verdict form that I
15 got to, Your Honor, as well as the state and Mr. Bellamy, I
16 would ask for the charge ---

17 THE COURT: You said verdict form, do you mean the
18 request to charge?

19 MR. SPRATLIN: I mean request to charge, excuse me.

20 THE COURT: Okay. That's all right.

21 MR. SPRATLIN: Yes, just that the defense would request
22 the charge along with the circumstantial evidence charge that
23 flight alone is not substantial circumstantial evidence. The
24 case I would be relying on for that is the case I relied upon
25 in my directed verdict motion, *State v. Lewis*.

1 THE COURT: All right. The Court respectfully declines
2 to grant that in -- and this is probably earlier than y'all's
3 experience as trial attorneys. It was common for the Court to
4 issue a charge on flight that has been disfavored as a comment
5 on the evidence. That is to be left to counsel to make those
6 arguments if they so choose to do so. Since the Court will
7 not be issuing a charge on flight, I will not charge this as
8 it would be a comment on the evidence, and I will leave it to
9 the -- the attorneys to argue about flight or escape based
10 upon their view of the evidence.

11 Thank you very much.

12 MR. SPRATLIN: Yes, sir, Your Honor. Thank you.

13 THE COURT: All right. Anything else, Mr. Spratlin?

14 MR. SPRATLIN: No, Your Honor.

15 THE COURT: All right. Very good.

16 All right. Well, I told the jury 1:30 and it's not quite
17 1:30, so we'll take a very short break, and then we'll come
18 back and get started with the closing arguments.

19 Just so we're clear on the closing arguments, the state
20 obviously has to give its full and complete argument in this
21 matter because the defendants did not enter any evidence.

22 We'll follow the same procedure that we used throughout the
23 trial. Mr. Bellamy you'll give your argument and then Mr.
24 Spratlin will give his, and then we will go to the arguments
25 or the charge on the law. Okay?

1 MR. SPRATLIN: Thank you, Your Honor.

2 MR. BELLAMY: Thank you, Your Honor.

3 THE COURT: All right. Thank you very much.

4 RECESS

5 *****OFF THE RECORD*****

6 (On the Record.)

7 BY THE COURT:

8 THE COURT: All right. Solicitor, is the state ready for
9 the jury to come in?

10 MR. DEBUSK: Yes, Your Honor.

11 THE COURT: And on behalf of your client, Mr. Bellamy?

12 MR. BELLAMY: Yes, sir, Your Honor.

13 THE COURT: And, Mr. Spratlin?

14 MR. SPRATLIN: Yes, Your Honor.

15 THE COURT: All right. Very good.

16 Ask the jury to come in, please.

17 MR. DEBUSK: Your Honor, may we approach?

18 THE COURT: Sure.

19 (REPORTER'S NOTE: Bench conference is held off the record and
20 outside the presence of the jury.)

21 (REPORTER'S NOTE: Jury enters courtroom.)

22 THE COURT: All right, ladies and gentlemen, as I
23 explained to you, we're at the stage of the trial where you
24 have received all of the evidence in this case. We are now
25 going to proceed to the closing arguments of the attorneys.

1 Please remember, as I told you at the very beginning, as in
2 the opening statements, closing arguments are not evidence.
3 You've heard all of the evidence in this case. Now, the
4 closing arguments are important. They're each side's
5 summation to you of what they believe the evidence has shown
6 to you, understanding of course, that you are the judges of
7 the facts of this particular case. After that, I will give
8 you the law that you will apply to the facts and evidence that
9 has been presented in this matter and then I'll submit the
10 case to you for your deliberations and unanimous decision.

11 Solicitor?

12 MR. DEBUSK: Thank you, Your Honor, may to please the
13 Court?

14 THE COURT: Yes, sir.

15 CLOSING BY DEBUSK:

16 MR. DEBUSK: Ladies and gentlemen, Nicholas Jacob McIver
17 and Terrell Freeman killed Amanda Fisher. It's been proven to
18 you by the evidence from the stand. No -- let's back up to
19 the video that might've shown the victim's -- the defendant is
20 driving the victim's car back to the Lancer, wouldn't change
21 that; finding the murder weapon, wouldn't change that, it
22 wouldn't even tell you whose finger was on the trigger. If we
23 had a way to know the residual velocity of the bullet after it
24 passed through the skull, the brain, and the skull again, it
25 wouldn't change that. It wouldn't change the fact that Amanda

1 Fisher left Supply North Carolina dropping her cousins off --
2 cousin off, the defendants, McIver and Freeman, were the only
3 ones with her. It would not change the fact that at the K&W
4 parking lot, both of them participated in pulling her out of
5 the car while her body was still moving. It would not change
6 the fact that they fled immediately in the victim's car,
7 converting it to their own use, to the Lancer, and then got
8 out of town. Those facts are given. This isn't a whodunit.
9 You know who it was; it was McIver and Freeman. They were the
10 ones in the car with Amanda at the K&W parking lot. There's
11 zero doubt that one of the two of them pulled the trigger.
12 There's zero doubt that both of them together pulled the
13 victim out of the car and dumped her like a piece of garbage
14 on the K&W parking lot.

15 But first, before I get into that in a little more
16 detail, let me talk a little bit about what it is that we have
17 to prove. The state has the burden of proof here and we don't
18 run from it. We have to prove the elements of the crime. The
19 crime murder is the killing of another with malice
20 aforethought. Obviously, Amanda was the one killed and she
21 was shot through the head. What is malice aforethought?
22 Malice is, is ill will, it is the intent to harm another.
23 Clearly, when you put a gun to somebody's head and pull the
24 trigger, you have ill will. You have intent to harm them.
25 What is aforethought? Aforethought is not premeditation.

1 What it means they had the intent to do harm. They had that
2 malice at or right before the time when the fatal blow was
3 struck. That's what malice aforethought means. It doesn't
4 mean premeditation. Premeditation can be part of the proof of
5 malice aforethought, but it's not necessary. You can deduce
6 malice aforethought from other circumstances and facts. In
7 this case I argue to you that we've got the quintessential
8 case of malice aforethought. Someone takes a gun out, raises
9 it up, puts in contact with the victim's head, and pulls the
10 trigger. That is malice aforethought per se. That is malice
11 aforethought written large. You cannot put a gun against
12 someone's head and pull the trigger without knowing that
13 you're gonna be killing them. That is malice aforethought.
14 It's not premeditation. Like I said, premeditation can be
15 evidence of malice aforethought, but here it's the nature of
16 the injury itself that shows malice aforethought. I ought to
17 tell you that just putting the gun against her head was malice
18 and when that trigger was pulled, that turned that malice into
19 murder.

20 Another thing we don't have to prove is motive. Motive
21 is in the heart and mind of the attacker. We don't know what
22 that is; we've got no way to prove it. We've got no way to
23 distill in the contents of their brain. But you can deduce
24 again from the nature of the injury, from the way they treat
25 the victim after the attack, you can deduce malice from that.

1 Another crime before you today is grand larceny. That's
2 taking the goods of another without permission and converting
3 it to your own use without intent to return them. Here they
4 took Amanda Fisher's car. Well, it was registered to Jerry
5 Fisher, her grandfather, but it was the car she was using; it
6 was not their property. They took it and converted it to
7 their own use. That use was as a getaway vehicle. They used
8 that car to get away from the K&W parking lot where they
9 dumped Amanda out of it, taking it from her by force, and they
10 took it to the Lancer. Both of them used it that way. They
11 both converted it to their own use. That car, the testimony
12 was that the grandfather had paid between 10 and 16,000 for it
13 just months before. Even giving every benefit of the doubt to
14 the defendants, it was still worth between 2 and 10,000 making
15 it grand larceny. Again, they converted it to their own use.
16 They used it as a getaway vehicle and they had no intent of
17 returning it. They intended to keep using it and using it to
18 cover up the crime. They took it to North Carolina and it was
19 burned, it was destroyed, burned down to ashes, nothing left
20 but the metal. There was no intent to return it; it was
21 intent to deprive.

22 Possession of a gun during a violent crime. There was a
23 bullet hole through Amanda's head. There's the copper jacket
24 of a bullet found next to her body, proof that there was a gun
25 involved in this. They possessed a gun during the murder,

1 murder being a violent crime. And they are both guilty and it
2 comes under the heading of hand of one hand of all. Hand on
3 one hand of all is another way of saying accomplice liability.
4 Accomplice is someone who is present, aiding and abetting a
5 principal person who does a crime. The classic example is the
6 getaway driver or the lookout in a bank robbery. He doesn't
7 go in, he doesn't confront the teller with a weapon, he
8 doesn't take any money, all he does is stand outside looking
9 for the police or standing at the getaway car ready to -- but
10 he's still guilty as a principal because he was part of the
11 crime. Another analogy, will be kind of like a football team.
12 The quarterback throws the ball; the tight end catches it and
13 runs it over the goal line for a touchdown. Even that wide
14 receiver, who never even threw a block, gets six points.
15 They're all part of the play that resulted in that touchdown.

16 And you -- you don't -- a pre-existing plan is a way to
17 prove accomplice liability, but you can join a plan on the
18 spot. You can see what's happening and start participating on
19 the spot. Like if someone walked into a bank with a friend
20 and the friend started robbing the bank and that person
21 decides well, I'll just be the lookout, or I'll get the car
22 and warm it up and get ready for the getaway; they joined that
23 as an accomplice in process. It's the aiding and abetting and
24 the intent of what they do in the crime that makes accomplice
25 liability.

1 And again, the pre-existing plan is one way to prove
2 that, but not the only way. Going back to the football
3 analogy, think of an interception. It wasn't planned, but say
4 the cornerback gets the ball and the linebackers stop blocking
5 immediately. They've gone on, they've changed from what they
6 were doing before to offensive players, they're blocking now
7 making room for that run back. On the spur of the moment,
8 they become part of that plan.

9 Now, mere presence isn't enough. Just being there when
10 somebody else commits a crime, that's not enough, and the
11 Judge will instruct you on that. But I put to you that --
12 that when you drag someone's body out of a car, 10 to 20
13 seconds after they've been shot in the head, no hesitation, no
14 wondering what to do, immediate action. Ten seconds, Ken
15 Thompson looks up and she's already being hauled out of the
16 car, someone is already out of the car hauling her out of the
17 car. That's not mere presence; that's participation. That is
18 present aiding and abetting. That is accomplice liability.
19 So, both I would argue are guilty. Both were present when the
20 fatal shot was fired. Again, 10 to 20 seconds after that shot
21 was fired, they both participated in pulling her out of the
22 car, no discussion, no extemporizing, no sitting wondering
23 what to do, immediate action. Remember, Amanda was still
24 moving, still twitching minutes later when the manager came
25 out there to see her. So much so that he -- he spoke to her,

1 thinking that she needed words of comfort. What was she like
2 right after she had been shot? Was she still breathing, was
3 she moving even more? But, they hauled her out as she was
4 dying and they threw her on the pavement to finish dying.
5 Both there, both participating, one finger on the trigger but
6 both aiding and abetting. Both were part of the crime, all
7 the crimes, grand larceny, possession of gun, and the murder.
8 Both hauled her out of the car as she was dying, both threw
9 her out, like Ken said, like a piece of garbage, both had
10 malice towards Amanda at that moment.

11 Looking further as to what they did after the killing, in
12 addition to what they did at the scene, what did they do
13 afterwards? They fled together. They took Amanda's car and
14 they fled from the K&W; they didn't stick around. They
15 returned to the Lancer and together they're grabbing their
16 goods, put it in the truck, got in the truck and -- one got in
17 the truck and one got in Amanda's car and they fled back to
18 Charlotte. And along the way, even though they were in
19 separate cars, they were in communication. They're calling
20 each other constantly. You've got the phone records, you can
21 look at it. You look, there are a few calls -- there are a
22 lot of calls that are under a minute and you can say maybe
23 they didn't go through, but there are a lot of calls that were
24 over a minute, up to five minutes long, two minutes long,
25 three minutes long. You add up just those ones that go over a

1 minute, they talked for 20 minutes as they were driving back
2 to Charlotte consulting on what they had done and how to cover
3 it up, continuing the aiding and abetting, continuing the hand
4 of one is the hand of all, furthering their cooperation.

5 As soon as the car was burned, what happens? McIver
6 starts calling Freeman again, and calls him and calls him and
7 calls him. It's on the phone records, you can look, until
8 suddenly it stopped. Why, well look at the pattern of the
9 day. Whenever they were together, there was no phone calls
10 between them. But if they were apart for even a short time,
11 they were probably calling each other. They got back together
12 in Charlotte; that's why the phone calls stopped. Both were
13 participating in the murder of Amanda. Those are the facts.
14 You can wonder about some of the other things like why did
15 Amanda go into the K&W parking lot to begin with. Well, I'd
16 argue to you that she already had the gun to her head and she
17 saw the K&W parking lot, probably saw Ken Thompson's brightly
18 colored car and thought if I get in there, there's a witness
19 and they want kill me in front of a witness, they want hurt me
20 in front of a witness, thought that was her way out, but
21 that's just speculation. What is proven is they were the two
22 together with Amanda when she was shot in the head and killed.
23 They both participated in hauling her out of the car while she
24 was still moving, while she was still dying, and they're both
25 guilty of murder.

1 And the same way, both had possession of the gun because
2 they were acting together. No matter who pulled the trigger,
3 both are guilty. But, I'm sure you'd say that's not enough,
4 we want to know who pulled the trigger, and I'll tell you the
5 facts in this case prove it was Nicholas McIver that pulled
6 the trigger, Nicholas McIver that had the gun. And you look
7 at it, start with the evidence of premeditation. Why were
8 they armed, or why was McIver armed going to North Carolina to
9 begin with? This was supposed to be a ride out to the beach
10 house, drop her off and come back. There's no need no for
11 that. Nobody had to bring a gun into this. Why prepare
12 yourself by bringing a gun except that you've got something
13 planned. And who had the gun? Nicholas McIver.

14 To show you that, I'm gonna show you a couple more
15 videos.

16 MR. BELLAMY: Your Honor, may we ---

17 THE COURT: Certainly.

18 MR. DEBUSK: Start with the Holiday Sands. Remember the
19 video when the girls came downstairs and the defendants met
20 them at the door. Give us just a moment to get the video up.
21 See here, what does Mr. Freeman do as soon as they meet
22 Tabetha, they embrace. He's got nothing to hide. If he had a
23 gun, she would find it; she would feel it. He's not hiding
24 anything. Where is Nicholas McIver? He stays in the car, no
25 hugging for him. If somebody hugged him, they might find the

1 gun on him. Obviously, Freeman has got nothing to hide. What
2 about McIver? If we could go to the video from the Lancer
3 after Amanda was shot. They stole her car and they drove back
4 to the Lancer. There they are getting out of it. Freeman out
5 of the passenger side and McIver out of the driver's side.
6 Watch what McIver does when he walks up to the back corner of
7 this pickup truck and watch very closely. It takes just a
8 moment. See him with his hand on his waistband. He walks up
9 there and he takes something out of his waistband, after
10 looking around furtively, he pulls something out of his
11 waistband. Look very closely and you'll see a glint of the
12 metal there. You can play it again, the last little portion
13 of it. Watch very closely, just as he's putting it in, you
14 see a little glint, glint of metal like a stainless steel gun.
15 See that little flash. McIver had the gun. Now, well and
16 then when they left, what did he do, he went right back to
17 that spot before he went and got in that car, went right back
18 to that spot and pulled out whatever it was he put in there.
19 Getting back into the car he stole from a dead woman, he
20 wanted to have his gun. He took it back from the same place
21 he put it. McIver had the gun.

22 Thank you. You can put the lights back up.

23 How about riding to North Carolina to begin with. Why
24 are they riding to North Carolina; they've been partying all
25 night. You know they wanted to do exactly what Tabetha did on

1 the drive back to Supply, sleep. They could've slept -- gone
2 back to their room, they had another night. They could've
3 slept all day, they could've went out on the beach and laid
4 down. Instead, they get in a car and drive all the way to
5 North Carolina just to ride back. Why? What's the purpose of
6 that? No reason to do it. And it was at McIver's request.
7 McIver was the one that asked can we ride with you to North
8 Carolina, knowing that on the trip back they'd be alone with
9 Amanda.

10 Next, I want to talk a little bit about the angle of the
11 shot. Here we had Dr. Proctor, who testified this was an
12 approximation of the angle which Amanda was shot. The first
13 thing you need to know -- wonder is where were people sitting
14 in that car. Well, we got one source of information and that
15 was Tabetha. She said, when they left Supply, McIver was in
16 the front passenger seat, Amanda of course driving, and behind
17 her, behind Amanda was Freeman. They made a stop, but people
18 are creatures of habit and I'd argue to you that they went
19 back to the same spots. Do we have another source of data?
20 Yes, we do. Ken Thompson. He saw two people pushing Amanda's
21 dying body out of that Malibu in the K&W parking lot. He
22 described the one he saw out of the car that he got a good
23 look at. He said short hair or maybe pulled back, not the
24 unruly dreadlocks that you see on the video on McIver sticking
25 out all over the place, not the unruly dreadlocks, but the

1 short hair and medium skin tone, not the light skin tone of
2 McIver, but the darker skin tone of Freeman. So, it was
3 Freeman who was out of the car pulling Amanda out. And where
4 does that put him? Because the person pushing was in the
5 front seat, he would've been in the backseat. So, they were
6 in the same place that they were when Tabetha last saw them.
7 And where did the shot come from? Well, you know the shot
8 came out of her head. The gun was actually in contact with
9 the head, but the bullet came out the other side and we know
10 at least some of it did because the jacket was found with her
11 body, the jacket of the bullet. We'd also know it didn't
12 break a window because there was no broken glass at the
13 parking lot when the crime scene took pictures. And if we
14 looked at the videos later in the day at Bennettsville and at
15 Marshville, you can see something strange. The driver's side
16 window is open. Why? This is someone fleeing from a
17 shooting. The last thing he wants is to be seen in that car.
18 He wants to hide behind those dark tinted windows and all the
19 other windows in the car except the windshield were tinted
20 pretty dark. Why have that window open and risk being seen?
21 Plus, it's July. It's 2 or 3 o'clock in July, the hottest
22 part of the afternoon in the hottest month of the year. In
23 Bennettsville, in the midlands of South Carolina, the hottest
24 region of South Carolina, just ask anybody that lives in
25 Columbia, why would that window be open if the air conditioner

1 in that works fine. I'd argue it's because when that bullet
2 passed out of Amanda's head, whatever was left of it hit that
3 window and also whatever blood and tissue came out of that
4 wound. The remains of the bullet probably broke that window,
5 not enough to go through it because it had that film, that
6 tint film might've held the window together and stopped the
7 bullet but not stopped the breaking. Alternatively, it
8 might've just been all the blood on the window dripping down.
9 You can't drive a car like that around, people will see it and
10 say why has that guy got a bloody window, or it could've been
11 both. The window could've been broken and covered with blood,
12 but that would be a reason for that window to be open. The
13 windshield, you didn't see anything wrong with the windshield.
14 If the bullet had gone from the rear seat, it would've been
15 the windshield that took a hit. It would've been the
16 windshield covered with blood, but it wasn't, it was the
17 driver's side door that was missing. And, if we think about
18 -- that puts the shooter in the passenger seat, the passenger
19 seat where Nicholas McIver was. It also puts Amanda's head
20 slightly turned away from him and tilted down, but she was
21 looking for the door handle, she was looking for a way out.
22 Again, McIver, the shooter. What else? Who winded up with
23 the car? After they got to Lancer, who took the car? Can you
24 imagine what the interior of that car would've been like?
25 Amanda was shot in the head. She would've bled all over the

1 inside of that car. The window wasn't, for some reason, what
2 I just told you, not there. Hot day, the shooter would've
3 driven that car. Driven it all the way back to Charlotte.
4 What else? Is McIver used the cards. He's on the video doing
5 it, can't deny it. You've got the receipts, you've got the
6 pictures of him using Amanda's cards and Amanda's
7 grandfather's card, which apparently Amanda also had. What
8 else did he do? He tried to burn it. We know that. We had a
9 witness here, a young lady nine years old now, seven at the
10 time, Shaniah. Shaniah saw him. She saw the man go in there
11 and burn the car. A memorable incident in a child's life,
12 burning of a car in her neighborhood right down from her
13 house, and she saw that man and she identified him from the
14 lineup. You've got the lineup, State's 44. She picked him
15 out of there 100 percent certain immediately. That was him.
16 What else do we have to link him to the burning of that car?
17 Well, has soon as he leaves Marshville -- you've got the phone
18 records and you've got the timelines. As soon as he leaves
19 Marshville, he starts calling someone named Tyquajua.
20 Tyquajua is the most frequently called number on his phone.
21 You also have those records. State's Exhibit 36, Tyquajua,
22 the girlfriend, lives less than a half a mile from where that
23 car was burned. Look at those numbers, the calls to that
24 number, they were all short. Apparently, he didn't get
25 through. I submit to you that he drove to that house and got

1 somebody to pick him up after he did what he needed to do.
2 He drove to the closest place to burn that car. It wasn't out
3 in the country, but it wasn't in the densely populated part of
4 Charlotte either. It was a dead-end road with no traffic,
5 houses with big yards, just a few houses, the most remote
6 place close to Tyquajua's apartment, and he burned that car.
7 But as soon they burn that car, what did he do, he starts
8 burning up the phone again calling Terrell Freeman. He calls
9 him and calls him and calls him until he quits. I'd argue
10 again, the time of the day indicates the only time they
11 weren't calling each other is when they were together. He
12 quit calling because they met up again. But it was McIver
13 that pulled something out of his waistband. It was McIver
14 that wasn't willing to get hugged at the Holiday Sands. It
15 was McIver that put that glinting object into the back of the
16 truck and then picked it up again when he drove back to
17 Charlotte. It was McIver that took the car filled with blood
18 and drove it back to Charlotte. It was McIver that used the
19 cards. It was McIver that burned the car. Something else
20 McIver did, somewhere between the Lancer and Bennettsville
21 where he had on long shorts -- or he has on shorts, some sort
22 of denim-looking shorts that just went down to the knee. He
23 changed to sweatpants that went down to the ankle, baggy
24 sweatpants. Why change his clothes? And if you'll also
25 notice something else, when he and Freeman left the Lancer, he

1 put all his stuff in the back of the truck. He walked over to
2 the -- to the car to drive to Charlotte with nothing but that
3 thing in his waistband that he recovered from the truck, the
4 gun. He didn't have any clothes. At Bennettsville, you can
5 see him on video opening the trunk of that car. He put on a
6 dead woman's pants to hide what he had done.

7 I encourage you to watch the videos. Look also when
8 they're leaving the Lancer. He puts a white cloth in the back
9 of the -- of the truck. Is that another white T-shirt? Did
10 he change white T-shirts? Look at him and you can decide for
11 yourself.

12 McIver was also the one that spent more time with Amanda.
13 You heard Tabetha say that it her and Freeman were the item
14 and Amanda was spending time with McIver. It would've been
15 McIver that would've been able to formulate a motive to do
16 what he did to Amanda. And, again, we don't have to prove
17 motive; we don't know what the motive is. We've got no way of
18 knowing it, of distilling that information, but the person
19 that would've had more contact with her, more likely to have
20 motive would've been McIver. So, all the evidence points to
21 McIver as the -- as the gunman, the one with his finger on the
22 trigger, the one who still had the gun when they got back to
23 the Lancer, the one that would've the gun before they even
24 went to North Carolina.

25 What about Freeman? Well, Freeman's guilty, too, as an

1 accomplice. Ten to twenty seconds after that shot was fired,
2 Ken Thompson looks up and he sees them pulling and pushing
3 Amanda out of the car. Ten seconds, they're already out of
4 the car. Ten to twenty seconds, they've already got her on
5 the ground where he could see her size and her hair color,
6 which he described. That's immediate action. That's not, let
7 me think about it for a minute, what am I gonna do? That's
8 immediate action; that's taking part in the crime. And what
9 else did he do, he immediately got back in the car and fled.
10 Fled to the Lancer, got his stuff, put it in the truck, and
11 fled to points unknown, presumably Charlotte. What else? All
12 during that flight when they weren't together, they were on in
13 phone contact. They were in contact; they talked for 20
14 minutes. Add it up for yourself; don't take my word for it,
15 look at the records. Twenty minutes during that -- while they
16 were fleeing from Myrtle Beach back to Charlotte, they talked.
17 What happened as soon as McIver burned the car? He starts
18 calling Freeman. He calls him and calls him and calls him
19 until I argue to you that they got back together and the calls
20 stopped. McIver deleted Freeman from his phone. He deleted
21 the contact. Maybe trying to cover this whole thing up, but
22 he could delete the fact of the calls and the fact of that
23 number. McIver and Freeman were together the whole time
24 working together, together the whole time. They knew each
25 other was doing. If McIver had the gun, Freeman would've

1 known it because they were staying together in the same room,
2 riding in the same truck, riding in the same car. McIver and
3 Freeman were together all the time. They were together when
4 they moved in to the Lancer, they were together when they went
5 to Holiday Sands and met the girls, they were together when
6 they went back to the girls' room, they were together when sex
7 tapes were made. Imagine that, I mean, something as private
8 as sexual activity and one guy is there with his cell phone
9 filming it. When they went back to the Holiday Sands in the
10 truck the next morning, they were together. They went into
11 the pickup together. They got into the car with the girls
12 together. They rode to Shallotte and Supply together.
13 They were together when Amanda was shot. They returned to the
14 Lancer together. After they left in separate vehicles, they
15 were in phone contact the whole time. Together for the whole
16 thing; it was a team murder and both are responsible. Sure,
17 only one, only McIver put the gun to her head and pulled the
18 trigger. Both participated, both are liable of the murder and
19 they both should be found guilty together.

20 As I said in the beginning, the evidence is there. They
21 were the two that left Supply, North Carolina in the car with
22 Amanda. They were the two that were seen by Ken Thompson
23 pulling her dying body out of the car of the K&W parking lot.
24 They were the two on video driving her car back to the Lancer,
25 making a quick getaway from the Lancer. The proof is there.

1 And if McIver pulled the trigger, Freeman is guilty as an
2 accomplice. Remember this is a contact wound. This is a gun
3 right against the head. You heard the -- our expert, Dr.
4 Proctor, testified to it. The gun was right up against her
5 head. So, this was -- why do you put a gun against somebody's
6 head? Immobilize them, keep them from going anywhere. Does
7 the angle indicate she was turning, going to a door? We don't
8 have to prove that because putting a gun -- taking a gun out,
9 raising it, putting it against someone's head, and pulling the
10 trigger is malice aforethought in and of itself. Pulling a
11 dying woman out of a car and dumping her on the pavement like
12 garbage is malice aforethought. And again, we don't have to
13 prove motive. It's not part of the proof of this case. We
14 could speculate. I can give you some ideas. Maybe they
15 wanted the car, maybe it was a carjacking gone bad, maybe it
16 was an old vendetta from when she lived in Charlotte before
17 she moved down to the coast, maybe it was just somebody else's
18 vendetta. Maybe they were trying to get Amanda to do
19 something she didn't want to do, like take her to the ATM and
20 make her withdraw her grandfather's funds with that ATM card
21 of his. Maybe it was a disagreement that just arose in that
22 trip to North Carolina. Who knows why? But, the fact is at
23 some point they both had malice. At some point, McIver had
24 enough malice to take out a gun, raise it, put it to her head,
25 and pull the trigger and kill her. At some point, they both

1 had enough malice to haul her dying body out of that car
2 together and throw her on the pavement to die and then steal
3 that car and drive it back to the Lancer. Both are murderers;
4 both the trigger man, McIver, and the accomplice Freeman.
5 Both are guilty of grand larceny because they both stole that
6 car and used it and converted it to their own use together.
7 And even though one pulled the trigger, both were in
8 possession of that gun because it was in the car with them
9 together.

10 A final word about the burden of proof. The burden of
11 proof in a criminal case is always proof beyond a reasonable
12 doubt. You can't prove things beyond all doubt; it's proof
13 beyond a reasonable doubt. The Judge will give you some idea
14 of what a reasonable doubt is. He'll tell you things like
15 it's proof that leaves you firmly convinced of the guilt of
16 the defendant but he can't draw you a picture, he can't give
17 you a mathematical formula for reasonable doubt. Reasonable
18 doubt is -- it's a standard that really comes from you. You
19 as a cross section of the community have to decide whether
20 there's enough evidence here to punish the men who put the gun
21 to Amanda's head and pulled the trigger and killed her, pulled
22 her dying body out of the car, dumped her, and stole her car.
23 It's up to you to decide if they're gonna have consequences.
24 And you give them consequences by finding them guilty of all
25 charges.

1 Thank you.

2 THE COURT: Mr. Bellamy?

3 MR. BELLAMY: May it please the Court?

4 THE COURT: Yes, sir.

5 CLOSING BY BELLAMY:

6 MR. BELLAMY: Mr. Solicitor, Mr. Spratlin, Madam
7 Forelady, ladies and gentlemen of the jury, y'all have heard
8 me coughing this week and a little bit probably, my voice is a
9 little hoarse, so I apologize.

10 When I stood up here I believe it was Monday and talked
11 to you, one of the things I mentioned to you is theory versus
12 facts in evidence. That sometimes we lawyers like to get up
13 here and theorize and then see if we can put the facts into
14 our theory. And I suggested to you that what really needs to
15 happen is the facts paint the picture, not our theory. And as
16 I listened to Senior Solicitor DeBusk talk just then, I heard
17 an awful lot of theory. Maybe it was this, maybe it was that,
18 maybe it was this, maybe it -- maybe? And the window, well,
19 maybe it could've been this, it could have been -- what person
20 sat on this witness stand and said anything about that? Who?
21 Nobody. It's a theory. I've got a theory, too. Nicholas
22 McIver smokes and there's evidence of that because there's a
23 videotape at the Holiday Sands of him smoking while he's
24 talking to Amanda Fisher. Might that be the reason that the
25 window is down? Theories, that's not what we do in criminal

1 court. It might be what we do when we're sitting around
2 talking at the dinner table or out with our friends or playing
3 golf or whatever you do for fun, but when we come in this
4 criminal court, we don't go on theories. We go on facts and
5 evidence that's competent.

6 And to that end, at the beginning of this case, I didn't
7 hear anything about it was the hand of one hand of all. That,
8 you know, we're gonna establish an agreement and these sort of
9 things. But, as Mr. DeBusk talked to you today, he's got a
10 theory that my client did it. Here's the problem with his
11 theory. His witness, Dr. Lee Proctor, an expert, not like me,
12 not like Mr. DeBusk, he's not an expert, he told you there is
13 no way to determine where the shooter was sitting. He's an
14 expert. Do you recall that?

15 Detective Lynam, lead detective, 25 years. Remember the
16 question I asked him? I believe it was either the last or
17 next to the last question I asked him. Do you have any
18 evidence that suggests my client's -- my client pulled the
19 trigger? What was his answer? No, I do not. But yet, Mr.
20 DeBusk stands up here for the state and theorizes that's the
21 way it happened. And I told you, suggest to you, that what he
22 needs is evidence that tells you it happened, not what he
23 thinks may have occurred.

24 Folks, this week I've had the pleasure of running into
25 and meeting and talking to some folks that were sitting right

1 out here. Particularly the gentleman in the blue shirt who's
2 Amanda Fisher's grandfather. It might seem kinda strange to
3 you, here I am defending a man charged with murder involving
4 his family, but we speak to each other in the mornings and at
5 lunch, and joke around a little bit. And he understands I've
6 got a job to do. But, you know, I thought to myself, what it
7 must be like to be in those shoes. I've got two daughters,
8 and I can only imagine wanting justice for either of them.
9 But also, I have three sons. One who is the exact age -- not
10 exact but by a year, of Mr. McIver. He's away at college; be
11 home next week. And I thought what must it be like to sit in
12 Nick's mother's chair where Nicholas McIver faces up to life
13 in prison, and he may have just been in a car and not known
14 anything. What must that be like as a parent? And as a
15 parent myself, I have thought about that on both sides. This
16 is a tragedy, no doubt. But it would be tragic as well if we
17 sent someone away for life and they didn't do it.

18 Now, I touched on at the beginning, presumption of
19 innocence. His Honor will tell you what that means, but I
20 used some examples how one can do that and I talked about my
21 grandmother and stuff and the person you most trust and used
22 this rail. I suggest to you, as we start out -- as you start
23 out to deliberate on this case here in a little bit, that the
24 scenario you should think is, well, he's innocent. So that
25 means he was just in the car, he didn't know what Mr. Freeman

1 was gonna do, he didn't have any plan, he didn't -- nothing of
2 that, that he was just there. So, if you start here and
3 that's your firm belief right now, that's your belief, no he
4 was just there and something bad happened. And then say,
5 okay, well, how do I get down there. The state bears the
6 burden to drag me all the way to there. So then the question
7 becomes what evidence, not theories, what might have happened.
8 What evidence did they bring to convince me beyond a
9 reasonable doubt? What do you have? What do you have that
10 takes you from this position that you're in now, which is he
11 was just in the car? What did they give you? Let me
12 summarize -- and I may cherry-pick out certain witnesses and
13 talk about them, but I -- y'all heard the evidence. I'm gonna
14 basically sum up this scenario with you and then go back and
15 talk about it. You've got two people from Shallotte,
16 Brunswick County, cousins want to come to the beach,
17 somebody's birthday, hang out and have a good time. Two
18 people from Charlotte, likewise coming to the beach, gonna
19 stay a couple of nights, not one, and randomly somehow meet
20 off of a balcony or however, exchange phone numbers, meet up,
21 names are given, where people live, vehicles are seen, they
22 party. They drink, they use drugs, there's some sexual
23 contact at least between two of the parties by evidence, and
24 I'm not gone speculate on anything beyond that. And during
25 the course of that, my client along with Mr. Freeman are

1 photographed and known to be photographed. They videotape.
2 And let me just touch on that, and I know Ms. Oxendine talked
3 about she didn't consent or something. But the Lancer Motel,
4 which is a single room motel. This isn't a suite like it is
5 at the Holiday Sands. I don't know you couldn't have known.
6 But the best evidence is the videotapes which would reflect
7 whether the person knew or didn't know, but the state chose
8 not to show those to you. And that might've been out of
9 respect, but this is a criminal case and it's their burden and
10 job to paint that picture for you of exactly what was going
11 on. And I don't know if it's relevant whether she knew or
12 didn't know other than it maybe make you not like Mr. McIver,
13 if he was hiding in the closet, but again that's not any
14 evidence of anything relevant to this case. But, that goes on
15 and they're back and forth from hotels and in and out and
16 then, ultimately at some point -- and again, and I listened to
17 Solicitor DeBusk, that my client sat in the car because he
18 refused to be hugged because he knew he had a gun. Where is
19 the evidence that he refused to be hugged? I mean, that's a
20 theory again, no evidence. Nobody -- did Ms. Fisher say --
21 not Ms. Fisher -- Ms. Oxendine say, yeah, we couldn't ever get
22 close to him, he would never -- that's a theory that somebody
23 is trying to come up with. But then the two girls, excuse me,
24 they go to the Lancer. They've left their room. They go to
25 them, and somehow the agreement is made, we're gonna ride with

1 you. Solicitor DeBusk makes a big deal, why didn't they stay
2 in the room? What does it matter if they decided to go
3 together, maybe they were gonna get something to eat. I don't
4 know. But, it was all voluntary. There was no problems,
5 there was no tensions, there was nothing. Asked Ms. Oxendine,
6 nothing between anybody. They stop at Taco Bell. Maybe
7 that's why they rode, to get something to eat.

8 Dropped Ms. Oxendine off. She's got their pictures,
9 their names, where they're from, knows what they're driving,
10 where they're staying. Okay. They go to another location so
11 she can get clothes and come back and continue and stay
12 another night. Nothing to indicate there was any problem at
13 that location, nothing disturbed, nothing broken. And even a
14 phone call by Ms. Fisher to her stepdad. All is well. I'm
15 gonna hang out in Myrtle Beach. I'm gonna get some clothes.
16 And then in the parking lot of K&W, the car pulls in, not
17 screeching, not here, there, pulls perfectly in a parking
18 place, is in park, and the event happens.

19 And as Dr. Proctor said, I can't tell you medically where
20 the shooter was. Solicitor DeBusk theorizes he knows. Then
21 the car is seen returning into the Lancer. They retrieve
22 items and leave separately.

23 Now, he showed you the videotape of my client looking to
24 do something and says, look, there's a glint. A glint?
25 Folks, they've shown a bunch of videos and he's got, I don't

1 know how many pictures here of stills in a video. Pretty good
2 high resolution, isn't it? Why couldn't we do it on the video
3 from the Lancer -- we know the technology exists -- if it
4 would show you that gun. And I suggest to you that evidence
5 sometimes or cases sometimes hinge not on just what's
6 presented, but what isn't. And it's his burden to have done
7 that; he did not. And I suggest to you, it's because it
8 wouldn't show you a gun. But, he'd rather leave it to
9 speculation, conjecture, and theory that it is. Why didn't he
10 bring it to you?

11 Then my client is seen as in that, two different
12 locations big as day, not trying to hide nothing, using the
13 person's credit card on a couple of occasions. Then he is
14 seen by the cute little girl yesterday, I believe it was
15 yesterday, walking away from a car that's burning. And then
16 we got phone calls back and forth. Most of them are missed
17 but I'll take the solicitor's word for it that there were 20
18 minutes total of talk time, assuming it's not going to voice
19 mail. And then two or three days later, Mr. McIver goes to
20 the Charlotte-Mecklenburg Police Department with his phone to
21 speak with them because it's been on the media that they want
22 to talk to him.

23 That's a basic summary of what this case is, factually.
24 What does that all tell us by circumstance? Does it tell us
25 there was a plan to kill Ms. Fisher? You do it at 11:15 on

1 July 4th week on a Saturday at open business on Business 17
2 where her body is left in an open place to be immediately
3 discovered. You've got no way to exit the scene other than
4 that car, and you have just within an hour dropped of a
5 witness who has video -- who has cell phone photos of you,
6 knows your name, where you live, where you were staying, and
7 what you're driving. Does that sound like a plan?

8 Then, you go to two gas stations where you know you're
9 being videotaped and you know there's gonna be a transaction
10 of a credit card receipt. Does that sound like somebody who's
11 got a plan? And then you go to Sally Lane in a residential
12 neighborhood on a Saturday where people aren't working, kids
13 are playing in the street, and right in front of somebody's
14 driveway at a mailbox, you burn a car. When you were in
15 Marshville, and you've got a aerial of that Marshville, it's a
16 bunch of fields and nothing, somebody'd think trash was
17 burning; they wouldn't know nothing. Does any of that sound
18 like a plan? By circumstances it suggests there was no plan.
19 If something happened in that car at 11:15 A.M. July 9th,
20 2016, no question about it. I told you at the beginning, I'm
21 not gonna question some of this evidence that's a fact. And I
22 suggest to you, there were two people in the car, my client
23 and Mr. Freeman. I don't dispute that.

24 But where, as I started this, is the evidence? Again the
25 state's evidence is they cannot tell you who shot. That would

1 be purely conjecture and speculation, and that's from a
2 medical expert and the lead detective. So, then you go to
3 hand of one. What evidence do they have that Mr. McIver knew?
4 And the Judge is gonna use a word in his charge, I believe,
5 but you listen, it talks about prior. What is prior? Prior
6 to the act, because once that bullet is shot, the murder has
7 occurred. It's not if she lives five seconds. The act is
8 that and that is the murder. So, prior to that, where is the
9 evidence of a plan, scheme or design to commit another
10 unlawful act, not the murder, another unlawful act. Where is
11 it? Kidnapping is gone; it's been dismissed. Where is the
12 evidence? Not a theory, not a speculation. Is it that he
13 used the credit card? That's after. And again, it -- it's --
14 it's evidence -- the only evidence is there's no plan. He
15 burns the car. That might be another crime in North Carolina,
16 but that's not evidence that he knew prior, prior to that
17 bullet being fired, that Mr. Freeman was gonna do it.

18 Folks, it was also -- and I talked to you at the
19 beginning, things that -- and I talked to you a little bit
20 earlier about things that haven' been excuse me, brought to
21 you. And I told you I might ask the police some questions
22 about what they did or didn't do, and I would do it in a
23 respectful way, but it was important that I do it. And some
24 of the things I want to talk to you about that might have
25 assisted you in determining a verdict, I want to go through.

1 Number one, there were a number of items, the bullet,
2 other -- fingernails, parts of the truck that were sent to the
3 State Law Enforcement Division. We've not seen one SLED
4 officer, analyst come up here and talk to you. We have not
5 seen any report. Likewise, I asked Detective Lynam, Did you
6 have a crime scene expert, somebody that focuses on that, and
7 SLED has those people, that could've helped you analyze the
8 entrance/exit wounds to try to figure out? No, we didn't do
9 that. Did you see anybody from Charlotte here to talk about
10 their analysis of that vehicle? Now, they were here to do the
11 photo lineup, but not a single person or report was put in to
12 tell you what they did to that car in Charlotte, because maybe
13 if we knew where the bullet hit -- and again, it's burned, but
14 the metal is not burned. If we saw a mark that would indicate
15 where that bullet hit, it could've helped you. Then get --
16 because you've got the angle on the head, and when you know
17 where it hits in the car, it gives you a better idea of where
18 the person may or may not have been seated, again, always
19 having the variable, you don't know the angle of where the
20 person's head may be. But, they didn't do that. They didn't
21 do it. They seize evidence, they send it to SLED, and then
22 they don't tell you anything else. It's their job to bring it
23 to you, not mine.

24 They had Mr. McIver's phone and they got all this
25 Cellebrite stuff they talked about, which is much more

1 extensive than just phone records. And I asked them, I said,
2 you know, did you contact on the day of this event, the people
3 that he may have called or contacted to see, hey, did he tell
4 you anything? No, we didn't do that. We didn't do that.
5 Nope, didn't call anybody. They had the information and two
6 years to do it. Don't you think it would be important to want
7 to know, hey, you talked to somebody three hours because you
8 -- we got a timeline on what happened. You know, did he
9 mention anything to you about he'd been to the beach? Did he
10 mention -- how did he seem? What was his demeanor? They
11 didn't do any of it.

12 Likewise, Mr. Freeman, they didn't have his phone because
13 he didn't bring his phone when he turned himself in. So, you
14 can't get all the data and information on that, but we do know
15 who he called that day. They did; they had it July 18th, 2016
16 and brought it and gave it to the solicitor on Tuesday the
17 24th of April, 2018. And during those 21, 22 months, they
18 didn't do a single thing to investigate anybody he would've
19 talked to in that same timeframe. What was his demeanor? How
20 did he act? What did he say? Why? I can't tell you. But
21 that's a question I would want to know if I were seated in
22 this jury box. Why wouldn't you do that? Why wouldn't you
23 get a crime scene analyst to help you with the car? Why
24 wouldn't you bring SLED down here to tell us whatever the
25 results are on the tests on the bullet and the car? Did they

1 swab the truck for GSR up in Charlotte to see if there was
2 gunpowder residue on that steering wheel, which would indicate
3 the person driving it, Mr. Freeman, did the shooting, but they
4 didn't bring that. They don't even tell you what they did on
5 it.

6 I told you at the beginning, Mr. McIver, he was 20 years
7 old at the time; ten years junior to Mr. Freeman. He made bad
8 decisions. I'm not gonna say poor because that's not a strong
9 enough word. When he drove off in that car and used the
10 credit cards, burned it. And that's a crime of accessory
11 after the fact, but he is not guilty of murder as a principal
12 of pulling the trigger because the evidence doesn't support it
13 at all, the state's evidence. This isn't where you've got you
14 know, competing experts; I paid somebody, they paid somebody
15 and everybody bounces off in the middle. It's there guy, Dr.
16 Proctor, Owen Lynam, ain't got no evidence, ain't got no
17 evidence that he shot anybody.

18 And Owen Lynam, I believe the last question I asked him,
19 Do you have any evidence that my client entered into
20 knowingly, an agreement, a plan, a conspiracy -- da-da-da and
21 went on -- to commit any crime that day? No, I do not.
22 That's where you get the hand of one, because hand of one, the
23 typical case as Solicitor DeBusk said is, three or four of us
24 get together and we gonna break into somebody's house or do
25 something, and I'm going in and you're driving and you're gone

1 be the lookout and you do this, and in the course of me going
2 in I get confronted by the owner and I shoot and kill him --
3 bless you -- in order to accomplish that burglary or robbery.
4 Well, in that kind of scenario, we know who the principal is,
5 me, and then the hand of one and hand of all is well we want
6 to get everybody else in the bag in on it too because they
7 were part of it beforehand, so they should be responsible. In
8 this case, we don't even know who the principal is and who --
9 who the other is to hold them accountable because they haven't
10 established which.

11 It's just as likely -- and I tell you the totality of the
12 circumstances is, is this ain't no plan. This was someone
13 from sufficient reasoning on their own lost it because they
14 were high or whatever, anger, don't know, and did a horrible
15 thing to Ms. Fisher, a horrible, horrible thing, and she died.
16 But, unless the state proves to you, dragging you from I know
17 that he didn't do it, because that's where you got to start,
18 not in the middle, over here to beyond a reasonable doubt.
19 What is beyond a reasonable doubt? I haven't talked about
20 much about that. I've heard it said that that's the kind of
21 doubt that would cause a reasonable person to hesitate,
22 hesitate to act. So, when you go in that jury room, if you
23 sit down and say, I wish I had heard this evidence, or that's
24 just -- there's too many other possibilities it could be,
25 that's reasonable doubt. If you have any question of anything

1 you would've wanted to hear, that's reasonable doubt. And I
2 think I pointed out a lot of different things, but the other
3 thing I want to say this they've also got to eliminate any
4 other reasonable hypothesis as to what could've happened. And
5 I say in this case, there's all kinds of theories. The
6 solicitor went through a number of things, maybe it's a
7 vendetta, maybe -- vendetta, where's that come from, from who?
8 No evidence of that. But, if you sit in that jury room and
9 think what if I'm with someone and for reasons sufficient to
10 themselves, they do something horrible and, because of fear
11 because I've just seen them shoot somebody, I helped them, or
12 loyalty or whatever it might be, I'm not guilty as the
13 principal; I'm guilty as an accessory.

14 You know, it used to be, they tell me, a long, long time
15 ago that a criminal case it was either you did it or the jury
16 had to determine absolutely you didn't. Well, in our country,
17 we sort of consolidated absolutely didn't and absolutely did,
18 and added a third part which is called not proven. So, not
19 guilty is not saying I'm 100 percent convinced they didn't do
20 it, because we're judging the state, not the defendants. It's
21 saying the state just simply hasn't given me enough. That's
22 not guilty, not proven.

23 You each took a solemn oath to follow the law. And
24 common sense tells me, and human nature tells me, that nobody
25 is going to want to say not guilty, not proven, because we

1 know she was shot in the head. Nobody's gonna want to do that
2 because it's not gonna feel good because we know she was
3 murdered. But, your solemn oath is to follow the law, not to
4 speculate, not to guess. And I very respectfully submit to
5 you that following the law in this case is not proven. And
6 that's not a judgment on Amanda Fisher, her family; that's an
7 obligation you took. It's a statement that just hasn't been
8 proven beyond, beyond a reasonable doubt to eliminate other
9 possible scenarios, other than hypothesis.

10 I've been doing this 20 -- in November will be 28 years.
11 And when I first came back, I guess, September 28 years ago, I
12 went to work for a Circuit Judge, his portrait hangs over
13 there, Sidney Floyd. I worked for him for a year and learned
14 a lot from him and listened to him talk to juries. One
15 description that he used to give on and one description that
16 he used to give on presumption of innocence and burden of
17 proof and stuff is this. He would stand up and had his robe
18 on -- he probably didn't have any shoes on at the time, but he
19 had his robe on -- and he would say, imagine the defendant
20 with this robe on and that this robe isn't black as his was,
21 but it was white and it was a robe of innocence that is draped
22 upon the defendants from the moment they walk in this
23 courtroom, and it remains firmly upon their body until the
24 state rips every piece of it away with competent evidence
25 beyond any reasonable doubt so that there is no hesitation,

1 there is no question of what more. And as I came in here
2 this morning and looked at his portrait, I thought, that's
3 what I'll tell this jury.

4 Nicholas McIver is not guilty on the charge of murder,
5 possession of a weapon during a violent crime. He is guilty
6 of grand larceny. There may be another day for other charges,
7 but today I ask you to follow your oath and return a verdict
8 of not guilty.

9 Thank you so very much.

10 THE COURT: Mr. Spratlin?

11 MR. SPRATLIN: Thank you, Your Honor, may it please the
12 Court?

13 THE COURT: Yes, sir.

14 CLOSING BY SPRATLIN:

15 MR. SPRATLIN: Good afternoon, ladies and gentlemen of
16 the jury. One thing I want to make sure you're clear on
17 because in these closing arguments, just like for the entire
18 trial, I've been the last person you heard from. If there was
19 a question asked by Mr. DeBusk or Mr. Bellamy of any witness
20 in this case, it applies to my client just as if I asked it.
21 I can't get up there and re-ask every question or else we'd be
22 in trial for three weeks because I'd just have to keep
23 repeating everything everybody else asked. So, that's why I
24 haven't been asking as many questions as Mr. DeBusk or Mr.
25 Bellamy. It's not that I don't think that information

1 important, it's not that I don't think that information is
2 relevant to my client; it's that it's already been asked so
3 there's no need.

4 And to that end, I'm also going to try not to repeat
5 everything you've heard during Mr. DeBusk's and Mr. Bellamy's
6 closing arguments. But there are several things that I think
7 are important and applies specifically to my client, Terrell
8 Freeman, and I am gonna point those out to you and it might
9 take a while and I know you've had to listen to a whole lot,
10 but I promise you if you power through this, you will see
11 where my client is not guilty.

12 Last night, I was talking to an attorney friend of mine
13 and we were discussing murder cases in general, not anything
14 specific with this one but just in general. And he said
15 something that made me kinda think. He said, it is harder for
16 a jury to say not guilty in a murder case when there's not
17 enough evidence than it is any other kind of case. At first,
18 when I was thinking about what he just told me, it didn't
19 quite make sense. Murder cases are the most serious cases in
20 the entire state of South Carolina. You are jurors on the
21 most serious charge you could possibly ever be a juror on.
22 Obviously, the stakes are as high as they could possibly be
23 for the state, for the co-counsel, for the codefendant,
24 certainly high for my client and me.

25 So, you would think, just thinking about it, that jurors

1 would require or want to be more certain of their decision in
2 a murder case than they would ever want to be about a decision
3 in any other kind of case because of the stakes that are
4 involved. But as I thought about it more, as I sat around
5 pondering what my friend had told me and what he -- and
6 thinking back on my experience of my last, I haven't been
7 doing it nearly as long as Mr. Bellamy, I've been doing it
8 about 15 years. Thinking over my last 15 years, 10 as a
9 prosecutor, I thought that he was right. I've seen that.
10 I've seen murder cases where it's very difficult for a jury to
11 say there's just not enough evidence. I can't be certain that
12 he did it. I can't vote guilty.

13 Here's why I think that is -- and I'm telling y'all this
14 because I don't want this to be a trap y'all fall into. The
15 emotions are higher in a murder case than any other kind of
16 case and you've seen that. Every time a picture of Amanda
17 Fisher was shown, every time a video was shown, someone in the
18 courtroom is crying. She had a family who loved her, a family
19 that lost a loved one. And, we're all people, every single
20 person in this room is a human being. We all have empathy.
21 Empathy when you see someone hurting, when you see someone
22 suffering, empathy makes you want to alleviate that suffering,
23 alleviate that hurt.

24 As a juror, these people have been told since two days,
25 24 hours, however long it took Owen Lynam to declare that this

1 case was solved. These people have been told that Nicholas
2 McIver and Terrell Freeman murdered their daughter. I submit
3 to you they probably believe it wholeheartedly because they
4 don't know any better and that's what law enforcement has told
5 them. So, if you're looking to alleviate their pain and
6 suffering, the only way you do that is by convicting the
7 client, convicting my client, convicting Mr. Bellamy's client.
8 But, your job is not to alleviate their suffering. As hard as
9 it is, as tough as it is, any emotional, any wrenching of the
10 heart that you have about returning a verdict of not guilty,
11 is not your role as the juror. Your role as a juror is not to
12 think with your heart; it's to think with your brain. And as
13 hard as it is, as much as you've may, your heart may go out,
14 maybe you lost a loved one, maybe you kinda get how they feel.

15 Terrell has loved ones. They're gonna lose Terrell if
16 you don't do what justice calls for. Your duty, your
17 obligations are not to them. Your duty and your obligation is
18 to provide a fair trial for Terrell and the State of South
19 Carolina. And, to do that, you can't be weighed by your
20 heart; you got to think with your brains. That's the one
21 thing I'm gonna ask you each and every one of you to do when
22 you're back in that jury room. You see, because it's real
23 easy to get angry, it's real easy to get impassioned in cases
24 like this. It's real easy. Mr. DeBusk, in his opening and in
25 his closing statement, I think he said dumped her out like

1 garbage about five or six times. The only reason he used that
2 phrase is so that you will feel inflamed, anger, upset at what
3 they did. Not because it proves anything, not because it
4 talks to your brain but because it talks to your heart. I
5 want to speak to your brain.

6 In criminal trials, there's a mechanism to address the
7 issues of being overly emotional or thinking with your heart
8 rather than your brain, that's called the burden of proof and
9 presumption of innocence. And what that means is burden of
10 proof; the buck stops here. Any questions you have, any
11 evidence you want, anything more you want to see, one of these
12 two men will have to show them to you. It doesn't go over to
13 my table, because it certainly doesn't go to my client.

14 Now, how much evidence do they have to show you? Well,
15 you see because first off when my client came in this
16 courtroom at the beginning of this trial, he was presumed
17 innocent. That means, if all 12 of you, even after opening
18 statements, even after you heard Mr. DeBusk tell what he
19 expected to have happen, even after Mr. Bellamy told what he
20 expected to have happen, if after I told what I expected to
21 have happen, if y'all went back to that jury room right now
22 and took a vote right then and there, every single one of you
23 would have to vote not guilty, because he's presumed, when he
24 walked into this courtroom, not to have done what they said he
25 did. Only after these two gentlemen bring forth enough

1 evidence to convince all 12 of you -- 14, excuse me,
2 alternates, but y'all aren't gonna be involved in this
3 decision most likely -- all 12 of you that my client is guilty
4 of not just doing something wrong, not just being a bad guy,
5 not just doing what somebody -- you wouldn't want somebody to
6 do or what you don't think somebody should do in a situation
7 of extreme stress. We don't just have to prove that he did
8 something bad, you know, he could've done this, he could've
9 done that. They have to prove explicitly exactly what they
10 said you did, that he murdered Amanda Fisher, that he
11 possessed a weapon during the commission of that murder, and
12 that he stole a car.

13 I'm not gonna stand up here, and I didn't at opening,
14 because first off, I wouldn't be honest to say my client
15 didn't do anything wrong that day; he did. He drove or rode
16 away in a car from the scene of the crime after Amanda's life
17 has already been taken. Went back to the hotel, got his
18 stuff, drove Nicholas McIver's truck back up to North
19 Carolina, supposedly. Had to get home somehow. Maybe you
20 would have wanted him to go to the police, maybe you would've
21 wanted him to not go back to Charlotte. Maybe you would've
22 wanted him to drive straight to the North Myrtle Beach Police
23 Department and report the crime. He went home. Is that so un
24 -- is that so difficult to understand why someone would've
25 done that? Why someone would have gone home when their buddy,

1 their friend, their co-worker, just shot somebody in front of
2 them. Still had the gun on him. He went home. Maybe you
3 would've wanted him to not go home. But not going home -- but
4 going home does not make him guilty of murder. It just
5 doesn't. How does it make him guilty of murder? When you're
6 in that jury room and somebody says, well, he drove -- went
7 home, so that makes him guilty. Ask them how. They won't be
8 able to tell you because it just doesn't. It might him guilty
9 of something, misprision of a felony, not reporting it,
10 whatever. Even accessory after the fact but not the crime
11 itself of murder. See, because the state has to prove my
12 client guilty of murder beyond a reasonable doubt.

13 Mr. DeBusk got up here. Mr. DeBusk gave all sorts of
14 theories. Mr. DeBusk basically wrote a screen play for Law
15 and Order, but none of that is evidence. Nothing Mr. DeBusk
16 theorized, this evidence showed -- pick up these pieces of
17 paper, it's gonna be back in the courtroom with you. See if
18 you see anything about a vendetta on this piece of paper, this
19 piece of paper, that piece of paper, that piece of paper, any
20 of these photos, this disc, that disc, see if you see anything
21 about it. No, you don't, because Mr. DeBusk just made that
22 up. It's a theory of the case that he has which is not based
23 on any piece of evidence sitting right there on that table,
24 and that is what you've got to base your decision on, this
25 evidence here, and what you heard from the witness stand.

1 Now, there are two ways that the state can actually prove
2 my client guilty. One way is as Mr. Bellamy stated, that he
3 was the person who pulled the gun out and shot. Even the
4 state, whose job it is to convict my client, agrees there's no
5 evidence that he was the one that shot, no evidence that he
6 had a gun. In fact, Tabetha Oxendine was all over him, didn't
7 feel a gun. Now, Mr. DeBusk theorizes, well, he must've known
8 Nick had it because they're together. I've got a pair of keys
9 in my pocket. Do you know why I have a pair of keys in my
10 pocket? I'm standing right in front of you. It's a theory;
11 it's not proof. That's all. There is absolutely, positively,
12 no evidence in the record, direct, circumstantial -- and I'm
13 going with the circumstantial evidence more, the distinction
14 between the two of them. But, there's absolutely no evidence
15 in the record that my client pulled out a gun, put it against
16 Amanda Fisher's head and pulled the trigger. And if any of
17 you are thinking that, you need to think about why you're
18 thinking that because my guess is it's for an improper reason.
19 It's not based on the evidence presented because none of this
20 -- none of that showed it.

21 The other way, is what you have heard probably more times
22 in your life than you've ever heard this phrase before, if
23 you've ever heard before, hand of one is the hand of all. You
24 see, hand of one is hand of all -- and the Judge is gonna give
25 you specific instruction on it and that is the part of the

1 trial or part of the Judge's charge that I'm gonna ask you --
2 you need to listen to all of it, but I'm gonna ask you to
3 listen especially hard to that charge because it's important.
4 When he starts talking about hand of one hand of all, ears go
5 up if you can. Hand of one is the hand of all does not -- let
6 me first tell you what it's not. It is not, these two guys
7 were at the beach, they're partying, they're hanging out, Nick
8 is Having sex with Tabetha -- or Terrell is having sex with
9 Tabetha and Nick's somewhere with Amanda. Lo and behold, they
10 all drive up to Shallotte, go to Taco Bell, drive back in the
11 car and Amanda gets shot. Two people in the car, one person
12 got shot. Charge them both. That's not hand of one hand of
13 all. Even the example Mr. DeBusk gave of hand of one hand of
14 all, being a lookout driver, being the getaway driver, you
15 know a crime is gonna occur. You don't just walk into the
16 bank and your buddy pulls out a gun and starts robbing the
17 place and you're like, whoa, and then he's like come on, come
18 on, we gotta go after he gets the money and you go. That's
19 not a crime. That might be accessory after the fact, but your
20 buddy has got a gun, he just robbed a bank, you might just do
21 what he says.

22 The best example I have for hand of one hand of all, and
23 it is the classic example. It is the 1970s example of hand of
24 one hand of all, but it's the robbery of a liquor store. If
25 you go into a liquor store with your buddy, knowing that he's

1 gonna rob it and you assist him, you lookout, you make sure
2 nobody is in the liquor store, you case the place out, make
3 sure that the person behind the counter, you know a woman or a
4 weak man that they can easily be taken and you go tell your
5 buddy that, you're guilty of hand of one hand of all. But you
6 go in the liquor store to get a bottle of vodka and your buddy
7 lo and behold pulls out a gun and shoots the clerk, you're not
8 guilty because you didn't know a crime was gonna occur. You
9 have to know that a crime is going to occur and that makes
10 sense. Think about it. I know there's a part of you with
11 your heart that wants to say, this man was with this guy that
12 killed Amanda, he needs to be held accountable, too, and maybe
13 he does for something, but not murder. There's no evidence
14 that he knew that Nicholas McIver was gonna pull out that gun
15 and shoot, none. No evidence he knew Nicholas McIver even had
16 a gun; there's just theories, theories which are not supported
17 by any piece of evidence.

18 The hand of one hand of all charge, as I stated it's
19 probably the most important charge you're gonna hear. There's
20 a couple of parts of it I want to talk about it because I
21 suspect this is what the Judge is gonna tell you, but listen
22 up, he's the one to tell you what it actually is. Don't -- if
23 there's a conflict, you go with that man. Two or more people
24 acting together to commit a crime are criminally responsible
25 if there is a probable and natural consequence of the act

1 something occurs, and that makes sense. With the liquor store
2 metaphor, if you go in with a buddy who has a gun to rob a
3 liquor store, it's a natural consequence that your buddy might
4 pull out and might shoot the clerk. That's just a natural
5 consequence because if you've got a gun in somebody's face, it
6 might go off. That's what that means, natural consequence.
7 Prior knowledge without more is not enough. So, even if you
8 know someone is gonna go in the liquor store and rob the
9 store, that's not enough; you still can't get convicted of
10 murder. So, even if you knew the person was gonna go rob the
11 liquor store and they shoot the clerk, you can't be convicted
12 of murder. There's no evidence my client knew Mr. Freeman was
13 gonna commit -- I mean, Mr. McIver was gonna commit any crime.

14 And the most important phrase I want you to listen for
15 with the Court when he reads his instruction is actual and
16 prior arrangement. You have to actually agree to aid and abet
17 and assist. Now, Mr. DeBusk told you, he's right, you can
18 make that decision right at the scene. If the evidence
19 supported that Nicholas McIver pulled out the gun and then
20 Terrell Freeman, not knowing he was gone pull out the gun,
21 decided to grab Amanda Fisher and hold her there, well, then
22 yeah, he would be guilty under the theory of hand of one hand
23 of all. But again, that's just a theory not supported by any
24 piece of evidence. Because they haven't proven and they can't
25 prove that my client ever laid a finger, a hand on Amanda

1 Fisher, that he ever wished any bit of harm to Amanda Fisher.
2 See, my guy, all the evidence supports that Terrell was at the
3 beach having a good time. Why would he do it? They don't
4 have to prove motive. Mr. DeBusk is absolutely right, they
5 don't, but motive helps you understand. Motive helps you
6 think, not feel, think about why somebody would do something.
7 Why would my client be a part to the murder of Amanda Fisher?
8 What possible reason could he have? All night long he's been
9 partying and hanging out and having a good time by all
10 accounts. You didn't see the videos, but you heard about the
11 videos. No issues between Terrell and the girl that he was
12 with, Tabetha, no issues at all. Why would he do it?
13 Detective Lynam said that he had no information, nothing
14 turned up in his investigation as to why Terrell would want to
15 cause harm to Ms. Fisher. I don't know about Nick; I can't
16 speak for Nick. Terrell was with Tabetha and she's okay. I
17 don't know what happened. I don't know what was going through
18 his head. I don't know why he did what he did, but there was
19 no reason, nothing bad going through Terrell's head in regards
20 to Ms. Fisher, nothing they've proven, and that's the ultimate
21 question, nothing they have proven.

22 The Judge is also gonna charge you in addition -- and
23 he's actually gonna do this right before he reads the hand of
24 one hand of all charge and what's called mere presence. What
25 that means, what that stands for is that someone who is merely

1 present, someone who is sitting in the backseat of a car with
2 their buddy -- or front seat, wherever, because we're not
3 really sure where anybody was, because Mr. DeBusk can stand up
4 here all day and theorize and float ideas, but I do agree with
5 Mr. Bellamy when he said that we don't know. We don't know
6 whether she's turned this way, this way, or this way, could be
7 turned around; we don't know. Merely present, sitting in the
8 back of the car, sitting in the side of the car, sitting
9 wherever in the car and somebody pulls out a gun and shoots
10 Ms. Fisher. You didn't do anything, you're just sitting
11 there. You're not guilty because you're there. Who knows --
12 here's -- Mr. Thompson, let me talk about him because now I
13 think is a good time. I was gonna get into the actual details
14 of the witnesses in a minute, but I want to talk about Mr.
15 Thompson. He's seated right there. He's been here the whole
16 week. He was the first witness to testify. The man with the
17 yellow Mustang. He heard a boom or a pop, first initial focus
18 was on the road because he thought a tire had blew; he told
19 you that. Then he turns around and sees a body being dumped
20 out of a vehicle, however it wound up on the ground and he
21 runs, runs like his life depends on it, which I don't blame
22 the man one bit for doing. As I told him, I would've done the
23 same thing. But he couldn't be certain what really was
24 happening. He said it looks like somebody pulling and
25 somebody pushing, but it doesn't matter. Here's the thing, it

1 doesn't matter. She already got shot. According to the
2 doctor, the pathologist who testified, death was already
3 there. The murder had already occurred. Anything that
4 happened afterwards doesn't matter for the crime of murder.
5 As much as your heart wants it to, it doesn't matter for the
6 crime of murder. If you believe that my client was helping
7 get that body out of that car, it doesn't matter. It might
8 make him a bad person in other ways, it might make him guilty
9 of something else, but not murder, because that already
10 happened. Mr. DeBusk theorized that she would've been moving
11 or -- or breathing or gurgling, no evidence of that. The
12 pathologist said death would have probably been instantaneous
13 or very, very, quickly. The guy at the scene said she was
14 twitching. He even said it looked like an involuntary muscle
15 twitch, no other signs of life. Again, trying to get you to
16 think with your heart rather than your head. Oh, my God,
17 these guys dumped out a woman that was gurgling, a woman that
18 was twitching; no evidence of that. Think with your head.

19 Now, I'm not gonna go through each witness individually,
20 but I do want to kind of talk to you about each witness. I
21 feel it's my duty. I know it's been a little bit of time and
22 y'all are probably getting a little restless, so, I'm gonna
23 ask you to bear with me for a couple of more minutes.

24 I've already talked about Kenneth Thompson. The manager
25 of K&W that testified really didn't add anything to this case,

1 did he? He saw the body in the parking lot. He saw it twitch
2 and no other signs of life, involuntary muscle spasm, nothing
3 else. Officer Jones arrived on scene, searched for cameras,
4 videos, didn't find any. He really didn't add anything to
5 this case, did he? No. Carrie Rose arrived on scene, she did
6 a little something. She found out who the victim's phone was
7 and identified the victim by calling 911 twice on the phone.
8 Doesn't have any evidence, didn't provide anything that points
9 to my client being involved with this murder. Stepfather, it
10 must have been hard for him to testify and my heart goes out
11 to him and he told you everything he knew and if he knew more,
12 I'm sure he would've told you. He came home, it looked like
13 there was a beer on the porch and they -- it looked like
14 someone had come by, the toilet seat was up, so somebody came
15 by. That's it, not unusual. He knew Amanda was planning on
16 coming home, nothing out of the ordinary. He provided no
17 evidence of my client's guilt. People from the Lancer, the
18 Holiday Sands, and we'll talk more about the videos in a
19 second, so I'm gonna skip over those. The gas station videos,
20 no evidence of my client's guilt. Terrell Freeman was not
21 seen on any gas station video. Terrell Freeman was not seen
22 using a debit card. Terrell Freeman was not seen burning the
23 car in front of a child. Terrell Freeman was not seen with
24 that vehicle again, and Terrell Freeman was not seen with any
25 involvement of Nicholas McIver getting rid of any evidence.

1 Mr. DeBusk, when he gave his closing argument, kept using
2 the word, they drove the car up to North Carolina. They did
3 this. No, Nicholas McIver drove the car to North Carolina.
4 The car that the victim was shot in. My client drove the only
5 vehicle, the only way he had to get home. It might not make
6 him the best man in the world, but it doesn't make him a
7 murderer.

8 Dr. Proctor, in most murder cases I've tried over my
9 career, as a prosecutor and as a defense attorney, the
10 pathologist is one of the most important witnesses because
11 they kinda provide not so much crime scene as much as
12 additional evidence. All he could really provide was
13 trajectory and the fact that the gun touched the head. He
14 couldn't provide who touched -- who shot the gun, couldn't
15 provide what that person was thinking when they did it, what
16 the other person in the car was thinking about it. In
17 actuality all he did was establish that Amanda Fisher was
18 killed by a gunshot at this angle. Nothing that purports to
19 my client's guilt.

20 North Carolina people, spent a whole morning with North
21 Carolina people testifying about burned cars and what Nicholas
22 McIver did to that car on Sandy Lane and a little child
23 testified and said that she saw him burn the car. She never
24 saw Terrell Freeman. Other than the fact that my client knows
25 Nicholas McIver was here and that he was partying with him and

1 had some phone calls or voice mails, nothing she or any of the
2 witnesses from the North Carolina arson unit said in any way
3 purports to my client's guilt.

4 Will Lynch, Will Lynch did cell phones. Now, Mr. Bellamy
5 brought up how his client brought his phone with him and my
6 client didn't. The police could have -- I submit to you, the
7 police could have looked at my client's phone anytime they
8 wanted. You head how easy it is to get a search warrant,
9 that's why I asked Detective Lynam that question. How easy is
10 it, you go to a Magistrate, tell him why you need it, he signs
11 a warrant, you go and get it. Not difficult. They didn't do
12 it. So, we don't know what my client's records would show.
13 We don't know who his top contacts would be. We don't know
14 what text messages he sent or didn't send. We don't know
15 because the police didn't bother doing it. In no way, as I
16 said, the buck stops here. Anybody on this side, if you
17 wanted to see my client's Cellebrite records, you wanted to
18 see my client's call log and my client's text messages and my
19 client's top contacts, this table right here had to give it to
20 you. Not me, not my client. That's the burden of proof. I
21 submit to you, ladies and gentlemen, the contact on the phone,
22 if we're theorizing, if we're throwing out random theories,
23 you can come up with anything you want to make data say
24 anything you want. If you take -- there's a reason why North
25 Carolina doesn't tell the officer doing the photo lineup who

1 the suspect is, because if you go in already knowing the
2 problem or knowing the answer, you make it look like anything
3 you want. And I submit to you, that's what this phone data
4 shows. They had a theory on the case that Nicholas McIver and
5 Terrell Freeman were in cahoots. In cahoots to do what,
6 nobody knows, but I'm sure they were in cahoots because look,
7 they're talking on the phone, there's contacts. When I asked
8 Detective Lynch, this doesn't show they actually talked, does
9 it; it doesn't. He says not. It could have been voice mails.
10 It doesn't show. Is it so unusual when your buddy shot
11 somebody in the car right in front of you that you might want
12 to call and find out why after you've cooled down? Is it so
13 unusual that your buddy might be blowing your phone up like
14 don't go to the police, man; don't go to the police, man;
15 don't go to the police, man; I'll make it right, I'll make it
16 right, I'll do whatever I got to do. Is that so unusual, but
17 they didn't see these this way. That's just as plausible an
18 explanation as their theory that these guys are in cahoots and
19 these cell phone records prove it.

20 The funniest thing during probably this entire trial, the
21 thing that I kinda -- and in a murder trial, you don't ever
22 expect to use the word funniest -- but the fact that him being
23 the Number 9 most contacted person on Nicholas McIver's phone,
24 somehow implicates him in a murder. If that ain't stretching
25 it as far as you can stretch it, I don't know what is. God

1 help you if you're in a group text.

2 Nothing malicious about this. This does not prove that
3 my client committed a murder or in any way aided or assisted
4 Nicholas McIver in committing a murder. It might show they
5 sent text messages or phone calls a lot, it doesn't show what,
6 it doesn't show about what, it doesn't show anything about my
7 client's guilt. Nicholas McIver deleted my client's cell
8 phone number, that must mean they're in cahoots, or it means
9 my client quit taking any of his phone calls because he just
10 shot somebody in front of him. Again, can make it look like
11 whatever you want when you already know the answer you want.
12 It's not an objective analysis. It's not a let-me-see-where-
13 this-evidence-leads-me. If I put it all on the ground in
14 front of me, what path am I walking?

15 The police department has made their decision within 24
16 hours. As soon as they got a name from Tabetha, I submit to
17 you. And the evidence, it was gonna fit that. Amanda's phone
18 records, now we heard that Tabetha was also using this phone
19 because her phone was dead. These contacts highlighted -- Mr.
20 DeBusk was kind enough to highlight these for y'all, showing
21 the contact between Amanda's phone and my client's. A number
22 we readily admit and never hid from is my client's phone
23 number. It doesn't prove guilt. In fact, Amanda called him
24 first or Tabetha called him first. These boys didn't reach
25 out to these girls. My client didn't reach out to Amanda. It

1 wasn't some master plan to find a girl at the beach, rob and
2 kill her, because if it was, you don't rely on the person
3 you're preying on to call you. If you go in thinking he did
4 it, you can make this seem like whatever you want to make it
5 seem. That is why the presumption of innocence is so
6 important and that is what we are talking about here, y'all,
7 the presumption of innocence. The presumption is that this is
8 maligned, that this has no bearing on my client's guilt. It's
9 only after they present enough evidence that shows that it
10 does, that you can consider it in my client's guilt. There's
11 been nothing about that, nothing about the phone call, nothing
12 about what was said, nothing about anything of that is
13 abnormal or unusual on a Myrtle Beach Saturday night or Friday
14 night at this point, I think. It was probably more like late
15 Friday night early Saturday morning. If you know the answer,
16 you can make it say whatever you want.

17 The videos that Mr. Lynch or Detective Lynch talked
18 about, Owen Lynam talked about and Tabetha talked about, none
19 of that points to my client's guilt. He had consensual
20 relations with an adult female in a Myrtle Beach hotel room;
21 doesn't make him guilty of murder. It doesn't prove the
22 state's case one little bit. But, if you twist it, if you try
23 to make it, oh, well Nicholas McIver is in there videotaping
24 so they must be in cahoots then, too. No, there's no evidence
25 of that. It's just not there. You can't twist it.

1 Owen Lynam, Owen Lynam took a long time yesterday. But,
2 I want you to think about what information Owen actually gave
3 you. He played the videos, sure, those were already in
4 evidence.

5 The North Myrtle Beach Police Department could've done
6 more. I hope in your minds there is no doubt about that. I'm
7 not saying it's their fault, I'm not saying they're bad
8 people. I actually like them. But, they could've done more
9 and they could've answered the questions that you have because
10 you've got questions. You can't look at this pile of evidence
11 sitting here at the table that doesn't really show anything
12 regarding my client's guilt and say, I don't have any
13 questions. Again, the buck stops here. Why wasn't the car
14 processed until November 2016? Why? These men were already
15 arrested and charged with the crime. Why? Because you made
16 the evidence fit already and you didn't need to look at the
17 car. Open and shut case, ladies and gentlemen; lock them up.
18 Let's not worry about processing that car; it doesn't matter
19 what's in there. It's the car the woman was shot in and it's
20 not processed until July, August, September, October, four or
21 five months after the shooting.

22 Now, before I go over Tabetha, I want to talk to you a
23 little bit about the videos we watched because I'm sure you
24 thought as well as probably everybody sitting in this
25 courtroom thought, when these videos got played, oh my God,

1 it's going to answer all my questions. It didn't, because it
2 didn't catch the most important part. All it did was show two
3 guys at the beach hanging out with two girls at the beach
4 having a good time. And we don't contest and we don't say
5 that the evidence does not show that my client and Nicholas
6 McIver were the only ones in the vehicle with Amanda Fisher on
7 that drive back from North Carolina, but that's not enough.
8 You can't just say two people in the car, one shot, they're
9 both guilty of murder. I mean, sure you can come up with like
10 explanations for phone records and all kinds of stuff and
11 videos and check-in slips, and you can come up with all kinds
12 of reasons how you can -- if you go in assuming that both of
13 them are together to make that stuff fit your idea. But
14 that's not your job as jurors because if he's presumed
15 innocent and you got to do your job as jurors.

16 The only part of the video I'm really gonna talk to and I
17 know it's taking a little while, y'all, and I apologize, but I
18 think this is important and my client's life is on the line,
19 so I ask you to bear with me as long as you can. When they
20 come back to the Lancer hotel, my client goes in the room,
21 he's not there when Nick takes the gun out of his waistband
22 and puts it in the truck. When Nick retrieves the gun, my
23 client is not facing him. Even if my client knew the gun was
24 in the back of the pickup truck, even if my client is standing
25 right there looking at Nicholas McIver put the gun in the back

1 of the pickup truck, even if my client is sitting there
2 looking at him take the gun out of the pickup truck, go to the
3 white car and leave, it doesn't make him guilty of murder.
4 But Nick wouldn't even move the gun in front of Terrell.

5 Terrell went in the room, packed his stuff up, threw it
6 in the back of the pickup truck -- here's something that I
7 thought was interesting -- waited for Nick to leave, sat in
8 the parking lot for a while and then left. They want you to
9 think that he was somehow scheming with Nicholas McIver how to
10 get rid of the car. Again, if you go in thinking he did it,
11 you can sure make the evidence look like he did. Isn't it
12 just as plausible that my man over here is having a crises of
13 conscience? Isn't it just as possible that my man is trying
14 to figure out what to do when my friend just shot a girl in
15 front of me. What do I do? And yes, he went home. He went
16 back to where he was safe. It may not be what you think you
17 would do in that situation, but when you are stuck in a spot
18 like that, you don't know what you're gonna do.

19 Now, Mr. DeBusk talked about -- the last thing I want to
20 talk about on these phone records, I promise. Mr. DeBusk
21 talked about with these call logs how, Nick, once he's done
22 burning that car, is blowing Terrell up, blowing him up,
23 blowing him up, outgoing, outgoing, outgoing, outgoing,
24 outgoing, outgoing. I'm not gonna read them all, all
25 outgoing. Terrell ain't answering. Now, Mr. DeBusk wants you

1 to think the reason Nick quit constantly calling Terrell was
2 because, oh, they're together. That's a theory, another one
3 of Mr. DeBusk's theories. It's not evidence. There's no
4 evidence putting them together until they turn themselves in
5 at the police department after the car was burned, after
6 Myrtle Beach. Now, you can assume at some point, Nick got his
7 truck back, but you don't have any evidence of how he got his
8 truck back, where he got his truck back, who all was there
9 when he got his truck back. They work together at a
10 restaurant, Floyd's.

11 Tabetha Oxendine, I felt bad for her. I think y'all
12 probably do, too. Not only did she lose what seemingly as one
13 of her best friends, she lost a family member. And I'm sure
14 just like Amanda's other family, your heart goes out to her.
15 And I can only imagine what Tabetha was going through when she
16 had to testify about the intimate details of what happened
17 that night in front of what is her family, too. So, she
18 probably wasn't gonna admit she any kind of relations with
19 anyone other than Terrell that night because her family was
20 here. But, they went back to the hotel together alone.
21 Terrell stayed with the victim for all of about two or three
22 minutes and left. Obviously, no interest in the victim. He
23 was all about Tabetha. Goes back to the hotel where they are
24 and they continue to engage in sexual activity. In fact, they
25 are gone so long that the victim, according to her cell phone

1 records, text Terrell and says, Is Tabby there? I'm leaving.
2 Meaning that Tabby is not back at the apartment yet or the
3 hotel yet.

4 I submit to you, just as likely a theory as any of the
5 ones that Mr. DeBusk has thrown out today, that Tabetha slept
6 with Nick, Amanda found out, and she was angry. I submit to
7 you there may've been a fight. I submit to you 20-year-old
8 Nick with a hot head and a quick gun shoots her. I submit to
9 you, my man, Terrell, had been up all night drinking,
10 partying, having sexual intercourse, is asleep. Wakes up when
11 he hears the shot, jumps out of the car. I submit to you my
12 man is not guilty of murder, and he's not guilty because I
13 don't -- I say he's not guilty. No, that's not how this
14 works. He's not guilty because the burden stops here. He won
15 that one. He's not guilty because no one at that table proved
16 it.

17 You cannot just convict because you don't want to convict
18 or -- I'm sorry -- you cannot convict just because -- it's
19 been a long day for me too, y'all. You cannot just convict
20 because you don't want to not convict. You can't just take
21 the easy way out. You can't just say, they're buddies,
22 they're in the car together, clearly, they both must be
23 involved. You can't take the easy way out because that man's
24 life is on the line. Nick's is, too. But I'm worried about
25 Terrell, and Terrell's life is on the line and he didn't

1 commit a murder. He didn't pull out a gun and shoot anybody
2 and he didn't aid or abet. It's gonna be really hard for you
3 to say not guilty, but your job as jurors is to look at the
4 evidence, not theories, not hypothesis, not what might have
5 happened, not what if we read this way it could mean this.
6 Your job as jurors is to look at the evidence and see if the
7 state has proven my client guilty beyond a reasonable doubt.
8 They haven't. And that is why -- I told you before, it's not
9 easy to tell family or loved ones that there's just not enough
10 evidence for the people that they think killed their child to
11 go to jail. I did it as a prosecutor and it was the hardest
12 thing I've ever done in my life. I'm sure these fine
13 gentlemen have done it as well. I'm sure Owen Lynam has done
14 it. And today, unfortunately, y'all are gonna have to do it
15 because there's not enough evidence to convict Terrell Freeman
16 of murder, and you have to do the right thing. You have to do
17 your oath as jurors and you have to find him not guilty
18 because they haven't proved he was guilty.

19 Thank you, ladies and gentlemen, I believe that's all I
20 have for you.

21 BY THE COURT:

22 THE COURT: All right, Madam Forelady, ladies and
23 gentlemen of the jury, go to your jury room and we'll come
24 back in about 10 or 15 minutes. Thank you.

25 Everyone else remain seated while the jury retires,

1 please.

2 Ma'am.

3 (REPORTER'S NOTE: Jury exits courtroom. The following takes
4 place outside the presence of the jury.)

5 THE COURT: Anything from the state, Solicitor?

6 MR. DEBUSK: No, Your Honor.

7 THE COURT: Mr. Bellamy?

8 MR. BELLAMY: No, sir, Your Honor.

9 THE COURT: Mr. Spratlin?

10 MR. SPRATLIN: No, Your Honor.

11 THE COURT: All right. We'll come back in about 10 or 15
12 minutes. Thank you.

13 MR. SPRATLIN: Thank you, your Honor.

14 RECESS.

15 *****OFF THE RECORD*****

16 (On the Record.)

17 THE COURT: Solicitor, is the state ready for the jury to
18 come in?

19 MR. DEBUSK: Yes, Your Honor, we are.

20 THE COURT: Mr. Bellamy?

21 MR. BELLAMY: Yes, sir, Your Honor.

22 THE COURT: Mr. Spratlin?

23 MR. SPRATLIN: Yes, Your Honor.

24 THE COURT: All right. Very good.

25 Ask the jury to come in, please.

1 (REPORTER'S NOTE: Jury enters courtroom.)

2 CHARGE TO JURY:

3 THE COURT: All right, ladies and gentlemen, it's now my
4 duty and responsibility to give you the law that you will
5 apply to the facts and evidence you've heard in this case. I
6 told you at the very beginning, I wouldn't indicate to you
7 what I think the facts of this case are because it wasn't my
8 job. It's your job and your responsibility to examine the
9 facts and evidence in this case. And it being my duty to give
10 you the law, if you came into the courtroom with any
11 preconceived ideas of what the law is, what it ought to be,
12 what it should be, what you hoped it would be, you'll
13 disregard that. You'll take the law as I now give it to you
14 and apply it to the facts and evidence you've heard in this
15 case.

16 Again, I told you at the very beginning, one of your jobs
17 as the judges of the facts is going to be to judge credibility
18 and that is the believability of the witnesses that have
19 testified before you in this particular matter. Now, in doing
20 so, you can believe one witness against several, several
21 against one, you can believe a portion of what a witness says,
22 disregard the remaining portion of it. If you got a good and
23 sound reason for doing so, you could disregard it in its
24 entirety the testimony of a particular witness. You examine
25 whether or not that witness has exhibited to you any kind of

1 interest, motive, prejudice, that they might have in giving
2 you the testimony they gave from the witness stand. And, of
3 course, you examine the opportunity for knowledge, how they
4 come about that information that they gave to you. You don't
5 have any friends to reward, you don't have any enemies to
6 punish, and your verdict can't be the result of any kind of
7 passion, prejudice, or sympathy. It has to be an examination
8 of the facts and the evidence and looking at whether or not
9 the state has proven the guilt of the defendants beyond a
10 reasonable doubt.

11 I'll talk about this again in a minute. But, I told you
12 again at the beginning, you are deciding two cases. That is
13 with different indictments. You've got two defendants. Each
14 of them is separate. You've got the charge of murder,
15 possession of a weapon during the commission of a violent
16 crime, and grand larceny valued at 2,000 against Nicholas
17 Jacob McIver. You've got the indictments of murder,
18 possession of a weapon during the commission of a violent
19 crime, and grand larceny value 2,000 to 10,000 against Terrell
20 Freeman. You have to decide each and every one of those
21 separate charges distinctly. Each of them have different
22 elements of proof and law. Your decisions don't have to be
23 the same. They can be or they cannot be. It has to be
24 guided, your decision has to be guided by the facts and
25 evidence and the law that I'm giving to you. So, you'll have

1 three decisions on the defendant Nicholas Jacob McIver and
2 you'll have three decision on Terrell Freeman.

3 As I told you, we had a minor testify in this case, and
4 you heard the testimony from that child. When a witness is a
5 child, you must determine whether, as with all witnesses,
6 whether the testimony is credible or believable. And with a
7 minor, you can also consider the age of the child, the child's
8 ability to observe and remember facts, the child's ability to
9 understand and answer questions. It's up to you to decide
10 whether the child understood the seriousness of appearing as a
11 witness in a criminal trial, whether again the child
12 understood the questions, whether she had a good memory,
13 whether the child understood the difference between lying and
14 telling the truth.

15 To the indictments the state brought against the three
16 [sic] defendants. I told you the defendants pled not guilty.
17 That put immediately the burden on the State of South Carolina
18 to prove the defendants guilty beyond a reasonable doubt.

19 Now, in conjunction with that, in this case, the
20 defendants did not testify. This is not a factor to be
21 considered by you in any manner. You may not talk about it in
22 your deliberations. You may not use it mentally in making
23 your decision in this particular matter. The defendants are
24 presumed innocent unless and until the state can prove the
25 defendants guilty of the crime or crimes charged beyond a

1 reasonable doubt. That burden of proof remains on the state
2 of South Carolina throughout and it remains now.

3 The -- in this matter, the parties agreed to a
4 stipulation and I think it was more between the state and the
5 defendant Mr. Freeman. But there was a stipulation, that's an
6 agreement or concession made in a judicial proceeding, it's a
7 fact, and the parties have accepted that that is a fact and
8 you will regard that fact as being conclusively proven.

9 In this case, I allowed one witness to give their
10 opinion, sometimes called expert witnesses. Normally, we
11 obviously we don't allow people to give their opinion.
12 They've got to tell you what they saw, what they heard, what
13 took place in their presence. But some witnesses, by reason
14 of their education, experience, training in a particular field
15 will allow them to express an opinion but that doesn't give
16 them any special status. You judge all the witnesses the
17 same, you judge every witness' credibility and believability
18 the same.

19 There are two types of evidence that are normally
20 presented in virtually every criminal trial, and this case is
21 no exception. It's called direct and circumstantial evidence.
22 Direct evidence, that's the testimony of a person who asserts
23 or claims to have actual knowledge of a fact. Circumstantial
24 evidence, that's proof of a chain of facts indicating the
25 existence of a fact. The law does not make a distinction

1 between the two, and a greater degree of certainty of one over
2 the other is not required. But, to the extent the State of
3 South Carolina relies on any circumstantial evidence, all of
4 the circumstances must be consistent with each other and when
5 taken together point conclusively to the guilt of the accused
6 beyond a reasonable doubt. If the circumstances merely
7 portray the defendants' behavior as suspicious, that proof has
8 failed. The state has the burden of proving these defendants
9 guilty beyond a reasonable doubt of the crimes charged. That
10 burden rests on the state whether the state relies on direct
11 evidence, circumstantial evidence or a combination of the two.

12 Again, to the indictments, the defendants pled not
13 guilty. And again, that put the burden immediately on the
14 State of South Carolina to prove them guilty of those charges
15 that the state levied or brought against the defendants. It's
16 an important rule of law that a defendant, these defendants,
17 any defendant, charged in a criminal trial, no matter the
18 seriousness of the charge, are presumed innocent of the crime
19 for which the indictment was issued unless the state can prove
20 their guilt by evidence satisfying you of that guilt beyond a
21 reasonable doubt. That presumption of innocence didn't end at
22 the beginning of the trial. It hasn't ended now. It does not
23 end unless and until you believe the evidence the state
24 brought forward in this matter proves the guilt of the
25 defendant of the crime charged beyond a reasonable doubt. We

1 liken the presumption of innocence to a robe of
2 righteousness.

3 It's placed on the shoulders of the defendant and it stays on
4 the shoulders of the defendant unless and until the state rips
5 that robe of righteousness from the shoulders of the defendant
6 of proof that convinces you of the guilt of the defendant
7 beyond a reasonable doubt. This isn't just some legal theory.
8 It's just not some legal phrase. It's a substantial right to
9 which every defendant is entitled unless you, the jury, are
10 satisfied from the evidence of the defendant's guilt beyond a
11 reasonable doubt.

12 So, what's reasonable doubt? Reasonable doubt is the
13 kind of doubt that would cause an ordinary reasonable person
14 to hesitate to act. Proof beyond a reasonable doubt is proof
15 that leaves you firmly convinced of the defendant's guilt.
16 Now, there are very few things you can know with absolute
17 certainty and the law doesn't require the State of South
18 Carolina to give you that kind of proof. What is required is,
19 if based upon your consideration of the evidence, your view of
20 the evidence, you are firmly convinced the defendant is guilty
21 of the crime charged, you must find the defendant guilty. On
22 the other hand, based upon your view of the evidence, your
23 consideration of the evidence, you are not firmly convinced
24 the defendant is guilty of that crime charged, you must give
25 the defendant the benefit of the doubt and find him not

1 guilty.

2 Both defendants, being charged with the crime of murder
3 -- what's murder? The state has to prove beyond a reasonable
4 doubt that the defendant killed another person with malice
5 aforethought. Malice, that's hatred or ill will or hostility
6 towards another person. It's the intentional doing of a
7 wrongful act without just cause or excuse with an intent to
8 inflict an injury or under circumstances that the law will
9 infer an evil intent. It indicates a wicked or depraved
10 spirit intent on wrongdoing. Malice aforethought does not
11 require that malice exist for any particular time before the
12 wrongful act is committed, but that malice has to exist in the
13 mind of the defendant just before and at the time the act is
14 committed. Therefore, you've got that combination of the evil
15 intent and the act. Malice aforethought could be expressed or
16 inferred. It just means the manner in which the malice may be
17 shown to exist. It can be shown from the facts and evidence
18 presented in the case. Malice can be inferred from conduct
19 that shows a total disregard for human life.

20 The defendants are also charged with the crime of
21 possession of a weapon during the commission of or attempt to
22 commit a violent crime. The state must prove beyond a
23 reasonable doubt that the defendant was in possession of a
24 firearm or visibly displayed what appeared to be a firearm
25 during the commission of a violent crime. The firearm is

1 basically anything that is designed to or is readily converted
2 to expel a projectile. In order to find the defendant guilty
3 of the possession of a weapon during the commission of a
4 violent crime, you have to've found the defendant previously
5 guilty of a violent crime. As you might expect, murder is a
6 violent crime. So, to convict either defendant of possession
7 of a weapon during the commission of a violent crime, you will
8 have to have previously convicted them of the crime of murder.
9 If you have found them not guilty of the crime of murder, you
10 don't even consider this particular crime because you have to
11 have them committing a violent crime to even consider this
12 one. The state also has to prove again that -- the state has
13 to prove beyond a reasonable doubt that the weapon further
14 advanced or helped in the commission of that violent crime.

15 Grand larceny 2,000 to \$10,000. The state has to prove
16 beyond a reasonable doubt that the defendant took and carried
17 away the property of another against the will or without the
18 consent of another person, the slightest removal of the
19 property or the complete possession of the property even for
20 an instant by the defendant is shown -- is enough to show a
21 taking and carrying away. The state also has to prove beyond
22 a reasonable doubt the defendant intended to permanently
23 deprive the owner of the property, and the state also has to
24 prove beyond a reasonable doubt that the value was at least
25 2,000 but less than 10,000.

1 Mer0e presence. Mere presence at the scene of a crime is
2 not sufficient to prove someone guilty of that crime. A
3 defendant's presence where a crime is being committed or mere
4 association with a person who commits a crime does not make
5 that defendant an accomplice or an aider or abettor of the
6 person committing the crime. The burden is on the State of
7 South Carolina to prove every element of the crime charged.
8 If you find, after reviewing all of the evidence, the state
9 has proved the defendant was only present at the scene of a
10 crime and they have not proved beyond a reasonable doubt any
11 other par0ticipation in the crime, then you would find the
12 defendant not guilty.

13 Hand of one. If a crime is committed by two or more
14 people who are acting together in committing a crime, the act
15 of one is the act of all. A person who joins with another to
16 commit an unlawful act is criminally responsible for
17 everything done by that other person which happens as a
18 probable or natural consequence of the acts done in carrying
19 out the common plan and purpose. The act of one is the act of
20 all, or it is sometimes said, the hand of one is the hand of
21 all. Prio0r knowledge that a crime is going to be committed
22 without more, is not sufficient to make a person guilty of
23 that crime. Mere knowledge that another person is going to
24 commit a crime, even if the defendant is present when the
25 crime is committed, is not sufficient to convict the

1 defendant. That's, again, mere presence. The state has to
2 prove beyond a reasonable doubt by competent evidence the
3 theory of the hand of one is the hand of all.

4 A principal in a crime is one who either actually commits
5 the crime or who is present aiding, abetting, assisting in the
6 crime. When a person does an act in the presence of and with
7 the assistance of another, the act is done by both. Where two
8 or more acting with a common plan or intent are present at the
9 commission of a crime, it does not matter who actually commits
10 the crime, all are guilty. The hand of one is the hand of
11 all. 0

12 Present at the commission of a crime means to be
13 sufficiently near to aid and abet and assist in the commission
14 of a crime. However, again, mere presence at the scene of a
15 crime is not sufficient to convict one as a principal on the
16 theory of aiding and abetting.

17 That ladies and gentlemen is the law that you're gonna
18 apply to the facts and evidence you've heard in this case.
19 Now, I've had prepared for you verdict forms and they're
20 pretty straightforward. You got three charges, as I've told
21 you, on00 each defendant. So here, the State of South
22 Carolina versus Nicholas Jacob McIver. You got the three
23 charges; murder, possession of a weapon during the commission
24 of a violent crime, and grand larceny value over 2,000 less
25 than 10,000. On the charge of murder, we, the jury, by

1 unanimous consent find the defendant, Nicholas McIver -- and
2 there's two choices and I put one before the other, don't
3 assign anything to that, I've got to put one before the other
4 -- not guilty or guilty, a place for the foreperson to sign.
5 If you have found the defendant, Nicholas McIver, guilty of
6 murder, then you can proceed and must make a decision on
7 possession of a weapon during the commission of a violent
8 crime. Again, if you found him not guilty of that crime, you
9 need to skip over that one because you haven't found him
10 guilty of a violent crime. Then you have grand larceny value
11 over 2,000 but less 10,000. And again on the charge of grand
12 larceny value over 2,000 less than 10,000, we, the jury, by
13 unanimous consent, find the defendant, Nicholas McIver -- two
14 choices, not guilty or guilty. So, on each one of these, two
15 choices not guilty or guilty.

16 The same for Mr. Terrell Freeman, the same three charges.
17 On the charge of murder, we, the jury, by unanimous consent,
18 find the defendant, Terrell Freeman, not guilty or guilty. If
19 you found him guilty of that violent crime, you answer the
20 question. Possession of a weapon during the commission of a
21 violent crime, by unanimous consent, find him not guilty or
22 guilty. If you found him not guilty of murder, you skip over
23 it because that's the violent crime. Then you go to grand
24 larceny value 2,000 to 10,000, again, unanimous consent, not
25 guilty or guilty.

1 Madam Forelady, you will take these verdict forms, once
2 your jury has well and truly deliberated and reached their
3 unanimous decision on each one of these matters and check the
4 appropriate block, it states right there, check the
5 appropriate block and sign your name, and put the correct date
6 on each of them. Again remembering, if the person is found
7 not guilty of murder, then you skip over to the last one. You
8 don't need to consider possession of a weapon during the
9 commission of a violent crime.

10 I reiterate again, you've got two defendants, your
11 decisions don't have to be the same. They can be, but they
12 do not have to be the same. You look at the facts, you look
13 at the law. Each charge has different elements as I just told
14 you. Your decision on each crime does not have to be the
15 same; it can be but does not have to be. So, you treat them
16 separately. You're deciding three cases against Mr. McIver
17 and three cases against Mr. Freeman. It's on here and I've
18 said it several times, unanimous. Your decision must be
19 unanimous. Every decision you make must be unanimous. That
20 means 12/0, not 11/1, 10/2, any combination thereof.

21 So again, Madam Forelady, you check the appropriate
22 block and you sign your name on here, you are telling the
23 Court each and every member of the jury agrees that's their
24 verdict. So, if called upon by the clerk's representative
25 after the clerk reads the verdict for you to raise your right

1 hand and say, y0es, that is my verdict, all members of the
2 jury will be able to do so.

3 I'm gonna ask you, Madam Forelady, to take the regular
4 members of the jury to the jury room. The two alternates, I
5 want you to stay with us. Do not, do not begin your
6 deliberations until the bailiff has handed to you the verdict
7 forms and the exhibits. There will be submitted to you a
8 laptop with just play-only capabilities for you to view the
9 videos, if you so choose to do so. I assume that y'all are
10 technically capable of doing so, but if for some reason you
11 need any kind of0 assistance, don't hesitate to ask.

12 So, Madam Forelady, please take the jury to the jury
13 room.

14 The two alternates, please stay with us.

15 (REPORTER'S NOTE: Jury exits courtroom. The following takes
16 place outside the presence of the jury.)

17 BY THE COURT:

18 THE COURT: Is there any reason at this time that the
19 Court should not excuse the alternates? From the state?

20 MR. DEBUSK: No, Your Honor.

21 THE COURT: From your client, Mr. Bellamy?

22 MR. BELLAMY: No, sir, Your Honor.

23 THE COURT: From your client, Mr. Spratlin?

24 MR. SPRATLIN: No, Your Honor.

25 THE COURT: Ladies, I appreciate your service in this

1 case. Your job was to step in the shoes of one of the regular
2 members of the jury should they be unable to do so. I can't
3 tell you honestly how many times that happens for one reason
4 or another. It often happens. It didn't happen in this
5 particular case, but that was your job and responsibility.
6 All the jurors seem ready, willing, and able to perform their
7 duties so I'm able to excuse you from your service at this
8 time. I'm gone excuse you from your jury service for this
9 week. You earn that exemption from coming back to Circuit
10 Court jury duty for the next three years. I want to thank you
11 for your service and you are now excused.

12 Thank you very much.

13 (REPORTER'S NOTE: Alternates exit courtroom.)

14 THE COURT: Exceptions, deletions, additions to the
15 charge from the state?

16 MR. DEBUSK: None, Your Honor.

17 THE COURT: Exceptions, deletions, additions to the
18 charge from the defendant McIver?

19 MR. BELLAMY: Other than what was previously stated prior
20 to the charge being done on flight.

21 THE COURT: All right. Regarding that one matter that
22 Mr. Spratlin submitted to the Court; is that correct?

23 MR. BELLAMY: Yes, Your Honor.

24 THE COURT: All right. Very good.

25 And any exceptions, deletions, additions to the charge by

1 from the defendant Freeman?

2 MR. SPRATLIN: No, Your Honor, other than the charge I
3 requested which was denied by the Court.

4 THE COURT: All right. Very good.

5 All right. Gentlemen, first, regarding the state's
6 representative, the attorneys for Mr. McIver and Mr. Freeman,
7 gentlemen, I want to thank you for your work that you have
8 done in this case. You have done everything that the Court
9 would expect all of you to do in representing the interests of
10 your respective parties and clients. I appreciate that and as
11 your Presiding Judge want to thank you for that.

12 If you would please come forward and make sure all the
13 proper exhibits are ready to go into the jury. With that, we
14 will be at ease until the jury needs us.

15 Thank you very much.

16 MR. SPRATLIN: Thank you, Your Honor.

17 MR. BELLAMY: Thank you, Your Honor.

18 (REPORTER'S NOTE: Counsel reviews and consent to exhibits to
19 be submitted to jury.)

20 MR. BELLAMY: We're good.

21 THE COURT: All right. So, go ahead and submit them to
22 the jury for their consideration then.

23 (REPORTER'S NOTE: Deliberations commence at 4:25 P.M.)

24 RECESS

25 *****OFF THE RECORD*****

1 **(On the Record.)**

2 THE COURT: All right, gentlemen, the jury has sent a
3 note out basically where they wanted the hand of one charge in
4 writing submitted to them. And we have talked about it and I
5 will submit my written hand of one charge to them, but I told
6 you I thought to be fair to all parties, if the written
7 portion of the mere presence charge had to be submitted at the
8 same time.

9 As I understand it, Solicitor, the state is in agreement
10 with that?

11 MR. DEBUSK: Yes, Your Honor.

12 THE COURT: And for your client, Mr. Bellamy?

13 MR. BELLAMY: We are in agreement and just for the
14 record, Your Honor, I conferred with my client and he is in
15 agreement as well.

16 THE COURT: From Mr. Spratlin?

17 MR. SPRATLIN: Yes, Your Honor, same matter. I have
18 conferred with my client and he is in agreement and I'm in
19 agreement.

20 THE COURT: All right. So, we'll mark them as Court's
21 exhibits and we'll send them into the jury then.

22 All right. So, let's mark -- let's staple this one
23 together. That's the hand of one that's two pages.

24 COURT REPORTER: Court's 4 and 5.

25 COURT'S EXHIBITS 4 AND 5

1 MARKED FOR IDENTIFICATION

2 THE COURT: All right. Great. So, if you'd give it to
3 them please, sir.

4 All right. Thank you.

5 RECESS

6 *******OFF THE RECORD*******

7 COURT'S EXHIBIT NUMBER 6

8 MARKED FOR IDENTIFICATION

9 **(On the Record.)**

10 THE COURT: All right. Solicitor, it's the Court's
11 intention at this point in time, looking at the time, to send
12 the jury home since we have the availability of tomorrow and
13 that's the Court's intention at this time. All right?

14 MR. DEBUSK: Yes, Your Honor.

15 THE COURT: Mr. Bellamy?

16 MR. BELLAMY: Yes, sir, Your Honor.

17 THE COURT: And, Mr. Spratlin?

18 MR. SPRATLIN: Yes, sir, Your Honor.

19 THE COURT: All right. Ask the jury to come in, please.

20 (REPORTER'S NOTE: Jury enters courtroom.)

21 THE COURT: All right, ladies and gentlemen, I am gonna
22 send you home for the evening. We'll resume again tomorrow
23 morning at 9:30.

24 A couple of things regarding on your request that the
25 Court will have that prepared for you when you arrive in the

1 morning it will -- the bailiff will be able to give that to
2 you.

3 Again, the Clerk's Office will have something for you in
4 the morning. Please remember now and Madam Forelady, it will
5 be one of your responsibilities, until all 12 of you are
6 present, you may not talk about the case. It might be such
7 that, you know, he brings some of you up and you start with
8 whatever the clerk has for you, but you can't talk about the
9 case until everybody is there. Now, as soon as everybody's
10 there, you can start if you choose to do so, but we'll make
11 sure we have that charge on the circumstantial, direct and
12 circumstantial evidence for you in the morning when you start.

13 Again, even though y'all have started deliberating and
14 you have been talking about it, again, you can't talk about it
15 with anybody else. Only the 12 of you are making this
16 decision. Again, you're not researchers, you're not
17 investigators.

18 I'll see you back tomorrow morning at 9:30.

19 Thank you very much.

20 (REPORTER'S NOTE: Jury exits courtroom. The following takes
21 place outside the presence of the jury.)

22 THE COURT: All right, gentlemen. What we'll do on that
23 circumstantial evidence charge, basically it has obviously the
24 definition on direct evidence also on the front of it, but
25 it's direct and circumstantial evidence. The -- I had it as

1 you saw in three pages. That one sentence from the second
2 page, we're gonna put that at the top of the second page.
3 Obviously, y'all can look at it before we send it in. We'll
4 again mark it as a Court's exhibit and it'll be here for you
5 to look at. So, maybe if y'all are here at least by 9:20.
6 Y'all be here by 9:20 to look at that so that we can give it
7 to the jury just as soon as they are all assembled.

8 Anything else from the state at this point in time?

9 MR. DEBUSK: No, Your Honor. Thank you.

10 THE COURT: From your client, Mr. Bellamy?

11 MR. BELLAMY: No, sir, Your Honor.

12 THE COURT: From your client, Mr. Spratlin?

13 MR. SPRATLIN: No, Your Honor.

14 THE COURT: All right, gentlemen, I'll see y'all tomorrow
15 morning at 9:20 then.

16 Thank you very much.

17 **RECESS - END OF DAY FOUR**

18 *****OFF THE RECORD*****

19 **APRIL 27, 2018 - DAY FIVE**

20 COURT'S EXHIBIT NUMBER 7

21 MARKED FOR IDENTIFICATION

22 (REPORTER'S NOTE: Deliberation continues at 9:30 A.M.).

23 (On the Record.)

24 THE COURT: All right, Solicitor, I understand the jury
25 has reached a verdict. Is the state ready to receive it?

1 MR. DEBUSK: Yes, Your Honor.

2 THE COURT: Mr. Bellamy, your client?

3 MR. BELLAMY: Yes, sir, Your Honor.

4 THE COURT: And, Mr. Spratlin, your client?

5 MR. SPRATLIN: Yes, Your Honor.

6 THE COURT: All right. Let me speak to everyone in the
7 courtroom. We've asked this jury to do a difficult thing and
8 that is to arrive at a unanimous verdict in this particular
9 matter. Obviously, they've been diligent in doing so as
10 reflected by the time they have taken to reach their verdict
11 in this matter. This verdict will be received by everyone
12 assembled in this courtroom with respect and silence. There
13 will be no reaction to the jury's verdict. I will not
14 tolerate any kind of outbursts or reaction to the verdict. If
15 you do so, you will be detained by an officer of this Court.
16 After these proceedings are over with, I will go forward with
17 a contempt of court hearing by which I could send you to the
18 Department of Corrections for a period up to one year. If you
19 cannot abide by these orders, please leave the courtroom now.
20 If you stay, you are under this order.

21 Thank you very much.

22 Ask the jury to come in.

23 (REPORTER'S NOTE: Jury enters courtroom @ 11:00 A.M.)

24 VERDICT OF THE JURY:

25 THE COURT: All right. Madam Forelady, has your jury

1 reached a verdict in all of these matters?

2 JUROR 79: Yes, sir.

3 THE COURT: Very good. Could you hand the verdict forms
4 to the clerk's representative, please?

5 You may publish the verdicts.

6 CLERK: Indictment number 2016-GS-26-05558, State of
7 South Carolina, County of Horry versus Nicholas Jacob McIver,
8 on the charge of murder, we, the jury, by unanimous consent,
9 find the defendant, Nicholas McIver, guilty. Signed by Taylor
10 Creel, Foreperson dated April 27th, 2018.

11 Indictment number 2016-GS-26-05557, State of South
12 Carolina, County of Horry versus Nicholas Jacob McIver, on the
13 charge of possession of a weapon during the commission of a
14 violent crime, we, the jury, by unanimous consent, find the
15 defendant, Nicholas McIver, guilty. Signed by Taylor Creel,
16 April 27th, 2018.

17 Indictment number 2016-GS-26-05556, State of South
18 Carolina, County of Horry versus Nicholas Jacob McIver, on the
19 charge of grand larceny value over 2,000 but less than 10,000,
20 we, the jury, by unanimous consent, find the defendant,
21 Nicholas McIver, guilty. Signed by Taylor Creel dated April
22 27, 2018.

23 Indictment number 2017-GS-26-02606, State of South
24 Carolina, County of Horry versus Terrell Freeman, on the
25 charge of murder, we the jury, by unanimous consent, find the

1 defendant, Terrell Freeman, not guilty. Signed by Taylor
2 Creel, dated April 27, 2018.

3 Indictment number 2017-GS-26-02607, State of South
4 Carolina, County of Horry versus Terrell Freeman, on the
5 charge of possession of a weapon during the commission of a
6 violent crime, we, the jury, by unanimous consent, find the
7 defendant, Terrell Freeman, not guilty. Signed by Taylor
8 Creel, Foreperson, dated April 27th, 2018.

9 Indictment number 2017-GS-26-02609, State of South
10 Carolina, County of Horry versus Terrell Freeman, on the
11 charge of grand larceny value over 2,000 but less than 10,000,
12 we, the jury, by unanimous consent, find the defendant,
13 Terrell Freeman, guilty. Signed by Taylor Creel, Foreperson,
14 dated April 27th, 2018.

15 Ladies and gentlemen of the jury, if this is this your
16 verdict, so signify by raising your right hand.

17 Thank you.

18 THE COURT: All the jurors having confirmed their verdict
19 by the raising of their right hand, does the state wish the
20 jury polled?

21 MR. DEBUSK: No, Your Honor, thank you.

22 THE COURT: Does the defendant McIver?

23 MR. BELLAMY: Yes, sir, Your Honor.

24 THE COURT: All right, Madam Clerk, if you would poll the
25 jury by number please, ma'am.

POLLING OF JURY:

CLERK: Please stand when I call your number, I will ask
you two questions. After you answer them, please be seated.

Number 67. Is this your verdict?

JUROR 67: Yes, it is.

CLERK: Is this still your verdict?

JUROR 67: Yes.

CLERK: Number 252. Is this your verdict?

JUROR 252: Yes, ma'am.

CLERK: Is this still your verdict?

JUROR 252: (Indicates affirmatively.)

CLERK: Number 394. Is this your verdict?

JUROR 394: Yes, ma'am.

CLERK: Is it still your verdict?

JUROR 394: Yes, ma'am.

CLERK: Number 308. Is this your verdict?

JUROR 308: Yes.

CLERK: Is it still your verdict?

JUROR 308: Yes.

CLERK: Number 79. Is this your verdict?

JUROR 79: Yes.

CLERK: Is this still your verdict?

JUROR 79: Yes.

CLERK: Number 243. Is this your verdict?

JUROR 243: Yes.

1 CLERK: Is this still your verdict?
2 JUROR 243: Yes.
3 CLERK: Number 61. Is this your verdict?
4 JUROR 61: Yes, ma'am.
5 CLERK: Is it still your verdict?
6 JUROR 61: Yes, ma'am.
7 CLERK: Number 17. Is this your verdict?
8 JUROR 17: Yes.
9 CLERK: Is it still your verdict?
10 JUROR 17: Yes.
11 CLERK: Number 73. Is this your verdict?
12 JUROR 73: Yes, ma'am.
13 CLERK: Is it still your verdict?
14 JUROR 73: Yes, ma'am.
15 CLERK: Number 198. Is this your verdict?
16 JUROR 198: Yes, ma'am.
17 CLERK: Is this still your verdict?
18 JUROR 198: Yes, ma'am.
19 CLERK: Number 260. Is this your verdict?
20 JUROR 260: Yes, ma'am.
21 CLERK: Is it still your verdict?
22 JUROR 260: Yes, ma'am.
23 CLERK: Number 359. Is this your verdict?
24 JUROR 359: Yes.
25 CLERK: Is it still your verdict?

1 JUROR 359: Yes.

2 CLERK: Thank you.

3 BY THE COURT:

4 THE COURT: All right. The jury having affirmed their
5 verdict after being polled, is there anything as else to the
6 jury from the state?

7 MR. DEBUSK: No, Your Honor, thank you.

8 THE COURT: From the defendant McIver?

9 MR. BELLAMY: No, sir, Your Honor.

10 THE COURT: From the defendant Freeman?

11 MR. SPRATLIN: No, Your Honor.

12 THE COURT: All right, ladies and gentlemen of this jury,
13 I want to thank you for your service in this particular
14 matter. You have done exactly what this Court asked you to
15 do, that is well and truly deliberate and reach a unanimous
16 verdict in these matters.

17 I understand -- everyone in these proceedings, I
18 understand we ask you to do a difficult thing and that is to
19 arrive at a unanimous verdict in this particular case. I
20 appreciate your service. You've earned an exemption from
21 coming back to Circuit Court jury duty for the next three
22 years. If you do get a summons, you tell your Clerk of Court
23 the -- when you served and you will have that exemption. You
24 are not excused from your duties and released from the -- the
25 conditions I placed on you about not talking about the case.

1 You are now allowed to do so if you choose to do so. If you
2 choose not to do so, that is all you need to do is just tell
3 them you do not wish to talk about it. But, if you wish to
4 talk to anyone about it, you now are free to do so. With
5 that, you are now excused. Thank you very much.

6 (REPORTER'S NOTE: Jury exits courtroom. The following takes
7 place outside the presence of the jury.)

8 THE COURT: Mr. Bellamy, any motions from the defendant
9 McIver?

10 MOTIONS:

11 MR. BELLAMY: Yes, sir, Your Honor, we would make a
12 motion for a JNOV verdict -- to set aside the verdict and for
13 the Court to enter a not guilty or in the alternative a new
14 trial renewing all previous motions made both at the end of
15 the state's case and at the end of the defense case. Thank
16 you, Your Honor.

17 THE COURT: Thank you.

18 In this particular matter, regarding the defendant's
19 motion for a new trial, the Court respectfully declines to
20 grant the motion for a new trial as to the defendant, Nicholas
21 Jacob McIver. I do find that the matter was properly
22 presented to the jury. By the jury's verdict they have found,
23 by their view of the credibility and believability of the
24 witnesses, the defendant guilty. The Court finds that there
25 was more than sufficient evidence presented in this matter to

1 so convict the defendant McIver of these crimes and the Court
2 respectfully declines to grant the motion for a new trial.

3 Any motions on behalf of the defendant Freeman?

4 MR. SPRATLIN: Yes, sir, Your Honor, regarding the, only
5 conviction of grand larceny, I would move to an order in
6 arrest of the judgment. I believe there are matters of fact
7 and matters of law in this case that the -- that should
8 instruct the Court to vacate the jury's verdict of guilty on
9 the grand larceny and insert a verdict of not guilty. In the
10 alternative, I would ask and move for a new trial before this
11 Court. I did not make a motion for a directed verdict in
12 regards to the grand larceny, so I do not renew any trial
13 motions at this time in regards to that.

14 THE COURT: Regarding the motion for a new trial
15 requested by the defendant, Terrell Freeman, the Court
16 respectfully declines to grant the motion for a new trial. In
17 this particular matter, again, the jury's job, judging
18 credibility and believability, they have so found the
19 defendant guilty of the crime of the grand larceny of the
20 vehicle valued at 2,000 to 10,000. The Court finds that there
21 was more than sufficient evidence in the record to support the
22 conviction of the defendant for this particular crime. The
23 Court respectfully declines to grant your motion for a new
24 trial.

25 MR. SPRATLIN: Yes, sir, Your Honor. Thank you.

1 SENTENCING:

2 THE COURT: All right. Is the state ready to proceed
3 with sentencing?

4 MR. OSKIN: Your Honor, if we may approach with attorney
5 Spratlin, please?

6 THE COURT: All right. Very good.
7 (REPORTER'S NOTE: Bench conference is held off the record.)

8 THE COURT: Do y'all have the sentencing sheets?

9 MR. DEBUSK: Mr. Holford is preparing them, Your Honor,
10 and will be here in just a moment.

11 THE COURT: All right, sir. Very good.

12 MR. DEBUSK: Your Honor, the sentencing sheets.

13 THE COURT: All right. Very good. Thank you.

14 Very good. Thank you.

15 All right. I'll be glad to hear from you regarding these
16 matters.

17 MR. DEBUSK: Thank you, Your Honor. You've heard the
18 testimony of this case. You know what a needless and brutal
19 act this was. I believe it was the grandfather of Amanda,
20 very close to her, he in fact bought the car that she was
21 killed in, took care of Amanda. He's not able to speak right
22 now, but he wrote you a letter and asked if you would read it.

23 THE COURT: Yes, sir.

24 (REPORTER'S NOTE: Court reviews letter.)

25 THE COURT: Yes, sir, Solicitor?

1 MR. DEBUSK: Thank you, Your Honor. Amanda Fisher was
2 only 29 when this happened to her. She had come down to the
3 coast to find a new life and get settled in a new area. She
4 had a new job and this terrible thing happened to her out of
5 the blue. Her family, of course, greatly misses her. They've
6 been here throughout the trial. I just would like to tell you
7 the names of the people that have been here. Renee Vann, her
8 mother, has been sitting right here in the front row. You met
9 Mr. Michael Vann, who is her step-father. Her biological
10 father wasn't able to be here today. Jerry Fisher and Glenda
11 Fisher, the grandfather and grandmother, they've been here as
12 well also on the front row. Penny Fisher and Keith Fisher, an
13 uncle and aunt, and Shirley Shelton, another aunt have been
14 here throughout the trial, Your Honor. Our first witness, Mr.
15 Ken Thompson has also been here. He's friends with one of the
16 family members through church.

17 There are no words to express the loss of the life of a
18 young person like this. It's a brutal act and the state
19 believes it merits the maximum punishment.

20 Thank you for hearing our trial, Your Honor.

21 THE COURT: All right, sir. Very good.

22 All right. Mr. Bellamy, be glad to hear from you, sir.

23 MR. BELLAMY: Thank you, if it please the Court, Your
24 Honor. And I don't want to, Your Honor, as in most cases
25 when we do the pleas, we kind of have to tell you what the

1 facts are because you don't know. You've listened to it.
2 But, I did want to go over a couple of things as the facts
3 bore out these people didn't know each other, that it was a
4 random sort of meeting, everything was fine, and then
5 something happened. We don't know what happened to cause this
6 in terms of what would've precipitated it by motive, but it
7 appears to have not've been a plan to them based on where it
8 happened and the events that occurred after. It was totally
9 random. While we disagree with the jury's verdict, we
10 certainly respect this system and we have to move forward from
11 here.

12 Judge, at the time of this, Mr. McIver was 20 years old.
13 As you've already heard, he had a little bit of a record,
14 nothing to amount to a felony or anything that would've been
15 impeachable on cross. He was working at his family's
16 restaurant. He came down here for the weekend. The jury has
17 spoken.

18 We would ask -- obviously he has a two-year-old child
19 back in Charlotte. Likewise, his family members have been
20 here this week. His mother is seated in the front row, his
21 grandmother, fiancé, sister, uncles, dad. This is a tragic
22 event. As I said to the jury, I can see both sides of this as
23 a parent. We would ask obviously the Court has a minimum
24 sentence here, which is day-for-day. We would ask the Court
25 to consider that in light of his age, his lack of criminal

1 history, and that this does not appear to be something that
2 was planned. There was alcohol and drugs involved. That's
3 not an excuse, Judge, not at all. I don't know what happened.
4 There's just nothing in the record to indicate there was any
5 problem. It wasn't a drug rip-off, this wasn't over money.
6 We just don't know but it happened. And, I submit to the
7 Court that the minimum 30 year sentence can appropriately
8 punish someone, which is one-and-half times his life up to
9 now. We would respectfully ask the Court to consider whatever
10 leniency you can give him understanding that the minimum is a
11 severe punishment for man of 20 years of age, 22 at this time.

12 Thank you, Your Honor.

13 THE COURT: Thank you.

14 MR. DEBUSK: Your Honor, for the record, may I put in the
15 prior history on?

16 THE COURT: Yes, sir, please.

17 MR. DEBUSK: Thank you. In 2013, possession of a handgun
18 by a minor; from 2013, possession of marijuana up to half an
19 ounce; from 2013, resisting a public officer, a misdemeanor
20 level; from 2013, injury to real property; 2013, reckless
21 driving to endanger; from 2014, again, resisting a public
22 officer, misdemeanor; and from 2014 assaulting a female.

23 THE COURT: Thank you.

24 MR. DEBUSK: Thank you, Your Honor.

25 THE COURT: 2016-GS-26-5558, State of South Carolina,

1 County of Horry versus Nicholas Jacob McIver. Regarding this
2 particular matter, this was just an absolute tragedy,
3 senseless act and the Court recognizes that no sentence that
4 this Court can give can -- obviously, can't bring the victim
5 back, can't do anything but place this matter at an end.

6 The sentence of this Court is the defendant is committed
7 to the State Department of Corrections for a determinate term
8 45 years. The Defendant is given credit for any time he has
9 already served.

10 2016-GS-26-5557, possession of a firearm during the
11 commission of a violent crime, the defendant is sentenced to
12 the Department of Corrections for a period of five years
13 concurrent.

14 2016-GS-26-5556, the grand larceny, sentenced to the
15 Department of Corrections for a determinate term of five years
16 concurrent.

17 Thank you very much.

18 As to the defendant Freeman, is the state ready to
19 proceed?

20 MR. DEBUSK: Yes, Your Honor.

21 THE COURT: I'll be glad to hear from you.

22 MR. DEBUSK: Thank you, Your Honor. This vehicle was a
23 gift from Jerry Fisher, the grandfather, to Amanda and it's
24 very ironic that not only was it a place for a murder, but it
25 was used as the getaway car by the individuals who pulled her

1 out of the car while she was probably still moving.

2 This defendant has a pretty bad record, Your Honor.
3 It's, from 2008, in North Carolina, voluntary manslaughter for
4 which he was sentenced to 69 to 92 months; from the State of
5 Virginia in 2006, disorderly conduct; in 2007, manufacturing,
6 sale or possession of controlled substance, felony level,
7 which he was revoked from -- I'm sorry -- probation on
8 December of 2008.

9 THE COURT: Thank you, sir.

10 All right, Mr. Spratlin?

11 MR. SPRATLIN: Thank you, Your Honor. My client is 31
12 years old. He's originally from Virginia. He was living in
13 North Carolina before this incident and before his arrest.
14 While none of Terrell's family was able to be here for this
15 trial, he does have a family that supports and cares about him
16 very much. His mother has had people calling me and checking
17 in with me regularly about this case and the progress of the
18 case. So, he does have loved ones who care a great deal about
19 Terrell, even though they weren't able to drive down.

20 Your Honor, I understand the tragedy of this case and --
21 and like Mr. Bellamy said, my heart also and Terrell's heart
22 also goes out to the victims in this case and their loss.

23 Regarding the charge that my client has been convicted
24 of, the grand larceny, the evidence presented at trial showed
25 that the jury believed that my client was not involved with

1 the murder or the state did not prove that he was involved
2 with the murder, but that he did flee in the vehicle along
3 with the defendant, Nicholas McIver. He was only in the car
4 for a matter of, I believe, 40 minutes at the most, and then
5 he is never tied to that car, connected to that car again.

6 Your Honor, he has about 430 days credit at J. Reuben
7 Long. However, he turned himself in on this warrant. He
8 turned himself into the police up in North Carolina, excuse
9 me, back on July 13th at the same time as Mr. McIver. But
10 based upon a parole violation on the charge that Mr. DeBusk
11 referenced, he was not brought to J. Reuben Long until March
12 23rd. The only request I would ask the Court in addition to
13 taking whatever mercy the Court feels appropriate upon my
14 client, is to somehow fashion a sentence that accounts for the
15 fact that he spent 256 days incarcerated for North Carolina
16 while this warrant was outstanding, which he will not be
17 getting credit for by law or by Department of Corrections'
18 policy. So, I would just ask the Court to take that into
19 account and fashion whatever sentence the Court feels is
20 appropriate for my client.

21 THE COURT: All right. 2017-GS-26-2609, State of South
22 Carolina, County of Horry versus Terrell Freeman regarding
23 grand larceny valued 2,000 to 10,000, the jury having found
24 him guilty, Mr. Freeman, of this matter, it is clear that you
25 were in possession of this automobile. The maximum sentence

1 is five years. The defendant is committed to the State
2 Department of Corrections for a determinate term of five
3 years, credit for the time that he served in South Carolina
4 only.

5 Thank you very much.

6 MR. SPRATLIN: Yes, sir. Thank you, Your Honor.

7 THE COURT: These proceedings are now at an end.

8 Thank you very much.

9 MR. DEBUSK: Thank you, Your Honor.

10 **ADJOURNED**

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C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of State of South Carolina v. Nicholas Jacob McIver and State of South Carolina v. Terrell Freeman, held in the Court of General Sessions for Horry County, Horry County Courthouse, Conway, South Carolina, on April 23-27, 2018 as reported by Dixie C. Eubank.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.

Kay H. Richardson
Official Court Reporter

July 24, 2018.

WITNESSES

Owen Lynam North Myrtle Beach Dept of Public
Safety

Howard Lockett

ARREST WARRANT NUMBER

2016A2620700691
CDR: 0116 16-03-0010, 0020
DOA: 9/12/2016

ACTION OF GRAND JURY

TRUE BILL

[Signature]
Foreperson of Grand Jury
Date:

DEC 15 2016

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2016-GS-28- 05558

The State of South Carolina

County of Horry

George H. DeBusk, Jr.
16H04946

COURT OF GENERAL SESSIONS

DECEMBER, 2016 TERM

THE STATE

vs.

Nicholas Jacob McIver
E/ M
4229 Quinn Dr
Charlotte, NC 28269
DOB: 1995-07-30
SSN: 243819652

ATTORNEY: G. Scott Bellamy

Indictment for

MURDER

Jimmy A. Richardson, II, Solicitor

U. G. R. L.

2016 DEC 19 AM 11:15

DATE RECEIVED FROM

CDR US NAVY

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT

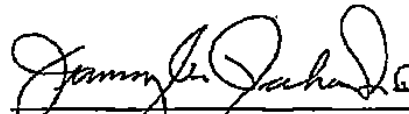
At a Court of General Sessions, convened on December 15, 2016, the Grand Jurors of Horry County present upon their oath:

MURDER

CDR: 0116 16-03-0010,0020

That Nicholas Jacob McIver, along or in combination with another, did in Horry County, on or about July 9, 2016, willfully, feloniously, and intentionally kill the victim, Amanda Fisher, with malice aforethought, either express or implied, by means of Shooting, and the victim did die as a proximate result thereof on or about July 9, 2016 in Horry County, in violation of Section 16-03-0010, S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



JIMMY A. RICHARDSON, II
FIFTEENTH CIRCUIT SOLICITOR

WITNESSES
Owen Lynam North Myrtle Beach Dept of Public
Safety

George H. DeBusk, Jr.

ARREST WARRANT NUMBER

2016A2620700737
CDR: 0549 16-23-0490
DOA: 9/12/2016

ACTION OF GRAND JURY

TRUE BILL

[Signature]
Foreperson of Grand Jury
Date:

DEC 15 2016

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2016-GS-26- 05557

The State of South Carolina
County of Horry

George H. DeBusk, Jr.
16H04946

COURT OF GENERAL SESSIONS

DECEMBER, 2016 TERM

THE STATE

VS.

Nicholas Jacob Mciver
B/ M
4229 Quinn Dr
Charlotte, NC 28269
DOB: 1995-07-30
SSN: 243819852

ATTORNEY: G. Scott Bellamy

Indictment for

**POSSESSION OF WEAPON DURING
COMMISSION OF VIOLENT CRIME**

Jimmy A. Richardson, II, Solicitor

ORIGINAL

2016 DEC 19 AM 11:15

DATE RECEIVED FROM
GRAND JURY

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on December 15, 2016, the Grand Jurors of Horry County present upon their oath:

**POSSESSION OF A WEAPON DURING THE COMMISSION
OF A VIOLENT CRIME**

CDR: 0549 16-23-0490

That Nicholas Jacob McIver did in Horry County, on or about July 9, 2016, possess a firearm, or visibly display what appeared to be a firearm, or visibly displayed a knife, during the commission or attempted commission of a violent crime, in violation of Section 16-23-0490, S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


JIMMY A. RICHARDSON, II
FIFTEENTH CIRCUIT SOLICITOR

WITNESSES

Owen Lynam North Myrtle Beach Dept of Public
Safety

Harold Locking

ARREST WARRANT NUMBER

2016A2620700738
COR: 3420 16-13-0030(B)
DOA: 9/12/2016

ACTION OF GRAND JURY

TRUE BILL

[Signature]
Foreperson of Grand Jury
Date:

DEC 15 2016

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2016-GS-26-05556

The State of South Carolina

County of Horry

George H. DeBuck, Jr.
18HD4946

COURT OF GENERAL SESSIONS

DECEMBER, 2016 TERM

THE STATE

VS.

Nicholas Jacob Mciver
B/ M
4229 Quinn Dr
Charlotte, NC 28269
DOB: 1995-07-30
SSN: 243819652

ATTORNEY: G. Scott Bellamy

Indictment for

**GRAND LARCENY
VALUE OVER \$2000 BUT LESS THAN \$10,000**

Jimmy A. Richardson, II, Solicitor

ORIGINAL

2016 DEC 19 AM 11:15

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on December 15, 2016, the Grand Jurors of Horry County present upon their oath:

GRAND LARCENY
(VALUE OVER \$2000 BUT LESS THAN \$10,000)

CDR: 3420 16-13-0030(B)(1)

That Nicholas Jacob McIver did in Horry County on or about July 9, 2016, take and carry away the personal goods of Amanda Fisher, valued at more than two thousand (\$2000.00) dollars but less than ten thousand (\$10,000.00) dollars, described as follows: 2012 Chevrolet Malibu, with the intent to deprive the owner permanently of such property and to convert the goods to his/her own use, in violation of Section 16-13-0030(B)(1), S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



JIMMY A. RICHARDSON, II
FIFTEENTH CIRCUIT SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Horry
STATE VS.Nicholas Jacob Melver

AKA:

Race: BLACK Sex: M Age: 22DOB: 1995 SS#: Address: 4229 Quinn DrCity, State, Zip: Charlotte, NC 28269DL#: SID#: *CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Murder (30 years - LIFE)in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45

*No Parole

w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives (Presentment to Grand Jury, (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

DeBusk, Jr., George H.

SCB16182

SC Bar#

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 45 years or ☐ under the Youthful Offender Act not to exceed yearsand/or to pay a fine of \$; provided that upon the service of days/months/years and/or paymentof \$; 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 the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135. Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-60 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$ Payment Terms: ☐ Set by SCDPPPSRecipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-226 (DUI Breath Test)	\$25	\$
Proviso 61.6 (Public Def/Probation)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (DUI Breath Test Fee)	\$50	\$
§ 56-5-2942(1) (Vehicle Assessment)	\$40/en	\$
3% to County (If paid in installments)	\$	\$ <u>3.75</u>

TOTAL

\$ 128.75

Clerk of Court/Deputy Clerk

Court Reporter: Dixie Eubank

SCCA/217 (07/2016)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2016GS2605558A/W#: 2016A2620700691Date of Offense: 7/9/2016S.C. Code § : 16-03-0010, 0020CDR Code #: 0116

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

PTUP

 days/hours Public Service EmploymentObtain GED ☐

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ 25.00 beginning 5-27-2016\$ 25.00 paid to Public Defender FundOther: ☐ Appointed PD or appointed other counsel, Proviso 61.6 requires \$500 be paid to Clerk during probation and shall be collected before any other fees.

Presiding Judge

Judge Code:

Sentence Date: 4/27/18

STATE OF SOUTH CAROLINA

COUNTY OF Horry
STATE VS.Nicholas Jacob McIver

AKA:

Race: BLACK Sex: M Age: 22DOB: [REDACTED]Address: 4229 Quinn DrCity, State, Zip: Charlotte, NC 28269DL#: [REDACTED] SID#: [REDACTED]*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TCO: Possession of a Firearm During Commission of a Violent Crime

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2016GS2605557A/W#: 2016A2620700737Date of Offense: 7/9/2016S.C. Code §: 16-23-0490CDR Code #: 0549

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS(5 YEARS IF NOT SENTENCED TO LIFE FOR VC)in violation of § 16-23-0490 of the S.C. Code of Laws, bearing CDR Code # 0549☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

DeBusk, Jr., George H.

SCB16182

SC Bar#

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 5 ~~years~~ 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 the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:	\$	
§ 14-1-206 (Assessments 107.5%)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 61.6 (Public Def/Probation)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(B)(1) (Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)	\$	\$ <u>3.75</u>

TOTAL

\$ 128.75

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA-217 (07/2016)

Presiding Judge

Judge Code:

Sentence Date:

PTUP days/hours Public Service EmploymentObtain GED ☐

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ 25.00 beginning 5-27-2023\$ paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel, Proviso 61.6 requires \$500 be paid to Clerk during probation and shall be collected before any other fees.

STATE OF SOUTH CAROLINA

COUNTY OF Horry
STATE VS.Nicholas Jacob McIver

AKA:

Race: BLACK Sex: M Age: 22DOB: 1995 SS: [REDACTED]Address: 4229 Quinn DrCity, State, Zip: Charlotte, NC 28269DL#: [REDACTED] SID#: [REDACTED]*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Grand Larceny, value more than \$2,000 but less than \$10,000 (0-5 years)in violation of § 16-13-0030(B) of the S.C. Code of Laws, bearing CDR Code # 3420☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

SM
DeBusk, Jr., George H.

SCB16182

SC Bar#

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 5 ~~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 the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135. Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*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
§ 56-1-286 (DUI Breath Test)	\$25
Proviso 61.6 (Public Def Probation)	\$500
§ 14-1-212 (Law Enforce. Funding)	\$25
§ 14-1-213 (Drug Court Surcharge)	\$150
§ 56-21-114(H)(1) (Breath Test Fee)	\$50
§ 56-5-2942(1) (Vehicle Assessment)	\$400
3% to County (if paid in installments)	\$

TOTAL:

\$ 128.75

Clerk of Court/Deputy Clerk

Court Reporter:

SCCA/217 (07/2016)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2016GS2605556A/W#: 2016A2620700738Date of Offense: 7/9/2016S.C. Code § : 16-13-0030(B)CDR Code #: 3420

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

ATTEST:

SM
DeBusk, Jr., George H.

SCB16182

SC Bar#

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 5 ~~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 the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135. Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*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
§ 56-1-286 (DUI Breath Test)	\$25
Proviso 61.6 (Public Def Probation)	\$500
§ 14-1-212 (Law Enforce. Funding)	\$25
§ 14-1-213 (Drug Court Surcharge)	\$150
§ 56-21-114(H)(1) (Breath Test Fee)	\$50
§ 56-5-2942(1) (Vehicle Assessment)	\$400
3% to County (if paid in installments)	\$

TOTAL:

\$ 128.75

Clerk of Court/Deputy Clerk

Court Reporter:

SCCA/217 (07/2016)

PTUP

_____ days/hours Public Service Employment

Obtain GED ☐Attend Voc. Rehab. or Job Corp. ☐May serve W/B beginning 5/27/2016Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ 25.00 beginning 5-27-2016

\$ _____ paid to Public Defender Fund

Other: _____

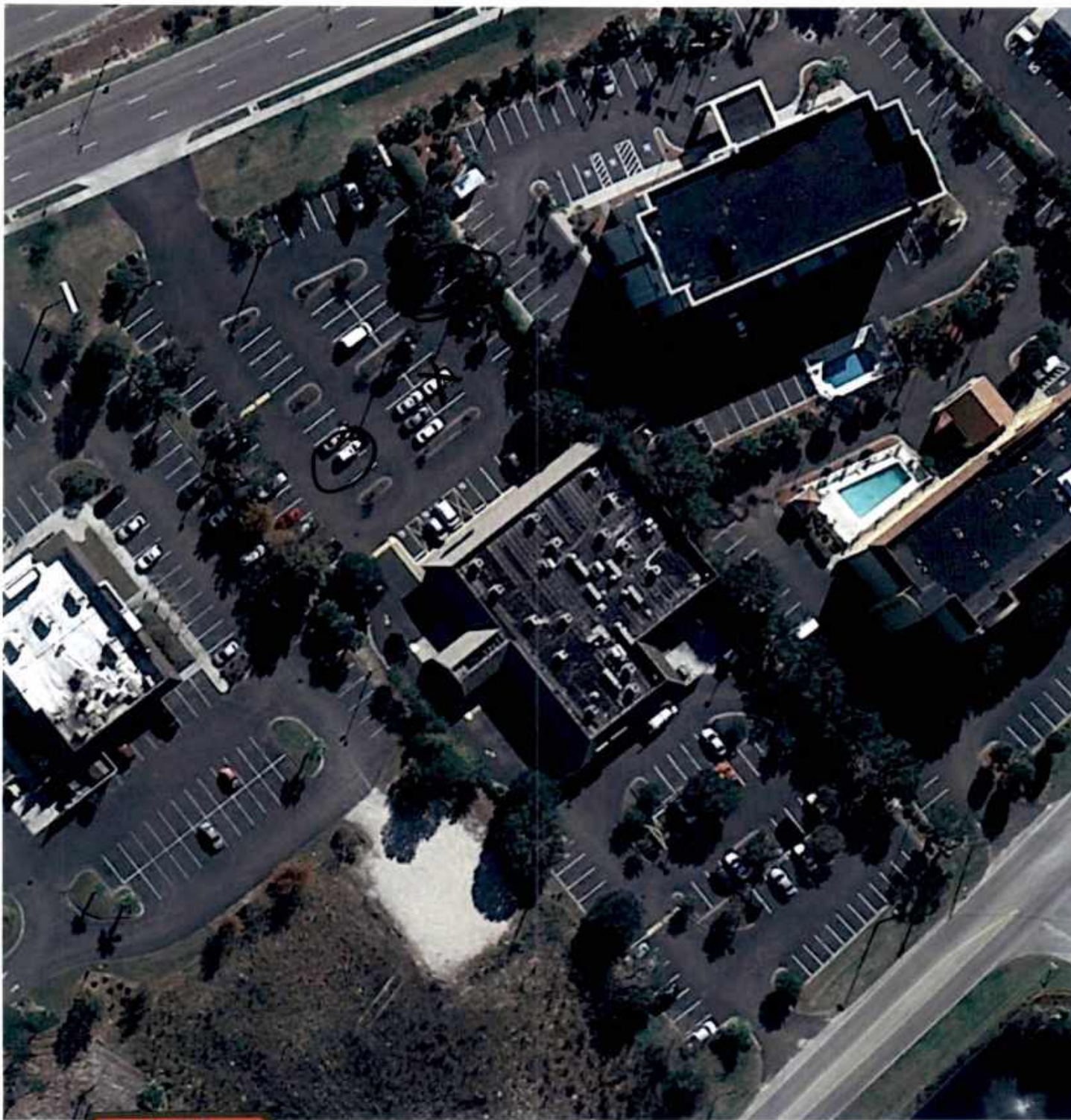
☐ Appointed PD or appointed other counsel, Proviso 61.6 requires \$500 be paid to Clerk during probation and shall be collected before any other fees.

Presiding Judge

Judge Code:

Sentence Date: 7/9/16







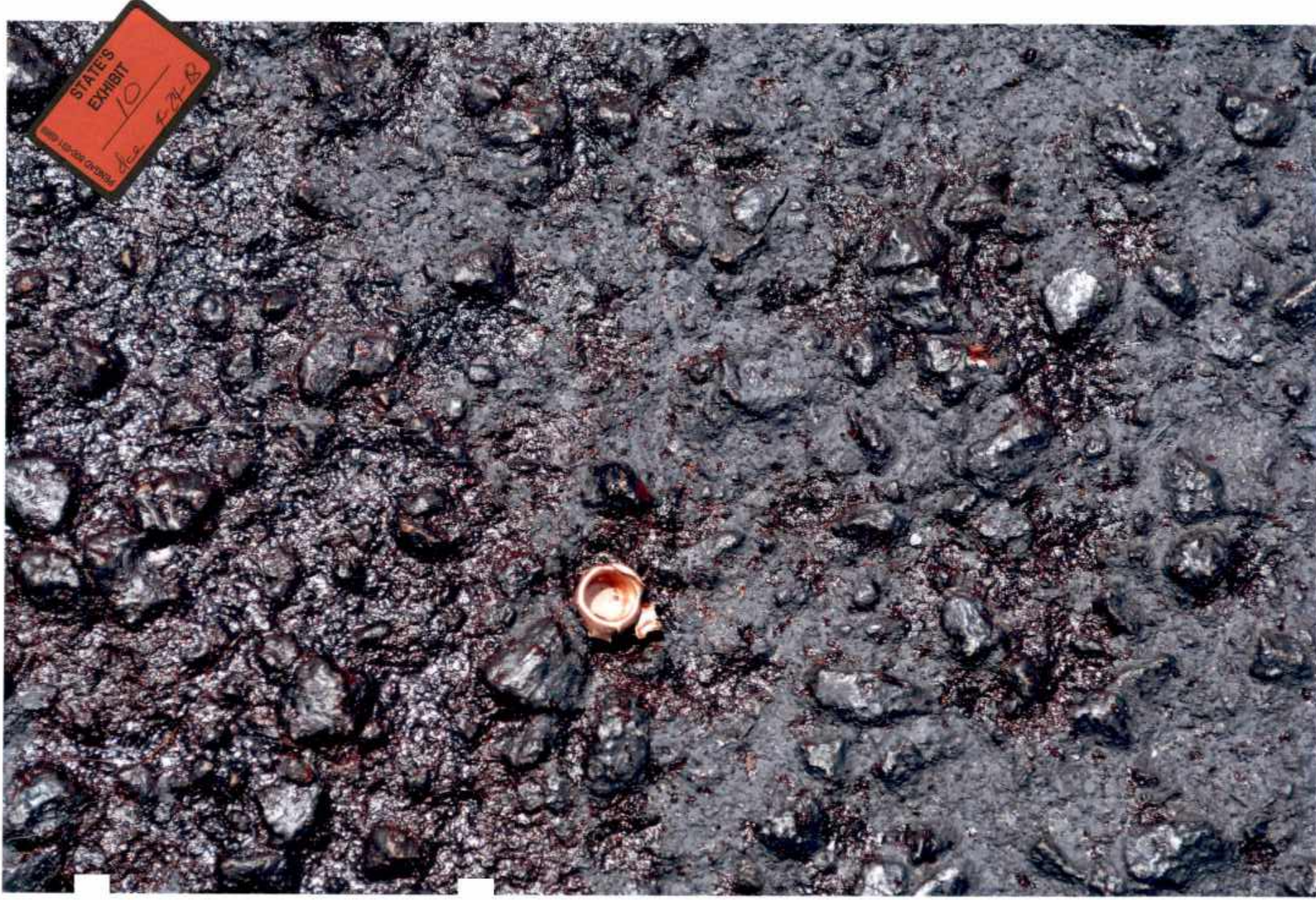
STATE'S
EXHIBIT
3
dce 4-24-88

Terrell Freeman Phone Number

(980) 298-1931















STATE'S
EXHIBIT
14
4-24-18

CHARLOTTE
FIRE DEPARTMENT
FIRE INVESTIGATION



STATE'S
EXHIBIT
15
dc 4-24-18

Dear Terrell Freeman,

Thank you for choosing to stay at Lancer Motel! In order to ensure you have a pleasant experience, we would like to take this time to review the motel rules and policies.

Check-Out Time

☐ All Rooms: 11:00 AM

☐ Late check-out must be pre-arranged at a cost of \$10.00 per hour or portion of an hour. Guests who remain after 2:00pm will be charged an additional night's stay.

Occupancy Guidelines

☐ Unless otherwise stated 2 adult guests are included in rate.

☐ Additional guests over 2 people will cost \$10 per person / per day unless under 6 years of age.

Security

☐ Management is not responsible for lost, stolen, or damaged articles.

☐ Keep your valuables locked up. Safes are available at the Front Desk.

☐ Report any problems with your room to the Front Desk immediately.

☐ We adhere to and maintain all state, county, and local laws on property.

WAIVER OF LIABILITY:

☐ Management is not liable to guest or occupants for personal injury, damage or loss of personal property for any cause, including, but not limited to, fire, smoke, wind, snow, rain, water or pipe leaks, hail, ice, lightning, explosion, earthquake, interruption of utilities, theft or vandalism unless otherwise required by law.

☐ Management assumes no responsibility for loss of property left in vehicles, guest rooms, or motel common areas during or after your stay.

☐ We reserve the right to refuse service to anyone.

☐ Should you refuse to follow the procedures and policies during your stay, you may be asked to leave without refund.

Guest Signature: _____

Cell Phone Number: _____

Car Make / License Plate #: _____

Terrell Freeman - 08 Jul 2016 - 10 Jul 2016 2 Night(s)

Room Number: 307





Checked in 9:33 pm Friday night

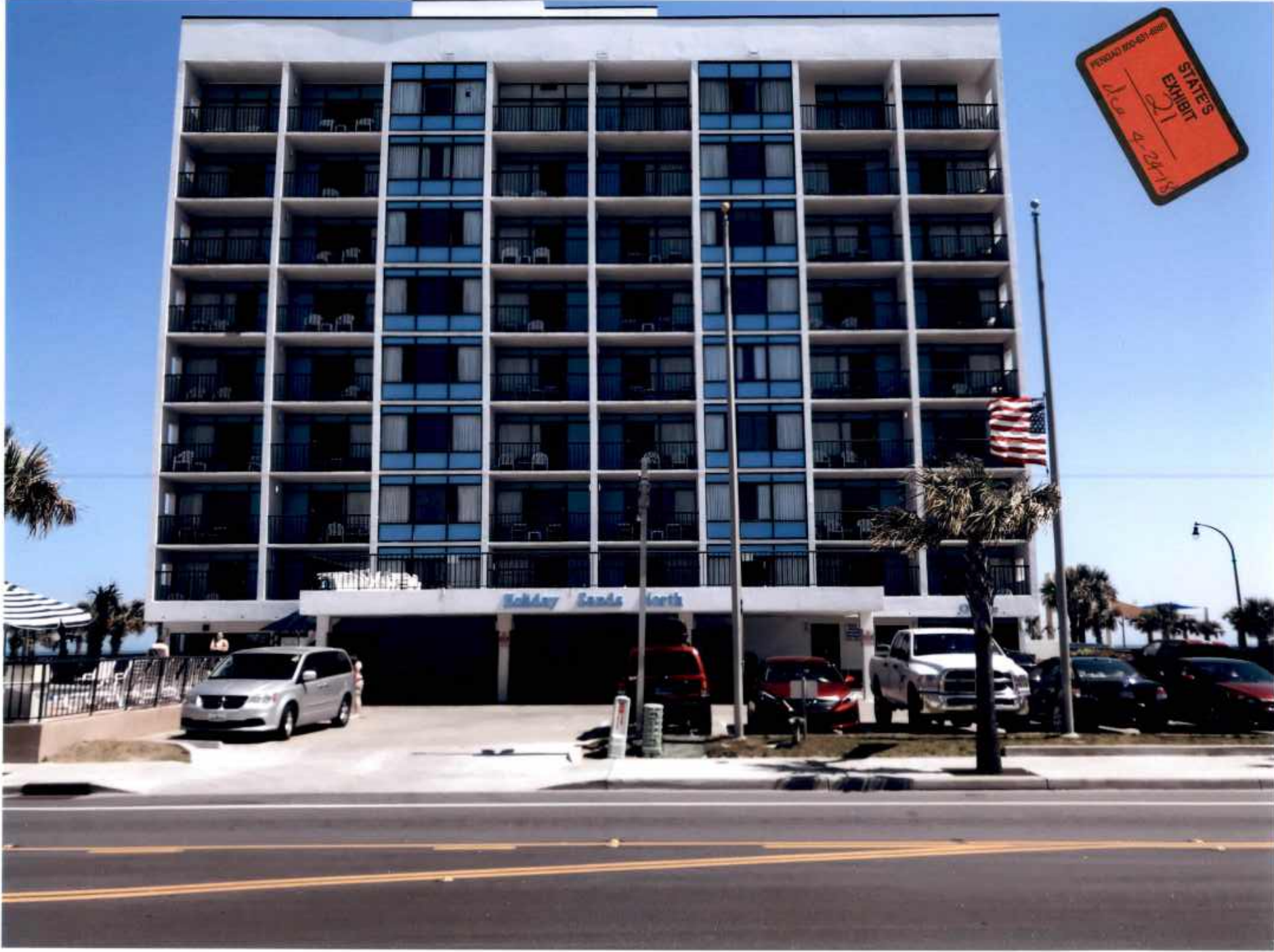
STATE'S
EXHIBIT
18
Dec 4-24-18







STATE'S
EXHIBIT
20
Dec 4-24-18



 Holiday Sands North 400 North Ocean Boulevard Myrtle Beach, SC, 29577 <i>FISHER</i>			REGISTRATION CARD #20		
ROOM NO.					
RATE CODE		Rack Rate			
ARRIVAL		07/08/16			
DEPARTURE		07/09/16			
NBR NIGHTS	VOUCHER NUMBER	FIRST NIGHT RATE	STAY VALUE	ADVANCED DEPOSIT	GUARANTEE
1		\$ 89.00	\$ 99.69	(\$ 99.69)	Yes
FOLIO	NO. GUESTS	NO. CHILDS	ROOM QTY	ROOM TYPE	VIP
332105	2	0	1	G	

Criteria

Special request

NOTES



FIRST NAME	Amanda	LAST NAME	Fisher
COMPANY	EMAIL		
ADDRESS	XXXXXX	TEL NO.	(704) 499-7956
		FAX NO.	
CITY	XXXXXX	PROVINCE	NC
		POSTAL CODE	28120

MAKE/MODEL	MAKE/MODEL	MAKE/MODEL
CAR LICENSE	CAR LICENSE	CAR LICENSE
ADDITIONAL GUESTS		
1	4	7
2	5	8
3	6	9

NOTICE TO RESORT GUEST:

Holiday Sands North is privately owned and, therefore, management reserves the right to refuse service to anyone.

Unless otherwise approved by management in advance, guest agrees to check-out no later than 11:00 AM on the departure date indicated.

Please be advised that Holiday Sands North is a **SMOKE-FREE (NON-SMOKING)** resort. Therefore, we do **NOT** allow smoking in our rooms and/or common areas (hallways, elevators, pool areas or sun decks). If any guest is found to be smoking in any of the aforementioned areas of the resort, the registered guest will be assessed a **\$250.00** charge for each offense - chargeable to the registered guest's credit card. If multiple offenses occur, the guest will be asked to leave the resort and no refunds will be issued. Smoking is permitted in designated smoking areas only. Thank you in advance for your cooperation.

NO PETS ALLOWED. **VIOLATION OF NO PET POLICY WILL RESULT IN A \$250.00 ROOM RECOVERY FEE AND EVICTION.**

NO REFUNDS will be issued for inclement weather and/or early departures.

Number of guests in room is limited to the number of guests indicated above. No unregistered guests are allowed on resort property after 11:00 PM.

Guest agrees to take all reasonable steps to ensure members of his/her family or group adhere to the rules and regulations of the resort.

The Resort provides a safety deposit box (safe) for your convenience, therefore, by virtue of the SC Innkeepers Law, the Resort cannot be held responsible for articles or valuables left in a guest room.

The Staff and Management of Holiday Sands North Resort hope your stay is beyond expectations. Please call on us if we can be of any assistance during your visit.

Guest certifies that he/she has read carefully these limitations and agrees to abide by such limitations.

Amanda Fisher

Tobetha Oxendine
07/08/16

4/20

DRIVER LICENSE

Katy J. Thomas

Amanda Fisher

FISHER
AMANDA RENEE
204 BELL ST
MOUNT HOLLY, NC 28120-1511

C NONE
F 5' 05" BLU
05/25/2016
0016364372

986
11/19/2019

36

DBJ 9284

NC

White Chevy Malibu

guest > Tabatha Oxendine



STATE'S
EXHIBIT
24
da 4-24-R



WELCOME TO
FAST SHOP

TP37651428-001 SUMMER 0516408200
8902 HWY 216 E
MARSHVILLE NC 28103

Descr.	qty	amount

Prepay CA#01		5.00

TOBACCO	1	49.40

Sub Total	54.40

Tax	3.33

TOTAL	57.73

PPMT	57.73

CARD TYPE: VISA

CARD NAME: FISHER /AMANDA

ACCT NUMBER: XXXX XXXX XXXX 0306

TRANS TYPE: SALE

APPROVAL: 012139

INVOICE: 041051

AMOUNT: \$ 57.73

X I AGREE AMOUNT ACCORDING TO
CARD ISSUANCE AGREEMENT INITIALS

APPROVED 0121

REG# 0002 CSH# 001 TP37651428-001 HWY 216E

07/09/16 13:53:55 ST# 00123



STATE'S
EXHIBIT
30
due 4-24-18



Transaction Journal

Detail: Business date: 7/9/2016
Transaction number: 1178072
Employee: Mary Cummings

Site: SPRINT FOODS #28 (728)

Trans#	Transaction Details	Item	Quantity	Amount (\$)
1178072	Date/time: 7/9/2016 1:47 PM	Cigarette	1.0000	0.10
	Employee: Mary Cummings	Tax (SC 6% tax)		0.01
	Terminal: 1	Tax (Marlboro Co 2% tax)		0.00
	Type: Sale	CREDIT		(0.11)
	Total: \$0.11			
	Age Verification: Instant Button			

Exact POS Receipt Available

Card payment details:

Card type: Visa
Card number: XXXXXXXXXXXX3331
Expiration: 06/19
Card holder name: FISHER/JERRY O



SPRINT Shell store. 701 Broad St. Bennettsville.

Transaction Journal

Detail: Business date: 7/9/2016
Transaction number: 1178069
Employee: Mary Cummings

Site: SPRINT FOODS #28 (728)

Tran#	Transaction Details		Item	Quantity	Amount (\$)
1178069	Date/time:	7/9/2016 1:52 PM	Unleaded (pump 8)	3.6480	7.00
	Employee:	Mary Cummings	Newport 100 Bx	1.0000	5.41
	Terminal:	1	Tax (SC 6% tax)		0.32
	Type:	Sale	Tax (Marlboro Co 2% tax)		0.11
	Total:	\$12.84	CREDIT		(12.84)
	Age Verification:	Instant Button			

Exact POS Receipt Available

Card payment details:

Card type: Visa
Card number: XXXXXXXXXXXX3331
Expiration: 06/19
Card holder name: FISHER/AMANDA R





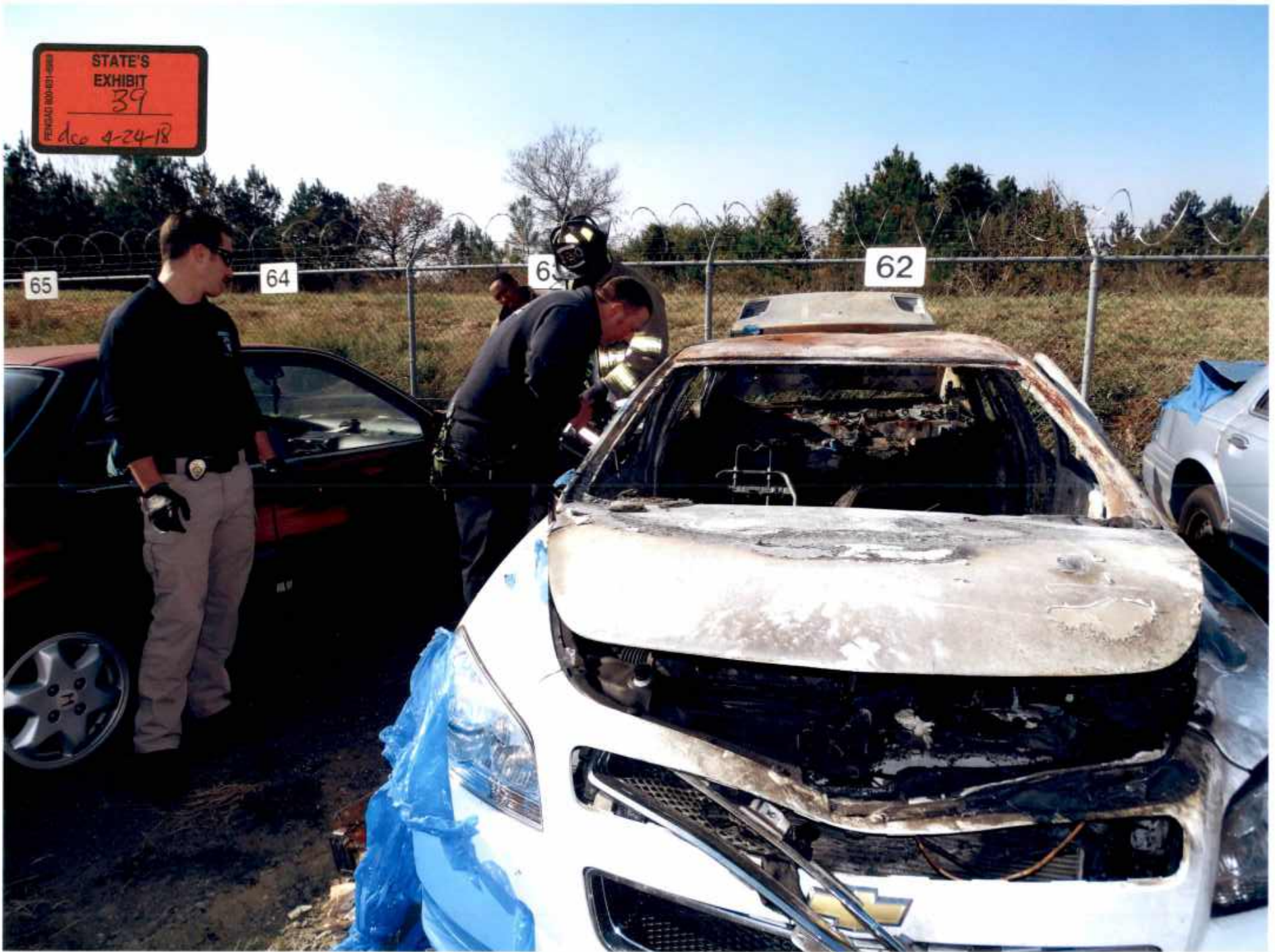
Car burned - 3901 Sally Ln, Charlotte, NC

Tyquajua Wiggins' Apartment

1500 ft















①



②



3



4



5



6



CHARLOTTE – MECKLENBURG POLICE DEPARTMENT Sequential Photograph Lineup Instruction Sheet		Complaint #: <u>20160709-160601</u>	
Officer/Detective Present: <u>R. Klass</u>	Code: <u>2403</u>	Assignment: <u>Arson</u>	
Location lineup presented: <u>3917 Sally Lane</u>		Date/Time: <u>7/12/2016 1305</u>	
Witness Name: <u>[REDACTED]</u>		DOB: <u>[REDACTED] 2008</u>	
Address: <u>[REDACTED]</u>		City: <u>Charlotte</u>	State: <u>NC</u>
Home Phone: <u>704-451-0656</u>	Cell Phone:	Work Phone:	Email:

In a moment, I am going to show you a series of photos. The person who committed the crime may or may not be included. I do not know whether the person being investigated is included. Even if you identify someone during this procedure, I will continue to show you all of the photos in the series. Keep in mind that things like hair styles, beards, mustaches can be easily changed and that complexion colors may look slightly different.

You should not feel like you have to make an identification. It is as important to exclude innocent persons as it is to identify the perpetrator. The investigation will continue whether or not an identification is made.

The photos will be shown to you one at a time and are not in any particular order. Take as much time as you need to look at each one. After each photo, I will ask, "Do you recognize this person, yes or no?" Take your time answering the question. If you answer "yes", I will then ask, "Why do you recognize this person?" I will then ask you what level of confidence you have that this person is the perpetrator.

Because you are involved in an ongoing investigation, in order to prevent damaging the investigation, you should avoid discussing this identification procedure or its results. Do you understand the way the lineup procedure will be conducted and the instructions I have given you?

I have read these instructions, or they have been read to me, and I understand the instructions. I am prepared to review the photographs which will be presented to me, and I will follow the instructions provided on this form.

Signature: [Signature] Date: 7/12/16 Time: 1:05 am/pm (P)

Photograph #1

Do you recognize this person? Yes No

If yes, ask "Why do you recognize this person? Document exact response."

Using your own words, how certain are you that this is the person that _____?

Response: _____

Photograph #2

Do you recognize this person? Yes ☒ No

If yes, ask "Why do you recognize this person? Document exact response.

Using your own words, how certain are you that this is the person that _____?

Response: _____

Photograph #3

Do you recognize this person? ☒ Yes No

If yes, ask "Why do you recognize this person? Document exact response.

The white car

Using your own words, how certain are you that this is the person that 100%?

Response: I sure

Photograph #4

Do you recognize this person? Yes ☒ No

If yes, ask "Why do you recognize this person? Document exact response.

Using your own words, how certain are you that this is the person that _____?

Response: _____

Photograph #5

Do you recognize this person? Yes ☒ No

If yes, ask "Why do you recognize this person? Document exact response.

Using your own words, how certain are you that this is the person that _____?

Response: _____

Photograph #6

Do you recognize this person? Yes ☒ No

If yes, ask "Why do you recognize this person? Document exact response.

Using your own words, how certain are you that this is the person that _____?

Response: _____

Amanda

17139	Instant Messages		2		7/9/2016 3:56:56 AM	From: slsms1234	Attachment (Empty File) Attachment (Empty File) Source Extraction: Logical	
17140	Instant Messages		2		7/9/2016 3:57:33 AM	From: slsms1234	Attachment (Empty File) Attachment (Empty File) Source Extraction: Logical	
17141	Instant Messages		2		7/9/2016 3:57:57 AM	From: slsms1234	Attachment (Empty File) Attachment (Empty File) Source Extraction: Logical	
17142	Instant Messages		2		7/9/2016 3:59:57 AM	From: ncfugitiveagent	Attachment (Empty File) Attachment (Empty File) Source Extraction: Logical	
17143	Instant Messages		2		7/9/2016 4:03:47 AM	From: uswgym16trials	Attachment (Empty File) Attachment (Empty File) Source Extraction: Logical	
17144	Instant Messages		2		7/9/2016 4:04:39 AM	From: srburke03	Attachment (Empty File) Attachment (Empty File) Source Extraction: Logical	
17145	Instant Messages		2		7/9/2016 4:16:52 AM	From: slsms1234	Attachment (Empty File) Attachment (Empty File) Source Extraction: Logical	
17146	Instant Messages		2		7/9/2016 4:17:30 AM	From: cartel_wop	Attachment (Empty File) Attachment (Empty File) Source Extraction: Logical	
17147	Instant Messages		2		7/9/2016 4:18:25 AM	From: uswgym16trials	Attachment (Empty File) Attachment (Empty File) Source Extraction: Logical	
17148	Locations			Yes	7/9/2016 12:22:34 AM(UTC-4)		(33.706029, -78.863770) Source Extraction: Logical	
17149	Notification s	Incoming			7/9/2016 12:25:39 AM(UTC-4)		iobyvehcxob82 wants to meet you! Source Extraction: Logical	
17150	Instant Messages				7/9/2016 12:37:18 AM(UTC-4)	From: scannupp Sandy Ann	<Snapchat Image/Video> Source Extraction: Logical	
17151	Instant Messages		2		7/9/2016 4:43:26 AM	From: scannupp	Attachment (Empty File) Attachment (Empty File) Source Extraction: Logical	
17152	Call Log	Outgoing			7/9/2016 12:56:15 AM(UTC-4)	To: +18438399860	Source Extraction: Logical	
17153	Wireless Networks				7/9/2016 1:05:48 AM(UTC-4)		HSN Source Extraction: Logical	
17154	Instant Messages				7/9/2016 1:09:16 AM(UTC-4)	From: chaggins Courtney	<Snapchat Image/Video> Source Extraction: Logical	
17155	Notification s	Incoming			7/9/2016 1:13:19 AM(UTC-4)		mikemelvin100blk wants to meet you! Source Extraction: Logical	
17156	Call Log	Outgoing			7/9/2016 1:18:54 AM(UTC-4)	To: (980) 298-1931	Source Extraction: Logical	
17157	Log Entries				7/9/2016 2:03:21 AM(UTC-4)		Wifi In:0 Wifi Out:0 Wan In:136793 Wan Out:149125 Source Extraction: Logical	
17158	Instant Messages		2		7/9/2016 6:12:58 AM	From: srburke03	Attachment (Empty File) Attachment (Empty File) Source Extraction: Logical	



17159	Call Log	Incoming			7/9/2016 2:15:38 AM(UTC-4)	From: +19802981931	Source Extraction: Logical	
17160	Log Entries				7/9/2016 2:17:18 AM(UTC-4)		Wifi In:0 Wifi Out:0 Wan In:210017 Wan Out:9504 Source Extraction: Logical	
17161	Instant Messages		2		7/9/2016 6:18:24 AM	From: lanlemathis123	Attachment (Empty File) Attachment (Empty File) Source Extraction: Logical	
17162	Locations			Yes	7/9/2016 2:26:58 AM		(33.686883, -78.864475) Source Extraction: Logical	
17163	Call Log	Incoming			7/9/2016 2:43:20 AM(UTC-4)	From: +19802981931	Source Extraction: Logical	
17164	Call Log	Outgoing			7/9/2016 2:45:02 AM(UTC-4)	To: (980) 925-3528 Jamie	Source Extraction: Logical	
17165	Call Log	Incoming			7/9/2016 2:45:24 AM(UTC-4)	From: +19802981931	Source Extraction: Logical	
17166	Call Log	Outgoing			7/9/2016 2:49:13 AM(UTC-4)	To: +19802981931	Source Extraction: Logical	
17167	Call Log	Incoming			7/9/2016 2:49:43 AM(UTC-4)	From: +19802981931	Source Extraction: Logical	
17168	Log Entries				7/9/2016 3:15:58 AM(UTC-4)		Wifi In:0 Wifi Out:0 Wan In:288120 Wan Out:50063 Source Extraction: Logical	
17169	Locations				7/9/2016 5:51:17 AM(UTC-4)		Source Extraction: Logical	
17170	Emails				7/9/2016 5:51:17 AM(UTC-4)	From: oldnavy@email.oldnavy.com Old Navy	Subject: Half-time! 50% OFF ALL Old Navy Active for women & men Body: message:%3C386ddc51-8b89-483d-ba4d-1d54662746ae@ind1s06mta917.xt.local%3E Body file: mes-3.eml Source Extraction: Logical	
17171	Call Log	Outgoing			7/9/2016 6:25:19 AM(UTC-4)	To: +19802981931	Source Extraction: Logical	
17172	Call Log	Outgoing			7/9/2016 6:27:32 AM(UTC-4)	To: +19802981931	Source Extraction: Logical	
17173	Call Log	Outgoing			7/9/2016 6:28:11 AM(UTC-4)	To: (980) 925-3528 Jamie	Source Extraction: Logical	
17174	Call Log	Outgoing			7/9/2016 6:28:36 AM(UTC-4)	To: +19802981931	Source Extraction: Logical	
17175	Call Log	Outgoing			7/9/2016 6:41:03 AM(UTC-4)	To: 9105245202 Antwan (Weezie)	Source Extraction: Logical	
17176	Call Log	Outgoing			7/9/2016 6:41:14 AM(UTC-4)	To: 9105245202 Antwan (Weezie)	Source Extraction: Logical	
17177	Call Log	Outgoing			7/9/2016 6:43:40 AM(UTC-4)	To: +19802981931	Source Extraction: Logical	
17178	SMS Messages	Outgoing			7/9/2016 6:44:09 AM(UTC-4)	To: +19802981931	Is Tabby there cause I'm leaving Source Extraction: Logical	
17179	Instant Messages		2		7/9/2016 10:54:50 AM	From: pawpawjoel5	Attachment (Empty File) Attachment (Empty File) Source Extraction: Logical	
17180	Instant Messages		2		7/9/2016 11:16:36 AM	From: kylizzemynizzl	Attachment (Empty File) Attachment (Empty File) Source Extraction: Logical	
17181	Call Log	Outgoing			7/9/2016 7:25:33 AM(UTC-4)	To: 9105245202 Antwan (Weezie)	Source Extraction: Logical	
17182	Log Entries				7/9/2016 7:33:38 AM(UTC-4)		Wifi In:0 Wifi Out:0 Wan In:224 Wan Out:1950 Source Extraction: Logical	
17183	Call Log	Outgoing			7/9/2016 8:17:53 AM(UTC-4)	To: 9105245202 Antwan (Weezie)	Source Extraction: Logical	
17184	Call Log	Outgoing			7/9/2016 9:06:31 AM(UTC-4)	To: 7043699400 Momma	Source Extraction: Logical	

Molwer

9	Name: PART_1467503050635_WP_20160702_19_35_31_Pro.mp4 Path: userdata (ExtX)/Root/data/com.android.providers.telephony/app_parts/PART_1467503050635_WP_20160702_19_35_31_Pro.mp4 MD5: 3683cac4f3e14a8e8cac4aa5898f6b83	Size (bytes): 784605 Created: 7/2/2016 7:44:10 PM(UTC-4) Modified: 7/2/2016 7:44:10 PM(UTC-4) Accessed: 7/2/2016 7:44:10 PM(UTC-4) Attachments: 1 Source Extraction Physical		
10	Name: VidClip_MMS-461585931_3gp Path: userdata (ExtX)/Root/media/0/DCIM/Camera/VidClip_MMS-461585931_3gp MD5: N/A	Size (bytes): 0 Source Extraction Physical		Yes

Activity Analytics (209)

#	Name	Entries	Total	Phone Events	Email Events	Other Events
1	Tyquajua	Phone: Phone Number (980) 298-9489	784	784	0	0
2	Tyquajua	Phone: Mobile (980) 298-9489	784	784	0	0
3	Daryen	Phone: Phone Number (980) 312-7210	745	745	0	0
4	Daryen	Phone: Mobile (980) 312-7210	745	745	0	0
5	Trienechia	Phone: Phone Number (980) 210-8455	491	491	0	0
6	Trienechia	Phone: Mobile (980) 210-8455	491	491	0	0
7	Erika	Phone: Phone Number (704) 605-9529	287	287	0	0
8	Erika	Phone: Mobile (704) 605-9529	287	287	0	0
9	(980) 298-1931	Phone: Mobile (980) 298-1931	261	261	0	0
10	BM Caleena	Phone: Phone Number (704) 674-9824	217	217	0	0
11	BM Caleena	Phone: Mobile (704) 674-9824	217	217	0	0
12	Kapria	Phone: Phone Number (704) 258-7432	182	182	0	0
13	Kapria	Phone: Mobile (704) 258-7432	182	182	0	0
14	Ma	Phone: Phone Number (704) 635-1537	181	181	0	0
15	Ma	Phone: Mobile (704) 635-1537	181	181	0	0
16	Devin	Phone: Phone Number (980) 598-7676	135	135	0	0
17	Devin	Phone: Mobile (980) 598-7676	135	135	0	0
18	Heath	Phone: Phone Number (704) 258-9379	119	119	0	0
19	Heath	Phone: Phone Number (704) 258-9379 Phone Number +1 980-785-6214	119	119	0	0
20	Heath	Phone: Mobile (704) 258-9379	119	119	0	0
21	Baby Greg	Phone: Phone Number (704) 524-1577	118	118	0	0
22	Baby Greg	Phone: Mobile (704) 524-1577	118	118	0	0
23	BG	Phone: Phone Number +1 704-524-1577	118	118	0	0
24	Scrap	Phone: Phone Number (704) 648-4143	99	99	0	0
25	Scrap	Phone: Mobile (704) 648-4143	99	99	0	0
26	Mr Sam	Phone: Phone Number (704) 492-9475	98	98	0	0
27	Mr Sam	Phone: Mobile (704) 492-9475	98	98	0	0
28	7049536315	Phone: 7049536315	98	98	0	0
29	19176070947	Phone: 19176070947	95	95	0	0
30	Unk	Phone: Phone Number (704) 777-8962	91	91	0	0
31	Unk	Phone: Mobile (704) 777-8962	91	91	0	0
32	9802105686	Phone: 9802105686	91	91	0	0
33	19807858852	Phone: 19807858852	72	72	0	0
34	Bri	Phone: Phone Number (704) 453-4161	64	64	0	0
35	Bri	Phone: Mobile (704) 453-4161	64	64	0	0



36	9803206687	Phone: 9803206687	60	60	0	0
37	Big T	Phone: Phone Number (704) 975-8251	57	57	0	0
38	Big T	Phone: Mobile (704) 975-8251	57	57	0	0
39	Pops	Phone: Phone Number (980) 777-2448	53	53	0	0
40	Pops	Phone: Mobile (980) 777-2448	53	53	0	0
41	Floyds	Phone: Phone Number (704) 537-2800	48	48	0	0
42	Floyds	Phone: Phone Number (704) 537-2800 Phone Number 1 704-537-2800	48	48	0	0
43	Floyds	Phone: Mobile (704) 537-2800	48	48	0	0
44	Floyds	Phone: Mobile 1 704-537-2800	48	48	0	0
45	Killa	Phone: Phone Number (704) 236-8195	44	44	0	0
46	Killa	Phone: Phone Number (704) 236-8195	44	44	0	0
47	Killa	Phone: Mobile (704) 236-8195	44	44	0	0
48	Mellisa	Phone: Phone Number (704) 890-0996	42	42	0	0
49	Mellisa	Phone: Mobile (704) 890-0996	42	42	0	0
50	Tiger	Phone: Phone Number (704) 519-9674	39	39	0	0
51	Tiger	Phone: Mobile (704) 519-9674	39	39	0	0
52	Reil	Phone: Phone Number (980) 800-8889	32	32	0	0
53	Reil	Phone: Mobile (980) 800-8889	32	32	0	0
54	19803204086	Phone: 19803204086	28	28	0	0
55	2674446715	Phone: 2674446715	27	27	0	0
56	Bryce	Phone: Phone Number 1 980-598-7675	25	25	0	0
57	Bryce	Phone: Mobile 1 980-598-7675	25	25	0	0
58	7042137567	Phone: 7042137567	25	25	0	0
59	Caprice	Phone: Phone Number (704) 201-8906	23	23	0	0
60	Caprice	Phone: Mobile (704) 201-8906	23	23	0	0
61	18039925619	Phone: 18039925619	23	23	0	0
62	Smurf	Phone: Phone Number (980) 345-0418	22	22	0	0
63	Smurf	Phone: Mobile (980) 345-0418	22	22	0	0
64	7049833129	Phone: 7049833129	22	22	0	0
65	Thug	Phone: Phone Number (704) 901-4596	20	20	0	0
66	Thug	Phone: Mobile (704) 901-4596	20	20	0	0
67	18642025758	Phone: 18642025758	20	20	0	0
68	9803957667	Phone: 9803957667	19	19	0	0
69	3012322852	Phone: 3012322852	16	16	0	0
70	Tyheim	Phone: Phone Number (704) 605-3573	15	15	0	0
71	Tyheim	Phone: Mobile (704) 605-3573	15	15	0	0
72	Showtime	Phone: Phone Number (704) 301-3887	13	13	0	0
73	Showtime	Phone: Mobile (704) 301-3887	13	13	0	0
74	Dawg	Phone: Phone Number (704) 912-8941	12	12	0	0
75	Dawg	Phone: Mobile (704) 912-8941	12	12	0	0
76	7043632485	Phone: 7043632485	12	12	0	0
77	Nut	Phone: Phone Number (980) 422-7682	11	11	0	0
78	Nut	Phone: Mobile (980) 422-7682	11	11	0	0
79	7042003871	Phone: 7042003871	11	11	0	0
80	9802674233	Phone: 9802674233	10	10	0	0
81	17043715177	Phone: 17043715177	10	10	0	0
82	7049778862	Phone: 7049778862	8	8	0	0

83	Neigbor Gass	Phone: Phone Number (980) 395-6501	7	7	0	0
84	Neigbor Gass	Phone: Mobile (980) 395-6501	7	7	0	0
85	9329	Phone: 9329	7	7	0	0
86	266781	Phone: 266781	7	7	0	0
87		Phone:	7	7	0	0
88		Phone:	7	7	0	0
89	7049046717	Phone: 7049046717	6	6	0	0
90	17046051523	Phone: 17046051523	6	6	0	0
91	9802592282	Phone: 9802592282	6	6	0	0
92	9802379477	Phone: 9802379477	6	6	0	0
93	8039920481	Phone: 8039920481	6	6	0	0
94	Bryan	Phone: Phone Number (704) 293-2869	5	5	0	0
95	Bryan	Phone: Mobile (704) 293-2869	5	5	0	0
96	Yayo	Phone: Phone Number (704) 526-9719	5	5	0	0
97	9192828908	Phone: 9192828908	5	5	0	0
98	3128089338	Phone: 3128089338	5	5	0	0
99	7045103100	Phone: 7045103100	5	5	0	0
100	Cameron	Phone: Phone Number (704) 490-9200	4	4	0	0
101	Cameron	Phone: Mobile (704) 490-9200	4	4	0	0
102	7043522192	Phone: 7043522192	4	4	0	0
103	7044926689	Phone: 7044926689	4	4	0	0
104	7049773177	Phone: 7049773177	4	4	0	0
105	7042995759	Phone: 7042995759	4	4	0	0
106	9803187399	Phone: 9803187399	4	4	0	0
107	Caleena	Phone: Mobile +1 704-223-6206	3	3	0	0
108	Marcicio	Phone: Phone Number (704) 363-3028	3	3	0	0
109	Ms Rosa	Phone: Phone Number (704) 408-3380	3	3	0	0
110	Ms Rosa	Phone: Mobile (704) 408-3380	3	3	0	0
111	Nut	Phone: Phone Number (704) 293-5629	3	3	0	0
112	Nut	Phone: Mobile (704) 293-5629	3	3	0	0
113	7046171641	Phone: 7046171641	3	3	0	0
114	9802426890	Phone: 9802426890	3	3	0	0
115	7042000426	Phone: 7042000426	3	3	0	0
116	9803391070	Phone: 9803391070	3	3	0	0
117	18432482285	Phone: 18432482285	3	3	0	0
118	9808000786	Phone: 9808000786	3	3	0	0
119	7047132434	Phone: 7047132434	3	3	0	0
120	17042227654	Phone: 17042227654	3	3	0	0
121		Phone:	3	3	0	0
122	2524522867	Phone: 2524522867	2	2	0	0
123	19802675914	Phone: 19802675914	2	2	0	0
124	3369861977	Phone: 3369861977	2	2	0	0
125	7043347311	Phone: 7043347311	2	2	0	0
126	9803187388	Phone: 9803187388	2	2	0	0
127	7044959475	Phone: 7044959475	2	2	0	0
128	9803184977	Phone: 9803184977	2	2	0	0
129	9808000310	Phone: 9808000310	2	2	0	0

130	22000	Phone: 22000	2	2	0	0
131	Granny	Phone: Phone Number (704) 579-8755	1	1	0	0
132	Granny	Phone: Mobile (704) 579-8755	1	1	0	0
133	9806898105	Phone: 9806898105	1	1	0	0
134	7046154983	Phone: 7046154983	1	1	0	0
135	7048915960	Phone: 7048915960	1	1	0	0
136	7049659642	Phone: 7049659642	1	1	0	0
137	7049304601	Phone: 7049304601	1	1	0	0
138	17045352207	Phone: 17045352207	1	1	0	0
139	7043751234	Phone: 7043751234	1	1	0	0
140	3369972617	Phone: 3369972617	1	1	0	0
141	9802301473	Phone: 9802301473	1	1	0	0
142	17045631234	Phone: 17045631234	1	1	0	0
143	7042089793	Phone: 7042089793	1	1	0	0
144	4348655638	Phone: 4348655638	1	1	0	0
145	4347557834	Phone: 4347557834	1	1	0	0
146	4342622992	Phone: 4342622992	1	1	0	0
147	9803352248	Phone: 9803352248	1	1	0	0
148	7042220574	Phone: 7042220574	1	1	0	0
149	704	Phone: 704	1	1	0	0
150	9802981	Phone: 9802981	1	1	0	0
151	9808885648	Phone: 9808885648	1	1	0	0
152	7048701974	Phone: 7048701974	1	1	0	0
153	9807855588	Phone: 9807855588	1	1	0	0
154	704258743_	Phone: 704258743_	1	1	0	0
155	98029894	Phone: 98029894	1	1	0	0
156	98029894 ♦	Phone: 98029894 ♦	1	1	0	0
157	(♦)!	Phone: (♦)!	1	1	0	0
158		Phone:	1	1	0	0
159	googlecommunityteam-noreply@google.com	Email: googlecommunityteam-noreply@google.com	1	0	1	0
160	jacobreynolds782@gmail.com	Email: jacobreynolds782@gmail.com	1	0	1	0
161		Email: jacobreynolds782@gmail.com	0	0	0	0
162		Email: jacobreynolds782@gmail.com	0	0	0	0
163		Phone: Mobile 1 704-352-6600	0	0	0	0
164	!!	Phone: Phone Number 16	0	0	0	0
165	{980} 298-1931		0	0	0	0
166	Alan	Phone: Phone Number (704) 441-2854	0	0	0	0
167	Body	Phone: Phone Number +1 704-352-4834	0	0	0	0
168	Bruh3	Phone: Phone Number +1 434-755-3526	0	0	0	0
169	Call Balance	Phone: Phone Number 225	0	0	0	0
170	Call Balance	Phone: Work 225 Web address: General http://m.boostmobile.com/myaccount General http://m.boostmobile.com/Z	0	0	0	0
171	Call Reboost	Phone: Phone Number 233	0	0	0	0
172	Call Reboost	Phone: Phone Number	0	0	0	0
173	Call Reboost	Phone: Work 233 Web address: General http://m.boostmobile.com/reboost	0	0	0	0

174*	Care Services	Phone: Phone Number 611	0	0	0	0
175	Care Services	Phone: Work 611	0	0	0	0
176	Cassandra	Phone: Mobile (704) 281-9015	0	0	0	0
177	Detroit	Phone: Phone Number (980) 349-1240	0	0	0	0
178	Dk Bouncer	Phone: Phone Number (704) 201-6501	0	0	0	0
179	Dk Bouncer	Phone: Mobile (704) 201-6501	0	0	0	0
180	D'miya	Phone: Phone Number +1 803-448-3413	0	0	0	0
181	Dogs For Ssle	Phone: Phone Number (704) 340-8635	0	0	0	0
182	Dogs For Ssle	Phone: Mobile (704) 340-8635	0	0	0	0
183	Ink Up Red	Phone: Phone Number +1 980-729-2832	0	0	0	0
184	Janae	Phone: Phone Number +1 347-575-4650	0	0	0	0
185	JeJy Molly		0	0	0	0
186	Keeba	Phone: Phone Number +1 980-729-4670	0	0	0	0
187	Kelly Service	Phone: Phone Number (704) ♦	0	0	0	0
188	Kiesha	Phone: Phone Number (704) 923-5075	0	0	0	0
189	Luke	Phone: Phone Number (704) 290-6338	0	0	0	0
190	Mechani	Phone: Phone Number (704) 264-9292	0	0	0	0
191	Mechani	Phone: Mobile (704) 264-9292	0	0	0	0
192	Metatfloyds		0	0	0	0
193	Money Gram	Phone: Phone Number 1 800**]	0	0	0	0
194	My A ♦		0	0	0	0
195	My Account		0	0	0	0
196	My Account	Web address: General http://m.boostmobile.com/myaccount	0	0	0	0
197	Reeka	Phone: Phone Number +1 980-785-6471	0	0	0	0
198	Shaunda	Phone: Phone Number (980) 621-8091	0	0	0	0
199	Show's Brother Justin	Phone: Phone Number ♦ZU	0	0	0	0
200	Sis	Phone: Phone Number (804) 248-0582	0	0	0	0
201	Sis3	Phone: Mobile 1 804-298-6876	0	0	0	0
202	Slim Gas		0	0	0	0
203	Slim Gas	Phone: Mobile +1 704-726-2315	0	0	0	0
204	Tish	Phone: Phone Number +1 919-561-9605	0	0	0	0
205	Trojan Labor	Phone: Phone Number (704) 395-0788	0	0	0	0
206	Tutu	Phone: Mobile (704) 615-5370	0	0	0	0
207	Warren	Phone: Phone Number (980) 785-5891	0	0	0	0
208	Zac	Phone: Phone Number (980) 636-9009	0	0	0	0
209	Zac	Phone: Mobile (980) 636-9009	0	0	0	0

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2015	Unknown	General: 9802581		00:00:00					Source Extraction: Physical	Yes

Contacts (127)

#	Contact	Timestamp	Entries	Addresses	Notes	Deleted
1	Source: Google Drive Source Extraction: Physical		Email: jacobreynolds782@gmail.com			
2	Source Extraction: Physical		Phone: Mobile 1 704-352-6600			Yes
3	Name: !! Source: Google Quick Search Box Source Extraction: Physical		Phone: Phone Number 16			Yes
4	Name: (980) 298- 1931 Source Extraction: Physical	Last time contacted: 7/8/2016 2:11:40 AM(UTC-4) Times contacted: 164	Phone: Mobile (980) 298-1931			Yes
5	Name: (980) 298- 1931 Source Extraction: Physical	Last time contacted: 7/9/2016 4:52:07 PM(UTC-4) Times contacted: 164				Yes
6	Name: Alan Source: Google Quick Search Box Source Extraction: Physical		Phone: Phone Number (704) 441-2854			Yes
7	Name: Baby Greg Source: Google Quick Search Box Source Extraction: Physical		Phone: Phone Number (704) 524-1577			
8	Name: Baby Greg Source Extraction: Physical	Last time contacted: 7/12/2016 7:02:53 PM(UTC-4) Times contacted: 91	Phone: Mobile (704) 524-1577			
9	Name: BG Source: Google Quick Search Box Source Extraction: Physical		Phone: Phone Number +1 704-524- 1577			Yes
10	Name: Big T Source: Google Quick Search Box Source Extraction: Physical		Phone: Phone Number (704) 975-8251			
11	Name: Big T Source Extraction: Physical	Last time contacted: 7/13/2016 2:18:07 PM(UTC-4) Times contacted: 53	Phone: Mobile (704) 975-8251			
12	Name: BM Caleena Source: Google Quick Search Box Source Extraction: Physical		Phone: Phone Number (704) 674-9824			
13	Name: BM Caleena Source Extraction: Physical	Last time contacted: 8/30/2016 7:36:20 PM(UTC-4) Times contacted: 140	Phone: Mobile (704) 674-9824			



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216	Outgoing	To: 9807772448 Pops	7/11/2016 6:09:04 PM(UTC-4)	00:00:44					Source Extraction: Physical
217	Outgoing	To: 7043013887 Showtime	7/11/2016 6:07:12 PM(UTC-4)	00:01:04					Source Extraction: Physical
218	Outgoing	To: 9176070947	7/11/2016 6:06:06 PM(UTC-4)	00:00:44					Source Extraction: Physical
219	Incoming	From: 9805987676 Devin	7/11/2016 5:59:42 PM(UTC-4)	00:01:03					Source Extraction: Physical
220	Incoming	From: 9805987676 Devin	7/11/2016 5:58:36 PM(UTC-4)	00:00:53					Source Extraction: Physical
221	Incoming	From: 9807772448 Pops	7/11/2016 5:16:03 PM(UTC-4)	00:05:01					Source Extraction: Physical
222	Incoming	From: 7042589379 Heath	7/11/2016 4:50:00 PM(UTC-4)	00:01:06					Source Extraction: Physical
223	Unknown	General: 7045241577 Baby Greg	7/11/2016 3:26:45 PM(UTC-4)	00:00:42					Source Extraction: Physical
224	Outgoing	To: 9807772448 Pops	7/11/2016 3:17:18 PM(UTC-4)	00:01:26					Source Extraction: Physical
225	Incoming	From: 9807772448 Pops	7/11/2016 3:15:03 PM(UTC-4)	00:00:27					Source Extraction: Physical
226	Unknown	General: 7045241577 Baby Greg	7/11/2016 2:50:31 PM(UTC-4)	00:01:56					Source Extraction: Physical
227	Unknown	General: 7045241577 Baby Greg	7/11/2016 2:28:42 PM(UTC-4)	00:00:25					Source Extraction: Physical
228	Unknown	General: 7045241577 Baby Greg	7/11/2016 2:28:23 PM(UTC-4)	00:00:00					Source Extraction: Physical
229	Unknown	General: 7045241577 Baby Greg	7/11/2016 2:21:41 PM(UTC-4)	00:00:46					Source Extraction: Physical
230	Unknown	General: 7045241577 Baby Greg	7/11/2016 2:15:09 PM(UTC-4)	00:02:36					Source Extraction: Physical
231	Unknown	General: 7045241577 Baby Greg	7/11/2016 2:12:22 PM(UTC-4)	00:00:59					Source Extraction: Physical
232	Unknown	General: 7045241577 Baby Greg	7/11/2016 2:07:33 PM(UTC-4)	00:00:32					Source Extraction: Physical
233	Missed	From: 9176070947	7/11/2016 1:20:03 PM(UTC-4)	00:00:00					Source Extraction: Physical
234	Unknown	General: 7044926689	7/11/2016 12:53:21 PM(UTC-4)	00:00:18					Source Extraction: Physical
235	Missed	From: 7044926689	7/11/2016 12:52:32 PM(UTC-4)	00:00:00					Source Extraction: Physical
236	Incoming	From: 9802426890	7/11/2016 12:36:51 PM(UTC-4)	00:00:24					Source Extraction: Physical
237	Outgoing	To: 7045241577 Baby Greg	7/11/2016 12:36:15 PM(UTC-4)	00:01:04					Source Extraction: Physical
238	Outgoing	To: 9802426890	7/11/2016 12:35:22 PM(UTC-4)	00:00:27					Source Extraction: Physical
239	Missed	From: 7046154983	7/10/2016 11:50:39 PM(UTC-4)	00:00:00					Source Extraction: Physical
240	Missed	From: 7042000426	7/10/2016 11:43:39 PM(UTC-4)	00:00:00					Source Extraction: Physical
241	Missed	From: 7042000426	7/10/2016 11:42:33 PM(UTC-4)	00:00:00					Source Extraction: Physical
242	Missed	From: 9802108455 Trienechia	7/10/2016 11:29:57 PM(UTC-4)	00:00:00					Source Extraction: Physical
243	Missed	From: 7042000426	7/10/2016 9:30:13 PM(UTC-4)	00:00:00					Source Extraction: Physical
244	Missed	From: 7042018906 Caprice	7/10/2016 9:22:17 PM(UTC-4)	00:00:00					Source Extraction: Physical
245	Missed	From: 7042018906 Caprice	7/10/2016 8:29:07 PM(UTC-4)	00:00:00					Source Extraction: Physical
246	Unknown	General: 7042018906 Caprice	7/10/2016 8:13:34 PM(UTC-4)	00:00:00					Source Extraction: Physical



247	Outgoing	To: 9176070947 Keeba	7/10/2016 8:06:28 PM(UTC-4)	00:01:58					Source Extraction: Physical	
248	Outgoing	To: 9802989489 Tyquajua	7/10/2016 8:01:05 PM(UTC-4)	00:05:09					Source Extraction: Physical	
249	Outgoing	To: 9803127210 Daryen	7/10/2016 8:00:21 PM(UTC-4)	00:00:36					Source Extraction: Physical	
250	Outgoing	To: 9803127210 Daryen	7/10/2016 8:00:17 PM(UTC-4)	00:00:00					Source Extraction: Physical	
251	Outgoing	To: 9803127210 Daryen	7/10/2016 7:59:33 PM(UTC-4)	00:00:37					Source Extraction: Physical	
252	Missed	From: 7042018906 Caprice	7/10/2016 7:39:43 PM(UTC-4)	00:00:00					Source Extraction: Physical	
253	Outgoing	To: 9802989489 Tyquajua	7/10/2016 7:34:28 PM(UTC-4)	00:10:15					Source Extraction: Physical	
254	Missed	From: 2524522867	7/10/2016 7:32:00 PM(UTC-4)	00:00:00					Source Extraction: Physical	
255	Outgoing	To: 9176070947 Keeba	7/10/2016 7:30:16 PM(UTC-4)	00:01:25					Source Extraction: Physical	
256	Incoming	From: 7042018906 Caprice	7/10/2016 7:28:14 PM(UTC-4)	00:01:26					Source Extraction: Physical	
257	Outgoing	To: 7043633028 Marcicio	7/10/2016 7:22:23 PM(UTC-4)	00:00:54					Source Extraction: Physical	
258	Outgoing	To: 7043633028 Marcicio	7/10/2016 7:22:01 PM(UTC-4)	00:00:12					Source Extraction: Physical	
259	Incoming	From: 9803127210 Daryen	7/10/2016 7:06:51 PM(UTC-4)	00:00:32					Source Extraction: Physical	
260	Outgoing	To: 7043633028 Marcicio	7/10/2016 6:19:20 PM(UTC-4)	00:01:19					Source Extraction: Physical	
261	Outgoing	To: 7042018906 Caprice	7/10/2016 5:45:40 PM(UTC-4)	00:00:34					Source Extraction: Physical	
262	Incoming	From: 8642025758 Iesha	7/10/2016 5:43:00 PM(UTC-4)	00:01:54					Source Extraction: Physical	
263	Outgoing	To: 9802989489 Tyquajua	7/10/2016 5:38:44 PM(UTC-4)	00:06:22					Source Extraction: Physical	
264	Outgoing	To: 9802989489 Tyquajua	7/10/2016 5:36:02 PM(UTC-4)	00:00:46					Source Extraction: Physical	
265	Incoming	From: 7042018906 Caprice	7/10/2016 5:08:31 PM(UTC-4)	00:06:53					Source Extraction: Physical	
266	Outgoing	To: 19802675914 Delmia	7/10/2016 5:04:20 PM(UTC-4)	00:00:45					Source Extraction: Physical	
267	Unknown	General: 8642025758 Iesha	7/10/2016 5:00:23 PM(UTC-4)	00:03:07					Source Extraction: Physical	
268	Incoming	From: 7042018906 Caprice	7/10/2016 4:55:02 PM(UTC-4)	00:04:50					Source Extraction: Physical	
269	Incoming	From: 8642025758 Iesha	7/10/2016 4:51:20 PM(UTC-4)	00:08:38					Source Extraction: Physical	
270	Outgoing	To: 19802675914 Delmia	7/10/2016 4:49:45 PM(UTC-4)	00:10:22					Source Extraction: Physical	
271	Outgoing	To: 7048915960 Foleisha	7/10/2016 4:47:03 PM(UTC-4)	00:02:06					Source Extraction: Physical	
272	Unknown	General: 8642025758 Iesha	7/10/2016 4:39:36 PM(UTC-4)	00:04:12					Source Extraction: Physical	
273	Outgoing	To: 8642025758 Iesha	7/10/2016 4:24:39 PM(UTC-4)	00:00:02					Source Extraction: Physical	
274	Outgoing	To: 7044926689	7/10/2016 4:23:48 PM(UTC-4)	00:00:36					Source Extraction: Physical	
275	Outgoing	To: 8642025758 Iesha	7/10/2016 4:23:09 PM(UTC-4)	00:00:03					Source Extraction: Physical	
276	Outgoing	To: 18039925819 Jazma	7/10/2016 4:01:58 PM(UTC-4)	00:19:12					Source Extraction: Physical	
277	Outgoing	To: 17042018906 Kaprice	7/10/2016 4:00:35 PM(UTC-4)	00:00:37					Source Extraction: Physical	

278	Missed	From: 7042018906 Caprice	7/10/2016 3:54:26 PM(UTC-4)	00:00:00					Source Extraction: Physical	
279	Missed	From: 9803391070	7/10/2016 3:45:39 PM(UTC-4)	00:00:00					Source Extraction: Physical	
280	Missed	From: 9803391070	7/10/2016 3:41:58 PM(UTC-4)	00:00:00					Source Extraction: Physical	
281	Outgoing	To: 18039925619 Jazna	7/10/2016 2:54:13 PM(UTC-4)	00:12:08					Source Extraction: Physical	
282	Missed	From: 7042587432 Kapria	7/10/2016 2:18:18 PM(UTC-4)	00:00:00					Source Extraction: Physical	
283	Outgoing	To: 9176070947 Keeba	7/10/2016 1:18:55 PM(UTC-4)	00:46:55					Source Extraction: Physical	
284	Outgoing	To: 18039925619 Jazna	7/10/2016 12:48:40 PM(UTC-4)	00:00:31					Source Extraction: Physical	
285	Outgoing	To: 18039925619 Jazna	7/10/2016 12:47:57 PM(UTC-4)	00:00:35					Source Extraction: Physical	
286	Outgoing	To: 18039925619 Jazna	7/10/2016 11:42:57 AM(UTC-4)	00:01:18					Source Extraction: Physical	
287	Incoming	From: 9803127210 Daryen	7/10/2016 11:42:01 AM(UTC-4)	00:00:40					Source Extraction: Physical	
288	Outgoing	To: 18039925619 Jazna	7/10/2016 11:23:16 AM(UTC-4)	00:19:33					Source Extraction: Physical	
289	Outgoing	To: 18039925619 Jazna	7/10/2016 11:22:25 AM(UTC-4)	00:00:39					Source Extraction: Physical	
290	Missed	From: 7042587432 Kapria	7/10/2016 8:06:13 AM(UTC-4)	00:00:00					Source Extraction: Physical	
291	Missed	From: 7045289719 Yayo	7/10/2016 7:28:29 AM(UTC-4)	00:00:00					Source Extraction: Physical	
292	Outgoing	To: 8039925619 Jazna	7/10/2016 5:48:42 AM(UTC-4)	00:04:19					Source Extraction: Physical	
293	Missed	From: 8039925619 Jazna	7/10/2016 3:58:22 AM(UTC-4)	00:00:00					Source Extraction: Physical	
294	Outgoing	To: 18039925619 Jazna	7/10/2016 1:20:49 AM(UTC-4)	00:00:23					Source Extraction: Physical	
295	Outgoing	To: 18039925619 Jazna	7/10/2016 1:20:08 AM(UTC-4)	00:00:34					Source Extraction: Physical	
296	Outgoing	To: 18039925619 Jazna	7/9/2016 11:39:39 PM(UTC-4)	00:02:01					Source Extraction: Physical	
297	Missed	From: 7042587432 Kapria	7/9/2016 11:38:05 PM(UTC-4)	00:00:00					Source Extraction: Physical	
298	Missed	From: 7042587432 Kapria	7/9/2016 11:33:49 PM(UTC-4)	00:00:00					Source Extraction: Physical	
299	Missed	From: 7042587432 Kapria	7/9/2016 11:30:38 PM(UTC-4)	00:00:00					Source Extraction: Physical	
300	Incoming	From: 9803127210 Daryen	7/9/2016 11:30:11 PM(UTC-4)	00:01:45					Source Extraction: Physical	
301	Outgoing	To: 9803127210 Daryen	7/9/2016 11:28:03 PM(UTC-4)	00:00:29					Source Extraction: Physical	
302	Incoming	From: 9803127210 Daryen	7/9/2016 11:15:46 PM(UTC-4)	00:01:22					Source Extraction: Physical	
303	Missed	From: 9802989489 Tyquajua	7/9/2016 11:06:03 PM(UTC-4)	00:00:00					Source Extraction: Physical	
304	Outgoing	To: 9803127210 Daryen	7/9/2016 10:51:22 PM(UTC-4)	00:01:12					Source Extraction: Physical	
305	Outgoing	To: 18039925619 Jazna	7/9/2016 10:49:50 PM(UTC-4)	00:00:39					Source Extraction: Physical	
306	Incoming	From: 9803127210 Daryen	7/9/2016 10:47:50 PM(UTC-4)	00:00:25					Source Extraction: Physical	
307	Unknown	General: 9803127210 Daryen	7/9/2016 10:47:30 PM(UTC-4)	00:00:00					Source Extraction: Physical	
308	Unknown	General: 9803127210 Daryen	7/9/2016 10:47:07 PM(UTC-4)	00:00:00					Source Extraction: Physical	

309	Incoming	From: 9803127210 Daryen	7/9/2016 10:27:23 PM(UTC-4)	00:00:48					Source Extraction: Physical	
310	Outgoing	To: 18039925619 Jazna	7/9/2016 9:44:44 PM(UTC-4)	00:00:28					Source Extraction: Physical	
311	Outgoing	To: 18039925619 Jazna	7/9/2016 9:38:34 PM(UTC-4)	00:01:14					Source Extraction: Physical	
312	Outgoing	To: 7043013887 Showtime	7/9/2016 9:16:47 PM(UTC-4)	00:01:00					Source Extraction: Physical	
313	Outgoing	To: 7045269719 Yayo	7/9/2016 9:13:02 PM(UTC-4)	00:00:07					Source Extraction: Physical	
314	Outgoing	To: 7045269719 Yayo	7/9/2016 9:12:42 PM(UTC-4)	00:00:06					Source Extraction: Physical	
315	Outgoing	To: 7045269719 Yayo	7/9/2016 9:12:28 PM(UTC-4)	00:00:06					Source Extraction: Physical	
316	Outgoing	To: 7043013887 Showtime	7/9/2016 9:10:26 PM(UTC-4)	00:00:32					Source Extraction: Physical	
317	Outgoing	To: 9803127210 Daryen	7/9/2016 8:48:17 PM(UTC-4)	00:00:25					Source Extraction: Physical	
318	Unknown	General: 9803450416 Smurf	7/9/2016 8:00:00 PM(UTC-4)	00:00:35					Source Extraction: Physical	
319	Unknown	General: 9803450416 Smurf	7/9/2016 7:55:53 PM(UTC-4)	00:00:28					Source Extraction: Physical	
320	Outgoing	To: 9803450416 Smurf	7/9/2016 7:54:23 PM(UTC-4)	00:00:00					Source Extraction: Physical	
321	Unknown	General: 9803450416 Smurf	7/9/2016 7:48:52 PM(UTC-4)	00:00:20					Source Extraction: Physical	
322	Unknown	General: 9803450416 Smurf	7/9/2016 7:41:45 PM(UTC-4)	00:00:27					Source Extraction: Physical	
323	Unknown	General: 9803450416 Smurf	7/9/2016 7:26:52 PM(UTC-4)	00:00:57					Source Extraction: Physical	
324	Outgoing	To: 7049758251 Big T	7/9/2016 7:25:51 PM(UTC-4)	00:00:39					Source Extraction: Physical	
325	Outgoing	To: 9803450416 Smurf	7/9/2016 7:22:26 PM(UTC-4)	00:00:18					Source Extraction: Physical	
326	Outgoing	To: 7042368195 Kills	7/9/2016 7:21:51 PM(UTC-4)	00:00:24					Source Extraction: Physical	
327	Outgoing	To: 7049758251 Big T	7/9/2016 7:20:46 PM(UTC-4)	00:00:34					Source Extraction: Physical	
328	Outgoing	To: 7049128941 Dawg	7/9/2016 7:19:37 PM(UTC-4)	00:00:35					Source Extraction: Physical	
329	Outgoing	To: 7049758251 Big T	7/9/2016 7:18:16 PM(UTC-4)	00:00:34					Source Extraction: Physical	
330	Outgoing	To: 7049758251 Big T	7/9/2016 7:16:36 PM(UTC-4)	00:00:35					Source Extraction: Physical	
331	Outgoing	To: 7049128941 Dawg	7/9/2016 7:15:23 PM(UTC-4)	00:00:39					Source Extraction: Physical	
332	Outgoing	To: 7049758251 Big T	7/9/2016 7:14:15 PM(UTC-4)	00:00:37					Source Extraction: Physical	
333	Outgoing	To: 7049758251 Big T	7/9/2016 7:12:33 PM(UTC-4)	00:00:37					Source Extraction: Physical	
334	Outgoing	To: 7049758251 Big T	7/9/2016 7:11:26 PM(UTC-4)	00:00:36					Source Extraction: Physical	
335	Outgoing	To: 7049758251 Big T	7/9/2016 7:10:47 PM(UTC-4)	00:00:35					Source Extraction: Physical	
336	Outgoing	To: 7049758251 Big T	7/9/2016 6:58:21 PM(UTC-4)	00:00:28					Source Extraction: Physical	
337	Missed	From: 7049773177	7/9/2016 6:56:43 PM(UTC-4)	00:00:00					Source Extraction: Physical	
338	Outgoing	To: 7043632485	7/9/2016 6:45:52 PM(UTC-4)	00:00:27					Source Extraction: Physical	
339	Outgoing	To: 7043632485	7/9/2016 6:45:13 PM(UTC-4)	00:00:30					Source Extraction: Physical	

340	Outgoing	To: 7049758251 Big T	7/9/2016 6:44:33 PM(UTC-4)	00:00:29					Source Extraction: Physical	
341	Outgoing	To: 7049758251 Big T	7/9/2016 6:41:49 PM(UTC-4)	00:00:35					Source Extraction: Physical	
342	Outgoing	To: 9802989489 Tyquajua	7/9/2016 6:40:23 PM(UTC-4)	00:01:01					Source Extraction: Physical	
343	Missed	From: 7042587432 Kapria	7/9/2016 6:35:47 PM(UTC-4)	00:00:00					Source Extraction: Physical	
344	Missed	From: 7042587432 Kapria	7/9/2016 6:09:51 PM(UTC-4)	00:00:00					Source Extraction: Physical	
345	Incoming	From: 7043013887 Showtime	7/9/2016 5:58:43 PM(UTC-4)	00:00:45					Source Extraction: Physical	
346	Missed	From: 9802989489 Tyquajua	7/9/2016 5:33:02 PM(UTC-4)	00:00:00					Source Extraction: Physical	
347	Missed	From: 9802989489 Tyquajua	7/9/2016 5:31:41 PM(UTC-4)	00:00:00					Source Extraction: Physical	
348	Outgoing	To: 7042587432 Kapria	7/9/2016 5:17:45 PM(UTC-4)	00:05:40					Source Extraction: Physical	
349	Outgoing	To: 7042587432 Kapria	7/9/2016 5:17:07 PM(UTC-4)	00:00:31					Source Extraction: Physical	
350	Outgoing	To: 9805987676 Devin	7/9/2016 5:15:57 PM(UTC-4)	00:00:53					Source Extraction: Physical	
351	Outgoing	To: 9805987676 Devin	7/9/2016 5:15:44 PM(UTC-4)	00:00:07					Source Extraction: Physical	
352	Outgoing	To: 7045372800 Floyds	7/9/2016 5:12:35 PM(UTC-4)	00:01:03					Source Extraction: Physical	
353	Outgoing	To: 7045372800 Floyds	7/9/2016 5:12:01 PM(UTC-4)	00:00:29					Source Extraction: Physical	
354	Outgoing	To: 7045372800 Floyds	7/9/2016 5:10:24 PM(UTC-4)	00:01:29					Source Extraction: Physical	
355	Outgoing	To: 7045372800 Floyds	7/9/2016 5:10:13 PM(UTC-4)	00:00:05					Source Extraction: Physical	
356	Outgoing	To: 7043013887 Showtime	7/9/2016 5:09:22 PM(UTC-4)	00:00:24					Source Extraction: Physical	
357	Outgoing	To: 7043013887 Showtime	7/9/2016 5:08:45 PM(UTC-4)	00:00:31					Source Extraction: Physical	
358	Outgoing	To: 7043013887 Showtime	7/9/2016 4:54:10 PM(UTC-4)	00:00:40					Source Extraction: Physical	
359	Outgoing	To: 7043013887 Showtime	7/9/2016 4:53:30 PM(UTC-4)	00:00:35					Source Extraction: Physical	
360	Outgoing	To: 7043013887 Showtime	7/9/2016 4:52:18 PM(UTC-4)	00:00:40					Source Extraction: Physical	
361	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 4:52:02 PM(UTC-4)	00:00:02					Source Extraction: Physical	
362	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 4:50:43 PM(UTC-4)	00:00:41					Source Extraction: Physical	
363	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 4:49:36 PM(UTC-4)	00:00:23					Source Extraction: Physical	
364	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 4:49:03 PM(UTC-4)	00:00:27					Source Extraction: Physical	
365	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 4:47:57 PM(UTC-4)	00:00:27					Source Extraction: Physical	
366	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 4:47:07 PM(UTC-4)	00:00:43					Source Extraction: Physical	
367	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 4:45:17 PM(UTC-4)	00:00:23					Source Extraction: Physical	
368	Outgoing	To: 7045372800 Floyds	7/9/2016 4:43:25 PM(UTC-4)	00:01:46					Source Extraction: Physical	
369	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 4:42:55 PM(UTC-4)	00:00:23					Source Extraction: Physical	
370	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 4:33:59 PM(UTC-4)	00:00:32					Source Extraction: Physical	

371	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 4:33:06 PM(UTC-4)	00:00:24					Source Extraction: Physical	
372	Outgoing	To: 7045372800 Floyds	7/9/2016 4:17:35 PM(UTC-4)	00:00:48					Source Extraction: Physical	
373	Outgoing	To: 7045372800 Floyds	7/9/2016 4:17:09 PM(UTC-4)	00:00:19					Source Extraction: Physical	
374	Outgoing	To: 7045372800 Floyds	7/9/2016 4:16:09 PM(UTC-4)	00:00:53					Source Extraction: Physical	
375	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 4:15:23 PM(UTC-4)	00:00:27					Source Extraction: Physical	
376	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 4:14:43 PM(UTC-4)	00:00:29					Source Extraction: Physical	
377	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 4:14:14 PM(UTC-4)	00:00:24					Source Extraction: Physical	
378	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 4:13:33 PM(UTC-4)	00:00:36					Source Extraction: Physical	
379	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 4:13:04 PM(UTC-4)	00:00:23					Source Extraction: Physical	
380	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 4:12:35 PM(UTC-4)	00:00:22					Source Extraction: Physical	
381	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 4:03:42 PM(UTC-4)	00:00:23					Source Extraction: Physical	
382	Outgoing	To: 9802989489 Tyquajua	7/9/2016 3:41:33 PM(UTC-4)	00:00:24					Source Extraction: Physical	
383	Incoming	From: 9802989489 Tyquajua	7/9/2016 3:30:22 PM(UTC-4)	00:00:16					Source Extraction: Physical	
384	Outgoing	To: 9802989489 Tyquajua	7/9/2016 3:12:58 PM(UTC-4)	00:00:34					Source Extraction: Physical	
385	Incoming	From: 9802981931 (980) 298-1931	7/9/2016 2:45:37 PM(UTC-4)	00:01:38					Source Extraction: Physical	
386	Incoming	From: 9802989489 Tyquajua	7/9/2016 2:43:47 PM(UTC-4)	00:00:09					Source Extraction: Physical	
387	Incoming	From: 9802981931 (980) 298-1931	7/9/2016 2:40:58 PM(UTC-4)	00:02:32					Source Extraction: Physical	
388	Incoming	From: 9802981931 (980) 298-1931	7/9/2016 2:35:56 PM(UTC-4)	00:00:00					Source Extraction: Physical	
389	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 2:35:15 PM(UTC-4)	00:00:00					Source Extraction: Physical	
390	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 2:35:05 PM(UTC-4)	00:00:00					Source Extraction: Physical	
391	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 2:34:59 PM(UTC-4)	00:00:00					Source Extraction: Physical	
392	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 2:34:55 PM(UTC-4)	00:00:00					Source Extraction: Physical	
393	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 2:34:38 PM(UTC-4)	00:00:00					Source Extraction: Physical	
394	Missed	From: 9802981931 (980) 298-1931	7/9/2016 2:33:58 PM(UTC-4)	00:00:00					Source Extraction: Physical	
395	Outgoing	To: 9802989489 Tyquajua	7/9/2016 2:32:24 PM(UTC-4)	00:00:41					Source Extraction: Physical	
396	Incoming	From: 9802981931 (980) 298-1931	7/9/2016 2:28:31 PM(UTC-4)	00:03:08					Source Extraction: Physical	
397	Missed	From: 9802981931 (980) 298-1931	7/9/2016 2:26:58 PM(UTC-4)	00:00:00					Source Extraction: Physical	
398	Outgoing	To: 9802989489 Tyquajua	7/9/2016 2:22:33 PM(UTC-4)	00:00:19					Source Extraction: Physical	
399	Outgoing	To: 9802989489 Tyquajua	7/9/2016 2:21:46 PM(UTC-4)	00:00:33					Source Extraction: Physical	
400	Unknown	General: 9802989489 Tyquajua	7/9/2016 2:19:59 PM(UTC-4)	00:00:00					Source Extraction: Physical	
401	Outgoing	To: 9802989489 Tyquajua	7/9/2016 2:15:02 PM(UTC-4)	00:02:21					Source Extraction: Physical	

402	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 2:10:19 PM(UTC-4)	00:03:19					Source Extraction: Physical	
403	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 2:09:44 PM(UTC-4)	00:00:00					Source Extraction: Physical	
404	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 2:08:59 PM(UTC-4)	00:00:00					Source Extraction: Physical	
405	Missed	From: 9802981931 (980) 298-1931	7/9/2016 2:03:50 PM(UTC-4)	00:00:00					Source Extraction: Physical	
406	Missed	From: 9802981931 (980) 298-1931	7/9/2016 2:02:55 PM(UTC-4)	00:00:00					Source Extraction: Physical	
407	Missed	From: 9802981931 (980) 298-1931	7/9/2016 2:02:13 PM(UTC-4)	00:00:00					Source Extraction: Physical	
408	Incoming	From: 9802981931 (980) 298-1931	7/9/2016 1:16:59 PM(UTC-4)	00:01:33					Source Extraction: Physical	
409	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 1:06:26 PM(UTC-4)	00:03:07					Source Extraction: Physical	
410	Outgoing	To: 9802989489 Tyquajua	7/9/2016 12:52:13 PM(UTC-4)	00:01:50					Source Extraction: Physical	
411	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 12:44:49 PM(UTC-4)	00:02:48					Source Extraction: Physical	
412	Incoming	From: 9802981931 (980) 298-1931	7/9/2016 12:38:31 PM(UTC-4)	00:05:49					Source Extraction: Physical	
413	Outgoing	To: 9805987676 Devin	7/9/2016 12:36:53 PM(UTC-4)	00:00:50					Source Extraction: Physical	
414	Outgoing	To: 7042589379 Heath	7/9/2016 12:33:11 PM(UTC-4)	00:00:40					Source Extraction: Physical	
415	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 12:30:27 PM(UTC-4)	00:00:07					Source Extraction: Physical	
416	Outgoing	To: 9802989489 Tyquajua	7/9/2016 12:28:44 PM(UTC-4)	00:01:22					Source Extraction: Physical	
417	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 12:26:06 PM(UTC-4)	00:00:07					Source Extraction: Physical	
418	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 12:25:52 PM(UTC-4)	00:00:09					Source Extraction: Physical	
419	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 12:17:05 PM(UTC-4)	00:00:07					Source Extraction: Physical	
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430	Outgoing	To: 7042589379 Heath	7/9/2016 8:49:15 AM(UTC-4)	00:00:36					Source Extraction: Physical	
431	Outgoing	To: 7047778962 Unk	7/9/2016 8:48:33 AM(UTC-4)	00:00:32					Source Extraction: Physical	
432	Outgoing	To: 7047778962 Unk	7/9/2016 8:47:52 AM(UTC-4)	00:00:31					Source Extraction: Physical	

433	Outgoing	To: 7042589379 Heath	7/9/2016 8:47:02 AM(UTC-4)	00:00:37					Source Extraction: Physical	
434	Outgoing	To: 7042589379 Heath	7/9/2016 8:46:17 AM(UTC-4)	00:00:38					Source Extraction: Physical	
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436	Outgoing	To: 7042589379 Heath	7/9/2016 7:40:30 AM(UTC-4)	00:00:35					Source Extraction: Physical	
437	Outgoing	To: 7042589379 Heath	7/9/2016 7:39:22 AM(UTC-4)	00:00:39					Source Extraction: Physical	
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439	Outgoing	To: 9805987676 Devin	7/9/2016 3:37:18 AM(UTC-4)	00:00:12					Source Extraction: Physical	
440	Outgoing	To: 9802989489 Tyquajua	7/9/2016 2:06:46 AM(UTC-4)	00:12:58					Source Extraction: Physical	
441	Outgoing	To: 9802989489 Tyquajua	7/9/2016 1:48:56 AM(UTC-4)	00:15:39					Source Extraction: Physical	
442	Outgoing	To: 9802989489 Tyquajua	7/9/2016 1:48:45 AM(UTC-4)	00:00:00					Source Extraction: Physical	
443	Outgoing	To: 9802981931 (980) 298-1931	7/9/2016 1:01:11 AM(UTC-4)	00:00:00					Source Extraction: Physical	
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459	Outgoing	To: 7042589379 Heath	7/8/2016 9:53:13 PM(UTC-4)	00:00:36					Source Extraction: Physical	
460	Outgoing	To: 7042589379 Heath	7/8/2016 9:33:52 PM(UTC-4)	00:00:37					Source Extraction: Physical	
461	Incoming	From: 7042137567	7/8/2016 9:31:38 PM(UTC-4)	00:00:58					Source Extraction: Physical	
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463	Incoming	From: 9802108455 Trienechia	7/8/2016 9:19:44 PM(UTC-4)	00:00:01					Source Extraction: Physical	

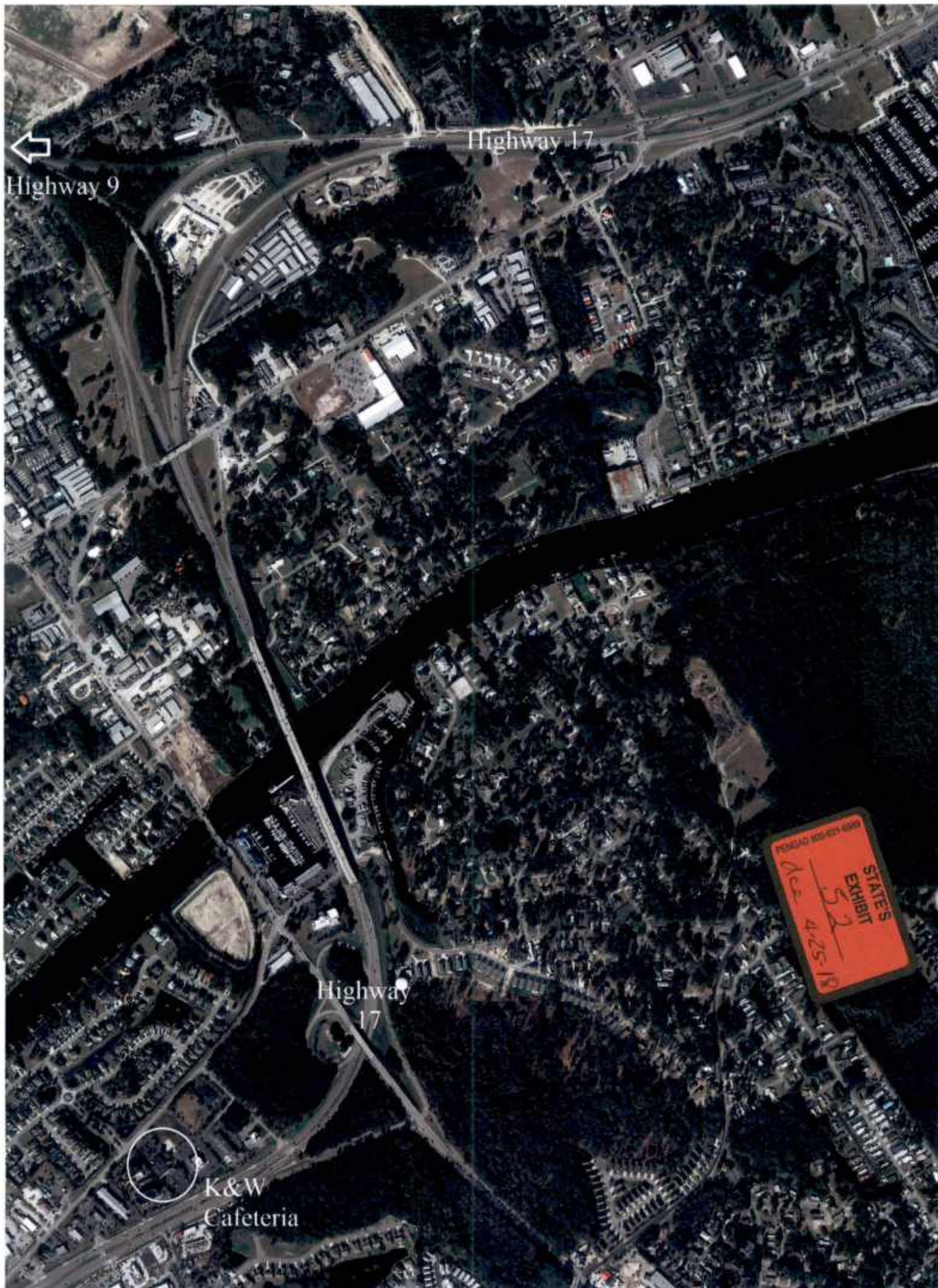
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470	Missed	From: 9803450416 Smurf	7/8/2016 4:46:29 PM(UTC-4)	00:00:00					Source Extraction: Physical	
471	Outgoing	To: 9803450416 Smurf	7/8/2016 4:25:12 PM(UTC-4)	00:00:38					Source Extraction: Physical	
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474	Outgoing	To: 7042995759	7/8/2016 4:22:13 PM(UTC-4)	00:00:20					Source Extraction: Physical	
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487	Outgoing	To: 9803127210 Daryen	7/8/2016 10:51:13 AM(UTC-4)	00:00:37					Source Extraction: Physical	
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Cell Phone Videos from McIver's Phone

Cell Phone Video	4:49:42 am	7/9/2016
Cell Phone Video	4:53:18 am	7/9/2016
Cell Phone Video	5:13:00 am	7/9/2016
Cell Phone Video	6:42:00 am	7/9/2016
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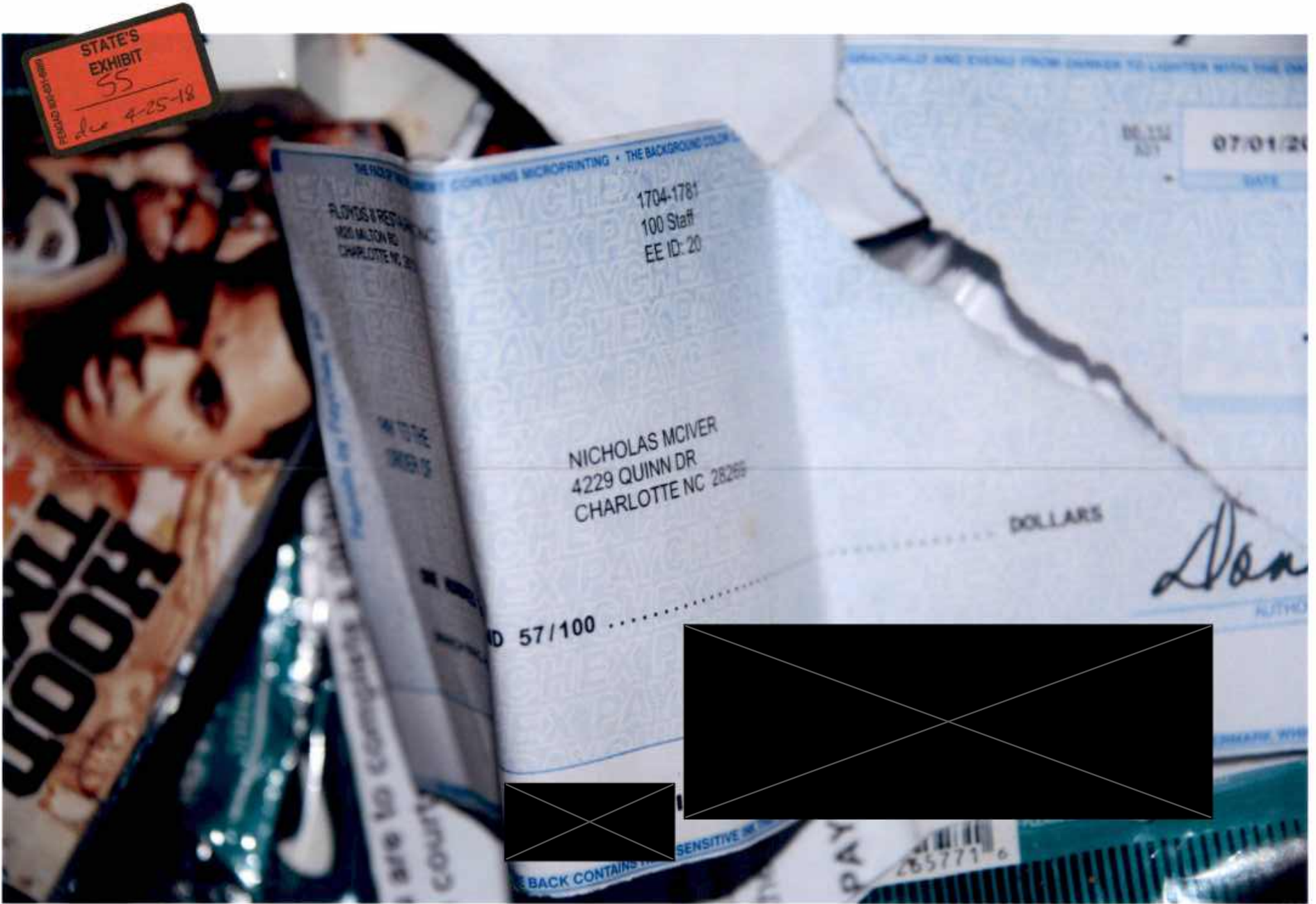






STATE'S
EXHIBIT
53
dec 4-25-18







STATE'S
EXHIBIT
56
die 7-25-18
FBI LABORATORY



7/09/2016 11:00:44 AM

CH10

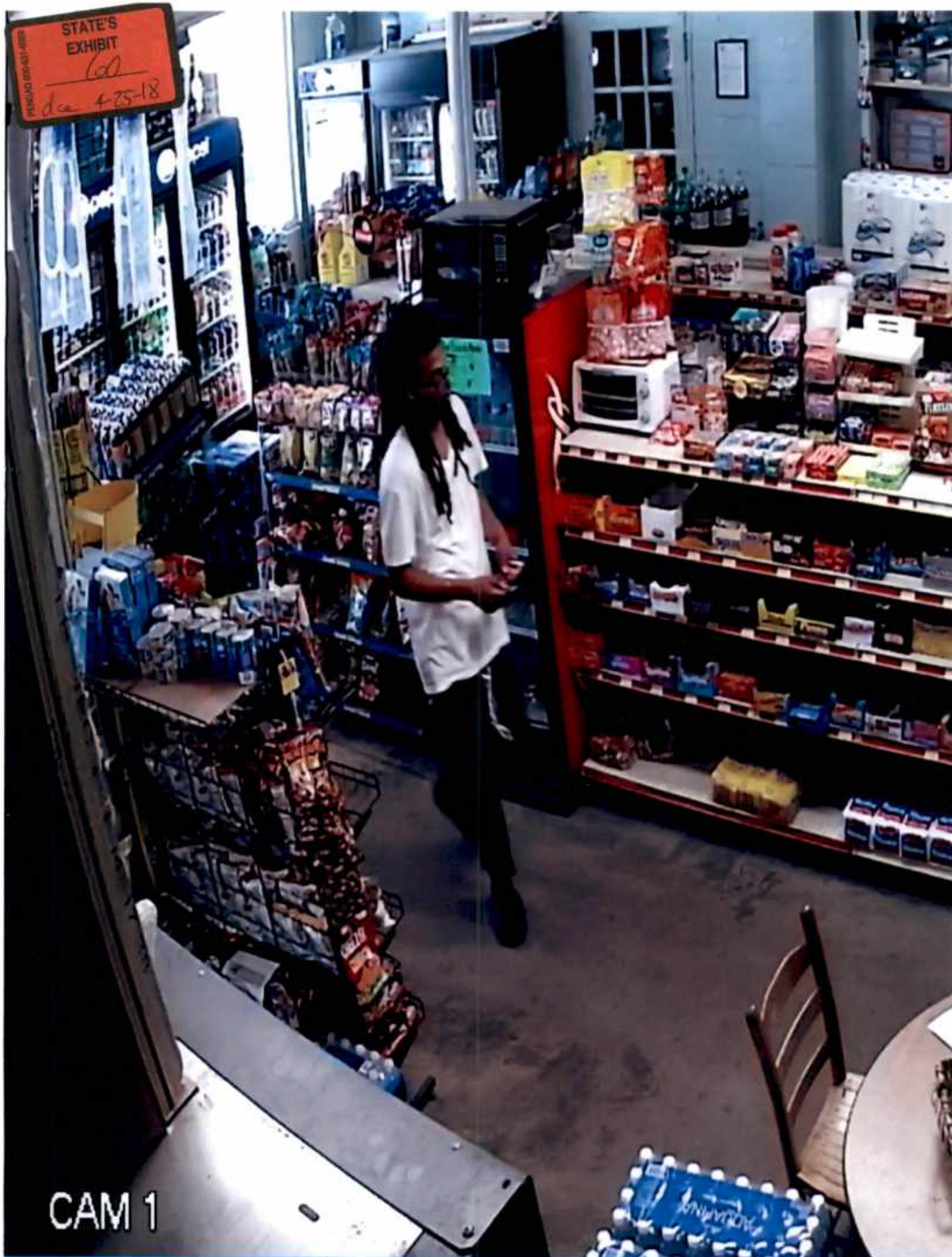
STATE'S
EXHIBIT
58
JCA 4-25-18
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STATE'S
EXHIBIT
57
JUL 4-25-18







STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA)
)
vs)
)
NICHOLAS MCIVER)

VOIR DIRE



- 1) Has any member of the jury panel or a family member been the victim of a violent crime?
- 2) Is any member of the jury a member of a victim's rights organization.
- 3) Is any member of the jury associated with or gives financial contributions to any victim's rights organization?
- 4) Has any juror or family member ever been represented by the Solicitor's Office?
- 5) Is there any member of the jury that can not accept the proposition of law, that a person who is charged with a crime is presumed innocent and does not have to prove himself innocent.
- 6) Does any member of the jury panel believe that just because a person is charged with a crime that they are likely to be guilty of such a crime?
- 7) Would any member of the jury panel automatically believe the testimony of a police officer over other witnesses?
- 10) Is there any member of the jury panel who can not accept the proposition of law that the State bears the sole burden of presenting evidence to convict a defendant in a criminal case?

11) Is there any member of the jury panel who can not accept the proposition of law that if unsure as to the facts of the case, they must find the Defendant not guilty.

12) Is there any member of the jury panel related someone in Law Enforcement?

A handwritten signature in black ink, appearing to read 'G. Scott Bellamy', written over a horizontal line.

G. Scott Bellamy
Attorney for the Defendant

Conway, South Carolina

Dated: April 23, 2018

Tangie Mills Account Info Go Sign Out Home

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Inbox (444)

Drafts (118)

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Trash (77) [Empty]

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State v. Nicholas McIver / State v. Terrell Freeman Tuesday, April 17, 2018, 2:48 PM

From: "Culbertson Benjamin H." <bculbertsonj@sccourts.org>

To: "tangle_mills@yahoo.com" <tangle_mills@yahoo.com>

"Martsprat@gmail.com" <Martsprat@gmail.com>

Cc: "John Steven H." <SJohnJ@sccourts.org> "John Steven H. Law Clerk (Victoria Harvey)" <SJohnLC@sccourts.org>

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Dear Mr. Bellamy and Mr. Spratlin:

At this juncture, I am not inclined to grant your motions to continue the above referenced cases currently scheduled for trial before Judge John next week. The DNA analysis from SLED of the victim's fingernail clippings does not produce any inculpatory evidence against your clients. The SLED report from the victim's fingernail clippings indicate a DNA profile consistent with the victim's DNA but no other DNA match other than "a mixture of at least two male individuals" with "no further interpretation" being offered. Therefore, I do not know the reason for another analysis by the defendants' experts or why the defendants require verification as to the accuracy of the SLED analysis.

Before I can grant a continuance, I need further explanation of why additional DNA testing is needed for DNA that the State cannot match to your clients'.

Sincerely,

Benjamin H. Culbertson

Circuit Court Judge
P.O. Box 479 (zip code 29442)
401 Cleland St. (zip code 29440)
Georgetown, South Carolina
Phone: (843) 545-3030
Fax: (843) 545-3282
Email: bculbertsonj@sccourts.org

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hand of one is hand for all

WRITING.

Copy of how it reads  
Taylor Ceel

**EXHIBIT**

Courts  
dec 3 4-23-18

### **HAND OF ONE**

IF A CRIME IS COMMITTED BY TWO OR MORE PEOPLE WHO ARE ACTING TOGETHER IN COMMITTING A CRIME, THE ACT OF ONE IS THE ACT OF ALL. A PERSON WHO JOINS WITH ANOTHER TO COMMIT AN UNLAWFUL ACT IS CRIMINALLY RESPONSIBLE FOR EVERYTHING DONE BY THE OTHER PERSON WHICH HAPPENS AS A PROBABLE OR NATURAL CONSEQUENCE OF THE ACTS DONE IN CARRYING OUT THE COMMON PLAN AND PURPOSE. THE ACT OF ONE IS THE ACT OF ALL OR, AS IT IS SOMETIMES SAID, "THE HAND OF ONE IS THE HAND OF ALL".

PRIOR KNOWLEDGE THAT A CRIME IS GOING TO BE COMMITTED, WITHOUT MORE, IS NOT SUFFICIENT TO MAKE A PERSON GUILTY OF THAT CRIME. MERE KNOWLEDGE THAT ANOTHER PERSON IS GOING TO COMMIT A CRIME, EVEN IF THE DEFENDANT IS PRESENT WHEN THE CRIME IS COMMITTED, IS NOT SUFFICIENT TO CONVICT THE DEFENDANT AS A PRINCIPAL. GUILT AS A PRINCIPAL IS SHOWN BY ACTUAL OR CONSTRUCTIVE PRESENCE AT THE SCENE AS A RESULT OF PRIOR ARRANGEMENT THEREFORE, A FINDING OF A PRIOR

**EXHIBIT**

(Court's  
dec 4 4-26-18)

ARRANGED PLAN OR COMMON SCHEME IS NECESSARY FOR A FINDING OF GUILT AS A PRINCIPAL. THE STATE MUST PROVE BEYOND A REASONABLE DOUBT BY COMPETENT EVIDENCE THE THEORY OF THE HAND OF ONE IS THE HAND OF ALL.<sup>1</sup>

A PRINCIPAL IN A CRIME IS ONE WHO EITHER ACTUALLY COMMITS THE CRIME OR WHO IS PRESENT AIDING, ABETTING, OR ASSISTING IN COMMITTING THE CRIME. WHEN A PERSON DOES AN ACT IN THE PRESENCE OF AND WITH THE ASSISTANCE OF ANOTHER, THE ACT IS DONE BY BOTH. WHERE TWO OR MORE, ACTING WITH A COMMON PLAN OR INTENT, ARE PRESENT AT THE COMMISSION OF A CRIME, IT DOES NOT MATTER WHO ACTUALLY COMMITS THE CRIME. ALL ARE GUILTY. THE HAND OF ONE IS THE HAND OF ALL. PRESENT AT THE COMMISSION OF A CRIME MEANS TO BE SUFFICIENTLY NEAR TO AID AND ABET AND ASSIST IN THE COMMISSION OF THE CRIME. HOWEVER, MERE PRESENCE AT THE SCENE OF A CRIME IS NOT SUFFICIENT TO CONVICT ONE AS A PRINCIPAL ON THE THEORY OF AIDING AND ABETTING. [REDACTED]

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<sup>1</sup> [REDACTED]

***MERE PRESENCE***

MERE PRESENCE AT THE SCENE IS NOT SUFFICIENT TO PROVE SOMEONE GUILTY OF A CRIME. A DEFENDANT'S PRESENCE WHERE A CRIME IS BEING COMMITTED OR MERE ASSOCIATION WITH A PERSON WHO COMMITS A CRIME DOES NOT MAKE A DEFENDANT AN ACCOMPLICE OR AN AIDER AND ABETTOR OF THE PERSON COMMITTING THE CRIME.

THE BURDEN IS ON THE STATE TO PROVE EVERY ELEMENT OF THE CRIME CHARGED. IF YOU FIND, AFTER REVIEWING ALL THE EVIDENCE, THAT THE STATE HAS PROVED THAT THE DEFENDANT WAS ONLY PRESENT AT THE SCENE OF A CRIME, AND THAT THEY HAVE NOT PROVED, BEYOND A REASONABLE DOUBT, ANY OTHER PARTICIPATION IN THE CRIME, THEN YOU MUST FIND THE DEFENDANT NOT GUILTY. THE LAW IS THAT PROOF OF AT THE SCENE OF THE CRIME IS NOT SUFFICIENT TO FIND SOMEONE GUILTY.<sup>1</sup>

**EXHIBIT**

(over)  
5  
dec 4-26-18

A COPY OF CIRCUMSTANTIAL EVIDENCE.  
Taylor Creel

**EXHIBIT**  
Court's  
dec 6 4-26-18

***DIRECT AND CIRCUMSTANTIAL EVIDENCE***

THERE ARE TWO TYPES OF EVIDENCE WHICH ARE GENERALLY PRESENTED DURING A TRIAL - DIRECT EVIDENCE AND CIRCUMSTANTIAL EVIDENCE.

DIRECT EVIDENCE IS THE TESTIMONY OF A PERSON WHO CLAIMS TO HAVE ACTUAL KNOWLEDGE OF A FACT, SUCH AS AN EYEWITNESS. CIRCUMSTANTIAL EVIDENCE IS PROOF OF A CHAIN OF FACTS AND CIRCUMSTANCES INDICATING THE EXISTENCE OF A FACT. THE LAW MAKES ABSOLUTELY NO DISTINCTION BETWEEN THE WEIGHT OR VALUE TO BE GIVEN TO EITHER DIRECT OR CIRCUMSTANTIAL EVIDENCE. NOR IS A GREATER DEGREE OF CERTAINTY REQUIRED OF CIRCUMSTANTIAL EVIDENCE THAN OF DIRECT EVIDENCE.

HOWEVER, TO THE EXTENT THE STATE RELIES ON CIRCUMSTANTIAL EVIDENCE, ALL OF THE CIRCUMSTANCES MUST BE CONSISTENT WITH EACH OTHER, AND WHEN TAKEN TOGETHER, POINT CONCLUSIVELY TO THE GUILT OF THE ACCUSED BEYOND A REASONABLE DOUBT.

**EXHIBIT**  
Charts  
dec 7 4-27-18



IF THESE CIRCUMSTANCES MERELY PORTRAY THE DEFENDANT'S BEHAVIOR AS SUSPICIOUS, THE PROOF HAS FAILED. <sup>1</sup>

THE STATE HAS THE BURDEN OF PROVING THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT. THIS BURDEN RESTS WITH THE STATE REGARDLESS OF WHETHER THE STATE RELIES ON DIRECT EVIDENCE, CIRCUMSTANTIAL EVIDENCE, OR SOME COMBINATION OF THE TWO.

AFTER WEIGHING ALL THE EVIDENCE, IF YOU ARE NOT CONINCED OF THE GUILT OF THE DEFENDANT BEYOND A REASONABLE DOUBT, YOU MUST FIND THE DEFENDANT NOT GUILTY.

---

<sup>1</sup> See State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013)

EXHIBIT

Court's  
Dec 8 4:26 PM

April 25, 2018

Honorable Judge

I wanted to write you a brief note to tell you how this trial and the tragedy that happened to our granddaughter Amanda Fisher has affected our family. Amanda, Mandy, as we called her was a girl that enjoyed life to the fullest and how she lived it. She had some rough spots, but underneath that rough was a girl we all loved very much.

She was very compassionate and would help anyone she could. I was her pen pal and she would come by or call me and tell me about her job most every day. Even now, I catch myself sitting by the phone awaiting her call. This tragedy has broken our hearts and everywhere we look, we see her and the pain is still there. The day before those men killed her, she called me to tell me how happy she was down here at the beach and how she enjoyed her new job.

Now when we, family, come down here, we are so sad. As a matter of fact, I really don't care to come down here that much anymore.

Going through this trial is re-living this tragedy all over again and it hurts so much.

Our hope now is that justice will be served and that God will forgive them for what they did. At some point in time I will forgive them as God has forgiven me for my sinful life.

May God bless you is my prayer for you today.

Jerry Farber

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

Appeal from Horry County Court of General Sessions  
The Honorable Steven H. John, Circuit Court Judge

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Appellate Case No. 2018-000824

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The State of South Carolina.....Respondent,

v.

Nicholas McIver,.....Appellant.

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FINAL BRIEF OF APPELLANT

---

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**RECEIVED**  
APR 30 2020  
SC Court of Appeals

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<sup>1</sup> The argument section for each issue contains sub-sections of the facts and standard of review relevant to that issue.

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<sup>2</sup> Citations to quoting and citing authorities and internal quotation marks have been omitted in the direct citations used herein unless otherwise provided.



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### STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT WHEN THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE THAT APPELLANT COMMITTED THE MURDER ACTING ALONE OR SUFFICIENT EVIDENCE HE AND CO-DEFENDANT FREEMAN JOINED TOGETHER TO COMMIT THE MURDER UNDER THE HAND OF ONE IS THE HAND OF ALL ACCOMPLICE LIABILITY DOCTRINE?
- II. WHETHER THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT EVIDENCE OF EVENTS TAKING PLACE AFTER THE COMMISSION OF THE OFFENSES CHARGED, SUCH AS EVIDENCE OF FLIGHT OR EVIDENCE OF ATTEMPTS TO COVER UP THE OFFENSES CHARGED ARE STANDING ALONE INSUFFICIENT CIRCUMSTANTIAL EVIDENCE TO FIND APPELLANT GUILTY.
- III. DID THE TRIAL COURT ERR IN PROHIBITING APPELLANT FROM CROSS-EXAMINING A DETECTIVE ABOUT THE QUESTIONS HE ASKED CODEFENDANT FREEMAN IF THE PROFFER DEMONSTRATED THE CROSS-EXAMINATION WOULD NOT HAVE ELICITED CODEFENDANT FREEMAN'S STATEMENT, THEREBY IMPLICATING *BRUTON* v. *UNITED STATES*, AND IF IT WOULD NOT HAVE OTHERWISE OPENED THE DOOR TO PREJUDICIAL OR IMPROPER TESTIMONY?
- IV. WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE IDENTIFICATION, PHOTO LINEUP, OR RELATED TESTIMONY IF THE IDENTIFICATION PROCEDURE AND LINEUP FEATURING APPELLANT'S PHOTO WERE UNDULY SUGGESTIVE, AND IF THE CHILD EYEWITNESS'S IDENTIFICATION IS OTHERWISE SO UNRELIABLE THAT THERE WAS A SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION, IN VIOLATION OF DUE PROCESS.
- V. WHETHER APPELLANT'S CONVICTIONS ARE FUNDAMENTALLY UNFAIR OR WERE OBTAINED IN VIOLATION OF DUE PROCESS BY THE STATE'S PRESENTATION OF CONFLICTING PROSECUTORIAL THEORIES REGARDING THE IDENTITY OF THE SHOOTER OR THE MANNER IN WHICH THE SHOOTING OCCURRED.

## STATEMENT OF THE CASE

Appellant Nicholas McIver and codefendant Terrell Freeman were indicted for the kidnapping and murder of Amanda Fisher; possession of a weapon during the commission of a violent crime; and grand larceny, value over \$2,000 but less than \$10,000. (Indictments, 2016-GS-26-05556 – 05558). Assistant Solicitor George H. Debusk, Jr. and Assistant Solicitor Seth A. Oskin prosecuted the case. G. Scott Bellamy, Esquire represented Appellant. Appellant and Freeman were tried in a joint trial by jury before the Honorable Steven H. John on April 25<sup>th</sup> through April 27<sup>th</sup>, 2018 in Horry County. A directed verdict was granted in favor of both Appellant and Freeman on the kidnapping charge. (Trial Transcript pp. 541-47). The jury found Freeman guilty of grand larceny, but acquitted him of murder and possession of a weapon during the commission of a violent crime. (Tr. p. 650-51). Freeman was sentenced to five (5) years imprisonment for grand larceny. (Tr. p. 664). The jury found Appellant guilty of murder, the weapon charge, and grand larceny. (Tr. p. 650) Appellant was sentenced to forty-five (45) years imprisonment for murder and five (5) years imprisonment each for grand larceny and the weapon charge, concurrent to the sentence for murder. (Sentencing Sheets, 2016-GS-26-05556 – 05558; Tr. p. 661). Appellant timely filed a notice of appeal on May 1, 2018.

## STATEMENT OF FACTS

On July 8, 2016, Amanda Fisher and her cousin, Tabetha Oxendine, went on a family vacation near Holden Beach, North Carolina. (Tr. p. 488, ln. 4-6; p. 167, ln. 15). Fisher lived nearby at her grandparents' house in Shallotte, North Carolina. (Tr. 487, ln. 25; p. 167, ln. 1-3). Later that evening, Fisher and Oxendine decided to drive to Myrtle Beach in Fisher's white Chevrolet Malibu sedan to celebrate Oxendine's birthday. (Tr. p. 488, ln. 17-18).

On the morning of that same day, Freeman and Appellant checked into the Lancer Hotel in Myrtle Beach for two nights. (Tr. p. 122, ln. 15; pp. 196 – 199, ln. 4; p. 409, ln. 24). The two knew one another from living and working in Charlotte, North Carolina. (Tr. p. 306, ln. 14-15; p. 391, ln. 5-6).

At approximately 1:00 a.m. on July 9<sup>th</sup>, 2016, Fisher and Oxendine checked into a room at the Holiday Sands North hotel ("HSN"). (Tr. p. 202, ln. 23-25). Their room featured a balcony that faced Ocean Boulevard. (Tr. p. 206, ln. 23-25; p. 207, ln. 1-2). While on the balcony, Fisher and Oxendine called down to Appellant and Freeman on the street below and they began chatting. (Tr. p. 490, ln. 2-3, 23-24). The pairs of friends, whom had not met one another before, ultimately exchanged phone numbers. (Tr. p. 491, ln. 7; p. 492, ln. 1-4).

At 2:41am, the women met the men on the nearby beach. (Tr. p. 412, ln. 22-23; p. 491, ln. 10-12, 15). After strolling on the beach, the pairs of friends returned to the room at HSN, where they "just hung out in the room and got to know each other," and Oxendine took pictures of the group. (Tr. p. 491, ln. 13-14, 20; p. 506, ln. 21-22). Throughout the early morning hours of July 9<sup>th</sup>, Fisher, Oxendine, Freeman, and Appellant drank heavily and engaged in drug activity. (Tr. p. 511, ln. 15-21). At 6:17am, Oxendine and Appellant walked to the Lancer Motel. (Tr. p. 512, ln. 6-12; p. 417, ln. 25; p. 418, ln. 1-2, 9-10). Just minutes later, Freeman joined Oxendine and

Appellant at the Lancer Motel. (Tr. p. 513, ln. 8-9; p. 418, ln. 12-19). Fisher stayed behind at HSN. (Tr. p. 495, ln. 2-7; p. 419, ln. 21-23). Oxendine and Freeman had engaged in consensual sexual activity at both HSN and the Lancer Motel. (Tr. p. 493, ln. 12-14; p. 494, ln. 11-18; p. 503, ln. 11-13). Unbeknownst to Oxendine and Freeman, Appellant was alleged to have filmed them. (Tr. p. 493, ln. 15-16).

The next morning, Appellant asked Fisher if he and Freeman could ride to North Carolina with she and Oxendine. (Tr. p. 497, ln. 16-19) The plan then changed to the men and Fisher dropping off Oxendine and the three returning to Myrtle Beach. (Tr. p. 498, ln. 16-17). Oxendine planned to go back to Myrtle Beach that night after spending the day at her aunt's house. (Tr. p. 519, ln. 20-21). Oxendine later testified that at no time did she hear Freeman or Appellant make any threats towards Fisher or any indication that either would do Fisher any harm. (Tr. p. 507, ln. 21-25, p. 50, ln. 2-24). Likewise, no security calls or complaints had been made at either the Lancer Motel or HSN. (Tr. p. 456, ln. 3-10)

On the ride, Fisher drove with Appellant in the front passenger seat, while Freeman and Oxendine sat in the back. (Tr. p. 500, ln. 15-22, p. 517, ln. 12-15). When asked about the mood in the car, Oxendine testified, "They all seemed fine," with no tension between the four. (Tr. p. 499, ln. 23 – p. 500, ln. 1). Oxendine sat in Freeman's lap and slept during the drive. (Tr. p. 496, ln. 18-22). She stated she did not think Freeman had a gun on his person; but she noted that she could not feel his back pockets. (Tr. p. 496, ln. 23-25; p. 506, ln. 1-14). An hour into the drive, Fisher called her mother to say she was going to get some clothes from her house before heading back to Myrtle Beach. (Tr. p. 180, ln. 8-9). According to trial testimony, Fisher gave her family no reason to be concerned during the telephone call. (Tr. p. 174, ln. 19-22). Fisher's stepfather stated the home

showed no signs of distress after she picked up clothes with Appellant and Freeman after dropping Oxendine off. (Tr. p. 182, ln. 3-5; p. 183, ln. 4-18).

At approximately 11:15 a.m.,<sup>3</sup> Kenneth Thompson heard a popping sound while getting out of his car in the parking lot of the K&W Cafeteria on Highway 17 in North Myrtle Beach, (Tr. p. 87, ln. 1-2, 8; p. 88, ln. 19 – p. 89, ln. 4; p. 425, ln. 24-25). He looked toward Highway 17 and saw nothing unusual; but as he turned toward the K&W Cafeteria, he saw a man pulling a woman out of a white car by her arm while another man in the car appeared to be pushing her. (Tr. p. 89, ln. 9-11). He then ran toward K&W; he saw that the white car was gone when he turned around. (Tr. p. 89, ln. 19-20). Thompson promptly reported the incident. (Tr. P. 90, ln. 23-25). Thompson had not seen the car pull in, but testified he saw it parked in a normal position and did not hear any squealing tires as it left. (Tr. p. 98, ln. 25; p. 99, ln. 1-4, 15-23). Thompson later testified he was not “taking a mental picture of the scene” and did not pay attention to details as he ran in the other direction. (Tr. p. 92, ln. 4-6, 24; p. 93, ln. 4; p. 102, ln. 8-10). When shown a photo of Fisher’s car, he testified that Fisher’s car “looked just like the car.” (Tr. p. 90, ln. 14). However, he could not provide a specific description of the individual outside the car and could only identify him as a black male with short or pulled back hair and a medium complexion. (Tr. p. 92, ln. 3-4, 8; p. 102, ln. 21-22). Thompson could not describe anything about the man’s clothes because he was not “pay[ing] attention to what he was wearing... I was not focused on him; I was focused on the young lady that was being pulled out of the car.” (Tr. p. 92, ln. 4-6). Thompson was unable to provide any description for the other person because he could only see that there was another person inside

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<sup>3</sup> The specific time and location of events are provided throughout this section for review of the record and the issues raised herein in conjunction with the driving routes taken and the cell phone records should Respondent designate the records to be included in the Record on Appeal.

the car. (Tr. p. 92, ln. 10-12; p. 102, 4-5). Thompson did not identify Freeman or Appellant from a photo lineup or make an identification at trial.

Freeman and Appellant arrived back at the Lancer Motel in Fisher's vehicle at around noon and collected their belongings. (Tr. p. 429, ln. 6-11). One of the men threw a luggage bag over the balcony and into the back of the truck. (Tr. p. 431, ln. 1-2). Between 12:10 p.m. and 12:30 p.m., Appellant called Freeman five times from the truck while Freeman was in the hotel, with each call lasting less than a minute. (Tr. p. 431, 13-16; p. 432, ln. 8-22). Freeman returned his calls at 12:38 p.m. with a nearly six-minute call. (Tr. p. 432, ln. 25). They made three more short calls to one another between 12:44 p.m. and 1:16pm. (Tr. p. 433, ln. 4-9).

At approximately 1:45 p.m., Appellant bought matches, \$7.00 worth of gas, and a pack of cigarettes using Fisher's credit card at a gas station in Bennetsville, as well as \$49.40 worth of gas and cigarettes later at a gas station in Marshville at 3:00 p.m. (Tr. p. 217, ln. 10-21; pp. 227-228; p. 434, ln. 21-24; p. 438, ln. 20 – p. 439, ln. 3; p. 441, ln. 23-24). While at the store at the second gas station, Appellant made several calls to his girlfriend, Tyquajua. (Tr. p. 449, ln. 1-2; p. 296, ln. 11-16). Cashiers from both gas stations testified they saw no blood on the white t-shirt Appellant had been wearing that entire day. (St. Ex. 26-27, 29, 59-60; Video; Tr. p. 220, ln. 2; p. 230, ln. 6-10; pp. 435-434.).

Because the K&W parking lot did not have surveillance cameras capturing where the white car was said to have parked, law enforcement was unable "to find any evidence that actually showed what occurred during this incident." (Tr. pp. 106-107; p. 109; p. 119; p. 123, ln. 7-15). Sergeant Rose located a bullet fragment between Fisher's legs; but did not collect it as evidence, nor did she or any member of law enforcement take measurements in relation to the found bullet fragment and where the car was parked. (Tr. p. 136, 15-24). Law enforcement collected Fisher's



clothing but did not submit it for blood spatter analysis or any other forensic testing. (Tr. p. 450, ln. 8-13). Sergeant Rose also stated that prior to the shooting, no calls were made to report someone in distress or any other disturbances, such as erratic driving, involving a white Malibu. (Tr. p. 141, ln. 2-6).

After speaking with other detectives at the scene, Detective Lyman drove to Shallotte to speak with Fisher's family. (Tr. p. 389, ln. 12-15). Oxendine informed Detective Lyman about the time she and Fisher spent with Freeman and Appellant and provided their phone numbers and the photographs from her phone. (Tr. p. 390, ln. 21-23). The family provided the make, model and color of Fisher's Malibu. (Tr. p. 392, ln. 1-3). He entered the information in the National Crime Information Center (NCIC) as a stolen vehicle, and subsequently learned that the vehicle had been located in Charlotte that afternoon on fire. (Tr. p. 391, ln. 6-8; p. 392, ln. 3-20). Detective Helms stated the scene of the burned vehicle was less than a mile away from the residence of Appellant's girlfriend, Tyquajua. (Tr. p. 296, ln. 11-16; p. 297, ln. 23-25). The vehicle was towed to Charlotte Metro Police Department's (CMPD) evidence lot. (Tr. p. 293, ln. 20-21). CMPD Arson team would have initially processed the vehicle, and it did generate a report on the vehicle, but the State did not present that report at trial. (Tr. p. 300, ln. 9-11, p. 452, ln. 7-11) Detective Helms later returned to the evidence lot with Detective Lyman to take photographs of the burned vehicle on July 13; Detective Helms stated that he was "looking for evidence in general, not specific evidence of arson." (Tr. p. 302, ln. 10-14). Four months after the incident in November 2016, Detective Lyman returned to Charlotte to process the vehicle, which had been wrapped in plastic. (Tr. p. 394, ln. 14-23). Detective Lyman said the car was "completely burned up" and he found no bullets, casings, or blood, but recovered Fisher's purse and a melted key fob. (Tr. p. 394; p. 476, ln. 10-

16; p. 479, ln. 12). Detective Lyman stated other than “sifting through the ashes” and melted glass, no forensic analysis or testing was performed on the vehicle. (Tr. p. 452, ln. 3-8).

Detective Lyman stated that the CMPD Crime Scene Unit did process the truck driven by Appellant and Freeman that weekend, and the relevant items and evidence were sent to SLED labs in Columbia. (Tr. p. 449, ln. 12-21). CMPD also analyzed the truck and completed a crime scene analysis report. (Tr. p. 451, ln. 1-7). The State did not present any evidence regarding either the SLED analysis of the truck or CMPD’s forensic reports at trial. North Myrtle Beach Police Department (NMBPD), which did not have a separate crime scene investigative unit, did not perform any forensic analysis on Fisher’s Malibu or the truck. (Tr. p. 359, ln. 16 – p. 360, ln. 3-7).

NMBPD had obtained Appellant’s cellphone when he voluntarily surrendered it upon he and Freeman turning themselves in to CMPD on July 13, 2016 after learning they were suspected in Fisher’s death. (Tr. p. 370, ln. 5-7; p. 458, ln. 1-17; p. 343, ln. 20-23; p. 354 – p. 355). Detective Will Lynch analyzed Fisher and Appellant’s cellphones using Cellebrite. (Tr. p. 342, ln. 7-9). Cellebrite “pulls information off of the cell phone itself and then puts it into a format that [one] could read as opposed to having to go through the cell phone and having to open up every single contact and incoming calls, outgoing calls, SMS pictures and things like that.” (Tr. p. 337, ln. 5-6, 12-13; p. 339, ln. 12-25). Cellebrite also generates a timeline that organizes the user’s cell phone activities in chronological order as well as analyzes the frequency of contact made with other cellphones. (Tr. p. 340, ln. 8-12, 23-25). Cellebrite’s analysis also includes the time, date, and duration of the phone calls made, but cannot generate or recover the content of the calls. (Tr. p. 340, ln. 4-9; p. 372, ln. 5-7). The analysis of Appellant’s phone demonstrated he and Freeman contacted one another 261 times *overall* via text messages and phone calls. (Tr. p. 345, ln. 1; p. 367, ln. 13-17). However, Cellebrite does not distinguish phone conversations from voicemails in

its call frequency analysis, and most of the calls made from Appellant's phone to Freeman went unanswered, including the calls made the day of the shooting. (Tr. p. 358, ln. 6-8; p. 374, ln. 20-22). Freeman was ranked, for lack of a better term, as Appellant's ninth most frequent contact out of twenty-seven (27) contacts. (Tr. p. 345, ln. 12-13). No effort was made to investigate or contact any of the numerous individuals Appellant spoke with on July 9th or in the following days. (Tr. p. 358, ln. 9-19; p. 465, ln. 5-9). Freeman's phone number was deleted from Appellant's phone on an unknown date. (Tr. p. 346, ln. 20-21; p. 363, ln. 2-4). The analysis of Fisher's phone demonstrated she had communicated with Freeman's phone. (Tr. p. 350, ln. 21-23). Both phones contained pictures and videos from July 9, 2016. (Tr. p. 350, ln. 24-25). Law enforcement did not seek a search warrant in order to seize Freeman's phone and analyze its data in depth. (Tr. p. 471, ln. 8-11). Thus, the only record law enforcement could possibly obtain was a log of the calls made from Freeman's phone, which provides no content. (Tr. p. 361, ln. 6-7; p. 362, ln. 5-7; p. 365, ln. 13-15). Law enforcement did not attempt to investigate or contact any of the contacts on Freeman's cell phone. (Tr. p. 362, ln. 8-13).

Pathologist Dr. Edward Proctor performed an autopsy on July 10, 2016 and concluded Fisher's cause of death was a fatal gunshot wound to the head. (Tr. p. 237, ln. 16-22; p. 238, ln. 3; p. 242, ln. 10, 20-21). Dr. Proctor neither found any other injuries or signs of assault, nor did he find injuries consistent with being pushed from a car. (Tr. p. 240, ln. 17-20; p. 246, ln. 11-19). Dr. Proctor also determined Fisher had a blood alcohol level of .068, and her blood screen was positive for Valium and cocaine metabolite, indicating she used cocaine shortly before her death. (Tr. p. 242, ln. 3-10). The bullet entered above Fisher's right ear and exited the left side of the head above the ear and was slightly anterior. (Tr. p. 238, ln. 4-6). Dr. Proctor found that a contact wound indicated the muzzle of the gun was right up against Fisher's head at the time. (Tr. p. 239, ln. 13-

19). Dr. Proctor could not determine which direction the single shot was made in relation to the person that fired it according to the possible seating arrangements in the car. (Tr. p. 245, ln. 4-8).

Detective Lyman is not a ballistics expert, and he did not request SLED's assistance in determining the origin of the gunshot or the velocity of the bullet. (Tr. p. 453, ln. 2-11; p. 480, ln. 5-8; p. 481, ln. 7-19). He did not know whether Freeman or Appellant was right-or left-handed. (Tr. p. 461, ln. 2-5). Detective Lyman admitted that "[t]here was one shot and there's two people" and "[a]t the end of the day, [he] did not know who pulled the trigger in that car." (Tr. p. 465, ln. – p. 466). He also conceded that nothing in the texts or data extracted from Appellant's phone indicated a plan or preparation to go to Myrtle Beach to kill Fisher, and no text, photo, or other data contained an admission of guilt. (Tr. p. 357, ln. 16-19, p. 358, 1-5). Detective Lynch stated no witness indicated that Appellant shot Fisher. (Tr. p. 359, ln. 1-2).

The trial court charged the jury on the law of mere presence, the law of principal as well as on accomplice liability under "hand of one is the hand of all." (Tr. pp. 630-642). The jury requested to review the hand of one instruction written out, and that instruction, as well as the mere presence and circumstantial evidence instructions were provided to the jury. (Ct.'s Ex. 5-7).

## ARGUMENT

- I. **THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT BECAUSE THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE THAT APPELLANT COMMITTED THE MURDER ACTING ALONE OR SUFFICIENT EVIDENCE HE AND CO-DEFENDANT FREEMAN JOINED TOGETHER TO COMMIT THE MURDER UNDER THE HAND OF ONE IS THE HAND OF ALL ACCOMPLICE LIABILITY DOCTRINE.**

### Relevant Facts

After the State rested, Appellant moved for a directed verdict of not guilty. In arguing that the State had failed to prove that he acted as the principal or as an accomplice under the "hand of one is the hand of all"<sup>4</sup> doctrine of accomplice liability, Appellant explained:

There is no direct evidence or substantial circumstantial evidence, Your Honor, to suggest that this is anything else other than a random act by one of these parties and that the State has failed to bring into this court evidence to establish who did what, and we would simply be asking this jury to speculate and/or guess as to what happened, and that's why we have this point in trial where the court can intervene and direct a verdict.

(Tr. p. 533, ln. 18-25; see also Tr. p. 531-532; p. 534, ln. 4; p. 537, ln. 16-25). The trial court directed a verdict of not guilty on the kidnapping charge as to both Freeman and Appellant, but denied the motion for all other charges. (Tr. p. 538, ln. 2 – 540). Appellant later renewed his motion for directed verdict or for a new trial in the alternative. (Tr. pp. 655-656). The trial court denied both motions. (Tr. p. 655-656).

### Standard of Review

"In reviewing the denial of a motion for a directed verdict, the Court must view the evidence in a light most favorable to the State," and review is limited to considering the existence or nonexistence of evidence, not its weight. *State v. Harry*, 420 S.C. 290, 298, 803 S.E.2d 272, 276

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<sup>4</sup> Hereinafter "hand of one".

(2017). This Court will find the case was properly submitted to the jury if the State presented direct or substantial circumstantial evidence tending to prove the guilt of the accused in regard to every element of the offense. *State v. Cain*, 419 S.C. 24, 33, 795 S.E.2d 846, 851 (2017).

The trial court's authority to grant direct a verdict in the defendant's favor embodies the constitutional demand that the State must prove every element of the charged offense beyond a reasonable doubt. *See* Rule 19, SCRCrimP.; U.S. Const. Amend. XIV; S.C. Const. Art. I, §3. *See also Cain*, 419 S.C. at 33, 795 S.E.2d at 851. In cases where the State has exclusively relied on circumstantial evidence, if the "evidence submitted raises a mere suspicion that the accused is guilty, a directed verdict should be granted because suspicion implies a belief of guilt based on facts or circumstances which do not amount to proof." *Harry*, 420 S.C. at 298, 803 S.E.2d at 276. "Suspicion, however strong, does not suffice to sustain a conviction." *State v. Hyder*, 242 S.C. 372, 379, 131 S.E.2d 96, 100 (1963). "The State may not obtain a conviction when its proof as to any one element requires the jury to speculate or guess whether the defendant engaged in the conduct the legislature sought to criminalize." *Cain*, 419 S.C. at 30, 795 S.E.2d at 849. If the jury would need to speculate or guess as to whether the defendant committed an element of the offense charged, the State has essentially presented no evidence of the offense charged. *Id* at 30-32, 846 S.E.2d at 849-51. Thus a motion for a directed verdict must be granted "where evidence [ ] is such as to permit the jury to merely conjecture or to speculate." *Id*.

**A. The State failed to present sufficient evidence that Appellant shot and killed the victim Fisher acting alone.**

The State's theory throughout trial primarily centered upon Appellant and Freeman committing the charges together as one another's accomplices to some degree, and the trial court did not specifically instruct the jury that it could find Appellant committed the crimes charged

acting alone. The relatively minimal role Appellant served as the lone shooter in the State's presentation of the case magnifies the lack of evidence sufficient to prove Appellant's guilt.

The State simply failed to present any evidence that Appellant committed the act of shooting and killing Fisher herself. The inculpatory evidence pertained primarily, if not exclusively to events before and after Fisher was shot. This evidence demonstrated Freeman and Appellant spent time with Oxendine and Fisher the day of her death and the previous night, but there was no evidence as to what transpired between dropping off Oxendine at her aunt's home in Shallotte and the time of the shooting in North Myrtle Beach. There were no calls about any disturbances while the three drove back to Myrtle Beach. The State did not present any evidence of what occurred inside the car when Fisher was shot; law enforcement was unable to "to find any evidence that actually showed what occurred during this incident" because the K&W's parking lot did not have surveillance cameras in that area. Most significantly, the State failed to present sufficient evidence demonstrating Appellant shot Fisher or evidence that placed a gun in Appellant's hand. Despite the State's admittedly unsubstantiated and speculative closing argument that Appellant was the shooter according to where he could have been sitting in the car and how Fisher's head could have been positioned at the moment she was shot (Tr. p. 575, ln. 14-25), the identity of the shooter could not be determined according to the medical examiner's testimony. Dr. Proctor could not determine from which direction the shot was fired inside the car in relation to the person who shot Fisher. (Tr. p. 245, ln. 4-8). In addition to Dr. Proctor's testimony, Detective Lyman and Detective Lynch also testified they did not know whether Freeman or Appellant pulled the trigger. The jury was thus left to speculate or guess as to whether Appellant killed Fisher himself. *See Id.* (reversing the trial court's denial of the defendant's motion for directed verdict on the manufacturing methamphetamine charge because the jury could only speculate or guess



whether the defendant was guilty from the State's evidence that merely proved the amount of methamphetamine the defendant could possibly or theoretically have produced); *State v. Palmer*, 413 S.C. 410, 419-21, 776 S.E.2d 558, 562-63 (2015).

There was also no evidence that Appellant even had a gun. Law enforcement never recovered one. Oxendine's testimony that she did not feel a gun on Freeman's person while sitting on his lap on the ride to Shallotte—hence, she was not even sure that Freeman had one—does not automatically constitute as evidence that Appellant must have had the gun that was later used to kill Fisher. This testimony is not evidence, but rather the absence of evidence, and at best invites the jury to speculate or guess as to whether Appellant might have had the gun later used to kill Fisher. This evidence is therefore equally insufficient to support guilt as the principal. *See State v. Martin*, 340 S.C. 597, 602-03, 533 S.E.2d 572, 574-75 (2000) (holding evidence that merely presents the possibility or is consistent with the defendant and codefendant's presence at the victim's home at the time of the murder was insufficient to submit the case to the jury). The State presented no facts to support any of its theories as to where the gun originated, even though Freeman had the opportunity to retrieve a gun from the truck or hotel room prior to the four leaving for Shallotte and there could have already been a gun in Fisher's car. Further, the State's reliance on the video of Appellant removing an admittedly unidentifiable object as evidence that Appellant had a gun and was the shooter is far from conclusive evidence. The fact that the State could not identify the object with any certainty in its closing argument as a gun and described it merely as "whatever it was he put in there" calls upon the jury to speculate that the item was a gun. The State did not provide the jury with any still photographs of the item or any evidence proving Freeman, Appellant, or Fisher owned, possessed, or even had access to a gun at that time. Moreover,

Detective Helms further testified that he did not know if any items, *i.e.*, possibly a gun, had been taken from the truck. (Tr. p. 301, ln. 1-3).

There were vast other inadequacies in the evidence presented by the State. The State presented no motive, eyewitnesses to the shooting, or videos from the scene. No evidence proving the shot was fired from the passenger seat or from the backseat was produced. There was no evidence or testimony regarding the blood spatters on the victim's clothes to determine the trajectory of the bullet. There was no evidence as to where the bullet struck the inside of the vehicle. There was no testimony or evidence regarding whether the shooter was right or left-handed, or whether the Appellant or Freeman was right or left-handed. There was no inculpatory forensic evidence gathered or analyzed from the truck or Fisher's car.

Thus, the State presented no evidence to distinguish Appellant as the lone gunman from Freeman at the time of the shooting. As in *Martin* and *Cain*, the jury was required to speculate about a essential element of murder in this case: who pulled the trigger. Because the jury was required to speculate regarding the shooter's identity, the State effectively presented no evidence that Appellant actually shot Fisher without Freeman acting as his accomplice. Therefore, the trial court erred in denying Appellant's motion for directed verdict.

**B. The State failed to present sufficient evidence Appellant and co-defendant Freeman joined together to commit murder, engaged in an overt act in furtherance of shooting the victim, or aided, abetted, or assisted the other in the shooting in order to submit the case to the jury under the accomplice liability doctrine of the hand of one.**

Under the hand of one, the State must prove the defendant was "present at the scene of the crime and intentionally, or through a common design, aided, abetted, or assisted in the commission of that crime through some overt act" to prove the defendant guilty under hand of one accomplice liability. *State v. Washington*, 424 S.C. 374, 417, 818 S.E.2d 459, 482 (Ct. App. 2018), *rehearing*

denied Sept. 20, 2018. Cf. e.g., *State v. Thompson*, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007) (“Mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt.”). Pursuant to this doctrine, a person that joins with another to “accomplish an illegal purpose is criminally liable for everything done by his confederate incidental to the execution of the common design or purpose.” *Id.* See also *State v. Fields*, 314 S.C. 144, 146, n. 1, 442 S.E.2d 181, 182, n. 1 (1994) (“Where two persons combine to commit an unlawful act and in its execution a homicide is committed as a probable or natural consequence thereof, all present and participating in the unlawful act are as guilty as the one who committed the fatal act.”). Circumstantial evidence of the parties’ conduct, rather than evidence of a formal or expressed agreement, is sufficient to demonstrate an agreement to achievement an illegal purpose, which thereby establishes presence by pre-arrangement. *State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct. App. 2010). Further, South Carolina courts have required evidence demonstrating the “**alleged accomplice must have acted with the intention of encouraging and abetting the commission of the homicide,**” or, at least that the commission of the murder by the principal must have been a reasonably foreseeable consequence of the defendant’s actions. *State v. Mattison*, 388 S.C. 469, 484, 697 S.E.2d 578, 586 (2010) (bolded text in original); but see *State v. Reid*, 408 S.C. 461, 473, 758 S.E.2d. 904, 910 (2014) (holding the State must present evidence that the defendant *knew* of the principal’s criminal conduct).

First, because there was insufficient evidence Appellant killed Fisher as the principal, the events following the shooting cannot constitute as substantial circumstantial evidence of Appellant’s guilt because there was insufficient evidence Freeman shot Fisher, and thus there was insufficient evidence of Appellant’s guilt under the “hand of one is the hand of all” accomplice liability doctrine. *Martin*, 340 S.C. 597, 533 S.E.2d 572 (holding the trial court erred in denying

the motion for directed verdict when the State failed to present evidence that the defendant killed the victim and had no proof he and his co-defendant had worked together to bring about the victim's death; despite their inculpatory statements about killing someone that night and the circumstantial evidence regarding their movements the night of the crime).

Further, in order to withstand Appellant's motion for directed verdict, the State was required to produce evidence that Appellant and Freeman's presence at the scene was the result of a previously arranged plan to undertake an illegal act. *See Harry*, 420 S.C. at 298, 803 S.E.2d at 276. However, the State failed to present any evidence that Freeman and Appellant joined together to accomplish an illegal purpose or present any evidence of an overt act prior to or during the shooting that would indicate a prior agreement plan to kill Fisher. Likewise, there is no indication that Freeman shooting and killing Fisher would have been foreseeable to Appellant or vice versa. According to Oxendine's testimony, the four had enjoyed their time together with no signs of trouble, violence, or other cause for concern, and at no time did she hear Freeman or Appellant make any threats towards Fisher or indicate a joint intent or plan to do her any harm. As Detective Lynch testified, no texts, calls, or other data extracted from Appellant's phone indicated a plan or agreement with Freeman to go to Myrtle Beach to kill Fisher, and Freeman's phone was not forensically analyzed. The numerous calls Appellant made to Freeman, which were made after they *separated* and drove *separate* cars, means little to prove they had been working together to kill Fisher or working together to cover up a crime because their calls went unanswered for a few hours or so. Moreover, despite testimony that two men removed Fisher from the car, the witness could not identify either Freeman or Appellant as either of the men. This evidence thus fails to prove the men worked together in some manner before or simultaneous to the shooting and only theoretically proves two unidentified men removed Fisher from the car together.

The State did present evidence Appellant and Freeman drove Fisher's car to the Lancer Motel after the shooting, and that a young girl did identify Appellant as the man she saw burning Fisher's car the following day. *State v. Lewis* is instructive. In *Lewis*, the Court of Appeals held that because "the State did not present any evidence of an overt act or the requisite state of mind for aiding and abetting" homicide by child abuse at the joint trial, evidence of the defendant's flight and suicide after the child's death did not suffice to withstand the defendant's motion for directed verdict. 403 S.C. 345, 356-57, 743 S.E.2d 124, 129-30 (Ct. App. 2013). Pursuant to the rationale in *Lewis*, the evidence as to the events after the shooting are insufficient to withstand Appellant's motion for directed verdict for the charges. The State failed to prove an overt act, particularly when considering that the trial court had directed a not guilty verdict for the kidnapping charge for Appellant and Freeman. As per the testimony previously discussed, there was no evidence as to the requisite state of mind. It is not as though the State proved Appellant and Freeman agreed to take possession of the vehicle as part of a plan or agreement to kill Fisher. Additionally, neither defendant was charged or tried for accessory after the fact, and the evidence actually presented and the reasonable inferences therefrom do not inform who actually pulled the trigger. Again, there also no evidence of what occurred during the shooting or evidence that placed the gun in either defendant's hand, let alone Appellant's.

Moreover, as previously discussed in the preceding sub-issue, it is paramount that the State failed to present direct evidence that either man shot Fisher, let alone evidence showing which of the two men actually shot her and which man aided, abetted, or assisted the other. Indeed, Detective Lyman conceded that "[t]here was one shot and there's two people" and "[a]t the end of the day, we did not know who pulled the trigger in that car." (Tr. p. 465, ln. — p. 466, ln. 1-6). See *Lewis*, 403 S.C. at 356, 743 S.E.2d at 130 (holding the trial court erred in refusing to direct the verdict on

aiding and abetting homicide by child abuse charge in a joint trial where the evidence showed only he or his codefendant could have committed the crime but evidence failed to show which of two did); *State v. Johnson*, 291 S.C. 127, 352 S.E.2d 480 (1987) (finding the evidence insufficient for the trial court to have denied the motion for directed verdict where it could not be proven the defendant killed the victim because it was inconclusive whether the defendant's tennis shoes caused the marks on the victim). There was no evidence that either even had a gun. The State's evidence regarding the events before and after the shooting simply fails to suffice to prove that Freeman and Appellant previously agreed to commit any crime together, the natural consequences of which was murder. As Appellant had argued, from the State's evidence, the jury would have had to impermissibly *assume* that either man had a gun, as well as have to assume or guess that either man actually shot Fisher while the other aided and abetted the homicide. *Cain*, 419 S.C. at 30, 795 S.E.2d at 849; *see also Martin*, 340 S.C. 597, 602-03, 533 S.E.2d 572, 574-75.. As in *Cain*, where the State had merely presented a theoretical amount, the State in this case had merely presented a "theoretical gun" and a "theoretical shooter." In *Cain*, the expert witness could not testify conclusively on the quantity element of trafficking in Cain. Likewise, in this case, the State's expert, Dr. Proctor, Detective Lyman, and Detective Lynch, could not determine that the shooter was Appellant nor could they testify from where the shot originated.

It is significant that the jury did not find the evidence sufficient to find Appellant or Freeman guilty under hand of one for murder and possession of a weapon during a violent a crime. This is made patent by the jury finding Appellant guilty on all charges, but finding Freeman guilty of only grand larceny in taking Fisher's car, which Appellant drove after the shooting.

The trial judge's ruling acknowledged that there was no evidence proving the identity of the shooter, and did not and could not refer to any evidence the State presented that proved any of the necessary elements of Appellant's guilty under the hand of one. The trial judge was confident the State presented evidence that established Appellant and Freeman were at the scene (Tr. p. 546, ln.10-25; p. 567, ln. 1-12). However, this is the only element the trial judge's ruling supports.

Lastly, in light of the fact three people could have pulled the trigger: Fisher in committing suicide, Freeman, or Appellant, the State's evidence raised nothing more than a mere suspicion as to the shooter's identification, and thus raised only a mere suspicion Appellant shot and killed Fisher acting alone or with Freeman as his accomplice. The evidence presented required the jury to speculate or guess as to whom pulled the trigger, which equivocates to no evidence at all.



**II. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT EVIDENCE OF EVENTS TAKING PLACE AFTER THE COMMISSION OF THE OFFENSES CHARGED, SUCH AS EVIDENCE OF FLIGHT OR EVIDENCE OF ATTEMPTS TO COVER UP THE OFFENSES CHARGED ARE STANDING ALONE INSUFFICIENT CIRCUMSTANTIAL EVIDENCE TO FIND APPELLANT GUILTY.**

Relevant Facts

During the charge conference, Appellant joined Freeman's request to charge the jury that the evidence of flight or a cover up alone is insufficient circumstantial evidence to find Appellant guilty of the crimes charged. (Tr. p. 565, ln. 10-25). The trial judge denied the request because he was not going to charge the jury on flight, adding that such a jury instruction would constitute as a comment on the evidence. (Tr. p. 566, ln. 1-10).

Standard of Review

"The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 167 (2007).

Argument

The law to be charged to the jury is determined by the evidence presented at trial. *State v. Sams*, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014). *See also* S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); *State v. Stukes*, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016) ("Jury instructions should be designed to enlighten the jury and aid it in arriving at a correct verdict."). As a general rule, a trial judge should refrain from all comment that tends to indicate to the jury its opinion on the credibility of the witnesses, the weight of the evidence, or the guilt of the accused. *State v. Jackson*, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989).

The trial judge committed reversible error by refusing to give the requested charge. The trial judge's reasoning that he would not give the requested charge because he was not charging the jury that it could find evidence flight as evidence of guilty knowledge or intent was flawed because there is no such reciprocal element required for the trial judge to give the requested charge. While the charge on flight has been held improper and has been prohibited, *see State v. Grant*, 275 S.C. 404, 272 S.E.2d 169 (1980), there is by no means authority for the trial judge's finding he could not then instruct the jury that evidence of flight or "cover up" evidence following the commission of the charged offense was in and of itself insufficient evidence of guilt.

The requested charge is also a sound principle of law. In *State v. Lewis*, this Court rejected the State's argument that defendant's flight and suicide attempt constituted sufficient evidence to withstand a directed verdict, particularly in light of the State's failure to present any evidence of an overt act or the requisite state of mind for aiding and abetting the crime charged. 403 S.C. at 357, 743 S.E.2d at 130. (citing *State v. Odems*, 395 S.C. 582, 590, 720 S.E.2d 48, 52 (2011)) (declining to hold "that flight alone is substantial circumstantial evidence of a defendant's guilt"). In *State v. Odems*, the South Carolina Supreme Court held that the State's evidence was insufficient to withstand the defendant's directed verdict motion. 395 S.C. 582, 586-87, 720 S.E.2d 48, 50-1 (2011). The evidence in *Odems* was also circumstantial and related to flight and a cover up: "(1) the fact that less than ninety minutes after the burglary, police located Petitioner in the getaway car with the burglars and the stolen goods; (2) Petitioner fled from law enforcement; and (3) Petitioner asked an uninvolved person to lie for him." *Id.* at 588, 720 S.E.2d at 51. As in *Lewis* and *Odems*, in which the charges in both cases were also presented under the hand of one, the State here failed to prove Appellant committed the crime and that he did so with the requisite mental state for accomplice liability. *See supra* Issue I. Moreover, similar to the circumstantial evidence

held insufficient in *Odems*, the evidence incriminating Appellant was his and Freeman's actions after the shooting: the driving away from K&W following the shooting and Appellant driving and burning Fisher's car.

Moreover, the requested instruction was supported by the evidence produced at trial. There was no evidence as to whom shot Fisher and no evidence of a plan between Freeman or Appellant or Appellant's knowledge Freeman was going to kill her. There was only circumstantial evidence after the fact. Further, the requested instruction does not constitute as a trial judge's improper comment on the evidence in the same way the firmly established instruction on mere presence is not a comment on the evidence.

The refusal to give such a charge was not harmless error in light of the insufficient or even complete lack of evidence that Appellant shot and killed Fisher acting alone or with Freeman as one another's accomplice. *See supra* Issue I. The evidence as to the events following the shooting was the strongest evidence of Appellant's guilt and heavily relied upon by the State during closing arguments. (Tr. pp. 581, ln. 3 – p. 582, ln. 25; p. 584, ln. 9-25; p. 585, ln. 24-25). *See generally State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999) (holding it was "impossible" to conclude the error was harmless partly because the State stressed the improperly admitted evidence in its closing argument).

Therefore, the trial judge's refusal to give this requested charge constituted reversible error, depriving Appellant of a fair trial and warranting a new trial.

**III. THE TRIAL COURT ERRED IN PROHIBITING APPELLANT FROM CROSS-EXAMINING A DETECTIVE ABOUT THE QUESTIONS HE ASKED CODEFENDANT FREEMAN BECAUSE AS DEMONSTRATED BY THE PROFFER, THE CROSS-EXAMINATION WOULD NOT HAVE IMPROPERLY ELICITED CODEFENDANT FREEMAN'S STATEMENT, THEREBY IMPLICATING *BRUTON v. UNITED STATES*, AND WOULD NOT HAVE OTHERWISE OPENED THE DOOR TO PREJUDICIAL OR IMPROPER TESTIMONY.**

**Relevant Facts**

Appellant sought to question Detective Lyman at trial about his statements and questions to Freeman during the course of his interview with Freeman. (Tr. p. 377, ln. 6-23). Outside of the presence of the jury, Appellant proffered the following questions that he sought to ask Detective Lyman: 1) "Did you ever make a statement that we had this case wrapped up within 24 hours?"; and 2) "Did you make a statement that we know this wasn't premeditated, it just happened?" (Tr. p. 383, ln. 15-23). Detective Lyman stated he there a "good chance" he asked Freeman those specific questions, explaining: "If I made those statements, they would've been made early on... basically building rapport with ... Mr. Freeman at the time" so that Freeman would be more forthcoming. (Tr. p. 378, ln. 7-12; p. 384, ln. 10-14). Freeman objected to the line of questioning. (Tr. p. 378, ln. 18-25). The trial court ultimately did not allow Appellant to ask Detective Lyman the questions proffered, reasoning such questioning would violate *Bruton*, prejudice Freeman, otherwise open the door to improper matters, and serve "no other purpose but to inflame the jury against [] Freeman." (Tr. p. 379, ln. 10-16; p. 384, ln. 20-25).

**Standard of Review**

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support

or are controlled by an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). Further, under harmless error analysis, an error is considered harmless where it reasonably could not have affected the trial's outcome. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1986).

### Argument

The scenario and constitutional concerns contemplated by *Bruton* and its successors were not present here. The Sixth Amendment's Confrontation Clause, extended to the states by the Fourteenth Amendment, guarantees the accused the right to confront witnesses against him, which includes the right to cross-examine those witnesses. *E.g.*, *State v. McDonald*, 412 S.C. 133, 139, 771 S.E.2d 840, 843 (2015). Further, the admission of an out-of-court statement violates the Confrontation Clause unless: 1) the witness is unavailable and 2) the accused had a prior opportunity to cross-examine the witness. *E.g.*, *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004). When the witness is a co-defendant that does not testify at a joint trial, and where the co-defendant's statement is a confession that inculcates another co-defendant, the out-of-court statement is inadmissible even with a cautionary jury instruction. *Bruton v. United States*, 391 U.S. 123, 126-137 (1968). *Bruton* applies only when the co-defendant's statement, on its face, implicates the defendant. *McDonald*, 412 S.C. at 139, 771 S.E.2d at 843. (citing *Richardson v. Marsh*, 481 U.S. 200, 207-208 (1987)).

The trial court erred in refusing to allow Appellant to question Detective Lyman regarding the investigation in this manner because it would not have implicated *Bruton* or opened the door to otherwise improper evidence. A *Bruton* violation occurs when

[T]wo defendants, A and B, are tried jointly, and defendant A makes a confession that inculcates defendant B. If defendant A does not testify, then A's statement against B is

inadmissible because B will be unable to exercise his right under the Confrontation Clause to cross-examine A.

*State v. King*, 367 S.C. 131, 140, 623 S.E.2d 865, 869 (Ct. App. 2005) (holding the admission of the co-defendant's confession did not violate *Bruton* because it did not inculcate the defendant).

Appellant was clear he was merely trying to ask Detective Lyman about the investigation and law enforcement's conclusions early on in the investigation, rather than seek to elicit or admit Freeman's statement. The cross-examination would not have raised concerns of prejudice to Freeman pursuant to *Bruton* because Appellant was not prompting Detective Lyman to testify to Freeman's responses or answers during the interview.

As for the trial court's concern about the statement opening the door to other improper matters *State v. Page*, 378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008) is instructive here. In *Page*, the defendant questioned the detective in the case regarding her investigation and the steps leading to the charges against the Page, the defendant, and his co-defendants. *Id.* at 480-81, 663 S.E.2d at 358-59. The trial court granted the State's subsequent motion to admit the co-defendant's statement into evidence against the defendant on the grounds the defendant had opened the door to allow in the complete unredacted confession. *Id.* at 481, 663 S.E.2d at 359. The defendant's questioning of the detective was merely to demonstrate that the State had little evidence to link him to the crime. *Id.* at 482-83, 663 S.E.2d at 359-60. The South Carolina Court of Appeals held it was error, but harmless error, to admit the unredacted statement because although a party may open the door to otherwise inadmissible evidence, any damage to the detective's credibility did not require admission of the statement to rehabilitate the detective's investigative techniques. *Id.* at 483, 378 S.E.2d at 360.

As in *Page*, Appellant's counsel was zealously defending his client and attempting to create reasonable doubt in the jury's minds by demonstrating law enforcement and the State made a rush

to judgment in charging Appellant, as well as underscore the possibility that what may have happened in the car was not premeditated or was even an accident. Also just as in *Page*, the proffered questions would not have required the admission of Freeman's statement into evidence to rehabilitate Detective Lyman's credibility. Any other prejudicial effect or concern regarding the questions' inherent implication of Freeman is nonconsequential because the jury knew Freeman and Appellant had obviously been arrested in this case at a certain point, and Detective Lyman explained the statements were for rapport building, not that Freeman had made any statement.

The error in prohibiting Appellant from conducting such cross-examination was not harmless. In light of Detective Lyman's testimony that Freeman's cellphone data was not analyzed, and his failure to interview any of the persons Appellant contacted close to the time of the shooting and the burning of the car, the questions about the investigation and law enforcement's conclusions regarding the timeline would have helped establish that law enforcement rushed to judgment in charging Appellant. In the same vein, in light of the lack of evidence as to the identity of the shooter and law enforcement's forensic failures, prohibiting Appellant from eliciting Detective Lyman's questions that raised the possibility the shooting may not have been premeditated or was even an accident, and thus not murder, was not harmless. Indeed, the State presented no direct or circumstantial evidence of what happened in the car precisely at the moment Fisher was shot.

Therefore, the trial court committed reversible error because such questioning would not have impermissibly opened the door to allow Freeman's otherwise inadmissible statement into evidence and would not have prejudiced Freeman.

**IV. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE IDENTIFICATION, PHOTO LINEUP, AND RELATED TESTIMONY BECAUSE THE IDENTIFICATION PROCEDURE AND LINEUP FEATURING APPELLANT'S PHOTO WERE UNDULY SUGGESTIVE, AND THE CHILD EYEWITNESS'S IDENTIFICATION IS OTHERWISE SO UNRELIABLE THAT THERE WAS A SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION, IN VIOLATION OF DUE PROCESS.**

Relevant Facts

In the three days after a burned vehicle was reported to CMPD, the connection between the vehicle and Fisher's death was established, and the CMPD and NMBPD came together to investigate the witnesses that encountered and reported the burned vehicle. (Tr. p. 317, ln. 11-22). A photographic lineup was created to include Appellant's photograph and the photographs of five other individuals. (Tr. p. 310, ln. 8-23; St. Ex. 44). Detective Levett had generated the lineup through a computer database using Appellant's mugshot taken a few years earlier when he had a previous encounter with Charlotte law enforcement. (Tr. p. 256). He testified that the procedure used was to ensure objectivity, and had reviewed the lineup before showing the witness to ensure they were "consistent" in characteristics; but could not explain the physical criteria the computer used to generate the lineup and admitted he had no control over which filler pictures were chosen. (Tr. pp. 262-263; p. 311, ln. 1-2). Photos 1, 2, 5, and 6 were photos of men described as having a medium or dark complexion, and photos 3 and 4 depicted men described as having a light complexion. (Tr. p. 259, ln. 1-15; St. Ex. 44). Appellant was described as being one of the two men with a light complexion, and Appellant was the only man out of six men with a mustache but without a beard. (Tr. pp. 259-260).

On July 12, 2016, three days after the burning car was reported, Detective Klass of CMPD presented the lineup to two witnesses, S.H. and Walter Digsby. (Tr. p. 265, ln. 12 -p. 266, ln. 1). Detective Klass told the witnesses: "I was going to show them a photo lineup and that they did not



have to feel pressured to pick out a person. If the person wasn't there it was fine to say that there wasn't anybody present." (Tr. p. 266, ln. 11-14). He presented each of the six photos to the witnesses one at a time, displaying the photos to the witnesses by putting them down on a piece of paper. (Tr. p. 267, ln. 4-6, 21-22; p. 268, ln. 1-2). The first eyewitness to see the vehicle, Walter Digsby, was unable to select anybody from the lineup, and he had written "no" beside Appellant's photo. (Tr. pp. 271- 272, ln. 7-9). Digsby was unavailable to testify because he passed away before trial. (Tr. p. 266, ln. 4-8; p. 317, ln. 18-21). The second witness, S.H., a seven-year-old at the time and nine years old at the time of trial, lived on the same street where the vehicle was found. (Tr. p. 327, ln. 17; p. 328, ln. 22). S.H. testified that while she was playing outside "one summer day", she saw a white car catch on fire. (Tr. p. 328, ln. 22, p. 330, ln. 14). S.H. stated she saw a white car right before it caught on fire, and she saw a light-skinned person with dreadlocks standing outside the car and a woman near the man in another car. (Tr. p. 275, ln. 9-20, p. 276, ln. 1; Tr. p. 280, ln. 17-19). She then saw the man and a woman leave together. (Tr. p. 329, ln. 23-24; p. 330, ln. 18-19). S.H.'s mother called the police after S.H. informed her mother what she had seen. (Tr. p. 330, ln. 23 – p. 331, ln. 2). When she first spoke with police, she told them the man was light-skinned, and then they came back to her with the pictures. (Tr. p. 280, ln. 1-3). When shown the lineup, S.H. quickly selected photograph Appellant's picture (picture #3) by pointing to his picture and stating, "That's him." (Tr. p. 321, ln. 11, 14; St. Ex. 45). She testified that she was 100 percent sure that the man in the photo shown to her by detectives was the man she had seen by the car. (Tr. p. 331, ln. 21 – p. 332, ln.1). S.H. described then men in pictures 1 through 4 as light-skinned, and photos 5 and 6 as depicting men that were dark-skinned. She agreed pictures 3 and 4 were close in complexion, but that the man in photo 4 had a darker complexion. (Tr. p. 279, ln. 1-24). Because S.H. was only seven years old at the time of the identification, Detective Klass stated he had to

take a little bit more time with her to explain the process and ensure she understood. (Tr. p. 270, ln. 3, 11-12). Although S.H. testified she knew the difference between right and wrong at trial, nearly two years after the original identification, Detective Klass did not determine her competence to know and tell truth versus to say something untrue, or lie, even if due to her uncertainty. (Tr. p. 272, ln. 18; p. 273, ln. 1-2; p. 274, ln. 13-25). The record contains no testimony of what S.H. told Detective Helms on July 9, 2016, regarding the car and what she saw the person by the car do; it only contains her testimony at the hearing two years later. No testimony was presented as to what the man later identified as Appellant was doing at the time witnesses saw the man near the burning car on July 9, 2016.

Appellant moved to exclude S.H.'s identification of him and related testimony on the grounds that the identification was unduly suggestive and unreliable. After holding a *Neil v. Biggers*<sup>5</sup> hearing, the trial court concluded the identification procedure or lineup was not unduly suggestive, but even if either were, the trial court found the "identification by the witness, [S.H.], was so reliable that there is no substantial likelihood of misidentification." (Tr. p. 286, ln. 7-13). The trial court also noted that S.H. identified the first four photographs as featuring light-skinned African American men, and that she had the opportunity to view what occurred and who was there, and was 100 percent certain of her identification (Tr. p. 284, ln. 23-24; p. 285, ln. 21, 24-25; p. 286, ln. 1). The trial court characterized the span of three days between witnessing the burning of the car and identification as: "Hardly any length of time between the two at all that would affect a person's memory or recall." (Tr. 286, ln. 3-6). Accordingly, the witness's testimony and the photo lineup were admitted into evidence. (Tr. pp. 252-287; St.'s Ex. 44).

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<sup>5</sup> *Neil v. Biggers*, 409 U.S. 188 (1972).

### Standard of Review

The decision to admit an eyewitness identification is within the trial court's discretion and will not be disturbed on appeal absent an abuse of such discretion, or "the commission of prejudicial legal error." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) "An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion that is without evidentiary support." *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526-27 (2004). "However, an eyewitness identification which is unreliable because of suggestive procedures is constitutionally inadmissible as a matter of law." *State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact. *Id.* at 289.

### Argument

A criminal defendant is deprived of due process when an identification procedure is unnecessarily suggestive and conducive to irreparable mistaken identity, or in other words, created a very substantial likelihood of irreparable misidentification. *Id.* at 343 S.C. at 286, 540 S.E.2d at 447 (citing *Stovall v. Denno*, 388 U.S. 293 (1967); *Manson v. Braithwaite*, 432 U.S. 998 (1977)).

In *Neil v. Biggers*, the United States Supreme Court developed a two-prong test to determine whether an out-of-court identification passes constitutional muster. 409 U.S. 188, 196-97 (1972). First, a court must determine whether the identification process was unduly suggestive. *Id.* at 198. The court next must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *Id.* "Reliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Braithwaite*, 432 U.S. 98, 98, (1977). The central question is whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive. *State v.*

*McCord*, 349 S.C. 477, 562 S.E.2d 689 (Ct. App. 2002). The relevant factors to determine whether an unduly suggestive identification is otherwise reliable considers the following factors: (1) the witness's opportunity to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of any prior descriptions by the witness of the suspect; (4) the witness's level of certainty; and (5) the amount of time between the crime and confrontation. *State v. Heyward*, 422 S.C. 488, 494, 812 S.E.2d 432, 435 (Ct. App. 2018).

The trial court erred in admitting into evidence S.H.'s testimony and her identification at trial because the identification procedure was so impermissibly suggestive to create a substantial likelihood of irreparable misidentification.

The rationale in *State v. Turner*, despite its contrary conclusion, is instructive here. In *Turner*, the defendant objected to the photo lineup as unduly suggestive because it contained only two persons that could be identified as dark-skinned because of the use of a light background. 373 S.C. 121, 127, 644 S.E.2d 693, 696 (2007). The lineup and the identification procedure were upheld because:

[D]espite the variation in background colors, appellant does not stand out in comparison with the other individuals in the lineup. All six men have facial hair and all appear to be "built," as described by the victim. The gray background does not make appellant's complexion seem darker than the complexions of the four other individuals who have purple backgrounds.

*Id.* The case at bar is distinguishable from *Turner* to the extent Appellant is light skinned; however, four of the photos were described as showing medium to dark-skinned persons. Appellant clearly stands out in comparison with these four photos. Only Appellant had a mustache without a visible beard. Thus, through only these two characteristics, the other five males were readily excludable as the man S.H. may have seen and it is not as though these characteristics are easily overlooked by an eyewitness such as a freckles or eye shape would be. Moreover, the

computer-generated procedure for creating the photo lineup offered no opportunity for review as the officer charged with overseeing the lineup's objectivity and consistency between photos was in actuality unable to regulate the lack of uniformity of material characteristics, such as skin tone. Thus, the failure to create a photo lineup containing men with sufficient similar characteristics resulted in an unduly suggestive photo lineup because Appellant appeared in stark contrast with the other men.

Further, the trial court erred in concluding the photo lineup was otherwise sufficiently reliable that no substantial likelihood of misidentification existed from the unduly suggestive lineup. There was no testimony or other evidence of S.H.'s proximity to the man by the car nor any evidence as to how long she observed the person. *See Moore*, 343 S.C. at 289, n. 2, 540 S.E.2d at 449, n. 2 (holding the brief period of time the eyewitness viewed the suspect from a distance away (the extent of the distance was absent from the record) were factors weighing *against* reliability). S.H. merely described the man as light-skinned with dreads and no other identifying features. Her description was meager and less than the eye witness's description in *Moore* which the court described as: "tenuous, at best. [The eyewitness's] descriptions were based primarily on the suspects' clothing and race, and that one was taller than the other. She really did not get a look at either suspect's face." Also inescapable to the analysis is S.H.'s age, and its compounding impact on all of the *Neil v. Biggers* factors, including how acute her attention could have been at the time. *See Id.* Recall that three days had passed before officers spoke with the a seven-year-old child. Despite S.H.'s testimony she was one hundred percent certain that Appellant was the man she saw, the photo lineup was so unduly suggestive that only one or two photos matched her description, which gave her a fifty-fifty chance of selecting Appellant. While she did not mention facial hair in her description—if she noticed facial hair on the suspect at all—only Appellant had

a mustache without a full or visible beard. Thus, under the totality of the circumstances, the only factor established with any degree of reliability was S.H.'s level of certainty, which means little when the rest of the factors weigh against any finding of reliability. See *State v. Hardin*, 425 S.C. 1, 14, 819 S.E.2d 177, 184 (Ct. App. 2018). ("While the victims testified they were one hundred percent certain that Hardin was one of the assailants, and the length of time between the robbery and the identifications was only a little over three hours, we do not believe these two factors alone suffice to support a finding that the out-of-court identifications were proper and admissible.").

Therefore, under the totality of the circumstances, the trial court erred in finding the photo lineup did not create a substantial likelihood of irreparable misidentification, and, thus, the identification was unreliable as a matter of law.

**V. THE STATE'S IMPROPER PRESENTATION OF CONFLICTING PROSECUTORIAL THEORIES REGARDING THE IDENTITY OF THE SHOOTER AND THE MANNER IN WHICH THE SHOOTING OCCURRED RENDERED APPELLANT'S CONVICTIONS FUNDAMENTALLY UNFAIR AND VIOLATED DUE PROCESS.**

Appellant raised the argument when moving for a directed verdict; arguing that the State did not present sufficient evidence for the jury to determine who shot Fisher and that the State was asking the jury to guess as to which defendant pulled the trigger. (Tr. p. 533, ln. 18-25). In presenting its case to the jury, the State impermissibly offered contradictory prosecutorial theories as to Appellant's guilt, in violation of due process and resulting in convictions that are fundamentally unfair.

Argument

The theory of contradictory or inconsistent prosecutorial theories is one of first impression in South Carolina. In the seminal case on this issue, *Smith v. Goose*, 205 F.3d 1045 (8<sup>th</sup> Cir. 2000), the Eighth Circuit Court of Appeals reversed the defendant's thirteen year old conviction because the prosecution's use of inconsistent prosecutorial theories violated due process in a way that rendered his convictions fundamentally unfair. In *Goose*, a married couple was found stabbed to death in their bed with the murder weapon, a butcher knife, near the bodies. *Id.* at 1047. The defendant and four others were arrested for the crime. *Id.* One of the co-defendants, Lytle, made inconsistent statements regarding who stabbed the victims. *Id.* Lytle stated that he and a group of juveniles had arrived at the victims' home after they had already been stabbed by co-defendant Cunningham; but later stated he saw his co-defendant Bowman stabbing them while the other juveniles were burglarizing the home. *Id.* at 1047-1048. The State used the Bowman statement at the defendant's trial to convict him under the theory of accomplice liability. *Id.* The State then used the prior inconsistent statement regarding Cunningham to convict Cunningham in a separate

trial. *Id.* “In short, what the State claimed to be true in Smith’s case it rejected in Cunningham’s case, and vice versa.” *Id.* at 1050. The two prosecutions were factually inconsistent, and the defendant could not have been convicted under both theories. *Id.* at 1051. The Eighth Circuit held reversal was constitutionally required because the “manipulation of the evidence deprived him of due process and rendered his trial fundamentally unfair....The adversarial system is poorly served when a prosecutor, the state’s own instrument of justice, stacks the deck in his favor.” *Id.* In so deciding, the Eighth Circuit likened the State’s impermissible actions to a hypothetical, alternate scenario: “[S]uppose that Smith and Cunningham had been tried jointly. Would the prosecutor have been entitled to ask the jury to accept as true both of Lytle’s accounts of who murdered [the victims] in an attempt to secure convictions of both Smith and Cunningham?” *Id.* at 1051-52. The Eighth Circuit concluded the alternative situation, as well as what actually occurred at trial surpassed the range of discretion given to prosecutors in presenting their case to hold “the use of inherently factually contradictory theories violates the principles of due process.” *Id.* at 1052.

The principles in *Smith v. Goose* are applicable to the present case. Here, the case consisted of one bullet and two defendants, and the State sought to convict both Freeman and Appellant for the murder and related charges without any direct or substantial, circumstantial evidence as to whom actually shot the victim. The State effectively admitted that the identity of the shooter was unknown in its closing argument; the State simply asked the jury to accept that both of them were guilty because regardless of whom pulled the trigger both defendants were guilty under the hand of one accomplice liability. (Tr. p. 568, ln. 19-22; p. 569, ln. 8-12; p. 570, ln.1-19; p. 572-74; p. 576, ln. 1-2). The State presented tenuous and incomplete evidence at trial and during closing argument, suggested to the jury factually different, possible scenarios of what *could* have occurred in the car when Fisher was shot regarding seating positions and shooter, and



the different *unsubstantiated, possible* motives of both or either men, prefacing the speculative suggestions with “if” and “maybe”. (Tr. pp. 576-80; p. 584, ln. 25; p. 586). Moreover, assuming *arguendo* the evidence was sufficient to properly send the case to the jury, the jury could have believed that Appellant was the principal and Fisher was the accomplice or vice versa. Under the scant evidence presented, the jury could have believed Appellant pulled the trigger or Freeman pulled the trigger; however, both could not have been true. Yet under either scenario, the guilty verdict would have otherwise been supported by the same evidence. The State’s creation of factually different scenarios, coupled with the jury’s option as to each defendant’s role in deciding the verdict on each charge, offends due process and principles of fundamental fairness in the same way the Eighth Circuit found the State’s use of inconsistent statements to support factually different theories did. The State here was able to take advantage of the holes in its own case to present unsubstantiated theories of guilt to the jury, and thus stacked the deck and bolstered its chances to secure convictions as the prosecution did in *Smith v. Grosse*.

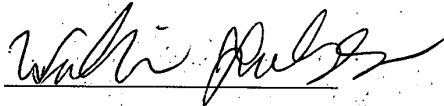
Therefore, Appellant was deprived of due process and his trial was fundamentally unfair because the jury was left to speculate or guess as to which defendant was guilty under the conflicting facts and theories the State presented.

### CONCLUSION

For the foregoing reasons, Appellant respectfully urges this Honorable Court to vacate Appellant's convictions and sentences and remand for the entry of a judgment of not guilty, or in the alternative, a new trial.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "William G. Yarborough III", written over a horizontal line.

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STATE OF SOUTH CAROLINA  
In the Court of Appeals

RECEIVED

May 19 2020

Appeal from Horry County  
The Honorable Steven H. John, Circuit Court Judge

SC Court of Appeals

THE STATE,

Respondent,

v.

NICHOLAS JACOB McIVER,

Appellant.

Appellate Case No. 2018-000824

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**FINAL BRIEF OF RESPONDENT**

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**APPELLANT'S STATEMENT OF ISSUES ON APPEAL**

I. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT WHEN THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE THAT APPELLANT COMMITTED THE MURDER ACTING ALONE OR SUFFICIENT EVIDENCE HE AND CO-DEFENDANT FREEMAN JOINED TOGETHER TO COMMIT THE MURDER UNDER THE HAND OF ONE IS THE HAND OF ALL ACCOMPLICE LIABILITY DOCTRINE?

II. WHETHER THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT EVIDENCE OF EVENTS TAKING PLACE AFTER THE COMMISSION OF THE OFFENSES CHARGED, SUCH AS EVIDENCE OF FLIGHT OR EVIDENCE OF ATTEMPTS TO COVER UP THE OFFENSES CHARGED ARE STANDING ALONE INSUFFICIENT CIRCUMSTANTIAL EVIDENCE TO FIND APPELLANT GUILTY?

III. DID THE TRIAL COURT ERR IN PROHIBITING APPELLANT FROM CROSS-EXAMINING A DETECTIVE ABOUT THE QUESTIONS HE ASKED CODEFENDANT FREEMAN IF THE PROFFER DEMONSTRATED THE CROSSEXAMINATION WOULD NOT HAVE ELICITED CODEFENDANT FREEMAN'S STATEMENT, THEREBY IMPLICATING BRUTON v. UNITED STATES, AND IF IT WOULD NOT HAVE OTHERWISE OPENED THE DOOR TO PREJUDICIAL OR IMPROPER TESTIMONY?

IV. WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE IDENTIFICATION, PHOTO LINEUP, OR RELATED TESTIMONY IF THE IDENTIFICATION PROCEDURE AND LINEUP FEATURING APPELLANT'S PHOTO WERE UNDULY SUGGESTIVE, AND IF THE CHILD EYEWITNESS'S IDENTIFICATION IS OTHERWISE SO UNRELIABLE THAT THERE WAS A SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION, IN VIOLATION OF DUE PROCESS?

V. WHETHER APPELLANT'S CONVICTIONS ARE FUNDAMENTALLY UNFAIR OR WERE OBTAINED IN VIOLATION OF DUE PROCESS BY THE STATE'S PRESENTATION OF CONFLICTING PROSECUTORIAL THEORIES REGARDING THE IDENTITY OF THE SHOOTER OR THE MANNER IN WHICH THE SHOOTING OCCURRED.

## **STATEMENT OF THE CASE**

On the morning of July 9, 2016, Appellant Nicholas J. McIver (“McIver”) murdered Amanda Fisher in Horry County. McIver was arrested later that day in Charlotte, N.C., charged with Fisher’s murder and the theft of her car, and subsequently returned to South Carolina.<sup>1</sup> McIver was indicted in Horry County for murder, kidnapping, possession of a weapon during the commission of a violent crime, and grand larceny over \$2,000 but less than \$10,000. (Ind. #s, 2016-GS-26-5556 - 5558). McIver was represented by Scott Bellamy, Esquire. Assistant Solicitors George Debusk and Seth Oskin prosecuted the case. On April 25-27, 2018, McIver proceeded to a jury trial before the Honorable Steven H. John. At the close of the State’s case, a directed verdict was granted in favor of McIver on the kidnapping charge. (R. 541-47). At the conclusion of the trial, the jury found McIver guilty of murder, the weapon charge, and grand larceny. (R. 650). Judge John sentenced McIver to 45 years imprisonment for murder and 5 years for grand larceny and the weapon charge concurrent. (2016-GS-26-5556 - 5558; R. 661).

## **RESPONDENT’S STATEMENT OF FACTS**

On July 9, 2016, at approximately 11:15 a.m., Kenneth Thompson, a retired school teacher from Brunswick County, N.C., stopped at the K&W Cafeteria on Highway 17 in North Myrtle Beach to eat lunch. Mr. Thompson, as was his habit, parked away from the few other cars in the parking lot of the cafeteria so his car would not be damaged and parked under a tree near Highway 17 so his car would be in the shade instead of the hot July sun. Mr. Thompson also liked to walk so he did not mind parking far from the front door of the restaurant, which did not open for breakfast and was just then opening for lunch. (R. 86-105, State’s Ex. 2 & 52).

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<sup>1</sup> McIver was arrested in Charlotte, N.C. with his codefendant Terrell Freeman. Freeman was indicted for the same crimes. Freeman was tried jointly with McIver but only found guilty of grand larceny > \$2,000 and sentenced to the maximum of 5 years. (R. 650-51, 664).

As he was getting out of his car, Mr. Thompson heard 1 “pop.” It was so loud it got his attention and he looked toward Highway 17 thinking a tire had blown out on a passing vehicle and saw nothing unusual. But as he turned toward the K&W Cafeteria, he saw about 25 feet away, a man pulling a woman out of a white car by her arm while another man in the car was also pushing the same woman out of the car. While this was occurring, the woman was not saying anything, fighting, resisting, or moving at all. The 2 men dumped the woman on the ground outside the white car like she was a bag of trash or garbage. The woman lay on the pavement motionless. At that point, Mr. Thompson realized the “pop” he had heard was a gunshot and he had just witnessed a shooting or murder of the woman removed from the car by the 2 men. Thompson believed he would be murdered next because of what he had seen. He was so afraid he ran toward the restaurant and instead of entering the front door hid behind the restaurant. When he was able to turn around, he saw the white car was gone from the parking lot. Thompson was so upset he could not dial his cell phone to call police but promptly reported to an employee in the restaurant that a woman had been shot and dumped in the parking lot. He then spoke to the manager. (R. 86-105; State’s Ex. 1, 2, & 3).

Mr. Thompson did not see the white car pull in to the parking lot before the shooting, but testified he saw it parked in a normal position and did not hear any squealing tires as it left the parking lot after the shooting. Thompson testified the man who was pulling the woman out of the car was outside the driver’s door pulling the woman out of the driver’s seat while the man in the front passenger seat was also pushing the woman out of the driver’s door at the same time. When shown a photo of the victim Amanda Fisher’s car, Thompson identified the victim’s car as the car the men removed the woman from. (R. 86-105; State’s Ex. 1, 2, & 3).

Thompson described the individual outside the car doing the pulling as a black male with short or possibly pulled back hair and a medium complexion [i.e. McIver's co-defendant Terrell Freeman, hereinafter "Freeman"]<sup>2</sup>. The man outside the car was not wearing a hat and did not have long braids or dreadlocks. Thompson could not describe the man's clothes because he was focused on the young woman being pulled and pushed from the car. Thompson was unable to provide any description for the other person because he could only see through the front windshield of the white car that there was another person inside the car in the front passenger seat pushing the woman out of the car as the other man outside the car was also simultaneously pulling her out of the car. Thompson did not attempt to identify McIver or Freeman from a photo lineup or try to make an in-court identification at trial. (R. 86-105; State's Ex. 1, 2, & 3).

After being notified by Mr. Thompson of what had just occurred in the parking lot, Reggie Benton, the manager of the K&W restaurant, went out into the parking lot, where he found the woman lying on the pavement face down with blood on her head. The white car was gone. Mr. Benton testified a car leaving the parking lot could only go south on Hwy. 17 toward the City of Myrtle Beach. There was no broken or shattered glass on the ground near the woman. Benton saw the woman's body twitch 1 time. Because he thought she might still be alive, he went to her, and spoke words to her in an attempt to comfort her even though she was unconscious and possibly dying or already dead. A fellow employee of the restaurant called 911

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<sup>2</sup> Based on other evidence in the trial, McIver is African-American with a light complexion who had long hanging dreadlocks at the time of the crimes. As a result, McIver was the person in the front passenger seat pushing the victim out of the car. His co-defendant Freeman was the person outside the car pulling the victim out by her arm. (R. 86-105, 353, 399-400; State's Ex. 60).



as the manager was attempting to assist the victim and EMS responded. By the time of their arrival, the woman had expired. (R. 105-114; State's Ex. 2, 3, & 4).<sup>3</sup>

Officers of the North Myrtle Beach Police Department arrived on the scene. The victim was lying on her stomach in the parking lot with a bleeding wound to her head. There was no broken or shattered glass anywhere near or under her body. Between the victim's legs, officers found the victim's cell phone and were able to access it and identify the victim as Amanda Fisher of Shallotte, N.C. Also found between the victim's legs was a piece of a bullet fragment. There was no purse or wallet on or near the body. Nothing else of evidentiary value was found at the crime scene. Officers attempted to locate any video surveillance footage of the parking lot or surrounding businesses, but there was none. (R. 114-63; State's Ex. 2, 3, 7-12).

Pathologist Dr. Edward Proctor performed an autopsy and concluded Amanda Fisher's cause of death was a fatal gunshot wound to the head. There were no other injuries or signs of assault. The bullet entered above Fisher's right ear and exited the left side of the head above the left ear and was slightly anterior. As a result, no bullet was recovered from her skull. The gunshot wound was a contact wound which meant the muzzle of the gun was pressed up against Amanda's head at the time she was shot. All of the gunpowder and metal particles from the gunshot went into the wound. (R. 237-46; State's Ex. 35).

After contacting the victim's family on the afternoon of July 9<sup>th</sup> in Shallotte and notifying them of their daughter's death, police learned the victim had been driving her white Chevrolet Malibu with N.C. license plate #DBJ-9284 before her death. The car was purchased for Amanda by her grandfather for between \$10,000 and \$16,000 and everything on the car functioned

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<sup>3</sup> Benton also testified the only cars parked in the parking lot that he remembered would have been employees who parked behind the restaurant and based on the time this occurred and on past experience, the only cars in front of the restaurant would have been 2 or 3. (R. 113).

including the air-conditioning and the windows. Amanda loved the car and was proud of it. Amanda had recently moved to the beach from the Charlotte, N.C. area to start her life over.<sup>4</sup> She was living in her family's vacation home in Shallotte near Holden Beach. At the time of her death, Amanda's family had traveled from Charlotte to Shallotte for a vacation, and they were staying with Amanda. The same day, July 9th, after her murder, police entered Amanda's vehicle information in the National Crime Information Center (NCIC) computer and reported the car stolen. Around 4:30 p.m., North Myrtle Beach police were notified the victim's car had been discovered in Charlotte, N.C. fully involved in fire. Charlotte is roughly a 4 hour drive from the Myrtle Beach area. Witnesses in that area of Charlotte had seen a male individual set the car on fire and then flee the area with a female driving him away. (R. 136-40, 166-88; 253-81; 289-334; 385-482; State's Ex. 1, 5, 13, 14, 15, 37, 38, 44 & 45).

Police also learned from the victim's family that the victim had been with her cousin Tabetha Oxendine ("Tabetha") the previous night and into the morning hours of July 9th up until about 9:45 a.m. Police interviewed Tabetha, who provided police with the names of 2 male individuals, Terrell Freeman and a person named "Jacob", whom the victim and Tabetha had met the previous night in Myrtle Beach and who the victim was with shortly before her death. Tabetha related to police that she and the victim met the 2 men on Ocean Boulevard around 1:00 to 2:00 a.m. on July 9th and spent the night with them partying at a motel there, the Holiday Sands North, where Amanda had rented a room to celebrate Tabetha's birthday. Tabetha testified at trial that she spent most of her time during the night with Freeman and Amanda with "Jacob". The following morning, still on July 9<sup>th</sup>, during daylight hours, the victim, "Jacob,"

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<sup>4</sup> Prior to moving to Shallotte, Amanda had testified in a murder trial in Charlotte, N.C. Apparently, this is the reason she moved to the coast to start her life over. However, the jury was not aware she had previously testified in a murder trial, only that she had moved to the coast from Charlotte to start her life over. (R. 47-48; 166-88).

Tabetha, and Freeman traveled to North Carolina in Amanda's white car where Amanda dropped Tabetha off at her family's beach house near Oak Island. Tabetha informed police Amanda left there in the white car with "Jacob" in the passenger seat and Freeman in the back seat behind Amanda headed back to Myrtle Beach. This was the last time Tabetha saw her cousin alive. (R. 166-88; 200-09; 385-482; 486-520; State's Ex. 4, 21, 22, 23, 24; 61).

North Myrtle Beach police provided Charlotte police with the name and partial name they had been given by Tabetha. Police there were able to determine the identities of the 2 men as Nicholas Jacob McIver and Terrell Freeman of the Charlotte area. (R. 385-91).

As a result, North Myrtle Beach police were able to discover the 2 men had checked into the Lancer Motel near 6<sup>th</sup> Avenue in Myrtle Beach on the night of July 8<sup>th</sup> at 9:44 p.m., the night before Amanda's murder. They checked into the motel under Freeman's name, the hotel requiring the person checking in to provide a photo i.d. card. They checked in to stay 2 nights with check out to be on Sunday, July 10th. However, it was learned the 2 men had left the motel suddenly without checking out on Saturday, July 9th, approximately 45 minutes to 1 hour after Amanda's murder. (R. 190-200, 396-97, 405-10; 429-32; State's Ex. 4, 16-20, & 59).

Police were also able to confirm Amanda did check in to the Holiday Sands North on July 9th at about 1:00 a.m. with her cousin Tabetha. Through obtaining video surveillance tape, police were also able to confirm the women met 2 men at about 2:00 a.m. and spent the remainder of the night with the 2 men in and out of the women's motel room. And, the victim was last seen at the Holiday Sands North at 7:32 a.m. on July 9<sup>th</sup>. (R. 410-24, 201-10, 440-41; State's Ex. 22, 23, 24). Further, through reviewing surveillance video at the Lancer Motel, the victim was last seen outside her car on video alive talking with the same 2 men in that parking lot near her white car at 7:42 a.m. also on July 9<sup>th</sup>. (R. 422-25). She leaves the Lancer Motel in

her white car and returns a few minutes later at 8:02 a.m. remaining in her car. In the surveillance video, 1 of the same 2 men can be seen talking to the victim as she sits in her car. The same 2 men then get into the victim's white car and it leaves the Lancer Motel parking lot at 8:06 a.m. (R. 422-25). The car does not reappear on the Lancer Motel surveillance video until shortly before noon, and the victim is no longer in her white car. (R. 428-31; State's Ex. 17).

Amanda Fisher's family also informed police later the evening after the murder that the victim's credit cards had been fraudulently used after her murder. Through further investigation it was determined the victim's stolen credit card had been used in Bennettsville, S.C. on July 9, 2016 at 1:45 p.m. to purchase matches, cigarettes, and gasoline at a convenience store which is on the way back to Charlotte, N.C. from Myrtle Beach. Police also learned someone had used the victim's stolen credit card again at a convenience store in Marshville, N.C., also on the way from Myrtle Beach to Charlotte. The person again purchased gasoline there. This purchase was made at 3:00 p.m. (R. 176-77; 397-98, 433-37; State's Ex. 28, 29, 30).

Based on the fraudulent credit card uses, police were able to determine through obtaining video surveillance footage that it was McIver who bought the matches, \$7.00 worth of gas, and cigarettes using Amanda's stolen credit card at the gas station in Bennettsville. McIver is seen in the store purchasing the items and outside the store still driving the victim's car. McIver is wearing shorts. In the surveillance video, it could be seen that the front windshield of the victim's car was intact. At times, McIver had the driver's window down and at other times the driver's window is up and intact. (R. 223-32; 433-37, 441, State's Ex. 5, 29, 30, 31, 32, 59, 60).

Police were also able to determine through obtaining video surveillance footage that it was McIver who also later bought a carton of cigarettes for \$49.40 and gas at the gas station in Marshville, N.C. using the victim's stolen credit card. This station is located in a rural area, not a

major traveled road from the coast to Charlotte, N.C. Again, McIver was driving the victim's white car. In this video, McIver is driving the victim's car with the driver's window down. McIver has now changed his pants from shorts to long pants. While at this gas station or shortly thereafter, McIver made several phone calls to his girlfriend. (R. 211-13; 217; 220; 227-28; 230; 296, 433-34; 437-42; 441; 449; 477; State's Ex. 5, 25, 26, 27, 28, 29, 59-60).

Video surveillance footage at the Lancer Motel in the City of Myrtle Beach also showed McIver and Freeman arriving at the motel at approximately noon on July 9, 2016, in Amanda Fisher's car. (R. 405-10, 428-32; State's Ex. 17). This was 45 minutes after Amanda Fisher's murder in the parking lot of the K&W cafeteria in the City of North Myrtle Beach. It takes about 30 to 45 minutes to drive from North Myrtle Beach to the Lancer Motel in heavy daytime July traffic. These are the same 2 men who could be seen talking with and leaving with Amanda in her car at around 8:00 a.m. earlier that morning. (R. 441-42). In the surveillance video, at approximately noon, McIver can be seen driving the victim's car and Freeman was in the passenger seat. (R. 407, 429, 430; State's Ex. 17). After parking the victim's car, McIver can be seen getting out of the driver's side, briefly conversing with Freeman, and walking to his pick-up truck also parked in the same parking lot. Freeman enters the motel. McIver can then be seen taking an item from the front waist band of his pants and placing it in the bed of his truck. (State's Ex. 17; R. 407, 429; State's Ex. 53-59). McIver then enters the Lancer Motel. The 2 men then collect their things out of their motel room and place them in the same truck. However, they do not do this hurriedly. This takes about 10 to 15 minutes to accomplish. (R. 407, 428-32; State's Ex. 17). McIver then goes back to the bed of his truck and retrieves the item he placed in the bed of the truck and places it back in his front waist band as he walks

toward the victim's car. (R. 407, 429-32; State's Ex. 17).<sup>5</sup> McIver then re-enters the victim's white car on the driver's side and drives out of the parking lot of the Lancer Motel. (R. 407, 429-32; State's Ex. 17). Freeman eventually gets in the driver's side of McIver's truck and drives away also leaving the Lancer Motel. (R. 407, 429-32; State's Ex. 17).

Through cell phone records, police were able to determine that after leaving the Lancer Motel, between 12:10 p.m. and 12:30 p.m., McIver called his co-defendant Freeman 5 times from the victim's car while Freeman is driving McIver's truck. (R. 400, 431; 432). Freeman returned McIver's calls at 12:38 p.m. with a nearly 6 minute call. (R. 432). The 2 men then made 3 more short calls to one another between 12:44 p.m. and 1:16pm. (R. 433).

Through cooperation with the Charlotte police, police in North Myrtle Beach learned the scene of the burned vehicle, Amanda's car, was less than a mile from the residence of McIver's girlfriend, who he had called from the last gas station before arriving in Charlotte. (R. 291-92, 296, 297-98; 439-40; State's Ex. 5 & 36). The car was "completely burned up" and police found no gun, bullets, casings, brain matter or blood in the car, but recovered Amanda's burned purse and a melted key fob containing her car keys. Her i.d. was still in her purse but her credit cards were missing. (R. 292-96; 306-07, 392-95; 476-77; 479; State's Ex. 13, 14, 36-43, 46).

As previously stated above, 2 persons who lived in the area where the car was found burning saw the car set on fire. On July 12, 2016, 1 witness, a 9 year old child, was able to identify a suspect from a photographic line-up presented by a Charlotte police investigator. She identified McIver as the person who set fire to the victim's white Chevrolet Malibu and then fled the scene with a woman parked in a nearby car. (R. 253-81; 289-334; State's Ex. 44 & 45).

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<sup>5</sup> In the surveillance video at the gas station in Bennettsville, McIver can be seen repeatedly placing a free-hand on the waist band area of his shorts. The same area where he placed the item he removed from the bed of his truck in the Lancer Motel parking lot as he walked toward Amanda's stolen car shortly after her murder.

After setting fire to the victim's car on the afternoon of July 9th, McIver contacted his co-defendant Freeman several times by phone and the 2 conversed. After police were able to determine their identities and put out a public BOLO for and request for assistance in their arrest, McIver and Freeman turned themselves in to police together. Freeman's cell phone was missing and never recovered. McIver's cell phone was recovered from his personal belongings at the Charlotte jail. By the time the phone was recovered, McIver had attempted to delete Freeman's contact information from his cell-phone. (R. 337-75; 400, 439; State's Ex. 47-51).

Charlotte police processed the truck driven by McIver and Freeman that weekend, (R. 449). Papers were found in the glove box of the truck showing the truck was used by McIver. (R. 451, 401-05; State's Ex. 53-59). Even after the arrest of McIver and Freeman, police were never able to locate or recover the murder weapon. (R. 453, 476-77; 480-81).

#### **ARGUMENT I.**

**Judge John did not err in denying the motion for a directed verdict on murder and the weapon charge.**

#### *What Occurred Below*

At the close of the State's case, McIver moved for a directed verdict of not guilty on all charges but grand larceny.<sup>6</sup> McIver argued there was not sufficient direct or substantial circumstantial evidence of guilt on the indictments for murder, kidnapping, and possession of a weapon during a violent crime. The State opposed the motion as to all charges. After hearing argument from both parties, Judge John reviewed the evidence in detail and the law and found McIver was not entitled to a directed verdict on the indictments for murder and possession of a weapon during a violent crime; however, McIver was entitled to a directed verdict on the charge of kidnapping as the State's evidence raised only a suspicion of guilt on that charge. (R. 522-47).

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<sup>6</sup> McIver had already conceded before the jury he was guilty of stealing the victim's car.

The defense then rested without calling any witnesses. McIver then renewed his motions for a directed verdict on murder and the weapon charge. Judge John again denied the motion for a directed verdict on murder and the weapon charge. (R. 554-57).

***Standard of Review / Directed Verdict  
(Appellate)***

A defendant may only appeal from a trial judge's denial of a motion for a directed verdict of acquittal where there is a total failure of competent evidence tending to establish the charge laid in the indictment, and absent an error of law, the ruling must stand. State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984). In reviewing a denial of a directed verdict, this Court must view the evidence in the light most favorable to the State. State v. Cope, 405 S.C. 317, 748 S.E.2d 194 (2013); State v. Rogers, 405 S.C. 554, 748 S.E.2d 265 (Ct. App. 2013). This Court views the evidence *and* all reasonable inferences in the light most favorable to the State. State v. Lemire, 406 S.C. 558, 753 S.E.2d 247 (Ct. App. 2013), *citing* State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is any direct evidence, or if there is substantial circumstantial evidence, reasonably tending to prove the defendant's guilt, this Court must find the trial court properly submitted the case to the fact finder. Rogers 405 S.C. 554, 748 S.E.2d 265, *citing* State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011). This Court considers only the existence or non-existence of evidence, not witness' credibility, in reviewing the denial of a directed verdict. Rogers *supra*, n. 5, 748 S.E.2d 265. Our courts have repeatedly held, where the evidence is circumstantial, the evidence will be considered as a whole, not in isolation, in determining whether there was sufficient evidence to submit the case to the jury. Rogers. If the State has presented any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must affirm the trial court's decision to submit the case



to the fact finder. State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013). “The appellate court may reverse the trial judge’s denial of a motion for a directed verdict only if there is no evidence to support the judge’s ruling.” State v. Stanley, 365 S.C. 24, 42, 615 S.E.2d 455 (Ct. App. 2005).

#### *Trial Court’s Standard*

When ruling on a directed verdict motion, the trial court is concerned with the existence or nonexistence of evidence, not its weight. Cope, 405 S.C. 317, 748 S.E.2d 194. A trial court should grant the directed verdict motion when the evidence merely raises a suspicion the accused is guilty, as suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2008). On the other hand, “a trial judge is not required to find that evidence infers guilt to the exclusion of any other reasonable hypothesis.” Hepburn, 406 S.C. 416, 753 S.E.2d 402. The trial judge is required to deny the motion for a directed verdict and submit the case to the jury if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. Hepburn, 406 S.C. at 429, 753 S.E.2d 402, *quoting* State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126, 127 (2000).

#### *Analysis*

There was more than substantial circumstantial evidence McIver murdered Amanda Fisher to overcome the motion for a directed verdict as to the charges of murder and possession of a weapon during a violent crime. Therefore, Judge John did not err in denying the motions for a directed verdict as to those charges. State v. Cherry, *supra*.

The State established that on the night of July 8, 2016, McIver and Freeman checked into the Lancer Motel under Freeman’s name. The 2 men were in a truck used by McIver. The Lancer Motel was located just a few blocks from the Holiday Sands North where the victim and

her cousin checked in at around 1:00 a.m. on July 9, 2016. The victim and Tabetha met McIver and Freeman on Ocean Boulevard. McIver introduced himself as “Jacob” not Nicholas or “Nick” McIver. During the entire night and following morning, McIver never used his last name. McIver also claimed he went to school with Tabetha in Charlotte, which was false. The group eventually went to the women’s motel room and partied into the early morning hours. McIver was primarily with the victim and Freeman with Tabetha. During the night, Tabetha had multiple sexual encounters with Freeman. At no time did Tabetha see *or* feel a gun on Freeman.<sup>7</sup>

McIver and Freeman were the last 2 individuals seen with the victim alive before her murder. Amanda was driving her white car when she dropped off her cousin, Tabetha, in Oak Island, N.C. shortly before her murder. Tabetha testified that when Amanda dropped her off, Amanda was driving her white car, McIver was in the front passenger seat, and Freeman was seated in the back seat behind Amanda. When Amanda drove away in her white car, McIver was still in the front passenger seat and Freeman was still in the back seat behind Amanda.

Tabetha also testified that before the ride to North Carolina, it was McIver who asked to ride with Amanda while she dropped off Tabetha near Oak Island. Tabetha testified she thought this was strange, but the 2 women agreed to allow McIver and Freeman to ride with them. Tabetha also testified that during the entire ride, Amanda drove and McIver sat in the front passenger seat. Tabetha and Freeman sat in the back seat and Tabetha fell asleep with her head on Freeman’s lap. Tabetha testified she never saw or felt a gun on Freeman during the ride to Oak Island. The evidence established McIver and Freeman were the last 2 individuals with the victim before she was shot. See State v. Lynch, 412 S.C. 156, 173, 771 S.E.2d 346, 355 (Ct. App. 2015)(discussing the fact that the defendant was the last person seen with the victim alive

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<sup>7</sup> This is circumstantial evidence it was McIver who was armed with the murder weapon.

and it was at the location of the crime scene as circumstantial evidence of guilt), *citing State v. Williams*, 303 S.C. 274, 276, 400 S.E.2d 131, 132-33 (1991)(finding substantial evidence to prove the defendant's guilt when the victim was employed by the defendant, was last seen alive with the defendant, and the victim's decomposed body was found). The victim was last seen alive with McIver and Freeman roughly 75 minutes before the victim was killed.<sup>8</sup>

At about 11:15 a.m., an eyewitness, Kenneth Thompson, parked his car in the parking lot of the K&W restaurant in North Myrtle Beach. As he got out of his car and started to walk toward the restaurant, he heard a loud "pop". It was so loud Thompson looked toward Hwy. 17 thinking a car had backfired or a tire had blown out, but he saw nothing. He turned and saw a white car parked near to him in the parking lot. He saw a black male outside the white car on the driver's side pulling a woman's body out of the front driver's seat of the car by her arm while another man seated in the car in the passenger seat was also pushing the same woman's body out the front seat of the car. The 2 men, the 1 outside the car, and the 1 inside the car were working together to get the woman's body out of the white car. Thompson realized he had just witnessed the woman being shot or murdered. The manager of the restaurant also testified when he reached the victim, he saw her body twitch 1 time. Based on the above evidence, the State established the murder occurred at approximately 11:15 a.m. inside the victim's white Chevrolet Malibu while it was parked in the parking lot of the K&W restaurant in North Myrtle Beach.

Thompson testified the 2 men working together to remove the woman from the car occurred just 5 to 10 seconds after the gunshot was fired. Thompson testified the 2 men pulled and pushed the woman's body out of the driver's seat of the car and dumped the body on the

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<sup>8</sup> After dropping Tabetha off, Amanda, McIver, and Freeman drove to Amanda's home in Shallotte, and then back to North Myrtle Beach where the car stopped and was parked in the K&W parking lot, a ride of about 1 hour and 15 minutes. Most of the time from dropping off Tabetha until the murder was spent by Amanda, McIver, and Freeman riding in Amanda's car.

ground like it was a piece of trash. Neither of the 2 men was exclaiming they had nothing to do with the shooting or attempting to withdraw from the situation. Neither man was arguing with the other. Neither man called for help for the victim or ran from the scene. Thompson did not hear any arguing or disagreement before the shooting. Thompson was afraid for his life because of what he had heard and seen and ran toward and eventually into the restaurant for assistance. There was no screeching of tires as the white car left the parking lot. Based on Thompson's testimony, and the reasonable inferences therefrom, the 2 men were definitely working in concert, aiding and abetting each other in the murder of Amanda Fisher. State v. Harry, 420 S.C. 290, 803 S.E.2d 272 (2017), *citing* State v. Thompson, 374 S.C. 257, 261-62, 647 S.E.2d 702 (Ct. App. 2007); State v. Hill, 268 S.C. 390, 395-96, 234 S.E.2d 219, 221 (1977).

Based on Thompson's description of the person outside the victim's car pulling her by the arm, the video surveillance evidence, and the testimony of other witnesses, the circumstantial evidence established it was McIver who was in the front passenger seat of the victim's white car pushing the victim out of the car, and it was Freeman who was the individual outside the car pulling the victim out by her arm.<sup>9</sup> As a result, the direct and circumstantial evidence established McIver was present at the scene of the crime at the time the victim was murdered. *See* State v. Frazier, 386 S.C. 526, 531-532, 689 S.E.2d 610, 613 (2010)(finding witness placing defendant near crime scene at the time of the murder was circumstantial evidence of guilt).<sup>10</sup>

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<sup>9</sup> There was no dispute at trial that McIver and Freeman were the 2 men in the car with the victim at the time she was shot. This was conceded several times during the trial by both defendants. Additionally, there was no dispute the murder of the victim occurred in her car in the parking lot of the K&W restaurant at about 11:15 a.m. on July 9, 2016. The dispute at trial was which of the 2 men shot the victim and whether the 2 men were acting in concert.

<sup>10</sup> McIver seeks to compare his case to State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000), where the Court found a directed verdict was warranted. However, the instant case is distinguishable from Martin. In Martin, the Court specifically noted the State had failed to present evidence placing the defendant at the scene of the crime. Martin, 340 S.C. at 602, 533

And, the evidence also established McIver was seated beside the victim at the time of her murder directly to her right, the same general direction from which the fatal gunshot wound was fired into her head. Other evidence in the case established the victim's front windshield was not shattered or shot out at the time of the murder, nor was the driver's side window. As a result, because the wound to the victim's head was a through and through gunshot wound from her right to left, and the gun was actually placed against the victim's head when fired, the circumstantial evidence and the reasonable inferences therefrom indicate it is more probable the victim was shot by someone sitting to her right in the front passenger seat of her car while the driver's side window was rolled down. No shattered glass was found at the crime scene. McIver had occupied the front passenger seat of the victim's car during the trip from Myrtle Beach to North Carolina. And, based on Mr. Thompson's testimony, and the other evidence in the case, it was McIver who was occupying the front passenger seat just seconds after the fatal gunshot was fired.

The circumstantial evidence also established the man who was outside the car, Freeman, then got back into the victim's white car and both men drove away in the white car south on Hwy 17 as Thompson was fleeing toward the restaurant, because when Thompson turned around, the white car was gone, but the victim was still lying on the ground. The circumstantial evidence established it was McIver who was driving the victim's car as it fled from the parking lot because just minutes later McIver is seen driving the victim's white car. (State's Ex. 17). The evidence established McIver and Freeman stole the victim's car. State v. Byers, 277 S.C. 176, 284 S.E.2d 360 (1981)(evidence defendant stole truck to flee the scene of a prior crime was admissible as evidence of guilt of the prior crime); State v. Bratschi, 413 S.C. 97, 113, 775 S.E.2d 39, 48 (2015)(fact that victim's car was missing after his murder, defendant's blood was

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S.E.2d at 574. Here, there is no question the State proved McIver was present at the scene of the crime at the time the crime was committed.

found on steering wheel of victim's car, and defendant was seen near where car was dumped after victim's murder, was all circumstantial evidence of the defendant's guilt of the murder).<sup>11</sup>

Even though both McIver and Freeman had cell phones in their possession, neither McIver nor Freeman called 911 or police for assistance for the victim. Instead, the 2 men stole the victim's car and her purse and drove to their motel.

When the restaurant manager and police arrived in the parking lot, the victim was still lying on the asphalt dying or dead. She had a gunshot wound to the right side of her head. No gun was anywhere around her body, but a fired bullet fragment was found between her legs. As a result, the circumstantial evidence established McIver and Freeman took evidence of the crime with them when they stole the victim's car, including the murder weapon and a fired shell casing.

The victim had been shot in the right side of her head with a pistol. The wound was fatal. Her death would have resulted immediately or shortly thereafter. The bullet wound was above her right ear and the bullet traveled across her head and exited over her left ear slightly anteriorly to the entrance wound. It was a contact wound with the gun being placed firmly against the side of her head when fired. The State established malice beyond any doubt. State v. Jones, 86 S.C. 17, 67 S.E. 160 (1910)(malice may be inferred from the brutal conduct on the part of the person committing the crime or by the use of a deadly weapon): State v. McLemore, 310 S.C. 91, 425 S.E.2d 752 (Ct. App. 1992)(same) And, the State established proximate cause. State v. Foote, 58 S.C. 218, 36 S.E. 551 (1900)(a physician may, after being qualified as an expert, give his opinion as to the cause of a person's death, based upon his own personal examination and

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<sup>11</sup> McIver argues the State did not definitively proving a motive for the murder. As this Court is well aware, in a murder prosecution the State is not required to prove motive. State v. Smith, 307 S.C. 376, 385, 415 S.E.2d 409, 415 (Ct. App. 1992)("In this state, it is well settled that motive is not an element of murder and, therefore, the State need not prove motive."); State v. Hartley, 307 S.C. 239, 414 S.E.2d 182, 187 (Ct. App. 1992)(Sanders, C.J., concurring)(same). Regardless, the State proved a motive, the victim's car and purse were stolen.

observation); State v. Lopez, 306 S.C. 362, 412 S.E.2d 390 (1991)(similar).

The pathologist also testified when a bullet travels through the brain and exits the skull on the other side, it is possible blood and brain matter exited the skull as well. As a result, blood and brain matter would have been scattered within the vehicle. Detective Lynam also testified based on his experience, with a through and through gunshot wound to the head it would be expected blood and brain tissue would have been deposited in the victim's car. (R. 235-47).

Within minutes of Amanda's murder, the victim's stolen car pulled into the parking lot of the Lancer Motel where McIver and Freeman had checked in late the previous night. This was captured on motel security camera footage. The victim's car was parked in the parking lot and McIver got out of the driver's side door, i.e. McIver was driving the victim's white car and Freeman was now in the passenger seat. This was just minutes after the victim's murder. The front windshield of the victim's car is not shattered or shot out. (State's Ex. 17).

After both men get out of the victim's car, both men converse in the parking lot. Neither man is yelling or screaming at the other. Neither man appears to be upset or in distress. Both walk calmly toward their motel room with Freeman entering the motel. McIver remains in the parking lot. This evidence and the reasonable inferences therefrom indicates both men were complicit in the murder of Amanda Fisher and neither was surprised by it. (State's Ex. 17).

On the hotel security footage, at this time, McIver can be seen walking to his pick-up truck parked in the same parking lot. Upon reaching his pickup truck, McIver looks around to see if anyone is looking at him and then removes from his front waist band a metallic object and places it in the bed of his truck behind the front passenger seat near the closed tailgate of the truck. The inference from this evidence is McIver was removing a gun from his front waistband, the gun he used to shoot Amanda Fisher, the murder weapon. This is circumstantial evidence

McIver was the shooter, the triggerman in the murder. (State's Ex. 17).

McIver then walks away from the truck and into the motel where he and Freeman had been staying. McIver and Freeman then calmly remove their luggage and personal items from their motel room and load them into the pick-up truck. Neither man appears to be in a hurry. (State's Ex. 17). This evidence and the reasonable inferences therefrom indicates both men were complicit in the murder and do not wish to draw attention to themselves after the murder.

McIver and Freeman check out of the motel early without notifying hotel personnel. Before leaving the parking lot, McIver returns to his truck and removes the metallic object [the murder weapon] from the bed of his pick-up truck where he had placed it minutes before shortly before entering the motel. McIver then takes the same metallic object [the murder weapon] and puts it back in the waistband of his pants as he is walking toward the victim's car. (State's Ex. 17). The inference from this evidence is McIver retrieved the gun he placed in the truck minutes earlier, so he could enter the motel unarmed, and returned it to his front waist band. This is circumstantial evidence McIver was the trigger-man in the murder of Amanda Fisher.

McIver then gets back into the driver's seat of the victim's car and leaves the motel parking lot driving the deceased's stolen car. After waiting a short while, Freeman gets in McIver's pick-up truck and also leaves the motel driving McIver's pick-up truck. McIver then flees the Myrtle Beach area of South Carolina where Amanda Fisher was murdered. In South Carolina, evidence of flight is evidence of guilty knowledge and intent and an attempt to avoid apprehension. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999); State v. Ballenger, 317 S.C. 364, 454 S.E.2d 355 (1996); *See e.g. State v. Wimbush*, 347 S.C. 513, 556 S.E.2d 413 (Ct. App. 2001)(where defendant hurriedly left town within hours of murder and did not return for a



year, this was evidence of flight, guilty knowledge, and intent).<sup>12</sup>

Phone records established for the next 30 minutes after fleeing the Lancer Motel, McIver and Freeman converse over their cell phones as they flee the North Myrtle Beach area and Horry County. McIver is still driving the victim's white car and Freeman is driving McIver's truck. The 2 men are fleeing to Charlotte, N.C. where they are from.

Approximately 1 hour and 30 minutes later, McIver, still driving the murdered victim's car, pulls into a gas station in Bennettsville, S.C. McIver enters the store and uses the deceased victim's credit card to buy matches, cigarettes, and gasoline. In the store surveillance video, McIver can be seen repeatedly placing his free hand, either his right or left hand depending on the situation, on his waist band area, i.e. McIver is still carrying the murder weapon he retrieved from the bed of his truck at the Lancer Motel. After purchasing matches, gas, and cigarettes, McIver then gets back into the victim's car and head's northwest toward Charlotte, N.C. This is all circumstantial evidence of McIver's guilt of the murder of Amanda Fisher.

Approximately 1 hour and 30 minutes later, McIver, still driving the murdered victim's car, pulls into another convenience store or gas station and again uses the deceased victim's credit card to buy gasoline. McIver is again captured on store surveillance video. McIver then leaves this store still driving the victim's car and drives to his hometown of Charlotte, N.C.

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<sup>12</sup> See also State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Milan-Hernandez, 287 S.C. 183, 336 S.E.2d 476 (1985); State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982); State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980); State v. Al-Amin, 353 S.C.405, 578 S.E.2d 32 (Ct. App. 2003); State v. Brownlee, 381 S.C. 34, 455 S.E.2d 704 (Ct. App. 1995). Case law recognizes the relevance of flight evidence is premised on a nexus between the flight **and the offense charged**. State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004), *affirmed as modified*, 369 S.C. 201, 631 S.E.2d 262 (2006); State v. Robinson, 360 S.C. 187, 600 S.E.2d 100 (Ct. App. 2004); United States v. Beaham, 664 F.2d 414 (4<sup>th</sup> Cir. 1981). Evidence of flight should be excluded when the flight is clearly linked to a separate offense for which the defendant is not on trial. Id. In the present case, the flight was clearly linked to the murder of Amanda Fisher and there was no real dispute as to this fact at trial.

Again, this is all circumstantial evidence of McIver's guilt of the murder of Amanda Fisher.

As he is leaving this gas station or shortly thereafter, phone records establish McIver contacts his girlfriend and they speak. Shortly thereafter a 9 year old child witnesses McIver set fire to the victim's white car on a dead end street less than 1 mile from McIver's girlfriend's residence. Beckham, 334 S.C. 302, 513 S.E.2d 606 (destruction or attempted destruction of evidence by the accused is circumstantial evidence of guilt of murder and the weight to be given such evidence is to be determined by the jury); State v. Epes, 209 S.C. 246, 265, 39 S.E.2d 769, 777 (1946)(the attempted destruction of evidence is regarded as a relevant incriminating circumstance and the weight is to be determined by the jury); State v. Ridgely, 251 S.C. 556 164 S.E.2d 439 (1968)(the destruction or attempted concealment of evidence is evidence of guilt and the weight is for the jury to determine); State v. Wells, 162 S.C. 509, 161 S.E. 177 (1931)(similar); Al Amin, 353 S.C. 405, 578 S.E.2d 32 (concealment of evidence is a circumstance which tends to show guilt and should go to the jury to weigh the evidence.); 2 A.L.R. 1227; *Wigmore on Evidence*, 2d Ed., Secs. 32, 172, 267, 272 and 276; *See also See* 40A Am Jur.2d *Homicide* section 462 (1999). The child witness later identified McIver from a photo line-up. McIver not only destroyed the victim's car, but the actual crime scene where Amanda Fisher was murdered. As a result, police were unable to locate any blood, gun powder residue, or DNA inside the car. This is clearly circumstantial evidence of McIver's guilt of the murder.<sup>13</sup>

The 9 year old girl also testified there was another car parked nearby when McIver set fire to the victim's car, and there was a woman inside the car. The child testified McIver and the woman then fled the area in the car occupied by the woman. The inference from this testimony

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<sup>13</sup> Additionally, it was McIver who burned the victim's car not Freeman. The jury could infer from this fact, that it was McIver who had more to gain in the burning of the victim's car and the destruction of evidence than Freeman, i.e. McIver was the trigger-man in the murder. This is also circumstantial evidence of McIver's guilt of the murder of Amanda Fisher.

is that it was McIver's girlfriend who drove McIver away from the scene after McIver set fire to the victim's car to destroy evidence of the murder.

After burning the victim's car, McIver then called Freeman on his cell phone and the 2 men converse for several minutes. This is circumstantial evidence McIver was informing Freeman he had burned the victim's car and destroyed evidence of the commission of the murder, further circumstantial evidence of Freeman's complicity in the murder. McIver and Freeman then turn themselves in to police together, but not before McIver deletes Freeman's contact information from his cell phone. Beckham, *supra* (destruction or attempted destruction of evidence by the accused is circumstantial evidence of guilt of murder and the weight to be given such evidence is to be determined by the jury); Epes, 209 S.C. at 265, 39 S.E.2d at 777 (the attempted destruction of evidence is regarded as a relevant incriminating circumstance and the weight is to be determined by the jury); Ridgely, 251 S.C. 556 164 S.E.2d 439 (the destruction or attempted concealment of evidence is evidence of guilt and the weight is for the jury to determine); Wells, 162 S.C. 509, 161 S.E. 177 (1931)(similar).

Finally, the circumstantial evidence established McIver got rid of the murder weapon and the fired shell casing that was either in the murder weapon or which would have been ejected in the victim's car. After the murder, on the Lancer Motel surveillance video, McIver can be seen removing an item from his waistband, the murder weapon, and placing it in the bed of his truck. He then returns minutes later and retrieves the murder weapon and places it back in his waist band and gets in the victim's car and drive's away. As a result, he had the weapon when he left the Lancer Motel shortly after the murder driving the victim's stolen car. McIver is next seen in Bennettsville at a gas station. In this video, McIver can be seen repeatedly placing one hand or the other on his front waist band indicating the weapon is still on him. McIver then

leaves the gas station in the victim's car. At some point, before his arrest, McIver disposed of the murder weapon because it was never found by police nor was the fired shell casing that would have either been in the gun or in the victim's car. Again, destruction of evidence is evidence of guilt of the principal crime. Beckham, (destruction of evidence by the accused is circumstantial evidence of guilt of murder and the weight to be given such evidence is to be determined by the jury); Epes, (similar); Ridgely, (same); Wells, (similar).

The evidence taken as a whole establishes McIver murdered the victim. As stated in Al-Amin: "[t]hese facts, especially Al-Amin's apparent attempt to conceal the body and his flight from the scene, constitute substantial circumstantial evidence presented by the State to warrant submission of the case to the jury." Al Amin, 353 S.C. at 413. There was substantial circumstantial evidence McIver was guilty of the murder of Amanda Fisher either as the trigger-man, or under accomplice liability. Therefore, Judge John did not err in denying the motion for a directed verdict. Hepburn, 406 S.C. 416, 753 S.E.2d 402. This appellate ground must be denied.

## ARGUMENT II.

**Judge John did not err in denying McIver's request to charge the jury that flight alone is not substantial circumstantial evidence of guilt and the remainder of McIver's argument is not preserved for appellate review because it was not raised or argued below; regardless, it has no merit.**

### *What Occurred Below*

At the jury charge conference, McIver requested Judge John instruct the jury that flight alone cannot constitute substantial circumstantial evidence of guilt. (R. 565-66).

MR. SPRATLIN: Yes, just that the defense would request the charge along with the circumstantial evidence charge that flight alone is not substantial circumstantial evidence. The case I would rely on for that is the case I relied upon in my directed verdict motion, State v. Lewis.

(R. 567, ll. 2-15). Judge John denied this specific request to charge as it would constitute a

charge on the facts which is prohibited under South Carolina law. Judge John specifically held:

THE COURT: All right. The Court respectfully declines to grant that in - - and this is probably earlier than y'all's experience as trial attorneys. It was common for the Court to issue a charge on flight that has been disfavored as a comment on the evidence. That is to be left to counsel to make those arguments if they so choose to do so. Since the Court will not be issuing a charge on flight, I will not charge this as it would be a comment on the evidence, and I will leave it to the - - attorneys to argue about flight or escape based upon their view of the evidence.

(R. 566). McIver and Freeman did not request Judge John instruct the jury as he now argues on appeal, that *any evidence of acts committed after the murder* could not constitute substantial circumstantial evidence of guilt of murder. (R. 565-66). As a result, this part of this appellate issue was not raised to or ruled on by Judge John, the trial court. (R. 565-66).

#### ***Lack of Preservation***

As a result, any argument on appeal other than the specific "flight" instruction requested at trial is not preserved for appellate review. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003)(appellant may not argue one ground to the trial court and another ground on appeal); State v. Dunbar, 356 S.C. 138, , 142, 587 S.E.2d 691, 693-94 (2003)(same). McIver's argument that Judge John should have instructed the jury *any evidence of acts committed after the murder* is not substantial circumstantial evidence of guilt is not preserved for appellate review and must be denied and dismissed. Haselden, *supra*; Dunbar, *supra*.

#### ***The Lack of Merit of the Preserved Issue***

As to the requested *flight* jury instruction, Judge John did not err or abuse his discretion. It is not appropriate for the trial judge to instruct on flight. State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980). While it is permissible for the parties to each argue to the jury whether evidence of flight is evidence of guilt, it is not permissible for the court to charge the jury on flight as it would constitute a charge or comment on the facts, place undue emphasis on that part

of the circumstantial evidence, and a charge on the facts is not permitted by the South Carolina Constitution. Id.; State v. Ballenger, 322 S.C. 196, 470 S.E.2d 851 (1996). See S.C. Const. art. V. Section 21 (“Judges shall not charge juries in respect to matters of fact, but shall declare the law.”). As this Court stated in State v. Perry, 410 S.C. 191, 763 S.E.2d 603 (Ct. App. 2014):

However, our Supreme Court has made clear in at least two instances when a principle of law is not the proper subject of a jury charge. See State v. Grant, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1981)(holding that it is improper for the trial judge to instruct the jury on the law of flight); State v. Hammond, 270 S.C. 347, 356, 242 S.E.2d 411, 416 (1978)(holding that although it is always proper for an attorney in his argument to the jury to point out the failure of a party to call a material witness, “such a charge has no proper place in the judge’s statement of the law”).

Perry, 410 S.C. at 202-03, 763 S.E.2d at 608-609.

What McIver has done here is pull 1 sentence from an appellate opinion and argue he was entitled to this 1 sentence in a jury instruction. As the Supreme Court recognized in Grant:

The impression is sometimes gained that any language from an appellate court opinion is appropriate for a charge to any jury, but this is not always true. Oftentimes a sentence, or sentences, taken from an appellate opinion, must be supplemented by additional relevant statements of the law because of a particular factual situation. Here, we think that the naked statement standing alone, though lifted from the opinion was erroneous.

Grant, 275 S.C. at 407, 272 S.E.2d 169. McIver has lifted 1 sentence from State v. Lewis, 403 S.C. 345, 743 S.E.2d 124 (Ct. App. 2013) [a homicide by child abuse case in which the State proceeded only on the theory the appellant was guilty as an aider and abettor], and from that sentence argues his jury should have been instructed that flight alone cannot constitute sufficient substantial circumstantial evidence of guilt. McIver is wrong because Lewis, *supra*, is limited to its particular facts and this Court was deciding a different issue, whether Lewis was entitled to a directed verdict on the particular evidence in that case, not whether Lewis was entitled to an instruction on flight. Id. In Lewis, this Court specifically held:

The State also asserts Lewis's flight and suicide attempt are sufficient evidence to withstand a directed verdict. We disagree with the State's contention **under these facts**. The State did not present any evidence of an overt act or the requisite state of mind for aiding and abetting, and thus, evidence of flight and a suicide attempt alone will not suffice to withstand a motion for a directed verdict. *See State v. Odems*, 395 S.C. 582, 590, 720 S.E.2d 48, 52 (declining to hold "that flight alone is substantial circumstantial evidence of a defendant's guilt"). Accordingly, we reverse the trial court.

Because we find a directed verdict should have been granted in Lewis' favor, we need not address his remaining arguments. (citation omitted).

Lewis, 403 S.C. at 357, S.E.2d at 130 (emphasis added). As a result, this Court in Lewis did not hold that a **defendant** in a criminal case charged with murder is **entitled to an instruction** that flight alone cannot be substantial circumstantial evidence of guilt. *Id.* Instead, this Court held that under the particular facts of Lewis's case, Lewis's flight and a suicide attempt alone could not constitute sufficient evidence to overcome a motion for a directed verdict. *Id.* Furthermore, McIver was charged with murder not aiding and abetting homicide by child abuse. And, the State did not proceed against McIver solely as an aider and abettor but also as a principal, i.e. the trigger man. As a result, there is no merit to this appellate ground and it must be denied.

#### *Harmless Error*

Regardless, the failure to instruct this language was harmless beyond a reasonable doubt where there was other evidence of guilt than flight. An eyewitness in the cafeteria parking lot, Mr. Thompson, heard a loud "pop" [the gunshot] and turned and saw 2 men pushing and pulling the limp unconscious victim out of her own driver's seat of her white car. One (1) man outside the car was pulling the victim out by her arm and the man on the inside of the car, in the front passenger seat, was pushing the victim out of the car at the same time. The man outside the car did not have long dreadlocks [i.e. he was not McIver]. McIver was the individual in the passenger seat pushing the victim out of her car, the same seat he was occupying when the group dropped off the victim's cousin in North Carolina. The victim died from a contact gunshot

wound to the right side of her head which went across her head and exited above her left ear. The gun was physically placed against her head and fired consistent with the gunman being seated in the passenger seat. McIver and his co-defendant dumped the still moving body of the victim out of her own car after shooting her like she was a bag of garbage and left her there on the hot asphalt pavement. Neither man attempted to assist the victim, but working together dumped her body out of her own car. McIver and his co-defendant then stole the victim's car and immediately returned to their own motel. McIver was driving the victim's stolen car as they pulled into their motel parking lot. McIver got out of the victim's car, took a metallic object out of his waist band [a gun] and placed it in the bed of his own truck, before entering his motel. McIver and his co-defendant then methodically loaded their luggage and left the motel 1 day early without checking out. Before leaving the parking lot, McIver retrieved the metallic object from the bed of his pick-up truck [the gun] and put it back in his waist band and got back into the victim's car, in the driver's seat and left the motel. McIver then used the victim's credit cards to purchase matches, cigarettes, and gasoline at a store in Bennettsville. McIver then used the victim's stolen credit cards again at another store in North Carolina to purchase a small amount of gasoline. McIver then drove the victim's car down a dead end street in Charlotte, N.C. approximately ¼ to ½ mile from his girlfriend's residence and set the victim's stolen car on fire destroying evidence of the murder of the victim. Freeman did not drive the victim's car, use her credit cards, or burn her car to destroy evidence. As a result, there was substantial evidence of McIver's guilt other than flight alone. Additionally, the jury found Freeman not guilty of the murder and accompanying weapon charge. Freeman also fled the scene and Myrtle Beach, but there was not the mountain of other evidence of his guilt as there was for McIver. As a result, it is clear the jury did not determine guilt based on flight alone, otherwise it would have convicted



Freeman of murder and the weapon charge. Clearly, the failure to instruct the language requested by McIver, if error, was harmless beyond a reasonable doubt as it could not have affected the verdict. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000); State v. Jeffries, 316 S.C. 13, 446 S.E.2d 427 (1994); State v. Buckner, 341 S.C. 241 534 SE.2d 15 (Ct. App. 2000).

With regard to McIver's unpreserved arguments, they make no legal sense. It is not hard to envision several scenarios where a defendant commits a murder in secret and there are no eyewitnesses. All of the evidence or most of the evidence of the defendant's guilt will be based on the defendant's actions after the crime including enjoying the fruits of the murder or attempting to cover up or escape detection or arrest for the crime. As a result, criminal defendants receiving a jury instruction as McIver requests from this Court, that a defendant's actions after the crime alone cannot constitute substantial circumstantial evidence of guilt, would result in many defendants, including the smartest ones, escaping criminal responsibility because it would be impossible for the State to prove their guilt. McIver's requested instruction that evidence of acts committed after the murder can never constitute substantial circumstantial evidence of guilt is not the law of South Carolina, never has been, and would be an improper charge on the facts and invade the province of the jury. See Al Amin, 353 S.C. at 413, 578 S.E.2d 32 ("[t]hese facts, especially Al-Amin's apparent attempt to conceal the body and his flight from the scene, constitute substantial circumstantial evidence presented by the State to warrant submission of the case to the jury"); See Beckham, *supra* (destruction or attempted destruction of evidence by the accused is circumstantial evidence of guilt of murder and the weight to be given such evidence is to be determined by the jury); Epes, *supra* (the attempted destruction of evidence is regarded as a relevant incriminating circumstance and the weight is to be determined by the jury); Ridgely, *supra* (the destruction or attempted concealment of

evidence is evidence of guilt and the weight is for the jury to determine); Beckham, (“Evidence of flight has been held to constitute evidence of guilty knowledge and intent.”); Thompson, 278 S.C. 1, 292 S.E.2d 581 (evidence of flight shows guilty knowledge, intent, and defendant sought to avoid apprehension); State v. Turnage, 107 S.C. 478, 93 S.E. 182 (1917)(evasion of arrest is a circumstance to go to the jury). As this appellate ground has no merit, it must be denied.

### ARGUMENT III.

**Judge John did not err in prohibiting McIver from eliciting from a detective certain questions the detective asked McIver’s co-defendant Freeman during post arrest interrogation.**

#### *What Occurred Below*

Prior to the testimony of Detective Owen Lynam, in an *in camera* hearing, McIver sought a ruling from Judge John whether McIver would be allowed to bring out before the jury on cross-examination of the Detective certain questions the Detective asked co-defendant Freeman after his arrest during Freeman’s interrogation. (R. 377-85). During this interrogation, Freeman gave a statement to police that attempted to exculpate himself and was incriminating as to McIver. Freeman admitted he was in the back seat of the victim’s car at the time of her murder and that McIver pulled out a gun while seated in the front passenger seat and shot the victim killing her. (R. 48, 377-85). During the trial, the State did not seek to introduce this statement in evidence against Freeman as it was self-serving and would constitute hearsay or against McIver as it would clearly violate Bruton v. United States, 391 U.S. 123 (1968). (R. 48, 86-520).

In the *in camera* hearing, McIver argued the questions the Detective asked co-defendant Freeman during his interrogation would prove the State: (1) rushed to judgment in this case; (2) the State did not believe the murder of Amanda Fisher was premeditated, and (3) the State was not sure if the item removed from McIver’s waistband and placed in the truck after the murder

was a gun or a pill bottle. (R. 377-80).

Counsel for Freeman objected to McIver's request to bring out questions the Detective asked Freeman during post-arrest interrogation as Freeman's statement had been kept out of evidence, as it was self-serving and inadmissible hearsay, and it would mislead the jury to allow McIver to ask the Detective about questions he had asked Freeman, i.e. the jury would believe or infer Freeman had confessed or refused to give a statement. Freeman also argued if McIver was allowed to bring out questions the Detective asked Freeman, it would also "open the door" to admission of Freeman's statement given to police, which incriminated McIver. (R. 378).

The State also opposed allowing McIver to ask the Detective about questions he asked Freeman during interrogation because the questions were asked during the interrogation to build a rapport and to elicit a response, not necessarily because the content of the questions was true. Therefore, admitting the questions of the Detective to co-defendant Freeman would mislead the jury. Further, asking those questions would "open the door" to admission of Freeman's statement which directly implicated McIver and would create Bruton concerns. (R. 378-80).

After hearing argument on the matter and allowing a proffer of the proposed testimony Judge John ruled he would not allow McIver to ask Lynam about questions the Detective asked Freeman during Freeman's post- arrest interrogation. (R. 379-85). Judge John ruled as follows:

THE COURT: All right. Thank you. All right. Again, the Court - - you can step down, sir. The Court reaffirms my ruling. I'm not gonna allow those questions to be asked because I think that would directly implicate the co-defendant in this matter and prejudice his rights. It would be I find, a violation, you know, a Bruton violation, and that also that it opens the door to matters that clearly are improper and cannot be placed before this jury. So, I'm not gonna allow it.

(R. 384, ln. 19 – 385, ln. 2). However, as stated above, before ruling, Judge John allowed McIver to proffer the testimony [or questions] he wished to elicit from Detective Lynam before the jury. (383-84). The proffer was as follows:

Q: Detective Lynam, just briefly. You conducted an interview of Mr. Freeman in March of '17, I believe, correct?

A: Yes, sir.

Q: Okay. And that interview was recorded by yourself and Detective Lynch?

A: Yes, sir.

Q: And there's a transcript, I don't know if you know this, that the solicitor has done that, had it typed up?

A: Okay.

Q: Okay. And during the course of that interview, did you ever make the statement that we had this case wrapped up within 24 hours?

A: I haven't actually watched the video in quite a while but, yeah, I would say it was a very good chance that I did say that.

Q: And did you also, the second statement, did you also make a statement that we know this wasn't premeditated, it just happened?

A: Again, I haven't watched the video recently but, yeah, there's a real good chance that I did say that.

Q: Okay.

MR. Bellamy: That would be it, Judge.

THE COURT: All right. The - - Mr. Spratlin [Freeman's trial counsel], do you want to ask any questions on that?

MR. SPRATLIN: No. Your Honor.

THE COURT: All right. Solicitor, is there anything you want to ask about that?

MR DEBUSK: Yes, Your Honor.

PROFFER CROSS EXAMINATION OF OWEN LYNAM BY MR. DEBUSK:

Q: Why would you make such statements in the contents of the interview?

A: If I made those statements, they would've been made early on basically building a rapport with the - - Mr. Freeman at the time.

Q: To convince a - a witness to, to be more forthcoming, is that why you would say that?

A: Yeah, to share his story.

[End of proffer]. (R. 383, ln. 5 – 384, ln. 17).

### ***Standard of Review***

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006). "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012) (internal quotations omitted). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Jennings, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011) (citation omitted).

### ***The Lack of Merit of this Appellate Ground***

There is no merit to this appellate ground. Judge John did not abuse his discretion in declining to allow McIver to ask Detective Lynam about specific questions he asked co-defendant Freeman during post-arrest interrogation. State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015)(holding the admission of "an un-redacted audiotaped interrogation was an abuse of discretion"); State v. Miller, 676 S.E.2d 546 (N.C. Ct. App. 2009).

McIver sought to bring out the detective's questions *alleging* they would prove certain facts; however, the questions do not prove the facts he alleges they prove. The fact that a detective makes certain assertions while questioning or interrogating a defendant or suspect does not mean that assertion is true. Brewer, 411 S.C. at 408, 768 at 659 (noting "questions police pose during suspect interviews may contain false accusations ... and inflammatory remarks that

constitute legitimate points of inquiry during a police investigation, but that would be otherwise inadmissible in open court.”), *quoting Miller*, 676 S.E.2d at 556. As this Court is well aware, officers are allowed to make misstatements of fact to a suspect during interrogation to elicit an incriminating response or a statement. *Brewer* 411 S.C. at 406, 768 S.E.2d 658-59 (“We acknowledge the propriety of law enforcement interrogation techniques, including misrepresenting the existence and strength of the evidence against an accused, as well as asking the accused to produce evidence voluntarily... But such evidence will rarely be proper for a jury’s consideration.”). This does not mean the statement or assertion made by the detective during the interrogation is true or even admissible. *Brewer*, 411 S.C. at 408, 768 S.E.2d at 659; *quoting Miller*, 676 S.E.2d at 556.<sup>14</sup> Further, as Detective Lynam testified, he would testify before the jury the statements, if made, were made for that very purpose, to build a rapport with co-defendant Freeman and in an attempt to get co-defendant Freeman to talk and tell his side of the story, i.e. to make or give a statement. (R. 384, l. 10-17).

When such statements by an interrogating officer are admissible it is so the jury can understand the context of the answers given by the person being interrogated. *See, e.g. State v. Castenada*, 715 S.E.2d 290 (N.C. Ct. App. 2011), *citing Dubria v. Smith*, 224 F.3d 995, 1001 (9th Cir.2000); *State v. Ninci*, 936 P.2d 1364, 1385 (Kansas 1997)(video tape interrogation not offered for truth of matter asserted but to place suspect's answers in context). *State v. Boggs*, 185 P.3d 111, 121 (Az. 2008)(accusations by police that defendant was lying were part of ordinary interrogation technique, not offered for purpose of giving opinion testimony, and provided necessary context for defendant's responses); *State v. O'Brien*, 857 S.W.2d 212, 221 (Mo.

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<sup>14</sup> *See also State v. Gillian*, 373 S.C. 601, 612-13, 646 S.E.2d 872 (2007)(evidence police ruse failed to obtain confession was not relevant to circumstances of the victim’s death and petitioner did not suggest State manufactured any evidence or engaged in any other improprieties in investigating the case).

1993)(similar). See Windhom v. State, 729 S.E.2d 25 (Ga. App. 2012), citing Axelburg v. State, 669 S.E.2d 439 (Ga. App. 2008); DeYoung v. State, 493 S.E.2d 157 (Ga. 1997); Carroll v. State, 408 S.E.2d 412 (Ga. 1991). That is not the purpose McIver is offering these statements for.

Additionally, even if the first assertion made by Detective Lynam was true, that he told Freeman police officers had this case wrapped up within 24 hours, this does not make more probable than not, the fact McIver *alleges* it proved, that police made a rush to judgment in this case. It simply means, as set forth in Respondent's Statement of Facts, that police had made the arrests of McIver and Freeman, i.e. solved the case, within less than 24 hours of Amanda Fisher's murder. See Rule 401, S.C.R.E. (evidence is relevant if it makes a fact or issue in controversy more probable or less probable than not). As a result, Judge John did not abuse his discretion in denying admission of Detective Lynam's statements to co-defendant Freeman during co-defendant Freeman's interrogation. Black, 400 S.C. at 16, 732 S.E.2d at 884.

Second, the statement by Lynam to Freeman that police knew the murder "just happened" was clearly made by Lynam with the intent to induce Freeman to talk to police and give a statement. Which Freeman ultimately did, implicating McIver.

Third, there was no showing during the proffer of the 3<sup>rd</sup> point McIver wanted to establish, *allegedly* that the State was not sure if the item removed from McIver's waistband and placed in the truck after the murder was a gun or a pill bottle. Detective Lynam was not asked during the proffer if he ever made such a statement to the co-defendant during his interrogation of him. (R. 383, ln. 5 – 384, ln. 17). It is entirely speculative that he even asked such a question or made such a statement. The failure to make a proffer of excluded evidence precludes review on appeal. State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004); State v. Silver, 314 S.C. 483,

431 S.E.2d 250 S.E.2d 250 (1993); State v. China, 312 S.C. 335, 440 S.E.2d 382 (Ct. App. 1993). This portion of this appellate ground is not preserved for appellate review. Id.

Even if it had been preserved, and even if such a statement was made or question was asked by Detective Lynam to the co-defendant during his interrogation, it would have been made to provoke a response from the co-defendant. It does not mean the State was unsure what McIver pulled from his waist band and placed in the bed of the truck. This ground has no merit and must be denied.

Finally, admission of these statements of Detective Lynam made during interrogation of co-defendant Freeman elicited by McIver would in fact have “opened the door” to the admission of Freeman’s statement implicating McIver, and raising Bruton implications. Questioning Lynam about statements he made to Freeman, even if McIver tried to sanitize the statements, would have resulted in the State and/or co-defendant Freeman’s counsel bringing out that Freeman gave a statement and the context of the statement. Detective Lynam made the statements he made in an attempt to establish a rapport with co-defendant Freeman and in an attempt to get Freeman to talk and give a statement. This would have resulted in Freeman’s counsel bringing out before the jury that his client had given a statement exculpating himself and inculcating McIver. This was the very thing **counsel for McIver** was trying to avoid and why he **sought an *in limine* ruling** from Judge John. (See R. 377-78). As a result, there is no merit to this appellate ground and it must be denied.

#### *Harmless Error*

"To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof." State v.



Commander, 396 S.C. 254, 263, 721 S.E.2d 413, 418 (2011). "An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result." State v. Black, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012). "In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt." State v. Watts, 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct. App. 1996) (citing Chapman v. California, 386 U.S. 18 (1967)). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Chavis, 412 S.C. 101, 109-10, 771 S.E.2d 336, 340 (2015). The factors for consideration in any harmless error analysis include: the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution's case. Delaware v. Van Ardsdall, 475 U.S. 673, 684 (1986).

Judge John's exclusion of this testimony is clearly harmless. The most McIver could have obtained from Detective Lynam was testimony that when questioning his co-defendant Freeman he made 2 statements to him: (1) that police were able to wrap this case up within 24 hours; and, (2) that Detective Lynam knew or believed this murder "just happened." However, the admission of the statements would also have come with the Detective's testimony before the jury that he made these statements in an attempt to get co-defendant Freeman to talk and give a statement. Additionally, the admission of the statements would also have opened the door to and come with Lynam's testimony that co-defendant Freeman did give a statement exculpating himself and incriminating McIver, i.e. that McIver was the shooter. The exclusion of these

quotes from the Detective's interrogation of the co-defendant was clearly harmless beyond a reasonable doubt. Chavis, *supra*; Black, *supra*. As a result, this appellate ground has no merit.

#### ARGUMENT IV.

**Judge John did not err in admitting the identification, photo line-up, or related testimony of the child witness as the identification procedure was not unduly suggestive and there was no substantial likelihood of irreparable misidentification.**

##### *What Occurred Below*

Prior to the testimony of a State's witness before the jury, Judge John, as required, conducted a Neil v. Biggers<sup>15</sup> hearing *in camera* to determine whether the out-of-court identification of McIver, as the person who set fire to the victim's car in Charlotte, N.C., made by the witness was admissible before the jury. (R. 252-86). The investigators involved in the identification process as well as the witness who made the identification testified at the Biggers hearing. (R. 253-81). The photographic line-up from which the witness identified McIver was also introduced at the hearing as well as a form read to the witness prior to the identification and filled out after the identification was made. (State's Ex. 44 & 45; R. 253-80). At the conclusion of the hearing, McIver objected to the admission of the witness' out-of-court identification of him as the person who set fire to the victim's car arguing the identification procedure was unduly suggestive and there was a substantial likelihood of irreparable misidentification. (R. 281-84). The State argued in response that the identification procedure was not unduly suggestive, the identification was reliable, there was no substantial danger or likelihood of irreparable misidentification, and the out-of-court identification should be admitted in evidence. (R. 282-83). After considering all of the testimony presented in the Biggers hearing, including the testimony of the witnesses, the photographic line-up, and the form reviewed with and executed by the

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<sup>15</sup> Neil v. Biggers, 409 U.S. 188 (1972).

witness during the identification process, Judge John found the identification process used was not unduly suggestive, the identification of McIver by the witness was reliable, but even if he had found the identification process was suggestive, there was no substantial danger of irreparable misidentification in this case. Therefore, Judge John ruled the witness' out-of-court identification of McIver was admissible. (R. 285-86).

Thereafter, the eye-witness, and the investigators who compiled and presented the photographic line-up, testified before the jury that it was McIver the eye-witness identified from a photographic line-up as the person who set fire to the victim's car on Kelly Street, in Charlotte, N.C. the afternoon after the victim's murder. The witness was not asked to nor did she attempt to make an in-court identification. (R. 289-334).

### ***The Lack of Merit of this Appellate Ground***

#### ***(Standard of Review)***

In criminal cases, the appellate court sits to review errors of law only. Baccus, 367 S.C. at 48, 625 S.E.2d at 220. Whether an eyewitness' identification is sufficiently reliable is a mixed question of law and fact. State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court. Id. Generally, the decision to admit an eyewitness' identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion. Id.

#### ***(The Law)***

"A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 3526 (2004). "An

in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification.” Id. Likewise, an out-of-court identification is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. *See Perry v. New Hampshire*, 565 U.S. 228 (2012).

In Biggers, the Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness’ identification. Due process requires courts to assess, on a case by case basis, whether (1) the identification resulted from unnecessary and unduly suggestive police procedures, and if so, (2) whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198.

“First, the court must determine whether the identification resulted from ‘unnecessarily suggestive’ police identification procedures.” State v. Wyatt, 421 S.C. 306, 310, 806 S.E.2d 708, 710 (2017), *citing Biggers*, 409 U.S. at 198-99 *and State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012). “The Supreme Court of the United States has repeatedly emphasized ‘that due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary.’” Wyatt, 421 S.C. at 310, 806 S.E.2d 710, *quoting Perry v. New Hampshire*, 565 228, 238-39 (2012)(*citing Manson v. Brathwaite*, 432 U.S. 98, 107, 109 (1977) *and Biggers*, 409 U.S. at 198); *see also Liverman*, *supra* (describing the trial court’s task under the first prong as determining “whether the identification resulted from unnecessary and unduly suggestive police procedures”). “If the court finds the police procedures were not suggestive, or that suggestive procedures were necessary under the circumstances, the inquiry ends there and the court need not consider the second prong.” Wyatt, 421 S.C. at 310,

806 S.E.2d 710; United States v. Sanders, 708 F.2d 976, 984 (7<sup>th</sup> Cir. 2013)(*citing Perry*)("courts will only consider the second prong if a challenged procedure does not pass muster under the first"); State v. Dukes, 404 S.C. 553, 745 S.E.2d 137 (Ct. App. 2013)(same).

"If however, the court determines the procedures were both suggestive and unnecessary, the court must then determine "whether the out of court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." Wyatt, 421 S.C. at 211, 806 S.E.2d at 710, *quoting Liverman*, 398 S.C. at 138, 727 S.E.2d at 426 (*citing Biggers*, 409 U.S. at 198-99). Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness degree of attention, (3) the accuracy of the witness prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98 (1977)(*citing Biggers*, 409 U.S. at 199-200). "As the Supreme Court stated in Perry, 'Only when [the] evidence "is so extremely unfair that its admission violates fundamental conceptions of justice," have we imposed a constraint [on admissibility] tied to the Due Process Clause.'" Wyatt, 421 S.C. at 311, 806 S.E.2d 710, *quoting Perry*, 565 U.S. at 237 (*quoting Dowling v. United States*, 493 U.S. 342, 352 (1990)).

### *Analysis*

There is no merit to this appellate ground. Judge John's determination the identification procedure was not suggestive is fully supported by the record. (R. 252-86; State's Exhibits 44 & 45). The photo line-up from which the witness identified McIver was generated randomly by a computer after McIver's physical characteristics were entered in the computer program. (R. 253-

63). The photos were not selected by any of the officers involved in the investigation but by an impartial computer. (R. 253-63). The photos contained in the line-up all bear a striking similarity to McIver including race, age, head hair, facial hair, and complexion. (State's Ex. 44). Quite simply, as Judge John found, there is nothing suggestive about the photo line-up shown to the witness. (R. 283-86; State's Ex. 44).<sup>16</sup>

Further, to insure fairness, the officer who presented the photo array was not involved in the investigation of McIver or Freeman for the arson of the car or the victim's murder. (R. 253-73 & State's Ex. 45). The officer who presented the photo array did not enter McIver's characteristics in the computer and did not assemble the photo array. (R. 272). Additionally, prior to the eye-witness being shown the photo line-up, the witness was read a form that specifically stated the person who committed the crime may or may not be in the photos contained in the line-up, and it was not necessary that the witness identify anyone. (R. 264-73; State's Ex. 45). The form also states the individuals in the line-up may have changed their head hair or facial hair between the time of the photo and the commission of the crime. (State's Ex. 45; see also R. 266-67, 270). The photos were shown to the witness 1 at a time beginning with photo #1 and sequentially through photo #6. The officer who presented the photos did not indicate in any fashion who the eye-witness should select. After being shown each photo, the witness was asked if she recognized the person in the photo. (R. 264-73; State's Ex. 45). The witness informed the investigator she did not recognize the person in photos #1 or #2. (R. 264-73). The witness did not identify an individual until she saw McIver's photo, photo #3. (R. 264-80; State's Ex. 44 & 45). When shown McIver's photo, photo #3, the witness immediately pointed at McIver's photo and identified him. (R. 264-280). The witness informed the officer

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<sup>16</sup> McIver also ignores the fact this photo line-up was shown separately to another witness who did not identify McIver. This is further evidence the line-up was not suggestive. (R. 266-73).

she was 100% sure McIver was the person who set fire to the victim's car on Kelly Street in Charlotte, N.C. (R. 264-73; 273-81; State's Ex. 45). The witness was shown the remainder of the photos, photos #4, #5, & #6, 1 at a time, and she informed the investigator she did not recognize any of them. (R. 264-73). She then signed the form, filled out by the investigator who showed her the line-up, setting forth exactly what happened during the identification process. (R. 264-81; State's Ex. 45).

McIver has not even established the first prong of Biggers. The police procedure used was not unduly suggestive. And, it was necessary. Therefore, it is unnecessary to proceed to the second prong of the Biggers analysis. As a result, there is no merit to this appellate ground.

Further, as Judge John found, there is no danger of misidentification. As to the witness' opportunity to view the perpetrator at the time of the crime, the witness observed McIver set fire to the victim's car at approximately 4:00 p.m. in the afternoon, in broad daylight, on the street where she resided and had resided all of her life. The witness' degree of attention was strong as this was an unusual occurrence and the car was set fire near her mailbox. Her prior description was accurate as she described McIver as a light-skinned black male with dreadlocks. The level of certainty demonstrated by the witness at the confrontation was 100% certain as testified to by the witness and the officer who showed her the photo line-up. Finally, the length of time between the crime and the confrontation was only 2 to 3 days after McIver set fire to the victim's car. Further, there is no danger of irreparable misidentification because as has already been shown, through several surveillance videos, **it was McIver** who was driving the victim's car from the time of the murder until his arrival in the Charlotte area. And after arriving in the Charlotte area, McIver called his girlfriend. The eyewitness also saw a female drive McIver away from the scene after McIver set fire to the victim's car. The car was set fire less than a

mile from McIver's girlfriend's home. Based on the totality of the circumstances, there was no danger of irreparable misidentification. Manson, 432 U.S. 98 (1977)(citing Biggers, 409 U.S. at 199-200). Judge John did not err in admitting the out-of-court identification of the eye witness.

In regards to McIver's argument the officer did not conduct a competency determination first before showing the witness the line-up, this issue was never raised or argued below, therefore it is not preserved for appellate review. (R. 252-335). State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003); State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003). Further, there is no requirement a policeman conduct a competency examination of a child witness before showing a photo line-up. There is no fixed age a child must attain to be a competent witness. State v. Green, 267 S.C. 599, 230 S.E.2d 618 (1976); S.C. Dept. of Social Services v. Doe, 292 S.C. 211, 355 S.E.2d 543 (Ct. App. 1987); State v. Lambert, 267 S.C. 398, 279 S.E.2d 364 (1981). Every witness is presumed competent to testify, even a minor child. Rule 601, S.C.R.E. The competency of a witness is a matter for the court, not a policeman. State v. Pitts, 256 S.C. 420, 182 S.E.2d 738 (1971); United States v. Barnes, 368 F.2d 567 (4th Cir. 1966).<sup>17</sup>

#### *Harmless Error*

Furthermore, the admission of the out-of-court identification of the witness is cumulative to the circumstantial evidence McIver burned the victim's car. It is undisputed the child witnessed a man set fire to the victim's car and run away. It is undisputed the man got in a car with a woman and was driven away from the scene. McIver could not prevent the State from introducing this testimony under any circumstances. It was also undisputed and proved by numerous exhibits and witnesses that the victim's car was burned on the same street where the

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<sup>17</sup> Here, the witness testified under oath she knew the difference between the truth and a lie and explained the difference. She also explained it would be wrong to tell a lie and a person should tell the truth. The witness was competent to testify, and McIver did not challenge her competency to testify at all. (R. 273-80, 281-87, 327-35).



child witness lived. And, the child lived less than a mile from McIver's girlfriend's residence. McIver is the last person seen in possession of the victim's car in Marshville, N.C. and at the time he was at this gas station or immediately thereafter, McIver called his girlfriend on his cell phone. It was just minutes later that the car was set fire in the Charlotte, N.C. area, and the person who set fire to the car was picked up by a female associate. Further, only McIver was ever seen driving the victim's vehicle after her murder and he was seen at several locations headed toward Charlotte, N.C. And, McIver bought matches and gasoline at 1 gas station when he was in possession of the victim's car. As a result, the admission of the out of court identification by the child witness was cumulative to the circumstantial evidence McIver set the victim's car on fire and was therefore harmless. The out of court identification was also harmless in light of the other overwhelming evidence of McIver's guilt including the testimony of Kenneth Thompson, Tabetha Oxendine, phone records, and surveillance video of McIver after the murder. As a result, this ground has no merit and must be denied.

#### ARGUMENT V.

**McIver's argument that his convictions are fundamentally unfair or were obtained in violation of due process by the State's alleged presentation of conflicting prosecutorial theories regarding the identity of the shooter or the manner in which the shooting occurred is not preserved for appellate review because this issue was never raised to the trial court at all; and, further, the issue has no merit because the State did not present conflicting theories of criminal liability, but under the facts of this case presented consistent theories of criminal liability that McIver was guilty of murder either as a principal or under the theory of the hand of one is the hand of all.**

##### *What Occurred Below/ Lack of Preservation of the Issue*

This issue was simply not raised to Judge John at any point during the trial or after. (R. 1-664). Therefore, this issue was not raised to or ruled upon by the trial court. McIver basically admits in his brief the issue he now raises was not raised to and/or ruled on by Judge John, the trial court. (IBOR, p. 39, ll. 1-6). McIver made a motion for a directed verdict and post-trial

motions but did not raise this issue to Judge John. (R. 522-47 [directed verdict motions], 555-57 [renewal of motions], 655-56 [post-trial motions]). McIver argues extensively in his brief that the Solicitor argued improperly in his closing argument; however, McIver did not object to the Solicitor's closing argument on this basis. (R. 568-88). Because this issue was never raised to Judge John, it was not preserved for appellate review and must be denied and dismissed. State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998)(constitutional arguments must be raised at trial to be preserved for appeal); State v. Varvil, 338 S.C. 335, 526 S.E.2d 248 (Ct. App. 2000)(same).

### ***The Lack of Merit of the Issue***

Even if the issue was preserved, it has no merit. There is no clearly recognized basis in federal law as decided by the U.S. Supreme Court to find a due process violation in the State presenting varying theories in separate prosecutions. Bradshaw v. Stumpf, 454 U.S. 175 (2005)(holding "[t]he Court of Appeals was also wrong to hold that prosecutorial inconsistencies between the Stumpf and Wesley cases required voiding Stumpf's guilty plea."); Id. (Thomas, concurring)("This Court has never hinted, much less held, that the Due Process clause prevents a State from prosecuting defendants based on inconsistent theories.").<sup>18</sup> In Stumpf, the Court considered a petitioner's challenge to his guilty plea to aggravated murder and attempted aggravated murder. It rejected Stumpf's argument that inconsistent arguments about the identity of the trigger-man at his trial and the trial of the co-perpetrator required reversal of the

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<sup>18</sup>See also Fotopoulos v. Secretary, Dept. of Corrections, 516 F.3d 1229, 1235 (11<sup>th</sup> Cir. 2008)("The Bradshaw Court did not hold that the use of inconsistent theories in the prosecution of two defendants violates the right to due process."); Poindexter v. Quarterman, 537 F.3d 511, 527 (5<sup>th</sup> Cir. 2008)("It is well established that the use of inconsistent theories in the separate trials of co-defendants is not a violation of the due process clause."); United States v. Frye, 489 F.3d 201, 214 (5<sup>th</sup> Cir. 2007)(similar).

convictions. The Court reasoned the identity of the triggerman was immaterial because the intent element of the offense did not require the defendant to pull the trigger.<sup>19</sup>

McIver argues that his convictions violate due process and were fundamentally unfair because the State alleged inconsistent theories. McIver admits this is a novel issue in South Carolina. He cites to only 1 case, Smith v. Groose, 205 F.3d 1045 (8th Cir. 2000), and alleges that case held when the State alleges inconsistent theories of criminal liability, a defendant's conviction must be overturned. However, that case is not apposite here. Smith involved the prosecution pursuing completely different theories of liability against 2 defendants in **separate trials** relying on inconsistent statements of the same witness which both could not be true.<sup>20</sup> Based on the fact a single jury trying both defendants together could not have believed both statements by the same witness, the court found the convictions fundamentally unfair. Id. The court pointed out the 2 defendants were not part of the same criminal enterprise, i.e. they were not aiding and abetting each other in the murders. Id.

What occurred in Smith did not occur in the present case. Here, there were not separate trials of separate unrelated defendants. And, here the State did not present conflicting irreconcilable statements of the same witness in separate trials and obtain convictions in both trials based on those irreconcilable statements. Here, both McIver and his co-defendant Freeman were tried together. The State's theory was both men committed the murder of Amanda Fisher acting in concert, aiding and abetting each other, and it was irrelevant who actually pulled the

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<sup>19</sup> The Court did note the use of the alleged inconsistent theories may have affected sentencing, but declined to express an opinion whether the prosecutor's actions amounted to a due process violation, and whether any such violation would have been prejudicial. Id., 545 U.S. 184-87.

<sup>20</sup> In Smith, the State prosecuted and convicted an *unrelated defendant* for the murder of a husband and wife during a home invasion based on the statement of a witness. The State then prosecuted an *unrelated defendant* for the same murders using a contradictory statement by the same witness.

trigger; however, the State admitted the evidence was stronger that it was McIver who pulled the trigger based on the testimony of the eyewitnesses and the circumstantial evidence in the case. (R. 568-88). As a result, the case cited by McIver, Smith, does not even apply here.<sup>21</sup>

Further, in the cases where there is a suggestion that a due process violation may arise, the issue is based on more than inconsistency, rather, the inconsistency must exist at the core of the State's case. *See e.g. United States v. Higgs*, 353 F.3d 281, 326 (4<sup>th</sup> Cir. 2003) ("In some situations, the Due Process Clause prohibits the government from presenting mutually inconsistent theories of the same case against different defendants. For example, due process may be violated 'if an inconsistency ...[e]xists at the core of the prosecutor's cases, against the defendants for the same crime,' ...or where the evidence used at the two trials is 'factually inconsistent and irreconcilable.'") (internal citations omitted). *But see DeCastro v. Branker*, 642 F.3d 442 (4<sup>th</sup> Cir. 2011) (recognizing this language in Higgs was dicta only). *See also* 16C C.J.S. Constitutional Law Section 1644 ("Discrepancies based on rational inferences from ambiguous evidence will not support a due process violation provided the two theories are supported by consistent underlying facts.")

This case is analogous to Stumpf. Like in Stumpf where the Court held "the precise identity of the triggerman was immaterial to Stumpf's conviction for aggravated murder," the

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<sup>21</sup> Further, Smith, has been heavily criticized, limited to its facts, and held to be overly broad in its holding. Farmer v. Commonwealth, 737 S.E.2d 32 (Va. Ct. App. 2013) ("Thus, we decline to apply the overly broad holding of the Eighth Circuit in Smith, and hold that in the absence of prosecutorial misconduct or bad faith, there is no due process basis for reversing Farmer's convictions simply because the prosecution proceeded under inconsistent theories of the identity of the principal in the first degree in the trials of Farmer and Williams regarding the rape of P.F."); Berry v. State, 366 S.W.3d 160 (Tenn. App. 2011) (Tennessee has expressly declined to adopt the holding in Smith), *citing* State v. Housler 193 S.W.3d 476, 492 (Tenn. 2006) and State v. Robinson, 146 S.W.3d 469, 496 n. 11 (Tenn. 2004); State v. Watkins, 659 N.W.2d 526, 532 (Iowa 2003) (Smith is limited to its facts and where there are separate trials and it is a narrow exception); State v. Bodden, 661 S.E.2d 23, 30-32 (N.C. Ct. App. 2008).

precise identity of the trigger-man was immaterial to McIver's guilt or innocence for the murder of the victim. This case is unlike shocking cases where 2 defendants are **independently tried** and convicted for the same crime **which could have been committed** by only 1 person **not acting in concert with another**. See Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997).

Here, it was undisputed Amanda Fisher was murdered in her car in the parking lot of the K&W Cafeteria at 11:15 a.m. on July 9, 2016 after pulling off Highway 17 into an almost vacant parking lot. There were 2 men in the car when she was murdered, McIver and Freeman. There was no eyewitness who actually saw the victim at the instant she was shot. Neither defendant confessed to the crime. As a result, the State had to rely on circumstantial evidence to prove McIver's guilt. See Housler, 193 S.W.3d at 493 ("We agree that 'prosecutors must not present proof of a historical narrative that they know not to be true[,] but we also recognize that 'prosecutors are not omniscient.' Just as important, prosecutors are not finders of fact. When a prosecutor has conflicting evidence or simply does not know the truth, he 'is entitled to retain skepticism about the evidence he presents and trust the jury to make the right judgment.'").

While there was no eyewitness who saw what occurred the instant Amanda was shot, there was an eyewitness who heard Amanda shot and saw what occurred just 5 to 10 seconds after she was shot.<sup>22</sup> When McIver and Freeman arrived at their motel shortly after the murder,

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<sup>22</sup> Kenneth Thompson saw 1 defendant [Freeman], pulling Amanda out of the driver's seat of her own car by the arm while simultaneously the other defendant [McIver], was pushing the victim out of her own car from the front passenger seat where he was sitting. Neither defendant was acting surprised by the shooting of Amanda. Neither protested what the other had done or was doing. In fact, both defendants, at the scene, remained quiet and were working together for the same purpose, i.e. getting the victim out of her own car, dumping her body, and then stealing her car. After dumping her on the ground with a gunshot wound to the head, Freeman got back in the car and both men quietly drove away from the parking lot headed south on Hwy. 17. Neither man called 911 or police requesting assistance for the wounded victim. Neither man jumped out of the stolen car at a red light, stop sign, or at any other time, as they headed back to the Lancer

their actions demonstrate or indicate both men were complicit in the murder of the victim and theft of her car and purse and that McIver was the triggerman.<sup>23</sup> Both men then leave their motel in separate vehicles but converse over the phone as they flee the Myrtle Beach area and Horry County. On his flight to Charlotte, McIver eventually uses items stolen from the victim to buy matches, gasoline, and cigarettes. McIver then calls his girlfriend on his cell phone. After arriving in Charlotte, his home, he drives the victim's car to a dead end street where he is seen setting the car on fire. Evidence of the murder was destroyed in the fire. McIver gets in another car driven by a woman, and is driven away from the scene of the arson. McIver calls Freeman shortly after setting fire to the car and they talk. Eventually, when their names and faces are broadcast on local T.V., McIver and Freeman turn themselves in to police together. However, before doing so, McIver deletes Freeman's contact information from his cell-phone. Freeman's cell phone is never recovered.

The State's theory was both men committed the murder of Amanda Fisher acting in concert, aiding and abetting each other, and it was irrelevant who actually pulled the trigger; however, the State admitted the evidence was stronger that it was McIver who pulled the trigger

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Motel, where they had checked in late the night before. No murder weapon was found at the scene. McIver and Freeman took the gun with them.

<sup>23</sup> Both quietly exited the victim's car, with McIver exiting the driver's side. The 2 men show no outward visible signs that 1 of them just shot Amanda or that the 2 of them had just dumped her out of her car and stole her car and purse. The 2 men speak quietly to each other in the parking lot as they walk toward their motel room. Neither man is upset or cursing or screaming at the other. As they reach McIver's truck, McIver looks around and then quietly removes a metallic item, i.e. the murder weapon, from his waist band and places it flat down in the bed of his truck. Freeman has already entered the 2 men's motel room and then McIver also enters the motel room. The 2 men then methodically load McIver's truck with their luggage from the room. There is no hurrying or agitation visible in either man as they load the truck. McIver then calmly retrieves the metallic item he placed in the bed of the truck and places it back in his waist band as he calmly walks toward the victim's parked car. McIver then gets in the driver's seat, and drives away without checking out of the motel. McIver leaves the motel first. Freeman waits a little while and only then gets in the driver's seat of McIver's truck and leaves. Freeman does not check out of the motel either. The 2 men were not scheduled to check out until the following day.

based on the testimony of the eyewitnesses and the circumstantial evidence in the case. (R. 568-88). As a result, the case cited by McIver, Smith, does not apply here. Here, the State argued factually consistent cases against co-defendants and the co-defendants were tried together not separately. See United States v. Fulks, 683 F.3d 512, 524 (4<sup>th</sup> Cir. 2012); United States v. Basham, 789 F.3d 358, 378 (4<sup>th</sup> Cir. 2015); Higgs, 353 F.3d at 326; Edwards v. Cartledge, 2012 W.L. 6915250 (D.S.C. 2012)(*Not published in F.Supp.3<sup>rd</sup>*); Bodden, 661 S.E.2d at 30-32; United States v. Paul, 217 F.3d 989, 998-99 (8<sup>th</sup> Cir. 2000). And, the State did not present inconsistent statements of the same witness and argue both statements were true. See Smith. The State presented what evidence it had based on the way McIver committed the murder of Amanda Fisher. This appellate ground must be denied.

#### CONCLUSION

For the above stated reasons, McIver's convictions and sentences must be affirmed.

Respectfully submitted,

J. ANTHONY MABRY  
Senior Assistant Attorney General  
S.C. Bar No. 11973

BY: s/ J. Anthony Mabry  
J. ANTHONY MABRY

Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
(803) 734-6305

ATTORNEYS FOR RESPONDENT

May 18, 2020.

**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.

Nicholas Jacob McIver, Appellant.

Appellate Case No. 2018-000824

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Appeal From Horry County  
Steven H. John, Circuit Court Judge

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Unpublished Opinion No. 2021-UP-353  
Submitted September 1, 2021 – Filed October 13, 2021

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**AFFIRMED**

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William G. Yarborough, III, and Lauren Carole Hobbis,  
both of William G. Yarborough III, Attorney at Law,  
LLC, of Greenville, for Appellant.

Attorney General Alan McCrory Wilson, Deputy  
Attorney General Donald J. Zelenka, Senior Assistant  
Deputy Attorney General Melody J. Brown, and Senior  
Assistant Attorney General J. Anthony Mabry, all of  
Columbia; and Solicitor Jimmy A. Richardson, II, of  
Conway, all for Respondent.

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**PER CURIAM:** Nicholas J. McIver appeals his convictions for murder, possession of a weapon during the commission of a violent crime, and grand larceny. On appeal, McIver argues the trial court erred in (1) denying his motion for a directed verdict on his murder charge because the State failed to present sufficient evidence he committed the murder alone or together with his codefendant, Terrell Freeman (Codefendant); (2) failing to instruct the jury that "evidence of events after the commission of the offenses . . . standing alone [are] insufficient circumstantial evidence to find [him] guilty"; (3) not allowing him to cross-examine a detective about statements the detective made to Codefendant; and (4) admitting a photo lineup identification and related testimony because the lineup procedure was unduly suggestive and the eyewitness's identification was unreliable. McIver also argues the State improperly presented "conflicting prosecutorial theories regarding the identity of the shooter and the manner in which the shooting occurred," causing his convictions to be "fundamentally unfair and in violation of due process." We affirm.

1. As to whether the trial court erred in denying McIver's motion for a directed verdict on his murder charge, we find there is evidence to support the trial court's ruling that the State presented sufficient evidence McIver committed the murder either alone or with Codefendant to survive McIver's directed verdict motion. *See State v. Zeigler*, 364 S.C. 94, 103, 610 S.E.2d 859, 863 (Ct. App. 2005) ("The appellate court may reverse the trial judge's denial of a motion for a directed verdict only if there is no evidence to support the judge's ruling."); *State v. Curtis*, 356 S.C. 622, 633, 591 S.E.2d 600, 605 (2004) ("A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged."); *id.* at 633–34, 591 S.E.2d at 605 ("If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury."). The State presented extensive circumstantial evidence McIver acted as the principal in shooting Amanda Fisher (Victim), including Victim's cousin's testimony she sat in Codefendant's lap in the backseat of Victim's car while Victim drove them to North Carolina just before the shooting, and it did not appear he was carrying a gun on his person; Victim's cousin's testimony McIver sat in the front passenger seat beside and to the right of Victim during the drive, and he continued to sit there when he, Victim, and Codefendant left after dropping cousin off; Victim's autopsy results showing her cause of death was a fatal gunshot wound to her head that entered above her right ear and exited above her left ear; the lack of glass at the crime scene and surveillance video of the Victim's car after the shooting that showed the gunshot did not break the car's windshield, which would have been likely if she had been shot from behind by Codefendant; surveillance video

showing McIver placing an item from the waistband of his pants into the bed of his truck shortly after Victim's murder; surveillance videos showing McIver driving Victim's car and using her credit cards after her death; and McIver burning Victim's car later in the day in Charlotte, NC. The State also presented considerable circumstantial evidence McIver and Codefendant acted together to kill Victim, including testimony from an eyewitness to the murder who stated he heard a gunshot and then saw two men pulling Victim out of her car; McIver and Codefendant being in possession of Victim's car shortly after her death; the ongoing phone calls between them following Victim's death and the burning of Victim's car; and McIver attempting to delete Codefendant's contact information from his phone.

We agree with McIver that evidence of events after Victim's murder, including the flight from the crime scene and McIver's burning of Victim's car, may not have been enough to survive directed verdict. *See State v. Odems*, 395 S.C. 582, 590, 720 S.E.2d 48, 52 (2011) (declining to hold "that flight alone is substantial circumstantial evidence of a defendant's guilt"). However, as detailed above, we find the State presented more than just flight and cover-up evidence. Accordingly, the trial court properly denied McIver's directed verdict motion, and we affirm as to this issue.

2. The trial court did not abuse its discretion in declining to charge the jury that evidence of flight or cover-up attempts after the crime occurred are not alone enough to convict McIver. *See State v. Santiago*, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006) ("An appellate court will not reverse the trial [court's] decision regarding jury charges absent an abuse of discretion."). Initially, to the extent McIver argues the trial court should have charged the jury as to cover-up evidence, this issue is not preserved for appellate review because McIver only requested a jury instruction as to flight evidence, not cover-up evidence. *See State v. Porter*, 389 S.C. 27, 37, 698 S.E.2d 237, 242 (Ct. App. 2010) ("The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal."). Second, the experienced trial court properly declined to charge the jury on flight evidence because a flight instruction would have been an impermissible comment on the facts. *See S.C. Const. art. V, § 21* ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); *Pantovich v. State*, 427 S.C. 555, 562, 832 S.E.2d 596, 600 (2019) ("The modern trend, however, has cast doubt upon the validity of charges instructing juries on how to interpret and use evidence."); *State v. Grant*, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980) (providing the "law of

flight" should not be charged to the jury because it "places undue emphasis upon that part of circumstantial evidence"). Accordingly, we affirm as to this issue.

3. We find the trial court abused its discretion in prohibiting McIver from cross-examining Detective Lynam about statements he made during an interrogation of Codefendant because the statements would not violate *Bruton v. United States*, 391 U.S. 123 (1968), or open the door to Codefendant's prejudicial statements. See *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 57–58 (2011) ("The admission or exclusion of evidence is left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an abuse of discretion."); *id.* at 444, 710 S.E.2d at 58 ("An abuse of discretion occurs when the trial court's ruling is based on an error of law." (quoting *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000))).

To the extent McIver argues he should have been allowed to question Detective Owen Lynam about asking Codefendant if what McIver took out of his waistband and put into the bed of the truck was a pill bottle or a gun, we find this issue unpreserved because McIver did not ask Detective Lynam about this statement during Detective Lynam's proffer. See *State v. Jackson*, 384 S.C. 29, 34, 681 S.E.2d 17, 20 (Ct. App. 2009) ("Excluded testimony must be proffered to the trial court to preserve the issue of its exclusion for appellate review."). However, McIver should have been allowed to question Detective Lynam about his other two statements that the State (1) had solved the case in twenty-four hours and (2) believed the murder was not premeditated. The statements do not violate *Bruton* because (1) the statements were Detective Lynam's, not Codefendant's, and (2) to the extent the statements could be construed as a confession from Codefendant, they were redacted to not mention or reference McIver. See *State v. McDonald*, 412 S.C. 133, 140, 771 S.E.2d 840, 843 (2015) ("The [*Richardson*] Court held that there was no Confrontation Clause violation 'by the admission of a nontestifying codefendant's confession with a proper limiting instruction' when 'the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.'" (quoting *Richardson v. Marsh*, 481 U.S. 200, 211 (1987))). Additionally, we find these statements would not have opened the door to Codefendant's confession, which implicated McIver and exculpated himself, because Detective Lynam could testify he made the statements to build rapport with Codefendant and Detective Lynam's credibility would not need to be further rehabilitated by introducing the confession. See *State v. Page*, 378 S.C. 476, 482–83, 663 S.E.2d 357, 360 (Ct. App. 2008) (providing the trial court erred "in finding that [defendant's] counsel's zealous representation of his client [by cross-examining the detective about her investigative techniques and the sufficiency of the

evidence] required the admission of this inadmissible evidence in order to rehabilitate Detective's investigative techniques"). Accordingly, we find the trial court erred in not admitting this evidence.

Nonetheless, we find this error harmless beyond a reasonable doubt. *See State v. Bryant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) ("Error is harmless where it could not reasonably have affected the result of the trial."). The statements do not provide any evidence that McIver did not murder Victim, and they do not, as McIver argues, necessarily tend to show the State rushed to a wrong judgment in this case. Any value McIver would have gained from asking Detective Lynam about these statements would have been diminished, or altogether erased, by Detective Lynam's testimony that he made these statements to build a rapport with Codefendant. Accordingly, although the trial court erred in not admitting the statements, the error was harmless, and we affirm as to this issue.

4. We find the trial court did not abuse its discretion in admitting Shaniah Holmes' identification of McIver as the person she saw burning Victim's car and any related testimony because Holmes' identification was "so reliable that no substantial likelihood of misidentification existed." *See State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 425–26 (2012). While it may be debatable whether the photo lineup procedure in this case was unduly suggestive, the photo lineup and related testimony was nonetheless admissible because, viewing all the circumstances, Holmes' identification was reliable.<sup>1</sup> *See id.* at 138, 727 S.E.2d at 426 ("Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed."); *id.* (providing one must review "the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure" under the totality of the circumstances). In this case, although Holmes was only seven years old at the time she claimed to see McIver burn the car, Holmes had the ability to view McIver as he set the car on fire on her street, and she could see him while standing in her yard next to her mailbox. *See id.* (providing a factor to consider in determining the reliability of an otherwise unduly suggestive procedure is "the witness's opportunity to view the perpetrator at the time of the crime"). Holmes also

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<sup>1</sup> To the extent McIver argues Holmes was not reliable due to her age and competency, this issue is unpreserved. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court].").

provided an accurate, albeit a bit vague, description of McIver, describing him as a light-skinned black man with dreadlocks. *See id.* (providing a factor to consider in determining the reliability of an otherwise unduly suggestive procedure is "the accuracy of the witness's prior description of the criminal"). Holmes instantly identified McIver during the lineup and stated she was 100% certain of her choice. *See id.* (providing a factor to consider in determining the reliability of an otherwise unduly suggestive procedure is "the level of certainty demonstrated by the witness at the confrontation"). Finally, Holmes viewed the photo lineup and identified McIver only three days after the crime occurred. *See id.* (providing a factor to consider in determining the reliability of an otherwise unduly suggestive procedure is "the length of time between the crime and the confrontation"); *State v. Brown*, 333 S.C. 185, 190–91, 508 S.E.2d 38, 40–41 (Ct. App. 1998) (affirming the admission of an eyewitness's testimony and noting the eyewitness "viewed the photo line-ups only six days after the" crime occurred). Because Holmes' identification was reliable, we find the trial court did not err in admitting the photo lineup, identification, and related testimony, and we affirm as to this issue.

5. As to McIver's argument the State violated his due process rights by improperly presenting conflicting theories as to who shot Victim, we find this issue unpreserved for appellate review because McIver did not raise it to the trial court. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *State v. Langford*, 400 S.C. 421, 432, 735 S.E.2d 471, 477 (2012) ("Constitutional questions must be preserved like any other issue on appeal.").

**AFFIRMED.**<sup>2</sup>

**KONDUROS, HILL, and HEWITT, JJ., concur.**

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<sup>2</sup> We decide this case without oral argument pursuant to Rule 215, SCACR.



## The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629  
COLUMBIA, SOUTH CAROLINA 29211  
1220 SENATE STREET  
COLUMBIA, SOUTH CAROLINA 29201  
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[www.sccourts.org](http://www.sccourts.org)

November 05, 2021

The Honorable Renee Elvis  
PO Box 677  
Conway SC 29528-0677

### REMITTITUR

Re: The State v. Nicholas J. McIver  
Lower Court Case No. 2016GS2605556, 2016GS2605557, 2016GS2605558  
Appellate Case No. 2018-000824

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

The following exhibits were filed in this appeal:

State's Exhibits #4 & 5 (large posters), State's Exhibit #17 (video surveillance), State's Exhibit #23 (CD), State's Exhibit #33 (photo of victim), State's Exhibit #34 (photo of victim), State's Exhibit #26 (DVD), State's Exhibit #27 (CD/DVD) and State's Exhibit #29 (CD/DVD)

It will be necessary for the Attorney General's Office, or its designee, to arrange for transportation of these exhibits from our office.

Very truly yours,  
*V. Lane Allen*

CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire  
William G. Yarborough, III, Esquire  
Melody Jane Brown, Esquire  
Lauren Carole Hobbs, Esquire  
J. Anthony Mabry, Esquire  
Donald J. Zelenka, Esquire  
Jimmy A. Richardson, II, Esquire

**FORM 5**

STATE OF SOUTH CAROLINA )

COUNTY OF HORRY )

NICHOLAS MCIVER, # 00376157 )  
Full name and prison number (if any) of Applicant. )

v. )

State of South Carolina )

IN THE COURT OF COMMON PLEAS

20 21 CP 7151  
APPLICATION FOR  
POST-CONVICTION RELIEF  
FILED  
HORRY COUNTY  
CLERK OF COURT  
TERRELL FREEMAN  
HORRY COUNTY, SC  
2021 OCT 17 A 10:09

**INSTRUCTIONS - READ CAREFULLY**

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional Institution
2. Name and location of Court which imposed sentence Horry County Court of Common Pleas
3. Name(s) of co-defendant(s) (if any) Terrell Freeman
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
  - (a) Murder (2016GS2605558)
  - (b) Grand Larceny, \$2,000 - \$10,000 (2016GS2605556)
  - (c) Possession of a weapon during the commission of a violent crime (2016GS2605557)

Revised 3/2003



5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 45 years
  - (b) 5 years
  - (c) 5 years
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty \_\_\_\_\_
  - (b) after a plea of not guilty X
  - (c) after a plea of nolo contendere \_\_\_\_\_
7. Did you appeal from the judgment of conviction or the imposition of sentence?  
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
    - i. 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. October 13, 2021
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (d) if known, citations of any written opinion or orders entered pursuant to such results:
    - i. State v. McIver, No. 2021-UP-353 (Ct. App. Oct. 13, 2021)
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) \_\_\_\_\_
  - (b) \_\_\_\_\_
  - (c) \_\_\_\_\_

Revised 3/2003

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Applicant was deprived of his constitutional right to the effective assistance of counsel and due process in violation of the Sixth Amendment and Fourteenth Amendment.

(b)

(c) \_\_\_\_\_

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Trial Counsel failed to object to irrelevant, inflammatory, and prejudicial testimony regarding an incident in which Applicant allegedly filmed his codefendant and the victim's friend having sex without their knowledge.

(b) Trial Counsel failed to object or otherwise challenge the hand of one, hand of all accomplice liability instruction given to the jury.

(c) Trial Counsel failed to object to the State's opening statement which contained references to hand of one, hand of all accomplice liability.

(d) Trial Counsel failed to object to unsupported arguments and references not in evidence during the State's closing argument.

(e) Trial Counsel failed to request an instruction on "cover up evidence" or preserve this issue for review.

(f) Trial Counsel failed to object to the photo-line up and identification of Applicant on the basis of the witness's age and competency. Trial Counsel likewise failed to argue that the identification was unreliable due to the witness's age and competency.

(g) Trial Counsel failed to object to the State's improper presentation of conflicting theories, in violation of due process.

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

Revised 3/2003

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
    - i. \_\_\_\_\_
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
    - iv. \_\_\_\_\_
  - (b) the name and location of the Court in which each was filed:
    - i. \_\_\_\_\_
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
    - iv. \_\_\_\_\_
  - (c) the disposition thereof:
    - i. \_\_\_\_\_
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
    - iv. \_\_\_\_\_
  - (d) the date of each such disposition:
    - i. \_\_\_\_\_
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
    - iv. \_\_\_\_\_
  - (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
    - i. \_\_\_\_\_
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
    - iv. \_\_\_\_\_
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- No

Revised 3/2003

15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
    - i. N/A
    - ii. N/A
    - iii. N/A
  - (b) the proceedings in which each ground was raised:
    - i. N/A
    - ii. N/A
    - iii. N/A
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) The grounds raised herein are not cognizable for relief on direct appeal.
  - (b) N/A
  - (c) N/A
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? N/A
  - (b) your trial, if any? Yes
  - (c) your sentencing? Yes
  - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
  - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
    - i. Gregory Scott Bellamy, Esq.  
G. Scott Bellamy, P.C., Attorney at Law  
1206 Third Ave., Ste. A  
Conway, SC 29526  
(843) 248-3173  
sbellamy@sccoast.net

Revised 3/2003

ii. William G. Yarborough, III, Esq.  
William G. Yarborough, Attorney at Law, LLC  
308 West Stone Avenue  
Greenville, SC 29609  
(864) 331-1612  
wgyarborough@gmail.com

iii. Lauren C. Hobbis, Esq.  
William G. Yarborough, Attorney at Law, LLC  
308 West Stone Avenue  
Greenville, SC 29609  
(864) 331-1612  
laurenwgylaw@gmail.com

(b) the proceedings at which each such attorney represented you:

- i. Through trial and sentencing
- ii. Appeal
- iii. Appeal

19. State clearly the relief you seek in filing this application:

Vacate conviction and sentence and remand for a new trial

20. Are you now under sentence from any other court that you have not challenged?

No.

STATE OF SOUTH CAROLINA

County of Horry

)  
)  
)

VERIFICATION

I, Nicholas McIver, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

SWORN to and subscribed before me this 18  
day of October, 2021.

Risa Cherry (L.S.)  
Notary Public

My Commission Expires: 4-22-29

FILED  
HORRY COUNTY  
2021 OCT 27 A 10:09  
RENEE N. ELVIS  
CLERK OF COURT  
HORRY COUNTY, SC

**APPLICATION TO PROCEED WITHOUT PAYMENT  
OF COSTS AND AFFIDAVIT  
IN SUPPORT THEREOF**

I, \_\_\_\_\_, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

\_\_\_\_\_  
*Applicant*

SWORN or affirmed to and subscribed before me this  
\_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_\_.

\_\_\_\_\_  
*Notary Public*

My Commission Expires: \_\_\_\_\_

Revised 3/2003

STATE OF SOUTH CAROLINA )  
COUNTY OF HORRY )  
NICHOLAS MCIVER, #00376157 )  
Applicant. )  
VS. )  
STATE OF SOUTH CAROLINA, )  
Respondent. )  
\_\_\_\_\_ )

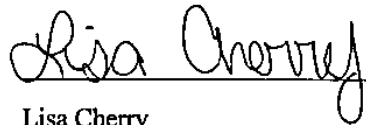
IN THE COURT OF COMMON PLEAS  
THIRTEENTH JUDICIAL CIRCUIT

CERTIFICATE OF SERVICE

FILED  
HORRY COUNTY, SC  
2021 OCT 27 A 10:09  
RENEE N. ELVIS  
CLERK OF COURT  
HORRY COUNTY, SC

The undersigned hereby certifies that on the 18TH day of October, 2021, she served a copy of the attached **Application for Post-Conviction Relief** by placing said copy in a postpaid envelope, addressed to the person hereinafter named, at the place and address stated below, by depositing said envelope and contents in the United States Mail at Greenville, South Carolina.

Honorable Alan Wilson, SC Attorney General  
ATTN: PCR Division of SC Attorney General's Office  
P.O. Box 11549  
Columbia, SC 29211



Lisa Cherry  
Paralegal to William G. Yarborough





ALAN WILSON  
ATTORNEY GENERAL

January 12, 2022

The Honorable Renee Elvis  
Horry County Clerk of Court  
PO Box 677  
Conway, SC 29528-0677

FILED  
HORRY COUNTY  
2022 JAN 18 P 12:21  
RENEE N. ELVIS  
CLERK OF COURT  
HORRY COUNTY, SC

Re: Nicholas McIver, #376157 v. State of South Carolina  
2021-CP-26-07151

Dear Ms. Elvis,

Enclosed please find the original **Return** of the Respondent, in the above-captioned case, for filing in your office.

Sincerely,

William H. Ray  
Assistant Attorney General

WHR/em  
Enclosure

cc: Mr. William G. Yarborough, III, Esquire

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON  
PLEAS

COUNTY OF HORRY )

Nicholas McIver, #376157 )

2021-CP-26-07151

vs )

AFFIDAVIT OF SERVICE BY  
MAIL

State of South Carolina, )

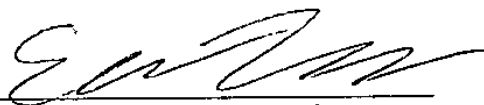
Respondent, )

FILED  
HORRY COUNTY  
2022 JAN 18 P 12:21  
RENEE N. ELVIS  
CLERK OF COURT  
HORRY COUNTY, SC

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, Motion for Merger, & Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Mr. William G. Yarborough, III  
308 W. Stone Ave.  
Greenville, SC 29609

DATED this the 12<sup>th</sup> day of January, 2022.

  
Erik Marcusson, Legal Assistant  
for Respondent

STATE OF SOUTH CAROLINA  
COUNTY OF HORRY

Nicholas McIver, SCDC No. 376157

Applicant,

v.

State of South Carolina

Respondent.

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2021-CP-26-07151

RETURN

FILED  
HORRY COUNTY  
2021 JAN 18 P 12:21  
RENEE N. ELVIS  
CLERK OF COURT  
HORRY COUNTY, SC

NOW COMES Respondent, the State of South Carolina, making its return to Applicant Nicholas McIver's October 27, 2021 application for post-conviction relief. Respondent would respectfully show this Court:

### I. PROCEDURAL HISTORY

Applicant is presently incarcerated in the South Carolina Department of Corrections. Applicant was indicted for grand larceny over \$2,000 but less than \$10,000, possession of a weapon during the commission of a violent crime, and murder by the Horry County Grand Jury at its December 2016 term. (2016-GS-26-05556; -05557; -05558).<sup>1</sup> Applicant was represented by Attorney G. Scott Bellamy and Senior Assistant Solicitor George H. Debusk, Jr., and Assistant Solicitor Seth Oskins, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On April 23, 2018 Applicant proceeded to a jury trial before the Honorable Steven H. John.<sup>2</sup> On April 27, 2018 Applicant was convicted, as indicted, of the grand larceny, murder, and weapons charge. Judge

<sup>1</sup> Applicant was also indicted for kidnapping, which was dismissed upon Applicant's motion for a directed verdict. (Tr. 542, 7 – Tr. 544, 10).

<sup>2</sup> Applicant was tried jointly with his codefendant, Terrell Freeman.

John then sentenced Applicant to a term of five years' imprisonment for the grand larceny, five years' imprisonment for the weapons charge, and forty-five years' imprisonment for murder.

Applicant appealed and the appeal was perfected by Attorneys William G. Yarborough, III and Lauren C. Hobbis. Applicant raised the following issues:

1. The trial court erred in denying Appellant's motion for directed verdict because the State failed to present sufficient evidence that Appellant committed murder acting alone or sufficient evidence he and co-defendant Freeman joined together to commit the murder under the hand of one is the hand of all accomplice liability doctrine.
2. The trial court erred in refusing to instruct the jury that evidence of events after the commission of the offenses charged, such as evidence of flight or evidence of attempts to cover up the offenses charged are standing alone insufficient circumstantial evidence to find Appellant guilty.
3. The trial court erred in prohibiting Appellant from cross-examining a detective about the questions he asked codefendant Freeman because as demonstrated by the proffer, the cross-examination would not have improperly elicited codefendant Freeman's statement, thereby implicating *Bruton v. United States*, and would not have otherwise opened the door to prejudicial or improper testimony.
4. The trial court erred in admitting into evidence the identification, photo lineup, and related testimony because the identification procedure and lineup featuring Appellant's photo were unduly suggestive, and the child eyewitness's identification is otherwise so unreliable that there was a substantial likelihood of misidentification, in violation of due process.
5. The State's improper presentation of conflicting prosecutorial theories regarding the identity of the shooter and the manner in which the shooting occurred rendered Appellant's convictions fundamentally unfair and in violation of due process.

The South Carolina Court of Appeals affirmed the conviction and dismissed the appeal.

*State v. McIver*, Op. No. 2021-UP-353 (Filed October 13, 2021). The remittitur was sent on November 5, 2021.

## II. FACTUAL HISTORY

On the morning of July 9, 2016, an eyewitness was sitting in the parking lot of the North Myrtle Beach K&W Cafeteria when he heard a pop and witnessed a man pulling a woman out of a nearby vehicle. (Tr. 86, 9 – Tr. 89, 20). He saw the man drive off in the vehicle and described him as a black male with short hair, but did not get a good look at another man inside the vehicle. (Tr. 91, 1 – Tr. 92, 14). The manager of the restaurant approached the victim and found her bloody and unresponsive. (Tr. 107, 9 – Tr. 108, 25).

Officers arrived at the scene and identified the victim by her cellphone, which was found nearby. (Tr. 126, 10 – Tr. 128, 8). It was determined that she drove a white, four-door Malibu and no purse or wallet was found at the scene. (Tr. 151, 1-4; Tr. 169, 15 – Tr. 172, 2). Applicant was caught on camera at a North Carolina gas station using the victim's credit card and driving the victim's vehicle shortly after the shooting. (Tr. 217, 4 – Tr. 221, 8). Additional transactions were made on her credit card at a Bennettsville convenience store on the afternoon of the shooting. (Tr. 227, - Tr. 231, 22). The vehicle was found, burned and abandoned, in Charlotte, North Carolina. (Tr. 289, 10 – Tr. 290, 13). The victim's purse was found inside, but no credit cards were recovered. (Tr. 394, 1 – Tr. 395, 9). Applicant was developed as a suspect and was identified by an individual who witnessed the burning of the vehicle. (Tr. 310, 2 – Tr. 312, 9).

The victim's cousin, Tabetha Oxendine, told police that Applicant and his codefendant may be responsible for the crime, because they had been with them the night before. (Tr. 390, 3-23). They had spent the previous night at the Holiday Sands hotel, while the defendants had stayed at the nearby Lancer motel. (Tr. 396, 15 – Tr. 397, 5). They rode to North Carolina together that morning and she was dropped off at her Aunt's house while the victim returned to Myrtle Beach

with the defendants. (Tr. 496, 2 – Tr. 500, 22). Oxendine never saw her cousin again after being dropped off. (Tr. 501, 8-9).

Video showed the group spending significant amounts of time together in the hotel before leaving in the victim's car on the morning of the murder. (Tr. 412, 11 – Tr. 425, 13). About a half hour after the shooting, video captured Applicant and his codefendant returning unaccompanied to the hotel in the victim's vehicle before separating and leaving in separate vehicles. (Tr. 426, 7 – Tr. 431, 16).

Dr. Edward Leroy Proctor, Jr. testified that he had performed an autopsy on the victim the day after the shooting and determined that she had died from a single, point blank gunshot wound to the head. (Tr. 237, 16 – Tr. 241, 12).

### **III. CURRENT APPLICATION**

In his current application for post-conviction relief, Applicant asserts that he is being held in custody unlawfully for the following reasons:

1. Trial Counsel failed to object to irrelevant, inflammatory, and prejudicial testimony regarding an incident in which Applicant allegedly filmed his codefendant and the victim's friend having sex without their knowledge.
2. Trial Counsel failed to object or otherwise challenge the hand of one, hand of all accomplice liability instruction given to the jury.
3. Trial Counsel failed to object to the State's opening statement which contained references to hand of one, hand of all accomplice liability.
4. Trial Counsel failed to object to unsupported arguments and references not in evidence during the State's closing argument.
5. Trial Counsel failed to request an instruction on "cover up evidence" or preserve this issue for review.
6. Trial Counsel failed to object to the photo line-up and identification of Applicant on the basis of the witness's age and competency. Trial Counsel likewise failed to argue that the identification was unreliable due to the witness's age and competency.

7. Trial Counsel failed to object to the State's improper presentation of conflicting theories, in violation of due process.

Attached and incorporated herein are Applicant's records from the Horry County Clerk of Court's Office, the South Carolina Department of Corrections, the trial transcript, the direct appeal records, and the current application for post-conviction relief. Respondent reserves the right to alter or amend this return upon receipt of any relevant materials.

#### **IV. RESPONSE TO ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL**

Applicant alleges that his counsel provided ineffective assistance of counsel for failing to make proper objections, failing to request proper jury instructions, and failing to make adequate arguments against an allegedly unreliable identification. Respondent submits that these allegations are without merit.

In a PCR action, Applicant bears the burden of proving the allegations in his/her application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625

(quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* (citing *Strickland*, 466 U.S. at 690). “When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109-10 (2011). “[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough*, 540 U.S. at 6; *see also* *Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced 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. “This does not require a showing that counsel’s actions ‘more likely than not altered the outcome,’ but the difference between *Strickland*’s prejudice standard and a more-probable-than-not standard is slight and matters ‘only in the rarest case.’” *Harrington*, 562 U.S. at 111-12 (quoting *Strickland*, 466 U.S. at 697). “The likelihood of a different result must be substantial, not just conceivable.” *Id.* at 112. “The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality



of the evidence before the judge or jury.” *United States v. Basham*, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

Respondent asserts that Applicant cannot satisfy either requirement of the *Strickland* test. Each alleged instance of ineffective assistance due to failure to object or make proper arguments were either not deficient performance, were motivated by a reasonable strategy, or were not so prejudicial that they would have altered the outcome of the trial. However, the allegations may raise questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See *Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983). (“Where an application for post-conviction relief alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court, a question of fact is raised which can only be resolved by an evidentiary hearing.”).

#### **V. ASSERTION OF RIGHTS TO NOTICE OF AMENDMENTS, EXPERTS**

Applicant must specify any claims he/she intends to raise at the PCR evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. Rule 11(a), SCRPC. *Pro se* filings will not be considered at the PCR hearing. *State v. Devore*, 416 S.C. 115, 123, 784 S.E.2d 690, 694 (Ct. App. 2016) (*Pro se* filing a nullity where person was represented by counsel); *Miller v. State*, 388 S.C. 347, 697 S.E.2d 527 (2010) (“Since there is no right to ‘hybrid representation’ that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relief counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel.”).

Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent, or in the alternative continue the matter to permit adequate time to investigate and address the claims. *See Mangal v. State*, 421 S.C. 85, 805 S.E.2d 568 (2017) (“In most PCR cases, . . . we have refused to excuse the pleading and issue-preservation requirements that apply in all civil cases.”); *Love v. State*, 428 S.C. 231, 242, 834 S.E.2d 196, 201 (2019) (“When analyzing the substance of a proposed amendment and any prejudice the State might suffer, a PCR court should consider all relevant circumstances, including, but not limited to, the timing of the motion, the complexity of the new issue, the degree of surprise to the State, the need for and availability of necessary witnesses to defend against the claim, and whether the substance of the proposed amendment is readily apparent from the underlying plea or trial record.”); *see also* Rules 15(a)-(b), SCRPC (explaining how to amend a pleading).

Under section 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

## **VI. GENERAL DENIAL**

Respondent denies each allegation not expressly admitted, qualified, or explained elsewhere herein.

VII. CONCLUSION

WHEREFORE, Respondent respectfully requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel.

Respectfully submitted,

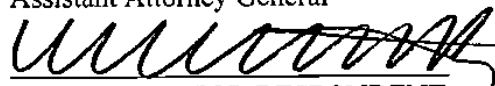
ALAN WILSON  
Attorney General

W. JEFFREY YOUNG  
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

WILLIAM H. RAY  
Assistant Attorney General

By:



ATTORNEYS FOR RESPONDENT  
Office of the Attorney General  
P.O. Box 11549  
Columbia, South Carolina 29211

1/12

, 2022

STATE OF SOUTH CAROLINA  
COUNTY OF HORRY

Nicholas McIver, #00376157,  
Applicant,

v.

State of South Carolina,  
Respondent.

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No.: 2021CP2607151

**MOTION TO AMEND  
PCR APPLICATION**

**FILED**  
**HORRY COUNTY**  
**2022 DEC 20 P 1:35**  
**REHEE N. ELVIS**  
**CLERK OF COURT**  
**HORRY COUNTY, SC**

NOW COMES the Applicant, Nicholas McIver, by and through undersigned counsel, and hereby moves this Honorable Court for leave to amend his application for post-conviction relief with the following additional or supplemental allegations:

- I. Trial Counsel was ineffective for failing to move for severance of the trial from Applicant's codefendant. This error was deficient and prejudicial because the joint trial of Applicant and his codefendant limited Applicant's trial strategy and cross-examination opportunities.
- II. Trial Counsel was ineffective for repeatedly making statements that incriminated Applicant during his opening statement and closing argument. Trial Counsel not only repeatedly told the jury that Applicant was guilty of grand larceny, one of the charges for which he was on trial, but he also stated Applicant was guilty of offenses he was not even charged with, like accessory after the fact, and commented that Applicant should be punished for that.
- III. Trial Counsel was ineffective for acquiescing to the State's theory of accomplice liability and for making statements in his opening statement and closing argument that bolstered that theory.

WHEREFORE, Applicant respectfully requests this Honorable Court to allow Applicant to amend his post-conviction relief application and to elicit testimony on the grounds raised herein at the evidentiary hearing.

Respectfully submitted,

William G. Yarborough, III,

Lauren C. Hobbis

By: Lauren C. Hobbis  
South Carolina Bar #103190  
308 West Stone Avenue  
Greenville, SC 29609  
(864) 331-1612

COUNSEL FOR APPLICANT

FILED  
HORRY COUNTY  
2022 DEC 20 P 1:35  
RENEE H. ELYS  
CLERK OF COURT  
HORRY COUNTY, SC

STATE OF SOUTH CAROLINA  
COUNTY OF HORRY

Nicholas McIver, #00376157,  
Applicant,

v.

State of South Carolina,  
Respondent.

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No.: 2021CP2607151

CERTIFICATE OF SERVICE

FILED  
HORRY COUNTY  
DEC 20 P 1:35  
RENEE H. ELYS  
CLERK OF COURT  
HORRY COUNTY, SC

The undersigned hereby certifies that a copy of the Applicant's Motion to Amend PCR filed in the above-captioned case was served upon the Respondent by depositing it in the U.S. postal mail with sufficient postage attached, addressed as follows:

AAG D. Chelsey F. Marto  
SC Attorney General's Office  
Post Office Box 11549  
Columbia, South Carolina 29211

Lauren C. Hollis #103190

This the 16<sup>th</sup> day of December, 2022.

|                          |   |                              |
|--------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA  | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF HORRY          | ) | 2021-CP-26-07151             |
| Nicholas McIver,         | ) |                              |
|                          | ) |                              |
| Applicant,               | ) | Transcript of Record         |
|                          | ) |                              |
| vs.                      | ) |                              |
|                          | ) |                              |
| State of South Carolina, | ) | July 30, 2024                |
|                          | ) |                              |
| Respondent.              | ) |                              |
|                          | ) |                              |

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**B E F O R E:**

The Honorable Deadra L. Jefferson  
Horry County Courthouse  
Conway, South Carolina

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

William G. Yarborough, III, Esquire  
**Attorney for Applicant**

Bryan T. Hall, Esquire  
**Attorney for State**

Sallie Beth Todd  
**Official Court Reporter**

I N D E X

| <u>WITNESS</u> | <u>DIRECT</u> | <u>CROSS</u> | <u>REDIRECT</u> | <u>RECROSS</u> |
|----------------|---------------|--------------|-----------------|----------------|
|----------------|---------------|--------------|-----------------|----------------|

**SCOTT BELLAMY**

|                   |   |  |    |  |
|-------------------|---|--|----|--|
| BY MR. YARBOROUGH | 5 |  | 43 |  |
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| BY MR. HALL |  | 26 |  |  |
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**NICHOLAS MCIVER**

|                   |    |  |  |  |
|-------------------|----|--|--|--|
| BY MR. YARBOROUGH | 51 |  |  |  |
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|-------------|--|----|--|--|
| BY MR. HALL |  | 57 |  |  |
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E X H I B I T S

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(There were no exhibits offered during this trial.)



1 THE COURT: This is Nicholas McIver v. the State 2021-CP-  
2 26-7151. It's an application for post-conviction relief filed  
3 on 10/27/2021. An amended application was filed on 12/20 of  
4 2022. The return was filed on 1/18 of 2022.

5 This trial took place on April 23rd through the 27th of  
6 2018 before Judge Steven John, at which time the defendant was  
7 convicted on the following offenses in chronological order:  
8 2016-GS-5556, 5557, and 5558. Those being the offenses of  
9 grand larceny, possession of a weapon during the commission of  
10 a violent crime, and murder. He was sentenced to five years  
11 on the grand larceny and the possession of a weapon, and 45  
12 years on the murder offense.

13 Mr. Yarborough, when were you appointed to represent --  
14 or were you retained to represent?

15 MR. YARBOROUGH: I was retained -- I -- I was retained to  
16 do the appeal and then file the PCR after that.

17 THE COURT: And when were you retained for the appeal?  
18 Did you file a notice of appearance with the court?

19 MR. YARBOROUGH: I did file a notice of appearance with  
20 the court, Your Honor. I filed the -- I filed the post-  
21 conviction relief application.03

22 THE COURT: Okay. Originally it looks like the PCR was -  
23 - let's see, that's the amendment. Okay.

24 MR. YARBOROUGH: I see another name on there, Ms. Hobbis.

25 THE COURT: Yeah. I just need to know when you filed

1 your notice of appearance so the procedural history can be  
2 accurate because I didn't have one in the record that was  
3 provided to me.

4 MR. YARBOROUGH: I believe that she would have filed the  
5 initial PCR and after the --

6 THE COURT: I have those dates. I've already placed them  
7 in the record. I just need to know when you filed your notice  
8 of appearance.

9 MR. YARBOROUGH: I -- I filed my notice of appearance  
10 with the -- with the original PCR when we filed it, Your  
11 Honor. It would have been that same day.

12 THE COURT: Okay. So that would be 10/27 of 2021?

13 MR. YARBOROUGH: Yes, that's correct, Your Honor.

14 THE COURT: Okay. And the lower record was affirmed on  
15 appeal in an unpublished opinion and the remitter was returned  
16 to the lower court on 11/5/2021.

17 Is the State ready to proceed?

18 MR. HALL: Yes, ma'am.

19 THE COURT: Is the applicant ready to proceed?

20 MR. YARBOROUGH: He is, Your Honor.

21 THE COURT: Okay. And was there a witness that we needed  
22 to take up electronically --

23 MR. HALL: Not in this case.

24 THE COURT: -- or did we not? Not in this case --

25 MR. HALL: Not in this case, Your Honor.

1 THE COURT: It was a different case, correct?

2 MR. HALL: Yes, ma'am.

3 THE COURT: Okay. All righty. You may proceed. And  
4 I've read the entire file, so we can dispense with opening  
5 arguments.

6 MR. YARBOROUGH: We -- we call Mr. McIver's original  
7 trial counsel, Mr. Bellamy.

8 THE COURT: Is Mr. Bellamy present?

9 MR. BELLAMY: I am, Your Honor.

10 THE COURT: If you would come to the stand, sir.

11 THE CLERK: Put your hand up, left hand, raise your  
12 right.

13 **SCOTT BELLAMY, HAVING BEEN DULY SWORN TESTIFIES AS**  
14 **FOLLOWS:**

15 THE CLERK: Have a seat. State your name for the Court  
16 and spell your last name. Thank you.

17 THE WITNESS: You're welcome. My name is Scott Bellamy.  
18 Last name spelled B-E-L-L-A-M-Y.

19 THE COURT: You may proceed.

20 **DIRECT EXAMINATION OF SCOTT BELLAMY BY MR. YARBOROUGH:**

21 Q: Mr. Bellamy, do you -- do you practice law here in  
22 Conway?

23 A: I do, yeah.

24 Q: How long have you done that?

25 A: I was sworn in in November, 1990, worked a year for Judge

1 Sidney Floyd, then prosecuted from '91 to '95, and in January  
2 of '95 went into private practice, and have been such till  
3 now.

4 Q: Okay. And at some point did -- were you retained by the  
5 -- by Mr. McIver or his family?

6 A: I was.

7 Q: Okay. And did you -- did you file an appearance and  
8 begin representing him?

9 A: I did.

10 Q: Okay. Did you have an opportunity to talk to him  
11 extensively about the discovery in this case?

12 A: I did.

13 Q: What -- can you tell the Court a little bit about what  
14 the evidence that -- against Mr. McIver actually was in the  
15 trial for the murder case?

16 A: Well, there's a lot of different things, but the evidence  
17 would show video evidence that Nick, Mr. McIver, and a co-  
18 defendant, Mr. Freeman, came to Myrtle Beach for a weekend, or  
19 a couple of days. That they were staying at a motel in Myrtle  
20 Beach, the Lancer Motel. There was registration information  
21 indicating where they had checked in. And I'm not sure  
22 whether it was Mr. Freeman or Mr. McIver, it was under one of  
23 their names, but it was under their legitimate names.

24 There's security video at the Lancer that puts the two of  
25 them there. There was a second motel where there were

1 security cameras. I think it's Bermuda Sands, where two  
2 females, Ms. Oxendine, and the other female were staying. And  
3 there's videotape that shows them there and then also shows  
4 Mr. Nicholas and his co-defendant, Mr. Freeman, at that hotel.  
5 There was also -- so that put the victim and defendants in  
6 contact with each other.

7 Q: But it puts them in contact with each other, but in  
8 reality, was there anything, was there a film of the murder?  
9 Was there anything?

10 A: No. They apparently meet up by random. There's no  
11 history between the parties. Didn't grow up together, don't  
12 know each other. They're just down there on the strip at the  
13 Boulevard, meet up there. Apparently two girls are there for  
14 a week or -- not a week, a couple of days, and so are they.

15 Then the next day one of the females needed to go home to  
16 Shallotte, North Carolina, for some particular reason, maybe  
17 involving a child. So there's testimony from her that what  
18 went on with the meeting and what went on that night and the  
19 next morning on the ride from Myrtle Beach to Shallotte, she -  
20 -

21 Q: And all of that was -- was normal --

22 A: Yes, everything was normal. They drop her off.

23 Q: They take her up to the house in North Carolina and drop  
24 her off and no controversy or anything?

25 A: Nothing. No, there was no issues with money, drugs, no

1 conversation from that witness or anybody else. The car  
2 apparently is the victim's car that they were in. She was  
3 driving it. When the one young lady was dropped off, Mr.  
4 McIver would have been in the passenger seat, Mr. Freeman in  
5 the rear passenger seat. That car is then spotted at the K&W  
6 in North Myrtle Beach --

7 Q: Right.

8 A: -- about 11:30-ish, right around lunchtime. The business  
9 was open. It was a July weekend, if I recall, in 2016. So a  
10 lot of businesses in that area, it's very busy. I went to the  
11 scene myself after the fact, of course. There's witnesses  
12 there that hear a gunshot and then see the victim's vehicle.  
13 They're able to identify general descriptions of two males in  
14 the car pulling and/or pushing the young lady who was the  
15 victim in this situation out of the vehicle onto the pavement  
16 in the parking lot --

17 Q: Did --

18 A: -- then the vehicle leaves.

19 Q: Okay. Did at any point during your analysis of the case,  
20 did Mr. McIver ever say that he was the one that did that?

21 A: No.

22 Q: Okay.

23 A: He -- he -- he --

24 Q: He told you he didn't?

25 A: He denies having shot the young lady at all.

1 Q: All right. And the co-defendant, Mr. Terrell -- is that  
2 how you say it, Terrell?

3 A: I know his last name's Freeman, but I think Terrell.

4 Q: Terrell --

5 A: I think you're correct.

6 Q: Terrell Freeman. He gave a lengthy statement to the  
7 police; is that correct?

8 A: He did give a recorded statement that basically said he  
9 didn't do it.

10 Q: Right. And he outlined a lot of the information about  
11 when he had interaction with -- with the girls and some of  
12 that with Mr. McIver, right?

13 A: Correct.

14 Q: And at some point he talks about where they had been,  
15 where they went to, maybe some incident where there's this  
16 video of somebody having sex or something along those lines.  
17 But he basically cooperates with the police, right?

18 A: To some degree. Yes, he, I think, even rode around with  
19 them and in an attempt to find a gun, but that was not  
20 successful.

21 Q: Right. And he told them where he -- he put the gun that  
22 was used in the shooting; is that correct?

23 A: He made some statement in reference to that, but he could  
24 not locate it. He's not from here.

25 Q: Right. But he said he threw it down a -- a --

1 A: I think some sort of drain --

2 Q: -- drain or something?

3 A: And --

4 Q: Yeah.

5 A: Like a curbing-gutter-type drain.

6 Q: And there was an extensive statement by him that said all  
7 that, that would have -- would have tied him to the gun,  
8 correct?

9 A: Yes.

10 Q: Okay. And there was -- at that point, that testimony  
11 would have helped Mr. McIver, right? The extended statement  
12 by Mr. --

13 A: Well, I didn't think so because the statement of Mr.  
14 Freeman was that Mr. McIver is the one who shot the victim.

15 Q: But everything else would have -- would have helped Mr.  
16 McIver, you know, Mr. Freeman took responsibility of the gun  
17 and all that stuff.

18 A: I don't know -- no, the statement that my client was the  
19 one who had the gun and shot the lady from the co-defendant I  
20 didn't think would help my client at all.

21 Q: Well, so did you think about moving to sever the case  
22 because of that?

23 A: Well, I thought about it but I did not do that.

24 Q: Okay. And that was -- did you discuss that with Mr.  
25 McIver?



1 A: I believe I did. I can't remember. Well, I talked to  
2 him a number of times. He never did bond out. His bond --

3 Q: Right.

4 A: -- was denied. So my meetings with him were at the jail.  
5 Can I tell you I have a specific of that conversation? No,  
6 but I can assure you that, that's one thing I would have --  
7 believed I would have mentioned to him, is the benefits of  
8 trying cases together versus separately.

9 And obviously the courts favor trying cases together  
10 where the facts would be the same. I don't know what that  
11 noise is either, but because there's this other statement  
12 which -- because Bruton, I don't think, would have come in --

13 Q: Right.

14 A: -- I didn't file a motion to sever.

15 Q: Okay. And did you ever put on the record or anything  
16 your decision not to do that and that Mr. McIver acquiesced in  
17 that discussion?

18 A: No, that -- you mean similar to like if a defendant's  
19 going to testify where you put that on the record that they've  
20 been advised and they've made that choice?

21 Q: Right.

22 A: No, and that's not a typical practice to go through each  
23 strategic decision and advise the court and put on the record,  
24 Hey, I've talked to him about a motion to object to this or  
25 that or the other, and my client agrees to it. Those things

1 sort of happen as they happen. So, no, that was not put on  
2 the record.

3 Q: But I mean, what you have is you had a case where two men  
4 were charged with a crime and the state didn't have evidence  
5 of who did the shooting, right?

6 A: That was our theory that they did not -- that the  
7 forensic evidence couldn't pinpoint which one of the two -- in  
8 what position they would have been in. And that would have  
9 been through the pathologist, Dr. Proctor, through Owen Lynam  
10 (ph), the detective who said they didn't know who did the  
11 shooting.

12 Q: Okay. And during your course of going through trial, you  
13 never argued to the court that -- the prosecutor's name was --  
14 what was --

15 A: George DeBusk.

16 Q: George DeBusk?

17 A: And then Seth Oskin was also there. There were two.

18 Q: Where -- when they got up in opening statement and said,  
19 it didn't really matter who did it, because it was the hand of  
20 one, hand of all. That's what they said, right?

21 A: I -- I believe they did.

22 Q: Right.

23 A: I've read parts of --

24 Q: Sure.

25 A: -- the transcript, but I have not read the whole thing --

1 -

2 Q: Well --

3 A: -- up to today. But if you say that's what's in there --

4 -

5 Q: Well, that's what -- that's what's in there. It is.

6 A: Yeah, then I would agree with that.

7 Q: And -- and they -- in that same part, they come up with  
8 this story about there being accomplice liability. I didn't -  
9 - they were talking about hand of one hand of all and the  
10 state's theory was accomplice liability, and that was all they  
11 talked about in the opening statement. And I think you and I  
12 talked about it, your practice is usually not to object an  
13 opening statement, correct?

14 A: Typically, unless they get into, you know, you're not  
15 going to hear the defendant testify and he should tell you  
16 what to say, something of that nature. That was their theory  
17 of the case. I never thought they were going to be able to  
18 establish evidence to get to the hand of one hand of all,  
19 which has got to be -- because the evidence from Mr. Freeman  
20 is there was no discussion, no plan, no robbery, no --

21 Q: Right.

22 A: -- stealing, nothing that they were trying -- one was  
23 trying to accomplish and the other assisted in some way, so  
24 they're now then responsible for the actions of the other.

25 Q: Right.

1 A: Because basically, I don't know why the fellow would have  
2 shot her kind of thing. And so there was no evidence of any  
3 plan to commit any separate act, which natural consequence led  
4 to the murder.

5 Q: Right. And if -- you'll agree with me, you did not  
6 object to that, right?

7 A: I agree with you, absolutely.

8 Q: And did the -- you were -- they were trying them based on  
9 the murder, but they were also trying them with a grand  
10 larceny charge and some --

11 A: Possession of a weapon during a --

12 Q: -- possession of a weapon during crime and --

13 A: -- commission of violent crime, yes.

14 Q: -- and a charge of kidnapping?

15 A: Correct.

16 Q: Right. And you didn't move to sever those cases either?

17 A: I did not. They were all in one continuous incident --

18 Q: Right.

19 A: -- although the kidnapping charge, there was a directed-  
20 verdict motion.

21 Q: And is --

22 A: We were successful.

23 Q: That was dismissed. And -- but then you had the case of  
24 the car being filled up with gas and perhaps Mr. McIver was  
25 the one filling up the gas there, but that doesn't prove

1 murder, right?

2 A: Correct.

3 Q: Okay. And so hindsight is 2020, do you wish you would  
4 have asked for that to have been severed because it became  
5 pretty important to the jury later on?

6 A: Well, but even if it gets severed, that doesn't mean that  
7 that evidence doesn't come in. That is evidence of use of the  
8 credit cards, driving the vehicle. That was a charge that I  
9 did not believe we would -- could argue with a straight face  
10 to a jury or judge. But, no, I didn't file a motion to sever  
11 it because it was all in one continuous incident -- incidents.

12 Q: Okay. You don't think that -- that the -- the fact that  
13 if Mr. McIver is not guilty, which he's always told you, and  
14 the fact that he had a credit card and used it, the card made  
15 him look more guilty? And that's after the fact. It's not --

16 A: After the fact.

17 Q: Right. And it's totally after the fact evidence that was  
18 admitted to prove what happened during the murder, right?

19 A: It was at -- yes, it was evidence that came in that  
20 linked him to the deceased, her credit cards, and her vehicle.

21 Q: And have you read the court -- you've read the court  
22 opinion --

23 A: Yes.

24 Q: -- on appeal, and it says in there that we agree with Mr.  
25 McIver's statement that evidence of events after the victim's

1 murder, including the flight from the crime scene and McIver's  
2 burning of the victim's car, may not have been enough to  
3 survive the directed verdict. Those were things that were --  
4 came in later, right? That maybe made him look more guilty  
5 than what he really was.

6 A: Well, it was evidence that tied him to being in the  
7 vehicle with the deceased, by having her personal belongings  
8 and vehicle.

9 Q: Right. Did -- what was your thought on the -- on the  
10 kidnapping? What was your theory on the kidnapping? That it  
11 was never a kidnapping? I mean, I don't -- I didn't --

12 A: Well, there was no -- there --

13 Q: I guess, what was the State's thought on the kidnapping?

14 A: Well, I -- I can't get into --

15 MR. HALL: Objection, speculation.

16 MR. YARBOROUGH: That's fine.

17 THE COURT: Sustained. Speculation rephrase.

18 BY MR. YARBOROUGH:

19 Q: What was the evidence that the state put forward about  
20 the kidnapping?

21 A: I didn't think any.

22 Q: Okay. And that's why it was dismissed, right?

23 A: Yes, sir.

24 Q: And there came a time in the trial when the state called,  
25 I think his name is Detective Lynam, about statements he had

1 made.

2 A: Owen Lynam. Yes.

3 Q: Yeah. Did you -- did you try to get some of those  
4 statements in that he made and they wouldn't let it in?

5 A: I believe so.

6 Q: Right. And are you familiar with the Court of Appeals'  
7 opinion that says that the reason they couldn't rule on that  
8 or the merits of that was because it hadn't been proffered?

9 A: I believe that's correct.

10 Q: Okay.

11 A: But I'd have to look at it if you --

12 Q: Yeah, I --

13 A: If you've got it right there, I'll look at it.

14 Q: Yeah, I do.

15 MR. YARBOROUGH: May approach, Your Honor?

16 THE COURT: Uh-huh. (Affirmative response)

17 MR. YARBOROUGH: Thank you.

18 BY MR. YARBOROUGH:

19 Q: It's in that file. Right there.

20 THE WITNESS: Court's indulgence.

21 THE COURT: Take your time.

22 THE WITNESS: What appears is if -- oh, I'm sorry.

23 THE COURT: You can answer if you're ready.

24 BY MR. YARBOROUGH:

25 Q: Yeah, go ahead.

1 A: We did do a proffer. I did not ask a specific question  
2 about it being a pill bottle or a gun when he was returning.

3 Q: Correct. And that's the -- that's the gun, that was the  
4 evidence against Mr. McIver at trial, right?

5 A: The gun?

6 Q: I mean, that was the question during trial that was  
7 pivotal for the state was whether or not Mr. McIver had a gun  
8 around his waistband.

9 A: There was a videotape of the two of them returning to the  
10 motel where they were staying in the victim's car, and there  
11 appears to be, in the waistband of Mr. McIver, a gun or gun-  
12 like object that was then placed into the back of Mr. McIver's  
13 truck. Mr. McIver got in the victim's vehicle, left in that.  
14 Mr. Freeman left in the truck.

15 And that would have been based on the timeline. They  
16 knew when the shooting took place based on the eyewitnesses  
17 and the 911 calls, and the time that the vehicle returned to  
18 the Lancer Motel from North Myrtle Beach to Myrtle Beach. So  
19 that was part of the evidence that -- that --

20 Q: But --

21 A: The State suggested Mr. McIver had the gun less than an  
22 hour, maybe, I think 26 minutes or so, after the shooting at  
23 the Lancer Motel. That was their theory.

24 Q: But you knew, from the statement of Mr. Freeman, I don't  
25 know why I keep on calling him Terrell, but Mr. Freeman, that



1 Mr. Freeman had said he took the gun and threw it in the -- in  
2 the drain pipe.

3 A: Correct. He did give a very -- somewhere between North  
4 Myrtle Beach and Myrtle Beach, he -- his statement is that the  
5 gun was disposed of.

6 Q: Right. And so it couldn't have been a gun that was in  
7 that waistband; isn't that correct?

8 A: If you believe Mr. Freeman, absolutely.

9 Q: Right. And that's the question, is, if you believe Mr.  
10 Freeman, then why did you -- why would you have wanted to call  
11 Mr. Freeman at trial to show that piece of evidence --

12 A: Well, I can't call him at trial.

13 Q: I know you can't because you didn't move to sever,  
14 correct?

15 A: I did not move to sever, but he also had -- would say  
16 that Mr. McIver's the one who had the gun and shot her. So I  
17 wouldn't want that. That's the crux of murder.

18 Q: And the state obviously didn't want it either because  
19 they didn't believe him, right?

20 MR. HALL: Objection, speculation.

21 THE WITNESS: I don't know what they believed.

22 THE COURT: Sustained, speculation. He can't say what  
23 someone else thought. Or what the form -- or what the  
24 foundation of their actions were.

25 MR. YARBOROUGH: Thank you, Your Honor.

1 THE COURT: You're welcome. Rephrase.

2 BY MR. YARBOROUGH:

3 Q: At no time, are you aware -- did the State talk to Mr. -  
4 or did the state intend to call Mr. Freeman?

5 A: I don't know ---

6 MR. HALL: Objection.

7 THE WITNESS: -- what they intended to do.

8 THE COURT: Basis?

9 BY MR. YARBOROUGH:

10 Q: If he knew it.

11 A: Not that I know of.

12 Q: Okay. And --

13 THE COURT: Overruled with the rephrasing of the  
14 question.

15 MR. YARBOROUGH: Thank you, Your Honor.

16 BY MR. YARBOROUGH:

17 Q: It was -- would you agree it was a circumstantial case?

18 A: All cases, well, not all cases, a lot of cases have both  
19 circumstantial and direct evidence. There was circumstantial  
20 evidence certainly in this case, and there was some direct  
21 evidence as well. But it was -- there was no video of the  
22 shooting. There's no -- there was no witness who could say it  
23 was Nick McIver who had the gun and shot her that was  
24 presented at trial. There was no forensic evidence that could  
25 definitively -- some expert that could say the person who did

1 the shooting had to have been in this position. That just  
2 didn't exist.

3 Q: Okay. In fact, what you talked about in your opening and  
4 in your closing was that Mr. McIver was guilty of the grand  
5 larceny, which was the taking of the car and the -- isn't that  
6 correct?

7 A: I did say that.

8 Q: Right. And --

9 A: In the closing, I think. I'm not sure I said that in the  
10 opening.

11 Q: Okay. Did you -- in opening you said he may have been  
12 guilty of other crimes, is the words you used. And then in  
13 closing you said --

14 A: Yes, I did.

15 Q: -- the car and the grand larceny.

16 A: I did.

17 Q: Yeah. Did -- and the case was lost, but in hindsight,  
18 does that make you think that you could have taken another  
19 approach than to give up those which tended to make him look  
20 guilty?

21 A: You mean by acknowledging that, yes, he's guilty of the  
22 grand larceny?

23 Q: Yeah.

24 A: No. You know, obviously, in hindsight, you think of all  
25 kinds of things --

1 Q: Sure.

2 A: -- you know, that you could have done. Because you did A  
3 and you got a negative result, you always just theorized,  
4 well, what if I'd have done B? But the evidence was  
5 overwhelming that he had the car from multiple sources, from  
6 the videos at gas stations, clerks at gas stations, all this,  
7 that you don't try to argue to the jury that which is obvious  
8 and lose credibility on the real issue, which was the murder  
9 in my mind.

10 Q: And did you discuss that strategy with Mr. McIver?

11 A: I'm sure I did.

12 Q: Did you talk to him about potential pleas?

13 A: Yes, I think we did.

14 Q: Okay. Did they make him an offer?

15 A: As best I can remember, they were willing to, I think,  
16 come to a voluntary manslaughter, but it was going to have to  
17 be at the top end 30-ish years, maybe a little less, which  
18 would mean a very significant amount of time.

19 Q: And I think I asked you this, but you didn't object to  
20 the opening statements of the reference to hand of one, hand  
21 of all --

22 A: I did not.

23 Q: -- or accomplice liability?

24 A: I did not.

25 Q: Okay. Did you think of suggesting to the Court a charge

1 in which it could lead the jury to understand that Mr. McIver  
2 could be guilty of having the car and taking the car, but not  
3 having acquiesced (ph) at all in the murder? Could you -- like,  
4 a cover up charge or those kind of statements aren't -- that  
5 evidence is not admissible against him at murder?

6 A: You mean that evidence of a cover up isn't enough alone  
7 to convict of the principal?

8 Q: Correct.

9 A: I don't think I asked for that charge.

10 Q: Okay.

11 A: Now, obviously, in Judge John's charge, you know, each  
12 charge that would be -- a jury would be instructed each  
13 indictment or charge is to be handled separately and that you  
14 could be guilty of one, not guilty of another, or not guilty  
15 of all or whatever so that each charge stood up on its own,  
16 but I did not ask specifically for that charge. No, it  
17 didn't.

18 Q: Okay. I'm going to jump ahead on one more and then I'll  
19 come back on the last thing. Did you feel like the state was  
20 -- I was -- or the state made different arguments about who  
21 was guilty for each charge? They were conflicting arguments.  
22 They would argue about one thing that dealt with Mr. McIver  
23 shooting and the other one with Terrell Freeman shooting  
24 element. So they both -- they made conflicting arguments  
25 during their summation; did you think about objecting to that?

1 A: No. Well, I mean, not to say I didn't think about it. I  
2 felt like they started out with sort of -- in the beginning,  
3 with one game plan, and they ended up with something  
4 different. I felt that was good because their theory of the  
5 case is shifting during the case, and they had their -- that  
6 was their inconsistencies, which I wanted to play on. I think  
7 initially they thought the hand of one, hand of all, they're  
8 going to get both of them --

9 Q: Right.

10 A: -- just because they're there together. The evidence  
11 didn't seem to pan that out, and then at the end, thought, we  
12 got to pick one, and they tried to single out Mr. McIver as  
13 being the shooter and still hoped that they could get the hand  
14 of one, hand of all, which they could not, with Mr. Freeman.  
15 But toward the -- as it went through, I think they felt they  
16 were lacking in that getting them both, so then they focused  
17 solely on Mr. McIver.

18 Q: And --

19 A: And they were conflicting.

20 Q: Sure. And I'll go back to my original question that at  
21 that point would a severance maybe have helped Mr. McIver?

22 A: In hindsight, maybe.

23 Q: Okay. There was one section where the -- there was a  
24 little girl, a seven, eight-year-old that testified and you  
25 all --

1 A: Correct, seven-year-old girl out of somewhere in North  
2 Carolina.

3 Q: And she had seen somebody in the car or outside the car;  
4 is that what it was?

5 A: I think in a neighborhood.

6 Q: Yeah.

7 A: Not businesses, but where homes, residences,  
8 neighborhood.

9 Q: Y'all had a pretty extensive hearing about that, correct?

10 A: I think we did that outside of the presence of the jury.

11 Q: Yeah. And did you feel like you were getting close to  
12 winning that argument?

13 A: To exclude the testimony?

14 Q: Yeah.

15 A: Not necessarily, based on the testimonies that came in  
16 from the officers who prepared the lineup and from the child.

17 Q: Did you ever argue that -- about her age? I think --

18 A: I didn't.

19 Q: -- that was something that was in the -- yeah.

20 A: I did not.

21 Q: And I think that's one thing that -- as the Court of  
22 Appeal said in their opinion, was that, that hadn't been  
23 preserved; is that right?

24 A: That's correct.

25 Q: Just a second. Mr. McIver reminded me of something he

1 wanted me to ask you.

2 A: Uh-huh. (Affirmative response)

3 Q: He said that they had told you about a witness who could  
4 not identify Mr. McIver from the scene where the body was  
5 thrown out; is that correct? Out of the car.

6 A: Out of the car?

7 Q: I said that wrong. I -- the body came out of the car.

8 A: And I don't think there was any positive -- there were  
9 some general descriptions by the individual at the parking  
10 lot, but there was no definitive identification other than  
11 there was light skin versus dark skin and --

12 Q: Did you try --

13 A: -- that --

14 Q: -- to call any of those witnesses?

15 A: They testified.

16 Q: But -- so --

17 A: Ahead of time? No, I did not talk to them ahead of time.

18 Q: Okay. Thank you.

19 THE COURT: Any questions for the witness?

20 MR. HALL: Yes, Your Honor. I beg the Court's  
21 indulgence.

22 **CROSS-EXAMINATION OF SCOTT BELLAMY BY MR. HALL:**

23 Q: How're you doing, Mr. Bellamy?

24 A: I'm well, how are you?

25 Q: I'm well. Mr. Bellamy, you've been practicing law since



1 1995; isn't that right? Or I'm sorry, since 1990?

2 A: '90, I've been doing criminal defense work since January  
3 of '95.

4 Q: Okay. And so you'd say that you're experienced in  
5 criminal law?

6 A: Yes, sir.

7 Q: Okay. Mr. Bellamy, I want to talk to you about the  
8 state's evidence in this case. You testified on direct that  
9 the evidence of guilt in this case is overwhelming; isn't that  
10 right?

11 A: I don't think I said that. I commented on some of it,  
12 some evidence that puts him in the car using the credit cards,  
13 things of that nature, that puts him together with the  
14 deceased, but as to whether he's the shooter, or pulled the  
15 trigger, I never said that there was overwhelming evidence of  
16 that.

17 Q: Okay. I want to ask you a few questions about the  
18 state's evidence. So the state had video surveillance of Mr.  
19 McIver and his co-defendant at the hotel, right?

20 A: Correct.

21 Q: Okay. And he had video surveillance of Mr. McIver and  
22 his co-defendant at the Lancer Hotel; isn't that right?

23 A: Correct.

24 Q: Okay. And he also had video surveillance of Mr. McIver  
25 and his co-defendant with the victim and her cousin; isn't

1 that right?

2 A: Correct.

3 Q: Okay. And that video surveillance showed them the night  
4 before and the morning of the murder; isn't that right?

5 A: Correct.

6 Q: Okay. And isn't it true that there was a witness in the  
7 parking lot of -- I forget the name of the restaurant.

8 A: K&W.

9 Q: Yes. And that witness saw two men pull the victim out of  
10 her car on the side of the road, right?

11 A: In the parking lot, yes --

12 Q: Right.

13 A: -- they described a body being taken out of the vehicle  
14 and left in the parking lot.

15 Q: Okay. And it was the state's theory that those two  
16 gentlemen were Mr. McIver and his co-defendant; isn't that  
17 right?

18 A: That's correct, and that would have been based on the one  
19 young lady who they had just dropped off, by time-wise, 30, 45  
20 minutes earlier. They had ridden from Myrtle Beach to  
21 Shallotte, got dropped off, and then on the return to Myrtle  
22 Beach, the stop was made there at the parking lot.

23 Q: Okay. And isn't it true that the state introduced at  
24 trial location data evidence that showed that the trip from  
25 North Carolina and dropping off the victim's cousin was

1 consistent with them being around that location at the time  
2 when the body was dumped?

3 A: When you say data information, what are you specifically  
4 referring?

5 Q: Cell phone records.

6 A: There were cell phone records. I don't think that they  
7 put in a -- and I could be wrong, it's been six years ago at  
8 least, that they -- you talking about, like, data that tracks  
9 a phone? Were you talking about just cell phone calls or -- I  
10 don't -- I don't recall --

11 Q: It's okay. I'll withdraw the question.

12 A: Okay.

13 Q: Isn't it true though, that the state had a video showing  
14 Mr. McIver and his co-defendant returning shortly after the  
15 body was dumped, returning at the hotel, and they were on  
16 video surveillance in the victim's car?

17 A: Correct.

18 Q: Okay. And isn't it true that the state had video  
19 surveillance of Mr. McIver pulling a gun-like object out of  
20 his waist and placing it in his truck; isn't that right?

21 A: Correct.

22 Q: Okay. And that would have been, according to the state's  
23 timeline, after the murder would have occurred, right?

24 A: Correct. It's fairly a short period of time based on --  
25 they had a very hard time on the shooting taking place based

1 on the 911 call, which was immediate to the shooting, and then  
2 the times stamp on the Lancer Motel, you could track from that  
3 location that it was very much within that timeline, but after  
4 the fact.

5 Q: And isn't it true that, at some point, Mr. McIver left  
6 the hotel in the victim's car and headed towards Shallotte,  
7 North Carolina?

8 A: Correct.

9 Q: Okay. And isn't it true that the state had evidence that  
10 along the way Mr. McIver stopped at a number of gas stations  
11 in the victim's car?

12 A: Yes.

13 Q: Okay. And isn't it true that the state also had video  
14 surveillance of Mr. McIver purchasing various items at those  
15 gas stations?

16 A: I believe so.

17 Q: Okay.

18 A: Yes.

19 Q: And isn't it true that the state introduced evidence at  
20 Mr. McIver's trial that he used -- that he was the person that  
21 used the victim's credit cards?

22 A: They did.

23 Q: Okay. And isn't it true that at trial a child witness  
24 testified and identified Mr. McIver as being the person who  
25 set the victim's car on fire?

1 A: Correct.

2 Q: Okay.

3 A: Or was present when the car burned. I don't think the  
4 child ever said he initiated the fire since -- excuse me,  
5 specifically, but that it -- he was there with the vehicle.

6 Q: Okay. I want to ask you about your defense strategy.  
7 Can you tell the court what your strategy was for trial in Mr.  
8 McIver's case?

9 A: Well, yeah, I felt like that under the hand of one, hand  
10 of all, that if you listen to Mr. Freeman's statement, if  
11 let's say they tried to make a deal with him and have him  
12 testify, I don't think -- there was never any evidence of an  
13 agreement or plan to do anything. This was a random meeting  
14 between four people that seemed to be going fine. There was  
15 sex between at least two of these people. That nobody seemed  
16 upset. There seemed nothing threatening. They were  
17 exchanging phone numbers, names. There's no hidden identities  
18 of any sort. There's no history. And the evidence was that  
19 there was no plan to do anything because, quite frankly, they  
20 had been in a rural area up in the Shallotte area. If the  
21 plan was to harm somebody, you don't do it in July in North  
22 Myrtle Beach in front of an open business at 11:30 in the  
23 morning, middle of the day, where there's dozens, if not  
24 hundreds, of people passing by and around that it didn't make  
25 any sense.

1           And because the forensic evidence from the pathologist,  
2 who I had talked to before trial, was that nobody could  
3 definitively say forensically where the shooter was. And  
4 there was some discrepancy as to who was sitting where based  
5 on the eyewitness at the parking lot of the K&W that I didn't  
6 feel they could establish that Mr. McIver and Mr. Freeman had  
7 some plan to do something.

8           And even if Mr. Freeman did it, Mr. McIver was going down  
9 for it too. Nor did they think they could put -- definitively  
10 put Mr. McIver as doing the shooting. The concern was, after  
11 the fact, what appeared to be a gun in his possession. That  
12 was the most concerning evidence. And I went to the jail and  
13 actually played the video on the laptop for him.

14 Q:    Okay. So what did you --

15 A:    But the strategy was they couldn't establish hand of one,  
16 hand of all, and they didn't have sufficient evidence that  
17 Nick was the shooter.

18 Q:    Okay. Are you familiar with the Court of Appeals'  
19 opinion in this case?

20 A:    I have looked at it.

21 Q:    Okay. Isn't it true that, in the Court of Appeals'  
22 opinion, the court stated that the state had presented  
23 extensive circumstantial evidence that Mr. McIver acted as a  
24 principal?

25 A:    I did read that.

1 Q: Okay.

2 A: I don't agree with it, but I read it.

3 Q: Mr. Bellamy, I want to ask you, would you agree that the  
4 sole -- or really the major issue in this case was who  
5 committed the shooting?

6 A: I think that's what it came down to, and I think  
7 ultimately there was a young lady who was clearly shot,  
8 killed, murdered, and that they couldn't have -- in hindsight,  
9 they thought it was Mr. McIver, not Mr. Freeman, and that's  
10 how they acted because they did not convict Mr. Freeman of the  
11 murder.

12 Q: Okay. So wouldn't you agree that there was no dispute in  
13 this case regarding the grand larceny charge, right?

14 A: No. No, sir.

15 Q: And there was no dispute in this case regarding any other  
16 crimes such as accessory after the fact, right?

17 A: That charge was not given to the jury.

18 Q: Right.

19 A: I did make reference to that in my closing. I know that  
20 was maybe an issue that was raised, hadn't been asked of it  
21 yet, but I felt like a jury wouldn't want to just turn someone  
22 loose under these facts that, hey, we're guilty of this.  
23 We're not arguing, grand larceny.

24 We might be guilty of accessory after the fact, which is  
25 zero to 15 years for assisting in, you know, getting rid of

1 the car, whatever it may be, but we're not guilty of murder.  
2 So I felt like that would give the jury some thought that,  
3 well, there may be another day in court for something else,  
4 but it's not this. And I think that was part of the crux of  
5 my closing argument.

6 Q: Okay. And so you gave those arguments to essentially  
7 build credibility with the jury?

8 A: Yes, to try to not argue something which is obvious --  
9 going to be obvious, I think, to them on the grand larceny.

10 Q: Okay. And I want to ask you about severance in this  
11 case. You testified on direct that you may have thought about  
12 severance, but you don't necessarily recall discussing it with  
13 Mr. McIver. It's not typical practice to put every decision  
14 on the record, is it?

15 A: No, it's not. It -- in statements of defendants, whether  
16 they're going to testify or not, yes, we do typically have  
17 that colloquy with the judge so the judge can question  
18 specifically the defendant, has he -- have I discussed that  
19 with him? So -- and we did that, I think in this case, which  
20 he did not testify, but as far as whether to file a motion to  
21 sever or do certain other strategic things, it is not my  
22 practice, at least, to put all of those matters on the record.

23 Q: Okay. And the -- Mr. McIver's co-defendant gave a  
24 statement and that statement wasn't helpful to Mr. McIver, was  
25 it?



1 A: Well, the crucial part was there were parts of it that  
2 were very inconsistent, didn't make any sense, where he took  
3 him looking for the gun, almost like he was wanting to ride  
4 around in the car, but the part about that it was Mr. McIver  
5 who did the shooting was certainly not helpful.

6 Q: Okay. And wouldn't you agree that if you had moved for  
7 severance and it was granted, couldn't the state have used  
8 that statement in Mr. McIver's separate trial?

9 A: Potentially. Potentially.

10 Q: Okay. And couldn't the state have also called the co-  
11 defendant to testify against Mr. McIver?

12 A: Well, yeah, they can always call him, whether he invokes  
13 his right to the Fifth Amendment and would testify, you don't  
14 know, but yes.

15 Q: Okay. And you would agree that if he chose to testify or  
16 that statement had come into Mr. McIver's separate trial,  
17 wouldn't you agree that, that wouldn't be helpful to Mr.  
18 McIver?

19 A: Correct. Yes, sir.

20 MR. HALL: May I have the Court's indulgence?

21 THE COURT: Yes, sir.

22 BY MR. HALL:

23 Q: I want to ask you about the state's theory of hand of  
24 one, hand of all in this case. Although they couldn't say for  
25 certain that it was Mr. McIver who pulled the trigger, there

1 was testimony that he and his co-defendant dropped the  
2 victim's body off on the side of the road; isn't that right?

3 A: There was evidence that there were two people who were  
4 involved in removing the body from the vehicle after the shot  
5 was heard.

6 Q: Okay. And you testified on -- you testified on direct  
7 that your strategy for trial was to distinguish Mr. McIver  
8 from his co-defendant; isn't that right? Or was that -- was  
9 that your strategy for trial?

10 A: Well, I mean, my strategy was more towards Mr. McIver  
11 and, you know, that there was no evidence that there was a  
12 plan to commit some separate crime that went bad and ended up  
13 in the death of an individual, and that forensically without  
14 Freeman's testimony that Mr. McIver did the shooting, they  
15 could not -- the witness in the parking lot couldn't say who  
16 did the shooting.

17 Nobody else -- there's no video of it. And that  
18 forensically, I didn't think that they could definitively have  
19 a pathologist say it had to have been from this angle, and  
20 this is -- and had definitive evidence that Mr. McIver was  
21 sitting in that spot, so it had to be him.

22 Q: Okay. Do you believe that if you objected to the state's  
23 argument for using the theory of hand of one, hand of all, do  
24 you believe that objection would have been sustained?

25 A: During like opening statement?

1 Q: Yes.

2 A: I don't believe it would have because that's -- it's not  
3 evidence. They're talking about what they think the evidence  
4 is going to show, so I don't -- I don't think -- I think it  
5 would have -- I don't like to object during openings, some on  
6 closing because now we're talking about facts that are in  
7 evidence. But in opening, there is no facts in evidence at  
8 this point, it's a theory. And if the state wants to make  
9 arguments they can't prove, then you point that out at the end  
10 of the case.

11 Q: And wouldn't you agree, in your experience as a trial  
12 attorney that you have to make strategic decisions about when  
13 to object and when not to object?

14 A: Correct.

15 Q: Okay. I want to ask you about the video of sex that was  
16 entered, or at least that there was testimony about in this  
17 case. Do you recall that evidence or that testimony?

18 A: I do. I believe it was a video, cell phone video, that  
19 was, I think, made by Mr. McIver.

20 Q: Okay. And that video depicted the victim and his co --  
21 or -- I'm sorry. Could -- do you remember what the --

22 A: His co-defendant and, not the victim in the case, the  
23 other female, I think, having sex.

24 Q: The victim's cousin?

25 A: I think. Now, I don't --

1 Q: Okay.

2 A: I won't -- it's been several years, but I'm positive it  
3 was not Mr. McIver having sex.

4 Q: Okay. And you did not object to testimony about that  
5 video?

6 A: I didn't.

7 Q: Why didn't you?

8 A: I thought the video depicted, you know, people who were -  
9 - this was everybody getting along. I mean, I don't know how  
10 to describe it, but, you know, that there was no history here  
11 that would create this. This is just four people who hooked  
12 up on the Boulevard, end up at motel rooms, and riding around  
13 kind of thing. And that video would have shown that this was  
14 not anything other than that, which is what I thought was  
15 helpful. And it did not depict my client doing anything bad.

16 Q: And do you believe that that video was perhaps helpful to  
17 your argument that there was no plan to commit this act?

18 A: I thought so, and I didn't think it added anything to the  
19 state's case other than maybe they just wanted to play that  
20 video. I don't know.

21 Q: Okay.

22 A: But I didn't think it went to the core issue of who did  
23 the shooting the following day. I don't think that showed --  
24 that had any relevance to that at all.

25 Q: Okay.

1 A: Now, maybe that's the reason to object, it's not  
2 relevant. What does it show? But I thought it could show  
3 that these were people who were getting along. There was  
4 nothing -- there was no reason -- you know, no one's accusing  
5 one of these guys of raping somebody, so therefore, well, we  
6 got to shoot them. They're going to call the police, say we  
7 raped them.

8 All the evidence indicates everybody's getting along up  
9 until the point, the one the cousins dropped off in Shallotte,  
10 and then what happened between there and the K&W, which is not  
11 a long distance. I don't know.

12 Q: Okay. Do you believe that if you had objected and that  
13 video was excluded, do you believe it would have changed the  
14 outcome in this case?

15 A: I do not.

16 Q: Okay. I want to ask you about the child witness in this  
17 case. The Court had a hearing outside of the presence of the  
18 jury regarding the competency of the child witness, isn't that  
19 right?

20 A: That's correct.

21 Q: Okay. And wasn't the child witness questioned about  
22 whether they knew right from wrong?

23 A: Correct.

24 Q: And they were questioned about whether they knew a truth  
25 -- the truth from a lie?

1 A: Correct.

2 Q: Okay. And so wouldn't you agree that it wouldn't have  
3 mattered regarding the child's age because the child knew  
4 right from wrong and knew the truth from a lie?

5 A: Well, I -- you know, there was already evidence in the  
6 record about the leaving in the car, stopping at gas stations,  
7 using credit cards, all that was there. And this was sort of  
8 additional evidence of him being with the vehicle. But you  
9 know, the question was the hearing was held in camera without  
10 the jury. The Judge made a determination that the witness was  
11 competent.

12 Q: Okay. And do you believe that if the Court had excluded  
13 the testimony from the child witness, do you believe that  
14 would have changed the outcome in this case?

15 A: Probably not. Certainly be helpful if that's just one  
16 less piece of evidence, no question about it, that --

17 Q: Okay.

18 A: -- ties him there.

19 Q: Okay. I want to ask you about the jury charge on cover  
20 up. You didn't request a jury charge on cover up --

21 A: I --

22 Q: -- did you?

23 A: I did not.

24 Q: Okay. Are you familiar with the court's ruling in  
25 Ballington's Court of Appeals opinion?

1 A: Not off the top of my head. I'm not.

2 MR. HALL: I beg the Court's indulgence.

3 THE COURT: Uh-huh. (Affirmative response)

4 And if you could spell the case you're referring to for  
5 the benefit of the court reporter?

6 MR. HALL: Yes, ma'am. I'm referring to State v.  
7 Ballington, B-A-L-L-I-N-G-T-O-N, 346 S.C. 262, 2001 Court of  
8 Appeals' opinion.

9 BY MR. HALL:

10 Q: Mr. Bellamy, in that case, the Court of Appeals held that  
11 evidence of cover up could be used as evidence of malice. If  
12 I told you that's the court's ruling, would you accept that?

13 A: If you, that's what -- yes, sir.

14 Q: Okay. So if the -- if you had requested a jury charge on  
15 cover up, couldn't the Court have also charged that cover up  
16 was evidence of malice?

17 A: It -- it's a double-edged sword. It can cut for you or  
18 against you, I think.

19 Q: Okay. And so because there was evidence in this case of  
20 Mr. McIver covering up after the murder, wouldn't a charge on  
21 cover up have hurt his case?

22 A: Potentially.

23 Q: Okay.

24 A: If charged as you've just described, yes.

25 Q: Okay. And because the Court of Appeals ruled that

1 evidence could be used as malice, couldn't that have tied Mr.  
2 McIver to the murder? Potentially.

3 A: Potentially, I guess. You could make that argument.

4 Q: All right. I want to ask you one final question. In  
5 preparing for trial, did you conduct investigations in this  
6 case?

7 A: Yes, I spoke to various witnesses. I physically went to  
8 the North Myrtle Beach Police Department and had them pull all  
9 the evidence that they had gathered, whether they intended to  
10 use it or not, and put it out in the big conference room for  
11 myself and Mr. Spratlin, the other lawyer, to review and go  
12 through, and look at, put our hands on. This was all before  
13 trial.

14 So yes, I believe I talked to the pathologist ahead of  
15 time. I think I talked to probably some officers as well.  
16 But if there's anything specific, you need to ask me, did I  
17 call -- you know, I did not call the parents of the seven-  
18 year-old child, I did not do that, but if there's something  
19 specific, I'd be happy to tell you if I can remember if I did  
20 it or not.

21 Q: I want to ask you, although you didn't call and talk to  
22 the witness that was in the parking lot, do you believe that  
23 if you had called and talked -- spoke to that witness before  
24 trial, do you believe that would have changed the outcome in  
25 this case?



1 A: I don't think so. That -- because they weren't  
2 definitive as to who -- that Mr. McIver did the shooting or  
3 that Mr. Freeman didn't do the shooting. They just heard a  
4 shot and saw -- gave a general description of two males  
5 leaving in the vehicle.

6 Q: Okay. That's all the questions.

7 MR. HALL: The state has no further questions.

8 THE WITNESS: Thank you.

9 THE COURT: Redirect.

10 MR. YARBOROUGH: Thank you, Your Honor.

11 **REDIRECT EXAMINATION OF SCOTT BELLAMY BY MR. YARBOROUGH:**

12 Q: I believe he asked you about some individual that they  
13 saw -- that saw the car that night when the body came out.

14 A: That day?

15 Q: That day, yeah.

16 A: There was a -- there were more than one witness, if I  
17 recall correctly, in the parking lot.

18 Q: And none of them identified anybody that looked like Mr.  
19 McIver, right?

20 A: I think someone gave a reference to someone light  
21 skinned, but no one positively put Mr. McIver there.

22 Q: There. And you did have an opportunity to call those  
23 witnesses, right? Or you did call some of them, but then --

24 A: They testified and --

25 Q: Right.

1 A: -- and then there was also a number of body-cam videos  
2 where law enforcement got there very quickly and encountered  
3 these people and got, almost in real time, what they say  
4 happened --

5 Q: Right.

6 A: -- in addition to written incident reports. So while I  
7 would not have talked to them ahead of time --

8 Q: Sure.

9 A: -- I don't believe I did. I get a real time video of  
10 them as whatever happened. And there were more --

11 Q: But you would agree with me --

12 A: -- than one person.

13 Q: None of them would identify Mr. McIver?

14 A: To the best of my knowledge, nobody could definitively  
15 identify him or to say that he did any shooting.

16 Q: All right. And it was -- from the evidence, it was hard  
17 to determine from -- who was seated where, right? In the car.

18 A: Yeah, there was some dispute as to the last definitive  
19 evidence I think would have been the young lady who was  
20 dropped off, who would say when they left, this is where  
21 people were seated.

22 Q: And perhaps --

23 A: But that was some 30 minutes to an hour, if my memory's  
24 right --

25 Q: Yeah.

1 A: -- from that moment until the shooting occurs.

2 Q: And everything that happened after that is really the sum  
3 of the evidence that's against Mr. McIver. The people there  
4 can identify him. And then it's what he did afterwards is  
5 what ends up --

6 A: Well, yeah, some of the evidence puts him meeting up with  
7 these people beforehand, some puts him in contact, but a lot  
8 of the evidence was after -- well, and the evidence of the  
9 female who got dropped off that --

10 Q: Sure.

11 A: -- puts them together very shortly before whatever  
12 happens.

13 Q: But nobody puts the gun or anything like that in Mr.  
14 McIver's hand at the time. Now, there's some question about a  
15 gun later, but nobody sees --

16 A: Not at the time.

17 Q: All right.

18 A: Not at the time.

19 Q: And you didn't move for severance and --

20 A: I did not.

21 Q: -- and they did argue hand of one, hand of all over and  
22 over again. They were beating y'all over the head but --

23 A: That was, I think, their initial theory, and then in the  
24 closing, it shifted to we really think it's Mr. McIver did it,  
25 but we also think it's hand of one, hand of all so convict Mr.

1 Freeman for what Mr. McIver did. But I think the initial  
2 thought was, we don't really have to tell you who did it.

3 And then it shifted when they -- I didn't think they  
4 could rely on -- or they probably didn't think. I didn't  
5 think they could rely on that theory. They had to pick, and  
6 they picked Mr. McIver as the one, and the window being up,  
7 the window being down. Some of the theories they threw out  
8 there which I argued against obviously in my closing, but that  
9 was -- became a jury question.

10 Q: And I mean, when you went down to the police station, Mr.  
11 McIver wasn't able to go with you to look?

12 A: No. He was not there. No.

13 Q: I don't have any further questions. Thank you.

14 A: You're welcome.

15 MR. HALL: No further questions.

16 THE COURT: Did you have any concerns about your client's  
17 competence?

18 THE WITNESS: I did not.

19 THE COURT: Did you ever have any concerns about his  
20 ability to communicate with you or to assist in his  
21 representation?

22 THE WITNESS: I did not.

23 THE COURT: Did you all go over every defense that was  
24 potentially available to him? And did you investigate those  
25 potential defenses?

1 THE WITNESS: Yes, ma'am.

2 THE COURT: Did you --

3 THE WITNESS: That I was aware of.

4 THE COURT: And -- yeah. And -- and --

5 THE WITNESS: In hindsight.

6 THE COURT: And I apologize the question.

7 THE WITNESS: I'm sorry.

8 THE COURT: I should have -- no. I should have framed it  
9 differently.

10 THE WITNESS: I should never question a Judge question.

11 THE COURT: Yeah -- no. I would -- no. I would never  
12 ask you hindsight because, you know, hindsight's always 20/20.  
13 But what was available --

14 THE WITNESS: Yes, ma'am.

15 THE COURT: To you at that time?

16 THE WITNESS: Yes, ma'am.

17 THE COURT: Did you follow up on all the information and  
18 do everything that he asked or expected of you during your  
19 representation?

20 THE WITNESS: I believe I did, Your Honor.

21 THE COURT: And I think you've already asked this  
22 question, so I apologize if I'm being redundant. Did you feel  
23 you had any need to have him evaluated pursuant to Blair or  
24 McNaughton?

25 THE WITNESS: I did not, Your Honor.

1           THE COURT: And the cover up charge. Tell me what that  
2 is, because I've never heard of that. And I need somebody to  
3 enlighten me.

4           THE WITNESS: Well, it has sort of come to light with me  
5 after the fact at the time, obviously flight from a crime can  
6 be evidence of consciousness of guilt.

7           THE COURT: It can be evidence, and it can be argued, but  
8 it can't be instructed.

9           THE WITNESS: Cover up, as I understand, is when you --  
10 not just fleeing, but when you take an affirmative act to  
11 cover something up, burn a vehicle, dispose of something,  
12 something that is more affirmative than just fleeing or trying  
13 to avoid detection.

14          THE COURT: Uh-huh. (Affirmative response)

15          THE WITNESS: And the case cited by the Attorney General,  
16 which is I believe from '01, references that that can be  
17 evidence of malice, which obviously would not be beneficial in  
18 this case based on some of the evidence.

19          THE COURT: And again, maybe I phrased my question  
20 incorrectly. I agree, and that's why I asked the question.  
21 But the way it was posited by applicant was that you had some  
22 duty to have asked the Judge to instruct on cover up. And I'm  
23 just not aware of any such instruction.

24          THE WITNESS: I don't know -- I don't think though that's  
25 the case.

1 THE COURT: I'm asking. That's what I'm asking.

2 THE WITNESS: I don't think that that's the case.

3 Obviously, strategically you do certain things in certain  
4 cases. But I -- no. No, ma'am.

5 THE COURT: Okay. All right. Any questions as a result  
6 of the Court's questions from the applicant?

7 MR. YARBOROUGH: No, ma'am.

8 THE COURT: From the state?

9 MR. HALL: No, Your Honor.

10 THE COURT: Any exception to Mr. Bellamy being excused?

11 MR. YARBOROUGH: No, ma'am.

12 MR. HALL: None from the state, Your Honor.

13 THE COURT: Okay. You're excused. Unless you just want  
14 to hang around with us.

15 MR. BELLAMY: I'll be good, Your Honor. Thank you.

16 THE COURT: You're welcome.

17 All right. Any further witnesses from the applicant?

18 MR. YARBOROUGH: I'd like to call Mr. McIver.

19 THE COURT: Sure. Is it easier for him to testify at the  
20 table or do we need to have him come to the stand?

21 MR. YARBOROUGH: I'd rather -- I think I'd rather him  
22 come to the stand.

23 THE COURT: You can't pull that mic to him? It's a lot  
24 easier to do it right there.

25 MR. YARBOROUGH: Okay.

1 THE COURT: We don't have to worry about him tripping,  
2 falling or anything else.

3 **NICHOLAS MCIVER, HAVING BEEN DULY SWORN TESTIFIES AS**  
4 **FOLLOWS:**

5 THE COURT: State your full name for the record.  
6 Spelling your last name for the court reporter?

7 THE WITNESS: Nicholas McIver, M-C-I-V-E-R.

8 THE COURT: Is that mic on? It doesn't sound like it.

9 MR. YARBOROUGH: I don't -- I know this one's not, it's  
10 not plugged in.

11 THE COURT: It's not on. Can we turn that mic on? Is it  
12 not -- is it not plugged up?

13 MR. YARBOROUGH: That one's plugged up, Your Honor.

14 THE COURT: It might have just turned them off. Try one  
15 more time for me, sir.

16 THE BAILIFF: He's saying everything is on.

17 THE COURT: Yeah, it's not working.

18 So, sir, if you would come to the -- I apologize for you  
19 having to -- I don't know why the mics aren't on. Probably  
20 because -- it's probably prudent not to have them on, but --

21 MR. YARBOROUGH: Probably, yeah.

22 THE COURT: Yeah.

23 And sir, if you would state your full name for the  
24 record, spelling your last name for the court reporter?

25 THE WITNESS: Nicholas McIver, M-C-I-V-E-R.



1 THE COURT: You may proceed.

2 **DIRECT EXAMINATION OF NICHOLAS MCIVER BY MR. YARBOROUGH:**

3 Q: Mr. McIver, will you tell us a little bit about Mr.  
4 Bellamy's representation of you? Were -- did you get out on  
5 bond?

6 A: No.

7 Q: Okay. Tell -- did he come to see you a bunch of times  
8 or?

9 A: He came a two times.

10 Q: Yep. Did y'all discuss the case against you?

11 A: Not -- I don't think -- yeah, we did. Yes. We spoke  
12 about the case.

13 Q: Did you think you were going to get tried with Terrell  
14 Freeman?

15 A: No, sir.

16 Q: Did you talk to your lawyer about that? That you didn't  
17 want to be tried with him? Is that what you told him?

18 A: To my knowledge, yeah.

19 Q: Okay. And the -- was the reason you didn't want to be  
20 tried with him because you knew he'd given a statement?

21 A: That's correct.

22 MR. HALL: Objection. Leading.

23 THE COURT: Sustained. Leading. You need to ask direct  
24 questions.

25 **BY MR. YARBOROUGH:**

1 Q: Were you aware of Mr. Freeman's statement?

2 THE COURT: That's still a leading question. You need to  
3 ask questions that don't presume a yes or no answer.

4 MR. YARBOROUGH: Yes, ma'am.

5 BY MR. YARBOROUGH:

6 Q: Have -- did you look at the discovery in this case?

7 A: I never got the full discovery.

8 Q: Okay. Did you get discovery later on as you were in  
9 prison?

10 A: Never. Still have gotten the full discovery.

11 Q: Right. Did you get any statements from any witnesses?

12 A: Yes.

13 Q: Okay. And have you reviewed those statements?

14 A: I have.

15 Q: Okay. And at the time of trial, were you aware of Mr.  
16 Freeman's statement against you?

17 A: I was.

18 Q: Okay. And did you talk to your lawyer about that?

19 A: I did.

20 Q: And what did you tell him?

21 A: I felt that it would help me in trial.

22 Q: Okay. And so you wanted to be able to use that in trial?

23 A: Yes, I did.

24 Q: Did you think that you were going to be able to use it in  
25 trial?

1 A: I did.

2 Q: Okay. Now, do you know what -- what Bruton is as a legal  
3 concept?

4 A: I think I went over it far as I think being against his  
5 amendments or something of that nature.

6 Q: Yeah. Well, do you know what it means that if you're  
7 tried together, his statement doesn't come in against you? Is  
8 that what you understand?

9 A: Correct.

10 Q: Okay. So would that be -- well, tell us why you wouldn't  
11 have wanted to be tried with Mr. Freeman under those  
12 circumstances?

13 A: I think the direct evidence and, you know, the  
14 circumstantial evidence as well as what he stated would show  
15 that I wasn't the -- the, I guess the shooter in this case.

16 Q: Right. And so did you feel like the statement would help  
17 you?

18 A: That's correct.

19 MR. HALL: Objection. Leading.

20 THE COURT: Sustained. Leading.

21 BY MR. YARBOROUGH:

22 Q: Tell me what you thought about the -- what you thought  
23 Mr. Freeman would testify to?

24 A: To exactly what he stated in his statement.

25 Q: Okay. And how did that implicate you in the -- in this

1 case?

2 A: Implicate meaning?

3 Q: Yeah. And -- where the gun was or anything along those  
4 lines?

5 A: I mean, he -- he stated multiple times that it wasn't no  
6 -- the object that I believe was, you know, hurt me in this  
7 trial wasn't a gun.

8 Q: Right.

9 A: And he had the gun, he threw the gun in the drain and,  
10 you know, the -- before evidence and the after evidence.

11 Q: Right. Did you have an opportunity to discuss all that  
12 with Mr. Bellamy?

13 A: To some degree.

14 Q: Excuse me?

15 A: To some degree.

16 Q: Right. Did you all talk about a severance motion?

17 A: No.

18 Q: Okay. Were you ever in court when there was a severance  
19 motion argued?

20 A: No.

21 Q: Now that you know what it means to have been tried with -  
22 - with Mr. Freeman, would you have liked one?

23 A: Absolutely.

24 Q: Do you feel like it would've helped your case?

25 MR. HALL: Objection. Leading.

1 THE COURT: Sustained. Leading.

2 BY MR. YARBOROUGH:

3 Q: Why -- why would you have liked to have been tried  
4 separately from Mr. Freeman?

5 A: I wouldn't -- I don't think -- I believe I would've got  
6 convicted of murder.

7 Q: Okay. Do you understand the -- what you heard your  
8 lawyer talk about, the hand of one hand of all?

9 A: Do I understand it?

10 Q: Yeah. Do you understand it?

11 A: To some degree.

12 Q: Yeah. Did you believe that should have been your defense  
13 in this case?

14 A: Absolutely not. If I get the question correctly that  
15 you're asking.

16 Q: Right. In your first -- your first ground in your PCR, I  
17 just want to make sure I'm asking you the question the right  
18 way, it talks about severance. Did you understand severance  
19 back then?

20 A: I don't believe so.

21 Q: Okay. And did your lawyer ever talk to you about it?

22 A: No, sir.

23 Q: Okay. Now, I'm going to move to part two. Were you  
24 aware of your lawyer ever objecting to an -- a hand of one --  
25 hand of one, hand of all argument?

1 A: No, sir.

2 Q: Are you -- do you know what accomplished liability means?

3 A: No, sir.

4 Q: Okay. Did you feel like you were guilty of -- of  
5 anything else besides murder?

6 A: Can you say -- can you ask that again?

7 Q: Yeah. Well, if -- were you there when your lawyer made  
8 his opening statement?

9 A: Correct.

10 Q: During that opening statement, were you aware that he  
11 said that you may have been guilty of other crimes? If you  
12 don't remember, you don't remember. That's fine. I mean.

13 A: Yeah. I can't -- I can't -- I don't.

14 Q: It was a while ago. You've had no legal training,  
15 correct?

16 A: No, sir.

17 Q: Did -- did you feel like you were represented as well as  
18 you wanted to be?

19 MR. HALL: Objection. Leading.

20 THE COURT: Sustained. Leading.

21 BY MR. YARBOROUGH:

22 Q: How -- what else would you have liked Mr. Bellamy to have  
23 done, to have helped you?

24 A: It's a multitude of things that I've asked Mr. Bellamy to  
25 do during trial, before trial. Like I said, I never got all

1 the discovery, the evidence is -- certain things, certain  
2 factual evidence that they had he didn't speak on. Direct  
3 evidence that they had, he didn't speak on pertaining to, I  
4 believe, like my character or me not wanting to go with them.  
5 You know, me wanting -- you know, them forcing me to go. And  
6 this lady and the -- the sex videos of, you know, me not, I --  
7 I guess my character, you know, it wasn't - I don't feel like  
8 it was who I was when he was representing me.

9 Q: Is there anything else you want to tell the Court?

10 A: I don't believe so.

11 Q: Thank you. Answer any questions Mr. Hall may have.

12 THE COURT: You may proceed.

13 **CROSS-EXAMINATION OF NICHOLAS MCIVER BY MR. HALL:**

14 Q: Mr. McIver, you're not an attorney, are you?

15 A: No, sir.

16 Q: And you don't have any legal training, do you?

17 A: No, sir.

18 Q: Okay. And you retained Mr. Bellamy to represent you at  
19 trial, right?

20 A: Correct.

21 Q: And Mr. Bellamy has legal training, doesn't he?

22 A: Correct.

23 Q: Mr. Bellamy's an attorney, right?

24 A: Correct.

25 Q: And you hired him to represent you, right?

1 A: Correct.

2 Q: Okay. So wouldn't you agree that there are some things  
3 and some legal arguments that Mr. Bellamy may know that you  
4 may not know?

5 A: Right.

6 Q: Okay. And so wouldn't you agree about hiring him you  
7 were deferring to his expertise and your -- in representing  
8 you?

9 A: Correct.

10 Q: Okay. And isn't it true that on the night of July 8th  
11 and the morning of July 9th, you and the victim and her cousin  
12 and your co-defendant, Terrell Freeman, all hung out together,  
13 right?

14 A: Right.

15 THE COURT: Please specify what year you're referring to?

16 MR. HALL: My apologies, Your Honor.

17 THE COURT: That's okay. I just want the record to be  
18 clear.

19 BY MR. HALL:

20 Q: Isn't it true that on the night of July 8th and the  
21 morning of July 9th, 2016 --

22 MR. YARBOROUGH: Objection. Leading.

23 THE COURT: He can lead. It's on cross examination.  
24 Overruled.

25 BY MR. HALL:



1 Q: Isn't it true on the night of July 8th and the early  
2 morning of July 9th, 2016, you, your co-defendant, the victim  
3 and her cousin all hung out together, right?

4 A: That's correct.

5 Q: And that's on video surveillance, isn't it?

6 A: That's correct.

7 Q: Okay. And at some point, you left on the morning of July  
8 9th with your co-defendant, Terrell Freeman, the victim, and  
9 her cousin, right?

10 A: After they begged me to leave --

11 Q: But you left with them, right?

12 A: After they begged me to, yes.

13 Q: Okay. And isn't it true that at some point during that  
14 day you returned to your hotel in the victim's car, right?

15 A: Yes.

16 Q: And that's on video surveillance, isn't it?

17 A: Yes.

18 Q: Okay. And isn't it true that there was video  
19 surveillance of you pulling something out of your waistband  
20 and putting it in your truck, right?

21 A: They said it was a glint object. There was no evidence  
22 of any shape or gun.

23 Q: Yes, or no question.

24 A: No.

25 Q: You pulled something. An item out of your waistband and

1 put it your vehicle?

2 A: Out of my pants, yes.

3 Q: And that's on video surveillance?

4 A: It's the -- it's the still. You can't see what, nothing.  
5 You can't barely see who I am.

6 Q: But there's a video, isn't there? Yes, or no?

7 A: There's a video.

8 Q: Okay. And isn't it true that at some point you left your  
9 hotel in the victim's car, right?

10 A: That's correct.

11 Q: Okay. And isn't it true that at some point along the way  
12 from Myrtle Beach to Charlotte you stopped at a gas station,  
13 didn't you?

14 A: That's correct.

15 Q: And you're seen on video buying gas, right?

16 A: That's correct.

17 Q: Now you're seen on video buying other items, right?

18 A: Yeah, I was deprived of my cards and my money. So I had  
19 no other choice --

20 Q: Yes, or no question. Did you?

21 A: That's correct.

22 Q: Okay. And you used the victim's credit cards in buying  
23 those -- those objects, right?

24 A: That's correct.

25 Q: Okay. And isn't it true that you were seen by a child?

1 Or let me rephrase or withdraw that question. Isn't that true  
2 that you were seen next to the victim's car, which is on fire,  
3 by a child, right?

4 A: No.

5 Q: Well, someone who resembled you, right?

6 A: No.

7 MR. HALL: No further questions, Your Honor.

8 THE COURT: Any redirect?

9 MR. YARBOROUGH: No, ma'am.

10 THE COURT: Sir, you may step down. Any further  
11 witnesses?

12 MR. YARBOROUGH: None from the applicant.

13 THE COURT: Any witnesses from the State?

14 MR. YARBOROUGH: I beg the Court's indulgence, Your  
15 Honor?

16 THE COURT: Uh-huh. (Affirmative response)

17 MR. HALL: No witnesses from the State, Your Honor.

18 THE COURT: I think that some things need to be addressed  
19 that were left hanging in the air, that I'm not satisfied that  
20 I've heard enough about.

21 Mr. Bellamy, could you retake the stand and indulge the  
22 Court? I'll remind you, you're still under oath.

23 THE WITNESS: Yes, ma'am.

24 THE COURT: Please state your name for the record?

25 THE WITNESS: My name's Scott Bellamy. Again.

1 THE COURT: Thank you, sir. I appreciate the indulgence.

2 THE WITNESS: Yes, ma'am.

3 THE COURT: Mr. Bellamy, Mr. McIver just testified that  
4 he barely met with you; is that accurate?

5 THE WITNESS: I don't believe that's accurate. I -- he  
6 was in jail --

7 THE COURT: My word's, not his. I'm paraphrasing.

8 THE WITNESS: He was in jail for -- being from North  
9 Carolina, it was a murder case, and the facts, as it laid out,  
10 occurring in the middle of the day, that sort of thing. His  
11 bond obviously couldn't be set by Magistrate. Circuit Judge  
12 denied it, because we did have, I think, two bond hearings in  
13 front of a Circuit Judge over that course period of time.

14 But because he's in jail, you know, he's available. He's  
15 not in Charlotte, you know, living. I did meet with him on a  
16 number of times. I can't tell you how many I do know.

17 I went specifically with a laptop to show him a specific  
18 video that I had to get some assistance with, just to make  
19 sure I knew how to play it. But I would've talked to him on a  
20 number of occasions.

21 I would've shared with him the discovery that we had.  
22 The concerns I had about the evidence, the things I thought  
23 were good, bad and I would've had -- and how many times I, but  
24 -- and as you work up getting closer to a trial date, those  
25 meetings become much more frequent.

1 THE COURT: And as I understand it, the implication from  
2 the testimony is that you made no efforts to have a bond set.  
3 And I think you've already answered that question, but is that  
4 accurate?

5 THE WITNESS: No, I did try to have bond set.

6 THE COURT: He testified that you did not provide him  
7 with his discovery; is that accurate?

8 THE WITNESS: No, ma'am.

9 THE COURT: And tell me what efforts you made to go over  
10 his discovery with him. And if you left the discovery with  
11 him or copies at the detention center. And if you didn't,  
12 why?

13 THE WITNESS: I believe I left it there with him. I  
14 believe he gave it back to me. He just didn't want other  
15 people to see it. His co-defendant was also in jail with him.  
16 Not at - housed, I think they were housed separately. But I  
17 leave that up to the individual client.

18 Some clients don't feel comfortable having their stuff so  
19 someone could get into it, read it, and that kind of thing.  
20 Some clients want to have it -- specifically with him, it  
21 seems like I may have given it to him, then I went and he gave  
22 it back to me. I do remember specifically showing videotapes  
23 to him on a laptop at the jail.

24 THE COURT: Mr. McIver testified that he has no  
25 recollection of any severance discussions with you; is that

1 accurate?

2 THE WITNESS: I think as I testified earlier, I don't  
3 have a specific recollection about severance matters. I can  
4 only testify as to what my normal practice would be, which  
5 would be when there's co-defendants, obviously you talk about  
6 the advantages of having the case tried together versus  
7 separate and you weigh those out and make a decision. And we  
8 -- I made the decision, I think we made the decision not to do  
9 that because of the advantages versus -- and again, the  
10 disadvantage would be the potential that Mr. Freeman's  
11 statement that says he, meaning Mr. McIver shot, was not  
12 helpful at all.

13 THE COURT: Did he ever articulate to you that he wanted  
14 a separate trial from his co-defendant?

15 THE WITNESS: I don't have that specific recollection,  
16 Your Honor, but -- because it's been some time ago. But I  
17 think that if he would've, I would've remembered that, made a  
18 note of it. And they talked about earlier about me putting  
19 certain things on the record like you do in the Jackson  
20 hearing.

21 I think if he was insistent on doing that, I probably,  
22 outside the presence of the jury would say, I have advised him  
23 not to do this, but this is his choice to do this. And I  
24 would've done it for him because he's the client, if he  
25 would've insisted on doing that. But to protect the record to

1 say, I think that's a bad idea, but I'm going to do it anyhow.  
2 And I did not do that. So that leads me to believe that that  
3 was not something he had assisted on at the time.

4 THE COURT: And he also testified that he -- it came to a  
5 -- as a surprise to him that he was being tried in a joint  
6 trial; is that accurate?

7 THE WITNESS: No, ma'am.

8 THE COURT: When did you begin preparing with him for --  
9 how far in advance did you know this matter was going to be  
10 set for a jury trial?

11 THE WITNESS: Several months. And yeah, we'd been back  
12 and forth round and round with the solicitor, and potential  
13 pleas, nothing that was really, really close. But it would've  
14 been several months I would've been preparing for it.

15 THE COURT: Okay. And would you have enlisted Mr.  
16 McIver's assistance in that process?

17 THE WITNESS: Yes, I would've consulted with him on the  
18 different issues.

19 THE COURT: Who else would've assisted you? Did you have  
20 someone that was helping you try to kick the case?

21 THE WITNESS: Other than my paralegal. She was in the  
22 court. She -- when I try a case, she's in the courtroom to  
23 make sure she can -- I can put my hands on everything in a  
24 trial notebook that we would've prepared.

25 THE COURT: Did you have an investigator that assessed --

1 assisted you, or did you do the leg work yourself?

2 THE WITNESS: No, I did most of it myself by talking to  
3 the pathologist and going physically up to North Myrtle Beach  
4 to review evidence.

5 THE COURT: Okay. Now, so that the record is clear, the  
6 Court actually had these questions before Mr. McIver's  
7 testimony, but I neglected to ask them. The Court does not  
8 take a position one way or the other regarding the  
9 presentation of the evidence in this case. However, when the  
10 court sits as the finder of fact, it is essential that the  
11 court has all the information necessary to make an informed  
12 decision. And the only person that can answer these questions  
13 was Mr. Bellamy.

14 Are there any questions as a result of the Court's  
15 questions from the applicant?

16 MR. YARBOROUGH: No, ma'am.

17 THE COURT: Any questions from the state as a result of  
18 the Court's questions?

19 MR. HALL: Nothing from the state, Your Honor.

20 THE COURT: Any exception to the witness being excused,  
21 from the applicant?

22 MR. YARBOROUGH: No, ma'am.

23 THE COURT: From the state?

24 MR. HALL: No, ma'am.

25 THE COURT: Thank you, Mr. Bellamy. Have a good day. I



1 guess for the second time.

2 THE WITNESS: Thank you. And I'm going to leave the  
3 courtroom this time.

4 THE COURT: You're welcome to. All right. I assume you  
5 stuck around because the state requested it in the event they  
6 planned to call you as a rebuttal witness?

7 THE WITNESS: Well, it is sort of reversed. I'm used to  
8 the applicant testifying again, so I thought maybe something  
9 new came up.

10 THE COURT: No worries. Thank you so much for your  
11 indulgence.

12 All right. Anything further from the state in terms of  
13 witnesses?

14 MR. HALL: Your Honor, no witnesses from the state. We  
15 would ask to reserve time for the closing argument.

16 THE COURT: I'm going to do that, but I need to --

17 MR. HALL: Yes, ma'am.

18 THE COURT: Yeah, let me take it as -- in stages. Any  
19 additional testimony from the applicant?

20 MR. YARBOROUGH: No, ma'am.

21 THE COURT: All right. Be glad to hear closing argument.  
22 You may proceed.

23 MR. YARBOROUGH: Thank you, Your Honor.

24 THE COURT: You're welcome.

25 MR. YARBOROUGH: If the Court would please, Your Honor.

1 Mr. McIver's question -- trial is extremely interesting based  
2 on the fact that there is so little evidence against him and  
3 anything that happened prior to the alleged killing. And  
4 that's why I would think that it would be extremely important  
5 that the courts look at this case as to what it would've  
6 looked like should they have been tried separately. And  
7 although this Court would not have had the benefit of hearing  
8 the testimony from Mr. McIver's co-defendants, it becomes very  
9 clear that --

10 THE COURT: What evidence do you have that he would've  
11 testified, that he would've showed up, that he would not have  
12 taken the fifth?

13 MR. YARBOROUGH: We would've been -- we would've had an  
14 opportunity to at least to have subpoenaed him.

15 THE COURT: You can't subpoena him just to take the  
16 fifth. That's contrary to case law. What evidence do you  
17 have that he would've actually testified? And that it  
18 would've been beneficial to your client's case?

19 MR. YARBOROUGH: We could've asked questions of the  
20 police officers and other evidence that whether the police or  
21 not went to a specific area where the co-defendant allegedly  
22 threw the gun that was used here. And they could have  
23 discussed that they did go and look and that did not come out  
24 at trial. And that is really important in my opinion, in my  
25 humble opinion, Your Honor that --

1           THE COURT: You're saying there's no evidence in this  
2 record about the gun being disposed of?

3           MR. YARBOROUGH: I'm saying that there is very little  
4 evidence about the police officers going and looking for the  
5 gun that was disposed of by Mr. McIver's co-defendant. That's  
6 exactly what I'm saying. That there was very little of that  
7 evidence presented at trial. There was very little evidence  
8 talked about where the individuals were seated in the car  
9 because the co-defendant's statement was not admitted into  
10 evidence due to the fact that they were on trial together.

11          THE COURT: But there was a witness that testified they  
12 were in the car together. So there was evidence of where they  
13 were seated.

14          MR. YARBOROUGH: I'm talking about positioning of the  
15 individuals in the car, which has serious implications about  
16 whether who the shooter was or not. None of that was  
17 addressed by the court and was addressed before the jury.

18          And in fact, the jury heard from opening statement on  
19 from Mr. McIver's counsel that this is a hand of all, hand of  
20 -- hand of one, hand of all accomplice liability type case  
21 that Mr. McIver -- Mr. Bellamy in the -- in his opening  
22 statement says, Mr. McIver is guilty of other crimes. Your  
23 Honor, I don't --

24          THE COURT: How is that unusual in theory? Especially in  
25 light of Mr. Bellamy's testimony, that there was more than

1 abundant evidence in the record regarding his client's guilt  
2 on these offenses and that it would've been an insult to a  
3 jury to argue otherwise?

4 MR. YARBOROUGH: I think that's a great question, Your  
5 Honor. And my answer is this, I think the jury rightly or  
6 wrongly, believed that because Mr. McIver had allegedly gotten  
7 rid of the car, burned the car, had been in different places,  
8 to somehow -- and had used the credit card on two occasions  
9 that somehow or another that had something to do with the --  
10 with the murder. I don't believe there's any evidence that  
11 that is true.

12 THE COURT: I've had a lot of cases where attorneys argue  
13 and admit what their clients have done, and it's ignored  
14 significantly to their benefit. I agree with Mr. Bellamy that  
15 it's an insult to the intelligence, the common sense, of a  
16 jury to argue against what is so clearly produced by what is  
17 empirical, that being evidence is that you really can't  
18 question the veracity of it. It's not subject to human  
19 intervention or the coloring of it by that person or a person  
20 who is testifying to it. I think to argue contrary to it  
21 would really have significantly impaired Mr. Bellamy's  
22 credibility with the jury; wouldn't you agree?

23 MR. YARBOROUGH: No, I would not agree. I -- my point is  
24 not that Mr. Bellamy could not have done that under the  
25 circumstances. My point is that shouldn't have been admitted

1 anyway. And that's what I'm trying to say.

2 THE COURT: What should not have been admitted anyway?

3 MR. YARBOROUGH: Ma'am?

4 THE COURT: What should not have been admitted anyway?

5 MR. YARBOROUGH: The evidence of Mr. McIver using the  
6 card.

7 THE COURT: How would you have kept that out when he was  
8 charged with grand larceny?

9 MR. YARBOROUGH: That's my point, Your Honor. Is they  
10 should have been separate. Those -- they should not have been  
11 tried together. That's my point.

12 THE COURT: What the charges? It's unlikely it was a  
13 part of the res gestae of the event. I doubt very seriously  
14 that it would've -- that that argument would've prevailed.  
15 When they're so closely connected and continuum, it's unlikely  
16 -- it leaves out the context of the crime. So it's unlikely  
17 that a court would've granted that motion.

18 MR. YARBOROUGH: And Your Honor, I --

19 THE COURT: It'd be different if they happened on  
20 different days. Let's say, you know, one day he had her  
21 credit cards, 15 days later he had something else, 20 days  
22 later something else happened. But that's not -- we're  
23 talking about a 24-hour span.

24 MR. YARBOROUGH: Yes. Yes, ma'am. And I totally respect  
25 what you're saying, but what -- I will say this, is that the

1 Court of Appeals opinion did directly say that they did not  
2 think the evidence of the --

3 THE COURT: I think that's reading that opinion out of  
4 context. The Court of Appeals in any Appellate Court only  
5 answers questions they were asked. It doesn't mean they're  
6 saying that they agree with the argument.

7 MR. YARBOROUGH: And my point is that it wasn't objected  
8 to, so they didn't have an opportunity to answer this.

9 THE COURT: Like I said, they only answer what's been  
10 asked. And when I look at the totality of the record, I have  
11 really significant concerns. Actually, I have doubts whether  
12 that argument would've prevailed. Their argument of flight,  
13 consciousness of guilt is always admissible.

14 It's impermissible for a court to comment on it. And  
15 really, the theory of that is that it ignores to the benefit  
16 of the defendant. Because why would you want the court to  
17 comment on something that would give credibility to a set of  
18 facts?

19 MR. YARBOROUGH: I understand the Court's argument. I  
20 just --

21 THE COURT: I don't have an argument. It's an  
22 observation. And I've read the opinion, and you know what I  
23 do is I get these files a month and a half in advance and I  
24 read them. Because I feel like I need to have a point of  
25 reference when you're talking to me.

1 MR. YARBOROUGH: Yes, ma'am.

2 THE COURT: I feel like that's the least I can do. So  
3 I've read the opinion --

4 MR. YARBOROUGH: And I appreciate it. We just can choose  
5 to disagree on that.

6 THE COURT: It's an observation. It's not a -- I'm just  
7 asking a question so I can have clarity in terms of being able  
8 to make an informed decision.

9 MR. YARBOROUGH: In my opinion from -- I -- my opinion  
10 from trying hundreds of these cases, I would've asked for a  
11 severance and I would've asked for the charges not to have  
12 been brought at the same time, especially the charge with  
13 kidnapping that was in it. I would've asked for all of that  
14 and I would've built a very strong record. And I --

15 THE COURT: Yeah. My experience -- and I've tried a  
16 murder case every week since last March.

17 MR. YARBOROUGH: Yes, ma'am.

18 THE COURT: And I've been doing this since 2001. I've  
19 tried a lot of murder cases, tried a lot of grand larceny  
20 cases.

21 MR. YARBOROUGH: Yes, ma'am.

22 THE COURT: Probably more than I can remember.

23 MR. YARBOROUGH: Me too.

24 THE COURT: But it has been my experience that when you  
25 have something that is so clearly tied to the res gestae of a

1 crime, whether you argue it, whether you preserved it, really  
2 is not what's critical. It's whether it would've prevailed  
3 and whether it would've made a difference. And it's really  
4 unlikely that that motion would've been granted under these  
5 circumstances.

6 MR. YARBOROUGH: I --

7 THE COURT: You may continue.

8 MR. YARBOROUGH: Thank you. I believe that -- where we  
9 were just going --

10 THE COURT: You were talking about -- I apologize, I  
11 didn't mean to interrupt you. You said that they did not call  
12 a particular witness and you felt it would've been beneficial  
13 to your client because there was no evidence of where the  
14 occupants were situated in the vehicle.

15 MR. YARBOROUGH: That's correct, Your Honor.

16 THE COURT: That's where you left off.

17 MR. YARBOROUGH: And so I think that is another reason  
18 that perhaps you could have severed the case and gone that  
19 route.

20 The rest of what I've got, Your Honor, is, I do think  
21 that as I pointed out the testimony of the sexual act and that  
22 it came in, and it only came in briefly, was inflammatory  
23 against Mr. McIver.

24 I will stick to my request that I thought that maybe they  
25 should have asked for an instruction on cover up or ---



1           THE COURT: And while we're on that point, what such  
2 instruction exists? I have searched the case law, and I  
3 cannot find any.

4           MR. YARBOROUGH: Your Honor, it -- often times when  
5 you're dealing with cases where, as you just said, that the  
6 res gestae was the act of taking the car and using the credit  
7 card. I would've asked for a charge that said that the  
8 evidence of covering up the crime should not be admitted to --

9           THE COURT: What case law do you have that supports that  
10 would've been appropriate?

11          MR. YARBOROUGH: Your Honor, I don't have it here in the  
12 courtroom, but I'll be happy to send it to you tomorrow if  
13 you'd like for me to, if I can find it. You may be correct.  
14 I just -- when I looked at --

15          THE COURT: We've searched the case law, we searched it  
16 ahead of this hearing, and we've searched it while the  
17 testimony was going on, and we cannot locate any cases that  
18 indicate -- the only cases on cover up state that the  
19 defendant's efforts to cover up his guilt indicated his  
20 malice, and it is not improper for the state to comment on it.  
21 There are no cases where the court directs that such an  
22 instruction of cover up -- I'm just not -- and I'm not trying  
23 to be peculiar, I just have never heard of it. I've never  
24 seen one. I've never had it requested, and I'm not aware of  
25 it being a part of any of our pattern instructions, which is

1 really not an appropriate word, because State Court doesn't  
2 have pattern instructions. But our charge books -- and I  
3 regularly use Judge Anderson's book. It's like my  
4 encyclopedia, and I'm just not aware of any such instruction  
5 existing in any of his books. As well as I use Judge Irvin's  
6 old stuff because I find it instructive and well worded and  
7 succinct as well. And I'm just not aware of -- that's why I'm  
8 asking. Again, I'm not trying to be peculiar. I'm just, if  
9 there's such an instruction, I'd be open to hearing what it  
10 says.

11 MR. YARBOROUGH: Right. And if -- and maybe not just for  
12 this argument, I'll go back and look and see what I've got  
13 when I get back to Greenville tonight or tomorrow. And I'll  
14 be happy to send it to you.

15 THE COURT: If you'd like to, that's fine.

16 MR. YARBOROUGH: Okay. Thank you.

17 I would've asked, as I asked Mr. Bellamy that he maybe  
18 would've spent a little bit more time on the age of the  
19 witness that testified. He did do a good, a very good job, on  
20 the Biggers (ph) issue. I just think that perhaps the age of  
21 the witness should have been pushed more. It might have  
22 helped Mr. McIver at the Court of Appeals.

23 And I felt like that we objected to conflicting theories  
24 of the case just based on the fact that they didn't really  
25 have a clear avenue of who did it, so they threw the case up

1 there that they were going to get one or get the other. And I  
2 know that the Court of Appeals didn't agree with us on that  
3 either.

4 Thank you, Your Honor.

5 THE COURT: You're welcome.

6 Any closing argument from the state?

7 MR. HALL: Yes, Your Honor. Appreciate it.

8 THE COURT: You may proceed.

9 MR. HALL: Your Honor, I'm sure as you know under  
10 Strickland the applicant must prove deficiency and prejudice.  
11 And counsel's actions taken at trial are not to be judged by  
12 hindsight. And so we must evaluate counsel's actions at the  
13 time of the trial.

14 First beginning with their argument regarding hand of one  
15 hand of all. They alleged that the state proceeded on  
16 conflicting theories and violation of due process, and counsel  
17 should have objected.

18 Your Honor, the state would cite to Bradshaw v. Stumpf.  
19 Stumpf is spelled S-T-U-P -- I'm sorry, S-T-U-M-P-F. That's  
20 545 U.S. 175. It's a 2005 Supreme Court case. Your Honor, we  
21 cite to that case because in that case the Supreme Court held  
22 that the state's inconsistencies in the prosecution's  
23 arguments about whether the defendant in that case or his co-  
24 defendant shot the victim was immaterial to the defendant's  
25 conviction for murder, where the two acted together during an

1 armed robbery.

2 And so, Your Honor, we would argue that that precedent  
3 applies here. The -- Mr. McIver and his co-defendant acted  
4 together in taking the victim's car. It doesn't matter which  
5 one of them shot her, they acted together.

6 When they acted together, the state could have proceeded  
7 on the theory of hand of one or could have proceeded under the  
8 theory of that Mr. McIver was the principal. And the Court of  
9 Appeals opinion in this case actually stated -- the Court of  
10 Appeals said that the state presented extensive circumstantial  
11 evidence that Mr. McIver acted as the principal in shooting  
12 the victim.

13 And so, regardless of whether the state had proceeded  
14 under hand of one or hand of all, or proceeded under Mr.  
15 McIver being the principal in this case, he can't prove  
16 prejudice because the state could have convicted him under  
17 either theory.

18 And so, any argument that counsel should have objected to  
19 such arguments or such charges, really he can't prove  
20 prejudice based on the Court of Appeals opinion, and the  
21 Supreme Court's ruling in the Bradshaw case.

22 Regarding severance, Your Honor, we would cite to State  
23 v. Halcomb. Halcomb spelled H-A-L-C-O-M-B. That's 382 S.C.  
24 432. And that's a 2009 Court of Appeals case.

25 Your Honor, in that Halcomb case, the Court of Appeals

1 held that a defendant failed to prove that he was prejudiced  
2 by the court's denial of a motion to sever where the evidence  
3 of guilt was overwhelming. And the defendant failed to show  
4 that he would've obtained a more favorable result in a  
5 separate trial.

6 Your Honor, Mr. McIver has failed to prove prejudice  
7 here. He's failed to prove that if he had proceeded in a solo  
8 trial, that he would've been successful in that trial. If he  
9 had proceeded in a solo trial, the state could have used his  
10 co-defendant's statement that was previously given against  
11 him. It's kind of speculative of whether or not his co-  
12 defendant would've testified. But if his co-defendant had  
13 chosen to testify, that would've been additional evidence  
14 against Mr. McIver. And again, going back to the Court of  
15 Appeals opinion, the state presented sufficient evidence that  
16 he was the principal in this case. And so he can't prove that  
17 if he had proceeded in a solo trial, that there would've been  
18 a more favorable outcome.

19 Further, you heard testimony from his attorney who  
20 testified that he didn't believe that a solo trial would've  
21 benefited him because of the co-defendant statement, which  
22 implicated him as the shooter.

23 Regarding the arguments that counsel made to the jury,  
24 you heard the testimony from Mr. Bellamy who testified that,  
25 you know, that the sole issue in this case was the murder.

1 And so he didn't want to lose credibility with the jury by  
2 arguing about the minor issues. And that's a reasonable  
3 strategic decision under Strickland.

4 Regarding the cell phone video of the sex, Your Honor,  
5 you heard the testimony from Mr. Bellamy that he didn't  
6 believe that if that video had been -- or if testimony  
7 regarding that video had been excluded, that it would've  
8 changed the outcome in this case. And certainly that would be  
9 our position that there is no prejudice.

10 But further, he articulated a reasonable strategic  
11 decision in not objecting to that video because he wanted to  
12 show that there was no plan to commit this murder. There was  
13 no plan to act together to murder the victim and take her car.  
14 I believe there's some allegations about some statements the  
15 solicitors made. Your Honor, we would cite to Fortune v.  
16 State. I beg the Court's indulgence so we can get a cite for  
17 you.

18 THE COURT: Yes, sir.

19 MR. HALL: Fortune v. State is 428 S.C. 545. That's a  
20 2019 Supreme Court case. Your Honor, the standard for a  
21 solicitor's comments during trial is whether the comments so  
22 infected the trial with unfairness as to result in a denial of  
23 due process.

24 Any comments the solicitor may have made in this trial  
25 under the theory of hand of one hand of all, did not so affect

1 the trial with unfairness as to result in a denial or due  
2 process to Mr. McIver.

3 And so, he failed to prove prejudice in that regard.  
4 Your Honor, regarding cover up evidence, in our research, I  
5 was unable to find any cover up charge as well. But the case  
6 that I did find was the State v. Ballington case, which is B-  
7 A-L-L-I-N-G-T-O-N, 346 S.C. 262. And that's a supreme -- I  
8 mean, that's -- excuse me, that's a Court of Appeals case in  
9 2001 in which the Court of Appeals stated that evidence of a  
10 cover up could be evidence of malice. Although the Ballington  
11 case was overruled on other grounds by State v. Belcher, the  
12 Court reaffirm the cover up evidence being used as malice in  
13 State v. Brooks 428 S.C. 618, which is a 2009 case in which  
14 the Court of Appeal, I believe it's the Court of Appeals, also  
15 found that the defendant's cover up actions were evidence of  
16 guilt.

17 And so, Your Honor, you heard testimony from Mr. Bellamy  
18 who, you know, stated that if, you know, he had mentioned the  
19 cover up thing, that could have perhaps been used as an  
20 argument of malice in this case, which would have tied Mr.  
21 McIver to the murder, and that would have been favorable. So  
22 he can't prove prejudice in that regard as well.

23 And on the final issue regarding the child witness's age  
24 and competency. Regarding whether or not age was mentioned,  
25 the Court conducted a hearing outside of the presence of the

1 jury and questioned the minor child about whether the child  
2 knew right from wrong and knew whether to tell the truth or  
3 the difference between the truth and a lie, in which case the  
4 Court did find that the child witness was competent to testify  
5 in this case.

6 And so, Your Honor, a review of the record shows that  
7 counsel performed his duties under prevailing professional  
8 norms, and Mr. McIver has failed to prove prejudice. And we  
9 would ask that you deny his application.

10 THE COURT: Anything further from the applicant?

11 MR. HALL: No, ma'am.

12 THE COURT: I think we all know the standard articulated  
13 by Strickland as well as our state's progeny of cases  
14 beginning -- well, not necessarily beginning with Cherry v.  
15 State, but certainly are cited throughout the course of  
16 opinions from our Supreme Court as well as our Court of  
17 Appeals. That being that in order to prevail on a post-  
18 conviction relief action, the applicant bears the burden of  
19 proof by preponderance of the evidence that his counsel --  
20 counsel's performance fell below the standard of  
21 reasonableness under prevailing professional norms. And that  
22 he failed to represent him within the range of competence  
23 required in criminal cases.

24 Of course, that is -- there is a presumption that counsel  
25 provided and rendered adequate assistance and made all



1 significant decisions in the exercise of reasonable  
2 professional judgment, which also follows the line of cases  
3 dealing with strategy, tactical reasons for making decisions,  
4 as well as the criteria regarding hindsight.

5 And a person, that being a lawyer, is not required to  
6 provide perfect advocacy because hindsight is always 20/20.  
7 There are, as Mr. Bellamy articulated, when you look back  
8 there are always things you wish you had done differently.  
9 And I think we all experience that on a daily basis in our  
10 professional duties. But that is not the standard, it is not  
11 hindsight.

12 And the applicant must also prove not only that his  
13 counsel's performance was deficient, but that it prejudiced  
14 him. And the prejudice that is articulated by our courts is  
15 that there is a reasonable probability that but for counsel's  
16 unprofessional errors, the result of the proceeding would have  
17 been different.

18 Now, starting -- and I may go in reverse order, and I  
19 apologize. And as I indicated I am -- I'm a '60s child. I'm  
20 very tactile. I'm trying to kick it. I'm trying to preserve  
21 trees. I just have not succeeded yet. So I have the state  
22 provide me, and they provided me with all of the case files  
23 well ahead. And actually I spent my chamber's week of July  
24 4th reading transcripts.

25 And I'm not saying that in a manner of in-humility. I'm

1 just saying, and as I've explained to counsel, that I take my  
2 responsibility very seriously, and I feel that the least I can  
3 do is read ahead of trial and to have some point of reference  
4 when cases are being presented. I think it is incredibly  
5 unfair for the Court not to do that. So I took the time and I  
6 read all of these items in advance of the testimony.

7 And again, I reinforce that any questions I asked of Mr.  
8 Bellamy -- you know, lawyers are advocates, the Court's  
9 objective, and when listening to testimony, I need -- there're  
10 questions that the Court needs answered. There're often  
11 vacuums left in testimony, and the Court needs to be equipped  
12 not of its own volition to answer questions, but it needs to  
13 be able to answer issues raised by the folk who actually  
14 participated in the proceedings and who actually have the  
15 answers instead of with the benefit of me looking at a record  
16 later and not being able to ask those questions, or for me to  
17 presume that somehow I am clairvoyant and I know what they  
18 meant or what they intended to testify to. I don't think  
19 that's an appropriate way to approach the Court's fact-finding  
20 function.

21 I've looked at both the original PCR, which was filed,  
22 the application that was filed on 10/27/21, and I looked at  
23 the amended PCR as well, which was filed 12/20 of 2022. And I  
24 may be taking these out of order, and if I am, I apologize in  
25 advance. And I'm going to make certain observations regarding

1 the record and then I will give some further instructions.

2 I would find that there's no good faith basis to have  
3 challenged a hand of one, hand of all argument that was  
4 propounded by the state. There is more than adequate evidence  
5 in the record to support that theory.

6 I agree with Mr. Bellamy, and I find credible his  
7 testimony, that it was a matter of strategy not to exclude the  
8 filming of his client, that being his client filming his co-  
9 defendant and the victim's friend having sex. That it belied  
10 any theory by the state that somehow this was an acrimonious  
11 situation that was anything other than some young people  
12 hooking up, and that the circumstance was anything more than  
13 collegial, my word, not his. That basically it was some young  
14 folk having a good time.

15 And unfortunately, in this world that we live in, the  
16 filming of sex, while because of our age, may sound -- seem  
17 like an aberrant behavior reflecting on someone's character,  
18 unfortunately or fortunately, as a result of what I do, I find  
19 that people do that all the time, and that they put it on  
20 Facebook Live, which is just amazing to me. What should be  
21 the most intimate of an act has been reduced to sportsmanlike  
22 behavior, and it is put on Snapchat, it is put on Instagram.

23 So what may seem shocking to the Court's conscience or to  
24 counsel's conscience, unfortunately, is regular everyday fare  
25 for a jury. It is not shocking to their conscience, and I

1 have found, in my experience, that they don't have the same,  
2 what you would presume, level of judgment about it. In fact,  
3 they've become quite immune to any sensitivity regarding it.

4 So I find credible his argument or his testimony that  
5 there was no benefit in excluding it because it actually  
6 supported his theory of the case and that that was a strategic  
7 decision.

8 In addition, there would have been no basis for him to  
9 have objected, and I find his testimony credible, to the  
10 state's argument regarding the hand of one is the hand of all.

11 The purpose of opening statements is for the state or the  
12 defense, which the state is not -- the defense is not required  
13 to make an argument. In fact, they can sit through a trial  
14 and say nothing. They have no burden of proof, but the state  
15 is entitled to argue what they believe the evidence will show.  
16 And I've read the opening argument, and it appears that that  
17 was exactly what they were doing.

18 They were arguing that the evidence would show that --  
19 what they believed to be the theory of their case, which was  
20 the hand of one, the hand of all accomplice liability  
21 regarding this incident. And I find credible Mr. Bellamy's  
22 testimony that reflects the Court's observation that there  
23 really would have been little to no benefit objecting to that  
24 argument. Because arguments -- and the Court instructs the  
25 jury that our opening arguments are only a prelude, so to

1 speak, for the parties to present to them what they believe  
2 the evidence will show in a case. And I agree with Mr.  
3 Bellamy that, and most lawyers probably look at it in this  
4 way, if the state makes an argument, they can't later prove  
5 the only person they've hurt is themselves.

6 Also, the argument that somehow Mr. Bellamy was deficient  
7 in failing to object to the state presenting conflicting  
8 theories, I find his testimony credible that he felt that  
9 ignored to his benefit, that it allowed him to argue regarding  
10 the credibility of the state's case, and therefore there was  
11 no basis for him to object.

12 And moreover, I cannot discern any positions in the rules  
13 that allows the state -- that allows the defense, even if they  
14 make an argument, there's nothing that would allow this court,  
15 and when I say this court, I mean Judge John, the individual,  
16 the judge that tried this case from somehow precluding the  
17 state from presenting multiple theories that conflicted with  
18 one another. They do it all the time. It's no different, in  
19 my estimation, that when you have a civil case and there's a  
20 motion to conform to the proof. You know, cases develop.  
21 Sometimes they develop one way, sometimes they develop another  
22 way, and certainly the state has the ability to argue what  
23 would appear to be conflicting theories. I'm not aware of  
24 anything in the rules that preclude that. So even if he had  
25 made an objection, I cannot discern any case law, rules or

1 otherwise that would have supported that objection.

2       Regarding the testimony of the seven-year-old, that being  
3 -- and I'm trying to find the young lady's name, it's in the  
4 opinion. That being Shaniah, S-H-A-N-I-A-H, Holmes, who  
5 identified Mr. McIver, the Court of Appeals agrees with this  
6 Court's observation that there was no basis to exclude this  
7 testimony.

8       As we know, the competency of a minor witness is solely  
9 within the discretion of the trial court and will not be  
10 reversed absent an abuse of discretion, that being an error  
11 of law or a finding a fact that is wholly unsupported by the  
12 record.

13       And at number 4, in the Court's opinion, they go through  
14 how the court came to allow that testimony. The court found  
15 that it engaged in the requisite balancing prior to the  
16 admission of the testimony as well as in this case. Though  
17 Holmes was only seven years old at the time, she claimed to  
18 see McIver burn the car.

19       Holmes had the ability to view McIver as he set the car  
20 on fire on her street, and she could see him while standing in  
21 her yard next to her mailbox. And then citing -- providing a  
22 factor to consider in determining the reliability of an  
23 otherwise unduly suggested procedure as the witness's  
24 opportunity to view the perpetrator at the time of the crime.

25       So this Court cannot discern how calling her parents

1 would have been helpful, and I agree with Mr. Bellamy that  
2 there would have been no purpose in that. And I don't know  
3 how much more strenuously he could have argued the  
4 qualification of the witness as that was solely in -- a  
5 decision within the prerogative of the trial court regarding -  
6 - and -- and the trial court did engage in the appropriate  
7 balancing test, and that was affirmed by the Court of Appeals.

8       There is a general statement that was made regarding that  
9 trial counsel failed to object to unsupported arguments and  
10 references not in evidence, but that was -- in listening to  
11 the testimony, I didn't hear anything that was particularized  
12 to support that argument. It was a very general statement  
13 made in the application, and without anything further, the  
14 Court, you know, is not -- I'd have to address those things  
15 that were specifically argued. And so that was really an  
16 overbroad argument that the Court doesn't have the ability to  
17 address.

18       There was also an exception raised that defense counsel  
19 failed to make a request for a cover up charge, or a cover up  
20 evidence charge. He did request a flight instruction, which  
21 was declined, and appropriately declined. And by analogy,  
22 when looking at the Court of Appeals decision, I am of the  
23 fixed opinion that any -- I'm not aware of any such  
24 instruction. I've never, in all the years I've sat as a  
25 Circuit Judge, had anyone request that type of instruction,

1 but I think it is clear from precedent that the state can  
2 argue flight, they can argue anything, any evidence that they  
3 feel or perceive in the record amounts to consciousness of  
4 guilt, and this evidence clearly would have been admissible.

5 And even if Mr. Bellamy had requested it, I can't imagine  
6 under any circumstances it would have been granted because it  
7 is -- it would clearly have been an impermissible charge on  
8 the facts, which really ignores and is designed to ignore to  
9 the benefit of a criminal defendant.

10 You would never want the court to make comments on the  
11 facts of a case, thereby giving them more credibility or  
12 somehow saying to the jury that they should pay more attention  
13 to certain sets of facts or others. It's just not  
14 appropriate. The court is required to charge the appropriate  
15 and up-to-date law in a very neutral fashion, such that it  
16 equips the finder of fact to make a fair and impartial  
17 decision. It should never comment on the facts of a case.

18 And so even if he had requested that, I really can't  
19 imagine, under any circumstances, that that request had been  
20 granted as it would have been an impermissible comment on the  
21 facts. And the Court of Appeals actually goes into that at  
22 paragraph two, and I think, by analogy, that the -- their  
23 observations, their analysis are on point. And so I won't  
24 belabor that except to cite what they say.

25 Second, the experienced trial court properly declined to



1 charge the jury on flight evidence because a flight  
2 instruction would have been an impermissible comment on the  
3 facts. Citing Article 5, Section 21 of the Constitution,  
4 which states, "Judges shall not charge juries in respect to  
5 matters of fact, but shall declare the law." Also citing  
6 Pantovich, P-A-N-T-O-V-I-C-H v. State, which is found at 427,  
7 S.C. 555, which is a 2019 Supreme Court decision.

8       There's also been a great amount of discussion about  
9 direct and circumstantial evidence. The only instruction we  
10 have from the Supreme Court is that direct and circumstantial  
11 evidence are not different. There's no greater degree  
12 required of circumstantial evidence than of direct evidence.

13       Of course, there is recent precedent that says when  
14 circumstantial evidence is presented by the state, it must be  
15 such that it rises above speculation and that all  
16 circumstances must point conclusively to the guilt of the  
17 accused. Rarely in my experience have I seen people commit  
18 certain offenses with eyewitnesses. It is as rare as the  
19 proverbial hen's tooth, although it does happen.

20       And under these circumstances, it is unlikely, based on  
21 my review of the record, that there would have been any  
22 eyewitnesses other than the defendant, the co-defendant, and  
23 the victim of this incident. And so I do not find any  
24 credibility in the argument that somehow the evidence in this  
25 case did not rise to the level that is required as the Court

1 of Appeals affirmed the Court's denial of the directed verdict  
2 in this case.

3 And as we know, the standard for directed verdict is not  
4 for the Court to act as the finder of fact, but only to  
5 determine whether there is direct or substantial  
6 circumstantial evidence reasonably tending to prove the guilt  
7 of the accused.

8 And at the point the directed verdict was considered in  
9 this case, the Court clearly articulated the standard, and  
10 based on my review of the record, was appropriate and -- as  
11 well as out of the Court of Appeals in denying the motion for  
12 directed verdict.

13 The Court finds Mr. Bellamy credible in the following  
14 regard, that he has extensive criminal experience, that he  
15 entered the practice of law in 1990, that he was a law clerk  
16 to the honorable Sidney M. Floyd for a period. And then from  
17 1991 to 1995 was an assistant solicitor, and since 1995, has  
18 engaged in the practice -- private practice of criminal  
19 offenses.

20 I find credible his testimony that he met sufficiently  
21 with his client, that he in fact engaged with him, that he  
22 went over all of the discovery, that he acted as his own  
23 investigator and followed up on all leads in this case, that  
24 he explored any potential defenses.

25 And he did all that his client asked or expected of him,

1 that he had no issues regarding his client's competency, nor  
2 any concerns regarding his ability to communicate with him or  
3 assist in his representation, and he found no necessity to  
4 have him in -- evaluated either pursuant to Blair or  
5 McNaughton, as there was some reference in the pleadings.

6 That's why I asked those questions regarding his competency.

7 And I've listened to him testify. He clearly appears to  
8 me to be competent. And I certainly -- it actually appears to  
9 be quite intelligent. And I don't have any concerns regarding  
10 his ability to have communicated with his lawyer and to have  
11 assisted in his representation.

12 There has been a myriad of issues raised, one of which is  
13 severance. I find credible Mr. Bellamy's testimony that he  
14 did not -- it was a strategic decision. He did not feel the  
15 severance would benefit his client. I find credible that he  
16 did in fact fully discuss all strategic decisions with his  
17 client, and while he does not have specific recollections,  
18 that it would have been his practice to have gone over his  
19 strategic decisions to have highlighted the positives and the  
20 negatives of each approach.

21 And then as he would have proceeded and as we are clear,  
22 the case law does not require a client to agree on a strategic  
23 decision. It only requires that it be discussed with a  
24 client.

25 I also find credible that it would not have been -- it

1 would not -- I don't have any doubt that him making a -- that  
2 him moving for severance would have been successful. It is  
3 clear that all of these offenses were part of a continuum and  
4 provide the context for the crime, and it is unlikely that a  
5 severance would have been successful, even if requested. They  
6 really all amounted to one incident.

7 And I also agree with him and find credible his testimony  
8 that it would have been an insult to the common sense of a  
9 jury to argue against what was clearly empirical from the  
10 evidence that was being presented. And when I say empirical,  
11 that evidence is not subject to human factor, human prejudice,  
12 human speculation.

13 I also find credible his testimony that there was no --  
14 that he made a strategic decision that there was no benefit in  
15 calling the co-defendant nor trying to enter his statement  
16 because most of the statement would have ignored, to the  
17 detriment of his client, that being putting the gun in his  
18 hand as the shooter.

19 He did testify that, in hindsight, severance may have  
20 been helpful, but that is speculative at best. And again, the  
21 Court would cite the rules on hindsight, and that not being a  
22 compelling argument. In other words, it does not undermine  
23 the Court's confidence in the outcome of this trial.

24 And I also find credible, and I -- and in my experience,  
25 he's correct that you don't put every strategic decision on

1 the record. It would just be impractical. In the trial of a  
2 death penalty case that is more practical, and it happens more  
3 often, but in your everyday run-of-the-mill trial, it is  
4 unlikely that you're going to clear courtroom so that only the  
5 defendant and his counsel are present to go over every  
6 strategic decision and have a contemporaneous record that, you  
7 know, that certain strategic decisions were discussed and then  
8 get a contemporary needs record on that. It's just not  
9 practicable nor does it happen on a daily basis in -- and I  
10 hate to say run of the mill because I really don't want to  
11 sound that I am belying the -- or making less consequential.  
12 But with the number of murders that we try in the Circuit  
13 Court across the state, you just would not do that in every  
14 case.

15 And again, referring to Mr. Bellamy's testimony, he said  
16 he did not object to the video because it depicted people  
17 getting along, hooked up, etcetera, and getting along. That  
18 he felt it was helpful, that it did not depict his client  
19 doing anything bad. And it also, in his mind, diminished any  
20 type of motive, did not support that his client had any  
21 motive, and it was not helpful to the state's case. In fact,  
22 he felt that it was beneficial to his case.

23 I think I've already covered the child witness testimony.  
24 And that was done appropriately in camera, and the Judge found  
25 the witness was competent. He also testified, and I found

1 credible, that even if the child witness were excluded it  
2 would not have made any change in the outcome of the trial,  
3 would not have resulted in any change in the outcome of the  
4 trial.

5 I also find credible his testimony that he investigated  
6 prior to the trial. He went and looked at all of the  
7 evidence, not just the evidence the state intended to use  
8 against his client, but also the evidence that the state did  
9 not intend to use against his client.

10 And there was also no benefit in calling witnesses from  
11 the K&W parking lot because their descriptions were  
12 generalized at best and did not pinpoint his client as the  
13 shooter, did not make any definite identification of Mr.  
14 McIver as the shooter.

15 I find credible that he met with his client on several  
16 occasions. He met with him even more closer in time. That he  
17 had more than adequate time to prepare for trial, and that he  
18 consulted with his client up to the case being called for  
19 trial.

20 I also find credible, based on the record, that he -- his  
21 testimony that he made two attempts at having a bond set for  
22 Mr. McIver, but both were denied by the Circuit Court. That  
23 he went and reviewed the evidence on a laptop at the detention  
24 center with his client. That he gave his client the  
25 discovery, but probably, and much -- I give credit to Mr.

1 McIver for having this level of discernment that he gave it  
2 back to his lawyer because he did not feel it would be wise to  
3 have discovery in a jail cell, my words that I'm about to say,  
4 not the witness', but that he had no expectation of privacy in  
5 a jail cell. And it certainly would not have been prudent for  
6 him to have such sensitive information lying around where  
7 other people could have access to it.

8 I also find credible his testimony that he has no  
9 recollection or remembrance of his client being insistent  
10 about requesting severance. That if that were the case he  
11 would have made a note of it, and he also would have put it on  
12 the record to protect the record, and to put on the record  
13 that he thought it was a bad idea but that he was doing that  
14 at the insistence of his client.

15 I also find credible his testimony that the joint trial  
16 was not a surprise to Mr. McIver, and that he had reviewed  
17 that with him prior to trial.

18 And as such, I'm denying the motion, or the application  
19 for post-conviction relief. I'm instructing the state to  
20 provide the Court with an order that makes findings of fact  
21 consistent with this record, as well as making any additional  
22 findings of fact consistent with the record, any applicable  
23 case law. And I need you to send that to  
24 [DJeffersonsc@sccourts.org](mailto:DJeffersonsc@sccourts.org) in Word format. Please copy Mr.  
25 Yarborough on that order as it is presented. And I will tell

1 you in advance that I rarely sign orders, I never sign orders  
2 the way they're submitted to me. I have a format that I like,  
3 so you're probably going to get it back different than you  
4 send it to me. So, but do what you would normally do, don't  
5 let that influence you, but I say that more for the comfort of  
6 Mr. Yarborough to know that this Court is not a rubber stamp,  
7 it pretty much writes its own orders. Yeah, I'm real peculiar  
8 that way.

9 MR. HALL: Does the Court have a deadline for the order?

10 THE COURT: Could you submit it to me in five days? I  
11 know that's a lot to ask, but you know we're in law clerk  
12 season and I'm a little prestigious and I need it off my desk  
13 before I'm by myself.

14 MR. HALL: Yes, ma'am. I understand.

15 THE COURT: And I know that's a lot to ask, and you know  
16 if you need more time don't be hesitant to ask, but no time  
17 like the present. While things are fresh in my mind I like to  
18 dispose of them.

19 MR. HALL: Yes, ma'am.

20 THE COURT: All right. Anything further from the  
21 applicant?

22 MR. YARBOROUGH: No, ma'am.

23 THE COURT: Anything further from the state?

24 MR. HALL: No, ma'am.

25 THE COURT: Thank you very much. Have a good day.



1           And, Mr. Yarborough, don't hesitate to let us know if  
2 when that order is submitted if there's anything that you  
3 would like included.

4           MR. YARBOROUGH: Okay. Thank you.

5           THE COURT: You're welcome, sir. Have a good day.

6

7                               (END OF HEARING.)

8

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Nicholas J. McIver

SCDC#376157

Applicant / Petitioner

vs.

State of South Carolina,

Respondent.

COURT OF COMMON PLEAS

Case # 2021-CP-26-07151

ORDER

FILED  
HORRY COUNTY  
2024 JUL 30 PM 5:01  
CLERK OF COURT  
HORRY COUNTY SC

This post-conviction relief case came before the court for a hearing. Having now heard this matter, the court orders as indicated herein.

- ☒ 1. The application for post-conviction relief is hereby: ☒ denied ☐ granted under advisement; a formal order will be filed (see below - No.6)
- ☐ 2. Motion(s) was/were heard in this case and the court orders:  
☐ The motion to dismiss and/or for summary judgment is hereby ☐ granted ☐ denied under advisement based upon the ☐ statute of limitations and/or ☐ the successive nature of the application or ☐ other reason as follows:
- ☐ 3. A conditional order of dismissal was previously filed in this case. Upon review of the matter, the court finds:  
☐ Good cause as to why the case should not be dismissed has been shown in response to the order of dismissal; therefore, a hearing on the merits of the application shall be scheduled.  
☐ The court has considered the response to the conditional order of dismissal and finds that good cause has not been shown or ☐ no response has been filed to the conditional order of dismissal; therefore, the application is hereby dismissed.
- ☐ 4. The application was freely, voluntarily, and intelligently withdrawn as indicated on the record; therefore, this case is dismissed ☐ with prejudice ☐ without prejudice.
- ☐ 5. Other:
- ☒ 6. The court further orders:  
☒ The ☒ Attorney General ☐ Applicant's counsel is directed to submit to the court a proposed order and to serve the order on opposing counsel within 5 days.  
☐ Both sides are directed to submit proposed orders to the court and to serve the orders on each other within ☐ days.  
☐ The court does not request proposed orders.

IT IS SO ORDERED.

*Dr. Jefferson*

2128

Presiding Judge

Date: July 30, 2024

*SA Conway*  
Horry, S.C.

Court Reporter: Sallie Beth Todd

Rev 08/08/01

STATE OF SOUTH CAROLINA )  
COUNTY OF HORRY )  
Nicholas J. McIver, SCDC #376157, )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2021-CP-26-07151

**ORDER OF DISMISSAL**

FILED  
HORRY COUNTY  
2025 MAR 17 P 3:51  
REBECCA ELVIS  
CLERK OF COURT  
HORRY COUNTY

Presiding Judge: Hon. Deadra L. Jefferson  
Applicant's Attorney: William G. Yarborough III, Esq.  
Respondent's Attorney: Bryan T. Hall, Esq.  
Trial Counsel: Gregory S. Bellamy, Esq.  
Date of Hearing: July 30, 2024  
Court Reporter: Sallie Beth Todd

This matter is before the Court pursuant to an application for post-conviction relief ("PCR") filed by Nicholas J. McIver ("Applicant") on October 17, 2021. On July 30, 2024, an evidentiary hearing was convened before this Court. Applicant was present and represented by William G. Yarborough III, Esquire. Assistant Attorney General Bryan T. Hall, Esquire represented Respondent. At the hearing, Applicant testified on his own behalf and called as a witness Gregory Scott Bellamy, Esquire. Respondent did not call any witnesses.<sup>1</sup> Following a thorough review of the trial transcript and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

**PROCEDURAL HISTORY**

<sup>1</sup> The Court made inquiry of Gregory Scott Bellamy, Esq. to supplement the record without objection. Counsel was given the opportunity to ask questions of the witness after the Court's questioning.

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Applicant is presently confined in the South Carolina Department of Corrections ("SCDC") serving a forty-five (45) year sentence. In December 2016, the Horry County Grand Jury indicted Applicant for Murder (Indictment 2016-GS-26-05558),<sup>2</sup> Grand Larceny \$2,000 to \$10,000 (Indictment 2016-GS-26-05556),<sup>3</sup> and Possession of a Weapon during the Commission of a Violent Crime (Indictment 2016-GS-26-05557).<sup>4</sup> On April 23-27, 2018, Applicant proceeded to a jury trial before the Honorable Steven H. John. Assistant Solicitors George DeBusk, Jr., and Seth Oskins prosecuted the case. Applicant was represented by Gregory Scott Bellamy ("Counsel").<sup>5</sup> These charges arose from an incident in which Applicant and his co-defendant were last seen with Amanda Fisher ("Victim") before Victim was found dead. Applicant was seen on video surveillance driving Victim's car and purchasing items with her credit cards after the murder. Applicant was also seen by a child witness burning Victim's car after the murder. The jury convicted Applicant as indicted. Judge Steven H. John sentenced Applicant to forty-five (45) years for Murder, five (5) years for Grand Larceny, and five (5) years for Possession of a Weapon during the Commission of a Violent Crime. These sentences were to run concurrently.

Applicant timely filed a notice of appeal. The Court of Appeals affirmed the Applicant's convictions and sentences, determining (1) the State presented extensive circumstantial evidence Applicant acted as the principal in shooting Amanda Fisher ("Victim"); (2) the trial court did not abuse its discretion in declining to charge the jury that evidence of flight or cover-up attempts after

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<sup>2</sup> The offense of murder is a violent, most serious felony punishable by death, or mandatory minimum term of imprisonment for thirty years to life. *See* S.C. Code Ann. §16-03-20.

<sup>3</sup> The offense of grand larceny value more than \$2,000 but less than \$10,000 is a felony and must be fined in the discretion of the court or punishable by imprisonment for not more than five years. *See* S.C. CODE ANN. § 16-13-30.

<sup>4</sup> The offense of possession of a weapon during the commission of a violent crime is a violent felony punishable by imprisonment for five years in addition to the punishment provided for the principal crime. *See* S.C. CODE ANN. § 16-23-490.

<sup>5</sup> Gregory Scott Bellamy, Esq. was admitted to the bar in November 1990. He further testified that he was law clerk to the Hon. Sidney M. Floyd, was an assistant solicitor for the 15<sup>th</sup> circuit from 1991-1995 and entered private practice in 1995 to the present concentrating in criminal defense.

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JG

the crime are not alone enough to convict Applicant because the State presented more than just flight and cover-up evidence; (3) the trial court's err in prohibiting Applicant from cross-examining Detective Lynam about statements he made during interrogation was a harmless error; (4) the trial court did not abuse its discretion in admitting the identification of the minor witness ("SH"); and (5) argument regarding presentation of conflicting theories was unpreserved. *State v. McIver*, Op. No. 2021-UP-353 (Ct. App. filed Oct. 13, 2021). The Remittitur was sent on November 5, 2021.

#### CURRENT APPLICATION

Applicant timely commenced this PCR action on October 17, 2021, alleging he is being held in custody unlawfully for the following reasons:

##### **Ineffective Assistance of Counsel**

- a. Failure to object to testimony regarding an incident in which Applicant filmed his co-defendant and Victim's cousin having sex without their knowledge.
- b. Failure to object to the jury charge on hand of one, hand of all theory of accomplice liability.
- c. Failure to object to the State's opening statement which contained references to the hand of one, hand of all theory of accomplice liability.
- d. Failure to object to unsupported arguments and references not in evidence during the State's closing.
- e. Failure to request a jury charge on cover up evidence or preserve the issue for appellate review.
- f. Failure to object to a photo lineup and identification of Applicant on the basis of minor witness' (SH) age and competency.
- g. Failure to argue minor witness' (SH) identification was unreliable due to witnesses' age and competency.
- h. Failure to object to State's improper presentation of conflicting theories, in violation of due process.

On January 18, 2022, Respondent filed its Return. On December 20, 2022, Applicant amended his application to raise the following additional allegations:

##### **Ineffective Assistance of Counsel**

- i. Failure to move for severance of the trial from Applicant's co-defendant.

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[Signature]

- j. Made statement during opening and closing arguments that incriminated Applicant by stating to the jury that Applicant was guilty of grand larceny.
- k. Making statements in opening and closing arguments that “bolstered” the State’s theory of accomplice liability.

Before this Court are the Horry County Clerk of Court records of the subject conviction; Applicant’s records from SCDC; the appellate records; the trial transcript; and the records of the current PCR action.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the trial transcript in its entirety and has heard the testimony at the PCR hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony. After a careful review based on the *Strickland* standard set forth below, this Court finds Applicant has failed to carry his burden of proof. Below are this Court’s findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

#### **Ineffective Assistance of Counsel**

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRCPP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). An applicant alleging ineffective assistance of counsel must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. at 441, 334 S.E.2d at 813. “The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases.” *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. at 441, 334 S.E.2d

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[Signature]

at 813. An applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland*, 466 U.S. at 687–88; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. Applicant must prove prejudice by showing “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. *Strickland* requires that trial counsel be given leeway to make reasonable strategic decisions. *Strickland*, 466 U.S. at 688-89 (stating “[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant.”). Judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689.

#### ***Failure to Object to the Sex Video***

This Court finds Applicant failed to prove Counsel was ineffective for failing to object to testimony that Applicant recorded Victim's cousin and his co-defendant having sex. Failing to object does not automatically constitute ineffective assistance of counsel. *See Millidge v. State*, 422 S.C. 366, 374, 811 S.E.2d 769, 800-01 (2018) (stating an applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel for failing to preserve an issue). At trial, Tabettha Oxendine, Victim's cousin, testified that Applicant filmed sexual activity between her and his co-defendant without her consent. (R. 493-94). Counsel testified at the evidentiary hearing that he did not object to this testimony because he believed the testimony was beneficial to the defense's theory that there was no plan between Applicant and his co-defendant to murder Victim,

which he believed would refute the State's theory of hand of one, hand of all accomplice liability. Counsel testified he believed the video supported his argument that Applicant's encounter with Victim was a casual encounter. Counsel further testified that this testimony corroborated the defense's theory that the parties were all getting along and depicted that the Applicant wasn't doing "anything bad." This Court finds *credible* Counsel's testimony that he believed the testimony was beneficial to the defense's theory of a casual encounter showing there was no plan to commit the murder. This Court finds Counsel articulated a reasonable strategic reason for not objecting to the video. Further, this Court finds Applicant failed to prove prejudice by showing a reasonable probability the result of trial would have been different but for Counsel's failure to object. Thus, Applicant failed to meet his burden.

***Failed to Spend Adequate Time and Prepare***

This Court finds Applicant failed to prove Counsel was ineffective for failing to prepare and spend adequate time on his case. Although not raised in his pleadings, there was testimony from Applicant that Counsel met with him a few times and Applicant did not receive discovery. In order to prevail upon a claim that counsel did not adequately prepare, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop if counsel had more fully prepared. *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998). "[B]revity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." *Smith v. State*, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must show evidence of how additional preparation or communication would have resulted in a different outcome. *Id.*; *See Jackson*, 329 S.C. at 353-54, 495 S.E.2d at 772.

This Court finds *credible* Counsel's testimony that he discussed, shared, and reviewed discovery with Applicant. This Court finds *credible* Counsel's testimony that he reviewed videos