

VOLUME II OF III

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Honorable Patrick Cleburne Fant, III, Circuit Court Judge

JERMAINE HARTWELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000867

APPENDIX

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1 MR. BOLUS: Yes.

2 THE COURT: Mr. Barnwell? Or do you need more time to
3 review what was just handed to you?

4 MR. BARNWELL: Let me see if I can --

5 (Sotto voce discussion between all counsel.)

6 MR. JENNINGS: Your Honor, I'll hand up, and I guess
7 we could make it a Court's Exhibit. A letter was left here
8 in our front office --

9 THE COURT: Uh-huh.

10 MR. JENNINGS: -- or front desk.

11 THE COURT: Uh-huh.

12 MR. JENNINGS: The person that left it didn't identify
13 themselves.

14 THE COURT: Uh-huh.

15 MR. JENNINGS: The letter's not signed.

16 THE COURT: Uh-huh.

17 MR. JENNINGS: It purports to have information
18 involving this case, but we've got ---

19 THE COURT: Do you have the original?

20 MR. JENNINGS: This is what -- this is -- this is the
21 piece that was left in our office.

22 THE COURT: Can you let them see it so they can --

23 It was left when? It was left when?

24 MR. JENNINGS: It was there when we -- we got down
25 when we broke for lunch.

1 THE COURT: Okay.

2 MR. JONES: Your Honor, it claims that ---

3 THE COURT: I'm sorry. I cannot hear you.

4 MR. JONES: May we approach?

5 THE COURT: Uh-huh.

6 (Bench conference.)

7 MS. WILSON: Judge, I thought you said "2:00." I'm
8 sorry we were late.

9 THE COURT: I accept your apology.

10 Do y'all need more time to look over that? I know
11 mine's really not legible, but you all have the original,
12 correct?

13 (Sotto voce discussion between Ms. Wilson and Mr. Bolus.)

14 (Bench conference.)

15 (Pre-marked State's Exhibit No. 83 for identification.)

16 THE COURT: Okay. Is the State ready to proceed?

17 MR. JENNINGS: The State's ready, Your Honor.

18 THE COURT: Is the Defense -- Mr. Bolus, are you ready
19 to proceed?

20 MR. BOLUS: Yes.

21 THE COURT: Mr. Barnwell?

22 MR. BARNWELL: I'm ready, Your Honor.

23 THE COURT: Mr. Jones?

24 MR. JONES: Ready, Your Honor.

25 THE COURT: Please bring in the jury.

1 (Jury enters at 2:01 p.m.)

2 THE COURT: You may be seated. Ladies and gentlemen,
3 I hope that you all had a restful lunch and that you are
4 refreshed. We'll now resume with the trial. The State may
5 proceed.

6 MR. JENNINGS: Your Honor, if we could, the State and
7 the Defense have entered into two stipulations.

8 THE COURT: Ladies and gentlemen, for purposes of
9 explanation, the State is going to publish what we call
10 "stipulations." A stipulation is an agreement, which means
11 that it -- it is matters that the parties have agreed upon
12 and it requires no further proof.

13 Mr. Jennings, you may proceed.

14 MR. JENNINGS: Thank you, Your Honor.

15 THE COURT: And I apologize I have a mint in my mouth;
16 I didn't expect I was going to have to talk. You may
17 proceed, Mr. Jennings.

18 MR. JENNINGS: The first stipulation concerns State's
19 Exhibits 63 and 64, which are the swabs of blood taken from
20 Snow Goose Circle and Dutch Fork. The parties stipulate
21 this is in State's Exhibit 79. We will offer into evidence
22 the parties stipulate that State's Exhibit 63, the swabs
23 taken from 1106 Snow Goose Lane, and State's Exhibit 64,
24 the swabs taken from 634 Dutch Fork Drive, were sent to the
25 South Carolina Law Enforcement Division for DNA testing.

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1 DNA profile for each swab was compared with DNA profile of
2 the victim, Dexter Perry, and each defendant.

3 South Carolina Law Enforcement Division Forensic
4 Scientist Manuel Ortuno determined the DNA profile for each
5 swab matched the DNA profile of Dexter Perry. The
6 possibility of randomly selecting an unrelated individual
7 having the DNA profile matching Dexter Perry and that for
8 each swab is one in 30 quadrillion.

9 The other stipulation which is outlined in a report in
10 State's Exhibit 83, a report done by Investigator Owen with
11 the Charleston County Sheriff's Department. And he
12 processed the silver Pontiac that Mr. Hollins has admitted
13 driving on the night of the robbery. Processed for
14 fingerprints and any forensic evidence and found no latent
15 fingerprints in the car or blood.

16 We would offer State's Exhibit 79 and 83 into
17 evidence.

18 THE COURT: Any objection? Mr. Bolus?

19 MR. BOLUS: None.

20 THE COURT: Mr. Barnwell?

21 MR. BARNWELL: None, Your Honor.

22 THE COURT: And Mr. Jones?

23 MR. JONES: None.

24 THE COURT: Marked and admitted without objection.

25 You may proceed.

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(Marked State's Exhibit No. 79, stipulation.)

(Marked State's Exhibit No. 83, field report.)

MR. JENNINGS: Your Honor, the State calls Agent Dan DeFreeze.

DAN DEFREESE, having been first duly sworn, testifies as follows:

COURT OFFICER: Please be seated. State your full name and spell your last name for the record.

A My name is Frank Dan DeFreeze. That's capital D-e-capital F-r-e-e-s-e.

THE COURT: E-e-s-e?

DET. DEFREESE: Yes, ma'am.

THE COURT: You may proceed.

DIRECT EXAMINATION BY MR. JENNINGS:

MR. JENNINGS: Thank you, Your Honor.

Q Agent DeFreeze, where are you employed, sir?

A I work for the South Carolina Law Enforcement Division in the Forensic Services Laboratory in Columbia.

Q And what are your duties and responsibilities with SLED?

A I'm assigned to the part of the laboratory where we do the analysis of firearm and toolmark evidence. And I have a caseload of firearm and toolmark related evidence that I examine, make reports, and appear in court about.

Q And what training have you received in the field of

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1 firearms and toolmark identification?

2 A My principal training occurred at SLED. But after my
3 employment, I was assigned to the firearm and toolmark
4 department, and I undertook the course of instruction
5 (clears throat) -- excuse me -- that lasted about 2 1/2
6 years. And during that period of time, I studied the
7 technique of firearm and toolmark identification under Lt.
8 Millard Kay. Lt. Kay established the SLED laboratory when
9 SLED itself was established in 1947. After that 2 1/2 year
10 period of time, I began accepting cases on my own and
11 testifying as to my results. I've been doing that since
12 1969.

13 Q And if you had to estimate, p how many opportunities
14 have you had to examine either projectiles or guns in
15 making toolmark identification?

16 A Thousands of times.

17 Q And in those situations, have you had the opportunity
18 to testify as an expert in State and Federal Court?

19 A I have.

20 Q And approximately how many times?

21 A I don't actually know, but I estimate it between six
22 and seven hundred times.

23 MR. JENNINGS: Your Honor, we would offer Agent
24 DeFreese as an expert in the area of firearms and toolmark
25 identification.

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1 THE COURT: Any objections?

2 MR. BOLUS: No objection.

3 MR. BARNWELL: No objection.

4 MR. JONES: None, Your Honor.

5 THE COURT: So admitted. You may proceed.

6 Q Agent DeFreese, can you explain to the jury what
7 exactly "firearms identification" is?

8 A The -- the principal things that we're asked to do in
9 the field of firearms identification are to identify
10 bullets or ammunition components back to the firearms of
11 which they are fired. In the case of a rifle firearms,
12 it's possible to identify a particular bullet back to the
13 particular gun barrel in which it's fired based on the
14 unique toolmarkings that are left on the bullet at the time
15 the bullet's fired through the barrel.

16 And in the case of cartridge cases, it's possible to
17 identify the unique markings left on those cartridge cases
18 by the guns of which they are fired. These are markings
19 that are left over from the manufacturer of the gun and
20 markings that occur randomly during the life -- the useful
21 life of the gun.

22 And when we recover bullets in sufficiently good
23 condition and cartridge cases that are undamaged, it's
24 possible to associate back -- them back to the firearm in
25 which they were fired.

1 We also do firearm safety analysis, distance
2 determinations in shotgun-related cases, and a host of
3 other allied kinds of examinations. But the -- the
4 principal question we get asked is, "Was this bullet fired
5 by this gun, or were these two bullets fired by the same
6 gun, or this cartridge case?" That sort of thing.

7 Q Okay. And what is it, if you could sort of explain,
8 the process of when a gun fires, how is a mark left on a
9 particular bullet or projectile?

10 A Sure. The firearms we deal with are firearms that use
11 fixed ammunition, that is they use cartridges. When a
12 cartridge is fired in a case of center-fire ammunition,
13 there's a primer at the rear of the cartridge case that's
14 struck by the tip of the firing pin in the firearm.

15 The imperfections that are present on the tip of the
16 firing pin -- if there are any -- can be transferred to the
17 primer or to the back of the cartridge case. After the --
18 the primer goes off and sets off the -- the main charge in
19 the cartridge, an area of really high pressure is built up
20 inside the cartridge case.

21 The cartridge case is being supported by the gun
22 barrel or the cylinder of the gun, which keeps the
23 cartridge case from bursting. But the sides of the
24 cartridge case and the end of the cartridge case are very,
25 very forcefully pressed against the surfaces inside the gun

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1 as a result of the pressure that occurs during the firing.

2 This embosses whatever imperfections are present in the gun
3 onto the cartridge case. In some guns the cartridge case
4 is also marked by an extractor or ejector mechanism in the
5 case of semi-automatic firearms.

6 At some point the pressure inside the cartridge builds
7 up to the point where it seeks to escape, and it does so by
8 driving the bullet down the barrel and out of the gun, or
9 in the case of a failure, by blowing the gun up. But
10 typically it's done so by driving the bullet down and out
11 of the bore.

12 The inside of the bore of a rifle firearm has a series
13 of spiral and grooves. The bullet is a very, very tight
14 fit in the bore, that is, the bullet won't just drop
15 through the barrel. The -- the bullet has an interference
16 fit with the barrel which causes the grooves to grip the
17 bullet and impart a spin on it. This is done for the
18 purpose of enhancing the accuracy of the -- of the bullet
19 in flight. Much in the same way the quarterback puts a
20 spin on a football to keep it from tumbling end over end,
21 the gun imparts a spin on a conical bullet to keep it from
22 tumbling end over end.

23 During the process of making the gun barrel, there are
24 a number of machine operations that have to occur to create
25 the -- the barrel itself and to create the grooves in the

1 barrel. This leaves unique markings on some portions of
2 the inside of the barrel which can be transferred to each
3 and every bullet fired in that barrel. It's those unique
4 markings that we're looking for to identify a particular
5 bullet back to one and only one gun barrel. A great many
6 gun barrels are made with essentially the same class
7 characteristics, that is, the same number of lands and
8 grooves and the same direction of twists. But one and only
9 one gun barrel is going to have that unique set of -- of
10 markings that will permit us to identify a particular
11 bullet back to it.

12 Q And the lands and grooves that you refer to, that's in
13 the actual barrel of the firearm?

14 A Correct. When you look down the barrel of the
15 firearm, which is a tube-like structure, you'll see the
16 rifling appear as swirls which generally go either to the
17 left or to the right. They appear to go to the left or to
18 the right according to the direction which the bullet is
19 spun.

20 Q And it's that rifling that is imparted on the
21 projectile as it travels down the barrel of the gun?

22 A It's the impression of the rifling. It's the damage
23 that the rifling in essence does to the bullet. It's the
24 deformation that occurs to the bullet which appears as a
25 series of striated marks or scratching. As the bullet

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1 moves, the bullet is being scratched by the inside surfaces
2 of the gun barrel.

3 Q And then so that bullet's in sufficient condition, you
4 can look at it and tell the type of rifling and the
5 direction of that rifle?

6 A Yes.

7 Q And when we're talking -- some of the terms you're
8 using with the bullet, if somebody wasn't familiar with the
9 exact scientific terms, the part being -- actual part that
10 comes out of the gun is called the "projectile"?

11 A It's the bullet.

12 Q The bullet. Okay.

13 A What many people refer to as a bullet is a whole
14 cartridge.

15 Q Uh-huh.

16 A Which consists --

17 THE COURT REPORTER: It's a -- I'm sorry. It's a
18 what?

19 AGENT DEFREESE: A cartridge.

20 THE COURT REPORTER: No. You said something before
21 that. A whole cartridge?

22 AGENT DEFREESE: A whole cartridge.

23 THE COURT REPORTER: Thank you.

24 A The unfired cartridge consists of a cartridge case, a
25 primer, the propellant powder, and the bullet itself in the

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1 case of center-fire ammunition.

2 Q And the case, that's the part that the gun -- the
3 firing pin strikes?

4 A The case holds the primer and the primer is that
5 portion that the firing pin strikes. The primer is -- in
6 center-fire ammunition -- is a cup-like structure that
7 contains a percussion-sensitive chemical, that is, when
8 it's struck very smartly, it detonates. And when it
9 detonates, it causes the propellant powder to catch fire
10 and the powder is what drives the bullet out of the gun.

11 Q And in this case, were a number of items submitted to
12 you for your inspection?

13 A Yes.

14 Q Show you what's marked as State's Exhibit 55, 56, and
15 57, and see if you recognize those items.

16 A Yes, sir. I do.

17 Q Okay. And those are all shell casings, correct?

18 A That's correct. They're all three fired .45 auto
19 caliber cartridge cases. Some people call them "shell
20 cases."

21 Q Okay. And were you able to examine those to look at
22 the -- the breach-face impression on each of those items?

23 A I was.

24 Q And were you able to draw any conclusions based on
25 your examination of those three casings?

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1 A Yes, sir.

2 Q And what were those?

3 A My conclusion was that all three of them were fired by
4 the same firearm. I found matching breach-face markings
5 which permitted me to conclude that they were all fired by
6 the same gun.

7 Q Okay. And explain to the jury the difference when we
8 use the term "semi-automatic handgun" and a "revolver."
9 What are the significant differences between those two
10 types of firearms?

11 A Both are handguns. A revolver is a manually operated
12 handgun which is characterized by having a cylinder, which
13 is usually in the center of the gun. And that cylinder has
14 a number of separate chambers into which you can put
15 cartridges, 4 or 5, 6 or more cartridges. The cartridges
16 are placed in the cylinder manually and they're removed
17 from the cylinder manually. That is, the gun has nothing
18 to do with the movement of the cartridge cases. After the
19 cartridges are placed in the cylinder, the gun is fired.

20 Some guns are what we call a "double-action revolver,"
21 and that is all you have to do is pull the trigger -- one
22 long pull of the trigger, which will cause the hammer to be
23 cocked. And then at some point, the hammer will be
24 released, resulting in firing.

25 Other revolvers are known as "single-action

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1 revolvers," which require the hammer to be manually cocked
2 and then the trigger to be pulled to fire, much in the way
3 the western-style revolvers are. But in any event, with a
4 revolver, the cartridge cases stay in the gun until the gun
5 is reloaded by hand.

6 Semi-automatic firearms do some of the work for the
7 shooter. That is, a semi-automatic firearm takes
8 cartridges that are loaded into a magazine -- which is
9 usually a spring-loaded box in the grip of the gun -- and
10 then as the cartridges are fired, the gun uses some of the
11 energy of firing to extract and eject the cartridge case --
12 the fired cartridge case from the gun after the bullet
13 leaves the barrel; and then to load the next cartridge from
14 the magazine into the chamber because it only has one
15 chamber. So that with a semi-automatic firearm, each time
16 the trigger is pulled a bullet leaves the barrel and a
17 cartridge case is ejected -- without any work on the part
18 of the shooter -- from the gun. Whereas with the revolver,
19 each time the trigger is pulled the bullet leaves, but the
20 cartridge cases stay.

21 Q So in a crime scene if a semi-automatic weapon is
22 fired, if -- what would you expect to find at the scene,
23 unless they're removed?

24 A I would expect to see -- for each bullet fired there
25 would be one cartridge case. That each time the -- the gun

DIRECT EXAMINATION BY MR. JENNINGS / DAN DeFREESE Page 515
1 fires a bullet, the gun would eject a cartridge case, so

2 long as -- as the gun's working properly.

3 Q And with a revolver, unless the cartridges are
4 manually removed by the shooter, they would not be at the -
5 - they would not be outside of the chamber.

6 A There would be no -- no need for them to be extracted
7 and ejected from the gun until the shooter decided to do
8 so.

9 Q Show you two -- the next two items, which are State's
10 Exhibit 54 and State's Exhibit 60. See if you can identify
11 those, please.

12 THE COURT: Is he going to be referring to that?

13 MR. JENNINGS: I'm just going to write a summary of
14 what he says.

15 THE COURT: Can you do it to the side so that ---

16 MR. JENNINGS: Okay.

17 THE COURT: --- everybody will be able to see it?

18 MR. JENNINGS: All right.

19 THE COURT: Thank you.

20 Q Yes, sir.

21 A Yes, sir. I -- I have examined these before.

22 Q Okay. And State's Exhibit 60, as already been
23 testified -- that is a projectile that was removed from the
24 freezer?

25 A State's Exhibit 60 is a fired bullet core. It's a

DIRECT EXAMINATION BY MR. JENNINGS / DAN DeFREESE Page 516
1 part of the bullet, but not a whole bullet.

2 Q Okay. And that was removed from the freezer in the
3 home?

4 A Yeah.

5 Q That's already been testified to.

6 A Right.

7 Q And State's Exhibit 54.

8 A State's Exhibit 54 is a fired .45 caliber full-metal-
9 jacketed bullet.

10 Q And based on your examination, State's Exhibit 60 and
11 State's Exhibit 54, were they both -- did they have the
12 same general characteristics?

13 A No, they do not.

14 Q Okay. What was the -- as for State's Exhibit 60, what
15 type of projectile was that?

16 A State's Exhibit 60 was a -- a fired, plain lead bullet
17 core that was consistent in it's size, weight, and physical
18 characteristics with that of a .38 caliber. And it was
19 fired from a .38 caliber firearm with five lands and
20 grooves. That is, it has a five-groove barrel.

21 State's Exhibit 54 is a somewhat larger .45 caliber
22 bullet. It was fired from a .45 caliber firearm that has
23 six lands and grooves.

24 Q Okay. Was one of the other -- one of the other
25 bullets you were provided was also a .45 caliber?

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1 A Yes.

2 Q Which item was that?

3 A It would be my item 7.

4 Q Okay. Which is -- and I show you what's marked as
5 State's Exhibit 59.

6 A Now, this is my item 8.

7 Q Okay. There you go.

8 THE COURT: What number is that, Mr. --

9 MR. JENNINGS: I'm sorry.

10 MR. DeFREESE: State's Exhibit 58.

11 THE COURT: Thank you.

12 A This is State's Exhibit 58. It's also a fired .45
13 caliber full-metal-jacketed bullet.

14 Q Okay. And that's a bullet as well.

15 A Yes.

16 Q And State's Exhibit 58 was found in the home in front
17 of the dryer. And both State's Exhibit 54 and 58 were both
18 .45 caliber?

19 A They were both .45 caliber; they both had six lands
20 and grooves with right-hand twists; and they also had
21 matching individual characteristics present from which I
22 concluded that both of these bullets were fired from the
23 same gun barrel.

24 Q Okay. So they are both .45 caliber; both had six
25 lands and grooves?

1 A Yes, sir.

2 Q And based on your examination were fired by the same
3 gun?

4 A Correct.

5 Q And State's Exhibit 54 and 58, being .45 caliber,
6 would have been consistent in caliber as having been
7 contained in the casings of State's Exhibit 55, 56, or 57?

8 A They could have been.

9 Q And I'll show you what's marked as State's Exhibit 59.
10 Do you recognize that item?

11 A Yes, sir, I do.

12 Q And what -- that is a bullet?

13 A It is. This is a fired .38 caliber full-metal-
14 jacketed bullet.

15 Q Okay.

16 A This bullet bears six land and groove right-hand twist
17 rifling impressions.

18 Q And that bullet, based on prior testimony, was found
19 under a chair in the living room.

20 I'll show you what's marked as State's Exhibit 61 and
21 62, which were two projectiles removed from the exterior of
22 this home where the incident took place.

23 A Yes, sir. I've seen State's Exhibit 61 and 62 before.

24 Q And what are the general characteristics of -- or what
25 -- what caliber are both of those?

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1 A These are also consistent with .38s and they are also
2 full-metal-jacketed bullets.

3 Q And how many land and grooves are shown on State's
4 Exhibit 61 and 62?

5 A They each have six. Six lands and grooves with right-
6 hand twists.

7 Q Now, were you able to microscopically prepare those
8 three items to make a finding as to whether they were fired
9 by the same gun?

10 A Yes, sir, I was.

11 Q And what were your findings as to those?

12 A I found matching individual markings on all three of
13 these bullets. And it was my conclusion that State's
14 Exhibit 59, 61, and 62 were all three fired by the same gun
15 barrel.

16 Q Okay. Now, we'll go back to State's Exhibit 60, which
17 was the bullet core that was removed from the freezer.

18 A Yes, sir.

19 Q And if we could, if you could tell us again what your
20 -- were you able to make a determination of the -- the
21 caliber of the bullet core?

22 A Yes, sir. In it's size and weight and its
23 construction, it was wholly consistent with that of a .38
24 caliber bullet.

25 Q Okay.

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1 A And even though the -- the core is not the part of the
2 bullet that's directly marked by the gun barrel, there is a
3 jacket that covers the outside of the bullet and the core -
4 - the lead core. The softer part of it is in the middle.
5 The impressions of the rifling are transferred through the
6 jacket when the jacket deforms onto the core. So I was
7 able to observe the -- the same five land and groove
8 rifling impressions on State's Exhibit 60.

9 Q So it had five lands and grooves?

10 A Yes, it had five land and groove impressions on it.
11 Of course, since it never actually came into contact with
12 the gun barrel, it had no striated markings that would be
13 suitable to identify it to a particular gun.

14 Q Now, based just on that single class characteristic
15 that there were only five lands and grooves, in your
16 opinion, is it possible that the gun that fired State's
17 Exhibit 60 -- is there any way that that gun fired State's
18 Exhibit 59, 61, or 62?

19 A No, sir.

20 Q Okay. And that's because --

21 A They're the wrong class characteristics.

22 Q Yes, sir. And that automatically excludes --

23 A Yes, sir.

24 Q Okay. State's Exhibit 53.

25 A Yes, sir. I've -- I've seen this before. State's

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1 Exhibit 53 is a fired .38 caliber. This is an aluminum-
2 jacketed hollow-point bullet. It's a type of bullet that
3 used to be made by the Winchester Company that was sold
4 under the name of "Silvertip." They no longer make this
5 bullet in this way, that they've discontinued the aluminum-
6 jacket in favor of more traditional materials. So it's a -
7 - a relatively characteristic bullet has not been made for
8 some years.

9 The -- the core portion of -- of this bullet, State's
10 Exhibit 53, has the same observable characteristics as the
11 core in State's Exhibit 50. That is the way it's base
12 structure and certain other physical characteristics of it
13 are similar in construction to the bullet in State's
14 Exhibit 53.

15 Q And State's Exhibit 60?

16 A Sixty and -- the core of 60 is made just like the core
17 of 53.

18 Q Yes, sir. And 53 was removed from the victim during
19 the autopsy.

20 THE COURT REPORTER: I'm sorry. What did you say, Mr.
21 Jennings?

22 MR. JENNINGS: That was removed from the victim's
23 esophagus during the autopsy.

24 Q How -- on State's Exhibit 53, how many lands and
25 grooves are shown on -- on that bullet?

1 A It has five.

2 Q Okay. And in the -- in this case, of the evidence
3 that was submitted to you, there were five .38 caliber
4 bullets. State's -- well, we've already gone over State's
5 Exhibit 59 that was recovered under the chair; State's
6 Exhibit 61 and 62 that were found in the outer wall of the
7 home. Each -- State's Exhibit 59, 61, and 62 each had six
8 lands and grooves and right-hand twists.

9 A Correct.

10 Q And State's Exhibit 60 and 53 were also .38 caliber.
11 State's Exhibit 60 was recovered from the freezer; State's
12 Exhibit 53 was recovered from the victim at the time of the
13 autopsy. Both of those items have five lands and grooves.

14 A Correct.

15 Q Based on -- in your opinion, is there any way that the
16 gun that fired State's Exhibit 60 or 53 also fired State's
17 Exhibit 59, 61, and 62?

18 A No, sir.

19 Q And that's based on the general class characteristics
20 of the lands and grooves?

21 A Correct.

22 Q Based on -- on these items that were submitted, then
23 we would -- we would at a minimum have had three guns
24 firing these projectiles.

25 A No less than three.

DIRECT EXAMINATION BY MR. JENNINGS / DAN DeFREESE Page 523

1 Q . A .45 caliber.

2 A Correct.

3 Q One .38 caliber with six lands and grooves.

4 A Correct.

5 Q And the other .38 caliber ammunition with five lands
6 and grooves.

7 A Correct.

8 Q Can -- .38 caliber ammunition can obviously be fired -
9 - fired from a .38 caliber handgun?

10 A Yes, sir.

11 Q Could it also be fired from a -- a .357?

12 A Yes, sir. There's a one-way interchange between .38
13 special ammunition and .357 magnum. That is, you can fire
14 .38 special cartridges and .357 magnum caliber cartridges
15 in a .357 magnum caliber firearm. But you can only fire
16 .38 special caliber cartridges in a .38 special. The
17 magnum cartridge is somewhat longer to prevent you from
18 putting it into a .38 special.

19 Q And finally, of the items submitted to you, there were
20 two of bullets that were removed from the victim's body:
21 State's Exhibit 54, that was a .45 caliber --

22 A Correct.

23 Q -- and State's Exhibit 53, that was a .38 caliber with
24 five lands and grooves.

25 A Yes, sir.

1 Q And based on your testimony, the same gun that fired
2 59, 61, and 62 could not have fired the bullet -- either of
3 State's Exhibits 54 or 53.

4 A That's correct.

5 Q That's all I have. If you'd answer any questions of
6 the Defense attorneys, please.

7 MR. BOLUS: None.

8 THE COURT: Mr. Barnwell?

9 MR. BARNWELL: None, Your Honor.

10 MR. JONES: None, Your Honor.

11 THE COURT: Any objection to the witness being
12 excused? From the State?

13 MR. JENNINGS: No, Your Honor.

14 THE COURT: From the Defense?

15 MR. BOLUS: None.

16 MR. BARNWELL: None, Your Honor.

17 MR. JONES: None, Your Honor.

18 THE COURT: Sir, you're excused.

19 AGENT DEFREESE: Thank you.

20 THE COURT: You're welcome.

21 Ladies and gentlemen, while we're calling our next
22 witness, why don't y'all stand up and stretch a little bit.

23 All right. You may call your next witness.

24 MR. JENNINGS: Thank you, Your Honor. The State calls
25 Lt. Mark Mason.

DIRECT EXAMINATION BY MR. JENNINGS / MARK MASON Page 525
MARK MASON, being first duly

1
2 sworn, testified as follows:

3 COURT OFFICER: Please be seated, state your full
4 name, and spell your last name for the record.

5 LT. MASON: Mark Mason. M-a-s-o-n.

6 THE COURT: You may proceed.

7 DIRECT EXAMINATION BY MR. JENNINGS:

8 Q Lt. Mason, you're employed with the sheriff's
9 department?

10 A Yes, sir.

11 Q And you are lieutenant over the investigative
12 division?

13 A Yes, sir.

14 Q And you and Sgt. Merrithew were essentially active as
15 the lead detectives in this case?

16 A Yes, sir.

17 Q Did you become involved on the early morning of August
18 the 2nd?

19 A I did.

20 Q And I believe through all the testimony that's come
21 out, immediately that night the victim said that Manny had
22 been involved.

23 A That morning. Yes, sir.

24 Q Okay. So was that the first bit of information y'all
25 had that you began trying to track down?

1 A Yes, sir.

2 Q And based on your investigation, were you able to come
3 up with a possible ID of -- of a person named "Manny"?

4 A Yes, sir.

5 Q And what was that person's name?

6 A Mr. Hartwell, Jermaine Hartwell.

7 Q And once -- you know, once you had that information,
8 what did you do to try to -- to clarify whether y'all were
9 talking about the same person?

10 A I took the information we had, obtained a driver -- it
11 was either a driver's license or a South Carolina ID card,
12 e-mailed that information to SLED so they could do a photo
13 lineup for us. They utilize the DMV database. So they
14 pulled his driver's license photo and also five other
15 photos, and prepared that photo lineup for us.

16 Q And when you're getting the photo lineup together, you
17 will try to get people of the same race?

18 A Yes, sir.

19 Q Same general facial features?

20 A Yes, sir.

21 Q Facial hair?

22 A Yes, sir.

23 Q Complexion?

24 A Yes, sir.

25 Q And were you able to get a photo lineup that contained

1 a picture of Jermaine Hartwell?

2 A Yes, sir. That -- that day SLED did e-mail me back a
3 photo lineup containing Jermaine Hartwell and five other
4 males.

5 Q I'm going to show you what's marked as State's Exhibit
6 No. 4. Do you recognize that?

7 A Yes, sir.

8 Q Is that the photo lineup that was put together?

9 A That is.

10 Q And which picture was Jermaine Hartwell?

11 A Number 5.

12 Q And on the back of this document -- you showed this to
13 Joe Husser?

14 A Yes, sir.

15 Q And he was a witness in the case?

16 A Yes.

17 Q When did you show it to him?

18 A It would have been August 2nd, 2006. Time dated was
19 14:24,, which would have been 2:24 in the afternoon. So it
20 would have been just a little bit before 2:24 in the
21 afternoon.

22 Q And that would have been on the same day as the
23 incident ---

24 A Yes, sir.

25 Q --- just later on?

1 A Yes, sir.

2 Q And when you met with Mr. Husser, where did you meet
3 with him?

4 A It was on the main drive into the trailer park, right
5 outside the Cobb [sic] residence, and we were in my
6 vehicle. I was in the driver's front seat, and Mr. Husser
7 was in the front passenger seat.

8 Q And when you spoke with Mr. Husser, did you give him
9 any instructions prior to him looking at the photographs?

10 A There is a little paragraph on the back of the folder
11 that I read to him.

12 Q And can you read it to the jury as you read it to Mr.
13 Husser?

14 A (As read) "You will be asked to look at a group of
15 photographs. The fact that the photographs are shown to
16 you should not influence your judgment. You should not
17 conclude or guess that the photographs contain the picture
18 of the person who committed the crime. You are not
19 obligated to identify anyone. It is just as important to
20 free innocent persons from suspicion as to identify guilty
21 parties. Please do not discuss the case with other
22 witnesses or indicate in any way that you have identified
23 someone."

24 Q And those were the only instructions you gave to him?

25 A I told him to take his time and look at the photo

DIRECT EXAMINATION BY MR. JENNINGS / MARK MASON
lineup.

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1

2 Q Okay. And was he able to select any photograph?

3 A He was.

4 Q And which picture did he identify?

5 A He identified number 5.

6 Q Okay. Did he indicate to you there was any doubt?

7 A No doubt.

8 Q And who was he identifying Mr. Hartwell as being?

9 A One of the people that was in the residence holding
10 onto the -- to Dexter Perry.

11 Q And -- and he indicated that he was armed?

12 A Yes, sir.

13 Q And in fact, you had him memorialize his selection in
14 State's Exhibit No. 52?

15 A Yes, sir.

16 Q Okay. That day you -- obviously as things progressed,
17 you received some more information concerning other
18 potential suspects?

19 A Yes, sir.

20 Q And did you -- were other further lineups compiled
21 with these suspects in them?

22 A Yes, sir.

23 Q And Mr. Gary Grant was one of those?

24 A Yes, sir.

25 Q And who prepared -- let me show you these State's

DIRECT EXAMINATION BY MR. JENNINGS / MARK MASON
Exhibit No. 1 and No. 2. Do you recognize those

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photographs?

A Yes, sir.

Q And based on the -- the way Mr. Grant looked, five other photos were selected with the same race, same general facial features?

A Yes, sir.

Q And who were these State's Exhibit No. 1 and No. 2 shown to?

A It was Ms. Birdie Cobb and Mr. Cobb.

Q Okay. And where were you when the lineups were shown to them?

A At their residence in Silver Fox Mobile Home Park.

Q And were they together or separate when they were shown?

A They were separate.

Q And what -- were any different instructions given to them than were given to Mr. Husser?

A We had been down at Charleston County Sheriff's Office at this time when we got these photo lineups, so we didn't have the folder with us. So we just presented them like it is here, but I still gave Ms. Cobb the instructions. I didn't have it verbatim from the folder, but I said, "The person may or may not be in here. We are conducting an investigation. Take your time. You're not obligated to

DIRECT EXAMINATION BY MR. JENNINGS / MARK MASON Page 531
1 pick anybody out, but if you recognize anybody, let me know

2 it."

3 Q Okay. And did they look at both of these lineups?

4 A I -- I showed it to Ms. Birdie.

5 Q Okay. And did she make a selection?

6 A She did.

7 Q And whose picture did she select?

8 A Mr. Grant's.

9 Q Okay. And was she -- indicate any hesitation to you
10 that Mr. Grant?

11 A No. She -- she was positive about picking him out,
12 she said, "But -- but that's not his hair. He's got hair
13 now."

14 Q Okay. But no doubt in her mind that he was in her
15 home armed with a weapon?

16 A Yes. Yes, sir.

17 MR. JENNINGS: Your Honor, we'd offer State's Exhibit
18 No. 2 into evidence.

19 THE COURT: Any objection?

20 MR. BOLUS: No, ma'am.

21 MR. BARNWELL: No objection.

22 MR. JONES: No objection.

23 THE COURT: Marked and admitted without objection.

24 (Marked State's Exhibit No. 2, Photo lineup.)

25 Q And State's Exhibit No. 1, that was shown to Mr.

DIRECT EXAMINATION BY MR. JENNINGS / MARK MASON
Cobbs?

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A Yes. Detective Merrithew showed that to Mr. Cobb.

Q Okay. Defense Exhibit No. 1 was a photograph or a
lineup involving Kerry Hollins?

A Yes, sir.

Q Did you also show that to Mr. Husser?

A There was another one there. I was with Det.
Merrithew when that was shown to Joe Husser and he picked
out Mr. Hollins.

Q Okay. And indicated to you that he saw him in the
house as well?

A Yes, sir.

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

MR. BOLUS: No questions.

MR. BARNWELL: No questions.

THE COURT: Mr. Jones?

MR. JONES: I don't have any questions.

THE COURT: Any objection to the witness being
excused? From the State?

MR. JENNINGS: No, Your Honor.

THE COURT: From the Defense?

MR. BOLUS: None.

MR. BARNWELL: None.

THE COURT: Mr. Jones?

MR. JONES: No, Your Honor.

RE-DIRECT EXAMINATION BY MR. JENNINGS / DAN DeFREESE Page 533

1 THE COURT: Sir, you're excused.

2 LT. MASON: Thank you.

3 MR. JENNINGS: Your Honor, we call Sgt. Gerry
4 Merrithew.

5 Your Honor, if we could -- I left out one thing with
6 Agent DeFreese. If I could briefly recall him.

7 THE COURT: Is there any exception? Please approach.

8 MR. BOLUS: I don't have any objection.

9 MR. BARNWELL: No objection.

10 MR. JONES: No objection.

11 THE COURT: You may recall that witness.

12 Mr. DeFreese, if you would retake the stand. I'll
13 remind you're still under oath. If you would state your
14 name for the record.

15 MR. DeFREESE: Frank Dan DeFreese.

16 THE COURT: You may proceed.

17 MR. JENNINGS: Thank you.

18 THE COURT: You're welcome.

19 RE-DIRECT EXAMINATION BY MR. JENNINGS:

20 Q Agent DeFreese, I forgot to show you a -- a firearm
21 that was submitted under a different case number that --
22 that was found in the vicinity of this scene. This -- this
23 firearm is State's Exhibit 80.

24 A Yes, sir.

25 Q And did you examine that firearm as well?

1 A I did.

2 Q And what type of handgun is that?

3 A This is a Smith and Wesson military and police
4 revolver. It's a .38-special caliber firearm.

5 Q All right. And did you compare that gun with the
6 bullets that were submitted in evidence in this case?

7 A Yes, sir. I test-fired this revolver and -- and I
8 compared my test bullets with the -- some of the bullet
9 specimens submitted.

10 Q Yes, sir. And what were your findings as to -- as to
11 that testing?

12 A My findings were inconclusive with respect to two of
13 the specimens, and I don't recall the exact numbers. But
14 one of the two bullets removed from the -- the body would
15 be bullet No. 3, item -- I believe it's State's Exhibit 55.
16 Excuse me. Yes, sir. State's Exhibit 53 has five lands
17 and grooves with right-hand twists. The barrel in this
18 revolver, State's Exhibit 80, has five lands and grooves
19 with right-hand twists.

20 My comparison of test bullets fired by State's Exhibit
21 80 with this bullet were inconclusive. That is, I couldn't
22 tell whether this bullet was fired by that gun to the
23 exclusion of all other similar guns. Part of the reason
24 for that is this aluminum bullet jacket present on the old
25 style Winchester Silvertip ammunition.

RE-DIRECT EXAMINATION BY MR. JENNINGS / DAN DeFREESE Page 535

1 When I tried -- as a part of my test, I test-fire the
2 weapon with various different kinds of ammunition,
3 including ammunition like the ammunition in question. I
4 could not identify my test-fire ammunition bullets that I
5 knew this revolver had fired. I could not identify my
6 tests with each other. That is, the gun just did not
7 impart sufficient unique, repeatable markings, even on test
8 bullets. And consequently I was not able to identify
9 State's Exhibit 53 as -- as being fired by this gun, but it
10 could have been fired by this gun.

11 Now, the other .38-special caliber bullets that have
12 six lands and grooves --

13 Q Yes, sir.

14 A -- with right-hand twists could not have been fired by
15 this gun. That is, they're class negative. The bullet
16 core from the freezer that has five land and groove rifling
17 impressions could have been fired by this gun. I can't say
18 that they were, but it could have been.

19 Q So the two bullets that were removed from the front of
20 the trailer and the bullet under the chair that had six
21 lands and grooves could not have been fired by this gun?

22 A No way.

23 Q And of course the .45 caliber specimens -- the
24 cartridge cases, any of those could not have been fired by
25 this?

1 A Yes, sir.

2 Q All right. Thank you.

3 MR. JENNINGS: That's all I have, Your Honor.

4 MR. BOLUS: No questions.

5 MR. BARNWELL: None, Your Honor.

6 MR. JONES: None, Your Honor.

7 THE COURT: Any objection to the witness being
8 excused? From the State?

9 MR. JENNINGS: No, Your Honor.

10 THE COURT: From the Defense?

11 MR. BOLUS: None, Your Honor.

12 MR. JONES: None, Your Honor.

13 THE COURT: Mr. Barnwell? Any exception to the
14 witness being excused?

15 MR. BARNWELL: No. No, Your Honor.

16 THE COURT: Sir, you're excused.

17 AGENT DEFREESE: Thank you.

18 THE COURT: You're welcome. The State may proceed.

19 MR. JENNINGS: The State calls Det. Gerry Merrithew.

20 **GERALD DALE MERRITHEW**, being first
21 duly sworn, testifies as follows:

22 COURT OFFICER: Please be seated. State your full
23 name for the record and spell your last name.

24 DET. MERRITHEW: It's Gerald Dale Merrithew. And
25 that's M-e-r-r-i-t-h-e-w.

DIRECT EXAMINATION BY MR. JENNINGS / GERALD MERRITHEW Page 537
1 THE COURT: You may proceed.

2 DIRECT EXAMINATION BY MR. JENNINGS:

3 Q Det. Merrithew, where are you employed, sir?

4 A Berkeley County Sheriff's Office.

5 Q And you are a detective in the investigations ---

6 A I am.

7 Q --- division? Are you assigned to any particular type
8 of crime?

9 A I do persons crimes.

10 Q And how -- when -- on the night such as August the
11 2nd, when you had a burglary and kidnaping at one scene,
12 and then a homicide at another scene, were you or somebody
13 in your capacity called out?

14 A Yes, sir. I was.

15 Q And were you assigned to this case?

16 A I was.

17 Q Where did you proceed first, when you were first
18 notified of it?

19 A I actually got called out. I was duty detective and
20 it sounded as though we had a kidnaping and a burglary at
21 Snow Goose. While on the way to Snow Goose, I heard the
22 call that there had been a shooting at Dutch Fork. So I
23 diverted over to Dutch Fork.

24 Q And then obviously when you got to Dutch Fork, the
25 crime scene was processed by Sgt. Kokinda and Ms. Spence?

DIRECT EXAMINATION BY MR. JENNINGS / GERALD MERRITHEW Page 538

1 A That's correct. The crime scene did the -- did the
2 scene itself.

3 Q And y'all sort of launched your investigation from
4 there?

5 A That's correct.

6 Q And you were aware of the dying declaration from
7 Dexter Perry, where he identified one of the people
8 involved?

9 A I was.

10 Q And he was identified as "Manny"?

11 A Correct.

12 Q And as Lt. Mason just testified, Manny was later
13 identified as Jermaine Hartwell?

14 A That's correct.

15 Q By Mr. Husser.

16 A (Nods head up and down.)

17 Q You were familiar with Marquita Smith?

18 A I was. Yes, sir.

19 Q Okay. And you, I guess, had spoken with Deputy
20 Crumley at the time?

21 A Yes, sir.

22 Q And he -- as he's testified, he had had an opportunity
23 to talk with her that morning.

24 A He did. He did at the scene there on Snow Goose.

25 Q All right. You knew that she had provided a written

DIRECT EXAMINATION BY MR. JENNINGS / GERALD MERRITHEW Page 539
1 statement, which is in evidence in State's Exhibit No. 50?

2 A That's correct, sir.

3 Q In that statement that she related to Det. Crumley,
4 did she have any knowledge concerning what happened to
5 Dexter Perry?

6 A No, sir.

7 Q Any knowledge concerning who might have been involved?

8 A No, sir.

9 Q Later as your investigation progressed, did you
10 develop information that was to the contrary of that?

11 A I did, sir.

12 Q And in fact it -- developed information that she may
13 have had some involvement in this incident?

14 A That's correct, sir.

15 Q On August the 3rd, the next day by nine o'clock, did
16 you have an opportunity to come back into contact with Ms.
17 Smith?

18 A I did.

19 Q And where was that?

20 A That was at the Berkeley County Sheriff's Office.

21 Q And how did she get to the sheriff's office?

22 A I called her and asked her if she would meet with me
23 and -- at the Berkeley County Sheriff's Office.

24 Q And did she indicate to you if she had any problem
25 coming and meeting with you?

DIRECT EXAMINATION BY MR. JENNINGS / GERALD MERRITHEW Page 540

1 A Oh, no, sir. She came right up. Well, she came up
2 within a hour or so.

3 Q And tell us what happened when y'all sat down to talk.

4 A Through investigation I -- we realized that she was
5 connected to Kerry Hollins and was -- at one time had
6 dated. So acting on a -- basically acting on a hunch, I
7 told her that Kerry Hollins had confessed to the crime and
8 implicated her.

9 Q And did you advise her of -- when you started talking
10 with her, did you advise her of her constitutional rights?

11 A I did, sir.

12 Q I'm going to show you what's marked as State's Exhibit
13 51. It's a copy of a document I believe you're familiar
14 with. Do you recognize that?

15 A Yes, sir.

16 Q What's that?

17 A That is a defendant's form from Berkeley County
18 Sheriff's Office. It has *Miranda* rights on it. It also
19 has information -- the person being given their rights.
20 And it also starts a statement.

21 Q Okay. And -- and how did you -- what rights did you
22 advise Ms. Smith of?

23 A We advised her that she has the right to remain
24 silent, and she didn't have to answer any questions or give
25 any statements. And we can't use against her if she

DIRECT EXAMINATION BY MR. JENNINGS / GERALD MERRITHEW Page 541

1 decides not to. That if -- if she does answer any
2 questions or any statements, anything that she says can be
3 used against her in a court of law.

4 That she has a right to counsel -- have a lawyer with
5 her of her choice while answering any questions or giving
6 any statements. And also she has a right to have him
7 present during any questioning. That if she wishes to talk
8 to a lawyer -- have him present -- is unable to afford one,
9 one will be appointed for her free of charge. That if she
10 decides to answer any questions or give any statements
11 without a lawyer present, she has the absolute right to
12 stop interviewing at any time and remain silent.

13 And then we -- we asked her if she fully understood
14 her rights and told her that we wanted to talk to her about
15 the murder of Dexter Perry. And we had her initial by each
16 right that she understood it. And then at the bottom of
17 the page, we had her -- if she understands her rights all
18 the way down and she doesn't mind talking with us, we have
19 her sign it.

20 Q And did she indicate to you that she understood each
21 of her rights?

22 A She understood each of her rights and initialed by
23 them.

24 Q Okay. And -- and initialed each one, signifying she
25 understood that.

DIRECT EXAMINATION BY MR. JENNINGS / GERALD MERRITHEW Page 542

1 A That's correct.

2 Q At -- at any point did she indicate to you she did not
3 want to talk to you?

4 A No.

5 Q And at any point did she indicate she wanted to have
6 an attorney prior to talking with you?

7 A No.

8 Q Have you -- how long have you been involved in law
9 enforcement?

10 A I started in 1985, so that puts me at 23 years.

11 Q And I'm assuming in that 23 years you've had numerous
12 opportunities to come in contact with people that were
13 under the influence of alcohol or drugs?

14 A More than I can count.

15 Q Did Ms. Smith give you any indication that night that
16 she was under the influence of any substance?

17 A No, she did not.

18 Q Did you -- was there anybody else present when you
19 talked with her?

20 A Lt. Mark Mason.

21 Q Did you or Lt. Mason threaten her in any way?

22 A No.

23 Q Did -- did you make her any promises in return for her
24 providing you a statement?

25 A No, we sure didn't.

DIRECT EXAMINATION BY MR. JENNINGS / GERALD MERRITHEW Page 543

1 Q Okay. And while you were talking with her, was what
2 she was saying memorialized in writing?

3 A That's correct. Yes, sir.

4 Q And that's in State's Exhibit 51?

5 A That's correct. Yes, sir.

6 Q And whose writing is this?

7 A That's mine.

8 Q Okay. And whose words were you writing down?

9 A Hers.

10 Q All right. Did you sort of put your interpretation on
11 it, or did you write it down exactly as she said it?

12 A What -- what we do is we write it as they tell us, and
13 then at the end, you -- you tell them to read it over and
14 make any corrections or deductions or anything. They may
15 not like it at all. They can do anything they want to with
16 it and start over again.

17 In this particular case, I gave it back to her, asked
18 her to read it over. Anything that she wanted to that, you
19 know, to -- to take out, she could scratch through it and
20 you can initial over it. Or you can go and add at the end
21 anything you want to.

22 I don't -- I remember her reading it over, but I don't
23 remember if she made any corrections or not. I'd have to
24 look it over to see if she did, if she decided that she
25 wanted to add to or take from. I don't remember; I'd have

DIRECT EXAMINATION BY MR. JENNINGS / GERALD MERRITHEW Page 544
1 to look at it.

2 Q There on each page of the statement that says, "I've
3 read the foregoing ---

4 A Uh-huh.

5 Q --- statement or had it read to me and it is true and
6 correct to the best of my knowledge."

7 A That's correct. And then she -- if -- if it's correct
8 and they agree with it, then they sign at the bottom of
9 each page and it's witnessed.

10 Q And did she sign every page?

11 A She did.

12 Q All right.

13 MR. JENNINGS: Your Honor, we'd offer State's Exhibit
14 51 into evidence.

15 THE COURT: Any objection?

16 MR. BOLUS: Is that the redacted one?

17 THE COURT: Yes.

18 MR. JENNINGS: It is.

19 MR. BOLUS: No objection.

20 THE COURT: Mr. Barnwell?

21 MR. BARNWELL: No objection.

22 THE COURT: Mr. Jones?

23 MR. JONES: No objection.

24 THE COURT: Marked and admitted without objection.

25 (Marked State's Exhibit No. 51; Defendant Smith,

DIRECT EXAMINATION BY MR. JENNINGS / GERALD MERRITHEW Page 545
1 written statement.)

2 MR. JENNINGS: Thank you, Your Honor.

3 Q And based on some rules of court, some language has
4 been taken out of the statement.

5 A Yes, sir.

6 Q Okay. If you would please, publish that to the jury.

7 A It says (as read): "I've lived in Berkeley County " -
8 - this is -- this would be her words. "I lived in Berkeley
9 County all my life. I met Kerry Hollins -- or Kerry in
10 2003. We dated off and on. At one point, we lived -- I
11 lived with Kerry and his mother. And Dexter was part of my
12 family. The whole time we have been together, Kerry has
13 been in and out of trouble. I love Kerry, but I am also
14 afraid of him.

15 "On Sunday, 7/31/2006, Kerry called me and asked me if
16 I knew someone we could rob. At first I told him I didn't
17 know anyone. Then Dexter came to my mind. I told Kerry
18 Dexter is the only person I know who flashes money around.
19 He asked me about how much money did I think he has. I
20 told him a lot. Try to find out how much. I called
21 Dexter's phone and got Chris's number. Chris is Dexter's
22 friend who likes me. Chris is always bragging about how
23 much he and Dexter had. After talking with Chris, I told
24 Kerry that Chris -- I told Kerry what Chris said.

25 "On the next day, Monday, 7/31/2006, Kerry called me

DIRECT EXAMINATION BY MR. JENNINGS / GERALD MERRITHEW Page 546

1 and asked me to set -- set it up so -- so they could rob --
2 so he could rob Dexter and Chris. I called Chris back and
3 while we were talking, he asked me to go out with him that
4 night. But I told him 'no' because I didn't feel like it.
5 I told Chris I would call him back later.

6 "On Tuesday, 8/1/2006, Kerry called me. 'Did you find
7 out anything else?' I told Kerry that Chris said Dexter
8 was back in town with a big pickup. Chris and Dexter,
9 Tawana and I made plans to go out to dinner. I told Kerry
10 about the plans. Kerry told me that Dexter would not get
11 hurt. Kerry told me to call him when we got to the place
12 where we -- "we" being Chris, Dexter, Tawana, and I -- were
13 going to eat, at Red Lobster.

14 "I called Kerry when Tawana and I got to Red Lobster.
15 I told -- I told that we were there, but Chris and Dexter
16 were not. Tawana and I waited inside, but Chris and Dexter
17 never showed up. Tawana and I called Chris and Dexter and
18 told them Red Lobster was closed. They and we decided to
19 meet at Ruby Tuesdays on Ashley Phosphate Road. I called
20 Kerry and told him that we were meeting Dexter and Chris at
21 Ruby Tuesdays. Kerry said, 'Okay. We are coming there.'

22 "After we met with Chris and Dexter while we were
23 eating, Kerry called me and asked me if Dexter had a lot of
24 money. I told him 'yes.' Chris and Dexter and Tawana and
25 I stayed at Ruby Tuesdays for about an hour or so.

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1 "When we left out of Ruby Tuesdays, Kerry and them
2 went on to follow Dexter and Chris, and then robbed them.
3 But something happened and they missed Dexter leaving.
4 Kerry called me and asked me to show them where Dexter and
5 Chris -- Chris's hole was -- in parenthesis -- where he
6 keep the drugs. I called Dexter and told him that Tawana
7 wanted me to check and see if he was in another -- if he
8 was with another girl. So he gave me directions to where
9 he was, at the Silver Fox trailer park.

10 "I called Kerry and told him the directions. He told
11 me to go over there and he would follow me. I drove to the
12 Silver Fox mobile home park and met with Dexter. We called
13 Tawana, but she didn't answer the phone. Dexter told me he
14 was going to Tawana's house, so I left.

15 "I called Tawana and told Dexter -- and told her
16 Dexter was coming to her house and let him in. When Kerry
17 called me, I told him Dexter had gone to Tawana's. I did
18 not want to, but he talked me into coming to the Hess Mart
19 on 78 and meeting with him.

20 "I went inside Tawana's and -- and Dexter's. We were
21 there about 10 minutes when Chris called Dexter and told
22 him to come pick him up. Dexter and I were going to leave
23 at the same time, but I walked out first. I got afraid and
24 had -- and had second thoughts about it, so I told Dexter,
25 'Someone's out there.'

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1 "Tawana told us -- Tawana told us it was probably one
2 of her brothers, so Dexter went out anyway. As soon as he
3 stepped out, they came running after him. Dexter made it.
4 back inside and tried to shut the door, but they got in
5 anyway. They pushed him down in the hallway -- they pushed
6 me down on the way in." Sorry y'all. "They pushed me down
7 on the way in.

8 "I got up and ran away and did not look back. I was
9 running behind the apartments and so was Tawana. Tawana
10 called the police. Later we spoke to the police. Kerry
11 called me right after it happened, and Kerry could hear
12 Tawana on the phone with the police. I hung up.

13 "Kerry kept calling me, asking me what the police were
14 doing. After I found out Dexter had been shot, I tried to
15 call Kerry, but it went to his voice mail."

16 Q And those were whose words?

17 A Marquita Smith.

18 Q And do you see her in the courtroom today?

19 A I do.

20 Q Can you point her out to the jury, please?

21 A She's in the jacket with the white shirt.

22 Q And what she had to say in State's Exhibit 51 is -- is
23 a far cry from what she said in State's Exhibit 50.

24 A That's correct.

25 Q And did you or Lt. Mason put any of these words into

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1 her mouth?

2 A No.

3 Q So when she was saying that she was talking with Kerry
4 Hollins about setting up a robbery of Dexter Perry, whose
5 words were those?

6 A Those were her words.

7 Q And when she talked about talking to Kerry Hollins
8 about this plan over essentially three days, whose words
9 were those?

10 A Those were her words.

11 Q And as she called Kerry Hollins and his crew and
12 updated them on where Dexter Perry was on the night of
13 August the 1st, who told you that?

14 A She did.

15 Q And who told you that she drove out to Highway 78 to
16 meet Kerry Hollins and his crew and to show them -- to get
17 directions to -- to where Dexter was?

18 A She did.

19 Q And who told you that they led these men back to Snow
20 Goose Circle to where Dexter Perry was?

21 A She did.

22 (Sotto voce discussion between State Counsel.)

23 Q I believe that based on the date of this statement,
24 August the 3rd at nine o'clock, had you talked to any of
25 the suspect -- other suspects at the time you talked with

1 Ms. Smith?

2 A I had not.

3 Q Okay. Kerry Hollins provided any information --
4 provided his statement?

5 A No, sir.

6 Q So when you spoke with Ms. Smith, did you -- did y'all
7 really know anything about the plan?

8 A No.

9 Q Other than you knew Jermaine Hartwell was involved,
10 based on Joe Husser?

11 A That's correct.

12 Q And who provided you the details as to who set up this
13 robbery?

14 A She did.

15 Q And she was ---

16 A Marquita Smith.

17 Q --- the first person to do it?

18 A That's correct.

19 Q The silver car that we've heard testimony about that
20 Mr. Hollins was driving, that was shown in State's Exhibit

21 18 --

22 A Yes, sir.

23 Q You've -- through the course of your investigation,
24 were you able to determine when that car had actually been
25 rented?

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1 A It was rented on the first.

2 Q On the day of this incident?

3 A Correct.

4 Q And the highway patrol when -- when Mr. Hollins was
5 pulled over, the highway patrol had the car?

6 A That's correct.

7 Q And then that was how y'all found out that Ms.
8 Chisholm had rented it?

9 A That's correct.

10 Q And it was processed by the Charleston County
11 Sheriff's Department?

12 A That's correct.

13 MR. JENNINGS: Beg the Court's indulgence one minute.

14 THE COURT: Uh-huh.

15 (Sotto voce discussion between the Court Reporter and
16 Mr. Jennings.)

17 Q Let me just show you these two photographs of the
18 State's Exhibit 16 and 17, already in evidence. That's the
19 -- Amber Cobbs' car?

20 A That's correct.

21 Q That Kerry Hollins was driving that night?

22 A Yes, sir.

23 MR. JENNINGS: We would offer State's Exhibit 16 and
24 17 into evidence, Your Honor.

25 THE COURT: Please show them to Defense counsel.

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(Sotto voce discussion between Mr. Jennings and

defense counsel.)

THE COURT: Any objection? Mr. Bolus?

MR. BOLUS: None.

THE COURT: Mr. Barnwell?

MR. BARNWELL: No, Your Honor.

THE COURT: Mr. Jones?

MR. JONES: None.

THE COURT: Marked and admitted without objection.

(Marked State's Exhibit Nos. 16 and 17, photos.)

(Sotto voce discussion between Mr. Jennings and
defense counsel.)

MR. JENNINGS: Your Honor, we'd offer State's Exhibit
84 into evidence.

THE COURT: Any objection?

MR. BOLUS: None, Your Honor..

MR. BARNWELL: None, Your Honor.

MR. JONES: None, Your Honor.

THE COURT: Marked and admitted without objection.

(Marked State's Exhibit No. 84, photo.)

Q Sgt. Merrithew, you've seen this picture of Berkeley
County?

A Yes, sir.

Q And this shows the general area that we're talking
about.

- 1 A Yes, sir.
- 2 Q With Snow Goose Circle -- the apartment complex ---
- 3 A Yes, sir.
- 4 Q --- is down here?
- 5 A Uh-huh.
- 6 Q And this is in Goose Creek?
- 7 A Yes, sir.
- 8 Q You've got College Park Road here as it crosses I-26?
- 9 A Yes, sir.
- 10 Q This is the shopping center with the ---
- 11 A Trailer park.
- 12 Q This trailer park is behind it.
- 13 A Uh-huh.
- 14 Q And these were the two areas that we're talking about.
- 15 A Uh-huh.
- 16 Q All right. Thank you. Do you know roughly how -- how
- 17 far -- what the distance is between those?
- 18 A I -- I haven't measured it out, but it's -- it's not
- 19 very far. I've, you know, I've drove it a hundred times
- 20 back and forth when I was with the sheriff's office.
- 21 Q Okay.
- 22 A On -- on patrol with the sheriff's office.
- 23 Q That's all I have. If you'd answer any questions from
- 24 the defense.
- 25 MR. BOLUS: No questions.

CROSS-EXAMINATION BY MR. JONES / GERALD MERRITHEW

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1 THE COURT: Mr. Barnwell?

2 MR. BARNWELL: No questions.

3 THE COURT: Mr. Jones?

4 MR. JONES: Just a couple.

5 THE COURT: You may proceed.

6 CROSS-EXAMINATION BY MR. JONES:

7 Q Real quick. With regard to -- let's see if I can find
8 the statement she gave to Deputy Crumley.

9 A Crumley?

10 Q Crumley? All right. Just a couple of things. Y'all
11 didn't have to go pick her up or anything?

12 A No. She came in as soon as I called her. Well,
13 within an hour or so.

14 Q Did -- did -- when y'all sat down and talked and you
15 read her everything, she didn't ask for a lawyer or
16 anything?

17 A Never asked for a lawyer.

18 Q And just a small thing: She talked about over a
19 period of this -- this was over a -- these conversations
20 between she and Kerry were over a period of three days,
21 correct?

22 A I think it was from the 30th or 31st through the --
23 the 1st.

24 Q I think -- yeah, I think. And Kerry said that day
25 really, in essence when he testified earlier, he said "one

1 day" really; is that correct?

2 A I don't -- I don't remember. I can look back. I
3 don't remember off the top of my head.

4 Q Nothing further.

5 THE COURT: Any re-direct of the witness?

6 MR. JENNINGS: No, Your Honor.

7 THE COURT: Any objection to the witness being
8 excused? From the State?

9 MR. BOLUS: None.

10 MR. BARNWELL: None.

11 THE COURT: From the State?

12 MR. JENNINGS: No, Your Honor.

13 THE COURT: Sir, you're excused.

14 You may call your next witness. State may proceed.

15 MS. WILSON: Beg the Court's indulgence.

16 MR. JENNINGS: Your Honor, at this time the State
17 rests its case.

18 THE COURT: Mr. Foreman, ladies, and gentlemen, the
19 State has rested their case. There are certain matters of
20 law I need to take up with the attorneys, and it probably
21 will take somewhere probably close to 20, maybe 25 minutes.
22 We apologize in advance for you all having to wait. It may
23 take a shorter time than that. I -- I'm just
24 guesstimating.

25 I'm going to tell your caretakers that anyone that --

1 that would like to smoke or anyone who would just like to
2 maybe walk around and get some air, that you'll be free to
3 do that.

4 Please, however, abide by my instructions and have no
5 discussion regarding the case among yourselves. Please
6 leave your note pads in your seats, and if you need
7 anything, please let your caretakers know. You need to go
8 with Mr. Hutto.

9 (Jury exits at 3:19 p.m.)

10 THE COURT: You may be seated. We're still in
11 session. I would ask that everyone --

12 Are there any motions?

13 MR. BARNWELL: Your Honor, I would move for a directed
14 verdict at this time based upon insufficient evidence.

15 THE COURT: Would the State like to respond?

16 MR. JENNINGS: I think there's an abundance of
17 evidence, Your Honor, linking each defendant. The evidence
18 that Mr. Hollins in this -- this statement as to the plans
19 of the robbery. And certainly from that point, the
20 evidence of the door being kicked in at Snow Goose Circle.

21 Ms. Dees testified no individuals had permission to
22 enter her home. As to the burglary first, the DNA at the
23 scene linking that Mr. Perry was injured there. It
24 certainly goes to the kidnaping as well.

25 Testimony of the Cobbs as to the people bursting in

1 their home at Dutch Fork -- did not have consent to enter.
2 Each -- Mr. Cobbs', Ms. Cobbs', Mr. Husser all testified to
3 being held at gunpoint, did not feel that they were free to
4 -- to move or to leave that location as to kidnaping of
5 each of them.

6 And then certainly there is evidence from which the
7 jury could find the defendants guilty of murder from being
8 shot inside the -- of the home during the commission of all
9 of these felonies, certainly would provide malice in
10 addition to the inference from the defendants using
11 weapons.

12 There's testimony in the record as to both Mr. Grant
13 and Mr. Hartwell being armed with handguns while they were
14 in the home at 634 Dutch Fork. And certainly in light of
15 viewing that evidence and in light most favorable to the
16 State, I would submit to the Court there is more than
17 sufficient evidence to -- to deny the motion for a direct
18 verdict.

19 THE COURT: Anything further, Mr. Barnwell?

20 MR. BARNWELL: I just ask that my motion be noted for
21 the record, Your Honor.

22 THE COURT: It is noted. Are there any other motions?

23 MR. BOLUS: Yes, ma'am. Judge, I move for a directed
24 verdict on the indictment for armed robbery. It says that
25 the defendants took from the presence of Dexter Perry goods

1 or monies or whatever. They don't allege anything else
2 being taken from anybody else, and there is a minimal --
3 there's no direct evidence showing anything was taken from
4 Dexter Perry. We got this one Kerry Hollins saying that
5 Grant made a statement to that effect, but it's not in his
6 statement. It's -- he testified to that, but the rule
7 would be they have not recovered any evidence. Dexter
8 Perry's own people testified that nothing was missing.
9 There's been no proof that any money was taken, any goods
10 from Mr. Perry. You don't -- there's no direct evidence.
11 It's such a scintilla of circumstantial evidence. There's
12 only one little itty-bitty piece of evidence, and that's
13 from Mr. Hollins, who says that Gary said he took a -- a
14 ring and a bracelet.

15 I submit that that is not enough to satisfy even the
16 indictment going to the jury to make a decision. There's
17 no -- there's no way they could find reasonable -- men and
18 women could find anybody guilty beyond a reasonable doubt
19 of -- of this indictment, and they shouldn't even consider
20 it. There's no evidence. It just fails. And that would
21 be my motion insofar as the armed robbery as for my client.

22 THE COURT: Is that the extent of the entirety of your
23 directed verdict motion?

24 MR. BOLUS: Well, I'd probably make it just for, you
25 know --

1 THE COURT: You need --

2 MR. BOLUS: -- CYA purposes.

3 THE COURT: You need to argue the full extent of any
4 motions you're seeking before you consider --

5 MR. BOLUS: Well, I make a directed verdict motion for
6 all the other charges, too, but on the same grounds that
7 Mr. Barnwell made his: insufficient evidence. But
8 particularly the armed robbery, I would ask Your Honor to
9 consider that seriously.

10 THE COURT: Mr. Barnwell, did you argue the entirety
11 of your directed motion?

12 MR. BARNWELL: Yes, Your Honor.

13 THE COURT: Mr. Jones, any motions for the record?

14 MR. JONES: Your Honor, also with regard to the armed
15 robbery, again, the only evidence of any -- the element of
16 the taking away was the statement. Clearly there's
17 credibility -- substantial credibility issue. He may have
18 been there in the house and -- and there was no attempt to
19 even ascertain the credibility. They knew that way back
20 when the identification came up.

21 Secondly, there was no attempt to -- to in any way
22 corroborate anything was taken. It's a necessary element
23 of this. And second would be -- I also ask to -- again,
24 that's to the accessory of the armed robbery of my client
25 with the same basic grounds and also to the accessory of

1 the murder and -- and the probable and natural -- a
2 probable and natural consequence of this matter. I'm not
3 sure if I'm using the exact phrase of the -- of the
4 accessory and all, but a common plan and a scheme.

5 But again, would -- there's no common -- there's no
6 evidence of a common plan and scheme to commit armed
7 robbery or to the murder. And it doesn't appear to be
8 evidence that it was a probable and natural consequence
9 that the murder would occur.

10 She -- she did try to warn and -- and I would -- I
11 would argue that that's just too far removed from the
12 circumstances. She couldn't even set it up at the
13 restaurant in the right place, let alone for it to go
14 further beyond that.

15 But I would ask on those grounds for the directed
16 verdict.

17 THE COURT: Would y'all like to respond?

18 MR. JENNINGS: The only thing I'll add is to the armed
19 robberies. Mr. Hollins did testify that Mr. Grant told him
20 he took a bracelet and ring. Certainly that is evidence
21 and direct evidence that -- that items were taken from the
22 victim. That alone would satisfy the standard on -- on a
23 directed verdict motion. Any weight given to Mr. Hollins's
24 testimony will be the function for the jury to determine
25 whether they either believe some of what he said, all of

1 what he said, or none of what he said.

2 But for the purposes of this motion, as I understand
3 the standard of the Court, viewing the evidence in light
4 most favorable to the State, certainly there is evidence in
5 the record to support the armed robbery charge.

6 As to the foreseeability of -- of murder extending from
7 the armed robbery, our Supreme Court for dozens and dozens
8 of years has upheld convictions of "the hand of one is the
9 hand of all" for cases wherein the original plan was armed
10 robbery and somebody was killed in the course of it. And
11 when weapons are involved, that it is a natural and
12 probable consequence of that act that somebody may be
13 killed. So I believe that there -- within the standard the
14 Court should employ there is evidence and ample evidence to
15 support every element of the charges.

16 MR. BOLUS: Your Honor?

17 THE COURT: Uh-huh?

18 MR. BOLUS: I -- I differ from my learned colleague.
19 I -- I -- I still consider that circumstantial. There is
20 no direct evidence: No goods being found; no one saw
21 anything; no one's testified that anybody took anything.
22 There's just no evidence here and it should be either a
23 substantial amount of circumstantial evidence to -- in the
24 -- in the record, or any direct evidence. I don't consider
25 that really direct evidence.

1 Some -- basically it's a hearsay statement. Let's say
2 t comes in. If you believe Mr. Hollins, it comes in
3 because of being admission against interest. But it's so -
4 - it's so minimal. I don't know how this indictment can be
5 supported just based on that alone. There's no testimony
6 of anybody that says that Dexter owned anything or anything
7 was taken. No police officer, no witnesses, no anything.

8 THE COURT: Anything further?

9 MR. JONES: No, Your Honor.

10 MR. BARNWELL: Nothing I can think of.

11 THE COURT: I think that I can handle each of the
12 motions collectively because they are basically the same
13 motion, because each of the defendants is charged under
14 accomplice liability. And the rules are very clear and the
15 case law is very clear that when considering a motion for
16 directed verdict, the Court is required to view the
17 evidence and all reasonable inferences in light most
18 favorable to the State.

19 Court is concerned with the existence or nonexistence,
20 and not its weight, because the Court is not a fact-finder.
21 The Court has to, however, determine that the evidence
22 rises above merely a suspicion that an accused is guilty.
23 A suspicion is one that implies a belief or opinion as to
24 guilt based upon facts or circumstances which do not amount
25 to proof. However, the Court is not required to find that

1 the evidence infers guilt to the exclusion of any other
2 reasonable hypothesis.

3 As regards Mr. Grant and as regards indictments 2007-
4 315, 316, 317, and 318, which are all kidnaping; 319, which
5 is murder; 343, 347, which is burglary in the first degree:
6 The Court would find that there is direct and substantial
7 circumstantial evidence reasonably tending to prove guilt
8 of the accused, and therefore directed verdict is not
9 appropriate and is denied.

10 As regards Mr. Hartwell on indictments 2007-308, 309,
11 310, 311, which are indictments for kidnaping; 312, which
12 is an indictment for murder; and 342 and 345, which are
13 indictments for burglary in the first degree: The Court
14 would find likewise that the Court is concerned with the
15 existence or nonexistence of evidence and not its weight.
16 And therefore, viewing the evidence in light most favorable
17 to the State, there is substantial circumstantial evidence,
18 as well as direct evidence reasonably tending to prove the
19 guilt of the accused; and therefore, the directed verdict
20 motion is denied.

21 Many of the issues raised by Defense counsel deal with
22 the weight afforded the evidence and -- though they are,
23 however, matters appropriately argued to the jury.

24 As it regards Marquita Smith, an indictment for --
25 2007-1748, accessory before the fact of felony murder, the

1 Court would find that likewise there is direct as well as
2 substantial circumstantial evidence reasonably tending to
3 prove her guilt, and the motion is denied.

4 I need to think about the armed robbery a little bit
5 more. I'm concerned about it. I need to -- I need to roll
6 that over in my mind a little bit and look back over my
7 notes. And I'll reserve ruling on that.

8 MR. BOLUS: Your Honor?

9 THE COURT: Yes?

10 MR. BOLUS: There is also a matter of some importance
11 I've just discovered in this almost illegible copy of a
12 letter that was found by the prosecutor.

13 THE COURT: Yes, sir.

14 MR. BOLUS: I don't know if you want to it --

15 THE COURT: And just so the record is very clear,
16 there was a statement -- a two-page handwritten statement
17 as I believe Mr. Jennings represented to the Court. It was
18 basically a copy, correct, Mr. Jennings?

19 MR. JENNINGS: That's correct.

20 THE COURT: And it was left at your -- at your
21 receptionist's desk or something?

22 MR. JENNINGS: That's correct.

23 THE COURT: Before the lunch and recess?

24 MR. JENNINGS: Yes.

25 THE COURT: And after lunch you shared that copy with

1 Defense counsel in the outside chance that it might prove
2 to have some exculpatory information; is that correct?

3 MR. JENNINGS: Correct.

4 THE COURT: Okay.

5 MR. BOLUS: But we discovered -- I think that it might
6 -- I can't hardly read some of it, but ---

7 THE COURT: Okay.

8 MR. BOLUS: --- you want me to present what I think
9 this is?

10 THE COURT: Sure.

11 MR. BOLUS: It appears -- according to some people
12 that I've talked to -- that this is a letter written by
13 Kerry -- is it Kerry Hollins? Kerry Hollins to --

14 (Sotto voce discussion with Mr. Barnwell.)

15 -- to Manny Hartwell and it's about making up a story --
16 sticking to his story. And the problem is you can hardly
17 read it, but it does say things about, "We going to sign
18 statements on Gary, saying he had a .45 and .357." It goes
19 on and curses a lot and all that. But it's -- it's a
20 letter written from one defendant, who is ---

21 THE COURT: Well, it purports because we don't have a
22 handwriting expert. We don't know who wrote it; it's
23 unsigned. And it well could have been contrived and
24 written by someone and left in ---

25 MR. BOLUS: That's true, but ---

1 THE COURT: --- the solicitor's office. I don't know
2 who it's from.

3 MR. BOLUS: But the point I'm making is ---

4 THE COURT: Uh-huh?

5 MR. BOLUS: --- this is something that was just handed
6 to me ---

7 THE COURT: Uh-huh.

8 MR. BOLUS: --- an hour ago. I still can't read much
9 of it, but I read enough to know that if -- if there is
10 something to it, that certainly impugns Mr. Hollins's
11 credibility as a witness ---

12 THE COURT: Uh-huh.

13 MR. BOLUS: --- if he wrote this. He may deny writing
14 it, but it seemed to me with the prosecution ---

15 THE COURT: Are you asking to recall him? You haven't
16 presented your case, have you?

17 MR. BOLUS: I haven't presented a case.

18 THE COURT: So there's nothing to preclude you from
19 recalling Mr. Hollins if you want to inquire into those
20 matters, correct?

21 MR. BOLUS: I guess not. I thought -- I was kind of
22 counting on the prosecutor to find out if he even wrote the
23 thing. If he didn't write it, then I'd like to know. I
24 mean ---

25 THE COURT: We can do that. Is he still here? Or has

1 he been -- he's next door?

2 THE BAILIFF: Correct.

3 THE COURT: Can we bring him over?

4 My concern is that it is a copy that was delivered to
5 the solicitor's office. My other concern is that it's not
6 signed. And ---

7 MR. BOLUS: Somebody writing a letter like this
8 probably wouldn't say "your friend, so-and-so."

9 THE COURT: Well, it's been my experience that they
10 do, Mr. Bolus.

11 MR. BOLUS: Okay.

12 THE COURT: Yeah. Pretty much.

13 MR. BOLUS: Okay.

14 THE COURT: It's been my experience that they do sign
15 them and that they do use -- albeit sometimes slang that
16 only they understand --

17 (To Mr. Barnwell) He needs to go to the restroom?

18 THE BAILIFF: We can help you.

19 THE COURT: Yeah. They'll help you.

20 My concern would be with the issue of authenticating
21 the document. I have no problem, however, giving you all
22 access to him in determining whether he -- he may tell you
23 who did write it, you know? I don't know.

24 MR. BOLUS: I'm thinking maybe Marquita Smith might
25 recognize his handwriting.

1 THE COURT: I don't know that Mr. Jones is going to
2 allow you to talk to his client ---

3 MR. BOLUS: That's what I'm saying.

4 THE COURT: --- for that purpose.

5 MR. BOLUS: The only reason I'm bringing it up is
6 because if something's handed to you and you can't make
7 heads or tails out of it and all of a sudden you start ---

8 THE COURT: I agree. And if you want more time, yes,
9 indeed, I certainly will give you that. I have read as
10 much of the statement as is legible because of the
11 faintness of the copy, and it would seem to me that if that
12 were Mr. Hollins' intent, he certainly did not follow
13 through on it when he testified.

14 MR. BOLUS: He didn't, did he?

15 THE COURT: If that were the intent expressed in the
16 letter, he certainly did not act in conformance with that
17 when he testified.

18 MR. BOLUS: That's right.

19 THE COURT: Because I believe the letter indicates
20 that they're going to stick together and blame and absolve
21 one another, but that's not what he did.

22 MR. BOLUS: I have an inquiring mind --

23 THE COURT: You need to.

24 MR. BOLUS: Not only ---

25 THE COURT: You need to -- you need to advocate for

1 your client, and I -- and I don't have a problem with you
2 having additional time to look into it if you would like
3 to. And I'm not going to, you know, restrict you in any
4 way in doing that. If you want to have access to him to
5 talk to him, you'd have to ask Ms. Kennedy, actually,
6 because that's his lawyer.

7 Ms. Kennedy, how are you?

8 MS. KENNEDY: (No audible response.)

9 THE COURT: What has happened -- I don't know if
10 you're aware of it, but ---

11 MS. KENNEDY: I just became aware of it, Your Honor.
12 Thank you.

13 THE COURT: A -- a letter was dropped off by the
14 solicitor's office at lunch -- at lunch break, which
15 purports to have been authored potentially by your client.
16 And Mr. Bolus wanted to make inquiry as to whether, in
17 fact, he wrote that or not. And what I have indicated to
18 all parties concerned is I'm concerned with the
19 authenticity of the document. You know, I'm jaded. I've
20 been doing this too long. When, you know, eleventh-hour
21 things that just fall out of the sky, it's just lack an
22 addition for my ability.

23 However, Ms. Kennedy, if you would like -- do you have
24 any problem discussing with Mr. Hollins whether that ---

25 MS. KENNEDY: No, Your Honor. I'd be happy to do

1 that.

2 THE COURT: Why don't you? And then I've instructed
3 them to bring him back over and then we'll see where we --
4 where the trail leads us.

5 MR. JONES: Judge, if we have a minute, could we have
6 a bathroom break?

7 THE COURT: We are as soon as I'm done taking care of
8 some housekeeping matters, yes. I plan to give everyone a
9 break.

10 'Why don't we go ahead and take a quick restroom break
11 so that I can have colloquy with the defendants regarding
12 their right to testify, and then let's see where we are
13 after that. Let's take about -- let's do it as quickly as
14 possible, because time is ticking.

15 THE COURT: You may be seated. Is Ms. Kennedy
16 present? Okay.

17 Ms. Kennedy, and of course without breaching any
18 attorney/client privilege, have you -- have you had an
19 opportunity to speak with your client?

20 MS. KENNEDY: Yes, Your Honor, I have.

21 THE COURT: And again, I guess I'm -- I'm trying to
22 handle this as delicately as possible. Did he indicate to
23 you whether he had written a statement or not?

24 MS. KENNEDY: Your Honor, he indicated to me that that
25 was not his statement.

1 THE COURT: And it was not his handwriting?

2 MS. KENNEDY: No, Your Honor.

3 THE COURT: Does that satisfy your curiosity, Mr.
4 Bolus?

5 MR. BOLUS: I would like to -- yes, ma'am, but I'd
6 like to put this in as a Court's Exhibit.

7 THE COURT: Certainly.

8 MR. BOLUS: For future PCR purposes and -- and it
9 reflect that I think you got this statement around three
10 o'clock today, or 2:30? Just for the record.

11 THE COURT: Actually, it was about ten of two.

12 MR. BOLUS: Ten of two?

13 THE COURT: We were scheduled to resume at 1:45 and I
14 was waiting on a juror and I took the bench at 1:50, I
15 believe, which would have been ten of two. And then about
16 five of two is when Mr. Jennings came in with the
17 statement.

18 MR. BOLUS: And the reason I say that is because my
19 client says certain things about this statement would be --
20 if it was written by Mr. Hollins, it'd impugn his
21 credibility.

22 THE COURT: Well, I don't ---

23 MR. BOLUS: But I'm not going to put him there and he
24 can say he didn't do it and that's the end of that anyway.
25 But I'd like to make this part of the Court's Exhibit for

1 whoever gets this case after this.

2 THE COURT: Okay. And I -- I think certainly -- I
3 would imagine no one has any exception to the statement
4 being marked as a Court's exhibit, correct?

5 MR. JENNINGS: No, Your Honor. Just so it's on the
6 record. I don't know what's been on the record and off the
7 record. When we broke for lunch, I went down to my office
8 and it was after one, probably ten after one, and my
9 receptionist, Ms. Gentry, told me she needed to talk to me.
10 And she had that piece of paper, said that a woman had come
11 into our lobby and just basically dropped that at the front
12 desk and refused to provide her name or any information,
13 and then left. And turned that over to me.

14 Based on what we read, there was obviously -- it was
15 unsigned and there was no way to attribute that to anybody.
16 But based on the content and the potential exculpatory
17 value, we provided a copy to each defense counsel and Your
18 Honor.

19 THE COURT: And I've given my copy to the court
20 reporter to be marked as Court's Exhibit.

21 (Marked Court's Exhibit No. 4, unsigned hand-written
22 statement.)

23 MS. KENNEDY: And -- and Your Honor, just for purposes
24 of the record, I would just like to advise the Court I have
25 been representing Mr. Hollins for well over a year. As a

1 result of that representation, I received numerous letters
2 from him. The grammar and the syntax in that letter is
3 totally inconsistent with any written communication that I
4 have ever received from him.

5 THE COURT: Okay. And I would imagine inconsistent
6 with his actual handwriting.

7 MS. KENNEDY: Yes, Your Honor.

8 THE COURT: Okay. I need the record, however, to
9 reflect that there is nothing that precludes you from
10 calling him if you would like to inquire into the substance
11 of any of the statements and any efforts to deal with the
12 issues of his credibility. But I think you can still ask
13 him about the substance of the statement without making
14 reference to it.

15 MR. BOLUS: I think I can pass on that. I think I'd
16 probably get the same kind of answers on ---

17 THE COURT: Which is a denial.

18 MR. BOLUS: Yes, ma'am. Thank you.

19 THE COURT: And you -- I would imagine that that is a
20 matter of strategy that you fully discussed with your
21 client, that that is the conclusion that the two of you
22 have reached.

23 MR. BOLUS: Yes.

24 THE COURT: Regarding any value the statement might
25 give you; is that correct?

1 MR. BOLUS: My personal feeling -- yes, ma'am. My
2 personal is I did enough cross-examination of the guns and
3 all that that, you know, the jury decides he's making up
4 something and they got enough there to do it, they're going
5 to do it.

6 THE COURT: Okay. But again, that is a matter of
7 strategy you fully disclosed to your client, and discussed
8 with him the statement and the strategy in not recalling
9 the witness, correct?

10 MR. BOLUS: (To Mr. Grant) Do you agree? He said
11 "yes."

12 THE COURT: Okay.

13 MR. JENNINGS: Your Honor, as to the armed robbery,
14 we've talked and reviewing the Statute 17-19-100 dealing
15 with the amended indictments, states that (as read) "If the
16 trial indicates there shall appear to be any variance
17 between the allegations of the indictment and the evidence
18 offered in prove thereof, the Court before which the trial
19 shall be had may amend the indictment according to the
20 proof, if such amendment does not change the nature of the
21 offense charged."

22 We've spoken and I think we're all in agreement if
23 Your Honor had a -- or if the jury has a question as to the
24 level of proof as to whether any items were taken, it would
25 still rise to the level of an attempted armed robbery,

1 which would then be proper under this statute.

2 THE COURT: Are you all then -- you all want to amend
3 the indictments to attempted armed robbery?

4 MR. JENNINGS: We just agreed to charge arm robbery
5 and attempted armed robbery, and then it would be a jury
6 decision as to the level of proof of -- of whether the
7 items were taken.

8 THE COURT: The problem is attempted armed robbery is
9 not -- well -- Mr. Bolus?

10 MR. BOLUS: My feeling was if Your Honor dismissed the
11 indictment of armed robbery -- and I kind of agree with the
12 prosecutor -- that just like us, we get a charge on a
13 lesser, then you could amend to an attempted. So I'm
14 satisfied that if the jury is charged with the armed
15 robbery and attempted armed robbery, that satisfies the
16 goal of my mission. I'm not sure it satisfies everybody
17 else.

18 THE COURT: Mr. Barnwell?

19 MR. BARNWELL: I -- I think that would satisfy me.

20 THE COURT: Mr. Jones?

21 MR. JONES: (No audible answer.)

22 THE COURT: I guess what I'm asking is are you all
23 asking for a motion to conform to proof to reflect the
24 charge of attempted armed robbery?

25

1 MR. JENNINGS: No, Your Honor

2 THE COURT: Or are you simply asking that the Court
3 charge both?

4 MR. JENNINGS: I -- I guess what I ---

5 THE COURT: Because if I grant the directed verdict,
6 that's going to be the end of all -- all of it.

7 MR. JENNINGS: Exactly. But I think ---

8 THE COURT: So what I think -- and I -- I guess my
9 comments earlier were to get you all to engage in some
10 conversation about it.

11 MR. BOLUS: Well, now ---

12 THE COURT: To some extent.

13 MR. BOLUS: I need to understand this. You're --
14 you're ---

15 THE COURT: You've made a motion for a directed
16 verdict on the armed robbery. If I grant it, that's the
17 end of it.

18 MR. BOLUS: And you're just -- is the Court saying you
19 would not grant -- you would not do the attempted --
20 amended indictment or anything to attempted armed robbery?
21 Because I -- I -- obviously, I thought the Court could do
22 that, but you're saying you're ---

23 THE COURT: No. I think I have the discretion to do
24 it. I just said what I've said, however, is that you made
25 a motion to dismiss at the directed verdict stage, where

1 you've made a motion for directed verdict on armed robbery.
2 And your argument is that the State has failed to provide
3 the Court -- or the jury with substantial circumstantial
4 evidence or direct evidence that in fact an armed robbery
5 took place. And what I'm saying is that in my estimation,
6 if I grant the motion, that there -- the charge of armed
7 robbery is dismissed.

8 MR. BOLUS: Well, I'm going to stick with the original
9 then, and I hate to backtrack, but -- but now the more I --
10 I'll take my chances with Your Honor's ruling then.

11 MR. BARNWELL: I think I agree with Mr. Bolus.

12 THE COURT: But if I deny the motion, then what you
13 all are saying is that you agree -- as I understand it,
14 that you agree that the Court then charge the lesser
15 included offense of attempted armed robbery.

16 MR. BOLUS: With -- I think the prosecutor would
17 disagree, but I think Your Honor -- the Court would have to
18 ---

19 THE COURT: That's what I understand him to say.

20 MR. BOLUS: --- because if the jury doesn't believe
21 any items were taken there, and there's evidence that none
22 -- none was taken, there's some little tiny iota that maybe
23 there was, I think we would have a right then to get an
24 attempted armed robbery charge. But that wasn't our
25 agreement; I thought we'd do it right now. But if you're

1 going to consider ---

2 THE COURT: Well, you all are confusing me because I
3 need to know if you've reached an agreement.

4 MR. JONES: Your Honor, for our purpose, we -- you
5 know, we're in a little bit different situation sort of.
6 But, I mean, we'd like you to make a ruling on the ---

7 THE COURT: Well, as an accessory, your client
8 basically is charged as a principal.

9 MR. BOLUS: Sure. Sure.

10 THE COURT: The only difference is that her behavior
11 is alleged to have happened in concert prior to the actual
12 event taking place and her not being present for the actual
13 event. It doesn't make her any less culpable and the
14 penalty is the same.

15 MR. JONES: And I certainly -- I certainly -- I just
16 don't know that, and I don't know if there's any benefit to
17 agreeing to -- and I think we just see what it is. I
18 think, you know, we've got a decent argument. And I feel
19 like seeing it through and if it doesn't, then we'll, you
20 know, have to ---

21 MR. JENNINGS: Let me -- could I make one statement,
22 Your Honor?

23 THE COURT: Sure.

24 MR. JENNINGS: Under *State vs. Hiott*, which is 276 ---

25 THE COURT: I'm sorry. I didn't hear you.

1 MR. JENNINGS: *State vs. Hiott*, H-i-o-t-t, 276
2 Southeastern 2nd, 163; 1981 decision. (As read) "Attempted
3 armed robbery is a lesser included offense of armed
4 robbery."

5 THE COURT: It is.

6 MR. JENNINGS: And an indictment for the lateral
7 supported conviction was performed.

8 THE COURT: That's correct.

9 MR. JENNINGS: But the evidence in this case, I
10 believe is overwhelming that the plan was to commit ---

11 THE COURT: I think that there is more than
12 substantial circumstantial evidence or direct evidence that
13 the -- that the act for which they acted in concert was to
14 rob Mr. Perry.

15 MR. JENNINGS: Yes.

16 THE COURT: Now, whether that ever actually took place
17 or not, I have to determined whether there's evidence in
18 the record to rise at the appropriate level, whether that
19 be submitted to the jury.

20 MR. JENNINGS: So all we would ask for ---

21 THE COURT: Frankly, I think the best case scenario
22 would be for all of you to agree to amend the indictment to
23 an attempted armed robbery, is what I think you should do.
24 Because I think that that's really what the evidence
25 supports.

1 MS. WILSON: Well, Your Honor, the evidence from the
2 co-defendant ---

3 THE COURT: I understand his statement. I have to
4 determine whether that rises above mere suspicion, however.

5 MS. WILSON: Right. But -- but in the defendants'
6 arguments, they have all conceded that there is evidence
7 that there was an armed robbery, that this jewelry was
8 taken. They're just arguing ---

9 THE COURT: Well, that's not what they -- that's not
10 what they conceded on. They concede that nothing was
11 taken. They said the only thing I have before me is the
12 word of a ---

13 MS. WILSON: They have --

14 THE COURT: --- co-defendant who says that ---

15 MS. WILSON: They have conceded that there's evidence,
16 not that it happened, but that there is evidence that it
17 happened, and they said that it's just a shred of evidence.
18 And what I'm saying is that gets into the weight of the
19 evidence.

20 THE COURT: I -- I agree. I still have it under
21 advisement. All I said was I was thinking about it.

22 MS. WILSON: Yes, ma'am.

23 THE COURT: Which I think is appropriate. The longer
24 I do this job, the more I realize I need to take more time
25 to think about some things. I'm going to think through

1 this and I'm going to think through the elements. I'm
2 going to go back through my notes and see exactly what --
3 what evidence there is in the record to support it.

4 As -- as my memory is not infallible, however, the
5 only evidence as I understand it that is in the record is
6 the testimony of Kerry Hollins, who says that Mr. Grant
7 told him that he took certain pieces of jewelry from Mr.
8 Perry. And what I am looking at right now is whether that
9 rises above mere suspicion. And there is a great argument
10 that that goes to the weight of the testimony according to
11 Mr. Hollins. And whether in fact Mr. Grant's statement was
12 an admission against interest and whether -- and of course
13 if I believe that to be the case and it to be a weight
14 issue, and if I determine that is substantial
15 circumstantial evidence, then they're all on the hook
16 because it's accomplice liability: Hand of one is the hand
17 of all. They were acting in concert, viewing the evidence
18 in the light most favorable to the State to rob Mr. Perry.

19 MR. BOLUS: It's complicated. So I have an inquiring
20 mind. I'd like to find out what's going to happen, so I'm
21 going to stick with my original motion.

22 THE COURT: Okay, Mr. Bolus. That's fine. And I'll
23 have an answer for you before we adjourn today.

24 Now, could all three defendants please stand for me
25 and raise your right hands to be sworn.

1 (All three defendants stand.)

2 Do you swear or affirm the testimony you give will be
3 the truth? Mr. Grant?

4 MR. GRANT: Yes, ma'am.

5 THE COURT: Mr. Hartwell?

6 MR. HARTWELL: Yes, ma'am.

7 THE COURT: And Ms. Smith?

8 MS. SMITH: Yes, ma'am.

9 THE COURT: You can all put your right hands down. I
10 need you to remain standing. At this time I'm going to
11 explain to you certain of your rights. If you do not
12 understand anything that I say, please let me know. If you
13 want me to explain anything in more detail, please let me
14 know. Do you understand? Mr. Grant?

15 MR. GRANT: Yes, ma'am.

16 THE COURT: Mr. Hartwell?

17 MR. HARTWELL: Yes, ma'am.

18 THE COURT: And Ms. Smith?

19 MS. SMITH: Yes, ma'am.

20 THE COURT: And I need you all to speak loudly and
21 clearly for me. The acoustics in this courtroom are
22 horrible, and I need to make sure that I can hear you, as
23 well as the court reporter being able to take down each of
24 your responses.

25 We have now reached the state of the trial where you

1 may present your defense. You have the right to claim the
2 protections given to you by the Fifth Amendment to the
3 Constitution of the United States. This amendment states
4 in part that no person shall be compelled in any criminal
5 case to be a witness against himself. This means that you
6 cannot be required to testify in this case. You have the
7 right to testify in your own behalf; however, no one can
8 make you testify. This is a personal right and no one can
9 waive this right except you.

10 If you decide to testify, you will be subject to the
11 same rule -- rules that govern other witnesses. And you
12 may be examined and cross-examined on any relevant issue in
13 this case. In addition, if you have any convictions
14 involving dishonesty, or a false statement, or for crimes
15 punishable by imprisonment for more than one year, and this
16 Court determines that the probative value of admitting this
17 evidence outweighs its prejudicial effect to you, the
18 solicitor will be able to introduce your record to attack
19 your credibility.

20 If you decide to testify, this decision on your part
21 must be freely, voluntarily, and intelligently made, with
22 knowledge of the protections given to you by the Fifth
23 Amendment and the consequences of your decision to testify.

24 If you decide not to testify, I will instruct the jury
25 that they cannot give the fact that you did not testify any

1 consideration whatsoever, and that there is to be
2 absolutely no prejudice to you because you did not testify.
3 In fact, I will instruct them that it is not to be
4 discussed in any way during the process of deliberations.
5 I will instruct them that you have no burden of proof in
6 this case, and that the burden remains on the State to
7 prove each and every element of the offense that you've
8 been accused of, and that you're entitled to a presumption
9 of innocence.

10 It is left entirely up to you whether or not you
11 testify. You may talk with your attorney, your family and
12 friends, or anyone else. But the final decision will be
13 left entirely up to you. Do you understand your rights as
14 I have just explained them to you? Mr. Grant?

15 MR. GRANT: Yes, ma'am.

16 THE COURT: Mr. Hartwell?

17 MR. HARTWELL: Yes, ma'am.

18 THE COURT: And Ms. Smith?

19 MS. SMITH: Yes, ma'am.

20 THE COURT: Do you have any questions about what I've
21 just explained to you? Mr. Grant?

22 MR. GRANT: No, ma'am.

23 THE COURT: Mr. Hartwell?

24 MR. HARTWELL: No, ma'am.

25 THE COURT: Ms. Smith?

1 MS. SMITH: No, ma'am.

2 THE COURT: Have you discussed with your lawyer
3 whether you should or should not testify? Mr. Grant?

4 MR. GRANT: Yes, ma'am.

5 THE COURT: Mr. Hartwell?

6 MR. HARTWELL: Yes, ma'am.

7 THE COURT: And Ms. Smith?

8 MS. SMITH: Yes, ma'am.

9 THE COURT: And just so that we're clear for the
10 record, we've already published that the State would not be
11 seeking any records for the purposes of impeaching your
12 credibility. Do you understand that? Mr. Grant?

13 MR. GRANT: Yes, ma'am.

14 THE COURT: Mr. Hartwell?

15 MR. HARTWELL: Yes, ma'am.

16 THE COURT: And Mr. -- Ms. Smith. I'm sorry.

17 MS. SMITH: Yes, ma'am.

18 THE COURT: Do you wish to talk with your lawyers
19 anymore at this time? Mr. Grant?

20 MR. GRANT: No, ma'am.

21 THE COURT: Mr. Hartwell?

22 MR. HARTWELL: No, ma'am.

23 THE COURT: Ms. Smith?

24 MS. SMITH: (Shakes head from side to side.)

25 THE COURT: I need you to tell me "yes" or "no."

1 MS. SMITH: No, ma'am.

2 THE COURT: Mr. Grant, do you wish to testify?

3 MR. GRANT: No, ma'am.

4 THE COURT: Mr. Hartwell, do you wish to testify?

5 MR. HARTWELL: No, ma'am.

6 THE COURT: And Ms. Smith, do you wish to testify?

7 MS. SMITH: No, ma'am.

8 THE COURT: You may be seated.

9 Mr. Bolus, will Mr. Grant be presenting any case as we
10 move forward?

11 MR. BOLUS: Any --

12 THE COURT: Any witnesses?

13 MR. BOLUS: No.

14 THE COURT: Okay. Mr. Barnwell?

15 MR. BARNWELL: No, Your Honor.

16 THE COURT: And Mr. Jones?

17 MR. JONES: None, Your Honor.

18 THE COURT: What I -- what I would suggest we do then
19 is to bring back in the jury, allow the Defense to rest in
20 their presence. I'll then excuse the jury and then we'll
21 have a charge conference, and we'll plan to have closing
22 and charge in the morning. Is that acceptable to everyone?

23 MR. JENNINGS: Yes, Your Honor

24 MR. BOLUS: Very much so.

25 THE COURT: Okay. You all give me one --

1 Please bring in the jury.

2 (The jury enters at 4:24 p.m.)

3 THE COURT: You may be seated.

4 THE COURT: Mr. Foreman, ladies and gentlemen, we
5 appreciate your patience as we disposed of those matters of
6 law. We will now resume with the trial.

7 Mr. Bolus, you may proceed.

8 MR. BOLUS: Defense rests.

9 THE COURT: Mr. Barnwell, you may proceed.

10 MR. BARNWELL: Defense rests.

11 THE COURT: And Mr. Jones, you may proceed.

12 MR. JONES: Your Honor, the Defense rests.

13 THE COURT: Mr. Foreman, ladies and gentlemen, you
14 have heard the entirety of the evidence in this case. The
15 next stage of the process will require the lawyers' closing
16 arguments and the Court's instruction on the law. It is
17 now 4:25, and I think it is -- we -- the day is well used.
18 It would not be prudent for us to begin that process this
19 evening because there are still some matters of law I need
20 to go over with the attorneys.

21 So what we will do -- and I have determined that we
22 will recess for the evening, and will resume in the morning
23 at 9:30 with closing arguments and the Court's instruction
24 on the law.

25 During this break, it is even more important that you

1 all abide by the Court's instructions and have no
2 discussion about this case among yourselves or with anyone
3 else. I know sometimes it is very difficult and may seem
4 very innocent to talk with someone about what you've heard
5 or the type case that you're hearing.

6 The reason that we ask you not to do this is because
7 when you begin to discuss with someone what you've been
8 hearing, it requires you to process what you've heard and
9 to draw conclusions based upon that analytical process.
10 And that by its very nature is deliberations, and you're
11 only allowed to do that among your fellow jurors once you
12 have heard all of the arguments and the Court's instruction
13 on the law and once you've been released to begin that
14 process. So I would ask that you strictly abide by those
15 instructions.

16 Also, please do not watch, read, or listen to any news
17 accounts about this case, or do any independent research of
18 any type regarding any matter about this case on the
19 internet or otherwise. When you return to the courthouse
20 in the morning, please come directly to your jury room.
21 And again, please don't have any contact with anyone in or
22 about the courthouse.

23 We hope that you have a restful evening, and we'll see
24 you in the morning at 9:30. Please leave your notepads in
25 your seats and we'll secure them during the recess.

1 (The jury exits at 4:27 p.m.)

2 THE COURT: You may take your seats. You all give me
3 a few moments. I need to print some portions of my charge,
4 and I will be right back.

5 MS. WILSON: Your Honor --

6 THE COURT: Uh-huh.

7 MS. WILSON: -- before you walk out, I'm going to hand
8 up -- I just have one copy -- *The State vs. ---*

9 THE COURT: You can just give us the citation.

10 MS. WILSON: *The State vs. David Bernard Elmore*, and
11 it is a January, 2006 case. It says Opinion No. 4082.
12 Judge Westbrook as the judge. Regarding directed verdict
13 motions. And again, it says (as read): "The trial accord
14 in a directed verdict motion is concerned with the
15 existence or nonexistence of evidence and not with its
16 weight if the standard remains constant, even when the
17 State provides exclusively on circumstantial evidence."

18 Now, we aren't conceding that the testimony of Mr.
19 Hollins is circumstantial, especially when it involves a
20 confession by a co-defendant. The case goes on to say (as
21 read): "If there is any direct evidence or substantial
22 circumstantial evidence reasonably tending to prove the
23 guilt of the accused, the case should be submitted to the
24 jury."

25 THE COURT: The Court is well familiar with the

1 standard.

2 MR. JENNINGS: And I think that -- and all -- and all
3 I will say, I think the proper -- whatever Your Honor's --
4 if Your Honor does not feel that there is sufficient proof
5 of the actual asportation of goods, I think that the
6 evidence is more than proof of the attempted armed robbery.
7 And I believe the proper inquiry is whether it goes forward
8 as armed robbery or attempted armed robbery, pursuant to
9 17-19-100.

10 If Your Honor does not feel there is sufficient proof
11 of the asportation, then the indictment will be amended to
12 attempted armed robbery as to Grant and Hartwell, and
13 accessory before the fact of attempted armed robbery as to
14 Ms. Smith. I think that's what everybody agrees to.

15 THE COURT: Thank you very much. We'll be at ease for
16 a few moments.

17 I will give the jury a general charge regarding their
18 function and my function. How they're to judge witness
19 credibility and believability. That they're to follow the
20 law as instructed by the Court and that they are bound by
21 the instructions of the Court.

22 I will also give them a charge about an expert witness
23 testimony. Then instruct them that the -- the record of a
24 witness can only be considered if they determine it's true
25 for the purposes of credibility. Then give them a general

1 charge regarding circumstantial and direct evidence. Then
2 instruct them that the charge, the arrest, and the
3 indictment are not evidence.

4 Then charge on the presumption of innocence.

5 Then charge *Victor vs. Nebraska* on reasonable doubt.

6 Then charge the elements of identification testimony
7 and how they are to judge that testimony. Also that the
8 State must prove identification beyond a reasonable doubt.

9 I think after reasonable doubt, before I charge
10 identification, I will charge regarding the fact that the
11 defendants did not testify, the fact that that cannot be
12 used against them.

13 I will then charge identification testimony and how
14 that is to be -- how that testimony is to be judged. And I
15 might change identification testimony around, and I may
16 charge it after the general charge regarding how they are
17 to judge witness credibility and believability, and along
18 in that same vicinity of the charge.

19 I'll then charge the elements of the offenses as they
20 were indicted. But actually they're kind of -- each of
21 them are somewhat charged differently. What I probably
22 will do is -- is charge -- at this moment as I look at
23 them, charge the elements of kidnaping; then the elements
24 of murder, the elements of burglary first, and the elements
25 of armed robbery.

1 I'll then charge accomplice liability, which is
2 commonly referred to as "the hand of one is the hand of
3 all." Within that charge is encompassed the language of
4 regarding mere presence.

5 I'll then charge -- give the jury instructions
6 regarding the multiple offenses that have been charged.
7 The fact that they must consider each offense
8 independently, regarding each element and the elements that
9 the Court has provided regarding how the State is to meet
10 their burden of proof, and to decide each of those
11 individually, independent of one another.

12 I'll also give them a general charge regarding the
13 fact that there are multiple defendants.

14 And actually I left something out, and I apologize
15 because I was -- I greatly appreciate your patience. I was
16 trying to find a computer. We just got new computers; our
17 software has been greatly enhanced, and there is no
18 computer in the building that can print from my thing,
19 except I have to disconnect this computer and take it back
20 there and hook it up to a printer, and it was just going to
21 take way too much time. So I apologize. I skipped some
22 portions of my charge because I was not able to print them,
23 and I will go back and tell you those that I omitted.

24 But I will be charging multiple charges, as well as
25 multiple defendants, and then of course give them the form

1 -- possible forms of the verdict. And there will be an
2 individual verdict form for each indictment for each
3 defendant. The charges that I left out, of course, will be
4 charging accessory before the fact for felony -- for both
5 murder and armed robbery.

6 I am debating at this time whether I may give the
7 charge entitled "dying declaration," which would instruct
8 (as read): "Ladies and gentlemen, the Court has admitted
9 evidence of statements allegedly made by the deceased
10 victim after the injuries. I've determined that these
11 statements should be admitted into evidence in this case.
12 However, it is for you to determine the believability of
13 these statements. In deciding this question, you may
14 consider whether the victim was dying and knew he was dying
15 and whether the victim had lost all hope of recovery at the
16 time the statements were made. And then, of course, as the
17 fact-finder, it is for you to determine the effect, value
18 and weight to be given to such testimony."

19 I'm debating. I've never given that instruction
20 before, but it is a part of our standard instructions, and
21 I may give it in conjunction with the other boiler plate
22 charge where I give -- regarding how they're to judge
23 witness credibility and believability. The same as I would
24 charge regarding the prior record of a witness, as well as
25 expert witness testimony.

1 I think that's all that I left out. If I left out
2 anything else, I apologize. I'll know that once I'm able
3 to actually print the rest of my charge from this memory
4 stick.

5 Are there any requests for any lesser included
6 offenses? From the State?

7 MR. JENNINGS: I think the only one -- we would just
8 ask you also charge attempted armed robbery in conjunction
9 with the armed robbery.

10 THE COURT: Is there any exception? And I'm going to
11 rule on the motion for directed verdict. Is there any
12 exception from the Defense regarding the State's request
13 that a lesser included offense of attempted armed robbery
14 be instructed? Mr. Bolus?

15 MR. BOLUS: There's no objection from me.

16 MR. JONES: I don't have any objection.

17 THE COURT: Mr. Barnwell?

18 MR. BARNWELL: No objection.

19 THE COURT: Okay. Then I will include that. Are
20 there any other requests for any lesser included offenses
21 to the offense of murder? From the State?

22 MR. JENNINGS: None for the State. I do have a
23 argument if the Defense requests though.

24 THE COURT: Okay. From the Defense? Mr. Bolus?

25 MR. BOLUS: If I was to request what?

1 THE COURT: If you wanted me to -- if any of you
2 wanted me to charge any lesser included offenses on the
3 offense of murder is what I'm asking. The State says they
4 have no request. They are prepared, however, to respond if
5 you have a request.

6 MR. BOLUS: I think I don't have a request.

7 THE COURT: Okay. Mr. Barnwell?

8 MR. BARNWELL: I don't think I have a request, Your
9 Honor.

10 THE COURT: Mr. Davis? I mean Mr. Jones?

11 MR. JONES: (To the State) Two for a lesser -- for
12 voluntary?

13 THE COURT: They have not requested any lesser
14 included offenses.

15 MR. BOLUS: (To Mr. Jones) He's anticipating you
16 asking for something.

17 MR. JONES: Your Honor, I -- I don't -- may I talk to
18 my client just a minute?

19 THE COURT: Sure. Go right ahead.

20 MR. JONES: I wasn't sure I -- I got the -- I -- I got
21 the request for charges and I was ---

22 THE COURT: They gave me that, I think, in
23 anticipation of you asking for it.

24 MR. JONES: I gotcha.

25 THE COURT: And I need to know if you all are

1 requesting any lesser included offense.

2 (Sotto voce between Mr. Jones and Defendant Smith.)

3 MR. JONES: Your Honor, we're not going to request
4 instruction ---

5 THE COURT: I'm sorry.

6 MR. JONES: We're not going to request instruction on
7 voluntary.

8 THE COURT: Any request for any other lesser included
9 offenses? That would be burglary in the first degree. Of
10 course, there are no lesser included as to kidnaping. And
11 the lesser included for armed robbery. I think we've all
12 agreed that you all would like me to add the -- the
13 attempted -- and the lesser included of attempted armed
14 robbery. So that's been covered.

15 Are there any requests on burglary in the first
16 degree? From the State?

17 MR. JENNINGS: No, Your Honor.

18 THE COURT: From the --

19 MR. BOLUS: No, Your Honor.

20 MR. BARNWELL: No, Your Honor.

21 MR. JONES: No, Your Honor.

22 THE COURT: Are there any exceptions to the charges
23 proposed? From the State?

24 MR. JENNINGS: No, Your Honor.

25 THE COURT: From the Defense? Mr. Bolus?

1 MR. BOLUS: No. There are no exceptions.

2 THE COURT: Mr. Barnwell?

3 MR. BARNWELL: No, Your Honor.

4 THE COURT: Mr. Jones?

5 MR. JONES: Your Honor, I would ask for the additional
6 request of the strong arm. I think there is, again, more
7 than enough -- the only evidence is really her statement
8 which never talks about any weapons, and Mr. Collins' [sic]
9 statement, which he did back up under cross that a "lick"
10 may not be -- he didn't talk about any weapons or anything.
11 A "lick" may or may not mean an armed robbery. A "lick"
12 could also be a noun, which is a person.

13 THE COURT: Is there any evidence in the record that
14 the -- the incident took place without weapons?

15 MR. JONES: There's no evidence, but it also, with the
16 accessory, the -- the intent plan, again, of -- I -- I
17 think you're instructing and I think you might have termed
18 it, but -- the accomplice -- was the action a natural
19 probable consequence of an agreed plan? There's no
20 evidence that -- and the State never attempted to produce
21 any evidence other than Mr. Collins [sic] -- which
22 obviously has issues on there -- that a-- that she knew
23 anything beyond a strong arm robbery, and that -- and you
24 know, anything beyond -- if her -- if her intent was that
25 this was going to be a "snatch and grab," or something of

1 that sort, I think there's -- there's a -- that's at least
2 a jury question as to whether or not they intended to
3 commit a strong armed robbery. I mean, again, there's --
4 Kerry Collins [sic]-- and Kerry never said she saw any
5 weapons, discussed weapons or anything of that sort. And
6 he backed up on cross that when Mr. Bolus asked him, "Is --
7 is a lick particularly an armed robbery," he said, "Could
8 be -- could be the other. Could be a noun."

9 I think she would be entitled to the -- to the charge
10 of strong armed robbery. No other evidence was -- was
11 submitted beyond that. Her statement never mentioned they
12 never asked.

13 THE COURT: Any exception from the State?

14 MR. JENNINGS: Your Honor, I think all -- all of Mr.
15 Hollins's testimony was that in his parlance and
16 understanding of the word "lick," it involved -- meant a
17 robbery involving weapons. Now, Mr. Bolus did ask him, in
18 fact, if he -- if "lick" could be used as a noun, as in
19 "they had a lick," but every time Mr. Hollins talked about
20 it, he said that a lick involved weapons.

21 And I think the most prudent example is that -- I
22 think, is the last question that Mr. Barnwell asked him on
23 his re-cross. And even at that point, Mr. Hollins
24 emphasized to him that -- that a lick involved weapons and
25 that Miss, you know, that was the common parlance on the

1 street.

2 MR. JONES: Your Honor, if I may. Again, if he -- he
3 said "robbery." He didn't go into armed robbery. He said
4 "robbery." And with regard he said, you know, for his mind
5 of this event, it -- for his mind. He never said what he
6 knew Marquita knew, or what he told her, or what he led her
7 to believe. And again, there was plenty of opportunities
8 for the -- for the State to delve into that with him.

9 THE COURT: The only thing the State has to prove
10 against your client, Mr. Jones, is that she was that -- the
11 only thing they have to prove beyond a reasonable doubt is
12 that she either advised, agreed, urged, counseled, hired,
13 or in some way aided or abetted another person to commit a
14 crime, that the defendant was not present when the offense
15 was committed. That's all they have to prove. So while
16 the underlying offense has to have taken place, all they
17 have to prove is that she aided, advised, urged, counseled,
18 or hired them to commit an armed robbery.

19 MR. JONES: Your Honor, and there was also testimony -
20 --

21 THE COURT: I think your argument goes more than one -
22 - the "hand of one is the hand of all" in terms of -- of
23 the spirit of liability, but all they have to prove is that
24 she made a phone call and said where they were. I mean
25 it's very -- it's a very different standard. They don't

1 have to prove she's guilty of armed robbery; they just have
2 to prove that she was -- that she was an accessory: that
3 she aided, advised, agreed, urged, counseled, or hired some
4 way, or in some way aided or abetted them in -- in
5 committing that offense.

6 MR. JONES: But Your Honor, isn't it -- I -- I would -
7 - I would also argue, again getting into -- I think we'd be
8 able to argue as to -- I -- I think there would be an
9 argument as to, you know, if what -- if they'd be able -- I
10 can't remember if there was evidence of a retaliatory
11 nature. It was -- I cannot remember if that ever got into
12 the retaliatory nature of the drugs being -- of the ripoff
13 and all that. It would clearly be a whole different plan
14 from the armed robbery that's in evidence.

15 Well, when Chris Nelson testified, he didn't think it
16 was an armed robbery. He thought it was retaliatory in
17 nature. And that he thought that it was sort of
18 retaliatory -- retaliating against Dexter for a bad drug
19 sale. So at least the -- the argument is there by one of
20 the witnesses ---

21 THE COURT: I don't know that that was his testimony.

22 MR. JENNINGS: No.

23 THE COURT: He testified ---

24 (Noise made from unknown person in the gallery.)

25 THE COURT: If there is any disruption from the

1 gallery, I will clear this courtroom.

2 MR. JONES: Your Honor, when he -- I thought that I
3 had -- and I'm not sure who asked it, but I thought Chris',
4 you know, question was -- is he said, "I didn't even think
5 it was a robbery." He said, "Nobody wore masks. So I
6 thought it was a hit on Dexter."

7 THE COURT: That's not -- that's your parenthetical of
8 what he testified to. He testified about there being no
9 masks. He testified about the fact that they didn't have
10 any concern about their -- their identity because it was
11 not their intention to leave anyone.

12 MR. JONES: But I --

13 THE COURT: After they left.

14 MR. JONES: Well, I -- but I thought that he testified
15 it was not, you know, he didn't think it was a robbery, and
16 that he thought it was a hit. And I mean, I -- I --

17 THE COURT: Hold on.

18 MS. WILSON: I believe he said ---

19 THE COURT: Did he say that?

20 MS. WILSON: I believe he also testified ---

21 THE COURT: Did he use that language?

22 MR. WILSON: --- that he could overhear them asking
23 where the money was, and Dexter -- Dexter's response to
24 that when he was looking through that air-conditioner. I -
25 - I don't remember -- recall anything about a hit.

1 THE COURT: He never said that. And of course my
2 memory is not infallible.

3 MR. JONES: Mine -- mine, too, after all this, too.
4 But -- but I did note because ---

5 THE COURT: His testimony was on re-direct or cross.
6 I can't remember. One of the -- it wasn't on his direct
7 testimony. The -- the question was asked of him why he
8 shot into the residence, and that nobody had on any masks.
9 And that it was his impression that when folk don't wear
10 masks, they're not concerned about their identity because
11 they don't plan to leave anybody behind. Basically, that's
12 the gist of it, and I'm paraphrasing what he said also. So
13 we'd have to go back to the transcript to see exactly what
14 he said. But he never used the term "hit."

15 MR. JONES: Well, maybe -- maybe I -- I -- but it --
16 it was something where it was beyond, because I -- I
17 remember making a note that it was -- backed up the other
18 theory that it was a possible bad drug deal, that their
19 retaliation was going to be against Dexter.

20 MR. BOLUS: I think that was a statement that was used
21 against Mr. Hartwell. There was a statement saying that,
22 "Dexter sold me some bad product."

23 THE COURT: It came up with some other ---

24 MR. BOLUS: -- that that was where ---

25 THE COURT: --- witnesses, but it didn't come up with

1 the witness he's referring to.

2 MR. BOLUS: That was referenced ---

3 THE COURT: It was a passing reference to it.

4 MR. JONES: He could have -- I wrote down, Your Honor,
5 in my notes, "Just think they came to hurt him, not rob
6 him." And I actually highlighted ---

7 THE COURT: But he still testified that when he was
8 listening through the drapes, he heard them attempt to rob
9 -- committing a robbery.

10 MR. JONES: Well, he didn't -- and I -- and I -- but
11 again, his attitude --

12 THE COURT: A strong arm robbery is where you commit
13 the robbery with intimidation or force without a deadly
14 weapon. That's the only element that is not present.
15 There's no testimony in the record that this robbery even
16 in fact took place -- took place without weapons. There's
17 no factual support for it. I originally went into it
18 believing that there would be some factual support for it,
19 but the evidence as it has been presented to this jury --
20 the only version by direct or circumstantial evidence is
21 that if in fact the robbery took place as alleged, that Mr.
22 Perry was basically within the control of two people who
23 had guns on him for the purpose of taking money or other
24 things of value from him. Of course, it couldn't be drugs
25 because that's an illicit substance, and the law does not

1 recognize that as a thing of value, I don't think.

2 MR. JONES: I think actually they do because I've
3 researched it ---

4 THE COURT: Do they really?

5 MR. JONES: --- and I was thinking that was an
6 argument. I think it's actually in a case. Not that it
7 helps me any, but ---

8 THE COURT: No, it doesn't.

9 MR. JONES: Just for future.

10 THE COURT: It might well be. It's a thing of value
11 on the street, of substantial value.

12 MR. BOLUS: Could I suggest something to you?

13 THE COURT: Sure. Go right ahead.

14 (Sotto voce discussion between Mr. Bolus and Mr. Jones.)

15 MR. JONES: Your Honor, the other thing with -- with
16 accessory before an attempted robbery -- also as if you --
17 armed robbery.

18 THE COURT: That goes on the verdict form. There will
19 be no ---

20 MR. JONES: Separate charge?

21 THE COURT: I would simply -- there is no separate
22 charge for the accessory, except the aiding and abetting
23 language. It's a very short charge, and it just -- the
24 jury then considers the elements of the offense that I
25 charge, and they will determine whether in fact she

1 advised, agreed, urged, counseled, hired, or in some way
2 aided or abetted someone to commit the crimes. So it will
3 be included on the verdict form, but there is no particular
4 -- or be included in the verbiage, but there is no separate
5 charge for that.

6 MR. JONES: Your Honor, who -- I don't know if you --
7 if the only other thing I'm thinking without -- outside --
8 I don't know -- I understand you made your ruling on the
9 strong arm, but I -- I believe the liability of accomplice
10 act, one is not liable for accomplice unless natural,
11 probable consequences ---

12 THE COURT: That's something you will argue to the
13 jury.

14 MR. JONES: Okay. I didn't -- well, I didn't know
15 whether you would have to charge it. I know there's a
16 liability for accomplice acts charge actually, also. And -
17 -

18 THE COURT: Say that one more time.

19 MR. JONES: I know there actually is a charge to that
20 point also.

21 THE COURT: I'm going to give the prevailing case law:
22 "Hand of one is the hand of all." It will encompass
23 everything that the Supreme Court has said about accomplice
24 liability.

25 MR. JONES: Thank you, Your Honor. I know they had

1 brought it up and ---

2 MS. WILSON: Well, I was just -- I was going to -- I
3 don't know if you've got a copy of our request to charge,
4 but ---

5 THE COURT: I'm going to deal with those in a second.

6 MS. WILSON: Okay.

7 THE COURT: I got 1 and 2. Which one was felony
8 murder instruction?

9 MS. WILSON: That's right. The first one we withdraw.
10 That was in response.

11 THE COURT: Yeah, that's voluntary manslaughter.
12 That'll be marked as a Court's exhibit.

13 MS. WILSON: Okay. And I was going to add something
14 to State's request to charge No. 2, based on accomplice
15 liability to make it more complete.

16 THE COURT: You said you were going to what now?

17 MS. WILSON: I wanted to add something to the State's
18 No. 2 to make it more complete, which ties into what Mr.
19 Jones was just saying.

20 THE COURT: Uh-huh.

21 MS. WILSON: I think it's a little bit different than
22 "hand of one" -- than the "hand of one" issue because it
23 has to do more with the actual offenses versus the number
24 of parties involved.

25 As to the felony murder, we would ask for that

1 instruction because based on the crimes that we allege were
2 committed -- the burglary first, the kidnaping, and the
3 armed robbery -- those charges being felonies, and we
4 believe it's proper under the law that those are natural
5 and probable consequences. Or murder would be a natural or
6 probable consequence if any one of those offenses -- we
7 think a felony murder instruction would be appropriate.

8 Then what I was going to suggest that we add to what I
9 handed up is the language (as read): "A person is not
10 liable for the acts of an accomplice unless the act is a
11 natural or probable consequence of the plan. You must find
12 that another -- that a homicide was a natural or probable
13 consequence of the particular act to which the defendant
14 was an accomplice."

15 And I think that's different than the "hand of one"
16 charge because this goes more under what the agreement was
17 for them to do and what the consequences of the agreement.

18 THE COURT: I'm going to charge "hand of one is the
19 hand of all" totally separately.

20 MS. WILSON: All right.

21 THE COURT: I think the way you all are asking is very
22 confusing for the jury. I will charge felony murder
23 inference, but I'm going to charge that within the elements
24 of malice on murder. I'm going to use my standard charge.

25 MS. WILSON: Okay. Can you tell us what that is?

1 THE COURT: Uh-huh. It says (as read): "If one
2 intentionally kills another during the commission of a
3 felony, the inference of malice may arise. If facts are
4 proven beyond a reasonable doubt sufficient to raise an
5 inference of malice to your satisfaction, this inference
6 would simply be an evidentiary fact to be taken into
7 consideration by you along with other -- along with all the
8 other evidence in the case, and you may give it the weight
9 that you decide it should receive."

10 MR. JONES: Your Honor, with -- if I may?

11 THE COURT: Uh-huh.

12 MR. JONES: With regard again, as I understand it, I
13 think you're going to -- you're talking about the language
14 of the act is a natural probable consequence is not going
15 to be part of the instruction, and ---

16 THE COURT: I didn't say that.

17 MR. JONES: Oh, okay.

18 THE COURT: I said I'm going to charge the "hand of
19 one is the hand of all," and I'm not going to mix it in
20 with the rest of it. I'm just going to say ---

21 MR. JONES: I just wanted to clarify that that -- you
22 know, obviously, that was in there.

23 THE COURT: It's in there.

24 MR. JONES: I just want to make sure that ---

25 THE COURT: I'll tell you what it says in just a

1 second.

2 MR. JONES: Thank you.

3 THE COURT: And I may add that additional language
4 regarding the fact that burglary first, kidnaping, and
5 armed robbery are felonies under the law in the State of
6 South Carolina. Something to that effect.

7 MS. WILSON: While you're looking, I'm going to hand
8 up amended State's Request to Charge 2(a), which just --

9 THE COURT: Would you mark that as Court's Exhibit?
10 (Marked Court's Exhibit No. 2, Request to Charge.)

11 THE COURT: When I charge accomplice liability, I will
12 charge (as read): "If a crime is committed by two or more
13 people who are acting together in committing a crime, the
14 act of one is the act of all. A person who joins with
15 another to accomplish an illegal purpose is criminally
16 responsible for everything done by the other person which
17 occurs as a natural consequence of the acts done in
18 carrying out the common plan and purpose. For example, two
19 people can be guilty of killing another person when only
20 one of the two had a gun. There was only one bullet and
21 only one of the two fired the shot that caused the death.

22 "If two or more people are together, acting together,
23 assisting each other in committing the offense, the act of
24 one is the act of all. As it is said sometimes, "The hand
25 of one is the hand of all." Prior knowledge that a crime

1 is going to be committed without more is not sufficient to
2 make a person guilty of that crime. Mere knowledge that
3 another person is going to commit a crime, even if the
4 defendant is present when the crime is committed, is not
5 sufficient to convict the defendant as a principal.

6 "Guilt as a principal is shown by actual or
7 constructive presence at the scene as a result of prior
8 arrangement. Therefore, finding of a prior arranged plan
9 or common scheme is necessary for a finding of guilt as a
10 principal. The State must prove beyond a reasonable doubt
11 by competent evidence the theory of "the hand of one is the
12 hand of all.

13 "A principal in a crime is one who either actually
14 commits the crime, or who is present, aiding, abetting, or
15 assisting in committing the crime. When a person does an
16 act in the presence of and with the assistance of another,
17 the act is done by both. Where two or more, acting with a
18 common plan or intent, are present at the commission of a
19 crime, it does not matter who actually commits the crime.
20 All are guilty. The hand of one is the hand of all.

21 "Present at the commission of a crime means to be
22 sufficiently near to aid and abet and assist in the
23 commission of the crime. However, mere presence at the
24 scene of a crime is not sufficient to convict one as a
25 principal on the theory of aiding and abetting.

1 "Intent is also a necessary element, for there must
2 have been a common design and intent to commit the crime,
3 and the crime must have been committed pursuant thereto,
4 with the person aiding and abetting by some overt act.
5 Intent means intending the result which actually occurs,
6 and not accidentally or involuntarily. Intent may be shown
7 by acts and conduct of the defendant and other
8 circumstances for which you may naturally and reasonably
9 infer intent. The State must prove these elements beyond a
10 reasonable doubt."

11 And I will also charge constructive presence. And
12 that will read as follows: "A person may be constructively
13 present at the commission of a crime, even though the
14 person is some distance away from the actual scene, if it
15 is shown beyond a reasonable doubt that the person played a
16 role in the commission of the crime as a result of some
17 prior arrangement."

18 You all are -- the State is withdrawing request No. 1,
19 which deals with voluntary manslaughter; is that correct?

20 MS. WILSON: Yes, ma'am.

21 THE COURT: I'm going to add the language from No. 2,
22 which is telling them that the crimes of burglary first
23 degree, kidnaping, and armed robbery are felonies when I
24 instruct on felony murder inference.

25 The Defense, Mr. Barnwell has requested a mere

1 presence charge, which I think is covered by the Court's
2 standard charge. He's also requested a charge of
3 identification testimony, which I believe is covered in my
4 standard charge. And No. 3 is not applicable because none
5 of the defendants testified.

6 Mr. Barnwell also requested a charge that is numbered
7 No. 5, where he's asking the Court to instruct on
8 punishment, and I have -- I have advised him that the Court
9 will not be giving an instruction on punishment because
10 that is not appropriate for the jury to consider. That is
11 solely a matter of law for the Court. There is case law
12 that provides that a jury is not to consider punishment in
13 their deliberations. It is not appropriate. I have Mr.
14 Barnwell's request marked as a Court's Exhibit.

15 (Marked Court's Exhibit No. 5, Mr. Barnwell's request
16 to charge.)

17 Are there any exceptions to the charges proposed from
18 the State, or any further requests?

19 MS. WILSON: Can you -- would you mind reading your --
20 your accessory charge -- would you have ---

21 THE COURT: I will say, "The defendant" -- and I'm
22 going -- I'm going to separate out each defendant as to
23 what each is charged with and the elements that would be
24 applicable to them. And it will read (as read): "The
25 defendant Marquita C. Smith is charged with being an --

1 being an accessory before the fact of a felony, those being
2 murder and armed robbery. In order to prove this crime,
3 the State must prove beyond a reasonable doubt that the
4 defendant either advised, agreed, urged, counseled, hired,
5 or in some way aided or abetted another person to commit a
6 crime, and that the defendant was not present when the
7 offense was committed.

8 "Aid" means to help to promote a course or
9 accomplishment of, to give support to, or to give
10 assistance to. "Abet" means to encourage, or appear to
11 favor or support."

12 Any further requests from the state?

13 MS. WILSON: Beg the Court's indulgence.

14 THE COURT: Uh-huh.

15 MS. WILSON: Your Honor ---

16 THE COURT: Uh-huh.

17 MS. WILSON: The one thing that we would ask, I
18 believe that the Court goes through the natural or probable
19 consequence language with regards to the principals and the
20 substantive charges. But with regards to Ms. Smith and the
21 accessory charges, I think it would be appropriate at that
22 point to have that language charged in relation to the
23 accessory charges as well.

24 (Sotto voce discussion between the Court and the law
25 clerk.)

1 THE COURT: I'm sorry. Say that one more time.

2 MS. WILSON: Okay. It gets kind of confusing. The
3 Court has said that you would charge the natural and
4 probable consequence language with regards, "The hand of
5 one, the hand of all," which goes to the principals
6 involved.

7 THE COURT: It goes to everybody involved because if
8 she -- either she's -- either she's involved as a co-
9 conspirator and her hand is the same as theirs, or it is
10 not. There's no difference between her and the rest of
11 them sitting at the table. They're all similarly situated.

12 MS. WILSON: Well, she -- technically speaking, she's
13 not charged as a principal. And "the hand of one" would
14 make her a principal. She's -- she is charged as an
15 accessory, so ---

16 THE COURT: Before the fact.

17 MS. WILSON: --- right. And I realize that they're
18 very close and even the cases talk about how those lines
19 can be blurred. What I'm saying is that language, I think,
20 is perfectly appropriate the way you have it and that fits
21 for these two defendants who were principals who were
22 there. And while we could have charged Ms. Smith as a
23 principal, we did not. We charged her as an accessory.

24 THE COURT: Uh-huh.

25 MS. WILSON: Because of that -- because it's accessory

1 before the fact, I think it's also appropriate to charge
2 that natural and probable consequence language with regard
3 to those two offenses as we outlined in State's Request to
4 Charge 2(a).

5 THE COURT: Do you have any case law to support that?

6 MS. WILSON: Yes, ma'am. And it's ---

7 THE COURT: If you have it for me, I'll be glad to
8 look at it.

9 MS. WILSON: Okay. It's *State v. Bell*. I believe I -
10 - I wrote it on there. And I'll give you the site. It's
11 *State v. Bell*, which is 305 South Carolina 11. It's a 1992
12 case. And also *State v. Levelle*, 34 South Carolina 120.
13 It's an 1891 case.

14 And we also cited Professor McAninch's book, which has
15 a recitation of these cases -- page 123 of his book and
16 also page 526 -- where he outlines those instructions that
17 were given. And in the example of *State vs. Peterson*, I
18 believe there was a -- a charge of an unarmed larceny of a
19 car. And the question was whether or not the instructions
20 were appropriate and whether or not they charged
21 sufficiently that the State had to prove that murder was a
22 natural or probable consequence of that unarmed larceny.

23 And I -- I think that's kind of the situation that we
24 might have here, and I think it, again -- I'm basically
25 asking for a similar "hand of one" instruction to go along

1 with the accessory charges. You've got it for the
2 principals, but Ms. Smith was not charged as a principal.
3 And that's my concern, that the jury understands that they
4 have to find those things in regards to her as well because
5 she's not charged as a principal.

6 THE COURT: Mr. Jones?

7 MS. WILSON: And if I -- I'll hand this to -- Mr.
8 Jones has not seen what I handwrote while we were having
9 discussions. This might help him see what I was talking
10 about.

11 MR. JONES: Your Honor, this -- this is more in line
12 with what I was also asking you ---

13 THE COURT: Y'all agree on it. Work something out.
14 I'll be glad to do it. As long as there is no exception, I
15 don't have a problem. Y'all happy; I'm happy.

16 Let me see what it is.

17 MS. WILSON: This is Court's -- been marked Court's
18 Exhibit 5. It's State's 2(a) request.

19 THE COURT: Are you all requesting I simply add this
20 language to the end of the charge of aiding and abetting --
21 I mean, accessory after the fact?

22 MS. WILSON: I'm requesting that you charge all that,
23 the typewritten and the handwritten portion.

24 THE COURT: Well, I've already be charging felony
25 murder. And I don't think ---

1 MS. WILSON: Well, this is a different aspect of
2 felony murder. There are different ways to -- to have
3 felony murder.

4 THE COURT: I agree.

5 MS. WILSON: One is as you were charging it earlier as
6 to give the -- the rise -- give rise to malice.

7 THE COURT: Uh-huh.

8 MS. WILSON: This involves more of what I was saying
9 earlier. When you have the felonies that have been
10 committed that are -- that are felonies and you said you
11 would instruct that those crimes were.

12 THE COURT: I will in a -- in the felony murder
13 instruction, which is supported by case law. I -- I was
14 just perusing *State vs. Bell* and it nowhere cites this
15 language. I have found that books are not always that
16 accurate. No reflection on Professor McAninch, but
17 sometimes they use dicta, which is not a part of the -- of
18 the case.

19 MS. WILSON: Right.

20 THE COURT: But again, I have no problem with the
21 language. I'm just asking where are you all -- well, let
22 me be clear.

23 Mr. Jones, do you have any exception to what Ms.
24 Wilson has requested, which is that this entire felony
25 murder instruction be amended to the instruction for

1 accessory before the fact of murder regarding your client?

2 MR. JONES: Your Honor, I -- I don't believe I do,
3 looking over it.

4 THE COURT: Okay. If you all agree, that's fine with
5 me. I'll simply charge it along with it. There's no
6 exception. I have no dog in the fight.

7 MS. WILSON: So -- so the Court's 5 will come after
8 the accessory --

9 THE COURT: The Court's what now?

10 MS. WILSON: The Court's No. 5 will come after you
11 charge the accessory language.

12 THE COURT: This will not be a Court's Exhibit any
13 longer.

14 MS. WILSON: Right. Right.

15 THE COURT: It will be a part of the charge.

16 MS. WILSON: I thought that you had ---

17 THE COURT: What I will do is add your request, and
18 then with the consent of Mr. Jones, I will simply charge it
19 after -- after I have charged the elements of accessory
20 before the fact of murder.

21 MS. WILSON: Yes, ma'am.

22 THE COURT: But they'll all be charged the same.

23 MS. WILSON: Right.

24 THE COURT: And I will simply -- and then I'll just
25 amend it to the end of the charge.

1 Are there any further -- further requests to charge
2 from the State?

3 MR. JONES: Your Honor, one -- one thing that I ---

4 THE COURT: From the State?

5 MR. JONES: No, Your Honor. I'm sorry.

6 THE COURT: Mr. Bolus, any further requests to charge?

7 MR. BOLUS: Just to be clear, you are going to charge
8 attempted armed robbery ---

9 THE COURT: Uh-huh.

10 MR. BOLUS: --- or just put it on -- okay, and be a
11 part of the verdict form?

12 THE COURT: Uh-huh.

13 MR. BOLUS: For our two.

14 THE COURT: I'm going to show you verdict forms in
15 there.

16 MR. BOLUS: And then she's going to be charged
17 accessory before the fact of attempted armed robbery, and
18 we all -- we're all getting attempted armed robbery charge?

19 THE COURT: I'm simply going to charge attempted armed
20 robbery. The elements of that is the lesser included
21 offense of armed robbery.

22 MR. BOLUS: For these two defendants.

23 THE COURT: But she's being charged with accessory, so
24 all I simply will do is list those offenses. She does --
25 they don't have to prove the elements of those offenses to

1 find her guilty. They only have to prove that she aided,
2 assisted in those offenses.

3 MR. BOLUS: But they do have to prove that a principal
4 committed the acts.

5 THE COURT: Of course.

6 MR. BOLUS: And -- can I -- I'm trying to -- we're
7 trying -- Jones and I was talking. Is she going to get a
8 charge accessory before armed robbery or an accessory
9 before attempted armed robbery? Right? Because if you
10 give a charge of attempted ---

11 THE COURT: No. The charge ---

12 MR. BOLUS: --- armed robbery on these two ---

13 THE COURT: --- the charge that is supported with the
14 case law simply says for her to be guilty of accessory
15 before the fact, the State only has to prove those things
16 I've already articulated for the record.

17 MR. BOLUS: But the fact that armed robbery -- or is
18 she going to be -- attempted armed robbery?

19 THE COURT: Armed robbery. Well --

20 MR. BOLUS: Because there's a the big difference --

21 THE COURT: -- I got to think through that a little
22 bit.

23 MR. BOLUS: --- on the -- on the sentencing --

24 THE COURT: I got to -- I have to think through that a
25 little bit.

1 MR. BOLUS: That's what I was trying to get at.

2 THE COURT: I may simply say murder, armed robbery, or
3 the lesser included offense of attempted armed robbery.

4 MR. BOLUS: Yes, that's ---

5 THE COURT: That's what I probably will say.

6 MR. BOLUS: -- what I ---

7 THE COURT: But within the actual body of the charge,
8 I will charge armed robbery and attempted armed robbery as
9 a lesser included offense, as -- and what the -- what it'll
10 actually say is that if you find the State has failed to
11 prove the elements of armed robbery, you may also consider
12 the elements of attempted armed robbery.

13 MR. BOLUS: That's what I was trying to clarify -- Mr.
14 and Mr. Jones were trying to.

15 THE COURT: But the verdict form will reflect armed
16 robbery or as to the lesser included offense, attempted
17 armed robbery.

18 MR. BOLUS: Thank you very much.

19 THE COURT: But her's will say accessory before the
20 fact of attempted armed robbery.

21 MR. BOLUS: Yes, ma'am. That's what we ---

22 THE COURT: Are there any further requests to charge?
23 Mr. Bolus?

24 MR. BOLUS: No, ma'am.

25 THE COURT: Mr. Barnwell?

1 MR. BARNWELL: I'm just -- hope you would give due
2 consideration to dying declaration charge because a number
3 ---

4 THE COURT: I probably will charge it.

5 MR. BARNWELL: --- a number of different people get
6 cumulative with it.

7 THE COURT: Uh-huh. I'll charge it. Anything
8 further, Mr. Barnwell?

9 MR. BARNWELL: Nothing further, Your Honor.

10 THE COURT: Anything further, Mr. Jones?

11 MR. JONES: Nothing, Your Honor.

12 THE COURT: Okay. I'll see y'all in the morning at
13 9:30. And at that time, I'll have the verdict forms for
14 you to look at and I will staple them to the inside of the
15 indictments.

16 **AUGUST 30, 2007; DAY 4**

17 THE COURT: Okay. As a preliminary matter, we had
18 discussed some things in chambers this morning, and I
19 wanted to put that -- to put those on the record.

20 I guess the first and most immediate concern we need
21 to deal with, one of our jurors who is -- I'll just sort of
22 give it in a nutshell. One of our jurors apparently
23 overslept this morning, Mr. Simmons. Mr. Hutto called him
24 at about 10 of 10:00 when he had not checked in and it was
25 apparent to him that maybe he had overslept.

1 He is on his way. He told him to get here as quickly
2 as possible. And as I shared with counsel, it is my
3 understanding that many of the individuals on the jury work
4 in industry and their employers are requiring them to come
5 and work on night -- the night shift. And so I suspect --
6 which is just horrible. I suspect that he worked last
7 night and that is why he overslept. He -- I've watched the
8 jury. They have all been incredibly -- incredibly
9 attentive, and I have even more respect for him now knowing
10 that he's been working at night and coming in here and
11 serving on jury duty.

12 So as soon as he arrives, we will -- any delay, we'll
13 just have to accommodate it, and we will get started as
14 soon as he arrives.

15 I have also had each of the parties review the verdict
16 forms. Are there any exceptions to the verdict forms as
17 proposed from the State?

18 MR. JENNINGS: No, Your Honor.

19 THE COURT: Mr. Bolus, any exception to the verdict
20 forms for your client, Mr. Gary Grant?

21 MR. BOLUS: No exceptions.

22 THE COURT: Mr. Barnwell, for Jermaine Hartwell?

23 MR. BARNWELL: No exceptions.

24 THE COURT: And Mr. Jones, for Marquita Smith?

25 MR. JONES: No. No, Your Honor.

1 THE COURT: Any exception to the Court's stapling them
2 to the inside of the indictments, as I have done, from the
3 State?

4 MR. JENNINGS: None, Your Honor.

5 MR. BOLUS: None.

6 THE COURT: Mr. Bolus?

7 MR. BOLUS: None.

8 THE COURT: Mr. Barnwell?

9 MR. BARNWELL: None.

10 MR. JONES: None, Your Honor.

11 THE COURT: All right. Now, the other thing that we
12 did not do on yesterday, and I made a note to myself, is at
13 the close of the defense case, I think because it was a --
14 it was late in the hour and we were all so focused on the
15 charge conference, I did not give the attorneys an
16 opportunity to renew any motions.

17 Are there any motions from the State?

18 MR. JENNINGS: No, Your Honor.

19 THE COURT: From the defense, Mr. Bolus? Do you wish
20 to renew any of your motions?

21 MR. BOLUS: Just the same ones I made concerning armed
22 robbery and the -- the other charge, and especially the
23 armed robbery. I still don't believe there is enough
24 evidence to submit it to the jury on the armed robbery.

25 THE COURT: Okay. Mr. Barnwell?

1 MR. BARNWELL: The same one concerning insufficient
2 evidence.

3 THE COURT: And Mr. Jones?

4 MR. JONES: The same with armed robbery.

5 THE COURT: And I would assume that the State's
6 argument response would be the same?

7 MR. JENNINGS: That's correct.

8 THE COURT: The Court will note the renewed objections
9 for the record and deny them based on my previous ruling.

10 As regards the motion for directed verdict on armed
11 robbery, I've given the matter substantial thought and I
12 was concerned about whether the evidence rose above the
13 level of mere suspicion. I've looked back through my
14 notes. The evidence in the record regarding the armed
15 robbery deals with the -- is based solely in the testimony
16 of a co-defendant, who indicates that Mr. Grant told him
17 that he had taken certain property from the deceased prior
18 to his death, that being, I believe, some items of jewelry.
19 And if, in fact -- that did, in fact -- viewing in the
20 light most favorable to the State and considering
21 accomplice liability, if those allegations remained or the
22 -- the charge remained, that certainly would make it
23 applicable to -- to his co-defendant.

24 In ruling on a motion for direct verdict the Court is
25 concerned with the existence or nonexistence of evidence

1 and not its weight. It is not for the Court to act as the
2 fact finder. It is for the Court to look at the existence
3 or nonexistence of evidence.

4 And the Court is bound to deny a motion if there is
5 direct evidence or substantial circumstantial evidence
6 reasonably tending to prove the guilt of the accused.
7 However, a Court is not required to find that the evidence
8 infers guilt to the exclusion of any other reasonable
9 hypothesis, and that is based on *State vs. Cherry*.

10 I listened very intently to the arguments made by
11 counsel regarding the armed robbery and the fact that
12 there's only one witness to substantiate that charge. Of
13 course, to prove armed robbery the State must prove beyond
14 a reasonable doubt that the defendant took personal
15 property from the person or presence of another person;
16 that the property was in the presence of the -- of the
17 person; that the defendant carried the property away
18 intending to permanently deprive -- permanently deprive the
19 owner of the property and to keep the property for the
20 defendant's own use. Of course, the slightest removal of
21 the property or the complete possession, even for an
22 instance, is sufficient to show a taking and carrying away.

23 And the taking and carrying away must have been done
24 with violence, or by putting the owner of the property in
25 fear of violence. The State must also prove that the

1 defendant was armed with a deadly weapon during the
2 robbery.

3 Mr. Kerry Hollins testified, as well as -- I was
4 trying to think of the little fellow's name -- Chris Nelson
5 testified, that he observed the defendants with guns drawn
6 on Mr. Perry and that they were making certain comments to
7 him regarding the taking of property, which is direct
8 testimony, as well as the testimony of Kerry Hollins, who
9 indicated that Mr. Grant later told him that he did, in
10 fact, take property. And while I struggled with whether
11 the evidence rose above a mere suspicion, and a suspicion
12 is one that implies a belief or opinion as to guilt based
13 upon facts or circumstances which do not amount to proof,
14 I think ultimately, what it really comes down to, and what
15 the defense has argued to the Court, is that Mr. Hollins'
16 testimony should not be given any weight. It is not for
17 the Court to weigh the evidence, it is only for the Court
18 to be concerned with the existence or nonexistence of
19 evidence. And I think that what, basically, I would be
20 doing if I rendered a directed verdict, would be to act as
21 the fact finder in this case; and that is not the Court's
22 prerogative.

23 The matters argued in the directed verdict motion are
24 really arguments that go to the weight of the evidence, and
25 there's nothing that precludes counsel from arguing the

1 very things that they argued to the Court, which is that
2 Mr. Hollins' word should not be given any weight, that
3 basically his statements are self-serving, and in addition
4 to that, the State has failed to prove that, in fact, Mr.
5 Perry was in possession of the property or that it was ever
6 stolen. These are all things that they are free to argue,
7 and I'm sure will argue, but all of those -- the issues
8 that have been argued to the Court really go to the weight
9 to be afforded to the evidence, not the existence or
10 nonexistence of it. Therefore, the motion for directed
11 verdict on the armed robbery is denied.

12 Now, in conformance with the agreement that you all
13 have reached, I will be charging attempted armed robbery,
14 and we've already gone over the substance of that charge in
15 chambers. As well as, I will be charging attempted -- the
16 accessory on the attempted armed robbery.

17 As a result of the chambers conference, it is my
18 understanding that at the request of the State and the
19 request of defense counsel, Mr. Jones, that you all wish
20 for me to remove the charge regarding constructive
21 presence. Is that correct, from the State?

22 MR. JENNINGS: Yes, Your Honor.

23 THE COURT: Is that correct?

24 MR. JONES: Yes, Your Honor.

25 THE COURT: And the Court will remove that by the

1 consent of the parties.

2 Also, I believe that I advised you all that I have
3 added the language to the felony inference charge dealing
4 with the classification of felonies, and that was without
5 objection; correct, from the State?

6 MR. JENNINGS: Correct.

7 THE COURT: From the defense?

8 MR. BOLUS: Correct.

9 MR. JONES: Correct.

10 MR. BARNWELL: Correct.

11 THE COURT: And also, with the consent of counsel, I
12 added State's request to Charge Number 2(a), to be charged
13 in conjunction with the accessory before the fact charge
14 for Ms. Smith, and that was without objection; correct,
15 from the State?

16 MR. JENNINGS: Correct.

17 THE COURT: And from the defense?

18 MR. JONES: Correct.

19 THE COURT: I believe I've covered everything that we
20 went over in chambers conference. Is there anything -- any
21 -- are there any exceptions to the charges proposed as a
22 result of the chambers conference from the State?

23 MR. JENNINGS: No, Your Honor.

24 THE COURT: From the defense, Mr. Bolus?

25 MR. BOLUS: None.

1 MR. BARNWELL: No, Your Honor.

2 MR. JONES: No, Your Honor.

3 THE COURT: Okay. I believe they've indicated to me
4 that the juror has arrived. Let me make sure that that is,
5 in fact, the case and then we will get started.

6 Again, I will emphasize and reinforce that during
7 closing arguments, I do not expect there to be any movement
8 in the courtroom. I know that there are lawyers that have
9 other appointments that are seated near the back of the
10 courtroom and the bailiffs will allow them to leave for the
11 purposes of attending other court hearings, but as regards
12 other members of the gallery, absent some emergency and
13 having some urgent need to go to the restroom or otherwise,
14 I do not expect there to be any movement, extraneous
15 comments, or other disturbances in the gallery. I need to
16 advise you that if any of those take place, I have
17 empowered security to handle it. So I -- and I expect them
18 to handle it swiftly and decisively. So I would ask that
19 everyone comport themselves appropriately, and that the
20 decorum of this courtroom and the dignity of this process
21 be maintained.

22 Are we ready to proceed from the State?

23 MR. JENNINGS: The State's ready, Your Honor.

24 THE COURT: From the defense?

25 MR. BARNWELL: Yes, Your Honor.

1 MR. JONES: Yes, Your Honor.

2 THE COURT: And as I understand it, the State will
3 open and close. Ms. Wilson, you'll be opening on the law?

4 MS. WILSON: Yes, ma'am.

5 THE COURT: And Mr. Jennings will be closing on the
6 facts?

7 MR. JENNINGS: That's correct.

8 THE COURT: And I think that everyone is in agreement
9 that the State is still entitled to last argument. Is that
10 correct, Mr. Bolus?

11 MR. BOLUS: Just for posterity sake, I do lodge an
12 objection to that concept that one little document
13 commented during the prosecution side by a co-counsel who
14 we have to slightly ---

15 THE COURT: Did it come in as a State's Exhibit or as
16 a Defense Exhibit?

17 MR. BOLUS: Unfortunately it came in as a Defense
18 Exhibit during the prosecution side, and our -- our
19 interests aren't exactly co-aligned either, I mean. So I
20 don't like that idea, but I hear that's the law so ...

21 THE COURT: Well, you acknowledge that that is the
22 precedent, but you just want to argue against precedent and
23 lodge ---

24 MR. BOLUS: Yes.

25 THE COURT: --- just in case, on the outside chance,

1 that ---

2 MR. BOLUS: Yes, ma'am.

3 THE COURT: Okay. Mr. Barnwell?

4 MR. BARNWELL: I'll -- I'll join in Mr. Bolus's
5 argument.

6 THE COURT: Okay. Mr. Jones?

7 MR. JONES: The same.

8 THE COURT: Okay. We'll note it for the record. The
9 State may -- we need a jury, don't we? Please bring in the
10 jury.

11 THE COURT: (To the court reporter) I'm sorry. That
12 needs to be marked as a Court's Exhibit.

13 (Marked Court's Exhibit No. 3, State's request to
14 Charge No. 2(a))

15 (The jury enters at 10:19 a.m.)

16 THE COURT: You may be seated. Good morning, ladies
17 and gentlemen. I hope that you all had a restful evening.
18 We -- as I indicated last night, we have now reached the
19 stage of the trial where we will have closing arguments and
20 the Court's instructions on the law. You will hear from
21 the State, after which you will hear from defense counsel,
22 after which will again be addressed by the State.

23 I would ask that you give the attorney's your
24 undivided attention. I will be mindful of the length of
25 time that we're sitting and I will keep in mind whether we

1 need any breaks during this process. I've arranged for the
2 clerk -- I've sort of estimated how long I think the
3 process may take and I've asked the clerk to have lunch
4 available for you. And we are estimating and I've asked
5 them to have that available by 12:30. I think that's a
6 happy medium. Even if we finish before then, that still
7 would be a good hour for lunch.

8 So again, I would ask that you give the attorneys your
9 undivided attention. You may proceed.

10 MS. WILSON: Thank you, Your Honor.

11 THE COURT: You're welcome.

12 MS. WILSON: May it please the court?

13 THE COURT: Yes, ma'am.

14 MS. WILSON: Thanks to you all for your attention and
15 patience during this process this week.

16 I want to talk to you a little bit about the law and
17 some of the concepts of law. I'm not going to go through
18 each charge as I did in my opening. Mr. Jennings, when he
19 goes through the facts of this case, he'll talk to you more
20 about the elements of each specific charge. But there are
21 some concepts that apply to the testimony and evidence that
22 you've heard that I want to talk to you about, and then the
23 judge, at the end of the case, will tell you more about
24 those as well.

25 You've all in your daily lives heard the term "beyond

1 a shadow of a doubt." Beyond a shadow of a doubt. And
2 that may be a standard that you use in your daily life, but
3 it's not the standard for here in the courtroom. Here in
4 the courtroom, the law, our law, is that the State has to
5 prove its case not beyond a shadow of a doubt, but beyond a
6 reasonable doubt. Beyond a reasonable doubt.

7 And what is that? Beyond a reasonable doubt doesn't
8 mean beyond all doubt. It doesn't mean beyond all doubt.
9 And the judge will tell you there are few things in your
10 life that are absolutely, one hundred percent certain. And
11 that's not the standard we have to meet. And think about
12 that. I talked to you a little bit about that in opening.
13 For you to be one hundred percent sure of something, you
14 had to see it for yourself, you had to hear it for
15 yourself; which means you would have to be there, which
16 means you would be a witness, and you wouldn't be able to
17 be a juror. Our standard is to leave you firmly convinced,
18 firmly convinced of the charges before you. Not beyond all
19 doubt, but beyond a reasonable doubt.

20 Another concept that you need to be aware of when
21 you're looking over the evidence of these past few days is
22 that involving felony murder. And what the law says is
23 that when there is an unlawful act of malice and it's done
24 in the commission of a felony, and the judge will tell you
25 that armed robbery, kidnaping, and burglary are -- and

1 burglary are felonies, that when those crimes are committed
2 and a death happens, it's murder. It's murder.

3 Think about that. The reason for that is it's a
4 natural, foreseeable consequence, such a dangerous crime
5 that a death is going to happen. It's not a surprise.
6 It's not a surprise.

7 I'll give you an example, not that it applies to this
8 case, but one we often see in our line of work. There's an
9 argument, there's a disagreement, somebody has a beef, they
10 decide to shoot at somebody. They kill them. They might
11 come to us and say, "I didn't mean to kill him. I just
12 meant to scare him. I was trying to shoot beyond him or
13 beside him or above him and I missed."

14 When you undertake such a dangerous act, you don't get
15 to claim surprise that it went wrong. You are responsible
16 for the foreseeable, for the natural, probable consequences
17 of your actions.

18 Armed robbery is dangerous; kidnaping is dangerous;
19 burglaries are dangerous. Why? Because people get hurt,
20 because people die. And I ask you to remember that when
21 you consider the evidence of this week.

22 Another concept that I talked about with you at the
23 beginning of the -- of this case is that the hand of one is
24 the hand of all. And think about why that makes sense. It
25 makes sense because people know there's safety in numbers.

1 They know that they have a better shot of creating or
2 committing a successful lick or a successful armed robbery
3 if they have help. It takes each person involved, it takes
4 each one of them, and for that reason the hand of one is
5 the hand of all. And another way of saying that is when
6 accomplices get together and they help each other out, the
7 law says that they're all equally guilty. The hand of one
8 is the hand of all.

9 Now remember, as I talked with you in opening, this is
10 a legal principle. Morally speaking, you might believe
11 that there is a difference between the person who actually
12 stares someone down and shoots them. You might believe
13 that there is a moral difference in someone shooting a man
14 in the back and someone who is standing there holding a gun
15 not firing. That is something for a judge to consider, for
16 a judge to consider as to sentencing. That is not for you
17 to consider, because when they set out to help each other
18 out, to act together, under the law they are all legally
19 responsible. That is not an option for you, because as the
20 judge told you in the very beginning, she will give you the
21 law that you have to follow.

22 Now, you get to decide however you want to decide
23 about the credibility of the witnesses. You can believe
24 all of what they say, none of what they say, or part of
25 what they say. And you can think about their motivations.

1 You can think about the stress that they were under.

2 Think about the Cobbs being bombarded and held at
3 gunpoint. Think about the surprise they were under. Think
4 about the stress. Think about all of that in considering
5 their memory of what happened. And think about the fact
6 that they told you that had never happened to them. That
7 was probably one of the most important, most impactful
8 things that's ever happened -- happened to them. And they
9 were paying attention.

10 Think about Chris Nelson when he came back to the
11 house and saw his friend through that window, what he was
12 hearing. He knew something was wrong. He sees his friend
13 at gunpoint. He's hearing, "Where's the money? Where's
14 the money?" He hears his friend saying, "Tear up the
15 walls. Look around." And he was clear in what he saw.

16 And think about how their stories and their
17 recollections fit together. Manny. Manny. Birdie and
18 Odoner both see Mr. Grant. Mr. Hollins telling you Mr.
19 Grant. When you think of credibility of the witnesses,
20 think about how their stories fit together and think about
21 how they don't fit together. If it was so perfectly carved
22 out so that everything matched, every little nook and
23 cranny fit together, that would mean that we all got
24 together and made it perfect. Because in real life, you
25 know that things aren't perfect. You know, that people

1 have their own recollections of what happened. We just ask
2 that you look at how those recollections fit together, and
3 they fit together absolutely consistently with regard to
4 these defendants.

5 Proof of who shot. Once again, under the hand of one
6 being the hand of all, it doesn't matter who shot. When
7 one fired, they all might as well of fired, because they're
8 all responsible. They're all responsible. What matters
9 then who bought -- is who bought in. Who signed up? Who
10 was ready to go? When they bought in, when they agreed to
11 help each other commit -- not all three of them, any one of
12 them that you find. When they agreed to a burglary first,
13 when they agreed to a robbery, when they agreed to a
14 kidnaping, they bought in. That's what we have to prove.

15 Who knew that Dexter Perry was going to die? Who knew
16 that? Chris Nelson told you he thought that and he told
17 you why he thought that. He thought it because the men
18 were not masked. Was he right? I don't know if he was
19 right or not, but that's what he believed at the time and
20 that's why he got a gun and that's why he fired, trying to
21 help out. Did it help? I don't know. He's a 20-year-old
22 guy watching his friend getting beaten and held at gunpoint
23 knowing his aunt and uncle are in there. He panicked.

24 Did those defendants know that night that Dexter Perry
25 was going to die? I don't know. That's not what we have

1 to prove to you. What we have to prove is a plan and not
2 that the plan was murder. We have to prove that they
3 undertook that plan to commit robbery, to commit burglary,
4 and to commit kidnaping, and I submit to you when you think
5 about that and you think about that woman sitting right
6 there, and she talks about in her own words, not my words,
7 not Mr. Jennings' words, in her own words planning that
8 robbery. She knew when she went and met with them -- it
9 was four of them. She knew it was four to one. She knew
10 he was going to be kidnaped, because she knew when he was
11 going to be robbed that he was not going to be free to go.
12 Once again, there was safety in numbers because the hand of
13 one is the hand of all. She knew, and she had every
14 opportunity for an out. She had every opportunity not to
15 make a call, not to accept a call, not to tip them off.
16 She signed up for the plan just like Mr. Grant did and just
17 like Manny did.

18 I ask you to remember those concepts as you listen to
19 what the defense attorneys have to say to you, and I ask
20 that you listen further when Mr. Jennings goes through all
21 of the facts of the case. And in the end, once again, we
22 ask you for a verdict that speaks the truth, a verdict that
23 gives each and every one of them exactly what they deserve.

24 MR. BOLUS: Ladies and gentlemen, first of all I
25 certainly appreciate your time. I understand some folks

1 had not only to spend some time here, but they may have had
2 to work, that type of thing. And in the long run,
3 probably, this could be your finest hour. No matter what
4 happens with the verdict, you might remember this years
5 from now and say, "You know, that was one tough week, but
6 we did out job."

7 And if you were sitting in here charged with a crime,
8 you'd want somebody to listen to the evidence, and whether
9 they had to work at night or whatever they had to do, that
10 they paid attention and they came to court. That separates
11 us from a lot of other countries where you just get three
12 judges lined up and they make a decision, and generally
13 it's always a bad decision for the defendant. At least in
14 this country, we have a jury.

15 And like I said in my opening, you're not an arm of a
16 the State. For crying out loud, the State has plenty of
17 arms. They got policemen, they got investigators, they got
18 everything. We pay taxes for that. So for you to get the
19 idea that you're just these folks' pals and friends and
20 you're here to do their bidding, that's just not the way it
21 is. The system was conceived that you would act as a
22 barrier between the force of the law, the State or the
23 federal government, and the citizens of South Carolina, the
24 citizens of the United States.

25 You know, this case would be real easy if you just

1 decide, "Well, the hand of one is the had of all." The
2 morality that Ms. Wilson wants you to forget is that -- is
3 what the law is based on. Almost all law comes from
4 morality. She says put your morality aside and just go
5 with the legal concepts. Well, you know, when that
6 happens, we get all kinds of bad problems in this world.
7 The hand of one and the hand of all, that's led in some
8 countries if -- if one man shoots a soldier of -- of -- of
9 a certain group, ten people are hung in the village. You
10 know why? The Germans in World War II figured the hand of
11 one is the hand of all. One Frenchmen kills one of our
12 soldiers, we hang 100 of them. Because they all hate us,
13 the hand of one is the hand of all.

14 That also gives you the concept of the Crusades, when
15 the Christians were fighting the Muslims and the Jews were
16 in the way and -- this is historical fact. The Christians
17 and the Muslims were fighting and they asked, "Well, how do
18 we make sure that we don't kill any of the Jewish people
19 that are in Jerusalem?" Well, the commander of the -- of
20 the Christian army says, "Well, we're not going to have to
21 worry about that because we're just going to wipe out
22 everybody in the village in Jerusalem, and let God sort out
23 who was Jewish, who was Muslim, who was Christian."

24 But the hand of one is the hand of all, that can be a
25 -- something just mashes people when they don't need to be

1 all mashed with the same hand. What I'm getting at is, why
2 do we need a jury if it's just the hand of one is the hand
3 of all? Something awful happened out there and I'm not
4 excusing it. A man was killed, but you have evidence in
5 front of you to make a decision and you're not bound --
6 you're not bound by this hand of one is the hand of all
7 concept. The law says that if you want to be bound by
8 that, you can be bound by that. If you want to go back
9 there and say, "Okay. Dexter Perry is dead. We got three
10 people sitting there." You know, you can take five
11 minutes. Hand of one is the hand of all. Let the Lord
12 sort it out in the end, but lets just find them all guilty
13 of everything.

14 But you have an opportunity and you're supposed to do
15 your duties to go through each defendant and each
16 indictment and -- if you want to make it simple, find
17 everybody guilty of everything. But that's not what you're
18 here for is to go home by two o'clock today, because these
19 people won't be going home. You're here today to decide
20 levels of guilt. That's your job. You can find somebody
21 guilty of one thing and not guilty of another thing. You
22 can find one defendant guilty of something and not the
23 other defendant guilty of the same thing. That's your job
24 today.

25 Now, what we have here is the State's own witnesses --

1 the State's own witnesses, except for Mr. Hollins and we'll
2 get to Mr. Hollins in a minute, but Joe Husser, he has
3 Kerry Hollins in the house. Kerry Hollins is the guy that
4 the prosecution is going to do for him what they don't want
5 you to do for the defendants. And what I'm saying is, if
6 you think that Mr. Hollins is going to testify and he was
7 testifying because he had -- he had a hang up, a bad
8 conscience, and that these folks are not going to help him
9 out in the long run and not going to do something for him,
10 then you were born last night. Because what's going to
11 happen is that after this case is over -- you're probably
12 going to read about it probably next week -- Mr. Hollins is
13 going to get some deal offered to him and he's going to
14 take it. You know why? Because the prosecution has that
15 power. They have the power to decide levels of guilt.

16 Now, they -- they seem to think that Hollins is less
17 culpable than everybody else. He's their witness. Well,
18 you know, if they can take that concept of morality, which
19 is what Ms. Wilson wants you to forget when you go back
20 there today, if they're going to exercise their morality
21 and decide that Mr. Hollins is their witness and they going
22 to do something for him, then you have the same right to go
23 back in that jury room and decide, out of these three
24 people, levels of guilt.

25 So she's -- she's -- she's contradicting herself.

1 Morality has to be in this courtroom. All law is based on
2 morality. Matter of fact, some -- some -- Cato in the 1st
3 Century says, "When morality and society degenerates, the
4 society creates more laws." And you can tell the more
5 corrupt a society is, the more laws we have. A lawless
6 society wouldn't need laws. Unfortunately, us all being
7 fallen people in some respects, we need laws to guide us.
8 Laws are based on morality.

9 So don't go back there and throw out your morality and
10 throw out your common sense and throw out your sense of
11 justice, and just say, "Hey, I don't want to think today,
12 you know, my mind -- you know, I'm just not that smart. So
13 let's just say the hand of one is the hand of all.
14 Everybody's guilty of everything."

15 But Mr. Husser, himself, their witness who was there,
16 his testimony, he never saw Gary Grant in the house. He
17 never saw him in the house. He didn't pick him out of a
18 lineup. He describes three males. Remember, he described
19 three skinny males. He never picked out Grant in the
20 house. He never saw Grant. Joe Husser said that Kerry
21 Hollins, Kerry Hollins, their witness -- the witness is
22 going to get the deal, believe me. Their witness was in
23 the house. Kerry said he wasn't in the house, he was just
24 driving around, just taking them from place to place. But
25 Joe Husser who's in the house, says that Kerry Hollins was

1 in the house and pistol whipping Dexter with a .38 caliber.
2 Now, you have their witness putting Kerry Hollins in the
3 house, beating Dexter with a .38 caliber.

4 Then you have Mr. Cobbs himself saying that the skinny
5 male, he refers to Manny -- Manny over there. The skinny
6 male had a .45 caliber, and he was pistol whipping the
7 victim.

8 So, you've got two of the State's witnesses, Husser
9 and Cobbs, saying that Manny and Kerry Hollins were pistol-
10 whipping Dexter Perry. Now, Mr. Cobb says Mr. Grant had
11 him with a gun to his head, but Mr. Cobb does not put Mr.
12 Grant doing anything to Dexter Perry.

13 And when you heard from the -- you heard from the
14 ballistics man, two bullets were found in Mr. -- Mr.
15 Dexter: there was a .45 caliber, the gun that Mr. Cobbs
16 says that Manny was carrying, and a .38, which is the gun
17 that Mr. Husser says that Kerry Hollins had. He described
18 three skinny males in the house. Mr. Hollins was
19 relatively thin. I wouldn't call him skinny, but he's not
20 250/260 pounds like my client.

21 So you have an opportunity here to decide levels of
22 guilt. And if the hand of one is the hand of all, you can
23 do what you need to do on that. But these folks here have
24 already exercised their morality and their discretion, and
25 they have already put up in person who by all accounts --

1 if -- if these two gentlemen are guilty, he's just as
2 guilty. But they're giving him a deal. They're going to
3 give him deal ---

4 MR. JENNINGS: Objection, Your Honor. There's no
5 evidence ---

6 THE COURT: Please -- please approach.

7 (Bench conference.)

8 THE COURT: Overruled. Mr. Bolus, you may continue.

9 MR. BOLUS: Thank you, Your Honor. I am not here to
10 say that my client, Mr. Grant, is a poster boy and should
11 get some sort of award or something like that. But you
12 know, we as people, we have an obligation to delve out --
13 when you're on jury, to delve out punishment that you see
14 fit, and this system of justice is not the only system of
15 justice. There is other systems, there'll be other places
16 where justice is going to be rendered, and in those other
17 places people will be rewarded for what they do in life and
18 they'll be punished on the level of their sin. And you
19 have the same ability and right to do what the prosecution
20 does in this case and what they do in every case. I'm
21 asking you, please go through each indictment and decide
22 the level of guilt.

23 Whatever happens, anybody getting convicted of
24 anything, they're not going to go home. They're going to
25 be punished very severely. And you can sit stick around

1 and hear what the judge does if someone's convicted, and
2 you know, you're going to find out what the levels of
3 punishment are, but just to go back there and say "the hand
4 of one is -- is the hand of all." and we don't want to
5 think about anything else, that's a failure of the system.

6 In closing, there was no -- there's really no evidence
7 of armed robbery in this case. It looks like it might have
8 been an attempted robbery. There is no evidence of any
9 goods being taken. Dexter Cobbs' [sic] own people, his own
10 relatives, his own folks that were with him, there's no
11 mention of any goods being taken. You know, that may be
12 kind of minor in the long run, but it's something that you
13 need to consider, that the only person that said anything
14 about goods being taken was Mr. Hollins, who is a
15 defendant, who is their witness, said something about Mr.
16 Grant saying that, "I had a bracelet and a ring." There's
17 no bracelet and ring in this courtroom. They've got a lot
18 of other evidence. They did not bring that in here.
19 There's no money, there's no drugs that were stolen.
20 There's absolutely no indication that any goods were taken.
21 And in the long run that may not be a big matter, but there
22 is -- that's still a matter for you to consider. There was
23 no armed robbery in this case.

24 I just ask that you do your duty today. It's going to
25 be tough, but you can -- whatever happens, you put in a

1 good week and one day you'll be talking to your kids and
2 grandkids about the week spent in Berkeley County. It's
3 not fun, but it's something you have to do. Thank you.

4 THE COURT: Mr. Barnwell?

5 (Sotto voce discussion between the court reporter and
6 the Court.)

7 THE COURT: Mr. Barnwell, let me interrupt you one
8 second. Could counsel approach for me, please?

9 (Bench conference.)

10 THE COURT: Mr. Barnwell, if you will just give us a
11 second and then you may proceed. Mr. Barnwell, you may
12 proceed. We appreciate your indulgence, Ladies and
13 Gentlemen.

14 MR. BARNWELL: Ladies and gentlemen, I would like to
15 thank you for the very close attention you've been paying.

16 Please listen carefully to this -- my closing
17 argument, because I don't get a chance to come back again
18 and talk to you again. Under the rules, the State gets the
19 last argument because I did introduce some evidence, which
20 was the lineup where Kerry Hollins was identified as being
21 present.

22 I talk to you about reasonable doubt. I thinking,
23 give you reasons for you to doubt, if you did have some
24 doubt. I'm going to mention some things, not to say these
25 are exclusive at all. You may have some doubts from what

1 Mr. Bolus -- his presentation or Mr. Jones's presentation
2 or -- or something you just picked out yourself listening
3 to testimony. But I'm going to suggest a few reasonable
4 doubts.

5 Mr. Bolus mentioned the hand of one is the hand of
6 all, and Ms. Wilson also included that as part of her
7 presentation. What that has to do with is if there's
8 agreement to participate, or -- and participation in -- in
9 an armed robbery and a murder results, then the hand of one
10 is the hand of all. But there has to be an agreement and
11 participation, or that doesn't apply. It applies when --
12 when the agreement ends. So you make -- if -- if you going
13 to find my client, Jermaine Hartwell, guilty of all of
14 those things based on the hand of one is the hand of all,
15 you have to find that he agreed and participated.

16 Now, Tawana Deas said he wasn't present at the Red
17 Lobster, he wasn't present at Ruby Tuesdays. She never
18 heard Marquita Smith say anything about him. At Tawana
19 Deas's house her testimony was she ran and jumped over the
20 balcony. She doesn't know who -- who was there, who wasn't
21 there, or -- or if -- if Mr. -- Mr. Grant and Mr. Hartwell
22 were simply merely present.

23 I mentioned in -- in the -- in the opening argument
24 that his position is he -- he had a bad drug transaction
25 with Mr. Perry and he wanted to discuss that with him.

1 There's no -- there's no fingerprints -- no
2 fingerprints on that broken door.

3 And I would ask you also to listen to the judge's
4 instructions. She's going -- she's going to instruct you
5 on -- on mere presence. If a person is merely present,
6 that doesn't mean they're -- they're guilty. The State has
7 to prove that they actually committed the crime, not just
8 that they were -- just there.

9 I don't believe there is testimony from Mr. Cobbs that
10 -- that Jermaine Hartwell had a .45 pistol. Mr. Cobbs said
11 that he heard the name "Manny," but Manny was not present
12 in the courtroom. And also, testified two guys came later.

13 Now, I want you to recall there are four -- four
14 people who are saying they're involved in this. One of
15 them is a driver and three -- three guys were -- were in --
16 in the -- in the residence, according to testimony. Birdie
17 Cobbs, she doesn't see who was -- who was pointing a gun.
18 She identified Gary Grant. She did not identify Jermaine
19 Hartwell as being somebody who was pointing a gun. Mr. --
20 Mr. Cobbs did not identify Jermaine Hartwell.

21 Chris Nelson -- Chris Nelson is not a credible
22 witness. He -- he's a drug dealer by his own admission.
23 He was dealing drugs for about eight months. He comes up
24 with this cock and bull story about a gun. He said, "Well,
25 he ran down four or five trailers." He said that one of

1 the guys outside the trailer pointed the gun at him and he
2 wrestled it away. That make sense? Or the guy recognized
3 him and gave him the gun? But did he give -- did he give
4 the gun back to the guy? He didn't recognize the guy. He
5 -- he didn't remember who it was. He throws it down in the
6 grass. He doesn't say, "Thank you very much. I had an
7 emergency. I had to run down to this trailer. I
8 appreciate you giving me the gun." That's not some gun he
9 got from someone. This is his gun. He's not credible.

10 And he's not credible about peaking in a window and
11 what he saw peaking in the window either.

12 He's not credible at saying he saw Jermaine Hartwell
13 through the air conditioner. And he also, in his
14 statement, didn't say Manny was the one that was pointing
15 the gun. Said some guy was pointing the gun. First time
16 he mentioned "Manny" was on the witness stand, claiming
17 that he saw him -- recognized him from some clubs.

18 Mr. Bolus's theory that Chris Nelson was just
19 protecting his -- his drugs and his money is certainly a
20 reasonable -- reasonable conclusion.

21 And also, as far as the time goes, he was saying that
22 he ran down -- ran down -- left -- ran down five or six
23 trailers, got a gun, got somebody to call 9-1-1. He said
24 that's take 15 seconds, but that would be time as far as
25 somebody entering the trailer later. Mr. -- Mr. -- Mr.

1 Cobbs says that people entered the trailer later.

2 What about Joe Husser? Now, Joe Husser -- the
3 prosecution called Mr. Husser. They did not introduce the
4 lineup where he -- he identified Kerry Hollins. I did
5 that. I put that into evidence. There's another
6 identification of my client, but his description was that
7 person had (as read) "facial hair, not a goatee, long
8 sideburns," and that would have fit Mr. Hollins' picture
9 better than Mr. Hartwell's picture. He -- he claimed -- he
10 said in his statements that he didn't really know what the
11 other two guys looked like. Mr. Kerry Hollins was never in
12 the house. He was -- he was out driving the Pontiac G6.
13 He wasn't -- he -- he was never even there. Mr. Husser is
14 not credible.

15 Kerry Hollins did testify that Jermaine Hartwell got
16 bad product from Dexter Perry and he wanted to make it
17 right. Also testified that -- that only person that Dexter
18 Perry knew was Jermaine Hartwell. He didn't know any of
19 the others. He didn't know Mr. Grant, he didn't know him,
20 and so his testimony that Dexter Perry said, "Manny did it"
21 -- and it came up through testimony from a lot of different
22 people after he was shot -- I would like you to consider
23 whether he just mentioned the name of the one person he
24 knew in the hopes that other people would get held
25 responsible, that that's the reason he mentioned Manny's

1 name.

2 But also, I ask you to listen carefully to the judge's
3 instructions on dying declaration, whether this is, in
4 fact, a dying declaration.

5 Again, I emphasize the presumption of innocence. I
6 would ask that you listen very carefully to the
7 instructions of the judge again about presumption of
8 innocence, which is that a person is innocent unless the
9 State proves his guilt beyond a reasonable doubt. The
10 burden is on the State. The burden is on the State to
11 prove him guilty. Thank you very much.

12 THE COURT: Mr. Jones.

13 MR. JONES: Your Honor, if I may, I'm going to use ---

14 THE COURT: Certainly. Go ahead take the time that
15 you need to set up.

16 (Sotto voce discussion between Mr. Jones and State's
17 counsel.)

18 MR. JONES: Ladies and gentlemen, I want to kind of
19 start out a little different. I want to walk through the
20 sequence of events and a little bit of Tuesday and a little
21 bit of Wednesday's testimony.

22 Obviously, you can tell there is a little difference
23 between my client and the rest of the people charged with
24 these crimes. She's charged with accessory. She's 19.
25 She wasn't present. It's a little different circumstance.

1 Keep in mind that the two pieces -- the key pieces of
2 evidence against Marquita Smith are her statement and Kerry
3 Hollins.

4 You somewhat have to decide the truth on those two
5 statements. There's not a lot of evidence otherwise: no
6 forensic evidence, nobody in the house that saw or heard or
7 knew anything about Marquita Smith. So really only the
8 events at the house they're saying she's responsible for
9 because they happened, and because of her earlier actions.
10 Again, the hand of one is the hand of all, and that she
11 should have known that all this was a -- let's see, what's
12 the -- (as read): "a probable and natural consequence of
13 her actions."

14 And all this comes down to credibility. And again, it
15 really comes down to for Marquita Smith, Kerry Hollins and
16 Marquita Smith. You've heard her testimony introduced
17 through Detective Merrithew. There wasn't any reason to
18 add anything to it. She said what she said, and I told you
19 the first day I come up that she played a role in it. She
20 knows there's going to be consequences for it, and all we
21 ask is that we make sure that the consequences -- and your
22 job is to make sure that the consequences -- that she's
23 held accountable for the part that she did and not for
24 everything that happens.

25 But I want to kind of walk you through something real

1 quick. Ladies and gentlemen, you remember on Tuesday Mr.
2 Husser took the stand. Mr. Husser sat down, the solicitor
3 -- solicitor's witness -- that he gets to use Mr. Husser to
4 get the evidence that Mr. Husser knows that effects this
5 case. That's the mechanism that he is able to get that
6 evidence into court so that you all can hear it and decide.
7 He can only do it through his witnesses and he can do it at
8 the appropriate time. When he calls a witness, he has that
9 opportunity, it's called "direct examination," to get into
10 evidence his case and so that you all can hear it to
11 consider.

12 And he got up and he sat down the lineup, and I'm not
13 sure which one it is over there, but Mr. Husser, he got the
14 little laser pointer out and he pointed up there. And he
15 got Mr. Husser to identify -- I think it was Manny that he
16 identified in the house. He said, "You sure?" "Yeah, I'm
17 positive, sure." "Okay." All that stuff.

18 He took that off and asked that they enter that into
19 evidence. Marked it Defense Exhibit -- State's Exhibit,
20 I'm sorry, whatever number.

21 Sat it down. Came back and he asked some other
22 questions. Asked a few things, and then he sat down. On
23 direct examination that was his opportunity to put in any
24 evidence that Mr. Husser had regarding this case. That was
25 his opportunity. That one time he said, "Ladies and

1 gentlemen of the jury, please answer any questions that the
2 defense has."

3 Well, Mr. Bolus got up and asked some questions. Mr.
4 Barnwell got up, and you know, this -- there's a little bit
5 of confusion. He got up and he picked up these pictures,
6 walked up to Mr. Husser and showed him, and Mr. Husser
7 pointed something out on here, and then he attempted to set
8 it on here and testify. And you heard there was some
9 confusion. "That's not in evidence yet. That's not in
10 evidence yet."

11 And there was a little confusion of now, is this the
12 State's evidence or is this the Defense's evidence?
13 Because it's the State's portion of the case we were still
14 in, but it wasn't the State introducing this evidence. It
15 was the defense, Mr. Barnwell. We ended up naming it
16 "Defendant's Exhibit Number 1," and I know Mr. Barnwell
17 talked about, "Well, I got this in and that affected my
18 ability to go last," and all. I'm glad he did.

19 But what Mr. Barnwell did was he ended up sitting this
20 down --

21 (Sotto voce between Mr. Jones and State counsel.)

22 And obviously I'm not sure if any of us really
23 understood the significance of it at that time. And he
24 asked Mr. Husser to come over here and take that laser
25 pointer, and point out if there's anybody on there that he

1 recognized. And he took that laser pointer and he pointed
2 it right there on the top left to Kerry Hollins.

3 And Mr. Barnwell asked him, "Are you sure?" "Yeah,
4 yeah, yeah." And he sat down and then I got up and I said,
5 "Are you positive that's the person that was in that house
6 pistol whipping you? Are you positive he was at the scene
7 and in the house?" Mr. Husser said, "I'm positive that's
8 the guy that was in there. That's the guy that was pistol
9 whipping me."

10 Now, you notice when I got done, the State never got
11 up. They never refuted that. They never addressed that
12 issue. If you think about the significance of it, if Mr.
13 Barnwell hadn't gotten up and sat this thing under there
14 and made this Defense Exhibit Number 1, you know who would
15 have been sitting and testifying before you the next day
16 and you would have never known that he was in that house
17 pistol whipping Mr. Husser? Kerry Hollins. Sound like a
18 "hide the ball" to you?

19 He got up and deliberately didn't present this, didn't
20 put this in. To make matters worse, the next day he put
21 Kerry Collins on the stand -- Hollins, I'm sorry. And the
22 one thing he said is he said, "I got one instruction from
23 the solicitor," Mr. -- Mr. Hollins, "tell the truth."

24 What's Mr. Hollins say? "I was never there. I was
25 never in that house."

1 Now, you notice how the State put Joe Husser on
2 Tuesday, put Mr. Hollins on Wednesday. If Mr. Barnwell
3 hadn't got up there, there's no other way that ID they
4 could get in. Y'all were never intended to know that Kerry
5 Hollins was in that house.

6 Did you ever hear the State ask Mr. Hollins about,
7 "How was your car put at the scene in that trailer park
8 that night?" That ID, that was made by Joe Husser, was
9 made the night of this incident. And Kerry Hollins,
10 arrested the night of that incident by Trooper Davis in
11 that car, did you notice the State never asked and never
12 tried to reconcile how Kerry Hollins could have been
13 identified by Chris Nelson, his car -- Kerry Hollins' car,
14 and by Joe Husser in that trailer park. And an APB went
15 out on that car that night, which is why Trooper Davis
16 stopped him that night shortly -- not too long after that
17 murder.

18 The detectives did their jobs: They got on it; they
19 got the information out; they knew Kerry Hollins was
20 involved; they knew Kerry Hollins was in that house; they
21 put an APB out. And you know who's telling you all this?
22 The defense. And you know why Kerry Hollins is up here?
23 Because Kerry Hollins's story is a little different than
24 Marquita's. And if they can use that truth then they can
25 hold trial, extend this "hand of one, hand of all" to

1 Marquita Smith.

2 It was -- it was a egregious thing to set her cousin
3 up. But she sat up there and you read in her statement
4 that she set him up to be robbed. She didn't -- she -- the
5 gun -- Kerry Hollins set up there and he lied in y'all's
6 face and he said Marquita set all this up.

7 You notice he's pretty confident and he's pretty
8 cocky. But think about it: If the State gets up here --
9 excuse me. Get a little water.

10 But if the State stands up here today and they tell
11 you to believe Kerry Hollins, you think they would have
12 intentionally put him up here and not put this other
13 evidence in, that he was picked out at the scene. Now you
14 think about it: If they get up here and they tell you,
15 "Ladies and gentlemen, you need to believe Kerry Hollins
16 because Kerry Hollins defined what a lick was. You need to
17 believe Kerry Hollins." Kerry Hollins said that a watch or
18 a bracelet and a ring was taken out of that house. To get
19 to armed robbery they've got to have something taken out of
20 that house. They've got to have something called
21 "asportation." Something's got to be taken away with the
22 intent to carry it off.

23 You notice they never brought any of Dexter's family
24 in to say whether he ever had a ring or bracelet? You
25 notice they never asked Chris Nelson, his best friend? You

1 notice that they never asked a single person in that house,
2 "Did you see if anybody took anything off of him?" The
3 only person is Kerry Hollins. And then I -- I think Joe
4 Husser talked about he couldn't find his wallet, so he
5 assumed; but again, you saw how the house was torn up. He
6 couldn't say what happened to the wallet one way or the
7 other. But they used Kerry Hollins. That's how they're
8 getting to the armed robbery. That's the only way they get
9 to that armed robbery.

10 And -- and again, follow the line -- Joe Husser's a
11 victim, too. They're requiring you to pick your victim.
12 Is it Dexter Perry or is it Joe Husser? Because you think,
13 two months down the road, as Mr. Bolus said, this case will
14 be over. And you think that the solicitor gets up here and
15 he says, "Ladies and gentlemen of the jury, I told, right
16 here in front of you, Mr. Collins -- Hollins" -- I'm sorry
17 -- "to tell the truth." Do you think they're going to
18 prosecute him and go after him? They don't know whether
19 he's the shooter or not. I mean, think about it:
20 Potentially, the murderer was sitting right there. They
21 never addressed it, yet they verify his statements and they
22 verify that he wasn't there. They can't go back after him.
23 Who's going to go after him? This is Number One in the
24 office and Number Two in the office. There's nobody that
25 can come back and hold him truly accountable for Joe

1 Husser.

2 They can't put Joe Husser -- do a separate trial, put
3 Joe Husser -- what are they going to do? Put Joe Husser on
4 the stand? Joe Husser's going to say, "Well, you said I
5 was truthful back in the trial of Marquita Smith and
6 everybody else." And Kerry Hollins is going to say, "Well,
7 you said I was truthful and you told the jury I was
8 truthful back in the -- in the -- in the trial for Marquita
9 Smith."

10 You want to know what the deal he got? The deal is he
11 gets the State to sanction his story when we know he was
12 there. There's no other way Joe Husser knew who Kerry
13 Hollins was. It was that night right after the murder.
14 They didn't know each other. Kerry Hollins said they
15 didn't know each other. There's no other way they knew
16 each other. What's the explanation? There's no way. And
17 the State was hoping you would never find out, because if
18 Mr. Barnwell hadn't have put that -- set that slide up
19 here, it would've never have come out. Because the only
20 time that the solicitor could put that into evidence was on
21 direct examination when Mr. Husser was sitting right there.

22 And the funny thing is, is that the State, right there
23 in front of Mr. Husser, in essence, gutted a lot of the
24 case if they -- if Mr. Husser wanted to have full
25 accountability for what happened to him.

1 It's wrong. And -- and why? Because Kerry Hollins
2 was able to define "lick," and was able to try and put into
3 terms so that they could get to Marquita Smith so that they
4 could say Marquita Smith was an accessory, and that Kerry
5 Hollins could tie her into this plan, and -- and make all
6 of this foreseeable for -- for Marquita Smith. There's
7 nobody else that can do it.

8 But I don't mind -- you know, witnesses all the time
9 get up and the defense says you believe this witness and
10 the State says you believe this witness. The State's put
11 you in an impossible position. If Kerry Hollins wasn't at
12 that scene, then Joe Husser, Chris Nelson are lying. But
13 they made identifications. They heard the word "Manny."

14 If Joe Husser's telling the truth and Chris Nelson's
15 telling the truth, then Kerry Hollins' car was in that
16 trailer park, Kerry Hollins was in that house; and Kerry
17 Hollins was beating on Joe Husser and Kerry Hollins
18 potentially pulled the trigger on Dexter Perry. And the
19 State is never, ever, ever going to tell you that.

20 And they were going to pick and -- cherry pick the
21 little pieces of truth of -- of what they wanted you to
22 perceive as the truth, to use it to get to an end. And
23 that's scary. They -- they're supposed to seek justice.
24 They're supposed to be seeking -- put it all up there. You
25 have the right to decide credibility. But if you don't get

1 the information -- if you never got that, you can't decide.

2 You take everything -- the solicitor gets up there and
3 says, "The only thing you got to do is tell the truth."
4 You take everything that they say for the truth because
5 they put it up there. That's a big, big, issue that Joe
6 Husser was being pistol whipped in that house by him, and
7 he's adamant that Kerry Hollins was there. That's a big
8 issue. And how in the world if you don't have that
9 information are you able to decide whether Kerry Hollins is
10 telling the truth or not? It's wrong. It's wrong. It's
11 wrong.

12 Two -- well, Marquita Smith's statement was entered in
13 and Kerry Smith's [sic] was entered in. Kerry Smith [sic]
14 said, "I didn't get --" you know, did you notice when I
15 pressed him on it? I said, "What changed two weeks ago?"

16 The State knew August of last year that Kerry Hollins
17 was in that house beating on him. They knew that. The
18 police officers took the statements. They knew that. They
19 knew that car was in the parking lot. They put it out on
20 the radio. But they didn't tell you because it didn't go
21 to their version of the events. And you talk about
22 reasonable doubt?

23 If Kerry Hollins is who's going to decide whether
24 property was taken away, if Kerry Hollins is going to
25 decide what a lick is defined as, if Kerry Hollins is going

1 to decide what the plan was, they sure didn't want you to
2 know that he was sitting in that house.

3 You want to know what the deal is? He gets up here
4 and says what his original statement says, they gloss over
5 the fact he was in there. Sorry Joe Husser. Sorry Dexter
6 Perry. Sorry if you're a potential shooter. Pretty
7 smooth. You want to talk about somebody -- you want to
8 talk about a lick? That's a lick.

9 There's a limit "to hand of one, and hand of all," and
10 the State can't manipulate the evidence and not put stuff
11 in to try and reach their end.

12 So a 19-year-old girl, and the State's going to hold -
13 - they've been manipulated by Kerry Hollins, but it's okay.
14 And they're going to take a girl that made a bad choice --
15 it's every parent's nightmare -- that made a bad choice in
16 a boyfriend. Kerry Hollins intentionally didn't bring up
17 guns. He didn't talk about guns. It's never in his
18 statement that he ever told her there was a gun. It's
19 never in his statement that he told her they were going to
20 do any type of kidnaping. It's never in his statement or
21 in his testimony that he was going to -- to arm -- to -- to
22 do an armed robbery, any of it.

23 He got Marquita -- and you know, Marquita came in on
24 her own. She came in. Detectives called, and they said,
25 "Look, we've got Kerry Hollins and we've got a statement."

1 She never asked for an attorney. She sat down and she told
2 them everything. She said this is what we did. And yet,
3 all-in-all, the facts line up, except there was never a
4 mention of guns, there was never a mention of an armed
5 robbery, was never a mention of any attempt, any plan of
6 murder. Kerry told her he wouldn't get hurt, and Marquita
7 sat right there and told them everything.

8 But they couldn't manipulate her facts to try and get
9 to this armed robbery. They had to try -- and get this
10 murder on her.

11 And -- and Dexter Perry's family is mad. I
12 understand. It's her cousin. It was a horrible thing to
13 do, but hold her responsible for the part that she did.
14 Don't let the State trick you into casting this wide net.
15 They've already tried to trick you once by withholding a
16 crucial piece and asking you to believe a witness that they
17 would never have told you was in that house. You talk
18 about a deal with the devil?

19 Just briefly going through it. I -- I don't want to
20 totally focus on Kerry Hollins, but if you think in terms
21 of Marquita's statement and the facts surrounding it and
22 even pieces of Kerry's, she's tried to -- Marquita couldn't
23 even set up the right restaurant to go to. She goes to Red
24 Lobster. They're closing. It's a public place. It's not
25 a -- it's -- it's not a dark road. It's not a dark house

1 or anything. It's a public place.

2 The next place is the second Ruby Tuesdays. It's
3 closed too. She then goes to the third Ruby Tuesdays and
4 Tawana testifies she didn't want Kerry to know where she
5 was. Presumably she had a problem. She went to Ruby
6 Tuesday one and Ruby Tuesday two.

7 She loved Kerry and Kerry manipulated her. But there
8 are little glimmers of her trying to back out of this
9 thing. She gets there and, you know, the whole deal where
10 Kerry says and all is, "I didn't want to come out there
11 because I didn't want Tawana to see my face because she
12 knows me." You heard Tawana testify that Marquita told
13 her, "Kerry's across the road at McDonald's," at that time.
14 She told her that. And you know what Kerry says, "I was
15 never in the area of Ruby Tuesdays." Tawana's their
16 witness, and so is Kerry.

17 They did go from there and they go -- and supposedly
18 the plan at Ruby Tuesdays, it falls apart. You know what
19 Kerry says? "Something came up."

20 What came up? Did he have a business meeting or
21 something? What came up? I tell you what came up. Kerry
22 Hollins planned this all along. Kerry Hollins never told
23 Marquita about any guns, any armed robbery. He assured her
24 nobody would get hurt. All Marquita was thinking is
25 they're going to run out there, snatch the money -- Dexter

1 carried the money on him -- grab the money he had on him
2 and go. It's wrong, it's bad; no doubt about it. But it's
3 not murder, and it wasn't an armed robbery. And Kerry
4 intentionally worked it that way.

5 She then goes, leaves, takes Tawana, drops Tawana off.
6 Tawana then gets her brothers. Tawana leaves with her two
7 brothers who live with her and they go home. Marquita goes
8 to the Hess Station and meets with Kerry. Kerry says, "Go
9 in there and find out where Dexter's hole is."

10 She calls Dexter and says, "Hey, where you at?"
11 Dexter tells her he's at the trailer park in Silver Fox.
12 She goes into Silver Fox. And when she pulls up, what does
13 she find? Dexter's there. Who else is there? Six to
14 eight guys. There's a cookout that's winding down.
15 There's six to eight guys in there. Talks with Dexter,
16 leaves from there, goes back to the Hess, talks to Kerry,
17 and then goes on her way home.

18 Dexter calls. Dexter says, "I'm going over to
19 Tawana's." Dexter goes over and -- he goes on over to
20 Tawana's. He calls Tawana and says, "I'm coming over."
21 She goes over there. Kerry calls Marquita. Marquita says,
22 "Everybody's going over to Tawana's." Dexter says, "I'm
23 going over there with the crew." I'm sorry, Kerry says,
24 "I'm going over there with the crew."

25 She gets to -- again, Marquita didn't know whether the

1 brothers were in there or not. And by this time, you gotta
2 think, nothing happens at Red Lobster, nothing happens at
3 Ruby Tuesday one, nothing happens at Ruby Tuesday two,
4 nothing happens at Silver Fox. You know, maybe it's a
5 bunch of boys just bluffing and bragging. She's never seen
6 any guns or anything. She's never been involved -- Kerry
7 said, to his knowledge she didn't have any expertise in
8 this, any prior involvement in this.

9 Get to Tawana's, they step outside, and you've heard
10 Tawana testify Marquita says, "Something is not right."
11 And she says it loud enough for Dexter to hear. And she
12 says, "Tawana, get back inside."

13 And at that time everything breaks loose. They knock
14 her down, Tawana goes over the banister, she's calling the
15 police, Marquita's running, they grab Dexter. And at that
16 point in time, it's not foreseeable, it's not foreseeable
17 that they're going to snatch him. Nothing's happened at
18 every point before that. That's not foreseeable. It's not
19 a probable and natural consequence.

20 They did take Dexter over to Silver Fox and Marquita
21 runs and meets up with Tawana. At this time Tawana's
22 already on the phone with the police. And you heard that
23 Kerry called while Tawana was on the phone with the police
24 and says, "What's she doing?" And she -- and Marquita
25 hangs up.

1 Now, the police -- you know, the solicitor rather, the
2 State said -- made a big deal about Marquita's first
3 statement, said it was false. It really wasn't false. She
4 just didn't provide all the details. She said two or three
5 people grabbed Dexter. But you know what she did say? She
6 said they're in a purple Nissan. You remember what Chris
7 said? The car they had been in the whole night was
8 Dexter's, I think, green station wagon. The purple Nissan
9 was Amber's. It was Chris Nelson's sister, cousin,
10 whatever -- it was niece, something like that. It was her
11 car. No association with Dexter.

12 Notice what Marquita did. Again, a little glimmer.
13 She gave them the right car to look for. She was too
14 scared to give everything. Should have -- should she?
15 Sure. Sure. No doubt about it. But she's not guilty of
16 murder, and she's not -- and that's not foreseeable
17 consequence. That's not "hand of one, hand of all" for
18 armed robbery.

19 When she gives that information -- you know, and when
20 we go to foreseeability, is it foreseeable they would have
21 taken Dexter back to Silver Fox? Think about it. Chris
22 says -- all the cops, Joe Husser, Chris, everybody says,
23 "Dexter doesn't live here. He doesn't reside here. He
24 doesn't spend the night over here. He doesn't keep stuff
25 over here. He comes over here and hangs out occasionally."

1 Chris says, "He doesn't keep his money over here. He
2 doesn't know what money I have. I knew he had some money,
3 but my money is in a shoe and I don't tell him what money I
4 have."

5 And keep in mind Chris also said, "Dexter and I never
6 carry guns." So no -- Marquita -- there's no need for a
7 gun.

8 The State talked about four to one -- four people on
9 one. We'll address that. Marquita had been to Silver Fox,
10 remember, back 45 minutes/an hour earlier; and met with
11 Dexter and then left. There was a cookout going on.
12 There's six to eight guys outside. And we know because
13 later on that evening Chris Nelson got a gun from one of
14 them. At least one of them had a gun, presumably maybe
15 more. And as far as anybody knew, those could be Dexter's
16 people. Who's going in there? And now it's not four to
17 one. Now it's eight or ten to four. Is it foreseeable at
18 all that Marquita should have known that they were there?
19 Should she have told the police what she did? Sure. That
20 doesn't make her guilty of armed robbery, doesn't make her
21 guilty of murder. They're trying to stretch that.

22 Whatever happens at the house -- is it -- let me ask
23 you this: Is it foreseeable that Chris Nelson would have
24 come up there, seen what's going on, run down the street,
25 not call the police or anything, run upon to his cousin's

1 house, there's six -- six/seven guys out there. One of
2 them draws down, he snatches the gun away, yells, "Call
3 9-1-1." Just think about whoever's hold -- carrying that
4 gun? Tell me what the odds are that that person's going to
5 call 9-1-1? Probably pretty slim.

6 He runs back and he opens fire; shoots three times
7 through the front door. Is that a probable and natural
8 consequence? Is that foreseeable for Marquita? The law
9 doesn't say you have to foresee every single consequence or
10 circumstance. And if you -- if you don't, you're not
11 liable for every -- all consequences. There is individual
12 liability, and there is actor's liability at the scene.

13 Kerry Collins -- Hollins got up here and he testified,
14 and the solicitor said, "What's a lick?" He said, "It's an
15 armed robbery."

16 You saw Mr. Bolus got up here and press him, and he
17 said, "Well, a lick could be an armed robbery or it might
18 be -- might not be armed." And a lick can also be a noun,
19 meaning the subject.

20 The State came up here the first day and they used
21 armed robbery, armed robbery, armed robbery. The only
22 evidence that Marquita knew of any armed robbery or could
23 have foreseen any armed robbery is through Kerry Hollins,
24 nothing else. Nothing else.

25 Ladies and gentlemen, to find armed robbery, you've

1 got to find property was taken away. Kerry Hollins is the
2 only person -- and you think, if truly property had been
3 taken away, the State would have been up here and they
4 would have had Dexter Perry's family, Chris Nelson, or any
5 number of the people that were in the house and said, "Did
6 you see him taking anything off? Did you see him doing
7 anything?" Didn't -- never asked that question, never
8 once.

9 They want you to take Kerry Hollins' word at it's face
10 value. And again, from the very beginning, they were going
11 -- they planned to leave out the fact that he was a suspect
12 in there, pull the wool over your eyes ---

13 Ms. Wilson: Your Honor, I object to that.

14 THE COURT: Please approach.

15 (Bench conference.)

16 THE COURT: You may proceed.

17 MR. JONES: Ladies and gentlemen, I'm going to close.
18 It's been long enough and I'm going to ask that you don't
19 believe what Kerry Hollins said. We know -- we know
20 there's a deal. Ladies and gentlemen, Kerry Hollins is the
21 key to Marquita Smith.

22 For Marquita Smith there is a charge on there for
23 accessory before the fact to attempted armed robbery. I
24 told you when I came up here the very first day, I'm not
25 trying to say that she doesn't have any -- that she

1 shouldn't be held accountable at all. From the very first
2 day I got up here I never said that. It's a horrible thing
3 what happened. She's a smart girl, she did what she did.
4 But ladies and gentlemen, my office -- my law office has
5 nine people in there, maybe same number of staff. If I
6 give somebody the key to my office and I say -- and the
7 alarm code, and I say, "Go in there and steal the computers
8 out of my office at night," and they walked in there on
9 Monday morning, nine o'clock, and kill everybody in there,
10 it's not the "hand of one, hand of all." I'm going to have
11 some liability, but that's not foreseeable.

12 What the State's saying is because a bad act happened
13 and because she had some involvement at some point in the
14 lineup, she's liable. That doesn't make sense, and that's
15 a scarey principle for every single person in here. And
16 that's a scarey principle to let the State draw it out that
17 far. There's a point to where there's a new plan and to
18 where the actors on this kidnaping and all of those things
19 are responsible for what they did, she's responsible for
20 what she did.

21 You've got an instruction on there for accessory
22 before the fact of attempted armed robbery. Again, nothing
23 -- only person that said anything was taken was Kerry
24 Hollins. I would ask that if you find that's the case, I
25 would ask that you find her guilty of accessory before the

1 fact of attempted armed robbery. But maybe you say there's
2 too many problems with the way this case went. There's too
3 many questions in here.

4 I leave that with you all. Thank you for your time.

5 THE COURT: You may proceed.

6 MR. JENNINGS: Thank you, Your Honor.

7 THE COURT: You're welcome. You need to set up
8 anything?

9 MR. JENNINGS: Ladies and gentlemen of the jury, it's
10 the first time I've had the opportunity to appear before
11 you and talk specifically about the case, and I also want
12 to thank you for the time and the attention that you've put
13 in this week. There's been a lot of testimony, and
14 watching each of you, you've all paid extraordinary
15 attention to it, and we appreciate you and thank you for
16 that.

17 You know, facts are stubborn things. There's nothing
18 I can do, there's nothing Ms. Wilson can do to change the
19 facts. There's nothing Detective Merrithew can do to
20 change the facts, and likewise, there's nothing the defense
21 attorneys can do to change the facts: Mr. Bolus, Mr.
22 Barnwell, and Mr. Jones.

23 What happened that night happened and nobody can go
24 back and change that. If they need to resort to attacking
25 myself and Ms. Wilson to take your attention off of what

1 their clients did that night, then that's what they're
2 going to do. But what I ask you, each one of you
3 individually and collectively as a group, is to keep your
4 eye on the ball. Keep your eye focused on what these three
5 defendants did that night, and look at the evidence that we
6 presented. And we're going to go through much of that
7 evidence, because that's your job.

8 This system we have is a wonderful system. It's the
9 best system in the world because we have twelve of you,
10 impartial people, who showed up at the beginning of the
11 week with no friends to reward and no enemies to punish.
12 You swore an oath that you would listen to all of the
13 evidence and at the end of the trial take the facts, as you
14 decide them, and apply it to the laws Judge Jefferson
15 charges you. And that is all that we ask you to do, for
16 each one of you individually to decide in your mind, based
17 on the evidence that you heard, what happened that night.
18 And then once y'all decide what happened, you take those
19 facts and apply it to the laws Judge Jefferson tells you,
20 and that will give you what you need to render your
21 verdict.

22 Now a trial, I like to say, is often just like a
23 puzzle, and each piece of the puzzle is something that we
24 presented to you. And we began that on Tuesday morning
25 with each witness, each item of evidence was another piece

1 of the puzzle. And I submit to you that at the end of
2 yesterday when we had completed all that testimony, we had
3 a complete picture of what happened on August the 1st that
4 carried over into the morning of August the 2nd.

5 I'm going to talk with you about some of the law, and
6 we're going to talk about some of the facts and how it
7 plays into that law.

8 Ms. Wilson already told you reasonable doubt -- we
9 have to prove to you beyond a reasonable doubt that each
10 defendant is guilty of each crime that they are charged
11 with. And Judge Jefferson is going to tell you that you
12 need to consider each indictment separately and distinctly
13 as it applies to each defendant and make a separate
14 decision as to that charge. Reasonable doubt is not proof
15 beyond any doubt. Judge Jefferson's going to charge you is
16 that -- that if after hearing all the evidence you are
17 firmly convinced of each defendant's guilt as to each
18 charge, then it will be your duty to find them guilty.

19 I want to talk about Ms. Smith first. She's charged
20 as an accessory before the fact. Essentially, an accessory
21 before the fact is a person who knowingly advises, urges,
22 or aides and abets another person, in this case Kerry
23 Hollins, Jermaine Hartwell, or Gary Grant, in the
24 commission of the armed robbery or the attempted armed
25 robbery of Dexter Perry and she was not present at the

1 scene. Essentially, what we claimed and told you in the
2 opening statement and maintained throughout the trial is
3 that Ms. Smith had an integral role, and I'd submit what
4 we'll talk about is a -- is a vital role in the plan that
5 failed. But clearly aided and abetted, urged, advised
6 these defendants in carrying out this crime. I submit to
7 you that with a friend like Marquita Smith or a family
8 member like Marquita Smith, who needs any enemies, because
9 without Marquita Smith, Dexter Perry would still be here
10 today.

11 What is astonishing about this case, ladies and
12 gentlemen, and adds to the maliciousness of what she did,
13 is we're not talking about a onetime plan, we're not
14 talking about one throw-away comment like, "I know somebody
15 you can rob. You can rob Dexter," and the plan ends there.
16 Marquita Smith orchestrated, planned, and directed this
17 robbery from beginning to end. Without her, it would not
18 have happened; would not have happened. None of these
19 people knew Dexter Perry, did not know where he was, did
20 not know where he was going, and did not know where he was
21 going to be. One person provided that information to this
22 group, and it's Marquita Smith.

23 We have not overcharged Marquita Smith, I submit to
24 you. She is charged with exactly what she did, and that is
25 setting up her cousin, Dexter Perry. And I submit to you

1 that when you set somebody up to be robbed, and those are
2 Marquita Smith's words, when you set somebody up to be
3 robbed, it is entirely foreseeable that that person could
4 be killed during the course of that robbery.

5 It's not a one-time plan. It's not a one-time
6 comment. This took place over three days. We're not
7 relying on anybody to implicate Marquita Smith. Marquita
8 Smith, when she finally decided to tell the truth,
9 implicated herself in State's Exhibit 51, which you'll have
10 back in your jury room.

11 This plan wasn't hatched in the spur of the moment one
12 night. This plan was hatched on Sunday, on July 30th, when
13 Kerry Hollins calls Marquita Smith says, "Do you know
14 anybody we can rob?" And what does Marquita Smith say?
15 She gives up Dexter right then. On Sunday, July 30th, she
16 had already given up her cousin to be robbed. "I told
17 Kerry," Marquita Smith's words. "I told Kerry Dexter's the
18 only person I know who flashes around money."

19 Then it carries over to Monday, July 31st. Even
20 again, Sunday, not only does she just give them Dexter
21 Perry's name, she calls Chris Nelson to make sure that, in
22 fact, Dexter's got money that they can rob him of. "After
23 talking to Chris, I told Kerry what Chris said." Marquita
24 Smith calls him back to tell them that they do have the
25 money so that they can be robbed, that the plan can go

1 forward.

2 On Monday they have more conversation about the
3 robbery. She doesn't do anything to put a stop to it. She
4 just tells them that she doesn't want to do it on Monday
5 because she doesn't want to go out with Chris Nelson that
6 night to dinner.

7 The third day, three days later, she talks to Kerry
8 again. "I told Kerry that Chris and Dexter were back in
9 town." Marquita Smith makes the plans for them to go to
10 dinner, because she continues in her statement, "I told
11 Kerry about the plans."

12 They would have no idea what was happening that night
13 without Marquita Smith. And keep in mind, Defense would
14 have you believe she didn't know it was going to be a
15 robbery -- she didn't know it was going to be an armed
16 robbery. She uses the word "robbery" in her own statement.

17 Ladies and gentlemen, when y'all came up here on
18 Monday and reported for jury duty, you didn't leave your
19 common sense at home and your life experience at home.
20 Y'all know what a robbery is, what a lick is.

21 Initial plan, they're going to the Red Lobster. Who
22 calls then to tell them that the Red Lobster is closed? "I
23 called Kerry when we got to the Red Lobster." Marquita
24 Smith called them and told them it was closed. Don't come
25 here. It can't happen here. It's ten o'clock. The guys

1 aren't here yet. We're going to have to leave and go
2 someplace else. I'm going to let you know where we're
3 going next. "We decided to meet at Ruby Tuesdays on Ashley
4 Phosphate Road. I called Kerry and told him we were going
5 to meet at the Ruby Tuesdays."

6 Marquita Smith, continuing the plan every step of the
7 way, from its inception. Anytime there was a chance it was
8 going to fall apart, she continued it. At any point along
9 this line it could have stopped and Dexter Perry would have
10 been safe, except for Marquita Smith. Every step she
11 called these guys, who she knew was going to rob her
12 cousin, and told them what was happening and where they
13 were going.

14 "Kerry called me, asked me if Dexter had a lot of
15 money. I told him, 'Yes.'" If she wants to save Dexter
16 Perry, why doesn't she just say, "No, he doesn't have any
17 money. It's a waste of time. Don't do it."? Because she
18 continued the plan. She told them, "Yes, he's got money.
19 Let's keep going forward."

20 A very critical piece of evidence I submit to you.
21 You remember what Tawana Deas said when they left Ruby
22 Tuesdays? What did she tell you that Marquita Smith asked
23 her? To follow them. Now, if you don't think she's in it
24 thick as thieves with these guys, why does she want to
25 follow Chris Nelson and Dexter Perry? Because she wants to

1 find out where they're going.

2 And they lost them because Tawana told her to make the
3 wrong turn. So what did she have to do after that? She
4 had to call her own cousin, and lie to him and trick him
5 into telling her where he was. These are not my words.
6 These are not Ms. Wilson's words. These are not a co-
7 defendant or co-conspirator's words. These are Marquita
8 Smith's words in writing (as read): "Kerry called me and
9 asked me to show him where Dexter and Chris's hole was,
10 where they kept their drugs. I called Dexter and told him
11 that Tawana wanted me to check and see if he was with
12 another girl. So he gave me directions to where he was at
13 in the Silver Fox trailer park."

14 She called her own cousin and lied to him to find out
15 where he was so that her buddies could go rob him. If
16 that's not malicious -- "I called Kerry and told him the
17 directions."

18 And it doesn't stop there. Then she drives to North
19 Charleston to meet him to take him up to Highway 78 to show
20 him where Dexter lived. Now, if this is just going to be
21 some innocent little snatch and grab, and nothing was going
22 to happen, why was it necessary to know where Dexter was
23 and where he was staying? Because that's the house where
24 they thought that this drugs and money was, and they were
25 going to have to go back to the house with Dexter.

1 But she doesn't stop there. She finds out where
2 Dexter is. She finds out he's gone to Tawana's house and
3 leads them straight to Dexter. Takes them from Highway 78
4 all the way down into Goose Creek, takes the wolves down
5 there. "I told them Dexter had gone to Tawana's house,"
6 and she leads them there.

7 And what happens when she gets to Tawana's house and
8 Dexter's there? She tells Tawana she needs -- she wants to
9 put on some long pants so that she can take her skirt out
10 to the car. I submit to you the only reason she had to go
11 outside is to make sure they were there. Because she knew
12 once she was inside the house she couldn't talk on the
13 phone to Kerry Hollins anymore. She had to go outside and
14 make sure that things were ready to go once and for all.
15 And she went back in and she led her cousin right to him.

16 If -- when you get back into the jury room, I would
17 ask take a couple of minutes and see how many times you can
18 jot down that Marquita Smith could have put a stop to this
19 whole thing. How many times over those three days, with
20 any one action, could she have stopped everything that was
21 in motion? I've jotted down a couple and I'm sure y'all
22 will be able to come up with more than that.

23 She could have told Kerry Hollins from the very
24 beginning she didn't know of anybody to rob. She could
25 have told Dexter, her cousin, about the plan. We're

1 talking about three days. How long would it have taken her
2 to say, "Dexter, I just need to let you know these guys are
3 going to rob you. Maybe take out -- you know, get out of
4 town." One phone call. They never would have known.

5 She could have called the police. That's a novel
6 idea. How long would that have taken to make that phone
7 call to let them know what's going on? If she's that
8 afraid of Kerry Hollins, as the defense would have you
9 believe, take ten seconds.

10 At any point that night she could have not told Kerry
11 what was happening, but instead she made the decision to
12 give him a step-by-step-by-step chronology of what was
13 happening. And not even that. It's not even like she's
14 just responding to, you know, some threats or something.
15 She's making calls to him telling him what's happening.
16 "The Red Lobster's not open." Marquita Smith said, "I
17 called Kerry to tell him we were going to Red Tuesday -- to
18 Ruby Tuesdays." Those were his -- her decisions. At any
19 point she could have lied to Kerry about where the victim
20 was. And up to the very last second, before she led Dexter
21 Perry to them, she could've told him not to go outside.

22 Instead, she leads them to him, and then the final
23 nail in the coffin of what her real intention was that
24 night, she tells Kerry Hollins to get out of there because
25 the police are on the way. She doesn't call the police.

1 Do you remember Detective Crumley when he testified?
2 He was surprised when he got there because they responded
3 so quickly that there were already family members there.
4 Who called the family members? Marquita Smith. Because
5 she was trying to build her story to get herself out of
6 trouble. And she lied to Detective Crumley.

7 You will have State's Exhibit Number 50 back in your
8 jury room. If you can read State's Exhibit 50 and think
9 that this is just her leaving out some details about what
10 happened, then you find her not guilty. Because when her
11 statement about all that she has done that night, about
12 starting to set up the robbery at Red Lobster, changing it
13 to Ruby Tuesdays, lying to her cousin, calling to find out
14 where he is to get the directions, taking these co-
15 defendants out there to show them where he lives, finding
16 out that he went to Tawana's, taking them to Tawana's,
17 going out and checking and making sure that they're there,
18 and the -- the most she can come up with was that (as
19 read), "I was at my friend Tawana Deas's house. Me and my
20 friend Tawana Deas was together and my cousin, Dexter
21 Perry. We was walking to his car and about three guys come
22 out of nowhere, knocked me down and took my cousin. I took
23 off running. Dexter can't be found. He was driving this
24 purple Nissan."

25 If she's that innocent, that taken advantage of, the

1 first instance she has the chance to talk to a law
2 enforcement officer, isn't it reasonable to expect that she
3 would tell them what happened, that she was forced into
4 doing all of this? She didn't and the reason she didn't is
5 because it's not the truth. It's simply not the truth.

6 She set something up and set it in motion, and the
7 problem, ladies and gentlemen, is that under the law and
8 rightfully so, when you set something like this in motion,
9 you can't just go back in time and say, "I don't want to be
10 responsible for what happened afterwards, for what I caused
11 to happen." The law doesn't recognize that, and that is
12 why the hand of one is the hand of all. Because when you
13 set something in motion, a robbery, it is entirely probable
14 and entirely foreseeable that somebody's going to get hurt.

15 The interesting thing about criminal law, ladies and
16 gentlemen, is we don't pick the witnesses. It's not like
17 Ms. Wilson and I got together and said, "Well, these are
18 the folks we want to have to come and testify," or we have
19 the ability to go and say, "Well, we'd like a librarian or
20 a doctor or a nurse or a nurse's assistant." We play with
21 the cards that we're dealt. They pick the witnesses: Gary
22 Grant, Jermaine Hartwell, Marquita Smith. Kerry Hollins is
23 her boyfriend. We don't -- we don't pick them. We don't
24 pick the people that were out there.

25 What was the natural consequence of her plan? What

1 did the actions that she put in motion lead to? I submit
2 to you these set of crimes, there's no question, occurred.
3 No question. The question is -- is who did it and who
4 should be held responsible?

5 Burglary first: You enter the dwelling of another,
6 without consent, with the intent to commit a crime, and
7 there's the presence of one or more aggravating
8 circumstances. Clearly in this case we have two residences
9 that were entered: Tawana Deas's home at Snow Goose Circle
10 and Dutch Fork. The door was kicked in at Ms. Deas's
11 house. We have photographs, which you'll have, of the
12 victim's blood that was tested at SLED. Clearly their
13 intent to commit a crime at the time was the armed robbery
14 and the kidnaping.

15 Possible aggravating circumstances are the entering
16 occurred during the hours of darkness, no question about
17 that, the middle of the night. While entering the home or
18 while in the home, he or another participant was armed with
19 a deadly weapon. No question they were all armed. Caused
20 physical injury to a person who was not a participant in
21 the crime. Clearly Dexter Perry was injured at Snow Goose
22 Circle. We have his blood. He was pistol whipped in his
23 head. He used or threatened a dangerous instrument,
24 displayed a pistol. No question burglary first occurred.

25 Armed robbery: To take from the person or presence of

1 Dexter Perry his goods or money while armed with a deadly
2 weapon. Obviously we're alleging the bracelet and the ring
3 were taken. Gary Grant's words; however, if you don't feel
4 that that was proven beyond a reasonable doubt, attempted
5 armed robbery is a lesser included offense. Clearly the
6 plan was the armed robbery. They did their best at Dutch
7 Fork to find something. Couldn't find what they were
8 looking for.

9 I submit to you in this case there's no question we
10 have four kidnappings. Was anybody seized, abducted,
11 confined by any means whatsoever without the authority of
12 law? Clearly Dexter Perry was taken at gunpoint from Snow
13 Goose Circle and taken to Dutch Fork. When they burst in
14 the home, they -- they forced Mr. Cobbs down on the floor
15 at gunpoint. Both he and Mrs. Cobbs tell you they were not
16 free to leave. Obviously, they've got this group of men in
17 their house with guns ransacking their house. They can't
18 move. They were confined and seized. And Joe Husser,
19 while he was being held at gunpoint back in his room and
20 the blanket put over his head.

21 So there's four -- two burglaries, the armed robbery
22 or attempted armed robbery, and four kidnappings, and
23 obviously against their will and consent.

24 So next we need to turn to the eyewitness
25 identification. Who was it that did this? The judge is

1 going to charge you on several factors that you can
2 consider. The first is the opportunity of the witness to
3 view the defendant, and I submit to you in this case we've
4 got basically six witnesses that put these defendants at
5 the scene.

6 Odoner Cobbs; I'm going to talk with you briefly about
7 what they say. He was in his house, minding his business,
8 watching TV, had just fixed a sandwich when his door gets
9 kicked in and Dexter Perry comes flying in, followed by
10 these guys with guns. He told you, and every other witness
11 told you, that every person that came into that house was
12 armed with a handgun. The person he described as the
13 heavysset black male, he said pointed the gun at him, forced
14 him down on the ground, and when he kept looking at him
15 told him, "If you look at me again, I'm going to blow your
16 brains out." He said the lights were on in the house. He
17 got a -- he could see the person's face, no problem.

18 And as the -- as the events continued to unfold, who
19 does he keep hearing this name mentioned? Manny, Manny,
20 Manny. Dexter Perry said, "Manny, you don't have to keep
21 hitting me. You already hit me." Manny, consistently all
22 through it. And the next day when the detectives come to
23 him and show a photo lineup, State's Exhibit 1, who does he
24 identify? Gary Grant was in that house with a handgun, had
25 Dexter Perry at gunpoint, and was involved in it all the

1 chance to look at these six photographs, just by chance he
2 picks Jermaine Hartwell's photograph? The same Jermaine
3 Hartwell that every person has testified is Manny? He says
4 that Jermaine Hartwell was in that house, with a gun, had
5 Dexter Perry at gunpoint, had that family at gunpoint
6 ransacking their home, tearing everything up, committing
7 this armed robbery.

8 The only evidence in this case, ladies and gentlemen,
9 is that every person that was part of that mob was armed
10 with a handgun.

11 Chris Nelson, who somehow this turned into all his
12 fault -- Chris Nelson's come to find out where his best
13 friend is and looks through the window. You'll have the
14 photograph showing where the slide was still open next to
15 the air conditioner. He looks in and sees Manny. And
16 tells you, "I recognized him. Dexter and I had seen him
17 before at a car show." He says Manny had a gun, was
18 holding Dexter at gunpoint in the room. Points to Jermaine
19 Hartwell and says, "That's Manny. That's the person I saw
20 in there with a gun."

21 The hand of one is the hand of all. They're all in it
22 together. We don't need the hand of one is the hand of all
23 for that. They were all in there conspiring, aiding, and
24 abetting each other to do the same thing and that was to
25 commit the armed robbery of Dexter Perry. Each one knew

1 it, and each one was involved.

2 Dexter Perry told you one person that was involved.
3 The only reason he said "Manny," I submit to you, is
4 because that's the only one he knew. But he told the
5 officer and told his family members, as he's lying [sic] on
6 the floor dying, that Manny was involved.

7 And finally, Kerry Hollins. I'm not asking you to
8 believe everything that Kerry Hollins said. Was Kerry
9 Hollins in the house that night? I don't know. I wasn't
10 there. But what we can do and what you can do and what I
11 submit to you, the problem that the defense can't overcome
12 and why they want to attack Kerry Hollins is because I told
13 you, facts are stubborn things. They can't change the
14 facts and they can't change the fact that on every
15 important issue, what Kerry Hollins said is supported by
16 other independent witnesses.

17 Kerry Hollins told you that when they were at their
18 house in North Charleston, they're all armed -- they all
19 armed themselves with handguns. And what did -- what all
20 the witnesses inside that home say is they're being
21 terrorized. Every person that entered the house had a
22 handgun.

23 He told you Manny was involved. He told you Manny is
24 Jermaine Hartwell. He told you Gary Grant was involved.
25 So did Odoner Cobbs, Birdie Cobbs, Joe Husser, and Chris

1 Nelson. They told you the same thing. He told you
2 Marquita Smith set this up. Marquita Smith told you she
3 set it up. Every key fact that he talked about is
4 supported concerning the -- concerning the evidence of what
5 happened and -- and what crimes were committed.

6 I submit to you some other factors that you can
7 consider: degree of witnesses' attention. I submit to you
8 these folks that have lived in this house since 1993,
9 Odoner Cobbs has worked at the same upholstery shop for 16
10 years, never had anything like this happen to them before.
11 And in the middle of the night have their door kicked in by
12 a couple of maniacs with guns and come and tearing their
13 house up, I submit to you that their degree of attention
14 would be at its highest. That if they had the chance to
15 see somebody and to remember them later, who was doing this
16 to them, who was terrorizing them, they would not forget
17 that face, and they did not forget Gary Grant's face.

18 Joe Husser, who told you he never made it out of --
19 down the hallway into the room to see where Gary Grant was.
20 He identified the person that was back there terrorizing
21 him, Jermaine Hartwell, Manny, who had the gun on Dexter
22 Perry.

23 What was the accuracy of their description, the level
24 of their certainty? That day each of them identified the
25 person they could. Told the detectives that day there was

1 no doubt in their mind, and they told you that when they
2 testified.

3 So we get to the last question, which is the murder.
4 Murder is the unlawful killing of another with malice
5 aforethought. It is probably the most serious crime we
6 have in South Carolina and its -- and its got the shortest
7 definition.

8 Malice is simply, a term of art. It's acting with a
9 dark and evil heart, a heart fatally bent on mischief. The
10 intentional killing of a person with no just cause or
11 excuse.

12 In this case, or in any case, there's two types of
13 malice. Express: If somebody says, "I'm going to kill
14 you," obviously they're acting maliciously. There's also
15 ways that you can infer malice from a person's conduct.
16 One way is the use of a deadly weapon. And in this case,
17 significantly, it's a felony murder. The law says, and
18 Judge Jefferson will charge you, if the victim was killed
19 in the course of another felony, then his death is murder.
20 End of story.

21 Burglary first, kidnaping, armed robbery, attempted
22 armed robbery, all felonies. When you take somebody at
23 gunpoint and they end up getting killed, it's murder.

24 Now, the defense attacks Chris Nelson. Says it's
25 Chris Nelson's fault that -- that this all happened. We

1 know who didn't kill Dexter Perry. We know it wasn't Chris
2 Nelson because we had the ballistics done. You'll have
3 State's Exhibits 61 and 62 and 59, the three shots that
4 Chris Fired. One of the shots that hit Jermaine Hartwell
5 and the photograph that shows the bullet wound. Three
6 shots and Agent DeFreese told you, without a doubt, the gun
7 that fired those three shots did not fire either of those
8 two bullets that were in the victim.

9 We know that two other guns were involved, which
10 automatically is consistent with what all the witnesses
11 said, that every person in there had a gun and started
12 shooting.

13 And that's the reason, ladies and gentlemen, that the
14 hand of one is the hand of all. Because we can't -- the
15 State cannot always prove exactly what happened. We can
16 prove what happened up -- up to that step and we've done
17 it. We proved who was there. We proved what they were
18 planning to do. We proved they were all in there with
19 guns. Who fired the fatal shot? We don't know because
20 they got rid of their guns. Should we reward Gary Grant
21 and Jermaine Hartwell for getting rid of their guns so that
22 we can't go back and -- and ballistically compare them to
23 the bullets? That doesn't make sense and that's why the
24 law says that "the hand of one is the hand of all," to
25 eliminate that problem.

1 One who joins with another to accomplish an illegal
2 purpose is liable criminally for everything done by his co-
3 defendant incidental to the common design and purpose.
4 When they all got together to commit this robbery and they
5 broke in the home at Snow Goose Circle, kidnaped Dexter,
6 went and broke into the Cobbs' house, once they were all in
7 it, they were in it for the long haul. And whoever fired
8 those shots, they're all guilty of murder. That's the law,
9 and I submit to you that that is the right law, because we
10 can't prove who fired the fatal shot and they should not
11 benefit from that.

12 Put another way, if a crime is committed by two or
13 more persons who are acting together in the commission of a
14 crime, then the act of one is the act of all. And it goes
15 all the way back to the beginning. It goes back to
16 Marquita Smith. Once she started this ball rolling, every
17 person who got involved, they all knew what the plan was,
18 and they were on board.

19 What the defense has done, I submit to you -- and what
20 I ask you to do is keep your eye on the ball. Keep your
21 eye on -- on what happened that night, because each one of
22 these defendants agreed to rob Dexter Perry. They were
23 armed; they chased him down. They went over half of lower
24 Berkeley County trying to find him. They kicked in the
25 door at Snow Goose Circle, and they kidnaped him. They

1 took him up to Dutch Fork; they kicked in that door. They
2 terrorized every person in that home that night, held them
3 at gunpoint, ransacked their home, the sanctity of their
4 home. And then they want to blame Chris Nelson for firing
5 those shots. And Chris Nelson did nothing more than try to
6 protect his friend, ladies and gentlemen. It's a lot more
7 than Marquita Smith did.

8 She wasn't trying to protect Dexter Perry. She led
9 Dexter Perry to the wolves. She knew what was going to
10 happen. She knew what the plan was. She had no problem
11 with it, because at any point in that night she could have
12 put a stop to it. She could have and she didn't. She is
13 just as guilty as if she was standing in that house, ladies
14 and gentlemen, because without her, none of it would have
15 happened.

16 Gary Grant and Jermaine Hartwell took the plan and
17 they ran. They did what they wanted. The only thing that
18 they didn't do is they didn't find the cash and they didn't
19 find the drugs that they were looking for, but everything
20 else went exactly according to the plan. I submit to you
21 when you get back in your jury room and you look at each
22 piece of evidence and you apply it to the law, that you
23 will be convinced beyond any doubt that each defendant is
24 guilty of every crime they have been charged with. Thank
25 you.

1 THE COURT: Madam Forelady, ladies and gentlemen, you
2 all have been sitting since a little after ten. I want to
3 give you a short break so that you can refresh yourselves.

4 During this break, please do not discuss the case.
5 Please leave your notepads in your seats. As soon as
6 you're done using the restroom, please let the bailiffs
7 know and at that time we'll immediately resume with the
8 Court's instructions. I anticipate that my instruction
9 probably will be somewhere between 25 and 30 minutes. I
10 tried to intercept your lunch so it would get here at 1:00
11 instead of 12:30, but I was not able to do that. I'm going
12 to sort of play it by ear because I don't want your lunch
13 to get cold, so if necessary I may stop. But we'll just
14 have to play it by ear and we'll just have to see how we
15 handle it. Okay? Just wanted you to know that I -- I was
16 looking out for you. If you would go with the bailiff and
17 your caretakers, please.

18 (The jury exits at 12:11 p.m.)

19 THE COURT: You may be seated. We'll be at ease for
20 about ten minutes. I'm thinking five to ten minutes. As
21 soon as the jury knocks on the door we're going to resume.

22 The jury has indicated that they are ready to proceed.
23 There's one other matter I wanted to deal with prior --
24 just to make sure we have it on the record. I originally --
25 -- and I meant to mention this this morning and I -- it just

1 -- just slipped my mind.

2 My charge would normally include an instruction
3 regarding the statements made by the defendant and how they
4 are to judge that statement. It really goes to the
5 voluntariness of the statement. I did not include that
6 charge in this instruction because of the Defendant Smith's
7 position, basically, that it was her statement. There was
8 no contest it wasn't her statement, and that the substance
9 of it was not in fact; and there were no contentions that
10 it was not freely and voluntarily made. So I did not
11 include -- it's basically a *Jackson vs.. Deno* kind of a
12 statement that says I've allowed the statement in, but it's
13 for you to judge whether it was made freely and voluntarily
14 and of her own will, and that she wasn't pressured or
15 coerced. The more I listen to Mr. Jones's statement, I
16 don't think there is really any contention about that. So
17 I have left that out of my charge. I just wanted to make
18 sure that was acceptable to everyone, from the State?

19 Ms. Wilson: That's fine, Your Honor.

20 MR. JONES: Yes, Your Honor.

21 THE COURT: Is there anything before we proceed with
22 the Court's instruction on the law from the State?

23 MR. JENNINGS: No, Your Honor.

24 THE COURT: From the defense?

25 MR. BOLUS: None.

1 MR. BARNWELL: None.

2 MR. JONES: No, Your Honor.

3 THE COURT: Please bring in the jury.

4 (The jury enters at 12:25 p.m.)

5 THE COURT: You may be seated. During this trial,
6 ladies and gentlemen, you and I have certain duties to
7 perform. As the trial judge it is my responsibility to
8 preside over the trial of this case. And I also have the
9 duty to rule upon and pass upon the admissibility of the
10 evidence offered during this trial.

11 You are not -- you are to consider only the competent
12 evidence that is before you, and you are to disregard and
13 disabuse from your mind any testimony ordered stricken from
14 the record in this case during the progress of this trial,
15 if there has been any. You are to consider only the
16 testimony which has been presented from the witness stand
17 together with any exhibits which have been made a part of
18 the record in this case and any stipulations of counsel
19 entered into the record.

20 I have the additional duty to instruct you on the law
21 applicable to this case. As the presiding judge, I am the
22 sole judge of the law of this case and it is your duty as
23 jurors to accept and apply the law as I now state it to
24 you. If you have a preconceived idea as to what the law is
25 or what the law ought to be in a case or in this case, and

1 it should not agree with what I now tell you the law is,
2 you are obligated, under the oath which you have taken, to
3 abandon this preconception on your part because you are
4 sworn to accept the law and apply the law precisely as I
5 now state it to you.

6 In every case tried in this court before a jury, the
7 judge becomes -- the jury becomes the sole and exclusive
8 judge of the facts in the case. You the jury are the
9 judges of the facts in this case. This Court is the judge
10 of the law.

11 The constitution of our state has declared that a
12 trial judge shall not intimate, state, comment upon, or
13 make any statement to a trial jury about the facts in a
14 case. Since you the jury are the sole judges of the facts
15 in this case, you are not to infer anything that I -- from
16 what I've said during the progress of this trial in ruling
17 upon the admissibility of evidence or otherwise, or
18 anything that I now say during the course of this
19 instruction to you that I had any opinion about the facts
20 in this case. The law does not permit me to have an
21 opinion about the facts. This is a matter solely for you
22 the jury to determine.

23 As jurors then, it is your duty, as I have instructed
24 you to determine the effect, the value, the weight, and the
25 truth of the evidence presented during this trial.

1 Necessarily you must assess the credibility of witnesses
2 who have testified in this case. Credibility is simply a
3 legalistic term which means believability. It becomes your
4 duty as jurors to analyze and to evaluate the evidence and
5 determine that evidence which convinces you of its truth.

6 I instruct you that in determining the question of the
7 credibility or believability of witnesses who have
8 testified in this case, you may believe one witness as
9 against several witnesses or several witnesses as against
10 one witness. You may believe a part of the testimony of a
11 witness and reject the remaining part of the testimony of
12 that same witness. If you have a good and sound reason,
13 you may believe the testimony of a witness in its entirety
14 or reject the testimony of a witness in its entirety.

15 You may consider whether any witness has exhibited to
16 you any interest, any bias, any prejudice or other motive
17 in the case. You may consider the demeanor of the witness;
18 that is, the appearance and manner of the witness from the
19 witness stand. You can believe as much or as little of
20 each witnesses' testimony as you think proper. You may
21 believe, as I've indicated, the testimony of a single
22 witness against that of many witnesses or just the
23 opposite. Ladies and gentlemen, of course you do not
24 determine the truth merely by counting witnesses.
25 Throughout this process you have but one objective, to seek

1 the truth regardless of its source.

2 Ladies and gentlemen, this Court has admitted evidence
3 of statements allegedly made by the deceased victim after
4 the injuries. I have determined that these statements
5 should be admitted into evidence in this case; however, it
6 is for you to determine the believability of these
7 statements. In deciding this question, you may consider
8 whether the victim was dying and knew he was dying, and
9 whether the victim had lost all hope of recovery at the
10 time the statements were made.

11 Ladies and gentlemen, I instruct you that a person who
12 has a past criminal record is competent to testify during a
13 trial. A past record does not affect the ability of that
14 witness to testify. The past record may be -- may only be
15 considered by you, if at all, in determining the witness's
16 believability. Remember, ladies and gentlemen, that you
17 are the sole judges of the facts in this case and of the
18 believability of any and all of the witnesses.

19 I also instruct you that the rules of evidence
20 ordinarily do not permit witnesses to testify to opinions
21 or conclusions. An exception to this rule exists for
22 witnesses we call "expert witnesses." A witness who by
23 education and experience has become an expert in some art,
24 science, profession, or calling may state an opinion as to
25 relevant and material matters in which the witness claims

1 to be an expert, and they also state the reasons for that
2 opinion. You should consider any expert opinion received
3 in evidence in this case like any other evidence. Give it
4 the weight you think it deserves. If you decide that the
5 opinion of an expert witness is not based on sufficient
6 education and experience; or if you conclude that the
7 reasons given in support of the opinion are not sound, or
8 that the opinion is outweighed by other evidence, you may
9 disregard the opinion entirely.

10 An expert witness's testimony is to be given no
11 greater weight than that of other witnesses simply because
12 the witness is an expert. Further, you are not required to
13 accept an expert's opinion even though it is not
14 contradicted.

15 Ladies and gentlemen, I instruct you that there are
16 two types of evidence which are generally presented during
17 a trial: direct evidence and circumstantial evidence.

18 Direct evidence is the testimony of a person who
19 asserts or claims to have actual knowledge of a fact such
20 as an eyewitness. Circumstantial evidence is proof of a
21 chain of facts and circumstances indicating the existence
22 of a fact. The law makes absolutely no distinction between
23 the weight or value to be given to either direct or
24 circumstantial evidence, nor is a greater degree of
25 certainty required of circumstantial evidence than of

1 direct evidence.

2 You should weigh all of the evidence in this case.
3 After weighing all of the evidence, if you are not
4 convinced of the guilt of the defendants beyond a
5 reasonable doubt, you must find the defendants not guilty.
6 Conversely, if you are convinced of the guilt of the
7 defendants beyond a reasonable doubt then you must find
8 them guilty.

9 Ladies and gentlemen, I instruct you that the fact
10 that the defendants were arrested, charged, and indicted in
11 this case is not evidence in this case and cannot be
12 considered by you as evidence of guilt in this case; nor
13 does it create any presumption or inference of guilt. This
14 documentation, ladies and gentlemen, are simply the formal
15 written instruments which contain the charge or charges
16 made against the defendants. They serve as the formal
17 documents by which the cases are processed or brought into
18 this Court.

19 Ladies and gentlemen, the defendants have pled not
20 guilty to the indictments and that plea casts the burden on
21 the State to prove the defendants guilty, because a person
22 charged with committing a criminal offense in South
23 Carolina is never required to prove himself or herself
24 innocent.

25 I instruct you, Mr. Foreman, ladies and gentlemen of

1 the jury, that it is a cardinal and important rule of the
2 law of evidence that the defendant or defendants in a
3 criminal trial, no matter what the seriousness of the
4 charge made against them may be, will always be presumed to
5 be innocent of the crime for which they are indicted unless
6 their guilt has been proven by evidence satisfying you of
7 that guilt beyond a reasonable doubt.

8 This presumption of innocence does not cease when you
9 retire to deliberate, but it accompanies the defendant or
10 defendants from the time of their appearance throughout the
11 trial until you reach a verdict of guilt based upon
12 evidence satisfying you of that guilt beyond a reasonable
13 doubt. Our Supreme Court has said that the presumption of
14 innocence is like a robe of righteousness placed about the
15 shoulders of the defendants, and it remains with them and
16 assigns them to that class, the innocent, until that
17 presumptive robe of righteousness has been stripped from
18 their person by evidence satisfying you of that guilt
19 beyond a reasonable doubt.

20 Mr. Foreman, and ladies and gentlemen of the jury, the
21 presumption of innocence is not mere legal theory. It is
22 not just a legal phrase. It is a substantial right to
23 which every defendant is entitled unless you the jury are
24 satisfied from the evidence of their guilt beyond a
25 reasonable doubt.

1 I instruct you and emphasize that the fact that the
2 defendants did not testify is not a factor to be considered
3 by you in anyway in your deliberations and in your
4 consideration on the question of the guilt or the innocence
5 of the defendants. It must not be considered by you in any
6 manner whatsoever. A defendant has the constitutional
7 right to remain silent, and the assertion of this right
8 must not be considered by you in your deliberations in any
9 manner. I repeat, under your oath, you are to draw no
10 conclusion, whatsoever, from the fact that the defendants
11 in this case did not testify. The fact that the defendants
12 did not testify should not even be discussed in the jury
13 room in any manner whatsoever.

14 The burden of proof, as I have stated to you, is on
15 the State. The defendants are not required to prove their
16 innocence. The burden of proof remains on the State to
17 prove guilt beyond a reasonable doubt. You may ask, What
18 is a reasonable doubt in the law? The State has the burden
19 of proving the defendants guilty beyond a reasonable doubt.
20 Some of you may have served as jurors in civil cases where
21 you are told that it is only necessary to prove that a fact
22 is more likely true than not true. In criminal cases the
23 State's proof must be more powerful than that. It must be
24 beyond a reasonable doubt. Proof beyond a reasonable doubt
25 is proof that leaves you firmly convinced of the

1 defendant's guilt.

2 There are very few things in this world that we know
3 with absolute certainty, and in criminal cases the law does
4 not require proof that overcomes every possible doubt. If,
5 based on your consideration of the evidence, you are firmly
6 convinced that the defendants are guilty of the crimes
7 charged, you must find them guilty. If, on the other hand,
8 you think there is a real possibility that they are not
9 guilty, you must give them the benefit of the doubt and
10 find them not guilty.

11 Ladies and gentlemen, an issue in this case is the
12 identification of the defendants Grant and Hartwell as the
13 persons or -- person or persons who committed the crimes
14 charged. The State has the burden of proving identity
15 beyond a reasonable doubt. You must be satisfied beyond a
16 reasonable doubt of the accuracy of the identification of
17 the defendant or defendants before you may convict the
18 defendant or defendants.

19 Identification testimony is an expression of belief or
20 impression by a witness. You must determine the accuracy
21 of the identification of the defendant or defendants. You
22 must consider the believability of each identification
23 witness in the same way as any other witness. You may
24 consider whether the witness had an adequate opportunity to
25 observe the offender at the time of the offense. This will

1 be affected by things like how long or short of time was
2 available, how far or close the witness was, the lighting
3 conditions, and whether the witness had the chance to see
4 or know the person in the past. Once again, I instruct you
5 the burden of proof on the State extends to every element
6 of the crimes charged, and this specifically includes the
7 burden of proving beyond a reasonable doubt the identity of
8 the defendant or defendants as the persons -- person or
9 persons who committed the crimes alleged. If after
10 examining the testimony you have a reasonable doubt as to
11 the accuracy of the identification, you must find the
12 defendants not guilty.

13 Ladies and gentlemen, the defendants Grant and
14 Hartwell are charged with kidnaping. The State must prove
15 beyond a reasonable doubt that the defendants knowingly and
16 unlawfully seized, confined, inveigled, decoyed, kidnaped,
17 abducted, or carried away another person without authority
18 of law.

19 To do a thing unlawfully is to do it willfully against
20 the law. Knowingly means with knowledge, conscientiously,
21 not accidentally. Seized means to take hold of suddenly or
22 forcibly. Confine means to limit, restrict, or enclose
23 within bounds, imprison or shut or keep in. Inveigle means
24 to lure, entice, or lead astray by false representations,
25 promises, or other deceitful means. Decoy means to lure by

1 or as if by decoy. A decoy is something to entice a person
2 into a trap. Kidnap is to remove a person against his
3 will, by unlawful force or by fraud. Abduct means to carry
4 off secretly or by force for an illegal purpose. Carry
5 away means to remove.

6 The State does not have to prove that the defendant or
7 defendants did all of these things. Instead, if you find
8 beyond a reasonable doubt that the defendants did any of
9 these things, you may find the defendants guilty of
10 kidnaping.

11 Something done without the authority of law is
12 something which the law does not sanction, permit, allow,
13 condone, or provide justification for.

14 The kidnaping does not have to be done for any
15 personal or monetary gain, or for any illegal purpose. It
16 may be for any reason whatsoever.

17 I further instruct you that the defendants Grant and
18 Hartwell are charged with murder. The State must prove
19 beyond a reasonable doubt that the defendants killed
20 another person with malice aforethought. Malice is hatred,
21 ill will, or hostility towards another person. It is the
22 intentional doing of a wrongful act without just cause or
23 excuse, and with an intent to inflict an injury or under
24 circumstances that the law will infer an evil intent.

25 Malice aforethought does not require that malice exist

1 for any particular time before the act is committed, but
2 malice must exist in the mind of the defendants just before
3 and at the time the act is committed; therefore, there must
4 be a combination of the previous evil intent and the act.

5 Malice aforethought may be express or inferred. These
6 terms "express" and "inferred" do not mean different kinds
7 of malice, but merely the manner in which malice may be
8 shown to exist. That is either by direct evidence or by
9 inference from the facts and circumstances shown which may
10 -- which are proven.

11 Express malice is shown when a person speaks words
12 which express hatred or ill will for another, or when a
13 person prepared beforehand to do the act which was later
14 accomplished. For example, lying in wait for a person or
15 any other acts of preparation going to show that the deed
16 was within the defendant's mind would be express malice.

17 Malice may be inferred from conduct showing a total
18 disregard for human life. Inferred malice may also arise
19 when the deed is done with a deadly weapon. A deadly
20 weapon is any article, instrument, or substance which is
21 likely to cause death or grave bodily harm. Whether an
22 instrument has been used as a deadly weapon depends on the
23 facts and circumstances of each case. The following are
24 examples of dead -- are examples of instruments which may
25 be deadly weapons: a pistol, a shotgun, a riffle, a dirk,

1 a dagger, a knife, a slingshot, metal knuckles, a razor,
2 gasoline, a firebomb or Molotov cocktail, and lighter
3 fluid. A gun may be a deadly weapon even if it is not
4 operating.

5 I further instruct you that if one intentionally kills
6 another during the commission of a felony, the inference of
7 malice may arise. If facts are proven beyond a reasonable
8 doubt sufficient to raise an inference of malice to your
9 satisfaction, this inference would simply be an evidentiary
10 fact to be taken into consideration by you along with all
11 of the other evidence in the case, and you may give it the
12 weight that you decide it should receive.

13 I further instruct you that the crimes of first degree
14 burglary, kidnaping, and armed robbery are felonies.
15 Again, ladies and gentlemen, this -- this is simply an
16 evidentiary fact to be taken into consideration by you
17 along with all the other evidence in the case, and you may
18 give it the weight that you decide it should receive.

19 The defendants Grant and Hartwell are charged with
20 first degree burglary. The State must first prove beyond a
21 reasonable doubt that the defendants entered a dwelling
22 without consent. A dwelling is any building or portion of
23 a building in which a person ordinarily sleeps. A building
24 constructed as a dwelling that has never been occupied
25 cannot be considered a dwelling for purposes of burglary,

1 but a building is a dwelling even if the residents are
2 temporarily absent from the building.

3 In order to prove that the defendant entered the
4 dwelling -- the defendants entered the dwelling, the State
5 does not have to show that the defendants' entire body
6 entered the dwelling. The smallest entry is sufficient.
7 It may be any part of the body such as a hand or foot, or
8 even an instrument such as a hook or other instrument. In
9 addition, the State does not have to prove that force was
10 used to gain entry. If a person enters a building by using
11 deception, artifice, trick, or misrepresentation to get
12 consent to enter, this is an entry without consent.

13 Next, the State must prove beyond a reasonable doubt
14 that the defendant intended -- that the defendants intended
15 to commit a crime, either a felony or a misdemeanor, at the
16 time of the entry. The mere entry into a dwelling without
17 consent is not burglary. If the intent to commit a crime
18 is formed after the entry, it is not burglary. On the
19 other hand, if the defendant intended to commit a crime at
20 the time of the entry, it is a burglary, even if the intent
21 was abandoned after the entry. It does not matter that the
22 intended crime was not completed. Intent may be shown by
23 acts and conduct of the defendants and other circumstances
24 from which you may naturally and reasonably infer intent.

25 Finally, the State must prove beyond a reasonable

1 doubt one of the applicable circumstances. One: When
2 entering while in the dwelling or when fleeing, the
3 defendant or accomplice was armed with a deadly weapon or
4 explosive. A deadly weapon is any article, instrument, or
5 substance which is likely to cause death or grave bodily
6 harm. Whether an instrument has been used as a deadly
7 weapon depends on the facts and circumstances of each case.
8 And as I've explained, the following are examples which may
9 be deadly weapons: a pistol, a shotgun, a rifle, a dirk, a
10 dagger, a knife, a slingshot, metal knuckles, a razor,
11 gasoline, a firebomb or Molotov cocktail, and lighter
12 fluid. A gun may be a deadly weapon even if it is not
13 operating.

14 Or when entering while in the dwelling or while
15 fleeing, the defendant or an accomplice caused physical
16 injury to anyone not participating in the crime.

17 Or when entering while in the dwelling or when
18 fleeing, the defendant or an accomplice used or threatened
19 to use a dangerous object.

20 Or when entering while in the dwelling or when
21 fleeing, the defendant or an accomplice displayed what was
22 or appeared to be a knife, pistol, revolver, rifle,
23 shotgun, machine gun, or other firearm.

24 Or that the defendants entered or remained in the
25 dwelling in the nighttime. Nighttime is the period between

1 sunset and sunrise during which there is not enough
2 daylight to recognize a person's face except by artificial
3 light or moonlight.

4 The defendants Grant and Hartwell are charged with
5 armed robbery. In order to prove this offense, the State
6 must first prove beyond a reasonable doubt that the
7 defendants took personal property from the person or
8 presence of another person. Property is in the presence of
9 a person if it is within the person's reach, inspection,
10 observation, or control, so that the person could, if not
11 overcome with violence or prevented by fear, keep
12 possession of the property.

13 The State must also prove beyond a reasonable doubt
14 that the defendant carried the property away, intending to
15 permanently deprive the owner of the property and to keep
16 the property for the defendant's own use. The slightest
17 removal of the property or the complete possession of the
18 property, even for an instant by the defendants, is
19 sufficient to show a taking and a carrying away of the
20 property. The taking and carrying away of the property
21 must have been done with violence or by putting the owner
22 of the property in fear of violence.

23 Finally, the State must prove beyond a reasonable
24 doubt that the defendants were armed with a deadly weapon
25 during the robbery. A deadly weapon is any article,

1 instrument, or substance which is likely to cause death or
2 grave bodily harm. Again as I've instructed, whether an
3 instrument has been used as a deadly weapon depends on the
4 facts and circumstances of each case. And again using my -
5 - my earlier examples, the following are examples of
6 instruments which may be considered as deadly weapons: a
7 pistol, a shotgun, a rifle, a dirk, a dagger, a knife, a
8 slingshot, metal knuckles, a razor, gasoline, a firebomb, a
9 Molotov cocktail, and lighter fluid. A gun may be a deadly
10 weapon even if it is not operating.

11 Ladies and gentlemen, I instruct you that if you find
12 that the State has failed to prove that the defendants
13 Grant and Hartwell are guilty of armed robbery, you may
14 then decide whether the State has proven that the
15 defendants are guilty of attempted armed robbery.

16 I instruct you that an attempt is an effort to
17 accomplish a crime which does not succeed. An attempt
18 includes a specific intent to do a particular criminal act
19 along with an act falling short of the act intended. The
20 State must show more than mere preparation and intent.
21 There must be some overt act committed in the effort to
22 commit the crime. Intent means intending the result which
23 actually occurs, not accidentally or involuntarily. Intent
24 may be shown by acts and conduct of the defendant -- of the
25 defendants and other circumstances from which you may

1 naturally and reasonably infer intent.

2 Ladies and gentlemen, I instruct you that if a crime
3 is committed by two or more people who were acting together
4 in committing a crime, the act of one is the act of all. A
5 person who joins with another to accomplish an illegal
6 purpose is criminally responsible for everything done by
7 the other person which occurs as a natural consequence of
8 the acts done in carrying out the common plan and purpose.
9 For example, two people can be guilty of killing another
10 person when only one of the two had a gun, there was only
11 one bullet, and only one of the two fired the shot that
12 caused the death. If two or more people are together,
13 acting together, assisting each other in committing the
14 events, the act of one is the act of all; or as it is
15 sometimes said, "the hand of one is the hand of all."

16 Prior knowledge that a crime is going to be committed
17 without more is not sufficient to make a person guilty of
18 that crime. Mere knowledge that another person is going to
19 commit a crime, even if the defendant is present when the
20 crime is committed, is not sufficient to convict the
21 defendant as a principle.

22 Guilt as a principle is shown by actual or
23 constructive presence at the scene as a result of prior
24 arrangement; therefore, a finding of a prior arranged plan
25 or common scheme is necessary for a finding of guilt as a

1 principle. The State must prove beyond a reasonable doubt
2 by competent evidence the theory of the hand of one is the
3 hand of all.

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

12 Present at the commission of a crime means to be
13 sufficiently near, to aid and abet and assist in the
14 commission of the crime; however, mere presence at the
15 scene of a crime is not sufficient to convict one as a
16 principle on the theory of aiding and abetting. Intent is
17 also a necessary element, for there must have been a common
18 design or intent to commit the crime; and a crime must have
19 been committed pursuant thereto where the person aiding
20 and abetting by some overt act.

21 Intent means intending a result which actually occurs,
22 not accidentally or involuntarily. Intent may be shown by
23 acts and conduct of the defendants and other circumstances
24 from which you may naturally and reasonably infer intent.
25 The State must prove these elements beyond a reasonable

1 doubt.

2 Ladies and gentlemen, the defendant Marquita Smith is
3 charged with being an accessory before the fact of the
4 felonies of murder and armed robbery. In order to prove
5 these crimes, the State must prove beyond a reasonable
6 doubt that the defendant, Marquita Smith, either advised,
7 agreed, urged, counseled, hired, or in some way aided and
8 abetted -- aided or abetted another person to commit a
9 crime, and that the defendant was not present when the
10 offense was committed.

11 Aid means to help, to promote the course or
12 accomplishment of, to give support to, or to give
13 assistance to. Abet means to encourage or appear to favor
14 or support.

15 I instruct you that whenever an unlawful act of malice
16 is done in the commission of a felony and death ensues, it
17 will be murder. I further instruct you that the crimes of
18 burglary first degree, kidnaping, and armed robbery are all
19 felonies. I further instruct you that a person is not
20 liable for the acts of an accomplice unless the act is a
21 natural or approximate -- a natural or probable consequence
22 of the plan. You must find that homicide was a natural and
23 probable consequence of the particular act to which the
24 defendant was an accomplice.

25 Ladies and gentlemen, I instruct you that if you feel

1 -- if you find that the State has failed to prove that the
2 defendant, Marquita Smith, is guilty of accessory before
3 the fact of a felony, that being armed robbery, you may
4 then decide whether the State has proven that she is guilty
5 of the offense of accessory before the fact of a felony,
6 that being attempted armed robbery.

7 And as I explained, an attempt is an effort to
8 accomplish a crime which does not -- which does not
9 succeed. Attempt -- an attempt includes a specific intent
10 to do a particular criminal act along with an act falling
11 short of the act intended. The State must show more than
12 mere preparation and intent. There must be some overt act
13 committed in the effort to commit the crime.

14 And as I've explained, intent means intending the
15 result which actually occurs, not accidentally or
16 involuntarily. Intent may be shown by acts and conduct of
17 the defendant and other circumstances from which you may
18 naturally and reasonably infer intent.

19 Ladies and gentlemen, there are three separate
20 defendants in this case, each of whom is charged with
21 different crimes.

22 The defendant Gary Grant is charged with the offenses
23 of armed robbery, four counts of kidnaping, two counts of
24 burglary in the first degree, and murder.

25 The defendant Jermaine Hartwell is charged with the

1 offenses of armed robbery, four counts of kidnaping, two
2 counts of burglary in the first degree, and murder.

3 The defendant Marquita Smith is charged with the
4 offenses of accessory before the fact of a felony, that
5 felony being murder; and accessory before the fact of a
6 felony, that felony being armed robbery.

7 The case of each defendant and the evidence and the
8 law concerning that defendant should be considered
9 separately and individually. Your verdict does not have to
10 be the same for all defendants. The fact that you may find
11 one defendant guilty or not guilty should not control your
12 verdict as to the other defendants.

13 Where more than one person is charged with a crime, if
14 the evidence warrants it, you may convict one and acquit
15 the other; or you may acquit both or you may convict both
16 or all. It will depend upon your view of the testimony and
17 evidence.

18 You must take each defendant and consider the evidence
19 as to that defendant and my instructions to you on the law.
20 You will then write a separate verdict of guilty or not
21 guilty for each individual defendant.

22 Ladies and gentlemen, the indictments in this case
23 allege eight different offenses against the defendant Gary
24 Grant. And as I've already indicated, those offenses are
25 armed robbery, four counts of kidnaping, murder, and two

1 counts of burglary in the first degree.

2 And the indictments allege eight different offenses
3 against the defendant Jermaine Hartwell. Again as I've
4 indicated, those being four counts of kidnaping, one count
5 of murder, one count of armed robbery, and two counts of
6 burglary in the first degree.

7 And as to Marquita Smith, accessory before the fact of
8 a felony murder and accessory before the fact of a felony
9 armed robbery.

10 Each indictment charges a separate and distinct
11 offense. You must decide each indictment separately on the
12 evidence and the law applicable to it, uninfluenced by your
13 decision as to any other indictment. The defendants may be
14 convicted or acquitted on any or all of the offenses
15 charged, and as I've indicated, you will be asked to write
16 a separate verdict for each -- write a separate verdict of
17 guilty or not guilty for each separate indictment.

18 Ladies and gentlemen, there are several possible
19 verdicts that you must find -- that you may find for each
20 individual defendant, and I will go over each of those
21 possible verdicts with you shortly.

22 I emphasize that there is absolutely no significance,
23 whatsoever, to the order in which I go over these verdicts.
24 It is simply that one must be stated first.

25 Ladies and gentlemen, your verdict must be a unanimous

1 one, which means that all 12 of you must agree. And as
2 I've indicated, I will go over each of the indictments --
3 each of the possible verdicts for each indictment.

4 As to the defendant Gary Grant, indictment 2007-314,
5 which is an indictment for armed robbery, that indictment
6 reads as -- that verdict form reads as follows (as read):
7 "As to the indictment number 2007-GS-08-314, we the jury,
8 by unanimous consent, find the defendant guilty of armed
9 robbery or not guilty"; or as to the lesser included
10 offense, "We the jury, by unanimous consent, find the
11 defendant guilty of attempted armed robbery or not guilty."

12 And as to the indictments for kidnaping which are
13 07-GS-08-315, 316, 317, and 318, they all read -- read as
14 follows: "We the jury, by unanimous consent, find the
15 defendant guilty of kidnaping or not guilty."

16 And as to the indictment for murder, which is
17 indictment 2207-GS-08-319 (as read): "We the jury, by
18 unanimous consent, find the defendant guilty of murder or
19 not guilty."

20 As to each verdict form burglary in the first degree,
21 which are indictments 2007-GS-08-347 and 343 (as read):
22 "We the jury, by unanimous consent, find the defendant
23 guilty of burglary first or not guilty."

24 And as to the defendant Jermaine Hartwell, the verdict
25 forms read as follows: "As to indictment 2007-GS-08-308,

1 309, 310, and 311, which are indictments for kidnaping, the
2 options are as follows, "We the jury, by unanimous consent,
3 find the defendant guilty of kidnaping or not guilty."

4 As to indictment 2007-GS-08-312, which is an
5 indictment for murder, "We the jury, by unanimous consent,
6 find the defendant guilty of murder or not guilty"

7 And as to the offense of armed robbery, 2007-GS-08-
8 313, "We the jury, by unanimous consent, find the defendant
9 guilty of armed robbery or not guilty," or as to the lesser
10 included offense, "We the jury, by unanimous consent, find
11 the defendant guilty of attempted armed robbery or not
12 guilty."

13 And as to the indictments for burglary in the first
14 degree, the options are the same, "We the jury, by
15 unanimous consent, find the defendant guilty of burglary
16 first degree or not guilty."

17 And as to the defendant Marquita C. Smith on
18 indictment 2007-1748, accessory before the fact of a felony
19 murder, "We the jury, by unanimous consent, find the
20 defendant guilty of accessory before the fact of a felony
21 murder or not guilty."

22 And as to indictment 2007-GS-08-1751, accessory before
23 the fact of a felony armed robbery, "We the jury, by
24 unanimous consent, find the defendant guilty of accessory
25 before the fact of a felony, armed robbery or not guilty";

1 or as to the lesser included offense, "We the jury, by
2 unanimous consent, find the defendant guilty of accessory
3 before the fact of a felony, that being attempted armed
4 robbery or not guilty."

5 Ladies and gentlemen, again I emphasize that there is
6 absolutely no significance whatsoever to the order in which
7 I state these possible verdicts. And again, I emphasize
8 that your verdict must be a unanimous one, which means all
9 12 member of the jury must reach consensuses and agree.

10 Mr. Foreman, it is your responsibility to fill out the
11 verdict forms. It is also your responsibility to advise
12 the bailiffs when the jury has completed its deliberations
13 by knocking on the door and telling them that the jury has
14 reached a verdict. It is also your responsibility that if
15 the jury has any questions during deliberations, that you
16 write those questions out and present them to the bailiff.

17 Ladies and gentlemen, I will advise you that if you
18 have any questions during deliberations, please note that
19 there will be a delay in our response. There is a
20 procedure that we must follow in answering jury questions.
21 So know that if you send a question and there is a delay,
22 please know that we're not ignoring you, that we're simply
23 adhering to that process in the -- in -- in providing an
24 answer to any question that you might have.

25 I'm going to ask that you return to your jury room.

1 Please leave your notepads in your seats and please do not
2 begin your deliberations. There are matters of law that I
3 must take up with the attorneys that may require additional
4 instruction or clarification of an instruction; however, if
5 there is no further instruction, we will send in your
6 notebooks as well as the evidence, and at that time we will
7 excuse the alternates and you will be allowed to begin your
8 deliberations.

9 Again, please do not yet begin your deliberations.
10 And if you would go with your caretakers and we will advise
11 you as to how we will be proceeding.

12 (The jury exits at 1:03 p.m.)

13 THE COURT: You may be seated. Are there any
14 exceptions from the State?

15 MR. JENNINGS: No, Your Honor. The only thing Ms.
16 Wilson and I were talking about is just making sure it's
17 clear to the jury that they can only convict for the armed
18 robbery or attempted armed robbery.

19 THE COURT: You know, I was concerned about the
20 verdict form, frankly, and I -- I didn't catch it yesterday
21 because, I'll be frank, I was little fatigued and I just
22 didn't -- and it's a funny thing, even the charge, when you
23 read it to yourself, it is very different than when you're
24 reading it out loud. And I got a little concerned about --
25 I've seen it done a different way, which is -- it would

1 simply say, "We the jury, by unanimous consent, find the
2 defendant guilty of -- of armed robbery or as to the lesser
3 included offense, guilty of -- guilty of attempted armed
4 robbery or not guilty," is the way I've also seen it done.
5 But I'm not certain that it would necessarily -- I guess
6 they would determine -- they would go through it and they'd
7 either say guilty of armed robbery or not ---

8 Ms. Wilson: How bout if you said if -- if you
9 determine that the defendants are not guilty of armed
10 robbery ---

11 THE COURT: No. What I said is if you find that the
12 defendant -- that the State has not proven beyond a
13 reasonable doubt the elements ---

14 MS. WILSON: Right.

15 THE COURT: --- of armed robbery, you may consider
16 whether they have proven the elements of attempted armed
17 robbery.

18 Ms. Wilson: Could we put that on the form?

19 THE COURT: I think I've instructed them. I mean, I -
20 - I ---

21 Ms. Wilson: I know you said it in your instructions.
22 You did say it in your instructions. I was just worried by
23 the time you got to the verdict form that was so long, I --
24 I'd hate for them to check both or something, and us have
25 to ferret that out.

1 THE COURT: Ask them a question, I know. I have found
2 that generally they ask questions if they're confused. I
3 don't know. Mr. Bolus, what are you thoughts?

4 MR. BOLUS: I would just bring them in and say you
5 can't find them guilty of both of them. It's one or the
6 other.

7 THE COURT: Or you can find them not guilty.

8 MR. BOLUS: Or not -- right. But not both. It's one
9 or the other or not either.

10 THE COURT: Does any -- well, let me ask Mr. Barnwell.

11 MR. BARNWELL: I agree with Mr. Bolus. I think that
12 would be ---

13 THE COURT: Mr. Jones?

14 MR. JONES: I agree also.

15 THE COURT: The State have any exception?

16 Ms. Wilson: That's fine.

17 THE COURT: And what I will just simply say is that
18 you're -- that we're clarifying an instruction that the
19 Court has charged you regarding the elements of armed
20 robbery. And I hope I can remember this after I say it.
21 The Court -- that the Court has charged you regarding the
22 offenses of -- the offense of armed robbery, and that --
23 that you must consider whether the State has met those
24 elements. I need to think about that. You cannot find the
25 defendants guilty of both offenses.

1 Let me think through that for a minute. I got to
2 think through it. I've got to think through how I want to
3 say that. Because I don't want to make it more confusing.

4 Ms. Wilson: How about if you said, "You should only
5 consider the offense of attempted armed robbery if you find
6 the State has not met its burden as to armed robbery"?

7 THE COURT: That's a little -- that's -- that's a
8 little -- I want to be really, really clear that I don't
9 make -- I don't cross the line and comment on the facts. I
10 -- I don't want to -- I -- let me think for a second about
11 how I want -- better ways -- better ways to say it.

12 I simply could say, "Ladies and gentlemen, I instruct
13 you that you may only consider the lesser included offense
14 if you find the State has failed to prove the elements of
15 the armed robbery." Any suggestions from defense counsel?

16 MR. BOLUS: I just like the way I said it the first
17 time.

18 THE COURT: I don't remember what you said, Mr. Bolus.
19 You're going to have to remind me.

20 MR. BOLUS: As long as they know they can't do both,
21 but they can find either.

22 THE COURT: I can say, "Ladies and gentlemen of the
23 jury, I further instruct you that under the less -- that
24 under the Court's instructions regarding the lesser
25 included offenses, you cannot make a finding of guilt on

1 both, but you can make a finding of not guilty on either."

2 That's confusing. I'm not sure I like that. I'm not
3 sure my instruction is unclear and I'm not sure the verdict
4 form is unclear.

5 MS. WILSON: I thought your instruction was good. I
6 was just concerned about how far back it was in relation to
7 the verdict form.

8 THE COURT: Actually, it was -- there's only like five
9 pages ahead of when I got to it, because Ms. Smith's stuff
10 is very short and it was right before that.

11 I -- I think the -- I -- I am concerned that I will
12 make it -- make the instruction less clear by now trying to
13 add something to it, and I think the form in and of itself
14 is fairly self explanatory.

15 The only other way I've seen it done is to leave out
16 the second part. In other words, where it would simply
17 read -- and I'm just using as an example Ms. Smith. So it
18 would just say, "Guilty of accessory before the fact of a
19 felony or as to the lesser included offense, guilty of
20 accessory before the fact attempted armed robbery or not
21 guilty." That's the only other way I've seen it done. And
22 I don't know that it makes it any more clear.

23 I tend to think doing it the way we have it makes it
24 more clear, because it's -- and if they do something
25 inconsistent, we'll just have to -- we'll just have to

1 cross that bridge and just have to get it clarified. Or
2 either I'll just have to deal with it as a matter of law
3 because they can't -- I mean, if they -- and I'm thinking
4 out loud, if they said not guilty on both of them, that's
5 clear. If they said -- if they said guilty on both of them
6 -- I don't -- that would mean they had to ignore the
7 instruction. That means they would had -- they would have
8 disregarded the instruction. Although I had one jury, not
9 in a criminal case, disregard the instructions in a civil
10 case I had. Totally disregard it. But I -- that means
11 they would have to totally disregard it. And if they -- if
12 they did that, what I might do is simply bring them back in
13 and re-instruct them on lesser -- on the elements of the
14 lesser included offense. And then we'd have to craft
15 something that tells them that you've done something
16 inconsistent with the instructions. I'm going to send you
17 back to -- and I don't think that would -- would enure to
18 the detriment of the defendants, because clearly they would
19 want to know which one -- well, I don't know.

20 Yeah. I think it was clear. I'm going to stick with
21 my initial gut reaction. If something otherwise happens,
22 we'll just have to deal with it. But I -- I think the
23 instruction regarding the lesser included offenses was
24 clear and I've used that -- not in this particular offense,
25 but I've used lesser included before, and I've used this

1 type of verdict form and I've never had an inconsistent
2 verdict. Okay.

3 Are there any exceptions from the defense, Mr. Bolus?

4 MR. BOLUS: None.

5 THE COURT: From Mr. Barnwell?

6 MR. BARNWELL: No. I did write something down on this
7 attempted armed robbery and armed robbery. I don't know if
8 you want to consider it or not.

9 THE COURT: Sure. I'm always open minded.

10 MR. BARNWELL: "You may find the defendant Marquita
11 Smith guilty of accessory to armed robbery or not guilty to
12 accessory of armed robbery, or you may find defendant
13 Marquita Smith guilty of a lesser included offense of
14 attempted armed robbery or not guilty of accessory to
15 attempted armed robbery. But you may not find defendant
16 Marquita Smith guilty of both accessory to armed robbery
17 and accessory to attempted armed robbery.

18 THE COURT: I think he might have a good solution.
19 What y'all think? Mr. Bolus?

20 MR. BOLUS: I like it.

21 THE COURT: Mr. Jones?

22 MR. JONES: Sounds good to me.

23 THE COURT: I could -- I could do that. Is your
24 handwriting legible, Mr. Barnwell?

25 MR. BARNWELL: It's not legible.

1 THE COURT: Mine's becoming illegible. Let me see if
2 I can decipher it.. Oh, it's no so bad. You write in code
3 like I do, though. That's nice. Okay.

4 (Sotto voce discussion between the Court and law
5 clerk.)

6 THE COURT: Okay. This is what I would propose. I'd
7 say -- and you all can tell me if you find this acceptable.
8 It's a little redundant, but I think it's basically what
9 Mr. Barnwell has suggested: "You may find the defendant
10 Gary Grant guilty of armed robbery or not guilty of armed
11 robbery, or you may find the defendant Gary Grant guilty of
12 attempted armed robbery or not guilty of attempted armed
13 robbery. But you may not find the defendant Gary Grant
14 guilty of both armed robbery and attempted armed robbery.

15 "You may find the defendant Jermaine Hartwell..." and
16 it would likewise say the same thing about Mr. Hartwell.

17 And then it would say likewise the same thing
18 regarding Mrs. Smith, which is, "You may find the defendant
19 Marquita Smith guilty of accessory before the fact of a
20 felony armed robbery or not guilty of accessory before the
21 fact of a felony armed robbery, or you may find her on the
22 -- on the attempt, but you may not find her guilty of both
23 accessory before the fact of a felony armed robbery and
24 accessory before the fact of a felony attempted armed
25 robbery." Is that acceptable to everyone?

1 MR. JENNINGS: Yes, ma'am.

2 THE COURT: Mr. Bolus?

3 MR. BOLUS: Yes, ma'am.

4 THE COURT: Mr. Barnwell?

5 MR. BARNWELL: Yes, Your Honor.

6 THE COURT: Mr. Jones?

7 MR. JONES: Yes, Your Honor.

8 THE COURT: Okay. If you all could bring the jury
9 back in.

10 MR. JONES: Your Honor, I have one other -- one other
11 issue.

12 THE COURT: I'm sorry. I didn't ask you. I
13 apologize. Mr. Barnwell, was there anything further? Did
14 you have any further exceptions?

15 MR. BARNWELL: No, ma'am.

16 THE COURT: Mr. Jones, any exceptions to the charge?

17 MR. JONES: Just one with regard to the accessory. I
18 think it said "of a offense," and I think it would be of
19 "the offense," which -- and it might read -- maybe I ---

20 THE COURT: I didn't -- I didn't say that at all.

21 MR. JONES: I'm sorry. I couldn't hear you.

22 THE COURT: I didn't read any classifications of
23 offenses. I read the offenses she was actually charged
24 with.

25 MR. JONES: No. I mean the jury charge. I think

1 there was a part in there where it says "defending and
2 advised -- was not present when -- or let's see -- in order
3 to prove this, they must prove they intended -- and aided
4 and abetted another person to commit, I think you said "a
5 crime," and I -- and I was --

6 THE COURT: It's a generalized charge. It has to be
7 read that way because at the beginning I told them that
8 she's charged with both of them. So this charge applies to
9 both of those offenses; otherwise, I'd have to read it
10 twice.

11 MR. JONES: Right. I just don't want them to think
12 what if -- if there's -- you know, if there's anything that
13 -- any crime that she could be charged with, I don't want
14 them to be confused.

15 THE COURT: I think it's self explanatory that it
16 applies to the offenses of murder and armed robbery or
17 attempted armed robbery.

18 MR. JONES: It's talks about it has to be part of the
19 offense -- principle to commit the offense, is one of the
20 instructions that I had. And I just don't want there to be
21 any confusion on the jury that -- that -- you know, that
22 she's -- and -- and she's, you know, party to something
23 else. Just because they find that there's a crime --

24 THE COURT: I think it's very clear when I say to them
25 what she's charged with that she can only be held

1 accountable for murder or armed robbery or attempted armed
2 robbery. And that's why I separated it out the way I did
3 as to each of the defendants. She's not charged with the
4 other offenses.

5 MR. JONES: Right. Right.

6 THE COURT: Does the State -- does the State have a
7 contrary opinion to the Court's opinion?

8 MR. JENNINGS: No. We agree with Your Honor's
9 opinion.

10 THE COURT: I'll note your exception for the record.
11 Please bring in the jurors so that I can give this
12 additional instruction.

13 (The jury enters at 1:24 p.m.)

14 THE COURT: You may be seated. Mr. Foreman, ladies
15 and gentlemen, out of an abundance of caution, I'm going to
16 give you -- I'm going to attempt to clarify an instruction
17 that I've given you.

18 Ladies and gentlemen, you may find the defendant Gary
19 Grant guilty of armed robbery or not guilty of armed
20 robbery, or you may find the defendant Gary Grant guilty of
21 attempted armed robbery or not guilty of attempted armed
22 robbery. But you may not find the defendant Gary Grant
23 guilty of both armed robbery and attempted armed robbery.

24 Likewise regarding the defendant Jermaine Hartwell,
25 you may find Mr. Hartwell guilty of armed robbery or not

1 guilty of armed robbery, or may find him guilty of
2 attempted armed robbery or not guilty of attempted armed
3 robbery. But you may not find him guilty of both armed
4 robbery and attempted armed robbery.

5 And as it regards the defendant Marquita Smith, you
6 may find her guilty of accessory before the fact of a
7 felony, that felony being armed robbery; or not guilty of
8 accessory before the fact of a felony, again that felony
9 being armed robbery. Or you may find her guilty of
10 accessory before the fact of a felony, that being attempted
11 armed robbery; or not guilty of accessory before the fact
12 of a felony, that being attempted armed robbery. But you
13 may not find the defendant Marquita Smith guilty of both
14 accessory before the fact of a felony, armed robbery, and
15 accessory before the fact of a felony, attempted armed
16 robbery.

17 That will conclude the Court's additional instruction.
18 If you would go with the bailiffs for me, please. Please,
19 do not yet begin your deliberations. I still have a couple
20 of matters of law to take up with the attorneys; however,
21 if there is no further instruction or clarification of an
22 instruction, your notebooks and the evidence will be sent
23 in.

24 Please feel free to go ahead and start to enjoy your
25 lunch, and we will then release you to begin your

1 deliberations. You can go with the bailiffs.

2 (The jury exits at 1:27 p.m.)

3 THE COURT: You may be seated. Any exceptions from
4 the State?

5 MR. JENNINGS: No, Your Honor.

6 MR. BOLUS: None.

7 MR. BARNWELL: None, Your Honor.

8 MR. JONES: None, Your Honor.

9 THE COURT: All righty. The record shall reflect the
10 jury's been released to begin their deliberations at 1:27.
11 If you could please bring out the alternates, and you all -
12 - pardon me?

13 COURT OFFICER: They're all right in the middle of
14 lunch.

15 THE COURT: Are they really? Can we take the
16 alternates to another room down here to start their lunch?

17 BAILIFF: I can.

18 THE COURT: Thank you. If you all would go through
19 the evidence for me, please, and make sure it's all in
20 order.

21 And also, I had to correct a scribner's error on the
22 verdict forms to reflect "guilty of burglary first degree,"
23 to make sure it mirrored the indictments.

24 MR. JENNINGS: We're fine, judge.

25 THE COURT: Everything is in order?

1 MR. JENNINGS: It looks like.

2 THE COURT: You all bear with me. I want to excuse
3 the alternates, and I want everybody to be present for
4 that. Where are the alternates?

5 BAILIFF: They're in there.

6 THE COURT: Can you get them for me?

7 (Alternate jurors enter at 1:35 p.m.)

8 THE COURT: I wanted to thank you both on behalf of
9 the State and Defense counsel and the defendants. We thank
10 you for your time and your attention to this case. I've
11 watched you both. You both were prompt, you've been
12 timely, and you've been extremely attentive to the
13 evidence. Being an alternate is a thankless job. You get
14 to do all the work but you don't get to deliberate. Least
15 we could do is give you a little lunch. I apologize that I
16 interrupted you all eating.

17 You are free to remain if you would like to see how
18 the jury deliberations come out, or you're also free to be
19 excused. If you need work excuses, please let us know.
20 Your checks as well as your work excuses will be mailed.
21 If you don't need your excuses today, they'll be mailed out
22 probably tomorrow and you will get them, I guess on
23 Saturday probably; or sometime shortly thereafter.

24 You are free to discuss this case if you would like,
25 but I would ask that you not do that until after the jury

1 has concluded its deliberations and until we have excused
2 everyone. By the same token you don't have to discuss your
3 verdict and if someone -- I mean, your deliberations or
4 your hearing of the case. And if someone should persist in
5 trying to speak to you, please make the clerk's office
6 aware of it so that we can protect your privacy.

7 Again, we thank you and you're excused with the
8 Court's profound thanks.

9 All right. We will be at ease.

10 **VERDICT**

11 THE COURT: You may be seated. Is the State ready to
12 proceed?

13 MR. JENNINGS: Yes, Your Honor.

14 THE COURT: The defense, Mr. Bolus, ready to proceed?

15 MR. BOLUS: Yes, Your Honor.

16 THE COURT: Mr. Barnwell, are you ready to proceed?

17 MR. BARNWELL: Yes, Your Honor.

18 THE COURT: Mr. Jones?

19 MR. JONES: Yes, Your Honor.

20 THE COURT: I understand from the bailiffs that the
21 jury has reached a verdict. Please bring in the jury.
22 Well, before you do that, I just remembered something else
23 I reminded myself.

24 I understand the gallery is full of a great deal of
25 individuals, some being related to the victims in this case

1 as well as the defendants in this case. I made these
2 remarks earlier in the week; some have had the benefit of
3 them, some have not. I know that these could be highly
4 charged emotionally -- highly charged proceedings and very
5 emotionally charged proceedings, but I would ask that
6 everyone abide by the decorum of the courtroom and the --
7 and what that is what -- and what is required of the
8 dignity of the process and that there be no outburst. If
9 there are any outbursts, you see that we have a great deal
10 of law enforcement present; you will immediately be removed
11 from the courtroom and it may result in other actions. So
12 I would ask that now, that if you do not feel that you can
13 comport yourselves appropriately, that you allow yourself
14 to be -- to leave the courtroom, because I do not want
15 there to be any inappropriate events taking place in the
16 presence of the panel. And I expect everyone to act
17 accordingly. Please bring in the jury.

18 (The jury enters at 3:10 p.m.)

19 THE COURT: You may be seated.

20 Mr. Foreman, is it correct the jury has reached a
21 verdict?

22 MR. FOREMAN: Yes, ma'am.

23 THE COURT: If you would give the verdict forms to the
24 bailiff for me.

25 Mr. Foreman, while reviewing the verdict forms, I

1 realize that there is one form that you did not fill out
2 for the defendant Gary Grant. I'm going to have to send
3 you all back to your jury room to fill out that form, and
4 then once you have completed that -- and I know it's a lot
5 of indictments -- once you've completed that process,
6 please knock on the door and advise the bailiffs that
7 you've completed that process.

8 (The jury exits at 3:10 p.m.)

9 THE COURT: You may be seated. We'll be at ease until
10 they've done that.

11 THE BAILIFF: Judge, they've got it.

12 THE COURT: All right. Bring them back in.

13 (The jury enters at 3:12 p.m.)

14 THE COURT: You may be seated. If you would give the
15 verdict forms to the bailiff.

16 MR. FOREMAN: I apologize, Your Honor.

17 THE COURT: That's okay. You don't have to apologize.

18 Madame Clerk, if you would publish the verdict in the
19 order of the defendants, which would be Mr. Grant, Mr.
20 Hartwell, and Ms. Smith. And I've put them back in order
21 for you.

22 Mr. Grant, if you would stand for the publication of
23 the verdict.

24 COURT CLERK: *The State of South Carolina vs. Gary*
25 *Grant*, Indictment No. 2007-GS-08-314. We the jury, by

1 unanimous consent, find the defendant guilty of armed
2 robbery.

3 Indictment number -- *The State of South Carolina vs.*
4 *Gary Grant, 2007-GS-08-315.* We the jury, by unanimous
5 consent, find the defendant guilty of kidnaping.

6 *The State of South Carolina vs. Gary Grant, 2007-GS-*
7 *08-316.* We the jury, by unanimous consent, find the
8 defendant guilty of kidnaping.

9 *The State of South Carolina vs. Gary Grant, 2007-GS-*
10 *08-317.* We the jury, by unanimous consent, find the
11 defendant guilty of kidnaping.

12 *The State of South Carolina vs. Gary Grant, 2007-GS-*
13 *08-318.* We the jury find -- by unanimous consent, find the
14 defendant guilty of kidnaping.

15 *The State of South Carolina vs. Gary Grant, 2007-GS-*
16 *08-319.* We the jury, by unanimous consent, find the
17 defendant guilty of murder.

18 *The State of South Carolina vs. Gary Grant, 2007-GS-*
19 *08-343.* We the jury, by unanimous consent, find the
20 defendant guilty of burglary first degree.

21 *The State of South Carolina vs. Gary Grant, 2007-GS-*
22 *08-347.* We the jury, by unanimous consent, find the
23 defendant guilty of burglary first degree.

24 THE COURT: Wait one second. Ask --

25 COURT CLERK: Mr. Foreman, is that your -- is that

1 y'all verdict?

2 MR. FOREMAN: Yes, ma'am, it is.

3 THE COURT: Mr. Foreman, ladies and gentlemen of the
4 jury, are these your verdicts regarding the defendant Gary
5 Grant? If so, please indicate by raising your right hand.

6 (All members of the jury raise their right hands.)

7 THE COURT: You may put your right hands down.

8 Mr. Bolus, is there any request to poll the jury
9 regarding the verdicts?

10 MR. BOLUS: No.

11 THE COURT: (To Mr. Grant) Sir, you may take your
12 seat.

13 Mr. Hartwell, if you would please stand for the
14 publication of the verdicts.

15 (To Court Clerk) You may proceed.

16 COURT CLERK: *State of South Carolina vs. Jermaine*
17 *Hartwell*, 2007-GS-08-308. We, the jury, by unanimous
18 consent, find the defendant guilty of kidnaping.

19 *State of South Carolina vs. Jermaine Hartwell*, 2007-
20 GS-08-309. We the jury, by unanimous consent, find the
21 defendant guilty of kidnaping.

22 *State of South Carolina vs. Jermaine Hartwell*,
23 indictment number 2007-GS-08-310. We the jury, by
24 unanimous consent, find the defendant guilty of kidnaping.

25 *State of South Carolina vs. Jermaine Hartwell*,

1 indictment number 2007-GS-08-311. We the jury, by
2 unanimous consent, find the defendant guilty of kidnaping.

3 *State of South Carolina vs. Jermaine Hartwell,*
4 indictment number 2007-GS-08-312. We the jury, by
5 unanimous consent, find the defendant guilty of murder.

6 *State of South Carolina vs. Jermaine Hartwell,*
7 indictment number 2007-GS-08-313. We the jury, by
8 unanimous consent, find the defendant guilty of armed
9 robbery.

10 *State of South Carolina vs. Jermaine Hartwell, 2007-*
11 *GS-08-342.* We the jury, by unanimous consent, find the
12 defendant guilty of burglary first degree.

13 *State of South Carolina vs. Jermaine Hartwell,*
14 indictment number 2007-GS-08-345. We the jury, by
15 unanimous consent, find the defendant guilty of first
16 degree.

17 THE COURT: Guilty of -- you need to publish that one
18 again, Ollie. Part of it I didn't hear.

19 COURT CLERK: 2007-GS-08-345. We the jury, by
20 unanimous consent, find the defendant guilty of burglary
21 first degree.

22 If this be your verdict, please signify by raising
23 your right hand at this time.

24 (All members of the jury raise their right hands.)

25 THE COURT: Mr. Barnwell, are there any requests to

1 poll the jury?

2 MR. BOLUS: No, Your Honor.

3 THE COURT: (To Mr. Hartwell) You may take your seat.

4 Marquita Smith, if you would stand for publication of
5 verdict.

6 (To Court Clerk) You may proceed.

7 COURT CLERK: *State of South Carolina vs. Marquita C.*
8 *Smith*, Indictment No. 2007-GS-08-1751. We the jury, by
9 unanimous consent, find the defendant guilty of accessory
10 before the fact of a felony, armed robbery.

11 *State of South Carolina vs. Marquita C. Smith*,
12 indictment number 2007-GS-08-1748. We the jury, by
13 unanimous consent, find the defendant guilty of accessory
14 before the fact of a felony, murder.

15 If this be your verdict, please signify by raising
16 your right hand at this time.

17 (All members of the jury raise their right hands.)

18 THE COURT: Any request to poll the jury?

19 MR. JONES: No, Your Honor.

20 THE COURT: (To Ms. Smith) You may take your seat.

21 Mr. Foreman, ladies and gentlemen, on behalf of the
22 State, as well as the defendants and defense counsel, we
23 thank you for your time and your attention to this case.
24 We know that jury service is thankless. It is a great
25 sacrifice both to your personal and professional lives and

1 we grossly underpay you. And so the best that I can do is
2 to give you my profound thanks.

3 I hope that you have learned something by serving on
4 services -- by serving on jury duty this week. I hope that
5 you've learned it is nothing like television. I hope
6 you've also learned how indispensable you are to our system
7 and that -- how unique our system is, in that we have 12
8 individual citizens who sit as fact-finders and determine
9 the facts of case, and then apply a very complicated set of
10 laws to those facts and render verdicts.

11 You are welcome to stay for any -- for the remainder
12 of the proceedings if you would like. I will have the --
13 actually, probably there's no room in the gallery, so we
14 would have to allow you to remain in the jury box. If you
15 do not wish to remain, that is fine also. But I'm going to
16 have you to retire to your jury room, and you can make that
17 decision and you can let the bailiffs know if you desire to
18 stay for the remainder of the proceedings.

19 If you need a work excuse, please let us know; we will
20 have one furnished for you today. If not, those, as well
21 as your checks, will be mailed out to you.

22 You may discuss this case if you would like. If you
23 do not want to discuss this case and someone should persist
24 in trying to speak with you, please make us aware of it by
25 reporting it to the clerk's office so that we can make sure

1 that your privacy is maintained.

2 Again, I would thank you on behalf of the State and
3 the defendants. And I'm going to ask -- I'm going to
4 excuse you to your jury room at this time, and I'm going to
5 then allow you to make the decision as to whether you wish
6 to remain with us. And if you do, you can let Mr. Hutto
7 know, and then he will escort you back into the courtroom.

8 We'll be at ease for a moment, after which I will hear
9 post-trial motions, as well as sentencing. I'll give you
10 all a few moments to get the documents you need to get
11 filled out, filled out.

12 (The jury exits at 3:22 p.m.)

13 **SENTENCING**

14 THE COURT: You may be seated. Are there any post-
15 trial motions? Are there any post-trial motions from the
16 State?

17 MR. JENNINGS: No, Your Honor.

18 THE COURT: Mr. Bolus?

19 MR. BOLUS: We just renew our directed verdicts for
20 armed robbery, the rest of them, I assume, for judgment of
21 acquittal notwithstanding the verdicts.

22 THE COURT: Okay. The Court would -- would the State
23 like to respond to the motions?

24 MR. JENNINGS: No, Your Honor.

25 THE COURT: The Court will note the motions for the
26 record and they are denied based on the Court's previous

1 ruling.

2 Any post-trial motions, Mr. Barnwell?

3 MR. BARNWELL: Move for a new trial based on
4 insufficient evidence and all the prior motions and
5 objections.

6 THE COURT: Okay. Would the State like to respond?

7 MR. JENNINGS: No, Your Honor.

8 THE COURT: The Court will stand on -- or rest on its
9 previous arguments and rulings regarding the previous
10 motions. The Court would find that there is no basis in
11 the record for a new trial and would deny that motion.

12 Anything further from --

13 MR. JONES: Your Honor, I'm going to echo the same
14 motions.

15 THE COURT: I'm sorry?

16 MR. JONES: I would echo the same motions, judgment
17 notwithstanding the verdict and renew the motion for
18 directed verdict, also.

19 THE COURT: Okay. The Court will note your motions
20 for the record and they are denied based on the Court's
21 previous ruling.

22 Okay. Are we ready to move forward with sentencing?
23 Is the State ready?

24 MR. JENNINGS: Yes, Your Honor.

25 THE COURT: Mr. Bolus, you ready?

26 MR. BOLUS: Yes, ma'am.

1 THE COURT: Mr. Barnwell?

2 MR. BARNWELL: Got some family -- I'm seeing if I can
3 find the family, ma'am.

4 THE COURT: We'll give you an opportunity to do that.
5 You may proceed.

6 MR. JENNINGS: Your Honor, Mrs. Connie Perry -- she's
7 Dexter's mother -- she would like to address, Your Honor.

8 THE COURT: Certainly. Uh-huh.. She needs to remain
9 -- uh-huh, for security purposes. Yes, ma'am. I would be
10 glad to hear from you.

11 MS. PERRY: My name is Connie Perry.

12 THE COURT: Yes, ma'am.

13 MS. PERRY: And I'm here on behalf of Dexter -- my son
14 Dexter Perry. All I would like to say is that I want them
15 to really know that they changed my life forever. They
16 have rocked my world and took part of my soul; that was my
17 son. What could you say about your child, but that I love
18 my son?

19 I ask you to take no mercy on any of them. Whatever
20 you sentence them to, I just have to accept that, but it
21 would never bring Dexter back. And I may have some peace
22 and closure to this part, but I will grieve for the rest of
23 my life until the Good Master call me home.

24 They took a son, a father, a brother, a friend, a
25 grandson, a uncle. And it's a hole in my heart that will
26 never be filled again. But they still have the opportunity

1 to see the sun rise and the sun set. All I can do from
2 this day on is go to the gravesite, put pictures on a T-
3 shirt, burn a candle, and just imagine in my mind that I'm
4 still talking to my son. I loved him. It didn't have to
5 be this way.

6 And I just want both parties to know that when we
7 leave this courtroom, let's leave it in respect and
8 dignity; because hatreds, it ain't going to solve anything.
9 And the world is really coming to a end --

10 THE COURT: Uh-huh.

11 MS. PERRY: -- you know. And then to know that,
12 Marquita, you was my family, girl. You didn't have to be
13 this way. You, and Kuku, and Fresh, y'all was friends.
14 Y'all was friends. You -- you can't even tell me you're
15 sorry. You show no remorse, so I show none for you. And I
16 can't say where your soul going to go. If it's going to
17 burn in hell or go to heaven, but I'll never see Kuku
18 again. I'll never see Dexter again, all because of you.
19 But you know what? I don't hate y'all. And I'll never
20 forgive you. God'll have to forgive you. But at least if
21 you're not on the outside, nobody else have to go through
22 this. You can't hurt nobody else.

23 You took a lot from me. Kuku was my dog. Dexter was
24 my child, my son. We talked about a lot of things, you
25 know, a whole bunch of things. And I love him. That's all
26 I can say. You took something that was so precious from

1 me, so precious. And for what reason? Hate? Jealousy?
2 What was the motive? Or just because you simply had
3 nothing to do but go get a lick?

4 And I can imagine him trying to call me, but he
5 couldn't call me. Shot his cell phone; beat him. I can
6 imagine in my mind him asking you, "Please don't hit me no
7 more."

8 Right now I'm numb. I can't even cry, but see, I know
9 when I go home, I go in my closet and I grieve. You can
10 still talk on the phone. Somebody going to say they love
11 you; somebody going to send you a letter; you going to get
12 a phone call. I can't get that. I can just imagine. I
13 can imagine him trying to call Mama, trying to tell me all
14 about it. He can't do that.

15 So I ask you, Your Honor, I don't have no mercy for
16 them. And thank you for allowing me to speak.

17 THE COURT: Thank you, ma'am. The Court appreciates
18 your candor.

19 Is there anything further from the State?

20 MR. JENNINGS: Your Honor, do you want to address each
21 defendant individually or you want to -- the same?

22 THE COURT: You need to say everything you want to
23 say, because I'm going to take them each in order and allow
24 them to be fully heard and then --

25 MR. JENNINGS: Your Honor, as to Mr. Grant, he has
26 prior convictions from 2001 for disorderly conduct,

1 criminal domestic violence --

2 THE COURT: Wait one second for me. You said
3 "disorderly conduct"?

4 MR. JENNINGS: Yes, ma'am.

5 THE COURT: What else?

6 MR. JENNINGS: Criminal domestic violence and
7 trespassing.

8 THE COURT: You said that was in 2000?

9 MR. JENNINGS: 2001.

10 THE COURT: And what was the other, after the criminal
11 domestic violence?

12 MR. JENNINGS: Trespassing.

13 THE COURT: Were those all in Magistrate's Court?

14 MR. JENNINGS: It appears so.

15 THE COURT: Uh-huh.

16 MR. JENNINGS: And in 2001, he was also convicted of
17 failure to stop for a blue light. And on the same date,
18 was convicted of possession of crack cocaine, and two
19 counts of that.

20 THE COURT: That was also in 2001?

21 MR. JENNINGS: Yes, ma'am. In 2002, he was convicted
22 of strong-arm robbery, possession of a stolen vehicle, and
23 auto-breaking.

24 As of the time of this incident, Your Honor, he had
25 just bonded out when this incident took place, about two
26 weeks earlier, from Charleston County on two counts of

1 murder that are still pending.

2 As for Mr. Hartwell --

3 THE COURT: Wait one second for me.

4 MR. JENNINGS: Okay.

5 THE COURT: You said two weeks prior to this incident
6 he had just bonded out on two counts of murder in
7 Charleston County that are still pending?

8 MR. JENNINGS: That's correct.

9 THE COURT: Which would have been in 2004, correct?
10 When he bonded out?

11 MR. JENNINGS: 2006.

12 THE COURT: 2006. I'm sorry. You may continue. I'm
13 sorry.

14 MR. JENNINGS: Thank you, Your Honor. As to Mr.
15 Hartwell, he was convicted in 2003 on a possession of
16 crack, as well as a conspiracy to violate drug laws. In
17 2000 -- on the same date he also had a conviction for an
18 unlawful carrying of a weapon.

19 He also had in -- later in 2003, a conviction for
20 driving under suspension; that's the extent of his record.

21 Ms. Smith has no record.

22 Your Honor, on behalf of the Solicitor's Office and --
23 and the Berkeley County Sheriff's Department, I think Your
24 Honor obviously heard all the facts in this case, and I
25 would submit to you that they are almost unbelievable in
26 their brazenness and brutality. I think the things that

1 you heard during this trial are things that you might think
2 you would only see on TV or in a movie. This group of
3 people who kicked in two doors, abducted somebody at
4 gunpoint.

5 And I think it's significant to note that these guys
6 were doing nothing wrong. Dexter and Chris, for whatever
7 might have been alleged that they were involved in, or what
8 they might have been suspected to have been doing, on the
9 night that this happened, they were just hanging out,
10 visiting -- visiting friends. And no allegation that
11 either of them was armed; no allegation that either of them
12 has been armed in the past; and what happened to them that
13 night, it just borders on unbelievable, and what the Cobbs
14 went through in their home.

15 I can't imagine being in there and having people kick
16 in your door, armed with handguns, not knowing what's going
17 on, ransacking your home, bullets flying. I think it's the
18 grace of God that only one person was killed and nobody
19 else was shot in the house with the number of people and
20 the manner in which the bullets were flying.

21 And I am perfectly comfortable saying that these two
22 gentlemen never need to be out of prison. I think a life
23 sentence is entirely appropriate given the facts of this
24 case.

25 As to Ms. Smith, what she did, I -- and Ms. Wilson and
26 I have talked about this, and our analysis of the case I

1 put her almost at the top the heap.

2 THE COURT: Uh-huh. I agree with you.

3 MR. JENNINGS: What she did and -- what she did and
4 the manner that she did it, with the repetition of
5 contacting these guys, letting them know where Dexter was,
6 this was not -- as I said in my closing argument, this was
7 not just a case of her saying on one offhand occasion, "You
8 can rob my cousin." It's almost like she saw it through to
9 completion --

10 THE COURT: Uh-huh.

11 MR. JENNINGS: -- because every chance that there was
12 for this to fall apart and for nothing to happen, it was
13 Marquita Smith that kept it going and brought it back until
14 it finally was completed.

15 And I have to -- I have to agree with Ms. Perry. I
16 think she has shown absolutely no remorse for what
17 happened, has no -- whether it is no comprehension of what
18 she did, I'm not sure. But what she did and the level that
19 she was involved is shocking, and she was in it up to -- up
20 to her head. And she might as well have been there and
21 pulled the trigger --

22 THE COURT: Uh-huh.

23 MR. JENNINGS: -- for what she did, Your Honor. And
24 as you know, the least she can get is 30 years on the
25 accessory before fact to murder, but I would submit to you,
26 based on what she did, even though she's got no prior

1 record, I think she's just as bad as -- as these gentlemen
2 that were there shooting the guns.

3 THE COURT: Thank you. Do any of the victims wish to
4 be heard? Any of the Cobbs? Are they present? Or Mr.
5 Nelson or -- I just want to make sure, in compliance with
6 the statute, if anyone wishes to be heard that they are
7 heard.

8 (Sotto voce discussion between Mr. Jennings, Mr.
9 Cobbs, and Mr. Nelson.)

10 MR. JENNINGS: No, Your Honor.

11 (Sotto voce discussion between the Court and unknown
12 female.)

13 THE COURT: Mr. Bolus?

14 MR. BOLUS: (To the client) Do you want to address
15 the Court?

16 Judge, I have nothing to say. I'm appointed on this
17 case and he has -- (To Mr. Grant) You have nothing to say
18 to the judge?

19 THE COURT: You have nothing you want to say on behalf
20 of your client? You don't want to tell me how old he is,
21 where he's from, anything about his life to give the Court
22 some perspective? I think for the record you need to make
23 some attempt, unless he, of course, is instructing you not
24 to.

25 (Sotto voce discussion between Mr. Bolus and Defendant
26 Grant.)

1 MR. BOLUS: He says I don't need to tell you anything.

2 THE COURT: Can you tell me how old he is?

3 (Sotto voce discussion between Mr. Bolus and Mr.

4 Grant.)

5 MR. BOLUS: He's twenty-four.

6 (To Mr. Grant) You've lived here all your life?

7 MR. GRANT: (Nods head up and down.)

8 THE COURT: Okay.

9 MR. BOLUS: I mean, it is what it is.

10 THE COURT: Your hands are tied.

11 Mr. Barnwell, is there anything you'd like to state
12 for the record?

13 MR. BARNWELL: Your Honor, I believe -- I could
14 address the Court first, but I believe his aunt, Lola King,
15 would like to address the --

16 THE COURT: Certainly, I would be glad to hear from
17 her.

18 MR. BARNWELL: -- wants to address the Court as well.

19 THE COURT: Uh-huh.

20 MR. BARNWELL: Mr. Hartwell is 25 years old. He
21 completed the 11th grade at North Charleston High School.
22 I would ask Ms. King to address the Court.

23 THE COURT: Yes, ma'am. Just speak loudly for me and
24 state your name for the record.

25 MS. KING: My name is Lola King. I am Jermaine's
26 aunt. I would just like to start by saying, as I always

1 do, saying to Ms. Perry from the King family, that we
2 apologize for what happened to your child. You know, I
3 just want to say that, you know, please don't be angry at
4 us, for we weren't there that night. Each time we come to
5 court we try to look at you and just some way say that I'm
6 sorry, because I'm the mother of four, four sons and a
7 daughter. I've lost a father and a sister, but this is
8 nothing like losing a mother and a -- and a child.

9 So you know -- I -- I saw his picture in the newspaper
10 and what I did is, I did ask God to have mercy on him. I
11 am a Christian and I say it because I don't know whether he
12 was saved as the Lord. Because there is life -- there is
13 life after death. And I asked, you know, the Lord, you
14 know, to have mercy on him, that he made it into heaven.

15 And as for these -- the co-defendants -- now, for
16 Jermaine, my nephew, I have known of him to be arrested for
17 drugs, but never him to be a murderer. And I do ask, you
18 know, the Court, to please not have only mercy for him, but
19 to have mercy on all of the co-defendants, you know,
20 because Jesus is love. God is love. You know, it's not
21 going to bring your son back. No, ma'am, and I do
22 empathize with you. I'll never know how you feel.

23 I have -- I have a son. His head is hard. He's a
24 college student. Been blessed. But the head -- his head
25 is hard and I pray to God that he would yield to what I'm
26 trying to tell him before something worser [sic] happens,

1 where I can't help him.

2 But all I can say is, is that I pray for you, that --
3 that your days will get easier for you, day-by-day, one day
4 at a time. Because God can give you peace. He's the only
5 one that can give you peace while you're going through this
6 hard journey.

7 And I pray for these young people. No matter what --
8 what happens, y'all will -- you can pick up a Bible, read
9 it, and let Jesus be your strength. And I ask the Court, I
10 don't know whether y'all have already made up the
11 sentences, but please have some kind of mercy on them.

12 I rest there, but I just ask you, please have some --
13 please to have some mercy on them. Thank you so kindly.

14 THE COURT: You're welcome, ma'am.

15 Anything further, Mr. Barnwell?

16 MR. BARNWELL: Mr. Hartwell wants to --

17 THE COURT: Mr. Hartwell, I'll be glad to hear from
18 you.

19 MR. HARTWELL: I've been telling y'all since day one,
20 Joe Husser and Chris Nelson, Chris was -- Chris shot up
21 from outside. But I be the one in the car. I did not
22 shoot Kuk. I never attempted to rob Kukp. Joe Husser, you
23 know -- y'all did not see -- I did not beat Kuk nor shoot.
24 I never attempted to rob Kuk. I tell you this, I'm an
25 innocent man going down for nothing. Joe Husser, you know
26 that. Y'all know that, man. I would give them all the

1 money. Kuk did sell me bad weed. But I did nothing. I
2 did nothing, Joe Husser and Chris shot my side. How could
3 I beat Kuk and get shoot at the same time? I'm innocent.
4 I'm telling you, I'm innocent. I never beat Kuk. I never
5 was near Kuk. Never. I never shot Kuk. I did nothing.
6 (Crying) I'm so innocent, man. I'm innocent. I did not
7 beat Kuk. I did not do nothing. You all got the wrong
8 man. Please. I'm telling y'all, man. Kuk said go on into
9 the house. Joe Husser, I wasn't there. That's -- that's
10 so. I saw what I saw. Birdie was on the bed, sitting
11 down. I came out the room. I told her to call the police.
12 She said, "Don't worry. There's a phone in the bedroom."
13 That's what Kuk was saying. Kuk said, "Manny, look in the
14 bag." I took the bag and I put it down, and I said, "King,
15 come on. Let's go." And on the way out, Chris started
16 firing at me. I'm innocent, Joe Husser. You did not see
17 me, man. I'm going down for nothing. Nothing, man. I'm
18 innocent. That's real, dog. That's real dog. I'm going
19 down for nothing. Joe Husser, Chris Nelson, you all didn't
20 see me, man. (Crying.) I don't get down like this. I
21 don't get down like this, man. When I came in your house,
22 I don't put no sheet over your head, man. I didn't pistol-
23 whip you. You all pointed out the wrong man. (Crying.) I
24 did not shoot Kuk, man. I did not shoot Kuk, man. I done
25 promised y'all that, man. That's real talk. Y'all didn't
26 see my in that trailer, man.

1 MR. BARNWELL: Your Honor, I'd like to relate an
2 anecdote to you, and I'm not making light of the situation.

3 THE COURT: No. And I wouldn't take it that way.

4 MR. BARNWELL: This is a very tragic --

5 THE COURT: It is.

6 MR. BARNWELL: -- situation, Your Honor. But Jermaine
7 Hartwell all week has been telling me he's got a better
8 looking suit than I had. And I told his Aunt Lola that and
9 she laughed, she says, "That's my Jermaine."

10 And the reason I tell that anecdote is to show that he
11 does have some attractive qualities. He does have a -- a
12 personality -- attractive personality. He's very highly
13 valued by his family. I'm sure Dexter Perry is -- is
14 equally valued by his family.

15 I would ask the Court to consider 30 years concurrent.
16 I know when he gets out of prison, maxing out at 30 years,
17 he'll be well past middle age. And these are -- are
18 terrible, terrible facts. These are terrible -- terrible
19 facts, but I would ask the Court to -- to consider that. I
20 know you can't give any less than the law allows, but I
21 would ask that you consider that.

22 THE COURT: Thank you, sir, Mr. Barnwell.

23 Anything further, Mr. Jones?

24 MR. JONES: Yes, Your Honor. I know the family will
25 want to speak, I believe, and I'm not sure in what order.
26 And I know Ms. Smith would also like to speak to the Court.

1 I'm not sure which order you want --

2 THE COURT: Pardon me? I didn't hear you. Say that
3 one more time.

4 MR. JONES: Oh, I'm sorry. I know that some of the
5 family would like to speak on her behalf, and I know that
6 she would like to speak also. I've got a couple of things
7 I would like to say also.

8 THE COURT: Go in whatever order you feel comfortable.

9 MR. JONES: Your Honor, just briefly. Again, she is
10 20 years old. She does -- or was attending CCPI -- had a
11 3.0. Worked at BiLo's at this time. During this time, she
12 had two jobs. She's got a good family and they are here to
13 support her. She's got a good family and she's got a
14 pleasant demeanor. She's obviously made some bad choices.

15 You've heard -- I think you heard during jury
16 selection that she's active in her church and there are
17 some people here that actually knew her from that. She
18 also has a mentor here that she's been, I think, has
19 working with her since -- since all this happened.

20 I think I'd like the family to address you first, if
21 they may.

22 THE COURT: Sure.

23 PASTOR BROWN: I'm Pastor Joseph Brown. I've had the
24 privilege to actually serve both of these families. I'm
25 the pastor of the Canaan Christian Church for 16 years.
26 I've known Marquita practically all of her life. When I

1 came here, she was probably about four or five years old.
2 This young lady has participated in our youth choir. She's
3 been a Bible student, attending our Sunday School, Bible
4 School, has been very active in our church.

5 I just pray that you would consider the fact of her
6 character as I talk to you today, and also on behalf of the
7 family. My concerns are not only about what happens here,
8 but what happens after this is over. I listened to the
9 families, both of them are related. There has to also be a
10 healing process that takes place beyond this court. So I
11 say to the family, that somehow y'all will find a way, a
12 will, a means to amend y'all's relationship, because there
13 is a higher court after this that all of us must stand
14 before.

15 So I say to you that -- just take into consideration
16 mercy and -- and -- and just let God guide the decision
17 that you make here today.

18 And I say to the family that certainly find a means
19 and a way to get beyond this, that you can heal yourselves;
20 because you have other children, you have other family
21 members that you have to consider that go beyond this
22 courtroom. And when we move off the scene, our children
23 have to remain and live and continue life on. So I'm
24 saying for the betterment of your offspring that is behind
25 you, they are going to also be impacted by this incident.
26 So it is vitally important that after this is over, that

1 the family do something to mend that relationship and be
2 able to move on; because these children got to live in the
3 same community. They are going to run into each other
4 periodically in the street, and they're going to have to be
5 able to deal with one another on a different level. So I'm
6 saying I hope beyond this point, there can be healing for
7 both families after the decision is made. Thank you, Your
8 Honor.

9 THE COURT: You're welcome, sir.

10 THE COURT REPORTER: Your Honor?

11 THE COURT: Uh-huh?

12 THE COURT REPORTER: Could he say the name of the
13 church for me?

14 THE COURT: Sir, could you repeat the name of your
15 church please for the benefit of the court reporter?

16 PASTOR JOSEPH BROWN: Canaan Christian Church.

17 THE COURT: Canaan -- C-a-n-a -- C-a-n-a-a-n?

18 PASTOR JOSEPH BROWN: Yes, ma'am.

19 THE COURT: Thank you, sir.

20 ROSEMARY SMITH: I'm Rosemary Smith. I'm Marquita's
21 mother, and I'm speaking on behalf of the Smith family, the
22 Walker family, and the Perry family, which is my family. I
23 mean, it -- it -- it -- it just really torn us up.

24 I don't know what Marquita -- whatever she [sic] role
25 in it, it was wrong. I know it was wrong, whatever she
26 [sic] role in it. But, like I said, I was acting on that,

1 if you all wanted to communicate with me, that was fine. I
2 told you from day one, whatever happen, whatever the
3 outcome, I has no hate on my heart; I said that from day
4 one. I said I don't know because I never lost someone, so
5 I can't say how -- how you feel. I mean, I can't say -- I
6 can't say -- like I said, I know I never said anything bad
7 about the family. Anybody can tell you all, I never said
8 anything.

9 Marquita came from a good home. A good Christian
10 home. Her grandparents are evangelists; her daddy is a
11 preacher; her granddaddy is a preacher. I've got sisters-
12 in-law that's preachers in the family, one brother, I mean,
13 and like I said, she knows she came from a good home. She
14 never want for anything. She never. She was working two
15 jobs when this went down. She was going to school. So, I
16 mean, why it occurred or how it occurred, like I said, I
17 don't know. I wasn't there.

18 Like I said, I can't tell the family how she -- how
19 Connie feel, because I never experienced it. So like I
20 said, I only got two kids and they know we give them the
21 world. I mean, what they don't have, we can -- I mean, we
22 makes ends meet for them. Her dad works two jobs. I work
23 with the special needs kids at Stratford High School. And
24 I fall in love with these kids.

25 So like I said, I can't say, but I just ask the judge
26 or whoever, or Connie, just to forgive my family, because I

1 have no hate for y'all; that's from day one. I mean that
2 been from day one. You can't say, I never on the street
3 say nothing bad about your situation. I didn't. Right? I
4 didn't. I didn't. Like I said, I love you.

5 (Sotto voce discussion between Ms. Smith and unknown
6 female.)

7 ROSEMARY SMITH: I know that. I know that. Like I
8 said, I'm just speaking on behalf of Marquita, you know.

9 Like I said, sometime she goes to church. She goes to
10 a different church. She has a mentor here that's mentoring
11 with her. Well, he -- he must be out because he's spent
12 all week. Just have mercy on her. She need to finish
13 school. She goes to school. She's working still.

14 But like I said, I mean, I -- I -- like I said, just
15 have mercy on her. We all praying. We was just all
16 praying, the church family. We all get together and we
17 just pray and we have good time in the name of the Lord.
18 Like I said, her daddy is a pastor. He just couldn't take
19 it, so he went out. And her -- her mother-in-law -- her
20 grandmama here is a evangelist. Her granddaddy is a
21 preacher. Like I said, just have mercy; that's all I'm
22 asking.

23 THE COURT: Thank you, ma'am.

24 MR. JONES: Your Honor, I think --

25 MS. SMITH: What really happened was -- and you know,
26 like I said, it's all over. Kerry Hollins came in here --

1 you know the witness that testified -- okay, me and him, a
2 person told you that we was dating for like three and a
3 half years. Okay. He was in and out of jail for three and
4 a half years. I was -- I'm afraid of Kerry Hollins. Kerry
5 Hollins put a gun to my mouth one night. Kerry Hollins, I
6 mean -- he abused me. I was in an unhealthy and abusive
7 relationship. He broke my window. I mean, it was -- he
8 was really abusive.

9 And I know Connie said -- well, I know I tell them --
10 she said, you know, I didn't feel no remorse, but that's
11 not true. You can ask my mom or anybody. I cry every
12 night, because what Kerry Hollins told me was, you know, he
13 -- he basically put me in a situation where you're going to
14 do this, or I'm going to do this. You see what I'm saying?
15 He put me in that situation, but he never, ever told me
16 that he was going to have guns. He never told me -- he
17 always said he's not going to get hurt. He's not going to
18 get hurt. They was planning -- he was supposed to snatch
19 his jewelry and his money in his pocket, and that was it.
20 And nine times out of ten, and I put my hand -- right by
21 the hand of God, I was going to tell Dexter what happened,
22 because I mean, I've learned from this. I've learned from
23 this. I grew up and I've wised up. I mean, and what
24 happened, it was not supposed to happen. I did not foresee
25 that they were going to kill him. They were going to
26 kidnap him; or they were even going to have guns; I did not

1 foresee that.

2 I mean and it takes a lot, you know what I'm saying,
3 to be 20 years old, and to, you know, make one mistake, the
4 only mistake I've ever made, and I mean, I got to stand in
5 front of a judge because I made a bad choice in dealing
6 with a boyfriend who I was scared to even leave him.

7 I mean, we had broken up. I was scared to, you know,
8 leave him. I was -- I was afraid of him, and when he got
9 up there Tuesday, or yesterday, he lied. He basically
10 lied. I mean, he manipulated me and he -- I can't say if
11 it was Manny or Gary or whoever killed him, I really can't,
12 but it put me in a situation that I had to deal with; my
13 cousin was murdered. You feel me? I had to deal with
14 that, and I cry every night.

15 Every single night I cry, because I know that I'm not
16 that type of person. I'm not evil. I -- no -- there was
17 no motive for it. There was just no motive. There was no
18 motive for it at all, and like I say, I do apologize. Like
19 I said, I was manipulated into the whole thing. I never
20 knew. I never foresee an armed robbery, kidnaping, none of
21 that. I -- I would never -- everybody that knows me, I am
22 not that way. I would never, ever -- I would have never
23 allowed that. Tawana was my friend. I would have never
24 allowed them to go into her house. And I did -- when he
25 was walking out I did tell him, you know, I was like, "No.
26 Somebody is out there." I -- I -- and I did. You know, I

1 warned him, but Tawana said, "You know, it's my brother,"
2 and before you knew it, he was out there and it had all
3 begun.

4 Like I said, I can't say Kerry, Gary, or Manny, or
5 anybody killed him, but all I can say is, that I'm sorry
6 and I never knew -- never -- Lord knows I never knew that
7 it was going to happen that way. I never intended for it
8 to happen that way.

9 THE COURT: Anything further, Mr. Jones?

10 MR. JONES: Your Honor, just due to her age I would
11 ask that you consider the 30-year sentence. I mean, I
12 think clearly as it is, there's a lot of growing up that
13 can still be done over that time period. I would ask the
14 Court to be lenient, to be merciful with regard to that,
15 and give the 30-year sentence with regard to this matter.

16 THE COURT: Thank you, Mr. Jones.

17 Anything further from the State?

18 MR. JENNINGS: No, Your Honor.

19 THE COURT: What is going to happen with Mr. Hollins?

20 MR. JENNINGS: Despite the characterizations of
21 defense counsel, who I have the utmost respect for ---

22 THE COURT: Well, they did -- they were doing their
23 job. They were supposed to put them in the worst light
24 possible. I -- I'm sure it's the ---

25 MR. JENNINGS: I'm telling Your Honor now that we
26 offered Mr. Hollins accessory before the fact to armed

1 robbery, the same thing that was offered to -- actually not
2 even as good as was offered to Ms. Smith, with a straight
3 plea. He turned that down.

4 THE COURT: Uh-huh.

5 MR. JENNINGS: As we -- Ms. Kennedy and I have spoken.
6 My understanding he understands it's not getting any better
7 than that.

8 THE COURT: So he, at this point -- where's Ms.
9 Kennedy? Is she still here?

10 Ms. Kennedy, so your client's charges are still
11 pending. They are unresolved. Does he plan to enter a
12 plea this week?

13 MS. KENNEDY: I'm sorry, Your Honor?

14 THE COURT: Does he plan to enter a plea this week?

15 MS. KENNEDY: No, Your Honor. There's -- there's an
16 additional co-defendant in this case that needs to be
17 resolved and he might be involved in that trial, too.

18 THE COURT: So, in other words, there's never going --
19 there's not going to be a resolution to this case as long
20 as he has the potential to testify?

21 MS. KENNEDY: Your Honor, we -- Mr. Jennings and I
22 have not discussed that.

23 THE COURT: Uh-huh.

24 MS. KENNEDY: My understanding is with Mr. Jennings
25 and with my client, is that he was made that offer, that --
26 that we --

1 THE COURT: Are the same charges pending against him
2 as these gentlemen were convicted on?

3 MR. JENNINGS: He has the same charges as Ms. Smith --
4 accessory before the fact to murder, accessory before the
5 fact to armed robbery.

6 THE COURT: And?

7 MR. JENNINGS: So at this point he has no offer. And
8 despite their characterization of some sweetheart deal
9 coming in at the last minute, there's certainly no plans
10 that the State has on that.

11 THE COURT: Well, let me ask: Worst case scenario,
12 what is -- and he testifies in this other trial absent this
13 person deciding to enter a plea -- what is the worst case
14 scenario of what will be offered to Mr. Hollins? Of
15 course, you're not bound by it, but I need to know, because
16 I think -- well, I'm not really -- I'm not sure I'm going
17 to tell you exactly what I think, but as a judge, my
18 perspective is a little more holistic; because I think
19 everybody needs to be fed out the same spoon based on their
20 level of culpability.

21 MR. JENNINGS: Uh-huh.

22 THE COURT: And I don't intend for him to be treated
23 any less. Because as far as I'm concerned, he and Ms.
24 Smith started the ball rolling, and without them there
25 would have been no impetus; there would have been no
26 catalyst, and this never would have happened.

1 MR. JENNINGS: And Ms. Smith had the best offer of
2 anybody this whole week.

3 THE COURT: She did. She did. I agree, she did. I
4 had a long discussion with her about it.

5 MR. JENNINGS: I certainly would say that we will not
6 offer him anything better than what was offered to Ms.
7 Smith. And as Your Honor knows, she was offered accessory
8 before the fact of voluntary --

9 THE COURT: That's correct.

10 MR. JENNINGS: It was at the beginning of the week
11 where she would have had the opportunity to have a sentence
12 of 2 to 30 years --

13 THE COURT: Uh-huh.

14 MR. JENNINGS: -- as well as an accessory before the
15 fact of kidnaping, so that -- that is apparent. He was
16 certainly not ever put in the position that Ms. Smith was
17 not put in and chose not to take advantage.

18 THE COURT: And of course, my -- you know, my concern
19 is a little broader than yours would have to be, because
20 unfortunately as a member of a court of about 51 judges who
21 rotate throughout this state, who don't have exclusive
22 jurisdiction, it is possible that Mr. Hollins could appear
23 before someone else and get a substantially reduced penalty
24 than other -- and then it looks disproportionate.
25 Sometimes that -- and -- and of course, I have to take all
26 of that into consideration. It's not something you need to

1 be concerned about, but it is something that I am concerned
2 about, and I think is a legitimate concern on my part; and
3 that's why I asked the question.

4 Okay. Anything further from the State?

5 MR. JENNINGS: Nothing.

6 THE COURT: Anything further, Mr. Bolus?

7 Anything further, Barnwell?

8 Anything further, Mr. Jones?

9 MR. JONES: Nothing, Your Honor.

10 THE COURT: Mr. Barnwell?

11 MR. BARNWELL: Nothing, Your Honor.

12 THE COURT: Mr. Bolus?

13 MR. BOLUS: No, Your Honor.

14 THE COURT: As I understand it, the maximum on
15 kidnaping is 30 years; murder, the minimum is 30, maximum
16 life; burglary the minimum is 50 and the maximum is life;
17 on the armed robbery, the minimum is 10, the maximum is 30,
18 and on the accessories, basically she has the same exposure
19 as a principle. Is that everyone's understanding?

20 MR. JONES: Yes.

21 MR. BOLUS: Yes, Your Honor.

22 MR. BARNWELL: Yes.

23 THE COURT: I've listened very intently to the facts
24 of this case over the course of this week. The one great
25 luxury I have is that I get -- I don't have to be the fact-
26 finder and we have had an astute jury who, frankly, have

1 listened to this case and have rendered their verdicts, and
2 I believe the verdicts that are supported by the evidence
3 in this case as the case was presented to them.

4 When the verdicts came back, I have to be quite frank,
5 my heart was very heavy. And my heart was heavy because I
6 was sitting here and I didn't know whether it was a
7 function of me getting older or more mature, or whether it
8 was just a function of me being very tired in my body. But
9 I sat here and I looked at the victim's mother, and I
10 thought that's one dead child. And then I looked over at -
11 - I thought about Mr. Nelson, and I thought that's going to
12 be another dead child if he doesn't make some changes in
13 his life. And then I thought of the fact of his behavior,
14 bringing this egregious behavior into his family's home, a
15 group of unsuspecting people. I can't imagine being in my
16 kitchen making a sandwich and somebody kicking my door in.
17 I don't even know how I would -- physically how my body
18 would respond to that. And then I looked over to my left
19 and I saw three children whose lives are over.

20 And not to diminish, ma'am, your loss, because I --
21 you know, you said something very profound. I have a very
22 good friend who is on the Court. He and I used to be on
23 the family court. And I'll never forget, we were together
24 one day. He had a grandchild who was born and who had had
25 a very serious heart defect when she was born, but they had
26 repaired it. But while playing on the playground one day

1 at three years old, she just dropped dead. Couldn't
2 explain it, they didn't know why, and he is of the Orthodox
3 Jewish persuasion and they have different ceremonies and
4 other things that they observe. And he said, for a child
5 they only observe seven days of mourning because their law
6 recognizes that you never end the grieving of a child. So
7 they sort of arbitrarily impose a seven-day limit on
8 themselves, because they recognize that no parent is ever
9 prepared for the loss of their child. They are never
10 prepared for their child to leave this earth before them.
11 He said, unlike a parent, where it's 30 days, because they
12 recognize that a parent should leave the earth before their
13 child, and in that -- in that circumstance they acknowledge
14 that there must come an end to the grieving. And I thought
15 about that as you talked about your child, so please don't
16 take any of my comments as any diminishment of your loss,
17 because I cannot -- and I listened to Mr. Hartwell's mother
18 and she's correct. She's never experienced your loss. She
19 doesn't know what it's like -- I'm sorry, Ms. Smith's
20 mother. She does not know what it is like for you, and you
21 have this Court's sympathy.

22 And please, again, when I said that, I looked at these
23 other -- again, I have a different view of everything. My
24 view is more of global sort of a perspective, because I do
25 this everyday, and it seems everyday I put more and more
26 young people in prison, and the lightbulb just isn't coming

1 on. It just doesn't seem that anybody is getting a clue,
2 but something has to change.

3 Based on what has been presented to the Court, and
4 while I have listened very intently to the evidence in this
5 case, and while the hand of one is the hand of all, and
6 there is sufficient evidence of accomplice liability, based
7 on my perception of this case there are different levels of
8 culpability and behavior in this case. They are different
9 -- each of them have different levels of record and other
10 things and -- other things that play into how the Court
11 comes to its decision-making process regarding each of
12 these offenses. Especially in light of the fact that Mr.
13 Grant, at the time of being arrested on this offense, had
14 just bonded out, although he is presumed innocent on the
15 Charleston charge, it's just very, very telling to this
16 Court the direction in which his life was traveling, and
17 other factors, of course, that the Court will take into
18 consideration in terms of sentencing.

19 Mr. Grant, if you would, stand for sentencing.

20 THE COURT: Sir, on the offense of armed robbery, you
21 are sentenced to the State Department of Corrections for a
22 period of 30 years.

23 How long have they been in -- has he been in jail, Mr.
24 Bolus?

25 MR. BOLUS: Since a couple of days after the --

26 THE COURT: So about a year?

1 MR. BOLUS: Yeah. Over a year -- about a year and two
2 weeks, something like that.

3 THE COURT: On the offense of kidnaping on each of the
4 indictments, those being 07-315, 07-316, 07-317, and 07-
5 318, sir, it is the sentence of the Court that you be
6 sentenced to the State Department of Corrections for a
7 period of 30 years.

8 Bear with me on moment. You can take a seat, sir. I
9 need to check the statute on something right quick. I need
10 to pull up the statute.

11 (Sotto voce discussion between the Court and the law
12 clerk.)

13 THE COURT: (To Defendant Grant) On each of the
14 offenses of kidnaping -- you may stand, sir. On each of
15 the offenses of kidnaping, you're sentenced to the State
16 Department of Corrections for a period of 30 years.

17 On the offense of murder, sir, you are sentenced to
18 the State Department of Corrections for a period of your
19 natural life.

20 And on the offenses of burglary in the first degree,
21 you are sentenced to the State Department of Corrections
22 for a period of 30 years.

23 (Sotto voce discussion between the Court and the law
24 clerk.)

25 On each of those offenses, sir, you are sentenced to
26 the State Department of Corrections for a period of 30

1 years. You will get credit pursuant to 24-13-40 to be
2 calculated and applied by the Department of Corrections for
3 any time that you have served, and these sentences will run
4 concurrently with one another.

5 Mr. Hartwell, if you will stand for sentencing.

6 Mr. Hartwell, on the offenses of kid -- of kidnaping,
7 you are sentenced to the State Department of Corrections
8 for a period of 30 years on each of the offenses.

9 On the offense of murder, you are sentenced to the
10 State Department of Corrections for a period of 30 years.

11 On the offenses of armed robbery, you are sentenced to
12 the State Department of Corrections for a period of 30
13 years.

14 On the offenses of burglary in the first degree, you
15 are sentenced to the State Department of Corrections for a
16 period of 30 years.

17 All of these sentences are to run concurrently with
18 one another. You are to get credit pursuant to 24-13-40 to
19 be calculated and applied by the Department of Corrections.

20 Ms. Marquita Smith, if you would stand for sentencing.

21 MR. HARTWELL: Be strong, Baby.

22 THE COURT: On the offense of accessory before the
23 fact of a felony of -- before the fact of a felony, that
24 being murder, Ms. Marquita Smith, you are sentenced to the
25 State Department of Corrections for a period of 30 years.

26 On the offense of accessory before -- before the fact

1 of armed robbery, you are sentenced to the State Department
2 of Corrections for a period of 30 years.

3 These sentences are to run concurrently with one
4 another. You are to get credit pursuant to 24-13-40 to be
5 calculated and applied by the Department of Corrections.

6 Is there anything further for the record from the
7 State?

8 MR. JENNINGS: No, Your Honor.

9 THE COURT: From the defense?

10 MR. BOLUS: No, Your Honor.

11 MR. BARNWELL: No, Your Honor.

12 MR. JONES: No, Your Honor.

13 THE COURT: I want to thank both the State -- both
14 State's counsel.

15 Mr. Bolus, Mr. Barnwell, and Mr. Jones, you all have
16 made what was a very arduous task a lot less taxing for the
17 Court. I appreciate the professionalism with which you all
18 have handled yourselves during the course of this trial,
19 and I just wanted to give you the Court's profound thanks.

20 MR. BOLUS: Thank you.

21 MR. JONES: Thank you.

22 MR. BARNWELL: Thank you.

23 THE COURT: You're welcome. Y'all have a -- well,
24 survive the torrential -- of course, I left my umbrella in
25 the car.

26 MS. WILSON: Also, Your Honor, we'd like to thank the

1 jurors who remained on their time and attention.

2 THE COURT: Yes, most certainly.

3 MS. WILSON: I know it's difficult to watch this ---

4 THE COURT: Uh-huh.

5 MS. WILSON: --- and hear all of this, but you did
6 what you're supposed to do and you applied the law to the
7 facts that you had before you.

8 THE COURT: And I think it's also wonderfully
9 educational for them to see the other part of the process.
10 The things that you don't get to see, because as the fact-
11 finders we don't want you to be prejudiced by it while
12 you're making your decisions.

13

14 -- END OF TRANSCRIPT OF RECORD --

15

16

17

18

19

CERTIFICATE

I, THE UNDERSIGNED BONNIE H. KELLY, OFFICIAL COURT REPORTER FOR THE FOURTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR SUMTER COUNTY, SOUTH CAROLINA, ON THE NINTH DAY OF AUGUST, 2007.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

A handwritten signature in cursive script, reading "Bonnie H. Kelly", is written over a horizontal line.

BONNIE H. KELLY

OFFICIAL COURT REPORTER

COLUMBIA, SOUTH CAROLINA

APRIL 23rd, 2008

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JERMAINE HARTWELL,

APPELLANT

FINAL ANDERS BRIEF OF APPELLANT

JOSEPH L. SAVITZ, III
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge committed reversible error by denying Hartwell's motion to sever his case from Grant and Smith's.

STATEMENT OF THE CASE

On August 27 through 30, 2007, Jermaine Hartwell and two co-defendants, Gary Grant and Marquita Smith, stood trial on multiple charges arising from the murder of drug dealer Dexter Perry. Hartwell and Grant were charged with murder, armed robbery, four counts of kidnapping and two counts of first- degree burglary. Smith was charged with two counts of accessory before the fact, one for murder and the other for armed robbery. A third co-defendant, Kerry Hollins, testified for the State. Although Hartwell did not testify, his defense was one of mere presence. ROA p. 122 line 22 through ROA p. 123 line 4; ROA p. 7 16 line 16 through ROA p. 717 line 20. The jury found Hartwell (as well as Grant and Smith) guilty as charged and the judge imposed concurrent sentences of thirty years for each charge.

ARGUMENT

The trial judge committed reversible error by denying Hartwell's motion to sever his case from Grant and Smith's.

Although none of the three co-defendants testified at trial, Hartwell's defense was mere presence, while Grant and Smith's were generic reasonable doubt defenses. For this reason, at the outset of trial counsel for Hartwell moved to sever Hartwell's case from Grant and Smith's. ROA p. 38 line 22 through ROA p. 39 line 23. The judge denied the motion. ROA p. 40 line 16 through ROA p. 41 line 8.

"There can be no clearly defined rule for determining when a defendant is entitled to a separate trial, because the exercise of discretion means the decision must be based upon a just and proper consideration of the particular circumstances which are presented to the court in each case." *State v. McIntire*, 221 S.C. 504, S. E. 2d 410, 415 (1952), cited in *State v. Halcolmb*, 382 S.C 432, 676 S.E.2d 149 (Ct. App. 2009).

[Severance] should be granted only when there is a serious risk when a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt.

State v. Dennis, 337 S.C 275, 523 S.E.2d 173, 176 (1999).

Since neither of the three co-defendants testified, the jury had to access their culpability or innocence entirely from the State's evidence. Under these circumstances, the jury could not have independently evaluated the evidence of Hartwell's mere presence. The judge should have severed his case from that of Grant and Smith.

Since he did not, this Court should reverse Jermaine Hartwell's convictions and remand for a new trial.

Respectfully submitted,



Joseph L. Savitz, III
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 27th day of July, 2009.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

 Appeal from Berkeley County

 Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JERMAINE HARTWELL,

APPELLANT

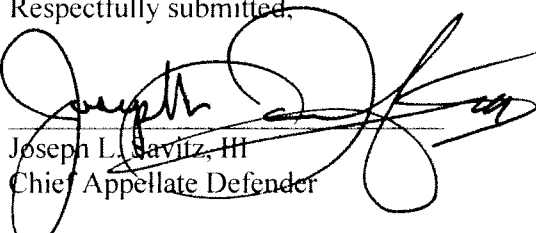
 PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jermaine Hartwell states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Deadra L. Jefferson, which was held on 8-30-07, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Jermaine Hartwell.

Respectfully submitted,



 Joseph L. Savitz, III
 Chief Appellate Defender

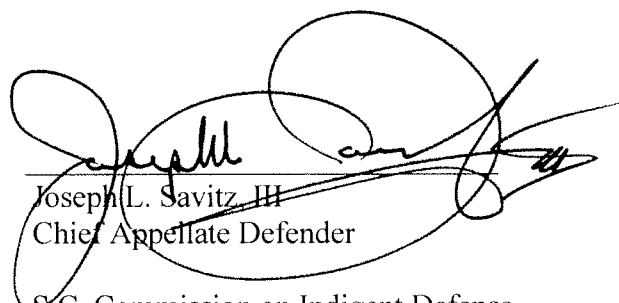
ATTORNEY FOR APPELLANT

This 27th day of July, 2009.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled “Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.”

July 27, 2009

A handwritten signature in black ink, appearing to read "Joseph L. Savitz, III", is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

Joseph L. Savitz, III
Chief Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

 Appeal from Berkeley County

 Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

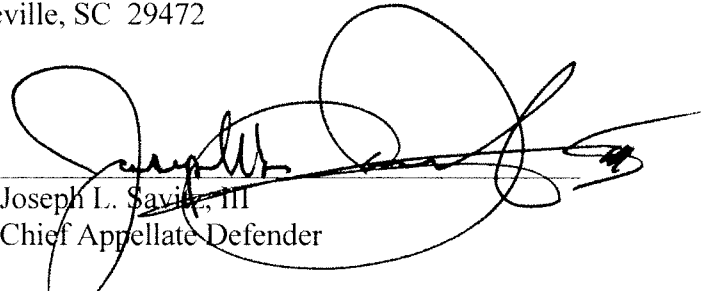
JERMAINE HARTWELL,

APPELLANT

 CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and on Jermaine Hartwell, #323738 at Lieber Correctional Institution, Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472

this 27th day of July, 2009.



Joseph L. Saville, III
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of July, 2009.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: July 1, 2019.

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.

Jermaine Hartwell,

Appellant.

Appeal From Berkeley County
Deadra L. Jefferson, Circuit Court Judge

Unpublished Opinion No. 2010-UP-036
Submitted January 4, 2010 – Filed January 26, 2010

APPEAL DISMISSED

Senior Appellate Defender Joseph L. Savitz, III, of
Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Donald J.
Zelenka, all of Columbia; and Solicitor Scarlett Anne
Wilson, of Charleston, for Respondent.

PER CURIAM: Jermaine Hartwell appeals his convictions for murder, armed robbery, four counts of kidnapping, and two counts of first degree burglary. Hartwell argues the trial court erred in denying his motion for a severance. After a thorough review of the record, counsel's brief, and Hartwell's pro se brief pursuant to Anders v. California, 386 U.S. 738 (1967), and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), we dismiss the appeal and grant counsel's motion to be relieved.¹

APPEAL DISMISSED.

HUFF, A.C.J., GEATHERS, J., and CURETON, A.J., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

FORM 5

STATE OF SOUTH CAROLINA)

) IN THE COURT OF COMMON PLEAS

County of Berkeley)Jermiane Hartwell #323736)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

2010-CP-08-2341

APPLICATION FOR

POST-CONVICTION RELIEF

CLERK OF COURT
JULY 5 11:10:50
2010INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Institution, P.O. Box 205Ridgeville, SC. 294722. Name and location of Court which imposed sentence Berkeley CountyGeneral Session:3. Name(s) of co-defendant(s) (if any) Gary Grant, Marquita Smith, KerryHollins

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2007-GS-08-00300, 319, 342, 345, 347, 174E, 175:

- (b) see attached memorandum of law, 2-1st degree burglary
 (c) murder, armed robbery, 4-counts kidnapping,

5. The date upon which sentence was imposed and the terms of the sentence:

- (a) August 30, 2007 (30) thirty-years each count
 (b) (concurrent sentences) totalling 30-years
 (c) _____

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty _____
 (b) after a plea of not guilty trial by jury
 (c) after a plea of nolo contendere _____

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 convictions and sentences
 ii. _____
 iii. _____
 (c) the date of each such result:
 i. January 26, 2010
 ii. _____
 iii. _____
 (d) if known, citations of any written opinion or orders entered pursuant to such results:
 i. Op.No. 2010-UP-036
 ii. _____
 iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

- (a) N/A

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective assistance of counsel
- (b) Denial of Due Process
- (c) Sixth and Fourteenth Amendment violations
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) see attached memorandum of law in support
- (b) same as above
- (c) same as above
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? no
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no
- (d) any other petitions, motions or applications in this or any other Court? no
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____

19. State clearly the relief you seek in filing this application:

~~vacate sentences and conviction and remand for new trial~~
~~or in the alternative whatever relief deemed appropriate~~

20. Are you now under sentence from any other court that you have not challenged?

100

Revised 3/2003

STATE OF SOUTH CAROLINA)
)
County of Dorchester)

VERIFICATION

I, Jermaine Hartwell, 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.

Debra Anne Hartman

SWORN to and subscribed before me this 31st
day of June, 1911.

Notary Public (L.S.)

My Commission Expires: 1/24/2018

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Jermaine Hartwell, 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.

Jermaine Hartwell
Applicant

SWORN or affirmed to and subscribed before me this
27th day of June, 2011.

Sybil Jones
Notary Public

My Commission Expires: 11/24/2013

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS

)

Indict No.'s 2007-GS-08-00308;

Jermaine Hartwell, #323738

) 00342; 00345; 00347; 1748 P 1751

Petitioner,

)

-v-

)

State of South Carolina

)

Respondent,

)

MEMORANDUM OF LAW IN SUPPORT OF
APPLICATION FOR POST CONVICTION
RELIEF PURSUANT TO S.C. CODE ANN
§§ 17-27-20 THROUGH 17-27-160

COMES NOW, Jermaine Hartwell, pro-se, hereinafter, Petitioner seeking relief in this Honorable Court claiming that his Constitutional Rights were violated in a number of ways during trial, including but not limited to his Sixth Amendment right to the effective assistance of trial counsel and his Fourteenth Amendment right to a fair trial that is protected under the United States Constitution. Petitioner, through the issues presented and citations of authorities relied on will show unto this Honorable Court he is entitled the requested relief sought herein.

Respectfully Submitted,

/s/ Jermaine Hartwell
Jermaine Hartwell

STANDARD OF REVIEW

The Sixth Amendment provides in part: "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." U.S. Const. amend VI.

The Supreme Court of the United States defined the Sixth Amendment right to the effective assistance of counsel in Strickland v. Washington, 466 U.S. 668, 686 (1984). In Strickland, the Court established a two-part test for reviewing claims of ineffective assistance of counsel. Id at 690.

First, the petitioner must demonstrate that trial counsel's performance is "highly deferential." Id at 688. Indeed, courts must afford a strong presumption that counsel's performance was within the wide range of professionally competent assistance. See Id.

Second, if the petition is able to demonstrate that his trial counsel's performance were objectively unreasonable, he must then "show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Id at 694. As a result, counsel may be deemed ineffective only if his "conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id at 686.

Through the issues presented and citations of authorities cited, Petitioner will show that his trial counsel's performance fell below the objective standard of reasonableness.

ISSUE (A) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO MR. BOLUS' IMPROPER RELIGIOUSLY TINGED CLOSING ARGUMENT?

FACTS

Petitioner asserts that he was unduly prejudiced by the improper religiously tinged closing argument given by Mr. Bolus. The following was recorded without objection from counsel:

The hand of one is the hand of all, that's led in some countries if -- if one man shoots a soldier of -- of -- of a certain group, ten people are hung in the village. You know why? The Germans in World War II figured that hand of one is the hand of all. One Frenchman kills one of our soldiers, we hang 100 of them. Because they all hate us, the hand of one is the hand of all. That also gives you the concept of the Crusades, when the Christians were fighting the Muslims and the Jews were in the way and -- this historical fact. The Christians and the Muslims were fighting and they asked, "Well how do we make sure that we don't kill any of the Jewish people that in Jerusalem?" Well, commander of the -- of the Christian army says, "Well, we're not going to have to worry about that because we're just going to wipe out everybody in the village in Jerusalem, and let God sort out who was a Jewish, who was a Muslim, who was Christian." [Tr.p.641, L.7-23].

Petitioner asserts that he was unduly prejudiced by the closing argument given by an alleged co-defendant's counsel, as the summation clearly put religion in issue, especially since there is a reasonable probability that the Jury members could have possibly been Christians, Muslims, or even atheists for that matter and as Bolus argued "smash them all and let God sort them out." The religiously tinged argument by Mr. Bolus was unduly prejudicial to Petitioner that denied him his right to fair trial as well as the denial of effective representation when counsel failed to object.

DISCUSSION

In Herring v. New York, 95 S.Ct. 2550 (1975), the United States Supreme Court recognized the importance of the opening and closing argument to a criminal defendant. The Court found that a New York Law which allowed every judge in a non-jury criminal trial to deny counsel any opportunity to make closing arguments deprived the accused of his constitutional right to the assistance of counsel. Id at 95 S.Ct. 2556.

There are many cases that uphold admonitions by the trial court that defense counsel is not to inform the jury of his or her opinion of the guilt or innocence of the defendant. Customarily this is when defense counsel asserts in effect "I believe this man is innocent because otherwise I would not be here defending him. This is universally held to be an improper argument. United States v. Young, 105 S.Ct. 1036 (1984) (Defense

counsel, like the prosecutor must refrain from interjecting beliefs into the presentation of his case), United States v. Swafford, 766 F.2d 426 (10.Cir.1985)(A lawyer's assertion of personal opinion during trial is an example of improper advocacy), United States v. Singer, 660 F.2d 1295 (8th.Cir.1981)(A personal expression of a defendant's culpability with an extraneous and irrelevant issue before the jury, is objectionable), United States v. Alanis, 611 F.2d 123 (5th.Cir.)(An attorney may not express his personal opinion regarding a defendant's guilt), United States v. Bess, 593 F.2d 749 (6th.Cir.1979)(personal opinions of counsel have "no place at trial"), United States v. Cain, 544 F.2d 1113 (1st.Cir.1976)(It is of course, elementary that statements of counsel's personal belief or opinions are improper).

In Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002), this Court held that an assistant solicitor made inappropriate comments during his opening statement that should have been objected to by trial counsel. Gilchrist, although only distinguishable because in Gilchrist it was the solicitor who made the improper comments and in the instant case it was an alleged co-defendant's counsel, in Gilchrist the solicitor's lengthy closing argument used similarly religiously-tinged language. In the instant case the improper statements infer a guilty verdict would cleanse the jury as a baptism. See Donnelly v. Dechristoforo, 416 U.S. 637 (1974); see also Fossick v. State, 317 S.C. 375, 453 S.E.2d 899 (1995), cert. denied,

U.S. _____, 116 S.Ct. 271 (Oct. 2, 1995) (failure to object to improper closing argument regarding the defendant's lack of remorse was ineffective assistance of counsel); Mincey v. State, 314 S.C. 355, 444 S.E.2d 510 (1994) (failure to object to improper solicitor argument held ineffective assistance of counsel); State v. Hinton, 210 S.C. 480, 43 S.E.2d 360 (1947) (improper remarks probably affected the verdict).

The first-prong of the Strickland test is deficient performance. Here counsel's failure to object to the inappropriate religiously-oriented manner was blatantly deficient.

The second-prong of the Strickland test is easily seen as but for the religiously-tinged improper closing argument, there is a reasonable probability the outcome of the trial would have been different. This was not a case of overwhelming evidence because there was no forensic evidence tying Petitioner to the crime. This meant the state's entire case hinged upon the testimony of the quasi-eyewitness. Petitioner was prejudiced by counsel failure to object to the improper closing argument.

For the aforementioned reasons, Petitioner respectfully prays that this Court will grant the requested relief of a new trial.

ISSUE (e) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE IMPROPER CLOSING ARGUMENT OF MR. BOLUS AND THE SOLICITOR THAT IMPERMISSIBLY INVOKED THE "GOLDEN RULE"?

FACTS

Petitioner asserts that he was denied the effective assistance of counsel when counsel failed to object to the improper closing argument of an alleged co-defendant's counsel, Mr. Bolus that invoked the "Golden Rule", and as a result of counsel failing to object it allowed the door to be opened for the Solicitor to impermissibly invoke the "Golden Rule" as well.

During closing summation, Mr. Bolus argued the following:

And if you were sitting in here charged with a crime, you'd want somebody to listen to the evidence, and whether they had to work at night or whatever they had to do, that they paid attention and they came to court. That separates us from a lot of other countries where you just get three judges lined up and they make a decision, and generally it's always a bad decision for that defendant. [Tr.p.640, L.7-13]. You know this case would be real easy if you just decide, "Well the hand of one is the hand of all." [Tr.p.640, L.25, p.641, L.1].

Coming directly after Mr. Bolus, the Solicitor argued the following:

"I know somebody you can rob. You can rob Dexter," and the plan ends there. [Tr.p.677, L.14-15].

And I submit to you that when you set somebody up to be robbed, and those are Marquita Smith's words, when you set somebody up to be robbed,

it's entirely foreseeable that that person could be killed during the course of the robbery. [Tr.p.677, L.25, p.678, L.1-4].

When you take somebody at gunpoint and they end up getting killed, it's murder. [Tr.p.693, L.22-23].

Petitioner asserts that a reasonable jurist could have interpreted this language to encourage the jury to place themselves in the shoes of the defendant which is clearly held to be impermissible under the "Golden Rule" theory. Petitioner asserts that he was denied the effective assistance of counsel when counsel failed to object and at least ask for curative instructions from the Court.

DISCUSSION

Golden Rule arguments are generally improper and may constitute reversible error. See State v. McHenry, 78 P.3d 403, 410 (Kan.2003).

This is especially true because a solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the passions and prejudices of the jurors. Humphries v. State, 351 S.C. 362, 570 S.E.2d 160, 166 (2002); accord Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

The traditional notion of the Golden Rule, although not contained in any rule of evidence or procedures, but can be seen at 75 Am.Jur.2d §282 p.357, which holds that [a lawyer] [shall

not) urge jury members to imagine themselves or their families or friends in the place of the victim or the defendant and to render their verdict from that perspective.

Although the forbiddance of Golden Rule arguments began in civil trials to hinder the plaintiff from urging the jury to put themselves in the place of the victim in order to obtain higher damages, the prohibition has now been made applicable to criminal actions. See 75 A.Az.Jur.2d Trial §650 (1991), also see Lucas v. State, 335 So.2d 566, 568 (Fla.Dist.Ct.App.1976)(holding the "[t]he technique of asking jurors to place themselves in the position of the victim has been held to improper in [both civil and criminal trials](emphasis supplied).

"The Golden Rule argument, suggesting to jurors as it does, that they put themselves in the shoes of one of the parties, is general impermissible because it encourages the jurors to depart from the neutrality and to decide the case the basis of personal interest and biases rather than on the evidence. Regardless of the nomenclature used, any argument that importunes the jurors to place themselves in the shoes of one of the parties is disallowed. See Johnson v. State, 587 S.E.2d at 781 (2003), also see Black's Law Dictionary 7th ed. p.700.

The Court, quoting State v. Gilstrap, 205 S.C. 412, 416, 32 S.E.2d 163, 164-65 (1944), reasoned the rule in this State and we think in most jurisdictions is that based upon the whole case, it appears to the Court that the defendant was prejudiced by the

language used as a result of which he did not have a fair and impartial trial, it would be the duty of the Court to reverse the case and remand it for a new trial. The Court opined "an argument of this nature addressed to the jury tends to completely destroy and nullify all sense of impartiality in a case of this kind. It's logical effect is to arouse the passions and prejudices of the jury. Jurors are sworn to be governed by the evidence and it is their duty to regard the facts of the case impersonally. Id at 417.

Statement such as those made in State v. McDaniel, 462 S.E.2d 883, 884, in her closing argument the solicitor used the word you or a form of the word you some forty-five times. Moreover, the request concerned family members, as in White, infra, but directly to the jurors themselves. This was clearly reversible error under White, 144 S.E.2d 481. In the instant matter surely counsel should have objected to Mr. Bolus' and the Solicitor's closing argument, for it directly mirrors that of McDaniel supra and held in permissible under White supra.

Petitioner asserts that he was denied the effective assistance of trial counsel when counsel failed to object to the improper closing argument of both, Mr. Bolus and the solicitor. The failure of counsel to object denied Petitioner his right to a fair and impartial jury.

For the aforementioned reasons, Petitioner respectfully prays that this Court will grant the requested relief of a new trial.

ISSUE (c) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S COMMENTS DURING HIS CHARGE TO THE JURY THAT IMPERMISSIBLY COMMENTED ON THE FACTS OF THE CASE?

FACTS

Petitioner asserts that he was denied his Sixth Amendment right to the effective assistance of trial counsel when counsel failed to object when the trial Court used examples applying specifically to Petitioner's case in it's definition of malice.

During closing summation to the jury the Solicitor argued the following:

This plan wasn't hatched in the spur of the moment one night. This plan was hatch Sunday, on July 30th, when Kerry Hollins calls Marquita Smith says, "Do you know anybody we can rob?" [Tr.p.678, L.11-14].

Coming directly after this summation the Trial Court gave the following instructions on malice, as was recorded:

Express malice is shown when a person speaks words which express hatred or ill will for another, or when a person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the defendant's mind would be expressed malice. [Tr.p.710, L.11-16].

Petitioner asserts that the Trial Judge used hypothetical examples in his charge on malice, all of which were directly relating to the facts of Petitioner's case and all echoing the solicitor's just-finished closing argument.

DISCUSSION

Petitioner asserts that he was denied his Sixth Amendment right to the effective assistance of counsel when counsel failed to object to the Trial Court's examples of malice which impermissibly commented upon the facts of the case. The instructions given by the trial Judge created in effect an impermissible judicial comment on the facts of the case.

Judicial comments on the facts of a case is prohibited in South Carolina. See South Carolina Constitution, article 5, section 17. "A trial judge may not instruct the jury regarding what weight should be given certain evidence or even that certain evidence is or is not entitled to consideration from them.

As the South Carolina Supreme Court said in State v. Hartley, 414 S.E.2d 182 at 183:

"A judge shall not charge in respect to matters of fact, but shall declare the law. State v. Bagwell, 23 S.E.2d 244 (1942)(a judge cannot express in his charge, or intimate any opinion as to the weight or sufficiency of testimony without violating the prohibition of the Constitution as to charging upon the facts). 75 A. Am.Jur.2d Trial §1203 at 693 (1991)(the trial court may not instruct the jury what weight should be given [to the evidence], or even that any particular evidence is or is not entitled to receive weight or consideration from them). State v. Edwards, 120 S.E. 490 (1923)(Wherein our Supreme Court held in the absence of motive is a mere circumstance to be considered by the jury and rejected an instruction that the absence of motive may raise a reasonable doubt as to the defendant's guilt because it was a charge upon the facts).

In the case at bar, the Court defined malice using examples which concurred with the State's articulated theory of malice.

The Court's examples of expressed malice all reflected the facts of the case and reiterated points stressed in the State's closing argument to the jury. The Court's definition included several examples of which directly applied to Petitioner.

This combination of examples would lead a reasonable juror to assume that malice corresponded precisely to the state's allegation against Petitioner. This charge coming directly after the State's closing argument only reiterated the facts as put forth by the Prosecution, to where the malice charge reasonably could be interpreted as a judicial endorsement of the prosecution's argument. The Judge's examples would lead a reasonable jurist to assume that this was a broad, multi-faceted term with only a tangible application to Petitioner. The examples strongly implied that the facts of the case perfectly supported a finding of malice.

Proving malice was central to the State's case against Petitioner. Since the Court's charge impermissibly skewed the jury's consideration of the facts regarding Petitioner's defense was that of mere presence, Petitioner was prejudiced by this error and counsel was ineffective for failing to object to the improper jury instructions given by the Court.

Petitioner further argues that his due process rights to a fair trial were violated by the comments of the trial Judge. For through the doctrine of substantive due process, all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. See Whitney v. California, 47 S.Ct. 641 (1927).

The threshold question is, whether the comments by the trial court were sufficiently conscience-shocking as to implicate substantive due process protections. Petitioner asserts they were. Because the trial Court acted intentionally, for purposes that only served the prosecution. Here the issue asserted is one protected by the Due Process Clause, when it's violation by the Court served a compelling interest which amounted to abuse of power sufficient to shock the judicial conscience. See Lewis v. County of Sacramento, 118 S.Ct. at 1717-18.

Petitioner asserts that the direct comments by the trial Court were a direct violation of his rights to a fair trial and that the only purpose was to direct a verdict for the State. Here counsel's failure to object and preserve a meritorious issue for appeal fell below the objective standard of reasonableness and amounted to a deficient performance. As there is reasonable probability that but for counsel's deficient performance the results of the trial would have been different.

For the aforementioned violations, Petitioner respectfully prays that this Court will grant the requested relief of a new trial.

ISSUE (3) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT THE TRIAL COURT'S MALICE INSTRUCTIONS THAT SHIFTED THE BURDEN OF PROOF?

FACTS

Petitioner asserts that he was denied his constitutionally guaranteed right to the effective assistance of trial when counsel failed to object to the Trial Court's malice instructions that shifted the burden of proof. The malice instructions given by the Court substantially lightened the State's burden of proof when the trial Court charged the jury they could infer malice if they concluded Petitioner was engaged in "an unlawful act".

During closing the solicitor made the following comments to the jury, as was recorded:

Another concept that you need to be aware of when you're looking over the evidence of these past few days is that involving felony murder. And the law says that when when there is an unlawful act of malice and it's done in the commission of a felony, and the judge will tell you that armed robbery, kidnapping, and burglary are --and burglary are felonies, that when those crimes are committed and a death happens, it's murder. It's murder. [Tr.p.634, L.20-25, p.635, L.1-2].

Coming directly after the Solicitor's statements the Trial Court gave the following instructions to the jury with regards to malice, as was recorded:

Something done without the authority of law is something which the law does not sanction, permit, allow, condone, or provide justification for. [Tr.p.709, L.11-13].

The State must prove beyond a reasonable doubt that the defendants killed another person with malice aforethought. Malice is hatred, ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse. [Tr.p.709, L.18-23].

Malice may be inferred from the conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. [Tr.p.710, L.17-19].

I further charge you that if one intentionally kills another during the commission of a felony, the inference of malice may arise. [Tr.p.711, L.5-7].

I further instruct you that the crimes of first degree burglary, kidnapping, and armed robbery are felonies. [Tr.p.711, L.13-14].

I instruct you that whenever an unlawful act of malice is done in the commission of a felony and death ensues, it will be murder. [Tr.p.718, L.15-17].

Petitioner asserts that the underlined portions of the trial Court's instructions on malice were unconstitutional and burden shifting. The instructions given could have lead a reasonable jurist to conclude that there were two-types of malice. First if the jury concluded that Petitioner was engaged in "an lawful act" they could conclude that malice existed and they needed to look no further. Second, if they couldn't conclude malice from the "unlawful act", then if there was a "deadly weapon" involved it was mandatory that they presumed malice.

The instructions were burden-shifting in that the record is replete that Petitioner had purchased "illegal drugs" from the victim, thus concluding the "unlawful act." The record reveals

that the prosecution employed an alternative theory of liability in persuading the jury to convict Petitioner of the victim's death. Faced with the possibility that the jury might accept Petitioner's defense of mere presence and reject the State's case for murder under the theory of vicarious liability ("hand of one, hand of all"), the Solicitor asserted as an alternative theory that Petitioner intended the natural consequences of the intended act which is a pre-existing plan to commit "robbery."

The prosecution's burden was substantially lightened by the trial Court's instructions that malice arising from the doing of an "unlawful act" and from the use of a "deadly weapon." The jury could have reasonably interpreted the instructions as directing the jury to find that Petitioner entertained actual malice in the death of the victim under the State's intent-to-kill theory, solely on the basis of the evidence that there was a "deadly weapon" involved and that he intentionally committed an "unlawful act -- buying and selling illegal drugs."

Apparently Petitioner was convicted as an accomplice under the hand of one is the hand of all theory. For this Court clearly held in State v. Peterson, 287 S.C. 244, 247, 335 S.E.2d 800, 801-802 (1985), South Carolina's law of accomplice liability is inapplicable unless the jury finds that the homicide was the probable results of the acts actually agreed upon by the co-conspirators.

Clearly this error is not harmless beyond a reasonable doubt.

Petitioner asserts that Counsel should have objected to the burden shifting instructions.

DISCUSSION

In a long line of cases, culminating in Yates v. Evans, 111 S.Ct. 1384 (1991), the United States Supreme Court recognized that the prosecution must prove each and every element of the crime charged beyond a reasonable doubt. See In re Winship, 397 U.S. 163 (1970). The burden on any element cannot be shifted to the defense, because doing so decreases the State's burden of proving the crime beyond a reasonable doubt.

As early as 1975 the Supreme Court considered a Maine Rule which required the defendant charged with murder to prove that he acted in the heat of passion to reduce the homicide to manslaughter. The Court determined that a State could not shift the burden of proof on any element of the crime to the defendant. See Mullaney v. Wilbur, 421 U.S. 684, 701 (1975). The Court found the risk described to be intolerable and reversed Wilbur's conviction.

The Supreme Court later overturned a conviction in Sandstrom v. Montana, 442 U.S. 510 (1979). Montana law provided that a person could be charged with deliberate homicide when that person "purposely or knowingly" cause death of another and, at Sandstrom's trial the judge instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." Id. at 512.

After considering Sandstrom's argument the Court agreed that the effect of that was to shift the burden of proof to Sandstrom on a critical element of the offense, (that he purposely or

knowingly killed another person). The Court again noted that the State must prove every element of the crime charge beyond a reasonable doubt and that the defendant cannot be required to prove any element of his defense or disprove any element of his crime. A reasonable juror might have interpreted the instructions either as a conclusive presumption or as a burden shifting presumption, but either interpretation the Court rendered the instruction unconstitutional.

The Supreme Court was confronted with another burden shifting jury instruction in Francis v. Franklin, 471 U.S. 307 (1985). The Court found that the use of a rebuttable presumption was also unconstitutional for the same reasons set forth in Sandstrom supra.

The defendant there was charged with malice murder and his sole defense was that he lacked the requisite intent to kill. The Court focused on, and held unconstitutional two sentences of the trial judge's jury charge: "the acts of a person of sound mind and discretion are presumed to be the product of a person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted." Francis v. Franklin, supra at 311. The Franklin Court evaluated both conclusive and rebuttable mandatory presumptions and concluded that both place the burden of persuasion on the defendant. Id. at 314. Both types of presumptions were deemed unconstitutional because they relieved the State of the

affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding. Id. at 355. [S]uch shifting of the burden of persuasion with respect to a fact the State deems so important that it must either be proved or presumed is impermissible under the Due Process Clause. See Patterson v. New York, 432 U.S. 197, 415 (1977). As part of its decision the Court refused to find that a presumptive jury instruction is cured if the jury is told that the presumption may be rebutted by the defendant. The Court noted that such an instruction does not cure the violation of the Due Process Clause because telling the jury that the defendant may rebut the presumption only serves to shift the burden of proof more firmly to the defense.

In deciding Francis v. Franklin, the Court relied upon its decision in Gullaney v. Wilbur, just as the Court did in Sandstrom. But more importantly all three cases relied upon the bedrock constitutional principles set forth in In re Winship, "that a state must prove every fact or every element of the crime charged beyond a reasonable doubt and mandatory burden shifting jury instructions relieves the State of that burden or proof in violation of the Due Process Clause of the Fourteenth Amendment. U.S. Const. XIV.

Shortly after Franklin was decided a South Carolina case began winding it's way through the appeals process on its way to consideration by the Supreme Court. Like Robert Yates was

convicted of murder and sentenced to death. His direct appeals were denied at all levels. See State v. Yates, 310 S.E.2d 805 (1982), cert. denied Yates v. South Carolina, 462 U.S. 1124 (1983).

Yates then filed a petition for writ of habeas corpus to the South Carolina Supreme Court. Yates claims that the trial court erred in charging the jury "that malice is implied or presumed from the use of a deadly weapon", because that presumption relieved the State of it's burden of proof on an essential element of the crime. His application was denied summarily by the Court. Yates then filed an appeal to the United States Supreme Court in 1985 and that Court remand his case to the South Carolina Supreme Court for reconsideration in light of Francis v. Franklin. See Yates v. Aiken, 474 U.S. 396 (1985). On remand the Supreme Court of South Carolina noted that the jury instruction at Yates trial suffered from the same infirmities present in State v. Elmore, 308 S.E.2d 781 (1983) and addressed in Francis v. Franklin. See Yates, 349 S.E.2d 84 (1986).

The Court neglected to consider Yates in light of Francis v. Franklin, however and only questioned whether it's previous decision in Elmore should be applied retroactively and the Court affirmed Yates' conviction.

Yates again appealed to the Supreme Court and in a second decision issue nearly in 1988, the Court briefly recounted the procedural history of Yates against the background of decisions in Sandstrom, Elmore, Franklin and In re Winship. The Supreme

Court noted that the South Carolina opinion apparently concluded that Franklin was not to be applied retroactively because it had announced a new rule of law. This Court disagreed saying Franklin was merely an extension and reaffirmation of its prior decisions. The Yates opinion concluded that since it (the South Carolina Supreme Court) has considered the merits of the federal claim it has a duty to grant the relief that federal law requires. Yates v. Aiken, 484 U.S. 211 (1988). Again the South Carolina Supreme Court refused to vacate Yates conviction finding that the charge used was harmless error. Yates v. Aiken, 391 S.E.2d 330 (1989). Once again Yates appealed his conviction and the United States Supreme Court set aside Yates conviction without a third remand to the South Carolina Supreme Court. Yates v. Wyatt, 500 U.S. 101.

This Court has held that burden-shifting presumptions are unconstitutional. See State v. Patterson, 287 S.C. 244, 355 S.E.2d 300 (1985).

Based on the facts presented and case law, it is readily apparent that Petitioner was denied the effective assistance of counsel when counsel failed to object to the trial Court's charge that the jury could find malice if they concluded that Petitioner committed "an unlawful act."

For the aforementioned reasons, Petitioner respectfully prays that this Court will grant the requested relief of a new trial.

CONCLUSION

WHEREFORE, Petitioner believes that through the issues presented, statement of facts and citations of authorities relied he has shown unto this Honorable Court his entitlement to the requested relief sought herein and that this Court will grant the requested relief of a new trial.

For the requested relief, Petitioner respectfully prays.

Respectfully Submitted,

1/3/10 Jermaine Hartwell
Jermaine Hartwell

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 3rd DAY OF June

20 10
Lelanda Jones

NOTARY PUBLIC
STATE OF SOUTH CAROLINA

MY COMMISSION EXPIRES 1/29/2013

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	)	
	)	
	)	2010-CP-08-2341
	)	
Jermaine Hartwell, #323738,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The Respondent, making its Return to the Application for post-conviction relief filed July 6, 2010, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Berkeley County. The Applicant was indicted at the February 2007 term of the Berkeley County Grand Jury for four counts of kidnapping (2007-GS-08-308,-309,-310,-311), two counts of burglary – 1st degree (2007-GS-07-342,-345), murder (2007-GS-07-312) and armed robbery (2007-GS-08-313). N. Elliott Barnwell, Esquire, represented the Applicant. The Applicant proceeded to trial on August 27-30, 2007, after which a jury found him guilty as indicted. The Honorable Deadra L. Jefferson sentenced the Applicant to confinement for thirty (30) years for each conviction. The sentences were to run concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Joseph L. Savitz, III, Esquire, of the South Carolina Commission on Defense, filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals subsequently

dismissed the appeal. State v. Hartwell, Op. No. 2010-UP-036 (S.C. Ct. App. filed January 26, 2010). The Remittitur was issued on February 11, 2010.

Attached herewith and incorporated herein by reference are the records of the Berkeley County Clerk of Court regarding the subject convictions, the Applicant's records from the Department of Corrections, the Record on Appeal, the Final Anders Brief of Appellant, the Court of Appeals' opinion dismissing the appeal, and the Remittitur dated February 11, 2010.

II.

In his application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel in that counsel
 - a. Failed to object to Mr. Bolus' improper religiously tinged closing argument.
 - b. Failed to object to improper closing argument of Mr. Bolus and the solicitor that impermissibly invoked the "Golden Rule."
 - c. Failed to object to trial court's comments during jury charge that impermissibly commented on the facts of the case.
 - d. Failed to object to trial court's malice instructions that shifted the burden of proof.
2. Denial of due process.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in the 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, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Applicant further alleges that he was denied due process of law. However, the Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must "... specifically set forth the grounds upon which the application is based." S.C. Code § 17-27-50 (2003). In an application for post-conviction relief, it is incumbent upon the Applicant to

make at least a prima facie showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Since the Applicant has failed to make even a prima facie showing, the Respondent would submit that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. This allegation is so vague that it is impossible for the State to respond.

V.

Respondent denies each allegation that is not expressly admitted, qualified, or explained.

VI.

WHEREFORE, having made its Return, the Respondent requests that an evidentiary hearing be held.

Respectfully submitted,

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Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

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(803) 734-3737

10/26, 2010.

STATE OF SOUTH CAROLINA

)

) IN THE COURT OF COMMON PLEAS

COUNTY OF BERKELEY

2010-CP-08-2341

Jermaine Hartwell, 323738,

)

Applicant,

)

)

vs

)

) AFFIDAVIT OF SERVICE BY MAIL

)

State of South Carolina,

)

)

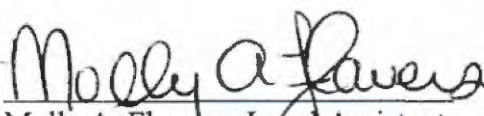
Respondent.

)

)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return of the Respondent in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Grover Cleveland Seaton, IV, Esquire**Seaton Law Firm****P.O. Box 38****Moncks Corner, SC 29461**DATED this 26th day of October, 2010.


 Molly A. Flowers, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF BERKELEY)

2010-CP-08-2341

Jermaine Hartwell, #323738,)

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

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 CLERK OF COURT
 BERKELEY COUNTY
 B

This matter came before the Court on July 12, 2011 by way of an application for post-conviction relief (PCR) filed July 6, 2010. The Respondent made its Return on October 26, 2010. Present at the hearing were Grover "Beau" Seaton, IV, on behalf of the Applicant and Matthew J. Friedman on behalf of the State of South Carolina. The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Berkeley County. The Applicant was indicted at the February 2007 term of the Berkeley County Grand Jury for four counts of kidnapping (2007-GS-08-308,-309,-310,-311), two counts of burglary – 1st degree (2007-GS-07-342,-345), murder (2007-GS-07-312) and armed robbery (2007-GS-08-313). N. Elliott Barnwell, Esquire, represented the Applicant. The Applicant proceeded to trial on August 27-30, 2007, after which a jury found him guilty as indicted.

The Applicant states that he was effective assistance of counsel and that he was denied due process. The Honorable Deadra L. Jefferson sentenced the Applicant to confinement for thirty (30) years for each conviction. The sentences were to run concurrently. At the PCR hearing, Applicant and trial counsel, N. Elliott Barnwell, testified.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Joseph L. Savitz, III, of the South Carolina Commission on Defense, filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The Court of Appeals subsequently dismissed the appeal. *State v. Hartwell*, Op. No. 2010-UP-036 (S.C. Ct. App. filed January 26, 2010). The Remittitur was issued on February 11, 2010.

ASSERTED GROUNDS FOR RELIEF

The Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel in that counsel
 - a. Failed to object to Mr. Bolus' improper religiously tinged closing argument.
 - b. Failed to object to improper closing argument of Mr. Bolus and the solicitor that impermissibly invoked the "Golden Rule."
 - c. Failed to object to trial court's comments during jury charge that impermissibly commented on the facts of the case.
 - d. Failed to object to trial court's malice instructions that shifted the burden of proof.
2. Denial of due process.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon his or her credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

The Applicant testified that trial counsel only met with him twice prior to trial. He asserted that he did not get a copy of the Rule 5 until his bond hearing, which was held before the trial. Applicant testified that it was his decision to reject the plea offer of thirty (30) years.

He contended that counsel did not explain the difference between mere presence and “the hand of one is the hand of all.” Applicant testified that counsel did not object to the closing statement of his co-defendant, in which Mr. Bolus made a religious argument. He also testified that counsel did not object to the solicitor’s closing statement in which he invoked the Golden Rule or the burden-shifting jury charge.

Trial counsel testified that he met with Applicant at least five times prior to trial. He testified that Applicant’s defense at trial was mere presence. Counsel testified that he did not think he should have objected during Mr. Bolus’ closing argument. He testified that Mr. Bolus’ argument was not religious, but rather contained historical references to the theory of “the hand of one is the hand of all.” Counsel asserted that Mr. Bolus’ argument was helpful to the Applicant. Counsel testified that he believed the trial court’s jury instructions contained the standard jury charges and did not shift the burden to the Applicant. He also testified that the solicitor’s argument did not rise to the level of being objectionable. He testified that the solicitor told the jury to listen to the evidence and he mentioned “the hand of one is the hand of all.” Counsel testified that he was able to argue that in order for “the hand of one is the hand of all” to apply, the defendant must agree to do something.

Ineffective Assistance of Counsel

The Applicant alleges that he received ineffective assistance of counsel. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be

relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. 668. The applicant must overcome this presumption in order to receive relief. *Cherry*, 386 S.E.2d 624.

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” *Id.* at 625 (citing *Strickland*, 466 U.S. 668). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997).

This Court finds that trial counsel’s testimony is credible. This Court finds that counsel is a trial practitioner who has extensive experience in the trial of serious offenses. Counsel conferred with the Applicant on several occasions. During conferences with the Applicant, counsel discussed the pending charges, the elements of the charges and what the State was required to prove, Applicant’s constitutional rights, and possible defenses or lack thereof.

Regarding Applicant’s claims of ineffective assistance of counsel, this Court finds Applicant has failed to meet his burden of proof. This Court finds that counsel demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected

of an attorney who practices criminal law in South Carolina. *State v. Pendergrass*, 270 S.C. 1, 239 S.E.2d 750 (1977); *Strickland*, 466 U.S. at 668; *Butler*, 286 S.C. 441, 334 S.E.2d 813. This Court further finds counsel adequately conferred with Applicant, conducted a proper investigation, and was thoroughly competent in his representation. This Court finds that counsel's representation did not fall below an objective standard of reasonableness.

This Court finds that counsel was not ineffective for failing to object to Mr. Bolus' closing statement. Applicant asserts that Mr. Bolus, who represented co-defendant Gary Grant, made improper religious references during his closing statement. This Court finds that Mr. Bolus' argument made historical references to the theory of "the hand of one is hand of all." This Court also finds that the argument benefited Applicant's defense at trial.

This Court finds that counsel was not ineffective for failing to object to the solicitor's closing statement. The statement did not ask the jurors to imagine themselves in the place of the victim and thus was not objectionable. The solicitor merely asked the jurors to listen to the evidence.

This Court finds that counsel was not ineffective for failing to object to the jury instructions. The trial court gave a standard charge on malice and did not shift the burden of proof to the Applicant.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the *Strickland* test (that counsel failed to render reasonably effective assistance under prevailing professional norms). The Applicant failed to present specific and compelling evidence that counsel committed either errors or omissions in his representation of the Applicant. The Applicant failed to show that counsel's performance was deficient. This Court also finds the Applicant has failed to prove the second prong of *Strickland* (that he was prejudiced by counsel's

performance). Applicant's complaints concerning counsel's performance are without merit and are denied and dismissed.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

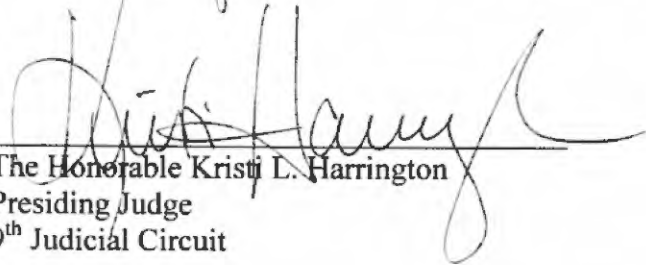
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial or sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely served and filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 15th day of August, 2011.


The Honorable Kristi L. Harrington
Presiding Judge
9th Judicial Circuit

Moncks Corner, South Carolina.

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF BERLELEY)

JERMAINE HARTWELL (00323738)
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2018-CP-08-2120

APPLICATION FOR
POST-CONVICTION RELIEF**INSTRUCTIONS - READ CAREFULLY**

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Ridgeland Lieber Correctional Institution
2. Name and location of Court which imposed sentence General Sesions; Ninth Judicial Circuit
3. Name(s) of co-defendant(s) (if any) Gary Grant & Marquita Smith
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2007-GS-08-308, 309, 310 & 311 Kidnapping
 - (b) 2007-GS-08-312 Murder
 - (c) 2007-GS-313 Armed Robbery 342 & 345 Burglary 1st Degree
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) August 30, 2007 thirty (30 Years

2018 OCT 23 AM 11:26
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

FILED

Revised 3/2003

EXAMINED

- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty no
- (b) after a plea of not guilty yes
- (c) after a plea of nolo contendere no
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. S. C. Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Conviction & sentence affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. January 26, 2010
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Opinion # 2010-UP-036
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____
- (c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) New, after discovered evidence: Recantation of testimony of State's witness,

Kerry Hollins (see attached affidavit).

(b) New, after discovered evidence of State's cooperative witness, Kareem King, (see attached affidavit).

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) See affidavits referred to in #10 hereinabove and as set forth in the Applicant's Memeorandum to be filed.

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? no

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? yes

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no

(d) any other petitions, motions or applications in this or any other Court? no

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Application for Post Conviction Relief dated June 30, 2010 (2010-CP-08-2341)

for ineffective assistance of counsel.

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. Court of Common Pleas for Berkeley County (2010-CP-08-2341)

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. Denied

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. August 15, 2011

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. Order of J. Kristi Harrington filed August 15, 2011 in 2010-CP-08-2341

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. N/A

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or

Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) N/A

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

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. N. Elliott Barnwell, Esq.(retained)

720 St. Andrews Road

Charleston, S. C. 29407

ii. Joseph L. Savitz, Esq. (appointed)

S. C. Commission on Indigent Defense

P. O. Box 11589

Columbia, S. C. 29211-1589

iii. Grover C. Seaton, Esq. (appointed)

112 Broughton Road

Moncks Corner, S. C. 29461

(b) the proceedings at which each such attorney represented you:

i. Arraignment, trial & sentencing

ii. Appeal to S. C. Court of Appeals

iii. 2010 PCR

19. State clearly the relief you seek in filing this application:

838

Vacate conviction & sentence and grant new trial.

20. Are you now under sentence from any other court that you have not challenged?

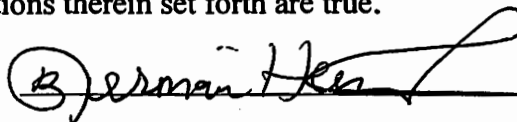
No

STATE OF SOUTH CAROLINA

2018-CP-08-2120
VERIFICATION

County of Dorchester

I, Jermaine Hartwell, 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 11th
day of Oct., 2018.

Virginia Robison (L.S.)
Notary Public

My Commission Expires: May 20, 2021

2018 OCT 23 AM 11:26
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

FILED



2018-CP-08-2120

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Jermaine Hartwell, 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.

Jermaine Hartwell
Applicant

SWORN or affirmed to and subscribed before me this
11th day of Oct., 2018.

Virginia Robinson
Notary Public

My Commission Expires: May 20, 2021

2018 OCT 23 AM 11:26
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

FILED

for

2018-CP-08-2120

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BERKELEY)

AFFIDAVIT

NOW COMES THE UNDERSIGNER, KERRY HOLLINS, who being first duly sworn, deposes and states the following.

1. My name is Kerry Hollins and I am currently incarcerated at Tyger River Correctional Institution in the S. C. Department of Corrections (Inmate # 307596) where I am serving a sentence of eighteen (18) years from a conviction of manslaughter and armed robbery in Berkeley County, S. C. in which I was codefendant of Jermaine Hartwell ("Hartwell").

2. I am giving this affidavit voluntarily, am under no undue influence or duress and with no expectation of any personal benefit for this affidavit.

3. I am giving this affidavit to set forth the true facts and circumstances of the events of the murder of Dexter Perry ("Perry") on August 1, 2006 which resulted in criminal charges being brought against Hartwell, Gary Grant ("Grant"), Marquita Smith ("Smith"), Kareem King ("King") and me.

4. Hartwell, Grant and Smith were charged with murder and went to trial in August, 2007 and were found guilty. I cooperated with the State, testified at their trial and later pled guilty pursuant to a plea agreement.

5. The facts and circumstances presented by the State at the trial of Hartwell, Grant and Smith were not correct and my testimony was incorrect and I now recant that testimony and the facts and circumstances of the Perry's murder are as set forth in this affidavit.

6. On the evening of August 1, 2006, Hartwell, Grant and King wanted to meet with Perry to buy some drugs from him. Perry was a known drug dealer and they had all bought drugs from him in the past. Hartwell had bought some "bad drugs" from Perry recently and wanted to meet with Perry so he could get some good drugs to make it right.

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 MARY P. BROWN
 CLERK OF COURT
 BERKELEY COUNTY, S.C.

FILED

7. I called them to tell them that I knew where Perry was that night and that I could pick them up and drive them to where Perry was, which was at an apartment occupied by a friend of Smith, who was a friend of mine and Perry. So, I picked up Hartwell, Grant and King and drove them to the apartment where Perry was visiting with Smith and her girlfriend.

8. When we got to the apartment, Perry met us in the parking lot to talk about the drug deal. Hartwell and Perry got into a verbal altercation about Perry making good on the "bad drugs" he had sold him. When they got into the argument, Perry ran back to the apartment where the door was closed and Perry kicked it in to get away from Hartwell. But, Perry agreed to give Hartwell some good drugs at no cost to make up for the "bad drugs" and to sell us some more drugs. Perry said his drugs were at the trailer he was staying in with his friend Chris Nelson ("Nelson") which was owned by Nelson's family. Perry agreed that they could all go there in his car. Since they were going with Perry in his car, I left in my car and told them to call me when they were ready to be picked up after they had bought the drugs from Perry.

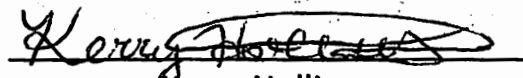
9. I drove up in the parking lot area of the trailer just as the shooting started. I saw Nelson shooting from outside the trailer and Hartwell was running away from him. I later found out that Nelson had shot Hartwell.

10. When the shooting started, I pulled out of the parking lot and shortly after that, I got a call from King to pick them up since they had all run away from the trailer when Nelson started shooting. Hartwell had been shot in the chest but it turned out to be a flesh wound and was not life threatening.

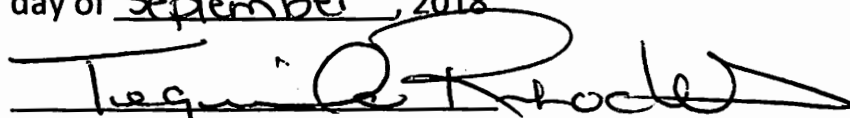
11. At no time did we, Hartwell, Grant, King, Smith nor me, plan to rob Perry and at no time did any of us shoot Perry. I am of the opinion that the problem was that Nelson started shooting through the door of the trailer without any provocation and that Nelson shot Perry since he had a .38 caliber revolver and Perry was shot with a .38. Neither Hartwell nor I had a weapon that night.

12. There was never any agreement with us for Smith for her to set up Perry for us to rob him.

INWITNESS WHEREOF, the undersigned does hereunder affix my hand and seal on this the 14 of September, 2018.


Kerry Hollins

Sworn to before me this 14
day of September, 2018



Notary Public for S. C.

My comm. expires: March 24, 2027

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BERKELEY)

2018-CP-08-2120
 AFFIDAVIT

NOW COMES THE UNDERSIGNER, KAREEM KING, who being first duly sworn, deposes and states the following.

1. My name is Kareem King and I am currently incarcerated at Ridgeland Correctional Institution in the S. C. Department of Corrections (Inmate # 30950) where I am serving a sentence of twenty-two (22) years from a conviction of manslaughter and armed robbery in Berkeley County, S. C. in which I was a codefendant of Jermaine Hartwell ("Hartwell").

2. I am giving this affidavit voluntarily, am under no undue influence, duress and with no expectation of any personal benefit for this affidavit.

3. I am giving this affidavit to set forth the true facts and circumstances of the events of the murder of Dexter Perry ("Perry") on August 1, 2006 which resulted in criminal charges being brought against Hartwell, Gary Grant ("Grant"), Marquita Smith ("Smith"), Kerry Hollins ("Hollins") and me.

4. Hartwell, Grant and Smith were charged with murder and went to trial in August, 2007 and were found guilty. Hollins cooperated with the State, testified at their trial and later pled guilty. I cooperated with the State and was prepared to testify at their trial but was not called to testify. I later pled guilty to the above charges.

5. The facts and circumstances presented by the State at the trial of Hartwell, Grant and Smith were not correct and the facts and circumstances of the Perry's murder are as set forth in this affidavit.

6. On the evening of August 1, 2006, Hartwell, Grant and I wanted to meet with Perry to buy some drugs from him. Perry was a known drug dealer and we had all bought drugs from him in the past. Hartwell had bought some "bad drugs" from Perry recently and wanted to meet with Perry so he could get some good drugs to make it right.

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 2018 OCT 23 AM 11:26
 CLERK OF COURT
 BERKELEY COUNTY, SC

7. Hollins called us to tell us that he knew where Perry was that night and that he, Hollins, could pick us up and drive us to where Perry was, which was at an apartment occupied by a friend of Smith, who was a friend of Hollins and Perry. So, Hollins picked us, Hartwell, Grant and me, up and drove us to the apartment where Perry was visiting with Smith and her girlfriend.

8. When we got to the apartment, Perry met us in the parking lot to talk about the drug deal. Hartwell and Perry got into a verbal altercation about Perry making good on the "bad drugs" he had sold him. When they got into the argument, Perry ran back to the apartment where the door was closed and Perry kicked it in to get away from Hartwell. But, Perry agreed to give Hartwell some good drugs at no cost to make up for the "bad drugs" and to sell us some more drugs. Perry said his drugs were at the trailer he was staying in with his friend Chris Nelson ("Nelson") which was owned by Nelson's family. Perry agreed that we could all go there in his car. Since we were going with Perry in his car, Hollins left by himself in his car and told us to call him when we were ready to be picked up after we had bought the drugs from Perry.

10. When we got to the trailer, Grant and I went inside with Perry while Hartwell stayed outside in Perry's car since he had lost his cell phone and was looking for it in Perry's car since he thought it had fallen out of his pocket while driving from the apartment to the trailer.

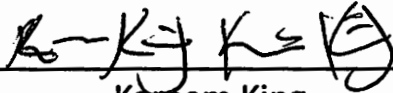
11. While Grant and I were inside the trailer with Perry while Perry was getting the drugs for us, someone started shooting through the door of the trailer. At the time we had no idea who was shooting. We later found out it was Nelson. We also later found out that Nelson had shot Hartwell outside the trailer.

12. When the shooting started, Grant, Hartwell and I ran away and called Hollins to pick us up; which he did a couple blocks away. We later found out that Perry had been shot and died.

13. At no time did we, Hartwell, Grant, Hollins, Smith nor me, planned to rob Perry and at no time did any of us shoot Perry. I am of the opinion that the problem was that Nelson started shooting through he door of the trailer without any provocation and that Nelson shot Perry since he had a .38 caliber revolver and Perry was shot with a .38. Hartwell did not have a weapon that night.

14. There was never any agreement with us for Smith for her to set up Perry for us to rob him.

INWITNESS WHEREOF, the undersigned does hereunder affix my hand and seal on this the 21 of ~~September~~ September, 2018.


Kareem King

Sworn to before me this 21
day of September, 2018


Virginia Robinson

Notary Public for S. C.

My comm. expires: May 20, 2021

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

Jermaine Hartwell, #323738
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT

Case No.: 2018-CP-08-2120

RETURN AND MOTION TO DISMISS

19 MAR 19 11:33:07
FILED
CLERK OF COURT
BERKELEY COUNTY, SC

The State (Respondent), making its Return to the application for post-conviction relief (PCR) filed by Jermaine Hartwell ("Applicant") on October 23, 2018, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. In February 2007, the Berkeley County Grand Jury indicted Applicant for four counts of kidnapping (2007-GS-08-0308-0311), murder (2007-GS-08-0312), armed robbery (2007-GS-08-0313) and two counts of first degree burglary (2007-GS-08-342;-345). N. Elliot Burnwell, Esquire represented Applicant. Assistant Solicitor Blair Jennings, Esquire prosecuted the case. On August 30, 2007, Applicant proceeded to trial before the Honorable Deadra Jefferson. The jury found Applicant guilty as indicted. Judge Jefferson sentenced Applicant to imprisonment for concurrent terms of 30 years for each charge.

Applicant filed a timely notice of appeal. Joseph L. Savitz, III, Esquire, of the Office of Appellate Defense perfected the appeal pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the Applicant's appeal. State v. Hartwell, Op. No. 2010-UP-036 (S.C. Ct. App. filed January 26, 2010). The Remittitur was sent on February 11, 2010.

2010-CP-08-2341

The Applicant subsequently filed an application for PCR on July 6, 2010, in which he alleged the following grounds for relief:

1. Ineffective Assistance of Counsel

Respondent filed its return on October 29, 2010. An evidentiary hearing into the matter was convened on September 20, 2011, at the Berkeley County Courthouse. Applicant was present at the hearing and was represented by Grover Seaton, Esquire. Matthew Friedman, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. On August 15, 2011, the Honorable J. Mark Hayes, II, issued the order of dismissal denying Applicant's application for post-conviction relief.

II.

In his second and current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. "Newly Discovered evidence: recantation of testimony of State's witness, Kerry Hollins"
2. "New, after discovered evidence of State's cooperative witness, Kareem King."

Attached to this Return and incorporated by reference are the records of the Berkeley County Clerk of Court regarding the subject convictions, the trial transcript, Applicant's appellate records, and the application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent submits that this application should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within

one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

Applicant was convicted and sentenced on August 30, 2007. Remittitur from the direct appeal was issued on February 11, 2010. The application was therefore due on February 12, 2011. This application was filed on October 23, 2018, well beyond the statutory filing period. Therefore, the application should be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

IV.

The application should be summarily dismissed because it is successive to Applicant’s previous PCR application. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly,

voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a “sufficient reason” why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that “could not have been raised ... in the previous application.” Id. at 450. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. Applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant’s current allegations were or could have been raised in the proceedings based on Applicant’s prior application for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant’s current application is practically identical to his prior application with the addition of a new allegation of newly discovered evidence. Applicant has failed to establish any sufficient reason why he could not have raised his current allegation of newly discovered evidence in his previous applications for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him, and the Court should summarily dismiss the application as successive to Applicant’s previous PCR application.

V.

Applicant’s assertion that he is being held in custody unlawfully as a result of newly-discovered evidence, such that he should be entitled to vacation of his sentence and immunity, is without merit. The Uniform Post-Conviction Relief Act states that a person may institute a post-

conviction relief action if “there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.” S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C).

A defendant requesting a new trial based on after-discovered evidence must show that the evidence:

1. Is such as would probably change the result if a new trial was held;
2. Has been discovered since the trial;
3. Could not, by the exercise of due diligence, have been discovered before the trial;
4. Is material to the issue of guilt or innocence; and
5. Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983); Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

In support of his claim of newly discovered evidence, Applicant provided an affidavit from his co-defendant Kerry Hollins, in which Hollins recanted his testimony at Applicant’s trial. “Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial.” State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977) (quoting State v. Whitener, 228 S.C. 244, 264, 89 S.E.2d 701 (1955)). The granting of a new trial based on after-discovered evidence is not favored, and the Court of Appeals will affirm the trial court’s denial of such a motion unless the trial court abused its discretion. State v. Harris, 391 S.C. 539, 706 S.E.2d 526 (Ct. App. 2011).

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965);

Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make a showing that he is entitled to relief based on the information set forth and, therefore, he is not entitled to an evidentiary hearing in the matter. Accordingly, this matter must be summarily dismissed with prejudice.

VI.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VII.

WHEREFORE, Respondent moves to summarily dismiss the application because it was filed after the statute of limitations had expired, and is successive to Applicant's prior post-conviction relief action.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

BENJAMIN LIMBAUGH
Assistant Attorney General

By: Benjamin Limbaugh
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

March 8, 2019

STATE OF SOUTH CAROLINA)

COUNTY OF BERKELEY)

JERMAINE HARTWELL, #323738)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent,)

IN THE COURT OF COMMON PLEAS

2018-CP-08-2120

AFFIDAVIT OF SERVICE BY MAIL

FILED
19 MAR 11 PM 3:07
CLERK OF COURT
BERKELEY 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 and Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

James P. Craig, Esquire
 Craig Law Firm, PC
 2001 Assembly Street, Suite 201
 Columbia, SC 29201

DATED this the 8th day of March, 2019


 Jennifer Jennison, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

Jermaine Hartwell, #323738
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT

Case No.: 2018-CP-08-2120

**CONDITIONAL ORDER OF
DISMISSAL**

FILED
2019 MAR 21 PM 3:21
CLERK OF COURT
BERKELEY CO, SC

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Jermaine Hartwell (Applicant) on October 23, 2018. Respondent made its Return, requesting the application be summarily dismissed.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. In February 2007, the Berkeley County Grand Jury indicted Applicant for four counts of kidnapping (2007-GS-08-0308-0311), murder (2007-GS-08-0312), armed robbery (2007-GS-08-0313) and two counts of first degree burglary (2007-GS-08-342;-345). N. Elliot Burnwell, Esquire represented Applicant. Assistant Solicitor Blair Jennings, Esquire prosecuted the case. On August 30, 2007, Applicant proceeded to trial before the Honorable Deadra Jefferson. The jury found Applicant guilty as indicted. Judge Jefferson sentenced Applicant to imprisonment for concurrent terms of 30 years for each charge.

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2010-CP-08-2341

The Applicant subsequently filed an application for PCR on July 6, 2010, in which he alleged the following grounds for relief:

1. Ineffective Assistance of Counsel

Respondent filed its return on October 29, 2010. An evidentiary hearing into the matter was convened on September 20, 2011, at the Berkeley County Courthouse. Applicant was present at the hearing and was represented by Grover Seaton, Esquire. Matthew Friedman, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. On August 15, 2011, the Honorable J. Mark Hayes, II, issued the order of dismissal denying Applicant's application for post-conviction relief.

CURRENT APPLICATION

In his second and current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. "Newly Discovered evidence: recantation of testimony of State's witness, Kerry Hollins"
2. "New, after discovered evidence of State's cooperative witness, Kareem King."

Before this Court are the Berkeley County Clerk of Court records, Applicant's prior post-conviction relief action records, Applicant's appellate records, and the records for this post-conviction relief action.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Statute of Limitations

The Court finds that this application must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

Applicant was convicted and sentenced on August 30, 2007. Remittitur from the direct appeal was issued on February 11, 2010. The application was therefore due on February 12, 2011. This application was filed on October 23, 2018, well beyond the statutory filing period. Therefore, the application shall be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

Successive Applications

The Court further finds the application must be summarily dismissed because it is successive to Applicant's previous PCR application. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

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Applicant's current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant's current application is practically identical to his prior application with the addition of a new allegation of newly discovered evidence. Applicant has failed to establish any sufficient reason why he could not have raised his current allegation of newly discovered evidence in his previous applications for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him, and the Court shall summarily dismiss the application as successive to Applicant's previous PCR application.

Newly Discovered Evidence

Applicant's assertion that he is being held in custody unlawfully as a result of newly-discovered evidence, such that he should be entitled to vacation of his sentence and immunity, is without merit. The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C).

A defendant requesting a new trial based on after-discovered evidence must show that the evidence:

1. Is such as would probably change the result if a new trial was held;
2. Has been discovered since the trial;
3. Could not, by the exercise of due diligence, have been discovered before the trial;
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5. Is not merely cumulative or impeaching.

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court's denial of such a motion unless the trial court abused its discretion. State v. Harris, 391 S.C. 539, 706 S.E.2d 526 (Ct. App. 2011).

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make a showing that he is entitled to relief based on the information set forth and, therefore, he is not entitled to an evidentiary hearing in the matter. Accordingly, this matter must be summarily dismissed with prejudice.

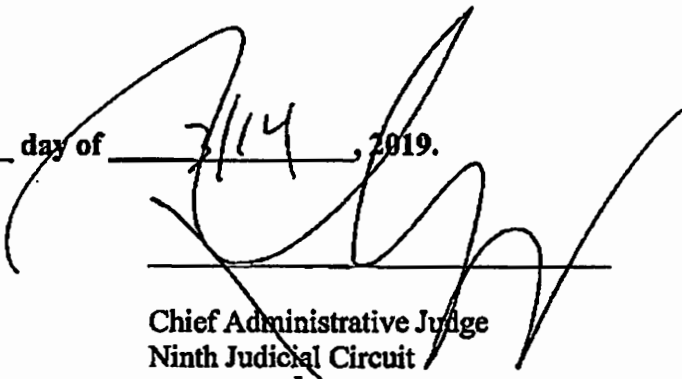
CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Berkeley County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
 Attn: Benjamin Limbaugh, Esquire
 PCR Division – 9th Circuit
 P.O. Box 11549
 Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Berkeley County Clerk of Court and opposing counsel within twenty (20) days, and that the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this _____ day of 7/14, 2019.



 Chief Administrative Judge
 Ninth Judicial Circuit


 _____, South Carolina



SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1345

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

December 12, 2025

Linda Hill
Berkeley County Clerk's Office

FILED

DEC 15 2025

Re: Jermaine Hartwell v. State
2018-CP-08-02120

CASE _____ NO _____
LEAH GUERRY DUPREE
CLERK OF COURT
BERKELEY COUNTY, SC

Dear Linda:

Our office is representing the above individual in their appeal to the Supreme Court. In order to properly prepare the appeal, we are asking you for copies of the following documents:

(1) Complete Applicant's Reply to State's Return & Motion to Dismiss 4.2.19

If you have any questions, please do not hesitate to contact me. Thank you in advance for your kind assistance in this matter.

Sincerely,

Sean Flynn
Administrative Coordinator

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY .	)	NINTH JUDICIAL CIRCUIT
JERMAINE HARTWELL (#323738)	)	Case no. 2018-CP-08-212
Defendant-Applicant,	)	APPLICANT'S REPLY
v.	)	to
STATE OF SOUTH CAROLINA,	)	STATE'S RETURN & MOTION TO DISMISS
Plaintiff-Respondent.	)	& MOTION TO RECONSIDER CONDITIONAL ORDER OF DISMISSAL

9 APR -5 PM 12:28
CLERK OF COURT
BERKELEY COUNTY, SC

FILED

[Handwritten signature]

NOW COMES the Applicant herein, JERMAINE HARTWELL, by and through his undersigned attorney, and submits the following Reply to the State's Return and Motion to Dismiss his Application for Post-Conviction Relief pursuant to S. C. Code 17-27-10 *et seq.* and in response to the Conditional Order of Dismissal issued by the Hon. Roger M. Young, Chief Administrative Judge for the Ninth Judicial Circuit dated March 14, 2019, filed March 20, 2019 and served upon the undersigned as attorney for the Defendant-Applicant on March 26, 2019 by e-notice.

LAW AND ARGUMENT

I. The Substantive Issues Raised Herein must Be Considered upon the Merits.

The State argues that his Application should be dismissed as being untimely filed (Return at 2-3) asserting that an application for relief must be filed within one year after the entry of a judgment or conviction, or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later citing S.C. Code

[Handwritten signature]

§17-27-45(A): While that is a correct statement, the statute provides exceptions to this time limit. S. C. Code 17-27-45(c) provides that if the applicant contends there is material evidence not previously presented and heard that would require vacation of the conviction or sentence, an application can be filed **within one year after the date of actual discovery of the new evidence or after the date when the evidence could have been ascertained by the exercise of reasonable diligence** (emphasis added). The Applicant's claim herein is based upon evidence only discovered in 2018 in the form of witnesses providing exculpatory information set forth in affidavits dated September 14, 2018 (affidavit of Kerry Hollins) and September 21, 2018 (affidavit of Kareem King) which are attached as exhibits to the Application. The Application was filed on October 23, 2018 which is clearly within one year of the date of the affidavits which constitute the new evidence. This evidence could not have been obtained earlier nor could have been discovered prior to the instant filing or in a "more timely fashion".

The State further argues that the Application is successive (Return at 3) and that successive post-conviction motions are not favored and that the Applicant has the burden of proving that the grounds raised in a successive application citing Alice v. State, 305 S.C. 448, 409 S.E.2d 392, 393 (1991). The Applicant acknowledges that the instant Application is the second application that he has filed under the Uniform Post-Conviction Procedure Act but is not barred by the statute of limitations because the grounds upon which this application are based were not known or discoverable by the Applicant within one year of his conviction but were only discovered in 2018 as set forth hereinabove. The State's argument that the claims raised herein could have been raised in the previous post-conviction application (Return at 4) is totally without merit as the basis of the current Application are affidavits obtained in 2018. The Applicant filed

his previous application for post-conviction relief in 2010 (Return at 2). It should be patently obvious that evidence obtained in 2018 could not have been raised in an application filed in 2010. The State fails to offer any specifics as to how the evidence at issue could have been obtained and presented in the prior post-conviction application. There is simply no manner in which the Applicant could have obtained the evidence at issue prior to the time when the witnesses felt compelled to and did in fact provide the evidence, and the State makes no specific assertion of how the Applicant could have obtained the evidence at an earlier date.

Addressing the requirements of a successive post-conviction application as set forth in *Alice* which the State asserts bars the instant Application, it should be recognized that while successive post-conviction applications "are not favored", that does not mean that they are automatically barred or suspect. That language simply means that the court should take a close look at successive post-conviction applications to see if they comply with the statute and in this case, it is clear that the instant Application complies with S. C. Code 17-27-45©. The State further argues, citing *Alice* and *Land v. State* 274 S. C. 243, 262 S.E.2d 735 (1980), that the Applicant has the burden of proving that the allegations in the current application could not have been raised in the previous application. The Applicant submits that the mere fact of the dates of the affidavits attached to the instant Application which are in September, 2018 and the date of the filing of the Application in October, 2018, only one month later satisfies the Applicant's burden of proof that the evidence is newly discovered, did not exist in 2010 and could not have been presented in the prior application and was presented within one year of the discovery of the new evidence.

The Applicant would further submit to the court that the initial filing of a post conviction

application pursuant to S. C. Code 17-27-10 *et. seq.* is by way of a form, specifically Form 5, revised 3/2003 and Form 5 is designed to present basic information in the initial filing by the answering of specific questions and none of the questions offer an opportunity for the applicant to address the issues raised in the State's Motion to Dismiss and it is only in a hearing on the merits can the issues raised in the State's motion be addressed properly. The Applicant has complied with the requirements of S. C. Code 17-27-10 *et. seq.*, properly completed and filed Form 5 and has acted in good faith and with due diligence in the discovery and presentation of the newly discovered evidence upon which the instant Application is based.

The Applicant submits that his new claim should be determined on its merits, rather than summarily dismissed because of the alleged procedural bars. As such, the court should consider this petition as being timely filed and reach a decision upon the Application based upon the merits of the claim presented at an evidentiary hearing.

II. The Applicant's Right to Due Process of Law as Guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution Has Been Violated by the Continued Incarceration of the Applicant, Who Can Demonstrate His Innocence Through Newly Discovered Evidence.

The State argues that relief is not merited herein, as recantation of testimony "ordinarily is unreliable and should be subjected to the closest scrutiny . . ." (Return at 5) (citing *State v. Whitener*, 28 S.C. 244, 264, 89 S.E.2d 701 (1955)). The Applicant submits that close scrutiny herein mandates that the witnesses be subjected to examination in an evidentiary hearing. The State has failed to put forth with any specificity a reason why Hollins and King would provide false information now. As to Hollins, his statement places the blame for the offenses at issue solely upon himself. There is no reason to assume blame herein unless such is the truth, as Hollins has nothing to gain from such an admission.

Although the Applicant was present at the crime scenes, there was no evidence that the Applicant had prior knowledge that the crimes at issue would be committed or that the Applicant participated in the crimes in any way. As the Applicant was neither a principal nor an accomplice in the above crimes, it is clear that the evidence supporting the Applicant's convictions does not rise to a level beyond a reasonable doubt.

The Applicant acknowledges that he has the burden of proving in a post-conviction application that it is likely that a different result would result in a new trial with the use of the newly discovered evidence. In support of that responsibility, the applicant submits that if he were granted a new trial and he called Hollins and King as witnesses in his defense and they testified as stated in their affidavits attached to the Application which essentially exculpates the Applicant, that a different outcome would result; that is to say, that it is likely that a jury would find the Applicant not guilty.

III. The Applicant Is Entitled to an Evidentiary Hearing on These Matters.

The Applicant contends that he is entitled to an evidentiary hearing on these issues. According to S.C. Code §17-27-80, a hearing shall be had on any properly filed motion for post-conviction for relief. In fact, it has been ruled error to issue a conclusion of facts and law upon such a motion without first hearing the facts of the matter. McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). The Applicant submits that this is especially true in cases where newly discovered evidence which exculpates the Applicant which if it had been available and presented at the Applicant's trial would likely have had an different outcome. The issues raised by the Applicant in the instant Application could not have been raised at the trial of his case as such evidence did not exist and was not available to the Applicant and therefore, cannot be determined

upon the record and must therefore rely upon evidence developed during an evidentiary hearing.

Delaney v. State, 269 S.C. 555, 238 S.E.2d 679 (1977).

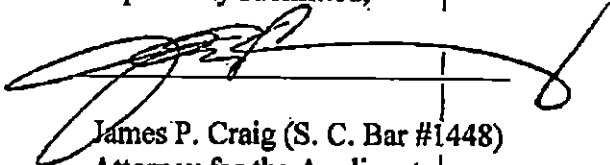
In the present case, the Applicant contends that he has set forth facts in his petition that entitle him to relief. Therefore, at a minimum, the Court should order an evidentiary hearing in this matter.

For the foregoing reasons, the Applicant respectfully requests that this Honorable Court deny the State's Motion to Dismiss, set aside its Conditional Order of Dismissal and set this matter for an evidentiary hearing.

Columbia, S. C.

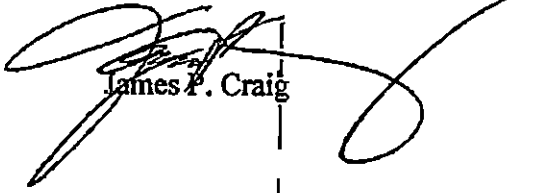
Respectfully submitted,

March 28, 2019


James P. Craig (S. C. Bar #1448)
Attorney for the Applicant
2001 Assembly Street, Suite 201
Columbia, South Carolina 29201
Phone: 803-252-5178
Fax: 803-252-5283
E-mail: jcraig@craiglawfirm.com

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply to the State's Motion to Dismiss has been sent this 28th day of March, 2019, by first class United States Mail with sufficient postage affixed thereto to insure delivery thereof to Benjamin Limbaugh, Esq. Asst. Attorney General, Office of the Attorney General of South Carolina, P.O. Box 11549, Columbia, South Carolina 29211; and a second copy sent on April 2, 2019 via email with Motion coversheet.


James P. Craig

1443 JERRY COOPER
CLERK OF COURT
BERKELEY COUNTY, SC

19 APR -5 PM 12:28

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IN THE STATE OF SOUTH CAROLINA)
)
 COUNTY OF BERKELEY)

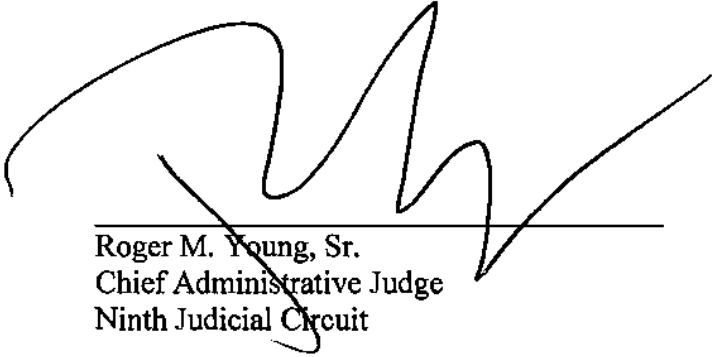
IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT
 Case No.: 2018-CP-08-2120

Jermaine Hartwell, #323738,)
)
 Defendant-Applicant,)
)
 vs.)
)
 The State of South Carolina,)
)
 Plaintiff-Respondent.)
 _____)

ORDER

This Court hereby grants Applicant Jermaine Hartwell's Motion to Reconsider the Conditional Order of Dismissal dated March 20, 2019. As such, the Attorney General is to set the Motion for a hearing.

AND IT IS SO ORDERED.



 Roger M. Young, Sr.
 Chief Administrative Judge
 Ninth Judicial Circuit

4/6, 2019
 Berkeley, South Carolina.

LEAH JOHNSON
 CLERK OF COURT
 BERKELEY COUNTY, SC

19 MAY -9 AM 10:47

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1 STATE OF SOUTH CAROLINA) IN THE SOUTH CAROLINA CIRCUIT COURT 9
2 COUNTY OF BERKELEY) COURT C.A NO. 2018-CP-08-02120
3
4 Jermaine Hartwell)
5)
6 Plaintiff,)
7 Versus)
8 State of South Carolina)
9 Defendant.)
10

11 H E A R I N G
12

13 DATE: December 9, 2020
14

15 LOCATION: WebEx
16

17 JUDGE: Perry H. Gravely
18

19 TRANSCRIBED BY: ERIN REILLY
20

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8 Attorney for Defendant.

9 Benjamin H. Limbaugh, Esquire

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EXHIBITS

None Marked

(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH IS
REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

1 PROCEEDINGS

2 THE COURT: This is the -- let me put on the record
3 here. This is in Berkeley County. It is Jermaine Hartwell,
4 2018CP082120. James Hartwell versus State on a PCR. Present
5 is Ben Limbaugh for the State, James Craig for the Petitioner
6 Valerie Butler from the clerk of court for Berkeley County.
7 Phil Norton is our court reporter and Hunter William is my law
8 clerk. First of all, is there any objections to proceeding
9 with this hearing by way of WebEx from the State?

10 MR. LIMBAUGH: No objection from the State, Your
11 Honor.

12 THE COURT: From the Petitioner?

13 MR. CRAIG: No, Your Honor. No objection.

14 THE COURT: All right. Well, I will -- I guess it's
15 kind of cross motions. I know Mr. Limbaugh had a -- it was a
16 conditional dismissal and then kind of a motion to be relieved
17 from that, I think is kind of your position. So, let's hear
18 from Mr. Limbaugh first and then I'll hear from you, Mr. Craig.

19 MR. LIMBAUGH: Yes, Your Honor. This is a little bit
20 like as you were saying about the procedural background, a
21 conditional order dismissal was signed and then Judge Roger
22 Young Senior signed an order. It was May 9th, 2019 granting
23 that this motion to reconsider that order and setting the
24 motion to dismiss for a hearing, which is why we're here today.
25 The State's motion is essentially just that for a -- we

1 | discovered evidence, which is what the applicant's claim is
2 | here to get past the summary dismissal stage of that they have
3 | to make a prima facie showing that relief can be granted. And
4 | the State's basic argument is that he hasn't done so. The
5 | applicant's has provided through counsel Mr. Craig through
6 | affidavits that should be in the packet before Your Honor that
7 | we submitted before the hearing.

8 | THE COURT: Right. And I have reviewed those.

9 | MR. LIMBAUGH: Well, Mr. Hollands [phonetic] and then
10 | one was from Mr. Kareem King. The State would just point out
11 | that essentially both of the affidavits are saying that --
12 | well, Mr. King didn't testify at the hearing as far as
13 | as I was would see, Mr. Hollands did.

14 | And Mr. Holland's affidavit as Your Honor have seen is
15 | basically saying there was no plan to rob the victim and then
16 | that there were no weapons there or at least that Mr. Hartwell
17 | didn't have a weapon. That that's estimation as Your Honor has
18 | reviewed them. But on page 431, I believe it is of the record
19 | on appeal, which I do apologize for getting that to you late,
20 | Your Honor, but it's the trial transcript essentially.

21 | Mr. Holland does testify on cross that the plan wasn't or
22 | at least Mr. Hartwell's plan wasn't to rob the victim. His
23 | plan was -- all he said about it was that he had sold him some
24 | bad drugs. So, that does go to what Mr. Holland says in his
25 | affidavit that the plan wasn't to rob the victim.

1 And then we'll admit that, you know, the testimony at
2 trial from Mr. Holland does say that Mr. Hartwell had a weapon
3 but at least it was a different caliber than what he states in
4 the affidavit. And then Mr. King didn't testify at trial and
5 we could see and to say that his affidavit doesn't bring
6 anything new that wasn't presented through Mr. Holland's
7 testimony other than being duplicative to the affidavit of Mr.
8 Holland's. But it's a relatively little bar to get through,
9 admittedly, Your Honor. But the State wanted to put that
10 argument on the record to -- at this stage.

11 THE COURT: All right. And I think -- and this trial
12 was in 2010?

13 MR. LIMBAUGH: I believe that's correct, Your Honor.
14 I can double check that with the trial transcript. No, it's
15 actually a -- no, it's actually in 2007, Your Honor.

16 THE COURT: 2007, I guess 2010 was his first PCR
17 maybe.

18 MR. LIMBAUGH: That's correct.

19 THE COURT: All right. Anything else?

20 MR. LIMBAUGH: Not from the State, Your Honor.

21 THE COURT: All right, Mr. Craig?

22 MR. CRAIG: Yes, Your Honor. I think our position is
23 pretty well set forth in my application for a hearing on this
24 motion for reconsideration. I was retained by Mr. Hartwell I
25 think in 2017 and it started with -- he said that he had

1 received some information that [indiscernible] Holland was
2 willing to recant his testimony that he gave in at the trial.
3 And also, in the process of interviewing, I went and
4 interviewed and met with Mr. Holland a couple times. And
5 eventually he agreed to give the affidavit.

6 Of course, I prepared the affidavit that he signed
7 based on the notes that end my conversations with him. I also
8 met with Kareem King, who was a -- both of these were co-
9 defendants and Mr. Hartwell. And through Mr. Holland testify,
10 Mr. King did not testify but he was ready to testify and he had
11 given some -- I think some statements at the time against Mr.
12 Hartwell.

13 In any event after meeting with them, I prepared the
14 affidavits and they were prepared and signed in September of
15 2008, I think it was. And then we filed a PCR application just
16 a few weeks after that, I think maybe six weeks after that.
17 So, we certainly within the one-year timeframe of filing a PCR
18 based on after discovered and you discovered evidence. And
19 certainly, that information was not available to Mr. Hartwell
20 at the time. They were not -- they were testifying against
21 him, willing to testify.

22 One of them was and the other one actually did
23 testify against him. And that this information just simply was
24 not available to him at the time. He couldn't have produced
25 these affidavits or produced the testimony at the time and he's

1 producing it as soon as he was able to procure it through me.

2 And I think certainly the affidavits are sort of like a tip of
3 the iceberg hearing a statement of what they would testify to.

4 And I think they would be able to testify in much greater
5 detail if an evidentiary hearing was scheduled. And I think
6 that's the proper thing to do, Your Honor is to schedule a
7 hearing and let these few people testify that Mr. Hartwell will
8 testify and let the judge at that time decide if it's
9 sufficient evidence for a new trial or not. I don't think it
10 should be dispositive today that he's -- that these affidavits
11 are not sufficient.

12 THE COURT: I guess my question is because witnesses
13 changed their minds or whatever is that new evidence?

14 MR. CRAIG: Well, I think it is new evidence Your
15 Honor. It's no different than discovering a new witness to the
16 case or discovering a DNA or something like that.

17 THE COURT: Well, I think there's there -- when you
18 have a co-defendant that all of a sudden 13 years later decide
19 they won't testify. I mean, I don't know. I don't -- I think
20 that's a lot different than discovering some new witness or DNA
21 or something like that. It just seems like a different -- a
22 whole different volume. Because if you did that then, you
23 know, 20 years down the road everybody could change their
24 testimony to help out their buddy or their co-defendant.

25 MR. CRAIG: Yeah. Well, I suppose that's possible

1 but I don't think it's probable.

2 THE COURT: So, I don't know. All right. Go ahead.

3 MR. CRAIG: Yeah, I - my condition is that is
4 officially to qualify as this new evidence and I think the
5 evidentiary hearing is appropriate.

6 THE COURT: Okay. All right. Okay. We got somebody
7 on line here. Let me see this is your Court. Yeah, this is
8 Mr. Hartwell. It says his name. Have his own cell phone. All
9 right. Good afternoon Mr. Hartwell? All right.

10 We are here for a hearing for -- this is just a motion
11 hearing by your the -- the State has requested that jurors be
12 dismissed because of previous filings and it's outside the
13 realm of the Court. At this point and your attorney has
14 indicated that this is newly discovered evidence, because of
15 affidavits of co-defendants that has changed the story. And
16 that you -- that should be a basis to have a PCR on this. And
17 Mr. Craig, if you want to do some follow up, just kind of some
18 -- a summary of your argument on that?

19 MR. CRAIG: Yes, Your Honor. Just for Mr. Hartwell's
20 benefit. Our position is that we got these two affidavits from
21 co-defendants and file the PCR based on the newly discovered
22 evidence within the one-year time period allowed by the statute
23 actually about six weeks later. And that both of these
24 witnesses, if they were to testify, they would provide
25 exculpatory evidence for Mr. Hartwell. And that combined with

1 his own testimony, I think would be sufficient grounds for a
2 new trial. But certainly, what we have here now is sufficient
3 grounds for an evidentiary hearing.

4 THE COURT: All right. Mr. Limbaugh?

5 MR. LIMBAUGH: Just a submission Your Honor.

6 THE COURT: Yes.

7 MR. LIMBAUGH: Yes. So, basically, the State's
8 position is just that applicant has not made a prima facie
9 showing for newly discovered evidence. And that the affidavits
10 would be really cumulative or impeaching under Part 5 for the
11 newly discovered evidence test under Hayden, Your Honor.

12 I do want to make one point just for -- as a matter of
13 law, essentially that recantations have been considered -- we
14 discovered evidence and they go more towards -- the
15 recantations, go more towards the weight of that testimony.
16 And rather than ruling it out on the basis at this stage, Your
17 Honor. Just because it's a recantation it goes more towards
18 the weight of that to be considered by the presiding judge
19 later on if that were to happen. All right. Anything else
20 from you, Mr. Craig?

21 MR. CRAIG: Nothing, Your Honor.

22 THE COURT: All right. Let me look at the -- I've
23 got the file that has been presented in the affidavits and I'd
24 just like to look at this a little more carefully and I will
25 take it under advisement and let y'all know what I come up

1 with. All right.

2 MR. CRAIG: Thank you, Your Honor.

3 THE COURT: I know this is Mr. -- I know you probably
4 had a lot to do to get here, Mr. Hartwell but this is one
5 of those hearings. It's kind of short. I'll just make a
6 decision of whether a full hearing will be required or not
7 and your attorney will let you know. All right. Good
8 luck to everybody. And just -- I will -- I guess the
9 question -- just let me know there's any changes Mr.
10 Limbaugh on the tomorrow schedule.

11 MR. LIMBAUGH: Yes, sir, Your Honor.

12 THE COURT: All right. Nothing further. We'll go
13 ahead and end this hearing.

14 MR. CRAIG: Thank you, Your Honor

15 [END OF HEARING]

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CERTIFICATE OF TRANSCRIBER

I, ERIN REILLY, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the South Carolina Circuit Court 9, Berkeley County, South Carolina, on the 9th day of, December 2020.

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

January 17th, 2024

ERIN REILLY

TRANSCRIBER

A rectangular stamp containing the handwritten signature "erinreilly" in a cursive script.

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Jermaine Hartwell, #323738,

C.A. NO: 2018-CP-08-2120

Defendant-Applicant,

ORDER

v.

The State of South Carolina,

Plaintiff-Respondent.

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21 JAN -6 PM 4:57
LEAH GUERRY DUPREE
CLERK OF COURT
BERKELEY COUNTY, SC

This matter came before the Court pursuant to a Motion to Reconsider filed by counsel on behalf of Jermaine Hartwell (hereinafter "Applicant") on March 28, 2019. The Motion to Reconsider was filed after a Conditional Order of Dismissal by the Honorable Roger M. Young Sr. was issued on March 20, 2019. Thereafter, Applicant filed a Reply to Respondent's Return and Motion to Dismiss and to the Conditional Order of Dismissal on March 28, 2019. On May 9, 2019, the Honorable Roger M. Young Sr. filed an order granting Applicant's Motion to Reconsider to which the hearing on this matter was set. The matter was heard on December 9, 2020 via WebEx with consent of all parties. Present at the hearing were Applicant; attorney for Applicant, James P. Craig; and attorney for Respondent, Benjamin H. Limbaugh.

PROCEDURAL HISTORY

Pursuant to orders of commitment of the Berkeley County Clerk of Court, Applicant is presently confined in the South Carolina Department of Corrections. In February 2007, the Berkeley County Grand Jury indicted Applicant for murder (2007-GS-08-0312), armed robbery (2007-GS-080313), two counts of first degree burglary (2007-GS-08-342; -345), and four counts of kidnapping (2007-GS-08-0308-0311). On August 30, 2007, the jury found Applicant guilty as

indicted and Hon. Deadra Jefferson sentenced Applicant to 30 years of imprisonment on each charge to run concurrent.

Applicant filed a timely notice of appeal, which was dismissed by the South Carolina Court of Appeals on January 26, 2010. The Remittitur was sent on February 11, 2010. Applicant then filed his first PCR application on July 6, 2010, in which he alleged “ineffective assistance of counsel” as his grounds for relief. Respondent filed its return on October 29, 2010. An evidentiary hearing was held on September 20, 2011 at the Berkeley County Courthouse. On August 15, 2011, the Honorable J. Mark Hayes II issued an order of dismissal denying Applicant’s first PCR application. On October 23, 2018, Applicant submitted a second PCR application, in which he alleged relief based on “Newly Discovered evidence: recantation of testimony of State’s witness, Kerry Hollins” and “New, after discovered evidence of State’s cooperative witness, Kareem King.” Respondent filed its Return and Motion to Dismiss on March 8, 2019. Applicant through his counsel submitted a Reply to Respondent’s Return and Motion to Dismiss on March 20, 2019. A Conditional Order of Dismissal issued by the Honorable Roger M. Young Sr. was filed on March 21, 2019. Such Order granted Applicant twenty days from service to show why the Conditional Order of Dismissal should not be final. Thereafter, Applicant through his counsel submitted on March 28, 2019 a Motion to Reconsider the Conditional Order of Dismissal. The Applicant’s Motion to Reconsider and the State’s initial Motion to Dismiss, is the present matter being considered by the Court.

ANALYSIS

Pursuant to *S.C. Code Ann.* §17-27-70(b), after an order by the Court has been submitted, “the applicant shall be given an opportunity to reply to the proposed dismissal.” *S.C. Code Ann.* §17-27-70(b) (2003). “In light of the reply, . . . the court may order the application be dismissed



or grant leave to file an amended application or direct that the proceedings otherwise continue.”

Id. “Disposition on the pleadings and record is not proper if there exists a material issue of fact.”

Id. The Supreme Court of South Carolina has held that “[s]ummary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief.”

Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005). When considering the State’s motion to dismiss where there has been no evidentiary hearing, the Court “must assume facts presented by applicant are true and view those facts in the light most favorable to the applicant.”

Id.

I. Statute of Limitations

An application for post-conviction relief “must be filed within one year after the entry of a judgment or conviction, or within one year after the sending of the remittitur to the lower court from an appeal, or the filing of the final decision on appeal, whichever is later.” *S.C. Code Ann.* §17-27-45(A) (1976). There is an exception to this general rule when the applicant claims there is material evidence not previously presented. *S.C. Code Ann.* §17-27-45(C) (1976). “If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed . . . within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.” *Id.*

Applicant’s alleged new evidence was based on affidavits from two of his co-defendants. The affidavit of Kerry Hollins was dated September 14, 2018 and the affidavit of Kareem King was dated September 21, 2018. Applicant filed his second PCR application on October 23, 2018. Assuming the affidavits are true, as required when there has been no evidentiary hearing, the

exception to the general statute of limitations applies. Therefore, Applicant's second PCR application meets the exception to the statute of limitations set forth in S.C.Code §17-27-45.

II. Successive Applications

Successive post-conviction relief applications “while not absolutely barred, are not looked favorably upon unless ample reasons exists for a person under sentence to litigate again.” *Foxworth v. State of S.C.*, 275 S.C. 615, 617, 274 S.E.2d 415, 416 (1981). When there is a successive application, “the burden shall be on the applicant to establish that any new ground raised in subsequent application could not have been raised by him in the previous application.” *Alice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991).

The second PCR application was submitted after Applicant received the affidavits from his co-defendants in 2018. Applicant’s first PCR application was submitted in 2010. The newly acquired evidence was not discovered by Applicant until 2018, eight years after the first PCR application. As such, Applicant has met his burden of establishing that his claims of newly discovered evidence and new after discovered evidence could not have been raised in his first PCR application.

III. Newly Discovered Evidence and New After Discovered Evidence

Before a court will hold an evidentiary hearing, an applicant must make a *prima facie* showing that they are entitled to relief. *Welch v. MacDougall*, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965). Recantation of testimony is “ordinarily unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial” *State v. Mayfield*, 235 S.C. 11, 34-35, 109 S.E.2d 716, 729 (1959). However, the issue of recantation of testimony “comes down to a matter of the credibility of the witnesses, which we leave to the trial court's discretion.” *State v. Harris*, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011). A defendant requesting a new trial based on newly discovered or after discovered evidence must establish the evidence: 1) is such as would probably



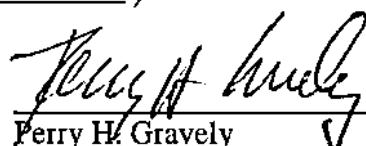
change the result if a new trial was held; 2) has been discovered since the trial; 3) could not, by the exercise of due diligence, have been discovered before the trial; 4) is material to the issue of guilt or innocence; and 5) is not merely cumulative or impeaching. *Hayden v. State*, 278 S.C. 610, 611-612, 299 S.E.2d 854, 855 (1983).

The issue before this Court is whether Applicant has made a *prima facie* showing of newly discovered and after-discovered evidence to allow Applicant an evidentiary hearing. Applicant has submitted two affidavits, which were not available at trial in support of his PCR application. A motion to dismiss without an evidentiary hearing will only be granted when there are no issues of material fact. As this stage, the Court must assume the facts presented by Applicant are true. As such, the Court must determine whether the affidavits meet the requirements of new evidence and if so, whether a new trial should be granted. Therefore, an evidentiary hearing would be required to address these issues.

CONCLUSION

Given the low threshold needed to survive a motion to dismiss without an evidentiary hearing, this Court deems Applicant has provided the *prima facie* evidence needed to proceed with an evidentiary hearing. Therefore, the Conditional Order of Dismissal is vacated and Respondent's Motion to Dismiss is DENIED and Applicant's second PCR application shall be set for an evidentiary hearing.

AND IT IS SO ORDERED this 30th day of December, 2020.



 Perry H. Gravely
 Presiding Judge, Ninth Judicial Circuit

Pickens, South Carolina

25

I N D E XWITNESSESPAGE

Jermaine Hartwell (SW)

Direct Examination by Mr. Craig

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Cross Examination by Ms. Whitehour

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Kareem King (SW)

Direct Examination by Mr. Craig

22

Cross Examination by Ms. Whitehour

30

Re-Direct Examination by Mr. Craig

33

Re-Cross Examination by Ms. Whitehour

34

Kerry Hollins (SW)

Direct Examination by Mr. Craig

38

Cross Examination by Ms. Whitehour

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Elliott Barnwell (SW)

Direct Examination by Ms. Whitehour

46

Cross Examination by Mr. Craig

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Re-Direct Examination by Ms. Whitehour

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CERTIFICATE OF TRANSCRIBER

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NONE

1 MS. WHITEHOUR: Judge Griffin, Turbeville, the number
2 that Jonathan Ekstrom from SCDC gave me is ringing through as
3 busy. I called about four times. So, I am not sure what's
4 going on there.

5 THE COURT: And Turbeville is where one of the witnesses
6 is located?

7 MS. WHITEHOUR: Yes, Mr. Kerry Hollins. I'm gonna have
8 somebody in my office keep calling. So, it might just take
9 another second.

10 JUDGE GRIFFIN: Okay. Yeah, I think we need to go ahead
11 and get started and just keep working on trying to locate that
12 witness. Good morning, everyone. For the record, this is case
13 number 2018-CP-08-2021. It is a post-conviction relief
14 application of Jermaine Hartwell. Before we get started, I
15 need Mr. Hartwell to raise his right hand for me, please. Mr.
16 Hartwell, you swear or affirm any testimony you'll give this
17 court this morning will be the truth, the whole truth, and
18 nothing but the truth, so help you God?

19 MR. HARTWELL: Yes, your honor.

20 THE COURT: All right, you can put your hand down. Mr.
21 Hartwell, as you can see, we are proposing to conduct your
22 post-conviction relief matter via video conference. Do you
23 specifically consent to this matter being held via video
24 conference?

25 MR. HARTWELL: Yes, your honor.

1 THE COURT: All right, you also specifically consent to
2 have any party who may address the court, whether it be the
3 attorneys involved in this matter, or any witnesses who may
4 testify in this case likewise appear via video conference.

5 MR. HARTWELL: Yes, your honor.

6 THE COURT: All right, thank you, sir. All right, Ms.
7 Whitehour or Ms. McAllister, before we get started, if one of
8 you would give me kind of a brief procedural history of where
9 we are in this matter. And I've reviewed the packet which
10 was presented, but just kind of for the record, let us know
11 where we are procedurally and (video stopped)

12 MS. WHITEHOUR: May I please record?

13 THE COURT: Yeah, go ahead.

14 MS. WHITEHOUR: During the February 2007 Berkeley County
15 Grand Jury, applicant was indicted for four counts of
16 kidnapping, one count of murder, one count armed robbery, and
17 two counts of first-degree burglary. On August 27th through
18 30th of 2007, co-defendants Gary Grant, Marquita Smith, and
19 Jermaine Hartwell were jointly tried before Judge Jefferson in
20 a jury, and Mr. Hartwell was convicted on all charges after a
21 trial. He was sentenced to concurrent sentences of 30 years
22 for each count. He subsequently filed a direct appeal, which
23 was dismissed by the Court of Appeals. The remitted error was
24 sent on February 11th of 2010. Hartwell filed his first
25 application for post-conviction relief on July 6th, 2010.

1 Following an evidentiary hearing on applicant's allegations,
2 Judge Marquez issued an order of dismissal. Jermaine Hartwell
3 has now filed his second and current application for post-
4 conviction relief, in which he alleges newly discovered
5 evidence. Specifically, applicant alleges recantation
6 testimony of state's witness, Carrie Hollins, and newly
7 discovered evidence of state's cooperative witness, Kareem
8 King. For purposes of the record at this time, the state would
9 also like to renew its motion to dismiss these allegations.

10 THE COURT: All right, and in terms of that motion to
11 dismiss, has that been brought before -- has it been heard by
12 any -- on this particular application, has it been heard by
13 any other circuit judge?

14 MS. WHITEHOUR: Yes, and they did have a motion to
15 dismiss, and we just would like to renew it for the record at
16 this time.

17 THE COURT: All right. So, that's not anything that
18 necessarily needs to be addressed.

19 MS. WHITEHOUR: Just for preservation purposes.

20 THE COURT: Just, okay, for preservation, all right.
21 Okay, thank you, ma'am. Mr. Craig, you represent the
22 applicant.

23 MR. CRAIG: That's correct, Your Honor.

24 THE COURT: All right, sir. I'll be happy for you to
25 call your first witness.

1 MR. CRAIG: All right, Your Honor, we called Jermaine
2 Hartwell?

3 MS. WHITEHOUR: Your honor, before we call witnesses the
4 state would also like to bring to the court's attention our
5 understanding of the allegations and the anticipated testimony
6 of these two witnesses, Kerry Hollins and Kareem King and we
7 would request the court, at the appropriate time, apprise the
8 two witnesses of the possible consequences and ramifications
9 of their recantation testimony, and determine whether
10 independent counsel may be necessary for them or need to be
11 appointed.

12 THE COURT: All right, thank you very much. Mr. Craig?

13 MR. CRAIG: Yes, Your Honor.

14 THE COURT: All right. Mr. Hartwell, you are -- I remind
15 you -- you are still under oath.

16 MR. HARTWELL: Yes, sir.

17 MR. CRAIG: All right, thank you, Your Honor. May it
18 please the court?

19 THE COURT: Yes, sir.

20 **DIRECT EXAMINATION OF JERMAINE HARTWELL BY ATTORNEY JAMES**

21 **CRAIG:**

22 Q. I would like to ask Jermaine, if you would, in your
23 own words, tell the court what happened on the night of the
24 event when Mr. Perry was killed. And you're nervous and you
25 talk fast, so please, if you would, talk slow and distinctly.

1 A. Yes, sir. That night, if I remember, I was on 7th
2 Avenue. I got a call from Green King, and they knew where Mr.
3 Perry was. They knew that Mr. Perry had owed me for some
4 drugs. (Inaudible) Came and got him. We all on 7th Avenue,
5 Mr. Grant was on the corner. He asked where we were going. I
6 said, I'm about to go somewhere (inaudible) or
7 something. Got in the car. We all knew where we were going,
8 but the Hollins took us.

9 Q. Let me interrupt you when you say we all, who is we
10 all?

11 A. Me, Grant, King, and Hollins.

12 Q. Okay, that's you, Green King, Gary Hollins, and Gary
13 Grant.

14 A. Yes, sir.

15 Q. Right?

16 A. Yes, sir.

17 Q. Okay, continue.

18 A. But we all rode, and Mr. Hollins (inaudible) sat in
19 the parking lot. Sat there (inaudible) I don't know what was
20 going on. So Mr. Hollins got a car like this, and it was ---

21 Q. Who was driving? Whose car?

22 A. Gary Hollins had a car.

23 Q. Gary Hollins, okay.

24 A. Yes, sir.

25 Q. And y'all were all riding with him?

1 A. Yes, sir.

2 Q. Okay. Why were you going to see Gary?

3 A. Sir?

4 Q. Why were you going to see Gary?

5 A. Oh, he was calling me about past drug deals. It was
6 a boy who owed me something. (Inaudible) So I lost contact
7 with him. He lost contact with me. You know, I used his
8 number or whatever. But I got a call, and they told me that
9 King Grant, I mean, King and Hollins both knew. We all went
10 together. They knew that they owed me. So they called me and
11 said that they knew where he was. So ---

12 Q. You said they knew where he was?

13 A. Yeah, they said Hollins knew where Mr. Perry was.
14 In fact, we all rode the same street. We sat in a parking lot,
15 and we waited, and we waited, and we waited. I guess nobody
16 was waiting to come outside. Mr. Hollins got a call, I guess,
17 and said that Mr. Perry was on his way outside. So, Mr. Perry,
18 I saw him on the sidewalk. I got (inaudible) by myself. I
19 (inaudible) just me talking like a man. And I saw a female,
20 like, I guess, a stand to the top of the sidewalk. A female
21 stand to the top of the sidewalk watching us talk. And I
22 guess when by me talking to Mr. Perry, I guess King and Grant
23 knew. Although, they got on the call. They thought that they
24 was going to talk about me. So I guess at that time, Mr.
25 Perry thought something was going to happen. So he ran.

1 Q. Mr. Perry ran? Ran from you?

2 A. Yeah. No, he ran because he saw King and Grant
3 coming to see what we were talking about. Thought King and
4 Grant were coming up to see what we were talking about. So he
5 ran. I ran behind him. I admit. I ran behind him. Just me.
6 I ran behind him. And I guess the girl (inaudible) she ran
7 inside the door and locked him out. So he ran. He tried to get
8 back inside the house (inaudible). So I guess he didn't get
9 in. So I heard a loud boom. I heard a big boom. That's what I
10 heard. The door slid open. He charged me. He charged me.

11 COURT REPORTER: Sir, can you slow down just a little
12 bit? I'm

13 sorry. Slow down just a little bit. Okay, thank you.

14 THE COURT: Mr. Hartwell, the lady that just spoke up
15 she's the court reporter. She's taking down every word that is
16 said in this proceeding. And like your lawyer said, you tend
17 to get going a little fast. So do your best to slow down,
18 please.

19 A. All right. When I ran behind Mr. Perry, I guess the
20 girl, whoever it was (inaudible) him up. (Inaudible). I
21 heard a boom. After that he charged me. He had a gun by his
22 arm like this. He had a gun.

23 Q. When you say you heard a boom, what do you
24 mean by that?

25 A. He was trying to get back inside the house.

1 The girl locked him out. She locked him out, I guess,
2 whatever.

3 Q. The apartment?

4 A. Yeah, the apartment.

5 Q. So Mr. Perry knocked the door down to get in?

6 A. I guess he was trying to knock the door down to get
7 in the way of the thing. I didn't see, but I know he heard a
8 boom. After the boom, he charged me. He had a gun like this.
9 I knew Mr. Perry. I knew he was going to pick up another
10 person. So I didn't know if it was going to be a fight or
11 not. He had a gun by the arm.

12 Q. After that, what happened? Did you go into the
13 apartment?

14 A. Sir?

15 Q. Did you go into the apartment and talk to Perry?

16 A. No time. No time. Never entered the apartment.
17 Never.

18 Q. Who went into the apartment?

19 A. Nobody. None of us went into the apartment.

20 Q. Did Mr. Perry agree to give you the drugs that he
21 owed you?

22 A. Yes, sir. Yes, sir.

23 Q. How did that occur?

24 A. All right. After we -- it was, together we was
25 locked together like this. They broke us up. They separated

1 us, King, and Grant. They separated us. So after that, Perry
2 was like, I got you, man. Fine with me. So we walked to his
3 car. Walked to his car. And after that, I'm like, man, let
4 me drive. Let me drive. Because I didn't know if he would try
5 something crazy. So, I said let me drive. Will you please
6 let me drive. He agreed to let me drive. We all got in the
7 car.

8 Q. You said, let me drive. Was that Perry saying that?

9 A. No, I asked Mr. Perry to let me drive because I
10 didn't want to put that (inaudible). So, I said, Mr. Perry,
11 let me drive. Give me the keys. Give me the keys. We all got
12 in the car. Me, King, Grant, and Mr. Perry.

13 Q. In whose car?

14 A. Mr. Perry's car.

15 Q. Okay. And then where did you go?

16 A. He gave us directions to; we went up to Summerville.
17 We went up to Summerville. After Summerville, Mr. Perry and
18 Grant was all in the backseat. So I told him to chill out
19 because Mr. Perry was giving us directions. (Inaudible). So
20 I told him to stop fussing and chill out. Stop fussing.

21 Q. Mr. Perry gave you directions to go to a place in
22 Summerville?

23 A. Yes, sir.

24 Q. And what place was that that you were going to?

25 A. Summer (inaudible) park.

1 Q. Summerhill Park?

2 A. Yes, sir. Trailer park.

3 Q. Why did you go to that trailer park?

4 A. He told us that's where the stuff was. He said he
5 was going to give me the money or the (inaudible) either one.
6 He said everything was right there. He said no one was in the
7 trailer. So we got to the trailer park. We left the car
8 running. King, Grant, and Mr. Perry went inside. I was going
9 inside, but I was looking for my cell phone to call Mr.
10 Hollins. I didn't know where he was. So I started going to
11 the car, looking for my cell phone. I didn't find it. I kept
12 looking through the car. I had all the doors open looking for
13 my cell phone. So I heard a noise like this coming. I looked
14 up and I thought I saw someone, but I didn't see no one. So
15 every five to seven minutes, every five to seven minutes, I
16 was like, what's going on. So I was going in to see what was
17 taking him so long. By the time I got around the car, I turned
18 around, and I was being shot at. Got shot in the chest.

19 Q. Did you know who was shooting at you?

20 A. Not at that time. Not at that time.

21 Q. Did you find out later who was shooting at you?

22 A. Yes, sir.

23 Q. Who was that shooting at you?

24 A. Chris Nelson.

25 Q. Mr. Nelson?

1 A. Mr. Nelson.

2 Q. Okay. Did he shoot you?

3 A. He shot me in the chest. He shot me in the arm.

4 Q. Did you ever go inside the trailer?

5 A. When I got shot in the chest, I fell to the ground.
6 I fell to the ground. When I ran to the trailer (inaudible) I
7 fell (inaudible and shot in the arm right there. That's how
8 the front left got busted. When the front left got busted, I
9 rolled to the trailer. I ran to a back room. Thinking Mr.
10 Nelson would stop shooting. So at that time, I came
11 (inaudible) reaching for the telephone. I'm like, ma'am, don't
12 call the police. I'm about to leave. They're silent. This
13 won't even hurt.

14 Q. What happened after you got shot? After that?

15 A. After that, when the shooting started outside --
16 when shooting started outside. I ran outside. I jumped the
17 fence. I heard more shooting inside the trailer. I fell to
18 the ground because my chest was bleeding. My arm was
19 bleeding. So I laid on the ground. I heard more gunshots
20 coming towards me (inaudible)

21 Q. Inside the trailer?

22 A. Yes, sir. Coming from that direction. I had to move
23 (inaudible). So I fell to the ground. My chest was bleeding
24 real bad. After that, I left. I didn't attack no one. I
25 didn't attack (inaudible). I was outside the whole time.

1 I was the one in the car looking for myself. I came up next to
2 the trailer, and I knew what I was talking about. And there
3 were two other women that lay down on the ground. I was
4 outside.

5 Q. Did you have a firearm that night?

6 A. I had a weapon.

7 Q. And you never went inside the trailer?

8 A. (Inaudible) I guess when the (inaudible) was
9 happening, I was not in the trailer. I was moved. I was
10 outside. I was outside.

11 Q. You don't know what happened inside the trailer
12 then?

13 A. I didn't know what happened inside the trailer until
14 after.

15 Q. Okay. And where did you go after all this happened?

16 A. I sat down on the ground. I guess Randy King and
17 (inaudible). I thought it was going to be (inaudible) but
18 (inaudible) they lifted me up. And Mr. Perry Meadows, Mr.
19 Perry Meadows met Mr. Hollins at the back door, and we all got
20 in the car.

21 Q. Gary Hollins came and picked you all up?

22 A. Yes, sir.

23 Q. Where did you go from there?

24 A. We went to Gary Hollins' girlfriend's house. And she
25 patched my chest up. Came to find out, I didn't get hit.

1 When it hit my chest it (inaudible). She patched my chest up.

2 Q. It was a superficial wound. Did you go to the
3 hospital?

4 A. No, sir.

5 Q. Did you ever have any intent to kidnap or rob, or
6 murder Mr. Perry?

7 A. No, sir. No, I didn't. No, I didn't.

8 Q. Was there a plan for you and Mr. King and Mr. Grant
9 to do that?

10 A. No, sir.

11 Q. And you don't know what happened inside the trailer?
12 You never went inside?

13 A. No, sir.

14 Q. Did you testify at your trial?

15 A. No, sir.

16 Q. So you never had a chance to tell your side of the
17 story?

18 A. No, sir.

19 Q. Do you have anything else you want to say?

20 A. Yes, sir. What I want to say is that at my trial,
21 Mr. Easton got up on the stand and said that the person he was
22 shooting at didn't have a gun. That was me. That was me.
23 Easton got on the stand and said, I didn't think the person
24 that he shot at didn't have a gun. I did not have a gun. I
25 was outside. I was going towards the trailer because they were

1 taking to long. I never went inside. Had I went inside, all
2 I could (inaudible)I would have stopped what was going on if I
3 didn't have a gun. I would have stopped it.

4 Q. And the reason you were there was to be paid by
5 Perry for the bad drugs he had sold you in the past?

6 A. Yes, sir.

7 Q. Okay. He's either going to give you some good drugs
8 or give you the money back?

9 A. Yes, sir.

10 Q. Did you have an intent to rob him?

11 A. No, sir. He had warned me about it. I never robbed
12 a boy in my life. I never was like that. I never pushed a
13 shirt like that. I never robbed a boy in my life. I never
14 hurt nobody in my life.

15 MR. CRAIG: Answer any questions that the government has
16 for you.

17 THE COURT: Cross examination.

18 **CROSS EXAMINATION OF JERMAINE HARTWELL BY MS. WHITEHOUR:**

19 Q. Good morning, Mr. Hartwell. So, you said that you
20 stayed outside at the car the entire time.

21 A. Yes, ma'am.

22 Q. And you were in the car the entire time that this
23 crime was happening?

24 A. No. When the crime was happening, I was outside
25 looking for my cell phone. I called Mr. Perry to come pick us

1 up. Because, you see, (inaudible) I was trying to call
2 (inaudible) to come pick us up.

3 Q. Okay, and were you looking for your cell phone near
4 the car?

5 A. I was in the car. I had all the doors open, looking
6 for my cell phone.

7 Q. Okay, and you were shot while you were in the car?

8 A. No. I heard a noise. I heard a noise. I looked up.
9 I thought I saw something. So, the person, I guess,
10 (inaudible) Brown he saw me and thought I'll come around this
11 way. He came around this way. Now, I was going to check. It
12 took them so long. By the time I got out of the car, he
13 turned around and started shooting at me.

14 Q. And did you know Chris Nelson prior to this?

15 A. No, ma'am. He knew me because, you know, I'm a very
16 known person. So, he knew me from (inaudible) my brother. He
17 knew me. I didn't know him.

18 Q. Okay. At trial, when you spoke with your attorney,
19 did you ask your attorney to call Kareem King or Carrie
20 Hollins as witnesses for you?

21 A. No, ma'am. But there was statements - it was
22 statements that (inaudible). There were statements that they
23 didn't see. (Inaudible). One time I was the person that saw
24 that. I was the person (inaudible).

25 Q. So you don't think their testimony would have been

1 helpful at trial?

2 A. I guess (inaudible) I was the person outside.

3 Q. But do you think if they testified at trial, they
4 testified at trial they would have testified on your behalf?

5 A. It will (inaudible). I don't know. (Inaudible) 10
6 years.

7 Q. You chose not to testify at your trial?

8 A. Yes, ma'am.

9 Q. Okay. And do you remember being asked by the Judge
10 that you could testify at your trial and choose to tell your
11 version of the facts?

12 A. Yes. I was nervous. I was scared. So I chose not
13 to testify. I was kind of nervous. I should have. But
14 (inaudible) I would have a better outcome.

15 Q. But you chose not to, ultimately?

16 A. Yes, ma'am.

17 Q. Okay. You also mentioned that you told somebody who
18 you thought was about to call the police not to call the
19 police, correct?

20 A. Yes, ma'am.

21 Q. And why did you not want the police called if you
22 were shot?

23 A. Because I wasn't supposed to be in that trailer. I
24 was being shot at. I was in somebody's house. So, why -- I
25 told them not to call the police. I told them not to call the

1 police.

2 Q. You weren't invited to the trailer. You were there
3 uninvited, rather.

4 A. I ended up in the trailer because I was being shot
5 at. I figured that the person shooting near me would stop
6 shooting because I was inside his trailer. That's why I ended
7 up in the trailer.

8 MS. WHITEHOUR: Beg the court's indulgence for a moment?

9 THE COURT: Yes, ma'am.

10 MS. WHITEHOUR: Okay. Thank you, Your Honor. That's all.

11 THE COURT: All right. Any redirect, Mr. Craig?

12 MR. CRAIG: No, Your Honor.

13 THE COURT: All right. Thank you, sir. Mr. Craig, you
14 can call your next witness.

15 MR. CRAIG: I'm not sure which of the two witnesses are
16 available. Is it Mr. (inaudible) or is it Hollins?

17 THE COURT: All right. The individual that's with us
18 from Ridgeland, sir, what's your name?

19 MR. KING: (Inaudible) King.

20 THE COURT: Okay.

21 MR. CRAIG: Okay. Your Honor, I call Mr. King.

22 THE COURT: All right. Mr. King, could you raise your
23 right hand for me, sir? Do you swear or affirm any testimony
24 you give this court today to be the truth, the whole truth,
25 and nothing but the truth? So, help you God?

1 MR. KING: Yes, sir.

2 MR. CRAIG: Okay, Mr. King.

3 THE COURT: Hold on one second, Mr. Craig. Mr. King, I
4 don't know what you were going to testify to, but I'm assuming
5 based upon the documents that I've read in this matter that
6 there could be a likelihood that you may say something that
7 could have the potential to incriminate you based upon your
8 testimony. Do you understand that?

9 MR. KING: Yes, sir.

10 THE COURT: All right. Do you understand that you have
11 the right to claim the protection of the Fifth Amendment if
12 there's any question asked of you that you feel that your
13 answer to that question may incriminate you, do you understand
14 that you have that right?

15 MR. KING: Yes, sir.

16 THE COURT: All right. Do you -- are you willing to
17 testify as a witness in this matter without legal
18 representation?

19 MR. KING: Yes, sir.

20 THE COURT: All right. Is anybody forcing you to do this?

21 MR. KING: No, sir.

22 THE COURT: Has anybody promised you anything to get
23 you to testify here today?

24 MR. KING: No, sir.

25 THE COURT: And you're doing this of your own free will?

1 MR. KING: Yes, sir.

2 THE COURT: All right. I find he's made a knowing and
3 voluntary decision to testify in this matter. I find he's
4 been apprised of his rights under the Fifth Amendment against
5 self-incrimination, and he has voluntarily chosen to proceed
6 in this matter without the benefit of any legal
7 representation. So we will go forward. Mr. Craig?

8 COURT REPORTER: Judge, I'm sorry. Before we go, could
9 we get him to spell his full name, please, and perhaps adjust
10 the computer so we can see his face? We can just sort of see
11 half of his head. Thank you.

12 THE COURT: Mr. King?

13 MR. KING: Yes, sir.

14 THE COURT: Do you have someone in the room with you
15 there?

16 MR. KING: No, sir.

17 THE COURT: All right. Are you on a laptop or a desktop
18 computer?

19 MR. KING: Desktop computer.

20 THE COURT: All right. We need you to orient yourself
21 better so that -- there you go. So you can be seen now. That
22 might impact the microphone's ability to pick up your voice,
23 so we're going to test it out. Could you spell your complete
24 name for the record for me?

25 MR. KING: Say that again?

1 THE COURT: Could you spell your complete name for the
2 record?

3 MR. KING: Kareem King, K-A-R-E-E-M-K-I-N-G.

4 THE COURT: All right, Mr. King, just remember to keep
5 your voice up and remember to speak probably a little slower
6 than you normally do because we're trying to do our best to
7 take down an accurate word-for-word record in this matter.
8 So, Mr. Craig, direct examination.

9 MR. CRAIG: Thank you, Your Honor.

10 **DIRECT EXAMINATION OF KAREEM KING BY ATTORNEY JAMES CRAIG:**

11 Q. Mr. King, my name is James Craig, and I represent
12 Jermaine Hartwell. Do you know that?

13 A. Yes, sir.

14 Q. Okay. And you're testifying today freely and
15 voluntarily, is that correct?

16 A. Yes, sir.

17 Q. Okay. Nobody's promised you anything, have they?

18 A. No, sir.

19 Q. Okay. Now, you gave an affidavit some time back
20 about the events that took place when Dexter Perry was
21 murdered. Can you, in your own words, and again, as Judge
22 Griffin said, please talk slowly and distinctly if you can,
23 and tell us, in your own words, what happened on the night
24 that Perry was murdered?

25 A. On the night that Perry was murdered, me and Gary

1 Hollins were together. We was together all that night. Paul
2 Higgins was receiving phone calls that night from several
3 different people. I don't know who he was talking to, but he
4 got a call on the ticket about Perry having some drugs. So he
5 was going (inaudible).

6 MR. CRAIG: Excuse me. Mr. King, I'm having difficulty
7 understanding you. I don't know if the reporter is or not.

8 THE COURT: Yeah, let's, Mr. King, get a little bit
9 closer to the computer and do your best to keep your face
10 where we see it. I'll tell you if we can see it. I think the
11 distance from the microphone is causing us some issues.
12 Okay, right there ought to be good. Go ahead, Mr. Craig.

13 Q. Thank you, Your Honor. So, Mr. King, if I
14 understood you correctly, you said that you got a call from
15 Gary Hollins that he knew where Mr. Perry was and you all were
16 going to go buy drugs from him. Is that correct?

17 A. Me and Hollins were together. Hollins received a
18 phone call saying that he knew where Perry was at. So, we was
19 going to buy some drugs, but at the same time, he had no that
20 (inaudible) and Perry had (inaudible) dealings back then that
21 he was trying to get corrected. So we was like we was
22 going to see Perry. So, we went and talked to the (inaudible)
23 So, we called it (inaudible).

24 Q. Now, let me repeat that to make sure I understood
25 you correctly. You said that you and Hollins were going to buy

1 some drugs, but that Jermaine Hartwell had already bought
2 drugs in the past and they were bad drugs. He was going to get
3 credit for that?

4 A. Yes. Oh, yes. Correct.

5 Q. Okay. So, did you all go to where Mr. Perry was
6 located?

7 A. We know -- Hollins had known where he was located.
8 (Inaudible) At that time, he knew where Mr. Perry was at. So,
9 we was on our way to go meet Perry, and we called up Hollins.
10 We were like, man, do you know where Perry has been at. So,
11 Hollins was like, come get us. Come get us. We were going to
12 straighten out the business. So, me and Hollins had a chance
13 to go to Perry's house. We were going to straighten out some
14 business on the drugs. We went to go pick up Hartwell. So,
15 when we were going to pick up Hartwell, he was leaving. When
16 we were going to pick up Hartwell, when I was leaving, I was
17 going to go to Mr. Perry, we saw Mr. Grant. So, Mr. Grant came
18 and got in the car. So, when we was leaving from there, I
19 suppose me and Mr. King, Hollins, Grant, and Hartwell we was
20 on our way to meet Mr. Perry at (inaudible) street.

21 Q. Now, let me just make sure I understand you
22 correctly. So, it was Hollins was driving, and he picked up
23 you?

24 A. No, me and Hollins had already been together.

25 Q. Oh, you were already together. And then y'all

1 picked up the others. The others being Hartwell and Grant?

2 A. Yes, sir.

3 Q. And then y'all went to where Perry was located. Is
4 that correct?

5 A. Yes, sir.

6 Q. Okay. Where was he located? Do you remember?

7 A. I want to say Goose Creek, I think it was in Goose
8 Creek.

9 Q. Was it at an apartment complex?

10 A. It was in (inaudible).

11 Q. All right. When you got there and you saw Perry,
12 what happened?

13 A. When we got there, Hartwell and Perry got out, and
14 they was out first. So, we (inaudible) the park. We're going
15 to find a place to park. So, the time we done went down a
16 block or two (inaudible) I got out, Perry got out, and Hollins
17 (inaudible) face the park. So, as we were approaching Hartwell
18 and Perry, I guess Perry got frightened because he seen us
19 approaching, so he took off running.

20 Q. Perry took off running?

21 A. Perry took off running.

22 Q. Where did he go?

23 A. (Inaudible). Before we could even catch up to them,
24 before he started running, we still had (inaudible). We still
25 had like a gap between us and Perry so we could meet up with

1 them. As soon as he seen us approaching, he took off running
2 around the building and tried to get in a house. When he seen
3 us coming, he took off. Hartwell took off behind us, so we
4 took off behind both of them. So, when we meet up, it's time
5 to get around the corner and meet up. Hartwell and Perry were
6 already, like they was stopping us, so we (inaudible).

7 Q. I'm having difficulty understanding you.

8 COURT REPORTER: Yeah. I didn't hear the very last
9 thing that he said after the scuffle. I didn't hear the very
10 last thing he said.

11 Q. Repeat that last thing you said?

12 A. (Inaudible) Perry and Hartwell started talking.
13 Perry was like man I'm (inaudible) and you act (inaudible) I
14 can't remember the location he said. He was like I don't have
15 nothing on me. (Inaudible).

16 Q. Let me interrupt you. So, Perry said he didn't have
17 anything on him?

18 A. No.

19 Q. No drugs to sell you? Did he tell you if he could
20 take you somewhere and get them?

21 A. Yes.

22 Q. Okay. Did y'all go to another location with him?

23 A. Yes.

24 Q. And how did you get to the other location?

25 A. With Perry. Perry started to drive. Perry started

1 to drive by the store (inaudible). So Hartwell was like let me
2 drive. So he let Hartwell drive. (Inaudible) shook up about
3 the incident that just happened (inaudible).

4 Q. So Hartwell drove Perry's car?

5 A. Yes.

6 Q. And who was in the car with him? Was it you and ---

7 A. Hartwell was in the front seat driving. I was in
8 the passenger. (Inaudible) was in the back seat and Perry was
9 in the back seat.

10 Q. Okay. Now, what about Kerry Hollins? Where did he
11 go?

12 A. (Inaudible) He couldn't find a place to park.

13 Q. So he had his own car and he left? Is that right?

14 A. (Inaudible) we are already at the park at that time
15 at the apartment complex.

16 Q. So, where did you go with Perry?

17 A. We went to the location that he told us.

18 Q. Trailer Park?

19 A. Yes, sir.

20 Q. Okay. But what happened when you got there?

21 A. We get to the trailer park he told us that just go
22 to the trailer. Everything was inside the trailer. So we got
23 inside the trailer me, Mr. Perry, Mr. Grant was inside the
24 trailer. (Inaudible) marijuana (inaudible) he went towards
25 the back -- went in the back (inaudible). (Inaudible) Mr.

1 Perry he was (inaudible). He was stolen. He was stolen.

2 Q. You said he was stolen? Is that what you said?

3 A. When we got there (inaudible). He was stolen.

4 Q. Well, let me ask you this. Did Jermaine Hartwell go
5 inside the trailer with you?

6 A. No.

7 Q. He stayed outside?

8 A. Yes.

9 Q. Okay and did Jermaine Hartwell eventually get shot
10 by somebody?

11 A. Yes.

12 Q. Tell me about that?

13 A. The shot happened when we was inside the trailer. I
14 don't know. Maybe five minutes? We was inside the trailer
15 five minutes before (inaudible) out the back we heard gun
16 shots. It was random gun shots coming from outside.

17 Q. After you heard gunshots, what happened after that?

18 A. There was a fast -- there was a fast reaction
19 (inaudible). Gun shots ---

20 MS. WHITEHOUR: Objection. I can't understand everything
21 you say, but I think he's testifying to something that
22 happened outside. And he couldn't have known that if he was
23 inside?

24 A. The gunshots ---

25 THE COURT: Hold on one second. Mr. King. Mr. King, you

1 can only testify about things that you observed. Now, you can
2 testify about hearing gunshots, but other than what you saw,
3 you would have no way of knowing that unless someone had told
4 you. So, I'm going to sustain her objection. Limit your
5 testimony to what you observed. Mr. Craig, go ahead.

6 Q. Mr. King.

7 A. Yes, sir.

8 Q. So, did you find out later that Jermaine Hartwell
9 had been shot?

10 A. I found out ---

11 Q. How did you find that he had been shot?

12 A. After the shots fired, we ran from out the trailer.
13 We ran from out the trailer. We jumped a fence. (Inaudible).
14 We thought he had been shot, he was laying on the ground.

15 Q. So you saw Hartwell on the ground after you and
16 Grant ran out of the trailer?

17 A. Yes, sir.

18 Q. What happened after that? How did you get away? Did
19 you call Mr. Hollins to come get you?

20 A. Yes, sir.

21 Q. Where did you go after he came to pick you up?

22 A. I tell Mr. Hartwell where we were three minutes in
23 he was coming to pick us up. I told him I give exact
24 directions where he was going to find us. It was a restaurant
25 on the corner and a food shopping center. I told him we could

1 get past him. He said we could walk a mile. We could walk a
2 minute's walk. He came with us. I gave Hollis the directions
3 and he came to pick us up.

4 Q. Did you have at any time a plan along with Mr. Grant
5 and Hollins and Hartwell to rob Mr. Perry?

6 A. No, sir.

7 Q. What was your intent in meeting with him?

8 A. To buy some drugs.

9 MR. CRAIG: Okay. I think that's all the questions I
10 have. Answer any questions the state has for you.

11 THE COURT: Cross examination.

12 **CROSS EXAMINATION OF KAREEM KING BY ATTORNEY MS. WHITEHOUR:**

13 Q. Thank you, Your Honor. Mr. King, you were on the
14 state's list to be called as a witness at trial, correct?

15 A. Correct.

16 Q. Okay. At that time, you were going to testify on the
17 state's behalf for the state's case, correct?

18 A. Correct. Okay. Why is your testimony different
19 today than it would have been back then?

20 A. Because back then, the detective told me that he was
21 going to -- he was going to (inaudible) I got a good deal. So
22 back then I was really just more for myself. You know he told
23 me if I work with him he'll work with me. Basically I just
24 wanted to help myself. When I was in the protective platform,
25 I was willing to do that to help myself.

1 Q. Okay. And you ultimately did plead?

2 A. Yeah.

3 Q. Okay. Going back to the questions that Mr. Craig
4 was asking you, did Hartwell offer to drive or was Perry
5 nervous and Perry didn't want to drive?

6 A. Perry was nervous. But Hartwell was like just let me
7 drive. (Inaudible).

8 Q. Can you say that one more time sir?

9 A. I said he couldn't even get the key inside the car
10 to unlock the door.

11 Q. Okay. And he took you to the trailer park to get
12 drugs, to buy the drugs?

13 A. Yes, ma'am.

14 Q. Okay. When you were there after you heard the first
15 shot did anyone in the trailer fire shots?

16 A. No ma'am.

17 Q. No one in the trailer fired any gun shots?

18 A. There were several shots that came, there were
19 several shots that came from outside. There were several
20 shots that came from outside. There were several different
21 shots but the time I came (inaudible) from the back all the
22 shots had already been -- all the shots already been shot.
23 See what I'm saying.

24 Q. Okay. And as soon as the shots were finished, you
25 said you left and Mr. Hartwell was outside?

1 And then you all left together, is that correct?

2 A. Yes, ma'am.

3 Q. Okay. Do you know your projected release date?

4 A. November 26th. I don't know (inaudible) stuff.

5 Q. Okay. By my records, it's April 2025. So you
6 ultimately did plead and get less time than the other co-
7 defendants for your plea?

8 A. Yes, ma'am.

9 COURT REPORTER: I did not hear his answer. I'm sorry, I
10 did not hear his answer to your question.

11 THE COURT: Ask the question again, Ms. Whitehour?

12 Q. During your plea, you ultimately got less time than
13 your other co-defendants who proceeded to trial, correct?

14 A. One of my co-defendants got less time than me.

15 Q. Okay, and Mr. Hartwell got more time than you,
16 correct?

17 A. Yes, ma'am.

18 Q. Okay. And during your plea, do you remember the
19 court asking you about the facts of the case?

20 A. I can't remember exactly, but he did ask about it.

21 Q. And did the court ask you to testify that everything
22 you were stating was true during that plea?

23 A. I can't remember, to be honest.

24 Q. Would you have lied to the plea court?

25 A. Would I have lied to the plea court? At that time,

1 you know, me just getting in trouble, like I said, the
2 detective (inaudible) about me getting a deal if I cooperated
3 or what not so me just getting out of the hot seat I was
4 willing to do anything to try to get the best (inaudible).

5 Q. Even lying to the court to get a better plea deal?

6 A. If I had to lie, I'd have to be in that situation to
7 tell you the truth. I'd have to be in that situation.

8 Q. Beg the court's indulgence?

9 THE COURT: Yes, ma'am.

10 Q. Do you know who called -- going back a little bit,
11 do you know who called Kerry Hollins initially to tell you and
12 Mr. Hartwell, and Mr. Grant where Dexter Perry was? Do you
13 know who called you originally to tell you that information?

14 A. I can't tell you that. I didn't receive a call.
15 (Inaudible) It was Hartwell that received the calls.

16 MS. WHITEHOUR: Okay. Thank you, Your Honor, that's all.

17 THE COURT: Any re-direct Mr. King?

18 MR. KING: Just briefly, Your Honor.

19 **RE-DIRECT EXAMINATION OF KAREEM KING BY ATTORNEY JAMES CRAIG:**

20 Q. So, Mr. King, if I understand what you said on
21 cross-examination, is that you would basically do whatever it
22 took to get a better deal at the time.

23 A. Say that again?

24 Q. I said you would do whatever it took to get a better
25 deal on your sentence at the time you were charged.

1 A. At the time I was charged, yes.

2 Q. You said yes?

3 A. Yes.

4 MR. KING: Okay. Thank you. That's all I have, Your
5 Honor.

6 THE COURT: Anything else from the state?

7 MS. WHITEHOUR: Re-cross, Your Honor?

8 THE COURT: Yes, ma'am.

9 **RE-CROSS EXAMINATION OF KAREEM KING BY MS. WHITEHOUR:**

10 Q. So, you're saying that you may have lied to the plea
11 court, or you would have done anything to get a better plea
12 deal?

13 A. I would have.

14 Q. Okay. And you're not lying today?

15 A. No, ma'am.

16 MS. WHITEHOUR: That's all, Your Honor. Thank you.

17 THE COURT: Thank you, ma'am.

18 MR. CRAIG: Nothing further of this witness, Your Honor.

19 THE COURT: All right.

20 MR. CRAIG: I don't know the status of getting Kerry
21 Hollins available.

22 MS. WHITEHOUR: I believe he's on, Your Honor.

23 LADY SPEAKING: Yes, Your Honor. I believe Ms. Glenda
24 Newton is the person at Turbeville who can help us with
25 getting Mr. Hollins.

1 THE COURT: All right. Ms. Newton, if you'd go ahead and
2 activate your camera for us, please.

3 LADY SPEAKING: I have the number for her, Your
4 Honor. I can call her real quick.

5 THE COURT: All right. Thank you, ma'am.

6 LADY SPEAKING: Your Honor, I'm still trying. I haven't
7 been able to connect to anyone at Turbeville, but I'll keep
8 trying.

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

10 LADY SPEAKING: Okay. Your Honor, Ms. Newton is coming.
11 She should be here in just a second. I think she was -- the
12 computer's in a different room than her office, so she's
13 coming back in.

14 THE COURT: All right. As soon as she gets in front of
15 the computer and gets the witness in front of the computer,
16 we'll get started.

17 LADY SPEAKING: And, I mean, I'll let her explain, Your
18 Honor, but she just told me that that camera does not have --
19 or that computer does not have a camera. So, I don't know if
20 that's going to be a problem for everyone.

21 THE COURT: Who is that speaking, please?

22 MR. HOLLINS: Kerry Hollins.

23 THE COURT: All right. If we could orient that computer
24 a little bit better, so we can see Mr. Hollins' face. There we
25 go. All right, Mr. Hollins, if you could raise your right

1 hand for me, please, sir. Do you swear or affirm any
2 testimony you give this court today to be the truth, the whole
3 truth, and nothing but the truth, so help you (inaudible).

4 MR. HOLLINS: Yes, sir.

5 THE COURT: All right. You can put your hand down. Mr.
6 Hollins, before we get started, based upon the nature of this
7 matter and the exclusions that I have read in this case, it
8 appears that there may be a likelihood or a possibility at
9 least that your testimony here today could potentially put you
10 in a position where you may say something in response to one
11 of the questions that might have the possibility of
12 incriminating you. I want to advise you that you have the
13 Fifth Amendment right to remain silent if any question asked
14 of you you feel will cause you to respond in a way that may
15 incriminate you. And so I want to make that clear. In
16 addition to that, Mr. Hollins, if there are questions which
17 may incriminate you, you have the right to have legal counsel
18 present with you. So my question to you today is you
19 understand that you have the right to assert your Fifth
20 Amendment right against self-incrimination?

21 MR. HOLLINS: Yes, sir.

22 THE COURT: And are you willing to proceed this morning
23 without the benefit of legal counsel?

24 MR. HOLLINS: Yes, sir.

25 THE COURT: All right, is anybody forcing you to testify

1 on this matter?

2 MR. HOLLINS: No, sir.

3 THE COURT: Has anybody promised you anything to get you
4 to testify on this matter?

5 MR. HOLLINS: No, sir.

6 THE COURT: Has anybody threatened or coerced you to
7 get you to testify on this matter?

8 MR. HOLLINS: No, sir.

9 THE COURT: Are you doing this for your own free will and
10 accord?

11 MR. HOLLINS: Yes, sir.

12 THE COURT: All right, I find he has been advised of his
13 Fifth Amendment rights. I find he's made it knowing voluntary
14 and informed waiver of his right to proceed in this matter
15 without the benefit of legal counsel. And he has answered
16 those questions in the affirmative. So we can go forward Mr.
17 Craig. Direct examination.

18 MS. WHITEHOUR: Judge Griffin, I also think we can
19 release Mr. King at this time, if Mr. Craig doesn't object.

20 THE COURT: Mr. Craig, do you have any objection to Mr.
21 King being released?

22 MR. CRAIG: No, Your Honor.

23 THE COURT: All right, Mr. King, you are free to resume
24 your normal activities. Excused from this court. Thank you,
25 sir.

1 COURT REPORTER: And Judge, if we could get the witness
2 to spell his first and last name, please. Thank you.

3 THE COURT: All right, Mr. Hollins, if you would spell
4 for the record your first and last name, please.

5 MR. HOLLINS: Kerry Hollins, K-E-R-R-Y-H-O-L-L-I-N-S.

6 THE COURT: All right, Mr. Hollins, thank you. Direct
7 examination, Mr. Craig.

8 MR. CRAIG: Thank you, Your Honor.

9 **DIRECT EXAMINATION OF KERRY HOLLINS BY ATTORNEY JAMES CRAIG:**

10 Q. Mr. Hollins, I'm James Craig, and you understand I
11 represent Jermaine Hartwell?

12 A. Yes, sir.

13 Q. Okay, and I want to ask you questions today about
14 what happened on the night that Mr. Perry, Dexter Perry, was
15 murdered. Do you recall that night?

16 A. Sir?

17 Q. Do you recall the events of that night?

18 A. Yes, I do.

19 Q. Okay, tell me in your own words what happened that
20 night.

21 A. Well, what happened was, sir?

22 Q. Go ahead, go ahead.

23 A. Well, what happened was on that night, my girlfriend
24 at the time Mojito (inaudible). She called me and told me
25 that she needed some extra cash because she was out eating

1 with her cousin and her friends and from that point, me, and
2 Kareem, we went to go drop the money off to her. So in the
3 process of being able to go drop the money off to her, we
4 ended up seeing Dexter come, and we knew that ---

5 Q. Dexter was (inaudible)

6 A. Yes, we knew that he had already sold some bad drugs
7 to Hartwell, along with a couple of other fellas around my
8 way. So at that time, I called Hartwell and told him, you know
9 what I'm saying, I know where Perry is, you feel what I'm
10 saying, and I went to go pick him up, me and Kareem. Me and
11 Kareem went back on School Avenue, and we picked up Hartwell
12 and Grant, and we went to Goose Creek to go meet Perry and
13 (inaudible) and when we got there, Perry was standing outside
14 with (inaudible) and somebody else I don't know, but from my
15 memory, they got out of the vehicle, and I was trying to find
16 a way to go park the car, but there were so many cars around,
17 they were probably following us. So by the time I did find a
18 way to park, Kareem had called me and told me to meet them
19 inside Lansing because they were all (inaudible) for Perry. By
20 the time I got there to the trailer park in Lansing, I heard
21 the gunshot, and so when I heard the gunshot, I turned around
22 and they followed both of them. Well, I did a wrong pick.
23 Hartwell, Grant, (inaudible) from the highway going back onto
24 the avenue.

25 Q. When you picked them up, was it a Hartwell shot, had

1 he been shot?

2 A. Yeah, he'd been shot in the chest and in his hand.
3 Or his wrists or something like that.

4 Q. So when you picked them up, where did you go?

5 A. To a female house that I was sleeping with at the
6 time. Okay, and did she bandage Hartwell's wounds?

7 A. Yes, she did.

8 Q. At any time, did you go into the trailer where he
9 was murdered?

10 A. You said what?

11 Q. Did you, yourself, ever go into the trailer?

12 A. No, I never got out of the car, because by the time
13 I got there, I already had heard the gunshot.

14 Q. You said you heard the gunshot. You never went to
15 the trailer?

16 A. No, I never made it to the trailer.

17 Q. Was there ever a plan for you and Hartwell, Grant,
18 and Kareem King to rob Dexter Perry?

19 A. No, no, sir. There was never a plan to rob anybody.
20 We were just trying to figure out the deal right there that we
21 hadn't found.

22 Q. So what was the purpose in meeting with Perry?

23 A. The purpose of meeting with Perry was to give us
24 more drugs.

25 Q. To get Hartwell's drugs, and were you going to buy

1 drugs as well?

2 A. We were just trying to get the whole deal, correct.

3 Q. I see.

4 A. There was no need to buy all those drugs, because we
5 already know they were bad drugs. We were just trying to get
6 that up on him more, but I wasn't.

7 Q. Now, you testified at the trial, Mr. Hartwell's
8 trial, did you not?

9 A. Correct.

10 Q. Okay, and the testimony you gave at the trial was
11 different than what you said today, is that correct?

12 A. Yes.

13 Q. Okay, is what you're telling the court today the
14 truth?

15 A. Yes, it is.

16 Q. Can you tell me why you testified differently at the
17 trial?

18 A. Well, I was young at the time, I was afraid, and I
19 was being pressured by detective (inaudible).

20 Q. Detective who?

21 COURT REPORTER: Yeah, pressured by who?

22 A. (Inaudible)

23 COURT REPORTER: I still didn't understand the name.

24 A. Detective (Inaudible).

25 Q. Merasey?

1 A. Merathew. He was a detective on our (inaudible).

2 Q. Okay, and how was he pressuring you?

3 A. I mean, he basically was telling me, like, you know,
4 you better cooperate with us, or we're going to put you in
5 jail for the rest of your life. You know what I'm saying? And
6 I was scared at the time. I didn't know what to do.

7 Q. How old were you then?

8 A. I was, like, 19.

9 Q. And what kind of sentence did you get?

10 A. 18 years.

11 Q. 18. Okay. All right. And nobody's promised you
12 anything for your testimony today, is that correct?

13 A. No, sir.

14 Q. You're doing this freely and voluntarily?

15 A. On my free will.

16 MR. CRAIG: Thank you. Answer any questions the state
17 has for you.

18 **CROSS EXAMINATION OF KERRY HOLLINS BY MS. WHITEHOUR:**

19 Q. Good morning, Mr. Hollings.

20 A. Good morning.

21 Q. I'd first like you to tell me if you know your
22 projected release date?

23 A. I'm sorry?

24 Q. Your parole date.

25 A. I believe sometime in 2023. Does March 2023 sound

1 correct?

2 A. Yes, ma'am.

3 Q. All right. At trial, you were a state's witness,
4 cooperating witness, correct?

5 A. Correct.

6 Q. And did you testify at trial that Marquita called
7 you saying she got a lick?

8 A. I can't remember exactly what I said.

9 Q. What do you understand a lick to mean?

10 A. A robbery.

11 Q. Okay. Do you remember testifying at trial that you
12 were with Grant, King, and Hartwell when plans were being made
13 for this lick?

14 A. I can't. Can you repeat the question, please?

15 Q. Do you remember testifying at trial that you were
16 with Grant, King, and Hartwell when plans were being made for
17 this lick or robbery?

18 A. I mean, I don't remember that because there was
19 never no plans for a robbery to happen. It was always about
20 drugs at the beginning.

21 Q. Do you remember testifying to that at trial,
22 though?

23 A. No, ma'am, I don't.

24 Q. Okay. Did you have a weapon on you that night?

25 A. No, ma'am.

1 Q. Okay. And you just testified that Marquita was
2 providing the information about Mr. Perry, correct?

3 A. No, ma'am, I didn't say that.

4 Q. Can you repeat what you said?

5 A. I said that they was out to eat, and she called me
6 and told me that she needed some money, and could I bring her
7 the money.

8 MS. WHITEHOUR: I beg the court's indulgence for a
9 moment, Your Honor.

10 THE COURT: Yes, ma'am.

11 Q. Okay. Do you remember giving a statement on August
12 4th of 2006?

13 A. Uh, briefly.

14 Q. Okay. And does this look like your handwriting?

15 A. No, ma'am, it's not my handwriting.

16 Q. Okay. Did the detective write this for you?

17 A. Yes, ma'am, he wrote everybody's statement.

18 Q. Okay. Is that your signature there?

19 A. Yes, ma'am.

20 Q. Okay. Do you remember telling the detective that
21 Marquita called me one day and said she had a lick?

22 A. To be honest with you, when I was being questioned,
23 it really ain't but so much that I remember, because I already
24 had, like, three, four days on drugs and stuff like that, and
25 I feel like, and I feel like, you know, that would cause a lot

1 of confusion inside of my statement that I never (inaudible).

2 Q. Okay. You said you were present at the trailer when
3 shots were fired, correct?

4 A. Yes, ma'am.

5 Q. Okay. And Mr. Hartwell was shot?

6 A. Yes, ma'am. By the time I got out of that
7 (inaudible) on the highway I seen that was was shot.

8 Q. So you were at the trailer when the shooting
9 occurred, or you were not at the trailer?

10 A. I was actually pulling up beside the trailer park at
11 the main entrance.

12 Q. And you heard gunshots and left?

13 A. Yes, ma'am.

14 MS. WHITEHOUR: Beg the court's indulgence for a moment.

15 THE COURT: Yes, ma'am.

16 MS. WHITEHOUR: That's all, Your Honor.

17 THE COURT: All right, thank you, ma'am. Any re-direct,
18 Mr. Craig?

19 MR. CRAIG: No, Your Honor.

20 THE COURT: All right, any objection to this witness
21 being excused for this matter?

22 MR. CRAIG: No, Your Honor.

23 MR. WHITEHOUR: No, Your Honor.

24 THE COURT: All right, Mr. Hollins, you are excused for
25 this matter.

1 MS. WHITEHOUR: Your Honor?

2 THE COURT: Yes, ma'am.

3 MS. WHITEHOUR: Ms. Newton, I'll call her and remind her.
4 We have another hearing for co-defendant Marquita Smith at
5 11:30. I'll make sure she knows.

6 THE COURT: All right. Mr. Craig, do you have any more
7 witnesses for us today, sir? Mr. Craig?

8 MR. CRAIG: That's all the witnesses I have, Your Honor.

9 THE COURT: All right. I have some argument, but I will
10 wait to see if the state has any witnesses.

11 THE COURT: All right. Ms. Whitehour?

12 MS. WHITEHOUR: Yes. The state would call Elliot
13 Barnwell.

14 THE COURT: All right. Mr. Barnwell, could you raise
15 your right hand for me, sir? You swear or affirm any testimony
16 you give this court today to be the truth, the whole truth,
17 and nothing but the truth, so help you God?

18 MR. BARNWELL: I do.

19 THE COURT: All right, thank you, sir. You can put your
20 hand down. Ms. Whitehour?

21 **DIRECT EXAMINATION OF ELLIOTT BARNWELL BY MS. WHITEHOUR:**

22 Q. Good morning, Mr. Barnwell.

23 A. Good morning.

24 Q. How long have you been practicing law, sir?

25 A. Since 1971.

1 Q. And how much of that has been criminal?

2 A. Probably 25 or 50 percent of it.

3 Q. Okay. Do you remember whether you were appointed or
4 retained in this case?

5 A. I was appointed.

6 Q. You were appointed?

7 A. Yes, ma'am.

8 Q. Do you remember what type of investigation you did
9 for this case?

10 A. I talked to Mr. Hartwell. I don't believe he
11 mentioned any other witnesses or anyone else that I need to
12 investigate. I think going to see Mr. Hartwell on numerous
13 occasions was the extent of my investigation.

14 Q. And it was Mr. Hartwell's decision to proceed to
15 trial?

16 A. That's correct.

17 Q. And to clarify, he did not tell you to call Kerry
18 Hollins or Kareem King as witnesses?

19 A. He did not, no.

20 Q. What was your understanding of the facts of the case
21 at the time?

22 A. My understanding of the case was that Mr. Hartwell
23 was involved in an armed robbery. There were numerous other
24 charges, including murder, kidnapping. And Dexter Perry was
25 the victim. Mr. Hartwell maintained that he did not

1 participate in any robbery. He said he got some bad goods from
2 Dexter Perry and wanted to make it right, wanted to have this
3 discussion with him. My review of the testimony of Mr.
4 Hollins, he agreed that Mr. Hartwell wanted to get straight to
5 bad drugs and did not participate in any armed robbery. But
6 later, I think in response to the Jennings cross-examination,
7 that he saw Mr. Hartwell with a pistol and loading it, and
8 that Mr. Hartwell was involved in this robbery.

9 Q. Okay. And do you remember reviewing discovery with
10 Mr. Hartwell?

11 A. I -- yeah, I did. I did do that. I would have gone
12 over the discovery materials.

13 Q. So you would have been provided with Kerry Hollins'
14 statement to police?

15 A. I believe so. But this file has long since been
16 destroyed since it's a long period of time to me when I first
17 represented Mr. Hartwell, so I don't have any independent
18 notes or too much independent recollection either. It's been a
19 long, long period of time.

20 Q. But you would have been provided a witness list?

21 A. Yes, yes, Your Honor. I mean yes, ma'am.

22 Q. And do you remember if Kerry Hollins and Kareem King
23 were on that witness list?

24 A. Mr. Hollins testified, but the other witness that I
25 understand is involved in this, in this request for

1 reconsideration did not testify. He was apparently was
2 available and willing to testify, but he was not called as a
3 witness.

4 Q. And as you mentioned, Mr. Hartwell's theory of the
5 case was that there were bad drugs involved and he went to go
6 get good drugs to replace those. Was that your overall theory
7 of the case and strategy?

8 A. That was my overall theory of the case and strategy.
9 At some point in time, during the trial, Mr. Hartwell decided
10 not to testify. He originally said he was going to testify,
11 but he decided not to testify. So he did not testify. He made
12 a plea to the judge for a lesser sentence, but he did not
13 testify in trial.

14 Q. And you would have discussed this theory with Mr.
15 Hartwell?

16 A. I did discuss the theory. My usual practice was to
17 warn my clients that if he had a criminal record, the jury
18 would become aware of that if he testified. And I'm not sure,
19 since I don't have my file, that he did, but I think he did
20 have a prior criminal record. My practice would have been to
21 warn him that the jury could have found out what his prior
22 criminal record was.

23 Q. And you also would have discussed his right to
24 testify?

25 A. I would have, yeah, absolutely, yeah. He asked

1 (inaudible) at some point in time during the trial that he
2 decided to change his mind. Throughout my representation to
3 him until the time of trial, he said he was going to testify.
4 And he changed his mind during the trial and decided not to
5 testify.

6 Q. Do you remember objecting at any time during this
7 trial?

8 A. I would have objected. I'm sure I objected to some
9 of the state's exhibits. They were very -- I thought they were
10 prejudicial exhibits, including photographs of bloody
11 mattresses and things like that. And I'm sure I objected to
12 other things as well. But I don't have any further
13 recollection of what that would have been.

14 Q. Do you remember a witness testifying that quote-
15 unquote, Manny did it?

16 A. I reviewed Mr. Hollins' testimony, and he did agree.
17 I mean, he said that he knew Jermaine Hartwell as Manny and
18 said Manny did participate in this robbery, murder, and
19 kidnapping charges as well.

20 Q. Okay. Do you have a copy of the record handy or on
21 your computer?

22 A. I do have it. I got a printout of it. I don't have
23 it handy. Could you turn to page 249 for me? I'm going to have
24 to leave and come back. Let me see if I can do that.

25 THE COURT: If you can go retrieve it, Mr. Barnwell,

1 we'll stand at ease until he returns.

2 MR. BARNWELL: Thank you, Your Honor. Let me find page
3 249, Your Honor. All right, I'm at page 249.

4 THE COURT: Whenever -- you were on mute, you probably
5 need to start over with that last question.

6 A. Okay, I'm on page 249, Your Honor.

7 A. Do you remember objecting to Chris Nelson's
8 testimony on page 249? I would refer you to lines 21 on page
9 250.

10 A. I don't have any recollection, but I will say that's
11 in the transcript, yes.

12 Q. Okay. And what was the statement that you were
13 objecting to?

14 A. He said that Manny did it.

15 Q. And ultimately, Judge Jefferson found that that was
16 a dying declaration admissible, correct?

17 A. Correct.

18 Q. Okay. I beg the court's indulgence for a moment.

19 THE COURT: Yes, ma'am.

20 Q. Okay, can you go to page 320 for me?

21 A. Okay.

22 Q. Okay. And on 320, do you remember Joe, I believe
23 his name is Husser, identifying Manny as the shooter as well?

24 A. I don't have any recollection, but I am referring to
25 the transcript.

1 Q. So if you move to page 321, and you go to line 21,
2 can you read for me what that says?

3 A. Line 21 says, and who did he ask to see if he
4 recognized?

5 Q. And line 22?

6 A. A guy named Manny.

7 Q. And that was following a photo line-up, correct?

8 A. Yeah.

9 Q. Okay, can you go to page 175, I believe? I'm trying
10 to find it.

11 A. Okay, I'm at page 175.

12 Q. Okay, and can you read lines 21 through 25?

13 A. Okay, line says -- line 21, the heavy set, dark
14 skinned one, he drugged Dexter back there. A question, the
15 light skinned, did you ever hear him called a light skinned
16 fellow by name? 24, Manny. 25, okay, you heard him say Manny.

17 Q. And was that during direct examination of O'Donnor
18 Cobb?

19 A. Yes, it was.

20 Q. So O'Donnor Cobb identified Manny as one of the
21 persons in the house, or Jermaine Hartwell also known as
22 Manny, correct?

23 A. Yeah, that's correct, Your Honor.

24 Q. Okay. So multiple people heard the victim say Manny,
25 and one also ID'd him from a line-up, correct?

1 A. That's correct, Your Honor.

2 COURT REPORTER: I'm sorry, Mr. Barnwell, please repeat
3 your last answer, you were breaking up just a little bit.

4 A. I just said, that's correct, with (inaudible), my
5 last answer.

6 MS. WHITEHOUR: Nothing further, Your Honor.

7 THE COURT: Thank you, Ms. Whitehour. Mr. Craig, cross
8 examination.

9 MR. CRAIG: Thank you, Your Honor.

10 **CROSS EXAMINATION OF MR. BARNWELL BY ATTORNEY JAMES CRAIG:**

11 Q. Mr. Barnwell, I'm James Craig. I represent Ms.
12 Hartwell. Do you recall a testimony of Chris Nixon in this
13 trial?

14 A. I don't have much recollection of testimonies from
15 quite some time ago. Essentially, I did review the testimony
16 with the Hollins, but I really haven't reviewed too much else
17 in the transcript.

18 Q. Let me see if I can refresh your memory, and you've
19 got the transcript in front of you there as well. Chris Nelson
20 was the man who went and got a pistol, a .38 caliber revolver
21 from other people at the trailer park, and came and he's the
22 one who shot Hartwell. Do you recall that?

23 A. I remember Hartwell was shot in the chest, and I'd
24 have to look at the transcript, but it was likely that Chris
25 Nelson did do that, or was referred to the person who did

1 that.

2 Q. Let me refer you first to page 245 of the
3 transcript. On page 2, that's Chris Nelson's testimony,
4 correct?

5 A. Right.

6 Q. And this is cross-examination, excuse me, direct
7 examination. And I refer you to line 11. What does that say?

8 A. It says, all right, what did you do after you saw
9 this person trying to go into your house?

10 Q. Continue reading.

11 A. I fired. Question, you fired once. Answer, I fired
12 my firearm. Question, okay. Who did you shoot at? Answer, I
13 tried to shoot the person walking in, walking inside the
14 house. Yes, you know.

15 Q. You can stop there.

16 A. Okay.

17 Q. All right, now let me ask you to take a look at page
18 260. Do you have that page?

19 A. Yeah, I do.

20 Q. Okay, let me direct your attention to line 8.

21 A. Okay, question, okay, who you shot at? An unarmed
22 man who was walking into the house, rather than somebody
23 that's holding your best friend in his room. You shoot at the
24 other man going into the house.

25 Q. Continue.

1 A. Answer, I had to run past him first. Question, huh?
2 Answer, if I was going in my house, I had to run past him
3 first. Question, well, what did you think would happen when
4 you opened up with a five-shot .38? What did you think was
5 going to happen? You got you -- you testified you had the man
6 holding your -- well Manny holding your best friend and you
7 take a pop shot at the guy walking into your house. Answer,
8 yes, sir.

9 Q. That's good. That's fine, Mr. Barnwell. So, the
10 person-- Hartwell was the one that got shot, and he got shot
11 outside the (inaudible), correct?

12 A. I'm assuming that's true, yes, Your Honor. Yes,
13 sir.

14 Q. And Chris Nelson is the one that shot him?

15 A. Right.

16 Q. So, Mr. Hartwell testified that he never went inside
17 the trailer and that would be corroborated by Chris Nelson's
18 testimony, would it not?

19 A. Yeah.

20 Q. Okay.

21 MR. CRAIG: All right. That's all the questions I have
22 for you, Mr. Barnwell. Thank you.

23 MS. WHITEHOUR: Redirect, Your Honor.

24 THE COURT: Yes, ma'am.

25 RE-DIRECT OF MR. BARNWELL BY MS WHITEHOUR:

1 Q. Was it ever confirmed that Nelson hit Hartwell
2 during trial?

3 A. I'm not, I don't know, Your Honor. I don't know. I
4 do know that he was shot, and apparently was -- they tried to
5 patch him up, but I don't know. I'm not sure at who shot him?

6 Q. Okay. And as discussed earlier, Joe Husser did ID
7 Manny as being in the house with a gun.

8 A. Yes, he did.

9 MS. WHITEHOUR: I beg the court's indulgence.

10 THE COURT: Yes, ma'am.

11 MS. WHITEHOUR: I think that's all, Your Honor. Thank
12 you.

13 MR. BARNWELL: Thank you.

14 MR. CRAIG: Nothing further, Your Honor, of this witness.

15 THE COURT: All right. Ms. Whitehour?

16 MS. WHITEHOUR: Briefly, in closing, there are multiple
17 inconsistencies, not only between the testifying witnesses
18 today stories, where the shots happened, where they were when
19 the shots happened, who was driving, who told them about
20 Perry, etc., but also inconsistencies between Mr. Hollins
21 testimony at trial and his testimony today. Furthermore, Mr.
22 King testifies today that he would have done and said anything
23 at his plea deal, and again proves that he would have said
24 anything at his plea deal, and also that he could have lied
25 during that time. There were multiple victims that ID'd Manny

1 as the shooter. There were four victims, including a
2 detective, that heard this dye declaration from the victim
3 that Manny was the shooter. Joe is inside, the witness at the
4 trial, testifying witness Joe Husser, and he ID'd Manny from a
5 lineup and also testified that Manny was the one inside the
6 room with Mr. Perry. O'Donner, also a witness inside the home,
7 heard one of the other people calling out to Manny as the man
8 with the gun. And lastly, I'd like to direct your honor to a
9 site. It's State v Porter, 269 SC 618 and its progeny cases
10 find that recantation of testimony ordinarily is unreliable
11 and should be subjected to the closest scrutiny when offered
12 as grounds for a new trial. Thank you, Your Honor.

13 THE COURT: All right. Thank you, ma'am. Mr. Craig, be
14 happy to hear from you.

15 MR. CRAIG: Yes, your honor. May I please the court. I
16 could agree with Ms. Whitehour in one respect, and that is
17 that there are multiple inconsistencies in this case. And from
18 what I perceive, not having been at the trial and reading the
19 record and hearing from these witnesses that I've interviewed,
20 is that there was considerable pressure being applied by the
21 detectives to get testimony to go the way they wanted it to
22 go. But there's one thing that is pretty crystal clear to me,
23 and that is that Mr. Hartwell never went inside that trailer.
24 He's testified, as the others did, that he didn't go inside.
25 And when they got there, he was looking for his cell phone,

1 and by the time he decided to go inside, that's when Chris
2 Nelson came up, who, and by the way, I'm sure Your Honor's
3 read the record, but Chris Nelson was somebody who was living
4 in the trailer who was also a drug dealer, who admitted a drug
5 dealer. And that he went racing to some other people at the
6 trailer park and grabbed this .38 revolver from somebody,
7 which sounds a little odd to me, but he grabbed the .38
8 revolver from some person, came back, and shot Hartwell
9 outside the trailer. So that's clear confirmation that Mr.
10 Hartwell was never inside the trailer. And as far as this
11 dying declaration, obviously there's no recording of that
12 declaration. Nobody knows exactly what he was saying, and Mr.
13 (inaudible) could have just been mumbling. Who knows what he
14 was saying? But it's got twisted around to where it was Manny.
15 Well, Manny is, no question about that, is Jermaine Hartwell,
16 but Jermaine Hartwell never went inside the trailer. And if he
17 never went inside the trailer, he could not have been the one
18 to shoot Dexter Perry. Your Honor, I would submit that the
19 person that actually shot Dexter Perry with a .38 caliber
20 revolver was Chris Nelson. He peeked in the window and saw
21 that there were other people there. He went and got a gun,
22 came back, shot Jermaine Hartwell, shot inside the trailer,
23 and then later threw the gun away. Certainly, if Mr. Hollins
24 had not testified the way he did at trial, and Mr. King had
25 testified like he testified today, and Mr. Hartwell had

1 testified, I think it's very likely there would have been a
2 different outcome. And I think that the problem here was that
3 the investigating officers were putting a tremendous amount of
4 pressure on witnesses to testify in the way they wanted to
5 testify. I know that's not unusual, Your Honor, but in this
6 case, I think it's resulted in a huge miscarriage of justice.
7 And Mr. Hartwell never was part of any kind of plan to rob
8 Dexter Perry. All he wanted to do is to get credit for or get
9 more drugs for what he purchased. Now, certainly that's not a
10 stance for someone. He's not an angel, let's put it that way.
11 Mr. Hartwell was buying drugs, and so his reason for being
12 with Mr. Perry was maybe not that honorable, but it was not to
13 rob him, and it certainly was not to murder him. And the fact
14 that he never went inside the trailer contradicts that he
15 could have been the one that shot Dexter Perry. And I submit,
16 Your Honor, that the dying declaration was simply an
17 utterance, of mumbling. And, Your Honor, I think that he's
18 certainly entitled to a new trial. And I would ask the court
19 to, in particular, read the testimony of Chris Nelson, which
20 is in the record. Because I think the testimony of Chris
21 Nelson is very enlightening as to what happened there that
22 night. That's all I have, your honor.

23 THE COURT: Thank you, Mr. Craig.

24 MS. WHITEHOUR: Your honor, if I could respond briefly.

25 THE COURT: Yes.

1 MS. WHITEHOUR: I feel that Mr. Craig has misrepresented
2 the testimony today. Mr. Hartwell himself said that he was
3 inside the trailer, and he testified to that today, which is
4 one of the inconsistencies that I pointed out earlier.
5 Additionally, I'd like to reiterate that the two witnesses
6 received deals for involvement in these crimes, and they are
7 about to be released. This trial was in 2007. They are about
8 to be released in a couple of years here, and now they are
9 recanting. So I would like to add that on that note. Thank
10 you, Your Honor.

11 THE COURT: All right. Thank you.

12 MR. CRAIG: Your Honor, I do have one thing to add, and
13 that is Mr. Hartwell did not testify that he was inside the
14 trailer. He testified he was never inside the trailer.

15 THE COURT: Anything else, Mr. Craig?

16 MR. CRAIG: That's all, Your Honor.

17 THE COURT: All right. I will take this matter under
18 advisement. Obviously, there's a lot to digest here, and I
19 will issue an opinion via a memo. I will e-mail to the
20 parties and ask that the prevailing side draft a formal order,
21 and I will send that memo out no later than September 24th,
22 which is a Friday. You will have my response by then. As far
23 as this matter is concerned, we are adjourned. I believe the
24 next matter is scheduled to begin at 1130, and we will start
25 at that time.

1 MR. CRAIG: Your Honor, one question.

2 THE COURT: Yes, sir.

3 MR. CRAIG: The next matter, I think, is a co-defendant
4 of Mr. Hartwell's. Could I be permitted to join that for
5 observation?

6 THE COURT: Yes, sir. You -- anybody -- this virtual
7 courtroom is open to anybody who is interested. Certainly,
8 with your connection to the co-defendant's case, I wouldn't
9 keep anyone from observing the proceedings in that matter. Mr.
10 Craig, you're welcome to stay on and review or listen to the
11 testimony in that matter as well.

12 MR. CRAIG: Thank you, Your Honor.

13 THE COURT: All right. We'll be in recess until 11:30.

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1 CERTIFICATE OF TRANSCRIBER

2

3 I, **SANDRA ALLEN**, a court-approved transcriber, do hereby

4 certify that the foregoing is a true, accurate, and complete

5 Transcript of Record of the proceedings had and evidenced

6 introduced in the trial of the captioned case, relative to

7 appeal, in the **Common Pleas of Berkeley County, South**

8 **Carolina, on the 7th day of September, 2021.**

9

10 I do further certify that I am neither of kin, counsel,

11 nor interest to any party hereto.

12

13 November 13, 2025

14 *Sandra Allen*

15 _____

16 Sandra Allen, Transcriber

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STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

Jermaine Hartwell, SCDC #323738,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2018-CP-08-021

ORDER OF DISMISSAL

LEAH C. DUFFY
CLERK OF COURT
BERKELEY COUNTY, SC

2022 FEB 14 PM 3:08

FILED

[Signature]

This matter comes before this Court by way of a post-conviction relief (PCR) action commenced by retained counsel, James P. Craig, Esquire, on behalf of Applicant Jermaine Hartwell on October 23, 2018.

A hearing into the matter was convened before the undersigned on September 7, 2021, virtually, via Cisco WebEx Meetings. Applicant was present and represented by James P. Craig, Esquire. Assistant Attorney General Samantha J. Weidauer represented the State. Applicant testified on his own behalf at the hearing, as did inmates Kareem King and Kerry Hollins. Applicant's trial counsel, N. Elliott Barnwell, Esquire, also testified.

In addition to the pleadings in this action, this Court had before it a copy of the Berkeley County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; records from Applicant's direct appeal, including the trial transcript; and Applicant's prior post-conviction relief record challenging these convictions.

After hearing the testimony at the PCR hearing and a full review of the record, this Court finds Applicant's allegations regarding newly-discovered evidence are without merit. Therefore, for the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

Copies sent to S. Weidauer, S. McClary, J.P. Craig, Cat. copy

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections. During its February 2007 term, the Berkeley County Grand Jury indicted Applicant for murder (2007-GS-08-00312); armed robbery (2007-GS-08-00313), two counts of first degree burglary (2007-GS-08-00342;-00345); and four counts of kidnapping (2007-GS-08-00308;-00309;-00310;-00311). On August 27, 2007, Applicant and two co-defendants, Gary Grant and Marquita Smith, proceeded to a jury trial before the Honorable Deadra Jefferson. N. Elliott Barnwell, Esquire (Counsel), represented Applicant. Blair Jennings and Scarlett Wilson of the Ninth Circuit Solicitor's Office prosecuted the case. On August 30, 2007, the jury found Applicant guilty as indicted. Judge Jefferson sentenced Applicant to concurrent sentences of thirty years' imprisonment for each charge.

Applicant filed a timely notice of appeal. Chief Appellate Defender Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense perfected Applicant's appeal by filing an *Anders*¹ brief and a petition to be relieved as counsel with the Court of Appeals on the following issue:

- I. The trial judge committed reversible error by denying Hartwell's motion to sever his case from Grant and Smith's.

The Court of Appeals dismissed the appeal. *State v. Hartwell*, Op. No. 2010-UP-036, (S.C. Ct. App. filed January 26, 2010). The case was remitted back to the circuit court on February 11, 2010.

On July 6, 2010, Applicant filed his first post-conviction relief action, alleging the following grounds for relief:

¹ *Anders v. California*, 386 U.S. 738 (1967).

1. Ineffective assistance of trial counsel in that counsel:
 - a. Failed to object to Mr. Bolus' improper religiously tinged closing argument;
 - b. Failed to object to improper closing argument of Mr. Bolus and the solicitor that impermissibly invoked the "Golden Rule";
 - c. Failed to object to trial court's comments during jury charge that impermissibly commented on the facts of the case;
 - d. Failed to object to trial court's malice instructions that shifted the burden of proof; and
2. Denial of due process.

Respondent filed its return on October 26, 2010. An evidentiary hearing was held on July 12, 2011. On August 15, 2011, the Honorable Kristi L. Harrington, issued an Order of Dismissal denying and dismissing the application with prejudice.

On October 23, 2018, Applicant, through counsel, submitted this second post-conviction relief application in which he requested relief based on newly-discovered evidence. Respondent filed its return and moved to dismiss the application as untimely because it was filed after the statute of limitations had expired and because it was successive to Applicant's prior post-conviction relief action. A proposed conditional order of dismissal consistent with Respondent's return and motion to dismiss was concurrently submitted for the Court's consideration with its return. The Conditional Order of Dismissal was signed by the Honorable Roger M. Young, Sr. on March 14, 2019, and was filed on March 21, 2019. On April 2, 2019, Applicant filed "Applicant's Reply to State's Return & Motion to Dismiss & Conditional Order of Dismissal". Thereafter, on May 9, 2019, Judge Young filed an Order Granting Applicant's Motion to Reconsider and requested Respondent set the motion for a hearing. The motion was set for a hearing before the Honorable Perry H. Gravely on December 9, 2020, via WebEx. Judge Gravely found Applicant had provided enough *prima facie* evidence to overcome Respondent's motion to dismiss and therefore, by Order dated December 30, 2020, and filed, January 6, 2021, vacated the Conditional Order of Dismissal and denied Respondent's motion to dismiss the application.

Judge Gravely further ordered Applicant's second PCR application be set for an evidentiary hearing.

II. Issues Before This Court

In the instant application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on:

1. "New, after discovered evidence: Recantation of testimony of State's witness, Kerry Hollins (see attached affidavit)" and
2. "New, after discovered evidence of State's cooperative witness, Kareem King (see attached affidavit)"².

To the extent the allegations set forth in Applicant's application can be construed as separate grounds for relief from the grounds stated at the PCR hearing, the Court finds those claims were voluntarily waived and abandoned, and those claims are therefore denied and dismissed with prejudice. S.C. Code Ann. § 17-27-90.

III. Testimony Presented at Evidentiary Hearing

Applicant's Testimony

At the evidentiary hearing, Applicant testified that Kareem King (King), Gary Grant (Grant), Kerry Hollins (Hollins), and himself went to see Dexter Perry (Victim) on the night of the incident because Victim had previously sold Applicant "bad drugs". Applicant indicated Victim had been avoiding him. Applicant testified Hollins, a friend of his, received a phone call the night of the incident and was told where Victim was located. Applicant testified Hollins then drove King, Grant, and himself to an apartment complex in Goose Creek, where the four of them sat in a parking lot and waited for Victim. Applicant testified that though he wanted to get paid for the "bad drugs" Victim had previously sold him, he never intended to rob Victim.

² Both allegations alleged in Applicant's application for post-conviction relief indicate, "see attached affidavit". Two affidavits were affixed to the application for post-conviction relief: one affidavit from Kerry Hollins and one affidavit from Kareem King.

Applicant testified Victim came out of an apartment to speak with him before attempting to run back into the apartment again; however, Victim was locked out. Thereafter, Applicant stated Victim agreed to give him drugs to replace the "bad drugs" Victim had previously sold him. Applicant testified Victim indicated they needed to go elsewhere to pick up the drugs owed to Applicant. At the hearing, Applicant stated Victim said, "I got you, ride with me," when asked how Victim agreed to give Applicant drugs. Applicant testified he told Victim he would drive them to pick up the drugs because he didn't want anything crazy to happen. Applicant stated Grant, King, Victim, and himself got into Victim's car and thereafter, Victim gave him directions to a trailer park in Summerville. According to Applicant, when they arrived at the trailer park, Victim and Grant began arguing and Grant told Victim to go to the trailer to get the money and drugs.

Applicant testified that while Victim went into the trailer, he remained outside because he was looking for his cell phone. Applicant alleged he was still at the car looking for his phone when he heard a noise, looked up, and saw someone. Applicant testified Chris Nelson (Nelson) approached him and shot him. Applicant stated he did not have a gun when he was shot by Nelson. According to Applicant, following the shooting, he fled the scene and Hollins picked him up and took Applicant to his girlfriend's house. Applicant testified his girlfriend patched up the gunshot wound on his chest. When asked why police were not called as a result of his gunshot wound, Applicant indicated he made the decision not to call the police.

When asked about his trial and whether he requested King and/or Hollins be called as witnesses, Applicant testified he did not request trial counsel call King or Hollins as defense witnesses because he did not know if they would have been willing to testify. Applicant noted both King and Hollins received a time cut for cooperating with the State. Applicant additionally

conceded he did not believe co-defendants' testimony would have been helpful at trial because at the time of trial he believed co-defendants were going to take their deals and testify for the State. When asked whether it was his decision not to testify at trial, Applicant conceded he alone chose not to testify at trial. Applicant further testified that the trial court Judge told him he could testify and tell his version of the events should he wish. Applicant stated he was nervous and therefore chose not to testify. Applicant stated he now believes he should have testified at trial.

Witness Kareem King's Testimony

Before Kareem King testified, Respondent requested this Court apprise him of the possible consequences and ramifications of his anticipated testimony and ask whether he wanted counsel appointed on his behalf. Following questioning, this Court found King had been thoroughly advised of his rights and had made a voluntary and informed decision to proceed without counsel.

King testified he and Hollins were together when Hollins received a phone call regarding Victim's location. King testified he did not remember who called Hollins. King further testified he knew Applicant and Victim had some dealings they were trying to correct – Applicant intended to get replacement drugs from Victim from a “bad deal”. King testified that after Hollins received the call, he and Hollins picked up Applicant and Grant and went to an apartment complex in Goose Creek. King testified that when they arrived, Applicant and King got out of the vehicle to talk to Victim. King stated Victim began running back towards the apartment. According to King, at some point, Applicant and Victim began “tussling” and needed to be broken up. King stated that Victim and Applicant spoke more after the scuffle occurred and subsequently, Victim told Applicant they had to go to a different location to get the drugs. King

also testified they never intended to rob the Victim. Rather, King, Hollins, Grant, and Applicant merely wanted to buy drugs from Victim.

King testified Applicant drove Victim's car to a secondary location while Victim told Applicant where to go. On cross-examination, when asked why Applicant drove, King stated Applicant drove because Victim was nervous. King indicated Victim was so nervous he could not get the keys inside the car to unlock it. King further testified that once they arrived at the secondary location – the trailer park – Victim began stalling. When questioned whether Applicant went inside the trailer, King testified Applicant did not. King testified Applicant was shot outside and indicated no one in the trailer ever fired shots. King testified that following the shooting, Hollins came to pick Applicant up.

Regarding King's anticipated testimony at trial, King testified he was on the State's list of witnesses at Applicant's trial³. King conceded that his testimony at Applicant's evidentiary hearing was different than it would have been at trial. King reasoned the difference in testimony was because he was told by a detective that should he testify favorably for the State, the detective would talk to a solicitor to make sure he got a good deal. King stated he ultimately pled guilty as a result of his involvement in these crimes and that his projected release date is April 2025. King testified that at the time of his plea he was scared and willing to do anything to get a shorter sentence – even lie to the plea court.

Witness Kerry Hollins' Testimony

Before Kerry Hollins testified, Respondent requested this Court apprise him of the possible consequences and ramifications of his anticipated testimony and ask whether he wanted counsel appointed on his behalf. Following questioning, this Court found Hollins had been

³ Though King was on the State's witness list at Applicant's trial, King was not called to testify.

thoroughly advised of his rights and had made a voluntary and informed waiver to proceed without counsel.

Hollins testified that on the night of the incident Marquita Smith, his girlfriend, called him and told him she needed money. Hollins stated that when he arrived at Marquita's location to drop off money for her, he saw Victim and recognized Victim as having previously sold "bad drugs" to Applicant. Thereafter, Hollins testified he called Applicant and told him he knew where Victim was. Hollins testified that following the call, he and King picked up Applicant and Grant and drove to Goose Creek to meet up with Victim and Smith. Hollins indicated that the purpose of the meeting with Victim was so that Victim could replace the "bad drugs" he had previously sold Applicant. Hollins testified that when they arrived, Victim was standing outside with Smith and another female. Hollins stated Grant, King, and Applicant got out of the car he was driving to speak with Victim while he went to park. Hollins further testified that by the time he found somewhere to park the car, King called him and told him they had left the apartments.

Hollins testified when he got to the trailer park he heard gun shots, turned around, and drove away. Hollins stated he later picked up Applicant who was shot in the chest and hand and took Applicant to his girlfriend's house. Hollins stated that Applicant's girlfriend bandaged his gunshot wounds.

Hollins conceded his testimony at Applicant's trial differed from what he testified to at the evidentiary hearing. When questioned about a statement he made to the Berkeley County Sheriff's Office on August 4, 2006, Hollins testified the statement was not written in his handwriting, that the detective who took his statement wrote the statement, and that the statement had been coerced. Hollins conceded that his signature on the statement. However, Hollins testified he did not remember making the statement because he was on drugs at the time. Hollins

testified he ultimately pled guilty as a result of his involvement in these crimes and his projected release date is March 2023.

Trial Counsel N. Elliott Barnwell Testimony

Elliott Barnwell (Counsel) testified he has been practicing since 1971 and that 25-50% of his practice since that time has been criminal. Counsel testified he was appointed in the instant case. Counsel credibly testified he met with Applicant on numerous occasions, that it was Applicant's decision to proceed to trial, and that he thoroughly discussed the case with Applicant.⁴ When asked about the facts of the case, Counsel recounted there were numerous charges in this case. Counsel testified that Applicant maintained he did not participate in a robbery; instead, Applicant claimed he had received some bad drugs from Victim and wanted to make it right.

When asked whether Applicant requested Counsel call King and/or Hollins as witnesses at trial, Counsel testified Applicant did not ask him to call either co-defendant as a witness. Counsel stated that while reviewing discovery with Applicant, he provided Applicant with Hollins' statement given to police. Additionally, Counsel testified he was provided with a witness list prior to trial and recalled both Hollins and King were listed as State's witnesses. Counsel stated Hollins testified at trial; however, King, though available and willing to testify, was not called by the State.

Regarding Applicant's decision not to testify – Counsel testified he did discuss with Applicant his right to testify and that it was Applicant's decision and Applicant's decision alone not to testify. Counsel stated it was his usual practice to warn Applicants that if they had a prior record, the jury would become aware of it should they testify. Counsel said while Applicant

⁴ Because of the age of the case, Counsel indicated he no longer has his defense file and it has been destroyed.

initially indicated he wished to testify, he later changed his mind.

Regarding the identification of Applicant during trial, Counsel testified Applicant was identified by co-defendant Hollins at trial as “Manny”. Counsel stated Hollins testified at trial that Manny had participated in the alleged robbery. Counsel was also questioned about the following exchange between Solicitor Wilson and witness Chris Nelson at trial:

Q: What was he saying?

A: I be asking him who did it, and he told us who did it.

Q: What did he tell you?

A: He said Manny – he said Manny did it.

MR. BARNWELL: You Honor, could I approach?

THE COURT: Yes, you may.

(Bench conference.)

THE COURT: Mr. Barnwell has objected to the statement as hearsay. It is overruled as an excited utterance or a dying declaration if the appropriate foundation can be established.

Trial Tr. 249-250.

Counsel testified that while he had objected to the admission of the hearsay statement referring to Manny as the perpetrator, Judge Jefferson ultimately found the statement was admissible as a dying declaration. Counsel testified that not only did Hollins testify during trial that he knew Applicant as “Manny” and confirm Manny did participate in the robbery, multiple persons other than Hollins testified during trial they had heard the victim identify Manny as the shooter.

IV. Standard of Review

An applicant may seek PCR upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;

4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. *See generally* S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in *Strickland v. Washington* to determine whether counsel’s conduct “was so ineffective as to require reversal” of the applicant’s conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel’s performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel’s deficient performance. *Id.* at 687–88; *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.

Strickland, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that “[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable” (citation and internal quotation marks omitted)).

Regarding the deficiency prong of the *Strickland* analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel’s performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption “by proving that his attorney’s representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy.” *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986); *cf. Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

Furthermore, the reviewing court will scrutinize counsel’s performance in a highly deferential manner, will make every effort “to eliminate the distorting effects of hindsight,” and will “evaluate the conduct from counsel’s perspective at the time” in light of then-existing circumstances. *Strickland*, 466 U.S. at 689. In order to establish counsel’s performance was deficient, the applicant must demonstrate “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. Accordingly, counsel’s performance will be considered to be deficient only when it was objectively incompetent under prevailing professional norms and *not* when it simply “deviated from best practices or most common custom.” *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as “[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland*, 466 U.S. at 691. In order for that burden to be met, counsel’s deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel’s unprofessional errors. *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625; see *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (“To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel’s representation fell below an objective standard of reasonableness and, but for counsel’s errors, there is a reasonable probability the result at trial would have been different.”). Importantly, “[t]he likelihood of a different result must be *substantial*, not just conceivable.” *Richter*, 562 U.S. at 112.

The *Strickland* standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant’s burden of proving both *Strickland* components is heavy in light of the strong presumption that counsel’s conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel’s conduct “so undermined the proper functioning of the adversarial process” that the defendant was denied a fair proceeding. *Id.* at 686; see *Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting

that under *Strickland*, the “benchmark” of the right to counsel is the “fairness of the adversary proceeding”); *cf. United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992) (“[T]he threshold issue is not whether [the applicant’s] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.”).

V. Findings of Fact & Conclusions of Law

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsels, as well as the record in this action incorporated by way of the State’s return, this Court proceeds to the claims raised at the evidentiary and finds each to be without merit. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

Newly-Discovered Evidence

A person may institute a PCR action if “there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.” S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of a material fact not previously presented, under the discovery rule, the PCR application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). To prevail, Applicant must show the newly-discovered evidence:

- (1) is such that it would probably change the result if a new trial were granted;
- (2) has been discovered since the trial;
- (3) could not in the exercise of due diligence have been discovered prior to the trial;
- (4) is material; and

(5) is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing *State v. Caskey*, 273 S.C. 325, 256 S.E.2d 737 (1979)).

In his application, Applicant raises newly-discovered evidence claims via affidavits from co-defendants Kareem King and Kerry Hollins. In support of his claims, Applicant also offered the testimony of both King and Hollins at the evidentiary hearing.

Recantation

As an initial matter, this Court finds the testimony of Kareem King and Kerry Hollins is not credible. The determination of whether new evidence is credible for purposes of a new trial rests with the trial court. *State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977). In particular, “our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment.” *State v. Mercer*, 381 S.C. 149, 168, 672 S.E.2d 556, 565 (2009) (citing *Porter*, 269 S.C. at 621, 239 S.E.2d at 643). “When testimony is in direct conflict and depends largely on the credibility of the new evidence, the trial judge is charged with the duty of assessing the evidence.” *State v. Deese*, 266 S.C. 534, 538 225 S.E.2d 175, 176 (1976) (citing *State v. Fowler*, 264 S.C. 149, 155, 213 S.E.2d 447, 450 (1975)).

The granting of a new trial based on after-discovered evidence is disfavored. *State v. Harris*, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011). Moreover, “[w]here a motion for a new trial is based on recantation of testimony given at the trial, such recantation is looked upon with utmost suspicion.” *United States v. Johnson*, 487 F.2d 1278, 1279 (4th Cir. 1973) (internal quotation omitted); see also *State v. Porter*, 269 S.C. 618, 239 S.E.2d 641 (1977) (“Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial.”) (internal quotation omitted). “Where the circumstances

surrounding the recantation suggest it is the result of coercion, bribery, or misdealing, the court... is justified in disregarding it.” *Johnson*, 487 F.2d at 1279 (explaining trial court properly found recantation testimony not credible when it was given years after the defendant’s conviction and “there was reason to suspect [the defendant] had exerted substantial pressure on [the witness] to withdraw his incriminating testimony”).

In this case, Applicant offered the testimony of both Kareem King and Kerry Hollins, both of whom were Applicant’s former co-defendants. As to Kareem King, though King did not testify at Applicant’s trial, he did testify at Applicant’s evidentiary hearing. Importantly, King testified that his testimony at the evidentiary hearing was different than it would have been at the time of trial. King further testified that his projected release date is April 2025 and that he would have lied to the plea court to receive a shorter sentence. Therefore, this Court finds King’s testimony is unreliable and not credible because King is nearing the end of his active prison sentence and has incentive to now assist his once co-defendant.

As to Kerry Hollins, Hollins did testify at Applicant’s trial. However, at the PCR evidentiary hearing, Hollins recanted his prior trial testimony which implicated Applicant. This Court finds Hollins’ recanted testimony to be unreliable and less than credible as well. Hollins is also nearing the end of his active prison sentence, and has incentive to now assist his once co-defendant. Moreover, a review of the trial transcript shows substantial evidence admitted in the trial that contradicts Hollins latest testimony. Specifically, multiple witnesses identified Hartwell as being inside the trailer where the crimes were committed and multiple witnesses heard the victim state as a dying declaration that “Manny did it”. Therefore, because the trial testimony directly contradicts Hollins’ testimony offered at the PCR hearing, this Court finds Applicant has failed to prove that the newly-discovered evidence is such as would probably change the result if

a new trial was had.

This Court finds both the testimony of King and the testimony of Hollins is entirely insufficient to support Applicant's request for relief as newly-discovered evidence of recantation. As discussed above, in order for Applicant obtain a new trial based on newly-discovered evidence, he must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching." *Jamison v. State*, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014) (internal citations and quotations omitted); *see also Hayden v. State*, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing *State v. Caskey*, 273 S.C. 325, 256 S.E.2d 737 (1979) (setting forth the five factors to be analyzed when considering a newly-discovered evidence claim). In this case, the Court finds Applicant has failed to meet the first prong – the alleged "recantation" of King's anticipated trial testimony is so unreliable and less than credible that there is no reasonable probability it would change the result at a new trial. This Court further finds the recantation of Hollins prior testimony is so unreliable and uncredible that there is no reasonable probability it would change the result at a new trial.

VI. All Other Allegations

As to any and all allegations raised in the application or at the hearing in this matter and not specifically addressed in this order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds those claims were voluntarily waived and abandoned, and those claims are therefore denied and dismissed with prejudice. S.C. Code Ann. § 17-27-90.

VII. Conclusion

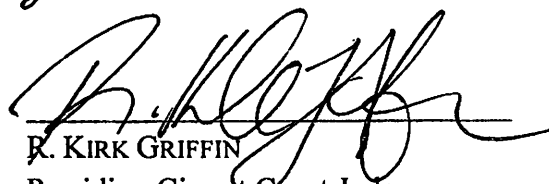
Based on the evidence presented at the PCR hearing and the record of the trial, this Court finds Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. This Court finds Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's representation. Moreover, this Court finds the alleged newly-discovered evidence is not such that it would probably change the result if Applicant received a new trial. Therefore, based on the foregoing, this Court denies relief on all allegations and dismisses this PCR action with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of the State.

AND IT IS SO ORDERED this 9th day of February, 2022.


 R. KIRK GRIFFIN
 Presiding Circuit Court Judge
 Ninth Judicial Circuit

Sumter, South Carolina



FORM 5

STATE OF SOUTH CAROLINA

County of

Berkeley

TERMAINE HARTWELL #323738

Full name and prison number (if any) of Applicant

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

C/A No.:

APPLICATION FOR

POST-CONVICTION RELIEF

RECEIVED

MAY 02 2022

SC Court of Appeals

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 Ridgeland Corr. Inst. P.O. Box 2039, 5 Correctional
Pl. Ridgeland South Carolina 29936-2039
2. Name and location of Court which imposed sentence The Court of General
Sessions, 300 Brea California Ave., Moncks Corner, SC 29461
3. Name(s) of co-defendant(s) (if any) GARY GRANT AND MARQUITA
Smith
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2007-GS-08-308 - Kidnapping; 2007-309 - Kidnapping;
 - (b) 310 - Kidnapping; 312 - Murder; 311 - Kidnapping; 313 -

- (c) ARMED ROBBERY; 342-burglary 1st degree; AND 345-Burglary 1st ⁹⁶⁷⁴
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) AUGUST 27-30, 2007, CONCURRENT SENTENCES, THIRTY (30) YEARS
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty NO
- (b) after a plea of not guilty YES
- (c) after a plea of nolo contendere NO
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. CONVICTION AND SENTENCE WAS AFFIRMED
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. FILED JANUARY 26, 2010
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. STATE v. HARTWELL, DP. NO. 2010-UP-D36
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) APPLICANT'S REPRESENTATIVE REFUSED TO FILE AN
- APPEAL ON BEHALF OF APPLICANT, FORCING APPLICANT TO
- (b) FILE HIS OWN NOTICE OF APPEAL THAT WOULD BE

(c) ATTORNEY JAMES P. MAIG. SEE: Exhibits (A) + (B)

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) THE APPLICANT'S POST-CONVICTION RELIEF COUNSEL RENDERED
 (b) INEFFECTIVE ASSISTANCE, UNDER WHITE V. STATE, 263 SC
 (c) 110, 208 S.E.2d 35 (1974); ILLEGAL SENTENCE.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) THE APPLICANT INFORMED P/R RELIEF COUNSEL HIS STRONG
 (b) DESIRE OF FILING A NOTICE OF APPEAL, HAD HE BEEN
 (c) DENIED P/R RELIEF.

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? N/A
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
 (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? N/A

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. N/A
 ii. _____
 iii. _____
 iv. _____

(b) the name and location of the Court in which each was filed:

i. N/A
 ii. _____
 iii. _____
 iv. _____

(c) the disposition thereof:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) The Applicant's counsel, after being retained, informed
 (b) him that he was now retired, and would not be able
 (c) to handle Applicant's case any longer, had not been of
such, Applicant would have retained another lawyer.

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? No
 (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? N/A
 (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. JAMES P. CRAIG, PCR
 ii.
 iii.

(b) the proceedings at which each such attorney represented you:

i. Post-Conviction Relief Hearing
 ii.
 iii.

19. State clearly the relief you seek in filing this application:

VACATE ILLEGAL JUDGMENT AND REMAND TO TRIAL COURT.

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)

County of Berkely)

VERIFICATION

I, TERNAINE HARTWELL, 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.

X(3) Termaine Hartwell

SWORN to and subscribed before me this 28th
day of April, 2022.

Devin G. Ferguson (L.S.)
Notary Public

My Commission Expires: 10-1-25

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Jermaine Harbelle, 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.

Jermaine Harbelle
Applicant

SWORN or affirmed to and subscribed before me this

28th day of April, 2022.

Deborah Ferguson
Notary Public

My Commission Expires: 10-2-25

RECEIVED

MAY 02 2022

SC Court of Appeals

Mr. Termaine Harwell
SCDC # 323738 - C-864
5 Correctional Rd
Ridgeland, S.C. 29936



US POSTAGE
ZIP 28933 \$ 001.36⁰
02 APR 29 2022

South Carolina Court of Appeals
Jenny Abbott Kitchens, Clerk
P.O. Box 11629
Columbia, S.C. 29211

RECEIVED

MAY 02 2022

SC Court of Appeals

SCDC AND CORRECTIONAL
INSTITUTION

APR 29 2022

Mailroom

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Jermaine Hartwell,

Plaintiff(s),

-vs-

State of South Carolina,

Defendant(s).

IN THE COURT OF COMMON PLEAS

9th JUDICIAL CIRCUIT

CASE NO.: 2022CP0802185

APPOINTMENT OF COUNSEL OR GAL

(Select one.)

☐ ORDER☐ AMENDED ORDER

TYPE OF CASE/PROCEEDING: (Check one.)

- ☐ Post-Conviction Relief (PCR)/habeas case ☐ Adoption ☐ Juvenile
☐ SVP case ☐ Custody and/or Visitation ☐ Abuse and Neglect
☐ Minor Name Change ☒ Other: Post Convict Rel 500

It appears Jermaine Hartwell, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

- ☒ counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.
☐ counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on:
☐ counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.
☐ court appointed counsel has obtained, Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.
☐ Other:

Therefore, it is ordered that Denise G. Swope hereby is appointed as (Select one.)

☒ Counsel ☐ lead counsel (if capital PCR case) ☐ guardian ad litem
for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

☐ (If Death Penalty PCR Case) It is further ordered that, Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED

November 29, 2022

☐ Circuit Judge

☒ Clerk of Court

Plaintiff Attorney:

Denise G. Swope	
1525 Sam Rittenberg Blvd, Ste 208	
Charleston, SC 29407	

Defendant Attorney:

Lauren T'Coya Mims	
S.C. Attorney General's Office	
PO Box 11549	
Columbia, SC 29211	

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

FILED

FORM 5

STATE OF SOUTH CAROLINA)

County of BERKELEY)JERMAINE HARTWELL)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS)

APPLICATION FOR)

POST-CONVICTION RELIEF)

2022-CP-08-02185)2022 SEP - 8 PM 1:18
LEAH GUERRY DUFFEE
CLERK OF COURT
BERKELEY COUNTY, SC

FILED

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make 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 Ridgeland Corr. Institution, 5 Correctional Rd. South Carolina 29936
2. Name and location of Court which imposed sentence THE COURT OF GENERAL SESSIONS, 300 CALIFORNIA AVE. MONCK'S CORNER, S.C. 29461
3. Name(s) of co-defendant(s) (if any) GARY GRANT; MAROLITA SMITH
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2007-BS-08-308-KIDNAPPING; 07-BS-08-309-KIDNAPPING;
 - (b) 07-BS-08-310-KIDNAPPING; 07-BS-08-311-KIDNAPPING;

cc:
J.H.

SM

- (c) 07-LS-18-312 - MURDER; 07-LS-08-345 - FIRST DEGREE BURGLARY, etc.
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) AUGUST 22-90, 2007 - CONCURRENT SENTENCES - 30 YEARS
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty YES
- (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. S.C. 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. JANUARY 26, 2010
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. STATE V. HARTWELL - DP No. 2010-UP-036
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) TRIAL COUNSEL REFUSED TO FILE A TIMELY NOTICE OF APPEAL FORCING APPLICANT TO FILE APPEAL
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) APPLICANT PRR COUNSEL RENDER INEFFECTIVE ASSISTANCE
- (b) PURSUANT TO WHITE V. STATE, 269 S.C. 110, 208 S.E.2d
- (c) 35(1994); TILGA) SENTENCE/CONSTRUCTIVE AMENDMENT
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) APPLICANT STRONGLY DESIRED FOR PRR COUNSEL TO FILED HIS
- (b) NOTICE OF APPEAL; DURING THE CRIMINAL PROCEEDINGS THE
- (c) SOLICITOR COMMITTED CONSTRUCTIVE AMENDMENT.
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? N/A
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
- (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? N/A
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. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- 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?

N/A

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. _____
- iii. _____

16. If any ground 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) APPLICANT'S COUNSEL AFTER BEING RETAINED INFORMED
 (b) HIM THAT HE WAS RETIRING, WOULD NOT BE ABLE TO
 (c) REPRESENT HIM ANY LONGER

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? NO
 (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? NO
 (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. N. ELLIOTT BARNWELL, ESQ.

ii. JAMES P. CRAIG

iii. _____

(b) the proceedings at which each such attorney represented you:

i. TRIAL

ii. PCR HEARING

iii. _____

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, TERMAINE HARTWELL, 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.

x(3) Termaine Hartwell
Applicant

SWORN or affirmed to and subscribed before me this

18 day of August, 2022.

Dorothy Ferguson
Notary Public

My Commission Expires: 10-1-25

FILED
2022 SEP -8 PM 1:25
LEAH GOERTZ JUDGE
CLERK OF COURT
BERKELEY COUNTY, SC

19. State clearly the relief you seek in filing this application:

GRANT RELATED APPEAL AND VACATE ILLEGAL SENTENCE.

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)

County of BERKELEY)

VERIFICATION

I, TERMAINE HARTWELL, 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.

x Termaine Hartwell

SWORN to and subscribed before me this 26th day of August, 2022.

Deventy Jeagerson (L.S.)
Notary Public

My Commission Expires: 10-1-25

2022 SEP -8 PM 1:23
LEAH GUDENY CLERK OF COURT
BERKELEY COUNTY, SC

FILED

Revis

AMH
FILED

I 725386

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

17 MAR 23 AM 11:25

Jermaine Hartwell, #323738

Name of applicant and Inmate number (if applicable)

OR

IN THE INTEREST OF JUSTICE

Juvenile

v.

State of South Carolina

Respondent,

) IN THE COURT OF (Select one)
) ☒ GENERAL SESSIONS
) ☐ FAMILY COURT
) JUDICIAL CIRCUIT

) APPLICATION FOR
) FORENSIC DNA TESTING
) #2007-GS-08-0312
) #2007-GS-08-0342, 0345.
) ORIGINAL INDICTMENT NO.
) #2007 -GS-08 -0313

OR

ORIGINAL PETITION NO.

-JU- -

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 continue an 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 end 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 or adjudicated.

I understand that DNA testing is only available if I have been convicted or adjudicated of an offense listed in S.C. Code Ann. § 17-28-30, that I am currently incarcerated for that offense, and that I am asserting that I am innocent of the offense. Further, if the conviction or adjudication was the result of a plea of guilty or nolo contendere, the application must be filed within seven years of the date of sentencing.

1. Identify the proceedings in which the applicant was convicted or adjudicated:

Trial by jury. Convicted of murder, burglary 1st degree
and armed robbery.

AMH

2. Give the date of the entry of the judgment and sentence: August 27th-30th, 2007.
30yrs for each ran concurrent.
 and current place of incarceration: LIEBER CORRECTIONAL INSTITUTION
3. Identify all previous or ongoing proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or adjudication:
- (a) Actual Innocence Access to Justice Post-Conviction
- (b) N/A
- (c) N/A
4. Make a reasonable attempt to identify the physical evidence or biological material that should be tested: Biological material- Blood, saliva, tissue,
hair, fingerprints, footprints, shoesize, clothing or drinking
cup or bodily fluids. Physical evidence object, things, used .
 Identify the specific type of DNA testing being sought:
Serology Testing, Ballistics, Pathology or Forensic Analysis
5. Explain why the identity of the applicant was or should have been a significant issue during the original court proceedings, notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity:
- Because of my conviction and sentence. The identity should
have been significant issue during the original proceedings.
Identity is very important to sustain the conviction and sentence .
Physical DNA evidence and biological material proves or disprove
guilt or innocence as being the perpetrator.
6. Explain why the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, provide the results of the testing and explain how the requested DNA test would provide a substantially more probative result:
- The State has failed to prove every element of the offenses
charged. Physical evidence or biological material was not
tested or subjected to testing because counsels rendered

inadequate assistance. The physical evidence or biological material sought to ^{be} tested would provide a more probable or less probable result that could exonerate the Petitioner.

There is no statute of limitations.

7. Explain why if the DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching:

The Petitioner has a right to present a defense according to the S.C. Criminal Procedures Rule#6 Rule for Chemical Analysis and Chain of Custody (d) Waiver of Rights.
Exculpatory evidence would prove that I am innocent, if tested.

8. I assert that I am actually innocent of the listed offense, that this offense is listed in S.C. Code Ann. § 17-28-30 and that I am currently incarcerated for the listed offense. I attest that this application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.
9. If DNA testing is conducted and results are determined to be inculpatory by the Court, I understand that:
- (a) The Court may hold me in contempt of court if it determines that my assertion of actual innocence was intentionally false;
 - (b) The Court may assess the cost of any DNA testing against me;
 - (c) The South Carolina Department of Corrections may use this determination to deny good conduct credit; and,
 - (d) The Department of Probation, Parole, and Pardon Services can use this determination to deny parole.

Jermaine Hartwell, #323738

Print Applicant Name

3 Jermaine Hartwell
Signature of Applicant

STATE OF SOUTH CAROLINA

County of BERKELEY

VERIFICATION

I Jermaine Hartwell, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; and that the matters and allegations set forth are true.

Jermaine Hartwell

Signature of Applicant

SWORN to and subscribed before me this 14th
day of March, 2017.

Linda K. B. (L.S.)
Notary Public

My Commission Expires: 6-20-26

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Jermaine Hartwell, 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.

Jermaine Hartwell

Signature of Applicant

SWORN to and subscribed before me this 14th
day of March, 2017.

Linda K. B.

(L.S.)

Notary Public

My Commission Expires: 6-20-26

FILED

987

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY) FOR THE NINTH JUDICIAL CIRCUIT

2024 DEC 19 PM 2:28

Jermaine Hartwell, #323738,) CASE NO. 2022-CP-08-02185

Applicant,)
CLERK OF COURT
BERKELEY COUNTY, SC

V.)

**RETURN AND PARTIAL
MOTION TO DISMISS**

State of South Carolina,)

(Counsel Already Appointed)

Respondent.)

In response to the application for post-conviction relief filed by Jermaine Hartwell (Applicant) on September 8, 2022, Respondent, the State of South Carolina, making its Return¹ would respectfully show this Court:

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections serving a cumulative thirty-year sentence. During its February 2007 term, the Berkeley County Grand Jury indicted Applicant for four counts of Kidnapping (2007-GS-08-00308, -00309, -00310, -00311), Murder (2007-GS-08-00312), Armed Robbery (2007-GS-08-00313), and two counts of first-degree Burglary (2007-GS-08-00342, -00345). On August 27, 2007, Applicant proceeded to a jury trial before the Honorable Deadra L. Jefferson. N. Elliot Barnwell, Esquire, represented Applicant. Solicitor Scarlet Wilson and Assistant Solicitor Blair Jennings prosecuted the case. On August 30, 2007, the jury found Applicant guilty as indicted. Judge Jefferson sentenced Applicant to

¹ Respondent's Return was due to be filed within ninety days of receipt. See Rule 12(a), SCRCP ("[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within 60 days after service of the application, if it arises out of a guilty plea, and 90 days if it arises out of a trial.") Now, having completed the Return required in this matter, and in light of no demonstrable prejudice to Applicant as a consequence of the delay, Respondent respectfully asks this Court to accept this Return as timely filed. See S.C. Code Ann. § 17-27-70(a) (establishing that the Court may fix the time in which the State must respond and that "respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application"); Guinyard v. State, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the trial court may extend the time for filing and that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court).

SCANNED

concurrent sentences of thirty years' imprisonment for each charge.

Applicant filed a timely notice of appeal. Chief Appellate Defender Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense perfected the appeal by filing an Anders² brief and a petition to be relieved as counsel with the Court of Appeals on the following issue:

- I. Did the trial judge commit reversible error by denying Hartwell's motion to sever his case from Grant and Smith's.

The South Carolina Court of Appeals dismissed Applicant's appeal without oral argument. State v. Hartwell, Op. No. 2010-UP-036 (S.C. Ct. App. filed January 26, 2010). The Remittitur was sent on February 11, 2010.

On July 6, 2010, Applicant filed his first post-conviction relief action, alleging the following grounds for relief:

1. Ineffective assistance of trial counsel in that counsel
 - a. Failed to object to Mr. Bolus' improper religiously tinged closing argument;
 - b. Failed to object to improper closing argument of Mr. Bolus and the solicitor that impermissibly invoked the "Golden Rule";
 - c. Failed to object to trial court's comments during jury charge that impermissibly commented on the facts of the case;
 - d. Failed to object to trial court's malice instructions that shifted the burden of proof; and
2. Denial of due process

Respondent filed its return on October 26, 2010. An evidentiary hearing was held on July 12, 2011. On August 15, 2011, the Honorable Kristi L. Harrington, issued an Order of Dismissal denying and dismissing the application with prejudice. Applicant did not appeal.

On October 23, 2018, Applicant, through counsel, submitted a second post-conviction relief application in which he requested relief based on newly discovered evidence. On September 7, 2021, an evidentiary hearing was held. On February 14, 2022, the Honorable R. Kirk Griffin

² Anders v. California, 386 U.S. 738 (1967).

issued an order dismissing the application with prejudice.

CURRENT APPLICATION

Applicant commenced this PCR action on September 8, 2022, asserting he is being held in custody unlawfully based on the following verbatim:

1. "Applicant's PCR Counsel [rendered] ineffective assistance pursuant to *White v. State* 269. S.C. 110, 208 S.E. 2d 35 (1974)"
 - a. "Applicant strongly desired for PCR Counsel to file his notice of appeal"
2. "Illegal sentence (Constructive Amendment)"
 - b. "During the criminal proceedings Solicitor committed constructive amendment"

Applicant requests relief in the form of "grant belated appeal and vacate illegal sentence".

Attached to this return and incorporated by reference are the Berkeley County of Clerk Court records regarding the subject conviction; Applicant's records from the South Carolina Department of Corrections; the opinion and remittitur from Applicant's direct appeal; and the applications, returns, and final orders from his prior PCR action. Respondent reserves the right to amend this return upon receipt of any additional relevant materials.

AUSTIN REVIEW

Respondent requests an evidentiary hearing on Applicant's claim related to a belated appeal of his first PCR application. An evidentiary hearing may be conducted regarding a successive PCR application "on the issue of whether, in fact, the petitioner requested and was denied an opportunity to seek appellate review" of his first PCR action. *Austin v. State*, 305 S.C. at 454, 409 S.E.2d at 396. "If the circuit court finds that the petitioner never in fact sought discretionary review, the petitioner may appeal that finding." *Id.* at 455, 409 S.E.2d at 396. *Austin* allows an applicant to petition the Supreme Court for discretionary review of the dismissal of his initial PCR application outside of the ordinary time limits for bringing such an appeal.

Here, Applicant's allegation that he asked PCR counsel to appeal this dismissal of his prior PCR action is likely not refuted by the record. Thus, Respondent requests an evidentiary hearing on the sole issue of whether Applicant is entitled to a late appeal of the dismissal of his first PCR action.

PARTIAL MOTION TO DISMISS

Respondent moves to dismiss all claims other than Applicant's claim to a belated appeal as successive and untimely.

Statute of Limitations

Respondent submits that this application should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the act requires as follows:

(A) An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

(C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

S.C. Code Ann. § 17-27-45.

The South Carolina Supreme Court has held the statute of limitations shall apply to all

applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). Additionally, South Carolina Code Annotated Section 17-27-70(c) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

In the present case, Applicant is alleging he is entitled to post-conviction relief based on allegations that his sentence is illegal. However, Applicant failed to comply with the filing requirements under S.C. Code Ann. § 17-27-45. Applicant was sentenced on August 30, 2007. Applicant pursued a direct appeal. The Remittitur was issued on February 12, 2011. Pursuant to section 17-27-45(A), Applicant needed to file his application for post-conviction relief on or before February 13, 2012. Applicant did not file this PCR application until September 8, 2022, *ten years, six months, and twenty-seven days* after the statute of limitations of limitations expired. Thus, any allegation other than his claim related to an Austin appeal should be dismissed as untimely.

Successiveness

The Application should be summarily dismissed because it is successive to Applicant's previous *two* PCR applications. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or

was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id., 305 S.C. at 450, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. The applicant bears the burden of showing that the allegations could not have been raised previously. Land, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant could have raised these grounds for relief in his *two* prior post-conviction relief applications. Applicant has failed to present any sufficient reasons why he could not have raised the current allegations in his previous post-conviction relief applications. Thus, there is no genuine issue of material fact necessitating an evidentiary hearing on this Application. Pursuant to S.C. Code Ann. § 17-27-70(c) (1976), Respondent moves for summary dismissal of the Application as it is successive.

ANY FUTURE AMENDMENTS AND INVOCATION OF DISCOVERY PROCESS

Respondent requests Applicant specify any claims he intends to raise at the PCR evidentiary hearing in advance of the hearing. Respondent reserves the right to either request a continuance or request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. Respondent further requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to the State in advance of the hearing, and Applicant provide the names of any witnesses he intends to call at the hearing and provide any evidence he intends to introduce at the hearing in advance of the hearing. Respondent

reserves the right to request a continuance and/or oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to the State.

OTHER ALLEGATIONS DENIED

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

[CONCLUSION AND SIGNATURE PAGE FOLLOWS]

CONCLUSION

WHEREFORE, Respondent requests an evidentiary hearing to be scheduled, solely to address the issue of whether Applicant is entitled to a belated appeal of his previous PCR application.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

D. RUSSELL BARLOW, II
Senior Assistant Deputy Attorney General

KYLEE KANEALEY
Assistant Attorney General

By:


Kylee Kanealey

ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

December 16, 2024

State of South Carolina	)	Court of Common Pleas
County of Berkeley	)	Ninth Judicial Circuit
JERMAINE HARTWELL,	)	
	)	Case Number:
Applicant,	)	2022-CP-08-02185
	)	
vs.	)	
	)	
STATE OF SOUTH CAROLINA,	)	POSTCONVICTION HEARING
	)	
Respondent.	)	TRANSCRIPT OF RECORD
_____	)	

January 21, 2025
 Moncks Corner, South Carolina

B E F O R E:

The Honorable Patrick C. Fant III

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

MS. DENISE SWOPE,
 Court-Appointed Attorney,
 for the Applicant;

MS. KYLEE KANEALEY,
 Assistant Attorney General,
 for the Respondent.

Jamie Bickett
 Official Court Reporter

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EXHIBITS

<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
NONE			

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1 (The following proceedings were had in open court.)

2 THE COURT: All right. Are y'all ready?

3 MS. KANEALEY: Yes, your Honor.

4 THE COURT: Okay. Ms. Swope, are you ready?

5 MS. SWOPE: I am.

6 THE COURT: Okay. All right.

7 MS. KANEALEY: May it please the Court?

8 THE COURT: Yes, ma'am.

9 MS. KANEALEY: Kylee Kanealey on behalf of the State of
10 South Carolina.

11 This is the postconviction relief matter of Jermaine
12 Hartwell versus the State, Case Number 2022-CP-08-02185 out
13 of Berkeley County.

14 Applicant is presently confined in the South Carolina
15 Department of Corrections. During its February 2007 term,
16 the Berkeley County Grand Jury indicted applicant for four
17 counts of kidnapping, 2007-GS-08-308, 309, 310, and 311;
18 murder, 2007-GS-08-312; armed robbery, 2007-GS-08-313; and
19 two counts of first-degree burglary, 2007-GS-08-342 and 345.

20 On August 27, 2007, applicant proceeded to a jury trial
21 before the Honorable Deadra L. Jefferson. Elliott Barnwell,
22 Esquire, represented applicant. Solicitor Scarlett Wilson
23 and Assistant Solicitor Blair Jennings prosecuted the case.
24 On August 30, 2007, the jury found applicant guilty as
25 indicted. Judge Jefferson sentenced applicant to concurrent

1 sentences of 30 years imprisonment for each charge.

2 Applicant appealed and the Court of Appeals dismissed
3 the appeal without oral argument. The remittitur was sent on
4 February 11, 2010.

5 On July 6, 2010, applicant filed his first
6 postconviction relief action, and an evidentiary hearing was
7 held on July 12, 2011. On August 15, 2011, the Honorable
8 Kristi L. Harrington issued an order of dismissal denying and
9 dismissing the application with prejudice. Applicant did not
10 appeal.

11 On October 23, 2018, applicant submitted a second
12 postconviction relief application. And on September 7, 2021,
13 an evidentiary hearing was held. On February 14, 2022, the
14 honorable R. Kirk Griffin issued an order dismissing the
15 application with prejudice.

16 Applicant commenced this PCR action on September 8,
17 2022, alleging PCR counsel rendered ineffective assistance of
18 counsel pursuant to *White v. State* and that during his
19 criminal proceeding the solicitor committed constructive
20 amendment.

21 It is my understanding the applicant is waiving all
22 claims other than the late appeal issue of his prior PCR.
23 And we have stipulated testimony from his counsel, who could
24 not be here due to a medical issue. And since it's a very
25 narrow issue, we are stipulating to what he would have

1 testified to today.

2 THE COURT: Okay.

3 MS. KANEALEY: So when I spoke with counsel, he stated
4 he doesn't specifically recall discussing an appeal, he was
5 retired during that time, he probably would not have filed a
6 notice of appeal if the applicant had asked, and he probably
7 did say to applicant what applicant alleged he said about
8 being retired and not being able to help with the appeal.

9 THE COURT: Ms. Swope, do you agree to the stipulation
10 of counsel on that?

11 MS. SWOPE: I do. I'm informed from my client that
12 there was a letter from PCR counsel that he was retiring and
13 could no longer assist. But that is -- my client's
14 testimony, as well as the testimony of PCR counsel, is that
15 an appeal did not occur and that my client wanted the appeal.

16 THE COURT: So basically, the attorney, in the
17 stipulated testimony, is that he does not recall discussing
18 it and he would have told him not to appeal. Correct?

19 MS. SWOPE: He would have told him that he couldn't help
20 him, I believe.

21 THE COURT: He could not --

22 MS. KANEALEY: Correct.

23 THE COURT: -- help him on appeal.

24 MS. KANEALEY: Yes.

25 THE COURT: Okay. And then does your client wish to