VOLUME II

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Frank W. Addy, Jr., Circuit Court Judge

Appellate Case No. 2014-001261
Lower Court Case No. 2006-CP-32-3862

TERRANCE V. SMITH, #292962,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI

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Q. Did you voluntarily go down there?
A. Yeah.
Q. Or did they ask you to come down or what?
A. They asked me to come down, and I went.
Q. They didn't come and arrest you?
A. No, sir.
Q. You went down there?
A. Yes, sir.
Q. Did they call you on the phone or did they come see you?
A. They got in touch with my attorney, and my attorney got in touch with me.
Q. Okay. And you went back down to see them on the 6th?
A. Yes, sir.
Q. Now, when you went down there on the 6th did you see Mark Jones again?
A. Yes, sir.
Q. Same officer?
A. Yes, sir.
Q. And I'm not going to go through this whole thing again but did they give you Miranda warnings on the 6th, again?
A. Yes, sir.
Q. And let me show you State's Exhibit Number 29,

Wykiesha. Does this appear to be just a duplicate of that same form?

A. No, sir.

Q. It's not the same form?

A. Yes, it's the same form but --

Q. And the information is filled out?

A. Yes, sir.

Q. For the 6th instead of the 4th?

A. Yes, sir.

Q. But they told you all those same things about the right to remain silent, that anything you say will be used against you in court, that you're entitled to talk to a lawyer, that if you can't afford a lawyer one will be appointed; and you told them you understood all those rights, correct?

A. Yes, sir.

Q. And you signed this?

A. Yes, sir.

Q. And then you signed down at the bottom that you were willing to make a statement and answer questions, correct?

A. Yes, sir.

Q. And that you wanted to do that without your lawyer being present?

A. Yes, sir.

MR. RIDDLE: I'd offer this in evidence, Your Honor, without objection.

THE COURT: Any objection?

MR. HENDRIX: No objection, Your Honor.

MR. ELLISOR: None, Your Honor.

THE COURT: Okay.

(WHEREUPON, State's Exhibit No. 31, a Miranda Form, was marked and admitted into evidence.)

MR. RIDDLE: Your Honor, I got a little ahead of myself. I'd like to mark this second statement from before for identification before we move on.

THE COURT: Any objection?

MR. ELLISOR: None, Your Honor.

MR. HENDRIX: No.

(WHEREUPON, State's Exhibit No. 32, a Written Statement, was marked for identification only.)

BY MR. RIDDLE:

Q. When you went back down to the West Columbia Police Department on August 6th, that was three days after the incident, correct?

A. Yes, sir.

Q. You talked with Investigator Jones?

A. Yes, sir.

Q. You'd been given your rights again?

A. Yes, sir.

Q. You knew it was going to be used against you?
A. Yes, sir.
Q. You'd even talked to your lawyer about that, had you not?
A. Yes, sir.
Q. At that time, do they take a statement from you?
A. Yes, sir.
Q. Let me show you that and ask if you recognize what it is.
A. Yes, sir.
Q. Is that the statement you gave?
A. Yes, sir.
MR. RIDDLE: Your Honor, I'd like to mark this for identification as well.
MR. HENDRIX: Okay.
MR. ELLISOR: Excuse me, I didn't hear. What's the date on that?
MR. RIDDLE: 8-6.
MR. ELLISOR: Okay, without objection.
THE COURT: And you're wanting to market it only for identification. Okay.
(WHEREUPON, State's Exhibit No. 33, a Written Statement, was marked for identification only.)
MR. RIDDLE: Your Honor, may we approach?
THE COURT: I was just getting ready to ask how

much longer direct was going to be. We've been going close to an hour and a half, so it's a good time.

Remember, we don't talk about the case.

(WHEREUPON, the jury leaves the courtroom at approximately 11:15 a.m.)

THE COURT: We'll stand in recess.

Ms. Williams, you can move around if you want to, but the only thing you can't do is talk to anybody about your testimony, okay?

THE WITNESS: Okay.

(WHEREUPON, a brief recess was taken.)

(WHEREUPON, State's Exhibit Numbers 34 and 35 were marked for identification only.)

THE COURT: Is the State ready?

MR. RIDDLE: Yes, sir. Just a very quick housekeeping matter. I think we have just marked the statement from 8-6 for identification, Your Honor. That was marked as State's 33 for I. D. Your Honor, during the break we marked one additional statement, State's 34 for identification; and also by agreement State's 35 is in, a third Miranda form. But we just went ahead and took care of that during the break.

For Your Honor's information, the reason that I have done this and marked these statements for identification purposes is because there's some information which is

potentially I guess considered as character information. And prior to court today Mr. Harling and I did some redacted statements, which we've already given copies to the defense.

As far as the redacted statements, I have copies here that I would hand up to the Court. And if, in fact, we get to a posture where I'm going to offer a statement I'm going to offer one of these redacted versions into evidence.

THE COURT: Mr. Hendrix and Mr. Ellisor, have you seen these?

MR. HENDRIX: We've gotten copies of them, Your Honor.

MR. ELLISOR: Yes, sir.

THE COURT: Okay.

MR. RIDDLE: And they have the original ones as well so they can compare them to the redacted versions.

THE COURT: Okay. Thank you, sir.

MR. RIDDLE: And with that, we're ready to go.

THE COURT: The defense ready?

MR. HENDRIX: We're ready, Your Honor.

MR. ELLISOR: Yes, sir.

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

(WHEREUPON, the jury enters the courtroom at approximately 11:50 p.m.)

THE COURT: All parties and attorneys are in the courtroom and all jurors have returned.

Mr. Riddle, continue.

MR. RIDDLE: Please the Court, Your Honor.

THE COURT: Yes, sir.

BY MR. RIDDLE:

Q. Ms. Williams, I think when we took the break we had talked about you going back to the West Columbia Police Department on August 6th, three days after this incident; is that correct?

A. Yes, sir.

Q. And you were Mirandized at that time?

A. Yes, sir.

Q. Same as you were on the fourth?

A. Yes, sir.

Q. And you talked to Mark Jones again?

A. Yes, sir.

Q. And there was some other officers there, correct?

A. Yes, sir.

Q. And you ended up giving an additional statement at that time; is that correct?

A. Yes, sir.

Q. During the break, did you have an opportunity to read through that statement?

A. Yes, sir.

Q. Now, when you talked to the officers on the sixth did you tell them all of the information you had told them

previously about the robbery taking place, about Doug Collins being involved, about Terrence Smith being involved in the robbery?

A. Yes, sir.

Q. Did you likewise at that time provide them some additional information?

A. Yes, sir.

Q. I'd like to ask you a little bit about that. First of all, at that time you had already talked to Mr. Mathews, had you not?

A. Yes, sir.

Q. And he's your lawyer?

A. Correct.

Q. And you go down there on the sixth, and you talk about meeting Charles, correct?

A. Yes, sir.

Q. And you talk about meeting him through Kiesha Harling, correct?

A. Yes, sir.

Q. And you talk about going over there and smoking pot with Charles on a prior occasion?

A. Yes, sir.

Q. You talk about the phone call which you testified to earlier where Ivan called you the night of the incident?

A. Yes, sir.

Q. And said he wanted to go over there and rob them, correct?

A. Yes, sir.

Q. And you told him that you agreed to do it?

A. Yes, sir.

Q. And you knew that was going to get you in trouble?

A. Yes, sir.

Q. And you told him you'd go when you got off work, right?

A. Yes, sir.

Q. You told him then that Ivan said he would call you on your cell phone and ask if you wanted to go to the club, correct?

A. Correct.

Q. And if you said yes that meant they had marijuana?

A. Yes, sir.

Q. And on the second page you further stated that if you said no that meant they didn't have any marijuana, right?

A. Yes, sir.

Q. And I believe you had seen marijuana in there that night?

A. Yes, sir.

Q. So you told him yes, correct?

A. Correct.

Q. Then on down the page you talk about you were in

there between 10 and 15 minutes, right?

A. Correct.

Q. Then you were supposed to walk out the door?

A. Yes, sir.

Q. And they were going to come in as you were leaving?

A. Yes, sir.

Q. Your car was in the parking lot in front and to the right of Charles' porch?

A. Yes, sir.

Q. You ran to your car, you got in and cranked it up, right?

A. Yes, sir.

Q. And you were looking into Charles' home and you could see what Ivan and Smile were doing, correct?

A. Yes, sir.

Q. And they were robbing the guys inside?

A. Yes, sir.

Q. And then one of the guys jumped on Smile?

A. Yes, sir.

Q. Smile was in the middle of the room?

A. Yes, sir.

Q. You could see Smile and that other guy fighting?

A. Correct.

Q. You told all this to the cops, right?

A. Yes, sir.

Q. Ivan was shooting in the direction that Smile and the guy were fighting?

A. Yes, sir.

Q. Ivan fired off four to six shots?

A. Yes, sir.

Q. Then you told the cops you were pulling off out of the parking lot and you didn't see or hear anymore shots, correct?

A. Correct.

Q. You were going up the road; down at the very bottom of that page?

A. Yes, sir.

Q. Do you tell them about looking in the rear view mirror and Ivan shooting in the direction of a dog?

A. Yes, sir.

Q. And they caught up with you just past Shull Street as you passed the stop sign, correct?

A. Correct.

Q. Then on page three you talk about Smile got in the back -- excuse me, you talk about Ivan getting in the front then Smile getting in the back?

A. Correct.

Q. Then you talk about what they were saying when they got in the car, right?

A. Yes, sir.

Q. Both saying one of the guys resisted?
A. Yes, sir.
Q. And you asked them why they were shooting?
A. Yes, sir.
Q. And Mr. Collins told you one of the guys jumped on Smile?
A. Yes, sir.
Q. Mr. Collins told you he thinks he shot the guy that was fighting Smile?
A. Yes, sir.
Q. And he said he thinks he shot the other one that was in the corner?
A. Yes, sir.
Q. Then you talk again about going out to Garners Ferry Road, correct?
A. Correct.
Q. And then going back to the motel on Saint Andrews Road?
A. Yes, sir.
Q. Talked about Lashawn Geiger again, the name you rented the room under?
A. Yes, sir.
Q. You talked about on page four Mr. Collins and Mr. Smith coming to pick you up from work the next morning?
A. Yes, sir.

Q. And about the threat that you had got?
A. Yes, sir.
Q. You talked about going to Fatz in Orangeburg?
A. Yes, sir.
Q. You talk about getting back to your house in Irmo at about 3:45?
A. Yes, sir.
Q. You talk about the police coming?
A. Yes, sir.
Q. Did you talk about going down to the West Columbia Police Department?
A. Yes, sir.
Q. You talk about you don't know how Mr. Smith and Mr. Collins left your house?
A. That's correct.
Q. This statement you gave on the sixth, is that statement true?
A. Yes, sir.
Q. Everything you said in there is true?
A. Yes, sir.
Q. So about three days after the incident you were telling them everything you knew?
A. Yes, sir.
Q. Now, again, on the sixth, you were at the West Columbia Police Department?

A. Yes, sir.
Q. Did Officer Jones arrest you at this time?
A. No, sir.
Q. Did you have an agreement with Officer Jones about Mr. Collins and Mr. Smith?
A. I don't remember.
Q. Had you told him whether or not you would help him find Mr. Collins?
A. Yes, sir.
Q. He left you on the street at that point?
A. Yes, sir.
Q. Now, on the eighth, did Officer Jones ask you to come back down to the West Columbia Police Department?
A. Yes, sir.
Q. And I'm going to show you State's Exhibit Number 35, which is in evidence, did they give you your rights again?
A. Yes, sir.
Q. Just like the first two times?
A. Yes, sir.
Q. And you signed them?
A. Yes, sir.
Q. And agreed to talk with the police?
A. Yes, sir.
MR. RIDDLE: Your Honor, I'd move 35 into evidence

at this time.

THE COURT: Any objection?

MR. HENDRIX: No objection, Your Honor. That's the Miranda waiver?

MR. RIDDLE: Yes, sir.

MR. ELLISOR: None, Your Honor.

THE COURT: All right, without objection.

(WHEREUPON, State's Exhibit No. 35, a Miranda Form, was admitted into evidence.)

BY MR. RIDDLE:

Q. And at that time, you talked with Officer Jones again?

A. Yes, sir.

Q. I'll show you State's 34 for identification. Did that statement consist of five pages?

A. Yes, sir.

Q. And it's pretty much all question and answer, correct?

A. Yes, sir.

Q. There's not just narrative in that statement?

A. Yes, sir.

Q. All right. Does that statement primarily concern whether or not you have heard from Mr. Collins and Smith since the last time you talked to the police?

A. Yes, sir.

Q. And had you?
A. No.
Q. That statement on the eighth was true?
A. Yes, sir.
Q. There's one question in there about a man named Mr. Branham?
A. Yes, sir.
Q. Tell the jury who Mr. Branham is.
A. That is my uncle.
Q. When SLED had processed your car there was a wallet in there, correct?
A. Yes, sir.
Q. Okay. And that was Mr. Branham's wallet?
A. Yes, sir.
Q. And he had just left it in your car?
A. Yes, sir.
Q. Does Branham have anything to do with this case?
A. No, sir.
Q. On the eighth, Wykiesha, five days after this incident, you had not heard from Mr. Collins?
A. No, sir.
Q. You had not heard from Mr. Smith?
A. No, sir.
Q. Officer Jones, does he arrest you at that point?
A. No, sir.

Q. He doesn't arrest you on that evening?
A. No, sir.
Q. You do get arrested?
A. Yes, sir.
Q. And you get charged with your part in all of this?
A. Yes, sir.
Q. You've been telling the police what happened during this robbery since the day after, correct?
A. Yes, sir.
Q. And you've been telling them the whole truth since three days after?
A. Yes, sir.
Q. Have you been totally truthful with the police since August the 6th of 2001?
A. Yes, sir.
Q. Have you been truthful with this jury?
A. Yes, sir.
Q. Wykiesha, who did you plan the robbery of Charles Penny with?
A. Ivan Collins.
Q. And who else?
A. And Terrence --
MR. HENDRIX: Objection, Your Honor. She's answered the question. He keeps begging her to add something to it, and she's already stated before, testified under oath

before that she didn't remember having any conversation with Mr. Smith.

MR. RIDDLE: That's fine.

THE COURT: Sustained. Go ahead.

BY MR. RIDDLE:

Q. Ms. Williams?

A. Yes, sir.

Q. Who did you go with to commit the burglary and robbery?

A. Ivan Collins and Terrence Smith.

Q. Who did you leave from there with?

A. Ivan Collins and Terrence Smith.

Q. Who had guns when you all went to Mr. Penny's house?

A. Ivan Collins and Terrence Smith.

Q. Did you know there was going to be shooting?

A. No, sir.

Q. Who did you see doing all the shooting?

A. I seen Ivan doing all the shooting.

Q. Who told you they had done shooting?

A. Ivan.

Q. Who was the one in the doorway?

A. Ivan.

Q. Who was the one that you saw fighting?

A. Terrence.

Q. When you saw the shooting you tried to leave?
A. Yes, sir.
Q. Did you see and hear when the dog got shot?
A. I heard -- I heard and I seen in the mirror.
Q. You saw in the mirror?
A. Yeah.
Q. Who was shooting at the dog?
A. Ivan was shooting in the direction of the dog.
Q. And then you heard the dog make that funny noise?
A. Yes, sir.

MR. RIDDLE: Thank you, Ms. Williams. Please answer any of their questions.

THE COURT: Cross.

CROSS-EXAMINATION

BY MR. HENDRIX:

Q. Now, Ms. Williams, the day after this occurrence that took place on ___ in West Columbia, you talked with Investigator Brian Carter; is that right?
A. Yes, sir.
Q. And as a part of your statement to him when he asked you what went on and how many shootings you witnessed you first told him three, then you said two or three. Well, I saw just one. Didn't you say that to him?
A. Could you please repeat that?
Q. That you told Investigator Brian Carter when he

asked you, his statement, I asked Wykiesha Williams how many shootings she witnessed. She stated, Three, two or three, I think. I just seen one.

Did you tell him that that day?

A. I don't remember.

Q. You don't remember that. Okay. But that would have been right after the thing occurred, the next day, and your memory would have been clearer then than any time since then?

A. Yes, it would have.

Q. Now, you also mentioned in your statements, and I'm assuming this part would have to be true, you'll have to tell the jury, that you saw Charles Penny sell drugs to somebody out of a cigar box; is that right?

A. Correct.

MR. HENDRIX: You don't have a cigar box? You all don't have a cigar box?

MR. RIDDLE: Objection, Your Honor, this is the witness.

MR. HENDRIX: Your Honor, I was going to show them the cigar box. If they don't have the cigar box, that's fine.

THE COURT: All right. Again, you still direct the question toward the witness. You can ask her if she's seen the box.

MR. HENDRIX: I'm sorry.

BY MR. HENDRIX:

Q. Have you seen the box?

A. Yes, I seen the box.

MR. HENDRIX: Your Honor, can we inquire of the State if they have the cigar box the drugs were sold out of?

MR. RIDDLE: I don't have a box, Your Honor.

THE COURT: Okay, that's fine.

MR. RIDDLE: Which he knows because he's seen the evidence that the State has, Your Honor.

MR. HENDRIX: I haven't seen quite all of it.

THE COURT: Well, move on.

BY MR. HENDRIX:

Q. Who told you the name Terrence Smith; because you didn't know it, you only knew Smile, according to you?

A. Once I picked his picture I seen the name.

Q. Where did you see the name; did somebody show it to you or did somebody tell it to you?

A. I don't remember, but I think it's on the photo --

MR. RIDDLE: Your Honor, Your Honor, Your Honor, I've got a matter we need to take up before we get ourselves in trouble.

THE COURT: Ladies and gentlemen, let me ask you to step to the jury room. While you're there be sure not to talk about the case.

(WHEREUPON, the jury leaves the courtroom at approximately 12:08 p.m.)

THE COURT: All right, Counsel, the jury is secured.

MR. HENDRIX: Your Honor, could my client run to the rest room while we're at break.

THE COURT: Yes, sir. Lets just stay in place and let him go ahead and go while we're sitting here.

MR. HENDRIX: Your Honor, I think he's okay for us to go ahead with this.

THE COURT: Is that all right with you, Mr. Smith?

DEFENDANT SMITH: Yes, sir.

THE COURT: All right. Go ahead.

MR. RIDDLE: Your Honor -- and I intentionally did not get into this with this witness. Ms. Williams identified Mr. Smith off of this document here, which was a wanted poster from the Cayce armed robbery which he has previously been convicted of. And I'm real concerned. If he asks this question and she answers it truthfully then we're right in that same position we were in three weeks ago where defense counsel has elicited damaging testimony, and there's not a thing in the world we can do to stop it.

I didn't get into this. I didn't offer any kind of photographic lineups with this witness. She knows these two individuals. It wasn't like a Neil V. Biggers situation

where you have the suggestiveness issue, she knows them. She either says that's him or it's not. And so I didn't get into that just because of the type of document that she was shown. And I sure don't want him asking this witness at 12:10 on a Thursday after we've been in this thing for this long and end up right back where we started from.

THE COURT: I understand.

MR. RIDDLE: From how we handle it is up to Your Honor.

THE COURT: Mr. Hendrix?

MR. HENDRIX: Your Honor, I think that the answer that she could give which would answer the question truthfully, as I understand it, and at the same time not get into that would be that she got it somehow or another through law enforcement, because she didn't know the name. The law enforcement showed her that.

MR. RIDDLE: Can he proffer what he intends and just ask her?

THE COURT: Sure, why don't we just do that. Why don't you just ask her while the jury is out and we'll see.

MR. HENDRIX: Well, I mean, she has to understand what's supposed to -- you know, not supposed to get into.

THE COURT: What we'll do is let's let her answer it now and we'll find out if --

BY MR. HENDRIX:

Q. Who provided you with the information that Smiley, the person you knew as Smiley, was Terrence Smith?

A. The investigator. I don't remember which one.

MR. HENDRIX: That's fine. That's fine.

THE COURT: Okay. And that's as far as you're going with it?

MR. HENDRIX: That's as far as I'm going with it.

THE COURT: All right. Do you have any problem with me advising the witness not to refer to any documents or anything?

MR. HENDRIX: No problem.

MR. RIDDLE: I would like for you to advise her not to refer to documents, mug shots, rap sheets, wanted posters or anything of the like.

THE COURT: Do you understand that, Ms. Williams?

THE WITNESS: Yes, sir.

THE COURT: The way you answered now is fine. Be sure you don't refer to any kind of documents, or as Mr. Riddle said, any sort of mug shots, booking sheets, any sort of rap sheets, nothing at all. Just don't refer to paper documents, just refer to just what the officers told you, okay?

THE WITNESS: Okay. Yes, sir.

MR. RIDDLE: Your Honor, can I just -- because this is going to come up when we come back to redirect?

THE COURT: Sure.

MR. RIDDLE: If he asks that one question, I was provided the name by law enforcement, on redirect, I am, I think, bound to stand up there and say were you shown a photograph of someone first, just a picture, and did you identify that person as Smile. And based on that you were informed by law enforcement that his real name was Terrence Smith, without referring to the source of the photograph at all.

THE COURT: Mr. Hendrix, what about that?

MR. HENDRIX: Well, I'll cover that.

MR. RIDDLE: If he'll cover that, if he'll say she was shown a picture.

MR. HENDRIX: I mean, I'm trying to move this thing along without waisting time.

MR. RIDDLE: That's fine.

THE COURT: You understand that, Ms. Williams? You can say that you were shown a picture but don't go any further. Don't say where it came from or anything else.

THE WITNESS: Okay. Yes, sir.

THE COURT: All right. You want this back, Mr. Riddle?

MR. RIDDLE: Yes, sir.

THE COURT: Are we ready?

MR. HARLING: The State is ready, Your Honor.

THE COURT: Okay. Let's bring the jury in.

(WHEREUPON, the jury enters the courtroom at approximately 12:15 p.m.)

THE COURT: All parties and attorneys are in the courtroom and all jurors have returned.

You may continue, Mr. Hendrix.

BY MR. HENDRIX:

Q. Ms. Williams, going back, my understanding is that you were shown a photograph and asked if you knew the person or could identify the person, and you indicated to the law enforcement folks, yes, that's Smiley or Smile, or whatever name you knew him by; is that your testimony?

A. Yes, sir.

Q. And then after that law enforcement gave, provided you the name that went with the photograph and told you the name was Terrence Smith; is that right?

A. I don't remember.

Q. You don't remember. Okay. But law enforcement provided you with the name of Terrence Smith; is that right?

A. I don't remember.

Q. You don't remember that?

MR. HENDRIX: Your Honor, we have a matter to take up. Can we just approach the bench?

THE COURT: Yes, sir, just come around here to the side.

(WHEREUPON, a bench conference had.)

MR. RIDDLE: Your Honor --

THE COURT: Mr. Riddle, I understand you have a stipulation.

MR. RIDDLE: After the bench conference and just to move things along I would say that after she saw the photograph which she identified as Smile I'll stipulate, the State will stipulate that law enforcement is the one that, in fact, provided her with the name Terrence Smith that went with the face.

THE COURT: Ladies and gentlemen, let me tell you what that means. When there's a stipulation between the parties that means that's something they agree that is a fact in the case. You consider that as evidence. Regardless of what the witness may have said you take that as evidence because the parties have agreed that that was a fact in the case. Now, again, it's always up to you to decide how much weight or credibility to give to it, you make those decisions. But as far as it being a fact in issue, it is a fact in the case.

Any exception to that charge, from the defense?

MR. HENDRIX: None from defense.

THE COURT: State?

MR. RIDDLE: No, sir.

THE COURT: All right, continue.

BY MR. HENDRIX:

Q. Now, Ms. Williams, isn't it true that in the statements that have been marked for identification you indicated that the person you're claiming was Ivan Collins never actually used the words I want to go rob Charles? The words that you put in the statements and that he used were actually I want to go run up in his house; is that correct?

A. Correct.

Q. And it is true, is it not, that any discussions you had, by your testimony, if it's to be believed, about going to Charles' house to commit any kind of robbery were conversations you had with Ivan Collins not with Terrence Smith; you don't remember any conversation with Terrence Smith about that?

A. That's correct.

Q. And so any agreement that you had would have been with Ivan Collins not with Terrence Smith since you didn't talk to him about it?

A. Correct.

Q. Now, you had known Charles for -- Charles Penny for awhile, a couple months did you say?

A. No, I did not say a couple months.

Q. How long had you known him? And I think I understood you to say you'd seen him a couple times but I'm not really sure I understood exactly what that was about. So

can you tell me how long you had known him?

A. Two or three weeks.

Q. Two or three weeks. You had not known him but two or three weeks?

A. Correct.

Q. How many times had you been to his house?

A. Twice.

Q. And you had gone there by yourself, right?

A. Correct.

Q. Nobody had gone with you?

A. Correct.

Q. And by your testimony, to your knowledge neither Mr. Collins nor Mr. Smith had any idea where Charles Penny lived, other than maybe if you told them in West Columbia that would be it; is that right?

A. That's correct.

Q. So you are the only one that knew where to go; is that right?

A. That's correct.

Q. And when you talked to Ivan Collins, by your testimony, you were the one that knew if you didn't show anybody where it was nothing would ever happen? You knew that, didn't you?

A. Could you please repeat that?

Q. You knew if you didn't show them where he lived

nothing could happen?

A. That's correct.

Q. And when a phone call was made to you, by your testimony, if it were to be believed, if you had said no nothing would have happened?

A. That's correct.

Q. But you didn't do that, did you?

A. No, sir.

Q. Now, you indicated that you had pled guilty, I believe you have already, to a forgery back in 1999; is that right?

A. That's correct.

Q. Forged somebody's check or something, forged some document?

A. I had a forgery charge, that's correct.

Q. Okay. And you have pled guilty to armed robbery -- attempted armed robbery, burglary and criminal conspiracy arising out of the August 3rd, 2001 situation that occurred on Witt Street; is that right?

A. Correct.

Q. And you had an attorney that represented you on that. I believe the solicitor brought that out, right?

A. Correct.

Q. And you were informed, were you not, that you wouldn't be sentenced until after this trial, until after

your testimony; is that right?

A. I would be sentenced after the trial, from what I understood, that's correct.

Q. But part of the understanding was, and you didn't have any doubts about this when you pled, that you were expected to testify in this trial as a part of the plea agreement where other charges were dismissed against you and the judge would consider your sentence, whatever it was to be, after you testified in this trial; is that right?

A. The other charges was dropped.

Q. Right.

A. For the guilty plea, that's correct.

Q. And you understood you had to testify in this trial before the judge would consider the sentence on the charges that you pled to?

A. I don't understand.

Q. In other words, you weren't going to be sentenced until after you had gotten on the -- you haven't been sentenced yet, have you?

A. No, sir.

Q. After you get through testifying, sometime in the future you will be sentenced?

A. Correct.

Q. And you knew that's the way it was going to be when you pled guilty?

A. Correct.

Q. Now, I understood you to say that you had been going with or the girlfriend of or however you want to put it, the lover of Ivan Collins for a year, about a year; is that right?

A. I've been going with Ivan Collins for about a year, that's correct.

Q. And that's a year before August the 3rd, 2001?

A. Correct.

Q. So that would have meant the two of you started going together, and as I understood it, you all were together all day, every day from about September of 2000; does that sound right?

A. I don't understand where you're trying to get at.

Q. What I'm trying to get at, you had said to the solicitor that you were with Ivan all day, every day; is that right?

A. Yes, I said that.

Q. And how long had that been going on, had that been going on for about that year?

A. Yes.

Q. Okay. So if this incident occurred on August the 3rd of 2001 I would say, well, maybe it was 11 months if you backed it up to September of 2000. By my figuring that would be about 11 months before August of 2001. I mean, I'm not

trying to trick you and it's not really meant to be a math quiz, but does that sound about right?

A. I don't understand.

Q. Okay. Well, in any event, you had been with Ivan all day, every day for about a year before this thing on August the 3rd, 2001; is that the truth?

A. I said just about, yes, sir.

Q. Yes, it is. Okay. So that would have meant in February of 2001, that's just a few months beforehand, you would have been with him all day, every day like you have testified to; is that right?

A. Correct.

Q. And March, same thing?

A. A year prior to that.

Q. For a year prior. So in March you would have been with him all day, every day too?

A. Yes, sir.

Q. April?

A. Yes, sir.

Q. May, on down the line. June, July, and the thing happened in August, according to your testimony, and in all of that you were with Ivan all day, every day; is that right?

A. Correct.

Q. Now, is your name Wykiesha Monique Williams?

A. That's correct.

Q. And is your birthday October the 30th, 1979?
A. That's correct.
Q. And were you born in South Carolina?
A. Yes, sir.
Q. In Columbia, South Carolina?
A. Yes, sir.
Q. And are you the same Wykiesha Williams who on March the 16th, 2001 married a gentleman by the name of Mao George Wambura, who was born in China?
A. Yes, sir, that's correct.
Q. And you took time out from Ivan Collins to go marry Mao George Wambura of China so he could stay in this country; is that correct?
A. That's not correct.
Q. That's not correct? Were you paid a thousand dollars or some amount of money to marry this man so he could stay in the country?
A. I don't understand what you're trying to --
Q. It's real simple. Were you paid money to marry Mao George Wambura, a known drug dealer, so that he could stay in this country --
MR. RIDDLE: Woah, woah, woah, woah, woah.
THE COURT: Just take one question at a time, Counsel.
A. No, sir.

Q. No, sir, what, you didn't get paid anything?
A. No.
Q. And you understand you're under oath?
A. Yes, sir.
Q. And you understand that if it's determined that what you are saying is not true you'll face charges of perjury?
A. Yes, sir.
Q. In addition to any others you have?
A. Yes, sir.
Q. But you did marry Mao George Wambura on March the 16th, 2001; is that correct?
A. That's correct.
Q. Even though you had spent all day, every day with Ivan Collins?
A. Yes, sir.
Q. According to your testimony. And you do understand that Mao George Wambura is a known drug dealer?
MR. RIDDLE: That's what I object to, Your Honor.
THE COURT: He can ask the question and certainly she can --
A. No, I do not know that.
Q. You do not know that. All right. But you don't know much about him, do you?
A. I know about him.

Q. You know about him?
A. Yes, I do.
Q. Do you know where he is now?
A. No, I don't.
Q. Did you know where he was on August 3rd of 2001?
A. No, I didn't.
Q. But in the statement that you may have given to Officer Carter you might have said something about three people, so you don't know where he was that day?
A. No, sir.
Q. Less than five months after you married him?
A. No, sir, I didn't know.
Q. Okay. Now, somebody called and threatened you the next day while you were at work?
A. That's correct.
Q. You didn't recognize the voice, or did you?
A. No, I didn't know who it was.
Q. But they threatened you, said something to the effect that you think that stuff -- and I'm saying stuff instead of another word --
A. Uh-huh.
Q. -- you did last night was cool. I'm going to get your something or other, and it refers to your backside; is that right?
A. Yes, sir.

Q. And it's your testimony you don't know who that was?

A. No, sir.

MR. HENDRIX: Your Honor, I don't have anything else at this time.

THE COURT: Mr. Ellisor?

MR. ELLISOR: Thank you.

CROSS-EXAMINATION

BY MR. ELLISOR:

Q. Ms. Williams, you had an intimate relationship with Ivan Collins?

A. Yes, sir.

Q. Did you have an intimate relationship with Charles Penny?

A. No, sir.

Q. Did you lead Mr. Penny to believe that you were his girlfriend?

A. No, sir.

Q. You knew where Mr. Penny lived?

A. Yes, sir.

Q. How many times had you been to Mr. Penny's house before August 3rd, 2001?

A. Twice.

Q. Twice?

A. Yes, sir.

Q. And when were those visits?
A. I don't remember.
Q. Were they within several weeks prior to the incident?
A. Well, I only know him for two or three weeks so it had to be within that two to three week time.
Q. Okay. Do you know Cameal Waddlington?
A. I knew of her.
Q. Well, you knew of her but you also shared a cell with her too, didn't you?
A. Excuse me?
Q. Did you not share a cell with her, Princelyn Waddlington, Cameal Waddlington?
A. No, I did not share a cell with her.
Q. Did you not tell her in jail that you went to Charles Penny's house to sell him heroin?
A. No, sir, I did not tell her that.
Q. Okay. On direct examination you had stated that you saw -- you told this jury you could see about everything that was going on inside?
A. Yes, sir.
Q. Okay. And I think you said the blinds were open?
A. No, sir, I didn't say that.
Q. You did not. The blinds were not open?
A. I don't know if they were open or not.

Q. Now, when the two people that were with you -- and you don't deny that the two people with you went inside that house, that apartment?

A. Could you please repeat your question?

Q. Two men were with you and went inside Mr. Muller's apartment -- Mr. Penny's apartment?

A. Correct.

Q. And you had been inside that apartment, correct?

A. That's correct.

Q. And you had gone inside to check it out for a robbery, correct?

A. That's correct.

Q. You had gone there with these two men to rob who?

A. Charles.

Q. Okay. So before you went over there you did not know who would be in that house?

A. No, sir.

Q. So you went to rob the owner, Charles Penny?

A. Yes, sir.

Q. What did you go to rob him of?

A. Marijuana.

Q. Marijuana?

A. Yes, sir.

Q. Okay. Now, you had worked out a code with these two robbers, correct?

A. Excuse me?
Q. You had worked out some kind of sign for these two robbers?
A. That's correct.
Q. You were to go inside, and then you were to make contact with them through cell phone?
A. That's correct.
Q. These two people. Whose cell phones did you and the two robbers use?
A. Mine.
Q. Yours?
A. Yes, sir.
Q. Okay. Now, what was the wording that was to be used as part of this scheme for these two robbers to come inside?
A. The question was asked if I was going to the club say yes. If I said no, I wasn't going, if I didn't see it.
Q. So the person on the phone talking with you would ask you are you going to the club?
A. Correct.
Q. Why didn't they just say do you see any drugs, because nobody could hear your conversation, you had a phone -- a cell phone to your ear?
A. I don't know.
Q. Okay. Now, you had been in there about 15 to 20

minutes?

A. Correct.

Q. Did you go into the back when the call came in?

A. No, sir.

Q. Where did you talk on the phone with the people who were involved in this robbery?

A. I was sitting on the chair.

Q. So you never left?

A. No, I never got up. I don't remember getting up.

Q. Did you go to the rest room for personal necessities?

A. No, sir, I don't remember going to the bathroom.

Q. So you talked on the phone for how long?

A. A couple of minutes.

Q. Okay. Now, during that conversation and while you were there where was Mr. Penny's marijuana situated at?

A. It was next to him under a table or by the chair next to him.

Q. Under a table. Did you see the blunts being prepared?

A. I don't remember seeing blunts being prepared.

Q. Are you saying you didn't see them or you just don't remember if you saw them or not?

A. I don't remember seeing blunts being prepared.

Q. Do you remember seeing any marijuana?

A. Yes, sir.
Q. What marijuana did you see?
A. I seen marijuana in a box, cigar box.
Q. In a cigar box?
A. Yes, sir.
Q. Now, did you see any other marijuana, other than what was in this cigar box?
A. No, sir.
Q. How long had you been in there when you saw the marijuana in the box?
A. It was there when I got in. I seen it the time I came through the door.
Q. The box was open?
A. Yes.
Q. Was the box filled with marijuana?
A. Yes, it was filled with marijuana.
Q. Was the marijuana already bagged?
A. No, sir.
Q. Now, you take a regular cigar box, about the size of the pad, correct?
A. I don't know, I'd have to see a cigar box.
Q. Well, describe for this jury the cigar box you saw filled with marijuana.
A. I don't have one. There's nothing in here that looks like a cigar box.

Q. Was it a standard size cigar box?
A. It's a cigar box. You know how a cigar box look. It's a cigar box.
Q. It was filled to the top?
A. It was filled.
Q. To the top?
A. It was filled.
Q. Now, what was the street value of the marijuana?
A. I don't know the street value.
Q. You don't?
A. No.
Q. You don't sell marijuana?
A. No, sir, I don't sell marijuana.
Q. You don't use marijuana?
A. No, sir, I don't use marijuana.
Q. Did you not in your statement say that you sit there and smoked a blunt before you went over to rob Mr. Penny?
A. Yes, I did.
Q. So you don't smoke marijuana but you smoke it before you commit a crime, right?
A. I smoked it that night, yes, sir, I did.
Q. Okay. How much did you smoke, a blunt?
A. A blunt, maybe two.
Q. Maybe two?

A. Uh-huh.

Q. Only time in your life you've ever smoked marijuana?

A. No, that wasn't the only time in my life.

Q. Okay. And you're telling me you don't know how much the marijuana costs?

A. No, sir, I don't.

Q. So you went over to rob a man of a cigar box of marijuana not knowing what the value was; is that what you are telling me?

A. I don't know the value, that's correct.

Q. But you went to rob him of a cigar box of marijuana?

A. Yes, we went.

Q. It was worth all this to take guns and for you to go with somebody to rob a person not of money but of one lousy box of marijuana; that's why you went to rob this man?

A. Yes, sir, that's correct.

Q. And you told this jury you could see everything that went on after you came out?

A. Yes, I could.

Q. But yet in your August 4th statement, of which you have two August 4th statements?

A. Correct.

Q. Is this the almost correct August 4th statement or

the almost, almost correct August 4th statement?

A. Which one are you talking about?

Q. The very first statement. Did you not say that you -- after they came out you drove off?

A. Could you please repeat that, after who came out?

Q. After you came out of that house, Charles Penny's apartment, did you not say in maybe one, possibly two -- and we'll look at them, and you are more than welcome to refresh your mind, did you not say you drove off?

A. Yes, sir, it was a lie.

Q. So it was a lie?

A. Yes, sir.

Q. And it was also a lie when you were saying that these two gentlemen are running up the road, a block down the road trying to stop you; that was a lie too? You weren't up there you were still back in the front of that house?

A. You have to show me the statement, sir.

Q. I think they're marked for identification purposes. Here is the August 4th original, August 4th. Look at that, please, ma'am. Here is another August 4th original.

A. Which one are you on?

Q. Well, you look through those statements, both of them. That is your handwriting, isn't it? Is that not your handwriting, ma'am?

A. Yes, sir, this is my handwriting.

MR. RIDDLE: Your Honor, perhaps it would speed things up if he's asking her about a specific statement that she made in those statements if he could direct her to what she's looking for.

MR. ELLISOR: Your Honor, we've already established that half of this stuff is a lie. I want her to refresh her mind and memory.

A. Show me which statement.

THE COURT: Ma'am, ma'am, ma'am, wait. When the lawyers talk, let them finish talking. Ma'am, you have the document in front of you.

If you have something particular that you're going to ask about, certainly you're free to go ahead and do that, Mr. Ellisor.

BY MR. ELLISOR:

Q. If you would look at the document that has -- well, I don't know because you got the original. Look at the one that has Doug Collins' name on it. That one. And if you would go to page two and if you would look, I was in the house about to walk out the door and Buck and Smiley pushed me out the way and came in. I ran to my car. I heard about four shots. I began driving toward Meeting Street.

Did you stay in your car or did you get in your car and leave --

A. Yes, sir, I stated that it was a lie.

Q. Go to your second August 4th statement.

MR. RIDDLE: This is the second one, Your Honor.

Q. Your first August 4th statement. Did you not say on page two of that statement, When I was in the house about to walk out the door and Richard Smith and Smile pushed me out the way and came in the apartment I ran to my car. I heard about four shots. I began driving toward Meeting Street? Did you not say it in that statement?

A. Yes, sir, I said --

MR. RIDDLE: Under rule 106, I would like for him to publish the next sentence of that statement.

THE COURT: All right. Mr. Ellisor.

Q. I began driving toward Meeting Street. Richard Smith and Smile came running up to my vehicle and got in.

MR. RIDDLE: That's fine. Thank you.

Q. So you didn't stay around and see anything, you left?

A. I lied.

Q. Okay. You were under oath when you gave these statements, were you not?

A. That's correct.

Q. You told this jury you could see inside.

A. That's correct.

Q. Were you sitting in your car when you saw inside?

A. Yes, sir.

Q. What did you see inside through, there is a wall right there?

A. The door was open.

Q. So they had robbed somebody and left the door open while they went inside to rob somebody?

A. Correct, the door was open.

Q. So they go in this house with guns and leave the door open?

A. Correct, the door was open.

Q. Okay. Now, these two statements, August 4th statements, you signed them. Who was present when you gave both these statements?

A. Mr. Jones and another officer.

Q. Okay. Do you know that officer's name?

A. I don't remember.

Q. Okay. Do you see him in the courtroom?

A. I don't know who he is. I wouldn't know him if I see him.

Q. Now, who told you that Mr. Muller was dead?

A. The captain at the West Columbia Police Department.

Q. And when did he tell you that?

A. He told me -- I don't remember.

Q. Did he tell you on August 4th when you gave your statements?

A. I don't remember. All I remember is him telling me

that someone was dead and another one was fighting for their life.

Q. Did you not see any coverage of the death in the news media?

A. No, I didn't see the news.

Q. Okay. They came out to your home and took you to the police department, correct?

A. That's correct.

Q. What day was that?

A. I don't -- the 4th.

Q. The 4th?

A. Correct.

Q. So on the day you gave these statements, before you gave these first two statements, they had come to your house?

A. That's correct.

Q. And according to you, your two accomplices were at your house?

A. That's correct.

Q. Okay. But they didn't find them?

A. No one asked me was they there.

Q. But they come to your house, take you, but don't search your house?

A. That's correct. They didn't have a search warrant.

Q. Did they ask you to search?

A. No, sir.

Q. So they took you down at this time and they read you your Miranda warnings?

A. That's correct.

Q. So you know at this time you are the subject of a homicide investigation?

A. That's correct.

Q. So did they tell you at the time they read you Miranda warnings that somebody had been killed?

A. No, sir, they didn't.

Q. They just said you have a right to remain silent; they didn't tell you why they were questioning you?

A. They just told me that they needed to talk to me.

Q. And did they tell you that there was a robbery?

A. I don't remember.

Q. Well, you went down there twice, didn't you, or you gave two statements? The statements on that day were given at two separate times, correct?

A. I don't remember the times.

Q. Do you remember if one was given in the morning or the afternoon?

A. I don't remember. I remember the afternoon.

Q. Both of them were done in the afternoon?

A. I don't remember. I just remember when they first came and got me one was done that afternoon.

Q. And they let you go at that time?

A. Correct.
Q. And you were to help them catch this Smiley and this other guy?
A. Correct.
Q. And these two people, one of which you told them you were going to help catch, you'd been with him inseparable for a year?
A. Correct.
Q. And yet he doesn't call you up the day after this, has no contact with you whatsoever, correct?
A. That's correct.
Q. Okay. Now, your testimony was eventually that you and Mr. Collins and Smiley went to a motel room?
A. That's correct.
Q. And you all spent the night there?
A. That's correct.
Q. Originally you had said that you went to that motel room by yourself?
A. I lied.
Q. Why did you lie about it?
A. Because I didn't want Ivan to get in trouble, and I was scared of him, and I didn't want to get in trouble.
Q. Well, you had just named him as somebody who was involved in the robbery. Why was it important to say that he didn't spend that night with you if you just told the police

he had done it with you?

A. I was scared.

Q. The fact is, he was the person you knew, he had dated you, correct?

A. Correct.

Q. He had had sex with you?

A. Correct.

Q. And he broke it off with you, and you cut his tires at least once, hadn't you?

A. He never owned a vehicle that I know of.

Q. Did you not cut his girlfriend's tires?

A. I didn't know he had a girlfriend.

Q. You didn't? Who's Peaches? Do you know a friend of his named Peaches?

A. I surely don't.

Q. Do you know a friend of his named Erica?

A. I know Erica.

Q. Okay. Did you not kick in the back door of Erica?

A. Yes, I did.

Q. You just don't like Erica?

A. But that happened way before this incident happened.

Q. You tried to get in a fight with his girlfriend, Tammy?

A. I don't know Tammy.

Q. You didn't go over and break her window?
A. I don't know Tammy. I don't know where she live. I never heard of her.
Q. So then your relationship is you and Mr. Collins were just getting along perfectly wonderful on August 3rd?
A. Correct.
Q. And the day after you leave the motel room with him you don't see him again?
A. Yes, I do. He drops me off at work the next morning.
Q. Well, that's the day afterwards.
A. Correct.
Q. According to your testimony. Okay. By August 6th you have your own personal attorney?
A. Correct.
Q. Are you in jail on August 6th?
A. No, I'm not.
Q. You had told these police that you're involved with this murder and you're not in jail on August 6th?
A. Correct.
Q. And you are out trying to catch two people?
A. Yes.
Q. Right?
A. Correct.
Q. And I believe you stated that you had lost your job

recently?

A. Correct.

Q. Ma'am, have you gone to jail at any time for this?

A. Excuse me?

Q. Had you, prior to your testimony, served any time in jail for your participation in a robbery that is without doubt undisputed you were one of the people involved in it?

A. Yes, I have been in the jail.

Q. When did you get out?

A. I got out January 23rd of 2002.

Q. 2002?

A. Correct.

Q. How long did you stay in there?

A. Five and a half months.

Q. Five and a half months. So you stay in jail five and a half months, you get out after you give these statements. So you walk around, work, whatever you do until now?

A. Correct.

Q. What was your bond?

A. My bond was set at a hundred thousand the first time.

Q. Okay. The first time, and then it was reduced?

A. Correct.

Q. It was reduced before or after your testimony, your

statements?

A. It was reduced after my statements.

Q. In other words, you're in jail, you can't make bond, you get with the prosecutors, you now make bond, correct?

A. I got with the prosecutors before I even got arrested the first time.

Q. When you drove up to Charles Penny's house where did you park your car?

A. I parked to the right of his apartment.

Q. How far to the right?

A. Not too far. You want me to show you?

Q. Yes, I would. Excuse me, let me show you a picture. I'm going to show you State's Exhibit Number 1. Could you come around here, please, ma'am.

A. (The witness complied).

Q. And show these jurors where your car was parked.

A. My car was parked somewhere over here (indicated).

Q. About where that white one is?

A. A little bit, yes, by the white car (indicated).

MR. RIDDLE: I'm sorry, I cannot hear her.

Q. Tell the prosecutor where you said you parked at.

A. I parked right here (indicated).

MR. RIDDLE: Where the white car is?

THE WITNESS: Correct.

MR. RIDDLE: Okay. Thank you.

(WHEREUPON, the witness returned to the witness stand.)

BY MR. ELLISOR:

Q. And you're looking inside that door at an angle, correct?

A. Correct.

Q. Was the door open wide all the way?

A. Yes, the door was open all the way.

Q. And you could see what all happened in there from looking at that inside from an angle?

A. That's right.

Q. And you don't deny that the blinds were pulled on the window?

A. I don't remember the blinds being open or closed. I don't remember.

Q. Well --

A. I don't even remember --

Q. Let me show you a picture of State's Exhibit 11. Are those blinds open or closed?

A. The blinds are closed.

Q. Okay. And you got a wall right there by the door, too, brick wall; and yet you've told the jury you could see everything that was going on inside?

A. Yes, I could see in clearly. I could see clearly

in the house.

Q. Could see clearly. And not only you could see clearly from looking at an angle in something that was going on back inside a room you could see who he was shooting, and it was Ivan who was doing the shooting, your boyfriend?

A. In the living room, yes, he was.

Q. And Ivan was at your house when the police come to talk to you?

A. Correct.

Q. And you didn't tell the police when you went down there and you started cooperating at this time --

A. Correct.

Q. -- that he was there?

A. No, I didn't tell them that.

Q. Okay. Because if he was there, if he was the co-defendant and he was there it would have been easy enough to see him because you could have said, hey, this is the guy. Even though I've named him, this is the guy in my house right now, go on and pick him up because here he is.

A. Yes, I could have said it but I didn't, because like I said, I was scared.

Q. You weren't scared enough not to identify him, were you?

A. I don't understand the question.

Q. Ma'am, who did this murder with you?

A. Ivan Collins and Terrence Smith.

Q. Well, if they were there with you and at your house and you identified them why didn't you tell the police they were in your house, go get them?

A. I was scared of them. I didn't want to.

Q. You were not scared of them enough not to name them. You would have had police escort to go out. I didn't say for you to go out and pick them up, why didn't you tell the police to go pick them up? Again, who did this robbery with you?

A. Ivan Collins and Terrence Smith.

Q. You did not go there to sell those --

MR. HENDRIX: Your Honor, we have a matter to take up with the Court.

THE COURT: Yes, sir.

Ladies and gentlemen, let me ask you to step to the jury room just for a minute. While you're there be sure not to talk about the case.

(WHEREUPON, the jury leaves the courtroom at approximately 1:00.)

THE COURT: Counsel, let me also note it's one o'clock now. Mr. Ellisor, do you have any idea how long your --

MR. ELLISOR: Five minutes at the most.

THE COURT: Mr. Hendrix, how about you; do you have

any recross?

MR. HENDRIX: I don't at this point, no, but I'm not sure yet.

THE COURT: Mr. Riddle, do you have any redirect?

MR. RIDDLE: About two minutes worth.

THE COURT: Okay. You think we can get her done before lunch break, maybe?

MR. RIDDLE: Absolutely. I don't see any reason why we wouldn't, depending on how long this takes.

MR. HENDRIX: Your Honor, at this time, on behalf of Terrence Smith, we would renew our motion for a severance. I believe that the questioning of Mr. Ellisor of the witness is putting us into an adversarial position, which, of course, was well known to the Court and that's why separate attorneys were appointed for each of these two defendants.

It appears to us now that the testimony being elicited, she's wanting to say she did this in conjunction with Mr. Smith and she's already stated she had no agreement -- and actually had no agreement and actually had no conversations with Mr. Smith or anything about this.

I think my client's rights are being harmed at this point in time and that a severance is required in order to protect his rights and would ask that Your Honor so do that, and depending on what happens and how we're going to handle it after that, but that's what we think is required at this

point in time to protect the rights of Mr. Smith.

THE COURT: Mr. Ellisor, before I ask the solicitor, what's your position on that motion?

MR. ELLISOR: Well, it is his motion. I'll let it rise and set on his. I'm not asking for a severance at this time.

THE COURT: Solicitor?

MR. RIDDLE: She indicated on direct and I believe again on cross that she did not recall having conversation with Terrence Smith beforehand, proving a conspiracy regarding Terrence Smith. What she was asked by Mr. Ellisor was who committed this murder with you. Didn't ask anything about a conspiracy. Who committed murder? And she answered the question just exactly like she did on direct, Ivan Collins and Terrence Smith. It's no more prejudicial than the direct was.

THE COURT: Mr. Hendrix, can you give me a specific way in which your client is prejudiced in terms of hostile defenses, or any other procedure?

MR. HENDRIX: Your Honor, what is happening from our point of view at this point in time is that basically evidence is being elicited which involves him, to our interpretation, more than the direct testimony of the witness would have indicated to start with, and, in fact, what she in part denied in cross-examination since then that she, in

fact, did not have any agreement with my client or anything such as that.

I think the implication is there though of her testimony as it's being elicited by Mr. Ellisor which again is what puts us in a conflict position on this thing by being both in the same trial.

If he wants to do all that and he's just got Mr. Collins to worry about that's one thing. When he's handling my client over here with her repeated assertions that my client was involved in this thing, you know, I can't do anything about that to protect my client's rights, and my client's rights are being harmed as a result. It's being reiterated and reiterated.

THE COURT: I'm going to deny the motion again. I don't think we're in a posture of where any specific right is prejudiced by the conflict in -- the potential conflict in defenses at this point.

MR. HENDRIX: Your Honor, if I can make it clear, I'm talking about my client's right to a fair trial, if you need for it to be asserted like that.

THE COURT: I understood. Of course, you understand that's -- obviously, that's the benchmark, but as you know, the case law also indicates that we must look at some specific element of prejudice, particularly that affects the right to a fair trial. At this point I can't find any.

Again, that doesn't mean you can't raise the motion again if it doesn't come up, but at this point I don't think it's there. I'm going to deny the motion.

All right, Counsel, you think we can get this witness through in just a few minutes here?

MR. ELLISOR: I do, Your Honor.

THE COURT: All right. Let's bring the jury back in.

(WHEREUPON, the jury enters the courtroom at approximately 1:04 p.m.)

THE COURT: All parties and attorneys are in the courtroom and all jurors have returned.

Mr. Ellisor?

MR. ELLISOR: Thank you, Your Honor.

BY MR. ELLISOR:

Q. Ms. Williams, did you see Charles Penny sell marijuana to the couple that came?

A. Yes, sir.

Q. Where were you at when he sold it to them?

A. I was in the chair.

Q. How far were you from the marijuana?

A. Not far at all.

Q. How much did they buy?

A. I don't know.

Q. Did you see him bag it for him?

A. I don't remember.
Q. Was there a white guy there with you all?
A. Yes, sir.
Q. Did he buy any?
A. I thought I remember seeing him buy some but I'm not sure.
Q. You think you remember. Did you see him give Charles Penny any money?
A. I don't remember.
Q. Do you remember how much Mr. Rogers -- did you know the white man's name?
A. No, I didn't know his name.
Q. Did you see how much he took?
A. I thought I remember a 20 sack but I'm not sure.
Q. A 20 sack?
A. Yes, sir.
Q. So for somebody who doesn't know anything about drugs you know how much a 20 sack is?
A. Yes, I do.
Q. Now, he was there -- the white man was still there when you left?
A. Yes, sir.
Q. And your testimony earlier was you were in your car -- come down a minute, please, ma'am.
A. (The witness complied).

Q. I show you State's Exhibit Number 3. Is this the road that runs beside Charles Busby's [sic] apartment?

A. Correct.

Q. Where was your car at when you showed the jury -- turn around to the jury and show again, where was your car at when Ivan and them come running up towards you.

A. Right here by this tree (indicated).

Q. You can sit down, please, ma'am.

A. (The witness complied.)

Q. Why had you stopped your car there?

A. Because I seen them running up.

Q. But you had gotten in your car and drove and were leaving these two?

A. Yes, I was going to but I seen them running up.

Q. So you're driving off by yourself?

A. Correct.

Q. Do you slam on brakes?

A. I come to a stop.

Q. Well, did you slam on brakes?

A. I come to a stop.

Q. Well, you had to come to a stop, they got in. Did you come to a fast stop, a rolling stop?

A. A slow stop.

Q. So you were looking back for them as you were creeping up the road?

A. I was looking in my rear view mirror and I seen them running up and I slowly stopped.

Q. But when you made that turn to go up that road, came out of that parking lot, they were still in the house?

A. I don't know my back was turned.

Q. Well, when you left and pulled out they weren't in the car with you?

A. No, they wasn't.

Q. So these two guys got in a car with you?

A. Correct.

Q. The two robbers are the robbers that robbed that young boy sitting over there and shot him and killed Sidney Muller, there were four men in another car with you, weren't there?

A. No, sir.

Q. Did you talk with Officer Carter?

A. Yes, sir.

Q. Was he at the scene?

A. I don't know.

Q. So you didn't see him at the scene?

A. I have no --

Q. When you talked with him he didn't tell you he had investigated this crime and had gone to it?

A. No, he didn't.

Q. Did you not tell Investigator Riley that you smoked

marijuana?

A. I don't remember.

Q. Now, your testimony is you knew Ivan Collins for a year?

A. Correct.

Q. And you testified that he and the young man beside him were inseparable friends?

A. I knew they was pretty close friends.

Q. Close friends. And yet in the year that you knew him prior -- it was a year prior to this incident?

A. I knew Ivan. I didn't know Smiley for very long.

Q. So you did not know the name of Ivan's best friend even though you had been around Ivan for one year?

A. Correct.

Q. And you said they were together all the time?

A. That's correct.

Q. And yet in one year these two people that were together all the time you had only seen --

A. I didn't know Terrence for a year. I knew Ivan. I didn't know Terrence for another two to three months prior to this.

Q. Two to three months?

A. Correct.

Q. Not two to three weeks, two to three months?

A. Correct.

Q. In two to three months Ivan Collins' close friend, you didn't even know his name?

A. No, I didn't.

Q. And you were with Ivan Collins every day?

A. Correct, just about.

Q. And did you try to get in touch with him after he took you back to work that day?

A. Yes, I did.

MR. ELLISOR: I don't have any further questions, Your Honor.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. RIDDLE:

Q. Is this a copy of the first statement that you gave to the West Columbia Police Department?

A. Correct.

Q. Is this a copy of the second statement you gave to the West Columbia Police Department?

A. Correct.

Q. And that one was given on 8-4?

A. Correct.

Q. The day after the incident?

A. Correct.

Q. You told them it was Smile and Ivan Collins?

A. Doug Collins, yes.

Q. Doug Collins, excuse me. That's the same guy though?

A. Yes, sir.

Q. Okay. Is this a copy of the third statement that you gave to West Columbia Police?

A. Yes, sir.

Q. And that was on 8-6, three days after the incident?

A. Correct.

Q. Then this is the last time you gave them on 8-8, correct?

A. Correct.

Q. That's a copy of that?

A. Yes, sir.

MR. RIDDLE: Your Honor, I'd offer all of these in evidence.

THE COURT: Any objection?

MR. HENDRIX: Your Honor, I object. The witness is here to testify, and he can ask her any questions he needs to about that. There's no need to introduce the statements.

THE COURT: You join the objection?

MR. ELLISOR: Yeah, I would join and concur in that, Judge.

THE COURT: Counsel, I'm going to allow the statements in. Again, I think everybody has been through them pretty thoroughly. And, again, if either of you have

any further questions of her you certainly would be allowed to ask those too. We'll allow them in.

Are they marked, yet, Madam Court Reporter?

MR. RIDDLE: No, sir, they're not marked.

THE COURT: Let her get them marked. Counsel, do you see any reason why we shouldn't just mark them as a group?

MR. HENDRIX: I don't see why you need to mark them at all, Your Honor.

[LAUGHTER.]

MR. HENDRIX: I don't have an opinion one way or the other.

THE COURT: I understand.

MR. ELLISOR: I have no objection.

THE COURT: All right, we'll mark them as group then.

(WHEREUPON, State's Exhibit No. 36, Statements, were marked and admitted into evidence.)

MR. RIDDLE: Your Honor, I don't have any other questions.

THE COURT: Anything else, Mr. Hendrix?

MR. HENDRIX: Yes, Your Honor, just to reiterate something now.

RECROSS-EXAMINATION

BY MR. HENDRIX:

Q. Wykiesha, if you don't mind I'm going to ask you a question from here to speed things along. Despite everything that's been said, once again you don't recall having any conversations about anything that was going to happen with Terrence Smith?

A. No, sir, I don't.

Q. You didn't have any agreement with him?

A. I don't remember having an agreement with him.

MR. HENDRIX: Thank you. Nothing further, Your Honor.

THE COURT: Anything else, Mr. Ellisor?

MR. ELLISOR: Nothing, Your Honor.

THE COURT: All right. You can step down.

Counsel, let's go ahead and take a lunch break at this point.

Ladies and gentlemen, we'll go ahead and take a lunch break at this point. I'll ask you to be back at 2:45. That will give you an hour and a half. And let me tell you this. I'm sure you're starting to wonder about time, when we're going to get through. From what we anticipate it looks like we're going to be through tomorrow. Hopefully earlier, maybe later. It depends.

But if we come down to a point of having to make a decision beyond tomorrow afternoon then what I'll do is probably let you make that decision. And, of course, the

alternative we would be faced with, if necessary, would be going late into Friday night, or to come back over the weekend, or to come back Monday. And those will be the alternatives, obviously.

And what I'll do is let you make the decision, if you're pretty unanimous. If you're split about it then I'll have to make the decision, but at least I want to give you some input into that. Hopefully it's not going to come to that, but if it does I want you to know that you'll at least be involved in it.

Anyway, I'll ask you to be back in the jury room at 2:45. Be sure not talk about the case during the lunch break, and we'll see you back then.

(WHEREUPON, the jury leaves the courtroom at approximately 1:15 p.m.)

THE COURT: Anything from the State before we recess?

MR. RIDDLE: Yes, sir. I don't know what the exhibit number is from the statements that we just marked as a group, those statements which I introduced are the redacted copies that I had shown to Mr. Ellisor and Mr. Hendrix prior to -- well, earlier this morning.

I'm not sure when it was, but because I did not want to get into the character issues, that's why the originals are still marked for identification purposes only

and should not go to the jury. And the copies that were introduced are the redacted versions that had previously been shown, and no objection was raised regarding the contents of those statements.

Secondly, Your Honor -- and this is premature, but I want to make it now because I will forget to make it later. They asked Ms. Williams a great deal of questions about other incidences of conduct, specific incidences of conduct which would constitute bad acts; such as a marriage, such as cutting tires, such as, I think, striking somebody, or what have you. Under State V. Majors, State V. Outlaw, and more specifically Rule 608 they are not allowed to -- in my opinion, they are not allowed to present extrinsic proof of misconduct which is not subject to conviction of crime if the witness denies it regarding collateral matters.

And I don't know who these people are, I don't know if they've got any witnesses that would try to get up there and testify to those things but it's not admissible. It's on a collateral issue. They are stuck with her answer under 608, Major and Outlaw, in my opinion.

And I'm not in a posture where I can effectively object to that beforehand. I don't think they should be allowed to present that evidence, and I would request that the Court require them, if they are going to attempt to present that type of evidence that 608 prohibits, that they

do so outside the presence of the jury, because there's no way for me the see it coming in advance because I don't know who their witnesses are.

THE COURT: Mr. Hendrix, what's your position?

MR. HENDRIX: Well, Your Honor, if he wants that kind of ruling the only thing I would say is if it comes to light that they are going to use any similar testimony we would require the same thing. It's got to cut both ways. And I don't have a problem with that, I just want it to cut both ways.

THE COURT: Yes.

MR. ELLISOR: I agree with the solicitor's position on that, Your Honor.

THE COURT: Okay. I think that's what the rule says. And, obviously, there is some recourse. In essence if you can show that she has lied about something -- and I realize it doesn't affect the trial itself, but after the trial is presented and if I find she has I'll find her in contempt and put her in jail.

MR. HENDRIX: Your Honor, one matter I did want to take up, something that you mentioned. But I need to remind Your Honor, I know that Ms. Steiger in my office came over for something, I believe Monday, and mentioned to Your Honor and I need to remind you again is that for months I have had protection for next week to be on vacation.

THE COURT: That's true.

MR. HENDRIX: And I understand you're leaving it to the jury but it would be a disaster for me to have to come back Monday and continue this thing. I mean, I've got some arrangements that I cannot change now.

THE COURT: Right.

MR. HENDRIX: I might could change a flight for a day or so but I can't change the other things.

THE COURT: That's true. I forgot about that.

MR. HENDRIX: And it would really be a disaster.

THE COURT: Well, actually, what we'll just have to do then is just plan to go tomorrow night, if necessary. That may put us into -- I may have to bring in my friend, Judge Midnight, but we haven't used him in awhile so he's ready. We'll see you back at 2:45.

(WHEREUPON, a lunch break was taken.)

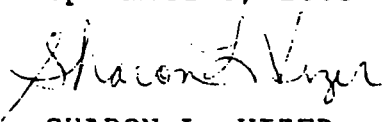
** END OF VOLUME II **

C E R T I F I C A T E

I, Sharon L. Vizer, Official Court Reporter for the 11th 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 the evidence introduced in the trial of the captioned case in Circuit Court on the 30th day of April, and the 1st day of May 2003.

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

September 5, 2003



SHARON L. VIZER

CIRCUIT COURT REPORTER

Thursday, May 1, 2003

(WHEREUPON, State's Exhibit No. 37, a Photograph, was marked and admitted into evidence by stipulation of attorneys.)

THE COURT: I understand we're ready to start on the case we've been trying. The State ready?

MR. RIDDLE: Yes, sir. Your Honor, for the record, during the break I showed Mr. Ellisor and Mr. Hendrix what's now been marked as State's Exhibit 37. It's going in without objection. And I also have one additional, State's Exhibit 38, which will be going in without objection.

THE COURT: Is that correct, Counsel?

MR. HENDRIX: Yes, sir.

MR. ELLISOR: Yes, sir.

MR. HENDRIX: I have no objection to the three pictures I have seen. I think there were three of them.

MR. RIDDLE: Three total, yes, sir.

THE COURT: Mr. Ellisor, you in agreement?

MR. ELLISOR: That's correct.

MR. RIDDLE: I'm only offering two of them.

MR. HENDRIX: Okay, two of them then. I was shown three.

MR. RIDDLE: I showed you three but then I decided not to offer one because it was cumulative.

THE COURT: Okay. Have we worked that out?

(WHEREUPON, State's Exhibit No. 38, a Photograph, was marked and admitted into evidence by stipulation of attorneys.)

THE COURT: All right, are we ready?

MR. RIDDLE: Yes, sir.

THE COURT: Is the defense ready?

MR. HENDRIX: The defense is ready, Your Honor.

MR. ELLISOR: Yes, sir.

(WHEREUPON, the jury enters the courtroom at approximately 3:05 p.m.)

THE COURT: All parties and attorneys are in the courtroom and all jurors have returned.

All right, call your next witness.

MR. RIDDLE: The State calls Mark Jones to the witness stand.

MARK JONES, after having been duly sworn, testified as follows:

THE CLERK: Have a seat and state your name and spell your last name.

THE WITNESS: Investigator Mark Jones. The last name is J-o-n-e-s.

DIRECT EXAMINATION

BY MR. RIDDLE:

Q. Mr. Jones, you are employed by the West Columbia Police Department?

A. Yes, sir.
Q. How long have you been with them?
A. A little over 12 years, sir.
Q. And what do you do with West Columbia?
A. I'm the supervisor of the narcotics division as well as work major crimes and investigations.
Q. So you do both, you do narcotics cases and major criminal cases?
A. That's correct, sir.
Q. How long have you been doing that particular job with West Columbia?
A. After leaving the road position as a supervisor I started investigations about four years now.
Q. Four?
A. Yes, sir.
Q. Is your total law enforcement experience with West Columbia?
A. Yes, sir.
Q. Now, Investigator Jones, are you the lead investigator on this particular case?
A. That's correct, sir.
Q. All right. And how do you go about becoming the lead investigator; how is that determined within the department?
A. Well, based on the investigation that a supervisor

looks at and the department heads look at, overall your performance, the way you deal with the public, the way you get out and perform your duties as far as getting leads and getting evidence in cases, and basically follow-up procedures, they look at all that.

Q. But, I mean, you get assigned to this case by whom?

A. I got assigned to this case particularly by my supervisor, Captain Owens.

Q. Tony Owens?

A. That's correct, sir.

Q. Now, he's been referred to earlier. He was an older black fellow; is that correct?

A. Yes, sir.

Q. Wears glasses?

A. Yes.

Q. When you work a case do you work it by yourself or do you end up working with the other investigators from West Columbia?

A. In most major cases we work it as a team with the investigators with the City of West Columbia.

Q. You just kind of run the show then?

A. Well, so to speak.

Q. You may do more than that but you kind of coordinate the efforts of the team as a lead investigator?

A. That's correct, sir.

Q. Now, one of the investigators on this case was an individual named Kevin Riley, was he not?

A. That's correct, sir.

Q. And is Kevin still employed by West Columbia?

A. No, sir.

Q. Where is he now?

A. Kevin Riley has since joined the U. S. Marshal Service. He is now in training down at Quantico, I believe it's in Georgia.

Q. Okay. And what's the statis of his training, is it mandatory?

A. Well, basically, the U. S. Marshal Service is one of those federal agencies, you're on a waiting list when you apply. And it's like a one shot deal. You get in there and you do the best you can. Once you're in there you're pretty much locked in. Your chances of leaving and coming back for any kind of emergencies is kind of slim.

Q. Now, Kevin Riley did some things in this particular case, correct?

A. Yes, sir.

Q. And he actually worked on this case, I guess the early morning hours of August the 4th; is that correct?

A. That's correct, sir.

Q. Is Kevin Riley the officer that went with Mr. Penny that night?

A. That's correct, sir.

Q. And did Mr. Penny assist the investigation in this case?

A. Yes, he did, sir.

Q. And how did he do that?

A. In the investigation he assisted Kevin Riley by going to locations locating individuals that could lead him to Wykiesha Williams.

Q. So Mr. Penny's efforts along with law enforcement in coordination is what led you all to Wykiesha Williams?

A. That's correct.

Q. Now, did an issue come up about Mr. Penny having a firearm?

A. That's correct. Mr. Penny in the investigation provided a firearm to Investigator Riley which he had at his residence.

Q. Let me show you this and ask if you recognize it to be the firearm that was obtained from Mr. Penny.

A. That's correct.

MR. RIDDLE: Your Honor, can I have this marked for identification at this time?

THE COURT: Yes, sir.

(WHEREUPON, State's Exhibit No. 39, a Gun, was marked for identification only.)

BY MR. RIDDLE:

Q. Now, Investigator Jones, were you all able to recover the guns that were actually used in this homicide?

A. No, sir, those were the only guns taken in evidence in this investigation.

Q. Mr. Penny's was?

A. That one single gun Mr. Penny provided to law enforcement.

Q. Now, as a result of Mr. Penny's cooperation with law enforcement were you all able to make contact with Wykiesha Williams?

A. That's correct, sir.

Q. And was it you that made the initial contact with her or another investigator at West Columbia?

A. Investigator Riley and Investigator Carter were directed to make contact with her initially.

Q. And where did they initially make contact with her?

A. At her residence in Irmo.

Q. Do you know approximately when that was?

A. That was on 4 -- excuse me, on 8-4-2001.

Q. And do you know approximately what time of the day it was?

A. It was afternoon approximately. A little after five, possibly.

Q. Now, after they made contact with her, where did she come to?

A. She came directly to the police department after speaking with Investigator Riley at her residence.

Q. And would she have been questioned at her residence or would you all have gotten her to come down to the police department?

A. We would have brought her to the police department for questioning.

Q. Based on you all's knowledge at that time did you all feel a need to Mirandize her or give her her rights?

A. Yes, sir, we would have Mirandized her before I asked her any questions in a serious case like this.

Q. And would that have been done pretty much as soon as she arrived at West Columbia?

A. That's correct, sir.

Q. Let me show you State's Exhibit 29. Do you recognize what that is?

A. Yes, sir, that's a Miranda warnings form.

Q. As a matter of fact, that's the original that came out of your form, is it not?

A. That's correct, sir.

MR. HENDRIX: Your Honor, we have already not objected to these coming in. If we could move along with this we would appreciate it. I understand the solicitor certainly has a right to try his case, but it's getting late in the week and we've already got in evidence the Miranda

warnings, three sets of them, I believe.

THE COURT: All right.

BY MR. RIDDLE:

Q. She was Mirandized at what time?

A. She was Mirandized at 5:40 p.m., sir.

Q. Thank you. Now, you all spoke with her on that occasion, did you not?

A. That's correct, sir.

Q. And she gave some initial statements to Investigator Carter, did she not?

A. That's correct.

Q. And then you took two written statements from her?

A. That's correct.

Q. And you've seen what's been marked State's 36?

A. That's correct.

Q. And the top two statements would be the ones that were taken on the fourth?

A. That's correct, sir.

Q. All right. Now, at that time did she admit to you her involvement in this?

A. She initially admitted to being present during the incident and gave me two names during the initial statement.

Q. And what names did she initially give you?

A. She gave me the names which she stated was Smiley and Buck, which was Richard Smith, Buck.

Q. Did you talk to her again that night and obtain a second statement?

A. That's correct, sir.

Q. And at that time did she give you the names of the individuals that were involved with her in this?

A. That's correct, sir.

Q. What names did she give you on the fourth?

A. She gave the name Smiley and Doug Collins.

Q. That would have been less than 24 hours after this incident, correct?

A. That's correct, sir.

Q. Now, did you place her in custody at that time?

A. No, sir, I did not.

Q. Tell this jury why you did not place her in custody at that time.

A. Based on the information we had received from the victims and the information we received from Wykiesha Williams we felt that by having her out she had the ability to make contact with Ivan Collins, which at that time appeared to be more of a danger than Wykiesha Williams.

Q. Now, you let her go home?

A. That's correct, sir.

Q. Did you have her back down on the sixth?

A. That's correct, sir.

Q. You went through the same process, did you not?

A. That's correct.
Q. You Mirandized her?
A. I certainly did.
Q. And then State's Exhibit 36, the third statement, that's the one she gave on the sixth, correct?
A. That is correct.
Q. Now, did you arrest her at that time?
A. No, sir, I did not.
Q. And would it be for the same reason that you didn't arrest her on the fourth?
A. It would be for the same reason.
Q. Now, at that time on the sixth did she reiterate her position of being involved in this robbery?
A. Yes, she did, as the statements continued a little more information which we figured we'd gather from Wykiesha Williams.
Q. And on the sixth she, I think, told you about the cell phones as well?
A. That's correct, sir.
Q. Did you all make an effort to run down those cell phone records?
A. That's correct.
Q. What did you discover about Ms. Williams' cell phones?
A. She was -- she had a prepaid cell phone.

Q. And why is that significant?

A. That's significant. At that point we didn't have the ability to run down the system through prepaid phones.

Q. You don't get those itemized call lists like you do on a regular cell phone?

A. That's correct.

Q. That all changed after 9-11, didn't it?

A. That's correct.

Q. And if it happened today you'd be able to obtain them?

A. Today you can pretty much get any type phone system.

Q. And I believe you indicated you let her go on the sixth?

A. That's correct, sir.

Q. You had her back down on the eighth, correct?

A. That's correct, sir.

Q. And went through the same process?

A. That's correct.

Q. And then on the eighth she gave you the fourth statement that was in that stack. She gave you the fourth statement that's in this stack?

A. That's correct. I asked her some questions that day.

Q. And did you place her under arrest at this time?

A. On the eighth after obtaining the information from her we contacted her attorney.

Q. Is that Mr. Mathews?

A. That's correct.

Q. And keep going.

A. After the attorney was contacted we advised him that we wanted him to turn her in the following morning.

Q. Now, that was the part of the investigation you dealt with Wykiesha Williams. Let me back up to the fourth again and touch on something else.

A. Yes, sir.

Q. On the fourth, did West Columbia Police Department release any information to the media in this case?

A. The media information was released on the morning of the fourth.

Q. What was released; were there any photographs released?

A. No photographs were released.

Q. What was released, just that there had been a shooting and there was a dead person and a hurt person?

A. Basically that there had been a shooting, one person was found, pronounced dead, and the other individual was in the hospital from gunshot wounds.

Q. Were any names released of suspects?

A. No, sir.

Q. Were any photographs of suspects released?
A. No, sir.
Q. Now, after dealing with Ms. Williams, you put together some lineups to show the witnesses in this case?
A. Yes.
Q. And I believe you showed one to Charles Penny, correct?
A. That's correct, sir.
Q. And Mr. Penny was able to point out Terrence Smith as being one of the individuals?
A. That is correct, sir.
Q. Was that lineup done prior to any information being released --
A. That's correct.
Q. -- to the media in terms of photographs?
A. That's correct, sir.
Q. All right. Now, during the course of this investigation did you make contact with people who knew both Mr. Smith and Ms. Collins -- or excuse me, Mr. Smith and Mr. Collins?
A. The question again?
Q. I didn't ask it very well. Did you make contact during this investigation with people who knew, and/or family members, of Mr. Smith and Mr. Collins?
A. That's correct, sir.

Q. And specifically, did you talk to anybody in Mr. Collins' family?

A. Yes, sir. I spoke with Mr. Collins' mother, Helen Collins. In the conversation with Ms. Collins --

MR. ELLISOR: I object, Your Honor.

Q. You can't say what she said, okay?

A. Thank you.

Q. You had a conversation with her?

A. Yes, sir.

Q. Was she aware that you were looking for her son?

MR. ELLISOR: I object to that, Your Honor.

Q. Did you make her aware?

A. I made her aware that I was looking for her son, Ivan Douglas Collins.

Q. Did you talk to anybody else in Mr. Collins' family?

MR. ELLISOR: Your Honor, I object. I'd like to take a matter of law up outside the presence of the jury.

THE COURT: All right. Ladies and gentlemen, let me ask you to step to the jury room, and while you're there be sure not to talk about the case.

(WHEREUPON, the jury leaves the courtroom at approximately 3:22 p.m.)

THE COURT: All right. The jury is secured. Mr. Ellisor?

MR. ELLISOR: Your Honor, at this point the solicitor is trying to inquire as to irrelevant matters, I would presume for the purposes of inferring in the eyes of the jury that the defendants were not around for any period of time, which would put their character in evidence.

The fact they asked questions is immaterial to the proof of the State's case in chief about whether they committed this act or not. Anything asked inquiring about their whereabouts would be immaterial and implies that they were hiding out and puts their character in issue. I object to any kind of questions along these lines at all.

THE COURT: All right. Mr. Riddle, is that where we're going?

MR. RIDDLE: I'm laying the groundwork for some flight evidence, Your Honor. I mean, that's clearly what I'm doing. They were arrested two months later in Georgia. He had spoken with people close to them. There's already evidence in the record from Ms. Williams that she expected them to be found in Georgia, both Mr. Smith and Mr. Collins. I'll do whatever Your Honor wants me to do. That's where I'm going with it.

MR. HENDRIX: Your Honor, if I can speak to that as that might relate to my client.

MR. RIDDLE: And it does, I'll just tell you.

MR. HENDRIX: Then, Your Honor, we object too and

ask that it not be allowed. Your Honor, if he wants to make a proffer that might be one thing. But the fact that he talks to relatives and they may not have contact with him for a couple of months does not mean, we should not permit the State to argue that they are fleeing, because there's too many other -- there are many, many people in the world, in fact, I can think of a former solicitor whose son unfortunately is missing, and that doesn't mean he's fleeing.

There can be many reasons for that, and there's no reason to allow the State to do it, unless he's got something more specific than he's getting here that they would be permitted to smear the character of these young men with very, very speculative evidence.

Because quite frankly, at the time they were over 18. If they for whatever reason, their relationship is such that they don't contact home, well, I mean that just happens from time to time. It may not be the best in the world but that doesn't mean that the person who doesn't contact home is necessarily fleeing.

I've got a son at Winford and I have a dickens of a time running him down, and he's not running from anybody. He just doesn't call like I want him to. So to allow them to try to argue to the jury, to have something to argue to the jury about flight on such flimsy evidence just cannot be permitted, Your Honor, and we do object and ask that you not

allow it, unless he's got something more specific than he's shown so far.

MR. RIDDLE: There's not anything a lot more specific than that, Your Honor.

THE COURT: I believe it would be better to stay away from that.

MR. RIDDLE: And that's fine. Your Honor, then I've only got about two more questions, and I'll tell you what those questions are.

THE COURT: Okay.

MR. RIDDLE: Were they ultimately arrested in Georgia on these charges?

MR. ELLISOR: I object to that. That's the same thing. That specific question puts their flight -- it implies that they are arrested in Georgia, that they are a flight. Where they are arrested at is immaterial as long as they are in this courtroom today being tried on the facts that happened on August the 3rd. Therefore, it's irrelevant, it's prejudicial, it puts character in evidence, and I object to it.

THE COURT: Well, you don't dispute that they can put in the date of arrest, do you? Do you have a problem with the date of arrest?

MR. ELLISOR: I do. I don't think it's relevant. Why is the date that somebody is arrested -- if it takes the

State two years to get probable cause or five years, why is that relevant when he finally is arrested?

THE COURT: Actually, I'm not a witness, Mr. Ellisor.

MR. ELLISOR: I understand.

THE COURT: What's your position, Mr. Hendrix?

MR. HENDRIX: I'm going to have to take the same position. It looks to me like they're going to try to do the same thing with that, and that's just going to raise something that doesn't really -- I agree with Mr. Ellisor that it's irrelevant to any issue before the Court, and I believe they're trying to get something in the back door they shouldn't be allowed to do.

THE COURT: Well, out of precaution then, Mr. Riddle, let's just stay away from it.

MR. RIDDLE: All right, then I'm going to ask this question, Your Honor. Based on the information you gathered, based on the I. D.'s, based on the information from Ms. Williams did you issue arrest warrants for Mr. Collins and Mr. Smith, and were they subsequently arrested on these charges?

MR. ELLISOR: I object, Your Honor. The fact that it's immaterial and it's waisting time.

THE COURT: No, that's appropriate. Let's bring them in.

(WHEREUPON, the jury enters the courtroom at approximately 3:30 p.m.)

THE COURT: All parties and attorneys are in the courtroom and all the jurors have returned.

Mr. Riddle.

BY MR. RIDDLE:

Q. Mr. Jones, I'm going to wrap this up quick. Based on your investigation, based on the information you had gotten from Wykiesha Williams, and the identifications from Mr. Penny and Mr. Hayward, did you take any action as a result of that?

A. Can you ask the question again?

Q. Based on the investigation, the information from Wykiesha Williams and the photographic lineups from Mr. Hayward and Mr. Penny did you take some action in regards to Mr. Collins and Mr. Smith in relation to that?

A. Yes, sir, I obtained arrest warrants for their arrests.

Q. Subsequently arrested them on those charges?

A. That's correct, sir.

Q. And that started the chain of events that brought us here today, correct?

A. That's correct, sir.

MR. RIDDLE: Thank you. Please answer any of their questions.

THE COURT: Cross.

CROSS-EXAMINATION

BY MR. HENDRIX:

Q. Investigator Jones, I may have missed this in your direct examination by the solicitor, when did you become the one in charge of the investigation?

A. It would be the 4th, morning of the 4th.

Q. Morning of August the 4th, 2001?

A. Yes, sir.

Q. So you had been the one in charge, the one primarily responsible as far as the West Columbia Police Department is concerned since that date; is that correct?

A. That's correct, sir.

Q. How long after the incident took place was it that you all became aware of a witness named Carlos Roberto Almendares Rodriguez?

A. Just a second.

Q. And I may not be pronouncing that right.

A. It's pretty close, I think.

Q. And if I can ask you this while you're looking, if it won't interrupt you. Isn't it true that Mr. Rodriguez Almendares speaks only Spanish?

MR. RIDDLE: Objection. If he's going to ask him what Mr. Rodriguez Almendares said I object to hearsay because that's just publishing it. If he's going to ask him

what he said --

MR. HENDRIX: Your Honor, it's part of the investigation.

MR. RIDDLE: No, sir, it's hearsay.

MR. HENDRIX: It's a part of their investigation, Your Honor.

THE COURT: Well, it may be part of the investigation but if it's hearsay it's still hearsay.

MR. HENDRIX: Well, Your Honor, they've taken statements from the witnesses, and one of the questions I want to ask him is if that statement is inconsistent with the statement --

MR. RIDDLE: Your Honor, can we take this up at the bench?

MR. HENDRIX: -- that the State is putting on now. Where is Mr. Almendares?

THE COURT: Yes, sir, come around here.

(WHEREUPON, a bench conference was had.)

THE COURT: Ladies and gentlemen, let me ask you to step to the jury room. While you're there be sure not to talk about the case.

(WHEREUPON, the jury leaves the courtroom at approximately 3:33 p.m.)

THE COURT: The jury is secured, Counsel.

Mr. Hendrix, let's go ahead and proffer the witness

and see what he's going to say.

MR. HENDRIX: First of all, if he can let us know when he's found whatever information he needs. I see him still thumbing, so there's no need for me to start until he's finished.

THE COURT: You want to go through and find the information, Officer?

THE WITNESS: Yes, sir.

MR. HENDRIX: Whenever you're ready just let us know.

[PAUSE.]

THE WITNESS: I'm ready, Judge.

THE COURT: Okay. He's ready, Counsel.

BY MR. HENDRIX:

Q. First of all, who talked to the gentleman, the Spanish gentleman, Hispanic gentleman, so I won't keep butchering his name?

A. Mr. Rodriguez?

Q. Yes, sir.

A. On 8-4-2001 at 4:15 hours the witness met at the West Columbia Police Department, verbal statement to Investigator Carter, and a Spanish speaking officer from the Springdale Police Department, Robert Marzol.

Q. Now, as a part -- this was at 4:15 in the morning after this incident occurred at whatever time that night; is

that correct?

A. That's correct, sir.

Q. And what time does the West Columbia Police Department say that it occurred? I've got some documents that indicates 10:51 p.m. as the time that has been put on some reports; does that sound right?

A. That's the documentation I have, sir.

Q. Okay. First of all, were you there when he was examined or talked to?

A. No, sir.

Q. Okay. But this was done as a part of the investigation of the West Columbia Police Department into this matter; is that correct?

A. Yes, sir.

Q. And kept as part of the business records of the West Columbia Police Department; is that right?

A. Excuse me?

Q. This is part of your all's business reports, isn't it?

A. That's correct, sir.

Q. And as a part of that statement he indicated that there were two males -- or two people in the car and then two people who came running up after the shooting and got into the car, for a total of four people; is that correct?

A. Say that again now.

Q. Did he not indicate -- did Mr. Rodriguez not indicate that what he saw, because he was coming down Shull Street as I understand it, when a white car pulls up with two people in it, then two other people came running from the area of the shooting whicn he heard and go into the car, and that would make a total of four people? Now, I may not be wording it the way the statement is, but isn't that the gist of what he told them about the number of people that he saw that would have been involved in some way?

A. You want me to read you what he told.

Q. Read to me what he told you.

A. He stated I saw two black males come out from the back of the car. I saw a black male walking from the apartment toward where the car was parked. Two black males from the car shot two shots at the black male coming from the house. I saw the shooting and I hid behind a parked car near where I was standing.

Is that in your statement?

Q. I got that. Continue.

A. I then heard several shots coming from the other side of the house. When the shots started the car that the black male got out of drove about halfway up the block towards Shull Street and then stopped.

Do you have that much?

Q. I got that much.

A. The car then moved to the corner of Shull Street and stopped. The two black males ran from the apartment and got into the car at Shull Street. While the black male was running to the car I heard a dog barking.

You got that much?

Q. I got that much.

A. The two black males shot at the dog.

Do you have that much?

Q. I got that.

A. It sounded like the dog made a yelping noise. After the black male got into the car they drove -- excuse me, after the black males, plural, go into the car they drove across Meeting Street. There were two males in the front of the car, then the two males who got out of the car. The car was a white four-door, maybe a 2000 model. I think it may have been a Cavalier.

You got that much?

Q. That much I got.

A. One of the black males who got out of the car had a red shirt and either white or gray pants. The other black male had a white T-shirt and cutoff blue jeans.

Q. That's what I have. That is the last of that report, is it not? That's what I understood it to be. That's the last of that witness interview; is that right? There's not another page to that, is there?

A. Yes, there are. There is another page to it if you have a translator. He wrote it in Spanish.

Q. Well, that won't do me any good.

A. Do you also have the interview of the same witness from the SLED report?

Q. I don't know that I do. Can I see what you've got?

MR. RIDDLE: I know that he does. Page 173 of the discovery, and 174.

MR. HENDRIX: Your Honor, to continue the proffer.

BY MR. HENDRIX:

Q. I believe that you mention -- you referred to a statement as part of a SLED investigation?

A. Excuse me, sir?

Q. You mentioned a subsequent report as part of SLED's investigation?

A. SLED form.

Q. A SLED form?

A. Yes, sir.

Q. Who actually filled that out? There was a name there, and I was maybe mistakenly thinking that was a SLED agent.

A. This is a form typed out by S. A. That means state agent, Bruce Otterbacher.

Q. That would be a SLED agent?

A. That's correct.

Q. And does that essentially have the same information in it?

A. Correct.

Q. Is that just a recapitulation of the same statement or did they, to your knowledge, conduct a separate interview with this Mr. Rodriguez?

A. Did you read this?

Q. I read it. I read it just a second ago. I didn't recall it saying that.

A. Let me let you read that first, then I can answer your question.

Q. Okay. So you were actually present and participated in this?

A. Yes, sir.

Q. Now, you don't speak Spanish?

A. No, sir. Very little.

Q. Very little, okay. I'm about that way myself. But you actually were there when that took place?

A. Yes, sir.

Q. Okay. And you had a translator there?

A. Yes, sir.

Q. And what was said in that interview was pretty much what was said in the other one, and both interviews involved this gentleman saying there were four people in the car, that he believed to be four black males; is that correct?

A. Let me confirm that.

[PAUSE.]

THE COURT: Okay, is that it? Anything else?

MR. HENDRIX: That's what we're trying to get out, Your Honor.

THE COURT: All right. Anything, Mr. Riddle?

MR. RIDDLE: Well, first of all, it's not a business record. I think it's State vs. Fowler that says criminal case files are not business records, I believe is what that case says.

THE COURT: Yes, sir.

MR. RIDDLE: Second of all, there is absolutely no indication in anything that is written here that would make it fall under an excited utterance exception. At best, the interview takes place at 4:15 in the morning, the shooting incident takes place at 11:00. This guy was not -- I mean, he doesn't even go down there and talk to the officers at the scene. He talks to them five hours later, and there's no indication whatsoever that that person is still under the stress or the excitement of the event.

THE COURT: Mr. Hendrix?

MR. HENDRIX: Your Honor, in response to that. I think a matter of common sense would tell you that someone that's just witnessed a shooting incident is likely to be upset and bothered by that for a number of hours, and

probably days afterwards.

And to say it happened 10:51 and at 4:15 -- and that's not the time that they first made contact with him, 4:15 is when they finally got him to the police station. They took him to the police station for this.

My understanding is contact had been made somewhere else, I don't know where, earlier than that. And I don't know how much earlier than that because nothing that the State has provided has indicated that.

MR. RIDDLE: But, see, that's the point. It doesn't matter when contact was initially made. It matters when the statement was made, and that was made at 4:15.

MR. HENDRIX: This particular one, but that doesn't mean that it didn't reconfirm another statement.

THE COURT: I understand. Counsel, I'm --

MR. ELLISOR: Your Honor, before you rule may I be heard on this, because I'm going to make these same additional motions? So in the interest of consolidation of time, I move to put it in under the res gestae exception to the hearsay rule, which has been codified under the rules of evidence, Rule 803.2.

Because that codifies the prior existing res gestae law, which in murder cases when witnesses are hard to get, this witness is unavailable, but even under the rule the witness is not required to be unavailable in this case. The

res gestae is independent of the business record act. The business record act stands on its own and would be entitled just to put it in should it be deemed by the Court to be a business record kept in the normal course of business.

But under the res gestae theory if it is an utterance -- and the Supreme Court has upheld utterances made days afterwards, not just hours or moments, days. Because it is the reliability, the indicia of credibility of the statement itself.

What we have is a person here that's not involved with this who was interviewed by an officer, which they do not intend to call, Officer Carter, they give no indication they have him present to call him, they are asking us to -- to hand tie us on this when it is clearly a reliable statement consistently made not once but twice.

If you notice, the Otterbacher statement I believe was made on the sixth, made a different time than the original statement, and the delay was caused because they had to get a translator down. And not only did they translate it they have in the record his voluntary statement written in his own hands, which says in Spanish in front of another witness, who I can't read their handwriting, that there were four people of color there.

Now, how reliable can a statement be when the man writes it in his language? He states that the first time

they get a Spanish -- a translator for him, and he comes down two days later and says the same thing. I think is has all the indicia of reliability, and we need that testimony to present our case. I tried to subpoena that man, he is not here.

MR. RIDDLE: He was here on Monday.

MR. ELLISOR: He was.

MR. RIDDLE: And now we're here on Thursday afternoon and he has not once asked this Court to compel that man's attendance. And he wants to back door it through a statement instead of asking for the Court's help in securing that witness's testimony.

THE COURT: Well, do you know where he is now? Any idea how to get him here?

MR. ELLISOR: He told me he wasn't coming. They claim they never could find him. We finally found him. And, no, I have no clue where he is.

THE COURT: You found him but you didn't subpoena him?

MR. ELLISOR: No, I did subpoena him. That's why he came.

THE COURT: Oh. Is he under subpoena now?

MR. ELLISOR: But I don't have any clue where he is now. He's moved. We subpoenaed him once, subpoenaed him again, he moved.

THE COURT: You don't have a phone number or an address for him?

MR. ELLISOR: Not the phone number he gave me. We called, there is no --

THE COURT: How did he know to get here Monday?

MR. ELLISOR: Because John and I went and talked with him, and we had a Spanish translator give him a subpoena and he came.

MR. HENDRIX: That was a month or so ago, Your Honor.

MR. ELLISOR: Yeah, about a month ago we called him.

THE COURT: So he left Monday, and he didn't tell you how to get in touch with him?

MR. ELLISOR: And he told me he was not coming back, which I apprized the Court at that time, and we decided we'd take it up when we got to the proper time. This is the appropriate time.

THE COURT: Well, then why don't you send somebody out just to find him?

MR. ELLISOR: But the point is, that under the res gestae theory, and this case has dragged on, and under Rule 803 his availability is not essential. It's the reliability of the statement that's an issue. And I think that we have shown that we have the indicia reliability through what has

happened. Because we may never find him by the time this case ends.

MR. RIDDLE: Certainly won't if you don't look.

MR. ELLISOR: Well, the State --

THE COURT: No, sir.

MR. HENDRIX: Same for the State.

MR. ELLISOR: I believe the State has the obligation if they want him as an independent witness. They haven't called him. They haven't called the other guy that was there claiming, they can't find him either.

THE COURT: No, I don't think the State is required to call him and I don't think they're required to find him for you. Certainly, if they've got the statement they've got to give you that but I can't require them to call him as a witness. I don't know that that in itself makes his hearsay -- makes a hearsay statement admissible.

MR. ELLISOR: Well, Your Honor, I rely again under Rule 803.1 and the case law of the res gestae witness. This Court in this County has been upheld by the Supreme Court for a hearsay statement, out-of-court declaration made as late, I believe, as a week after the incident.

THE COURT: Well, let me find out.

Officer, are you familiar with -- you didn't talk to Mr. Almendares; is that correct?

THE WITNESS: No, sir.

THE COURT: Did you see him at all?

THE WITNESS: Yes, sir. I was present during the interview.

THE COURT: How did he show up, did somebody find him or did he come over and offer his statement himself?

THE WITNESS: On the date that I was present during the interview with Sandy Owens and the state agent, Bruce Otterbacher?

THE COURT: Well, when was that?

THE WITNESS: That was on August 6th, 2001. He came to the police department.

THE COURT: Okay. Well, that was what, how many days, three days after the -

THE WITNESS: Yes, sir, three days.

THE COURT: He didn't give a statement before that?

THE WITNESS: He had gave a statement, a verbal statement to Investigator Carter on 8-4-2001 at 4:15.

THE COURT: In the morning?

THE WITNESS: Yes, sir.

THE COURT: And did Agent Carter take notes on that?

THE WITNESS: Based on his interview notes he stated that he met with the witness at the police department and he gave voluntary verbal statements.

THE COURT: Now, what I'm trying to find out is

between 11:00 and 4:15 where was this fellow? Was he on the scene, was he in your presence, or at least some officer's presence all the time, or did he go and come back, or what?

THE WITNESS: I couldn't answer that question, Your Honor, I wasn't there.

THE COURT: Do you know who can answer the question?

THE WITNESS: I would imagine Investigator Brian Carter can answer that question best.

THE COURT: Is he going to be available?

MR. RIDDLE: He's available now. He works at West Columbia still.

THE COURT: Okay. Well, Counsel, I think I can answer one question. As far as this witness, this statement that he's part of is not going to be admissible because it was three days later. And I understand how you go in time but there's nothing to indicate any sort of excited utterance aspect involved on this. So I don't think it's admissible.

Now, as far as Agent Carter, Officer Carter, that statement may become admissible depending on what the circumstances of it are. And I think we just got to lay the appropriate groundwork with him. But as far as this, this statement is not admissible.

And, of course, any statement that this officer got from Officer Carter wouldn't be admissable because then that

becomes double hearsay, which is a little bit more of a problem. So I don't think this witness can testify to any statement by Mr. Almendares.

MR. HENDRIX: I understand, Your Honor. I understand. I don't think we have to note exceptions, but with all due respect, we would except, but certainly respect your ruling, Your Honor.

THE COURT: Mr. Hendrix, I don't think there's any question on that ruling. The only statement this witness knows about was three days later.

MR. HENDRIX: I understand what Your Honor's ruling is.

MR. ELLISOR: Your Honor, again, in support of the position though I do cite the business records and disagree with the solicitor's interpretation that this is not a business record within the meaning of law for exceptions of hearsay.

THE COURT: I understand. I can't let it in through that.

MR. RIDDLE: Your Honor, if they will give us an address that they have as a last known address for Mr. Almendares we'll send a deputy out looking for him because if there's going to be testimony about this the best source of it is going to be coming from Mr. Almendares.

THE COURT: Do you want to --

MR. RIDDLE: I mean, they are not even looking for him then they want to use the hearsay, and they had him. They had him.

THE COURT: Counsel, do you want to give him an address?

MR. ELLISOR: To be honest with you, we've been involved in this trial now I'm not even sure I have it. I'll have to get it from my office. I mean, I don't bring everything here. I've got enough I brought with me. All I know is I had an address and it was on -- I can't even -- it was a couple blocks away from the Shull Street property address they gave me, Raleigh Street or something, but I don't have it here. I won't be able to get it until we break or adjourn.

THE COURT: Something is not connecting here, and I'm missing something. You don't have his address but somehow you knew how to get in touch with him in the first place and get him here. How did you know how to get him here in the first place?

MR. ELLISOR: I had his address a month ago when I served him, and I went out and talked with him. But I can't remember what his address was because it was given to me by somebody else who tracked him down.

THE COURT: You didn't write it down?

MR. ELLISOR: No, I did, but it's at my office in

my file. I did write it down. And I didn't prepare the subpoena. I have it available I just don't have it in this courtroom.

THE COURT: Oh, okay. You can't call somebody in the office?

MR. ELLISOR: I can call my secretary.

MR. HENDRIX: Can we do that later and let's get moving?

THE COURT: Yes, sir, I want to get moving but I can see this is going to be a problem later on.

MR. ELLISOR: Yeah, it certainly is. I can't tell the Court I have it because I don't think I have it. As a matter of fact, I left half my files and stuff today that I had been brining.

THE COURT: I can see it coming tomorrow. I can see a problem right now, you come up tomorrow and want to find him and then it is too late because it's on the same day we're trying to get him.

MR. ELLISOR: Well, Your Honor, I can't give you an address. All I know is it's somewhere on Raleigh Street. I remember that. That's all I can give you. I can give you the specifics when I get in touch with my secretary.

THE COURT: Okay. Mr. Ellisor, you can use the phone right in the courtroom.

MR. ELLISOR: Okay. This one right here?

[PAUSE.]

MR. ELLISOR: It appears to be in West Columbia.

THE COURT: Okay. Now, let me ask this. Mr. Ellisor, do you want me to have them pick him up and hold him in the Lexington County jail?

MR. ELLISOR: Arrest my witness?

THE COURT: Well, he's under subpoena and he said he wasn't coming back.

MR. ELLISOR: Yeah.

MR. RIDDLE: That's the only way I can guarantee him being here, Your Honor. I'd move for a bench warrant on him at this time.

MR. ELLISOR: Whatever, I don't care what it takes.

THE COURT: Well, we'll have to issue a bench warrant.

MR. HENDRIX: Your Honor, can I take up a matter while we're here now?

THE COURT: Yes, sir.

MR. HENDRIX: On behalf of Mr. Smith, I'm not anxious to have a witness who's been arrested and held in jail come and testify for fear what recriminations he may take with his testimony. I would renew our motion for a severance of the trial. I think we're getting way down the road here in something that may end up prejudicing my client

that I'm not asking -- I'm not asking for the witness to be arrested and held in jail until it's time for him to testify.

THE COURT: Well, give me a chance to say something now. I will listen to another way to do it if you tell me another way, but it sounds, from what Mr. Ellisor is saying, the impression that I have is that even if we get him here and he leaves we ain't going to be able to get him back.

MR. HENDRIX: Well, Mr. Ellisor is the one that's wanting to subpoena him. I was asking this witness about the information. If that's not appropriate, I'm through with this witness. I don't want a witness to come here who's been locked up and held in jail at the behest of one of the two defendants who are sitting here to come and testify for fear that he takes recriminations through his testimony and decides that maybe he remembers a lot more.

I don't know what the man is going to say but I don't want my client to have to be involved in that, and that's why I'm renewing my motion for a severance, and I think that's another way to do it, Your Honor.

THE COURT: I understand that, but this came up when you were wanting to get hearsay in from this witness. And, obviously, if we can get him here -- for me, judicially, the best way to do it, if we can get Almendares here to testify that resolves the hearsay problem.

MR. HENDRIX: Your Honor, that may be. But I will

tell you this, we, at this point -- I don't know that we, that is Mr. Terrence Smith and I, intend to call him as a witness.

THE COURT: Well, then why did you ask the --

MR. HENDRIX: I wanted to know if he knew what he said. If you ruled that it can't come in then you've ruled, but I never said that I was going to put Mr. Almendares on the stand. I did not subpoena him.

THE COURT: Okay. I'm still missing something but that's just me. I understand the motion, Mr. Hendrix. I'm going to have to deny the motion. And, again, if there's another way to do it I'll try to do it but I don't know of another way to get Mr. Almendares here and have that testimony available, unless they pick him up -- if they can pick him up in the next few minutes and have him here tonight for some reason. Maybe that's a possibility.

And as far as that goes, he doesn't have to know who it is that's holding him. As far as I'm concerned, he can understand that I'm the one that's ordering him held. It doesn't have to come back on you. Let's go ahead and issue the bench warrant for him, okay. And Frankly, you understand we're in kind of a time restriction here?

MR. HENDRIX: I think I'm the one that really understands that.

THE COURT: I understand, but that's why I want to

do that and I don't want to run into a problem tomorrow where we're trying to track him down.

MR. ELLISOR: Your Honor, in the interest of while we're taking a break outside of the presence of the jury --

THE COURT: I didn't know we were.

MR. ELLISOR: Well, we have this same issue on the statement of Ronnie Rogers who we also have tried to subpoena and cannot find, period. He also gave this officer a statement on 8-8-01, pretty much inconsistent with the State's other witness's position. He was there, and I would like to have his statement entered under the exception to the hearsay rule that's cited under excited utterances, voluntary statements, and etcetera, Your Honor, under the grounds that we have submitted on the other ones.

THE COURT: When did he give this statement?

MR. ELLISOR: This statement, according to what's been supplied to me, was committed to written form on 8-8-01 in front of both Otterbacher of SLED and Officer Jones.

THE COURT: When did he actually give the statement?

MR. ELLISOR: 8-8-01, which would have been four days.

THE COURT: So he was at the scene and he didn't give a statement until five days later?

MR. RIDDLE: Five days later. He fled the scene.

MR. ELLISOR: He fled.

THE COURT: Oh, okay. I sure don't think that's going to fall under excited utterance.

MR. ELLISOR: Well --

THE COURT: At least not from the event itself.

MR. ELLISOR: But I want to tender this, mark it as an exhibit for identification purposes.

THE COURT: Okay.

MR. HENDRIX: Your Honor, one more thing. My client has got a headache from all of this. Can I give him a couple of Tylenol?

THE COURT: Is that what he normally takes?

DEFENDANT SMITH: Yes, sir.

MR. HENDRIX: And this is my personal stash that I take to trials for just such emergencies.

THE COURT: Mr. Smith, you've taken Tylenol before?

DEFENDANT SMITH: Yes, sir.

THE COURT: You never had any reactions or anything from it?

DEFENDANT SMITH: No, sir.

MR. ELLISOR: I'd just like to have this marked for identification purposes of the tender and proffer, Your Honor.

THE COURT: We'll do that.

(WHEREUPON, Court's Exhibit No. 7, a Statement, was

marked and made a part of the record.)

THE COURT: All right, let's bring the jury back.

(WHEREUPON, the jury enters the courtroom at approximately 4:07 p.m.)

THE COURT: All parties and attorneys are in the courtroom and all jurors have returned.

All right, Mr. Hendrix?

MR. HENDRIX: Your Honor, I have no further questions of the witness at this time.

THE COURT: Mr. Ellisor?

CROSS-EXAMINATION

BY MR. ELLISOR:

Q. Officer Jones, you were in charge of the investigation?

A. Yes, sir.

Q. What time did you arrive on the scene?

A. Once again, I did not arrive on the scene.

Q. So you actually never went out to the apartment on ?

A. Not on the night of the incident.

Q. Who actually has reported to you as being -- since you're the lead investigator, who has been identified to you as having gone out that night to investigate this matter? If I give you some names will that refresh your memory?

A. No, I can read off the list to you, if you don't-

have it.

Q. Good. I'd love it.

A. You ready, sir?

Q. Yes, sir, I am.

A. Inside perimeter we have Captain Owens, Lieutenant Sharpe, Sergeant Johnny Dollar, Sergeant Kleckley, Officer Billings, Officer Paige, Officer Lettsome. That's from the City of West Columbia Police Department. You want me to continue on?

Q. No, thank you. Now, so inside -- when it says inside perimeter what does this mean, sir?

A. That's the crime scene, sir.

Q. So at the crime scene itself Captain Tony Owens came?

A. Sir?

Q. Captain Tony Owens came?

A. Yes.

Q. He was there. Did he take statements from any witnesses?

A. I have no knowledge of him taking statements right now.

Q. Lieutenant Sharpe, what's his first name?

A. Lieutenant Bobby Sharpe.

Q. Bobby Sharpe. Did he take any statements from any of the witnesses?

A. Hold on one second.

Not to my knowledge, sir.

Q. Did Sergeant Dollar take any statements?

A. One second, sir.

Based on Sergeant Dollar's statement to me, he stated that he did not talk to any other victims, suspects or witnesses on that day.

Q. Okay. Did Sergeant Kleckley take any statements from any of the witnesses?

A. One second, sir.

I have no knowledge of Sergeant Kleckley taking a statement at the scene.

Q. Did Officer Billings, Ms. Connie Billings, did she take one?

A. One second, please.

Once again, these statements I'm referring to are written statements.

Q. That's correct.

A. Officer Billings obtained information that was verbal also at the scene.

Q. So she had verbal information on the scene?

A. All officers on the scene.

Q. Now, Officer Paige, did Officer Paige obtain any verbal or written information?

A. Hold on one second, sir.

Officer Paige obtained verbal information on the scene.

Q. What about Officer Lettsome?

A. One second, sir.

I have no written statement from Investigator Lettsome from the crime scene.

Q. Now, how many witnesses gave oral statements?

A. The witnesses at the scene.

Q. Who were they, sir?

A. Well, the victim inside the residence, excluding the deceased. They obtained information from Frank Hook, Franklin Hook; Mr. Charles Penny; John Hayward. That's it, sir.

Q. A statement was not taken from Ronnie Rogers?

A. Excuse me, sir?

Q. A statement was not taken from Ronnie Rogers, the young white man that was there?

A. No, sir. It's been established that Ronnie Rogers had left the scene before officers arrived.

Q. So you are saying that you all did not take a statement from him; is that your testimony?

A. Once again, it has been established that Ronnie Rogers left the scene before the officers arrived.

Q. I got a Court's Exhibit that we just discussed minutes ago. I want to look at that and see who that

statement is of.

A. It says Ronnie Rogers, dated 8-8-2001.

Q. So you all did take a statement from Ronnie Rogers?

A. Not from the scene.

Q. I didn't ask you, I asked you if you took a statement.

A. That's correct, sir, you asked me from the scene.

MR. RIDDLE: Your Honor, I'd like for the testimony -- the question to be played back because that's exactly what he asked him.

THE COURT: One second. He's answered the question. Go ahead. Move on.

BY MR. ELLISOR:

Q. Was a statement taken from a Mexican?

A. Which Mexican are you referring to, sir?

Q. Mr. Rodriguez.

A. There was not a statement taken from the scene from Mr. Rodriguez, to my knowledge.

Q. Was there statements in your file taken at any time from a Mexican, a Mr. Rodriguez?

A. There was a statement taken from a Mr. Rodriguez, yes, sir.

Q. Now, Mr. Ronnie Rogers was shown an I. D. lineup like Mr. Penny was, was he not?

A. Let me check.

Yes, sir.

Q. As a matter of fact, not only was he given one it was conducted by you?

A. Just a second.

Q. If it will refresh your mind I'll be glad to show you information supplied by the Solicitor's Office.

A. That's correct, sir.

Q. You administered the lineup to him on the date the statement was taken from him, did you not?

A. That's correct, sir, on 8-8-2001.

Q. Thank you, sir. And when you administered the lineup to Ronnie Rogers he identified not one but two of the individuals, did he not?

A. Excuse me?

Q. When you administered the lineup he did not identify Mr. Collins or Mr. Smith, he identified two separate individuals?

A. That's correct.

Q. And you showed him one set of lineups then you showed him another set of lineups?

A. That's correct.

Q. Both times you showed him lineups he identified somebody else? He did not identify either one of these witnesses at the two separate times that you showed him the two separate lineups?

A. That's correct.

Q. Now, who retrieved the evidence from the crime scene? In the chain of custody, tell us who first took the evidence.

A. The crime scene was processed by SLED, South Carolina Law Enforcement Division.

Q. When was it done? That may save time and we'll wait until they come. Do you remember when they processed it? You all did not --

A. The night of the incident they processed it.

Q. But you all didn't do it, SLED processed it?

A. That's correct, sir.

Q. Okay. And do you remember who did process it from SLED?

A. Make sure I get the name spelled right -- pronounced right.

[PAUSE.]

Q. Not to cut you short, Officer, maybe we can save some time. The evidence that was seized was taken from the crime scene by SLED personal not West Columbia Police Department?

A. Evidence was -- several different dates where evidence was located was turned in through West Columbia evidence, but on the date of the incident SLED crime scene came out to the location after a search warrant was served on

the residence.

Q. Who took possession of Mr. Penny's gun from Mr. Penny.

A. Mr. Penny's weapon was taken possession of by Investigator Riley and Investigator Kleckley.

Q. And who?

A. Kleckley.

Q. Kleckley. And do your records show, since Mr. Riley is not here, who that weapon was turned over to once they took control of it?

A. Wayne Kleckley received evidence control, returned to SLED. Wayne Kleckley received it and entered it.

Q. So he sent it to SLED for testing, okay. And do you know what number the SLED assigned to it?

A. Yes, sir, 1019400. 101-9400.

Q. Now, were there any bullets or casings or cartridges found at the scene?

A. That's correct, sir.

Q. That were shot by that gun?

A. Not to my knowledge.

MR. RIDDLE: Your Honor, I might be able to make this real simple. About two witnesses down the road we're going to call the SLED crime scene guy, and the next witness after that will be the SLED firearms man.

MR. ELLISOR: That's all I want.

MR. RIDDLE: And they are coming up. So we might can short circuit this whole thing.

MR. ELLISOR: I will. That's a short circuit. I just want to establish the chain.

Thank you, Officer, I have no further questions.

THE COURT: Any redirect?

MR. RIDDLE: No, nothing further from Mr. Jones.

THE COURT: Anything else, Mr. Hendrix?

MR. HENDRIX: No, sir, Your Honor.

THE COURT: Officer, you can step down.

Counsel, why don't we take a short break at this point.

Ladies and gentlemen, I know you've had a break but the rest of these folks haven't. We were engaged in mortal combat I think while you were out a couple minutes ago. We'll ask you to step to the jury room just for a few minutes. Be sure don't talk about the case. We'll bring you back in just a few minutes.

(WHEREUPON, the jury leaves the courtroom at approximately 4:33 p.m., and a brief recess was taken.)

(WHEREUPON, State's Exhibit Numbers 40 through 49 were marked for identification only.)

THE COURT: All right. One thing we need to do, Counsel, Mr. Riddle, I understand you need to get about three more witnesses this evening.

MR. RIDDLE: Yes, sir.

THE COURT: Any idea how long we're talking about to get them in?

MR. RIDDLE: I hope not very long.

THE COURT: I need to let the jury have some idea of how late we'll be because they may need to make phone calls.

MR. RIDDLE: I'll tell you this. We've got three here. I'd like to get them in but I don't have to get all three in, if that becomes an issue. We can just -- if you want to inquire from the jury, then let's start and see how we go.

THE COURT: Okay.

MR. HENDRIX: Your Honor, for your information, the solicitor has been kind enough to share with us the nature of the testimony and many of these witnesses I don't know that I would ask very many and some probably no questions.

THE COURT: 6:00 or 6:30?

MR. RIDDLE: I would think that would be the latest.

MR. ELLISOR: Certainly no later than 6:30, probably 6:00.

THE COURT: Counsel, a couple jurors got to make phone calls then we'll be ready. Let's just wait right here for a second.

[PAUSE.]

MR. RIDDLE: Your Honor, during the break Mr. Ellisor and Mr. Hendrix and I got together and were able to stipulate on a number of items of evidence that should come in. Item 39, which was previously marked for I. D. as the gun, is now going to be in evidence with the magazine attached, empty. Item 40 is the nine, nine millimeter rounds that came from item 39, the gun.

Item 41 is a cartridge casing; 42 is a fired 380 automatic cartridge casing; 43 is a fired nine millimeter Luger casing; 44 is a bullet fragment; 45 is a fired nine millimeter Luger casing; 46 is a fired nine millimeter Luger bullet; 47 is a fired 380 auto cartridge casing; 48 is a known palm print, Ivan Collins; 49 is a latent lift which has been matched to Ivan Collins, and there will be testimony to that.

(WHEREUPON, State's Exhibit Numbers 39 through 49 were admitted into evidence by stipulation of attorneys.)

MR. ELLISOR: Those are the exhibit numbers you were calling, not the numbers that were on the SLED --

MR. RIDDLE: No, these are the exhibit numbers I'm calling here. I can call the SLED --

MR. ELLISOR: No, let's just make sure you got the ones that I had.

[PAUSE.]

MR. ELLISOR: We're good to go.

THE COURT: All right. Let's bring the jury in.

(WHEREUPON, the jury enters the courtroom at approximately 5:10 p.m.)

THE COURT: All parties and attorneys are in the courtroom and all jurors have returned.

Ladies and gentlemen, during the break we did a few things that we think are going to shorten things a little bit too, that I think will help in the long run. And I will tell you that I'm sure some of you are getting worried at this point but there's actually more light at the end of tunnel than you may realize. So just be patient with us.

All right. Call your next witness.

MR. HARLING: Thank you, Your Honor. The State calls Henry Gunter.

HENRY GUNTER, after having been duly sworn, testified as follows:

THE CLERK: Please have a seat. State your name and spell your last name.

THE WITNESS: My name is Henry Gunter, G-u-n-t-e-r. I'm a Cayce animal control officer for the City of Cayce.

DIRECT EXAMINATION

BY MR. HARLING:

Q. Officer Gunter, how long have you been employed with the City of Cayce?

A. 18 years.

Q. And what are your present duties at the City of Cayce?

A. Presently I'm an animal control officer, which I've been doing this for about three and a half years.

Q. And over your course of employment with the City of Cayce what all roles have you had?

A. Sanitation, street department, heavy equipment operator, a little bit of everything.

Q. But you are the animal control officer for the City of Cayce?

A. City of Cayce, Springdale and West Columbia.

Q. Officer Gunter, were you dispatched to on August the 4th, 2001?

A. Yes, sir.

Q. Could you tell the jury what you found.

A. I found a dog that had been shot on a chain, chained to the doghouse, and which also had a litter of puppies. I proceeded to take the dog off the chain. It was still alive. Picked it up, put it in the truck. Took the animals, the litter of puppies, put them in the truck.

Then I contacted Captain Owens from West Columbia Police Department because, see, West Columbia, Springdale contracts us out from the City of Cayce. So any time I do something in West Columbia I have to have their permission

before I can do it.

So I took the -- got their permission and I took the animal to Platt Springs Animal Clinic to be examined, see what was wrong with it, make sure it was shot. And when I got there Dr. Mike examined the dog. Captain Owens came over and Dr. Mike examined the dog and the dog had been shot.

And it was in such bad shape from being shot that we had to euthanize the dog, and then the next day because the puppies were so little and without a mother, we didn't have another mother that would take the puppies, we eventually had to euthanize the little puppies, also.

Q. Officer Gunter, I'm going to show you what has been marked as State's Exhibit Number 21. I'm going to ask you to step down. And if you would, step on this side. Could you indicate where on this diagram the dog you found was?

A. Right back here on the doghouse with the litter of puppies on a chain (indicated).

Q. I'm going to hand you a stick-on that's labeled dog, would you place it where you found the dog.

A. Sure. (The witness complied).

MR. HARLING: The State has no further questions. Please answer any questions defense has.

MR. HENDRIX: No questions, Your Honor.

MR. ELLISOR: No questions, Your Honor.

THE COURT: All right. You can step down. Thank

you, sir.

MR. HARLING: Your Honor, we'd ask that this witness be excused.

THE COURT: Yes, sir. You're free to go.

Call your next witness, please.

MR. RIDDLE: The State calls Joe Leatherman.

JOE LEATHERMAN, after having been duly sworn, testified as follows:

THE CLERK: Have a seat. State your name and spell your last name.

THE WITNESS: Joe Leatherman, L-e-a-t-h-e-r-m-a-n.

DIRECT EXAMINATION

BY MR. RIDDLE:

Q. Joe, where are you employed?

A. I'm currently employed by the South Carolina Law Enforcement Division, more commonly referred to as SLED.

Q. And are you like a regular field agent or you work in the lab out there?

A. I'm assigned a little bit of both. I'm assigned to the latent crime scene section in the forensic building.

Q. And tell the jury what you do in the crime scene section there.

A. We respond to requests of local agencies like the West Columbia Police Department if we have a crime scene that they have that they don't feel comfortable processing or

can't process. Once there, of course, we document the scene through photographs, crime scene diagrams. We also collect physical evidence.

Q. Okay. And did you respond out to at on August 3rd?

A. Yes, I did.

Q. It may have been August the 4th, I think, by the time you got there?

A. Yes, I did.

Q. It was, you arrived after midnight?

A. Yes, sir.

Q. Let me ask you this. What kind of training and experience do you have in this area, Mr. Leatherman?

A. Besides the bachelors degree from the University of South Carolina in criminal justice, specifically to latent print and crime scene work I have completed the Basic Latent Print School through the Criminal Justice Academy; the Advanced Latent Fingerprint School through the Federal Bureau of Investigation; an I. D. Technician School through the South Carolina Academy; Crime Scene Photography School through the South Carolina Criminal Justice Academy.

I've attended a Basic Blood Pattern School put on by Jerry Findlay, who is an instructor with the Georgia Bureau of Investigation; an Advanced Blood Stain School put on by Jerry Findlay. And I'm also currently enrolled in a

Ridgology Class with Cayce Whitheim, who is an examiner with the Mississippi Crime Lab.

Q. We had to pull you out of that class to come to court?

A. Yes, sir.

Q. Ridgology deals with the ridges in fingertips or fingerprints and things like that?

A. Yes, sir.

Q. Have you ever been qualified as an expert in the area of crime scenes and latent fingerprint analysis?

A. Yes, sir, on both.

Q. Approximately how many times?

A. In latent prints I've been qualified 29 times as an expert. In the area of crime scene I've been qualified 16 times.

MR. RIDDLE: Your Honor, at this time I'd move to qualify him in both of those areas as an expert witness.

MR. HENDRIX: No objection from us.

MR. ELLISOR: No objection, Your Honor.

THE COURT: Ladies and gentlemen, this witness is qualified as an expert witness, and what it means is this. I told you that you are the judges of the credibility of each witness that testified, you decide how much weight to give to the testimony of each witness.

An expert witness is like all the other witnesses

in the sense that he is subject to your review as to how much weight to give to his testimony. But an expert witness is classified as such because of his skill, training, background, education or experience in a particular area, and he is allowed to give an opinion in that area.

Other witnesses aren't allowed to do that, but an expert witness can. And even though he is qualified as an expert it's still up to you to decide how much weight and credibility to give to his opinion. You're not bound by the opinion of an expert. You decide how much weight is to be assigned to it.

Any exception to that charge, from the State?

MR. RIDDLE: No, sir.

THE COURT: Defense?

MR. HENDRIX: No, sir, Your Honor.

MR. ELLISOR: None, Your Honor.

THE COURT: All right. Continue.

BY MR. RIDDLE:

Q. You testified that you responded out to this crime scene?

A. Yes, sir, I did.

Q. You also said you arrived after midnight?

A. I believe so. Let me check that. It was right -- I received a call at 11:30 on August 3rd, and I arrived at 24 after midnight on the 4th.

Q. Okay. Now, let me ask you this. Tell the jury kind of what the basic steps are that you go through when you process any crime scene and sort of the sequence of events you go through in order to process it.

A. First of all, on every crime scene the first thing that I like to do is when I arrive on the scene I talk with the local investigator, whoever that might be. A lot of times they have a lot of information that they won't give you or won't walk right up and give you. But I find that if I walk up and talk to them and find out what they know it makes my job easier.

After I do that, I check to make sure that the scene is secured. I then do an initial walk-through of the crime scene. Try not to the disturb any evidence while I walk through. Just to get an idea of what I need to do, I may or may not during that initial walk-through find any evidence. Sometimes it takes me searching to find evidence, but the initial survey gives me an idea of what the scene looks like and what I need to do.

After we do that, typically we go through with still photography, completely document the scene inside and out with 35 millimeter color. We'll then go through and find out what may or may not be relevant as far as evidence goes; what we need to process on the scene, what we need to secure and take back to the lab. Of course, during that time the

crime scene diagram is also either started or completed.

Once we figure out what evidence that we're going to collect up and take back, we then process the evidence that we cannot or don't feel should be brought back to the lab to be processed for latent prints, or hair, or blood, or whatever else.

After we do that, any blood pattern analysis that we need to perform is done, also any ballistic evidence. Perhaps there might have been a shot in the wall or something like that that we might need to take a look at is done. After that, the one final crime scene search is done to make sure that we didn't -- to provide the best possibility that we didn't miss anything.

Q. All right. Now, you indicated basically -- I assume you talked to the officers on the scene out there?

A. Yes, sir.

Q. And then you did an initial walk-through?

A. I did.

Q. And then you took a number of photographs?

A. Yes, sir.

Q. And with the exception of these daytime pictures -- well, you haven't seen them all, but all the photographs that would have the punched out numbers at the bottom you would have taken?

A. Yes, sir.

Q. And down at the bottom they say SLED then have a number beside them?

A. Yes, sir.

Q. And that's just the SLED lab number that is assigned to this particular case?

A. Yes, sir.

Q. Now, let me ask you this. After you photograph this scene did you go through and collect some ballistic evidence in the sense of bullet fragments and gun cartridge casings, spent casings?

A. Yes, sir, I did.

Q. And did you take some photographs of those?

A. Yes, sir, I did.

Q. Let me show you these pictures, if I could. And I'm referring to State's 15, 16, 17. Can you step down here with me, please, sir.

A. (The witness complied.)

Q. And I'll hold one, and you hold the two. And if you could explain to the jury what these represent.

A. Right here in the middle you see there's actually the flashlight shining on it when the picture was taken is a cartridge casing on the floor.

Q. Right here?

A. Yes, sir.

Q. Okay. What is this back in this area here?

A. That's another cartridge casing.

Q. And where were these located?

A. As you step through the door -- if you can visualize this with me. As you step through the door almost directly in front of you there's the entertainment center with a television, speakers, VCR, and everything else; the cartridge casings were located down on the floor in between the speaker and the television, I believe.

Q. And I'm going to show you State's Exhibit Number 22. Can you point out on there where you're talking about?

A. Yes, sir. It would be right in between the speaker and the big TV (indicated).

Q. If you would walk down here and publish those photographs to the jury as we go, that would be great.

A. Publish them?

Q. By letting them look. Did you also find some additional cartridge casings in the house?

A. Yes, sir, I did.

Q. And those appear to be on the rug; is that correct?

A. They were on the -- I believe there was a raincoat and pair of jeans in this general area (indicated). I can't remember if it was on the chair or love seat at the time. When we picked them up to look through them the shell casings fell off of them.

Q. Now, State's Exhibit 17, it has a bottle in it?

A. Yes, sir.
Q. Do you see that bottle in State's Exhibit Number 11?
A. Yes, sir.
Q. Can you point it out in Number 11, then we'll show them Number 17 in conjunction with it.
A. The water bottle is right here (indicated).
Q. And there was a cartridge casing near that water bottle?
A. Yes, sir.
Q. And then can you show us generally where State's 19 is in relation to this picture.
A. I believe it was here on this corner of the room (indicated).
Q. And that's just a cartridge casing laying on the carpet there?
A. Yes, sir.
Q. And these are spent cartridge casings, are they not?
A. Yes, sir.
Q. Now, Mr. Leatherman, did you also, after you collected those items, did you -- you indicated that you checked for latent prints; is that correct?
A. Yes, sir.
Q. And did you find any latent prints in this house

that were useful to this case?

A. Yes, sir.

Q. And where did you find them?

A. Can I refer to my notes?

Q. Sure.

A. There was a latent print taken off the Aquafina bottle on the living room floor.

Q. Right. And that's the bottle that was in the picture there?

A. Yes, sir.

Q. Okay.

A. Do you want me to go over all of them or just that night?

Q. No, just for this night. I'm going to get to the automobile in just a moment, okay. You found some prints on that Aquafina bottle?

A. Yes, sir.

Q. Did you test those latent prints against any known prints?

A. Yes, sir, I did.

Q. And were you able to get a match?

A. No, sir, I was not.

Q. Okay. And those are the only prints that you got from this particular house, correct, or apartment?

A. That's correct.

Q. Is that unusual in your experience not to find identifiable prints related to a crime in a particular crime scene?

A. No, sir, it's not.

Q. Now, Agent Leatherman, did you find any marijuana at the scene?

A. No, sir, I did not.

Q. Were you looking for marijuana?

A. We weren't looking particularly for marijuana. I didn't go in the house to look for marijuana. Given the crime scene search that was done, having 16 years experience in law enforcement, I'm sure if I would have ran across it I would have found it suspicious.

Q. Right. Did you have any reason to believe that marijuana was a part of this case at the time that you were there?

A. There was nothing that was brought to my attention at the time.

Q. Based on what the other officers told you when they briefed you initially?

A. That's correct.

Q. Do you recall whether or not you found a cigar box at that scene?

A. No, sir, I did not.

Q. Now, did you collect anything from the bedroom

areas of this residence?

A. No, sir, I did not.

Q. Was it your understanding, based on your initial briefing, that everything happened out in what's marked as the living room? I don't know if you can see that or not.

A. Yes, I can.

Q. In the living room area of this crime scene?

A. Based on what I was told and also based by the initial survey of the scene.

Q. Now, you indicated that you sometimes will find bullet holes in walls and things like that, that become useful to you?

A. Yes, sir.

Q. Did you, in fact, find such an item at this particular location?

A. Yes, sir, I did.

Q. Where was that item found?

A. You speaking of the bullet hole?

Q. The bullet holes, yes, sir.

A. I first noticed in the closet down there up against the wall by the -- along the wall, the hall wall, I noticed a hole in the door.

Q. And is this the area that you are referring to?

A. That's correct.

Q. The door next to that closet there?

A. Yes, sir.
Q. Okay. You noticed a hole in that door?
A. Yes, sir.
Q. What else did you notice?
A. About -- I can't remember if it was before or after, about the same time we noticed the top of the VCR had been struck.
Q. All right.
A. And there was also a lead fragment or a fragment that was -- I can't remember if it was embedded in or nearby the VCR on top.
Q. Okay. And this hole in the door, was it a through-and-through hole?
A. Yes, sir.
Q. And had the projectile gone on in and lodged in this back wall of this closet?
A. It had gone through that wall.
Q. Actually, gone through the back wall?
A. Yes, sir.
Q. And based on the information that you had, what kind of test were you able to perform on those holes and those markings on the VCR?
A. We found the bullet, the actual head, the part that comes out of the end of the gun in the kitchen cabinet. It had gone through a bottle of Maurice's Barbecue sauce, I

believe. So I knew, just common sense would tell you that happened pretty fresh, it didn't happen a couple weeks ago. So I felt that I had one of the bullets that was fired that night. I was interested to see if I could do anything to tell where the person that shot that bullet, where he might have been standing at the time.

Of course, I had several reference points. I had the one wall in back of the closet. I had the closet door, and I also had the mark on top of the VCR. I took a string and actually tied it off on the cabinet in the kitchen and ran a string through the holes in a straight line and ran it back, and it came back to -- it came back to the side of the doors where I taped it off at.

Q. Let me get you to step down, if you would.

A. (The witness complied).

Q. I've got a number of exhibits in my hand, State's 14, 13, 37 and 38. I'm going to let you pick the ones which are most useful to you and get you to explain what you did in that regard to the jury.

A. This would be the front door to the apartment. The string line you see right here is the string that we strung that night, giving a general point of origin where the bullet was fired from.

Q. What's represented on State's Exhibit Number 37?

A. This is the other side, using the VCR as reference

in the photograph. This would be the other side of the apartment shown in the closet, the closet door (indicated).

Q. Step down here and show this end of the jury, because we've got a terrible courtroom for doing this kind of stuff.

A. (The witness complied).

Q. 37 is the closet door?

A. Yes, sir.

Q. And the end you've got represents the TV area and the front door?

A. Yes, sir.

Q. Do you see that same string in State's Exhibit Number 38?

A. Yes, sir.

Q. And what is the black box underneath 38?

A. That is the top of the VCR.

Q. And you can see it in 13?

A. Yes, sir.

Q. Sitting on top of the television. And that's where a projectile struck the VCR?

A. Yes, sir. It's significant to me because I can tell -- of course, it's not rocket science, it's pretty much common sense. You can see the hole and see the marks, scratches on top of the VCR and you can see where the fragments came to rest. It gives you the kind of the

direction, the direction the bullet came.

Q. So when it strikes the VCR you can get sort of a direction of travel based on the scratch marks it leaves behind?

A. Yes, sir. Also significant in that photograph you can tell that the angle is not straight down. You can tell that the angle is pretty flat along that path.

Q. I'm sorry, you can have a seat.

A. (The witness complied).

Q. Agent Leatherman, did you subsequently have an opportunity to examine a 1997 Honda Civic, white in color, that belonged to Wykiesha Williams?

A. Yes, sir. I believe the registered owner was her mother.

Q. Was her mother?

A. Yes, sir.

Q. And did you check that vehicle for latent prints?

A. I did.

Q. And when did you perform that examination?

A. I don't have a specific day. I logged the evidence in on the 21st of August.

Q. Okay. Let me show you State's Exhibit Number 49. Do you recognize that?

A. Yes, sir, I do.

Q. Does that have a date on it?

A. Yes, sir, it does.
Q. What date is that?
A. That would be August the 8th of 2001, which would be the date that the car was processed.
Q. That's the date you processed the car?
A. Yes, sir.
Q. What is this item, 49?
A. One of the latents that we lifted from the car using black powder.
Q. You dust the car with powder?
A. Yes, sir.
Q. And then lift the latents with what?
A. It's not quite as -- a little bit stronger than Scotch tape and a little bit more sticky.
Q. Almost like a packing tape kind of stuff?
A. Yes, sir.
Q. Okay. And just put the tape down on top then pull it up and it brings the print off with the tape?
A. Yes, sir.
Q. Then you transfer it to these cards?
A. Yes, sir.
Q. I'm referring to State's Exhibit Number 49, which I believe was your item 40; is that correct?
A. Yes, sir.
Q. I'd like to refer specifically to this. Did you

draw a little diagram of the vehicle on there?

A. The diagram is drawn at my direction, yes, sir.

Q. And does it show where this latent lift came from?

A. Yes, sir, it does.

Q. Where does that latent lift come from?

A. Also written on the card, it's from the rear passenger door up by the door frame, towards the front by the driver door.

Q. So basically the pillar between the front door and the back door, up near the roof line?

A. In that general area, yes, sir.

Q. And State's Exhibit Number 48, do you recognize what that is?

A. Yes, sir, I do.

Q. What is that?

A. That is the left palm print bearing the name of Ivan Collins.

Q. And did you have this to examine as well?

A. Yes, sir, I did.

Q. And comparing State's Exhibit Number 48 to State's Exhibit Number 49, what, if anything, can you tell us about what was found?

A. After examining the item 40 with item 52, my item 40 to my item 52, it was my conclusion that the latent print was made by the left hand of the fingerprint card bearing the

name of Ivan Collins.

Q. So this matches this; is that what you are saying?

A. Yes, sir.

Q. All right. And when you say your item, your item 52 is State's Exhibit 48?

A. That's correct.

Q. And your item 40 is State's Exhibit Number 49?

A. That's correct.

Q. You found a palm print from Ivan Collins just above the left rear passenger door near the pillar on that white Honda?

A. Yes, sir.

Q. Now, initially, Agent Leatherman, did you miss that palm print and not see it?

A. Yes, sir, I did.

Q. And do you all have a system out at SLED whereby work gets checked -- or explain to the jury how that works.

A. We call it quality assurance. It's part of the method that we use to look at fingerprints. We analyze, compare, evaluate the latent print, and the last part of it is verify it. Another qualified, competent examiner looks at the print, whether I say it's an identification that matches or whether I say it doesn't match.

It's also in our policy before the report is issued that another qualified and competent examiner has to look at

the same latent print and the same ink card that I did. This puts in a measured quality assurance, number one, for a latent fingerprint and an ink fingerprint that an examiner such as myself says it doesn't match when, in fact, it does.

It also helps us with what we call erroneous identifications, which is another area completely separate from this, which is where a latent print is examined against a known fingerprint card. The examiner says that they match or they identify when, in fact, they don't.

So this quality assurance program that we have, number one, gives us that quality check to make sure that nothing goes out of our laboratory that is, in fact, not correct either way.

Q. You did not misidentify this fingerprint?

A. No, sir, I did not.

Q. Just failed to see the match initially when you looked at it?

A. That's correct.

Q. Be like akin to say you can't find a piece of the jigsaw puzzle that fits in that particular hole?

A. Yes, sir.

MR. RIDDLE: Thank you, Agent Leatherman. Please answer any of their questions.

THE COURT: Cross?

MR. HENDRIX: Yes, sir.

CROSS-EXAMINATION

BY MR. HENDRIX:

Q. Agent Leatherman, did you actually yourself, personally participate in the gathering of the evidence; and by that I mean like picking up the shell casings and things like that?

A. Yes, sir.

Q. You didn't have anything to do with doing the ballistics testing, or whatever you call it, to see if the shell casings came from a particular gun like the Sidney Muller or the Charles Penny gun, did you?

A. No, sir. That's not my area of expertise, no.

Q. Did you find any nine millimeter casings or were there nine millimeter casings found, to the best of your knowledge, outside the apartment?

A. No, sir, not that I know of.

Q. You don't know that. If any were found outside who would have found those, if you know?

A. On that night?

Q. At any time.

A. I don't know.

Q. Are you able to look at the information or is there anybody with SLED who can look at the information and say which shell casings were found where?

MR. RIDDLE: Dan DeFreese.

MR. HENDRIX: Okay.

BY MR. HENDRIX:

Q. Dan DeFreese would Probably be able to answer that?

A. I could probably think of no one better.

MR. HENDRIX: Okay, thank you. I'm through.

THE COURT: Cross.

CROSS-EXAMINATION

BY MR. ELLISOR:

Q. The fingerprint that was found of Mr. Collins, it was found on a car, correct?

A. Yes, sir.

Q. None of his fingerprints were found inside?

A. That's correct.

Q. And the fingerprint that you found, you at first did not ascertain it to be what you call a match?

A. That's correct.

Q. Now, what criteria do you use to determine it is a match?

A. Every latent is judged on their own basis.

Q. What do you mean by that?

A. Each latent is considered according to its quality, how well I can see the points. Also the ink print, how well the ink print is rolled. We use that in other areas to determine only that one latent to that card, if it's -- you asked if it's suitable for identification?

Q. Yes, sir.

A. That's how.

Q. Now, how many points do you have to have before you make a determination that it is a match?

A. There's no point standard in the United States.

Q. So it's discretionary?

A. Well, it goes back to every latent being judged on its own merit.

Q. So it is possible you could say it was a match and another expert equally qualified as you could say it's not a match, based upon the same objective, information in front of you?

A. No, sir, I wouldn't agree with that at all.

Q. Okay. What would it take for both of you all looking at the information in front of you to agree?

A. If the -- we call it ACE-V's, analyze, compare, evaluate and verify. If both examiners use that method and they're both competent and qualified they should reach the same conclusion.

Q. Now, when you use the term points, what does that mean?

A. The general term points is associated with a ridge running along and it ends, called an ending ridge; a ridge running along a formation that divides, called a dividing ridge; and a ridge that has the same thickness around the

other two ridges, which doesn't go anywhere, which is called a dot.

Q. Okay. Now, why do you all use the terminology points?

A. That's the way I was trained.

Q. Okay. But what is the significance of the number of points that you find?

A. There is no significance to the number of points.

Q. So one point, you could do a match from just one point of the latent print?

A. If I got a latent print where there was enough clarity and enough area and I only saw one point, to me that would be so unique based on the thousands of prints that I've looked at, that would be so unique that I would probably call that identification, yes, sir.

Q. Now, you took the prints; and that's called dusting, isn't it?

A. It can be called that, yes, sir.

Q. Did you do that method?

A. Yes, sir.

Q. And when did you dust the car?

A. On the 8th of August.

Q. On the 8th of August. Do you remember what time of day?

A. It was, I believe, in the afternoon. I don't

recall the specific time.

Q. Now, how many prints did you see on this vehicle?

A. I didn't count them. I would say there were probably quite a number.

Q. Quite a number?

A. Yes, sir.

Q. And did you check all the number of prints? Why did you check that specific print?

A. All the palm prints that I have not identified were compared to Mr. Collins and Mr. Smith.

Q. Okay. And you didn't find Mr. Smith's print on there?

A. No, sir.

Q. Okay. But there were numerous other prints that were not identifiable to anybody in particular?

A. That's correct.

MR. ELLISOR: No further questions. Thank you.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. RIDDLE:

Q. Do you know whether or not the match that you came up with was independently examined in this case?

A. Yes, sir, it was.

Q. And who was that by?

A. The first independent verification means that

another qualified competent examiner, more often than not, not associated with -- like in our case, SLED forensic lab is called in and again goes through the same process, the ACE-V process that I used, and in this case reached the same conclusion, that the latent print was identified to the ink print.

Q. So you found a latent?

A. Yes, sir.

Q. And then it was independently examined?

A. That's correct.

Q. And was that by Don Girndt?

A. Yes, sir, it was.

Q. And are you aware that Don Girndt was retained by Mr. Collins' attorney?

A. Yes, sir, I was.

Q. And he found a match as well?

A. That's correct.

MR. RIDDLE: All right. Thank you. I don't have anything further.

THE COURT: Anything else, Mr. Hendrix?

MR. HENDRIX: Not from me, Your Honor.

MR. ELLISOR: Nothing, Your Honor.

THE COURT: All right, you can step down. Thank you, sir.

MR. RIDDLE: I'd ask that he be excused, Your

Honor.

THE COURT: Yes, sir.

MR. HENDRIX: No objection.

MR. ELLISOR: None, Your Honor.

THE COURT: Very good.

MR. RIDDLE: The State calls Dan DeFreese.

FRANK DAN DEFREESE, after having been duly sworn, testified as follows:

THE CLERK: Please have a seat and state your name and spell your last name.

THE WITNESS: My name is Frank Dan DeFreese, D-e-F-r-e-e-s-e.

DIRECT EXAMINATION

BY MR. RIDDLE:

Q. You work at South Carolina Law Enforcement Division?

A. Yes, sir, I do.

Q. In the forensic lab?

A. Yes, sir.

Q. And what is your job out there?

A. I'm assigned to the department within the forensic laboratory where we do the analysis of firearm and tool mark evidence.

Q. And how long have you been doing that?

A. For 36 years.

Q. All right. Have you had any specific training in this area, Mr. DeFreese?

A. Yes, sir, I have.

Q. Can you tell the jury what that is.

A. My principle training occurred at SLED after I was employed with SLED, which was in 1967. I was assigned to the firearms laboratory, and I undertook a course of instruction in firearm and tool mark identification. I did that for approximately two and a half years, studying the techniques of firearms identification and tool mark identification. After which time I began accepting cases on my own and testifying as to my results, which I've been doing since 1969. I've testified in courts throughout this state and in Federal District Court.

Q. Can you give us an estimate of the number of times you've been qualified as an expert in forensic firearm and tool mark analysis?

A. I'm still estimating something between 500 and 600 times, because I really didn't keep track of it while I was doing it.

MR. HENDRIX: Your Honor, to save time, on behalf of Defendant Smith we're willing to stipulate to his qualifications.

MR. ELLISOR: I also stipulate --

MR. HENDRIX: If that will shorten things up.

MR. ELLISOR: I'm very familiar with him, Your Honor.

THE COURT: We'll accept it.

MR. RIDDLE: I'll take it.

THE COURT: Ladies and gentlemen, again, this witness is qualified as an expert. Remember what I told you earlier, he's allowed to give an opinion. You decide how much weight to give to that opinion. You're not bound by it. You decide the weight to be given to it.

Any exception to that charge?

MR. RIDDLE: None.

MR. HENDRIX: None.

MR. ELLISOR: None.

THE COURT: Wow. Okay, go ahead.

BY MR. RIDDLE:

Q. Agent DeFreese, while the jury was in their room and they thought we were doing nothing, did you have an opportunity to review a number of items out here?

A. Yes, sir, I did.

Q. And you're aware that we got them premarked so we could speed this along once they came back?

A. Yes, sir.

Q. Let me show you what's been marked as item number 39 and ask if you could identify that.

A. Yes, sir, I can.

Q. And did you have that gun to examine in this case?
A. I did.
Q. And item 40, what does that represent?
A. Item 40 is a box which contains nine unfired nine millimeter Luger caliber cartridges.
Q. And State's Exhibit Number 41, what is that?
A. State's Exhibit Number 41 is a fired nine millimeter Luger caliber cartridge case.
Q. State's Exhibits -- well, let's do them one at a time, 44, did you examine that?
A. I did. State's Exhibit 44 is a fired bullet fragment.
Q. Where was that bullet fragment recovered?
A. It was identified on its container as being fragment on top of VCR.
Q. All right. And then State's 42?
A. State's 42 is marked on its container as cart, short for cartridge casing, in blue jeans on couch. State's Exhibit 42 is a fired 380 auto-caliber cartridge case.
Q. State's Exhibit 47?
A. State's Exhibit 47 was received in a container marked cart casing in raincoat on couch, and it also contains a fired 380 auto-caliber cartridge case.
Q. 46?
A. State's Exhibit 46 was received in a container

marked bullet in kitchen cabinet, and it contains a fired nine millimeter Luger caliber bullet. It also contains a swab which I took during the course of my examination.

Q. State's Exhibit 45?

A. State's Exhibit 45 is received in a container marked cart casing by wall, behind TV, and it contains a fired nine millimeter Luger caliber cartridge case.

Q. Now, Agent DeFreese, when you received State's Exhibit Number 39 --

A. Yes, sir.

Q. -- the firearm, was State's Exhibit Number 40 with it?

A. Yes.

Q. How was it packaged up when you received it?

A. They were received together in the same container. State's Exhibit 40 now contains all of the fired cartridge -- I mean, all of the unfired cartridges that I received with State's Exhibit 39.

When I received them, the magazine section of the pistol, State's Exhibit 39, was fully filled with eight of the nine cartridges received in State's Exhibit 40; and inside the outer container there was one loose unfired cartridge received with item 39, that's now in item 40.

Q. That has now been placed in with the other?

A. Yes.

Q. Is that standard policy to clear a gun before it is submitted to you all?

A. Yes. In fact, our evidence handling will not permit sealed packages to move in commerce within our laboratory unless the firearm has been unloaded. And it's common for me to see firearms where I have the cartridges still in the magazine and then one loose cartridge received in a container, which is usually the cartridge that was removed from the chamber of the gun.

Q. All right. So before any law enforcement agency can submit to you they have to clear the one out of the chamber?

A. Yes. Before we seal a package it has to be unloaded.

Q. Now, let me deal, if I could, with all of the items that are contained in the little tins.

A. Yes, sir.

Q. And that would be items that were marked as having come from the interior of the house in this particular case?

A. Yes, sir.

Q. All right. Did State's Exhibit 39, the firearm, have anything to do with any of the items contained in the little tins?

A. No.

Q. Okay. Tell the jury how you know this and the test

that you perform in order to make that determination.

A. In any identification of bullets or cartridge cases we do a side-by-side microscopic comparison of test bullets which we would fire from, like, this gun, from State's Exhibit 39, and cartridge cases which were fired by State's Exhibit 39; and we would view them under a microscope that permits us to view both objects side-by-side.

When a bullet is fired in the barrel of a rifle firearm it's a very tight fit within the barrel and the bullet is gripped by rotating -- by spiralling segments called lands. As the bullet is propelled out of the barrel of the gun a spin is imparted on the bullet to make the bullet stable in flight.

The marks that are placed on the bullet to impart this spin become the signature of the firearm on that bullet, and where bullets are recovered in sufficiently undamaged condition and where guns are consistent in their markings it's possible to identify a particular bullet back to the particular firearm barrel in which it was fired.

Similarly, in the case of cartridge cases fired in a given gun there are markings which are left over from the manufacturer of the firearm and markings which the firearm acquires with use or abuse which become unique to that firearm. There are markings that can be imparted on a fired cartridge case by the firing pin, and by the breech face, and

by the chamber of the firearm.

There are a number of other markings that can be left on a cartridge case, sometimes by the extractor, sometimes by the ejector, sometimes by the magazine, or some other mechanism mark. Where we find a matching firing pin impression, or a matching breech face impression, or a matching chamber impression it's possible to identify a particular cartridge case as having been fired by a particular firearm.

That's the basis I use to make my conclusion about whether a particular cartridge case was fired by State's Exhibit 39 or not.

Q. So you test fired State's 39?

A. I did.

Q. And took the known bullets and cartridge casings from your test firing and compared them to the items that were submitted in the tins?

A. Yes, sir.

Q. And based on that you found no matches between the submitted items and item 39 -- or excuse me, Exhibit 39, which is the pistol?

A. Right. For clarity, we have items 42, 43, 44, 45, 46 and 47. None of these items were fired by State's Exhibit 39.

Q. Are all of those items the same type and caliber of

ammunition?

A. No.

Q. Are some of those items fired by a gun similar in caliber to 39?

A. Yes, sir. Some of the items are nine millimeter Luger caliber, the same caliber as State's Exhibit 39, and some of them are not. For instance, State's Exhibit 42, which corresponds to my item 29; and State's Exhibit 47, which corresponds to my item 12, these are slightly -- well, the bullet diameter is the same as a nine millimeter Luger but the cartridge case is slightly smaller than a nine millimeter Luger. It's a caliber that's known as 380 auto.

Now, both of these cartridges, or cartridge cases, the ones in State's Exhibits 42 and 47, were fired by the same gun, but they weren't fired by this gun.

Q. All right. So those two were fired by the same weapon but not this one?

A. But not that weapon.

Q. All right. How about the remaining items that we have in tins?

A. State's Exhibit 43 is a fired nine millimeter Luger cartridge case, which was not fired by State's Exhibit 39. State's Exhibit 45, the same result. Neither one of these were fired by this pistol.

Q. They are the right size to have been fired by that

gun but was not?

A. They are the same caliber. They were fired by the same gun, but they were not fired by State's Exhibit 39 and this were not fired by the gun that fired State's Exhibits 42 and 47. So there's two different guns involved in the firing of these cartridge cases, neither one of which is this gun.

Q. And the remaining items in the tins that you have there, those are bullet fragments?

A. Well, State's Exhibit 44 is a tiny fragment of a bullet. State's Exhibit 46 is most of a bullet. In fact, they are similarly constructed and they could be parts of the same bullet.

Q. All right.

A. There simply were not enough markings on State's Exhibit 44 to identify with any particular gun but there was enough markings on it for me to be able to determine this was not fired by State's Exhibit 39, nor was the bullet in State's Exhibit 46 fired by State's Exhibit 39.

The State's Exhibit 46, being a nine millimeter Luger caliber, could be associated with one or the other of those nine millimeter Luger fired cartridge cases, but I can't tell for certain that they were. It was not associated with the 380 auto-caliber.

Q. So none of the cartridge cases, bullets or bullet fragments that were found inside the house were fired by

Exhibit 39, the pistol?

A. That's correct.

Q. Now, let's move to your item 27.

A. Yes, sir, State's Exhibit 41.

Q. State's Exhibit 41, how was that received?

A. It was actually received in a stapled-closed brown paper evidence bagged inside of a sealed bubble envelope. That's the way I received it. The container in which it was received was marked grass area between front doors of - and , ...

Q. Let me ask you this, Agent DeFreese; do you recognize that?

A. Yes, sir. This is the container in which the cartridge case in State's Exhibit 41 was received. The little plastic container that it's in now I put it in.

Q. So when you received it it was in this brown bag?

A. Yes, sir.

MR. RIDDLE: I'd offer this bag into evidence.

THE COURT: Any objection?

MR. HENDRIX: No objection.

MR. ELLISOR: None.

THE COURT: All right, without objection.

(WHEREUPON, State's Exhibit No. 50, a Brown Bag, was marked and admitted into evidence.)

BY MR. RIDDLE:

Q. So when you received 27 it was inside --

A. State's Exhibit 50.

Q. State's Exhibit 50. Sorry, it's been a long day. This is identified as having come from where?

A. It's marked as -- under location of recovery printed on the bag it's written grass area between front doors of _ _ and , . I assume .

Q. All right. Now, can you tell us the condition of item 27? Yes, sir, item 27, that cartridge casing as you received it, State's Exhibit 41.

A. As to its current color, that is having the brownish color, it's the same. At the time I received it it actually had particles of sand and little fine bits of vegetable debris, like grass or something like that, that had deteriorated that were inside the cartridge case, and a fine dusting of it on the outside of the cartridge case.

Q. And was there additional material like that contained in the bag that it was submitted in, State's Exhibit 50?

A. Yes, sir. Some of that same debris was in the bag.

Q. And if you shake the bag can you still hear it rattling around in there?

A. I just heard it. It's still in there.

Q. Was this material just on the cartridge case or was

it caked to it?

A. The material that was inside the cartridge case, because the outside of the cartridge case had evidently been handled to some small degree, the material inside was fairly well adhered. Some of it I actually removed and tamped it back into the bag just because I didn't want to get it all over my microscope during the course of the examination.

All of the material that was contained within State's Exhibit 41 and within the bag, State's Exhibit 50, and the tarnished condition of State's Exhibit 41 were all consistent with it having been in the weather for some prolonged period of time.

Q. If this item was recovered on 8-4 of '01 at 10:55 in the morning would that be consistent with it having been discharged on 8-3-01 at approximately 10:50 at night, some 12 hours earlier?

A. No, sir, not in the condition that it was in when I received it.

Q. Now, you mentioned the color of State's Exhibit 41; can you use one of the rounds from State's Exhibit 40 and explain to the jury what you are referring to?

A. Surely, or I can use one of the fired cartridge cases.

Q. Either way. Whichever works best.

A. There is some discoloration to some of these fired

cartridge cases as a result of processing, but the other cartridge cases still have a brass color to them. And the other unfired cartridges, also having been processed, still have a brass color to them (indicated).

State's Exhibit 41 has a brownish-black oxide color. The contrast is particularly noticeable as you look at the nickel plated primer of State's Exhibit 41. It did not tarnish to the extent that the brass did because it was nickel plated.

Q. Now, I probably forget to mention this. Item 27, State's Exhibit 41, what can you tell us about your comparison of that with item 39?

A. I performed a similar side-by-side microscopic comparison of the fired cartridge case in State's Exhibit 41 with test cartridge cases I fired from State's Exhibit 39, and I found matching breech face impressions on it from which I was able to conclude that this cartridge case was indeed fired by this pistol.

Q. In your expert opinion was it fired on the evening of 8-3-01?

A. No, sir. This cartridge case is not consistent with having been recently fired before the time of its recovery. It's in every respect consistent with having lain in the elements for some period of time before it was recovered.

Q. Now, was there anything about item 39 -- excuse me, I keep doing that, State's Exhibit 39 and State's Exhibit 40 that also would be consistent with this round not having been fired the previous evening?

A. Well, yes, sir. The pistol, State's Exhibit 39, as I may have mentioned before, has a detachable magazine. This magazine will hold as many as eight cartridges. It can hold one additional cartridge in the chamber, in the back end of the barrel, giving this firearm a maximum capacity without reloading of nine cartridges. There were a total of nine unfired cartridges received with the pistol. So that if this pistol had been used the previous night someone would have had to have reloaded it, or it simply was not used.

Q. That gun will hold nine cartridges?

A. Yes, sir, a maximum of nine.

Q. And nine were received?

A. Yes, sir.

Q. But you cannot put ten in it?

A. No, sir, ten won't fit. Not with this magazine.

Q. Thank you, Agent DeFreese. Please answer any of there -- oh, wait, I'm sorry, I do have one other thing. You were here when Agent Leatherman testified?

A. Yes, sir.

Q. And you heard his testimony about the locations of where the shell casings were found inside of , where

this incident occurred?

A. Yes, sir.

Q. Can you draw any significance from the location where shell casings end up if they are fired by an automatic or semiautomatic weapon, I guess I should say?

MR. ELLISOR: I object to that. He's an expert on weaponry fires. He's asking him a question now that's for the province of the jury to decide. He's going to ask him about the location of it and can he attribute anything from the location. He's not an expert on that.

THE COURT: Yes, sir. Well, certainly he can answer any question that goes to the ultimate question of fact, if it's within his area of expertise. And let me just do this.

Agent, you heard the question that was given?

THE WITNESS: Yes, sir.

THE COURT: If you feel qualified to answer that question I'll let you do so. If you feel that it's outside the realm of what you can comfortably answer then I'll let you say that also.

THE WITNESS: No, sir, it is within the area of my expertise.

THE COURT: All right, go ahead.

A. Solicitor, if I understand the question, given where cartridge cases are found at a crime scene can you

determine the position of the shooter from the placement of the cartridge cases?

Q. You worded it better, but, yes, sir, that's basically what I'm asking.

A. The answer to that question is yes, you can do that sometimes. In order to do that we have to have a great deal of information. First of all, we have to have the pistol that actually did that firing.

We have to have ammunition that's similar to the ammunition that was used in the actual shooting. And we have to know something about the angle and position that the gun was in at the time of discharge, how firmly or how weakly the pistol was held at the time of discharge.

For instance, just using this pistol. If I hold a pistol straight out from me I know the ejection port is on the right-hand side of the pistol. I don't have an expectation that the cartridge case is going to go to the left, if this pistol were used. Of course, this pistol wasn't used. But whether it goes forward, goes straight out, or goes to the rear can in many instances have a lot to do with how firmly I grab the pistol.

It also assumes I'm holding the pistol straight up and I don't know that to be the fact, sometimes people hold them like this. So it takes a great, great many facts to be known to me in order to make a determination about where the

shooter was at the time of the discharge, which is just not present in this case.

Q. Let me, I guess, phrase it the opposite way. Can you tell anything from the location of cartridge casings alone not knowing any other facts about the location of a shooter?

A. In this case I can't.

MR. RIDDLE: Thank you, Agent DeFreese. Please answer any of their questions.

THE COURT: Cross?

MR. HENDRIX: Very, very briefly, Your Honor.

CROSS-EXAMINATION

BY MR. HENDRIX:

Q. Mr. DeFreese, as I understand it, the exhibits that you have discussed today, with the exception of the exhibit which came in the paper bag in front of you, your understanding is the rest of them were gathered by someone at SLED?

A. Yes, sir.

Q. Where did you receive the exhibit that came out of the paper bag from, which I believe you said is State's Exhibit Number 41; who did that come from?

A. That was brought to the SLED laboratory by Wayne Kleckley with the West Columbia Police Department, I believe.

Q. Hand delivered?

A. Right. Right.

Q. And as far as who found it or anything like that you don't have any indication?

A. It's marked as recovered by, I believe McClarrie, M-c-C-l-a-r-r-i-e. That's what's on the container.

MR. HENDRIX: Your Honor, I believe that's all I have.

MR. ELLISOR: Thank you. I'll be very brief.

CROSS-EXAMINATION

BY MR. ELLISOR:

Q. Mr. DeFreese, Mr. Penny's gun I believe you have as number 17 on your list but it's State's Exhibit 39; is that correct?

A. Yes, sir.

Q. Now, on your report you said that item number 17 fired out of number 27, and 27 was a fired nine millimeter Luger caliber cartridge case?

A. Yes, sir.

Q. Received in grass area between front door of and , correct?

A. That's correct.

Q. So that bullet at some time fired the cartridge that was found outside the apartment?

A. This pistol.

Q. Yes, sir.

A. This pistol fired State's Exhibit 41.
Q. That is correct?
A. Yeah, this is correct.
Q. Okay. And that State's Exhibit 41 was found outside the apartment?
A. It was received in a container that so indicates, yes, sir.
Q. That's correct. Thank you so much on that.
Now, you also said that there was an exhibit in here, State's Exhibit 47?
A. Yes, sir.
Q. Now, State's Exhibit 47 was listed as what exhibit on your report, sir?
A. That would be my item 12.
Q. Your item 12. Okay. And your item 12 says it's a fired 380 auto-caliber cartridge casing in raincoat on coach, correct?
A. Right. That's what's on the container, cartridge casing in raincoat on couch.
Q. Now, that item in there according to -- was found in a raincoat on the couch?
A. It's so labeled, yes, sir.
Q. Now, there is no indication of any bullets from that weapon anywhere in the living room?
A. There were no 380 -- there were no bullets

consistent with 380 auto-caliber bullets submitted in this case.

Q. Right. But you had -- and that's called a bullet basically, right? That would be --

A. Well, these are fired cartridge cases.

Q. Okay. So it had been fired?

A. Right, these had been fired. You know bullets used to be in them but were not in them at the time.

Q. Right. So it's what I called a spent bullet?

A. Yeah. Well, people call it that but it's really a fired cartridge casing.

Q. I'm with you. But it was found in a raincoat on the couch?

A. Right, item 12 was, or State's Exhibit 47.

Q. Okay. And then there was another one, number 29 on your report, which is one fired 380 automatic caliber cartridge case found in blue jeans on couch?

A. That's correct, sir.

Q. Now, you have a different number on it, it's like R. P. 380 auto on item 29, and you have the same number on the other one.

A. Right. Both of them are headstamped R-P 380 auto, which is the headstamp that the Remington Company -- R. P. is short for Remington Peters, so they both have the same headstamp. They were both made by the same manufacturer.

Q. Okay. And that cartridge has already been shot?
A. Right.
Q. So they have turned over to you spent bullets found inside clothing in the living room?
A. Fired cartridge cases in the clothing in the living room.
Q. I yield to you.
A. Right.
Q. One thing. The one that was found outside that was turned over to you that you said had been shot previously, is there any kind of way with the scientific knowledge that we possess and SLED possess to have determined how long it had been out there?
A. Not really, no, sir. It's just given the extent of the tarnishing on it it could have been out there a period of weeks, months or years depending on the chemical action or reaction with the soil and its surroundings.
Q. Okay.
A. But it certainly wasn't fresh in the sense of being fired the night before.
Q. But you have no doubt it was fired by that gun right there?
A. None whatsoever.
MR. ELLISOR: Thank you so much.
THE COURT: Redirect?

MR. RIDDLE: Nothing further, Your Honor. I would ask that he be excused.

THE COURT: Mr. Hendrix, anything else?

MR. HENDRIX: Nothing further.

MR. ELLISOR: Nothing, Your Honor.

THE COURT: All right. You're free to step down. You're free to go. Thank you, Agent.

MR. RIDDLE: Your Honor, that's the last witness that we have today, and we have one additional witness that we will call in the morning.

THE COURT: Do you anticipate he'll be very long?

MR. RIDDLE: I wouldn't think so. It's Dr. John Carter, Your Honor.

THE COURT: Okay.

MR. HENDRIX: Can you give us just a second. I was going to try to speak to him and see if we might can do something to speed that up.

THE COURT: Okay. I'll let you chat for just a second.

[PAUSE.]

MR. HENDRIX: Your Honor, I think we're ready to go today.

THE COURT: Okay. Ladies and gentlemen --

MR. RIDDLE: Well, they are ready to go for the day.

THE COURT: Ladies and gentlemen, you put in a long day. I'm going to ask you to be here in the morning at nine. Let's go ahead and get a good start at nine o'clock tomorrow morning. Is that going to give anybody trouble with getting children to school or anything? Is everybody okay with nine?

Okay. We'll start at nine in the morning.

Let me ask, which juror is Ms. Padgett?

(WHEREUPON, a female juror indicated.)

THE COURT: Ms. Padgett, I'm going to ask if you'll serve as the forelady of the jury, please, ma'am, okay? You don't have to do anything, you don't get paid any extra. But I'll tell you in the morning what you have to do, okay? Or sometime during the day tomorrow.

But let's be back in at nine and get off to a good start, and I think we should get the case to you sometime during -- maybe later in the day, but hopefully it will be even earlier than that in the day. The main thing is, remember, not to talk with anybody about the case. Don't let anybody talk with you about the case. And with that in mind, we'll see you tomorrow morning. Have a good evening.

(WHEREUPON, the jury leaves the courtroom at approximately 6:20 p.m.)

THE COURT: Counsel, the jury is gone. Anything from the State before we --

MR. HARLING: Your Honor, may I approach briefly?

(WHEREUPON, a bench conference was had.)

THE COURT: Let's put this on the record. Mr. Ellisor, I understand that West Columbia has Mr. Almendares in their possession; is that correct?

MR. ELLISOR: That's what they have so informed me.

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

THE COURT: Boy, that's pretty quick.

MR. ELLISOR: That is, for somebody the State couldn't find him. Of course, you know, we're broke for the day. I would like to know if he's here or there. I would like to talk with him.

THE DEPUTY: Your Honor, we're holding him in West Columbia pending your ruling as to bringing him here or take him to the county jail.

THE COURT: I'm okay either way. I just don't want him to get out of pocket again.

MR. ELLISOR: Well, that's the problem. If he was that easy to find I think he would be just as easy -- I don't want to hold a witness in jail, Your Honor. Nobody does. But I don't want him to go either. But I trust him -- I reckon I trust him, I don't know. We need him but I don't want him if I got to put him in jail all night. That is what I'm saying.

THE COURT: Well --

MR. ELLISOR: I would like for just West Columbia

to tell him to be up in this courtroom when we convene in the morning.

MR. HARLING: Your Honor, I believe he's been arrested pursuant to a bench warrant.

THE DEPUTY: Your Honor, we faxed a copy of the bench warrant down to West Columbia for them to go look for him. So they have picked him up on your bench warrant.

THE COURT: That's right. He can't be released unless I sign something to release him. And I don't mind doing that, but here is the situation. What if we tell him to be here in the morning and he doesn't show up in the morning? Here is the problem, because two things happen. I don't want you using that as grounds of appeal and I don't want -- just being very honest, I don't want your client using it as grounds for a PCR.

MR. ELLISOR: Certainly, and I understand that also.

MR. RIDDLE: And I don't want it used as a ground, frankly, Your Honor, to try to get hearsay in, and I can't cross-examine him.

MR. ELLISOR: I understand your concerns with that.

THE COURT: Yes, sir. What it comes down to, of course, the instigator of all this was Mr. Hendrix.

[LAUGHTER.]

MR. HENDRIX: Now, wait a minute, I didn't have

anything to do with arresting this man.

THE COURT: Who now doesn't want him here. Here's what it comes down to. You wanted him, we got him. They want him.

MR. HENDRIX: I didn't say nothing about arresting no Hispanic people.

THE COURT: It's kind of like I always tell my kids, be careful what you ask for you might get it.

MR. HENDRIX: Well, I submit, I didn't ask for that.

THE COURT: I know, you're right. You are correct, you didn't. And you understand one thing, I want all of you to understand. I'm willing to take the load for you. I will tell him that I'm the one that had him put in jail and I'm the one that had him held in jail.

MR. ELLISOR: Your Honor, I would like for you to question my client because we would do this at the end of the State's case anyway. My client has just advised me that he wishes to take the stand. If he takes the stand then this other person's testimony would not be necessary.

Of course, I wanted the other person there for the purposes of not having my client take the stand, but my client says he wants to take the stand. If he does opt to do that I don't need this other person. So I would rather cut the other person loose, but I would like for you to put on

the record my client's intentions and wishes.

THE COURT: Okay. Let me do this. One thing I don't want to do is put -- since West Columbia has acted so quickly on this I don't want to put them in a jam with it. If I fax an order over to West Columbia ordering him to be released and be here in the morning, is that going to give your folks a problem?

MR. RIDDLE: You talking about West Columbia folks?

THE COURT: I'm talking about West Columbia folks now.

THE DEPUTY: No, sir, it wouldn't give us a problem.

THE COURT: What I might do right quick is go ahead and do an order. I could either e-mail it or fax it over to them, and just tell them -- and the order basically would order them to release him, with an order, in essence, directed to him also that he appear in this courtroom tomorrow morning at nine o'clock.

The problem, Mr. Ellisor, is if he doesn't appear at nine o'clock, obviously, we can't hold the trial up at that point, and then if something happens and your client decides not to testify then we don't have him.

MR. ELLISOR: But, Your Honor, I think that's a risk that my client is willing to accept, that's what I'm saying.

THE COURT: Okay. Well, let's find out.

Mr. Collins, let me ask you to stand just a minute, okay?

Madam Clerk, would you put him under oath, please.

IVAN DOUGLAS COLLINS, after having been duly sworn, testified as follows:

THE COURT: Mr. Collins, you understand that as I am advised Mr. Almendares may be a witness that you may want called in your case; do you understand that?

DEFENDANT COLLINS: Yes, sir.

THE COURT: And you understand and I'm sure you heard here that West Columbia has him and I can order him held overnight, order them to bring him here in the morning to make him available to testify, and I can take the brunt for you? I can tell him that I'm the one who ordered him held and had him brought over and hopefully reduce any kind of animosity he might have; do you understand that?

DEFENDANT COLLINS: Yes, sir.

THE COURT: Now, you understand that I can also send an order over saying that he is to be released and order him to appear on his own in the morning at nine o'clock? Now, if he doesn't appear at nine o'clock then we can send somebody to get him but they may not be able to find him in time to complete the trial; do you understand that?

DEFENDANT COLLINS: Yes, sir.

THE COURT: Have you had a chance to talk with your lawyer about all this?

DEFENDANT COLLINS: Yes, sir.

THE COURT: Are you in agreement with your lawyer's suggestion to let Mr. Almendares out tonight?

DEFENDANT COLLINS: Yes, sir.

THE COURT: Okay. Do you want to give that any thought at all? Do you want to think about it some more?

DEFENDANT COLLINS: No, sir.

THE COURT: You are sure that's what you want to do?

DEFENDANT COLLINS: Yes, sir.

THE COURT: Okay. And you understand that if you agree to this that, in essence, that's something you're probably not going to be able to come back on your lawyer about, if you happen to be convicted; do you understand?

DEFENDANT COLLINS: Yes, sir.

THE COURT: Okay. Understanding that, do you still want to do it that way?

DEFENDANT COLLINS: Yes, sir.

THE COURT: Okay. Mr. Ellisor, anything to add to it?

MR. ELLISOR: Nothing, Your Honor.

THE COURT: Mr. Hendrix, I understand you don't have a dog in this fight.

MR. HENDRIX: No, sir. We didn't ask for him to be arrested to start with.

THE COURT: And you don't want him anyway; is that right?

MR. HENDRIX: I'm not looking for him.

THE COURT: Mr. Smith, are you in agreement with that, really don't want him, don't need him in your case?

DEFENDANT SMITH: I had no idea this was going to happen.

THE COURT: Okay. All right. If you folks will wait a minute I'll do an order right quick before -- just the West Columbia people, everybody else can head on and go on. No, no, not right now. Not right now. Everybody stay in your seat just a minute. But I'll get the West Columbia people an order and it will order him to be released tonight, order him to be here in the morning at nine o'clock in this courtroom, and hopefully he'll show.

All right. Anything else before we stop for the evening?

MR. HENDRIX: Your Honor, can we stand aside and I can speak to my client in the grand jury room?

THE COURT: Yes, sir.

MR. HENDRIX: I understand from the deputies that's fine.

THE COURT: Yes, sir. Just stay here as long as

you need to talk with him.

MR. HENDRIX: Thank you, Your Honor.

THE COURT: Anything else from the State?

MR. RIDDLE: No, sir, I'm just assuming by all this colloquy, because I actually did step out a minute because I got a phone call from my kids, Your Honor. I didn't want you to think it was just any phone call.

THE COURT: I understand.

MR. RIDDLE: But I assume that if he does not show up we're not going to have to deal with the issue of going through or trying to put in the hearsay testimony on the statements?

THE COURT: That's correct.

MR. RIDDLE: Okay.

THE COURT: You understand that, Mr. Ellisor?

MR. ELLISOR: Sir?

THE COURT: Do you and Mr. Collins understand that, that if he doesn't show up that we're not going to go --

MR. ELLISOR: I understand that.

THE COURT: We're still not going to let you go into hearsay.

MR. ELLISOR: I understand that.

THE COURT: Because we've got him for you, if you want him.

MR. ELLISOR: I understand that.

THE COURT: Okay. I don't mean to be overdoing it. I know you understand.

MR. ELLISOR: No, no. I certainly understand that.

THE COURT: I want the record to be very, very clear on this.

Okay. Anything else from the State then?

MR. RIDDLE: No, sir, not at the time.

THE COURT: Anything else?

MR. ELLISOR: Nothing from the defense, Judge.

THE COURT: I'll see you folks in the morning at nineish.

MR. RIDDLE: And just, Your Honor, I'm serious, we've got Dr. Carter. I don't anticipate him being long. So hopefully we can get to the defense case real short.

THE COURT: Okay. If you West Columbia folks will wait just one minute.

(WHEREUPON, the trial of this case was recessed for the day.)

Friday, May 2, 2003

(WHEREUPON, State's Exhibit No. 39-A, the Magazine from State's Exhibit No. 39, was marked and admitted into evidence by stipulation of attorneys.)

MR. RIDDLE: Your Honor, for the record, the sheriff's department asked that the gun that has been placed in evidence, item 39, be secured. They have done so with a

trigger lock and with some wire ties. As a result of doing that, Your Honor, the gun can no longer be marked with the magazine because the magazine won't fit. So what we've done is just pulled the magazine out and marked it as 39-A.

THE COURT: Okay.

MR. RIDDLE: As a portion of item 39.

MR. HENDRIX: No objection.

THE COURT: Any objection to that from the defense?

MR. ELLISOR: None, Your Honor.

THE COURT: Anything else before we begin?

MR. RIDDLE: Not from the State, Your Honor.

THE COURT: Anything from the defense?

MR. HENDRIX: No, sir, Your Honor.

MR. ELLISOR: No, Your Honor.

THE COURT: And let me note, I understand that Mr. Almendares is here. We can take that up later on, but it's probably a good idea to go ahead and get the jury in and get started.

All right, let's bring the jury on in, please.

(WHEREUPON, the jury enters the courtroom at approximately 9:22 a.m.)

THE COURT: All parties and attorneys are in the courtroom and all of our jurors are back bright eyed and bushy tailed and ready to go.

– Call your next witness, please.

MR. HARLING: Thank you, Your Honor. The State calls Dr. John Carter.

DR. JOHN CARTER, after having been duly sworn, testified as follows:

THE CLERK: Please have a seat, and state your name and spell your last name.

THE WITNESS: I'm Dr. John Carter, C-a-r-t-e-r.

DIRECT EXAMINATION

BY MR. HARLING:

Q. Dr. Carter, where are you currently employed?

A. I've been director of clinical laboratories at Lexington Medical Center since 1984, for 19 years now.

Q. And what are your duties there?

A. I direct the clinical laboratories and I, with a group of six other pathologists, share the professional work in surgical anatomic pathology and autopsy pathology. And since the hospital opened in 1961 we've done the forensic pathology for Lexington.

Q. What is your educational background?

A. I went to college at the United States Air Force Academy.

MR. HENDRIX: Your Honor, we'll stipulate that he's qualified as a pathologist, a forensic pathologist.

THE COURT: You want to accept that?

MR. HARLING: That's fine, Your Honor.

MR. RIDDLE: Does Mr. Ellisor stipulate as well?

MR. ELLISOR: I so stipulate.

THE COURT: Ladies and gentlemen, Dr. Carter will be qualified as expert in the area of forensic pathology. Remember that I told you yesterday an expert is allowed to give an opinion. You are not bound by the opinion of the expert. You decide how much weight or how much credibility to give to it.

Any exception to that charge, from the State?

MR. RIDDLE: No, sir.

THE COURT: Defense?

MR. HENDRIX: No, sir, Your Honor.

MR. ELLISOR: None, Your Honor.

THE COURT: All right. Go ahead.

BY MR. HARLING:

Q. Dr. Carter, how many autopsies have you performed?

A. Since 1969, in the range of 1200.

Q. And how many have you testified as an expert?

A. I've lost count, but probably in the range of 80 to 100 times. Most of them in this courtroom.

Q. Dr. Carter, did you perform an autopsy in this case?

A. Yes, I did.

Q. And who did you perform that on?

A. The autopsy was performed on Mr. Sidney Muller.

Q. And when did you perform this autopsy?

A. I'll look that up to get the specific date. It was October 4th, 2001.

Q. Could you tell the jury exactly what an autopsy is.

A. An autopsy is the examination after death of an individual to determine the cause of death and the manner of death. The two different things we determine, exactly what caused the person's death; and then as far as manner of death, was it a natural cause of death, an accidental cause of death, a homicide or suicide.

In the extent of the autopsy it varies depending on what the situation is, what the case is. Many times it is a full external and internal examination of the body of the deceased. Sometimes it is an external examination or photographic record, depending on what needs to be determined. In this situation a complete autopsy was done.

Q. And what were your findings on the autopsy?

A. The findings was -- starting from the back, there was no significant medical ailment. There was no injury other than that which was the immediate cause of death, namely a gunshot wound to the chest, the bullet traveling through the abdomen severing or lacerating, cutting across a major abdominal artery then exiting through the back of the right side of the body.

Q. And what was the exact cause of death in this case?

A. The cause of death, the bullet entering into the left side of the chest, traveling slightly downward and slightly posterior severed, cut across the splenic artery, the main artery to the spleen, an artery approximately the diameter of a person's index finger. And then the bullet traveled on through other organs and out of the body. But that major artery inside that abdominal cavity being cut led to a fatal hemorrhage within probably two or three minutes.

MR. HARLING: Your Honor, at this time, may I remove my jacket?

THE COURT: Yes, sir.

MR. HARLING: May I ask the witness to step down?

THE COURT: Yes, sir.

(WHEREUPON, the witness stepped down from the witness stand.)

BY MR. HARLING:

Q. Dr. Carter, could you demonstrate on me for the benefit of the jury where the bullet entered Mr. Muller.

A. The bullet entered just in front of the arm. Right -- this is called the axial of the arm, that region, about the level of the sixth rib. It traveled downward slightly to the posterior and exiting in the right side of the back, through the diaphragm, in and out of the stomach, cutting the splenic artery, through the left adrenal gland, through the first lumbar vertebral body and then out the

back. So lightly front to back, and slightly up to down tract (indicated).

Q. Thank you.

A. (The witness returned to the witness stand).

Q. This type of wound, would this wound have been immediately fatal?

A. Most likely not. The artery that was severed would cause major bleeding. But it's the nature of a hemorrhage that would have allowed a person to be alive, even be active for 30 seconds, a minute, two minutes. It's a little bit unpredictable, but in that range. It probably would not have been immediately fatal. It probably did not have the shock injury that would have immediately knocked a person down because we did not see evidence of blast injury inside the body that would have immediately incapacitated the victim.

Q. Now, this type of wound, although not immediately fatal, you said he would have died very soon thereafter?

A. This type of hemorrhage, the artery that was cut was deep inside the abdomen. So it's not the type of hemorrhage that external pressure or first aid or any type of nonsurgical care could have prevented the bleeding. It would have -- in order to stop this kind of bleeding and save the victim's life, they would have needed immediate surgical intervention, such as -- not even EMS type intervention, but such would have been available in an emergency room.

Q. So he would have had -- immediately had to have had surgery in order to save his life?

A. That's correct.

Q. Now, Dr. Carter, based on the entrance area of wound and the exit area of the wound do you have an opinion as to whether the deceased was standing or seated when this happened?

A. You know, I have an opinion that the angle of the weapon -- or, I mean, the placing of the weapon was very most likely at a higher level than the victim. In assuming that the weapon was held in a natural shooting position, in other words, about waist height, in order to achieve this downward tract the victim was most likely seated or squatted or at least in a lower position than the weapon, than the shooter was at the time of the shooting.

Q. Do you have an opinion as to how close the shooter was?

A. We did not see residue, powder residue on either the clothing or on the body. So that would put the weapon to begin with three or four feet away. The angle of it, the slightly downward angle would preclude, would kind of rule out a real close range. So I estimated the weapon was several feet away from the victim when it was fired.

MR. HARLING: Can I ask the witness to step down one more time, Your Honor?

THE COURT: Yes, sir.

(WHEREUPON, the witness stepped down from the witness stand.)

BY MR. HARLING:

Q. I'm going to pull around a chair for the benefit of the jury. Can you show them why your opinion is that the deceased was seated and that it was from some distance away?

A. Yes.

Q. Just tell me -- use that to indicate with and just tell me how you want me to sit.

A. Okay. The relationship of the weapon to the victim to the left side; if the weapon was close the tract would have been a sharp angle down. The further back that the weapon was from the victim the more gradual of the angle, and the injury point -- I don't know if the jury can see where I have the laser beam right now, but I have the pointer right here, at about this distance and about the angle that Mr. Harling is from me would give the angle of the bullet tract slightly downward, slightly posterior through the body.

Q. Thank you, Dr. Carter.

A. (The witness returned to the witness stand).

Q. Dr. Carter, did Sidney Muller die as a result of that gunshot wound?

A. That's the sole and only cause of death.

MR. HARLING: Thank you, Dr. Carter. Please answer

any questions defense may have of you.

THE COURT: Cross.

CROSS-EXAMINATION

BY MR. ELLISOR:

Q. Dr. Carter, after the bullet entered the defendant -- I mean, the victim, excuse me, how long a time would you say once the vein got cut, the part of the body that's caused the bleeding, once that happened, the impact of the bullet, how long would the victim live?

A. It was an artery rather than a vein that was cut, and the important difference there is the artery carrying blood directly from the heart bleeds out much faster than if the splenic vein, for example, had only been cut.

It's variable, of course, with different shooting situations, but it would have been unlikely for the victim to have not lived, let's say 30 to 60 seconds; and it would have been unlikely for the victim to have lived more than three or four or five minutes, with that nature of bleeding.

Q. But it's most likely about 30 to under a minute?

A. Well, a minute or two. It's imprecise. But I've seen situations before in which the victim was capable of some physical activity after a fatal wound.

Q. Would he be strong enough to walk after that, even though he's alive and breathing, still alive, could he move himself any distance?

A. I've seen situations where traumatic injury, where people would, like, exit an automobile and be talking to the EMS people for a couple minutes then collapse.

Q. So it is possible he could have left inside the house and went outside?

A. It's possible.

Q. Okay. Is it possible that he would have been outside the house at the time he was shot?

A. Yes. I mean, the evidence I have doesn't place him in any particular geography.

Q. Now, the example you showed the jury a minute ago, the prosecutor was sitting down. Now, the bullet entered at the upper part of the trunk, correct?

A. The upper part of the trunk is here --

Q. Okay, the midpart of the trunk?

A. Correct.

Q. And it exited where?

A. In the -- let's see. You're pointing to your left side which is correct. Just about four inches to the right of the spine. Just right -- to the right of the spine, just above the right hipbone.

Q. Now, if a person was bending over like that to tackle somebody that also -- that angle would also be consistent with a person bending?

A. Turn it a little bit toward me. The angle you're

bending over would have put the bullet tract right down into the pelvis. So I don't think that could have done it.

Q. Well, say you were up. In other words, can the tract of your --

A. May I stand up?

Q. Sure. And all I'm trying to do is -- the example that you're giving, are there any other positions that the victim's body could have been in that would have caused the bullet to go the same way?

A. Yes, there are. It has to be relative -- there are different positions that the cylinder of the weapon could have been in relative to the victim.

Q. Right.

A. But you have to have a slight downward and a slight front to back relationship between angles.

Q. Right. So could not the victim been standing somewhat and leaning and done the same thing without having been sit down?

A. The way you are doing now would have put the bullet tract shortly downward and into the pelvis. Now, if you would have been maybe leaning backward the other way, possibly.

Q. This way?

A. Yeah, but the way you're leaning down toward me would have put it much more up to down angle than what we

found.

Q. Okay. Now, when you were talking about the length of the victim would have stayed alive after the impact of the bullet, would that be affected by his sobriety? In other words, if you were intoxicated, extremely intoxicated, would you have passed out sooner or later?

A. The amount of time it would have taken to bleed out, as the saying goes, would have been the same. The degree of sobriety would have affected how lucid the victim would have been or how coherent the victim would have been during that time period.

Q. But would that also, his lucidity, would that not also affect his ability, his motor skills to move and to walk?

A. If he was inebriated sufficiently that he couldn't have walked otherwise. I'm not sure that the gunshot -- that was a separate event. I'm not sure the gunshot would have further aggravated that.

Q. The victim in this case had a -- I believe your report said he had a high level of marijuana in his body?

A. That's correct.

Q. Again, though, your testimony, as I understand it, is the fact that he had a very large -- I think you just used the word large; is that correct?

A. That's correct.

Q. Large amount of marijuana in his body, that wouldn't have affected his ability to travel any distance after the bullet went in him?

A. Not relative -- it wouldn't have affected at all the amount of time it took the fatal hemorrhage -- the hemorrhage to become fatal. Whether or not he could have walked or talked is not relevant to the gunshot wound. It depends on how sober or house lucid and functional he was anyway prior to the shooting.

Q. Okay. But it would have been more difficult for him to do it if he was inebriated from alcohol and drugs, to move any great distance?

A. Well, what I'm trying to say is that that's a separate set of variables.

Q. I understand.

A. And if the victim was intoxicated due to drugs and alcohol and unable to walk or talk I don't think the gunshot wound compounded that.

Q. Okay.

A. And I don't think the intoxication, if there had been any, compounded the fatal hemorrhage.

Q. Got you.

A. They are two separate events.

MR. ELLISOR: Thank you very much. Appreciate it, sir.

No further questions, Your Honor.

THE COURT: Mr. Hendrix?

MR. HENDRIX: No questions, Your Honor.

THE COURT: Any redirect?

MR. HARLING: Your Honor, the State has no further questions. We'd ask that this witness be excused.

THE COURT: Okay.

MR. HENDRIX: No objection.

MR. ELLISOR: Without objection.

THE COURT: You can step down. You're free to go. Thank you.

MR. RIDDLE: Your Honor, with that testimony the State would rest its case in chief.

THE COURT: All right. Ladies and gentlemen, you've heard the State has now rested their case. I will tell you that there are certain things that I have to take up with the attorneys at this time. So I'll ask you to step to the jury room just for a few minutes. It shouldn't take too long, then we'll bring you back out and continue in just a few minutes. Be sure we don't talk about the case.

(WHEREUPON, the jury leaves the courtroom at approximately 9:40 a.m.)

THE COURT: Are there any motions, Counsel?

MR. HENDRIX: Yes, sir, Your Honor. On behalf of Terrence Smith, we would make a motion for a directed verdict

of not guilty as to all the charges on the grounds that the evidence taken as a whole, even in the light most favorable to the State, is insufficient to allow a reasonable jury to find the defendant, Terrence Smith, guilty beyond a reasonable doubt and would ask that Your Honor so grant that motion so that this case concerning him would be over.

Also, Your Honor -- do you want me to do them one at a time or go through them?

THE COURT: No, sir. I can go ahead and rule on that particular one. I would have to deny the motion. The State has introduced into the record evidence related to Mr. Smith sufficient to allow it to go to the jury.

MR. HENDRIX: Your Honor, at this time then we would ask at this stage for a mistrial on the grounds that the in-court identification and testimony concerning the photographic lineup identification, especially of the witness John Hayward, with all due respect, Your Honor, we believe was erroneously permitted and that it has prejudiced our client unfairly.

The witness proved to be unreliable and that that evidence, even though I know that the admission of evidence is in the discretion of the Court, we believe that under the circumstances, not necessarily that you saw it at the beginning, but what developed later may have been -- turned out to be something that shouldn't have been done.

So we would ask at this point in time for a mistrial on behalf of Terrence Smith so that that matter can be corrected. I don't know how else it can be corrected at this time other than a mistrial.

THE COURT: All right. Again, I note the motion, Mr. Hendrix, and would have to deny the motion.

MR. HENDRIX: One further thing, Your Honor. We would also at this point in time ask for a severance of this trial from the trial of Ivan Collins on the grounds that trying these two together under all the facts and circumstances of this case and based upon the fact as I understand it the two defendants have indicated to us, their attorneys, that they plan to take the stand in their own defense. We think it would be important -- especially I'm talking about Terrence Smith, that Mr. Smith be given a separate trial from his co-defendant, Mr. Collins.

THE COURT: Okay.

MR. HENDRIX: And for all the other grounds we've previously raised in that regard.

THE COURT: I certainly note that, and again, I would have to deny the motion at this time. I don't think there's anything that would necessarily prejudice either of the parties in an excessive fashion. So I would deny the motion.

MR. HENDRIX: I believe that's all I've got right

now, Your Honor, but if I can reserve the right to maybe stand up again when Mr. Ellisor gets through.

THE COURT: All right. Mr. Ellisor?

MR. ELLISOR: Your Honor, I'll be very brief. I would reiterate all three motions made by co-counsel, with the additional grounds to sustain those motions under grounds of the evidentiary rulings that you made.

With all due respect, we feel that the suppression of certain evidence that was allowed in has injured our clients, especially the Rogers proffer that we made. And had that been in, I think the circumstances would have changed in the factual situation.

So I would also in support of our motion add the evidentiary rulings that you've made that have prejudiced the clients at this time and a mistrial should be allowed on those grounds for failure to allow that in.

THE COURT: Again, I would note the motion and deny the motion, Counsel.

MR. HENDRIX: And, Your Honor, so the record will be clear, I will join in the additions made by my co-counsel, Mr. Ellisor.

THE COURT: And those are also noted for the record.

MR. HENDRIX: Your Honor, I don't believe I have anything else. Your Honor, if we are going to deal with the

Mr. Almendares issue I understand that there's a law enforcement who speaks Spanish. But out of an overabundance of caution if Your Honor would permit I'd like to call my office and ask my receptionist who speaks Spanish to come over just to kind of double check each other. If that would be permitted, Your Honor, I'd like to make a phone call.

THE COURT: Okay. What you might do is let her do that now. I'm going to go ahead and examine the defendants now.

MR. HENDRIX: If I can use this phone it won't take me but a second.

THE COURT: Just go right ahead. Do you have any problems with me going ahead and starting to question them?

MR. HENDRIX: No, sir.

THE COURT: All right. Mr. Collins and Mr. Smith, let me ask both of you to stand and raise your right hands.

Madam Clerk, would you put them under oath, please.

IVAN DOUGLAS COLLINS and TERRENCE V. SMITH, after having been duly sworn, testified as follows:

THE COURT: All right. Thank you, ma'am.

Each of you understand that in this case the State has brought criminal charges against you, and under our system that means that the State then has the burden of proof? In other words, they must prove each of you guilty of the offenses with which you are charged. And, in fact, they

must prove each element of each charge against you. Do each of you understand that? Do you understand that, Mr. Collins?

DEFENDANT COLLINS: Yes, sir.

THE COURT: Mr. Smith, do you understand that?

DEFENDANT SMITH: Yes, sir.

THE COURT: And, of course, what that further means is that neither of you have to prove anything. The law is very clear that you two don't have to prove a single thing. The entire burden is on the State. So what that means is that you don't have to put up a case. In other words, you don't have to call any witnesses and you don't have to testify if you don't want to. Of course, you can if you do want to. Do each of you understand that? Do you understand that, Mr. Collins?

DEFENDANT COLLINS: Yes, sir.

THE COURT: Mr. Smith, do you understand that?

DEFENDANT SMITH: Yes, sir.

THE COURT: Let me talk just for a moment with you about what happens under either circumstance. Let's say for example, first of all, if you do not call any witnesses and do not testify, which means you put up no case, the law says that -- and some people find this -- like to do this, some don't. It depends on each individual. The law says that your attorneys would have the last closing argument to the jury. Do you understand that? Mr. Collins, do you

understand that?

DEFENDANT COLLINS: Yes, sir.

THE COURT: Mr. Smith, do you understand that?

DEFENDANT SMITH: Yes, sir.

THE COURT: But now the law also says that if either one of you puts up evidence and the other one doesn't then both of you lose your closing argument to the jury. In other words, you wouldn't get the last one. Your lawyer would have to take the first one. Do you understand that, Mr. Collins?

DEFENDANT COLLINS: Yes, sir.

THE COURT: Mr. Smith, do you understand that?

DEFENDANT SMITH: Yes, sir.

THE COURT: Also, if you did not testify, if you wanted me to I would tell the jury that they could not consider that in any way and, in fact, they couldn't even talk about it in the jury room. Do you understand that, Mr. Collins?

DEFENDANT COLLINS: Yes, sir.

THE COURT: Mr. Smith, do you understand that?

DEFENDANT SMITH: Yes, sir.

THE COURT: Okay. Now, if you do decide to testify, of course, if you call witnesses as I've said you would give up that last argument, if that was anything you wanted. But if you were to testify, once you get up on the

stand and are sworn then you give up your Fifth Amendment right. Do you understand that, Mr. Collins?

DEFENDANT COLLINS: Yes, sir.

THE COURT: Mr. Smith, do you understand that?

DEFENDANT SMITH: Yes, sir.

THE COURT: And, of course, that means that once you -- of course, you would answer any questions your lawyer asks but you would also have to answer any questions the solicitor asks. Mr. Collins, do you understand that?

DEFENDANT COLLINS: Yes, sir.

THE COURT: And, Mr. Smith, do you understand that?

DEFENDANT SMITH: Yes, sir.

THE COURT: And, in essence, what it means is if you got up on the stand and you started testifying and the solicitor starts asking you questions and about halfway through you start thinking, woah, I'm in trouble here, this ain't going right, you can't change your mind at that point. Do you understand that, Mr. Collins?

DEFENDANT COLLINS: Yes, sir.

THE COURT: Mr. Smith, do you understand?

DEFENDANT SMITH: Yes, sir.

THE COURT: Okay. And also if you testify the State has a right to ask you about certain prior convictions, and I'm going to find out now if there are any so that both of you will know.

Mr. Riddle, let me take Mr. Collins first. If Mr. Collins were to testify would you ask him about any prior convictions?

MR. RIDDLE: Yes, sir, I would.

THE COURT: All right. What are they?

MR. RIDDLE: Your Honor, I would ask him about indictment number 2002-GS-32-1305. It is an indictment for an armed robbery that he pled guilty to on February 3rd of this year in front of the Honorable Jim Barber.

THE COURT: Any others?

MR. RIDDLE: No, sir, that's it.

THE COURT: Mr. Ellisor, what's your position on that? Do you have any dispute that that would be appropriate to be asked?

MR. ELLISOR: No, sir. Under my understanding of the law that's in affect at this time that they would have the right to impeach him on that.

THE COURT: I think Rule 609 does provide for that.

MR. ELLISOR: Right.

THE COURT: Mr. Collins, do you understand that then, that if you were to testify the State would be able to ask you about a conviction in February of this year for armed robbery? Do you understand that?

DEFENDANT COLLINS: Yes, sir.

THE COURT: And, of course, I would also tell the

jury that they could consider it only for purposes of credibility. In other words, to determine whether they believe you more or less or not; do you understand that?

DEFENDANT COLLINS: Yes, sir.

THE COURT: Okay. And while talking to Mr. Collins let me just go ahead and ask. Do you feel like you understand your rights that we've discussed at this point, Mr. Collins?

DEFENDANT COLLINS: Yes, sir.

THE COURT: Have you had a chance to talk with your lawyer about it?

DEFENDANT COLLINS: Yes, sir.

THE COURT: And have you been satisfied with what your lawyer has done for you?

DEFENDANT COLLINS: Yes, sir.

THE COURT: Do feel like he's done everything you wanted him to?

DEFENDANT COLLINS: Yes, sir.

THE COURT: And have you had his advice on all of this?

DEFENDANT COLLINS: Yes, sir.

THE COURT: And while this may sound like a stupid question we also have to ask it; today are you under the influence of any kind of medication, drugs, alcohol, anything that would influence your ability to know what's going on?

DEFENDANT COLLINS: No, sir.

THE COURT: In other words, you do feel like you know what's going on around you today?

DEFENDANT COLLINS: Yes, sir.

THE COURT: Okay. Understanding that, have you decided, first of all, whether you will call a case; in other words, whether you will call any witnesses? Do you want your lawyer to call any witnesses?

DEFENDANT COLLINS: No, sir.

THE COURT: You don't?

DEFENDANT COLLINS: I mean, myself.

THE COURT: Okay. Well, that's what I was going to get to next. Have you decided whether you will testify yourself?

DEFENDANT COLLINS: Yes, sir.

THE COURT: Okay. And have you had a chance to talk with your lawyer and get his advice about that?

DEFENDANT COLLINS: Yes, sir.

THE COURT: And do you feel like you have been competent and able to make that decision yourself?

DEFENDANT COLLINS: Yes, sir.

THE COURT: And is that your decision?

DEFENDANT COLLINS: Yes, sir.

THE COURT: Mr. Ellisor, is there anything you want to say about that or add to it?

MR. ELLISOR: Your Honor, I would like for you to question him as to my position that I have advised him that he should not take the stand, and does he understand that he is making this decision on his own and against the counsel of his attorney.

THE COURT: Mr. Collins, I'm sure you understand that but I have to ask you for the record. Do you understand that your lawyer feels like you should not take the stand? Do you understand that?

DEFENDANT COLLINS: Yes, sir.

THE COURT: And I gather you've had a chance to talk with him though and get his advice about it; is that right?

DEFENDANT COLLINS: Yes, sir.

THE COURT: And despite that you've decided you still wish to take the stand?

DEFENDANT COLLINS: Yes, sir.

THE COURT: Okay. And you understand that what will happen is in just a moment we'll call each of your cases separate, probably call your case first, I think your indictment numbers were first, and I just go by the numbers, basically, and you understand even at that point if you decide not to testify you can still let your lawyer know that you don't want to testify? So you have the right to change your mind up to that point; do you understand that?

DEFENDANT COLLINS: Yes, sir.

THE COURT: You understand everything that's going on at this point you feel like then?

DEFENDANT COLLINS: Yes, sir.

THE COURT: All right. You can have a seat.

Let me note for the record, in examining Mr. Collins I find that he understands his rights and has been able to intelligently articulate his position, and that his decision to testify is made of his own free will and knowing the repercussions of such testimony.

Now, Mr. Smith, let's talk about it with you. If you were to testify, do you understand the State could ask you certain questions about prior convictions?

DEFENDANT SMITH: Yes, sir.

THE COURT: And, Mr. Riddle, would you ask Mr. Smith about any prior convictions?

MR. RIDDLE: Yes, sir.

THE COURT: All right.

MR. RIDDLE: Your Honor, I would ask Mr. Smith about a conviction under indictment 2003-GS-32-130. That is a prior conviction for armed robbery. That conviction took place -- I'm looking for the date, Your Honor. I believe it's 4-16-03. But I'm not going to swear that that's the correct date, but it happened this calender year in this courtroom for a 1999 incident at Tommy's Grocery Store in the

City of Cayce.

MR. HENDRIX: Your Honor, I believe that's when the sentencing took place. I believe the plea had taken place a month or two earlier.

MR. RIDDLE: And that's why I couldn't tell you.

MR. HENDRIX: I was not involved in that case and I don't remember the exact time.

THE COURT: Would you ask him about any other prior convictions, Solicitor?

MR. RIDDLE: No, sir, I don't believe so. I don't believe so.

THE COURT: Okay. You understand that then, Mr. Smith; if you were to testify the State would ask you about a conviction for armed robbery in 2003; February of this year, you understand that?

DEFENDANT SMITH: Yes, sir.

THE COURT: And, of course, you understand that I would, of course, tell the jury that they could consider that only for purposes of determining your credibility? Do you understand that?

DEFENDANT SMITH: Yes, sir.

THE COURT: Now, again, I would ask you at this time are you under the influence of any drugs, or alcohol, or medication, or anything that influences your judgment in any way?

DEFENDANT SMITH: No, sir.

THE COURT: Do you feel like you know what's going on today?

DEFENDANT SMITH: Yes, sir.

THE COURT: Do you feel like you're able and capable of making these decisions that you're going to be making?

DEFENDANT SMITH: Yes, sir.

THE COURT: And you've had your lawyer's advice about it?

DEFENDANT SMITH: Yes, sir.

THE COURT: Have you -- of course, I've been over the other repercussions of calling witnesses and not testifying and such. Have you decided whether you will testify or not?

DEFENDANT SMITH: Yes, sir.

THE COURT: And let me ask first, have you decided whether you will call any other witnesses?

DEFENDANT SMITH: Only me.

THE COURT: You will testify yourself?

DEFENDANT SMITH: Yes, sir.

THE COURT: Okay. And is that your decision?

DEFENDANT SMITH: Yes, sir.

THE COURT: Have you had a chance to have your lawyer's advice?

DEFENDANT SMITH: Plenty of time.

THE COURT: So you've had plenty of advice from your lawyer to make that decision?

DEFENDANT SMITH: Yes, sir.

THE COURT: And you feel like he's told you everything you need to know to make the decision?

DEFENDANT SMITH: Yes, sir.

THE COURT: And is this, again, made of your own free will?

DEFENDANT SMITH: Yes, sir.

THE COURT: All right. Mr. Hendrix, did you wish to add anything?

MR. HENDRIX: No, sir, Your Honor, I don't. I'm satisfied with the communication we've had concerning my advice to him, and I do not think that the Court needs to go into that. But, of course, Your Honor I guess does what he thinks is appropriate, but I'm not asking you to do it.

THE COURT: Mr. Hendrix, do you feel like you've given Mr. Smith the best advice you could give him?

MR. HENDRIX: Yes, sir, I have, Your Honor. To the best of my ability I've advised him the best I can and tried to tell him from every ramification I can think of one way or the other.

THE COURT: Okay. And I didn't ask this. Mr. Ellisor, have you also given Mr. Collins the best advice

you could give him?

MR. ELLISOR: I certainly have tried, Your Honor.

THE COURT: All right, thank you. I find then that Mr. Smith's decision is made knowingly and intelligently, is made of his own free will, after both he and Mr. Collins both have made their decisions after advice from very competent and experienced counsel, and I am satisfied that the decisions they've made are their own decisions at this point.

Do you have something else you want to take up?

MR. RIDDLE: Just one other thing, Your Honor. In regards to the prior convictions on both Mr. Smith and Mr. Collins, I would like for the Court to make an affirmative finding under Rule 609 that the probative value of admitting those prior convictions does, in fact, outweigh prejudicial effect to the accused.

THE COURT: Right. Okay. I guess I just assumed too much. I assumed that under subsection 1 that that is inherent in the decision, but I do find that as to each defendant that the questioning of a prior conviction regarding armed robbery would have sufficient probative value and greater than any potential prejudice to the defendants in this case.

Now, let's take up the matter of Mr. Almendares, if we might. Are you going to call him as a witness?

MR. ELLISOR: Yes, I am. And in response to one of

your questions to my client it might be inferred that he did not consent to my calling Mr. Almendares, which he does concur with my decision to call him. I would ask that you question him as to that matter so that we'll have it on record, that not only he wants to testify, he does actually agree with my calling another witness.

THE COURT: Okay. Mr. Collins, is that correct, sir?

DEFENDANT COLLINS: Yes, sir.

THE COURT: You know that your lawyer is going to call Mr. Almendares as a witness?

DEFENDANT COLLINS: Yes, sir.

THE COURT: And are you in agreement with that?

DEFENDANT COLLINS: Yes, sir.

THE COURT: Okay. All right.

MR. ELLISOR: I'm ready to bring the jury.

THE COURT: Mr. Almendares is here, is there anything we need to take up with him at all?

MR. ELLISOR: Well, he's here as a witness now. I'll put him on the stand.

THE COURT: All right. Are we ready to go? Is the State ready?

MR. RIDDLE: Yes, sir, do we need to swear the interpreter, or do you want to do that in front of jury?

THE COURT: I usually do that in front of the jury.

Counsel, do you need a break before we start?

MR. RIDDLE: I'm ready.

MR. HENDRIX: I'm ready, Your Honor.

MR. ELLISOR: We're ready.

THE COURT: Let's bring the jury in. One second. I would think we call Mr. Collins case first.

MR. HENDRIX: That's my understanding.

MR. ELLISOR: That's my understanding, too.

THE COURT: Okay.

(WHEREUPON, the jury enters the courtroom at approximately 10:08 p.m.)

THE COURT: All parties and attorneys are in the courtroom and all jurors have returned with us.

Counsel, as we indicated we'll take the case of Mr. Collins first and Mr. Smith second, because that's just the numeric order, okay.

Mr. Ellisor?

MR. ELLISOR: Thank you, Your Honor. Your Honor, Mr. Collins calls as his first witness Carlos Roberto Rodriguez Almendares.

THE COURT: Come on around and have a seat. First, just stand here. First let me ask the two translators to come and stand up right here, right up here at the front.

Madam Clerk, if you put them under oath first. Have them state their name.

MARK MIRAMONTES and JUANA P. HOUSTON, after having been duly sworn, translated as follows:

THE COURT: Did we get their names yet?

THE CLERK: I'm sorry. Would you please state your name.

TRANSLATOR HOUSTON: Juana P. Houston.

TRANSLATOR MIRAMONTES: Mark Miramontes.

THE COURT: Okay. Thank you, ma'am.

MR. HENDRIX: Your Honor, for the record, Ms. Houston is a reception in my office and speaks fluent Spanish. My understanding of her role here is that the law enforcement officer who speaks Spanish is going to be translating for the jury, and just as a second opinion, so to speak, Ms. Houston is here to help.

THE COURT: Right. Well, what we've worked out is that he'll be the primary translator. He'll be doing it, and if she has a disagreement with any of his translation we can get together up here and we can work it out. I'm not sure how much help I'll be with working it out but we'll try to work it out. With that in mind, let's put Mr. Almendares under oath.

What we will do is this, Mr. Translator, we will take it -- and attorneys, you've got to cooperate with me on this, okay? Very short sentences, short phrases. It takes a little while longer to do it but it's just better, it's

easier to do it that way. I don't want any long-winded questions from anybody. It's got to be short phrases, okay? And I know the translators will appreciate it.

Go ahead.

CARLOS ROBERTO RODRIGUEZ ALMENDARES, after having been duly sworn, testified as follows:

THE CLERK: Have him state his name and spell his last name.

THE WITNESS: Carlos Roberto Rodriquez Almendares.

THE COURT: Mr. Rodriquez, is your last name Rodriquez?

THE WITNESS: Yes.

THE COURT: What we will do is this. We will talk in short phrases so that you'll be able to understand everything. If you have any question understanding, just let me know. When there's a question asked we will have the translation for the question. And when you answer, just answer in short phrases and we will translate in short phrases. Do you understand?

THE WITNESS: Yes.

THE COURT: Mr. Ellisor, just take your time.

(WHEREUPON, the following answers were translated by Translator Miramontes.)

DIRECT EXAMINATION

BY MR. ELLISOR:

Q. Mr. Rodriquez, where do you live?

A. , West Columbia.

Q. On August 3rd, 2001, where did you live?

A. -- . It's Columbia.

Q. On August 3rd, 2001, did you see a shooting while you were walking on Shull Street?

A. When I was walking down from my house, he heard some shots when he saw a white car, Chevy Cavalier, then he saw two guys.

THE COURT: Stop, stop.

MR. RIDDLE: I just can't quite hear the interpreter after he's saying it. If you could speak up loudly.

THE COURT: It might be better to move that little microphone right there in front of you, Mr. Interpreter. We really need to pick you up I think more than we do him, as long as you hear him. We don't have to hear him, only you got to understand him. But we've got to hear you, okay. And take your time. Don't go too fast.

BY MR. ELLISOR:

Q. Did you see the individual that was shot?

A. I never saw the person that got shot.

Q. Where was he standing when he saw this?

A. When I was coming from my house, he was walking and he saw two guys that had killed the dog. He went under a

car. The person in the car was telling the other person to come back fast.

Q. How many people were in the car?

A. One car turned on . In the front there was two. When they turned, the other two guys that were carrying guns got in it.

Q. Ask him were there two -- I mean, were there then four people in that car?

A. He said probably.

Q. He said of course, didn't he?

A. No. He said probably, yes.

Q. Then did he hear any gunshots?

A. Yes, I did.

Q. When did he hear the gunshots?

A. When he was coming from the house he heard the shots. I thought I was hearing something else.

THE COURT: You've got to go slower. Got to go slower. Repeat the last part.

A. There was a street that there's -- where the crime occurred. Then there's another street, . I saw the dog was -- the dog was barking and that's when they shot the dog.

Q. How many gunshots did he hear?

A. Between three and four, but the first time there was four or five.

Q. How long a period was there between the shots?
A. About three minutes.
Q. About three minutes? Ask him again, is he sure there was a lapse of three minutes?
A. He's not sure, but the time that it took him to walk from his house to that section that that doesn't take him very long.
Q. Did he hear shots coming from different parts of the house?
A. He said no, that there was only from one side.
Q. Where was the white car when the two gunmen got in it?
A. There's a gas station. They were going from the bottom up. I don't know the areas, I can't picture what it is. From the apartments and then he turned. The two people were coming up from the apartments.
Q. Did he see a woman at the apartment that night?
A. No, he went when the police car came around.
Q. Did he see a woman in the white car?
A. From that I can't tell you because I don't know if it was a guy or a girl.
Q. Okay. Did he see a woman run out of the apartment?
A. No, sir.
Q. Did he tell Officer Otterbacher -- ask him if he talked with a SLED officer.

A. I spoke with several officers, and I was in Columbia Police Department.

Q. Does he remember talking with an Officer Otterbacher?

A. He spoke with a bunch of them. He doesn't remember any of the names.

Q. Did he see anyone shoot at the two guys who got in the car?

A. No.

Q. Did he see anyone come out of the house other than the two guys who got in the car?

A. He only saw the two guys that killed the dog.

Q. How much time expired between the time he heard the last gunshots and that he saw the two guys run out?

A. Seconds. It was very fast.

Q. Ask him how long the incident happened from the first shots to the last, until he saw the men.

A. It was very fast.

Q. Could he tell us in minutes how long?

A. Between four and five, five minutes. Between the shots it was between four and five, between the first and the last shots.

Q. Ask him if one of the guys that was running up the road was bald-headed?

A. They weren't bald. They had something on their

head.

Q. Ask him if he did not tell the police that one of the males was bald-headed?

A. No, sir, that they had their heads covered.

Q. Ask him did he not tell the police that he saw a thin lady run out of the apartment area?

A. The one he saw --

MR. RIDDLE: Your Honor, I'm having a terrible time right at this minute.

MR. ELLISOR: Thank you. Your Honor, me too.

THE COURT: Ask him to talk in short phrases, and then when he finishes, wait until he finishes before you translate. Go ahead. I couldn't hear it either don't feel bad.

A. The skinny girl that I saw was at the police department.

Q. Oh, okay.

MR. ELLISOR: Thank you. I have no further questions.

THE COURT: Mr. Hendrix, any questions?

MR. HENDRIX: None.

MR. RIDDLE: No, sir. I ask that he be excused, Your Honor.

MR. HENDRIX: No objection.

THE COURT: Tell him he's free to go and he can go

home. Thank you.

All right. Mr. Ellisor?

MR. ELLISOR: We call Mr. Collins to the stand.

IVAN DOUGLAS COLLINS, after having been duly sworn, testified as follows:

THE CLERK: Have a seat. State your name and spell your last name.

THE WITNESS: My name is Ivan Douglas Collins, C-o-l-l-i-n-s.

DIRECT EXAMINATION

BY MR. ELLISOR:

Q. Mr. Collins, how old are you, sir?

A. I'm 22.

Q. In August 3rd of 2001 how old were you?

A. Almost 21 years old.

Q. 21?

A. Yes, sir.

Q. Mr. Collins, I have advised you not take the stand, have I not?

A. Yes, sir.

Q. You're doing this over my advice to you?

A. Yes, sir.

Q. And the Judge has --

THE COURT: Don't go into legal matters. Let's just get right on into the testimony, okay.

BY MR. ELLISOR:

Q. Now, you have an armed robbery conviction against you, do you not?

A. Yes, sir.

Q. And that armed robbery happened at what time, when?

A. In July of 1999.

Q. July 1999. Okay. Now, are you married?

A. No, sir.

Q. Do you have any children?

A. I had two, sir, but I only have one because one died.

Q. And how old is your child?

A. The one that's still alive is five years old.

Q. And how old was the deceased child?

A. He would be three now, but he passed when he was one.

Q. When did he die?

A. In 2000, in 2000 January.

Q. January, okay. And in 2001, what were you doing for a living?

A. I was selling drugs.

Q. And how long had you been doing that, son?

A. Ever since I was 12 years old.

Q. Where did you grow up at?

A. I growed up inside Latimer Manor Apartments.

Q. Where is that at?
A. It's located off North Main Street inside Columbia.
Q. Who did you live with?
A. My mother.
Q. Anyone else?
A. Yes, sir, I have two older brothers.
Q. How long did you live with your mother?
A. Ever since I was younger, ever since like five years old because I was in a foster care.
Q. Okay. Now, in the time of the robbery that you pled guilty to what were you doing?
A. I was selling drugs.
Q. Now, was your child alive then?
A. Yes, sir.
Q. What was the condition of your child?
A. He was in good condition, I mean --
Q. Now, you pled guilty to the armed robbery?
A. I did.
Q. You came up to this courtroom and there was not a trial?
A. No, sir.
Q. Now, you have said that you're innocent of these charges?
A. Yes, sir.
Q. Now, tell us what happened on August -- well, let

me rephrase. Wykiesha Williams, how long have you known Wykiesha Williams?

A. I met her -- I met her when I was like 11 years old, and so then we lost contact and I ran back into her in 2001.

Q. And when you ran back into her what was your relationship with her?

A. Just more like a friendship level.

Q. Okay. Now, on August 3rd did you see Wykiesha Williams?

A. Yes, sir.

Q. On August 3rd did you have any money on you? And when I say August 3rd, son, I mean August 3rd, 2001. On August 3rd, 2001, how much money did you have on you?

A. Inside my pocket I had probably like 600 dollars.

Q. Where did you get that from?

A. Because that night before I had won a bracelet playing cards. So I took the bracelet to the pawnshop and sold it for the money.

Q. Can you identify this right here? Look at it. Just hold it and look at it. I know you've seen it plenty of times, but what is it?

A. This is the pawnshop receipt.

Q. Now, whose name is that made out in?

A. Richard Smith.

Q. Now, who is Richard Smith?
A. I was going by that name.
Q. Now, did you pawn that item for that money; is that the pawn receipt?
A. Yes, sir.
Q. And what day did you do it?
A. On August 3rd.
Q. And how much money did you get from the pawnshop?
A. 450 dollars.
MR. ELLISOR: Your Honor, I'd like to have this marked as an exhibit.
THE COURT: Any objection?
MR. RIDDLE: Can I just look at it again real quick?
THE COURT: Mr. Hendrix, anything?
MR. HENDRIX: Your Honor, I haven't see it but I can't imagine why I would object. No objection, Your Honor.
MR. RIDDLE: No objection.
(WHEREUPON, Defendant Collins' Exhibit No. 1, a Pawnshop Receipt, was marked and admitted into evidence.)
BY MR. ELLISOR:
Q. Mr. Collins, on August 3rd, the day this thing happened, you had at least 450 dollars from a pawn item in your possession, cash?
A. Yes, sir.

Q. Okay. Now, did you know Mr. Penny?
A. No, sir.
Q. Did you know any of the people in Mr. Penny's apartment?
A. No, sir.
Q. Now, did you go to that apartment?
A. Yes, sir.
Q. Who did you go to that apartment with?
A. Wykiesha Williams and Terrence Smith.
Q. What time did you all go to that apartment?
A. I'm not sure, but I'm pretty sure it was like around 10:30.
Q. Who drove?
A. Wykiesha Williams.
Q. Did you know where you were even going?
A. No, sir.
Q. Where were you all headed that night; why were you with Wykiesha and Mr. Smith that night?
A. Because earlier that day Wykiesha had stopped by my house and asked me did I need to use a car. And I said, Yes. And I went and dropped her off at work.
Q. Did you have a car?
A. Yes, sir.
Q. Why were you using her car?
A. Because my car didn't have no insurance on it.

Q. Did you borrow her car often?

A. Yes, sir.

Q. Now, what did you do with the car that day?

A. After I dropped her off from work I went back to the house and picked Terrence up, and we went and got our hair cut and went to the mall and bought -- I know I bought a pair of jeans, and I think Terrence bought a pair of boots. So after that, I stopped by --

MR. RIDDLE: Can he speak just a shade louder, Your Honor?

THE COURT: Yes, sir. Ask him to speak up just a little bit.

BY MR. ELLISOR:

Q. Just speak up and continue, please.

A. Yes, sir. So then I stopped by the pawnshop after we left the mall. So then we stopped by some girl's house by the name of Peaches and Tiara. So we was there playing cards, playing cards and playing Monopoly and listening to music, and hanging out.

So then Wykiesha called me and told me to come pick her up from work, that I was late. So I told Terrence we had the leave, because he asked me to drop him off at home, and I told him I was already late. So we went on to pick Wykiesha up. And when we made it to her job I got in the passenger side and I let her drive her car.

Q. What time did you pick her up?

THE COURT: Talk just a little more slowly too, okay, Mr. Collins?

Q. I know you're nervous. What time did you pick her up?

A. It was -- it had to be after ten o'clock.

Q. Where did you pick her up at?

A. At her job.

Q. Where was that at?

A. At K. F. C.

Q. Where at, where is it located at?

A. In Irmo.

Q. Irmo?

A. Yes, sir.

Q. Okay. And when you picked her up who drove the car from there?

A. She did.

Q. Where were you all going?

A. I asked her to take us home, but she said she needed to make a quick stop before she take us home.

Q. And where did you all live at?

A. Inside Columbia off Cherry Street.

Q. And how long did it take you to get over there?

A. I'm not sure, probably like 10 minutes, 10, 15 minutes.

Q. And where did you all -- when you got there, where did she park the car at?

A. Directly in front of the house.

Q. Now, what happened after you got there? You drove up.

A. We drove up, and she said that she was only going to be a minute or two. I told her hurry up because me and Terrence was going out.

Q. Did she tell you why she went inside, why she wanted to go there?

A. No, sir. The only thing she said that she got to make a quick stop.

Q. Now, when she went inside did you see anybody there? I mean, did you see who let her in or anything?

A. Yes, sir, a guy.

Q. Do you remember who it was, if it was Mr. Penny or any of the other individuals?

A. Well, after I seen them, yes, sir, it was Mr. Penny.

Q. It was Mr. Penny?

A. Yes, sir.

Q. Was he as big then as he is now, physically?

A. Yes, sir.

Q. Now, when she went inside you all -- were you all sitting in the car?

A. Yes, sir.
Q. Did you all ever get out of the car?
A. Yes, sir.
Q. When?
A. After I had called her on the cell phone about ten minutes later.
Q. Whose cell phone did you use?
A. My own cell phone.
Q. Your own cell phone?
A. Yes, sir.
Q. You didn't use her cell phone?
A. No, sir.
Q. And what did you tell her?
A. I asked her what was taking her so long because she said she would only be a minute or two. And her response was that she'd be out in a minute.
Q. How long did you wait after the phone call?
A. About five more minutes, then I got out the car and leaned on the hood and smoked a cigarette.
Q. Now, could you see inside? Were the blinds open any way, could you see inside?
A. No, sir.
Q. So what did Mr. Smith do?
A. He had got out the car probably like a minute later after I did, and we were standing like right there on the

porch.

Q. Did you all see anybody down there?

A. No, sir.

Q. Neighbors or anything?

A. No, sir.

Q. Now, what happened next?

A. And so we got tired of waiting so Terrence knocked on door to see what was talking her so long. So then the door swung open and Wykiesha rushed out fast. So then within the same time an object came throwing at Terrence. Terrence like flinched, and like within the instant a guy grabbed him and slammed him to the ground.

Q. Where were you all standing; where was Terrence standing?

MR. RIDDLE: I'm sorry, I can't hear him. He trails off at the end and I just don't hear.

Q. Tell us again what happened.

A. Terrence had knocked on the door to see what was taking so long. So the door had swung open, so Wykiesha had rushed out. So within the same time, like, an object got thrown at Terrence, so he had flinched then.

Q. Do you remember what it was?

A. No, sir.

Q. Okay. And what happened then?

A. So a guy, like right after he throwed it at him, a

guy like grabbed him and slammed him to the ground. And when the guy slammed him to the ground, I looked up. And it was a big guy, and he went and pulled a gun and I had to pull my gun.

Q. You keep a gun on you?

A. Yes, sir.

Q. Why?

A. Because I sell drugs.

Q. Did you shoot your gun?

A. Yes, sir.

Q. Where did you shoot your gun at?

A. Inside the direction of Mr. Penny.

Q. So it went through the front of the door to the back wall?

A. Yes, sir.

Q. What happened next?

A. So Mr. Penny was shooting back at me, so I had ran.

Q. Now, do you remember seeing how many people were inside the room?

A. No, sir, I never made it inside the house.

Q. Now, after you all ran -- well, when Wykiesha ran through the door do you know what she did?

A. No, sir.

Q. Where did you next get up with Wykiesha at?

A. She was on up the street.

Q. And what was she doing?
A. She was driving away.
Q. So she was in the car?
A. Yes, sir.
Q. So she had left you all there?
A. Yes, sir.
Q. Did either one of you, you or Mr. Smith get hit with any bullets?
A. No, sir.
Q. Now, did you recognize anybody in there at all?
A. No, sir.
Q. Now, after you got back with Wykiesha where did you go?
A. She took us home on Cherry Street.
Q. So you went back to your house that night?
A. Yes, sir.
Q. When is the next time you talked to Wykiesha?
A. The next afternoon.
Q. Where was she at?
A. She had came back by my apartment.
Q. Did she ever call you?
A. No, sir.
Q. Did you ever find -- learn that she had been threatened by somebody?
A. Yes, sir.

Q. So she shared that with you?
A. Yes, sir.
Q. Did she tell you she knew who it was?
A. No, sir.
Q. After talking with her that day, did you talk with her anymore?
A. Yes, sir.
Q. When?
A. When she had came by the apartment the next day and she had told me about a threat, because I took her out to lunch.
Q. But after that time had you seen her since then? I mean, since up here?
A. I don't understand.
Q. The day after the shooting you all go to lunch?
A. Yes, sir.
Q. After that lunch have you talked with her at any time?
A. Yes, sir, because we had went to her mother's house afterwards to go play cards.
Q. When was that?
A. Right after lunch.
Q. Okay. But on that day, have you seen her since that day?
A. No, sir.

Q. Now, what have you done since then?
A. I went out of town.
Q. Where did you go?
A. Augusta, Georgia.
Q. When did you go to Augusta, Georgia?
A. Like -- probably like two days afterwards.
Q. Why did you go?
A. Because I was a fugitive on my first armed robbery.
THE COURT: She couldn't understand. Repeat the answer.
Q. Repeat your answer, please.
A. Because I was a fugitive on an armed robbery charge.
Q. And that's the armed robbery charge that you pled to?
A. Yes, sir.
Q. Now, how long did you stay away?
A. All the way up until I got arrested.
Q. Now, did you ever meet with Wykiesha and plan to rob Charles Penny?
A. No, sir.
Q. Did Wykiesha ever tell you what Charles Penny did for a living?
A. No, sir.
Q. Did you even know Charles Penny?

A. No, sir.
Q. Did you ever discuss Charles Penny with Wykiesha?
A. No, sir.
Q. On the night of the shooting, how much money did you still have on you?
A. Well, like 500, 600 dollars.
Q. How much would a cigar box of marijuana packed tight as it could be, as big as it is, how much would it be worth for you to sell to somebody, that you could get revenue from it if you sold it on the street, street value?
A. I'm not sure. I'd have to see what kind of box are you talking about?
Q. A normal cigar box about the size of that transcriber there?
A. Probably like 250 dollars.
Q. 250 dollars?
A. Yes, sir.
Q. And that would be what you would sell it for after breaking it up?
A. Yes, sir.
Q. Okay. Now, the dog, who shot the dog?
A. I did, sir.
Q. Where was the dog at when you shot the dog?
A. Like on the side of the house close to the road.
Q. Was the dog chained?

A. I'm not sure.
Q. Where were you at when you shot him?
A. I was running past him and he was coming at me in my direction.
Q. And where was the car at?
A. Wykiesha's car?
Q. Yes.
A. It was going up that side road.
Q. So she was on the other side of the dog from you?
A. Yes, sir.
Q. Okay. Where was Mr. Smith at?
A. I don't know, sir, I was running.
Q. But you did not pull your gun until you saw Mr. Penny's gun?
A. Yes, sir.
Q. Were you outside or inside?
A. I was outside on the porch.
Q. Was he outside or inside?
A. He was inside his house.
Q. Inside?
A. Yes, sir.
Q. Okay. Did he ever come outside?
A. No, sir, not -- I cannot -- not to my knowledge.
Q. Did you see Mr. Hayward, the gentleman that's been injured with this, that lived but was injured?

A. Really, I didn't see anybody. I can't picture their face or nothing like that but I saw a guy tussling with Terrence, but anyone else that was in the house I wouldn't be able to see them.

Q. How many guns did you have?

A. One.

Q. What was it?

A. A 380.

Q. Did Terrence have a gun?

A. I didn't see him with one.

Q. Did you shoot Mr. Hayward?

A. Who is Mr. Hayward?

Q. Or excuse me, the gentleman that was disabled?

A. No, sir.

Q. Did you shoot Mr. Muller?

A. Who is Mr. Muller?

Q. That's the deceased man.

A. No, sir, I was just shooting inside. I was shooting at Mr. Penny's direction.

Q. Now, once -- he pulled his gun; did he shoot?

A. Yes, sir.

Q. When you shot, were they at the same period of time? Was there any lapse in your shooting?

A. No, sir.

Q. Were there any shots later fired after you and

Mr. Penny shot?

A. Yes, sir.

Q. When, how much later?

A. It had to be a few seconds later when I was running, I was running away from the apartment.

MR. ELLISOR: I have no further questions, Your Honor.

THE COURT: Mr. Hendrix, any questions?

MR. HENDRIX: I would like to follow the solicitor, if that's possible.

THE COURT: That's not the way I normally do it. I normally let the defendants go ahead and do it, then the State, then back to the defense.

MR. HENDRIX: I just have a few questions.

CROSS-EXAMINATION

BY MR. HENDRIX:

Q. To your knowledge, did Terrence Smith have a gun that night?

A. No, sir, I didn't see him with one.

Q. And I think you already covered this, but is it your testimony to the jury that you didn't have any agreement with Terrence about going there to rob anyplace or anything like that?

A. No, sir.

Q. You hadn't talked to him about anything like that?

A. No, sir.

Q. And I think your testimony was that he had even asked that you drop him off on your way to go get Wykiesha?

A. Yes, sir.

Q. And if you had done that he wouldn't be sitting here today?

A. Yes, sir.

Q. And to your knowledge, did you ever hear Terrence and Wykiesha talking about anything to do with a robbery?

A. No, sir.

Q. To your knowledge, does Terrence even have a gun or own any gun, I mean back then?

A. Back then, what are you referring to?

Q. I mean, obviously he wouldn't now, he's in the jail; I'm talking about back in 2001, August of 2001?

A. No, sir, I didn't see him with a gun.

MR. HENDRIX: Your Honor, I don't believe I have anything else at this time.

THE COURT: All right. Cross.

CROSS-EXAMINATION

BY MR. RIDDLE:

Q. Let's get a couple things straight, Mr. Collins. Did you testify just a minute ago that you borrowed Wykiesha's car in 2001 because you didn't have any insurance; is that right?

A. Yes, sir.

Q. So you got no compunction about sticking a gun in somebody's face and robbing them at gunpoint but you wouldn't drive an uninsured vehicle; is that what you are telling this jury?

A. I don't understand your question, sir.

Q. Well, okay, let me rephrase it then. You told this jury that you borrowed a car, correct?

A. Yes, sir.

Q. Because your car had no insurance, correct?

A. Yes, sir.

Q. Because I presume you think it would be wrong to drive an uninsured vehicle, correct?

A. Yes, sir.

Q. All right. But you don't have any compunction or any qualms about sticking a gun in somebody's face and robbing them, correct? Because you pled guilty to that; is that correct?

A. Yes, sir.

Q. All right. Now, I think you also testified that you knew Wykiesha since you were 11, right?

A. Yes, sir.

Q. Okay. And that you kind of grew up with her in the projects?

A. No, sir. Her cousin had lived there in the

projects and she used to go and visit her cousins on weekends.

Q. When did you lose contact with Wykiesha?

A. I'm not sure.

Q. Well, how old were you?

A. I can't remember a specific age.

Q. Well, give me a ball park; were you in middle school?

A. I can't remember, sir.

Q. Was it before or -- well, you just ran into her in 2001; is that what you said?

A. Yes, sir.

Q. So let's say in 2000, did you hang around with her?

A. No, sir.

Q. '99?

A. No, sir.

Q. '98?

A. Yes, sir.

Q. Okay. So you were with her in '98?

A. I wouldn't say I was with her but --

Q. Were you close to her?

A. Like could you be a little more specific?

Q. Were you close to Wykiesha Williams in 1998; were you all good friends?

A. No, sir.

Q. Were you good friends with her family?
A. I would say that, yes, sir.
Q. But you weren't friends with Wykiesha?
A. I was friends with her but not like good friends.
Q. But you told this jury or what it sounded like to me, and you can correct me if I'm wrong, is that you knew her back when you were 11 then kind of lost contact with her until you ran into her in 2001; is that basically what you said?
A. Yes, sir.
Q. Let me show you something. I'm going to ask if you recognize what this is.
A. Yes, sir, a picture.
Q. What is that?
A. A picture of --
Q. Of who?
A. Of me.
Q. You?
A. Yes, sir, and another woman.
Q. And where was that picture taken?
A. At Wykiesha's mother's wedding.
Q. Wykiesha's mother's wedding.

MR. RIDDLE: I'd offer this into evidence, Your Honor.

THE COURT: Any objection?

MR. HENDRIX: None from us.

MR. ELLISOR: None from us, Your Honor.

THE COURT: All right. You can go ahead and mark it.

(WHEREUPON, State's Exhibit No. 51, a Photograph, was marked and admitted into evidence.)

BY MR. RIDDLE:

Q. Wykiesha's mother's wedding; when did that wedding take place?

A. I'm not sure.

Q. Does June 6th, 1998 sound about right to you, Mr. Collins?

A. I'm not sure. It probably was within that time.

Q. So you're not close to Wykiesha or anything at all but you were in her momma's wedding in 1999, right?

A. Yes, sir.

Q. Okay. Now, you talked to this jury about having a dead child, correct?

A. Yes, sir.

Q. Truth be known, you're wanting sympathy because your child died, correct?

A. No, sir, that's not why I'm up here.

Q. Because you didn't even go to that child's funeral, did you?

A. I was in jail.

Q. You were on the run.
A. I was in jail.
Q. For what?
A. For them charges I had gotten in Augusta, Georgia.
Q. Charge that you got in Augusta, Georgia?
A. Yes, sir.
Q. Now, let's get down to this night, okay. You were out on the front porch I think you testified; is that correct?
A. No, sir.
Q. Where were you?
A. I was leaning on the car.
Q. Leaning on the car?
A. Yes, sir.
Q. Step down here if you would, sir.
A. (The witness complied).
Q. Where was that car parked?
THE COURT: Mr. Collins, if you would stand on the other side and face this direction, okay. And be sure to stand a little bit back so the jurors can see, okay.
Q. Do you recognize that apartment?
A. I don't know what I'm looking at.
Q. All right. Let me show you this diagram. Does that help you out any? This is this apartment where the shooting took place, okay?

A. Yes, sir.
Q. You recognize that?
A. (There was no response).
Q. Parking lot here?
A. Oh, yes, sir.
Q. Where was the car?
A. Right here in front of the house (indicated).
Q. Huh?
A. Like right here in front of the porch (indicated).
Q. Right there in front of house?
A. Yes, sir.
Q. And parked directly in front of it?
A. Yes, sir.
Q. So if you're leaning back on the hood of that car you're looking straight in that door?
A. Yes, sir.
Q. Okay. How tall are you?
A. Five-six, five-seven.
Q. And when you're standing there Terrence Smith goes up on the porch, correct?
A. Yes, sir.
Q. And Terrence Smith knocks on the door?
A. Yes, sir.
Q. And Terrence Smith doesn't have a gun?
A. No, sir.

Q. And the door opens?
A. Yes, sir.
Q. And Wykiesha comes out?
A. Yes, sir.
Q. And you're still leaning on the car?
A. Yes, sir.
Q. And you've got a gun?
A. Yes, sir, on me.
Q. A 380?
A. Yes, sir.
Q. And that's the only gun you had, correct?
A. Yes, sir.
Q. You're sitting there leaning up on the car?
A. Yes, sir.
Q. Wykiesha comes out, somebody throws something at Terrence; is that correct?
A. Yes, sir.
Q. Where is he standing?
A. He was standing on the porch.
Q. Okay. And where are you standing?
A. After Wykiesha came out I walked up on the steps.
Q. So you go up on the porch then?
A. Yes, sir.
Q. Well, how fast does this happen? You go up on the porch, I thought they flung the door open, Wykiesha comes

running out, then they throw something at Terrence?

A. Yes, sir.

Q. And you immediately jump up on the steps?

A. Yes, sir.

Q. And what happens at that point?

A. At that point, after the guy threw something at Terrence he flinched, and the guy grabbed him and slammed him to the ground.

Q. Where?

A. It had to be like the center of the door and like on the porch and the door.

Q. Inside or outside?

A. Like the porch is like half and half, half in the house and half on the porch.

Q. All right. And you're standing on this porch, correct?

A. Yes, sir.

Q. And you pull out your gun?

A. Yes, sir.

Q. Now, who is the man that threw Terrence Smith to the ground?

A. I didn't see his face.

Q. You didn't see his face?

A. No, sir.

Q. Well, was it Mr. Penny?

A. No, sir.
Q. It was not Mr. Penny?
A. No, sir.
Q. Where was Mr. Penny?
A. He was standing back away.
Q. How far away?
A. Probably if you take a few steps back.
Q. A few step back?
A. Yes, sir.
Q. And what do you see going on then?
A. I look up, I seen Mr. Penny reaching for a gun.
Q. Okay. Then what happens?
A. I pull my gun.
Q. And what do you do with it?
A. I fired in his direction.
Q. And how many times do you fire?
A. I don't remember.
Q. You're standing out on the porch or are you on the ground again?
A. I'm standing on the porch.
Q. You're standing on the porch?
A. Yes, sir.
Q. And you got a 380, correct?
A. Yes, sir.
Q. Now, when is it that you go inside, Mr. Collins?

A. I never went inside the apartments.
Q. You never went inside?
A. No, sir.
Q. Now, Mr. Collins, how many times do you shoot your gun?
A. I don't remember.
Q. You don't remember. Was it once?
A. No, sir.
Q. Was it twice?
A. I don't remember.
Q. Was it more than twice?
A. I don't remember if it's more than twice, sir.
Q. It was or wasn't?
A. I don't remember if it was more than twice.
Q. But the whole time you're standing on the front porch?
A. Yes, sir.
Q. And you are -- well, how are you holding that gun? Show us.
A. (Indicated).
Q. Like that?
A. Yes, sir.
Q. Okay. And you're five-feet-six; is that what you said?
A. Yes, sir.

Q. Is that porch at the same level at the house or is it lower?

A. I think it's like a few steps up. I don't really remember.

Q. Is it the same level as inside the room?

A. Yes, sir.

Q. It is? All right. And from where you're holding that gun, you're five feet six inches tall; correct?

A. The last time I checked, yes, sir.

Q. And you are telling this jury that at five feet six inches tall standing out on the porch you're going to hit -- you're going to hit the top of that VCR with a bullet holding that gun just like this, right? Is that what you're telling this jury?

A. I don't know if I hit the VCR, sir.

Q. Well, if a bullet came into that house -- and you've been here the whole week, you know what the testimony has been, don't you?

A. I was listening, yes, sir.

Q. And if a bullet came into this house and came over and hit this closet and struck the top of this VCR, you're holding the gun like this, you're tall enough to shoot up that high, right, from outside just holding it like this? Let me ask you another question, okay?

A. Yes, sir.

Q. There was two 380 auto-caliber cartridge casings found, correct?

A. I'm not sure.

Q. You won't dispute me if I say that's what Mr. DeFreese testified to yesterday, would you?

A. Sir?

Q. Do you dispute that, if that's what Agent DeFreese testified to yesterday?

A. No, sir.

Q. You wouldn't dispute that on Agent DeFreese's report he said one of them, R. P. 380 auto, number 29, item 29, correct?

A. Yes, sir.

Q. The other one R. P. 380 auto, item 12, correct?

A. Yes.

Q. You would agree with me that item 12 is this exhibit here, State's Exhibit Number 47, correct?

A. Yes, sir.

Q. Tell this jury how that auto casing got into the raincoat on the couch inside that apartment if you're standing out on the front porch, Mr. Collins.

A. The other guy. I'm not sure. He probably had a 380.

Q. Well, the only other rounds out there were nine millimeter rounds. Tell me this. Item 29 that you just

talked about, do you want to see the report again?

A. Yes, sir.

Q. Okay. Item 29, R. P. 380 auto, right?

A. Yes, sir.

Q. Item 29, State's Exhibit 42, do you agree with that?

A. Yes, sir.

Q. Tell this jury how item 29 became a cartridge casing in blue jeans on the couch?

A. I have no idea, sir.

Q. You don't know?

A. (There was no response).

Q. State's Exhibit Number 11, have you seen that before?

A. No, sir.

Q. Has your attorney ever showed you the pictures from this incident?

A. No, sir.

Q. Okay. State's Exhibit Number 11, would you agree with me that there's no clothes on the couch, the long couch?

A. No clothes?

Q. No clothes on that couch? You agree -- there's clothes over here though, aren't there, a raincoat and jeans?

A. I can't tell what any of this is.

THE COURT: Mr. Collins, speak up just a little bit

if you could, okay.

Q. The blue jeans and the raincoat on that love seat are all the way across the room from the door; isn't that correct, Mr. Collins?

A. I see it on the picture, yes, sir.

Q. Right. So how do the 380 shell casings end up on this couch when you're standing outside? Tell this jury how that happens, Mr. Collins.

A. They didn't come from my gun if it was.

Q. What?

A. It did not came from my gun if it was a 380 shell from there.

Q. You're standing out there, right?

A. Yes, sir.

Q. And you're not doing a thing, right?

A. Standing out where?

Q. Out -- well, leaning up against the car right outside here, right?

A. Yes, sir.

Q. And you're not doing a thing, and all of a sudden somebody jumps on your buddy, Terrence, because he's a friend, right?

A. Yes, sir, I know him.

Q. And then they pull a gun on you?

A. Yes, sir.

Q. Right?
A. Yes, sir.
Q. And you run, right?
A. Yes, sir.
Q. Well, first you shoot, then you run?
A. Yes, sir.
Q. And you go around the side of that apartment, right? Around the side of the apartment?
A. No, sir. I saw Wykiesha driving down the street, and I saw her going that way and I came that way.
Q. Right.
A. Yes, sir.
Q. Around the side of the apartment?
A. Yes, sir.
Q. Then you shoot and kill his dog?
A. Well, I shot a dog, yes, sir.
Q. Okay. Then you hop in the car with Wykiesha, right?
A. Yes, sir.
Q. You know where these apartments are?
A. No, sir.
Q. You don't remember?
A. No, sir, I never been there before.
Q. I know that but how many times do you get shot at?
A. I haven't been shot at before.

Q. All right. If this is the apartment here -- you know where Meeting Street is, don't you?

A. No, sir, I don't know none of the names of the streets.

Q. Number 1, US-1, it turns into Gervais Street; do you know where that is?

A. I'm not from West Columbia.

Q. You're from Columbia, right?

A. Yes, sir.

Q. How long you lived in Columbia?

A. All my life, sir.

Q. You've never come across the bridge into Lexington County?

A. No, sir.

Q. Okay. Mr. Collins, do you know how to dial 911 on a cell phone?

A. Yes, sir.

Q. And do you know when you dial 911 on a cell phone you get the police?

A. Yes, sir.

Q. Tell this jury why you don't call 911 on that cell phone and say somebody has jumped on my friend, pulled a gun on me and I'm running for my life; tell them that.

A. Because I didn't know that anyone had gotten hit with the bullets I shot.

Q. You didn't know what?
A. I didn't know that somebody had got shot.
Q. You didn't tell Wykiesha Williams once you hopped back in that car that you think you shot the one in the corner?
A. No, sir.
Q. You didn't tell her that you thought you shot the one that was tussling with Terrence?
A. No, sir.
Q. Where is that gun now?
A. I threw it over the Broad River.
Q. Why did you do that if you didn't do anything wrong?
A. Because I was going out of town to Augusta, Georgia.
Q. Well, why didn't you pawn it, you pawned some jewelry? If you didn't do anything wrong why did you throw a perfectly good gun in the river? Tell them. Don't tell me, tell them.
A. Because I was going out of town. I was going out of town to Augusta, Georgia and I didn't want to drive with a gun.
Q. You just throw that perfectly good gun in the river?
A. Yes, sir.

Q. You got nothing to hide?
A. No, sir.
Q. You were going out of town anyway?
A. Yes, sir.
Q. When do you figure out that you need to throw away that gun?
A. I don't understand your question.
Q. Well, let me ask you this. When do you throw it away?
A. About two days later.
Q. Two days later?
A. Yes, sir.
Q. When is it that you decide to throw it away?
A. When I was going to Augusta, Georgia.
Q. When you were going to Augusta, Georgia?
A. Yes, sir.
Q. And when did you decide to do that?
A. Well, I was going to Augusta, Georgia on and off because I was still a fugitive in South Columbia.
Q. You were running from the law?
A. On the armed robbery I had got convicted for, yes, sir.
Q. You're going back to Georgia?
A. Yes, sir.
Q. Somebody has taken a shot at you?

A. You talking about the night of the incident?
Q. Uh-huh.
A. Yes, sir.
Q. You're a drug dealer and you need protection?
A. Yes, sir.
Q. You've done nothing wrong?
A. I don't understand your question.
Q. You don't think you did anything wrong the night of the incident?
A. No, sir.
Q. And you throw a perfectly good gun in the river?
A. Yes, sir.
Q. I guess you had separate weapons down in Georgia? You don't need your South Carolina guns, your Columbia guns in Georgia?
A. No, sir.
Q. You got other guns down there?
A. No, sir, I don't.
Q. Well, what are you going to use for protection once you get back to Augusta?
A. Because I had money. I wasn't selling drugs in Augusta.
Q. You wasn't selling drugs in Augusta?
A. No, sir.
Q. Just when you come up here?

A. Yes, sir.
Q. Where are you getting your drugs from?
A. From different people.
Q. What kind of drugs are they?
A. Crack cocaine.
Q. You're getting it in Augusta and you're bringing it here?
A. No, sir.
Q. You're getting it here and selling it here?
A. Yes, sir.
Q. You getting any here and selling it down there?
A. No, sir.
Q. What do you do when you're in Augusta?
A. I just stay at motel rooms.
Q. How do you pay for that?
A. With money.
Q. Yeah, I understand that, Mr. Collins. Where's the money come from?
A. From drugs.
Q. So basically what you're saying is you go vacation down in Georgia then you come back to Columbia and peddle a little death, right, then you use that money to go hang out in the motels and the bars in Augusta? Is that what you are telling these jurors?
A. What was your question, I peddle what?

Q. Death, crack cocaine.
A. Yes, sir.
Q. Okay. So you are telling this jury that you hang out in the Augusta and don't work, right?
A. No, sir, I don't work.
Q. You spend your money down there?
A. Yes, sir.
Q. And then when you need some more cash you come back to Columbia, get some drugs, sell it and then head on back out to Georgia; is that right?
A. Yes, sir.
Q. You only carry a gun when you're here because you don't need a gun for protection down in Georgia, right?
A. Right.
Q. Is that correct?
A. Yes, sir.
Q. And instead of saving the gun for the next time you come up here to peddle some drugs you just chunk it in the river?
A. No, sir, my plans was I was going to leave that life alone.
Q. Pray tell, Mr. Collins, what convinced you to do that?
A. After the bullets got shot at me.
Q. When you got arrested in Georgia on these charges

you tell them your name was Richard Smith?

A. Yes, sir.

Q. That would be the same name that Wykiesha Williams first told the police about you?

A. Yes, sir.

Q. The casual friend you ran into in 2001?

A. Yes, sir.

Q. The friend whose car you borrowed because you didn't have any insurance?

A. Yes, sir.

MR. RIDDLE: I don't have anything further.

THE COURT: Any redirect?

MR. ELLISOR: None, Your Honor.

THE COURT: Anything else, Mr. Hendrix?

MR. HENDRIX: No, sir, Your Honor.

THE COURT: You can step down.

MR. ELLISOR: Your Honor, I have no other witnesses. That concludes our case.

THE COURT: Ladies and gentlemen, as you've heard, the Defendant Collins has now rested his case. Again, this is one of those junctures that I have to take up certain matters with the lawyers.

We'll ask you to step to the jury room. If you need any refreshments or anything let the bailiffs know and they'll take care of you. And also, the clerk is going to

take just a moment to discuss lunch with you, too. Remember, the only thing we don't talk about is the case.

(WHEREUPON, the jury leaves the courtroom at approximately 11:25 a.m.)

THE COURT: Counsel, the jury is secured. Any motions?

MR. ELLISOR: I have none, Your Honor.

MR. HENDRIX: Your Honor, I do have a motion on behalf of Terrence Smith, even though this maybe a little unusual for me to do it at the end of the co-defendant's case. We would make a motion on behalf of Mr. Smith for a directed verdict of not guilty on the conspiracy charge because both Wykiesha Williams and Ivan Collins have testified under oath that there was no conspiracy with Terrence Smith to do anything.

Under the facts and circumstances, Your Honor, I would have to submit that there is no credible evidence in the record to support the charge of conspiracy, and I would certainly point out to the Court that there's plenty more stuff in the record. It's not like this ends the case for Mr. Smith, but I do think that Mr. Smith is entitled to a directed verdict on the issue of conspiracy.

THE COURT: All right. Solicitor, what's your position on that?

MR. RIDDLE: Your Honor, on -- and I don't know

what exhibit number it is, but on the 8-6 statement which Ms. Williams gave to Agent Otterbacher and Mark Jones with the West Columbia Police Department there is a sentence in there that says we all agreed -- this is talking about when they are in the car, we all agreed to go to West Columbia and try to rob Charles, and there ain't but three people in that car, and we all agree.

The conversation where she said -- or the part of her testimony when she said I don't remember having a conversation with Terrence Smith dealt with having a conversation with him beforehand. It was not dealing with the time that they spent in the car from the K. F. C. to the scene on the night of the incident. And clearly in this statement it says we all agreed to go to West Columbia and rob Charles. The issue is the existence of evidence not the weight.

MR. HENDRIX: Your Honor, two things. First of all, if Your Honor will recall on behalf of Defendant Terrence Smith I objected to that statement coming in and still submit, Your Honor, with all due respect, it was error to let that statement in when the witness was here.

And secondly, the witness clearly recanted, if you will, that word was not used. But she made it clear that she had not only not had conversation but had no agreement with Terrence Smith. That was her sworn testimony from the

witness stand. And we did object to the introduction in any form of those statements, and the State is trying to bootstrap its case now with that, which is highly improper. We still maintain that Mr. Smith is entitle to a directed verdict on the conspiracy charge.

THE COURT: Anything else, Solicitor, and particularly what about in light of Mr. Collins' testimony, also?

MR. RIDDLE: No, sir, I don't think that that changes it. The issue is viewed in the light most favorable to the State; is there any evidence which creates a jury issue. The evidence was in at the close of the State's case. And Mr. Collins' testimony doesn't change whether or not there existed any evidence then.

If there was no evidence at the close of the State's case then the directed verdict should have been granted. There was evidence at the end of the State's case, and Mr. Collins' testimony doesn't negate that evidence. It may be different but it doesn't erase it.

MR. HENDRIX: Your Honor, I submit that the testimony of their own witness whose credibility they have to vouch for --

MR. RIDDLE: No, sir, we don't. They took away the vouching rule. We don't have to vouch for anybody anymore.

MR. HENDRIX: And we submit that Mr. Smith is

entitled to a directed verdict on the issue of that. And, Your Honor, these are two cases. I don't believe that the Defendant Collins objected to the statements coming in. However, on behalf of Mr. Smith I did.

THE COURT: You want to add anything to this, Mr. Ellisor?

MR. ELLISOR: No, sir, Your Honor.

THE COURT: Counsel, I'm going to deny the motion. I grant it's light but there's enough in the record to get to the jury.

MR. HENDRIX: Thank you, Your Honor.

THE COURT: Any other motions, Mr. Hendrix?

MR. HENDRIX: Nothing at this time, Your Honor.

MR. ELLISOR: Nothing, Your Honor.

THE COURT: Mr. Smith, now what we'll do is we'll take a break here and just for a few minutes. Mr. Smith, we'll start your case in just a minute. As I indicated earlier, you have the right to -- listen to me now, okay. You have the right to change your mind if you want to.

MR. HENDRIX: Your Honor, my client has informed me that when the jury gets back we will rest our case.

THE COURT: Okay. So he will not testify?

MR. HENDRIX: He will not testify.

THE COURT: Let's get into that then. Give me one second.

[PAUSE.]

THE COURT: Back on the record. Mr. Smith, let me ask you to stand again, okay. And you're still under oath, okay?

DEFENDANT SMITH: Yes, sir.

THE COURT: Mr. Smith, I understand that you've now decided that you do not wish to testify; is that right?

DEFENDANT SMITH: Correct.

THE COURT: And I gather you will not call a case at all; is that correct?

DEFENDANT SMITH: Yes, sir.

THE COURT: Now, do you understand that since Mr. Collins has presented evidence that you still would not get a last -- your lawyer would not get a last argument; do you understand that?

DEFENDANT SMITH: Yes, sir.

MR. HENDRIX: Your Honor, I hate to interrupt, but in that regard, even at this late date, we would renew our motion to sever. That should allow him to have the last argument.

THE COURT: No, I think the law is that he can't.

MR. HENDRIX: As long as you don't sever I'd have to agree I think the law is that way, but if you see fit to sever I think he gets the last argument, because in this case he hasn't put up any evidence.

THE COURT: I understand. I think the cases indicate that that in itself is not a reason to grant a motion to sever. If you want to add anything to it.

MR. HENDRIX: Your Honor, if I may add, we submit there's been a lot more than just that why Your Honor should have granted the severance. We're not relying just on that.

THE COURT: I understand.

MR. HENDRIX: But everything else that we've argued, and I think the record in this case is replete with reasons why we believe -- and with all due respect to Your Honor, don't mean this in any way --

THE COURT: Sure, I understand.

MR. HENDRIX: But why we believe a severance should have been granted from the get go, and throughout the trial several other things have occurred. But at this point in time that's just one more stone on the pile, so to speak, that we believe now should clearly indicate that this young man should be entitled to a severance and have his case considered completely separately from the co-defendant.

THE COURT: Again, I note that and I would have to deny the motion.

MR. HENDRIX: Thank you, Your Honor.

THE COURT: But again, Mr. Smith, you have decided you do not wish to testify; is that correct?

DEFENDANT SMITH: Yes, sir.

THE COURT: And that is your decision?

DEFENDANT SMITH: Yes, sir.

THE COURT: Do you need any more time to talk with your lawyer?

DEFENDANT SMITH: No, sir.

THE COURT: Okay. All right. You can have a seat.

I find then that Mr. Smith again has made his decision knowingly and intelligently and freely and voluntarily, and I find that it is his decision.

Anything else, Counsel, in terms of procedure? I was hoping to have a copy of the charge to you in a lot of time but it didn't work out that way.

MR. HENDRIX: Your Honor, on behalf of Mr. Smith we clearly want a mere presence charge.

THE COURT: Yes, sir.

MR. HENDRIX: And I don't have any to hand up particularly right now because I know Your Honor's procedure that you are normally kind enough to hand us a copy.

THE COURT: And I'm going to try to do that somewhere during the lunch break. As you know, I always charge mere presence along with the hand of one is the hand of all.

MR. HENDRIX: Okay. Thank you, Your Honor.

MR. ELLISOR: We're going to take a break now then come back and do the closing arguments?

THE COURT: Right. I think that's what we're going to do. We're going to do that. Take the break, we'll have a charge conference here and then we'll decide -- we probably need to give the jury a little extra time to get back then.

MR. HENDRIX: And maybe us, too.

THE COURT: Well, mainly us extra time. They don't need it so much as we will.

Mr. Riddle, you got something else?

MR. RIDDLE: We're going to do the jury, then do the charge conference right now?

THE COURT: Let's go ahead and get the cases rested. Are you going to have any reply testimony or do you want to wait until after lunch to decide that?

MR. HENDRIX: Your Honor, can my client run to the rest room quickly?

THE COURT: Sure can. Let's just go ahead and take a break at this point. How about that? A short break before we bring the jury in.

MR. RIDDLE: I'm going to rest, Your Honor.

THE COURT: Okay. Well, hang on one second then before everybody gets going. You are going to rest?

MR. RIDDLE: Yeah.

THE COURT: Okay.

MR. HENDRIX: Just a bathroom break and we're ready to do it.

[PAUSE.]

THE COURT: Is the State ready?

MR. RIDDLE: Yes, sir.

THE COURT: The defense ready?

MR. HENDRIX: Yes, Your Honor.

THE COURT: All right. Let's bring the jury in.

(WHEREUPON, the jury enters the courtroom at approximately 11:37 a.m.)

THE COURT: All parties and attorneys are back in the courtroom and all jurors have returned.

Mr. Hendrix?

MR. HENDRIX: Your Honor, on behalf of the Defendant Smith we rest.

THE COURT: And will the State call any reply testimony?

MR. RIDDLE: No, sir.

THE COURT: Ladies and gentlemen, as you've now heard all the evidence in the case is in. And let me note, I will be telling you this again later, Mr. Smith has not testified. Remember what I told you at the beginning, the State has the burden of proof. They must prove all elements of each charge.

No defendant is ever required to prove his innocence, and they are never required to testify. So you may not consider that in any way. It does not create any

presumption against him. You cannot even talk about it in the jury room. You go on the evidence that is actually in the record before you.

Now, at this time we're going to take a break. I have to do at this time a short conference with the lawyers in terms of the closings which are going to happen in just a little while. So we'll need a little extra time to do that but I don't want you to have to sit there while we're doing it. I understand you have plans.

So we're going to let you go at this time, ask you to be back at 1:30. 1:30, and we should hopefully be prepared to get started. We have a lot of things to put together here. But again, very, very important that you not talk about the case and certainly don't let anybody talk with you about the case.

We're going to let you go as a jury. We're going to have a couple of bailiffs to go with you so you'll be together. What I'm going to do -- but anyway, I think you understand. Ladies and gentlemen, we're going to let you go in the jury room just a moment, and in just a moment the bailiffs are going to come get you and take you to lunch. Remember, don't talk about the case.

(WHEREUPON, the jury leaves the courtroom at approximately 11:40 a.m.)

MR. RIDDLE: Your Honor, so you'll know, I think

all the lawyers would waive the oath for the bailiffs.

THE COURT: I understand, but I've just about got it. Thanks anyway.

All right, let me ask the bailiffs to -- which bailiffs are going to take the jury to lunch? Come around, please. Let me ask both of you to state your name for the record, please.

BAILIFF BOYDE: Jean Boyde.

BAILIFF CORLEY: Homer Corley.

THE COURT: Raise your right hand, please.

(WHEREUPON, the bailiffs were sworn.)

THE COURT: All right, they will be in your custody at this time. Now, it means you can't let them go once they are through eating. But if you want to just stay at the restaurant in one place and just kind of take it easy, let them do that if they'd like to. But once they get back, obviously, if some of them want to go for a walk one of you can go with them or something. So I'll let you all go ahead and take them now.

(WHEREUPON, the bailiffs were excused to take the jurors to lunch.)

THE COURT: Counsel, let's do this. I think we all need a short break now. So let's take just about five minutes then we'll come back and do our charge conference.

(WHEREUPON, a brief recess was taken.)

THE COURT: Counsel, first of all, order of closing, as I gather, will be State can open on the law then Mr. Collins' closing, Mr. Smith's closing, then the State closes. Any exception to that?

MR. ELLISOR: None, Your Honor.

MR. HENDRIX: No, sir, Your Honor.

MR. RIDDLE: None.

THE COURT: And also in final charge basically would be a lot of the standard language. Let's just run down through it and if I leave something out you understand you're always, always open to move to amend it at any point. So you're never bound by this. Standard opening information, presumption of innocence, the right of the defendant not to testify, and define reasonable doubt, then the role of the jury as to the facts of the case, the charge on expert witnesses, on circumstantial evidence.

I, of course, will charge them on identification evidence. Then I will get into the particular charges, and I will, of course, preface that with an instruction that each defendant is to be determined separately and the State must prove each charge against each defendant separately.

There's a standard language on that, as you know, then I will discuss each of the individual charges. Then, of course, hand of one is the hand of all, along with mere presence, and the final portion as to the jury's role in the

deliberative process, and the verdict procedure.

MR. HENDRIX: Your Honor, I'm not exactly sure what your wording would be but I'm certain you're going to say something to the affect that they do have to consider the cases separately of the two.

THE COURT: Yes, sir. Yes, sir. That's under the instruction regarding separate defendants. I will do that. I always do that very clearly. And that's why, in fact, I will have -- each defendant's sentencing sheet will be separately also so that they'll take each one separate. And I usually -- and I'll probably take each charge separately also, which means the jury will have a lot of sentencing sheets but that's -- not sentencing, but verdict sheets. But that will give them plenty to do.

Any other proposed charges at this point, from the State?

MR. RIDDLE: No, sir. I didn't hear you mention it but I understood from chambers you were going to use Grippon and Darby?

THE COURT: Yes, sir, standard, standard. Darby being a combination of Manning and Victor.

Any proposed charges at this point, Mr. Hendrix?

MR. HENDRIX: No, sir, not at this point.

THE COURT: Mr. Ellisor?

MR. ELLISOR: None, Your Honor.

THE COURT: All right. We'll stand in recess. I'll try to get back at 1:15 or so and get it wrapped up. But as soon as I get a copy of it wrapped up I'll try to get a copy to each of you. We'll talk about getting a copy of the charge to the jury also. I'll hear it from all of you later on that to give you some time to think about it.

MR. HENDRIX: Your Honor, can I ask you this. At the end when it's all over do you want your charges back?

THE COURT: Not usually. I'll let you keep them.

MR. HENDRIX: Okay, thank you.

THE COURT: There will be a record of it.

MR. HENDRIX: That's fine. I just wanted to know because I might make notes.

THE COURT: Oh, sure. You're welcome to. As you know, all of mine have a database. I have thousands of charges I've had for years on the computer. So you're welcome to any of them.

MR. HENDRIX: Thank you, Your Honor.

THE COURT: All right. We'll stand in recess until 1:30.

(WHEREUPON, a lunch break was taken.)

THE COURT: Counsel, anything else we need to put on the record before we begin?

MR. RIDDLE: Your Honor, we had the charge conference, and at least my understanding was everybody

pretty much agreed to, I guess, the contents of the charge. But Your Honor had indicated that you intended to send the charge back. I expressed an objection to that which I would like to put on the record. But I think the other side wants it to go back, and I believe that is in the Court's discretion, although I do object to it.

THE COURT: At this point, I probably will send it back, assuming I've got everything. As you know, the problem with it is it just takes so much extra time just to get it in the right format to send it back, make sure there are no inconsistencies in the language or anything. I think I've got it set to do that. Probably will do that if I'm in a position to, but I'll just have to see at the time.

Anything else?

MR. HENDRIX: On behalf of Terrence Smith I've had an opportunity to discuss that issue with him, and we're fine with it going back to the jury room, the charge going back to the jury.

THE COURT: Anybody got anything else then before we start?

(There was no response.)

THE COURT: Bring the jury in.

(WHEREUPON, the jury enters the courtroom at approximately 2:23 p.m.)

THE COURT: All parties and attorneys are in the

courtroom and all jurors are with us.

Ladies and gentlemen, at this time we are going to have closing statements by the attorneys then I'll give you a charge on the law, and in just a little while here we're going to turn the case over to you. The order will be that the State will open with a closing on the law, which they are required to do, and then the defense lawyers will have their final closing then the State have its final close. So I'll ask you to give the attorneys your undivided attention.

You ready?

MR. RIDDLE: Yes, sir.

Good afternoon. It's been a pretty long week and I want to thank you for you all's service. I know this isn't what you all had in mind when you came up here this week. I know you all have been here a long time every day.

I have watched you all during the course of this trial, which is what I'm supposed to do, and I have watched the way you all have listened, every one of you, all 14 of you. Sometimes we get jurors that go to sleep. Sometimes we get jurors that are staring, you know, bored out of their minds, not doing what they are supposed to do.

When you all were selected you all took an oath. I don't know if you all remember it but you all took an oath right at the start of this case. And that oath said I will well and truly try, and you all have done that, every single

one of you all have done that. You have fulfilled that half of your oath.

You will well and truly try and true deliverance of a verdict render, okay. And what does that mean? Well, that's the part you're fixing to start, true deliverance of a verdict render. You've well and truly tried it, you've listened to all this testimony. You're fixing to get closing arguments, the Judge is going to tell you exactly what the law is, and then you're going to go back to your jury room and true deliverance of a verdict render.

Now, what does that mean exactly, a verdict? Verdict comes from two Latin words; verus, like verify, means the truth; dicta, like a dictaphone, which means to speak it. And that's what we're asking this jury to do, is to speak the truth about what happened in this particular case.

Now, what I'm up here doing now is talking to you about the law. And generally what I like to do is break it down into two categories, and that being the general law and the specific law. The general law is the law that's going to apply to any case. It could be a D. U. I. It could be a speeding ticket, it could be whatever it is, all the way up to a murder. And the specific law is the law as it relates to this particular case, and that's the charges that are contained in the indictments.

Now, as far as the general law goes, the Judge has

told you and he's going to tell you again that the State has the burden of proof, and he's absolutely right. We have the burden of proving these two individuals guilty of the crimes that they are charged with.

The Judge is going to tell you that the State has the burden of proving them guilty beyond a reasonable doubt, and he's going to tell you what reasonable doubt means. He's going to tell you that reasonable doubt is doubt -- excuse me, is proof that leaves you firmly convinced of the defendant's guilt.

He's going to tell you that there is no way for anyone to ever prove anything beyond any and all doubt, and that's not the burden on the State. You all might doubt as you sit here today that the sun is going to come up tomorrow. I don't know. I think it will. I hope it will, but there's no way that I can prove that to you beyond any and all doubt, other than it has just come up that way for so many years.

The Judge is going to talk to you all about the presumption of innocence, and what that means is this. That means that when they walked in the courtroom they are presumed innocent until the 12 of you all decide that they are not. That's you all's role, to decide whether they should walk out of this courtroom with their presumption of innocence intact or whether the State has met its burden of proof proving them guilty beyond a reasonable doubt. So you

all can see that all three of those terms are really tightly connected.

How does the State do that? How does the State do that? It puts up testimony from the witness stand, it puts in exhibits and other types of evidence, diagrams and things like that for you all to consider when you're back in the jury room. And there's a bunch of them, I think the last count I had there was over 50 of them. I don't know exactly how many exhibits there are in this trial. And we'll ask you all to consider those when you're back in the jury room.

You have to determine the credibility of the witnesses in this case. He's going to talk to you about that. He's going to tell you to consider things like bias, motive or reason to lie, opportunity of the witness to observe the things that he or she testified about.

He is going to ask you in a very drawn out way, the Judge is -- not that drawn out, I guess, but in a detailed way I guess is a better way to put it, to use your good common sense, use your good common sense.

And, ladies and gentlemen, you all swore that you would decide this based on the evidence and testimony that you heard in the case, but you did not swear to check your common sense at the jury room door. And the State just wants you to use your good common sense.

And listen to the factors that the Judge is going

to give you about credibility and believability of the witnesses. It's the same factors that you would use in your ordinary life when you're deciding something important like whether to buy a car and spend a whole lot of your own money.

You know you don't believe everything that salesman tells you because you know that salesman is standing to gain something if he can close this deal and make this sale. So you kind of take it with a grain of salt. You're using your good common sense.

You're actually using the factors the Judge is going to give, although I submit you probably don't analyze it that way because nobody does. The Judge is going to tell you that you're the judges of the facts, and you are. He's the judge of the law, you are the judge of the facts.

Now, you all have heard a lot of evidence in this case from this witness stand, and it cannot all be true. It can't all be true because there's been conflicting evidence. You're the judge of the facts. And what is your job in that regard? Evidence is like a big sponge. It's like a big sponge and it's full of everything that you have heard today and for the last couple of days.

Your job as the jury of 12 is to take that sponge and squeeze the truth out of it. Then you take that truth that you find and you apply it to the law that the Judge is going to give you, and I'm talking about the specific law in

this case, and that's how you'll determine the verdict.

Now, one thing that the Judge is going to tell you specifically in this case is the concept of law which I briefly mentioned in my opening, the hand of one is the hand of all, and he's got a definition for that. And he is going to tell you that two or more people who get together and are acting as one doing deeds, might be different deeds but towards one common purpose or one common goal, that each is responsible for the acts of the other party involved. The hand of one is the hand of all.

The Judge is going to charge you the law of murder. He's going to tell you that murder is the killing of someone else with malice aforethought. And what that means is that they had evilness or wickedness in their heart.

Now, I could express malice to you by saying I'm going to kill you; I'm going to kill you. Well, that's pretty easy to see malice in that situation, but every case isn't susceptible of proving malice in that fashion. Malice may have to be proven by conduct going on at the time.

Malice can be inferred. You can take one fact alone and find malice; the use of a deadly weapon. You don't have to. You don't have to do that in a particular case, but if you find the use of a deadly weapon in this case you can infer malice from that one fact alone.

There's a doctrine in South Carolina called the

felony murder rule, and that is if you kill somebody during the commission of a felony that one fact alone the jury can find malice. It can find malice from the commission of a homicide during the commission of another felony.

Burglary is a felony. Assault and battery with intent to kill is a felony. Attempted armed robbery is a felony. So you can find that if this homicide occurred during the commission of any of those other felonies that they are guilty of murder on that one fact alone, as long as you find a killing.

Murder, the killing of another with malice aforethought express, I'm going to kill you; or implied by the other circumstances surrounding the case. Burglary in the first degree, entering a dwelling without consent with the intent to commit a crime.

And the State has to prove one or more of the following things; that they were armed with a weapon, that they caused harm to somebody who was not a participant in the crime, like killing someone or putting someone in a wheelchair, that they displayed or threatened to use a deadly weapon, or that it occurred during the nighttime hours.

I know that you all wondered why I asked Sergeant Dollar if it was dark at 10:51 p.m. in West Columbia on August 3rd of 2001, that's why. If the State proves that it happened in the nighttime you don't even have to consider

those other factors.

Assault and battery with intent to kill; the Judge is going to define that for you. And he's going to tell you the elements of assault and battery with intent to kill. He's going to tell you this, basically. He's going to say think about it in terms of if the individual had died.

If the individual had died would the person be guilty of murder? Because if he was or would be then they are guilty of assault and battery with intent to kill. We can probably just as easily call that attempted murder in South Carolina but it's called assault and battery with intent to kill. The Judge is going to give you the law on all that.

Attempted armed robbery. Well, robbery is taking something from the person or presence of another person, okay. If I go into your house and I steal something then I'm guilty of larceny, stealing. If I come up to you and threaten you and place you in fear and then steal something I'm guilty of robbery.

It's taking something from the person or presence of another as opposed to just stealing it. And if I come up to you and take something of yours, your wallet or something else from your person or presence while I'm armed with a deadly weapon that's armed robbery.

So you got larceny, stealing; from the person or

presence makes it robbery, armed with a deadly weapon makes it armed robbery. You all know what an attempted armed robbery is, it's trying to do that very thing. He's going to tell you the law on that.

He's going to tell you the law of possession of a firearm during the commission of a violent crime. If you find that one or more of these people had a firearm during the commission of this crime you're going to need to find them guilty of at least one of these offenses in order to find them guilty of that.

Attempted armed robbery is a violent crime. Murder is a violent crime. Burglary first is a violent crime. Assault and battery with intent to kill is a violent crime. So if you find these individuals guilty of one of those four offenses and you find that he had a weapon when he did so then he's guilty of possession during a violent crime.

The last two I want to talk about; ill treatment of animals. Well, they shot the dog. That is what we are alleging, they shot a dog. And the Judge is going to tell you what the elements of that offense are. But it is pretty straightforward. It is unnecessarily inhumane treatment of an animal.

Conspiracy. What's a conspiracy? It's when two or more people get together and decide that they are going to go commit an unlawful act. Does it have to be spoken? No.

Does it have to be written down on paper? No. All it had to do is be agreed upon, sort of an understanding. It doesn't have to be verbalized, doesn't have to be laid out in detail. You just have to have an understanding. The Judge is going to tell you all of that.

He's going to tell you, ladies and gentlemen, during his charge that you all are going to have to reach 14 separate verdicts. There are 7 charges on each defendant, 14 separate verdicts. And that you'll have to consider each charge and each defendant separately. Well, that's pretty straightforward. You've got to decide if each person is guilty of the things that he is charged with.

And the Judge is going to tell you that you have to reach a unanimous verdict on these. What does that mean? What that means is that the Judge expects for everybody to go back there and collectively reason. We picked 12 jurors for this reason. Everybody hears it just a shade differently. Everybody sees it just a shade differently. Everybody has got different life experiences and different things that they bring to the table back in that jury room. Okay.

And there is not a single person in this world that is as smart as the 12 of you all acting together. Because you're going to see it better with 12 sets of eyes, and hear it better with 12 sets of ears, and think about it better with 12 brains than any single person could.

And the verdict is designed to be the collective voice of the group of 12. You're not supposed to go back into the jury room and say this is my idea and when everybody else thinks my way then we're write it. That's not what deliberation is about. Deliberations is about coming to the collective voice of the group of 12.

After you have done that, ladies and gentlemen, what you will do, and the Judge is going to explain this to you, is that you'll have a verdict form. And you, Madam Forelady, will be asked to write the verdict, write the voice of the 12 down on that form and sign your name. And when you've done that then you just knock on the door and come out and we'll take it.

And I'll tell you this, and I told you this in opening. When you all do that, when you all do that you'll have fulfilled your duty. You'll have fulfilled your oath true deliverance of a verdict rendered, and nobody in this courtroom, nobody in this courtroom will have a right to argue with what you decide.

Justice in South Carolina and everywhere has to work for everybody. It has to work for everybody. It's got to work for rich people, it's got to work for poor people. It's got to work for people that sit around smoking pot on a Friday night. The State of South Carolina wants justice in this case. We're not asking for anything more, and we don't

expect we're going to get anything less. Thank you.

THE COURT: Mr. Ellisor?

MR. ELLISOR: Thank you, Your Honor.

Ladies and gentlemen, thank you for your attention throughout this trial. When I first addressed you I told you it would be a complicated case. I told you I didn't know what evidence would eventually come out, and I think you can see why I was of that opinion after we've sit for some four days listening to the testimony that the State has presented and the rebuttal that we have presented.

After the Judge charges you the law, you must go back and try to reach a verdict on exactly what happened. There are numerous charges in this case and they all turn on one thing; did Ivan Collins, Terrence Smith and Wykiesha Williams go to rob Charles Penny? That's the crucial issue.

At this time, Mr. Collins is presumed innocent. He will remain innocent until you go back and consider every bit of this evidence and talk among yourselves and deliberate and reason together as 12 citizens from Lexington County.

If any individual, one of you as the 12, as a part of the collective wisdom of this county find that there is a real possibility, not a probability but a real possibility that Mr. Collins' position is true, then you must -- as a body of 12, you must reason together, you must return a not guilty verdict. Because it takes the collective wisdom of

all of you all finding that there is no real possibility that he is innocent.

Now, as Mr. Collins said when he took the stand, I was not -- and had no intentions as I listened to the evidence develop to put him on the stand. But it's not my choice, ladies and gentlemen. I am here to counsel him, that's why they call us counselors, and to advise him. The choice is always his. And I'll tell you why my counsel was not for him to take the stand.

MR. RIDDLE: Objection. He's not allowed to tell what his reasoning is to this jury.

THE COURT: Yes, sir. Sustained, Counsel. Those are legal issues.

MR. ELLISOR: Okay, Your Honor.

I submit to you that the State has not shown beyond a reasonable doubt that my client -- in the State's case in chief, I submit to you, their evidence was inefficient with the credible evidence with the witnesses they had. And I'll submit to you, they were not very credible. But they did not even establish that he was at the scene to start off with.

You have Mr. Hayward who was the gentleman shot, testified. And I submit to you that he did not remember anything that happened and was purely at the mercy of those who suggested to him what happened, friends. Mr. Hayward had had four drinks that night. He had two blunts.

Now, ladies and gentlemen, a blunt is not a toke. It's not a refer cigarette. It is a cigar size of marijuana packed together, okay. And I think there was testimony it was about a penny thick and four inches long.

So you think about how many cigarettes -- and one cigarette, I submit to you, of marijuana will affect you. Two cigarettes will doubly affect you. It is no telling how many cigarettes, six, seven, eight are in the size a cigarette -- a cigar size is. He had two blunts. On top of this he had five beers. I submit to you that he didn't have his right mind that day.

And if his story is correct he was the person who tackled the person standing there with the gun. I submit that most reasonable people would have been quaking in fear if the story is as the State said that Mr. Collins stood inside the doorway with two guns.

But Mr. Hook, Franklin Hook, who left his 14-year-old son next door and came over and had a half a blunt in the 30 minutes that he was there, he got there later after the others because the others had already been there getting high earlier. And he had one drink in that time, and he stated that Charles walked Wykiesha to the door and then the shooting started. And there was a break, and they came in and robbed them.

Now, ladies and gentlemen, the State's forensic

evidence -- Mr. Collins said he stood outside the door and shot inside. They said -- I think both the State's witnesses said there were four shots fired. Well, you look at the State's exhibit here. This is Exhibit 37, and you look at this and you see where the bullet -- a bullet came in right here. We only have three fragments of bullets from out of all the shooting, but let's look. Let's look at that bullet.

And you see the line right here where the expert said the gun came from? Now, look at that line right there, and we'll come back to that in a second, but just look at the angle. The expert is saying it comes straight from the front door, and I'll show you the angle in a minute.

Now, the other bullet hit was taken from a cabinet in the kitchen. Well, you only see right here. There are no cabinets over here on this side of the room. The cabinets are close to this wall right here from the front door. In other words, this TV is standing right in front of the front door. One bullet comes through and hits there.

They find another one that goes over and hits that cabinet. All aimed from the front of the house consistent, you have two bullets. You have two bullets in the house and you have two bullets in the victims. One in the decedent, Mr. Muller, and one in Mr. Hayward. All of this is consistent with my client's position of what happened, ladies and gentlemen.

MALE JUROR: Your Honor, could I take a 30 second bathroom break?

THE COURT: Yes, sir, we could. What we'll do is we'll have to let the entire jury go, but that's okay. Let's do that. While you're there be sure not to talk about the case. Go ahead and go.

(WHEREUPON, the jury leaves the courtroom at approximately 3:40 p.m.)

THE COURT: All right. Counsel, let's stay in place.

Mr. Bailiff, as soon as the jurors are ready bring them back out, okay.

[PAUSE.]

(WHEREUPON, the jury enters the courtroom at approximately 3:45 p.m.)

THE COURT: All parties and attorneys are in the courtroom and all jurors have returned.

Mr. Ellisor, you may continue.

MR. ELLISOR: Thank you, Your Honor.

Before we took a break I had showed you Plaintiff's Exhibit 37. Can you see where this bullet hit and was coming across the room? And it continues through the room here and it goes across this tall TV and this VCR and out the door. Now, for that shot to have been shot, I want you to use your common sense.

Now, you see that front door which is just a standard front door, and you look at those pictures. That person shooting the bullet, if it hadn't bounced off anything he would have had to hold his gun up like that to shoot it. Look how high this bullet goes through that door, across the top of that TV, okay.

I want to show you another exhibit by the State, which is that VCR sitting up there, State's Exhibit 38. My client is five foot six inches tall, ladies and gentlemen. He couldn't have held a gun up tall enough to shoot that VCR up on that television unless that VCR was coming at him and had been thrown at him, as he said something was thrown.

I submit to you, this was thrown at him. I submit to the you, that house has been sanitized before the police got there. We have Mr. Rogers who left. A 14 year-old-boy from next door came over, he left. The police came 30 minutes later. No marijuana there. Now, even their testimony was they were sitting there selling marijuana when a couple came there. Wykiesha's testimony was there was still a cigar box full of marijuana.

Now, the essence of this case is built upon the premise that Mr. Collins, Mr. Smith and Wykiesha Williams went to rob Mr. Penny of this marijuana at a value of some 250 dollars, whatever a box would be worth. My client valued it at that much. And yet it will be -- if the evidence has

been submitted, instead of me taking the time to hunt it, we had the receipt from that very day where he had 450 dollars on him. Why would he go rob somebody for 200 dollars, at the most, and why would he rob them if the plan was as Wykiesha said it was?

Wykiesha said we planned it ahead. I'm a participant in it. I knew we were robbing him, I'm a robber. She goes in. And my part of the robbery was I was going to look out -- check the room out, scope it out, and call you or you call me and I'm going to tell you.

But I'm going to use this code. I'm not just going to say hey, the stuff is here. If you had planned, all Collins had to do is say how much they got, is it worth it. And she would have had to say yes. But, no, she gives this elaborate code, according to her, of going out.

But the point is that what was there to rob? They done sold the dope that night. She was there 30 minutes, she would have known there was no dope for him to come in and rob to start off with. I submit to you, she was there for another purpose, and it was not to rob them of a small amount of marijuana worth no more than he already had money in his pocket that day.

Now, I submit to you that that alone, ladies and gentlemen, creates a possibility that my client is not guilty. Just the credibility of that lady alone who changed

her story under oath now, sworn statement to be honest, she changed it. She changes it in court even when she was in here in front of you upon cross-examination.

Let's look at the evidence that the State's case is based on. Mr. Penny, the big guy, his testimony is that he leaves and goes back and gets his gun. He brings his gun out. And this is the only gun that we have in evidence from this whole shoot-out is Mr. Penny's gun right here, ladies and gentlemen. The only weapon that we can identify that we know it for a fact existed during the shoot-out was his gun, and this one was not fired.

Of course, he said he went to get his guns when he testified. He didn't say I went to get my gun, but he said he never fired that gun at that house at all. And yet the SLED agent said outside we found a casing that is identified to that gun, which means that casing in that gun was shot at that house.

The Solicitor's Office would have you believe that it was dirty, it was old. The point is, though, it goes to the credibility of this man. He under oath stood to tell you the facts of what happened, and we know for a fact he's lying about the gun because the State's own witness proved that the gun was fired.

And this man, Mr. Penny, he was drinking Absolute. He had three mixed drinks, had a couple of beers, and he

smoked a blunt himself. But he never fired the gun in that apartment, and he was sure of it when I cross-examined him. And he smoked and drank as much as Muller, he testified, and the pathologist said that Muller had a high amount of marijuana in his system.

Now, John Hayward unfortunately was injured when he attacked one of these assailants, assuming that he had been attacked. I submit to you, in his state of mind he may have misunderstood what happened and may not have been attacked. I don't know. I don't know what happened. Because when somebody has four drinks, two blunts and five beers in the amount of time he was there I think their mind is so foggy that they don't know what is happening at the time.

But why, if he was sitting off over in the diagram of the room here, if they were all over on this side of the room and my guy came in and was going to rob them, shoot them, why are there no bullets over here in any way that were stuck and shot from a gun that the State could say was a weapon?

Oh, they found bullets. They found a 380. They found 380 sanitized, I submit to you, inside the pockets in the man's pants. They found 380 casings inside a raincoat, put away. Now, those things just didn't pop out like these other bullets did. They were placed there, ladies and gentlemen, and they were over here. And they are over near

where the victim was found.

And the decedent, the dead man was found outside. You heard the pathologist say that death would have been fairly fast, one of several minutes. Now, he could have made it outside or he could have been outside when it happened. The point is that death happened soon. He was intoxicated, had a high level of alcohol in him.

And Ronnie Rogers, the other person there, they don't have any evidence from him. But he left, there is no marijuana. There are no guns, and yet we have bullets of guns there but no guns. And the bullet holes that are found that can be documented as coming from a gun came in the direction that is consistent with my client's position that he was at the front door and that he was attacked. And I submit to you, nobody goes in and attacks somebody like that. I submit to you that the bullet bounced off the thing that was thrown at him, consistent with his testimony.

Now, His Honor will charge you the law, and as I understand it, he's going to allow you, because this is a very complicated case, which we normally do, he's going to allow you to take the evidence back in with you and review it. So I won't talk too much about it, other than to enumerate what my client is charged with.

He is charged with the conspiracy to commit a crime, a robbery, which means that the essence of that is it

takes two or more people to have a conspiracy. He has denied it. There is no evidence of a conspiracy other than what Wykiesha says. And I submit to you that her testimony is inherently untrustworthy and untruthful and not supported by common sense because if they were there to rob Mr. Penny of his marijuana why didn't they take some with them.

There was no evidence from any of these people that when the assailants left they took anything with them, yet they had ample opportunity to take anything. So if they had attempted a robbery they sure didn't try very hard to complete the robbery.

The second is burglary in the first degree. His Honor will charge you that burglary is you enter into a premises basically unlawfully. But before you enter into that premises you have to have a certain state of mind. And again I tell you a lot of these charges goes on states of mind. You have to go inside the house with a purpose of committing a crime.

Now, why does the State say that they entered that house? It was to rob Mr. Penny. Therefore, if they do not enter, have the preestablished idea to rob Mr. Penny when they went in, then they cannot be guilty of burglary.

Assault and battery with intent to kill is the shooting at somebody with intent to kill them. Now, their theory on this is it is murder, attempt to murder somebody,

but they don't die. You have to attempt, you have to want to kill them.

Now, under the State's evidence if Mr. Hayward, if they wanted Mr. Hayward to die the assailants, as described by the State's witnesses, could have very easily killed them because these men had no guns. Their version is that the assailant had the gun. We had nothing until Charles Penny went and got his gun in the back, but by that time they were all gone.

So at the time this thing happened they had every opportunity to kill any of those people they wanted to, if they had no guns. If there was four guys in that house with no guns, grant it they were as big as they were, three hundred pounders, they wouldn't have been that hard to miss. They could have killed any one of them that they wanted to, but they didn't.

And I submit to you, there was no intent to kill anybody. This thing was described, happened because Charles Penny panicked when Wykiesha came there. And again, we have nothing in record as to why Wykiesha came there. You'll have to use your common sense, ladies and gentlemen, on why she was there and waited 30 minutes.

The possession of a weapon in a commission of a violent crime. Well, if there is, in fact, a crime, if there was not self defense then I would yield to the State; they

have proven that, don't waist any time deliberating on that because we would have failed -- would have failed in my job to convince you.

My client is presumed innocent, ladies and gentlemen. And he's cloaked with that presumption until you consider all of the evidence. But we know that there were ammunition that was not used by the assailants in that house. We know that there were drugs being sold there, which would make you a little nervous if you were selling drugs and somebody came to your door, when somebody came in there.

My client has boldly taken the stand to say I'm not a very nice person but when bullets start flying I'm getting another profession. I submit to you that this thing got out of hand and we'll never know the truth because the independent witness, the Mexican who I subpoenaed to bring here, he described what happened but he said there were four people. I don't know if the defendant is protecting somebody. All I can do is give you the evidence of what happened.

And Mr. Hayward, he said that the lady had come and gone for sometime. All their minds were clouded, ladies and gentlemen. All their minds were clouded. But just think about it. If Wykiesha went there for some reason on her own to rob somebody or just to hassle them or whatever, for whatever reason, but see, she has admitted she went there to

rob them, okay. And she was the only witness that the victim knew. And yet they let her stay out.

I submit to the you, her testimony is bought and purchased at a price. For one thing, she could be tried for murder just like these gentlemen, but she is not. You heard her say they are not trying her for murder.

This is a lady that they let out of jail in the public who by her own depiction of evidence was involved, if you believe her story, in a murder. And yet she walks around among people. It was paid testimony. How much -- what would you do for 10, 15 years of your life at that age? How much would you lie if you were caught in these circumstances?

My guy didn't have to take the stand. And his story ain't a nice story. But if it is true and these other potheads that were stoned, that could have been so drunk that they don't even remember what happened and could have -- anything could have set it off. Anything could have set a drunk off. Anything could have set a pothead off, somebody whose mind is out of space on that much dope. Anything could have happened, and they could have interpreted anything. Their stories are so inconsistent with each other.

But common sense will tell you if my client wanted to kill somebody he had a chance, or if he wanted to rob somebody and they were accidently killed. If you wanted to rob somebody that caused an accidental death that would

charge him with murder he could have robbed them. He could have taken the marijuana. And if there was no marijuana, as they say, why would he want to rob them?

It is an extremely complicated case, ladies and gentlemen. And if my ability has impaired my client, or my performance, or my approach to this case offended you, or you found unfair in any way, don't hold it against my client.

I believe in the constitution. I wear it on my flag, on the flag on my tie. And I wear it pretty often when I come to court because I believe in the constitution. I believe in what we fight for. And what we fight for is the right to have this right here go on.

Your greatest right as an American citizen is not to vote. The Lord knows some of the people we elect in office. That's not your greatest right and that's not your greatest privilege. Your greatest privilege is sitting right there in those seats right now and protecting society should it need protecting, and protecting the individual, as you are, should that individual need to be protected. And only when society as a body finds you guilty by 12 of you unanimously agreeing is society protected and our system of justice allowed to continue. I'm sure you will do your duty.

I do not have the chance to close last. The State will have the last chance to find any defects in anything I tell you and point it out, and I'm sure they will ably do it,

that I've done that for many years. But I want you to go back and look at all these exhibits and listen to the testimony of my client very briefly, very sensibly what he said happened, because I was going to require them to prove he was there.

He said -- he comes up, overrules me, I was there, but it is not as they said it happened. And I don't care who I am or what I've done it didn't happen that way, and I'm taking a stand. You got to respect somebody like that, ladies and gentlemen.

If he had gotten up there and his story would have been inconsistent he runs that risk, but he didn't. And he told you, he hadn't seen these pictures. He didn't know where these bullets were found, because I didn't share that with him. But I submit to you, these pictures right here corroborate what he said.

This is an unfortunate incident. You've got ballistics, casing in blue jeans on couch, in blue jeans; casings by the wall and by the TV in the front; casings in the raincoat. Now, these cartridge casings, these casings just didn't get inside this raincoat, get inside these pants, whoever was wearing them.

You'll have to go back through those parameters, because it's just that complicated for me. I don't remember. But whatever it was, I submit to you, for every casing we had

we had a different gun. Whatever it was it was not two guns in the hand of Mr. Collins.

The State's case is built on Wykiesha Williams who would have you believe she is Ivan Collins' girlfriend and has been for a year, and yet in March of that year she gets married. Now, what is it? Was she spending time with Ivan, or was she spending time with her husband, or did she just get married for the heck of it and never see her husband again, just something she wants to do, marry somebody totally that she doesn't know?

Credibility is everything. The ability to be competent enough to remember what happened is everything. It happened so fast. You heard the Mexican say it happened so fast. This was a shoot-out, ladies and gentlemen. Whatever happened, whoever started it I don't know. I would like to not put my guy at the scene, but he put himself there. He took that risk and he said no, I will admit I was there and this is what happened.

I ask you to be wise enough, to review the evidence, be open minded enough; and if you find that his story has the possibility of truth, just as the State's story has the possibility of truth, but that is not the standard. The State has their version, their witness has a version, my client has a version, the defense has a version; and if the defendant's version is possible then as a juror, as an

American citizen it's your duty to return a verdict of not guilty. No matter how much you may despise him, how much you may disapprove of my trial tactics and me that is your obligation and your duty.

I have always been impressed with jurors in this county. I was born and reared here. I will die here. This is a wonderful place, ladies and gentlemen. And it's a wonderful place because we have wonderful people who do their duty. Please review this, as I'm sure you will, and if there is a benefit of doubt that the State hasn't proved their case beyond a reasonable doubt, I'll credit you all, give my client the benefit of that doubt and acquit him. Thank you.

MR. HENDRIX: Please the Court.

Ladies and gentlemen of the jury, Terrence Smith, as I told you in my opening, is a young man younger than four of my five children. He is facing the most important day in his life, judgment day in your hands.

For a week now he has faced an awesome power that the State of South Carolina has available to it trying to convince you of something he says isn't right. They've tried to convince you and must convince you that he is guilty beyond each and every reasonable doubt.

And His Honor will define reasonable doubt to you and will tell you right off the bat that a reasonable doubt is any doubt that would cause you to hesitate to act. When

considering the evidence if you feel that hesitation that's what Judge Westbrook is talking about, that's what the law is talking about. And if you feel it you cannot convict Terrence Smith of anything.

That's one of the freedoms we have. One of the most important freedoms we have as a result of being fortunate enough to be in the State of South Carolina which is one of the United States of America. It's guaranteed to us, not only by constitution but by the common law that was brought over from England.

They've got to prove he's guilty of everything they say beyond each and every reasonable doubt. And to do that they've got to present evidence; not just evidence that something happened that was bad, not just that something happened that we may all think is deplorable.

They've got to prove that he actually was there with the intent to participate in it and did participate in it and did something wrong. And His Honor will tell you that mere presence at the scene of a crime when it is committed does not in and of itself prove anything, and you may not convict based on that.

Now, what evidence has the State shown that would indicate Terrence Smith is guilty of anything, and is it testimony that you can afford with this awesome task to rely upon? Because if the evidence in the form of testimony

causes you any reason to hesitate to act then that's reasonable doubt, and you've each taken an oath to follow the law and find the defendant, Terrence Smith, not guilty.

And His Honor is also going to tell you this. Whatever you believe the facts may be concerning Ivan Collins you have to consider separately the case of Terrence Smith. Now, I'm not going to belabor all the facts and evidence here today, you've heard them. You've heard them maybe more than you wanted to.

And I know you all remember that the only people who can try to create any crime on the part of Terrence Smith would be the people who were drinking alcohol to excess and smoking marijuana to excess, and one more person, Wykiesha Williams, who went out of her way in her early statements to try and protect her lover, not caring what happened to Terrence Smith.

It's okay if he's thrown to the dogs, but in some kind of way I'm going to try to protect to a certain extent my lover. Wykiesha Williams who spent all day, every day with Ivan Collins, according to her, but yet found time in March of 2001 to marry somebody named Mao George Wambura; who had a conviction for forgery, who has pled guilty to attempted armed robbery and burglary, who has admitted that she lied repeatedly in this very case to the police.

What did she say? The State goaded her when she

would testify and say I talked to Ivan. And they would goad her to say and Terrence Smith, and she would go along with it until we would ask her the question directly; well, did you have any conversation that you can recall with Ivan Smith? No. Did you have any agreement with Ivan Smith? No.

Now, why would she say some of the things that she said on the stand? One of the things that was brought out is she hadn't been sentenced on the attempted armed robbery, the criminal conspiracy of the burglary. And she, in fact, knew, I submit to you this is a permissible inference, that the amount of her sentence was going to be in no small way dependent upon how she performed on this witness stand.

Judge Westbrook is going to tell you what you need to consider whenever you consider any credibility and any motive or other type of thing. What would be a motive someone would testify a certain way? Well, I would submit to you that they are trying to get years off a sentence that's going to come, some sentence will come, is a power for motive to testify in a certain way.

And I submit to you that her testimony, if you consider it and remember it, and I know you did, showed hesitation in spots. It showed that she had to be goaded to try to say something about Terrence Smith and then change it when you would directly ask her the question. Can you believe such a witness? Can you possibly not have a

hesitation to act when you've got to rely on a witness like that? I submit to you, you should and must hesitate to act and have reason to doubt her testimony.

Because see, Terrence Smith doesn't have to prove or disprove anything to you. He really doesn't. And that's an important right. And if you ignore that right of his then you're violating your sworn oath as jurors, and I know none of you are going to do that. I know none of you are going to do that. The only people who could possibly hint at any crime that supposedly Terrence Smith did would be Wykiesha Williams and the people who were too stoned, too drunk to know what happened.

Now, I'm going to tell you something, I've thought about it. The whole case had been a little confusing to me. And I don't know that this is the truth or not, none of us were there, but something one of the witnesses said struck me and it made me wonder is this the reason that something got out of hand that shouldn't.

I don't know, I wasn't there, but the witness, Mr. Hayward, John Hayward made a statement that caught me off guard. But would it explain an overreaction by the people in the apartment which might explain how something terrible could happen when it shouldn't have?

As I recall his testimony, he said under oath that the day before August the 3rd, that is it would have been

August the 2nd of 2001, a different girl, Lakiesha, was at the house and had left threatening to kill Charles Penny. In their smoked up, inebriated state if someone knocked on the door did they mistakenly think this was a visitor from Lakiesha and overreact, creating a tragedy that shouldn't have happened?

If there's any real possibility that that could be right, I submit to you that's the sort of thing that should cause you to hesitate to act. I'm not saying if it's right or not, I'm saying if it could be right. That's the sort of thing that should cause you to hesitate to act, and in accordance with your oath and the instructions on the law that Judge Westbrook is going to give you should cause you to find the defendant, Terrence Smith, not guilty.

We do submit to you that the appropriate verdict in this case as to Terrence Smith is that he should be found not guilty. He might be guilty of having a friend that he shouldn't be associating with. He might be guilty of being at the wrong place at the wrong time, but that's not a crime that's before you today. That's not a crime that's before you today. You can't find him guilty if he's made judgment mistakes like that.

You can only find him guilty if they prove, the State of South Carolina has proved by a reliable, credible, believable evidence that every one of the elements of all the

crimes that the Judge is going to charge you have been proved beyond each and every reasonable doubt. And as I said at the beginning, if you have any hesitation to act, to act. If you feel that as a mental process, if you feel that, then you must find him not guilty.

Now, I'm not going to get a chance to stand back up here and talk to you. And I know that when the solicitor gets up -- I except Mr. Riddle to get up, it may be Mr. Harling, I'm not sure, he's going to say some things. And I'm going to want to jump up and say, well, wait a minute, there's an answer to that in the evidence, there's something to consider here. But I don't get to. He gets the last whack at you, and I know you're glad.

But I'm going to ask you to do something for us which is nothing more than what your oath requires you to do. In order protect the rights of the individual as well as society, because society has made these rules, examine the evidence, consider the credibility and see if there's not an answer there that is consistent with something other than the guilt. We don't have to prove that, remember? All you have to do is find that there's a reason to hesitate to act. That's it.

I appreciate your attention. I know this has been a long case, and I know that each of you is going to take the responsibility that's going to be bestowed on you momentarily

very seriously. Thank you very much.

THE COURT: Mr. Riddle.

MR. RIDDLE: We picked a jury, you all, on Monday afternoon. And we put 12 people in the jury box and we told you all the next morning at opening that this case was a case that if nobody gets hurt, nobody tells. If nobody gets hurt it never gets reported.

Because we, the State, never once hid from you the fact that they were smoking dope. We never once hid from you the fact that Charles Penny sells some marijuana. We never once tried to hide that Franklin Hook was over there, and that they were unwinding on a Friday night, and that they were doing things that were illegal. Okay.

And Mr. Dope Dealer over here, crack peddler, Georgia vacationer and his girlfriend, who is no angel, okay. You lie down with that, you're not an angel. I didn't hide that from you either.

She pled guilty right after we picked you all, Monday. Attempted armed robbery carries up to 20 years in prison. Criminal conspiracy carries up to 5 years in prison. Burglary first, it carries up to life in prison. Okay. For her part in this.

You all think about that for a minute. She pled guilty and now she's going to have to come back over here and stand up in front of this man right here. And guess what? I

don't sentence her, Mr. Harling doesn't sentence her, he does. He does. So they try to put it off on us that her testimony is going to somehow affect her sentence. That's the justice right up there. Sitting right there.

I don't get to sentence her. The sentence depends on what he thinks she ought to get, not what I think. Because the last time I checked, in South Carolina and in the United States the prosecutor doesn't get to sentence somebody, the judge does. And she pled guilty knowing that that man right up there could sentence her to the rest of her natural life in prison.

Now, I tell you that for a reason. Why in the world would anybody plead guilty to something like that, expose themselves to something like that if they weren't telling the truth about what happened?

You all are going to have this girl's statements, the ones she gave to the West Columbia Police Department. And she told you she lied, and she did. She did. But on the first night she told Brian Carter, I don't know nothing about nothing. I was there. I saw some people coming and shooting, and I got out of there.

And as soon as she found out somebody had gotten hurt she told them about her role in it. Okay. As soon as Tony Owens, Captain Owens, Mark Jones' boss, told her that somebody had gotten hurt, somebody had gotten killed; Well,

okay, I agreed with these other two guys and we were going to come over there and rob them.

Because the plan was, ladies and gentlemen, no harm, no foul, okay. We're going to come in, we're going to get the money, we're going to get the drugs, we're going to get out of there.

And Charles Penny can't possibly report this. Charles Penny cannot call the West Columbia Police Department and say somebody just stole my refer. He can't do it. So Charles may end up having to pay Franklin Hook back a paycheck that he would have cashed that day.

They want to tell you there's nothing there to steal. People get paid on Fridays, ladies and gentlemen. People get paid on Fridays. John Hayward worked at the Food Lion before those two put him in a wheelchair. He would have had money. Franklin Hook had been working at Constantin's restaurant for -- I don't even remember how many years he said. I hope one of your 12 sets of ears remembers that, but he's been working there forever.

He smokes some refer. Okay. He'd had one drink and smoked some refer. He told you all what happened. All right. He told you that two guys come in there with guns and start robbing people. Two guys come in. What reason has Franklin Hook got to lie? What reason? None whatsoever.

I don't know John Hayward. You know, I think it's

brutally apparent to all of you all after he testified that he's not the smartest individual in the world. I think it's brutally apparent to you all that he couldn't possibly be the man that he used to be before he was hurt, because he was an assistant manager at a grocery store before he's been in that wheelchair. Do you think his mind is as good today as it must have been at one point? No.

I don't know what's happened to him. I can't imagine what's happened to him. I'll tell you this. I'll tell you this. I think Mr. Hayward did the best he could. I think he does the best he can every day in that wheelchair. He is in a wheelchair because he smokes pot. Because nobody said that he was a drug dealer. He is in a wheelchair because he smokes pot. Sidney Muller is in a box because he smokes pot.

Nobody hurt, nobody knows; that's what we told you in opening. And then we spent the better part of two solid days -- I think we only got three or four witnesses up the first two days, we spent the better part of two solid days arguing about whether they were even there. Arguing about whether or not they were even there. How long did we talk about those photographic lineups? How many times did we have to go through when the press release came out, when the pictures came out? They were there.

Ivan Collins. I submit that's the one thing you

can believe that Ivan Collins said is that they were there. Sorry, two, that he threw the gun in the river. Ladies and gentlemen, if that makes sense, if his testimony makes sense let them go. Write not guilty down and let them go if his testimony makes sense to you.

You know, during that first two days they crossed Hayward and they crossed Mr. Penny. Okay. And they crossed them about the lineups, they crossed them about how drunk they were, they crossed them about the press release. Did they -- I don't remember; did they ask either one of those guys anything about where the shooting took place?

Did they ask anybody anything about how Mr. Hayward, who is paralyzed by the gunshot, ends up on this couch when he is supposedly fighting at the front door? Look at the pictures. There's no blood trail going across there. He didn't drag himself with his arms. I mean, if he's shot here do you think he would drag himself to this couch or all the way over here? If that makes sense let them go.

Did they talk about shootings going on outside? No. Here's what happened. Here's what happened. The State proved to you that Mr. Collins and Mr. Smith were there, and then the theory changed. The theory went from it weren't us to some kind of self defense. That we were there but we just got attacked. Because we argued over and over about who it was.

And, you know, Franklin Hook, I keep going back to him. All right. He's sitting on that couch. He's having a drink and two guys come in with guns, and he doesn't fudge anything. He doesn't say I saw something, I did. He wasn't able to identify either one of them.

But you know what he could say? The one in the doorway was shooting, and the one going around was checking people's pockets. Is that present aiding and abetting? Is that not entering the house and standing out there shooting at a VCR? I don't even know what happened to that picture that Mr. Ellisor was showing you all about the VCR.

You all tell me, does that look sanitized? Did they clean that place up real good? And look at the difference between this area where the struggle occurs and the VCR sitting nice and neat on top of the television. I can't find that picture right this minute, you all will have it in your jury room.

That's one of the hazards of going last because you never know where all the evidence has been stuck down. But I bet you that VCR is plugged in. I really can't remember if you can see the wires on the back of it or not. I don't know. I don't know. You all look and see.

What did Mr. Penny tell you? He told you that Smith was checking pockets, present aiding and abetting. Mr. Hayward. You know, he's just a shell of what he used to

be. I can't imagine the pain that he lives with every day. I can't imagine what it's like to have had your life taken from you like his has been, all because he was in the wrong place at the wrong time.

You know, we heard some from Dr. Carter. Dr. Carter told you that he believed that Mr. Muller was sitting down, or at least significantly lower than the gun at the time. You all remember where those witnesses said he was sitting, right beside Mr. Hayward where he was found. And that he had gotten up to try to get away from the fight, and had fallen over the coffee table and knocked that coffee table in front of the couch all askew.

You all think about where he was standing in the doorway, okay. You all think about where Ivan Collins is standing in the doorway with those two guns. Think about a man sitting right here on this love seat who tries to get up and turn to get away from this fight, where Mr. Hayward is, and as he turns away he gets shot right here.

He's not even standing up straight. Not even standing up straight. He's still sitting down on the couch getting up trying to get away from this fight going on behind him, and Ivan Collins right over here caps him. And he falls face first into that coffee table, knocks everything down. Knocks that little table that was between the chair and the couch over.

And they keep asking, well, wasn't he intoxicated? Didn't he have such a high level of marijuana? Why don't we just dig him up and kick him again. What possible difference could it make if Sidney Muller had any marijuana in his blood? Does that have anything to do with what happened that night? Because was there ever any dispute that the people in that house were smoking refer?

One other thing. They talk about, oh, the only gun we've got is Mr. Penny's. How did we get Mr. Penny's? He volunteered it up. Yes, you may come and get my gun and check it for ballistics. Sure, you may do that. I will take you to my house, I will give you my gun.

Well, now, let's compare that with Mr. Collins. Mr. Collins whose done nothing wrong takes his gun and throws it in the river because he's going back on vacation in Augusta and he don't need it anymore. Mr. Penny's gun hadn't been fired that night, unless you believe that in the sanitation process Mr. Penny had the forethought to clean up every cartridge case that he shot inside.

If you can figure that since they found other nine millimeter cartridge cases that weren't fired by his gun that he could figure out which ones were; if you figure he had the foresight to go back to his bedroom, eject the clip, reload it so that it had a full magazine, chamber a round and put another one in the clip and then put it up to store it after

he's just watched his next-door neighbor get killed and one of his friends lying paralyzed on his couch, if that makes sense to you all turn them lose.

The only people that cooperated with the police are the people that were there, and Wykiesha Williams after she found out somebody died. The only ones. And from the very beginning look at them; me, Smile and Richard Smith, that's right, Richard Smith, the name on the pawn ticket that Ivan Collins uses. We went over there to rob them.

You tell me what possible motive Wykiesha Williams had to implicate those two if they weren't the ones in there. I think Mr. Collins wants you to believe that she got mad at him, that she's going to implicate him in a homicide because he let Peaches drive her car, I think. I didn't really understand that part.

And then, you know, after they leave, after they leave there, if you believe Mr. Collins, if you believe him, when they leave he comes running out. He's just been shot at or had a VCR thrown at him, or a gun pulled on him for no reason whatsoever, according to him, and his response to that is to walk around this apartment and kill this man's dog.

He shot a dog. Does that show malice to you? Does that seem malicious, just mean? Does that sound to you like a heart fatally bent on mischief, devoid of social responsibility? I don't know.

Mr. Collins' testimony, he just ran back into her in 2001. Well, he was in the woman's mother's wedding in '98. You got the picture.

I don't know why this one strikes me so, I just thought it was interesting. Mr. Collins wants to borrow Wykiesha's car because his doesn't have insurance, but that's the same man, the exact same man that will stick a gun in somebody's face and rob them. If that makes sense to you, ladies and gentlemen.

You know, I asked him how many times did you shoot that gun in the door. Well, I don't know. Well, he says he has a 380. Those rounds are found all the way over on this couch. All the way over on the little love seat, beside the chair. Because you all can see, there's no clothes found on this couch. No clothes on the front couch.

Under Mr. Ellisor's theory and Mr. Collins' theory when Charles Penny went to sanitizing that house he knew that Mr. Collins had a 380, so he knew he had to take the 380 bullets over there. You know where these came from? Just what John Hayward was saying, that Terrence Smith was shooting in that house. That's where the 380's came from, Terrence Smith's gun.

Mr. Collins didn't have a 380, he had a nine millimeter. He had a nine millimeter, and all those rounds that were found behind the speakers, near the TV, that's

where those come from. There's even some found -- they bounced all over the place. You heard Dan DeFreese.

Mr. Collins is in that house and he's shooting. Mr. Smith is in that house and he's shooting. Because nobody expected somebody to resist. No harm, no foul. Was it smart for Mr. Hayward to resist? Of course not. Of course not. Did he have a right to? Absolutely. Absolutely.

You know what the marijuana did to Mr. Hayward, And the liquor? Same thing it does to everybody else that drinks and smokes a lot; he thought he was bullet proof and invisible. And he thought he could jump on that man with the gun and disarm him, and he was so tragically wrong.

But, you know, when you come into a house, where people are sitting around enjoying themselves, armed with guns, trying to rob them, you are responsible for the consequences of that. And if a man in that house tries to resist, as he has every right to do, you shoot him and kill him, you are guilty of murder, just as sure as I'm standing here. And if you shoot and hurt one and put him in a wheelchair, you're guilty of A. B. I. K.

Mr. Collins when asked by his lawyer, when he sat in this chair he was asked by his lawyer about John Hayward. He says, Who's John Hayward. His lawyer says, He's the guy in the wheelchair. He said, Who's Sidney Muller?

He's on trial for murder and he has the audacity to

sit in this stand and act like he does not know who Sidney Muller is. Who's Sidney Muller? He's the dead guy. That's who Sidney Muller is right there. Right there. That's Sidney Muller. And you all saw John Hayward.

Right there are the two men that did it. Right there. Who's Sidney Muller? Who is Sidney Muller? Ladies and gentlemen, please, please go back into your jury room and deliver a verdict that speaks the truth and tell those two who Sidney Muller is.

THE COURT: Ladies and gentlemen, we've been going for about an hour and a half. We will take a short break, just enough to give you a chance to get in the room and stretch and use the rest room if you need to, get some water or something, and we'll come back out and finish up. My closing instructions will be probably 20, 25 minutes. So I want to be sure you're fresh when we do that. Remember, we don't talk about the case. We're almost there, okay.

(WHEREUPON, the jury leaves the courtroom at approximately 4:02 p.m.)

THE COURT: The jury is secured, Counsel. Don gave both side copies of this. Have you had a chance to look it over?

MR. ELLISOR: I don't have any problem with it, Your Honor.

THE COURT: I'll give you a chance to glance it

over.

(WHEREUPON, a brief recess was taken.)

THE COURT: State, are you ready?

MR. RIDDLE: Yes, sir.

THE COURT: Defense, are you ready?

MR. ELLISOR: Yes, sir.

MR. HENDRIX: Yes, Your Honor.

THE COURT: Counsel, one more time. The State's position at this point on giving the jury a copy of the charge -- and I don't know if you've had a chance to look it over. I looked it over to make sure it was in proper form, which I think it is.

Mr. Riddle, I know what your motion is.

MR. RIDDLE: Are you asking me or them, Your Honor?

THE COURT: Well, I guess both ways, actually.

MR. RIDDLE: My position has not changed since the last time. You know, I don't think we should. I think it scares me that the jury may take one little portion of the charge and get hung up on it instead of considering it as a whole, and that's my concern about it. I recognize the Court's concerns regarding how many charges there are in this case. I mean, it is, in fact, a lengthy charge but that is, in fact, my concern about it.

THE COURT: Do you have any problem with the form of the charge as it is?

MR. RIDDLE: Well, actually, I have not reviewed it but my legal scholar, Mr. Harling, has; and he tells me that it's in fine order.

MR. HARLING: A loose definition of that, Your Honor.

THE COURT: Yes, sir.

Mr. Hendrix, anything?

MR. HENDRIX: Your Honor, our position has not changed concerning your giving it to the jury. And I have looked over it, and as best I can understand I think you have cleaned it up nicely, and I think it's fine. And the reason I'm a little behind on this, I tried to review it hurriedly, but Mr. Ellisor concealed it from me for awhile.

[LAUGHTER.]

THE COURT: You can actually -- all of you can look it over.

MR. HENDRIX: It looks fine to me.

THE COURT: And while I'm doing it you can go through it with me and make sure it's in check. And at the end of it you can point anything out, if you need to.

MR. ELLISOR: Your Honor, I have reviewed it. I have no problems with it. I have no problems with you sending it to the jury but I would ask that you inform the jury that if they have problems understanding the law when they go back and look at it that they will -- any concerns,

disagreements they may have in the interpretation of it that they inquire of the Court as to them, in other words, clarification on any disagreement on the law.

Because I don't want them getting back there and start arguing on the law, we may be here forever. But if they have any questions concerning the law that they will notify the Court so the Court can address whatever concerns that they have.

THE COURT: Well, the only problem with that is, as you know, once I give them the charge if they need clarification I can't add to the charge. I can't tell them something else.

MR. ELLISOR: Well --

THE COURT: Except within certain limitations.

MR. ELLISOR: That's right. You can still clarify what the wording means, and I understand that that is the danger of sending it to the jury.

THE COURT: I understand. Okay. Are we ready then?

(There was no response.)

THE COURT: If anybody needs to leave the courtroom we'll be sealing the doors and nobody is going to be able to come in or out, so let's understand that before we start.

All right. Let's bring the jury in.

(WHEREUPON, the jury enters the courtroom at

approximately 4:18 p.m.)

THE COURT: All parties and attorneys are in the courtroom and all jurors are now with us.

Let me note first of all, bailiffs, please seal the doors and see that no one comes in or out at this time.

Ladies and gentlemen, it is a tradition in South Carolina court procedures that the doors are sealed when the judge instructs the jury so that you can give full concentration to it.

At this time, it is my duty to instruct you as to the law which applies in this case. And I will tell you that I will be sending in with you a copy -- for you, Madam Forelady, that you can share with the others, of course, a written copy of the charge that I'm giving you.

And let me tell you up front that this charge should be taken in its entirety. Consider it in its whole. Don't pick little pieces apart and give one section greater weight than the other section. You must consider it all as a whole. It is designed only for your guidance in the procedures that you'll be using in the jury room. And I do so understanding that there are seven charges we're talking about, and that it can get complicated. So this is, again, for your assistance and your guidance in the jury room.

Now, as we told you earlier, by virtue of these indictments the State has charged the defendants with the

offenses of conspiracy, burglary in the first degree, attempted armed robbery, murder, assault and battery with intent to kill, possession of a weapon during a violent crime and ill treatment of animals. Now, I previously read these indictments to you so I will not do so again.

Now, to the indictments the defendants, each defendant, has pled not guilty; and that places upon the State the burden of proving each defendant guilty beyond a reasonable doubt. You should consider the evidence or lack of evidence in determining whether the State has met its burden of proof.

A person charged with committing a criminal offense in South Carolina is never required to prove himself innocent. The defendants have no burden of proof. It is a vital and important rule of our law that the defendant in a criminal trial, no matter how serious the offense with which he is charged, must always be presumed innocent until his guilt has been proven beyond a reasonable doubt.

And this presumption remains with the defendant from the beginning of the case, throughout the arraignment, throughout trial, and unless and until a jury finds him guilty beyond a reasonable doubt. And it is a solemn duty for you as a jury if not clearly convinced of his guilt beyond every reasonable doubt to the contrary to acquit a defendant.

Now, in this case one of the defendants did not take the stand. The fact that a defendant did not take the stand and testify does not create a presumption against him. You must not consider it in any way and you must not even discuss it at any time in any way, including in the jury room. Remember I told you earlier, a defendant is not required to prove his innocence and he is not required to testify. The burden of proof is on the State.

What is proof beyond a reasonable doubt? Well, a reasonable doubt is a doubt that would cause a reasonable person to hesitate to act. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. You know, there are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt.

If based on your consideration of the evidence you are firmly convinced that a defendant is guilty of a crime charged you must find him guilty. On the other hand, if you think there's a real possibility he is not guilty you must give him the benefit of a doubt and find him not guilty.

Now, remember I told you earlier that you sit as the finders of fact in this case. I cannot pass upon the facts nor express any opinion I might have about them in any way, nor may I intimate in any way what I may think of the

guilt or innocence of either of the defendants.

Now, as judges of the facts you're also judges of the credibility, or in other words, the believability of the witnesses who testified in this case. And in passing on their credibility you may consider many factors; such as the appearance and manner of the witness on the stand, which is sometimes referred to as the demeanor.

You may consider whether a witness was forthright or hesitant in his or her testimony, whether a witness's testimony was consistent with itself or was consistent with prior statements, or did it contain discrepancies. You may consider the ability of the witness to know the facts about which he or she testified.

Did the witness have a cause or reason to be biased or prejudiced in favor of the testimony that he or she gave or was the testimony of the witness corroborated or made stronger by the other evidence, or was it made weaker, in other words, impeached by the other evidence.

And also you heard evidence of prior convictions of crime of witnesses who testified, and this evidence was admitted and may be considered by you only for the purpose of evaluating the credibility or believability of that witness. Evidence of convictions such as this can be used by you in determining whether a witness is truthful or worthy of belief, and you may give it such weight or value as you deem

it to be entitled to.

Now, as jurors you have a right to believe a small portion of a witness's testimony and discard the rest or vice versa. You may believe the testimony of one witness against all of the others, or the other way around. Of course, most certainly you do not consider the matter of credibility or believability by counting the number of witnesses who may have testified.

Throughout the process you have one objective and that is to seek the truth regardless of the source from which it may have come, and you do so bearing in mind that you must give each defendant the benefit of every reasonable doubt.

You heard testimony of witnesses who were called expert witnesses. They were treated as such because special knowledge, skill, experience, training or education in a particular field, and were allowed to give opinions as experts in the fields in which they were skilled.

In determining the weight to be given to an expert's opinion you should consider the qualifications and credibility of the expert and the reasons given for his or her opinion. You are not bound by the opinion of any expert. Give it such weigh, if any, to which you deem it entitled.

Now, you know, in a case such as this there are two types of evidence presented; one is called direct evidence and the other is called circumstantial evidence.

Now, direct evidence is the testimony of a person who claims to have actual knowledge of a fact, for example, an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances which indicate the existence of a fact in issue.

The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required for circumstantial evidence than it is for direct evidence. You should weigh all the evidence in the case, and after doing so if you are not convinced of the guilt of each defendant beyond a reasonable doubt you must find that defendant not guilty.

Now, an issue in this case has been the identification of the defendants as the perpetrators of the crime charged. The State of South Carolina has the burden of proving identity beyond a reasonable doubt. Identification testimony is an expression of belief or impression by a witness. You may consider the opportunity that a witness had to observe the alleged offender at the time of the offense and thereafter to make an identification.

And it is for you, the jury, to determine the accuracy of the identification of a defendant. You must consider the credibility of each identification witness in the same way as any other witness. You may consider his or

her truthfulness, as well as his or her capacity, opportunity or circumstances of observation of the matters about which he or she testified.

Now, I told you at the beginning and I will tell you again that the same constitution which makes you the finders of fact requires me to be the instructor of the law. You must accept the law as I give it to you as correct.

Now, if there's anything that I'm wrong about there is a time and a place that it can be corrected. But for today's purposes you must consider the law as correct. And again, as I told you earlier, it's not what you think the law should be. It is, in fact, what I tell you that the law is. You must go strictly by that.

Now, I would like to discuss with you for a few moments the elements of the charges against the defendants. And remember, each defendant, both defendants are charged with the same set of offenses. But I also must be sure to tell you and be sure you understand that while there are two defendants in this case and while each are charged with the same offenses you must understand that whatever verdict you find does not have to be the same for both defendants.

In other words, you take each defendant separately, consider the evidence separately as it applies to him and write your verdict in accordance with the evidence in the case and these instructions that I am giving to you now.

And that is to say that where more than one person is charged with a crime if the evidence warrants it you may convict one and acquit the other, or you may acquit both, or you may convict both. It all depends on the testimony and the evidence of which you alone are to pass on.

Let's start with the offenses, and we'll start with them in terms of the time alleged. The first is conspiracy. Both defendants are charged with the crime of conspiracy. A conspiracy is an agreement between two or more people to do an unlawful act in an unlawful way. The agreement alone constitutes the offense. You as a jury must decide whether a conspiracy existed and whether a defendant was an active party to the alleged conspiracy.

Before a defendant may be convicted it must be proven beyond a reasonable doubt that a conspiracy existed and that the defendant was a knowing party to the conspiracy and that an unlawful act was committed by someone in furtherance of the conspiracy.

If the people involved are not acting together but are acting separately and individually then you may rightfully conclude that they are not involved in a conspiracy. However, if two or more people pursue the same goal, the same unlawful goal, one doing one act and another person performing another act, then you may conclude that they are in a conspiracy to achieve that unlawful goal.

Now, the second offense they are charged with is burglary in the first degree. Burglary in the first degree is a statutory offense. In other words, our legislature has passed a law which sets forth the elements of this crime and gives us certain definitions.

And what it says is this. It says that a person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime therein and either when in affecting entry or while in the dwelling or in immediate flight from the dwelling he or another participant in the crime is armed with a deadly weapon or explosive; or causes physical injury to a person who is not a participant in the crime; or uses or threatens the use of a dangerous instrument; or displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun or other firearm; or the entering or remaining occurs in the nighttime.

Now, our law says that a person is guilty of burglary in the first degree if the person enters into a dwelling without consent and with the intent to commit a crime therein, and that the entering or remaining occurs in the nighttime. So then in order for the State to prove the defendant guilty the State must prove -- as to either defendant guilty, the State must prove each of the elements with proof beyond a reasonable doubt.

And these are, one, that the defendant, in other words, that it was a particular defendant. Second, entered the dwelling. Third, without consent. Fourth, with the intent to commit a crime therein; and then one of following.

Now, they must prove all of these that I just gave you then beyond that one of the following. Is armed with a deadly weapon or explosive; or causes physical injury to any person who is not a participant in the crime; or uses or threatens the use of a dangerous instrument; or displays what appears to be a knife, pistol, revolver, rifle, shotgun, machine gun or firearm; or that the entry or remaining, act of the entry occurs in the nighttime. And as I have told you throughout this, each of these elements must be proven beyond a reasonable doubt.

Our legislature defines a dwelling house to include the living quarters of a building which is used or normally used for sleeping, living or lodging by a person. The State now must also prove that the entry occurred with the intent to commit a crime therein.

It is necessary that the criminal intent existed at the time of entering, and it is not enough if the criminal intent was formed after the entry. On the other hand, where the entry -- the intent exists at the time of the entry it is not a defense that the intent was abandoned after the entry. And the reason is that the entry with criminal intent

completes the crime of burglary.

And, obviously, intent is a mental state. Intent must be determined from the evaluation of the facts and circumstances proven to have existed in the case, including the conduct of each defendant. Intent may be determined by direct evidence or by circumstantial evidence or by a combination of the both of them.

Now, the next offense with which the defendants are charged with is attempted armed robbery. I'm going to explain this to you, and I will tell you that I will define armed robbery then I will define for you attempt. Our Code of Laws in South Carolina defines armed robbery as follows. It says any person convicted for the crime of robbery while armed with a pistol or other deadly weapon shall suffer punishment for armed robbery.

In order to help you better understand these I'm going to have to first tell you about an offense called larceny, and then robbery, and then armed robbery. It's sort of a step process, so just stay with me. Let's talk first about larceny. What do we mean by larceny? Four elements make up larceny. And again, each element must be proven beyond a reasonable doubt.

First, that there was a taking. Second, that the taking was of the personal property of another. Third, that after being taken the property was carried away; and fourth,

that the taking and carrying away of the property was done with intent to steal. Now that's larceny.

The crime of robbery includes each of these four elements of larceny which I've just explained to you, but in addition to them another element is necessary to constitute or make out the crime of robbery; and this additional element is that the taking and carrying away of the property must have been accomplished by placing the other person in fear by violence or threats of violence so as to make that person surrender the property without his consent and against his will. So then that's larceny, robbery.

Now let's talk about armed robbery. Again, armed robbery includes all the elements of larceny and robbery, as I've just told you, but there is another additional element that is required; and that is that the robbery must have been committed with a deadly weapon.

And that is that the person committing the robbery had and used a deadly weapon with which he placed the person possessing the property in fear in order to obtain the property. And I will charge you that a pistol, or gun, or rifle is a deadly weapon whether or not it was actually loaded with ammunition at the time of the robbery.

Now, that is armed robbery. And remember, the charge is attempted armed robbery. So what do we mean by attempt? Well, an attempt is an act done in part execution

of a design to commit a crime. There must be an intent that the act shall be committed and an act done not in full execution but in pursuance of the intent.

An attempt to commit a crime does not require that the crime be successfully completed. An attempt is distinguished from preparation to commit it and also from the intent to commit it. The law does not punish the mere entertainment of criminal intent.

To bring the law into action it is necessary that some act be done in pursuance of the intent immediately and directly tending to the commission of the crime an act which should the crime be perpetrated would constitute part and parcel of the transaction, but which does not reach to the accomplishment of the original intent because it is either prevented or voluntarily abandoned. All right. That's the offense of attempted armed robbery.

The defendant's are next charged with the crime of murder. Now, the offense of murder is defined as follows by our legislature. It says this; that murder is the killing of any person with malice aforethought, either express or implied. Again, murder is the killing of any person with malice aforethought, either express or implied. So in order to convict on murder the State must prove not only that the defendant killed the victim but that they did so with malice aforethought.

Now, in the law malice is referred to as a term of art. In other words, it is a technical term which means wickedness, which means there was no just cause or excuse, and it is something which springs from depravity, from a heart devoid of social duty and fatally bent upon mischief.

Now, while the law does not require that malice shall exist for any particular length of time before the commission of the act in question it simply must be aforethought. There must be a combination of the previous evil intent and the act producing the fatal result.

Now, you notice also it said that it must be malice aforethought either express or implied. What do we mean by express or implied? Well, those words don't mean different kinds of malice but they mean the manner in which malice may be shown to exist. In other words, malice may be proven by direct evidence or it may be proven by inferences from the facts and circumstances which are proven.

Proof of malice may be direct or it may be express, such as where there is evidence of previous threats or evidence of lying in weight, in other words, circumstances which show directly that intent to kill existed.

But the circumstances of many homicides will prevent the possibility of offering this kind of evidence of the existence of malice. So out of necessity, the law says that malice may be inferred under certain circumstances even

without direct evidence as to what was in the defendant's heart and mind.

Malice may be inferred from the willful, deliberate and intentional doing of an unlawful act without just cause or excuse, or may be inferred from the use of a deadly weapon. Resulting implication only permits rather than requires the jury to infer malice.

In other words, this permissive inference is of an evidentiary nature and the implication does not require you to infer malice but permits you the infer malice. So again, in other words, the inference of malice from the use of a deadly weapon is simply an evidentiary fact to be taken into consideration by you, the jury, along with the other evidence in the case; and it should be given such weight as you, the jury, determine it should be received.

The inference of malice may be drawn from proof of the use of a deadly weapon, if the jury concludes that it's proper after considering all the facts and circumstances in evidence. I also would charge you the State is not required to prove a motive for the killing.

Now, as part of this we have in South Carolina what is called a felony murder rule. And it says this; that if one intentionally kills another during the commission of a felony then an implication of malice may arise.

If facts are proven beyond a reasonable doubt

sufficient to raise an inference of malice to your satisfaction then this inference would be again simply an evidentiary fact to be taken into consideration by you, along with the other evidence in the case, and you may give it such weight as you determine it should receive. That's murder.

The defendants are also charged with assault and battery with intent to kill. Let's begin, so you understand this, by talking first about assault and battery. An assault -- and we'll define assault, then battery.

An assault is the unlawful attempt to offer with force or violence to hurt or injure another person where there is a present ability to complete the offense. In more common terms it may be said that the assault is the threat by words or actions to do violence to another person in a situation where the person communicating the threat is close enough and able to establish it. That's assault.

A battery is an unlawful touching. It may be accomplished by an object put in motion by the person committing the assault. A battery is the carrying into affect of the assault by ensuing or implying force, however slight, in a rude, angry or resentful manner without legal justification.

Now, there are different degrees of assault and battery, and the most serious of these is the offense of assault and battery with intent to kill. Assault and battery

with intent to kill is defined as an unlawful act of violent injury to a person of another accomplished with malice aforethought.

Assault and battery with intent to kill then contains all of the elements of murder except that the death of the person assaulted did not occur. So before a defendant can be convicted of assault and battery with intent to kill the jury must be satisfied beyond a reasonable doubt that if the person assaulted had died as a result of these injuries then the defendant would have been guilty of murder.

The law requires, obviously, then that I again briefly define the term murder. I did it before but I will do it again for purposes of this particular offense. Remember that murder is the unlawful killing of a human being with malice aforethought, express or inferred.

Malice is an essential element of murder and must be aforethought. It is not required that malice exists for any particular length of time but it must exist in the mind of the accused just before and at the time of the commission of the act.

Remember I told you that malice imports wickedness and excludes just cause or legal excuse. Malice springs from depravity, from a heart devoid of social duty and fatally bent upon mischief.

It does not necessarily import ill will towards the

person injured but signifies rather a general malignancy toward and recklessness for the lives and safety of others, or a condition of the mind which shows a heart without regard to social duty and fatally bent on mischief. And as I told you before, there must be a combination of this evil intent as existing aforethought and the act producing fatal result in a case of murder.

Remember I told you that malice aforethought can be express or inferred. That is malice aforethought may be shown by direct evidence or by indirect evidence which by necessary inference arises from facts and circumstances which are proven. Malice may be inferred in the mind of the perpetrator from the use of a deadly weapon.

If facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction then this inference would simply be an evidentiary matter to be considered by you, along with other evidence in the case, and to be given such weight, if any, as the jury determines it should receive.

So if you conclude then that the State has failed to prove beyond a reasonable doubt that a defendant would have been guilty of murder had the injured person died as a result of injury then you may not find the defendant guilty of assault and battery with intent to kill.

Next the defendants are charged with the offense of

possession of a weapon during the commission of a violent crime. A person is guilty of this offense if during the commission or while attempting to commit a violent crime he or she is in possession of a firearm or visibly displays what appears to be a firearm.

Now, a firearm is defined as any machine gun, automatic rifle, revolver, pistol, or any weapon which expels a projectile. So therefore if you find either defendant guilty of either burglary in the first degree, or attempted armed robbery, or murder, or assault and battery with intent to kill, any of those offenses, and you find that the State has proven beyond a reasonable doubt that the defendant was also in possession of a firearm or displayed what appeared to be a firearm then you must find him guilty of the crime of possession of a firearm during the commission of a violent crime.

And lastly, the defendants are charged with ill treatment of animals. South Carolina law says that whoever inflicts unnecessary pain or suffering on any animal shall be guilty of a misdemeanor. Now, a person then may not be found guilty of this offense unless you find that the State has proven beyond a reasonable doubt that he inflicted unnecessary pain or suffering on an animal.

Now, I also will charge you that in South Carolina we have a legal theory called hand of one is the hand of all.

In other words, if a crime is committed by two or more persons who are acting together in the commission of a crime then the act of one is the act of both.

Two people can be guilty of the same offense at the same time if both are together, acting together, assisting each other in the commission of the offense, then the law says that under those circumstances the act of one is the act of all. In other words, the hand of one is the hand of all.

But, however, I will tell you that mere presence at the scene of a crime is not enough to prove someone guilty of a crime. The burden is upon the State to prove every element of the crime charged.

So if you find after reviewing all of the evidence that the State had proven that a defendant was only present at the scene of the crime and that they have not proven beyond a reasonable doubt any other participation in the crime then you must find that defendant not guilty. The law says that proof of mere presence at the scene of a crime is not enough to find someone guilty.

Ladies and gentlemen, you've been selected as fair and impartial jurors. You've been sworn to impartially try and determine the facts of the case, and when you've complied with your oath to do so then no one will have a right to criticize your verdict. You will have fully discharged your duty as jurors.

Now, you must not be influenced by opinions, or ideas, or expressions which you may have heard outside of this courtroom about this case or about any other case like it. You must decide the case only from the testimony that you've heard from the lips of the sworn witnesses, along with all of the other evidence introduced.

You must not be swayed by any form of passion, prejudice or improper sympathy for or against any of the parties. You have no friends to reward and you have no enemies to punish. All parties are entitled to a fair trial at your hands.

Now, there are two possible verdicts which you may find, and I will tell you that what you're going to have, in essence, are 14 sheets.

And, Madam Forelady, those sheets, there will be seven as to each defendant, and each sheet will be the sheet for a particular offense.

And on each of these there are two possible verdicts; you may find the defendant not guilty or you may find him guilty. Now, there's no significance in the order in which I state them, obviously it's simply that one just has to be stated first.

And as to each defendant you must not take into account the fact that he's been charged with more than one charge. Each defendant is entitled to a fair trial on each

of the charges before him and should not be prejudiced by the fact that there is more than one charge.

So as to each charge, you must take each charge separately against each defendant and consider whether the State has proven the elements of that charge against that defendant. So, in essence, I guess it would come down to there are 14 of them that you will be considering, each separately.

Now, your verdict must be a unanimous verdict. In other words, it must be agreed upon by all of you.

Madam Forelady, this is where you start. I told you we'd put you to work, this is where it starts. It will be your duty to preside over the deliberations of the jury. And when you have reached a unanimous verdict then you'll take those forms and fill in the appropriate verdict on each form; sign your name as the forelady and date it. Now, once you've done all that, knock on the door and we'll take the verdict.

Now, prior to that time if you have any questions or inquiries you can also do so by one of two ways. One is you can knock on the door, and we'll let you and the jury come out and you can ask a question verbally; or you can send a written note out. I'll leave that up to you to decide how you want to do it.

I'm going to ask you at this time to step to the

jury room just for a moment now. What's going to happen is this. I have some matters to take up with the lawyers. So I don't want you to begin deliberating just yet. In fact, what will happen is in just a moment we will send all of this evidence in, along with a copy of the instructions, and along with the sentence sheet -- the verdict sheets, and it's up to you to decide, of course, each of those.

Once you have all of that, once you have all of that then you may start deliberating, but don't begin until you actually get word. All right. Let me ask if you will step to the jury room for a moment. Don't start talking about the case just yet.

(WHEREUPON, the jury leaves the courtroom at approximately 4:52 p.m.)

THE COURT: The jury is secured. Any exception to the charge, from the State?

MR. RIDDLE: No, sir.

THE COURT: The defense, Mr. Hendrix?

MR. HENDRIX: Your Honor, I don't really have any exception to the charge except right at the end there -- and I don't know if this would make any difference, but Your Honor, I think in all honesty, misspoke and used sentence sheet.

THE COURT: I know it, but I corrected it to verdict sheet. And I told them it would be up to them to

decide the verdict.

MR. RIDDLE: One thing -- and I'm sorry, Your Honor, that I forget to say because I wrote it down. In the felony murder charge you did not tell them that burglary and attempted armed robbery are felonies. So I don't know that they've got any real guidance in order -- other than what I told them. If that's the only thing that you're going to bring them out for -- well, go ahead and deal with Mr. Ellisor and come back to me.

MR. ELLISOR: I have no objections.

MR. RIDDLE: Never mind.

THE COURT: Okay. Why don't you come and look over the evidence with the court reporter.

MR. ELLISOR: Did we ever track all the indictments down?

THE COURT: We got them.

MR. ELLISOR: Okay. So they're going back with the evidence?

THE COURT: No, I usually don't send the indictments back to the jury room, unless you want them to go in there.

MR. ELLISOR: I want them to go back because they have to consider who the person was that was murdered, who the person was that was with the assault and battery with intent to kill, because that's different people, and they

have to have their names and they have to be identified for them to consider it.

THE COURT: Mr. Hendrix, what's your position on that?

MR. HENDRIX: Your Honor, I would be okay with Your Honor not sending the indictments back and going with the verdict sheets. I almost said the same thing you did, the verdict sheets. I don't know that they are going to add anything. If you were I'd certainly think you need to give them a cautionary charge that all that is is a charging paper, and go through that stuff that you normally do, which I know Your Honor did not since you were not planning on sending those back.

THE COURT: Let me tell you one thing that concerns me, Mr. Ellisor, and certainly it may not be of concern to you. I notice in some of these that these are not serially numbered. For example, with Mr. Smith on some of the indictments they are numbered -- and this is just an example of three of them, 743, 745 and 746.

I don't know how close they look but there's always a danger to a juror spending too much time, start looking closely, and they may say, you know, there's no 744, I wonder if he's got something else he hasn't been charged with.

And I actually had that happen in a case one time where the jury sent out a question saying that -- somebody

had noticed the numbers and said were there some other charges that they were supposed to consider, basically. You know, I don't know that it's necessarily a problem but you get some jurors that get picky.

MR. ELLISOR: Here's the problem I have --

THE COURT: But I just wanted you to know that.

MR. ELLISOR: I understand, and I'm aware of that. The problem I have is there was sporadic shooting in there that could have been directed at any of those people in that room, and for there being an assault with intent to kill the person that was assaulted, the person shooting him had to intend to kill that particular person or somebody in the room. And that's what the concern is.

MR. RIDDLE: That's transferred intent. We'd like that charge.

MR. ELLISOR: Forget about it. I'll withdraw it.

THE COURT: Do you want the indictments to go in?

MR. ELLISOR: No, I don't. I changed my mind. It's never too late to evaluate a position.

THE COURT: Any other motions?

MR. RIDDLE: No, sir. The court reporter went through the exhibits, and that's good enough for me.

THE COURT: Oh, okay. Good then.

MR. HENDRIX: Your Honor, we're okay if they are.

MR. ELLISOR: We're okay.

THE COURT: All right. I'm going to send the charge in also. I'm going to staple it here. What we'll do is let the court reporter mark it as a Court's Exhibit so it will be available for review.

(WHEREUPON, Court's Exhibit No. 8, the Jury Charge, were marked and made a part of the record.)

THE COURT: Counsel, I understand a couple of the jurors want to smoke. We probably need to go ahead and let them do it now before they get started. So how about hold up on those, okay, and let them go on out.

(WHEREUPON, a brief recess was taken.)

THE COURT: The clerk now has the evidence and is taking it into the jury. She'll bring the alternates out in just a moment. But the jury has the case at 5:10.

(WHEREUPON, the alternate jurors entered the courtroom.)

THE COURT: Alternates, we thank you for participating with us. As you can see, all the 12 jurors made it into the jury room okay, and they are deliberating. If anything were to happen to one of them now we wouldn't be able the put you back in there anyway. So, in essence, your jury duty is over and you're freedom is restored. You're free to go. Thank you.

Now, I will tell you this; you're welcome to stay, if you wish. Some alternates like to stay and see what

happens. You don't have to, you can go if you want. If you to stay, sometimes some of the folks, some of the attorneys like to talk to jurors about their feelings about the case. You can talk with them if you want to but you don't have to. It's your choice. All right. Thank you.

(WHEREUPON, the alternate jurors were excused, and court was in recess while awaiting a verdict from the jury.)

(The following occurred at approximately 7:30 p.m.)

THE COURT: I understand that we have a verdict. Is the State ready?

MR. RIDDLE: The State is ready.

THE COURT: The defense ready?

MR. HENDRIX: The defense is ready, Your Honor.

MR. ELLISOR: Yes, sir.

THE COURT: All right. Of course, as you know -- I'm sure all counsel you've told everyone, there is to be no reaction to the verdict, whether pro or con. Officers and bailiffs take whatever measures are necessary to see that there's no reaction.

Let's bring the jury in, please.

(WHEREUPON, the jury enters the courtroom at approximately 7:31 p.m.)

THE COURT: All parties and attorneys are in the courtroom and all jurors have returned.

Madam Clerk.

THE CLERK: Madam Forelady, have you reached your verdicts?

THE FORELADY: Yes, we have.

THE CLERK: Please pass them up by the bailiff.

THE COURT: Madam Clerk, the verdicts are in proper form. Go ahead and publish them, please.

THE CLERK: Indictment 2002-GS-32-1306, The State vs. Ivan Douglas Collins, we the jury by unanimous consent find the defendant, Ivan Douglas Collins, on the charge of criminal conspiracy guilty.

Indictment 2003-GS-32-887, The State vs. Ivan Douglas Collins, we the jury by unanimous consent find the defendant, Ivan Douglas Collins, on the charge of burglary in the first degree guilty.

Indictment 2002-GS-32-1300, The State vs. Ivan Douglas Collins, we the jury by unanimous consent find the defendant, Ivan Douglas Collins, on the charge of attempted armed robbery guilty.

Indictment 2002-GS-32-1301, The State vs. Ivan Douglas Collins, we the jury by unanimous consent find the defendant, Ivan Douglas Collins, on the charge of murder guilty.

Indictment 2003-GS-32-505, The State vs. Ivan Douglas Collins, we the jury by unanimous consent find the defendant, Ivan Douglas Collins, on the charge of assault and

battery with intent to kill guilty.

Indictment 2003-GS-32-506, The State vs. Ivan Douglas Collins, we the jury by unanimous consent find the defendant, Ivan Douglas Collins, on the charge of possession of a firearm during the commission of a violent crime guilty.

Indictment 2003-GS-32-888, The State vs. Ivan Douglas Collins, we the jury by unanimous consent find the defendant, Ivan Douglas Collins, on the charge of ill treatment of an animal guilty.

Madam Forelady, if this so be your verdicts on Mr. Collins please indicate so by raising your right hands, please.

All hands were raised on Mr. Collins, Your Honor.

THE COURT: Thank you, ma'am.

THE CLERK: Indictment 2002-GS-32-1406, The State vs. Terrence Valente Smith, we the jury by unanimous consent find the defendant, Terrence Valente Smith, on the charge of criminal conspiracy guilty.

Indictment 2003-GS-32-743, The State vs. Terrence Valente Smith, we the jury by unanimous consent find the defendant, Terrence Valente Smith, on the charge of burglary in the first degree guilty.

Indictment 2002-GS-32-1405, The State vs. Terrence Valente Smith, we the jury by unanimous consent find the defendant, Terrence Valente Smith, on the charge of attempted

armed robbery guilty.

Indictment 2003-GS-32-746, The State vs. Terrence Valente Smith, we the jury by unanimous consent find the defendant, Terrence Valente Smith, on the charge of assault and battery with intent to kill guilty.

Indictment 2003-GS-32-745, The State vs. Terrence Valente Smith, we the jury by unanimous consent find the defendant, Terrence Valente Smith, on the charge of possession of a firearm during the violent crime guilty.

Indictment 2002-GS-32-1407, The State vs. Terrence Valente Smith, we the jury by unanimous consent find the defendant, Terrence Valente Smith, on the charge of murder guilty.

Indictment 2003-GS-32-1109, The State vs. Terrence Valente Smith, we the jury by unanimous consent find the defendant, Terrence Valente Smith, on the charge of ill treatment of an animal not guilty.

Madam Forelady, ladies and gentlemen of the jury, if this so be your verdicts on Mr. Terrence Valente Smith please indicate so by raising your right hands.

All hands were raised, Your Honor.

THE COURT: Thank you, ma'am.

Does anybody wish to -- and let me note for the record that the verdicts are posted at 7:35 p.m. Does anybody wish to have the jury polled?

MR. ELLISOR: No, sir.

MR. HENDRIX: Your Honor, on behalf of Mr. Smith we'd like to have the jury polled.

THE COURT: Madam Clerk, if you're going to pole for one defendant let's go ahead and poll for both of them, just do them separately. And just take each juror individually but ask one set of questions for each defendant.

THE CLERK: As I call your name if you'll hold your hand up so I can recognize you, please. I will ask you a question as to these verdicts, are these your verdicts and are they still your verdicts. Please respond at the end of that question, please.

Penny Padgett, as to the verdicts on Mr. Collins, are these your verdicts and are they still your verdicts?

MS. PADGETT: Yes, they are.

THE CLERK: And as to the Defendant Smith, are these your verdicts and are they still your verdicts?

MS. PADGETT: Yes, they are.

THE CLERK: Thank you, ma'am.

Steven Benton, as to these verdicts on Mr. Collins, are these your verdicts and are they still your verdicts?

MR. BENTON: Yes, ma'am.

THE CLERK: As to the Defendant Smith, are these your verdicts and are they still your verdicts?

MR. BENTON: Yes, ma'am.

THE CLERK: Kimberly Riley, as to these verdicts on Defendant Collins, are these your verdicts and are they still your verdicts?

MS. RILEY: Yes.

THE CLERK: As to the Defendant Smith, are these your verdicts and are they still your verdicts?

MS. RILEY: Yes.

THE CLERK: James Griggers, as to these verdicts on Defendant Collins, are these your verdict and are they still your verdicts?

MR. GRIGGERS: Yes, they are.

THE CLERK: As to the Defendant Smith, are these your verdicts and are they still your verdicts?

MR. GRIGGERS: Yes, they are.

THE CLERK: Carolyn Henry, as to these verdicts on Defendant Collins, are these your verdicts and are they still your verdicts?

MS. HENRY: Yes.

THE CLERK: As to the Defendant Smith, are these your verdicts and are they still your verdicts?

MS. HENRY: Yes.

THE CLERK: Wesley Harwell, as to these verdicts on Defendant Collins, are these your verdicts and are they still your verdicts?

MR. HARWELL: Yes, they are.

THE CLERK: As to the verdicts on Defendant Smith, are these your verdicts and are they still your verdicts?

MR. HARWELL: Yes, they are.

THE CLERK: Robert Babcock, as to the verdicts on Defendant Collins, are these your verdicts and are they still your verdicts?

MR. BABCOCK: Yes, they are.

THE CLERK: As to the Defendant Smith, are these your verdicts and are they still your verdicts?

MR. BABCOCK: Yes, they are.

THE CLERK: Michael Florom, as to the verdicts on Defendant Collins, are these your verdicts and are they still your verdicts?

MR. FLOROM: Yes, ma'am.

THE CLERK: As to the verdicts on Defendant Smith, are these your verdicts and are they still your verdicts?

MR. FLOROM: Yes, ma'am.

THE CLERK: Charles Hall, as to the verdicts on Defendant Collins, are these your verdicts and are they still your verdicts?

MR. HALL: Yes, ma'am.

THE CLERK: As to the Defendant Smith, are these your verdicts and are they still your verdicts?

MR. HALL: Yes, ma'am.

THE CLERK: Judith Shealy, as to the verdicts on

Defendant Collins, are these your verdicts and are they still your verdicts?

MS. SHEALY: Yes, ma'am.

THE CLERK: As to the Defendant Smith, are these your verdicts and are they still your verdicts?

MS. SHEALY: Yes, ma'am.

THE CLERK: Amy Oswald, as to the Defendant Collins, are these your verdicts and are they still your verdicts?

MS. OSWALD: Yes, ma'am.

THE CLERK: As to the Defendant Smith, are these your verdicts and are they still your verdicts?

MS. OSWALD: Yes, ma'am.

THE CLERK: Robin Sharpe, as to the verdicts on Defendant Collins, are these your verdicts and are they still your verdicts?

MS. SHARPE: Yes, ma'am.

THE CLERK: As to the verdicts on Defendant Smith, are these your verdicts and are they still your verdicts?

MS. SHARPE: Yes.

THE CLERK: All jurors are polled, Your Honor.

THE COURT: All right. Thank you, ma'am.

Counsel, are there any other motions that need to be made before we release the jury?

MR. HENDRIX: None from us, Your Honor.

MR. ELLISOR: None from the defense, Your Honor.

THE COURT: Ladies and gentlemen, thank you for the patience that you showed us during the week. I know that when we all started we thought this would be a couple of days trial, and I'm sure all of you realize now this was not just a two day trial.

It took a good bit to do all of this; and the reason is that these cases, because the way we do things in our society and we look after people's rights, sometimes it just takes longer to do things. I think all of you have figured that out.

It's very necessary when you're seeking the truth to make sure you do it thoroughly and to make sure that every avenue is covered, and I think you saw during this week that every avenue was covered in this case to try to give you the information you needed to make the decision that you needed.

You know, sometimes I sort of feel for jurors because we take you from the comfort of your daily lives and your work and your homes and expose you to a world of violence that you're not used to.

I know that you see it on TV, but when you come into a jury box and you see the people sitting just three or four feet from you who are involved in this it takes on a whole different dimension. And different jurors respond in different ways, but I certainly appreciate the way all of you

have responded and the way that you have been involved working with us.

I told the jury at the start of the week, and I think all of you probably understand now, that it certainly would be easier if we didn't use juries, if we just let judges make the decisions, but I think you can see because of the nature of these cases that's why we need people like you to sit in the jury box and to make these decisions. They are tough decisions to make but it's fair to everybody involved to have a group such as yourself doing it, and you were a good jury to work with.

So we're going to obviously release you now. You're free to leave, if you wish. I will tell you that the sentencing will take place at this time. If any of you wish to stay for sentencing you are certainly welcome to do so. If you wish to leave you're welcome to do so.

And I will also tell you that very often at the end of cases such as this I will meet with any jurors afterwards who want to. If any of you wish to when all this is done if you want to stay and have any questions or anything or ask why we did certain things during the week I'll be happy to do that with you. And I know that there were some delays during the week. One time -- I think one morning we were trying to work out a plea on one of the defendants and weren't able to and it took almost the whole morning doing it. So those

things do happen.

Again, if you have any questions I'll be delighted to meet with you for a few minutes afterward. Once we're through just wait in the jury room and I will come right over there. And if I walk into an empty room then I'll know that nobody stayed. But we certainly appreciate what you've done.

And if you wish to stay for the sentencing you can either just stay in the jury box or sit back here in the middle section. And if you wish to leave, certainly you can. And whenever you leave you've got to be sure and leave the jury buttons. You can't keep those. But again, we thank you for your participation with us. Thank you.

And, Madam Forelady, we actually need you to stay, if you would. We've got some things for you to sign.

THE COURT: Defense, are you ready to come around for sentencing?

MR. ELLISOR: Yes, sir, we are, Your Honor.

MR. HENDRIX: Your Honor, when do we need to make motions? My problem is this, I'll be glad to note them and if you can give me some time, but I'm going to be away for awhile.

THE COURT: Do you wish to make them now or just note them and come back and make them at a later time? Either way is okay.

MR. HENDRIX: If you can note them and note we do

intend after that to file an appeal on behalf of Mr. Smith, and if we could come back later and do that I'd appreciate it.

THE COURT: Mr. Ellisor, did you want to do that?

MR. ELLISOR: I'll make mine right now, Your Honor.

THE COURT: Solicitor, did you have any objection to doing that?

MR. RIDDLE: No, if he just wants to make them in written form that's fine with me.

MR. HENDRIX: If Mr. Ellisor is going to go ahead and do it now we might as well get it done.

THE COURT: Okay. Actually, there's only one post-trial motion that you make in these cases anyway.

MR. ELLISOR: That's right. We got to wait for sentencing anyway.

THE COURT: All right. Let's first as to -- and we'll just take them in the order we have been. As to the defendant, Mr. Collins, Mr. Solicitor, you can take them both together if you wish, whichever.

MR. RIDDLE: I'll do them one at a time, Your Honor. That's fine.

THE COURT: Okay.

MR. RIDDLE: Your Honor, as to Mr. Collins, I believe he was convicted on all seven of the charges. Your Honor, back on February 19th, 2003 I served a notice on

Mr. Collins that the State would seek to have him sentenced to life without parole as a result of the strike which he obtained when he was convicted on the armed robbery charge from Tommy's Grocery Store.

Your Honor, that armed robbery occurred on July 28th of 1999 at Tommy's Grocery Store. Mr. Collins was convicted of that on February 3rd of 2003. As Mr. Collins testified, Your Honor, he was a fugitive for a long period of time. Those charges were not served on him until he was arrested on these charges.

Because of the prior conviction for the Tommy's Grocery armed robbery being a most serious offense, because the burglary, the attempted armed robbery, the A. B. I. K., and the murder are all most serious offenses, the notice I believe was properly served. It was served on the record to Mr. Collins and his attorney. We would ask that the Court impose the sentence as required by the statute.

I would note for the record, Your Honor, that prior to any of this there was a plea offer to Mr. Collins that had he gone ahead and entered the guilty plea on these charges we would pull the life notice off the table and let the Court sentence him in its discretion as opposed to him being sentenced as a matter of law. He declined that, and that is the posture that we are in today.

THE COURT: Okay.

MR. RIDDLE: The victims do not wish to speak at this time, Your Honor.

THE COURT: They understand they can speak if they want to, though?

MR. RIDDLE: Yes, sir, they do.

THE COURT: Mr. Ellisor?

MR. ELLISOR: Your Honor, at this time we will not make any statements in mitigation on behalf of my client for the sentence. We will accept to a sentence being imposed -- and object to a sentence being imposed of him under Section 17-25-45, which is the life without parole statute on the unconstitutionality of that statute.

It violates the equal protection clause, the United States Constitution because it allows the defendant similarly situated to be treated arbitrarily by the State of South Carolina by the executive branch of the government by giving them the right at the timing of the trials and when they bring trials that they can treat defendants differently at their sole discretion. So it violates equal protection clause and the separation of powers clause of the United States and the South Carolina Constitutions.

We ask that since this crime that he was tried for today was committed prior to the sentence that he received on the prior most serious charge, in other words, his sentence was this year, this crime was in 2001, therefore, it is --

let me see how I should word this, I'm tired.

It treats him -- sentences him for a crime that he was never put on notice of at the time he committed the crime would subject him to life imprisonment because he had not been convicted of a crime when he committed this crime today. He had not been convicted of a most serious crime when he committed this one. Therefore, there is no notice to a person at that time that they may receive life imprisonment. Based upon that and the violation of the equal protection clause I ask the Court not to sentence him under Section 17-25-45, and sentence him on just the charges itself.

MR. RIDDLE: Your Honor?

THE COURT: Yes, sir. I was going to ask you if you wanted to respond.

MR. RIDDLE: Yes, sir, I do. First of all, the statute that Mr. Ellisor is referring to has been the law since way before either of these crimes were committed. Mr. Collins is presumed to be on notice of that.

Additionally, Your Honor, I would request that you make an affirmative finding as it relates to Mr. Collins that life without parole is an appropriate sentence for the murder, for the burglary in this particular case, notwithstanding the application of Section 17-25-45 as Your Honor knows. Life is an available sentence to the Court under the criminal statutes for burglary and for murder.

And in Mr. Collins' case, Mr. Collins actions on this night from the Tommy's Grocery Store incident, which Your Honor has seen the videotape of that armed robbery, they certainly justify him being sentenced to life without parole, notwithstanding 17-25-45, and I would ask that you make an affirmative finding of that.

THE COURT: Anything else, Mr. Ellisor?

MR. ELLISOR: Nothing, Your Honor.

THE COURT: Mr. Collins, is there anything you wanted to say?

DEFENDANT COLLINS: No, sir.

THE COURT: Counsel, based on the record of the case, the testimony in the case presented and the full record as I've had it reviewed before me I do find that the sentence of life without parole is appropriate as a legal matter and as a factual matter in this particular case.

On each of the sentences I'll order the defendant committed on the attempted armed robbery charge to the State Department of Corrections for a sentence of 20 years; on assault and battery with intent to kill for 20 years; on murder for the term of his natural life without possibility of parole; on burglary for life without possibility of parole; on possession of a weapon during the commission of a violent crime for five years; ill treatment of an animal for five years; and on conspiracy for five years, and these

sentences since they were part of the same action, series of actions, to run concurrently with each other.

MR. ELLISOR: Your Honor, in light of your sentence of Mr. Collins I now would move for a new trial based upon the grounds of your evidentiary ruling that you made during the trial, your rulings failing to sever the defendants trials and your rulings of refusing to grant a mistrial during the trial. Based upon those errors of law I would request a new trial on behalf of the defendant.

THE COURT: I note the motions, Mr. Ellisor, and would deny the motions.

MR. ELLISOR: Thank you, Your Honor.

THE COURT: Thank you, sir.

MR. RIDDLE: Your Honor, may we approach for just one minute.

THE COURT: Yes, sir.

(WHEREUPON, a bench conference was had.)

THE COURT: Solicitor, your point is well taken, is correct. For consistency on the sentences I will amend the attempted armed robbery sentence and also provide that the defendant serve a term of his natural life without possibility of parole, and on the assault and battery with intent to kill also for the term of his natural life without possibility of parole. And I think that will make all the sentences consistent.

MR. RIDDLE: And they are all still concurrent?

THE COURT: Yes, sir, and they still will run concurrently with each other. Thank you, sir. All right.

Do you have anything you wish to discuss on Mr. Smith's case?

MR. RIDDLE: Yes, sir, I do.

THE COURT: Go ahead.

MR. RIDDLE: Your Honor, Mr. Smith was a co-defendant of Mr. Collins on the Tommy's Grocery Store armed robbery. He was convicted on that armed robbery earlier this year as well and sentenced by Your Honor on 4-16-03, roughly two weeks ago. Your Honor, at that time you sentenced Mr. Smith to 20 years in prison for the Tommy's Grocery Store armed robbery.

Your Honor, likewise on February 19th, 2003, we served a notice on Mr. Smith that should he be convicted on these charges he would be subject to the two strikes law in South Carolina subjecting him to a sentence of life without parole if he was convicted on any of the most serious offenses for which he was on trial.

As Your Honor eluded to earlier, the morning that we did not get very much done in front of the jury was when we were trying to negotiate a plea with Mr. Smith regarding these charges.

We had offered Mr. Smith a plea to these charges

whereby I would pull the notice off the table seeking life without parole and agree to allow him to plead guilty and enter -- and be sentenced to 25 years, which would have given him an affective sentence on these charges of five years. Mr. Smith declined to enter a guilty plea at that time, and we proceeded forward with the trial. And now we are in a posture where he is in the same boat legally as Mr. Collins.

Your Honor, frankly, I watched after these verdicts were delivered Mr. Smith and Mr. Collins yucking it up and laughing, and I've had a change of heart about Mr. Smith. At one point, Your Honor, I wanted to do something for Mr. Smith in regards to these charges because I didn't think he was as culpable as Mr. Collins.

I don't believe he is the trigger man in this in terms of the individual that killed Sidney Muller. I don't believe he was the trigger man that paralyzed John Hayward, but I can't help but notice his demeanor and his attitude after the verdicts are read and he is very well aware of what these verdicts mean.

And anybody that can laugh when they are facing life in prison as a matter of law I don't want on the streets with me. And as a result of all of that, Your Honor, I would request that you make the same affirmative factual finding as it regards Terrence Smith that I requested that Your Honor make on Ivan Collins.

They have been criminal conspirators since at least 1999. They committed that armed robbery in Cayce together. They committed these offenses together. They were on the run together down in Georgia, and they are laughing about this whole matter even as we are awaiting sentencing. And these individuals do not need to be on the streets with normal everyday law-abiding folk. That's all I've got to the say.

THE COURT: Again, I'll give one last opportunity if the victims have anything they want to say. Do they want to say anything?

MR. RIDDLE: No, sir, Your Honor.

THE COURT: All right, thank you.

Yes, sir, Mr. Hendrix.

MR. HENDRIX: Your Honor, since the law requires the sentence that it requires I don't have anything in mitigation, but I've talked to my client and he would like to make a statement, Your Honor.

THE COURT: All right. Mr. Smith.

DEFENDANT SMITH: Mr. Dayton, as you know, my nickname is Smiley and I do smile a lot. That's how I got the nickname. But the whole time I didn't take the plea of 25 years is because I informed Mr. Dayton and those that I wanted to talk to the family and tell them the truth about the situation. I was willing to take the five years extra because I already have a 25 sentence. I didn't even want to

try to go through this, as well as my mother and father.

You know, I feel for Mr. Muller every day, and I hurt inside also, you know. And Mr. Hayward, I wish I could be in the wheelchair. Just like I wish I could take Mr. Sidney's place in the grave. But I did not conspire with Wykiesha or Ivan, or I did not shoot none of your family members. I was willing to take that and all the charges with it I just wanted to tell you all the truth of the situation.

I did commit some wrong acts in my life. I have made some wrong mistakes of who I hung with. But I just wanted to apologize to you all and hope that you can forgive me even though a life was taken. And I know I'm asking for a lot, but I hurt every day.

And I have been in the protective custody wing in Lexington County Jail in a room by myself for 18 months, and isn't a night that I don't cry or pray for Ms. Christine Muller, if I'm correct. I don't know who she is or how she looks, but I really hurt. I really apologize for what happened to your son. And if I could take his place, I really would. I really would. And I apologize to Mr. Hayward, even though I don't see him today. And if I could take his pain away from him I would also do that.

And if I was smiling with Mr. Collins after the verdict, I do smile. If I was smiling just now I was smiling not to cry. You know, I'm going to be away from my family

also, and don't think that this time is going to make me fell any better. As I just talked to Mr. Lett, I just talked to him in the police car, this -- I've been hurt also, and I just want to apologize.

And that's the only reason that I didn't take the plea because I wanted a chance to tell you exactly this. And I will suffer the rest of my life, and I hope that brings some comfort to your heart. And I apologize, and I hope you all will find in your heart to forgive me one day. That's it, Your Honor.

THE COURT: Anything else, Mr. Hendrix?

MR. HENDRIX: Nothing concerning that, Your Honor.

THE COURT: On the charge of conspiracy I'll order the defendant committed to Department of Corrections for five years; possession of a weapon during a violent crime for five years; on the charge of burglary in the first degree for the term of his natural life without possibility of parole; attempted armed robbery for the term of his natural life without possibility of parole; assault and battery with intent to kill, life without possibility of parole; and on the charge of murder for the term of his natural life without the possibility of parole, and these sentences will all run concurrently with each other.

MR. HENDRIX: Your Honor, at this time then on behalf of Mr. Smith I would make a motion for a new trial.

And if I can kind of do this conglomerately.

THE COURT: Certainly.

MR. HENDRIX: On all the grounds we've previously raised for a directed verdict at the directed verdict stage, at the end of the State's case and at the end of all the evidence, we would renew those and ask you to grant a new trial on the basis that we think some of those grounds should have been granted.

Also, we would ask for a new trial on the grounds that considering all the evidentiary rulings that Your Honor made against our objections and over our objections that we would ask for a new trial on the grounds that we believe some of those should have been granted and would have made a difference in the outcome of this trial.

Further, Your Honor, we would make a new trial on the grounds that our request for a severance of the trials of these two young men we believe would have made a difference in the outcome of the trial as it concerns Mr. Terrence Smith. And in generally, all the requests that we made of Your Honor which were denied we would renew those and ask you to grant a new trial on the grounds that we believe some, one or more of those should have been granted and would have made a difference in the outcome of the trial for Mr. Smith.

THE COURT: Thank you, sir. Let me note also, as far as the finding that the solicitor requested, I do make

the finding that as a matter of law in fact that the sentence of life without parole is appropriate in this circumstance.

I observed Mr. Smith's conduct and was not concerned so much about that over there. People react in different ways to sentences, and I've seen just the full gamut of reactions. But I do so based on the actions that were attributed to him on the night of this particular incident as was testified to on the record and based on the full record of the case. But I do make that finding.

As far as the motion for a new trial, I find as far as you and Mr. Ellisor are both concerned, Mr. Hendrix, the motions are made based on all rulings that were made during the trial.

MR. HENDRIX: All rulings, yes, sir.

THE COURT: I incorporate all the rulings into the trial, into the motions that you and Mr. Ellisor have both made and would deny your motion, also.

MR. HENDRIX: Thank you.

THE COURT: Again, Counsel, both of you I thought did an excellent job and your clients had excellent representation, cannot fault that. Thank you very much.

If any jurors want to stay for a second I'll be happy to stay and talk with you.

Madam Forelady, you've got some signing to do.

[PAUSE.]

THE COURT: Go ahead, Mr. Riddle.

MR. RIDDLE: Yes. I'm making a motion to have State's Exhibit Number 39 and 39-A returned to the owner, Charles Penny, who was the homeowner in this case. The gun was not used during the commission of the crime. He voluntarily gave it to the police. We ended up needing to put it in evidence for the trial of the case, and I would move to get that gun back so that I can return it to him.

THE COURT: Okay. The motion is granted. I note the defense lawyers are not present, but we'll notify them next week of what we've done. What you might do is to take a photograph of it, put that in the record in its place.

MR. RIDDLE: I will get a Polaroid picture and substitute that, and we will put that in its place.

THE COURT: Good. Thank you, sir.

MR. RIDDLE: And I'll go ahead and take that.

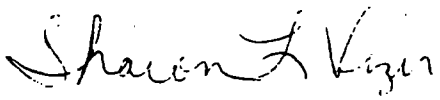
(WHEREUPON, the trial was concluded.)

C E R T I F I C A T E

I, Sharon L. Vizer, Official Court Reporter for the 11th 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 the evidence introduced in the trial of the captioned case in Circuit Court on the 1st and 2nd day of May 2003

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

September 5, 2003



SHARON L. VIZER

CIRCUIT COURT REPORTER

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Honorable Marc H. Westbrook, Circuit Judge

Case No.: 03-GS-432-130

State of South Carolina ..... Respondent,

v.

Terrance V. Smith ..... Appellant.

FINAL BRIEF OF APPELLANT

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Attorney for Appellant

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ARGUMENT

I. THE TRIAL COURT ERRED IN NOT SEVERING THE TRIAL AND TRYING THE TWO DEFENDANTS SEPARATELY.

As noted in his Brief of Appellant by Terrance V. Smith, the appellant in this appeal and a defendant in the court below ("Mr. Smith"), the rule in this State is that"[a] motion for severance is addressed to the sound discretion of the trial court[.]" *State v. Castiniera*, 341 S.C. 619, 535 S.E.2d 449, 452 (Ct. App. 2000). *See also State v. Harris*, 342 S.C. 191, 535 S.E.2d 652, 656 (Ct. App. 2000)(same). The exercise of that discretion "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, 71 S.E.2d 10, 15 (1952). *See also State v. Crisp*, 357 S.C. ___, 608 S.E.2d 429, 431 (2005).

Notwithstanding these principles, the motion (Transcript of Record in Case Nos. 2002-GS-32-1300, 1301, 1306; 2003-GS-32-505,506, 887, 888; 2002-GS-32-1405, 1406, 1407; 2003-GS-32-43, 745, 746, 1109 for proceedings held in the Court of General Sessions, 11th Judicial Circuit, State of South Carolina, County of Lexington on April 28 to May 2, 2003 in the matter of State v. Ivan Douglas Collins and Terrance V. Smith ["Tr."] page ["p."] 722, line ["l."] 7-16; R. 733), was denied (Tr. p. 722, l. 20-24; R. 733).

In assessing the trial court's exercise of that discretion, it is important to emphasize that "'[a]n abuse of discretion occurs when the trial court's ruling is based upon an error of law....'" *State v. McDonald*, 343 S.C. 319, 540 S.E.2d 464, 467 (2000), *quoting Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528, 539 (2000). By the same token, "[t]he failure to exercise discretion, however, is itself an abuse of discretion." *State v. Mansfield*, 343 S.C.

committing the crime'" (Brief of Respondent at 15, quoting *State v. Dennis, supra*, 523 S.E.2d at 176).

What the State fails to point out is that the court in *Dennis* took a much more cautious view of the matter than the respondent would allow. *See id.* The essential problem is that the State misunderstands the nature of Mr. Smith's severance argument. Citing the decisions in *State v. Avery*, 333 S.C. 284,509 S.E.2d 478 (1998); and *State v. Smith*, 359 S.C. 481, 597 S.E.2d 888, 893 (2004), the State argues that Mr. Smith attempts to avoid the rule of *Dennis* "by claiming antagonistic defenses" (Brief of Respondent at 15).

In fact, however, Mr. Smith is not arguing a defense that is antagonistic to that of his fellow defendant Ivan Collins ("Mr. Collins").[1] This is not a case in other words, in which as between Messrs. Smith and Collins, "the codefendants may present evidence accusing each other of the crime." *State v. Smith, supra*, 597 S.E.2d at 893. Rather, Mr. Smith argues that he did not commit the crime irrespective of whether Mr. Collins might have done so.

In fact, the State unwittingly admits this theory when it states that "[a]t trial, [Mr. Collins] testified and admitted shooting in the house, but blamed the victims for starting it with him and Appellant while they were merely waiting outside the car during [Ms. Williams's] visit" (Brief of Respondent at 4).[2] The thrust of Mr. Collins testimony was that *both* he and Mr. Smith were guilty of the crime while Mr. Smith's argument was limited to a defense that he did not commit the crime irrespective of whether anyone else had done so.

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1 One notes that the State disrespectfully refers to Mr. Collins as "Ivan"throughout its Brief of Respondent.

2 As with Mr. Collins, the State disrespectfully refers to Ms. Williams as "Wykeisha" throughout its Brief of Respondent.

It is telling that, as the State acknowledges, Mr. Collins did not join in the motion (Brief of Respondent at 12). This offers additional support for the notion that a unitary trial was advantageous for Mr. Collins alone. Indeed, Mr. Collins theory of the case seemed premised on the notion that the more participants to which he could point, the more likely his defense would be to work. It was for this reason that the defenses were antagonistic so as to require severed trials. That is, it was not that each defendant pointed to each other as the sole perpetrator. It was that the cross-examination of Ms. Williams required for Mr. Collins's defense evidence that Mr. Smith was involved so as to minimize Mr. Collins's part. This means that the interests of the two defendants were hopelessly at odds; to the extent one defendant's defense succeeded, the other defendant's defense was harmed. For that reason a severance was required to protect Mr. Smith's rights.

The State acknowledges the problem but attempts to evade it by stating that "[e]ven if [Mr. Collins's] cross-examination of [Ms. Williams] had undermined a point made by Appellant during his turn to examine [Ms. Williams], this would not be enough to warrant a new trial, *as Appellant still had a fair shot at re-cross examination in which to explore the truth*" (Brief of Respondent at 15)(emphasis suppled). This pallid characterization ('A fair shot"), underscores rather than dismisses the problem, The truth is that Mr. Smith had little or no chance under all the facts and circumstances to "explore the truth" (Brief of Respondent at 15).

The State next argues that Mr. Collins's cross-examination of Ms. Williams failed to "harm" the points Mr. Smith had made in his cross-examination (Brief of Respondent at 16-17). This obscures the point Mr. Smith had been trying to make. Mr. Smith was trying to

an identification" (Brief of Respondent at 23). This argument, with all due respect, is fatuous. First, the access to the newspaper was itself suggestive, whether or not it was provided by the State. The point is the reliability of the identification more than it is the identity of the party who tainted the process.

Second, the issue is not whether the presence of medicine "aid[ed] an identification" (Brief of Respondent at 23)–Mr. Heyward made an identification, afer all–but whether Mr. Heyward's sedated state *prevented* an accurate identification. Mr. Smith argues that the Mr. Heyward's sedated state had precisely that effect, and that the State's arguments on the point evade rather than address that issue.

In fact, the State acknowledges that "[u]ndoubtedly, some of the reliability factors do not favor [Mr.] Heyward, as the record has no information that [Mr.] Heyward gave a description at the scene while he lay wounded with which to compare to Appellant" (Brief of Respondent at 24). In addition, as the State admits, "approximately twenty days passed from the time of the incident until the lineup was given" (Brief of Respondent at 24). In fact, those elements, when combined with the mind-altered state in which Mr. Heyward found himself when he made both identifications, i.e., at the scene and in the hospital, combine to entail that the trial court abused its discretion when it admitted the identification.

When one examines the five *Biggers* elements as set out in that case, 409 U.S. at 199, 93 S. Ct. 375, one sees that exactly *none* of them were satisfied. Indeed, it is significant to note that in *State v. Moore, supra,* 540 S.E.2d at 449, where the court found that "[u]nder the totality of the circumstances here, we find a substantial likelihood of irreparable misidentification such that the identifications are unreliable as a matter of law," the court

also found that one of the five elements, "the amount of time between the crime and the confrontation, *id.*, had been satisfied. Here, as we have seen, none of them have been satisfied. A fortiori, it could hardly be clearer that a *Moore*-type reversal and remand for a new trial is mandated. *Compare State v. Brown*, 356 S.C. 496, 589 S.E.2d 781, 786 (Ct. App. 2003)(showup took place "'just the briefest time, maybe a minute or a minute and a half'") *with State v. Moore, supra,* 540 S.E.2d at 449 (a ninety-minute gap). Here, the nearly three-week gap in this case would flunk both the *Moore and* the *Brown* tests.

One might expect the State to assume that because other eyewitnesses identified Mr. Smith, the error in allowing Mr. Heyward's identification–assuming arguendo only it was an error–was a harmless error that cannot support a reversal of the conviction. *See, e.g., State v. Primus*, 341 S.C. 592, 535 S.E.2d 152, 160-61 (Ct. App. 2000). Instead, the State used the fact of those other witnesses in an attempt to demonstrate that the identification did not violate Mr. Smith's due process rights (Respondent's Brief at 25).

This attempted use of the additional evidence is unavailing because the other witnesses identifying Mr. Smith were not more convincing. Mr. Penny's view lasted but a few seconds, was clouded by alcohol and drug usage (Tr. p. 327, l. 22-24; R. 335), and involved seeing two men whom he had never seen before (Tr. p. 340, l. 8-11; R. 349), nor ever again after that one brief look. (Tr. p. 337, l. 19-21; R. 346). If that was not enough, Mr. Penny could even purport to identify one of the two suspects (Tr. p. 367, l. 7-10; R. 376). In addition, witness Ronnie Rogers could not identify either Mr. Collins or Mr. Smith (Tr. p. 639, l. 11 to p. 640, l. 1; R. 650 - 651).

Ms. Williams's identification of Mr. Smith is highly suspect as well because she knew him only by nickname (Tr. p. 454, l. 17-18; R. 463), but not by name (Tr. p. 530, l. 8-13; R. 541). Of course, Ms. Williams was not present in the apartment during the shootings. Finally, Mr. Hook was unable to identify either of the defendants from the photo lineup he was shown. This was so, he explained, "[b]ecause I didn't look in their face all the way" (Tr. p. 264, l. 13; R. 273). Cumulatively, therefore, the identifications of Mr. Smith presented at trial fall far short of being probative.

Finally, witness Franklin Hook was unable to identify either of the defendants "[b]ecause I didn't look in their face all the way" (Tr. p. 264, l. 13; R. 273). Of course, Mr. Franklin's consumption of vodka and blunts would have made his identification of little value in any event (Tr. p.270, l.11-12; R. 279). Cumulatively, therefore, the identifications of Mr. Smith presented at trial fall far short of being probative. This means that, for what it was worth, the State's due process argument fails. A fortiori, the identification made by Mr. Heyward should have been suppressed. *Cf. State v. Frazier*, 357 S.C. 161, 592 S.E.2d 621, 623-24 (2004).

III. THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL OR, IN THE ALTERNATIVE, SUPPRESSING WITNESS HEYWARD'S TESTIMONY ON ACCOUNT OF HIS CHANGED TESTIMONY ON THE SECOND DAY OF THE TRIAL.

Mr. Smith argued in his Brief of Appellant that he was entitled to a mistrial on account of Mr. Heyward's changed testimony. Alternatively, he argued that he was entitled to have the testimony stricken on essentially the same grounds.

There can be no question but that Mr. Smith has satisfied that test. Mr. Heyward's initial testimony was changed in midstream to the great prejudice of Mr. Smith. That is,

although Mr. Heyward has testified that some friend had told him that Mr. Smith was one of the intruders before he was shown the lineup (Tr. p. 130, l. 1-13; R. 139), and notwithstanding his testimony that he had seen the newspaper pictures before he was shown the lineup (Tr. p. 130, l. 18-20; R. 139 ; Tr. p. 149, l. 18-19; R. 158), Mr. Heyward changed and recanted his testimony on cross-examination (Tr. p. 392, l. 2 to p. 395, l. 17 R. 401 - 404).

The trial court did attempt to deal with the problem by instructing the jury on the point (Tr. p. 402, l. 20 to p. 404, l. 17; R. 411 - 413). This case, however, is ruled by the principle that "[a]n instruction ... is deemed to cure any error," *State v. Dempsey*, 340 S.C. 565, 532 S.E.2d 306, 309 (Ct. App. 2000), except where "an incident is so grievous that its prejudicial effect can be removed in no other way." *Id.*, *quoting State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 68, 73 (1998). This is just such a case.

The view taken by the Court (and perforce the State), is that the troublesome nature of the testimony went to its weight rather than to its admissibility so that "the issues were for the jury" (Brief of Respondent at 29, citing Tr. pp. 445-48). The State offered the Court a nationwide survey of the law on this subject (Brief at Respondent at 30-31), in support of this proposition.

Mr. Smith has no quarrel with these general principles. They are, however, of dubious relevance in this case. Certainly, "[e]ven a convicted perjurer may testify as long as he or she meets the minimum standard." *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857, 861 (1998). Those standards, as the court enumerated, are the following:

> A proposed witness understands the duty to tell the truth when he states that he knows that it is right to tell the truth and wrong to lie, that he will tell the

> truth if permitted to testify, and that he fears punishment if he does lie, even if that fear is motivated solely by the perjury statute. *State v. Green*, 267 S.C. 599, 606, 230 S.E.2d 618, 621 (1976). As succinctly explained by the Pennsylvania Supreme Court, in order to be competent to testify, a witness must have the ability (1) to perceive the event with a substantial degree of accuracy, (2) remember it, (3) communicate about it intelligibly, and (4) be mindful of the duty to tell the truth under oath. *Pennsylvania v. Goldblum*, 498 Pa. 455, 447 A.2d 234, 239 (Pa. 1982).

Id.

The problem for the State in light of these standards is that although Mr. Heyward might meet the theoretical standards allowing an accused liar's testimony to be matters for the jury to weigh, his testimony to be allowable must pass this four-part test before it ever gets to the jury in the first place. This is, as we will see, a test Mr. Heyward's testimony cannot meet. First, Mr. Heyward's alcohol- and drug-besotted state during the alleged crime plus his medicated state in the hospital entails that his testimony flunks factor (1) of the *Needs* test. Second, these very same conditions preclude compliance with factor (2) of that test.

Third, Mr. Heyward's confused and contradictory testimony fails to mesh with factor (3) of the *Needs* test. As even the State acknowledges, the trial court "agreed that at one point [Mr.] Heyward's testimony was garbled" (Brief of Respondent at 32). At the same time, the court, according to the State at least, found that these testimonial defects were "apparently due to his severe physical injuries and 'fatigue' from a lengthy and withering cross-examination from Appellant" (Brief of Respondent at 32). Mr. Smith would point out that the cause of this garbled testimony is much less important than the fact of its existence. That is, whether the deficiencies in the testimony were the result of physical infirmities or "'fatigue'" may

be important in some ultimate sense but for purposes of the issue at hand, either explanation disqualifies the testimony from being presented to the jury.

Fourth, the sudden switch in testimony indicates that Mr. Heyward was far from "mindful of the duty to tell the truth under oath." *Id.* Notwithstanding the State's attempts to explain it away (Brief of Respondent at 31-32), the fact remains the truth was not told. Whether it was caused by mendacity or simple "'fatigue,'" the fact remains that this factor (4) of the *Deeds* test is unsatisfied.

Unlike the situation in *Needs*, this was more than a case in which the witness simply changed his testimony. *Id.* at 861-62. That is, if this were a case in which a change in testimony was the *only* flaw in the proffered testimony, then the four-part *Needs* test might conceivably be met. This is, however, a case in which none of those factors were satisfied. Certainly, the rule when the test is satisfied is that "[a]fter the trial court properly has determined a witness is competent, the resolution of the credibility of the witness is within the province of the jury." *Id.* at 862. Where, by contract, the trial judge abused his discretion in making that determination, the testimony should never have gone to the jury in the first place. For this additional reason, the judgment of conviction entered against Mr. Smith in the court below cannot stand.

IV. THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL ON ACCOUNT OF WITNESS HEYWARD'S DISPLAY OF WRITHING AND THE LIKE IN AN APPARENT ATTEMPT TO GAIN THE JURY'S SYMPATHY.

As noted above, the decision to grant or deny a motion for a mistrial is a matter entrusted to the trial court's discretion, *State v. Dempsey*, *supra*, 532 S.E.2d at 309, which

the defendant must show was abused. In addition, to overturn a trial court decision not to grant a mistrial, "the defendant must show error and resulting prejudice." *State v. Harris*, 340 S.C. 59, 530 S.E.2d 626, 628 (2000). Here, those requirements have been satisfied and so the conviction below must be disapproved.

As Mr. Smith noted in his Brief of Appellant, episodes of this sort have often led as a matter of general law to mistrials or their functional equivalent. *See, e.g., Collum v. State*, 21 Ala.App. 220, 107 So. 35 (1926); *Collier v. State*, 115 Ga. 803, 42 S. E. 226 (1902); *Wamsley v. State*, 171 Neb.197, 106 N.W.2d 22 (1960). *See generally*, Annot., Emotional Manifestations by Victim or Family of Victim During Criminal Trial as Ground for Reversal, New Trial, or Mistrial, 31 A.L.R.4th 229 (1984 & supp. 2003). The same remedy should have been applied here. Because it was not, the conviction below should be reversed.

The State seeks to rebut Mr. Smith's argument (Brief of Respondent at 33-37); however, it does so by means of clearly inapposite authority. For example, respondent seeks to counter Mr. Smith's authority with decisions like *State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999); *State v. Anderson*, 322 S.C. 89, 470 S.E.2d 103 (1996); and *State v. Jones*, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996)(Brief or Respondent at 35-36). The problem with these cases is that they all involved outbursts by spectators instead of as here alleged victims of the purported criminal acts for which the defendant was standing trial. An outburst by the alleged victim himself is clearly more of an illicit signal to the jury than one from the spectator section.

Mr. Heyward's outburst was not simply crying or some emotion tangential to the incident in issue. Rather, his outburst consisted of a supposed demonstration of the very

injuries he had allegedly suffered at the defendants' hands. This makes it more likely that the jury will give credence to the charges against the defendants. It does so, however, in an illicit manner which is not subject to any sort of reasonable cross-examination or rebuttal.

The State seeks to defend the outburst on the ground that it was real instead of feigned (Brief of Respondent at 36-37). This is not the point, however. Whether real or not, the jury was exposed to an emotional form of testimony that was highly prejudicial to Mr. Smith's defense. Moreover, the State's assertion "that the episode at trial was far less egregious than the one at the pretrial hearing" (Brief of Respondent at 37), is supremely beside the point. It is the fact that the outburst occurred before the jury that was the point. Plainly, Mr. Heyward's outburst was so prejudicial that a mistrial should have been declared.

V. THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL ON ACCOUNT OF WITNESS HEYWARD'S GARBLED TESTIMONY.

As noted in the discussions above, the decision to grant or deny a motion for a mistrial is a matter entrusted to the trial court's discretion, *State v. Dempsey, supra,* 532 S.E.2d at 309, which the defendant must show was abused. In addition, we have seen that to overturn a trial court decision not to grant a mistrial, "the defendant must show error and resulting prejudice." *State v. Harris, supra,* 530 S.E.2d at 628. Here, those requirements have been satisfied in regard to his issue as well, and so the conviction below must fail.

This argument incorporates by reference and implication a number of the points that were made above. When all the facts and circumstances of Mr. Heyward's appearance on the witness stand are considered, it is plain that his testimony was so garbled and confusing that only a mistrial could have remedied the situation.

The State does not appear to deny that Mr. Heyward's testimony was garbled. Rather, it attempts to minimize its nature. First, it describes the condition in its argument heading as "somewhat 'garbled'" (Brief of Respondent at 37), which appears to be a backhanded acknowledgement that the testimony was deficient.

Second, the State argues that a review of the record "removes any notion that he lacked the basic capacity to communicate" (Brief of Respondent at 37). In making this statement, respondent is engaging in the hoary debtor's trick of inflating his opponent's argument beyond its intended terms and then knocking down that straw man he has just created for that purpose. Mr. Smith does not argue that Mr. Heyward "lacked the basic capacity to commujnicate." What he *does* argue is that Mr. Heyward's "answers were contradictory, his demeanor on the stand showed that he approached a level of what I could consider incompetent to testify about the facts ... that he didn't accurately remember the situation, changed his testimony" (Tr. p. 446, l. 6-8, 11-12; R. 455). Mr. Heyward may not have lacked the basic capacity to communicate;" however, the information he *did* attempt to communicate was so incredibly garbled (Tr. p. 445, l. 4-5; R. 454), that a mistrial was indicated on this grounds as well as on account of his outburst and allegedly perjured testimony while on the stand. For that reason, the State's out-of-state authority presented in its Brief of Respondent at 38 is essentially off the point.

Here, the trial court abused its discretion because a mistrial or directed verdict was mandated for many reasons; for purposes of the present argument, however, it is also mandated on account of the "incredibly garbled" (Tr. p. 445, l. 4-5; R. 454), nature of Mr. Heyward's testimony.

VI. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON SELF-DEFENSE IN LIGHT OF THE FACTS THAT CO-DEFENDANT COLLINS HAD TESTIFIED THAT (A) MR. SMITH HAD BEEN PHYSICALLY ATTACKED; AND THAT (B) HE HIMSELF HAD BEEN FIRED UPON WITHOUT PROVOCATION.

No one, least of all Mr. Smith, denies that he did not seek an instruction on self-defense. Yet there was extensive testimony that could have supported such a defense in Mr. Collins's testimony (Tr. p. 746, l. 12 to p. 765, l. 18; R. 756). The factual basis of this defense on grounds that supplemented Mr. Collins's testimony was discussed in Mr. Smith's Brief of Appellant. The testimony and ancillary factual matters add up to a colorable plea of self-defense. *See, e.g., State v. Day*, 341 S.C. 410, 535 S.E.2d 431, 434 (2000), *State v. Hill*, 315 S.C. 260, 433 S.E.2d 848, 849 (1993).

The State naturally objects on the ground that self-defense is waived if not argued trial (Brief of Respondent at 39-40). In that regard, Mr. Smith acknowledges his failure to raise the point at trial. He did argue in his Brief of Appellant, however, that the failure of the trial court to charge the jury with self-defense notwithstanding this failure by the parties to raise the point is an "'omission ... as to a matter which is basic or fundamental.'" *State v. Lyles*, 210 S.C. 87, 41 S.E.2d 625, 627 (1947), *quoting State v. McGee*, 185 S.C. 184, 193 S. E. 303, 307 (1937). *See also State v. Biggs*, 192 S.C. 49, 5 S.E.2d 563, 565 (1939). That is, given the testimony of Mr. Collins and the ancillary facts supporting his theory, nothing could have been more "basic or fundamental" than a self-defense charge. This entails that (a) the trial court should have so charged the jury even though an instruction on the point was not requested; and (b) the failure of the trial court to do so is reversible error.

One notes in reading the Brief of Respondent on this point that the State does not respond to this assertion. Instead, the State argues that the matter should be explored on post-conviction relief ("PCR") proceedings. Even if it is true, however, that the failure of counsel to request an instruction on self-defense could be the subject of a PCR proceeding, the State fails to show how, in light of *State v. Lyles*, *supra*, and like cases, it is inevitable that the question could not be considered by *this* Court.

Certainly, judicial economy favors such a consideration in the present proceeding. The Court is considering as a whole the alleged flaws that took place in the trial of this case. Because these grounds are so interrelated, it makes sense to consider them as a whole, rather than to reserve an important part of that defense to a subsequent PCR hearing.

Again, Mr. Smith acknowledges his failure to raise self-defense at trial. Nonetheless, under the facts and circumstances of this case, the absence of any consideration of self-defense at trial constitutes an "'omission ... as to a matter which is [so] basic or fundamental.'" *State v. Lyles*, *supra*, 41 S.E.2d at 627, that the usual rules precluding such a consideration should be overridden. Certainly, for all of the State's emphasis on the PCR avenue of relief, the respondent has singularly failed to rebut Mr. Smith's argument in terms. For that reason, the judgment of the court below should be reversed.

VII. THE TRIAL COURT ERRED IN REFUSING TO GRANT MR. SMITH'S MOTION FOR A DIRECTED VERDICT AND FOR A NEW TRIAL.

The rule governing the grant of directed verdicts is well settled. *See, e.g., State v. James*, ___ S.C. ___, 608 S.E.2d 455, 457 (Ct. App. 2004). The assessment of the denial of a motion for a new trial involves much the same consideration; in addition, "[t]he denial of

a motion for a new trial will be disturbed on appeal only upon a showing of an abuse of discretion." *State v. Guillebeaux*, 362 S.C. 270, 607 S.E.2d 99, 101 (Ct. App. 2004). *See also State v. Smith*, 316 S.C. 53, 447 S.E.2d 175, 176 (1993).

In its discussion of the grounds for a directed verdict and/or new trial, Mr. Smith was plainly incorporating the grounds raised in earlier discussion points. In other words, the appellant was incorporating earlier arguments by reference. Yet the State argues that these points "are not properly presented on appeal, as they are not specifically argued" (Brief of Respondent at 40). In fact, these points are all "properly presented" and "specifically argued" earlier in the Brief of Appellant. For sake of economy and the avoidance of repetition, Mr. Smith chose to incorporate rather than repeat those arguments. Indeed, he could not have been clearer in announcing the procedure he was using. There is nothing in that procedure, Mr. Smith contends, that amounts to the waiver of any issue on appeal.

One notes that when it comes to its argument against the grant of a directed verdict or new trial, the State is not above incorporating the discussion in *its* Brief of Appellant. *See* Brief of Respondent at 41. Mr. Smith has done no more in his Brief of Appellant than the State is doing in its Brief of Respondent. For that reason all of his points–which the State only seeks to rebut in the most general terms (Brief of Respondent at 40-41)–are preserved and worthy of consideration.

In terms of that consideration, the points raised both in this Reply Brief of Appellant and the earlier Brief of Appellant fully support the notion that Mr. Smith should have been granted a directed verdict or, failing that, a new trial. Because neither motion was granted,

the judgment below should be overturned and judgment entered in Mr. Smith's favor. Alternatively, the case should be remanded to the trial court for a new trial on the merits.

CONCLUSION

For the reasons set out above, appellant Terrance V. Smith respectfully asks the Court to reverse the judgement of conviction and sentences of life imprisonment and terms of years entered in the trial court and to dismiss the indictment against him. Alternatively, Mr. Smith respectfully asks the Court to reverse the judgment and sentence and to remand the cause to the trial court for a new trial. Mr. Smith also asks the Court to grant him all additional relief to which it finds him entitled.

Respectfully submitted,

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May 31, 2005

West Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Honorable Marc H. Westbrook, Circuit Judge

Case No.: 03-GS-432-130

State of South Carolina ..... Respondent,

v.

Terrance V. Smith ..... Appellant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Initial Reply Brief of Appellant was served on the respondent by mailing a true and correct copy of the same via first class mail, proper postage affixed, to:

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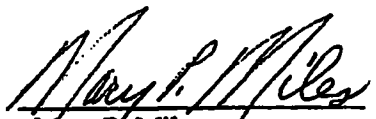
On this 31th day of May, 2005.



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Marc H. Westbrook, Circuit Court Judge

THE STATE,

Respondent,

v.

TERRANCE V. SMITH,

Appellant.

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II. DID THE TRIAL COURT COMMIT AN ABUSE OF DISCRETION IN ADMITTING HEYWARD'S IDENTIFICATION OF APPELLANT, WHERE THERE WAS NO EVIDENCE OF GOVERNMENTAL SUGGESTIVENESS IN THE CASE, AND HEYWARD'S OPPORTUNITY TO OBSERVE AND CERTAINTY OF IDENTIFICATION WERE ENOUGH TO SUPPORT ADMISSION?

III. DID THE TRIAL COURT COMMIT AN ABUSE OF DISCRETION IN REFUSING TO STRIKE THE TESTIMONY OF A WITNESS WHERE CROSS-EXAMINATION EXPOSED INCONSISTENT OR CONFLICTING ANSWERS, WHERE THE OVERWHELMING WEIGHT OF AUTHORITY IS THAT SUCH ISSUES ARE MATTERS OF CREDBILITY FOR THE JURY, NOT COMPETENCE FOR THE JUDGE?

IV. DID THE TRIAL COURT ERR IN REFUSING TO GRANT A MISTRIAL DUE TO THE WITNESS'S EXPRESSIONS OF LINGERING PHYSICAL PAIN FROM HIS INJURIES, WHERE THE PAIN WAS LEGITIMATE, UNEXPECTED, AND NOT SPECIFICALLY AIMED AT THE DEFENDANTS; MOREOVER, THE JUDGE CALLED A RECESS, AND THE EPISODE WAS LIMITED IN TIME AND SCOPE?

V. DID THE TRIAL COURT ERR IN REFUSING TO GRANT A MISTRIAL BECAUSE HEYWARD'S TESTIMONY WAS SOMEWHAT "GARBLED", WHERE THE FACE OF THE RECORD BELIES ANY NOTION THAT HEYWARD FAILED TO HAVE THE MINIMUM AND BASIC CAPABILITY TO COMMUNICATE NECESSARY FOR COMPETENCE TO TESTIFY?

VI. IS RELIEF WARRANTED WHERE APPELLANT FLATLY CONCEDES HIS ISSUE REGARDING SELF DEFENSE IS NOT PRESERVED, BECAUSE NO REQUEST FOR THE CHARGE WAS MADE AT TRIAL?

VII. ARE APPELLANT'S CONCLUSORY CONTENTIONS WITH REGARD TO HIS MOTION FOR A NEW TRIAL PROPERLY PRESENTED ON APPEAL, AND WAS THE EVIDENCE MORE THAN SUFFICIENT TO SURVIVE A MOTION FOR DIRECTED VERDICT?

STATEMENT OF THE CASE

At the May 2002 term, the Lexington County Grand Jury indicted Appellant, Terrence Smith, for attempted armed robbery, criminal conspiracy, and murder (02-GS-32-1405. -1406, & -1407). **{R. 923-27}**. At the February 2003 tern, the Lexington County grand jury indicted Appellant for first degree burglary, possession of a firearm during the commission of a violent crime, and assault and battery with intent to kill (02-GS-32-743, -745 & -746). **{R. 917-22}**. Appellant was also indicted for ill treatment of an animal (2003-GS-32-1109). Specifically, the murder indictment alleged that, on or about January 15th, 2001, Appellant and/or Ivan Collins killed Sidney Muller with malice aforethought by shooting him. Appellant's codefendant Ivan Collins was separately indicted for the same offenses. **{R. 892-93}**.

The Honorable Marc H. Westbrook conducted a jury trial of Appellant and Ivan Collins from April 28th through May 2nd, 2003. At trial, Appellant was represented by Jonathan R. Hendrix, Esquire, and Michael R. Ellisor represented Ivan. Deputy Solicitor Dayton Riddle and Assistant Solicitor Jonathan Harling prosecuted the case for the State. On May 2nd, 2003, the jury found Appellant guilty of all offenses except ill treatment of an animal; the jury convicted Ivan of all the charges. Given that Appellant had a prior conviction for a most serious offense, Judge Westbrook sentenced Appellant to concurrent terms of life without parole for murder, life without parole for ABIK, life without parole for attempted armed robbery, life without parole for first degree burglary, and five year sentences each for criminal conspiracy and possession of a weapon during commission of a violent crime.

A timely notice of appeal was filed and served. Initially, Acting Chief Appellate Defender Joseph Savitz, III represented Appellant, and he filed an Anders brief in the case. However, Appellant subsequently hired Mary Miles, Esquire, who filed a motion with this Court to substitute her as counsel and submit her own Initial Brief and Designation of Matter. Following Return by the State, this Court granted Ms. Miles's motion. The present appeal follows.

STATEMENT OF FACTS

This case involves the murder of one victim and the serious wounding of another during a small get-together at a petty drug dealer's house. The State's theory was that Appellant and his codefendant Ivan attempted to rob the drug dealer and his friends, after their accomplice Wykeisha Williams pretended to visit the victims in order to see if there was marijuana present to steal. At trial, Ivan testified and admitted shooting in the house, but blamed the victims for starting it with him and Appellant while they were merely waiting outside by the car during Wykeisha's visit. Appellant did not testify. No self-defense charge was requested or given.

A. 8/3/01 at 10:51 p.m.: Shots fired, police respond

At about 10:51 on August 3rd, 2001, a 911 call came in reporting a shooting at a triplex in West Columbia. Officers were dispatched, where they found Sidney Muller laying face down on the grass outside already dead and beyond resuscitation. Inside the room was somewhat ransacked, as if there had been a scuffle. There, officers found John Hayward writhing in pain on the couch, with bullet wounds to his back and calf. Heyward was generally conscious and talking as officers put pressure on his wounds and tried to keep him talking. **{R. 196-225}**.

Police talked to the witnesses present and started to piece together the story.

B. The get together at Charles Penny's

Charles Penny was a very small-time marijuana dealer who lived in the triplex on . On Friday evening, August 3rd, 2001, a few friends came over to Charles's house to drink a little, smoke marijuana, and play video games on the big screen

TV. By 10:00 p.m. or so, this little party included Charles, his next-door neighbors Franklin Hook and Sidney Muller, John Heyward, and Ronnie Rogers. **{R. 255-61; 307-309; 312-15; 337; 386-87}**.

At about 10:30 p.m., a girl named Wykiesha Williams came over. Charles, who was looking for a new girlfriend, had recently met Wykiesha though a mutual friend, Kiesha Harley. Charles and Wykiesha had smoked marijuana at Charles's house during at least one of the few times they had seen one another prior to the incident. **{R. 310-13}**.

Wykiesha came inside that night, explaining that she had not called first because she lost Charles's number. She was there but a few minutes before she received a call on her cell. She chatted for a bit, and at one point may have walked back to the bathroom while on the phone. When she hung up, it was apparent she was in a hurry to go. **{R. 261-63; 313-14; 342-44; 386-87}**.

C. The attackers make their move

Charles walked Wykiesha to the door, and after she exited, he casually pushed it to close. Suddenly, someone stuck his foot in the door and two men burst in the living room. One man, brandishing a pistol in each hand, remained at the door and apparently fired a few warning shots at no one in particular. The other quickly entered the house and started accosting the occupants, demanding or searching for their valuables. **{R. 263-65; 281; 314-17; 345-46; 386-87}**.

Surprised and at first thinking it was a joke, Charles gathered his wits and ran back to his bedroom to get his gun. Meanwhile, John Heyward had returned from using the restroom and getting some more ice from the kitchen. Heyward testified that the assailant

inside came running up on him, putting the gun in his face and demanding that he "give it up". Heyward tried to "slide" away and get behind a speaker, but the culprit starting shooting over the speaker. At that point, Heyward and the inside attacker started wrestling. Franklin Hook also recalled Heyward rushing and tackling the inside attacker. **{R. 266-69; 316-19; 386-89; 422-23}.**

While Heyward and the assailant wrestled, Sidney and Ronnie dove for cover as the robber at the door opened fire. Heyward felt himself spun around by the bullets, and landed on the couch before going out. Charles returned from the back room after the attackers had gone, and saw Heyward writhing on the couch in pain, complaining that he could not feel his legs. Heyward remembered Charles and officers slapping and talking to him to keep him awake. **{R. 209-25; 266-69; 318-20; 349-50; 389-91; 422-24}.**

Meanwhile, Sidney asked Franklin to get him home, and Franklin helped Sidney outside until Sidney abruptly became a heavy weight. Sidney fell to the ground and crawled a short distance to where he was found in the yard. The next day, Charles's dog was found to be shot, and she and her newborn puppies had to be euthanized. **{R. 207-08; 269-71; 320; 656-59}.**

Heyward is permanently paralyzed in his lower body from a gunshot wound. Sidney died from a bullet to the abdomen that lacerated a major artery. **{R. 385-86; 719-26}.**

D. Wykiesha Identifies Ivan and Appellant as the attackers

Charles thought it strange Wykiesha had been allowed to leave the house right before the robbery and murder, and told this to police. He went with police as they went from one cousin's house to another, until they finally located Wykiesha at her mother's

house in Friarsgate. She agreed to come to the station and talk. **{R. 320-22; 494-96; 572-73; 606-09}.**

Over the next few days, Wykiesha gave police about four statements, divulging a little bit more of the truth each time. Shortly before Appellant and Ivan's trial, she pled guilty to criminal conspiracy, first degree burglary and attempted armed robbery. **{R. 464-67; 494-531; 608-614}.**

At trial, Wykiesha testified that she grew up with Appellant's codefendant Ivan Collins, but lost contact with him until about 1999 or 2000 when they ran into each other and started dating. By the time of the incident, they had been involved about a year and spent virtually every day together. Wykiesha met Appellant through Ivan about two or three months prior to the incident. **{R. 460-64}.**

Wykiesha agreed she met Charles Penny through Kiesha Harley about two or three weeks before the crime, and stated she had been over to his house a couple of times during which they smoked marijuana. At some point about two weeks prior to the attack, she told Ivan that Charles had marijuana in his house, and Ivan said "he wanted to go and run up in his house". **{R. 468-70}.**

On August 3rd, Wykiesha was working at the local KFC in Irmo when Ivan called. Ivan said he wanted to go rob Charles, and Wykiesha agreed. The two hatched a plan whereby Wykiesha would visit Charles, and Ivan would call her cell. If Wykiesha said on the phone that she was going to the club, that was a signal that she saw marijuana in the house for Ivan to rob. **{R. 470-72; 474-76}.**

When her shift ended at 10:00 p.m., Ivan and Appellant picked her up at the KFC.

Ivan was driving Wykiesha's white 1997 Honda Civic, and they headed to West Columbia. Wykiesha saw that Ivan had his two guns and Appellant had one. {R. 471-73}.

Wykiesha dropped the two confederates off at a real estate parking lot near Charles's home and drove on to Charles's house. She stayed there for about fifteen or twenty minutes, and saw that marijuana was present. Thus, she told Ivan she was "going to the club" when he called on her cell. {R. 473-78}.

As Wykiesha left out the front door, she saw Ivan and Appellant coming from around the bushes with their guns in hand. She ran to her car, but watched as Ivan stood near the door and Appellant went inside. When she saw Ivan shoot in the direction of where Appellant and a victim were "tussling", she cranked up her car and headed off. At a stop sign on Witt, she looked in her rear view mirror to see Ivan and Appellant running to catch up. Ivan shot Charles's poor dog on the way. {R. 479-87}.

The two assailants jumped in Wykiesha's car, and the three sped off towards Garner's Ferry Road. Ivan said he thought he shot someone in the corner, and the two men were mad they did not get any loot from the crime. The three went to a Super 8 Motel in St. Andrews where they spent the night. The next day the men took Wykiesha to work. Eventually, she went home to Friarsgate. Appellant and Ivan were actually hiding upstairs when investigators came by to talk to Wykiesha. {R. 487-94}.

E. The Identifications

Charles Penny identified Appellant as the attacker who came inside the house to check the pockets of the victims. Penny explained that he was focused on the two guns the man in the doorway was holding, but then Appellant came around in front of him and

he got a "good look". {R. 323-24; 329-32}. Penny did not identify Ivan in the other lineup, and indeed picked out the wrong person. He explained that his error was because his view was trained on the guns the man in the doorway was holding. {R. 106-07; 332-33}.

John Heyward identified both Appellant and Ivan, although there was some dispute at trial about whether he had viewed pictures of the defendants in the newspaper or learned their names from a friend prior to the photo lineup. Heyward was in the hospital and medicated for his injuries when the lineup was conducted on August 23rd. {R. 392-96; 399-404}.

Frankin Hook was also shown a photo lineup but was unable to pick anyone out, as he testified he was focused on the guns the entire time. {R. 273}. Ronnie Rogers, who apparently could not be found for trial, was shown a lineup and apparently identified two people other than Ivan and Appellant. {R. 650}.

F. The forensic evidence

SLED experts and police found casings and bullets or bullet fragments from 9mm and .380 ammunition. They were able to walk back one bullet's trajectory to a position at the apartment's doorway. One 9mm casing was found outside, but it was clearly weathered and had been there much longer than the time of the incident. No marijuana was found in the house. {R. 665-72; 688-99}.

Ivan's palm print was found on a pillar inside Wykiesha's car. {R. 674-76}.

G. The defense case

Appellant did not present any testimony or other evidence.

Ivan first called Carlos Almendares, a Spanish-speaking individual who witnessed

the incident. Carlos testified as to hearing gunshots, seeing two men run out of the house and kill the dog, and then jump into a white Cavalier automobile. Carlos said there were "probably" two people in the front of the car before the two other men jumped in, but he could not tell if they were male or female. {R. 752-56}.

Ivan then testified himself. He admitted a prior armed robbery conviction as well the fact that he was a drug dealer who carried around a gun. He claimed that after he and Appellant picked Wykiesha up from work, she said she needed to make a quick stop before she took them home. She then drove to the triplex on {R. 757-65}.

Ivan claimed that he and Appellant waited outside in the car while Wykiesha went inside. Eventually, after about ten minutes, they grew bored and called her on her cell. Wykiesha said she would be out in a minute, but did not show, so the two men got out of the car. They waited about five more minutes until Appellant knocked on the door. {R. 765-67}.

At that point, at least according to Ivan, the door suddenly swung open and Wykiesha came running out. An object flew out toward Appellant, and then some guy grabbed him and slammed him on the ground. Ivan claimed he then saw Charles pulling out a gun, so Ivan produced his and fired at Charles. Charles supposedly fired back at Appellant and Ivan as they ran. {R. 767-69; 783-92}.

Ivan admitting gunning down Charles's dog, but said he did not know Charles and there was no plan to rob him. {R. 771-72; 791-92}.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN REFUSING THE SEVER THE TRIALS OF APPELLANT AND HIS CODEFENDANT IVAN, WHERE APPELLANT CANNOT SHOW EVEN THE MERE EXISTENCE OF ANTAGONISTIC POSITIONS.

Appellant first contends the trial court erred in refusing his repeated requests during the course of the trial for a severance of his trial from Ivan's trial. Appellant's only argument of prejudice was that Ivan's cross-examination of accomplice Wykeisha minimized Ivan's involvement to the detriment of Appellant. However, as will be seen, Appellant cannot show even the mere existence of antagonistic positions, as Ivan's cross examination of Wykiesha did nothing to harm any meaningful point made by Appellant, and Ivan's testimony and position at trial was favorable to Appellant anyway.

A. Events at trial

Appellant raised the issue of severance a number of times during the course of the trial. After jury selection, the trial court noted that the defense had made a motion to sever in chambers but that it would be taken up at a later time. **{R. 70}**. Following a pre-trial hearing, the attorney for Ivan supported his severance motion by arguing that the two codefendants *might* have inconsistent defenses arising during development of the evidence. The defense also contended that a long list of witnesses made it impossible to prepare. Appellant's attorney joined the motion. The trial court declined finding prejudice at that time, and the solicitor pointed out that the State had given the defense a copy of the entire file, that the defense has polled their jury strikes, and that the defendants had not provided statements implicating each other. **{R. 169-71}**.

During Wykiesha's testimony on direct, she stated that about two weeks prior to the

crime her boyfriend Ivan mentioned he wanted to rob Charles Penny. On the night of the incident, Ivan – not Appellant – called her at her work to arrange the crime. However, both Ivan and Appellant were in the car when they picked her up from her job at KFC. **{R. 469-75; 524-25}**. On cross by Appellant, Wykiesha admitted that her discussions and conversations about planning the robbery were with Ivan Collins, not Appellant. **{R. 543-44}**.

On cross by Ivan's attorney, Wykiesha was asked about the "two men" who went into Charles's apartment with her, and the "two robbers" with whom she worked out the code phrase on the cell phone. **{R. 554-55}**. Ultimately, in examining Wykiesha on her supposed fear of the defendants despite the fact that she did not tell the police Appellant and Ivan were in her house, Ivan's attorney asked twice, "Who did this [crime] with you?", to which Wykiesha answered, "Ivan Collins and Terrence Smith". Only after the second time did Appellant renew his motion for severance, arguing that Ivan's cross examination was putting them in an adversarial position:

> It appears to us now that the testimony being elicited, she's wanting to say she did this in conjunction with [Appellant] and she's already stated she had no agreement – and actually had no agreement and actually had no conversations with [Appellant] or anything about this.

{R. 573-74}.

Ivan's attorney declined to join the motion, and the solicitor noted the difference between questioning about who had prior conversations regarding the crime, and questioning about who actually *committed* the crime. When asked for specific prejudice, Appellant's attorney could only state that Wykiesha was "reiterat[ing] and reiterat[ing]" that Appellant was involved in the commission of the crime. The trial court found no prejudice

to Appellant's right to a fair trial. {R. 574-77}.

Later in the trial, Appellant's counsel attempted to question an investigating officer about the substance statements made by an out-of-court eyewitness. {R. 621-31}. Following the State's hearsay objection, it was brought out that the eyewitness had appeared on the first day of trial pursuant to the defense subpoena but had not returned. When the State and Ivan's attorney discussed a bench warrant for the missing eyewitness, Appellant renewed his severance motion by arguing that he did not want the witness to testify, because he did not know what the witness was going to say, especially if the witness were arrested and held in jail on a defense subpoena. The court declined the motion, noting that the witness would be instructed the warrant was the court's action. {R. 632-43}.

At the close of the State's evidence, Appellant renewed his severance motion "based upon all the facts and circumstances of this case" as well as the fact that both defendants were indicating a desire to testify. The court again denied the motion, finding no prejudice. {R. 733}.

Finally, Appellant renewed his severance motion at the end of the defense case, arguing that since Ivan testified and he did not, he was losing his right to last argument. The court ruled that the caselaw held that was not a valid reason for severance. {R. 803}.

B. General Rules

In State v. Dennis, our state supreme court synthesized the general rules regarding appellate review of a trial court's decision denying a severance motion:

> Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right. State v. Kelsey, 331 S.C. 50, 73-74, 502

S.E.2d 63, 75 (1998); State v. Holland, 261 S.C. 488, 201 S.E.2d 118 (1973); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972). A defendant who alleges he was improperly tried jointly must show prejudice before this Court will reverse his conviction. State v. Crowe, supra. The general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and a codefendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime. State v. Leonard, 287 S.C. 462, 473, 339 S.E.2d 159, 165 (Ct.App.1986), rev'd on other grounds, 292 S.C. 133, 355 S.E.2d 270 (1987).

The trial judge, however, must act cautiously in allowing a joint trial. The judge must carefully consider problems that may arise from a joint trial, such as redacted statements, and must assure protection of each defendant's constitutional right to confront witnesses against him. State v. Singleton, 303 S.C. 313, 315, 400 S.E.2d 487, 488 (1991). A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial. State v. Holland, 261 S.C. at 494, 201 S.E.2d at 121.

Motions for a severance and separate trial are addressed to the discretion of the trial court. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997); State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Absent a showing of an abuse of discretion, this Court will not disturb the trial court's ruling on appeal. State v. Nelson, 273 S.C. 380, 256 S.E.2d 420 (1979).

State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999).

Dennis went on to adopt the following standard from Zafiro v. United States, 506 U.S. 534 (1993):

> [S]everance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt.

Dennis, 337 S.C. at 282, 523 S.E.2d at 176. Subsequently, the court has also noted that "an appellate court should not reverse a conviction achieved at a joint trial in the absence of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial". Hughes v. State, 346 S.C. 554, 552 S.E.2d 315 (2001) (citing a

California case).

C. Appellant's supposed antagonistic position with his codefendant is not enough alone to warrant separate trials, and in any event he cannot even show the existence of an antagonistic position with his codefendant.

Obviously, on at least a facial level there was no problem in joining these two defendants for the same trial, given that they were alleged to have participated together in the same criminal acts. See, e.g. State v. Dennis, 337 S.C. 275, 523 S.E.2d at 176 (trial court did not abuse discretion in denying severance, in part because "the state alleged that both defendants participated in the murder of the victim"); State v. Avery, 333 S.C. 284, 509 S.E.2d 476 (1998) (finding no abuse of discretion from denial of severance, and reasoning: "Moreover, if appellant had been tried separately from [his co-defendant], the same evidence could have been presented. Appellant could still have been prosecuted under the theory of accomplice liability for the murder.").

Appellant attempts to get around this by claiming antagonistic defenses; however, as noted in the preceding subsection, "the general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and a codefendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime." Dennis, *supra*. Even if Ivan's cross-examination of Wykeisha had undermined a point made by Appellant during his turn to examine Wykiesha, this would not be enough to warrant a new trial, as Appellant still had a fair shot at re-cross examination in which to explore the truth. Simply because a codefendant elicits something a defendant does not like is not enough to sever a trial. See generally State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999) (where State alleged both defendants participated in the robbery,

severance was not warranted even though in a prior mistrial one codefendant called witnesses blaming the crime on the other; the codefendant could not point to a specific trial right prejudiced by the joint trial); State v. Smith, 359 S.C. 481, 489-90, 597 S.E.2d 888, 893 (2004) ("the general rule allowing joint trials is not impugned simply because the codefendants may present evidence accusing each other of the crime").

In any event, though, the claim of antagonistic defenses here is entirely illusory.

1. Ivan's cross examination of Wykiesha did nothing to harm the point Appellant made during his examination, and the point was of little actual value anyway.

First, Appellant misconstrues the meaning and effect of the testimony when arguing that Ivan's cross of Wykiesha somehow harmed points brought out during his own cross of her. Appellant only established during his cross of Wykiesha that she personally never talked with Appellant "about going to Charles' house to commit any kind of robbery", and that her express agreement to do so was made with her boyfriend Ivan, not Appellant. **{R. 543}**. In contrast, Wykiesha on direct and during Ivan's cross was always clear that when the crime took place, Appellant was present and involved – indeed, on direct examination she specifically described watching as Appellant went inside with a gun in his hand, and started fighting with one of the victims. **{R. 471-75; 479-84; 533; 554-55; 561-62; 573}**. As the solicitor pointed out, there is a difference between Wykeisha being asked with whom she spoke in setting up and planning the robbery *beforehand*, and being asked who all was there and participating at the time the offenses actually were committed. **{R. 575}**. Ivan's questioning did nothing to challenge the extent of Appellant's point, for whatever it was worth.

And, of course, the point was hardly worth much for Appellant anyway. While Wykiesha never specifically testified she personally talked with Appellant about the crime *before* it took place, "as is frequently so, *concert of design [can] be proved only by circumstantial evidence.*" State v. Green, 261 S.C. 366, 200 S.E.2d 74, 77 (1973) (emphasis added). Where the testimony is that Ivan called Wykiesha about wanting to rob Charles, Ivan later arrived with Appellant in the car to pick Wykiesha up to commit the crime, and upon arrival at Charles' house Appellant went inside with Ivan and immediately started to accost the victims at gunpoint, it certainly can be inferred that at least Ivan told Appellant about his plan with Wykiesha. There is simply no significant negative effect or prejudice from the challenged examination, as the point Appellant made was nearly worthless.

2. The purpose of Ivan's questions was to challenge Wykiesha, not shift blame to Appellant.

Next, Appellant is incorrect inasmuch as he asserts that Ivan's cross-examination sought to minimize his involvement at the expense of Appellant. At no time during Ivan's cross of Wykeisha did he seek to imply that Appellant was more guilty or guilty to the exclusion of Ivan; instead, he merely tried to attack the credibility of Wykiesha's testimony as a whole. He tried to show a motive to lie on Wykiesha's part due to trouble with another girl over Ivan, and pointed out that police allowed Wykiesha to remain free as long as she was "out trying to catch two people". {R. 567-68}. Both of these points were just as beneficial to Appellant as Ivan – they implied that Wykeisha was framing her ex-boyfriend and his friend because she had to give the police someone.

More importantly, when the challenged questions were asked, it is clear they were

not asked to shift guilt from Ivan to Appellant – or to unfairly include Appellant among the guilty – but only asked to set up questioning on Wykiesha's supposed fear as a reason for not telling police the two codefendants were at her house the very moment she identified them:

> IVAN'S ATTORNEY: Ma'am, who did this murder with you?
>
> WYKIESHA: Ivan Collins and Terrence Smith.
>
> IVAN'S ATTORNEY: Well, if they were there with you and at your house and you identified them why didn't you tell the police they were in your house, go get them?
>
> WYKIESHA: I was scared of them. I didn't want to.

{R. 572-73}. Ivan's attorney could have also been simply engaging in the common tactic of making the witness go through her testimony on direct again under the far more aggressive and trying experience of cross-examination, for whatever weight the jury may take from her demeanor during such questioning. The bottom line is that at no point did the questioning seek to minimize Ivan's culpability and maximize Appellant's.

3. Ivan's testimony was favorable to Appellant anyway.

Finally, there was no adversarial relationship among the codefendants as Ivan's testimony was ultimately as exculpatory to Appellant as it was to him. Ivan claimed that after Appellant knocked on the door because they grew impatient waiting outside for Wykiesha to visit her friends, Wykiesha suddenly came running out, Appellant was grabbed and thrown to the ground without warning, and Ivan saw Charles pull a gun. {R. 766-69}. In closing argument, Appellant used Ivan's testimony and tied it in with other testimony to support the theory that the victims had overreacted and started the fight. {R.

847}. Since Ivan's ultimate testimony was favorable to Appellant, it cannot be said that they were in adversarial positions such that severance was warranted. See, e.g. Hughes v. State, 346 S.C. 554, 552 S.E.2d 315 (2001) (where did not testify, and both victim and codefendant testified that defendant was not involved in the ABIK, evidence of that ABIK in the joint trial was not prejudicial); State v. Avery, 333 S.C. 284, 509 S.E.2d 476 (1999) (defenses were not antagonistic where codefendant testified and appellant did not; codefendant testified that the robbery was staged and codefendant's shooting of the victim was accidental, which was favorable to the appellant).

Since Appellant's claim of mutually antagonistic defenses is illusory, he can nowhere approach showing the denial of a specific trial right, the prevention of a reliable judgment of his guilt, or a reasonable probability of a more favorable result. Hughes, *supra*; Dennis, *supra*. Indeed, the judge specifically instructed the jury to consider each defendant separately, and fact that the jury acquitted Appellant of the ill treatment charge and convicted Ivan shows it carefully considered each defendant's case. {R. 870-71}. See Dennis, 337 S.C. 275, 523 S.E.2d at 176 (Jurors obviously were able to follow those [cautionary] instructions, as they found appellant guilty and his brother not guilty."); Zafiro v. United States, 506 U.S. 534, 540 (1993) (rejecting claim that co-defendants' accusations that the other committed the crime creates inference that one must be guilty regardless of state's proof, by noting that the jury ultimately convicted the defendants of varying offenses).

The issue should be rejected.

II. THE TRIAL COURT DID NOT COMMIT AN ABUSE OF DISCRETION IN ADMITTING HEYWARD'S IDENTIFICATION OF APPELLANT, WHERE THERE WAS NO EVIDENCE OF GOVERNMENTAL SUGGESTIVENESS IN THE CASE, AND HEYWARD'S OPPORTUNITY TO OBSERVE AND CERTAINTY OF IDENTIFICATION WERE ENOUGH TO SUPPORT ADMISSION.

Appellant next contends the trial court erred in failing to suppress witness John Heyward's identification of Appellant as the attacker with whom he wrestled in the house. Appellant asserts the identification was suppressible because Heyward had been drinking and smoking marijuana at the scene, he was on medicinal drugs when showed the photo lineup at the hospital, he was told the names of the culprits by a friend prior to the lineup, and he saw the defendants' pictures in the newspaper prior to viewing the lineup. However, there is no evidence of governmental suggestiveness in this lineup, and even if there was, Heyward's opportunity to observe and certainty of identification were sufficient to support the judge's decision on admissibility.

A. Events at trial

Testimony was taken on the admissibility of Heyward's identification at a pre-trial hearing. Unfortunately, the officer who showed Heyward the lineup was not available for trial as he was in training to be a federal marshal. **{R. 82-83}.**

Heyward testified that he got a good look at the culprits, and that although the doctors had given him drugs in the hospital, his mind was still good and he had a couple of weeks to get better from his wounds. He stated there was no suggestion on the part of the officers in the photo lineups. **{R. 120-25}.**

On cross, Heyward admitted he had about 4 mixed drinks, 5 beers, and a couple of "blunts" of marijuana on the night of the incident. **{R. 126-31}.** Heyward also admitted

a friend told him the names of the defendants at some point. While Heyward initially denied he had seen a newspaper article with the defendant's pictures prior to the lineup, he agreed he must have seen the article prior to the lineup, since it occurred on August 23rd, and the article was dated August 10th. Heyward also realized on closer inspection that the pictures in the newspaper were the same ones included among the photos in the lineup. **{R. 138-44}**.

On redirect and recross, Heyward wavered as to whether he knew the names of the defendants prior to the lineup. Heyward was insistent, however, that he was positive in his identification, which was based on nothing but his observations the night of the incident. **{R. 153-59}**.

The defendants moved to suppress the testimony, arguing that Heyward was on drugs and had been given prior information. The defendants also contended that the incident happened too fast for identification, and that Heyward could not identify what the culprits were wearing. Finally, the defendants made the general argument that the evidence should be excluded as untrustworthy. **{R. 164-67}**.

The trial court found the identification to be sufficiently reliable. The court noted that there are always some problems, and that while this witness may have had a few more than usual, the identification was still admissible. **{R. 167-68}**.

B. General Rules

An in-court identification is inadmissible if a suggestive out-of-court identification created a substantial likelihood of misidentification. Pursuant to Neil v. Biggers, 409 U.S. 188 (1972), a two-prong inquiry determines the admissibility of an out-of-court

identification. First, the court must ascertain whether the identification process was unduly suggestive. If it was, the court must next determine if the identification was nevertheless so reliable that no substantial likelihood of misidentification existed:

> The inquiry, therefore must focus on whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification.

State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000); State v. Brown, 356 S.C. 496, 589 S.E.2d 781 (Ct. App. 2003).

To determine whether an identification is reliable, a court must consider the following factors: (1) opportunity to view the crime, (2) degree of attention, (3) accuracy of prior description, (4) level of certainty demonstrated, (5) amount of time from the crime to the confrontation. State v. Brown, 356 S.C. 496, 589 S.E.2d 781 (Ct. App. 2003) (citing State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000).

Admission of an in-court or out-of-court identification is within the sound discretion of the trial court, and it will not be reversed absent an abuse of discretion of prejudicial legal error. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000); State v. Tisdale, 338 S.C. 607, 527 S.E.2d 389 (Ct. App. 2000).

C. There is nothing to indicate the photo lineup was suggestive, and any media or other non-governmental information imparted to the defendant does not change this conclusion.

As an initial matter, there is nothing to indicate that the photo lineup used by the police in this case was suggestive. Appellant presented no evidence nor even any argument that the lineup was improperly conducted, that the officer suggested the answer, or that the defendants were substantially different from the other subjects in the lineup.

Appellant claims there was testimony that Heyward learned the names from a friend prior to the lineup. Of course, learning the names of two people you do not otherwise know would do nothing to aid in a visual identification of the culprits, and there is no evidence the suspects' names were written in plain view on the photo lineup.

Appellant also points to Heyward's contradictory testimony as to whether or not he saw a newspaper article with the defendants' pictures in it before the photo lineup. However, a number of jurisdictions, including this Court, have noted that media identifications in which there was no governmental involvement are not subject to an analysis under Neil v. Biggers. State v. Tisdale, 338 S.C. 607, 527 S.E.2d 389 (Ct. App. 2000). This is because the rule exists to deter police from using less reliable procedures. Id. Accordingly, this point does nothing to create a finding of suggestiveness under the first prong of the analysis.

Appellant of course points to the fact that Heyward was under the influence of medicine at the hospital when he made the identification. However, if no suggestion was made to him in the lineup, the presence of medicine in and of itself would do nothing to aid an identification. This element goes more to weight than admissibility.

Since the photo lineup was not suggestive, the Neil v. Biggers analysis ends here on admissibility of the identifications.[1]

D. In any event, the out of court identification was still sufficiently reliable under the second prong of the *Neil v. Biggers* test.

Even if a suggestive procedure is assumed, Appellant cannot meet the second

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[1] It should be noted that neither the arguments at trial nor the brief on appeal follow closely the Neil v. Biggers two prong analysis. Thus, the issue is not properly preserved or presented on appeal.

prong of the Neil v. Biggers test. As noted before, the second prong looks at whether, under the totality of the circumstance, the identification is reliable despite a suggestive procedure.

Undoubtedly, some of the reliability factors do not favor Heyward, as the record has no information that Heyward gave a description at the scene while he lay wounded with which to compare to Appellant. And, approximately twenty days passed from the time of the incident until the lineup was given.

However, Heyward testified that he got a good look at the assailants, and noted that he would never forget a face. {R. 121; 123}. He very specifically described the events of wrestling with Appellant, during which he obviously could have had ample opportunity to view his face. {R. 133-34}. At trial, Heyward noted that he would never forget the people who shot him, and added that he had good eyesight and the room was well lit. {R. 392}. This testimony is more than enough for the trial court not to have abused its discretion in crediting it over the evidence that Heyward had consumed alcohol and marijuana on the night of the incident. Thus, the factors of opportunity to observe, degree of attention, and level of certainty favor Heyward. See, e.g. State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004) (although procedure was suggestive, identifications were still reliable, where witnesses had ample opportunity to observe, they were very certain in their identifications, and the lineup took place two days later); State v. Brown, 356 S.C. 496, 589 S.E.2d 781 (2003) (although showup was suggestive, identification was still reliable, where witness had good view, and was certain in his identification).

The bottom line is that given the totality of Heyward's testimony, it cannot be said

that the trial court abused its discretion in finding there was no *substantial likelihood* of irreparable misidentification.

E. Admission of the identification did not violate due process.

Courts applying the rule that media suggestiveness is not subject to Neil v. Biggers analysis have noted that testimony should be excluded where "the mind of a witness is so clouded by suggestions from nongovernmental sources that a conviction principally on the testimony of that witness violates due process". State v. Tisdale, 338 S.C. 607, 527 S.E.2d 389 (Ct. App. 2000) (quoting United States v. Peele, 574 F2d 589 (9th Cir. 1978)).

Here, however, Charles Penny also identified Appellant, and Wykiesha identified him as her accomplice along with Ivan in the attack on Charles's house. Thus, it cannot be said that the conviction was "principally" based on Heyward's testimony. Moreover, Heyward was fully and extensively cross-examined on all of these issues regarding his identification, and the judge even gave a special charge to the jury on its duty to consider the reliability and credibility of Heyward's identification. During this charge, the judge himself told the jury the witness had changed his testimony. **{R. 410-14}**. See, e.g. Tisdale, 338 S.C. 607, 527 S.E.2d 389 (finding no violation of due process from media identifications, and noting that all the witnesses were extensively cross-examined on their identifications).

It simply cannot be said that admission of Heyward's identification violated due process.

III. THE TRIAL COURT DID NOT COMMIT AN ABUSE OF DISCRETION IN REFUSING TO STRIKE THE TESTIMONY OF A WITNESS WHERE CROSS-EXAMINATION EXPOSED INCONSISTENT OR CONFLICTING ANSWERS; THE OVERWHELMING WEIGHT OF AUTHORITY IS THAT SUCH ISSUES ARE MATTERS OF CREDIBILITY FOR THE JURY, NOT COMPETENCE FOR THE JUDGE.

Appellant next contends that because Heyward had changes or inconsistencies in testimony he gave under oath, the trial court erred in not either suppressing the testimony, ordering a mistrial, or granting a directed verdict. However, our state supreme court has already joined the overwhelming majority of jurisdictions that hold that inconsistencies, changes, or even prior perjury do not make a witness incompetent to testify, such as would be necessary to support Appellant's motions to strike or for a mistrial.

A. Events at trial

As noted in the previous ground, victim John Heyward was resisting Appellant when he was permanently paralyzed by bullets from Ivan's two guns. He later identified both Appellant and Ivan in photo lineups shown to him at the hospital on August 23rd, 2001. **{R. 121-26}.**

Heyward testified as to his identification during a pre-trial hearing. On cross-examination by Appellant, Heyward stated that his friend Kevin Sumter told him who committed the crime prior to him giving his statement to police. Heyward stated that Kevin was able to find out because he knew the defendants' cousins. The following then occurred:

> DEFENSE ATTORNEY: Had you seen [the defendants'] picture in the newspaper?
>
> HEYWARD: Yeah. Yes, sir.
>
> DEFENSE ATTORNEY: Before you made this identification on the 23rd, right.

HEYWARD: It was after. What, the newspaper came out that next day?

Heyward then denied ever seeing a wanted poster of the defendants, but admitted he had a copy of the newspaper article at home. **{R. 139-40}**.

When shown that the newspaper article was dated August 10th, Heyward admitted he "had to" have seen the article prior to his identification on August 23rd, "because it said the 10th". Heyward then admitted on closer inspection that the photographs in the lineup were the same photographs as in the newspaper, albeit in color. **{R. 140-42}**.

On redirect by the solicitor, Heyward stated that he did not know the names of the defendants when police first came to see him at the hospital on the morning of August 23rd. Heyward testified that his identification was not based on anything other than what he saw the night of the incident. **{R. 153-55}**.

On recross, Heyward stated that while he was not absolutely sure, because he was "doped up" at the hospital, he thought he was shown the lineup the same day he was tested for gunshot residue. Heyward again was contradictory – he stated he did not know the defendants names when he pointed them out in the lineup, but agreed friends had already told him the names and he had already seen the newspaper prior to the lineup. **{R. 156-58}**.

Predictably, the issue arose again during trial. On cross by Appellant, Heyward again seemed to say that he saw the photo lineup before the newspapers even though the article came out on the 10th. **{R. 400-01}**. Heyward was questioned about his earlier testimony during the pre-trial hearing, but he was insistent that despite his prior testimony, he saw the lineup first:

DEFENSE ATTORNEY: You swore to that yesterday, that's what you swore the truth was yesterday, isn't it? Yes?

HEYWARD: You've got it on document. I can't lie. I can't lie to the Court. I'm telling you I saw those two papers right there [the lineup] before I saw the news article.

DEFENSE ATTORNEY: What you're telling us now is you want to change your sworn testimony. Is that what you're telling us?

HEYWARD: I'm saying that I saw those two papers right there before I even saw the newspaper.

DEFENSE ATTORNEY: What I'm asking you is do you want to change your sworn testimony?

HEYWARD: Yes. Yes sir.

{R. 402-03}. Heyward then explained that once he saw the newspaper article, he called his friend Kevin to ask if Kevin knew anything about the defendants. According to Heyward, Appellant's counsel did not "carry on to make me tell you the whole thing" about Kevin during the pretrial hearing. Heyward remained insistent that he saw the lineup before the newspaper article. **{R. 403-04}**.

At this point, Appellant moved for a mistrial, arguing that because Heyward's testimony had changed to the point that he was committing perjury, and the State was trying to base a conviction on lies. The defense requested striking of the testimony or a directed verdict in the alternative. The State responded that exposing inconsistences is exactly what cross-examination is all about. The judge noted that witnesses changing testimony is not uncommon, and that it rarely rises to the level of a mistrial. He denied the defense's motion, but gave the jury a supplemental instruction in which he noted that the witness had changed his testimony, reminded them that the prosecution had to prove

identity, and went through the various factors a jury could consider in assessing the credibility of an identification. {R. 404-13}.

As cross continued, Heyward again waffled a bit on whether he knew the defendant's names from the newspaper before he saw the lineup. But he remained firm that he saw the lineup before the newspaper. {R. 420; 432}.

The morning after the cross was completed, the defendants argued in part that Heyward's contradictory answers arose to the level of incompetence to testify. The judge disagreed, finding that while the witness's testimony "gradually degenerated", a lot of it came from fatigue, and that the witness demonstrated an ability to independently recall. The court ruled the issues were for the jury. {R. 454-57}.

B. Our state supreme court has already joined the great majority of jurisdictions in ruling that a witness's inconsistencies, changed testimony, admissions of lying, or prior perjury are not enough alone to rule the witness incompetent to testify, as these are matters of credibility for the jury.

Appellant now contends that since "it is clear" Heyward was "lying" and his identification was central to the State's case, a mistrial or other remedy was warranted. Fundamentally, his contention is (and has to be) that Heyward's inconsistencies made him incompetent to testify; thus, the testimony should have been struck or a mistrial declared.

However, our state supreme court and the overwhelming weight of authority have already rejected the position that a witness's inconsistencies, changed testimony, admitted lies, or prior perjury is alone enough to disqualify a witness from giving sworn testimony in a trial. In State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1999), the court identified four factors in order for a witness to be competent to testify: (1) perceive the event with a

substantial degree of accuracy, (2) remember it, (3) communicate about it intelligibly, and (4) understand the duty to tell the truth under oath. Id. (citing Commonwealth v. Goldblum, 447 A.2d 234 (Pa. 1982), and discussing Rules 601-603, SCRE)). The party opposing the witness has the burden of proving incompetence, and the trial court's decision is adjudged on appeal by the very deferential "abuse of discretion" standard. Needs, 333 S.C. at 143, 508 S.E.2d at 861.

In Needs, the challenged witness had changed her statements four times, alternatively benefitting the State or the defendant. The court affirmed the judge's decision to let her testify despite the defendant's claim she was a "pathological liar", noting that the witness had sworn to tell the truth, had personal knowledge of the matter, and understood her duty to tell he truth. Needs, 333 S.C. at 143-44, 508 S.E.2d at 861-62. The court concluded that any inconsistencies in her prior statements were matters of credibility for the jury. Id. (quoting Soulious v Mills Novelty Co., 198 S.C. 355, 364, 17 S.E.2d 869, 874 (1941) ("This Court has more than once held that the jury is the judge of which contradictory statement of the witness is the truth.")). See also State v. Merriman, 287 S.C. 74, 337 S.E.2d 218 (Ct. App. 1985) (noting the repeal by implication of the statute that barred testimony by convicted perjurers).

A vast number of courts have also ruled that mere inconsistencies or changes in a witnesses's testimony come no where near the level of disqualification to testify, but merely are relevant to adjudging the witness's credibility. See, e.g. United States v. Cook, 949 F.2d 289 (10th Cir. 1991) (refusing to characterize as incompetent a witness whose testimony is inconsistent, and calling "regressive" any evidentiary analysis that fuses competence with credibility); Outten v. State, 650 A.2d 1291, 1295-96 (Del. 1994) (witness

who admitted she frequently lied in the trial was not incompetent, she understood her duty to tell the truth, and was amply cross-examined on her various statements); Price v. Commonwealth, 31 S.W.3d 885, 891 (Ky. 2000) (inconsistencies and gaps go to credibility, not competency of child witness); State v. Haskins, 887 P.2d 1189, 1193 (Mont. 1994) (if inconsistencies were enough to disqualify a witness, the testimony of very few witnesses would survive); In the Matter of A.W., 147 S.W.3d 632, 635 (Tex. Ct. App. 2004) (confusing and inconsistent responses from child witness go to credibility, not competence); 98 C.J.S. Witnesses § 103 (2004) ("Cross-examination testimony revealing that a witness has lied while under oath on one or more prior occasions, is considered relevant only to the extent it affects credibility, not competence . . . .").

C. The mere fact that Heyward changed his testimony on whether or not he had seen the newspaper or learned the names of the defendants prior to his identification is insufficient to disqualify him.

With those rules in mind, it is clear that Appellant did not meet his burden of establishing Heyward was incompetent to testify. All Appellant points to in his brief is the fact that Heyward changed his testimony or was inconsistent about whether he saw the newspaper article or learned the names of the defendants from his friend prior to the photo lineup. As noted in the preceding section, such an inconsistency is a classic matter for cross-examination that goes to the witness's credibility, not his competence.

Although Appellant did not specifically argue at trial the Goldblum factors set forth in Needs, it was certainly no abuse of discretion to find his testimony was permissible, inconsistencies and all. Certainly Heyward was able to perceive the event with a substantial degree of accuracy, as he described very clearly details of the attack on him,

and specifically stated that the scene was well lit, he has good eyesight, and got a good look. {R. 391-93}.

Heyward was also able to remember the event, as is evident from his testimony. Indeed, while Appellant asserts Heyward must have been "lying" one way or the other during his inconsistent testimony on the newspaper article and the information from his friend Kevin, the more likely explanation apparent from the testimony is that Heyward simply had trouble remembering the exact order of when these events happened while he lay newly paralyzed on his hospital bed. Indeed, despite claims of lies now, Appellant's codefendant specifically told Heyward during cross-examination that no one was disputing whether he conducted the photo lineup as honestly as he could. {R. 440}. But, as noted before, mere defects in memory about certain aspects of the testimony do not equate to incompetency – that is exactly the sort of issue that cross-examination exposes for whatever it might say about credibility.

While the judge later agreed that at one point Heyward's testimony was garbled, apparently due to his severe physical injuries and "fatigue" from a lengthy and withering cross-examination from Appellant, it is certainly apparent from the face of the record that Heyward's testimony was clear enough for him to meet the minimum ability to communicate necessary for competence.

Finally, the record reflects Heyward was sworn, and there was no indication he did not understand the duty to tell the truth. Because Appellant did not request at trial a detailed colloquy on Heyward's understanding of his duty, the presumption from his taking of the oath stands unchallenged on appeal. Indeed, even if his inconsistencies are viewed

in the worst case as out and out lies, the case law is clear that this does not go to competence – a witness must only *understand* the duty to tell the truth, not necessarily abide by it. The latter is a matter of credibility for the jury. See, e.g. 98 C.J.S. Witnesses § 103 (2004) ("Evidence that a witness has lied while under oath in prior cases demonstrates only a failure to comply with the duty to tell the truth, rather than a failure to understand or recognize it, for the purpose of a witness's competency to testify.").

The bottom line is that the judge certainly did not commit an abuse of discretion in refusing to strike Heyward's testimony simply because Appellant did such a normal thing as expose an inconsistency or two on cross-examination.

IV. THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A MISTRIAL DUE TO THE WITNESS'S EXPRESSIONS OF LINGERING PHYSICAL PAIN FROM HIS INJURIES, WHERE THE PAIN WAS LEGITIMATE, UNEXPECTED, AND NOT SPECIFICALLY AIMED AT THE DEFENDANTS. MOREOVER, THE JUDGE CALLED A RECESS, AND THE EPISODE WAS LIMITED IN TIME AND SCOPE.

Appellant next contends that the trial court erred in failing to grant a mistrial because of Heyward's writhing in pain on the stand, which he contends was an "apparent attempt to gain the jury's sympathy". However, the event was simply not enough to warrant a mistrial, where the pain was legitimate, unexpected and not specifically aimed at the defendants like an outburst would be. Moreover, a recess was declared and the episode was minimal in time and scope.

A. Events at trial

As noted before, victim John Heyward was permanently paralyzed by the attackers' bullets, and he spent a lot of time in the hospital after the incident. During cross examination of Heyward during the pre-trial hearing, Heyward asked counsel to "hold on".

There was a pause, during which the solicitor noted that Heyward has chronic pain from his injuries, but that EMTs were not necessary. Heyward then stated, "I just got to move the bullet on up. That's better. I'm ready." Cross-examination then proceeded without further incident. {R. 144}.

Heyward unfortunately had another pain event during cross-examination at trial. The court reporter noted that the witness appeared to be in pain, and when asked if he was all right, Heyward explained, "The bullet is starting to move." He was brought some water, and a brief break was taken. {R. 425}.

During the break, Appellant noted that Heyward was "writhing in some effort to apparently gain comfort" (not, as he contends on appeal, in a calculated attempt to gain sympathy from the jury). Appellant argued the display was unduly prejudicial. The trial court disagreed, stating: "I noticed he was making some movement but frankly to me it didn't appear to be excessive." The court noted Heyward's evident discomfort was not as bad as the day prior during the pretrial hearing, and the solicitor pointed out that the pain comes unexpectedly because Heyward still has the bullet in him from Appellant and Ivan's attack. {R. 425-27}. Cross examination then resumed.

At one point later during the cross-examination, Heyward broke down sobbing after stating that he was not lying, he was just trying to get justice done. The jury was sent out until Heyward composed himself, and the cross examination resumed and concluded without further incident. {R. 438-40}.

The morning after Heyward's examination, Appellant moved for a mistrial, arguing in part that Heyward's sobbing and writhing was unduly prejudicial, and the jury might

blame the defense for putting him through cross-examination. The judge denied the mistrial, but primarily addressed the argument about inconsistencies and garbled testimony addressed in other grounds on appeal. {R. 454-57}.

B. General Rules

Perhaps the closest analogy to the present situation is the frequent problem of witness, victim, or spectator outbursts during the course of the trial. Our state supreme court and this Court have been very deferential to trial courts in their decisions to maintain order and a fair environment in their courtrooms, as "the trial judge is in the best position to evaluate the prejudicial effect of a[n] . . . outburst". State v. Anderson, 322 S.C. 89, 470 S.E.2d 103 (1996) (quoting C.J.S.). Accordingly:

> The decision whether to grant a mistrial because of a witness's outburst rests within the sound discretion of the trial judge and will not be reversed absent an abuse thereof or manifest prejudice to the complaining party.

State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999). Further:

> Ideal conditions [at trial], it is true, are not to be expected, and verdicts should not be set aside by an appellate court for misconduct in a trial, unless the evidence is clear and convincing that extraneous influences so interfered with the conduct of the trial, or so pressed upon the jury, as to become factors in the result.

State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996) (quoting State v. Stewart, 278 S.C. 296, 295 S.E.2d 627 (1982)).

In applying these rules, our appellate courts have repeatedly affirmed the denial of mistrials in situations far more egregious than the one at bar. See State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999) (no error in denying mistrial in death penalty case where victim's mother "loudly exited" the courtroom during defense case, the outburst was limited

and the jury was already aware of the mother's feelings); State v. Anderson, 322 S.C. 89, 470 S.E.2d 103 (1996) (where victim's relative accosted defendant and cried loudly for several minutes, no error in denial of mistrial where the judge excused the jury for a recess, the incident was limited in time and scope, the expression of grief was likely understood by the jury as just that, and no curative instruction was necessary); State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996) (curative instruction and removal of spectators sufficient where they were audibly crying during testimony).

C. The witness's legitimate expressions of pain, limited in scope and followed immediately by a recess, did not come anywhere close to so interfering with the conduct of trial that a mistrial was the necessary remedy.

Here, Appellant again fails to show entitlement for relief.

As an initial matter, this was not an "outburst" in the usual sense, where a witness, victim, or spectator in a calculated or at least intentional manner directs a negative comment or emotion specifically towards the defendant. Although Appellant now attempts to somehow suggest Heyward was malingering in some sort of attempt to gain sympathy from the jury, there is absolutely nothing in this record to suggest that Heyward's reactions were anything less than legitimate and unpredictable expressions of pain from the horrible wounds he suffered in the attack. As such, the display would have been inherently far less egregious or prejudicial than the direct confrontations in cases such as Hughes and Stewart, and, in any event, the jury was aware of the injuries Heyward suffered and would have likely understood his expressions of pain to be nothing more than what they were. See, e.g. Hughes, *supra*, and Anderson, *supra* (expressions of grief not prejudicial where jury already aware of the person's feelings).

Further, the trial court took a recess and sent the jury out during Mr. Heyward's pain episode, which lessened any possible emotional impact from the event. See Anderson, *supra* (pointing out the trial court's immediate recess as a factor justifying the lack of prejudice).

Finally, the pain event was limited in time and scope to one portion of one witness's testimony. Anderson, *supra* (noting the limited nature of the event). There is no indication of an extended or particularly gruesome display; indeed, the judge noted that the episode at trial was far less egregious than the one at the pretrial hearing.

This simply not a case where the clear and convincing evidence is that the episode so interfered with the conduct of the trial that a mistrial was the only remedy to protect the defendant's rights.

V. THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A MISTRIAL BECAUSE HEYWARD'S TESTIMONY WAS SOMEWHAT "GARBLED", WHERE THE FACE OF THE RECORD BELIES ANY NOTION THAT HEYWARD FAILED TO HAVE THE MINIMUM AND BASIC CAPABILITY TO COMMUNICATE NECESSARY FOR COMPETENCE TO TESTIFY.

Appellant next asserts that a mistrial should have been granted because the witness's testimony was garbled. However, the record of the extensive examination of Heyward removes any notion that he lacked the basic capacity to communicate.

A. Events at trial

Much of Heyward's testimony has already been extensively described. When arguing for a mistrial the morning following Heyward's testimony, Appellant asserted as one of many reasons that Heyward's testimony was "incredibly garbled". **{R. 454}.**

In ultimately denying the motions, the trial court agreed the testimony was garbled

and that some of it changed, but reasoned:

> TRIAL COURT: A great deal of that probably came about because of fatigue and because of just having to go through the process. It was the sort of testimony that just gradually degenerated as it went on, but certainly early on he indicated an ability to recall independently what had occurred on the night of the incident. So with that in mind, I would have to deny the motion. And, again, I think it's a matter for the jury to determine.

{R. 456-57}.

B. While Heyward's testimony may have been somewhat garbled at times, the face of the record containing about 100 pages of detailed examination of the witness belies any notion that Heyward failed to meet the minimum and basic capability to communicate necessary for competence to testify.

This issue again raises aspects of witness competency discussed in section III, *supra*. As noted there, the court in State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1999), identified four factors in order for a witness to be competent to testify: (1) perceive the event with a substantial degree of accuracy, (2) remember it, (3) communicate about it intelligibly, and (4) understand the duty to tell the truth under oath. Id. (citing Commonwealth v. Goldblum, 447 A.2d 234 (Pa. 1982), and discussing Rules 601-603, SCRE)). The party opposing the witness has the burden of proving him incompetent, and the trial court's decision is adjudged on appeal by the very deferential "abuse of discretion" standard. Needs, 333 S.C. at 143, 508 S.E.2d at 861.

The necessary ability to communicate does not require perfection, only a basic and minimal level is needed. See generally, e.g. State v. Butler, 143 A.2d 530 (N.J. 1958) (person of unsound mind may testify as long as a certain minimal intelligence is reached); State v. Marr, 673 A.2d 452 (R.I. 1996) (child witness has such basic abilities as to satisfy the minimal standards of witness competence); State v. Robert Anderson, 608 N.W.2d 644

(S.D. 2000) (four year old demonstrated sufficient ability to communicate and recollect to satisfy minimal standards for competency).

Here, while the parties and the judge used the word "garbled", there is nothing to show the witness was incapable of communicating at the basic and minimal level required for witness competency. Heyward was extensively examined both during the pre-trial hearing and the trial, and the face of the record shows that the court reporter was able to produce a complete and accurate transcript of Heyward's testimony, encompassing about 100 pages of generally responsive and detailed answers to a myriad of questions. It is apparent that the judge's use of the word "garbled" was not intended to entail a finding or conclusion that Heyward lacked the capability to communicate intelligently, as would be necessary to exclude a witness. Indeed, the judge specifically noted Heyward possessed the capability to recall the events, and that the "gradual degeneration" was most likely due to fatigue from a long cross-examination on a severely injured man.

Finally, as argued before in section III, any inconsistencies or changes in Heyward's testimony go to matters of credibility for the jury, not competence for the judge.

VI. APPELLANT CONCEDES HIS ISSUE REGARDING SELF DEFENSE IS NOT PRESERVED AS NO REQUEST FOR THE CHARGE WAS MADE AT TRIAL

Appellant next contends the court erred by refusing to charge self defense. As both Acting Chief Appellate Defender Joseph Savitz and Appellant's present counsel conceded, no request for a self defense charge was made at trial whatsoever. The issue is plainly not preserved for direct appeal and cannot be reviewed at this stage of the process. See State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998) (failure to request specific instruction waives the right to complain about the issue on appeal); Rule 20, SCRCrimP (all requests for legal

instructions must be submitted at the close of evidence, and failure to object constitutes a waiver).

Appellant contends this Court should review the issue anyway. However, decisions whether or not to request certain charges or pursue certain legal defenses are precisely the types of issues to be explored by presentation of evidence in post-conviction relief proceedings. See generally State v. Kinloch, 338 S.C. 385, 526 S.E.2d 705 (2000) (failure to demonstrate witness's unavailability and defense efforts made to locate witness are best explored in PCR); Brown v. State, 317 S.C. 270, 453 S.E.2d 251 (1995) (noting that failure to advise of right to give argument is better left to PCR where the facts can be fully explored). There is no general doctrine allowing appellate courts to ignore clear error preservation rules. See, e.g. Hicks, *supra* (finding issue not preserved even though the defendant contends instruction errors were so egregious they needed to be addressed on direct appeal, and specifically noting that its alternative discussion of the merits was not an abrogation of the clear error preservation rules).

The issue is not preserved and cannot be a basis for relief.

VII. APPELLANT'S CONCLUSORY CONTENTIONS WITH REGARD TO HIS MOTION FOR A NEW TRIAL ARE NOT PROPERLY PRESENTED ON APPEAL, AND THE EVIDENCE WAS MORE THAN SUFFICIENT TO SURVIVE A MOTION FOR DIRECTED VERDICT.

Appellant finally contends the trial court erred by failing to grant the motion for a new trial or a directed verdict. Initially, he contends:

> [M]ost of the grounds for a new trial have been discussed under other headings; to discuss them here would be repetitive and redundant. Nevertheless, Mr. Smith urges them upon this Court under this point as well.

{Appellant's Brief p. 30}. Respondent has already addressed the specific issues raised

under the prior grounds, and would incorporate those responses here. Any other bases for relief or other contentions are not properly presented on appeal, as they are not specifically argued. See State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981) (issue not argued in the brief is deemed abandoned); State v. Black, 319 S.C. 515, 462 S.E.2d 311 (Ct. App. 1995) (issue is deemed abandoned if the argument is only conclusory).

Appellant also contends that the evidence was insufficient to support his conviction. When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. When reviewing the denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the State. If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury. State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004).

Respondent would incorporate its discussion in the Statement of Facts, *supra*. Here, two eyewitnesses (Penny and Heyward) identified Appellant as one of the attackers. Wykiesha described the plan to rob Charles Penny's house for drugs, and identified Appellant and Ivan as the men who committed the crime with her. The direct evidence was more than sufficient in the light most favorable to the State. Appellant's arguments that the evidence was "extremely and fatally weak" are matters of credibility and weight outside the directed verdict determination.

CONCLUSION

For the foregoing reasons, Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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June 3, 2005.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Marc H. Westbrook, Circuit Court Judge

THE STATE,

Respondent,

v.

TERRANCE V. SMITH,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, S. Creighton Waters, Counsel for Respondent, certify that I have this date served the ***Final Brief of Respondent***, dated June 3, 2005, on Appellant by depositing three (3) copies of the same in the United States mail, first class postage prepaid, addressed to his attorney of record:

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I further certify that I have served all parties required by Rule to be served.

This 3rd day of June, 2005.

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ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Honorable Marc H. Westbrook, Circuit Judge

Case No: 02-GS-32-1405,1406,1407
02-GS-32-0743,0745,0746

State of South Carolina ..... Respondent,

v.

Terrance V. Smith ..... Appellant.

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ARGUMENT

I. THE TRIAL COURT ERRED IN NOT SEVERING THE TRIAL AND TRYING THE TWO DEFENDANTS SEPARATELY.

As noted in his Brief of Appellant by Terrance V. Smith, the appellant in this appeal and a defendant in the court below ("Mr. Smith"), the rule in this State is that"[a] motion for severance is addressed to the sound discretion of the trial court[.]" *State v. Castiniera*, 341 S.C. 619, 535 S.E.2d 449, 452 (Ct. App. 2000). *See also State v. Harris*, 342 S.C. 191, 535 S.E.2d 652, 656 (Ct. App. 2000)(same). The exercise of that discretion "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, 71 S.E.2d 10, 15 (1952). *See also State v. Crisp*, ___ S.C. ___, 608 S.E.2d 429, 431 (2005).

Notwithstanding these principles, the motion (Transcript of Record in Case Nos. 2002-GS-32-1300, 1301, 1306; 2003-GS-32-505,506, 887, 888; 2002-GS-32-1405, 1406, 1407; 2003-GS-32-43, 745, 746, 1109 for proceedings held in the Court of General Sessions, 11th Judicial Circuit, State of South Carolina, County of Lexington on April 28 to May 2, 2003 in the matter of State v. Ivan Douglas Collins and Terrance V. Smith ["Tr."] page ["p."] 722, line ["l."] 7-16; R. p.733), was denied (Tr. p. 722, l. 20-24; R. p. 733 lines 20-24).

In assessing the trial court's exercise of that discretion, it is important to emphasize that "'[a]n abuse of discretion occurs when the trial court's ruling is based upon an error of law....'" *State v. McDonald*, 343 S.C. 319, 540 S.E.2d 464, 467 (2000), *quoting Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528, 539 (2000). By the same token, "[t]he failure to exercise discretion, however, is itself an abuse of discretion." *State v. Mansfield*, 343 S.C.

66, 538 S.E.2d 257, 267 (Ct. App. 2000). As we will see, that discretion was abused, a harmful error of law was committed, and so the conviction of Mr. Smith cannot stand.

As counsel pointed out at trial (Tr. 563, l. 10-15; R.p.574 lines 10-15), Ivan Douglas Collins, a defendant below ("Mr. Collins"), and Mr. Smith were essentially in an adversary position during the trial. This was particularly the case on account of the testimony of Wykiesha Williams ("Ms. Williams"), during her cross-examination by Mr. Collins's attorney.

As the Court will also note, the request was not made simply in passing but was renewed time after time. After the presentation of most of the prosecution's case, for example, Mr. Smith's counsel renewed his motion for a severance on the ground that the two defendants were essentially in an adversary position (Tr. p. 563, l. 10-15; R.p.574 lines 10-15). The trial court denied the motion (Tr. p. 565, l. 14; R. p.576 line 14). Mr. Smith renewed the severance motion at the close of the State's evidence (Tr. p. 722, l. 7-16; R. p. 733 lines7-16). That motion also was denied (Tr. p. 722, l. 21; R. p. 733 line 21). Then, after Mr. Collins testified, Mr. Smith again renewed his severance motion (Tr. p. 792, l. 17-19; R. p.803 lines 17-19). Once again, the motion was denied (Tr. p. 793, l. 20-21; R. p.804 lines 20-21). As Mr. Smith argued at trial, that denial was an abuse of discretion. Nothing the State has said in its Brief of Respondent serves to rebut that contention.

The State relies heavily on the decision in *State v. Dennis*, 337 S.C. 275, 523 S.E.2d 173 (1999), in support of its argument. It is true that *Dennis* upheld the denial of a severance. It is also true, as the State points out, that "'[t]he general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and

a codefendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime'" (Brief of Respondent at 15, quoting *State v. Dennis*, *supra*, 523 S.E.2d at 176).

What the State fails to point out is that the court in *Dennis* took a much more cautious view of the matter than the respondent would allow. *See id.* The essential problem is that the State misunderstands the nature of Mr. Smith's severance argument. Citing the decisions in *State v. Avery*, 333 S.C. 284,509 S.E.2d 478 (1998); and *State v. Smith*, 359 S.C. 481, 597 S.E.2d 888, 893 (2004), the State argues that Mr. Smith attempts to avoid the rule of *Dennis* "by claiming antagonistic defenses" (Brief of Respondent at 15).

In fact, however, Mr. Smith is not arguing a defense that is antagonistic to that of his fellow defendant Ivan Collins ("Mr. Collins").[1] This is not a case in other words, in which as between Messrs. Smith and Collins, "the codefendants may present evidence accusing each other of the crime." *State v. Smith*, *supra*, 597 S.E.2d at 893. Rather, Mr. Smith argues that he did not commit the crime irrespective of whether Mr. Collins might have done so.

In fact, the State unwittingly admits this theory when it states that "[a]t trial, [Mr. Collins] testified and admitted shooting in the house, but blamed the victims for starting it with him and Appellant while they were merely waiting outside the car during [Ms. Williams's] visit" (Brief of Respondent at 4).[2] The thrust of Mr. Collins testimony was that *both* he and Mr. Smith were guilty of the crime while Mr. Smith's argument was limited to

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1 One notes that the State disrespectfully refers to Mr. Collins as "Ivan"throughout its Brief of Respondent.

2 As with Mr. Collins, the State disrespectfully refers to Ms. Williams as "Wykeisha" throughout its Brief of Respondent.

a defense that he did not commit the crime irrespective of whether anyone else had done so.

It is telling that, as the State acknowledges, Mr. Collins did not join in the motion (Brief of Respondent at 12). This offers additional support for the notion that a unitary trial was advantageous for Mr. Collins alone. Indeed, Mr. Collins theory of the case seemed premised on the notion that the more participants to which he could point, the more likely his defense would be to work. It was for this reason that the defenses were antagonistic so as to require severed trials. That is, it was not that each defendant pointed to each other as the sole perpetrator. It was that the cross-examination of Ms. Williams required for Mr. Collins's defense evidence that Mr. Smith was involved so as to minimize Mr. Collins's part. This means that the interests of the two defendants were hopelessly at odds; to the extent one defendant's defense succeeded, the other defendant's defense was harmed. For that reason a severance was required to protect Mr. Smith's rights.

The State acknowledges the problem but attempts to evade it by stating that "[e]ven if [Mr. Collins's] cross-examination of [Ms. Williams] had undermined a point made by Appellant during his turn to examine [Ms. Williams], this would not be enough to warrant a new trial, *as Appellant still had a fair shot at re-cross examination in which to explore the truth*" (Brief of Respondent at 15)(emphasis suppled). This pallid characterization ('A fair shot"), underscores rather than dismisses the problem, The truth is that Mr. Smith had little or no chance under all the facts and circumstances to "explore the truth" (Brief of Respondent at 15).

The State next argues that Mr. Collins's cross-examination of Ms. Williams failed to "harm" the points Mr. Smith had made in his cross-examination (Brief of Respondent at

16-17). This obscures the point Mr. Smith had been trying to make. Mr. Smith was trying to establish in that cross-examination that he had played no role in the planning of the robbery while in his cross-examination Mr. Collins tried to establish that Mr. Smith took part in the robbery in fact. The State's assumption seems to be that the Collins cross-examination does not devalue the Smith cross-examination because establishing that one did not *plan* a robbery is entirely a different matter from taking part in it. *See* Brief of Respondent at 17.

The point the State is trying to make would make sense only if Mr. Smith had been content to prove he had not taken part in the robbery planning while leaving open the question of his actual participation. This is of course absurd; it is indeed true that proving such a point would "have hardly been worth much for Appellant anyway" (Brief of Appellant at17). But of course Mr. Smith was attempting to prove both his lack of planning before the alleged crime took place *and* his lack of participation in the alleged offense when it supposedly took place. It is simply that he was not attempting to prove both within the confines of cross-examining Ms. Williams. It does not, however, mean that both points were not central to his defense. They were central–absolutely central!–and so the State's attempt to confine the conflict for which a severance was sought to the confines of Ms. Williams's dual cross-examinations is both misleading and incomplete.

Nevertheless, the State perseveres in its attempt to show that severance was not required. It claims that "[a]t no time during [Mr. Collins's] cross of [Ms. Williams] did he seek to imply that Appellant was more guilty or guilty to the exclusion of [Mr. Collins]; instead, he merely tried to attack the credibility of [Ms. Williams's] testimony as a whole" (Brief of Appellant at 17). Again, this statement misrepresents the effect of that testimony

upon Mr. Smith's case. The State attempts to explain away the effect of the testimony by claiming that Mr. Collins "tried to show a motive to lie on [Ms. Williams's] part due to trouble with another girl over [Mr. Collins], and pointed out that [the] police allowed [Ms. Williams] to remain free so long as she was 'out trying to catch *two* people'" (Respondent's Brief at 17, citing Tr. pp. 556-57) (emphasis supplied).

The reference to "two people" gives the game away, however. It demonstrates that the goal in Mr. Collins's cross-examination of Ms. Williams was to add to the number of people guilty of the offenses under examination. At the same time, it was Mr. Smith's goal to subtract one from the total of guilty parties to bring it down to a grand total of one , i.e., Mr. Collins alone. This example from the State's own brief demonstrates (a) the irreconcilable conflict between the defendants' defenses; and (b) the need for separate trials in this matter.

The State denies any desire "to unfairly include Appellant among the guilty" (Brief of Respondent at18). Yet in the very same paragraph, the state quotes an exchange between counsel for Mr. Collins and Ms. Williams that proves precisely the opposite (Brief of Respondent at 18, quoting Tr. pp. 562-62). The State offers a singularly weak excuse for that line of questioning immediately following that quotation from the transcript: "[Mr. Collins's] attorney could have also have been simply engaging in the common tactic of making the witness go through her testimony on direct again under the far more aggressive and trying experience of cross-examining, for whatever weight the jury may take from her demeanor during such questioning" (Brief of Respondent at 18). Mr. Smith has a much more simple and credible explanation – Mr. Collins undertook that repetitious line of questioning because

he was attempting "unfairly [to] include Appellant among the guilty." For this reason as well, the trial of the two defendants should have been severed.

The State next argues that Mr. Smith cannot object to the lack of severance because Mr. Collins's "testimony was ultimately as exculpatory to Appellant as it was to him" (Brief of Respondent at 18). The State in so arguing is plainly speaking out of both sides of its mouth. It argues on the one hand that because Mr. Collins's self-defense argument "was favorable to Appellant, it cannot be said that they were in adversarial positions such that severance was warranted" (Brief of Respondent at 19). At the same time, the State argues later in its Brief that this very issue that supposedly "was favorable to Appellant" (Brief of Respondent at 19), turns out in the end to be an "issue [that] is plainly not preserved for direct appeal and cannot be reviewed at this stage of the process" (Brief of Respondent at 39).

Because the jury was not charged with self-defense, it could not consider it as a basis for acquittal. Yet the issue is nonetheless said by the State to be "favorable to Appellant" (Brief of Respondent at 19). How, one asks, could an issue as to which the jury was not even instructed be "favorable to Appellant [?]" (Brief of Respondent at 19). The question, Mr. Smith asserts, answers itself. An issue which the jury was not instructed to considered simply cannot be "favorable to Appellant" (Brief of Respondent at 19). Thus, Mr. Collins's self-defense scenario could not militate against Mr. Smith's arguments for severance.[3]

Finally, the State argues that the result in *Dennis* supports the trial court's failure to

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[3] Of course, even though Mr. Smith argues that the self-defense defense is no argument against the appellant's right to severance, he continues to argue, as evidenced below, that the issue of self-defense should nevertheless be considered in this forum. That is an argument, in contrast to the State's self-defense/favorable testimony contention, that is by no means contradictory.

order a severance. The problem with this argument is that, although in *Dennis* no severance was ordered, one of the defendants was convicted while the other was acquitted. *State v. Dennis, supra*, 523 S.E.2d at 175. That result might offer some support for the notion that severance was not necessary after all. As the court noted in that case, "[j]urors were obviously able to follow these instructions, as they found appellant guilty and his brother not guilty." *Id.* at 176.

Here, of course, both defendants were found guilty; therefore, there is no result from which one could deduce that there was no prejudice on account of a failure to order severance. Yet the State offers to the Court a supposed example of such a result. It argues that the "fact the jury acquitted Appellant of the ill-treatment charge and convicted [Mr. Collins] shows it carefully considered each defendant's case" (Brief of Respondent at 19).

With all due respect to the State, it must be said that this argument is fatuous at best. As the State notes, Mr. Smith was "sentenced ... to concurrent terms of life without parole for murder, life without parole for ABIK, life without parole for attempted armed robbery, life without parole for first degree burglary, and five year sentences each for criminal conspiracy and possession of a weapon during commission of a violent crime" (Brief of Respondent at 2). The mere fact that the jury acquitted Mr. Smith of the minor offense of shooting the dog while convicting Mr. Collins of that act hardly shows that the jury carefully differentiated between the two defendants. This is especially the case given that, as the State acknowledges, Mr. Collins "admitted gunning down Charles's dog" (Brief of Respondent at 10). Unless the evidence had suggested that the dog was killed in a cross-fire, no other result in the face of Mr. Collins's admission of guilt on this point could be possible. A

fortiori, the State's proffer of the ill treatment acquittal as justification for the trial court's refusal to sever is decidedly unconvincing.

The fact is that all of the State's arguments on the severance issue are unavailing. Under the facts and the law, a severance of the trial should have been ordered. Because it was not, Mr. Smith's convictions should be overturned, and his case returned to the trial court for a new trial on all charges.

II. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE IN-COURT IDENTIFICATION AND OUT-OF-COURT IDENTIFICATION OF DEFENDANT TERRANCE V. SMITH BY WITNESS JOHN HEYWARD.

Both at trial and in his Brief of Appellant, Mr. Smith objected strongly to the admission into evidence of his identification by John Heyward ("Mr. Heyward"). In fact, the identification was so flawed that the appellant asked for a mistrial on that ground, (Tr. p. 721, l. 13-19; R. p732 lines 13-19), which is a matter of appeal in this proceeding as well. It should be stressed that this objection applied both to his identification by way of the photographic lineup while the witness was in the hospital as well as the in-court identification.

There is little question as to the standards for judging the admission of such testimony is well-settled in South Carolina. *State v. Moore*, 343 S.C. 282, 540 S.E.2d 445, 448 (2000)(citations omitted). Indeed, the State would seem to agree with this point. *See* Brief of Respondent at 21-22. The real problem in a consideration of this issue, then, is not the law but the facts. The identification of Mr. Smith by Mr. Heyward was so flawed that the Court should firmly voice its disapproval of that process.

Mr. Smith's argument has three main prongs. First, Mr. Heyward was seriously

impaired when he observed Mr. Smith at the scene of the crime. Initially, one notes that Mr. Heyward did not know Mr. Smith before he allegedly encountered him that evening. (Tr. p. 381, l. 21-23; R. p.388 lines 21-23). Next, Mr. Heyward had consumed not only four mixed rum drinks in the apartment before the intruders arrived (Tr. p. 118, l. 7-8; R. p.129 lines 7-8), but five beers during that period as well. (Tr. p. 120, l. 4-6; R. p.131 lines 4-6). And if that were not enough, Mr. Heyward had "smoked a blunt" (Tr. p. 120, l. 7-8; R. p.131 lines 7-8), before allegedly encountering Mr. Smith. In fact, he admitted to smoking *two* blunts (Tr. p. 406, l. 4-7; R. p.413 lines 4-7). How his mental state during the alleged home invasion could have been anything but foggy at the very least is a mystery to Mr. Smith.

Thus, the process was highly flawed with respect to the identification on the scene. What is more, the identification made earlier by Mr. Heyward was fatally flawed as well. Mr. Heyward admitted that he was pumped up on drugs in the hospital when the police officers showed him the picture he identified as Mr. Smith (Tr. p. 390, l. 16 to p. 391, l. 15; R. 397 -398). In addition, the photographic lineup seemingly took place sometime on August 23, 2001, twenty days after the incident (Tr. p. 129, l. 10-20; R. p.140 lines 10-20 ; Tr. p. 140, l. 6-7; R.p.151 lines 6-7).

As if that were not enough, Mr. Heyward testified that friends had told him that Mr. Smith was one of the intruders *before* he was shown the lineup (Tr. p. 130, l. 1-13; R. p.141 lines 1-13). Nor is that all; Mr. Heyward also testified that he had seen Mr. Smith's picture in the newspaper *before* the lineup (Tr. p. 130, l. 18-20; R. p.141 lines 18-20; Tr. p. 149, l. 18-19; R. p.160 lines 18-19). In fact, the pictures in the newspaper and the pictures in the lineup were–but for the fact that the former were in black and white and the latter in

color–the very same pictures that had been carried in the newspaper (Tr. p. 134, l. 6-21; R.p.145 lines 6-21).

A more flawed and less probative identification is impossible to imagine. The State's defense of the process is simply unconvincing. The respondent purports to quote the trial judge for the proposition "that there are always some problems, and while this witness may have more than a few more than usual, the identification was still admissible" (Brief of Respondent at 21, quoting Tr. pp. 158-59). The trial court's abdication of its responsibility on that ground that there are "[a]lways some problems" is simply no answer. The mere fact that most identifications are imperfect in some respect is no reason for a court to throw up its judicial hands and admit into evidence an identification process that has not just "some problems" but an almost unparalleled collection of problems whose presence should have precluded use of the identification out of hand.

The trial court's disregard of Mr. Heyward's consumption of four rum drinks, five beers, and two marijuana "blunts" as northing more than "a few more than usual" is equally insupportable. No specific evidence as to Mr. Heyward's capacity to hold his drinks and drugs appears in the record; however, the normal person who had consumed such a collection of mind-altering substances would find it difficult to make his way to the bathroom. The assumption that Mr. Heyward could have made an accurate identification in such a state, especially when the identification took place during an encounter that took place during a highly charged and action-packed few seconds, is simply not worthy of belief.

When it considers the hospital identification that took place weeks after the events that formed the basis for that process, the State is equally unconvincing. In fact, the

respondent goes off on somewhat of a tangent based upon the rule of *Neil v. Biggers*, 409 U.S. 188, 198-99, 93 S. Ct. 375, 34 L.Ed.2d 401 (1972). The State misapprehends Mr. Smith's argument, however. He does not argue prosecutorial misconduct in the sense of "suggestiveness" as employed by the Court in *Biggers*. Rather, he simply argues that, regardless of such "suggestiveness" or not, the process was so unreliable as to preclude admission of the identification. Of course, to that extent *Biggers* is not entirely irrelevant.

There is an initial problem, however. Mr. Smith was not able to make a *Biggers* argument because the critical witness was unavailable. As the State admits, however, "the officer who showed [Mr.] Heyward the lineup was not available for trial as he was in training to be a federal marshal" (Brief of Respondent at 20, quoting Tr. pp. 73-74). As the party proffering the evidence of the identification, it is of course the States' burden to satisfy its reliable nature. *Cf. State v. Carlson*, ___ S.C. ___, ___ S.E.2d ___, 2005 S.C. App. Lexis 48 (2005). Given its failure to produce the federal marshal, it is clear that the State has failed to satisfy its burden and so the entire identification process should be disapproved.

Aside from that issue, however, the fact that a heavily-drugged patient identifies a picture that he had earlier seen in the newspaper is a compelling reason to reject the identification as reliable. The identification was "suggestive" not because the State acted improperly–though whether it did or did not do so is impossible to determine absent the federal marshal–but because of the combination of the newspaper pictures and Mr. Heyward's sedated state.

The State attempts to escape this logical snare by arguing that "if no suggestion was made to him in the lineup, the presence of medicine in and of itself would do nothing to aid

an identification" (Brief of Respondent at 23). This argument, with all due respect, is fatuous. First, the access to the newspaper was itself suggestive, whether or not it was provided by the State. The point is the reliability of the identification more than it is the identity of the party who tainted the process.

Second, the issue is not whether the presence of medicine "aid[ed] an identification" (Brief of Respondent at 23)–Mr. Heyward made an identification, afer all–but whether Mr. Heyward's sedated state *prevented* an accurate identification. Mr. Smith argues that the Mr. Heyward's sedated state had precisely that effect, and that the State's arguments on the point evade rather than address that issue.

In fact, the State acknowledges that "[u]ndoubtedly, some of the reliability factors do not favor [Mr.] Heyward, as the record has no information that [Mr.] Heyward gave a description at the scene while he lay wounded with which to compare to Appellant" (Brief of Respondent at 24). In addition, as the State admits, "approximately twenty days passed from the time of the incident until the lineup was given" (Brief of Respondent at 24). In fact, those elements, when combined with the mind-altered state in which Mr. Heyward found himself when he made both identifications, i.e., at the scene and in the hospital, combine to entail that the trial court abused its discretion when it admitted the identification.

When one examines the five *Biggers* elements as set out in that case, 409 U.S. at 199, 93 S.Ct. 375, one sees that exactly *none* of them were satisfied. Indeed, it is significant to note that in *State v. Moore, supra,* 540 S.E.2d at 449, where the court found that "[u]nder the totality of the circumstances here, we find a substantial likelihood of irreparable misidentification such that the identifications are unreliable as a matter of law," the court

also found that one of the five elements, "the amount of time between the crime and the confrontation, *id.*, had been satisfied. Here, as we have seen, none of them have been satisfied. A fortiori, it could hardly be clearer that a *Moore*-type reversal and remand for a new trial is mandated. *Compare State v. Brown*, 356 S.C. 496, 589 S.E.2d 781, 786 (Ct. App. 2003)(showup took place "'just the briefest time, maybe a minute or a minute and a half'") *with State v. Moore, supra*, 540 S.E.2d at 449 (a ninety-minute gap). Here, the nearly three-week gap in this case would flunk both the *Moore and* the *Brown* tests.

One might expect the State to assume that because other eyewitnesses identified Mr. Smith, the error in allowing Mr. Heyward's identification–assuming arguendo only it was an error–was a harmless error that cannot support a reversal of the conviction. *See, e.g., State v. Primus*, 341 S.C. 592, 535 S.E.2d 152, 160-61 (Ct. App. 2000). Instead, the State used the fact of those other witnesses in an attempt to demonstrate that the identification did not violate Mr. Smith's due process rights (Respondent's Brief at 25).

This attempted use of the additional evidence is unavailing because the other witnesses identifying Mr. Smith were not more convincing. Mr. Penny's view lasted but a few seconds, was clouded by alcohol and drug usage (Tr. p. 327, l. 22-24; R. p.334 lines 22-24), and involved seeing two men whom he had never seen before (Tr. p. 340, l. 8-11; R. p.347 lines 8-11), nor ever again after that one brief look. (Tr. p. 337, l. 19-21; R. p.344 lines 19-21). If that was not enough, Mr. Penny could even purport to identify one of the two suspects (Tr. p. 367, l. 7-10; R. p.374 lines 7-10). In addition, witness Ronnie Rogers could not identify either Mr. Collins or Mr. Smith (Tr. p. 639, l. 11 to p. 640, l. 1; R. p.650 - p.651).

Ms. Williams's identification of Mr. Smith is highly suspect as well because she knew him only by nickname (Tr. p. 454, l. 17-18; R. p.461 lines 17-18), but not by name (Tr. p. 530, l. 8-13; R. p.541 lines 8-13). Of course, Ms. Williams was not present in the apartment during the shootings. Finally, Mr. Hook was unable to identify either of the defendants from the photo lineup he was shown. This was so, he explained, "[b]ecause I didn't look in their face all the way" (Tr. p. 264, l. 13; R. p.271 line 13). Cumulatively, therefore, the identifications of Mr. Smith presented at trial fall far short of being probative.

Finally, witness Franklin Hook was unable to identify either of the defendants "[b]ecause I didn't look in their face all the way" (Tr. p. 264, l. 13; R. p. 271 line 13). Of course, Mr. Franklin's consumption of vodka and blunts would have made his identification of little value in any event (Tr. p.270, l.11-12; R. p.277 lines 11-12). Cumulatively, therefore, the identifications of Mr. Smith presented at trial fall far short of being probative. This means that, for what it was worth, the State's due process argument fails. A fortiori, the identification made by Mr. Heyward should have been suppressed. *Cf. State v. Frazier*, 357 S.C. 161, 592 S.E.2d 621, 623-24 (2004).

III. THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL OR, IN THE ALTERNATIVE, SUPPRESSING WITNESS HEYWARD'S TESTIMONY ON ACCOUNT OF HIS CHANGED TESTIMONY ON THE SECOND DAY OF THE TRIAL.

Mr. Smith argued in his Brief of Appellant that he was entitled to a mistrial on account of Mr. Heyward's changed testimony. Alternatively, he argued that he was entitled to have the testimony stricken on essentially the same grounds.

There can be no question but that Mr. Smith has satisfied that test. Mr. Heyward's initial testimony was changed in midstream to the great prejudice of Mr. Smith. That is,

although Mr. Heyward has testified that some friend had told him that Mr. Smith was one of the intruders before he was shown the lineup (Tr. p. 130, l. 1-13; R. p.141 lines 1-13), and notwithstanding his testimony that he had seen the newspaper pictures before he was shown the lineup (Tr. p. 130, l. 18-20; R. p.141 lines 18-20 ; Tr. p. 149, l. 18-19; R. p.159 lines 18-19), Mr. Heyward changed and recanted his testimony on cross-examination (Tr. p. 392, l. 2 to p. 395, l. 17 R. p.399 to 402).

The trial court did attempt to deal with the problem by instructing the jury on the point (Tr. p. 402, l. 20 to p. 404, l. 17; R. p.409 -411). This case, however, is ruled by the principle that "[a]n instruction ... is deemed to cure any error," *State v. Dempsey*, 340 S.C. 565, 532 S.E.2d 306, 309 (Ct. App. 2000), except where "an incident is so grievous that its prejudicial effect can be removed in no other way." *Id.*, *quoting State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 68, 73 (1998). This is just such a case.

The view taken by the Court (and perforce the State), is that the troublesome nature of the testimony went to its weight rather than to its admissibility so that "the issues were for the jury" (Brief of Respondent at 29, citing Tr. pp. 445-48). The State offered the Court a nationwide survey of the law on this subject (Brief at Respondent at 30-31), in support of this proposition.

Mr. Smith has no quarrel with these general principles. They are, however, of dubious relevance in this case. Certainly, "[e]ven a convicted perjurer may testify as long as he or she meets the minimum standard." *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857, 861 (1998). Those standards, as the court enumerated, are the following:

> A proposed witness understands the duty to tell the truth when he states that he knows that it is right to tell the truth and wrong to lie, that he will tell the

> truth if permitted to testify, and that he fears punishment if he does lie, even if that fear is motivated solely by the perjury statute. *State v. Green*, 267 S.C. 599, 606, 230 S.E.2d 618, 621 (1976). As succinctly explained by the Pennsylvania Supreme Court, in order to be competent to testify, a witness must have the ability (1) to perceive the event with a substantial degree of accuracy, (2) remember it, (3) communicate about it intelligibly, and (4) be mindful of the duty to tell the truth under oath. *Pennsylvania v. Goldblum*, 498 Pa. 455, 447 A.2d 234, 239 (Pa. 1982).

Id.

The problem for the State in light of these standards is that although Mr. Heyward might meet the theoretical standards allowing an accused liar's testimony to be matters for the jury to weigh, his testimony to be allowable must pass this four-part test before it ever gets to the jury in the first place. This is, as we will see, a test Mr. Heyward's testimony cannot meet. First, Mr. Heyward's alcohol- and drug-besotted state during the alleged crime plus his medicated state in the hospital entails that his testimony flunks factor (1) of the *Needs* test. Second, these very same conditions preclude compliance with factor (2) of that test.

Third, Mr. Heyward's confused and contradictory testimony fails to mesh with factor (3) of the *Needs* test. As even the State acknowledges, the trial court "agreed that at one point [Mr.] Heyward's testimony was garbled" (Brief of Respondent at 32). At the same time, the court, according to the State at least, found that these testimonial defects were "apparently due to his severe physical injuries and 'fatigue' from a lengthy and withering cross-examination from Appellant" (Brief of Respondent at 32). Mr. Smith would point out that the cause of this garbled testimony is much less important than the fact of its existence. That is, whether the deficiencies in the testimony were the result of physical infirmities or "'fatigue'" may

be important in some ultimate sense but for purposes of the issue at hand, either explanation disqualifies the testimony from being presented to the jury.

Fourth, the sudden switch in testimony indicates that Mr. Heyward was far from "mindful of the duty to tell the truth under oath." *Id.* Notwithstanding the State's attempts to explain it away (Brief of Respondent at 31-32), the fact remains the truth was not told. Whether it was caused by mendacity or simple "'fatigue,'" the fact remains that this factor (4) of the *Deeds* test is unsatisfied.

Unlike the situation in *Needs*, this was more than a case in which the witness simply changed his testimony. *Id.* at 861-62. That is, if this were a case in which a change in testimony was the *only* flaw in the proffered testimony, then the four-part *Needs* test might conceivably be met. This is, however, a case in which none of those factors were satisfied. Certainly, the rule when the test is satisfied is that "[a]fter the trial court properly has determined a witness is competent, the resolution of the credibility of the witness is within the province of the jury." *Id.* at 862. Where, by contract, the trial judge abused his discretion in making that determination, the testimony should never have gone to the jury in the first place. For this additional reason, the judgment of conviction entered against Mr. Smith in the court below cannot stand.

IV. THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL ON ACCOUNT OF WITNESS HEYWARD'S DISPLAY OF WRITHING AND THE LIKE IN AN APPARENT ATTEMPT TO GAIN THE JURY'S SYMPATHY.

As noted above, the decision to grant or deny a motion for a mistrial is a matter entrusted to the trial court's discretion, *State v. Dempsey, supra*, 532 S.E.2d at 309, which

the defendant must show was abused. In addition, to overturn a trial court decision not to grant a mistrial, "the defendant must show error and resulting prejudice." *State v. Harris*, 340 S.C. 59, 530 S.E.2d 626, 628 (2000). Here, those requirements have been satisfied and so the conviction below must be disapproved.

As Mr. Smith noted in his Brief of Appellant, episodes of this sort have often led as a matter of general law to mistrials or their functional equivalent. *See, e.g., Collum v. State*, 21 Ala.App. 220, 107 So. 35 (1926); *Collier v. State*, 115 Ga. 803, 42 S. E. 226 (1902); *Wamsley v. State*, 171 Neb.197, 106 N.W.2d 22 (1960). *See generally*, Annot., Emotional Manifestations by Victim or Family of Victim During Criminal Trial as Ground for Reversal, New Trial, or Mistrial, 31 A.L.R.4th 229 (1984 & supp. 2003). The same remedy should have been applied here. Because it was not, the conviction below should be reversed.

The State seeks to rebut Mr. Smith's argument (Brief of Respondent at 33-37); however, it does so by means of clearly inapposite authority. For example, respondent seeks to counter Mr. Smith's authority with decisions like *State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999); *State v. Anderson*, 322 S.C. 89, 470 S.E.2d 103 (1996); and *State v. Jones*, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996)(Brief or Respondent at 35-36). The problem with these cases is that they all involved outbursts by spectators instead of as here alleged victims of the purported criminal acts for which the defendant was standing trial. An outburst by the alleged victim himself is clearly more of an illicit signal to the jury than one from the spectator section.

Mr. Heyward's outburst was not simply crying or some emotion tangential to the incident in issue. Rather, his outburst consisted of a supposed demonstration of the very

injuries he had allegedly suffered at the defendants' hands. This makes it more likely that the jury will give credence to the charges against the defendants. It does so, however, in an illicit manner which is not subject to any sort of reasonable cross-examination or rebuttal.

The State seeks to defend the outburst on the ground that it was real instead of feigned (Brief of Respondent at 36-37). This is not the point, however. Whether real or not, the jury was exposed to an emotional form of testimony that was highly prejudicial to Mr. Smith's defense. Moreover, the State's assertion "that the episode at trial was far less egregious than the one at the pretrial hearing" (Brief of Respondent at 37), is supremely beside the point. It is the fact that the outburst occurred before the jury that was the point. Plainly, Mr. Heyward's outburst was so prejudicial that a mistrial should have been declared.

V. THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL ON ACCOUNT OF WITNESS HEYWARD'S GARBLED TESTIMONY.

As noted in the discussions above, the decision to grant or deny a motion for a mistrial is a matter entrusted to the trial court's discretion, *State v. Dempsey, supra,* 532 S.E.2d at 309, which the defendant must show was abused. In addition, we have seen that to overturn a trial court decision not to grant a mistrial, "the defendant must show error and resulting prejudice." *State v. Harris, supra,* 530 S.E.2d at 628. Here, those requirements have been satisfied in regard to his issue as well, and so the conviction below must fail.

This argument incorporates by reference and implication a number of the points that were made above. When all the facts and circumstances of Mr. Heyward's appearance on the witness stand are considered, it is plain that his testimony was so garbled and confusing that only a mistrial could have remedied the situation.

The State does not appear to deny that Mr. Heyward's testimony was garbled. Rather, it attempts to minimize its nature. First, it describes the condition in its argument heading as "somewhat 'garbled'" (Brief of Respondent at 37), which appears to be a backhanded acknowledgement that the testimony was deficient.

Second, the State argues that a review of the record "removes any notion that he lacked the basic capacity to communicate" (Brief of Respondent at 37). In making this statement, respondent is engaging in the hoary debtor's trick of inflating his opponent's argument beyond its intended terms and then knocking down that straw man he has just created for that purpose. Mr. Smith does not argue that Mr. Heyward "lacked the basic capacity to commujnicate." What he *does* argue is that Mr. Heyward's "answers were contradictory, his demeanor on the stand showed that he approached a level of what I could consider incompetent to testify about the facts ... that he didn't accurately remember the situation, changed his testimony" (Tr. p. 446, l. 6-8, 11-12; R. p.453 lines 6-8, 11-12). Mr. Heyward may not have lacked the basic capacity to communicate;" however, the information he *did* attempt to communicate was so incredibly garbled (Tr. p. 445, l. 4-5; R. p.452 lines 4-5), that a mistrial was indicated on this grounds as well as on account of his outburst and allegedly perjured testimony while on the stand. For that reason, the State's out-of-state authority presented in its Brief of Respondent at 38 is essentially off the point.

Here, the trial court abused its discretion because a mistrial or directed verdict was mandated for many reasons; for purposes of the present argument, however, it is also mandated on account of the "incredibly garbled" (Tr. p. 445, l. 4-5; R. p.452 lines 4-5), nature of Mr. Heyward's testimony.

VI. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON SELF-DEFENSE IN LIGHT OF THE FACTS THAT CO-DEFENDANT COLLINS HAD TESTIFIED THAT (A) MR. SMITH HAD BEEN PHYSICALLY ATTACKED; AND THAT (B) HE HIMSELF HAD BEEN FIRED UPON WITHOUT PROVOCATION.

No one, least of all Mr. Smith, denies that he did not seek an instruction on self-defense. Yet there was extensive testimony that could have supported such a defense in Mr. Collins's testimony (Tr. p. 746, l. 12 to p. 765, l. 18; R. p.757 to 776). The factual basis of this defense on grounds that supplemented Mr. Collins's testimony was discussed in Mr. Smith's Brief of Appellant. The testimony and ancillary factual matters add up to a colorable plea of self-defense. *See, e.g., State v. Day*, 341 S.C. 410, 535 S.E.2d 431, 434 (2000), *State v. Hill*, 315 S.C. 260, 433 S.E.2d 848, 849 (1993).

The State naturally objects on the ground that self-defense is waived if not argued trial (Brief of Respondent at 39-40). In that regard, Mr. Smith acknowledges his failure to raise the point at trial. He did argue in his Brief of Appellant, however, that the failure of the trial court to charge the jury with self-defense notwithstanding this failure by the parties to raise the point is an "'omission ... as to a matter which is basic or fundamental.'" *State v. Lyles*, 210 S.C. 87, 41 S.E.2d 625, 627 (1947), *quoting State v. McGee*, 185 S.C. 184, 193 S.E. 303, 307 (1937). *See also State v. Biggs*, 192 S.C. 49, 5 S.E.2d 563, 565 (1939). That is, given the testimony of Mr. Collins and the ancillary facts supporting his theory, nothing could have been more "basic or fundamental" than a self-defense charge. This entails that (a) the trial court should have so charged the jury even though an instruction on the point was not requested; and (b) the failure of the trial court to do so is reversible error.

One notes in reading the Brief of Respondent on this point that the State does not

respond to this assertion. Instead, the State argues that the matter should be explored on post-conviction relief ("PCR") proceedings. Even if it is true, however, that the failure of counsel to request an instruction on self-defense could be the subject of a PCR proceeding, the State fails to show how, in light of *State v. Lyles, supra*, and like cases, it is inevitable that the question could not be considered by *this* Court.

Certainly, judicial economy favors such a consideration in the present proceeding. The Court is considering as a whole the alleged flaws that took place in the trial of this case. Because these grounds are so interrelated, it makes sense to consider them as a whole, rather than to reserve an important part of that defense to a subsequent PCR hearing.

Again, Mr. Smith acknowledges his failure to raise self-defense at trial. Nonetheless, under the facts and circumstances of this case, the absence of any consideration of self-defense at trial constitutes an "'omission ... as to a matter which is [so] basic or fundamental.'" *State v. Lyles, supra*, 41 S.E.2d at 627, that the usual rules precluding such a consideration should be overridden. Certainly, for all of the State's emphasis on the PCR avenue of relief, the respondent has singularly failed to rebut Mr. Smith's argument in terms. For that reason, the judgment of the court below should be reversed.

VII. THE TRIAL COURT ERRED IN REFUSING TO GRANT MR. SMITH'S MOTION FOR A DIRECTED VERDICT AND FOR A NEW TRIAL.

The rule governing the grant of directed verdicts is well settled. *See, e.g., State v. James*, ___ S.C. ___, 608 S.E.2d 455, 457 (Ct. App. 2004). The assessment of the denial of a motion for a new trial involves much the same consideration; in addition, "[t]he denial of a motion for a new trial will be disturbed on appeal only upon a showing of an abuse of

discretion." *State v. Guillebeaux*, 362 S.C. 270, 607 S.E.2d 99, 101 (Ct. App. 2004). *See also State v. Smith*, 316 S.C. 53, 447 S.E.2d 175, 176 (1993).

In its discussion of the grounds for a directed verdict and/or new trial, Mr. Smith was plainly incorporating the grounds raised in earlier discussion points. In other words, the appellant was incorporating earlier arguments by reference. Yet the State argues that these points "are not properly presented on appeal, as they are not specifically argued" (Brief of Respondent at 40). In fact, these points are all "properly presented" and "specifically argued" earlier in the Brief of Appellant. For sake of economy and the avoidance of repetition, Mr. Smith chose to incorporate rather than repeat those arguments. Indeed, he could not have been clearer in announcing the procedure he was using. There is nothing in that procedure, Mr. Smith contends, that amounts to the waiver of any issue on appeal.

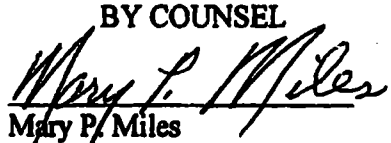
One notes that when it comes to its argument against the grant of a directed verdict or new trial, the State is not above incorporating the discussion in *its* Brief of Appellant. *See* Brief of Respondent at 41. Mr. Smith has done no more in his Brief of Appellant than the State is doing in its Brief of Respondent. For that reason all of his points–which the State only seeks to rebut in the most general terms (Brief of Respondent at 40-41)–are preserved and worthy of consideration.

In terms of that consideration, the points raised both in this Reply Brief of Appellant and the earlier Brief of Appellant fully support the notion that Mr. Smith should have been granted a directed verdict or, failing that, a new trial. Because neither motion was granted, the judgment below should be overturned and judgment entered in Mr. Smith's favor. Alternatively, the case should be remanded to the trial court for a new trial on the merits.

CONCLUSION

For the reasons set out above, appellant Terrance V. Smith respectfully asks the Court to reverse the judgement of conviction and sentences of life imprisonment and terms of years entered in the trial court and to dismiss the indictment against him. Alternatively, Mr. Smith respectfully asks the Court to reverse the judgment and sentence and to remand the cause to the trial court for a new trial. Mr. Smith also asks the Court to grant him all additional relief to which it finds him entitled.

Respectfully submitted,
TERRANCE V. SMITH
BY COUNSEL



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