

Volume II of II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Robin B. Stilwell, Circuit Court Judge

RECEIVED

DEC 9 2014

S.C. Supreme Court

RUSSELL W RICE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

KAREN RATIGAN
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

INDEX	i
TRIAL TRANSCRIPT	1
OPINION 4107 FILED APRIL 24, 2006.....	592
APPLICATION FOR POST-CONVICTION RELIEF	597
MEMORANDUM OF LAW IN SUPPORT OF POST-CONVICTION RELIEF APPLICATION	602
AMENDMENTS TO POST-CONVICTION RELIEF APPLICATION	630
RETURN	635
ORDER (GRANTING DISCOVERY).....	638
POST-CONVICTION RELIEF HEARING TRANSCRIPT	642
DEPOSITION TRANSCRIPT	669
ORDER OF DISMISSAL	690

RUSSELL RICE - CROSS EXAMINATION BY MR. MOYER

497

1 A. NO, NO. I -- IT WAS -- I'D BEEN IN TOWN TWO WEEKS.

2 AND THAT'S ABOUT AS LONG I USUALLY STAY.

3 Q. AND THE TRUTH OF THE MATTER IS, ISN'T IT, MR. RICE,

4 THAT YOU HAD GONE AND JUST DUG UP THAT GUN AND CUT IT INTO

5 PIECES?

6 A. NO. NO, THAT'S NOT TRUE.

7 Q. THAT'S WHY THERE WERE FRESH CUT MARKS WHERE THOSE CUT

8 MARKS HAD ---

9 A. NO, NO.

10 Q. --- BEEN ON THAT GUN?

11 A. NO, THAT'S NOT TRUE.

12 Q. AND ISN'T IT THE TRUTH OF THE MATTER, MR. RICE, THAT

13 YOU WERE HEADING OUT OF TOWN TO DISPOSE OF THAT THING FOR

14 GOOD ON THE VERY DAY THAT YOU WERE STOPPED BY THE POLICE?

15 A. NO. I WAS GOING TO DO MY USUAL THING, GOING BACK OUT

16 OF TOWN LIKE I ALWAYS DO.

17 Q. THANK YOU.

18 THE COURT: ANY REDIRECT?

19 MR. SUMNER: NO, SIR.

20 THE COURT: THANK YOU. STEP DOWN.

21 MR. SUMNER: YOUR HONOR, THAT WOULD CONCLUDE THE

22 DEFENSE CASE.

23 THE COURT: ALL RIGHT. TAKE THE JURY OUT PLEASE.

24 (WHEREUPON THE JURY EXITED THE COURTROOM AT 10:30 AM)

25 THE COURT: ALL RIGHT. ANY MOTIONS?

1 MR. SUMNER: YES, SIR. YOUR HONOR, I WOULD JUST RENEW
2 THE MOTIONS MADE AT THE CLOSE OF THE STATE'S CASE. I DON'T
3 BELIEVE I NEED -- UNLESS YOU WANT TO GET INTO THEM, I DON'T
4 NEED TO.

5 THE COURT: I WOULD DENY YOUR MOTIONS.

6 MR. SUMNER: THANK YOU.

7 THE COURT: WILL THERE BE ANY REPLY?

8 MR. MOYER: I'LL HAVE A COUPLE OF WITNESSES IN REPLY,
9 YOUR HONOR.

10 THE COURT: OKAY. THAT'S FINE. ALL RIGHT. WE'LL TAKE
11 A SHORT RECESS.

12 MR. SUMNER: YOUR HONOR, COULD I ASK IF THERE'S A SHORT
13 REPLY CASE DO YOU ANTICIPATE US GOING DIRECTLY INTO CLOSING?

14 THE COURT: YEAH.

15 MR. SUMNER: OKAY. ANY UNUSUAL, I GUESS, CHARGE ISSUES
16 OR IS THERE ANYTHING IN PARTICULAR ---

17 THE COURT: I'M GOING TO CHARGE ---

18 MR. SUMNER: IT'S MOSTLY FOR MY OWN BENEFIT. I'M JUST
19 TRYING ---

20 THE COURT: WELL, OF COURSE, THE GENERAL CHARGE.

21 MR. SUMNER: YES, SIR.

22 THE COURT: I'M GOING TO OBVIOUSLY CHARGE ON MURDER.

23 MR. SUMNER: YES, SIR.

24 THE COURT: TRAFFICKING COCAINE, CARRYING AN UNLAWFUL
25 WEAPON, POSSESSION OF A WEAPON WITH A VIOLENT CRIME,

1 CIRCUMSTANTIAL EVIDENCE, EXPERT TESTIMONY, AND ALIBI.

2 MR. SUMNER: THANK YOU. CAN I JUST SEE WHAT THOSE --
3 CAN I JUST SEE YOUR CHARGE FOR ONE SECOND? I DON'T WANT TO
4 MISSTATE ANYTHING.

5 THE COURT: TELL ME WHAT YOU WANT TO KNOW.

6 MR. SUMNER: OKAY. CIRCUMSTANTIAL EVIDENCE, I KNOW
7 THAT CHANGED UNDER -- IS IT ---

8 THE COURT: I'LL LET YOU READ THAT ONE...

9 MR. SUMNER: WELL, NO, I'M NOT TRYING TO PUT YOU OUT.

10 THE COURT: THAT'S ALL RIGHT.

11 MR. SUMNER: I DON'T WANT TO MISSTATE ANYTHING. AND IF
12 I COULD JUST MAYBE DO THE SAME ON THE ALIBI. WOULD YOU MIND
13 IF I GOT A COPY OF YOUR ALIBI CHARGE?

14 (WHEREUPON COPIES WERE MADE)

15 MR. SUMNER: THANK YOU, JUDGE.

16 THE COURT: ALL RIGHT. WE'LL TAKE A RECESS.

17 (WHEREUPON COURT WAS IN RECESS)

18 THE COURT: ALL RIGHT. YOU HAVE TWO SHORT REPLY
19 WITNESSES AS I UNDERSTAND IT.

20 MR. MOYER: THERE ARE ACTUALLY FOUR, YOUR HONOR.

21 THE COURT: ALL RIGHT. THAT'S ALL RIGHT. AND THEN
22 WE'LL GO INTO ARGUMENTS AND CHARGE. AND YOU'RE GOING TO
23 WAIVE OPENING ARGUMENT.

24 MR. MOYER: YES, SIR.

25 THE COURT: OKAY.

1 MR. MOYER: YOUR HONOR, BEFORE WE BRING THE JURY WOULD
2 YOU ENTERTAIN AN ARGUMENT FOR AN ALTERNATE CHARGE ON
3 CIRCUMSTANTIAL EVIDENCE?

4 THE COURT: SURE. LET ME SEE IT.

5 MR. MOYER: MAY IT PLEASE THE COURT? STATE V. GRIPPON,
6 IN THIS CASE, YOUR HONOR, THE COURT -- THE SUPREME COURT
7 STATES THAT IT RECOMMENDS A CHARGE FOR CIRCUMSTANTIAL
8 EVIDENCE TO BE AS FOLLOWS: THERE ARE TWO TYPES OF EVIDENCE
9 WHICH ARE GENERALLY PRESENTED DURING THE TRIAL, DIRECT
10 EVIDENCE AND CIRCUMSTANTIAL EVIDENCE.

11 DIRECT EVIDENCE IS THE TESTIMONY OF A PERSON WHO
12 ASSERTS OR CLAIMS TO HAVE ACTUAL KNOWLEDGE OF A FACT.
13 CIRCUMSTANTIAL EVIDENCE, PROOF OF CHAIN OF FACTS OR
14 CIRCUMSTANCES INDICATING EXISTENCE OF A FACT. THE LAW MAKES
15 ABSOLUTELY NO DISTINCTION BETWEEN THE WEIGHT OR VALUE TO BE
16 GIVEN TO EITHER DIRECT OR CIRCUMSTANTIAL EVIDENCE. NOR IS A
17 GREATER DEGREE OF CERTAINTY REQUIRED OF CIRCUMSTANTIAL
18 EVIDENCE THAN OF DIRECT EVIDENCE. YOU SHOULD WEIGH ALL THE
19 EVIDENCE IN THE CASE. AFTER WEIGHING ALL THE EVIDENCE IF
20 YOU'RE NOT CONVINCED OF THE GUILT OF THE DEFENDANT BEYOND A
21 REASONABLE DOUBT YOU MUST FIND THE DEFENDANT NOT GUILTY.

22 THE COURT: ISN'T THAT WHAT MY CHARGE SAYS?

23 MR. MOYER: I'M SORRY?

24 THE COURT: ISN'T THAT WHAT MY CHARGE SAYS?

25 MR. MOYER: UNLESS I -- MAY IT PLEASE THE COURT? THE

JOHN LEENAARS - DIRECT EXAMINATION BY MR. MOYER

501

1 CHARGE THAT I HAVE HERE TALKS ABOUT -- HAS LANGUAGE TO THE
2 EFFECT OF WHERE TWO INFERENCES CAN BE DRAWN FROM THE SAME
3 FACT, ONE CONSISTENT WITH GUILT AND ONE CONSISTENT WITH
4 INNOCENCE. WELL, I GUESS THE LANGUAGE OF -- AT THE SAME
5 TIME -- ALL THE CIRCUMSTANCES PROVED MUST BE CONSISTENT WITH
6 THE THEORY THAT THE DEFENDANT IS GUILTY AT THE SAME TIME
7 INCONSISTENT WITH THE THEORY THAT HE IS INNOCENT WITH EVERY
8 OTHER REASONABLE THEORY EXCEPT THAT OF GUILT. I GUESS THAT
9 LANGUAGE IS THE LANGUAGE THAT I WOULD OBJECT TO.

10 MR. SUMNER: I JUST -- YOUR HONOR, I THINK THAT YOUR
11 CHARGE THAT YOU HANDED OVER SAYS MAYBE IN DIFFERENT WORDS
12 EXACTLY WHAT THIS CASE SAYS THAT MR. MOYER QUOTED, THE
13 GRIPPON CASE. SO I WOULD JUST ASK THAT YOUR STANDARD
14 CIRCUMSTANTIAL EVIDENCE CHARGE BE USED.

15 THE COURT: WELL, I'LL LOOK THIS OVER, BUT I'M INCLINED
16 TO JUST STICK WITH MY STANDARD CHARGE. OKAY. BRING THE
17 JURY.

18 (WHEREUPON THE JURY ENTERED THE COURTROOM AT 10:54 AM)

19 THE COURT: ALL RIGHT. SOLICITOR, YOU HAVE SOME REPLY
20 TESTIMONY?

21 MR. MOYER: YES, YOUR HONOR. THE STATE WOULD CALL JOHN
22 LEENAARS.

23 JOHN LEENAARS, BEING DULY

24 SWORN TESTIFIED AS FOLLOWS:

25 DIRECT EXAMINATION BY MR. MOYER:

JOHN LEENAARS - DIRECT EXAMINATION BY MR. MOYER

502

1 Q. MR. LEENAARS, WHERE ARE YOU EMPLOYED?

2 A. CENTURY III, INCORPORATED.

3 Q. AND WHERE IS THAT BUSINESS LOCATED?

4 A. IN GREER, SOUTH CAROLINA.

5 Q. AND WHAT IS YOUR POSITION WITH CENTURY III?

6 A. I'M THE ACCOUNTING MANAGER.

7 Q. HOW LONG HAVE YOU WORKED FOR -- AS THE ACCOUNTING
8 MANAGER THERE?

9 A. TEN YEARS.

10 Q. OKAY. AND DO YOU HAVE ACCESS TO EMPLOYEE RECORDS AS AN
11 ACCOUNTING MANAGER AT C-III?

12 A. THAT'S CORRECT.

13 Q. AND THOSE EMPLOYEE RECORDS, THEY'RE KEPT IN THE
14 ORDINARY COURSE OF REGULAR CONDUCTED BUSINESS ACTIVITY FOR
15 THE BUSINESS?

16 A. THAT'S CORRECT.

17 Q. DID SOMEONE BY THE NAME OF KEVIN MOORE WORK FOR CENTURY
18 III IN NOVEMBER OF 2002?

19 A. YES.

20 Q. AND HAVE YOU GONE BACK AND LOOKED AT THE EMPLOYMENT
21 RECORDS TO DETERMINE WHETHER OR NOT HE WORKED ON NOVEMBER
22 THE 5TH, 2002?

23 A. YES, I HAVE.

24 Q. AND DID MR. MOORE, IN FACT, WORK ON NOVEMBER THE 5TH?

25 A. YES, HE DID.

JOSH HUTSON - DIRECT EXAMINATION BY MR. MOYER

503

1 Q. HOW MANY HOURS DID HE WORK?

2 A. HE WORKED TEN HOURS.

3 Q. WHAT WERE -- AT WHAT LOCATION DID HE WORK?

4 A. ONE OF OUR CLIENTS, MITSUBISHI IN GREER.

5 Q. OKAY. AND WHAT ARE THE -- WHAT ARE THE HOURS AT THAT

6 ---

7 A. OUR NORMAL HOURS ARE FROM SEVEN IN THE MORNING UNTIL

8 5:30 WITH A HALF AN HOUR FOR LUNCH.

9 Q. THANK YOU.

10 MR. MOYER: NO FURTHER QUESTIONS.

11 THE COURT: ALL RIGHT. ANY QUESTIONS?

12 MR. SUMNER: ONE SECOND PLEASE, YOUR HONOR. NO. THANK

13 YOU.

14 THE COURT: THANK YOU. YOU CAN STEP DOWN.

15 MR. MOYER: CALL JOSH HUTSON. AND I ASK THAT THIS

16 WITNESS BE EXCUSED.

17 MR. SUMNER: WITHOUT OBJECTION.

18 THE COURT: WITHOUT OBJECTION.

19 JOSH HUTSON, BEING DULY

20 SWORN TESTIFIED AS FOLLOWS:

21 DIRECT EXAMINATION BY MR. MOYER:

22 Q. OKAY. MR. HUTSON, WHERE ARE YOU EMPLOYED?

23 A. CENTURY III INDUSTRIAL CONTRACTORS.

24 Q. AND WHERE WERE YOU WORKING BACK IN NOVEMBER OF 2002?

25 A. MITSUBISHI, POLYESTER FILM IN GREER, SOUTH CAROLINA.

JOSH HUTSON - DIRECT EXAMINATION BY MR. MOYER

504

1 THE COURT: PULL IN A LITTLE CLOSER TO THE MICROPHONE
2 PLEASE.

3 A. MITSUBISHI, POLYESTER FILM IN GREER, SOUTH CAROLINA.

4 Q. OKAY. DID SOMEBODY BY THE NAME OF KEVIN MOORE WORK
5 WITH YOU THEN?

6 A. HE DID.

7 Q. DID YOU KNOW KEVIN MOORE?

8 A. I DID.

9 Q. SO Y'ALL WORKED THE SAME SHIFTS?

10 A. YES.

11 Q. LET ME ASK YOU THIS, ARE THERE -- TO GO IN -- TO ENTER
12 THE PLANT AND TO LEAVE THE PLANT, HOW DOES THAT WORK?

13 A. THEY HAVE A BADGE SYSTEM WHERE IT'S JUST DIGITAL. YOU
14 PUT IT UP ONTO A CARD READER, YOU GO THROUGH A TURN STYLE.
15 ONCE YOU'RE IN, THAT CLOCKS YOU IN. ONCE YOU LEAVE, IT
16 CLOCKS YOU OUT. AND YOU HAVE TO PUT THE BADGE BACK UP TO
17 LEAVE.

18 Q. ARE YOU ALLOWED TO LEAVE DURING THE DAY?

19 A. NO.

20 Q. AND DO THEY WATCH THAT PRETTY CLOSELY THERE AT
21 MITSUBISHI?

22 A. YES. THE GUARDS HAVE THE RECORD OR THEY SEE EVERYBODY
23 PASS THROUGH THE GATE.

24 Q. OKAY. AND IS THAT RECORDED MECHANICALLY THEN, THE
25 TIMES?

LINDA MOORE - DIRECT EXAMINATION BY MR. MOYER

505

1 A. I WOULD ASSUME SO, YES.

2 MR. MOYER: I HAVE NOTHING FURTHER FOR THIS WITNESS.

3 THE COURT: MR. SUMNER.

4 MR. SUMNER: NO, SIR.

5 THE COURT: THANK YOU. STEP DOWN.

6 MR. MOYER: I'D ALSO ASK THAT HE BE EXCUSED, YOUR

7 HONOR.

8 THE COURT: THANK YOU. YOU'RE EXCUSED.

9 MR. MOYER: CALL LINDA MOORE.

10 LINDA MOORE, BEING DULY

11 SWORN TESTIFIED AS FOLLOWS:

12 DIRECT EXAMINATION BY MR. MOYER:

13 Q. MS. MOORE, HOW OLD ARE YOU?

14 A. THIRTY-SIX.

15 Q. WERE YOU MARRIED AT ONE POINT TO A MAN BY THE NAME OF
16 KEVIN MOORE?

17 A. YES.

18 Q. IS HE NOW DECEASED?

19 A. YES.

20 Q. I'M SORRY, BUT I'M GOING TO HAVE TO ASK YOU A FEW
21 QUESTIONS ABOUT THAT. WHEN DID HE DIE?

22 A. NOVEMBER 7TH, 2002.

23 Q. AND HE DIED BY SUICIDE, IS THAT CORRECT?

24 A. YES, HE DID.

25 Q. WHAT HAD YOUR RELATIONSHIP BEEN WITH MR. MOORE IN THE

LINDA MOORE - DIRECT EXAMINATION BY MR. MOYER

506

1 TIME PERIOD BEFORE HE DIED?

2 A. WE WERE HAVING A LOT OF PROBLEMS. AND A WEEK BEFORE HE
3 DIED I MOVED OUT. I LEFT HIM. AND HE WAS REALLY DEVASTATED
4 BY THAT. AND THAT LED UP TO HIS SUICIDE.

5 Q. DID YOU HAVE A LOT OF -- DID YOU HAVE CONVERSATIONS
6 WITH HIM DURING THAT TIME-FRAME, THAT WEEK?

7 A. OH, YEAH. HE CALLED SEVERAL TIMES A DAY BEGGING ME TO
8 COME BACK, AND HE COULDN'T LIVE WITHOUT ME, AND HE COULDN'T
9 LIVE WITHOUT OUR SON, AND EVERYTHING WOULD BE DIFFERENT,
10 EVERYTHING WOULD CHANGE, HE COULDN'T LIVE WITHOUT US.

11 Q. DID YOU -- DID YOU SPEAK TO HIM ON THE NIGHT THAT HE
12 DIED?

13 A. YES, I DID. SEVERAL TIMES.

14 Q. OKAY. AND WAS IT IN CLOSE PROXIMITY TO THE TIME THAT
15 HE DIED?

16 A. YES, IT WAS.

17 Q. AND DID HE TALK ABOUT WHAT HAD BEEN TROUBLING HIM?

18 A. YES. HE TOLD ME THAT HE -- IF I DIDN'T GIVE HIM
19 ANOTHER CHANCE THAT HE WAS GOING TO KILL HIMSELF, AND THAT
20 HE HAD PILLS, AND THAT HE WAS TAKING THEM AT THAT MOMENT.
21 AND I DIDN'T BELIEVE HIM. I DIDN'T THINK THAT HE REALLY WAS
22 DOING THAT. AND I SAID, NO, IT'S OVER. AND HE SAID, WELL
23 THEN, THIS IS GOODBYE.

24 Q. AND GOING BACK TO THE TUESDAY PRIOR TO THAT DO YOU
25 REMEMBER SEEING KEVIN THAT DAY?

LINDA MOORE - CROSS EXAMINATION BY MR. SUMNER

507

1 A. YES. I SAW HIM THAT EVENING. THAT WAS THE DAY THAT HE
2 FOUND OUT WHERE I MOVED TO BECAUSE I DIDN'T TELL HIM AT
3 FIRST. AND IT WAS AN APARTMENT IN TAYLORS. AND HE CAME
4 THERE TO THE APARTMENT. AND WE HAD A LITTLE SCREAMING MATCH
5 IN THE PARKING LOT. AND THEN HE CIRCLED AROUND SEVERAL
6 TIMES OVER THE NEXT COUPLE OF HOURS, PROBABLY AROUND NINE.

7 Q. OKAY. AND, IN FACT, DID HE LEAVE A NOTE WHEN HE DIED?

8 A. YES, HE LEFT A NOTE.

9 Q. AND WAS THERE ANY REFERENCES OTHER THAN TO YOUR
10 RELATIONSHIP IN THE NOTE?

11 A. NO, THERE WAS NOT.

12 Q. OKAY. PLEASE ANSWER ANY QUESTIONS ...

13 MR. SUMNER: YES, SIR. BRIEFLY.

14 CROSS EXAMINATION BY MR. SUMNER:

15 Q. MS. MOORE, I KNOW THIS IS GOING TO BE A TOUGH QUESTION
16 TO ASK YOU. AND I'M SORRY FOR HAVING TO ASK THIS. BUT WAS
17 YOUR HUSBAND INVOLVED IN ILLEGAL DRUGS?

18 A. YES, HE WAS.

19 Q. THANK YOU.

20 THE COURT: THANK YOU. YOU CAN STEP DOWN.

21 MR. MOYER: WE CALL BRIAN LEOPARD. WE'D ASK THAT SHE
22 BE EXCUSED.

23 THE COURT: ANY OBJECTION?

24 MR. SUMNER: NO.

25 BRIAN LEOPARD, BEING DULY

BRIAN LEOPARD - DIRECT EXAMINATION BY MR. MOYER

508

1 SWORN TESTIFIED AS FOLLOWS:

2 DIRECT EXAMINATION BY MR. MOYER:

3 Q. MR. LEOPARD, HOW OLD ARE YOU?

4 A. I AM FORTY-ONE.

5 Q. WHERE DO YOU LIVE?

6 A. TAYLORS.

7 Q. DID YOU KNOW A GUY NAMED KEVIN MOORE?

8 A. YES, SIR, CERTAINLY DID.

9 Q. OKAY. AND WERE YOU FRIENDS WITH HIM UP AROUND THE TIME
10 THAT HE PASSED AWAY?

11 A. VERY GOOD FRIENDS.

12 Q. DID YOU SEE HIM IN THE DAYS PRECEDING HIS DEATH?

13 A. YES, SIR.

14 Q. WHEN WAS THE LAST TIME THAT YOU SAW HIM?

15 A. WEDNESDAY NIGHT, THE NIGHT OF HIS DEATH, ABOUT 9:00.

16 Q. OKAY. LET ME TAKE YOU BACK ANOTHER DAY.

17 A. ALL RIGHT.

18 Q. TO TUESDAY.

19 A. YES, SIR.

20 Q. DID YOU SEE HIM AT ALL THE DAY BEFORE THAT?

21 A. YES, SIR, I CERTAINLY DID.

22 Q. DID YOU SEE HIM AT ALL THE DAY BEFORE THAT?

23 A. YES, SIR, I CERTAINLY DID.

24 Q. AND WHERE AND WHEN DID YOU SEE HIM?

25 A. AT MY HOUSE. AND I'M GUESSING ON TIME NOW. BECAUSE I

BRIAN LEOPARD - DIRECT EXAMINATION BY MR. MOYER

509

1 GOT OFF AT 5:00, I CAME FROM WOODRUFF ROAD, BETWEEN 5:15,

2 QUARTER TIL SIX.

3 Q. OKAY. AND WHERE WAS IT THAT YOU SAW HIM?

4 A. AT MY -- HE CAME TO MY HOUSE.

5 Q. WHAT WAS HE DRIVING?

6 A. GOLD PICK-UP TRUCK.

7 Q. DID Y'ALL SPEND ANY TIME TOGETHER AFTER THAT?

8 A. YES, SIR. WE LEFT MY HOUSE, WENT TO HIS HOUSE, AND

9 STARTED GOING THROUGH PAST DUE BILLS.

10 Q. HE WAS HAVING FINANCIAL PROBLEMS, WAS HE?

11 A. YES, SIR.

12 Q. AND WAS THAT TROUBLING HIM?

13 A. YES, SIR.

14 Q. DO YOU KNOW HIS WIFE, LINDA?

15 A. YES, SIR.

16 Q. AND WERE YOU AWARE OF ANY DIFFICULTIES THEY WERE

17 HAVING?

18 A. YES, SIR. YES, SIR.

19 Q. AND SHE HAD LEFT HIM?

20 A. YES, SIR.

21 Q. WAS THAT TROUBLING HIM?

22 A. YES, SIR.

23 Q. DO YOU KNOW OF ANYTHING ELSE THAT WAS TROUBLING HIM?

24 A. JUST MONEY, THE LACK OF.

25 Q. OKAY. THANK YOU. PLEASE ANSWER ANY QUESTIONS THE

BRIAN LEOPARD - CROSS EXAMINATION BY MR. SUMNER

510

1 DEFENSE HAS.

2 A. YES, SIR.

3 MR. SUMNER: ONE SECOND PLEASE, JUDGE.

4 **CROSS EXAMINATION BY MR. SUMNER:**

5 Q. WHAT TIME DID YOU SAY THAT YOU ARRIVED HOME THAT DAY AS
6 BEST YOU ---

7 A. I'M GUESSING 5:15, 5:20 BECAUSE I CAME FROM WOODRUFF
8 ROAD, WENT DOWN 385 HAYWOOD ROAD.

9 Q. OKAY. AND WAS KEVIN, TO YOUR RECOLLECTION, THERE WHEN
10 YOU GOT THERE?

11 A. NO, SIR.

12 Q. HE WAS NOT ---

13 A. HE ARRIVED SHORTLY AFTER.

14 Q. OKAY. AND DO YOU RECALL WHAT DAY OF THE WEEK THIS WAS?
15 THIS WAS ON ---

16 A. TUESDAY.

17 Q. ON A TUESDAY?

18 A. YES, SIR.

19 Q. DO YOU RECALL SEEING KEVIN THAT MONDAY?

20 A. NO, SIR.

21 Q. OKAY.

22 A. I KNOW I TALKED TO HIM ON THE PHONE, BUT, NO, I DON'T
23 -- I DIDN'T SEE HIM. NO, SIR.

24 Q. HOW OFTEN WOULD YOU TYPICALLY SEE KEVIN?

25 A. ON AN AVERAGE, FOUR DAYS A WEEK, SOMETIMES MORE.

DANIEL FULLER - DIRECT EXAMINATION BY MR. MOYER

511

1 Q. WHAT WOULD BE THE TYPICAL CONTEXT THAT YOU WOULD SEE
2 HIM? Y'ALL WERE FRIENDS?

3 A. YES, SIR, CLOSE FRIENDS, GOOD FRIENDS.

4 Q. WHAT WOULD Y'ALL -- CLOSE FRIENDS. WHAT WOULD Y'ALL
5 TYPICALLY DO?

6 A. JUST HANG OUT, AND DRINK BEER, WATCH TV BASICALLY.

7 Q. ON THE WEEK BEFORE -- OKAY. DO YOU REMEMBER WHAT DAYS
8 OF THE WEEK YOU SAW HIM THEN?

9 A. NO, SIR. NO, SIR.

10 MR. SUMNER: I DON'T HAVE ANY OTHER QUESTIONS.

11 THE COURT: THANK YOU. YOU CAN STEP DOWN.

12 MR. MOYER: ONE OTHER SHORT WITNESS. I CALL DETECTIVE
13 FULLER.

14 THE COURT: YOU'RE STILL UNDER OATH. COME BACK AROUND
15 PLEASE.

16 MR. MOYER: ASK THAT THE WITNESS BE EXCUSED.

17 DIRECT EXAMINATION BY MR. MOYER:

18 Q. ALL RIGHT. DETECTIVE FULLER, JUST A COUPLE OF
19 QUESTIONS. FIRST OF ALL, FIRST OFF, DID YOU SPEAK TO SHARON
20 RICE EARLY ON IN YOUR INVESTIGATION OF THIS CASE?

21 A. YES, I DID.

22 Q. AND WHERE DID YOU MEET WITH HER?

23 A. AT THE SILOAM CHRISTIAN ACADEMY IN POWERSVILLE WHERE
24 SHE IS A TEACHER.

25 Q. WHAT WAS THE DATE THAT YOU MET WITH HER?

DANIEL FULLER - DIRECT EXAMINATION BY MR. MOYER

512

1 A. I REFERRED BACK TO MY NOTES TO GET THAT DATE, BUT IT
2 WAS ON A WEDNESDAY, NOVEMBER 13TH, 2002.

3 Q. OKAY. AND DID YOU ASK HER AT THAT TIME THE LAST --
4 WHERE -- THE LAST TIME SHE HAD SEEN THE DEFENDANT?

5 A. YES, I DID.

6 Q. DID SHE GET BACK WITH YOU AT A LATER DATE WITH THAT
7 INFORMATION?

8 A. YES, SHE DID.

9 Q. AND WHEN WAS IT?

10 A. ON SATURDAY, NOVEMBER 16TH. JUST AT THE END OF THE
11 WEEK SHE HAD CALLED THE NUMBER. I'D GIVEN HER MY CARD. AND
12 SHE CALLED AND LEFT ME A VOICE-MAIL MESSAGE. AND IN THAT
13 MESSAGE SHE INCLUDED THAT SHE HAD CONSULTED WITH HER FIANCÉ
14 SO THAT SHE COULD HELP REMEMBER WHAT DAY IT WAS SHE HAD LAST
15 SEEN RUSTY.

16 IN THAT MESSAGE SHE TOLD ME THAT SHE HAD SEEN HIM ON
17 SUNDAY, NOVEMBER 3RD, THAT HE HAD CAME TO PICK UP THE GIRLS.
18 HE TOOK THEM TO PLAY FRISBEE GOLF AND THEN CARRIED THEM TO A
19 BROTHER'S FOR A COOKOUT.

20 Q. ALL RIGHT. LET ME TAKE YOU NOW TO DECEMBER THE 28TH OF
21 2002 AT THE CAR STOP. YOU'VE ALREADY TESTIFIED ABOUT THE
22 RIFLE THAT YOU SAW OUT THERE AS IT WAS TAKEN OUT OF THE
23 DEFENDANT'S TRUNK?

24 A. YES.

25 Q. DO YOU RECALL ANY DIRT ON THE BAG OR IN THE BAG?

CLOSING ARGUMENTS - MR. SUMNER

513

1 A. THE BAG WAS NOT NOTICEABLY DIRTY OR MUDDY. IT WAS JUST
2 A RELATIVELY CLEAN, WHITE, PLASTIC TRASH BAG FULL OF METAL
3 PARTS.

4 Q. OKAY. THANK YOU. NOTHING FURTHER.

5 THE COURT: MR. SUMNER?

6 MR. SUMNER: NO, SIR.

7 THE COURT: THANK YOU. YOU CAN STEP DOWN.

8 MR. MOYER: YOUR HONOR, I HAVE NOTHING ELSE.

9 THE COURT: ALL RIGHT.

10 MR. SUMNER: I DON'T HAVE ANY RESPONSIVE WITNESSES ---

11 THE COURT: OKAY. YOU WAIVE OPENING ARGUMENT,

12 SOLICITOR?

13 MR. MOYER: YES, SIR.

14 THE COURT: ALL RIGHT. YOU MAY PROCEED, MR. SUMNER.

15 MR. SUMNER: THANK YOU, YOUR HONOR. MAY IT PLEASE THE
16 COURT? IF YOU'LL GIVE ME JUST ONE SECOND. I'VE GOT SOME
17 THINGS ---

18 THE COURT: SURE.

19 MR. SUMNER: --- I WANT TO SET UP. GOOD MORNING.

20 THE JURY: GOOD MORNING.

21 MR. SUMNER: IT'S BEEN MY PLEASURE TO BE HERE WITH
22 EVERYONE. I BELIEVE I SAID AT THE BEGINNING THAT IT WOULD
23 NOT BE BORING. AND I KNOW THERE'S BEEN A LOT OF SUBJECT
24 MATTER THAT'S COME IN THAT'S NOT BEEN BORING REGARDING THIS
25 CASE.

CLOSING ARGUMENTS - MR. SUMNER

1 WHAT I'D LIKE TO DO IS TOUCH ON A FEW THINGS THAT I
2 NOTICED THROUGH THE COURSE OF THE TRIAL AND TALK ABOUT IT
3 JUST BRIEFLY HERE FOR A FEW MINUTES. I PUT THIS SIGN BACK
4 UP, AND I REMEMBER AT THE BEGINNING WHEN I FINISHED UP MY
5 CLOSING, OPENING STATEMENT, FORGIVE ME, I SAID, LET'S TAKE A
6 LOOK AT THESE FIVE QUESTIONS.

7 ONE, DOES THE STATE HAVE A WITNESS TO THE MURDER? TWO,
8 IS THERE A WITNESS PLACING RUSTY RICE AT THE SCENE EITHER --
9 WHICH WOULD BE THE SUPER 8 MOTEL, EITHER IMMEDIATELY PRIOR
10 TO OR RIGHT AFTER THE MURDER? NUMBER THREE, DOES THE STATE
11 HAVE THE MURDER WEAPON? NUMBER FOUR, CAN THE STATE PROVIDE
12 FORENSIC PROOF THAT ANY WEAPON SOUGHT TO BE PLACED INTO
13 EVIDENCE WAS THE WEAPON USED? AND IS THERE ANY FORENSIC
14 EVIDENCE OR PROOF AGAINST RUSTY RICE? BY THAT I WAS TALKING
15 ABOUT FIBERS, OR SOIL MATCHES, FOOTPRINTS, FINGERPRINTS,
16 THOSE TYPE THINGS.

17 AND WHAT I'M GOING TO DO IS KIND OF RIP THIS OFF AND
18 ADDRESS THAT IF I CAN. I DON'T HAVE ONE OF THESE. AS Y'ALL
19 CAN SEE, I JUST HAVE A FLIP CHART. FIRST OF ALL, HIS HONOR
20 WILL TELL YOU -- AND IF I SAY ANYTHING THAT CONFLICTS WITH
21 WHAT JUDGE PYLE SAYS THE LAW IS, PLEASE FOLLOW WHAT JUDGE
22 PYLE SAYS.

23 BUT HE WILL TALK ABOUT REASONABLE DOUBT. AND HE'LL
24 TELL YOU THAT THE STATE IS REQUIRED, I BELIEVE, TO FURNISH
25 PROOF THAT LEAVES YOU FIRMLY CONVINCED OF RUSTY RICE'S GUILT

CLOSING ARGUMENTS - MR. SUMNER

515

1 AND SO STRONG THAT THERE IS NO REAL POSSIBILITY THAT RUSTY
2 IS NOT GUILTY OF THE CRIMES.

3 NOW THERE ARE FOUR CRIMES, I BELIEVE, THAT YOU WILL
4 HEAR. ONE IS CARRYING A PISTOL. TWO IS CARRYING A PISTOL
5 WHILE COMMITTING A VIOLENT CRIME. JUDGE PYLE WILL ADDRESS
6 THAT. THREE, THE CHARGE OF TRAFFICKING IN COCAINE, WHICH IS
7 HAVING OVER TWO HUNDRED GRAMS. THE FOURTH CHARGE IS THE ONE
8 THAT I'M GOING TO TALK ABOUT MORE THAN THE OTHERS. AND THAT
9 IS THE CHARGE OF MURDER. AND THAT IS THE CHARGE AGAINST
10 RUSTY RICE OF MURDER OF HOMER JOHNSON. AND I WANT TO
11 EXAMINE THE PROOF HERE.

12 FIRST OF ALL, AS IS QUESTION NUMBER ONE, A WITNESS TO
13 THE MURDER. WHAT DO WE KNOW? WE KNOW THAT IT HAPPENED ON
14 WADE HAMPTON BOULEVARD. NOW ALL OF US IN OUR COMMON
15 EXPERIENCE HAVE DRIVEN UP AND DOWN WADE HAMPTON BOULEVARD A
16 THOUSAND TIMES. OR MAYBE NOT A THOUSAND, BUT PLENTY OF
17 TIMES LIVING HERE IN GREENVILLE. WE KNOW HOW BUSY IT IS.
18 WE KNOW THAT THIS AREA OF THE ROAD, AND I'M USING THE
19 STATE'S EXHIBIT HERE, THERE'S A MOTEL, I MEAN, THERE'S ALL
20 KIND OF BUSINESSES RIGHT HERE. THE IHOP IS RIGHT THERE.
21 IT'S A STRETCH OF ROAD THAT'S BUSY. WE KNOW THAT THERE'S --
22 MY ONLY POINT IS THERE ARE A LOT OF PEOPLE AROUND THERE.
23 AND THE STATE HAS NOT -- THE MURDER ACTUALLY TAKES PLACE IN
24 THE PARKING LOT OF THIS HOTEL.

25 NOW IT MIGHT BE TROUBLING -- I THINK IT'S TROUBLING FOR

CLOSING ARGUMENTS - MR. SUMNER

516

1 THE STATE'S CASE THAT THERE HAS NOT BEEN ANY WITNESS THAT
2 HAS COME IN HERE TO COURT AND SAID, I SAW RUSTY RICE THERE.
3 NOBODY CAN PLACE HIS VEHICLE THERE. NOBODY CAN PLACE HIM
4 THERE. THERE IS NO LIVE WITNESS THAT'S COME FORWARD TO TALK
5 ABOUT THAT.

6 NOW WE ALSO KNOW OR MY SECOND QUESTION IS CAN ANYONE
7 PLACE HIM AT THE SCENE? NO. NOBODY PUTS HIM AT THE HOTEL
8 THAT DAY. AGAIN, I'VE ALREADY TOUCHED ON THAT. IT'S A BUSY
9 CONGESTED AREA. THERE'S A HOTEL THERE. WE KNOW THAT THE --
10 WE'VE GOT A PRETTY GOOD IDEA THAT THE MURDER OCCURRED AROUND
11 5:30 BECAUSE WE HEARD THE TESTIMONY FROM, I BELIEVE, THE
12 LADY, THE EMS -- THE LADY FROM EMS HAD GOT THERE, I BELIEVE,
13 AROUND TEN TIL SIX. I BELIEVE THE OFFICER SAID THAT THE
14 DISPATCH CALL CAME IN ABOUT 5:46 PM THAT AFTERNOON. AND HE
15 WAS THERE, I BELIEVE HE SAID, AT 5:49... AND WE HEARD FROM
16 THE FIRST WITNESS WHO SAID, I HEARD THE BANGS ABOUT TWENTY
17 OR THIRTY MINUTES BEFORE THE POLICE GOT THERE.

18 SO WHEN WE TAKE A LOOK AT THAT WE KNOW THAT THE
19 MURDER'S GOING TO HAPPEN AROUND 5:30. AND AGAIN WE KNOW
20 THERE'S NO QUESTION ABOUT WHERE THE MURDER HAPPENED. IT
21 HAPPENED AT A VERY BUSY CONGESTED AREA, SUPER 8 MOTEL RIGHT
22 OVER THERE ON WADE HAMPTON BOULEVARD.

23 PLEASE LISTEN CLOSELY TO THE JUDGE'S CHARGE ON ALIBI.
24 JUDGE PYLE WILL CHARGE YOU ON THE LAW OF ALIBI IN SOUTH
25 CAROLINA. AND IN PART THAT CHARGE SAYS THIS; IF YOU HAVE A

CLOSING ARGUMENTS - MR. SUMNER

517

1 REASONABLE DOUBT THAT THE DEFENDANT WAS PRESENT IN PERSON AT
2 THE PLACE AND AT THE TIME IN QUESTION YOU MUST RESOLVE THAT
3 DOUBT IN FAVOR OF THE DEFENDANT AND ACQUIT HIM.

4 NOW DOES THE STATE HAVE -- AND I'M GOING TO COME BACK
5 TO HIS ALIBI HERE IN JUST A SECOND. DOES THE STATE HAVE THE
6 MURDER WEAPON? OKAY. WELL, THIS IS KIND OF INTERESTING.
7 MY NOTES HERE SAY WE HAVE SOME OPINION, BUT DO WE HAVE ANY
8 PROOF? WE HEARD FROM MR. ARMSTRONG. WE HEARD FROM HIM
9 YESTERDAY AFTERNOON.

10 AND HE SAID -- FIRST OF ALL HE ADMITTED THAT THERE WAS
11 NO TEST PERFORMED WHERE AN ACTUAL PROJECTILE WAS FIRED
12 THROUGH THE BARREL. HE SAID THAT. HE SAID, I CAN GO
13 THROUGH, AND I BELIEVE -- I DON'T KNOW ALL THE WORDS THAT HE
14 USED, BUT ONE OF THEM, I BELIEVE, WAS A MIKOSIL OR MIKROSIL
15 PLASTER. I DON'T BELIEVE HE USED THE WORD PLASTER, SOME
16 TYPE OF CAST ON THE END OF THE BARREL. BUT I ASKED HIM
17 SEVERAL TIMES, AND HE READILY ADMITTED, I WAS NOT ABLE TO
18 FIRE A BULLET THROUGH THAT BARREL, THAT WOULD BE HERE, OKAY,
19 IN ORDER TO MATCH IT AGAINST FRAGMENTS OF THE BULLETS THAT
20 WERE FOUND IN THE DECEASED AND AT THE SCENE.

21 YOU KNOW, I THOUGHT SOMETHING THAT WAS MUCH MORE
22 INTERESTING THAN THAT THAT I NOTICED IS THEY DIDN'T PLACE
23 ANY PHOTOS OF THE BULLETS UP ON THE PROJECTOR SCREEN SO THAT
24 YOU COULD TAKE A LOOK AND HE COULD TESTIFY AS TO WHAT THE
25 POINTS OF AGREEMENT WERE BETWEEN THE BULLETS AND THE

CLOSING ARGUMENTS - MR. SUMNER

518

1 FRAGMENTS. AND I THOUGHT THAT WAS INTERESTING BECAUSE
2 GOODNESS KNOWS THERE'S BEEN A LOT OF OTHER PHOTOGRAPHS THAT
3 HAVE BEEN PLACED UP THERE AND PUT RIGHT UP THERE.

4 BUT I THOUGHT IT WAS INTERESTING THAT THE ONLY THING
5 THAT MR. ARMSTRONG COULD SAY ON THAT POINT WAS I FOUND
6 POINTS OF AGREEMENT. AND I ASKED HIM, Y'ALL WILL RECALL MY
7 QUESTIONS, I SAID, WELL, I MEAN, ARE THERE POINTS LIKE A
8 FINGERPRINT? ARE THERE TWENTY POINTS? ARE THERE FIFTY
9 POINTS? HE SAID, NO, THERE'S NOT ANYTHING IN PARTICULAR,
10 BUT HE SAID, I KNOW -- THEN HE SAID IN THIS CASE IT WAS JUST
11 COMPLETE AGREEMENT. THERE WAS JUST NO QUESTION ABOUT IT.

12 AND I WAS PUZZLED THAT THERE WAS NOT ONE BIT OF
13 DOCUMENTATION TO BACK UP HIS OPINION ON SUCH A CRUCIAL POINT
14 NOW BECAUSE WE KNOW THAT BARREL WAS FOUND IN THE TRUNK OF
15 RUSTY RICE'S CAR. NO QUESTION ABOUT IT. AND I WAS
16 SURPRISED THAT THE STATE WOULD RELY SIMPLY UPON HIS OPINION
17 IN JUST TELLING YOU THERE'S A LOT OF AGREEMENT, THERE'S NO
18 QUESTION IT MATCHED UP THROUGH THAT BARREL. AND NOT SIMPLY,
19 I MEAN, THEY COULD PULL THAT SCREEN DOWN, PUT THE FRAGMENT
20 ON THE LEFT HAND, PUT THE BULLET ON THE RIGHT HAND, AND SAY
21 THERE IT IS RIGHT THERE. THERE'S A STRIATION, THERE'S THIS,
22 AND THERE'S THAT SO THAT YOU COULD SEE IT. AGAIN, THAT WAS
23 SOMETHING THAT WAS PUZZLING TO ME AS WE WENT THROUGH THE
24 TRIAL AND WE HEARD FROM MR. ARMSTRONG.

25 NOW, AS RELATES TO MR. ARMSTRONG, AND PLEASE DON'T

CLOSING ARGUMENTS - MR. SUMNER

519

1 THINK THAT I'M MAKING ANY PERSONAL ATTACKS BECAUSE I'M NOT.
2 I'M NOT DOING THAT AT ALL. BUT HE WENT THROUGH AN EXTENSIVE
3 VOIR DIRE. I ASKED -- JUDGE PYLE GAVE ME PERMISSION TO ASK
4 HIM QUESTIONS. AND IT CAME OUT THAT A LOT OF WHAT WAS ON
5 HIS RESUME WERE THINGS THAT DIDN'T HAVE ANYTHING TO DO WITH
6 WHAT HE WAS TESTIFYING ABOUT IN THIS TRIAL. HE CAN PUT
7 TOGETHER A SIG/SAUER PISTOL. HE CAN TAKE A SHOTGUN APART.
8 HE CAN DO ALL THOSE OTHER TYPE THINGS. NOT A LOT -- DIDN'T
9 SEEM THAT MUCH OF HIS RESUME HAD TO DO WITH WHAT HE WAS HERE
10 FOR. AND THAT WAS TO -- THAT WAS REALLY AN INCREDIBLY
11 CRUCIAL FUNCTION. AND THAT WAS TO OFFER YOU PROOF THAT THE
12 GUN BARREL THAT WAS IN MR. RICE'S CAR IS WITHOUT QUESTION
13 THE ONE THAT FIRED THE BULLETS. THAT'S REALLY WHAT THIS
14 CASE HINGES ON IN A LOT OF RESPECTS.

15 HE SAID I WAS ONLY CERTIFIED TO GIVE EXPERT OPINION IN
16 NOVEMBER OF 2003 IN THIS COURT IN THE COURT OF GENERAL
17 SESSIONS, WHICH WAS AFTER HE PERFORMED THESE EXAMINATIONS.
18 NOBODY CAME UP HERE FROM SLED, STATE LAW ENFORCEMENT
19 DIVISION. NOBODY CAME UP HERE FROM SLED AND TESTIFIED ABOUT
20 THEIR EXAMINATION OF THE BARREL. THERE WASN'T A SECOND
21 OPINION OFFERED BY THE STATE. IT WAS JUST ONE.

22 AND HE ALSO SAID CANDIDLY, YOU KNOW, OUR LOCAL LAB
23 CRANKED UP LESS THAN FIVE OR FOUR YEARS AGO OR SO, AND I WAS
24 ON THE PHONE WITH THEM A LOT ON HOW TO DO THINGS, WENT DOWN
25 HERE AND TALKED TO THEM, THINGS THAT WOULD -- THAT MIGHT

CLOSING ARGUMENTS - MR. SUMNER

520

1 GIVE YOU PROBLEMS IN TERMS OF WHAT -- AGAIN, WHEN YOU
2 CONSIDER THAT THEY DIDN'T PUT ANYTHING UP ON THE SCREEN AND
3 THAT HE DIDN'T SHOW YOU NOT ONE -- OH, AND I DON'T KNOW HOW
4 MANY -- I'LL HAVE TO ASK THE COURT REPORTER HOW MANY ITEMS
5 OF EVIDENCE WENT INTO THIS CASE FROM THE STATE. BUT NOT ONE
6 ITEM OF EVIDENCE FROM THE STATE BACKS UP HIS OPINION ON
7 SOMETHING SO CRUCIAL.

8 WHAT ELSE DID HE TELL US? HE SAID, WELL, THE CASINGS
9 FROM THE SCENE WERE NOT MATCHED TO THE RECEIVER THAT WAS
10 RECOVERED. REMEMBER THAT? HE SAID THE CASINGS, I COULDN'T
11 COME UP WITH A MATCH, OKAY. NO CONCLUSIVE MATCH THERE,
12 OKAY. I'VE PUT, YOU KNOW, DOES THIS MAKE SENSE? I DON'T
13 KNOW IF THAT MAKES SENSE OR NOT.

14 ALSO, THERE WERE NO PRINTS OF RUSTY RICE OFF ANY OF THE
15 RECOVERED GUN PARTS THAT CAME OUT OF HIS TRUNK. ALSO, THE
16 POINT WAS MADE, I ASKED MR. ARMSTRONG, REMINGTON 742 30-06,
17 HE SAID THAT IS A VERY POPULAR RIFLE. THERE ARE PLENTY OF
18 THEM AROUND. PLENTY OF THEM. K-MART, WAL-MART, HUNTING
19 SHOPS. THEY'RE EVERYWHERE. IT'S A MASS PRODUCED WEAPON.
20 AND THAT'S SOMETHING THAT THEY'VE GOT TO TRY TO TIE IT TO
21 THAT BARREL AND TO THOSE PARTS.

22 AND AGAIN, ON THE BARREL THERE WAS NOTHING THEY SHOWED
23 YOU OTHER THAN HIS OPINION. AND ON THE RECEIVER, HE SAID,
24 WE COULD NOT -- I CAN'T TESTIFY THAT THE CASINGS MATCH UP TO
25 THAT RECEIVER AND THAT THEY WERE EVER FIRED BY THAT

CLOSING ARGUMENTS - MR. SUMNER

521

1 RECEIVER, BUT IT'S IN EVIDENCE.

2 MY NEXT QUESTION WAS, WAS THERE ANY FORENSIC PROOF

3 CONCLUSIVELY ESTABLISHING RUSTY RICE'S GUILT? OKAY. WELL,

4 Y'ALL MIGHT REMEMBER THE FIRST DAY WHEN I ASKED SOME PRETTY

5 HARD QUESTIONS OF THE GENTLEMAN WHO WENT OUT AND CONDUCTED

6 THE CRIME SCENE. AND IT CAME OUT THAT THERE WERE NO PRINTS

7 -- HE WAS UNSURE WHETHER OR NOT HE EVER EVEN ATTEMPTED TO

8 TAKE FINGERPRINTS FROM THE SHELL CASINGS THAT WERE FOUND.

9 AND THOSE -- AMONG ALL THOSE PICTURES, Y'ALL REMEMBER,

10 THERE WAS PHOTOGRAPHS TAKEN WHERE HE LAID A RULER OR A

11 MEASURING DEVICE DOWN AND THAT'S WHERE I FOUND THE SHELL

12 CASINGS OVER THERE SOMEWHERE BACK IN THIS AREA RIGHT HERE IN

13 THE WOODS. AND I EVEN ASKED HIM, HOW WOULD YOU PICK THOSE

14 CASINGS UP. AND HE WENT INTO GREAT DETAIL TO SAY, GOT DOWN,

15 AND SAID, I WOULD PICK THEM UP WITH A PAIR OF TWEEZERS. I

16 SAID, WOULD YOU HANDLE THEM? NO, I'M NOT GOING TO HANDLE

17 THEM. WHY? WELL, THIS COULD BE EVIDENCE. THERE COULD BE

18 TRACE EVIDENCE THERE. OKAY. HE DIDN'T -- THAT WAS NOT --

19 THAT WAS NOT FOLLOWED UP ON.

20 AND I MADE THE POINT, I SAID, WOULDN'T YOU AGREE WITH

21 ME, BEFORE I ASKED HIM THAT, IF SOMEBODY'S LOADING A GUN,

22 PUTTING BULLETS IN A GUN, HOW ARE THEY GOING TO DO IT? AND

23 THEY'RE GOING TO DO IT USING THEIR FINGERTIPS OR THEIR THUMB

24 TIPS. I MEAN, THAT'S JUST THE WAY THAT YOU PUT A BULLET IN

25 THERE. NO TESTIMONY THAT THEY EVER EVEN ATTEMPTED TO TAKE

CLOSING ARGUMENTS - MR. SUMNER

522

1 FINGERPRINTS FROM THOSE SHELL CASINGS. AND IT WAS TROUBLING
2 -- THAT WAS TROUBLING TO ME. HE, OF COURSE, AFTER I
3 FINISHED ASKING THOSE QUESTIONS MR. MOYER TRIED TO
4 REHABILITATE, SAID, WELL, HAVE YOU EVER BEEN ABLE TO FIND
5 IT? NO, I NEVER HAVE AND THIS TYPE THING.

6 I THOUGHT IT WAS INTERESTING THAT THERE WERE NO
7 FOOTPRINTS. I THOUGHT THAT WAS INTERESTING THAT THERE WAS
8 NO TESTIMONY THAT THEY EVER TRIED TO GET FOOTPRINTS. WHY?
9 WE KNOW THAT IT WAS HEAVY, EVERYBODY AGREES, HEAVY RAIN. NO
10 QUESTION ABOUT IT. AND WHAT DO WE KNOW? I ASKED THE --
11 EVERYBODY, I THINK EVEN ASKED DETECTIVE FULLER ABOUT THIS
12 CREEK BED AREA THAT WAS BEHIND, THAT WAS IN THE WOODS RIGHT
13 HERE. AND I'M JUST GOING TO KIND OF USE MY FINGERS AND KIND
14 OF -- YOU CAN SEE THAT THIS AREA IS JUST SURROUNDED BY
15 WOODS. THERE'S NO WAY -- IT'S HARD TO GET THERE WITHOUT
16 GOING THROUGH THE WOODS. OKAY. BECAUSE, I MEAN, AND THERE
17 WAS NO QUESTION THAT THE TESTIMONY FROM THE STATE WAS THAT
18 -- REMEMBER THAT TREE THAT KIND OF HAD A FORK IN IT THAT WAS
19 BACK IN THE WOODS. AND THEY SAID THAT'S RIGHT WHERE WE
20 FOUND THE SHELL CASINGS.

21 AND I FOUND IT TROUBLING THAT THERE WAS NO TESTIMONY
22 OFFERED THAT THEY EVER TRIED TO GET FOOTPRINTS. I ASKED
23 SEVERAL WITNESSES, IS THERE A CREEK BED? YES, THERE'S NO
24 QUESTION. RIGHT BEHIND IT, IT CIRCLES AROUND IT, THERE'S A
25 CREEK BED THERE. WELL, I MEAN, YOU KNOW, WE USE OUR OWN

CLOSING ARGUMENTS - MR. SUMNER

523

1 COMMON SENSE, I MEAN, IF IT'S RAINING LIKE THAT, AND
2 SOMEBODY'S GOING BACK THROUGH THOSE WOODS, I MEAN, MAN,
3 YOU'RE SKEE-DADDLING DOWN THROUGH THERE, I MEAN, WOULD YOU
4 NOT POTENTIALLY LEAVE A FOOTPRINT? AND WOULD IT NOT HAVE
5 BEEN PRUDENT FOR, EXCUSE ME, WOULD IT NOT HAVE BEEN PRUDENT
6 AND REALLY NECESSARY FOR THE POLICE TO GO BACK THE NEXT
7 MORNING WHEN EVERYTHING IS DRIED UP OR THE NEXT AFTERNOON
8 WHEN EVERYTHING IS DRIED UP AND SAY, WELL, WHAT DO WE SEE
9 HERE? THAT WAS SOMETHING THAT I THOUGHT WAS LACKING IN THE
10 CASE.

11 AND AGAIN, I'VE ALREADY TOUCHED ON THAT. I GOT AHEAD
12 OF MYSELF A LITTLE BIT. ALL THE FACTORS WERE CONDUCIVE TO
13 FOOTPRINTS. NO TESTIMONY HERE WHATSOEVER.

14 NO SOIL ON CLOTHING FROM THE SHOOTER OR AGAINST RUSTY
15 RICE. NO SOILED SHOES. AGAIN, WE KNOW THAT IT'S MUDDY OUT
16 THERE. NO EVIDENCE THAT RUSTY WAS THERE. I MEAN, THERE'S
17 JUST NO EVIDENCE THAT'S BEEN PLACED HERE. AND AGAIN, I'M
18 GOING TO ASK YOU TO LISTEN TO JUDGE PYLE'S CHARGE ON ALIBI.
19 THERE'S NO EVIDENCE THAT I'VE BEEN ABLE TO SEE PLACING HIM
20 AT THE SCENE. THERE JUST ISN'T ANYTHING THERE.

21 I'M NOT GOING TO SPEND A LOT OF TIME ON THIS. I ASKED
22 THE OFFICER ABOUT IT. I WAS SHOCKED THEY WENT OUT THERE SIX
23 DAYS LATER. I'VE JUST GOT TO TELL YOU THAT. I COULDN'T
24 BELIEVE THAT. THERE WAS NO CRIME SCENE TAPE UP. WE'VE GOT
25 A MURDER THAT'S OCCURRED HERE AND NO CRIME SCENE TAPE, NO

CLOSING ARGUMENTS - MR. SUMNER

524

1 NOTHING. I MEAN, THEY GO OUT THERE SIX DAYS LATER TO TRY
2 AND GATHER WHAT THEY CAN. THERE'S NOTHING ELSE I CAN REALLY
3 SAY ABOUT THAT.

4 HE SAID THERE WAS NO CRIME SCENE TAPE. THE CRIME SCENE
5 WAS NOT MAINTAINED. I ASKED HIM ABOUT POTENTIALLY A
6 CIGARETTE BUTT THAT MIGHT HAVE BEEN THROWN DOWN. I MEAN,
7 ALL THESE TYPES OF THINGS THAT A PERSON COULD LEAVE THERE,
8 AND THEY WERE --- THEY DON'T KNOW. I MEAN, THEY DIDN'T GO
9 OUT THERE TIL SIX DAYS LATER.

10 NOW, RUSTY'S TESTIMONY, HE DETAILS HIS ACTIVITIES ON
11 NOVEMBER 4TH AND NOVEMBER 5TH. THE CELL PHONE RECORDS MATCH
12 UP WITH RUSTY BEING INVOLVED WITH DRUGS AND SELLING DRUGS.
13 HE'S NOT DENIED THAT. AND I'M NOT GOING TO DENY THAT.
14 THERE'S NO QUESTION ABOUT THAT. I MEAN, THERE'S JUST NO
15 OTHER WAY TO LOOK AT THAT. I MEAN, HIS CELL PHONE RECORDS
16 AND WHAT HE WAS DOING THE DAY BEFORE AND THAT DAY MATCH UP
17 TO SOMEBODY WHO WAS INVOLVED IN DRUG ACTIVITY. BUT AS IT
18 RELATES TO THE MURDER CHARGE, I JUST DON'T KNOW IF IT'S
19 THERE.

20 PLEASE ALSO LISTEN TO THE JUDGE'S CHARGE ON
21 CIRCUMSTANTIAL EVIDENCE BECAUSE THIS IS A CIRCUMSTANTIAL
22 CASE. AND JUDGE PYLE WILL INSTRUCT AS TO THE LAW IN SOUTH
23 CAROLINA ON CIRCUMSTANTIAL EVIDENCE. AND I WOULD ASK THAT
24 YOU PLEASE LISTEN CLOSELY TO THAT.

25 I WANT TO TALK ABOUT JOHN HAMBY A LITTLE BIT. I CAN'T

CLOSING ARGUMENTS - MR. SUMNER

525

1 EVEN WORK SHEETS OF PAPER, IT LOOKS LIKE. JOHN HAMBY, WHAT
2 DO WE KNOW ABOUT MR. HAMBY? WELL, WE KNOW HE WAS INVOLVED
3 IN THE DRUG TRADE, DON'T WE? YEAH. HE SAYS HE'S NOT. I
4 ASKED HIM, WERE YOU CLOSE WITH HOMER? YEAH, WE'VE KNOWN
5 EACH OTHER FOURTEEN YEARS.

6 I BELIEVE I ASKED HIM, DID YOU -- WERE YOU INVOLVED
7 WITH DRUGS WITH HOMER? NO, I'M NOT INVOLVED IN DRUGS WITH
8 HOMER. I SAID -- I BELIEVE MR. MOYER BROUGHT OUT, YOU'RE
9 CURRENTLY UNDER -- OTHER CHARGE -- BEING PROSECUTED BY THIS
10 SOLICITOR'S OFFICE BY THIS D. A.'S OFFICE FOR TRAFFICKING
11 OVER THIRTY POUNDS OF MARIJUANA. YEAH. I WOULD THINK THAT
12 MEANS YOU'RE IN THE DRUG TRADE. I DON'T KNOW.

13 HE ALSO GAVE TESTIMONY THAT ON ELEVEN -- THAT ON THE
14 NIGHT BEFORE HE GAVE TESTIMONY ON THE NIGHT BEFORE THE
15 MURDER OF HOMER JOHNSON HE AND HOMER, AND HE SAYS RUSTY, WAS
16 THERE TO CUT UP TWENTY POUNDS OF MARIJUANA. NOW, WHY DID I
17 PUT RUSTY'S EX-WIFE ON THE STAND AND HIS DAUGHTER ON THE
18 STAND? ONLY TO SHOW THAT THERE WAS NO QUESTION THAT RUSTY
19 WAS WITH THEM THAT NIGHT. HE WASN'T THERE THROUGH THEIR
20 TESTIMONY. HE WASN'T THERE AT THE CAR SHOW.

21 AND IF YOU'LL REMEMBER, I BELIEVE JOHN HAMBY, AND I'LL
22 REFER TO -- LET Y'ALL REFER TO YOUR OWN MEMORY THERE, I
23 BELIEVE JOHN HAMBY SAID IT WAS DURING THE CAR SHOW THAT WE
24 ALL WENT OFF TO HOMER'S HOUSE AND CUT UP THIS MARIJUANA AND
25 LEFT. ALL RIGHT. WELL, SOMEBODY'S TELLING THE TRUTH AND

CLOSING ARGUMENTS - MR. SUMNER

526

1 SOMEBODY'S LYING. THERE'S JUST NO OTHER WAY AROUND THAT.

2 AND THEN HE THREW A LITTLE FROSTING ON THE CAKE THERE
3 AT THE END. REMEMBER? THAT RUSTY WAS MAD. REMEMBER HE
4 SAID THAT? HE SAID RUSTY WAS MAD.

5 WHAT ELSE DO WE KNOW ABOUT HIM? HE OWNS A HUNTING AND
6 FISHING STORE. LOW AND BEHOLD, SHOT WITH A 30-06 HUNTING
7 RIFLE. JOHN HAMBY OWNS A HUNTING AND FISHING STORE. VERY
8 FAMILIAR WITH HUNTING RIFLES. WHAT DO WE KNOW ELSE FROM
9 JOHN HAMBY'S OWN TESTIMONY? HE HAD A 30-06 RIFLE PRIOR TO
10 THE MURDER. NO QUESTION ABOUT IT. OKAY.

11 WHAT ELSE DO WE KNOW? BY MELISSA WHITE'S TESTIMONY,
12 AND I KIND OF KEYED IN ON THIS, Y'ALL PROBABLY KNOW THIS
13 BETTER THAN I DO, HE DOESN'T HAVE AN ALIBI FOR THAT NIGHT.
14 DID YOU PICK UP ON THAT? HE DOESN'T HAVE AN ALIBI. MELISSA
15 WHITE SAYS, I PICKED HIM UP AROUND 7:30 AND WE WENT TO THE
16 BLOCK HOUSE AT 8:00. I DON'T RECALL THERE BEING ANY
17 TESTIMONY ABOUT WHERE HE WAS FIVE, 5:30, 6:00.

18 REMEMBER ALSO, HE SAID HE SAW HOMER IN THE STORE AROUND
19 FIVE PM. HE KNEW HOMER HAD A LOT OF DRUGS ON HIM. OKAY.
20 AND WE HEARD THE TESTIMONY OF ABRA HAMBY. AND SHE SAID THE
21 NEXT DAY THAT JOHN HAMBY HAD A COUPLE OF MORPHINE PATCHES
22 ON, A LITTLE LOOSE AT THE TONGUE, I BELIEVE IS WHAT SHE
23 SAID, HE STARTED TALKING ABOUT IT. AND HE SAID, I SHOT THE
24 M. F. AND SOMETHING LIKE DON'T SEND A BOY TO DO A MAN'S JOB.
25 BUT WE'RE NOT THROUGH WITH JOHN HAMBY, OKAY? ALL

CLOSING ARGUMENTS - MR. SUMNER

527

1 RIGHT. SHE ALSO MENTIONED THE HOTEL. SHE MENTIONED, I
2 BELIEVE IN HER STATEMENT, SHE MENTIONED THAT JOHN HAMBY
3 MENTIONED TO HER THE HOTEL, ABOUT GOING TO THE HOTEL. IS IT
4 COINCIDENTAL THAT HE WAS MURDERED AT THE HOTEL?
5 WHAT ELSE DO WE KNOW ABOUT MR. HAMBY? I PUT A STAR BY
6 THIS. HE LIED TO THE POLICE. I ASKED HIM ON CROSS
7 EXAMINATION, DID YOU NOT GIVE A STATEMENT TO THE POLICE
8 FIRST OF ALL ON THE DAY OF THE MURDER, THAT EVENING AT THE
9 HOSPITAL? DID YOU NOT GIVE A STATEMENT TO THE POLICE THAT
10 YOU DID NOT SEE HOMER THAT DAY? YEP, I TOLD THEM THAT. I
11 TOLD THEM I'D TALKED TO HIM ON THE PHONE TWICE THAT DAY.
12 NEVER MENTIONED THAT I SAW HIM. OKAY. WHY WOULD HE NEED TO
13 DO THAT? WHY DO THEY NEED TO TAKE THREE STATEMENTS FROM
14 THIS GUY ANYWAY? WHY NOT JUST GET IT RIGHT THE FIRST TIME?
15 THE SECOND TIME, SECOND STATEMENT, OH, YOU KNOW, MAYBE
16 I DID SEE HIM. AROUND FOUR OR 5:00 THAT AFTERNOON I THINK
17 MAYBE HE CAME BY THE STORE. PRETTY SIGNIFICANT TO NOT
18 REMEMBER ON THE DAY OF THE MURDER. I MEAN, LET'S USE OUR
19 COMMON SENSE. THE DAY SOMEBODY IS MURDERED WHO IS, UNDER
20 THE TESTIMONY, YOUR BEST FRIEND, OKAY, AND YOU TALK TO THE
21 POLICE SOME THREE TO FIVE HOURS LATER AND YOU TELL THEM I
22 HAVEN'T SEEN MY BEST FRIEND, OKAY, I HAVEN'T SEEN HIM,
23 HADN'T SEEN HIM THAT DAY. AND THEN A WEEK LATER YOU COME
24 BACK AND SAY, OH, DID I NOT TELL YOU THAT I DID SEE HIM OR
25 HER ABOUT AN HOUR, MAYBE FORTY-FIVE MINUTES BEFORE THEY WERE

CLOSING ARGUMENTS - MR. SUMNER

528

1 BRUTALLY MURDERED? DOES THAT MAKE SENSE? NO, IT DOESN'T
2 MAKE SENSE.

3 WHAT ELSE HAPPENS? I LEFT MY PEN OVER HERE BECAUSE I
4 WANT TO DRAW A CIRCLE AROUND THIS BECAUSE EVERYTHING CHANGES
5 ON THAT SECOND STATEMENT. YOU KNOW, I ASKED HIM THAT. TWO
6 PARAGRAPH STATEMENT, TWO PARAGRAPHS, HOW MANY TIMES YOU
7 MENTION RUSTY RICE'S NAME? NINE TIMES. NINE TIMES.

8 MR. MOYER MAY TALK ABOUT CELL PHONE RECORDS AS IT
9 RELATES TO JOHN HAMBY, BUT JOHN HAMBY'S TESTIMONY IS THE
10 ONLY THING THAT PLACES HIS CELL PHONE IN HIS HAND AT 5:30.
11 WE KNOW THE PHONE IS REGISTERED TO HIS COMMON-LAW WIFE,
12 MELISSA WHITE. OKAY. THERE'S NOTHING PROVING OTHER THAN
13 JOHN HAMBY'S TESTIMONY ABOUT ANY POTENTIAL CELL PHONE CALL.

14 I DIDN'T HEAR ANY WITNESS THAT PLACES JOHN HAMBY
15 ANYWHERE BETWEEN 5:00 AND 7:30 PM. AND YOU THINK, HE SAYS,
16 I RECALL, I BELIEVE HE SAID, I WAS AT MY STORE. OKAY. THIS
17 HARD TIMES HUNTING AND FISHING STORE. HOW MANY PEOPLE ARE
18 GOING TO COME IN AND OUT OF A STORE BETWEEN FIVE OR -- 5:00
19 AND 7:30 PM? HOW MANY? AT LEAST A COUPLE I WOULD IMAGINE.
20 YOU ADD ALL THIS UP, A LOT OF QUESTIONS ABOUT JOHN HAMBY. A
21 LOT OF QUESTIONS ABOUT JOHN HAMBY.

22 WE ALSO HEARD ABOUT KEVIN MOORE. AND WE HEARD ABOUT
23 KEVIN MOORE THROUGH THE TESTIMONY OF RUSTY RICE. AND HE
24 TALKED ABOUT A CELL -- ABOUT A PHONE CALL THAT TOOK PLACE
25 THE NIGHT OF THE MURDER WITH KEVIN MOORE. WHAT DO WE KNOW?

CLOSING ARGUMENTS - MR. SUMNER

529

1 WE KNOW THAT KEVIN MOORE COMMITTED SUICIDE TWO DAYS LATER,
2 NO QUESTION. OKAY.

3 WE ALSO KNOW THAT HE -- KEVIN MOORE DID NOT ALLEGEDLY
4 SAY TO RUSTY RICE THAT HE WAS INVOLVED. HE JUST SAID HE
5 KNEW ABOUT IT. HOMER WOULDN'T -- I BELIEVE HE SAID, HOMER
6 WOULDN'T HAVE BEEN KILLED IF HE HADN'T HAVE BEEN TRYING TO
7 BE SUCH A COWBOY, OR TRYING TO BE SUCH A BAD ASS, OR
8 SOMETHING LIKE THAT. OKAY. THAT'S WHAT HE SAID. OKAY.
9 THAT'S WHAT KEVIN MOORE SAID. AND WE DO KNOW THAT TWO DAYS
10 LATER UNFORTUNATELY, OBVIOUSLY UNFORTUNATELY, HE COMMITTED
11 SUICIDE.

12 WE HEARD FROM SOME REPLY WITNESSES TODAY FROM MR.
13 MOYER. AGAIN, TALKED ABOUT KEVIN MOORE, THAT HE WAS AT WORK
14 THAT DAY. AGAIN, THERE WERE NO RECORDS THERE. WHAT ELSE DO
15 WE KNOW FROM THEIR TESTIMONY TODAY? HE WAS HEAVILY INVOLVED
16 IN THE DRUG TRADE. NO QUESTION. AND I DIDN'T WANT TO ASK
17 HIS WIFE. LORD KNOWS SHE'S BEEN PUT THROUGH ENOUGH WITH A
18 HUSBAND THAT -- WHOSE LIFE ENDED IN SUCH A HORRIBLE FASHION.
19 BUT I DID ASK HER, I JUST HAD TO ASK HER THE QUESTION, ISN'T
20 IT TRUE HE WAS INVOLVED IN DRUGS? YES. OKAY. WOULD HE
21 POTENTIALLY KNOW WHAT HAPPENED TO HOMER? YES. NO QUESTION.
22 THESE CASES INVOLVED -- THIS CASE INVOLVED DRUGS.
23 WE LAST HEARD FROM A FRIEND OF KEVIN'S WHO SAYS WITHOUT
24 DOUBT ON THAT DAY I SAW HIM BETWEEN 5:20 AND 5:45. AND I
25 JUST HAD TO ASK HIM, WHAT ABOUT THE WEEK BEFORE? I MEAN,

CLOSING ARGUMENTS - MR. SUMNER

530

1 GOSH, WE'RE TALKING ABOUT -- WE'RE TALKING ABOUT 2002 IN
2 NOVEMBER. I MEAN, WE'RE TALKING ABOUT EIGHTEEN MONTHS AGO
3 ROUGHLY, GIVE OR TAKE A LITTLE BIT. I THOUGHT IT WAS KIND
4 OF ODD THAT HE WAS SO PARTICULAR ABOUT WHEN HE SAW HIM. AND
5 I SAID, WELL, YOU KNOW, DID YOU SEE HIM THE WEEK PRIOR?
6 YEAH, FOUR OR FIVE TIMES. WHEN DID YOU SEE HIM? I DON'T
7 KNOW. I DON'T KNOW. I COULDN'T EVEN TELL YOU. I DON'T
8 KNOW. HIS TESTIMONY BOTHERED ME A LITTLE BIT IN THAT
9 RESPECT.

10 RUSTY TOOK THE WITNESS STAND. AND WHAT DID HE ADMIT?
11 HE ADMITTED THAT THE COCAINE WAS IN HIS TRUNK. NO QUESTION.
12 HE SAT RIGHT THERE AND TOLD YOU THAT IT'S RIGHT THERE. HE
13 ADMITTED THAT HE'S GOT A PISTOL IN HIS POCKET. HE ADMITTED
14 -- I'M SURE IT WAS NOT PLEASANT FOR HIM, I WAS INVOLVED IN
15 SELLING DRUGS. NO QUESTION ABOUT IT. BUT HE DENIES THE
16 MURDER. HE DENIES VEHEMENTLY THE MURDER THAT HE WAS
17 INVOLVED IN ANY WAY, SHAPE, OR FORM OF THE MURDER OF HOMER
18 JOHNSON.

19 WHAT DOES THE STATE HAVE? WHEN YOU BOIL IT ALL DOWN,
20 THEY'VE GOT A RIFLE BARREL IN HIS TRUNK, OKAY? I'M NOT
21 GOING TO GO BACK OVER MR. ARMSTRONG'S TESTIMONY, BUT AGAIN,
22 I'D ASK YOU TO REALLY WONDER WHY WE SEE ALL THESE PICTURES,
23 WE SEE ALL THESE PICTURES, FLASHED EVERY ONE OF THEM UP ON
24 THAT SCREEN, WHY DID WE NOT SEE THE BULLET? WHY DID HE NOT
25 TAKE US THROUGH WITH THAT LASER POINTER AND SHOW US WHY

CLOSING ARGUMENTS - MR. SUMNER

531

1 THESE BULLETS MATCHED THAT BARREL? BUT THEY'VE GOT A RIFLE
2 BARREL, OKAY?

3 THEY'VE GOT CELL RECORDS PLACING HIM ON OR NEAR WADE
4 HAMPTON BOULEVARD. OKAY. REMEMBER WHAT THE LADY SAID FROM
5 VERIZON THOUGH. SHE SAID, IT'S A THREE MILE RADIUS AS THE
6 CROW FLIES. I MEAN, IT COULD BE -- AND HE TESTIFIED. HE
7 SAID, I -- BASICALLY, HE SAID -- HE USED WORDS THAT I DIDN'T
8 LIKE. HE SAID, I DROPPED OFF SOME MATERIALS. I SAID, JUST
9 CUT -- CUT THE JUNK, OKAY? YOU'RE DELIVERING DRUGS. ISN'T
10 THAT WHAT'S GOING ON? YEAH. YOU KNOW, HE'S OUT DOING ALL
11 THIS STUFF. OKAY. THEY'VE GOT CELL RECORDS PLACING HIM ON
12 OR NEAR WADE HAMPTON BOULEVARD. OKAY. BUT AGAIN, WE'VE GOT
13 A THREE MILE RADIUS THERE. AND THEIR KEY WITNESS, JOHN
14 HAMBY.

15 I'M SURE MR. MOYER MAY HAVE A DIFFERENT SPIN ON IT, BUT
16 THAT'S PRETTY MUCH IT. THAT'S THE CASE. A LOT OF TALK. A
17 LOT OF TESTIMONY FROM PEOPLE LIKE JOHN HAMBY, YOU KNOW.

18 BUT AGAIN, PLEASE JUST REMEMBER THESE POINTS HERE.
19 LADIES AND GENTLEMEN, SUSPICION IS NOT ENOUGH TO CONVICT. A
20 NOT GUILTY VERDICT AS IT RELATES TO THE MURDER CHARGE WOULD
21 SIMPLY MEAN IT'S NOT PROVEN. IN EUROPE THEY HAVE THREE
22 FORMS OF VERDICT, INNOCENT, GUILTY, AND NOT PROVEN. IN THE
23 UNITED STATES WE HAVE MERGED THE INNOCENT AND NOT PROVEN
24 VERDICT INTO JUST A NOT GUILTY VERDICT. OKAY.

25 NOW I'M GOING TO QUIT TALKING. AND I KNOW THAT MAKES

CLOSING ARGUMENTS - MR. SUMNER

532

1 Y'ALL HAPPY. I'M GOING TO SIT DOWN. I WOULD LOVE TO GET
2 BACK UP AND TALK AGAIN. Y'ALL KNOW I LOVE TO DO IT. THE
3 RULES OF COURT FORBID THAT. MR. MOYER, AS THE PROSECUTOR,
4 GETS THE LAST ARGUMENT TO THE JURY. AND YOU'RE GOING TO SEE
5 ME OVER THERE. I'M GOING TO BE KICKING LIKE THIS. AND I'M
6 GOING TO WANT TO JUMP UP AND SAY, WHAT ABOUT THIS AND WHAT
7 ABOUT THAT? BUT I CAN'T DO THAT. I CAN'T DO THAT. THIS
8 WILL BE MY LAST CHANCE TO SPEAK TO YOU.

9 AGAIN, I WOULD JUST ASK YOU TO CONSIDER EVERYTHING
10 THAT'S COME IN. AND CONSIDER RUSTY'S TESTIMONY,
11 PARTICULARLY AS IT RELATES -- HE'S NOT SAYING HE WASN'T
12 INVOLVED IN DRUGS. HE'S NOT SAYING THAT THE COCAINE IN HIS
13 TRUNK -- HE'S NOT CONTESTING THAT. BUT HE IS CONTESTING THE
14 MURDER. AND THE MURDER CHARGE IS ABOUT PROOF. IT'S JUST
15 WHAT I SAID AT THE VERY BEGINNING IN MY OPENING STATEMENT TO
16 YOU ALL, IT'S ABOUT PROOF, PROOF SO STRONG THAT YOU ARE
17 FIRMLY CONVINCED THAT HE PULLED THAT TRIGGER ON WADE HAMPTON
18 BOULEVARD. AND I CAN'T GO BACK THROUGH EVERYTHING AGAIN.
19 I'D LIKE TO, BUT I WON'T.

20 I WOULD SIMPLY ASK THAT IF YOU IN THAT JURY ROOM, IF
21 YOU HAVE A REASONABLE DOUBT, AND IF YOU SAY THERE ARE JUST
22 TOO MANY QUESTIONS, IT'S JUST NOT THERE AS IT RELATES TO THE
23 MURDER CHARGE, STAND UP AND PLEASE MAKE SURE THAT EVERYBODY
24 ELSE IN THIS JURY KNOWS WHERE YOU STAND ON THAT. IF YOU
25 FEEL THAT THEY JUST DON'T HAVE THE PROOF AS IT RELATES TO

CLOSING ARGUMENTS - MR. MOYER

533

1 THE MURDER CHARGE, PLEASE, MR. MOYER MENTIONED AT THE
2 BEGINNING THAT HIS LIBERTY IS AT STAKE. AND THAT'S TRUE.
3 PLEASE MAKE YOUR VOICE HEARD IN THAT JURY ROOM. IT'S BEEN
4 MY PLEASURE. THANK YOU.

5 THE COURT: SOLICITOR.

6 MR. MOYER: EXCUSE ME FOR TAKING UP SO MUCH TIME TO SET
7 UP -- TO SET UP MY MATERIALS. WE HEARD AN AWFUL LOT OF
8 TESTIMONY IN A DAY AND A HALF. I THINK IF WE WOULD HAVE
9 BEEN IN CALIFORNIA WE'D STILL BE DRAWING OUR JURY RIGHT NOW.
10 AND WE JUST GOT IN ABOUT SIXTY-FIVE PIECES OF EVIDENCE AND
11 ABOUT TWENTY -- MORE THAN TWENTY WITNESSES IN ABOUT, I
12 GUESS, CLOSE TO TWO DAYS HERE. SO THERE'S A LOT THERE.

13 I'M GOING TO TAKE JUST A FEW MINUTES TO GO OVER THAT
14 EVIDENCE WITH YOU, TRY TO ORGANIZE IT A LITTLE BIT FOR YOU
15 AND SHOW YOU, LADIES AND GENTLEMEN, WHY YOU CAN BE CONVINCED
16 THAT THAT EVIDENCE BEYOND ANY REASONABLE DOUBT POINTS
17 DIRECTLY TO THAT MAN SEATED OVER THERE, RUSSELL RICE, AS THE
18 KILLER OF HOMER JOHNSON ON NOVEMBER THE 5TH OF 2002.

19 I WAS GOING TO TALK TO YOU A LITTLE BIT ABOUT THE LAW
20 FIRST, BUT I DON'T THINK I NEED TO. THE DRUG CHARGE, IT
21 SOUNDS TO ME LIKE THE DEFENDANT TOOK THE STAND AND BASICALLY
22 ADMITTED HIS GUILT. THE DRUGS WERE IN THE TRUNK. HE EVEN
23 ADMITTED HE WAS GOING TO USE IT.

24 NOW I CAN SIT HERE AND ARGUE WITH YOU NUANCES OF WHAT
25 HE WAS GOING TO DO WITH IT BECAUSE I DON'T THINK IT FITS THE

CLOSING ARGUMENTS - MR. MOYER

534

1 EVIDENCE AND THE TESTIMONY AS WE HEARD IT. AND YOU'LL HAVE
2 TO ASK YOURSELF HOW BELIEVABLE THAT ASPECT OF IT IS. BUT IT
3 DOESN'T MATTER. IF YOU HAVE THE DRUGS, AND IF IT'S A
4 CERTAIN AMOUNT OF DRUGS, IN THIS CASE TWO HUNDRED GRAMS,
5 THEN YOU'RE GUILTY OF TRAFFICKING COCAINE. YOU COULD BE
6 SELLING IT, BUYING IT, BORROWING IT FROM A FRIEND, HOLDING
7 IT FOR A LITTLE WHILE FOR A FRIEND, USING IT AS A DOOR STOP,
8 IT DOESN'T MATTER. IF YOU HAVE TWO HUNDRED GRAMS OF COCAINE
9 IT'S TRAFFICKING IN COCAINE.

10 AND I WOULD ARGUE, LADIES AND GENTLEMEN, THAT THE
11 EVIDENCE SHOWS THAT WITH THE NUMBER OF BAGS THAT WERE THERE
12 WITH THAT COCAINE, WITH THE SCALE, AND WITH THE WAY THAT
13 COCAINE WAS ALL BAGGED UP, I THINK IT'S PRETTY OBVIOUS WHAT
14 WAS TAKING PLACE WITH THAT COCAINE. AND WHEN YOU CONSIDER
15 THE AMOUNT OF CASH THAT WAS WADDED UP IN HIS POCKET AND
16 NEATLY TIED UP WITH THAT HAIR BAND I THINK IT'S -- YOU CAN
17 SURMISE FROM THAT, LADIES AND GENTLEMEN, PRETTY CLEARLY WHAT
18 WAS TAKING PLACE WITH THAT COCAINE. SO IT SOUNDS LIKE HIS
19 GUILT IS ESTABLISHED ON THAT.

20 THE GUN CHARGE AS WELL, THE GUN CHARGES. HIS HONOR
21 WILL INSTRUCT YOU THAT TRAFFICKING IN COCAINE IS A VIOLENT
22 OFFENSE. IT'S CONSIDERED VIOLENT. IF YOU HAVE ANY FIREARM
23 IN YOUR POSSESSION WHILE COMMITTING A VIOLENT OFFENSE THEN
24 YOU'RE GUILTY OF THAT CHARGE, POSSESSION OF A FIREARM DURING
25 A -- COMMISSION OF A VIOLENT CRIME. HE HAD THE COCAINE, HE

CLOSING ARGUMENTS - MR. MOYER

535

1 HAD THE GUN, HE'S GUILTY OF THAT AS WELL.

2 AND HE'S GUILTY OF UNLAWFUL POSSESSION OF A PISTOL FOR

3 HAVING A LOADED AND COCKED PISTOL IN HIS POCKET AS HE WAS

4 DRIVING AROUND WITH A MURDER WEAPON. THAT'S WHAT THIS CASE

5 BOILS DOWN TO

6 MURDER, WHAT IS THE DEFINITION OF MURDER? ONCE AGAIN,

7 HIS HONOR IS GOING TO INSTRUCT YOU CLEARLY ON THAT, BUT IT'S

8 NOT GOING TO BE A DEBATE WHETHER OR NOT HOMER JOHNSON WAS

9 MURDERED. THERE'S NO SELF DEFENSE HERE. THERE'S NO ISSUES

10 LIKE ACCIDENT, OR IS IT A LESSER INCLUDED OFFENSE LIKE

11 MANSLAUGHTER, WAS THERE SOME HEAT OF PASSION? NO. SOMEONE

12 WAS WAITING BEHIND THAT TREE LINE AND RIGHT AROUND 5:30 AND

13 MURDERED HOMER JOHNSON. THERE'S NO DOUBT ABOUT THAT.

14 ISSUE IS NOW, WAS IT THIS DEFENDANT? DID THE EVIDENCE

15 PROVE BEYOND ANY REASONABLE DOUBT THAT HE IS THE ONE WHO DID

16 THIS? HIS HONOR, AGAIN, IS GOING TO INSTRUCT YOU ON THAT

17 LAW, REASONABLE DOUBT. AND I TOLD YOU AT THE BEGINNING OF

18 THIS CASE THAT THAT IS A FAIR BURDEN. AGAIN, WE'RE DEALING

19 WITH PEOPLE'S LIBERTIES.

20 THIS IS NOT A CIVIL CASE WHERE SOMEONE'S AFTER SOMEONE

21 ELSE'S MONEY WHERE IN THOSE SITUATIONS ALL YOU HAVE TO DO IS

22 TRY TO DECIDE, WELL, WHO DO I BELIEVE A LITTLE BIT MORE?

23 WHICH SIDE DO I PUT A LITTLE MORE CREDENCE TO? NO, IN A

24 CRIMINAL CASE IT IS BEYOND A REASONABLE DOUBT. NOW THAT

25 DOESN'T MEAN BEYOND ALL DOUBT. IT DOESN'T MEAN BEYOND EVERY

CLOSING ARGUMENTS - MR. MOYER

536

1 DOUBT. IT MEANS YOU HAVE TO BE FIRMLY CONVINCED AFTER
2 LOOKING AT ALL THE EVIDENCE. IT DOESN'T MEAN YOU CAN'T HAVE
3 A LIVELY DEBATE. IT CAN'T MEAN, LADIES AND GENTLEMEN, ALSO
4 THAT IT HAS TO ANSWER EVERY QUESTION. IT MEANS ARE YOU
5 FIRMLY CONVINCED?

6 AND LET ME TALK ABOUT THAT FOR JUST A MINUTE BECAUSE
7 ONE QUESTION THAT WE'RE PROBABLY ALL WONDERING IS WHY DID
8 THIS HAPPEN? WHY DID SOMEBODY HIDE BEHIND THAT TREE AT
9 ABOUT 5:30? MOTIVE IS NOT AN ELEMENT OF MURDER. MURDER IS
10 THE KILLING OF SOMEBODY WITH MALICE AFORETHOUGHT EITHER
11 EXPRESSED OR IMPLIED. THE STATE DOES NOT HAVE A BURDEN OF
12 COMING IN HERE AND PROVING TO YOU WHY THE DEFENDANT KILLED
13 HOMER JOHNSON.

14 WE LIKE TO KNOW MOTIVE THOUGH, DON'T WE? ESPECIALLY
15 WHEN IT'S A VIOLENT CRIME. OUR CHILDREN -- OUR CHILDREN --
16 ONE CHILD STRIKES ANOTHER CHILD, WHAT'S THE FIRST THING WE
17 ASK? WHY DID YOU DO THAT? BECAUSE WE JUST INTUITIVELY WANT
18 TO KNOW WHY SOMEBODY COMMITS VIOLENCE AGAINST SOMEBODY ELSE.
19 IT'S HUMAN NATURE. AND THERE'S CERTAINLY PLENTY OF EVIDENCE
20 IN THIS CASE FROM WHICH YOU CAN CERTAINLY SURMISE, AT LEAST
21 ONE MOTIVE, IF NOT SEVERAL, BUT IT'S NOT REQUIRED.

22 SO WHAT DO WE HAVE ABOUT THIS CASE? LET'S TALK ABOUT
23 FIRST A LITTLE BIT ABOUT THE INVESTIGATION. AND LIKE I
24 SAID, THERE'S BEEN A LOT OF TESTIMONY. BUT LET'S THINK BACK
25 TO THE FIRST DAY, THE FIRST COUPLE OF WITNESSES. WHAT DID

CLOSING ARGUMENTS - MR. MOYER

537

1 THEY ESTABLISH WITH US? WELL, THEY ESTABLISHED THAT THE
2 DEFENDANT WAS KILLED SOMEWHERE AROUND 5:30.

3 THE FIRST WITNESS WORKS RIGHT NEXT DOOR. HE WORKED FOR
4 THIS GAS STATION. AND REMEMBER WHAT HE SAID? IT WAS AROUND
5 5:30 AND I HEARD TWO NOISES, TWO LOUD NOISES. IT SOUNDED
6 PRETTY CLOSE. I ASSUMED THERE WAS AN ACCIDENT ON WADE
7 HAMPTON. THAT'S HOW CLOSE IT WAS. SO HE STEPS OUT AND
8 LOOKS, DIDN'T SEE ANYTHING. SO HE GOES BACK TO WORK. THEN
9 ABOUT TWENTY OR THIRTY MINUTES LATER HE HEARS, YOU KNOW,
10 AMBULANCES, SOMEONE COMES SHOWING UP.

11 THEN WE HEARD FROM A MAN WHO ACTUALLY FOUND HOMER
12 JOHNSON. HE USES THIS ENTRANCE, THE ONE CLOSER TO THE TOWN
13 OF GREENVILLE, EVERY DAY WHEN HE COMES HOME FROM WORK. AND
14 AGAIN, IT WAS AROUND 5:30, 5:45. HE PULLS IN THE FIRST
15 ENTRANCE, ALWAYS DRIVES AROUND THE BACK AND PARKS AT A
16 CERTAIN SPOT. THAT WITNESS WAS ABLE TO TELL US WHERE HOMER
17 JOHNSON WAS. AND HOMER JOHNSON WAS LYING ON THE GROUND
18 RIGHT THERE IN THE PARKING LOT, POURING DOWN RAIN. REMEMBER
19 THAT TESTIMONY, LADIES AND GENTLEMEN, POURING DOWN RAIN. HE
20 IMMEDIATELY GOES AND GETS THE CLERK. THEY COME OUT, TAKE A
21 LOOK. HE DOES NOT SEEM RESPONSIVE. SO THEY GO BACK. THE
22 CLERK CALLS THE POLICE. THE POLICE SHOW UP. THEN THE
23 INVESTIGATION BEGINS.

24 AND YOU HEARD ABOUT THAT INVESTIGATION, HOW NOTHING WAS
25 COLLECTED THERE ON THE SCENE. IN FACT, IT WAS RAINING SO

CLOSING ARGUMENTS - MR. MOYER

538

1 HARD, LADIES AND GENTLEMEN, THAT THE FIRST FEW PEOPLE WHO
2 SAW HOMER JOHNSON -- AND YOU SAW THE WOUNDS THAT WERE GAPING
3 ON HIS SIDE. I TOLD YOU AT THE BEGINNING THAT IT WAS GOING
4 TO BE A LITTLE DIFFICULT. AND I'M SURE THAT ASPECT WAS.
5 YOU SAW THOSE WOUNDS.

6 DESPITE THOSE WOUNDS, PEOPLE DIDN'T EVEN KNOW HE WAS
7 SHOT. WHEN THAT CALL WENT OUT IT WENT OUT AS WHAT? AN EMS
8 ASSIST. THEY DIDN'T KNOW WHAT WAS WRONG. THERE WAS JUST A
9 MAN LYING THERE IN THE PARKING LOT. AND THE TWO -- MR.
10 WARREN WHO FOUND THE BODY, HE DIDN'T SEE BLOOD. HE DIDN'T
11 SEE TRAUMA. THE FIRST OFFICER WHO SHOWED UP -- IT WASN'T
12 UNTIL EMS ACTUALLY HAD HIM IN THE AMBULANCE THAT THEY EVEN
13 KNEW HE'D BEEN SHOT. THAT'S HOW HARD IT WAS RAINING. IT
14 WAS WASHING THE BLOOD AWAY. SO THERE'S NOT A CHANCE THAT
15 THERE'S GOING TO BE FOOTPRINTS OR THINGS LIKE THAT THERE IN
16 THAT PARKING LOT.

17 AND YOU HEARD THE EFFORTS THAT CHRIS BRYAN WENT THROUGH
18 IN THIS CASE. WE SOMETIMES BEMOAN THE FACT AS PROSECUTORS
19 THAT THE PROLIFERATION OF THESE TELEVISION SHOWS ABOUT
20 FORENSIC EVIDENCE, AND POLICE PROCEDURES, AND SO ON PERHAPS
21 GIVE PEOPLE AN UNREALISTIC IDEA OF HOW ACTUAL POLICE WORK
22 TAKES PLACE.

23 WELL, THIS IS ONE CASE, LADIES AND GENTLEMEN, WHERE I
24 WOULD SAY THIS STACKS UP AGAINST ANYTHING YOU'D SEE BECAUSE
25 OFFICER CHRIS BRYAN WENT TO EXTRAORDINARY LENGTHS TO COLLECT

CLOSING ARGUMENTS - MR. MOYER

539

1 EVIDENCE IN THIS CASE. YOU SAW HOW HE WAS ABLE TO GO -- WE
2 SAW THE TWO HOLES THAT WENT IN THROUGH THE WINDOW.

3 AND WE'VE BEEN ABLE TO SURMISE SINCE THEN WHAT
4 HAPPENED. YOU WOULD INITIALLY THINK, AH, TWO BULLETS WENT
5 THROUGH THAT WINDOW. YOU'VE GOT TWO HOLES. AND RIGHT THERE
6 WHERE ONE OF THE PROJECTILES FINALLY HIT THE CURTAIN ON THE
7 OTHER SIDE AND DROPPED, THAT WAS A JACKET, REMEMBER? THE
8 JACKET THAT GOES AROUND THE CORE, ONE BULLET. SO THAT'S
9 LOSING STEAM AND FINALLY MAKES IT THROUGH THE CURTAIN AND
10 DROPS. THE OTHER PART OF THAT BULLET, THE CORE, GOES
11 THROUGH THE CURTAIN AS WELL AND HITS THE WALL.

12 WHAT DO WE KNOW ABOUT THAT BULLET THEN? WE HEARD
13 TESTIMONY THAT -- WHAT'S GOING TO MAKE A BULLET GO APART
14 LIKE THAT? WELL, IT'S GOING TO HIT SOMETHING. IT COULD BE
15 A BODY, IT COULD EVEN BE RIBS, IT COULD BE SOMETHING ELSE.
16 COULD IT BE THE PAVEMENT? ONE OF FEW THINGS. ~~EITHER THAT~~
17 ~~-- ONE OF THOSE SHOTS HIT HOMER JOHNSON, AT THAT POINT SPLIT~~
18 AND WENT INTO TWO PIECES THROUGH THE WINDOW. OR THE VERY
19 FIRST SHOT THAT HIT HOMER JOHNSON THAT WENT INTO THE SIDE
20 AND LODGED RIGHT AGAINST HIS RIB-CAGE ON THE OTHER SIDE
21 DROPPED HIM, THE SECOND SHOT THAT WENT THROUGH HIM WAS WHILE
22 HOMER JOHNSON WAS LYING ON THE GROUND AND IT RICOCHETED UP
23 OFF THE PAVEMENT. ONE OF THOSE TWO OPTIONS.

24 WELL, WHATEVER HAPPENED, THAT BULLET LODGED THROUGH
25 THAT HOTEL ROOM. DETECTIVE BRYAN WAS ABLE TO COLLECT THE

CLOSING ARGUMENTS - MR. MOYER

540

1 ONE PART, THE JACKET THERE RIGHT AT THE CURTAIN. THEN HE
2 WAS ABLE TO GO TO THE WALL. AND HE SAW A LITTLE HOLE. AND
3 YOU SAW WHAT HE DID. HE STARTED CUTTING AWAY. HE CUT AWAY
4 UP AT THE TOP OF THE ROOM, DIDN'T SEE ANYTHING. SO HE
5 STARTED CUTTING AWAY AT THE BOTTOM THINKING, WELL, MAYBE THE
6 BULLET FELL. HE WAS ABLE TO RECOVER IT. WENT TO
7 EXTRAORDINARY LENGTHS.
8 WHAT DID HE DO NEXT? AND YOU SAW THE PICTURES AND
9 HEARD -- I DON'T FEEL LIKE LEAFING THROUGH ALL THOSE, BUT
10 YOU CAN LOOK AT THEM AGAIN BACK IN THE JURY ROOM. BUT YOU
11 HEARD WHAT THEY DID THEN WHEN THEY WENT BACK TO THE SCENE.
12 THEY TOOK A STRING AND THEY WERE ABLE TO LINE UP FROM THE
13 WALL TO THE HOLE. AND THEY WERE ABLE TO ACTUALLY FIND OUT
14 WHERE THAT SHOT WAS FIRED FROM. AND THEN USING THAT
15 INFORMATION THEY BEGAN LOOKING FOR SHELL CASINGS. AND WHAT
16 DID THEY FIND? TWO 30-06 SHELL CASINGS RIGHT WHERE YOU
17 WOULD EXPECT THEM TO BE. RIGHT AT THE FORK OF THAT TREE
18 WHERE SOMEONE COULD BE WAITING, RIGHT WHERE -- TO THE RIGHT
19 WHERE THOSE SHELL CASINGS WOULD EJECT, THAT'S WHERE THEY
20 WERE, RIGHT WHERE YOU WOULD EXPECT. SO THEY WERE COLLECTED.
21 AND WHAT DID OFFICER BRYAN SAY? WELL, NO, YOU CAN'T
22 TAKE FINGERPRINTS OFF SOMETHING LIKE THAT. A FIRED SHELL
23 CASING, THE HEAT AND THE EXPANSION, HE SAID, NO. I'VE NEVER
24 SEEN -- I'VE NEVER HEARD THAT TAKING PLACE. DON'T YOU THINK
25 THAT AN OFFICER WHO'S GOING TO GO TO SUCH LENGTHS AS TO THE

CLOSING ARGUMENTS - MR. MOYER

541

1 DIAGRAMS, AS TO CUTTING AWAY THE WALL, AS GOING OUT THERE TO
2 BEGIN WITH WITH ALL THE MEASURING STRINGS, IF IT WERE AS
3 SIMPLE AS JUST DUSTING IT FOR PRINTS DON'T YOU THINK HE
4 WOULD HAVE DONE THAT? NO, BECAUSE IT COULDN'T HAVE TAKEN
5 PLACE.

6 AND WE KNOW FROM THAT ALSO THE DISTANCE FROM WHERE
7 THOSE SHELL CASINGS WERE TO WHERE HOMER JOHNSON WAS FOUND
8 WAS JUST ABOUT FORTY FEET. AND WE KEEP THINKING OF PARKING
9 LOTS AND WOODS. AND I THINK IN OUR MINDS WE'RE THINKING OF
10 A LONG SHOT. IT WAS FORTY FEET. IT WAS BARELY A FIRST

11 DOWN, LADIES AND GENTLEMEN, IN FOOTBALL. IT WAS NOT THAT
12 FAR. IT WAS JUST OFF TO THE EDGE OF THAT PARKING LOT.

13 THEN WE HEARD OF THE COLLECTION OF THE EVIDENCE FROM
14 THE CAR. YOU HEARD HOW DETECTIVE FULLER HERE HAD BEEN

15 TRYING TO GET AHOLD OF THAT DEFENDANT, AND TRYING, AND
16 TRYING, LEAVING MESSAGES, CALLING HIM ALMOST EVERY DAY,

17 LEAVING MESSAGES ON VOICE MAIL, LEAVING MESSAGES WITH
18 PEOPLE. HE GOT A CALL AT THE VERY BEGINNING, A VOICE-MAIL

19 MESSAGE, I HEARD YOU'RE TRYING TO GET IN TOUCH WITH ME.
20 I'LL GET BACK IN TOUCH WITH YOU, EARLY, EARLY NOVEMBER.

21 WHEN'S THE NEXT TIME HE HEARD FROM HIM? ~~DECEMBER 26TH~~

22 DETECTIVE FULLER IS JUST CONTINUING TO TRY EVERY DAY,
23 CALLING HIM, CALLING HIM. LOW AND BEHOLD ONE DAY HE

24 ANSWERS. AND WHAT DOES HE SAY? I'M NOT IN TOWN RIGHT NOW.
25 I'LL MEET YOU MONDAY. I'LL MEET YOU MONDAY. HE'D BEEN IN

CLOSING ARGUMENTS - MR. MOYER

542

1 TOWN SINCE DECEMBER THE 24TH, SINCE CHRISTMAS EVE. IF THIS
2 WAS SO IMPORTANT THAT HE TALK TO DETECTIVE FULLER -- AND IT
3 IS IMPORTANT. ONE OF HIS GOOD FRIENDS WAS KILLED ACCORDING
4 TO HIS TESTIMONY. HE WAS WAITING TIL DECEMBER THE 30TH TO
5 SAY HE WAS GOING TO MEET WITH DETECTIVE FULLER BECAUSE HE
6 WAS GOING TO BE OUT OF TOWN. AND THAT GUN WAS GOING TO BE
7 CUT UP IN PIECES AND DISPOSED OF PROPERLY THIS TIME. THAT'S
8 WHY HE WAS WAITING TIL DECEMBER THE 20TH, DECEMBER THE 30TH.
9 WELL, DETECTIVE FULLER GETS IN TOUCH WITH HIM. HE
10 DOESN'T TAKE HIS WORD FOR IT. HE GOES OUT LOOKING LIKE HE
11 SAID HE WOULD DO ALMOST EVERY NIGHT, JUST GO OUT TO HOTELS,
12 GO OUT TO HOTELS, GO OUT TO HOTELS. HE FINDS HIM DECEMBER
13 THE 27TH, THAT NIGHT. AND WHERE IS HE? STUDIO PLUS HOTEL
14 ON HAYWOOD DRIVE. THERE IS THAT CAR. AND IT MATCHES, THE
15 VIN, YOU KNOW, ALL THE DESCRIPTION, YEAR, MAKE, MODEL. SO
16 HE KNOWS HE HAS THE CAR. HE TALKS TO THE CLERK. HE HAS IT
17 ALL READY. HE'S GOING TO DO A TRAFFIC STOP. AND HE DOES.
18 HE GETS A COUPLE OF OTHER OFFICERS INVOLVED.

19 AND THAT MORNING RIGHT ABOUT 11:30 AS THE DEFENDANT
20 LEAVES -- RIGHT AS THE DEFENDANT LEAVES THEY STOP THAT CAR.
21 PULL OVER IN AN EMPTY LOT. THE OFFICERS GET THE DEFENDANT
22 OUT OF THE CAR. TALK TO HIM A LITTLE BIT FIRST. AND YOU
23 HEARD ALL THE TESTIMONY ABOUT THE TAG. AND YOU CAN MAKE
24 YOUR OWN CONCLUSION -- YOUR OWN CONCLUSIONS ABOUT THE TITLE,
25 AND THE BILL OF SALE, AND HOW LEGITIMATE THEY WERE. WE KNOW

CLOSING ARGUMENTS - MR. MOYER

543

1 IT WASN'T REGISTERED. THE OFFICERS HAD A REASON TO STOP HIM
2 THERE. AND HE SAYS WHATEVER IT WAS THAT HE SAID, WHICH WAS
3 THAT HE JUST GOT IT, THAT HE JUST GOT INTO TOWN. YOU CAN
4 HEAR IT ON THE VIDEOTAPE.

5 AND, WELL, THE OFFICERS GET HIM OUT OF THE CAR. AND
6 WHAT'S THE FIRST THING THEY DO? THEY DO THAT PAT-DOWN. AND
7 WHAT IS IN HIS POCKET? IT IS THIS PISTOL. AND WE HAVE SO
8 MUCH EVIDENCE HERE I'M NOT GOING TO GO THROUGH AND TRY TO
9 FIGURE OUT WHICH ONE IT IS. I BELIEVE IT'S THIS ONE,
10 BERETTA 25 CALIBER. THIS PISTOL LOADED AND COCKED IN HIS
11 POCKET, LOADED AND COCKED IN HIS POCKET. WHAT DOES THAT
12 TELL YOU WHAT WAS GOING ON? WHAT DOES THAT TELL YOU ABOUT
13 WHAT HE WAS TRYING TO PROTECT IN THAT CAR?

14 SO THE PISTOL WAS COLLECTED. HE WAS PUT IN THE BACK OF
15 THE PATROL CAR. AND LOW AND BEHOLD WHAT IS FOUND IN THE
16 TRUNK? THE RIFLE. THE RIFLE IN A PLASTIC BAG. DETECTIVE
17 FULLER SAID IT DIDN'T LOOK LIKE IT HAD JUST BEEN DUG UP. IT
18 WAS CLEAN. IF THAT PLASTIC BAG HAD BEEN BURIED AND JUST DUG
19 UP RECENTLY LIKE THE DEFENDANT SAID DON'T YOU THINK IT WOULD
20 HAVE BEEN DIRTY AND MUDDY? DON'T YOU THINK WHAT HAPPENED,
21 LADIES AND GENTLEMEN, IS THAT THAT GUN WENT IN THAT BAG
22 AFTER IT WAS JUST DUG UP, THAT IT HAD BEEN BURIED SOMEWHERE
23 SHALLOW LIKE HE SAYS, BUT IT'D BEEN DONE BY HIM AND THAT
24 THOSE FRESH SAW MARKS ON THAT GUN WERE BECAUSE HE WAS
25 FEELING THE HEAT AND HE WAS NOW AFTER DIGGING IT UP, AND THE

CLOSING ARGUMENTS - MR. MOYER

544

1 RUST IS ALL OVER THE GUN, HE IS NOW GOING TO CUT IT UP IN
2 PIECES AND MAKE SURE, HE THINKS, THAT IT CAN'T BE MATCHED UP
3 AGAINST A BULLET? AND THEN IT'S CUT UP, AND THEN IT'S PUT
4 INTO A PLASTIC BAG, AND PUT INTO HIS CAR ALONG WITH THE
5 DRUGS. WE HEARD HE ALSO HAD SOME CAMOUFLAGE CLOTHING IN THE
6 CAR.

7 LET'S TALK REAL BRIEFLY ABOUT THIS STORY. WHAT DID WE
8 HEAR FROM THE WITNESSES IN THIS CASE ABOUT THE BACKGROUND TO
9 THIS STORY? WELL, WE KNOW IT IS ONE OF DOUBLE DEALING, OF
10 DOUBLE CROSSING, OF REVENGE AND PAYBACK. AND I THINK IT
11 GOES HAND IN HAND WITH WHAT WE ALL SUSPECT ABOUT THE DRUG
12 WORLD, PEOPLE STABBING EACH OTHER IN THE BACK, PEOPLE
13 STEALING FROM ONE ANOTHER, PEOPLE GETTING MAD, AND PEOPLE
14 WANTING REVENGE. THE DEFENDANT AND THE VICTIM KNEW EACH
15 OTHER AND THEY HAD FOR A WHILE. THEY KNEW EACH OTHER GOING
16 BACK SEVERAL YEARS. AND THEY'D GOTTEN BACK TOGETHER.

17 WE KNOW HOMER JOHNSON STOLE HIS CAR. AND WE KNOW THERE
18 WAS SOMETHING VALUABLE IN IT. YOU CAN MAKE YOUR OWN
19 DETERMINATION WHETHER OR NOT IT WAS BECAUSE OF TOOLS. OR
20 WAS IT BECAUSE OF WHAT THE OTHER TESTIMONY WE HEARD IN THIS
21 CASE THAT IT WAS FULL OF DRUGS, AND MONEY, AND A GUN? WE
22 KNOW THERE WAS A GUN IN THERE BECAUSE WE HEARD TESTIMONY
23 FROM A PERSON WHO USED TO EMPLOY HOMER JOHNSON SOME WHO SAID
24 THAT HOMER JOHNSON GAVE HIM A 44 CALIBER PISTOL. AND THAT
25 PISTOL IS IN EVIDENCE, THE PISTOL THAT MATCHED THE SHELLS

CLOSING ARGUMENTS - MR. MOYER

545

1 THAT WERE IN THE DEFENDANT'S CAR. AND HE TOLD DALE SHIRLEY,
2 THIS CAME FROM RUSTY'S CAR WHEN I STOLE IT ALONG WITH THE
3 DRUGS AND THE MONEY.

4 WHO ELSE WOULD BE STEALING A SEVEN HUNDRED DOLLAR CAR
5 IN THE PARKING LOT OF WAL-MART IN THE MIDDLE OF THE DAY
6 AROUND DINNERTIME? WHO ELSE WOULD BE DOING IT? WHAT WOULD
7 BE THE REASON? IT'S NOT BECAUSE OF THE CAR. IT WAS BECAUSE
8 OF WHAT WAS IN IT. AND WE KNOW FROM TESTIMONY OF WITNESSES
9 THAT WHAT THE INTENTION WAS, THAT HOMER WAS GOING TO BUY
10 TWENTY POUNDS OF MARIJUANA, THE MARIJUANA WAS GOING TO BE
11 SOLD, AND TEN OR TWENTY THOUSAND, TEN THOUSAND FOR HALF OF
12 IT, TEN OR ELEVEN THOUSAND FOR THE OTHER HALF. AND WHERE
13 WAS THAT MONEY GOING TO GO? IT WAS GOING TO GO TO BUY
14 COCAINE.

15 SO WHAT HAPPENED? HOMER JOHNSON STEALS THE DEFENDANT'S
16 COCAINE AND MONEY, BUYS TWENTY POUNDS OF MARIJUANA. AND WE
17 HEARD THE MAN WHO MADE THE DELIVERY TO HOMER JOHNSON THE
18 NIGHT BEFORE THE KILLING. HE HAS THE TWENTY POUNDS OF
19 MARIJUANA. HE THEN SELLS HALF OF THAT MARIJUANA TO THIS
20 DEFENDANT THE NIGHT BEFORE IN HIS HOUSE AFTER THAT CAR SHOW,
21 GIVES HIM HALF OF IT. AND THIS DEFENDANT IS SUPPOSED TO
22 BRING HIM THE MONEY THE NEXT DAY. THE OTHER HALF GETS SOLD
23 IN SOME OTHER FASHION. THEY DON'T KNOW HOW.

24 AND WHAT DO WE KNOW ABOUT WHEN IT WAS SUPPOSED TO TAKE
25 PLACE? IT WAS SUPPOSED TO TAKE PLACE AT NOON ON THE DAY OF

CLOSING ARGUMENTS - MR. MOYER

546

1 THE KILLING, BUT IT DOESN'T. THEY CAN'T MEET AT NOON. AND
2 WHY IS THAT? BECAUSE, LADIES AND GENTLEMEN, WELL, WE HEARD
3 THAT HOMER JOHNSON BROKE HIS TOE, BROKE HIS TOE, HE WAS IN
4 THE HOSPITAL. THAT PUSHES EVERYTHING BACK. THAT PUSHES
5 BACK THE TIME-FRAME. AND IT PUSHES BACK AND IT EXPLAINS THE
6 DIFFICULTY IN WHY THESE MEN ARE GETTING -- HAVING A HARD
7 TIME GETTING IN TOUCH WITH ONE ANOTHER.

8 AND WHAT DO WE KNOW? YOU HEARD TESTIMONY THAT THE
9 DEFENDANT CALLS JOHNNY HAMBY, WHO'S THE THIRD PART OF THESE
10 THREE INDIVIDUALS WHO WERE SELLING DRUGS TOGETHER. AND HE
11 CALLS JOHNNY HAMBY AND TELLS JOHNNY HAMBY, I CAN'T GET IN
12 TOUCH WITH HOMER. TELL HOMER TO MEET ME AT THE SUPER 8
13 MOTEL -- TO MEET ME THERE, I'LL BE IN SUCH AND SUCH A ROOM.
14 JOHNNY HAMBY DOES. HE CALLS HOMER AND TELLS HIM WHERE TO
15 MEET HIM.

16 WHAT DOES HOMER DO? WE KNOW HE WENT OVER THERE TO THAT
17 HOTEL TO TRY TO MEET HIM. HE BORROWS A FRIENDS CAR. HE
18 GOES OVER THERE. HE THEN CALLS A MAN AT 5:06, I'M SORRY, AT
19 4:16. REMEMBER DETECTIVE FULLER TESTIFIED ABOUT TIMES THAT
20 HE WAS ABLE TO GET FROM THE VICTIM'S -- HOMER JOHNSON'S CELL
21 PHONE.

22 AT 4:16 HOMER JOHNSON CALLED ZACK SMITH, HE'S THE MAN
23 WHO GAVE HIM THE DRUGS IN THE BEGINNING, AND SAYS, I'VE BEEN
24 TO THE SUPER 8, HE WASN'T THERE, BUT I'M GOING BACK, YOU
25 KNOW, I'M GOING TO GO THERE TO GET THE REST OF THE MONEY.

CLOSING ARGUMENTS - MR. MOYER

547

1 AT 5:06 THE VICTIM, HOMER JOHNSON, CALLS DALE SHIRLEY.

2 REMEMBER WHO DALE SHIRLEY IS? DALE SHIRLEY IS THE MAN WHO

3 USED TO EMPLOY HIM AND WHO GOT THE 44 CALIBER GUN. HE'D

4 ALREADY TOLD HIM ABOUT WHAT HAD HAPPENED. HE SAID, AGAIN,

5 I'VE BEEN TO THE SUPER 8, HE'S NOT THERE.

6 AND THEN WHAT DO WE KNOW? WE KNOW THAT HOMER JOHNSON

7 CALLED JOHNNY HAMBY AT 5:28. 5:28 IS THE TESTIMONY THAT

8 DETECTIVE FULLER SAID HE WAS ABLE TO GLEAN FROM THE CELL

9 PHONE AS THE LAST OUTGOING CALL FROM THAT CELL PHONE, 5:28.

10 AND IT'S TO JOHNNY HAMBY. AND HE SAYS, HE'S NOT HERE,

11 RUSTY'S NOT HERE. I DON'T SEE HIS CAR. I'M GOING TO GO IN

12 TO THE CLERK AND I'M GOING TO TRY TO FIND OUT IF HE'S HERE.

13 AND, LADIES AND GENTLEMEN, THAT HAS TO BE THE TIME HE

14 DIED. THAT'S ABOUT WHEN THE SHOTS WERE HEARD, RIGHT AROUND

15 5:30. AT 5:28 HE MAKES THAT PHONE CALL, SAYS I'M GOING TO

16 GET OUT AND GO IN AND FIND OUT IF RUSTY RICE IS CHECKED INTO

17 THE HOTEL. GETS OUT OF THE CAR AND HE'S SHOT DEAD RIGHT

18 THERE. SHOT DEAD RIGHT THERE.

19 IT WOULDN'T BE SURPRISING FOR HIM TO MEET THE DEFENDANT

20 AT A HOTEL. WHY NOT? BECAUSE WE KNOW THE DEFENDANT LIVED

21 AT HOTELS. WE KNOW THEN THE DEFENDANT DISAPPEARS. HE TRIED

22 -- HE TOLD YOU, LADIES AND GENTLEMEN, THAT HE'D BEEN

23 PLANNING LEAVING TOWN FOR -- HE'D BEEN PLANNING TO LEAVE

24 TOWN AND HE WAS GOING TO LEAVE FOR A WHILE. YOU REMEMBER HE

25 GOT UP ON THE STAND AND SAID HE WENT AROUND TELLING PEOPLE

CLOSING ARGUMENTS - MR. MOYER

548

1 GOODBYE? BECAUSE HE KNEW WHERE HE WAS GOING TO GO. HE KNEW
2 HE WAS GOING TO HAVE TO LEAVE TOWN AFTER DOING WHAT HE WAS
3 GOING TO DO.

4 HE'S LAST SEEN AT THE BLOCK HOUSE WITH JOHNNY HAMBY.

5 AND THEN HE'S GONE. NO PHONE CALLS. DOESN'T SEE JOHNNY

6 HAMBY. HE'S OUT OF TOWN. WITH HIS BEST FRIEND HAVING JUST
7 BEEN SHOT, HE LEAVES. HE THEN IS CAUGHT RED HANDED WITH THE
8 MURDER WEAPON.

9 LET ME TALK JUST A FEW MOMENTS IN CLOSING, LADIES AND
10 GENTLEMEN, ABOUT THE EVIDENCE THAT YOU'VE HEARD. YOU HEARD
11 ABOUT THE BALLISTIC MATCHES. AND YOU WERE ABLE TO LOOK THAT
12 OFFICER, THAT AGENT IN THE EYE AND JUDGE HIS CREDIBILITY.
13 YOU HEARD ALL OF HIS QUALIFICATIONS, HOW HE'S DONE THIS FOR
14 YEARS. AND HE TOLD YOU -- YOU WERE ABLE TO SEE HOW EVEN
15 HANDED HE WAS. THEY DIDN'T MATCH ALL FOUR FRAGMENTS, THAT
16 TWO OF THOSE FRAGMENTS -- TWO OF THOSE BULLETS MATCHED THAT
17 GUN. HE WAS ABLE TO SAY -- HE WAS ABLE TO SAY THAT HE DID A
18 MATCH OF THE BULLET THAT WAS TAKEN FROM HOMER JOHNSON'S BODY
19 AND THE JACKET THAT WAS FOUND IN THAT HOTEL ROOM, HE WAS
20 ABLE TO TAKE AN OATH AS AN EXPERT WITNESS AND LOOK Y'ALL IN
21 THE EYE AND TELL YOU THAT THOSE TWO BULLETS WAS SHOT FROM
22 THAT GUN.

23 AND HE SAID, WELL, THE DEFENSE CROSSED HIM PRETTY
24 THOROUGHLY ON, WELL, YOU WEREN'T ABLE TO SHOOT THE GUN, YOU
25 WOULD HAVE LIKED TO HAVE SHOT THE GUN. HE SAID, WELL, OF

CLOSING ARGUMENTS - MR. MOYER

549

1 COURSE. IT'S EASIER. IT'S A LOT EASIER TO SHOOT THE GUN
2 AND GET THE PROJECTILE THAN IT IS TO, YOU KNOW, RAM BULLETS
3 IN IT. HE SAID IT'S NO LESS RELIABLE. SO HE DID WHAT HE --
4 THE ONLY THING HE COULD DO IS HE GOT A BULLET TO MATCH. AND
5 HE SAID WITHOUT ANY DOUBT THAT BULLET -- THOSE TWO BULLETS
6 CAME FROM THE SAME GUN, AND THOSE TWO BULLETS CAME FROM THAT
7 RIFLE, THAT RIFLE THAT WAS FOUND IN THIS DEFENDANT'S TRUNK.

8 AND THEN VERY BRIEFLY, LADIES AND GENTLEMEN, WE HEARD
9 ABOUT TELEPHONE RECORDS. I'M JUST GOING TO CLOSE ON THIS.
10 WE HAD A WITNESS WHO CAME IN, LADIES AND GENTLEMEN, FROM
11 VERIZON. AND SHE WAS ABLE TO TESTIFY TO YOU ABOUT CELL
12 PHONE RECORDS. AND IT GOT A LITTLE TEDIOUS. AND WE SAID AT
13 THE BEGINNING OF THIS CASE THAT NONE OF IT WOULD GET BORING,
14 BUT THAT PROBABLY GOT A LITTLE BIT BORING AS WE WERE JUST
15 PUTTING UP DOCUMENT AFTER DOCUMENT AND YOU WERE LOOKING OVER
16 THOSE DOCUMENTS AS SHE TRIED TO EXPLAIN THEM. AND IT WAS
17 PROBABLY A LITTLE DIFFICULT TO KEEP ALL THE PHONE NUMBERS
18 STRAIGHT. AND THAT'S WHY I WANT TO TAKE JUST A FEW MINUTES
19 TO GO OVER THOSE WITH YOU.

20 BECAUSE SHE WAS ABLE TO TAKE A MAP -- YOU HAVE A
21 COLORED ONE. AND THAT'S IN EVIDENCE. BUT HERE'S A COPY OF
22 WHAT IT IS. AND SHE WAS ABLE TO SAY -- I DON'T KNOW HOW
23 MANY OF US KNEW THIS WAS POSSIBLE, BUT THAT YOU CAN BE
24 TRACKED WHERE YOU'RE GOING BY THE USE OF YOUR CELL PHONE.
25 THEY CAN FOLLOW WHERE THAT CELL TOWER --- WHICH CELL TOWER

CLOSING ARGUMENTS - MR. MOYER

550

1 PICKS UP YOUR CALL. THEY CAN FOLLOW YOU AROUND. AND THEY
2 WERE ABLE TO DO THAT WITH THIS DEFENDANT.

3 AND LET'S THINK ABOUT THAT FOR JUST A MINUTE. AND JUST
4 TO REMEMBER, LET'S REFRESH OUR MEMORY ON A COUPLE OF THESE
5 DIFFERENT CALLS. OF COURSE WE KNOW, HERE'S THE TIME, THE
6 TIME-FRAME THAT THE CALL WAS MADE. AND IT GOES BACKWARDS.
7 OKAY. SO WHEN YOU LOOK AT THE -- I STARTED HERE ON PAGE
8 THREE BECAUSE THE TIME SEQUENCE GOES IN REVERSE. THE DATE.
9 THIS, LADIES AND GENTLEMEN, IS THE CELL TOWER. EXCUSE MY
10 WRITING. THIS IS THE -- THIS IS THE CALL. THIS IS THE
11 PHONE IN QUESTION, 244, I'M SORRY, 420-0035. THIS IS THE
12 PHONE THAT MADE THE CALL. THIS IS THE CALL FOR WHAT NUMBER
13 WAS ACTUALLY CALLED.

14 LET'S THINK ABOUT -- LET'S GO THROUGH THESE JUST FOR A
15 MINUTE. 44, I'M SORRY, 420-0035, THERE'S TESTIMONY THAT IS
16 THE DEFENDANT, RUSSELL RICE. THESE ARE HIS RECORDS. AND
17 LET'S START ON NOVEMBER THE 5TH OF 2002. AND WE CAN SEE
18 HERE, I'VE HIGHLIGHTED IN GREEN THE CALLS THAT HE MADE TO
19 JOHNNY HAMBY. HIGHLIGHTED IN BLUE THE CALLS THAT HE MADE TO
20 -- THAT WERE MADE BETWEEN HIM AND HOMER JOHNSON.

21 WE KNOW THAT MORNING JOHNNY HAMBY RECEIVED A CALL FROM
22 THE DEFENDANT RIGHT ABOUT 9:21 IN THE MORNING. THEY WERE
23 SUPPOSED TO MEET THAT DAY. THEY WERE SUPPOSED -- HE WAS
24 SUPPOSED TO MEET WITH HOMER BY NOON. HE THEN MAKES A CALL,
25 420-0035 MAKES A CALL TO HOMER JOHNSON. HOMER JOHNSON IS

CLOSING ARGUMENTS - MR. MOYER

551

1 THE 363 NUMBER YOU HEARD.

2 WHAT HAPPENS NEXT? OVER, AND OVER, AND OVER, AND OVER

3 AGAIN HOMER IS TRYING TO CALL THE DEFENDANT. AND WE KNOW

4 THAT HOMER AGAIN TRIES TO CALL THE DEFENDANT UP TIL ABOUT

5 11:00 MOST LIKELY TELLING HIM WE CAN'T MEET AT NOON, I'M IN

6 THE HOSPITAL WITH A BROKEN TOE.

7 AND WHAT DO WE KNOW ABOUT WHERE THE DEFENDANT'S

8 WHEREABOUTS ARE? BY 10:25 HE'S AT CELL TOWER 13, WHICH IS

9 NOT ON THIS MAP. BUT WE KNOW THAT MORNING, NOVEMBER THE 5TH

10 OF 2002 HE STARTED OFF AT 1:55. AND WE KNOW, LADIES AND

11 GENTLEMEN, THAT BY -- AS THAT DAY PROGRESSED AND AS HOMER

12 JOHNSON AND THE DEFENDANT, RUSSELL RICE, ARE CONTINUING TO

13 MAKE CALLS BACK AND FORTH WITH ONE ANOTHER, WE KNOW THAT BY

14 2:30 HE IS AT CELL TOWER 33, WHICH IS RIGHT HERE, WMUU. ONE

15 TO THREE MILE RANGE. ONE TO THREE MILE RADIUS. AND WE SEE

16 SOME PHONE CALLS GOING BACK AND FORTH BETWEEN HOMER JOHNSON

17 AND RUSSELL RICE, BETWEEN HAMBY AND RUSSELL RICE, BETWEEN

18 HOMER JOHNSON AND RUSSELL RICE, BACK AND FORTH.

19 NOW UP TO THE 4:00 RANGE, IT IS 4:24, 4:25, 4:49, 4:53,

20 THAT ENTIRE TIME-FRAME HE IS IN A ONE TO THREE MILE RADIUS

21 OF WMUU. AND WE KNOW, LADIES AND GENTLEMEN, THAT FROM NOON

22 UNTIL THAT TIME HE IS AT CELL TOWERS 208 AND 21, CELL TOWER

23 208 IN POWERSVILLE, CELL TOWER 21 ON MAULDIN ROAD. AT

24 2:30, AGAIN, HE IS AROUND THAT AREA. TOO BIG OF A DIAGRAM.

25 AND WE KNOW, LADIES AND GENTLEMEN, THAT BY 4:59 HE IS STILL

CLOSING ARGUMENTS - MR. MOYER

552

1 AT THAT CELL TOWER SITE, 33. AT 5:25, MINUTES BEFORE THE
2 MURDER, HE IS STILL AT THAT CELL TOWER SITE, 33. CELL TOWER
3 SITE, WMUU, ONE TO THREE MILE RADIUS. WE KNOW THAT HE THEN
4 IS AT CELL TOWER SITES 56, 70, AND 57, WHICH ARE GOING SOUTH
5 TOWARDS MAULDIN AND FOUNTAIN INN.

6 LADIES AND GENTLEMEN, I WOULD ARGUE TO YOU THAT 5:25 PM
7 AND THEN HE IS NOT ACCEPTING CALLS IN THAT TIME-FRAME UNTIL
8 6:15. AND THE REASON IS IS BECAUSE THAT IS THE TIME AT
9 WHICH HE COMMITTED THE MURDER AND THEN WAS FLEEING THE
10 SCENE. AND THE IDEA THAT HE COULD LEAVE GREENVILLE, GO TO
11 TRAVELERS REST, AND THEN BE BACK DOWN INTO MAULDIN AND
12 FOUNTAIN INN JUST DOES NOT WORK.

13 HE THEN IS BACK BY ABOUT 9:00. HE IS AT CELL TOWER
14 137, WHICH HAS BEEN TESTIFIED AS BEING RIGHT HERE ON WHITE
15 HORSE ROAD, RIGHT HERE ON WHITE HORSE ROAD. I SAID WHITE
16 HORSE ROAD. I MEAN AUGUSTA ROAD WHERE THE BLOCK HOUSE WAS
17 TESTIFIED AS BEING. RIGHT HERE IS CELL TOWER 137.

18 THIS EVIDENCE COMBINED -- COMBINED, LADIES AND
19 GENTLEMEN, WITH WHAT YOU'VE HEARD FROM THE WITNESSES AS TO
20 WHO HOMER JOHNSON SAID HE WAS GOING TO MEET SHOWS THAT THE
21 DEFENDANT WAS CERTAINLY THERE AT THAT LOCATION WHEN THE
22 MURDER TOOK PLACE.

23 VERY BRIEFLY WE MOVED ON TO JOHNNY HAMBY. AND I JUST
24 WANT TO POINT OUT A COUPLE OF THINGS TO YOU ABOUT JOHNNY
25 HAMBY'S PHONE RECORDS. JOHNNY HAMBY WAS THE 918. AND VERY

CLOSING ARGUMENTS - MR. MOYER

553

1 BRIEFLY HOMER -- THE TESTIMONY FROM JOHNNY HAMBY AND FROM
2 THE CELL PHONE, THE VICTIM'S CELL PHONE, HOMER JOHNSON'S
3 CELL PHONE WAS THAT HE MADE A PHONE CALL 5:28 TO JOHNNY
4 HAMBY. AND IT SHOWS UP ON JOHNNY HAMBY'S CELL PHONE
5 RECORDS, 5:28. HOMER JOHNSON, 363-3849 CALLED JOHNNY HAMBY.
6 THAT IS THE TIME AT WHICH HE SAID I'M GOING TO GO INSIDE.
7 I'M GOING TO GO INSIDE THE HOTEL. THERE IS NO MORE PHONE
8 CALLS FROM HOMER JOHNSON TO JOHNNY HAMBY AT THAT TIME.
9 WE ALSO KNOW FROM THE CELL TOWER SITES IMMEDIATELY
10 SURROUNDING THAT THAT JOHNNY HAMBY WAS AT HIS STORE.
11 AUGUSTA ROAD, THE INTERSECTIONS OF WHITE HORSE ROAD AND
12 I-85, THERE'S A CELL TOWER SITE RIGHT THERE. AND THE
13 TESTIMONY, LADIES AND GENTLEMEN, OF THESE PHONE RECORDS IS
14 THAT THAT WAS WHERE JOHNNY HAMBY WAS. AND YOU CAN LOOK BACK
15 -- YOU CAN LOOK BACK ON THE RECORDS THAT YOU HAVE. BUT
16 JOHNNY HAMBY IS THERE AT 5:00. HE'S THERE AT 5:15. HE'S
17 THERE AT 5:27. HE'S THERE AT 5:31. ALL THE WAY THROUGH
18 5:00, THROUGH 6:00, 7:00, ALL THE WAY UP UNTIL HE'S AT CELL
19 TOWER 137 AT ABOUT 8:45 WITH THE DEFENDANT. WHEN HE IS
20 TALKING ON THE PHONE TO HOMER JOHNSON HE IS AT THAT STORE ON
21 AUGUSTA ROAD. ALL RIGHT.

22 IN CLOSING, LADIES AND GENTLEMEN, I WENT ON LONGER THAN
23 I MEANT TO. THE DEFENDANT -- THE DEFENSE CHALLENGED YOU AT
24 THE OUTSET OF THIS CASE, THEY SAID TO LOOK AS THE TESTIMONY
25 PRESENTED AND SEE CAN WE PUT THE DEFENDANT THERE? DID HE

CHARGE OF THE COURT

554

1 HAVE A WEAPON? IS THAT WEAPON FORENSICALLY LINKED TO THIS
2 CRIME AND THE DEFENDANT? AND IT UNDOUBTEDLY DOES. WE HAVE
3 PUT THE DEFENDANT THROUGH PHONE RECORDS, WE HAVE PUT THE
4 DEFENDANT THROUGH PEOPLE WHO SPOKE TO HOMER JOHNSON, WE HAVE
5 PUT THE DEFENDANT AT THE SCENE OF THE SHOOTING. WE HAVE PUT
6 THE MURDER WEAPON IN HIS CAR.

7 AND IT'S UP TO YOU, LADIES AND GENTLEMEN, TO DETERMINE
8 WHETHER OR NOT YOU BELIEVE THE STORY THAT HE GAVE YOU AS
9 BEING TRUTH OR JUST A CONVENIENT WAY FOR HIM TO TRY TO PUT
10 ALL THESE -- CONNECT THESE DOTS IN SOME SORT OF FASHION, IN
11 SOME SORT OF WAY TO ABSOLVE HIMSELF.

12 LADIES AND GENTLEMEN, I ASKED YOU AT THE BEGINNING TO
13 DO JUSTICE. AND LADIES AND GENTLEMEN, JUSTICE DEMANDS THAT
14 THE DEFENDANT, RUSSELL RICE, BE HELD RESPONSIBLE FOR THE
15 KILLING OF HOMER JOHNSON. AND I ASK YOU, LADIES AND
16 GENTLEMEN, TO FIND HIM GUILTY OF KILLING AND MURDERING HOMER
17 JOHNSON. THANK YOU.

18 THE COURT: ALL RIGHT. NOW NO ONE IN OR OUT OF THE
19 COURTROOM DURING MY CHARGE. SO IF ANYONE NEEDS TO LEAVE,
20 NOW IS THE TIME YOU CAN BE EXCUSED.

21 NOW, LADIES AND GENTLEMEN, THE FIRST INDICTMENT IN THIS
22 CASE IS FOR MURDER. SECTION 16-3-10 OF OUR CODE OF LAWS
23 READS AS FOLLOWS: MURDER IS THE KILLING OF ANY PERSON WITH
24 MALICE AFORETHOUGHT EITHER EXPRESSED OR IMPLIED. WHAT THEN,
25 LADIES AND GENTLEMEN, ARE THE ELEMENTS WHICH THE STATE MUST

CHARGE OF THE COURT

555

1 PROVE BEYOND A REASONABLE DOUBT WITH RESPECT TO MURDER?

2 FIRST OF ALL, THE STATE MUST PROVE THE KILLING OF ANOTHER.

3 AND SECONDLY, THAT IT WAS DONE WITH MALICE AFORETHOUGHT

4 EITHER EXPRESSED OR IMPLIED.

5 NOW WITH RESPECT TO THE FIRST ELEMENT, THAT BEING THE

6 KILLING OF ANOTHER, I CHARGE YOU THAT ANY KILLING OF A HUMAN

7 BEING IS CALLED HOMICIDE, BUT NOT ALL HOMICIDES ARE

8 NECESSARILY UNLAWFUL. FOR EXAMPLE, WHERE ONE KILLS ANOTHER

9 IN SELF DEFENSE, THIS IS KNOWN AS EXCUSABLE HOMICIDE. OR

10 WHERE A POLICE OFFICER KILLS A FLEEING ARMED ROBBER, THIS IS

11 KNOWN AS JUSTIFIABLE HOMICIDE. AND NEITHER OF THESE

12 HOMICIDES IS PUNISHABLE BY LAW. AS A NECESSARY ELEMENT OF

13 MURDER THE HOMICIDE MUST HAVE BEEN UNLAWFUL. THAT IS

14 WITHOUT JUST CAUSE OR EXCUSE.

15 NOW WITH RESPECT TO THE SECOND ELEMENT, THAT BEING

16 MALICE, MALICE IS A LEGAL TERM OF ART THAT IMPLIES

17 WICKEDNESS AND EXCLUDES A JUST CAUSE OR EXCUSE. MALICE

18 MEANS A CONDITION OF THE MIND OR HEART WHICH PROMPTS ONE TO

19 TAKE THE LIFE OF ANOTHER WITHOUT JUST CAUSE OR EXCUSE. NOW

20 OUR SUPREME COURT HAS DEFINED MALICE BY SAYING IT SPRINGS

21 FROM A DEVOID OF SOCIAL DUTY OR OBLIGATION AND IS ONE

22 FATALLY AND DELIBERATELY BENT ON MISCHIEF.

23 TO PROVE MALICE IT IS NOT NECESSARY FOR THE STATE TO

24 PROVE THAT THE DEFENDANT HAD A FEELING OF HATRED OR ILL-WILL

25 TOWARD THE PERSON KILLED. NOW THE STATUTE SAYS THAT MALICE

CHARGE OF THE COURT

556

1 MUST BE A FORETHOUGHT. A FORETHOUGHT, LADIES AND GENTLEMEN,
2 SIMPLY MEANS DELIBERATE OR PLANNED.

3 IN OTHER WORDS, A FORETHOUGHT MEANS THAT MALICE MUST
4 HAVE BEEN IN THE MIND A SUFFICIENT LENGTH OF TIME TO HAVE
5 PRODUCED THE ACT THAT CAUSED THE DEATH, BUT NO LONG PERIOD
6 OF TIME MUST HAVE EXISTED. IF IT WAS THERE LONG ENOUGH TO
7 BRING ON THE ACT THAT CAUSED THE DEATH IT WOULD BE
8 SUFFICIENT IN THE POINT OF TIME.

9 NOW THE STATUTE SAYS MALICE MAY BE EXPRESSED OR THAT IT
10 MAY BE IMPLIED. EXPRESSED MALICE, LADIES AND GENTLEMEN,
11 MEANS THERE IS SOME DIRECT PROOF OF MALICE. AS FOR EXAMPLE
12 WHERE A PERSON BY WORD OF MOUTH STATES HIS HATRED OR ILL-
13 WILL FOR ANOTHER OR WHERE THERE'S EVIDENCE OF PREVIOUS
14 THREATS, LYING IN WAIT, OR MAKING PLANS TO TAKE HUMAN LIFE,
15 THOSE ARE EXAMPLES OF EXPRESSED MALICE.

16 NOW IMPLIED MALICE, ON THE OTHER HAND, MAY BE SHOWN
17 FROM THE FACTS AND CIRCUMSTANCES SURROUNDING AN INCIDENT OR
18 AN EVENT. IMPLIED MALICE EXISTS WHERE THERE IS NO ACTUAL
19 INTENT TO KILL ANY PERSON, BUT DEATH IS CAUSED BY CONDUCT
20 WHICH THE LAW REGARDS AS SHOWING SUCH AN ABANDONED STATE OF
21 MIND AS TO BE THE EQUIVALENT OF AN INTENT TO KILL.

22 MALICE MAY BE MANIFESTED BY THE IMPLICATION FROM THE
23 FACTS AND CIRCUMSTANCES SURROUNDING A TRANSACTION OR AN
24 EVENT. FOR EXAMPLE, OUR LAW SAYS THAT IF ONE KILLS ANOTHER
25 WITH THE USE OF A DEADLY WEAPON THEN YOU MAY INFER THAT

CHARGE OF THE COURT

557

1 MALICE IS THERE. IN OTHER WORDS, LADIES AND GENTLEMEN, YOU
2 MAY INFER MALICE FROM THE USE OF A DEADLY WEAPON.

3 NOW, LADIES AND GENTLEMEN, I CHARGE YOU, HOWEVER, THAT
4 THIS INFERENCE OF MALICE FROM THE USE OF A DEADLY WEAPON IS
5 ONE OF FACT AND NOT OF LAW. IT IS SIMPLY AN EVIDENTIARY
6 FACT TO BE TAKEN INTO CONSIDERATION BY THE JURY ALONG WITH
7 ALL THE OTHER EVIDENCE IN THE CASE. AND IT'S TO BE GIVEN
8 SUCH WEIGHT AS YOU DETERMINE IT SHOULD RECEIVE. IT MAY
9 AUTHORIZE A CONVICTION, BUT THAT RESULT IS NOT REQUIRED.

10 LADIES AND GENTLEMEN, IF FACTS ARE PROVED SUFFICIENT TO
11 RAISE AN INFERENCE OF MALICE FROM THE USE OF A DEADLY
12 WEAPON, AGAIN, THAT INFERENCE IS NOT CONCLUSIVE. AND IT IS
13 ALWAYS FOR THE JURY TO DETERMINE FROM ALL OF THE EVIDENCE IN
14 THE CASE IF MALICE HAS BEEN PROVED BEYOND A REASONABLE
15 DOUBT.

16 I FURTHER CHARGE YOU, LADIES AND GENTLEMEN, THAT MOTIVE
17 IS NOT AN ESSENTIAL ELEMENT OF THE CRIME OF MURDER. AND THE
18 STATE IS THEREFORE NOT REQUIRED TO PROVE A MOTIVE FOR
19 MURDER. ALTHOUGH THE PRESENCE OR ABSENCE OF MOTIVE MAY BE
20 CONSIDERED IN DETERMINING WHETHER THERE WAS A CRIMINAL
21 INTENT TO COMMIT MURDER.

22 THE DEFENDANT IS NEXT INDICTED, LADIES AND GENTLEMEN,
23 FOR CARRYING A PISTOL. AND IN THIS CONNECTION SECTION 16-
24 23-20 OF OUR CODE OF LAWS PROVIDES IN PART AS FOLLOWS: IT
25 SHALL BE UNLAWFUL FOR ANY PERSON TO CARRY ABOUT THE PERSON,

CHARGE OF THE COURT

558

1 WHETHER CONCEALED OR NOT, ANY PISTOL. NOW THERE ARE CERTAIN
2 EXCEPTIONS SET FORTH IN THIS CODE SECTION OF THE LAW, BUT
3 NONE ARE APPLICABLE TO THIS CASE.

4 NOW PISTOL, OF COURSE, MEANS ANY FIREARMS DESIGNED TO
5 EXPEL A PROJECTILE AND DESIGNED TO BE FIRED FROM THE HAND.
6 IT DOES NOT INCLUDE ANY WHICH DOES NOT FIRE FIXED
7 CARTRIDGES, OR TO ANTIQUE CURIOSITY, OR COLLECTOR'S ITEM.
8 NOW, LADIES AND GENTLEMEN, A PISTOL IS ABOUT THE PERSON IF
9 IT IS READILY ACCESSIBLE AND CONVENIENT FOR IMMEDIATE USE.
10 IN OTHER WORDS, IT NEED NOT BE ACTUALLY TOUCHING THE PERSON
11 CHARGED WITH CARRYING IT.

12 THE DEFENDANT IS NEXT CHARGED WITH TRAFFICKING COCAINE.
13 THIS TOO, LADIES AND GENTLEMEN, IS A STATUTORY OFFENSE. AND
14 SECTION 44-53-370 PROVIDES IN PART AS FOLLOWS: ANY PERSON
15 WHO KNOWINGLY SELLS, MANUFACTURES, CULTIVATES, DELIVERS,
16 PURCHASES, OR BRINGS INTO THIS STATE OR WHO PROVIDES
17 FINANCIAL ASSISTANCE OR OTHERWISE AIDS, ABETS, ATTEMPTS, OR
18 CONSPIRES TO SELL, MANUFACTURE, CULTIVATE, DELIVER,
19 PURCHASE, OR BRING INTO THIS STATE OR WHO IS KNOWINGLY IN
20 ACTUAL OR CONSTRUCTIVE POSSESSION OR WHO KNOWINGLY ATTEMPTS
21 TO BECOME IN ACTUAL OR CONSTRUCTIVE POSSESSION OF TWO
22 HUNDRED GRAMS OR MORE OF COCAINE IS GUILTY OF A FELONY WHICH
23 IS KNOWN AS TRAFFICKING IN COCAINE.

24 NOW, LADIES AND GENTLEMEN, IT IS THE AMOUNT OF COCAINE
25 RATHER THAN THE CRIMINAL ACT THAT TRIGGERS THIS TRAFFICKING

CHARGE OF THE COURT

559

1 STATUTE AND DISTINGUISHES TRAFFICKING FROM DISTRIBUTION AND
2 SIMPLE POSSESSION. IF THE AMOUNT OF COCAINE OR ANY MIXTURE
3 CONTAINING COCAINE IS TWO HUNDRED GRAMS OR MORE THEN THE
4 TRAFFICKING STATUTE I READ TO YOU IS APPLIED.

5 SO WHAT THEN ARE THE ELEMENTS OF THIS OFFENSE WHICH THE
6 STATE MUST PROVE TO YOUR SATISFACTION BEYOND A REASONABLE
7 DOUBT? FIRST OF ALL, THE STATE MUST PROVE THAT THE
8 SUBSTANCE IN QUESTION IS COCAINE. AND SECOND, THE STATE
9 MUST PROVE THAT THIS DEFENDANT KNOWINGLY POSSESSED THIS
10 COCAINE. NOW KNOWINGLY, OF COURSE, MEANS WITH KNOWLEDGE,
11 THAT IS CONSCIENTIOUSLY DONE. AND THIRD, THE STATE MUST
12 PROVE THAT TWO HUNDRED OR MORE GRAMS OF COCAINE IN PURE
13 FORM, OR ANY COMPOUND, OR MIXTURE THEREOF WAS POSSESSED BY
14 THIS DEFENDANT.

15 NOW, LADIES AND GENTLEMEN, UNDER THE STATUTE I READ TO
16 YOU POSSESSION MAY BE ACTUAL OR IT MAY BE CONSTRUCTIVE. A
17 PERSON HAS POSSESSION OF A SUBSTANCE WITHIN THE MEANING OF
18 THE LAW WHEN HE OR SHE HAS BOTH THE POWER AND THE INTENT TO
19 CONTROL ITS DISPOSITION OR ITS USE.

20 NOW, LADIES AND GENTLEMEN, WHERE A SUBSTANCE IS FOUND
21 ON THE PROPERTY, OR ON THE PREMISES, OR IN THE PLACE, UNDER
22 THE CONTROL OF A PERSON, THIS FACT IN AND OF ITSELF GIVES
23 RISE TO AN INFERENCE OF KNOWLEDGE AND POSSESSION ON THE PART
24 OF THAT PERSON. THEREFORE, POSSESSION OF A SUBSTANCE MAY BE
25 INFERRED FROM THE CIRCUMSTANCES. AND THE SUBSTANCE IS

CHARGE OF THE COURT

560

1 DEEMED TO BE IN THE CONSTRUCTIVE POSSESSION OF THE PERSON
2 CONTROLLING THE PLACE, THE PROPERTY, OR THE PREMISES WHERE
3 IT IS LOCATED.

4 LADIES AND GENTLEMEN, AGAIN I TELL YOU THAT THIS
5 INFERENCE IS ONE OF FACT AND NOT OF LAW. IT IS EVIDENTIARY
6 IN NATURE AND IS NOT CONCLUSIVE. AND IT SHOULD THEREFORE BE
7 TAKEN INTO CONSIDERATION BY YOU ALONG WITH ALL OF THE OTHER
8 EVIDENCE IN THE CASE AND IS TO BE GIVEN SUCH WEIGHT, IF ANY,
9 AS YOU DETERMINE IT SHOULD RECEIVE.

10 NOW, LADIES AND GENTLEMEN, I CHARGE YOU THAT PROOF OF
11 POSSESSION REQUIRES MORE THAN PROOF OF MERE PRESENCE AT THE
12 SCENE OF A CRIME. AGAIN, THE STATE MUST PROVE THAT THIS
13 DEFENDANT HAD DOMINION AND CONTROL OVER THE SUBSTANCE
14 ALLEGEDLY POSSESSED, THAT IS COCAINE, OR THAT HE HAD THE
15 RIGHT TO EXERCISE DOMINION AND CONTROL OVER IT.

16 ALSO IN DETERMINING WHETHER OR NOT A SUBSTANCE IS
17 POSSESSED YOU MAY CONSIDER THE AMOUNT OF A SUBSTANCE ALLEGED
18 TO HAVE BEEN POSSESSED, THE MANNER IN WHICH IT WAS ALLEGEDLY
19 POSSESSED, THE PLACE WHERE IT WAS ALLEGEDLY POSSESSED, AND
20 ANY OTHER FACTOR THAT YOU CONSIDER TO BE IMPORTANT PROVIDED,
21 OF COURSE, THAT THE FACTOR IS SUPPORTED BY THE EVIDENCE.

22 NOW THE DEFENDANT IS LASTLY INDICTED FOR THE POSSESSION
23 OF A FIREARM DURING THE COMMISSION OF A VIOLENT CRIME. THIS
24 TOO IS A STATUTORY OFFENSE. AND SECTION 16-23-490 OF OUR
25 CODE OF LAWS PROVIDES IN PART AS FOLLOWS: IF A PERSON IS IN

CHARGE OF THE COURT

561

1 POSSESSION OF A FIREARM OR VISIBLY DISPLAYS WHAT APPEARS TO
2 BE A FIREARM DURING THE COMMISSION OF A VIOLENT CRIME AND IS
3 CONVICTED OF ATTEMPTING OR ATTEMPTING TO COMMIT A VIOLENT
4 CRIME AS DEFINED IN SECTION 16-1-60, AND I CHARGE YOU THAT
5 TRAFFICKING IN COCAINE IS DEFINED IN THAT STATUTE AS A
6 VIOLENT CRIME, HE MUST BE IMPRISONED IN ADDITION TO THE
7 PUNISHMENT PROVIDED FOR THE PRINCIPLE CRIME.

8 NOW UNDER THE STATUTE, LADIES AND GENTLEMEN, FIREARM
9 MEANS ANY REVOLVER, PISTOL, OR ANY WEAPON WHICH WILL, OR IS
10 DESIGNED TO, OR MAY READILY BE CONVERTED TO EXPEL A
11 PROJECTILE. SO BEFORE THIS DEFENDANT CAN BE CONVICTED OF
12 THIS OFFENSE HE MUST FIRST HAVE BEEN FOUND GUILTY BY YOU,
13 THE JURY, IN THIS INSTANCE OF TRAFFICKING IN COCAINE. AND
14 THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THIS
15 DEFENDANT WAS IN POSSESSION OF OR DISPLAYED A FIREARM, AS I
16 HAVE DEFINED THAT TO YOU, DURING THE COMMISSION OF THE
17 CRIME, THAT IS TRAFFICKING IN COCAINE.

18 NOW, LADIES AND GENTLEMEN, I AM THE JUDGE OF THE LAW IN
19 THIS CASE. YOU ARE THE JUDGES OF THE FACTS. THE
20 CONSTITUTION OF OUR STATE DOES NOT ALLOW ME TO CHARGE YOU ON
21 THE FACTS OF THIS CASE, OR TO DISCUSS THE FACTS WITH YOU, OR
22 IN ANY WAY OR MANNER LET YOU KNOW WHAT MY PERSONAL FEELINGS,
23 IF ANY, ARE ABOUT THIS CASE. THAT IS BECAUSE YOU AND YOU
24 ALONE ARE THE JUDGES OF THE FACTS. THEREFORE, IF DURING THE
25 COURSE OF THIS TRIAL OR IF DURING THE COURSE OF MY CHARGE

CHARGE OF THE COURT

562

1 YOU HAVE A FEELING OR YOU HAVE BEEN LEFT WITH THE IMPRESSION
2 THAT I HAVE A PERSONAL FEELING ABOUT THIS CASE ONE WAY OR
3 ANOTHER THEN YOU DISREGARD THAT FEELING OR THAT IMPRESSION.

4 NOW IT'S YOUR DUTY AND YOUR DUTY ALONE TO WEIGH THE
5 TESTIMONY AND EVIDENCE PRESENTED IN THIS CASE AND TO PASS
6 UPON THE CREDIBILITY OR THE BELIEVABILITY OF THE WITNESSES
7 YOU HEARD TESTIFY. IN THIS CONNECTION YOU HAVE A RIGHT TO
8 BELIEVE ALL THAT A WITNESS TOLD YOU OR YOU CAN DISBELIEVE
9 ALL A WITNESS TOLD YOU. YOU CAN BELIEVE PART OF WHAT A
10 WITNESS TOLD YOU AND DISBELIEVE A PART OF WHAT A WITNESS
11 TOLD YOU. YOU CAN BELIEVE ONE WITNESS AS AGAINST SEVERAL OR
12 YOU CAN BELIEVE SEVERAL AS AGAINST ONE. YOU ALSO HAVE THE
13 RIGHT TO TAKE INTO CONSIDERATION ANY BIAS, OR PREJUDICE, OR
14 SYMPATHY YOU MAY THINK A WITNESS IN THE CASE MIGHT HAVE.

15 NOW, LADIES AND GENTLEMEN, WITH RESPECT TO WITNESSES,
16 OUR RULES OF EVIDENCE ORDINARILY DO NOT PERMIT THEM TO
17 TESTIFY AS TO OPINIONS OR TO CONCLUSIONS. BUT AN EXCEPTION
18 TO THIS RULE EXISTS AS TO THOSE WHOM WE CALL EXPERT
19 WITNESSES. WITNESSES WHO BY EDUCATION AND EXPERIENCE HAVE
20 BECOME EXPERT IN SOME ART, SCIENCE, PROFESSION, OR CALLING
21 MAY STATE AN OPINION AS TO RELEVANT AND MATERIAL MATTER IN
22 WHICH THEY PROFESS TO BE EXPERT. AND THEY ALSO STATE THEIR
23 REASON FOR THE OPINION.

24 NOW YOU SHOULD CONSIDER EACH EXPERT OPINION RECEIVED
25 INTO EVIDENCE IN THIS CASE AND GIVE IT SUCH WEIGHT AS YOU

CHARGE OF THE COURT

563

1 THINK IT DESERVES. IF YOU DECIDE THAT THE OPINION OF AN
2 EXPERT WITNESS IS NOT BASED UPON SUFFICIENT EDUCATION OR
3 EXPERIENCE, OR IF YOU SHOULD CONCLUDE THAT THE REASONS GIVEN
4 IN SUPPORT OF THAT OPINION ARE NOT SOUND, OR THAT THE
5 OPINION IS OUTWEIGHED BY OTHER EVIDENCE THEN YOU MAY
6 DISREGARD THE OPINION IN ITS ENTIRETY. AN EXPERT'S
7 TESTIMONY IS TO BE GIVEN NO GREATER WEIGHT THAN THAT OF ANY
8 OTHER WITNESS SIMPLY BECAUSE THAT PERSON HAS BEEN DECLARED
9 TO BE AN EXPERT.

10 NOW, LADIES AND GENTLEMEN, I AM THE JUDGE OF THE LAW IN
11 THIS CASE. AND I AM REQUIRED TO CHARGE THE LAW THAT APPLIES
12 TO THE FACTS. IT IS NOT A QUESTION OF WHAT YOU FEEL THE LAW
13 MIGHT BE OR WHAT IT SHOULD BE. IT IS NOT NECESSARILY WHAT
14 THE LAWYERS MAY HAVE TOLD YOU IT IS BECAUSE UNDER YOUR OATH
15 YOU ARE REQUIRED TO TAKE THE LAW AS I GIVE IT TO YOU, APPLY
16 THAT LAW TO THE FACTS AS YOU DETERMINE THOSE FACTS TO BE,
17 AND TO WRITE YOUR VERDICTS ACCORDINGLY.

18 LADIES AND GENTLEMEN, IN THIS CASE AS IN ALL CRIMINAL
19 CASES THIS DEFENDANT COMES INTO THIS COURTROOM PRESUMED TO
20 BE INNOCENT. AND THIS PRESUMPTION CONTINUES AND CARRIES
21 THROUGH THE ENTIRE TRIAL UNTIL AND UNLESS IT IS REMOVED BY
22 EVIDENCE THAT SATISFIES YOU OF HIS GUILT BEYOND A REASONABLE
23 DOUBT. THE BURDEN IS ON THE STATE IN THIS CASE TO PROVE
24 THIS DEFENDANT GUILTY AND TO PROVE EACH AND EVERY ELEMENT OF
25 THE OFFENSES WITH WHICH HE IS CHARGED BEYOND A REASONABLE

CHARGE OF THE COURT

1 DOUBT.

2 NOW SOME OF YOU, LADIES AND GENTLEMEN, MAY HAVE SERVED
3 AS JURORS IN CIVIL CASES. AND IF SO YOU WERE LIKELY TOLD
4 THAT IT WAS ONLY NECESSARY TO PROVE THAT A FACT WAS MORE
5 LIKELY TRUE THAN NOT TRUE. BUT IN CRIMINAL CASES THE
6 STATE'S PROOF MUST BE MORE POWERFUL THAN THAT. AS I'VE TOLD
7 YOU, IT MUST BE BEYOND A REASONABLE DOUBT.

8 NOW PROOF BEYOND A REASONABLE DOUBT IS PROOF THAT
9 LEAVES YOU FIRMLY CONVINCED OF THIS DEFENDANT'S GUILT.
10 LADIES AND GENTLEMEN, THERE ARE VERY FEW THINGS IN THIS
11 WORLD THAT WE KNOW WITH ABSOLUTE CERTAINTY. AND IN CRIMINAL
12 CASES OUR LAW DOES NOT REQUIRE PROOF THAT OVERCOMES EVERY
13 POSSIBLE DOUBT.

14 IF, BASED ON YOUR CONSIDERATION OF THE EVIDENCE AND
15 TESTIMONY IN THIS CASE, YOU ARE FIRMLY CONVINCED THAT THIS
16 DEFENDANT IS GUILTY THEN YOU MUST FIND HIM GUILTY. IF ON
17 THE OTHER HAND YOU THINK THERE IS A REAL POSSIBILITY THAT HE
18 IS NOT GUILTY THEN YOU MUST GIVE HIM THE BENEFIT OF THAT
19 DOUBT AND FIND HIM NOT GUILTY.

20 LADIES AND GENTLEMEN, IN THE TRIAL OF A CASE THE STATE
21 CAN RELY ON DIRECT EVIDENCE, OR ON CIRCUMSTANTIAL EVIDENCE,
22 OR ON A COMBINATION OF THE TWO. NOW DIRECT EVIDENCE PROVES
23 THE EXISTENCE OF A DISPUTED FACT BY USING ONE OR MORE OF OUR
24 FIVE SENSES WITHOUT THE AID OF ANY INFERENCES. FOR EXAMPLE,
25 THE TESTIMONY OF A PERSON WHO ASSERTS OR CLAIMS TO HAVE

CHARGE OF THE COURT

565

1 ACTUAL KNOWLEDGE OF A FACT, IN OTHER WORDS AN EYE-WITNESS,
2 THIS IS DIRECT EVIDENCE.

3 CIRCUMSTANTIAL EVIDENCE, ON THE OTHER HAND, IS WHERE
4 CERTAIN FACTS ARE KNOWN THROUGH USING ONE OF OUR FIVE SENSES
5 REDUCES A LOGICAL INFERENCE THAT OTHER FACTS EXIST WITHOUT
6 DIRECTLY PROVING THOSE FACTS. CIRCUMSTANTIAL EVIDENCE IS
7 PROOF OF A CHAIN OF FACTS AND CIRCUMSTANCES INDICATING THE
8 EXISTENCE OF A FACT. NOW AS I'VE SAID, THE STATE MAY RELY
9 ON EITHER OR BOTH OF THIS TYPE EVIDENCE, DIRECT OR
10 CIRCUMSTANTIAL. AND NEITHER IS INFERIOR TO THE OTHER. ONE
11 IS AS GOOD AS THE OTHER IF EQUALLY CONVINCING TO YOU, THE
12 JURY.

13 IN ORDER TO SUSTAIN A CONVICTION ON CIRCUMSTANTIAL
14 EVIDENCE ALL OF THE CIRCUMSTANCES PROVED MUST BE CONSISTENT
15 WITH THE THEORY THAT THIS DEFENDANT IS GUILTY AND AT THE
16 SAME TIME INCONSISTENT WITH THE THEORY THAT HE IS INNOCENT
17 AND WITH EVERY OTHER REASONABLE THEORY EXCEPT THAT OF GUILT.

18 NOW, LADIES AND GENTLEMEN, WITH RESPECT TO
19 CIRCUMSTANTIAL EVIDENCE, I CHARGE YOU THAT A DEFENDANT IS
20 ENTITLED TO EVERY INFERENCE IN HIS FAVOR THAT CAN BE
21 REASONABLY DRAWN FROM THE EVIDENCE. AND WHERE TWO
22 INFERENCES CAN BE DRAWN FROM THE SAME FACT, ONE CONSISTENT
23 WITH GUILT AND ONE CONSISTENT WITH INNOCENCE, THEN THE
24 DEFENDANT IS ENTITLED TO THE INFERENCE THAT IS CONSISTENT
25 WITH INNOCENCE.

CHARGE OF THE COURT

566

1 IN SHORT, LADIES AND GENTLEMEN, IF ALL NATURAL
2 CIRCUMSTANCES AND EVIDENCE IN THIS CASE POINT TO GUILT AND
3 EXCLUDE EVERY REASONABLE THEORY EXCEPT THAT OF GUILT A
4 CONVICTION WOULD BE WARRANTED.

5 NOW, LADIES AND GENTLEMEN, THE DEFENDANT IN THIS CASE
6 PLEADS ALIBI. NOW THE DEFENSE OF ALIBI MEANS THAT THE
7 DEFENDANT CLAIMS HE WAS NOT THERE WHEN THIS CRIME WAS
8 COMMITTED, BUT WAS SOMEWHERE ELSE AND THEREFORE COULD NOT
9 HAVE COMMITTED THE CRIME. THE WORD ALIBI, LADIES AND
10 GENTLEMEN, MEANS ELSEWHERE. BUT I CHARGE YOU THAT ALIBI IS
11 NOT AN AFFIRMATIVE DEFENSE AND THE DEFENDANT DOES NOT HAVE
12 THE BURDEN OF PROVING IT.

13 ON THE CONTRARY THE STATE HAS THE BURDEN OF PROVING
14 BEYOND A REASONABLE DOUBT THAT THIS DEFENDANT WAS PRESENT AT
15 THE SCENE OF THE ALLEGED CRIME AND THAT HE ACTUALLY
16 COMMITTED IT BECAUSE IN A CASE SUCH AS THIS THE PRESENCE OF
17 THE DEFENDANT AT THE PLACE OF THE CRIME AT THE TIME OF ITS
18 COMMISSION IS ESSENTIAL TO HIS GUILT. AND IN SUCH CASE THE
19 STATE MUST SHOW THE PRESENCE OF THIS DEFENDANT BEYOND A
20 REASONABLE DOUBT. AND IF ON ALL THE EVIDENCE IN THE CASE
21 YOU HAVE A REASONABLE DOUBT THAT THIS DEFENDANT WAS PRESENT
22 IN PERSON AT THE PLACE AND TIME IN QUESTION THEN YOU MUST
23 RESOLVE THAT DOUBT IN HIS FAVOR AND FIND HIM NOT GUILTY.

24 NOW, LADIES AND GENTLEMEN, UNDER THE OATH YOU TOOK IN
25 THIS CASE YOU SWORE TO TRY THIS CASE BASED ONLY AND SOLELY

CHARGE OF THE COURT

567

1 ON THE TESTIMONY AND EVIDENCE PRESENTED IN THIS CASE. I
2 TELL YOU THAT IT IS YOUR DUTY TO LAY ASIDE ALL OUTSIDE
3 OPINIONS, BIAS, OR PREJUDICE, OR SYMPATHY YOU MAY HAVE IN
4 REACHING YOUR VERDICT. THE WORD VERDICT, LADIES AND
5 GENTLEMEN, IS TAKEN FROM THE LATIN WORD VEREDICTO. IT MEANS
6 TO SPEAK THE TRUTH. LADIES AND GENTLEMEN, YOU HAVE NO
7 FRIENDS TO REWARD IN THIS CASE OR ENEMIES TO PUNISH. I
8 CHARGE YOU TO ABIDE BY YOUR OATH AND RETURN VERDICTS THAT
9 SPEAK THE TRUTH.

10 NOW, YOU'LL HAVE IN THE JURY ROOM WITH YOU THE FOUR
11 INDICTMENTS. THESE INDICTMENTS DO NOT CONSTITUTE EVIDENCE.
12 THEY SIMPLY SET FORTH THE ALLEGATIONS BY THE STATE. THESE
13 INDICTMENTS ARE THE LEGAL DOCUMENTS THAT BRING THIS CASE
14 INTO THE COURTROOM AND PRESENTS IT TO YOU FOR YOUR
15 DETERMINATION.

16 NOW, LADIES AND GENTLEMEN, WITH RESPECT TO EACH
17 INDICTMENT THERE ARE ONE OF TWO POSSIBLE VERDICTS, EITHER
18 GUILTY OR NOT GUILTY. AND WHATEVER YOUR VERDICT IS ON EACH
19 INDICTMENT IT MUST BE UNANIMOUS, THAT IS ALL TWELVE OF YOU
20 MUST AGREE.

21 MR. FOREMAN, WHATEVER THE UNANIMOUS VERDICTS ARE BY THE
22 JURY, GUILTY OR NOT GUILTY, YOU'LL FIND A PLACE ON THE BACK
23 OF THE FORM WHERE IT SAYS VERDICT. PLEASE WRITE OUT THE
24 VERDICT IN THE SPACE PROVIDED. AND THEN SIGN YOUR NAME ON
25 THE LINE WHERE IT SAYS FOREPERSON OF THE PETIT JURY.

CHARGE OF THE COURT

568

1 NOW, LADIES AND GENTLEMEN, AT THIS TIME I'M REQUIRED TO
2 SUSPEND AND GO OVER MY CHARGE WITH THE LAWYERS. I NEED YOU
3 TO GO BACK INTO YOUR JURY ROOM, BUT DO NOT BEGIN
4 DELIBERATING UNTIL I SEND WORD IN FOR YOU TO DO SO. THANK
5 YOU.

6 (WHEREUPON THE JURY EXITED THE COURTROOM AT 12:45 PM)

7 THE COURT: ALL RIGHT. ANYTHING FURTHER FROM THE
8 STATE?

9 MR. MOYER: NOT FROM THE STATE, YOUR HONOR.

10 THE COURT: ANYTHING FURTHER FROM THE DEFENSE?

11 MR. SUMNER: YOUR HONOR, JUST FOR THE RECORD I WOULD
12 LIKE TO REQUEST A CHARGE OF POSSESSION WITH INTENT TO
13 DISTRIBUTE COCAINE. I DIDN'T BRING THAT UP EARLIER, BUT I
14 DIDN'T WANT ---

15 THE COURT: AND I WOULD DENY THAT REQUEST BECAUSE THAT
16 WOULD NOT APPLY TO THIS CASE.

17 MR. SUMNER: I UNDERSTAND. NOTHING ELSE FURTHER FROM
18 ME.

19 THE COURT: ALL RIGHT. GIVE THEM THESE INDICTMENTS.
20 TELL THEM TO START DELIBERATING. TELL THEM WE'RE GOING TO
21 BRING ALL THE EXHIBITS IN. WE'LL GET THEM ALL TOGETHER AND
22 GET THEM IN. BUT TELL THEM TO START DELIBERATING, OKAY?

23 THE BAILIFF: YES, SIR.

24 THE COURT: AND BRING MY ALTERNATE TO ME PLEASE.

25 (WHEREUPON THE JURY BEGAN DELIBERATING AT 12:47 PM)

1 (WHEREUPON THE ALTERNATE ENTERED THE COURTROOM)

2 THE COURT: MR. NEDWARDS, SINCE OUR TWELVE JURORS HAVE
3 SUCCESSFULLY MADE IT THROUGH THIS CASE THIS WILL CONCLUDE
4 YOUR SERVICE ON THIS CASE.

5 MR. NEDWARDS: OKAY.

6 THE COURT: NOW WE ORDERED SOME LUNCH FOR YOU. IT HAS
7 NOT YET ARRIVED. SO I WANT YOU TO WAIT AROUND TIL YOU GET
8 YOUR LUNCH.

9 MR. NEDWARDS: OKAY.

10 THE COURT: AND THEN ENJOY. AND I NEED YOU BACK IN THE
11 JURY ASSEMBLY ROOM DOWNSTAIRS AT 2:30 THIS AFTERNOON. SO
12 JUST WAIT TIL YOU GET YOUR LUNCH.

13 MR. NEDWARDS: YES, SIR.

14 THE COURT: AND THEN BE BACK IN THE JURY ASSEMBLY ROOM
15 AT 2:30 THIS AFTERNOON, OKAY?

16 MR. NEDWARDS: OKAY.

17 THE COURT: THANK YOU VERY MUCH. APPRECIATE IT.

18 (WHEREUPON THE ALTERNATE EXITED THE JURY ROOM)

19 THE COURT: ALL RIGHT. LET'S GET ALL OF THE EXHIBITS
20 TOGETHER.

21 (WHEREUPON COURT WAS IN RECESS)

22 THE COURT: THE JURY SAYS THEY'RE IN NEED OF A BREAK.
23 CAN WE GO HOME AND SLEEP ON IT? THAT'S WHAT WE'RE GOING TO
24 LET THEM DO. BRING THEM ON.

25 (WHEREUPON THE JURY ENTERED THE COURTROOM AT 5:05 PM)

1 THE COURT: LADIES AND GENTLEMEN, WE'RE GOING TO RECESS
2 FOR THE EVENING. WE'LL PICK BACK UP TOMORROW MORNING AT
3 9:00. NOW WHEN YOU LEAVE YOU DO NOT TALK ABOUT THIS CASE
4 AMONG YOURSELVES OR WITH ANYONE ELSE. AS I'VE TOLD YOU
5 BEFORE, THIS INCLUDES EVEN MEMBERS OF YOUR OWN FAMILY. IF
6 ANYBODY CONTACTS YOU AND TRIES TO TALK TO YOU ABOUT THIS
7 CASE GET THEIR NAMES AND ADDRESSES AND REPORT THAT TO ME.

8 LADIES AND GENTLEMEN, UNDER THE OATH YOU TOOK IN THIS
9 CASE YOU SWORE TO TRY THIS CASE BASED ONLY AND SOLELY ON THE
10 TESTIMONY AND EVIDENCE PRESENTED IN THIS COURTROOM. AND
11 I'LL THEREFORE TELL YOU THAT IT WOULD BE A VIOLATION OF YOUR
12 OATH FOR YOU TO GO TO THE SCENE OF THIS ALLEGED CRIME OR TO
13 ANY OF THE LOCATIONS MENTIONED DURING THE TESTIMONY TO
14 CONDUCT YOUR OWN INVESTIGATION. IN OTHER WORDS, DON'T GO
15 ANYWHERE NEAR THE LOCATIONS MENTIONED DURING THE COURSE OF
16 THIS TRIAL. OKAY. NOW DO ANY OF YOU HAVE TO GO OUT WADE
17 HAMPTON BOULEVARD TO GET HOME? IF YOU DO PLEASE TAKE AN
18 ALTERNATE ROUTE. ALL RIGHT.

19 PLEASE BE BACK AT 9:00 IN THE MORNING. NOW, MR.
20 FOREMAN, IF BY ANY CHANCE YOU'RE ALL TWELVE BACK TOGETHER
21 BEFORE 9:00 YOU CAN BEGIN YOUR DELIBERATIONS. BUT IN OTHER
22 WORDS, JUST DON'T START DELIBERATING UNTIL ALL TWELVE OF YOU
23 ARE BACK TOGETHER, OKAY? PLEASE BE BACK AT 9:00 IN THE
24 MORNING. THANK YOU.

25 (WHEREUPON THE JURY EXITED THE COURTROOM AT 5:07 PM)

1 THE COURT: ALL RIGHT. SEE YOU BACK AT 9:00 IN THE
2 MORNING.

3 (WHEREUPON COURT WAS IN RECESS)

4 THURSDAY, APRIL 15, 2004:

5 (WHEREUPON THE JURY BEGAN DELIBERATING AT 9:00 AM)

6 THE COURT: ALL RIGHT. NOW, GENTLEMEN, THE JURY ASKED
7 FOR A COPY OF RUSTY AND JOHN HAMBY'S TESTIMONY. OF COURSE,
8 WE DON'T HAVE A COPY. AND THE ONLY THING I CAN DO IS PLAY
9 BACK THEIR TESTIMONY IF THAT'S WHAT THEY WANT. JOHN HAMBY'S
10 TESTIMONY WAS ABOUT A HALF AN HOUR AND RUSTY RICE'S WAS
11 ABOUT AN HOUR. ~~NOW THEY ALSO SAY CAN WE GET THE DATES OF~~
12 ~~JOHN HAMBY'S THREE DIFFERENT STATEMENTS? UNLESS THAT IS IN~~
13 ~~EVIDENCE, OF COURSE, WE CAN'T DO THAT. THOSE STATEMENTS ARE~~
14 ~~NOT IN EVIDENCE, ARE THEY?~~

15 MR. MOYER: THE STATEMENTS WERE NOT.

16 MR. SUMNER: YOUR HONOR, MY RECOLLECTION IS IN CROSS
17 EXAMINATION I COVERED A COUPLE OF THE DATES ON THE
18 STATEMENTS WHEN I IMPEACHED HIM. SO I BELIEVE IF THEY
19 LISTEN TO THAT TESTIMONY I BELIEVE IT'LL COME OUT. BUT, NO,
20 ~~THEY'RE -- I DID NOT PLACE THEM INTO EVIDENCE. THEY WERE~~
21 ~~NOT PLACED INTO EVIDENCE.~~

22 THE COURT: OKAY.

23 MR. SUMNER: THAT'S JUST MY RECOLLECTION OF MY
24 QUESTIONS TO HIM.

25 THE COURT: ALL RIGHT. BRING THIS JURY IN.

1 (WHEREUPON THE JURY ENTERED THE COURTROOM AT 9:36 AM)

2 THE COURT: MR. FOREMAN, YOU HAVE ASKED FOR A COPY OF
3 RUSTY AND JOHN HAMBY'S TESTIMONY. WE DON'T HAVE A WRITTEN
4 COPY OF THE TESTIMONY. SO THE ONLY THING I CAN DO IS TO
5 PLAY BACK FOR YOU FROM THE BACKUP TAPE THAT TESTIMONY. NOW
6 FOR YOUR INFORMATION THE TESTIMONY OF JOHN HAMBY WAS ABOUT A
7 HALF AN HOUR. THE TESTIMONY OF RUSTY RICE WAS ABOUT AN
8 HOUR.

9 NOW YOU SAY CAN WE GET THE DATES OF JOHN HAMBY'S THREE
10 DIFFERENT STATEMENTS? THOSE STATEMENTS ARE NOT INTO
11 EVIDENCE AND THEREFORE I CANNOT GIVE YOU THOSE DATES. THE
12 ONLY THING I CAN TELL YOU IS THAT IF THOSE DATES WERE
13 ELICITED DURING TESTIMONY THEN THAT'S FINE, BUT I CAN'T TELL
14 YOU WHETHER THAT WAS OR WAS NOT DONE. SO I CAN'T FURNISH
15 THOSE DATES TO YOU AT THIS TIME.

16 NOW WHAT I NEED FOR YOU TO DO IS TO GO BACK INTO YOUR
17 JURY ROOM AND DETERMINE IF YOU WANT TO HAVE THE TESTIMONY OF
18 MR. RICE AND MR. HAMBY PLAYED BACK TO YOU. AND IF YOU DO
19 LET ME KNOW. AND THEN WE'LL GET IT SET UP SO THAT I CAN DO
20 THAT, OKAY?

21 MR. FOREMAN: OKAY.

22 (WHEREUPON THE JURY EXITED THE COURTROOM AT 9:37 AM)

23 THE COURT: ALL RIGHT. LET'S SEE WHAT THEY DECIDE.

24 (WHEREUPON COURT WAS IN RECESS)

25 THE COURT: THE JURY WOULD LIKE TO HEAR RUSTY RICE AND

1 JOHN HAMBY'S TESTIMONY REPLAYED. I WANT TO GO AHEAD AND GET
2 THIS CASE TO THE JURY. SO I'M GOING TO ASK THAT THEY
3 CONTINUE TO DELIBERATE AND THEN WE'LL PLAY THAT TESTIMONY
4 BACK AS SOON AS WE CONCLUDE THIS CASE. ALL RIGHT. ANY
5 OBJECTION IF I JUST WRITE THAT OUT AND SEND IT BACK IN?

6 MR. SUMNER: NO, SIR.

7 (WHEREUPON COURT WAS IN RECESS)

8 THE COURT: ALL RIGHT. WE'RE GOING TO PLAY MR. RICE,
9 AND THAT'S ABOUT AN HOUR. AND THEN WE'LL TAKE A RECESS
10 WHILE SHE GETS SET UP ON MR. HAMBY. OKAY. BRING THE JURY.

11 MR. SUMNER: LUNCH RECESS AFTER MR. RICE?

12 THE COURT: NO, PROBABLY TRY TO GET IT ALL.

13 MR. SUMNER: OKAY.

14 (WHEREUPON THE JURY ENTERED THE COURTROOM AT 10:52 AM)

15 THE COURT: ALL RIGHT. NOW, LADIES AND GENTLEMEN, WE
16 HAVE THE TESTIMONY OF MR. RICE READY TO BE PLAYED BACK FOR
17 YOU. AND, AS I SAID, THAT'S ABOUT AN HOUR. AND AFTER WE
18 HEAR HIS TESTIMONY THEN WE'LL HAVE TO TAKE ANOTHER RECESS SO
19 THAT WE CAN GO BACK AND FIND THE DISC FOR THE OTHER
20 TESTIMONY, OKAY? ALL RIGHT.

21 (WHEREUPON RUSSELL RICE'S TESTIMONY WAS REPLAYED FOR
22 THE JURY WITH NO INTERRUPTION)

23 THE COURT: OKAY. TAKE THE JURY OUT PLEASE.

24 (WHEREUPON THE JURY EXITED THE COURTROOM AT 11:56 AM)

25 THE COURT: ALL RIGHT. GENTLEMEN, I'VE GOT A VERDICT

1 IN MY OTHER CASE. I NEED TO TAKE IT NOW AND THEN WE'LL GET
2 SET UP TO PLAY BACK THE -- MR. HAMBY'S.

3 (WHEREUPON COURT WAS IN RECESS)

4 THE COURT: ALL RIGHT. BRING THEM ON.

5 (WHEREUPON THE JURY ENTERED THE COURTROOM AT 12:20 PM)

6 THE COURT: ALL RIGHT. NOW THIS IS THE TESTIMONY OF
7 MR. HAMBY. ALL RIGHT.

8 (WHEREUPON JOHNNY HAMBY'S TESTIMONY WAS REPLAYED FOR
9 THE JURY WITH NO INTERRUPTION)

10 THE COURT: OKAY. LADIES AND GENTLEMEN, IF YOU'LL
11 RETIRE AND CONTINUE WITH YOUR DELIBERATIONS. THANK YOU VERY
12 MUCH.

13 (WHEREUPON THE JURY EXITED THE COURTROOM AT 12:56 PM)

14 THE COURT: ALL RIGHT, FOLKS, IF YOU'LL BE AT EASE.
15 STAY CLOSE NOW IN CASE THEY HAVE OTHER QUESTIONS.

16 (WHEREUPON COURT WAS IN RECESS)

17 THE COURT: ALL RIGHT. NOW, GENTLEMEN, THE JURY HAS
18 SENT IN THIS STATEMENT. WE HAVE CONSIDERED THE EVIDENCE AND
19 ARE UNABLE TO COME TO A UNANIMOUS DECISION ON ONE OF THE
20 CHARGES. PLEASE ADVISE. CAN YOU PLEASE GO OVER THE RULES
21 OF REASONABLE DOUBT AND CIRCUMSTANTIAL EVIDENCE? SO AT THIS
22 TIME I WOULD HAVE SOME FURTHER REMARKS TO MAKE TO THEM
23 CONCERNING A UNANIMOUS DECISION. AND THEN I WILL RECHARGE
24 CIRCUMSTANTIAL EVIDENCE AND REASONABLE DOUBT.

25 MR. SUMNER: ARE YOU GOING TO -- IS THE COURT GOING TO

1 GIVE AN ALLEN CHARGE AS WELL?

2 THE COURT: YES. OKAY. BRING THE JURY.

3 (WHEREUPON THE JURY ENTERED THE COURTROOM AT 2:53 PM)

4 THE COURT: MR. FOREMAN, YOU'VE SENT IN THIS STATEMENT.

5 WE HAVE CONSIDERED THE EVIDENCE AND ARE UNABLE TO COME TO A

6 UNANIMOUS DECISION ON ONE OF THE CHARGES. PLEASE ADVISE.

7 CAN YOU PLEASE GO OVER THE RULES OF REASONABLE DOUBT AND

8 CIRCUMSTANTIAL EVIDENCE? I WILL GO OVER THE RULES OF

9 REASONABLE DOUBT AND CIRCUMSTANTIAL EVIDENCE IN A FEW

10 MOMENTS. I HAVE SOME OTHER REMARKS TO MAKE TO YOU BEFORE

11 DOING THAT.

12 LADIES AND GENTLEMEN, THE ONLY MODE OR THE ONLY METHOD

13 PROVIDED BY OUR LAWS FOR DECIDING QUESTIONS OF FACT IS BY

14 THE VERDICT OF THE JURY. IN MOST ALL CASES THAT WE TRY

15 ABSOLUTE CERTAINTY CANNOT BE OBTAINED OR EVEN EXPECTED. AND

16 WHEN A MATTER IS IN DISPUTE IT IS -- IT ISN'T ALWAYS EASY

17 FOR EVEN TWO PEOPLE TO AGREE. INDEED THE PARTIES TO THIS

18 CASE HAVE NOT BEEN ABLE TO AGREE. SO WHEN TWELVE PEOPLE

19 MUST AGREE AS YOU ARE REQUIRED TO DO IT IS VERY UNUSUAL FOR

20 A JURY TO GO OUT AND TO IMMEDIATELY OR QUICKLY RETURN WITH A

21 VERDICT. THAT, OF COURSE, IS WHAT WOULD HAPPEN IF THE JURY

22 WERE IN AGREEMENT TO BEGIN WITH. BUT I TELL YOU AT THE SAME

23 TIME WE USUALLY GET A VERDICT IN THE CASES THAT WE TRY.

24 SO WHILE IT IS NORMAL FOR A JURY TO DISAGREE AT FIRST

25 WE NEVERTHELESS GET A VERDICT AFTER THE JURY HAS LAID ASIDE

1 ALL EXTRANEIOUS AND OUTSIDE MATTERS AND HAS DETERMINED TO TRY
2 THE CASE BASED ON ITS MERITS AND ON THE BASIS OF THE LAW,
3 AND THE EVIDENCE, AND THE TESTIMONY PRESENTED IN THE CASE.

4 LADIES AND GENTLEMEN, IT'S BEEN SAID THAT JURY SERVICE
5 IS PERHAPS THE HIGHEST SERVICE A CITIZEN CAN PERFORM FOR HIS
6 COUNTRY OR STATE DURING PEACETIME. AND I CERTAINLY AGREE
7 WITH THAT. HOWEVER, I TELL YOU THAT A JUROR DOES NOT RENDER
8 GOOD JURY SERVICE WHO ARBITRARILY SAYS I KNOW WHAT I WANT TO
9 DO IN THIS CASE AND IF AND WHEN EVERYBODY AGREES WITH ME
10 WE'LL WRITE A VERDICT, AND WE WILL NOT WRITE A VERDICT UNTIL
11 THAT TIME.

12 LADIES AND GENTLEMEN, IT WAS NEVER INTENDED THAT THE
13 VERDICT OF THE JURY SHOULD BE THE VIEW OF ANY ONE PERSON.
14 AT THE SAME TIME I TELL YOU THAT EVERY JUROR HAS A RIGHT TO
15 HIS OR HER OWN OPINION. AND HE OR SHE NEED NOT GIVE IT UP
16 MERELY FOR THE PURPOSE OF TAKING A VERDICT. HOWEVER, THE
17 VERDICT OF A JURY IS A COLLECTIVE REASONING OF ALL TWELVE
18 JURORS. AND, OF COURSE, THAT'S WHY WE HAVE A JURY.

19 SO I TELL YOU IT IS THE DUTY OF EACH OF YOU TO TELL THE
20 OTHERS HOW YOU FEEL AND WHY YOU FEEL THAT WAY. HOWEVER, I
21 TELL YOU THAT IF THE LARGER NUMBER OF YOUR PANEL ARE IN
22 FAVOR OF ONE VERDICT, ONE PARTICULAR VERDICT, THEN A
23 DISSENTING JUROR OR JURORS SHOULD CONSIDER WHETHER HIS OR
24 HER POSITION OR POSITIONS IS A REASONABLE ONE WHICH MAKES NO
25 IMPRESSION UPON THE MINDS OF THE MAJORITY.

1 IN OTHER WORDS, IF A MAJORITY OF YOU ARE FOR ONE
2 VERDICT, THEN THE MINORITY OUGHT TO SERIOUSLY ASK THEMSELVES
3 WHETHER THEY CAN REASONABLY DOUBT THE CORRECTNESS AND THE
4 JUDGMENT OF THE MAJORITY.

5 NOW, ALTHOUGH THE VERDICT TO WHICH A JUROR AGREES MUST,
6 OF COURSE, BE HIS OR HER OWN VERDICT OF THE RESULT OF HIS OR
7 HER OWN CONVICTIONS AND NOT A MERE ACQUIESCENCE AND THE
8 CONCLUSION OF HIS FELLOW JURORS. YET IN ORDER TO BRING
9 TWELVE MINDS TO A UNANIMOUS RESULT YOU MUST EXAMINE THE
10 QUESTIONS SUBMITTED TO YOU WITH CANDOR AND WITH A PROPER
11 REGARD TO AND RESPECT FOR THE OPINIONS OF EACH OTHER.

12 LADIES AND GENTLEMEN, YOU SHOULD ALSO CONSIDER THAT YOU
13 WERE SELECTED FROM -- YOU WERE SELECTED IN THE SAME MANNER
14 AND FROM THE SAME SOURCE FROM WHICH ANY FUTURE JURY MIGHT BE
15 SELECTED. AND THERE'S CERTAINLY NO REASON FOR ME TO SUSPECT
16 THAT THIS CASE WILL EVER BE SUBMITTED TO TWELVE PEOPLE MORE
17 INTELLIGENT, MORE IMPARTIAL, MORE COMPETENT THAN YOU TWELVE
18 FOLKS ARE OR THAT CLEARER OR MORE EVIDENCE WILL BE PRODUCED
19 ON ONE OR THE OTHER SIDE.

20 IN OTHER WORDS, LADIES AND GENTLEMEN, WHAT I'M TELLING
21 YOU IS THAT A MISTRIAL IN A CASE IS AN UNFORTUNATE THING.
22 IF YOU CANNOT AGREE ON A VERDICT IN THIS CASE IT DOESN'T
23 MEAN ANYBODY WINS. IT JUST MEANS POSSIBLY THAT AT SOME
24 FUTURE TIME I OR ONE OF THE OTHER CIRCUIT JUDGES WILL TRY
25 THIS CASE WITH A JURY SEATED WHERE YOU ARE NOW SEATED. THE

1 SAME PARTICIPANTS WILL COME. THE LAWYERS WILL ASK BASICALLY
2 THE SAME QUESTIONS AND I SUSPECT PROBABLY GET BASICALLY THE
3 SAME ANSWERS. AND WE'LL JUST GO THROUGH THE WHOLE PROCESS
4 AGAIN.

5 IN CONCLUSION, IF THE STATE IS ENTITLED TO A VERDICT IN
6 THIS CASE IT IS ENTITLED TO THAT VERDICT TODAY. NOT
7 TOMORROW, NEXT WEEK, NEXT MONTH, BUT TODAY. ON THE OTHER
8 HAND, IF THIS DEFENDANT IS ENTITLED TO A VERDICT IN HIS
9 FAVOR IN THIS CASE, THEN HE IS ENTITLED TO THAT VERDICT
10 TODAY. NOT TOMORROW, NEXT WEEK, NEXT MONTH, BUT TODAY.

11 SO I CANNOT ACCEPT ANY REPORT AT THIS TIME THAT YOU
12 CANNOT ARRIVE AT A UNANIMOUS VERDICT IN THIS CASE. I AM OF
13 THE OPINION THAT YOU HAVE NOT DELIBERATED SUFFICIENTLY LONG
14 SO THAT I IN GOOD CONSCIENCE COULD ACCEPT THAT REPORT. AND
15 I'LL TELL YOU FRANKLY THAT IT WILL TAKE CONSIDERABLY MORE
16 TIME BEFORE I AM CONVINCED THAT YOU CANNOT REACH A VERDICT
17 IN THIS CASE. I THEREFORE HUMBLY BESEECH YOU TO RETURN TO
18 YOUR DELIBERATIONS WITH THE HOPE THAT YOU CAN ARRIVE AT A
19 VERDICT WITHIN A REASONABLE TIME.

20 NOW, LADIES AND GENTLEMEN, CIRCUMSTANTIAL EVIDENCE AND
21 DIRECT EVIDENCE MAY BE USED BY THE STATE IN THE PROCESS OR
22 PRESENTATION OF A CRIMINAL CASE. AS I TOLD YOU EARLIER,
23 DIRECT EVIDENCE IS EVIDENCE PRESENTED BY SOMEONE WHO
24 PROFESSES TO BE AN EYE-WITNESS. THAT IS WHAT WE CALL DIRECT
25 EVIDENCE.

1 BUT CIRCUMSTANTIAL EVIDENCE, ON THE OTHER HAND, IS
2 WHERE CERTAIN FACTS KNOWN THROUGH USING ONE OF OUR FIVE
3 SENSES PRODUCES A LOGICAL INFERENCE THAT OTHER FACTS EXIST
4 WITHOUT DIRECTLY PROVING THOSE FACTS. CIRCUMSTANTIAL
5 EVIDENCE IS PROOF OF A CHAIN OF FACTS AND CIRCUMSTANCES
6 INDICATING THE EXISTENCE OF A FACT. AS I'VE TOLD YOU, THE
7 STATE CAN RELY ON EITHER OR BOTH OF THIS TYPE EVIDENCE. AND
8 NEITHER IS INFERIOR TO THE OTHER. THE ONE IS AS GOOD AS THE
9 OTHER IF EQUALLY CONVINCING TO YOU, THE JURY.

10 BUT TO SUSTAIN A CONVICTION ON CIRCUMSTANTIAL EVIDENCE.
11 ALL THE CIRCUMSTANCES PROVED MUST BE CONSISTENT WITH THE
12 THEORY THAT THE DEFENDANT IS GUILTY AND AT THE SAME TIME
13 INCONSISTENT WITH THE THEORY THAT HE IS INNOCENT AND WITH
14 EVERY OTHER REASONABLE THEORY EXCEPT THAT OF GUILT.

15 WHERE TWO INFERENCES CAN BE DRAWN FROM THE SAME FACT,
16 ONE CONSISTENT WITH GUILT AND ONE CONSISTENT WITH INNOCENCE,
17 A DEFENDANT IS ENTITLED TO THE INFERENCE THAT IS CONSISTENT
18 WITH HIS INNOCENCE. IN SHORT, LADIES AND GENTLEMEN, I AGAIN
19 TELL YOU THAT IF ALL NATURAL CIRCUMSTANCES AND EVIDENCE IN
20 THIS CASE POINT TO GUILT AND EXCLUDE EVERY REASONABLE THEORY
21 EXCEPT THAT OF GUILT A CONVICTION WOULD BE WARRANTED.

22 PROOF BEYOND A REASONABLE DOUBT, LADIES AND GENTLEMEN,
23 IS PROOF THAT LEAVES YOU FIRMLY CONVINCED OF THIS
24 DEFENDANT'S GUILT. I AGAIN TELL YOU THAT THERE ARE VERY FEW
25 THINGS IN THIS WORLD THAT WE KNOW WITH ABSOLUTE CERTAINTY.

1 AND IN CRIMINAL CASES OUR LAW DOES NOT REQUIRE PROOF THAT
2 OVERCOMES EVERY POSSIBLE DOUBT.

3 IF, BASED ON YOUR CONSIDERATION OF THE TESTIMONY AND
4 EVIDENCE IN THIS CASE, YOU ARE FIRMLY CONVINCED THAT THIS
5 DEFENDANT IS GUILTY, THEN YOU MUST FIND HIM GUILTY. IF, ON
6 THE OTHER HAND, YOU THINK THERE IS A REAL POSSIBILITY THAT
7 HE IS NOT GUILTY, THEN YOU MUST GIVE HIM THE BENEFIT OF THAT
8 DOUBT AND FIND HIM NOT GUILTY.

9 SO, LADIES AND GENTLEMEN, AT THIS TIME I'LL ASK THAT
10 YOU RETIRE TO YOUR JURY ROOM AND CONTINUE WITH YOUR
11 DELIBERATIONS WITH THE HOPE THAT YOU CAN ARRIVE AT A
12 UNANIMOUS VERDICT SHORTLY. THANK YOU.

13 (WHEREUPON THE JURY EXITED THE COURTROOM AT 3:04 PM)

14 THE COURT: ALL RIGHT. THANK YOU, LADIES AND
15 GENTLEMEN. IF YOU'LL BE AT EASE.

16 (WHEREUPON COURT WAS IN RECESS)

17 THE COURT: LADIES AND GENTLEMEN, I'M TOLD WE HAVE A
18 VERDICT. OF COURSE, WE DON'T KNOW WHAT THAT VERDICT IS.
19 BUT I NEED FOR EVERYONE IN THE COURTROOM TO UNDERSTAND THAT
20 REGARDLESS OF THE VERDICT I WILL NOT PERMIT OR CONDONE ANY
21 OUTBURST OF ANY KIND, NO DISPLAYS OF EMOTION. AND SHOULD
22 THERE BE ANY THEN THAT WILL CONSTITUTE CONTEMPT OF COURT.
23 AND I WILL PUNISH ACCORDINGLY. NOW DOES ANYONE NOT
24 UNDERSTAND WHAT I JUST SAID?

25 (NO RESPONSE)

VERDICT OF THE JURY

581

1 THE COURT: OKAY. BRING OUR JURY PLEASE.

2 (WHEREUPON THE JURY ENTERED THE COURTROOM AT 3:37 PM)

3 THE COURT: MR. FOREMAN, IF YOU'VE REACHED A VERDICT

4 WOULD YOU HAND IT TO THE BAILIFF PLEASE, SIR? OKAY. MADAME

5 CLERK, WOULD YOU PUBLISH THE VERDICTS PLEASE, MA'AM?

6 MADAME CLERK: YOUR HONOR, THIS IS CASE 2003-GS-23-

7 3615, THE STATE VERSUS RUSSELL WILLIAM RICE, JR., INDICTED

8 FOR MURDER. AND THE VERDICT IS GUILTY. 2003-GS-23-3612,

9 THE STATE VERSUS RUSSELL WILLIAM RICE FOR TRAFFICKING

10 COCAINE. THE VERDICT IS GUILTY. 3614, INDICTED FOR

11 UNLAWFUL CARRYING OF A PISTOL, THE VERDICT IS GUILTY. 8779,

12 INDICTED FOR POSSESSION OF A WEAPON DURING THE COMMISSION OF

13 OR THE ATTEMPT TO COMMIT A VIOLENT CRIME, THE VERDICT IS

14 GUILTY. THESE ARE ALL SIGNED BY WARREN REAUX, FOREMAN.

15 LADIES AND GENTLEMEN, IF YOU AGREE THAT THESE ARE YOUR

16 VERDICTS WOULD YOU PLEASE RAISE YOUR RIGHT HAND?

17 (WHEREUPON ALL JURORS RAISED THEIR RIGHT HAND)

18 MADAME CLERK: THANK YOU.

19 THE COURT: ANYTHING FURTHER FROM THE JURY, MR. SUMNER?

20 MR. SUMNER: NO, SIR, NOT FROM THE DEFENSE.

21 THE COURT: THANK YOU, LADIES AND GENTLEMEN, FOR YOUR

22 SERVICE ON THIS CASE. AND INSOFAR AS YOU'RE CONCERNED,

23 THANK YOU FOR YOUR SERVICE THIS WEEK. YOU'RE FREE. YOU

24 DON'T HAVE TO COME BACK TODAY OR TOMORROW.

25 SO LET ME TAKE THIS OPPORTUNITY TO THANK YOU FOR COMING

1 AND SERVING. I WANT YOU TO KNOW THAT WE ARE WELL AWARE OF
2 THE FACT THAT JURY SERVICE IS A BURDEN TO YOU. WE KNOW THAT
3 IT'S DIFFICULT FOR YOU TO TAKE TIME OFF FROM YOUR JOBS AND
4 FAMILIES AND SPEND IT WITH US ON JURY DUTY. BUT I DO HOPE
5 YOU UNDERSTAND THE IMPORTANCE OF BEING HERE THIS WEEK. FOR
6 WITHOUT YOUR PRESENCE WE COULD NOT GET OFF FROM OUR DOCKET
7 THE CASES THAT WE DO. IT IS A VERY IMPORTANT SERVICE YOU
8 HAVE PERFORMED THIS WEEK. AND I THANK YOU VERY MUCH FOR
9 THAT SERVICE.

10 NOW THE CLERK WILL MAIL CHECKS OR VOUCHERS TO YOU FOR
11 YOUR SERVICE THIS WEEK. AND ATTACHED TO THAT VOUCHER WILL
12 BE A SLIP FOR YOU TO GIVE TO YOUR EMPLOYER IF YOU NEED THAT.
13 NOW SHOULD YOU NEED ONE OF THOSE SLIPS TODAY THEN THE
14 BAILIFFS CAN SEE THAT YOU GET ONE. DO I HAVE ANY MEMBER OF
15 THE PANEL WHO HAS SOME QUESTION I CAN TRY TO ANSWER FOR YOU
16 BEFORE LETTING YOU GO?

17 (NO RESPONSE)

18 THE COURT: I'VE ENJOYED WORKING WITH YOU, LADIES AND
19 GENTLEMEN. THANK YOU SO MUCH. YOU'RE FREE TO GO.

20 (WHEREUPON THE JURY EXITED THE COURTROOM AT 3:41 PM)

21 THE COURT: ANY MOTIONS, MR. SUMNER?

22 MR. SUMNER: THANK YOU, YOUR HONOR. I WOULD AT THIS
23 TIME RENEW THE MOTIONS FOR A DIRECTED VERDICT OF NOT GUILTY
24 AS IT RELATES TO EACH OF THE FOUR CHARGES. IF THE COURT
25 WOULD LIKE TO I'LL ARTICULATE AN ARGUMENT OF THAT POINT, BUT

1 I JUST BASICALLY WANT TO GET IT ON THE RECORD.

2 THE COURT: I DON'T THINK THAT'S NECESSARY TO DO THAT.

3 I'D HAVE TO DENY YOUR MOTION. ALL RIGHT. YOU READY TO COME
4 AROUND PLEASE?

5 MR. SUMNER: YES, SIR, I'M READY.

6 THE COURT: ANY PRIOR RECORD, SOLICITOR?

7 MR. MOYER: IN 1996, DRIVING UNDER SUSPENSION AND
8 CRIMINAL DOMESTIC VIOLENCE.

9 THE COURT: AND WHAT?

10 MR. MOYER: CRIMINAL DOMESTIC VIOLENCE.

11 THE COURT: OKAY. MR. SUMNER, ANYTHING FURTHER, SIR?

12 MR. SUMNER: YOUR HONOR, BRIEFLY. YOU'VE HEARD THE
13 TESTIMONY. HE'S FORTY-SEVEN YEARS OLD. HIS FAMILY IS HERE
14 IN THE COURT. THEY'VE BEEN HERE ALL WEEK. IT'S HARD FOR
15 ME, I GUESS, AT THIS POINT TO KNOW WHERE TO START AND WHERE
16 TO STOP IN TERMS OF RUSTY. HE OBVIOUSLY MADE SOME HORRIBLE
17 DECISIONS AND GOT INVOLVED IN DRUG TRAFFICKING AND DRUG
18 TRADE. I WOULD LIKE TO BRING YOUR ATTENTION THAT HE NEVER
19 DENIED THAT ON THE WITNESS STAND. AND THROUGH HIS TESTIMONY
20 HE SAID HE WAS INVOLVED IN DRUGS.

21 I'D JUST ASK THAT YOU PLEASE BE AS MERCIFUL UPON HIM AS
22 YOU CAN BE. HE HAS A TWELVE YEAR OLD DAUGHTER AND A
23 THIRTEEN -- DID I SAY THAT RIGHT, A TWELVE YEAR OLD DAUGHTER
24 AND A THIRTEEN YEAR OLD DAUGHTER. HE HAS A WONDERFUL
25 FAMILY.

1 THIS IS A TRAGEDY. I CERTAINLY -- I'VE NOT BEEN ABLE
2 TO EXPRESS THIS TO THIS POINT, BUT I'M CERTAINLY SORRY THAT
3 WE'RE HERE. AND I'M SORRY FOR THE DEATH THAT OCCURRED. BUT
4 I KNOW THAT MR. RICE, YOUR HONOR, HAS A WONDERFUL FAMILY.
5 MY FATHER HAPPENS TO HAVE KNOWN HIS FATHER FOR MANY YEARS.
6 AND HE'S A GOOD MAN.

7 SO WE JUST -- I DON'T WANT TO MAKE A BELABORED SPEECH
8 OTHER THAN JUST TO ASK YOU TO BE AS MERCIFUL UPON HIM AS YOU
9 CAN BE. OBVIOUSLY THE JURY STRUGGLED WITH ONE OF THE
10 PARTICULAR CHARGES. AND I DON'T NEED TO GO ANY FURTHER, I
11 DON'T THINK, INTO THAT. I'LL BE GLAD TO ANSWER ANY
12 QUESTIONS YOU HAVE OR TENDER MR. RICE TO YOU FOR YOUR
13 EXAMINATION.

14 THE COURT: MR. RICE, YOU HAVE A PERFECT RIGHT AT THIS
15 TIME TO ADDRESS THE COURT CONCERNING SENTENCE. ANYTHING
16 YOU'D LIKE TO SAY NOW, SIR, BEFORE I SENTENCE YOU?

17 MR. RICE: JUST WHAT HE JUST SAID, TO BE AS MERCIFUL AS
18 YOU CAN. I DID NOT DO THAT, THE MURDER CHARGE. I'M GUILTY
19 OF EVERYTHING ELSE. AND I'M SO SORRY IT HAPPENED. MY
20 APOLOGIES ARE TO THE FAMILY FOR ALL THE -- WHAT HAS HAPPENED
21 TO THEM. I'M SO SORRY I WAS EVEN INVOLVED WITH DRUGS SO
22 THAT ANYTHING LIKE THAT WOULD EVEN BE AROUND ME. MY PRAYERS
23 ARE WITH THE FAMILY ESPECIALLY HIS WIFE AND KIDS. PLEASE BE
24 AS MERCIFUL AS YOU COULD TO ME.

25 THE COURT: SOLICITOR, ANYTHING?

SENTENCE OF THE COURT

585

1 MR. MOYER: I DON'T, YOUR HONOR. I RECEIVED A NOTE
2 THAT PERHAPS THE VICTIM -- THE VICTIM'S FAMILY WOULD LIKE TO
3 ---

4 THE COURT: CERTAINLY. IF THEY'D LIKE TO ADDRESS THE
5 COURT THEY'RE WELCOME TO DO THAT. YOU CAN COME AROUND.
6 COME AROUND.

7 MRS. JOHNSON: I'M SHELLY JOHNSON, HOMER JOHNSON'S
8 WIFE. AND I WOULD LIKE TO SAY THAT MY HUSBAND HAS FIVE
9 CHILDREN, SIX IN ALL. HE HAD -- WE HAVE FIVE. AND MY
10 CHILDREN HAVE BEEN THROUGH A LOT THIS PAST ONE AND A HALF
11 YEARS. THEY MISS THEIR FATHER TERRIBLY. THEY CAN'T SEE
12 THEIR FATHER AGAIN. AND I FEEL THAT, YOU KNOW, NO LENIENCY
13 SHOULD BE BECAUSE MY CHILDREN CAN'T SEE THEIR FATHER. MY
14 CHILDREN WILL NEVER SEE THEIR FATHER AGAIN. AND I'LL NEVER
15 SEE MY HUSBAND AGAIN. HE WASN'T GRANTED ANY LENIENCY WHEN
16 HE WAS SHOT TO DEATH. THANK YOU.

17 THE COURT: ALL RIGHT.

18 MR. SUMNER: YOUR HONOR, THERE'S NO -- I BELIEVE YOU
19 KNOW -- YOU KNOW WHAT THEY WOULD SAY.

20 THE COURT: CERTAINLY.

21 MR. SUMNER: I'M NOT GOING TO BRING ANYBODY ELSE UP. I
22 THINK YOU KNOW THE POSITION I'M IN HERE AT THIS POINT.

23 THE COURT: ALL RIGHT. MR. RICE, ON THE INDICTMENT FOR
24 MURDER FOR WHICH YOU'VE BEEN FOUND GUILTY, THE SENTENCE OF
25 THE COURT IS YOU BE COMMITTED TO THE DEPARTMENT OF

SENTENCE OF THE COURT

1 ~~CORRECTIONS~~ FOR LIFE.

2 ON THE INDICTMENT FOR TRAFFICKING COCAINE, THE SENTENCE
3 IS THAT YOU BE COMMITTED TO THE DEPARTMENT OF CORRECTIONS
4 FOR A PERIOD OF ~~TWENTY-FIVE YEARS~~ AND PAY THE MANDATORY FINE
5 OF A HUNDRED THOUSAND DOLLARS.

6 ON THE INDICTMENT FOR POSSESSION OF A WEAPON DURING A
7 VIOLENT CRIME, FIVE YEARS. AND ON THE POSSESSION OF A
8 PISTOL, ONE YEAR. THESE LAST THREE SENTENCES TO RUN
9 CONCURRENT TO THE OTHER SENTENCE. AND FOR WHATEVER AMOUNT
10 OF TIME YOU'VE BEEN IN JAIL YOU'RE ENTITLED BY THE STATUTE
11 TO CREDIT FOR THAT TIME. THAT WILL BE DETERMINED BY THE
12 SOUTH CAROLINA DEPARTMENT OF CORRECTIONS. ALL RIGHT. WE'LL
13 STAND AT RECESS.

14 (HEARING ENDED AT 3:49 PM)

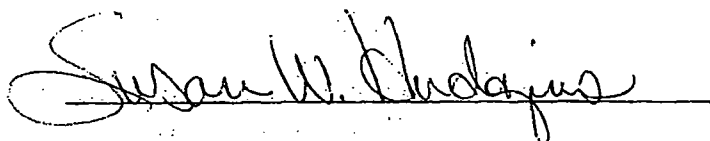
15 (END OF REQUESTED TRANSCRIPT OF RECORD)

1 CERTIFICATE OF REPORTER

2 I, THE UNDERSIGNED, SUSAN W. HUDGINS, OFFICIAL COURT
3 REPORTER FOR THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF
4 SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A
5 TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
6 PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL/HEARING
7 OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT
8 COURT FOR GREENVILLE COUNTY, SOUTH CAROLINA, ON THE 12TH -
9 15TH DAY OF APRIL 2004.

10 I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL,
11 NOR INTEREST TO ANY PARTY HERETO.

12 OCTOBER 19, 2004

13
14 

15 CIRCUIT COURT REPORTER

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Russell W. Rice, Jr., Appellant.

Appeal From Greenville County
C. Victor Pyle, Jr., Circuit Court Judge

Opinion 4107
Heard April 6, 2006 – Filed April 24, 2006

AFFIRMED

Assistant Appellate Defender Robert M.
Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster,
Chief Deputy Attorney General John W.
McIntosh, Assistant Deputy Attorney General
Donald J. Zelenka, and Assistant Attorney
General Derrick K. McFarland, all of
Columbia; and Solicitor Robert M. Ariail, of
Greenville, for Respondent.

ANDERSON, J.: Russell W. Rice, Jr. appeals his convictions and sentences for murder and trafficking in cocaine arguing the trial court erred in denying his motion to sever the charges. Rice contends he was prejudiced by having a single trial for both charges because the murder occurred six to seven weeks before the cocaine trafficking. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In September or October of 2002, upon leaving a restaurant in Greenville, Rice discovered his car, a 1994 Mercury Topaz, had been stolen from the parking lot. Rice suspected Homer Johnson, an acquaintance who sold drugs, stole the car. Drugs and money were inside the

vehicle when it was stolen.

On November 4, 2002, despite Rice's suspicion that Johnson had stolen his car, Rice and Johnson entered into a drug deal. Johnson possessed twenty pounds of marijuana that he, Rice, and another person, Johnny Hamby, "cut up" into twenty individual bags. Johnson gave Rice ten pounds of marijuana and told him he owed \$11,000. Although Rice was unhappy that he received only ten pounds of marijuana, he told Johnson he would pay him the money the next day.

The following day, Rice phoned Hamby. He asked Hamby to call Johnson and tell him that Rice would meet him at a Super 8 Motel. Hamby relayed the message to Johnson. Johnson was murdered at the motel.

During the course of the police investigation, Daniel Fuller, the investigator assigned to the case, attempted to contact Rice numerous times by telephone. On December 26, Investigator Fuller spoke with Rice, who informed Fuller he was leaving town and would not return until December 30. Fuller was skeptical of Rice and began looking for Rice in Greenville. Fuller observed Rice driving a 1994 Mercury Topaz – the car Rice claimed Johnson had stolen from him a few months earlier. Fuller found the car at a motel and discovered it was not insured or properly registered in South Carolina. Further, the forty-five day paper tag had expired. Fuller set up surveillance at the exits of the motel.

When Rice left the parking lot, Corporal Dave Dempsey followed Rice and pulled him over. Rice was unable to provide proof of insurance. Dempsey and Fuller asked Rice to exit the vehicle. They patted Rice down to see if he had a weapon. Dempsey found a pistol in Rice's front pocket and \$2,500. They arrested Rice for the traffic violations. The officers conducted an inventory search before they removed the car from the scene. A search of the trunk produced a large amount of cocaine, a scale, and a rifle cut into several pieces in a plastic bag. Rice was subsequently charged with murder and trafficking in cocaine.

Before trial, Rice moved to sever the murder and trafficking in cocaine charges. Rice argued the traffic stop occurred six to seven weeks after the murder and the only connection between the two was that a weapon was found with the cocaine. Therefore, Rice alleged, no nexus between the two charges existed. The State disagreed and claimed the reason for the stop was the murder. The State believed the rifle found in Rice's car was the murder weapon. The State contended the "drug transaction was at the root of the murder itself" and the two charges involved the same or similar evidence. The trial court denied the motion to sever the charges. A jury convicted Rice of both charges.

STANDARD OF REVIEW

A motion for severance is addressed to the sound discretion of the trial court. State v. Walker, 366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005); State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002). The trial court's ruling will not be disturbed on appeal absent an abuse of that discretion. State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002); State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); Walker, 366 S.C. at 656, 623 S.E.2d at 128; see also State v. Grace, 350 S.C. 19, 564 S.E.2d 331 (Ct. App. 2002) (declaring circuit court has wide discretion when deciding whether to consolidate charges for trial and its decision will only be overturned when abuse of discretion has occurred). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. Walker, 366

S.C. at 656, 623 S.E.2d at 129.

LAW/ANALYSIS

SEVERANCE

Rice contends the trial court erred in refusing to sever the murder and trafficking in cocaine charges. Rice maintains the cocaine discovered in his car was unrelated to the murder that occurred six to seven weeks earlier. Therefore, Rice avers any evidence of cocaine trafficking was prejudicial to Rice in the murder trial, warranting severance of the charges. We disagree.

The appellate court considers several factors when deciding whether the trial court's consolidation of charges was proper. Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced. State v. Cutro, 365 S.C. 366, 618 S.E.2d 890 (2005); State v. Smith, 322 S.C. 107, 470 S.E.2d 364 (1996); State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002); State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996); see also State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981) (noting where offenses charged in separate indictments are of same general nature, involving connected transactions closely related in kind, place and character, trial judge has authority, in his discretion, to order indictments tried together over objection of defendant absent showing that defendant's substantive rights were violated); McCrary v. State, 249 S.C. 14, 36, 152 S.E.2d 235, 246 (1967) (stating "[t]he two offenses were of the same general nature, involving connected transactions closely related in time, place and character; and the trial judge had power, in his discretion, to order them tried together over objection by the defendant in the absence of a showing that the latter's substantive rights would have been thereby prejudiced."). Offenses are considered to be of the same general nature where they are interconnected. State v. Grace, 350 S.C. 19, 564 S.E.2d 331 (Ct. App. 2002); Jones, 325 S.C. at 315, 479 S.E.2d at 519.

Conversely, offenses which are of the same nature, but which do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together. See Simmons, 352 S.C. at 350, 573 S.E.2d at 860; Jones, 325 S.C. at 315, 479 S.E.2d at 519; see also State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986) (holding although prison escapee committed two murders within a few miles of each other and attempted an armed robbery, the trial judge erred in consolidating the charges for one trial where the crimes did not arise out of a single chain of circumstances and they required different evidence); State v. Tate, 286 S.C. 462, 334 S.E.2d 289 (Ct. App. 1985) (finding that joint trial on identical but unrelated forgeries violated defendant's right to a fair trial). Cf. State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (ruling that consolidation was proper even though crimes occurred over numerous days because conduct arose from a single uninterrupted crime spree); Simmons, 352 S.C. at 351, 573 S.E.2d at 861 (concluding defendant's separate burglary offenses were properly joined when both arose out of a single chain of events, were of the same nature, and proved by the same evidence).

Charges can be joined in the same indictment and tried together where they (1) arise out of a single chain of circumstances; (2) are proved by the same evidence; (3) are of the same general nature; and (4) no real right of the defendant has been prejudiced. State v. Harris, 351

S.C. 643, 572 S.E.2d 267 (2002); State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); see also Simmons, 352 S.C. at 351, 573 S.E.2d at 861 ("Further, joinder of offenses in one trial is proper if the offenses (1) are of the same general nature or character and spring from the same series of transactions, (2) are committed by the same offender, and (3) require the same or similar proof.").

In the case sub judice, two separate indictments were issued against Rice. The first was for trafficking in cocaine, the second for murder. The cocaine trafficking charge arose out of a traffic stop the police set up because they suspected Rice of Johnson's murder. The police found the gun believed to be the murder weapon in the same search that produced the cocaine that forms the basis of the cocaine trafficking charge. The State surmised Rice's motive for murdering Johnson was in part to retrieve the cocaine and money Johnson stole from Rice's car. When the police arrested Rice at the traffic stop, he was found with large amounts of cocaine and money. Moreover, the testimony at trial revealed the relationship between Rice and Johnson was largely based on selling drugs. The State's theory as to the motive for Johnson's murder involved the drugs Johnson stole from Rice when he stole Rice's car as well as the drug-related argument the two recently had involving the marijuana.

Additionally, Rice suffered no prejudice from the joinder of charges because, without the evidence of cocaine trafficking, the jury would not have received an accurate portrayal of the case. The cocaine trafficking evidence was necessary for a full presentation of the case without fragmentation. See State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002). In State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996), our Supreme Court explained:

One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context or the *res gestae* or the uncharged offense is so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . . [and is thus] part of the *res gestae* of the crime charged. And where evidence is admissible to provide this full presentation of the offense, [t]here is no reason to fragmentize the event under inquiry by suppressing parts of the *res gestae*.

Id. at 122, 470 S.E.2d at 370-71 (internal quotations omitted).

The information regarding the cocaine trafficking was relevant to show the complete, whole, unfragmented story regarding Johnson's murder. Therefore, Rice was not prejudiced by consolidating the two charges.

CONCLUSION

We hold the trial court did not abuse its discretion in refusing to sever the murder and trafficking in cocaine charges against Rice. Rice's arrest for trafficking in cocaine arose out of the murder investigation. Moreover, Rice murdered Johnson because of their history of selling drugs. Accordingly, Rice's convictions and sentences are

AFFIRMED.

HEARN, C.J., and KITTREDGE, J., concur.

STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

County of GREENVILLE)

2008-CP-23- 3945

RUSSELL RICE #301294)

Full name and prison number, if any, of applicant.)

APPLICATION FOR

v.)

POST-CONVICTION RELIEF

STATE OF SOUTH CAROLINA)

Name of Respondent)

ATT. GEN. HENRY McMASTER)

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly, handwritten, or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention LIEBER CORRECTIONAL INSTITUTION

P.O. Box 205, Ridgeville, SC. 29472

2. Name and location of Court which imposed sentence GREENVILLE COUNTY

GENERAL SESSIONS

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

(a) 03-GS-23-3615 (murder)

(b) 03-GS-23-3612 (trafficking cocaine)

(c) 03-GS-23-3614; 8779 (poss. weapon, violent crime & poss. pistol)

4. The date upon which sentence was imposed and the terms of the sentence:

(a) APRIL 15, 2004 (LIFE)

(b) same as above (25 years) (\$100,000.00)

(c) same as above (5 years) & (1 year)

5. Check whether a finding of guilty was made
- (a) after a plea of guilty _____
- (b) after a plea of not guilty JURY TRIAL
- (c) after a plea of nolo contendere _____
6. Did you appeal from the judgment of conviction or the imposition of sentence? YES
7. If you answered "yes" to (6), list
- (a) the name of each Court to which you appealed:
- i. S.C. COURT OF APPEALS
- ii. S.C. SUPREME COURT
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. DENIED
- ii. DENIED
- iii. _____
- (c) the date of each such result:
- i. 4-24-06
- ii. UNKNOWN
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Opinion No. 4107
- ii. N/A
- iii. _____
8. If you answered "no" to (6), state your reasons for not so appealing:
- (a) N/A
- (b) N/A
- (c) N/A
9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) INEFFECTIVE ASSISTANCE OF COUNSEL
- (b) DENIAL OF SIXTH, FIFTH, FOURTH AND FOURTEENTH AMENDMENTS
- (c) OTHER ISSUES OF LAW

(d) the date of each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? No

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. N/A
- ii. N/A
- iii. N/A

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. N/A
- iii. N/A

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

(a) this is properly filed first post conviction relief.

(b) same as above

(c) same as above

16. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? N/A
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence?
YES

(e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? YES

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

(a) SEE ATTACHED MEMORANDUM OF LAW IN SUPPORT

(b) SEE ATTACHED MEMORANDUM OF LAW IN SUPPORT

(c) SEE ATTACHED MEMORANDUM OF LAW IN SUPPORT

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law ?

NO

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

NO

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) NO

(d) any other petitions, motions or applications in this or any other Court?

NO

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(b) the name and location of the Court in which each was filed:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(c) the disposition thereof:

i. N/A

ii. N/A

iii. N/A

iv. N/A

INDEX

STATEMENT OF CASE.....	1
MEMORANDUM OF LAW.....	2
ISSUE (A).....	3
ISSUE (B).....	8
ISSUE (C).....	13
ISSUE (D).....	19
CONCLUSION.....	24
CERTIFICATE OF SERVICE.....	25

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE

INDICT.NO.'S 03-GS-23-3612; 3614; 3615; and 8779

RUSSELL RICE #301294.....PETITIONER,

-VS-

STATE OF SOUTH CAROLINA; and

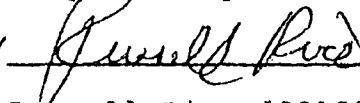
ATTORNEY GENERAL, HENRY McMASTER.....RESPONDENT,

MEMORANDUM OF LAW IN SUPPORT
OF POST CONVICTION RELIEF APPLICATION
BROUGHT PURSUANT TO:

S.C. CODE ANN. §17-27-20 THROUGH §17-27-160

Respectfully Submitted

/s/



Russell Rice #301294

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

- i. N/A
- ii. STEVEN SUMNER, ESQUIRE GREENVILLE COUNTY BAR
- iii. ROBERT DUDEK ESQUIRE, COLUMBIA BAR

(b) the proceedings at which each such attorney represented you:

- i. N/A
- ii. TRIAL & SENTENCING
- iii. APPEAL

18. State clearly the relief you seek in filing this application.

VACATE SENTENCE AND JUDGEMENT OR IN THE ALTERNATIVE REMAND FOR NEW TRIAL

19. Are you now under sentence from any other court that you have not challenged?

NO

STATEMENT OF CASE

Petitioner was indicted by the Greenville County grand jury for one count of murder, one count of possession of weapon during the commission of a violent crime, and one count of unlawful carrying of a pistol and one count of trafficking in cocaine.

Petitioner proceeded to trial by jury on April 12, 2004 before the Honorable C. Victor Pyle, Jr.

Petitioner was represented by Steven Sumner Esquire, and the State was represented by L. Mark Moyer Esquire, Assistant Solicitor for Greenville County.

On April 15, 2004 Petitioner was ultimately found guilty on [all] of the aforementioned counts. Judge Pyle, sentenced Petitioner to life for the murder, twenty-five years and \$100,000.00 fine for the trafficking in cocaine and five years for the possession of a weapon and one year for the unlawful possession of a pistol.

A timely appeal was perfected by the South Carolina Court of Appeals, Petitioner was represented by Robert Dudek from the South Carolina Appellate Defense. The appeal was ultimately denied Opinion No. 4107 (S.C.Ct.App. filed 4/24/2006). Robert Dudek subsequently filed for rehearing on June 26, 2006; which was ultimately denied. Robert Dudek then petitioned the South Carolina Supreme Court for writ of certiorari in Petitioner's behalf on November 27, 2006, The State filed their return to the petition for writ of certiorari on January 26, 2007...writ of certiorari was ultimately denied and this Post Conviction Relief is as follows:

IN STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

) IN THE COURT OF COMMON PLEAS
)

RUSSELL RICE #301294

) INDICT. NO. 'S 03-GS-23-3612; AND

PETITIONER,

) 03-GS-23-3614; 3615; and 8779

-V-

)

STATE OF SOUTH CAROLINA; and

) MEMORANDUM OF LAW IN SUPPORT OF

ATTORNEY GENERAL; and

) APPLICATION FOR POST CONVICTION

RESPONDENT,

) RELIEF BROUGHT PURSUANT TO: S.C.

) CODE ANN. §17-27-20 THROUGH §17-27-160

COMES NOW, Russell Rice, pro-se, known herein after as Petitioner, seeking relief in this Court; claiming that his constitutional rights were violated at trial in a number of ways; including; but not limited to his Sixth Amendment Right to the effective assistance of trial counsel; as well as his Right to a fair trial that is protected under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Petitioner presents this Application and Memorandum of Law in Support pursuant to S.C. Code Ann. §17-27-20 through §17-27-160. The issues included herein along with Petitioner's statement of facts, will show unto this Court that Petitioner is entitled to the requested relief stated herein.

Respectfully Submitted,

/s/ *Russell Rice*

Russell Rice #301294

ISSUE (A) WAS COUNSEL INEFFECTIVE FOR FAILING TO INTRODUCE JOHN HAMBY'S THREE INCONSISTENT STATEMENTS INTO EVIDENCE AND IN FAILING TO DO SO DENIED THE FACT FINDERS ALL THE FACTS OF THE CASE?

FACTS

The pivotal point of Petitioner's trial turned on State's witness John Hamby who initially gave the police three inconsistent statements. These statements were very critical as such the State's entire case revolved around Hamby's testimony against Petitioner. During closing argument Petitioner's Counsel argued the following to the Jury; as recorded:

WHAT ELSE DO WE KNOW ABOUT MR. HAMBY? I PUT A STAR BY THIS. HE LIED TO THE POLICE. I ASKED HIM ON CROSS EXAMINATION, DID YOU NOT GIVE A STATEMENT TO THE POLICE FIRST OF ALL ON THE DAY OF THE MURDER, THAT EVENING AT THE HOSPITAL? DID YOU NOT GIVE A STATEMENT TO THE POLICE THAT YOU DID NOT SEE HOMER THAT DAY? YEP, I TOLD THEM THAT I TOLD THEM I'D TALKED TO HIM ON THE PHONE TWICE THAT DAY. NEVER MENTIONED THAT I SAW HIM. WHY WOULD HE NEED TO DO THAT? WHY DO THEY NEED TO TAKE THREE STATEMENTS FROM THIS GUY ANYWAY? WHY NOT GET IT RIGHT THE FIRST TIME? [Tr.p.527, L.5-14]

As is seen in the afore recorded the points stressed in Hamby's three statements clearly are vital as Counsel points out as critical to the Jury, yet directly after closing the Court charges on the law and the Jury begins to deliberate a short time before returning a note to the Court requesting the very same three statements of Hamby's that Counsel argued in closing, as

was recorded:

THE COURT: ALL RIGHT. NOW LADIES AND GENTLEMEN, THE JURY ASKED FOR A COPY OF RUSTY AND JOHN HAMBY'S TESTIMONY. OF COURSE, WE DON'T HAVE A COPY. AND THE ONLY THING I CAN DO IS PLAY BACK THEIR TESTIMONY IF THAT'S WHAT THEY WANT. JOHN HAMBY'S TESTIMONY WAS ABOUT A HALF AN HOUR AND RUSTY RICE'S WAS ABOUT AN HOUR. NOW THEY ALSO SAY CAN WE GET THE DATES OF JOHN HAMBY'S THREE DIFFERENT STATEMENTS? UNLESS THAT IS IN EVIDENCE, OF COURSE WE CAN'T DO THAT. THOSE STATEMENTS ARE NOT IN EVIDENCE, ARE THEY?

MR. MOYER: THE STATEMENTS WERE NOT.

MR. SUMNER: YOUR HONOR, MY RECOLLECTION IS IN CROSS EXAMINATION I COVERED A COUPLE OF THE DATES ON THE STATEMENTS WHEN I IMPEACHED HIM. SO I BELIEVE IF THEY LISTEN TO THAT TESTIMONY I BELIEVE IT'LL COME OUT. BUT, NO, THEY'RE--I DID NOT PLACE THEM INTO EVIDENCE. THEY WERE NOT PLACED INTO EVIDENCE. [TR.p.571, L.6-21].

THE COURT

NOW YOU SAY CAN WE GET THE DATES OF JOHN HAMBY'S THREE DIFFERENT STATEMENTS? THOSE STATEMENTS ARE NOT INTO EVIDENCE THEREFORE I CANNOT GIVE YOU THOSE DATES. THE ONLY THING I CAN TELL YOU IS THAT IF THOSE DATES WERE ELICITED DURING TESTIMONY THEN THAT'S FINE, BUT I CAN'T TELL YOU WHETHER THAT WAS OR WAS NOT DONE. SO I CANNOT FURNISH THOSE DATES AT THIS TIME [Tr.p.572, L.9-15]

It cannot be said that these statements weren't critical such as is revealed by the Jury's [compelling need] for the statements. The dates and inconsistencies were very crucial to Petitioner and his defense, for how could the fact finders render a legal and lawful decision of the facts if they (the jury) were denied all the facts of the case. Petitioner clearly contends that Counsel was ineffective for failing to introduce the three

statements into evidence. It is apparent that the Jury [NEEDED] the statements, this is easily seen such as the Jury could not render a verdict. Shortly after the Jury began to deliberate again they returned and told the Court they could not reach a unanimous decision on one of the charges. It would be assumabley conclusive to believe that a reasonable juror was very confused by the "missing" evidence that Counsel assured the Jury was necessary in the case. Petitioner's contentions are that this missing evidence that the Jury deemed so important surely contributed to the verdict. Of course without inquiring into the Jury's province which this Court knows is not legal. So there is no way of knowing just what evidence the Jury actually relied in coming to the verdict of the one charge.

DISCUSSION

Petitioner contends that Counsel was ineffective for arguing something to the Jury that he (counsel) was not going to give them. This evidence was very imperative as is seen from the Jury's desire to have such evidence. The touchstone of effective assistance is fairness of adversary proceedings. Nazarene v. United States 69 F.3d 1391, yet when Counsel utterly fails to deliver what he tells the Jury exists then there has been a breakdown.

When two statements are inconsistent both of them cannot be true, and the jury must decide which to believe or whether to

believe either of them. see e.g. State v. Williams 222 S.C. 354, 72 S.E.2d 830 (1952), from case law it is clear that these statements were critical, such as in the instant case it wasn't one or two, but (three) inconsistent statements from a witness that the State deemed to be reliable and trust worthy to the point that the State used Hamby's testimony to prove the truth of the matter asserted.

To properly determine a witnesses credibility, the fact finder needs to know whether the witness has a motive to misrepresent or slant his/her testimony. State v. McGuire 272 S.C. 574, 253 S.E.2d 103 (1979); Jackson v. Jackson 234 S.C. 291, 108 S.E.2d 86 (1959); Cummings v. Tweed 195 S.C. 173, 10 S.E.2d 322 (1940); State v. McIntosh 94 S.C. 439, 78 S.E. 327 (1913).

In Strickland v. Washington 104 S.Ct. 2052, the United States Supreme Court articulated "the appropriate test for prejudice" as follows: The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the trial would have been different. A reasonable probability in turn that was defined as a probability sufficient to under mine the confidence in the out come. A defendant need not show that counsel's deficient conduct more likely than not altered the out come of the case. The Court found this out come a determinative standard imposed too heavy a burden on the defendant and that it's use was not appropriate. Instead, the question is whether there is a reasonable probability that,

absent the errors, the fact finders would have had a reasonable doubt respecting guilt.

Petitioner contends the evidence of the statements not being in evidence for the Jury, denied Petitioner his right to a fair trial, such as it was clear that the statements were a very critical and pivotal point in the trial.

For the aforementioned reasons, this Petitioner will forever pray that this Court will grant the requested relief of a new trial.

ISSUE (B) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT WHEN THE TRIAL COURT IMPERMISSIBLY COMMENTED UPON THE FACTS OF PETITIONER'S CASE DURING HIS CHARGE TO THE JURY?

FACTS

Petitioner contends that Counsel was ineffective for failing to object to the Trial Court's charge when the Trial Court used hypothetical examples specifically relating to the State's theory as well as directly relating to Petitioner's case in its definition of malice, which clearly constituted prejudicial error by creating an impermissible comment on the facts of Petitioner's case.

The State's theory of the case was that the victim Homer Johnson previously had stolen Petitioner's car and allegedly obtained money and or drugs which were believed to be in Petitioner's car. The State tried to present the theory that Petitioner had [allegedly] waited in a wooded area distantly from Motel 8 where Homer Johnson was shot and killed on the day in question because of the aforementioned incident.

After the State's closing summation the Trial Court gave the following charge as was recorded:

NOW THE STATUTE SAYS THAT MALICE..[Tr.p.554, L.25]...MUST BE AFORETHOUGHT. A FORETHOUGHT LADIES AND GENTLEMEN, SIMPLY MEANS DELIBERATE OR PLANNED. [Tr.p.556, L.1-2].

NOW THE STATUTE SAYS MALICE MAY BE EXPRESSED OR THAT IT MAY BE IMPLIED. EXPRESSED MALICE, LADIES AND GENTLEMEN, MEANS THERE IS SOME DIRECT PROOF OF MALICE. AS FOR EXAMPLE WHERE A PERSON BY WORD OF MOUTH STATES HIS HATRED OR ILL-WILL FOR ANOTHER OR WHERE THERE'S EVIDENCE OF PREVIOUS THREATS, OR MAKING PLANS TO TAKE A HUMAN LIFE THOSE ARE EXAMPLES OF EXPRESSED MALICE. NOW IMPLIED MALICE, ON THE OTHER HAND, MAY BE SHOWN FROM FACTS AND CIRCUMSTANCES SURROUNDING AN INCIDENT OR AN EVENT. [Tr.p.556, L.9-18]

MALICE MAY BE MANIFESTED BY THE IMPLICATION FROM THE FACTS AND CIRCUMSTANCES SURROUNDING A TRANSACTION OR AN EVENT. FOR EXAMPLE, OUR LAW SAYS THAT IF ONE KILLS ANOTHER WITH THE USE OF A DEADLY WEAPON THEN YOU MAY INFER THAT...[Tr.p.556, L.22-25]...MALICE IS THERE. IN OTHER WORDS, LADIES AND GENTLEMEN, YOU MAY INFER MALICE FROM THE USE OF A DEADLY WEAPON. [Tr.p.557, L.1-2].

DISCUSSION

As was seen in the infra the Trial Court cited several [examples] of circumstances that might constitute malice..."all" which directly related the facts of Petitioner's case. These instructions created, in effect, an impermissible judicial comment on the facts of the case.

Judicial comments on the facts of a case is prohibited in South Carolina. (See S.C. Constitution Art. V, §17) "A trial judge may not instruct a jury regarding what evidence should be given certain evidence or even that certain evidence is or is not entitled to consideration from them.

As the South Carolina Supreme Court said in State v. Hartley

414 S.E.2d 182, at 183

A JUDGE SHALL NOT CHARGE IN RESPECT TO MATTERS OF FACTS, BUT SHALL DECLARE THE LAW. State v. Bagwell 23 S.E.2d 244 (1942)(A JUDGE CANNOT EXPRESS IN HIS CHARGE, OR INTIMATE ANY OPINION AS TO THE WEIGHT OR SUFFICIENCY OF TESTIMONY WITHOUT VIOLATING THE PROHIBITION OF THE CONSTITUTION AS TO CHARGING UPON THE FACTS). 75 Am.Jur.2d Trial §1203 at 693 (1991)(THE TRIAL COURT MAY NOT INSTRUCT THE JURY WHAT WEIGHT SHOULD BE GIVEN [TO THE EVIDENCE], OR EVEN THAT ANY PARTICULAR EVIDENCE IS OR IS NOT ENTITLED TO RECEIVE WEIGHT OR CONSIDERATION FROM THEM). State v. Edwards 120 S.E. 490 (1923)(WHEREIN OUR SUPREME COURT HELD THE ABSENCE OF MOTIVE IS A MERE CIRCUMSTANCE TO BE CONSIDERED BY THE JURY AND REJECTED AN INSTRUCTION THAT THE ABSENCE OF MOTIVE MAY RAISE A REASONABLE DOUBT AS TO THE DEFENDANT'S GUILT BECAUSE IT WAS A CHARGE ON THE FACTS).

In the case at bar the Trial Court's definition of malice included examples which concurred with the State's articulated theory of malice. The Court's examples of malice all reflected the facts of the case and reiterated points stressed in the State's case and closing argument.

The combination between the State's closing and the Court's examples would lead a reasonable juror to assume that malice corresponded precisely to the State's allegations against Petitioner. This charge coming directly after the State's closing argument only reiterated the facts as put forth by the Prosecution, to where the malice charge could reasonably be interpreted as a judicial endorsement of the Prosecution's argument and case.

The Trial Court's examples would lead a reasonable juror to assume that this was broad, and multi-faceted with only a

tangible application to Petitioner. These examples strongly implied that the facts of the case perfectly supported a finding of malice.

Proving malice was central to the State's case against Petitioner. Since the Court's charge impermissibly skewed the Jury's consideration of facts regarding this issue, Petitioner was not prejudiced by the error and Counsel was ineffective for failing to object to the improper jury instructions given by the Court.

Petitioner further contends that his due process rights to a fair trial were violated by the comments of the Trial Court. For through the doctrine of substantive due process, all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. Whitney v. California 47 S.Ct. 641 (1947).

The threshold question is whether the comments by the Trial Court were sufficiently conscience-shocking as to implicate substantive due process protections. Petitioner contends that they were. Because the Trial Court acted intentionally, for the purposes that only served the Prosecution.

Here the issue asserted is one protected by the due process clause, when its violation served a compelling interest, which amounted to an abuse of power sufficient to shock the judicial conscience. County of Sacramento 118 S.Ct. at 1717-18.

Petitioner contends that the direct comments by the Trial Court were a direct violation of his rights to a fair trial, and that the only purpose served by this was to direct a verdict

for the State. That Counsel was ineffective for failing to object and at least ask the Trial Court for a curative instruction. Here Counsel's failure to preserve meritorious issues for appeal fell below the objective standard of reasonableness and amounted to a deficient performance. As there is a reasonable probability that but for this deficiency the results of the trial would have been different.

Counsel's failure to object did amount to a deficient performance, as there is a probability that but for this deficiency the results of the trial, and the appeal would have been different, surely this deficiency undermines the confidence in the outcome. For the aforementioned reasons Petitioner will forever pray the this Court will grant the requested relief of a new trial.

ISSUE (C) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S CHARGE THAT USED CONFUSING LANGUAGE AND IMPERMISSIBLY DIRECTED A VERDICT FOR THE STATE?

FACTS

After the State presented it's case in chief and the Defense rested, Petitioner's Counsel engaged in the following colloquy with the Trial Court, as recorded:

MR. SUMNER: YOUR, HONOR, COULD I ASK IF THERE'S A SHORT REPLY CASE DO YOU ANTICIPATE US GOING DIRECTLY INTO CLOSING?

THE COURT: YEAH.

MR. SUMNER: OKAY, ANY UNUSUAL I GUESS, CHARGE ISSUES OR IS THERE ANYTHING IN PARTICULAR----

THE COURT: I'M GOING TO CHARGE----

MR. SUMNER: IT'S MOSTLY FOR MY BENEFIT. I'M JUST TRYING---

THE COURT: WELL, OF COURSE THE GENERAL CHARGE.

MR. SUMNER: YES, SIR.

THE COURT: TRAFFICKING CONCAINE, CARRYING AN UNLAWFUL WEAPON, POSSESSION OF A WEAPON WITH A VIOLENT CRIME...[Tr.p.498, L.12-25]...CHARGE THAT I HAVE HERE TALKS ABOUT--HAS LANGUAGE TO THE EFFECT OF WHERE TWO INFERENCES CAN BE DRAWN FROM THE SAME FACT, ONE CONSISTENT WITH GUILT AND ONE CONSISTENT WITH INNOCENCE. WELL, I GUESS THE LANGUAGE OF--AT THE SAME TIME--ALL THE CIRCUMSTANCES PROVED MUST BE CONSISTENT WITH THE THEORY THAT THE DEFENDANT IS GUILTY AT THE SAME TIME INCONSISTENT WITH THE THEORY THAT HE IS INNOCENT WITH EVERY OTHER REASONABLE THEORY EXCEPT THAT OF GUILT. I GUESS THAT LANGUAGE IS THE LANGUAGE THAT I WOULD OBJECT TO. [Tr.p.510, L.1-9].

As is seen from the above the Trial Court has discussed the language of the charge he intended to give, yet as is seen in bold, the Trial Court has explicitly told Petitioner's attorney that he [the trial court] would object to the very type language the Trial Court was about to give. Directly after this colloquy the following charge was recorded..."without objection" from Counsel. as recorded

IN ORDER TO SUSTAIN A CONVICTION ON CIRCUMSTANTIAL EVIDENCE ALL OF THE CIRCUMSTANCES PROVED MUST BE CONSISTENT WITH THE THEORY THAT THIS DEFENDANT IS GUILTY AND AT THE SAME TIME INCONSISTENT WITH THE THEORY THAT HE IS INNOCENT AND WITH EVERY OTHER REASONABLE THEORY EXCEPT THAT OF GUILT.

NOW, LADIES AND GENTLEMEN, WITH RESPECT TO CIRCUMSTANTIAL EVIDENCE, I CHARGE YOU THAT A DEFENDANT IS ENTITLED TO EVERY INFERENCE IN HIS FAVOR THAT CAN BE DRAWN FROM THE EVIDENCE. AND WHERE TWO INFERENCES CAN BE DRAWN FROM THE SAME FACT, ONE CONSISTENT WITH GUILT AND ONE CONSISTENT WITH INNOCENCE, THEN THE DEFENDANT IS ENTITLED TO THE INFERENCE THAT IS CONSISTENT WITH INNOCENCE...[Tr.p.565, L.13-25]

IN SHORT LADIES AND GENTLEMEN, IF ALL NATURAL CIRCUMSTANCES AND EVIDENCE IN THIS CASE POINT TO GUILT AND EXCLUDE EVERY REASONABLE THEORY EXCEPT THAT OF GUILT A CONVICTION WOULD BE WARRANTED. [TR.p.566, L.1-4].

It is clearly seen, the Trial Court immediately gave the parroting language and charge that the Trial Court said should be objected too, yet Counsel does nothing other than remain silent and bootstrap Petitioner into a directed verdict of guilty. as will be seen from the colloquy that will be seen infra, as recorded:

THE COURT: YOU'VE SENT IN THIS STATEMENT. WE HAVE CONSIDERED THE EVIDENCE AND ARE UNABLE TO COME TO A UNANIMOUS DECISION ON ONE OF THE CHARGES. PLEASE ADVISE. CAN YOU PLEASE GO OVER THE RULES OF REASONABLE DOUBT AND CIRCUMSTANTIAL EVIDENCE? [Tr.p.575, L.4-8].

BUT, TO SUSTAIN A CONVICTION ON CIRCUMSTANTIAL EVIDENCE ALL THE CIRCUMSTANCES PROVED MUST BE CONSISTENT WITH THE THEORY THAT THE DEFENDANT IS GUILTY AND AT THE SAME TIME INCONSISTENT WITH THE THEORY THAT HE IS INNOCENT AND WITH EVERY OTHER REASONABLE THEORY EXCEPT THAT OF GUILT. WHERE TWO INFERENCES CAN BE DRAWN FROM THE SAME FACT, ONE CONSISTENT WITH GUILT AND ONE CONSISTENT WITH INNOCENCE, A DEFENDANT IS ENTITLED TO THE INFERENCE THAT IS CONSISTENT WITH HIS INNOCENCE. IN SHORT, LADIES AND GENTLEMEN, I AGAIN TELL YOU THAT IF ALL NATURAL CIRCUMSTANCES AND EVIDENCE IN THIS CASE POINT TO GUILT AND EXCLUDE EVERY REASONABLE THEORY EXCEPT THAT OF GUILT A CONVICTION WOULD BE WARRANTED. [Tr.p.579, L.10-21].

DISCUSSION

Petitioner contends that he was denied the effective assistance of trial counsel when Counsel utterly failed to object to the very language the Trial Court said "should be objected too". That in itself deserves emphasis, yet this is also a pivotal point for the Trial Court was in error as well. To state that you [the trial court] would object to a specific charge because of the language used and then turn around and give the very charge and language deserves the greatest emphasis as well.

In each case a balancing process [must] be employed to determine whether the trial judge's comments have pervaded the overall fairness of the proceedings. The balance is adversely tipped against the defendant in a criminal trial where the judges

role loses its color of neutrality and tends to accentuate and emphasize the prosecution's case. See United States v. Hickman 592 F.2d 931, 934-35 (6th Cir.); United States v. Sheldon 544 F.2d 213, 218 (5th Cir.), United States v. Hill 332 F.2d 105 (7th Cir.) A judge's slightest indication that he favors the government's case can have an immeasurable effect upon the jury. See Hickman (supra) also see United States v. Karnes 531 F.2d 214, 216-217 (4th Cir.).

In the instant case it is apparently clear from the colloquy that took place before the Trial Court gave the Jury the confusing, complained of instructions simply because in giving the instructions directly after the Trial Court said the language should be objected to clearly establishes the fact that the Trial Court stacked the deck against Petitioner so as to make the trial and resulting conviction a denial of due process.

Surely Counsel should have objected just as the Trial Court had instructed. As Strickland explains, the range of reasonable professional judgments is wide and courts must take care to avoid legitimate second-guessing of counsel's strategic decisions from the superior vantage point of hindsight. 466 U.S. at 689, 104 S.Ct. at 2065. In the instant case, this clearly cannot be considered tactical nor hindsight because the Trial Court said "this is the language I'd object to" [Tr.p.510, L.1-9] from the onset, so surely counsel cannot call this strategic.

The United States Supreme Court certainly did not intend the Strickland analysis to be a total barrier to relief. Id at 1391.

Where deficiencies in counsels performance are severe and cannot be characterized as the product of strategic judgement, ineffectiveness may be clear, such as is seen in the instant case. Thus, it cannot be said that Counsel abandoned Petitioner a very critical stage of the proceeding. From a stringent review of the language used it is clearly seen that the confusing language contributed to the verdict, especially since a short time after beginning to deliberate the Jury shortly returned and asked to be recharged on circumstantial evidence and the Trial Court "again gave the same" language. Counsel should have objected and preserved this meritorious issue for appellate review. There is no way of telling just how a reasonable juror may have interpreted the language. The only conclusion that can be reached is the language was very confusing and one can only assume the Jury was confused as well.

It is well settled in this circuit by case law that the charge of the Court must be taken as a whole in its entirety when considering its import upon the jurors. Dyke v. State 232 Ga. 817, 209 S.E.2d 166 (1974). As well the Fourth Circuit Court of Appeals held that in considering the unconstitutionality of a challenged jury instruction the reviewing court must consider the single jury instruction in the context of the overall charge. Gore v. Leeke 605 F.2d 741, 743 (4th Cir.).

The Fourth Circuit also stated that to receive relief a petitioner must show the ailing instruction by itself so infected the entire trial that the resulting conviction violates due

process. Cooper v. North Carolina 702 F.2d 481, 483-84 (4th Cir.).

In the instant case it could not be said any clearer than it was said by the Trial Court from the colloquy that was recorded before the charge was given....."I guess that language is the language that I would object to"...The Trial Court by this statement alone has established the prejudice incurred and Petitioner will forever pray that, for this violation of Petitioner's rights that this Court will grant the requested relief of a new trial.

ISSUE (D) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S ALLEN CHARGE THAT WAS COERCIVE AND ERRONEOUS, THUS RENDERING THE TRIAL COURT'S CHARGE UNCONSTITUTIONAL?

FACTS

Petitioner contends that Counsel should have objected to the Trial Court's [ALLEN] charge that was coercive and directed a verdict for the State. The Allen charge was given as was recorded:

THE COURT: MR. FOREMAN, YOU'VE SENT IN THIS STATEMENT. WE HAVE CONSIDERED THE EVIDENCE AND ARE UNABLE TO COME TO A UNANIMOUS DECISION ON ONE OF THE CHARGES. PLEASE ADVISE. CAN YOU PLEASE GO OVER THE RULES OF REASONABLE DOUBT AND CIRCUMSTANTIAL EVIDENCE. I WILL GO OVER THE RULES OF REASONABLE DOUBT AND CIRCUMSTANTIAL EVIDENCE IN A FEW MINUTES. I HAVE SOME OTHER REMARKS TO MAKE TO YOU BEFORE DOING THAT.

LADIES AND GENTLEMEN, THE ONLY MODE OR THE ONLY METHOD PROVIDED BY OUR LAWS FOR DECIDING QUESTIONS OF FACTS IS BY THE VERDICT OF THE JURY. IN MOST ALL CASES THAT WE TRY ABSOLUTE CERTAINTY CANNOT BE OBTAINED OR EVEN EXPECTED. AND WHEN A MATTER IS IN DISPUTE IT IS---IT ISN'T ALWAYS EASY FOR EVEN TWO PEOPLE TO AGREE. INDEED THE PARTIES TO THIS CASE HAVE NOT BEEN ABLE TO AGREE. SO WHEN TWELVE PEOPLE MUST AGREE AS YOU ARE REQUIRED TO DO IT IS VERY UNUSUAL FOR A JURY TO GO OUT AND TO IMMEDIATELY OR QUICKLY RETURN WITH A VERDICT. THAT OF COURSE, IS WHAT WOULD HAPPEN IF THE JURY WERE IN AGREEMENT TO BEGIN WITH. BUT I TELL YOU AT THE SAME TIME WE USUALLY GET A VERDICT IN THE CASES THAT WE TRY.

SO WHILE IT IS NORMAL FOR A JURY TO DISAGREE AT FIRST WE NEVERTHELESS GET A VERDICT AFTER THE JURY HAS LAID ASIDE..[Tr.p.575, L.4-25]..ALL EXTRANEIOUS AND OUTSIDE MATTERS AND HAS DETERMINED TO TRY THE CASE BASED ON IT'S MERITS AND ON THE BASIS OF THE LAW, AND THE EVIDENCE, ANT THE TESTIMONY PRESENTED IN THE CASE.

LADIES AND GENTLEMEN, IT'S BEEN SAID THAT THE

The Fourth Circuit also stated that to receive relief a petitioner must show the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. Cooper v. North Carolina 702 F.2d 481, 483-84 (4th Cir.).

There are, it's true, other types of constitutional error, unrelated to racial discrimination, that The United States Supreme Court has said cannot be overlooked on grounds of harmlessness. These include actual bias by the judge, and denial of assistance of counsel as distinct from denial of the right to the effective assistance of counsel. Sullivan v. Louisiana 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993).

Such cases involve denial of the most fundamental constituents of due process---so fundamental that conviction in their absence is indecent even if the defendant is plainly guilty. The Constitution requires "unless a defendant waives his rights" a certain modicum of adversary procedure even if the outcome is a foregoing conclusion because evidence is overwhelming. Walberg v. Israel 766 F.2d 1071, 1074 (7th Cir. 1985). The right to a judge who is free from the mere appearance of partiality is not part of due process at all, let alone a fundamental part. Tyson v. Trigg 50 F.3d at 442.

In turning to the case at bar, a trial judge has a duty to urge, but not coerce a jury to reach a verdict. Green v. State Op.No. 25515, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002).

An ALLEN charge cannot be directed to the minority voters on the jury panel, but instead must be even handed, directing both

the minority and the majority to consider the other views. Id.

Whether the ALLEN charge is unconstitutionally coercive must be judged "in it's context under all the circumstances". Tucker v. Catoe 346 S.C. 483, 491, 552 S.E.2d 712, 716 (2001) citing Lowenfield v. Phelps 484 U.S. 231, 237, 108 S.Ct. 546, 550, 98 L.Ed.2d 568, 577. The Tucker Court considered various factors to determine whether the given ALLEN charge was unconstitutionally coercive. One factor addressed whether the trial court inquired into the jury's numerical division; another considered whether the charge spoke to the minority jurors. In the instant case a stringent review of the charge clearly reveals the latter. The underlined/bold (supra) is replete in the sense that it is not only a coercive charge but that it also[]....Directed a verdict for the State.

Under the circumstances of this case it was clear that the Jury had already told the Judge that in considering the evidence presented by the State they (the jury) were unable to come to unanimous verdict on [one] of the charges. The underlined in the charge clearly was coercive, especially due to the nature of the language used by the Trial Court that surely led the Jurors to perceive this charge as one directing the charge toward the minority Jurors.

This was clearly improper under applicable United States Supreme Court precedent. LowenField v. Phelps 484 U.S. 221, 239, 108 S.Ct. 546, 552, quoting Brasfield v. U.S. 272 U.S. 448, 450, 47 S.Ct. 135, 136, 71 L.Ed 345, 346.

JURY SERVICE IS PERHAPS THE HIGHEST SERVICE A CITIZEN CAN PERFORM FOR HIS COUNTRY OR STATE DURING PEACETIME. AND I CERTAINLY AGREE WITH THAT. HOWEVER, I TELL YOU THAT A JUROR DOES NOT RENDER GOOD SERVICE WHO ARBITRARILY SAYS I KNOW WHAT I WANT TO DO IN THIS CASE AND IF AND WHEN EVERYBODY AGREES WITH ME WE'LL WRITE A VERDICT, AND WILL NOT WRITE A VERDICT UNTIL THAT TIME.

LADIES AND GENTLEMEN, IT WAS NEVER INTENDED THAT THE VERDICT OF THE JURY SHOULD BE THE VIEW OF ANY ONE PERSON. AT THE SAME TIME I TELL YOU THAT EVERY JUROR HAS A RIGHT TO HIS OR HER OWN OPINION. AND HE OR SHE NEED NOT GIVE IT UP MERELY FOR THE PURPOSE OF TAKING A VERDICT. HOWEVER, THE VERDICT OF THE JURY IS A COLLECTIVE REASONING OF ALL TWELVE JURORS. AND OF COURSE, THAT'S WHY WE HAVE A JURY.

SO I TELL YOU IT IS THE DUTY OF EACH OF YOU TO TELL THE OTHERS HOW YOU FEEL AND WHY YOU FEEL THAT WAY. HOWEVER, I TELL YOU THAT IF THE LARGER NUMBER OF YOUR PANEL ARE IN FAVOR OF ONE VERDICT, ONE PARTICULAR VERDICT, THEN A DISSENTING JUROR OR JURORS SHOULD CONSIDER WHETHER HIS OR HER POSITION OR POSITIONS IS A REASONABLE ONE WHICH MAKES NO IMPRESSION UPON THE MINDS OF THE MAJORITY. [Tr.p.576, L.1-25].

IN OTHER WORDS, IF A MAJORITY OF YOU ARE FOR ONE VERDICT, THEN THE MINORITY OUGHT TO SERIOUSLY ASK THEMSELVES WHETHER THEY CAN REASONABLY DOUBT THE CORRECTNESS AND THE JUDGEMENT OF THE MAJORITY. [Tr.p.577, L.1-4].

DISCUSSION

It is well settled by case law that the charge of the Court must be taken in it's entirety when considering it's impact upon the jurors. Dyke v. State 232 Ga. 817, 209 S.E.2d 166 (1974. As well the United States Supreme Court of Appeals for the Fourth Circuit held that in considering the constitutionality of a challenged instruction the reviewing court must consider the single jury instruction in the context of the overall charge. Gore v. Leeke 605 F.2d 741, 743 (4th Cir.).

In Smalls v. Batista 191 F.3d 272 (2nd Cir.1999) the petitioner was able to obtain relief in a habeas action because of an erroneous jury instruction "parroting" the language used in the instant case. In Smalls v. Batista (supra) The Court submitted an ALLEN charge to a deadlocked jury. The charge was defective because it failed to emphasis the necessity of remaining firm in each jurors own beliefs. The Court held the instruction was both contrary to and an unreasonable application of clearly established federal law and granted relief.

Petitioner contends that Counsel was clearly ineffective for failing to object to this unconstitutional charge and at least preserving this very meritorious issue for appellate review. Although it may not have stopped the jury from convicting due to the Trial Court already ringing the bell, it would have at least been preserve as an issue for appeal and there is surely a strong possibility that the out come of the appeal would have been different.

Petitioner contends that his Sixth Amendment right to the effective assistance of trial counsel was violated when counsel failed to object the erroneous Allen charge, and as a result of Counsel's deficient performance Petitioner was denied his Fourteenth Amendment right to due process of law, that is protected under the due process clause of the Fourteenth Amendment.

For the aforementioned Petitioner will forever pray that this Court will grant the requested relief of a new trial.

CONCLUSION

WHEREFORE, Petitioner believes that through the issues presented and citations of authorities relied on that he has shown unto this Court that his Constitutional Rights, specifically his Sixth and Fourteenth Amendments were violated at trial, and further that he has also established his burden of showing his entitlement to the requested relief state herein.

THEREFORE, Petitioner will forever pray that this Court will grant the requested relief of a new trial.

Respectfully Submitted,

/s/ Russell Rice

Russell Rice #301294

IN THE STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

INDICT.NO.03-GS-23-3612; 3614; 3615, and 8779CERTIFICATE OF SERVICE

I, Russell Rice, do hereby swear under the penalty of perjury that I mailed the Original and one (1) copy of the enclosed Post Conviction Relief Application and Memorandum of Law in Support to the Clerk of Court for Greenville County. This was done by placing the aforesaid in a properly addressed, sufficient postage affixed envelope and placed in the U.S. Mailroom here at Lieber Correctional Institution, in Ridgeville, South Carolina 29472.

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 22 DAY OF May, 2008*[Signature]*

NOTARY PUBLIC

MY COMM. EXPIRES

8/20/2016

Respectfully Submitted,

/s/

Russell Rice

Russell Rice #301294

Pro-se Petitioner

Lieber Corr. Inst.

P.O. Box 205

Ridgeville, SC. 29472

STATE OF SOUTH CAROLINA)

VERIFICATION

COUNTY OF DORCHESTER)

I, RUSSELL RICE, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Russell Rice

Sworn to and subscribed before me

This 22 day of May, 2008

Yvette Blum L.S.
Notary Public for South Carolina

My Commission Expires 8/20/2016

CLERK OF COURT
JAMES H. LEWIS
JUNIOR
DORCHESTER COUNTY, S.C.

2008 MAY 28 A 11:45

**APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, RUSSELL RICE, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

Russell Rice
Applicant

Sworn to and subscribed before me

This 22 day of May, 2008

Yvette Blum L.S.
Notary Public for South Carolina

My Commission Expires: 8/20/2016

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMONS PLEAS
CASE NO: 2008-CP-23-3945

RUSSELL W. RICE, JR.,)
SCDC # 301294)
Applicant,)

AMENDMENTS TO
POST CONVICTION
RELIEF APPLICATIONS

vs.)

THE STATE OF SOUTH CAROLINA,)
Respondent)

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
JAN 2 2009

2008 DEC -4 A 9:39

The applicant hereby amends answers to number 9 and number 10 of his Application for Post-Conviction Relief to state the following:

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(A) The Applicant was denied effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of The South Carolina Constitution.

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) The applicant was provided with deficient representation by his attorney, in that the conduct of his attorney was objectively unreasonable under the circumstances. Strickland v. Washington, 466 U.S. 668 (1984). The outcome of the applicant's proceeding was prejudiced, and it is reasonable probable that the outcome would have been different had counsel's performance not been deficient. Strickland, 466 U.S. at 694. Defense counsel was ineffective based on one or more of the following:

1. My defense attorney failed to conscientiously discharge his professional responsibilities while he was handling my case.
2. My defense attorney failed to effectively challenge the arrest and seizure of Applicant.
3. My defense attorney failed to act as my diligent, conscientious advocate.
4. My defense attorney failed to give me his complete loyalty.
5. My defense attorney did not have my best interest in mind while he was supposed to be investigating and preparing my case.
6. My defense attorney failed to serve my cause in good faith.
7. My defense attorney neglected the necessary investigations and the preparation of my case.
8. My defense attorney did not do the necessary factual investigations on my behalf.
9. My defense attorney did not do the necessary legal research.
10. My defense attorney did not conscientiously gather any information to protect my rights.
11. My defense attorney did not try to have my case settled in a matter that would have been to my best advantage.
12. My defense attorney did not advise me of all my rights or take any of the actions that were necessary to protect preserve them; knowing that I was not versed in the law.
13. My defense attorney, knowing I was illiterate in the law, never properly ascertained whether or not I actually understood or comprehended all of the issues that were involved in my case.
14. My defense attorney never properly consulted with me or kept me informed with what was going on as far as my case was concerned.

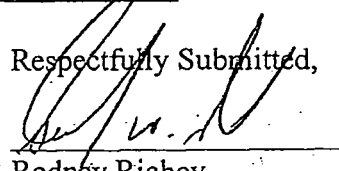
15. My defense attorney never explained to me or discussed with me any of the elements of the crime charged.
16. My defense attorney never made any attempt to ascertain whether or not I actually knew what the elements for the crime charged were or whether or not I understood exactly what the term "criminal" element" actually meant.
17. My defense attorney never explained to me or discussed with me how the elements of the crime charge and the evidence that the prosecution planned to introduce into evidence against me related to one another and did not discuss how the sentencing would be done especially as it related to the elements of the crime as in State V. Boyd.
18. My defense attorney never informed me of any of the defenses that were available to me.
19. My defense attorney never intended to offer any defense to the court on my behalf.
20. My defense attorney never explained to me or discussed with me any kind of defense strategy.
21. My defense attorney never explained to me or discussed with me any of the tactical choices that they either made or were planning to make.
22. My defense attorney dictated to me exactly how my case was going to be handled and offered no alternative options.
23. My defense attorney failed to properly acquaint themselves with the law and the facts surrounding my case and as a direct result of their intentional negligence, there was a very serious error in their assessment of both the law and the facts.
24. Because of my defense attorney's gross neglect and his many legal errors no defense at all was put in issue for me during the Court proceedings.
25. My defense attorney did not subject the prosecution's case to any adversarial testing.

26. My defense attorney failed to oppose the prosecution's case with any adversarial litigation.
27. My defense attorney failed to function as the government's adversary in any sense of the word.
28. My defense attorney failed to pursue any of the legal recourse that were available to him.
29. The attorney that represented me on this charge in Court failed to function as the counsel that the Constitution's Sixth Amendment Guarantees.
30. My defense attorney failed to call alibi witnesses on my behalf which would have proven my innocence.
31. My defense attorney failed to appeal my case after I was convicted when I wanted to appeal.

His counsel's representation was not within the range and scope of competence demanded by Strickland and its progeny.

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction requires that the defendant show first, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Sosebee v. Leeke, S.C. 362, F. 2nd 221 (1987), citing Strickland v. Washington 46 S.E.2D. 813 (1984), See also Butler v. State 286 S.C. 441, 334 S.E. 2d 813 (1985), also, Hill v. Lockhart 474 U.S. 88 (1985).

Respectfully Submitted,


Rodney Richey
Richey and Richey, P.A.
Post Office Box 10916
Greenville, South Carolina 29603
Attorney for the Applicant

November 29 2008

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
)
 RUSSELL W. RICE, JR.,)
 SCDC#301294)
)
 vs.)
)
 THE STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMONS PLEAS
 CASE NO: 2008-CP-23-3945

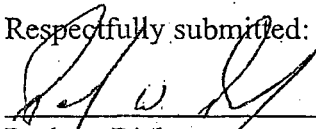
AFFIDAVIT OF SERVICE

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 JAMES WICKENS JR.

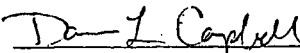
2008 DEC -4 A 9:39

I certify that I have served the Amendment to PCR Application on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on November 24, 2008, addressed to their attorney of record, Karen Ratigan, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Respectfully submitted:


 Rodney Richey
 Richey and Richey, P.A.
 Post Office Box 10916
 Greenville, South Carolina 29603
 Attorney for the Applicant

Sworn to before me this 24th day of
 November, 2008.


 Notary Public of South Carolina
 My Commission Expires: 7/15/2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2008-CP-23-3945
COUNTY OF GREENVILLE	)	
	)	
Russell W. Rice, Jr.,	)	
S.C.D.C. No. 301294,	)	
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

In response to the post-conviction relief application filed May 28, 2008, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the May 2003 term of General Sessions for trafficking cocaine (2003-GS-23-3612), unlawful carrying of a pistol (2003-GS-23-3614), and murder (2003-GS-23-3615) and at the December 2003 term for possession of a weapon during commission of a violent crime (2003-GS-23-8779). Steven W. Sumner, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On April 15, 2004, the Honorable C. Victor Pyle, Jr. sentenced the Applicant to concurrent terms of twenty-five (25) years for trafficking cocaine, one (1) year for unlawful carrying of a pistol, life imprisonment without parole for murder, and five (5) years for possession of a weapon during commission of a violent crime.

A notice of appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences on April 24, 2006. State v. Rice, 368 S.C. 610, 629 S.E.2d 393 (Ct. App. 2006). The South Carolina Supreme Court denied the Applicant's subsequent petition for writ of certiorari by order dated October 18, 2007.

Attached herewith and incorporated herein by reference are the records of the Greenville County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

II.

In his application for post-conviction relief the Applicant alleges he is being held in custody unlawfully for the following reason:

1. Ineffective assistance of trial counsel:
 - a. Failed to introduce John Hamby's three inconsistent statements into evidence.
 - b. Failed to object when the trial court impermissibly commented upon the facts of the case during the jury charge.
 - c. Failed to object to the trial court's charge that used confusing language and impermissibly directed a verdict for the State.
 - d. Failed to object to the trial court's Allen charge that was coercive and erroneous.

III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a criminal defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland

v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The Respondent denies each allegation not expressly admitted, qualified or explained.

V.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

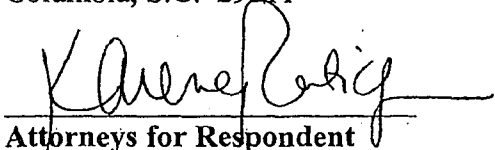
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

KAREN C. RATIGAN
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for Respondent

August 27, 2008

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

2008-CP-23-3945

RUSSELL W. RICE, JR., 301294

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

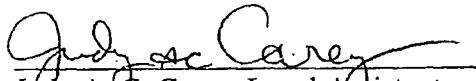
STATE OF SOUTH CAROLINA,

Respondent.

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Russell Rice, 301294
Lieber Correctional Institution
Post Office Box 205
Ridgeville SC 29472**

DATED this 27th day of August, 2008.


Judy A. C. Carey, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)

IN THE COURT OF COMMONS PLEAS
 CASE NO: 2008-CP-23-3945

RUSSELL W. RICE, JR.,)
)
 SCDC#301294)

ORDER
 (Granting Discovery)

vs.)

THE STATE OF SOUTH CAROLINA)
 _____)

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENSHER
 2009 NOV -4 P 2:01

This matter comes before the Court on a motion by the applicant's attorney, Rodney Richey. The Applicant was convicted of murder in Greenville County. The Applicant was alleged to have shot and killed the victim. Pursuant to his conviction, the Applicant filed this application for Post Conviction Relief. The Applicant's motion requests the Court to allow him discovery in this matter. The Applicant requests this Court to allow him to test the firearm that the State alleged was used in the killing.

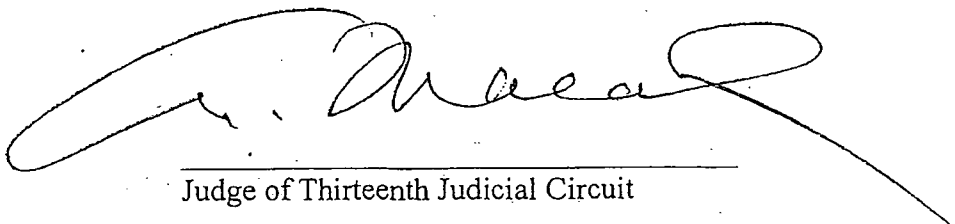
Present in the courtroom was the Applicant and his attorney, Rodney Richey. The State was represented by Karen Ratigan of the South Carolina Attorney General's Office and Mark Moyer of the Greenville County Solicitor's Office. Counsel for the Applicant and Counsel for the State, Mark Moyer, made arguments to the Court.

After the Court's review of the file, the arguments by the Applicant's counsel and Mr. Moyer from the Solicitor's Office, the Court finds the following.

1. The Applicant is granted an order of discovery;
2. The alleged gun that was used during the killing is still available;
3. Kelly Fite shall be the expert used to testify and test the firearm;

4. The firearm must be tested in Greenville County Law Enforcement Center if the facility allows for the testing of firearms.

WHEREFORE IT IS ORDERED!



Judge of Thirteenth Judicial Circuit

Dated: October 24, 2009
Walhalla, South Carolina

A Certified Copy
Paul B. Winkens
Clerk of Court C.P. & G.S.
Greenville County, SC
Dated 11/4/09

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

COURT OF COMMON PLEAS

2008-CP-23-03945

RUSSELL W. RICE, JR.)

APPLICANT)

vs.)

STATE OF SOUTH CAROLINA)

RESPONDENT)

ORIGINAL

TRANSCRIPT OF RECORD

November 15, 2010

Greenville, South Carolina

B E F O R E:

THE HONORABLE ROBIN B. STILWELL, Judge.

A P P E A R A N C E S:

RODNEY RICHEY, ESQ.

Attorney for the Applicant

KAREN C. RATIGAN, ESQ.

Attorney for the Respondent

APRIL HERRON

Official Court Reporter

INDEX OF WITNESSES

RUSSELL RICE

Direct By Mr. Richey 7

STEVE SUMNER

Direct By Mr. Richey 16

Cross By Ms. Ratigan 20

BEVERLY RICE

Direct By Mr. Richey 24

» > o < «

Certificate of Reporter 27

PLAINTIFF EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
1	Statements	15	16

1 THE COURT: Good morning, Gentlemen, how y'all
2 doing today? Good.

3 I got, Mr. Rice. Okay.

4 And Mr. Cureton. Okay.

5 And Mr. Rucker.

6 And Mr. Bradley, is that correct?

7 Good, I hope y'all are doing well today and
8 welcome. I know that you know the reason why you're here
9 because, obviously, you filed a Post-Conviction Relief
10 Application. And the purpose of me bringing you in and
11 talking to you is just to advise you of something
12 important that you may or may not know. But it really
13 does -- it really is important that I tell you before we
14 get started. In your Post-Conviction Relief Application,
15 essentially what you're asking is that the underlying
16 charge and or conviction be overturned. In most instances
17 for ineffective assistance of counsel or for some error
18 that may have occurred in the trial of your case.

19 Now, what you need to know is that if I grant
20 your application for post-conviction relief, what happens
21 is you're sent back to the county detention center and you
22 start over from square one. Meaning if you receive the
23 benefit of a plea negotiation, wherein charges were
24 reduced or you were given less than the maximum amount of
25 time allowable under the law, then you may not receive the

1 same benefit of that plea negotiation. And of that
2 reduction in your charge and or your sentence.

3 So let's just say hypothetical, for
4 illustration, that you were charged with assault and
5 battery with intent to kill. And you were allowed to
6 plead to or you were found guilty of a lesser included
7 offense of assault and battery of high and aggravated
8 nature. And as opposed to getting 20 years under the
9 statute, you received 20 years under the statute. Well,
10 if I grant your post-conviction relief, then it all goes
11 back and you just start over from scratch. So you would
12 be looking at the original charges. And you wouldn't have
13 the benefit of those plea negotiations and you wouldn't
14 have the benefit of a lesser included offense that may
15 have been included in the Judge's charge to the jury.
16 Okay.

17 I don't tell you that to dissuade you from going
18 forward. I'm perfectly content and happy to have you here
19 and hear your application. And I intend to do that. Very
20 deliberately. But I wanted to make sure that you were
21 advised of that so you'd know and you'd have your eyes
22 wide opened before you came in front of me. And you
23 didn't get something that actually, in the final analysis,
24 wasn't good for you. Okay. All right.

25 This is Russell Rice vs. State of South

1 Carolina, Post-Conviction Relief Application. Case No.
2 2008-CP-23-3945.

3 Ms. Ratigan, anything you need to put on the
4 record, ma'am, before we begin?

5 MS. RATIGAN: Yes, Your Honor, just a brief
6 procedural history. Mr. Rice was indicted for trafficking
7 cocaine, unlawful carrying of a pistol, murder and
8 possession of a weapon during a commission of a violent
9 crime. He was represented on these charges by Mr. Sumner.
10 He was brought to trial before Judge Pyle in April of
11 2004. The jury found him guilty of the charges as
12 indicted.

13 On April 15th, 2004, Judge Pyle levied
14 concurrent sentences of life for murder, 25 years for
15 trafficking cocaine, one year for possession of --
16 unlawful carrying of a pistol and five for possession of a
17 weapon during the commission of a violent crime. Mr. Rice
18 did file an appeal with the South Carolina Court of
19 Appeals. Those convictions and sentences were affirmed in
20 April of 2006. He filed a subsequent petition for Writ of
21 Certiorari in the Supreme Court. That petition was denied
22 in October of 2007. He filed a timely PCR application and
23 the State is ready to proceed.

24 THE COURT: All right, good enough.

25 Mr. Richey, you prepared to proceed, sir?

1 MR. RICHEY: We're ready to proceed, we call
2 Mr. Rice.

3 THE CLERK: Step up here, please. Place your
4 left hand on the Bible, raise your right hand.

5 RUSSELL RICE, after being duly sworn, testified
6 as follows:

7 THE CLERK: Thank you, you may be seated. State
8 your name for the record.

9 THE WITNESS: Russell William Rice, Jr.

10 DIRECT EXAMINATION

11 BY MR. RICHEY:

12 Q Mr. Rice, are you currently in South Carolina
13 Department of Corrections?

14 A Yes, sir.

15 Q What are you in there for?

16 A Life for murder, 25 years for cocaine and five years
17 for weapon, and a year for carrying a concealed
18 weapon.

19 Q Were you convicted in Greenville County?

20 A Yes, sir.

21 Q Okay. Who represented you on those charges?

22 A Mr. Sumner.

23 Q Did you plead guilty or did you have a jury trial?

24 A We had a jury trial.

25 Q Okay. And you were tried -- you had a jury for both

1 the drug charges and the murder?

2 A It was all together.

3 Q And you all made a motion to sever that but that was
4 denied, is that correct?

5 A That is correct.

6 Q And the Appeals Court -- y'all appealed that issue,
7 is that correct?

8 A That's correct.

9 Q And that was -- the issue that we're going to deal
10 with today is with the murder charge, isn't that
11 correct?

12 A Right.

13 Q The murder charge, the State alleged that you
14 basically killed this guy over not paying you for
15 drugs. I mean, that's a summarization of it. I know
16 it was a two or three day trial. But the gist of the
17 State's theory was that this guy stole your car and
18 basically you were retaliating against the guy. I
19 mean, that's kind of a real brief summary but that's
20 the gist of it, is that correct?

21 A That's my understanding of the State. And they sort
22 of mixed it with some confusion about we were -- when
23 he got murdered we were supposed to be doing some
24 sort of drug stuff as well. That never did really
25 come out very clear but there was some rhetoric of

1 that.

2 Q And at this case there was no direct eye witness that
3 you shot and killed this gentleman?

4 A No. No.

5 Q And basically this was a circumstantial evidence case
6 by the State, basically try to connect the dots, use
7 your phone records and testimony from other people to
8 prove that you were, in fact, the one that actually
9 did kill him; is that correct?

10 A Yes, that was my understanding.

11 Q Well you were at trial. There were no direct
12 evidence --

13 A No evidence at all. And they just basically had
14 testimony come in and then they claimed that gun was
15 involved somehow that was in my car--

16 Q We're going to get into that --

17 A Yes.

18 Q But I'm just saying there was no direct evidence
19 meaning the State had to put together the pieces?

20 A That's right?

21 Q And the State alleged that a riffle that was, use the
22 phrase, cut up in your trunk, at the time you were
23 basically taken into custody, was the murder weapon;
24 correct?

25 A That's right.

1 Q I mean, the solicitor referred to that as the murder
2 weapon?

3 A That's what he did, yes, sir.

4 Q And at your trial the State produced an expert
5 witness, is that correct? To testify as to the gun
6 being the murder weapon, correct?

7 A Yes. Said it was his opinion at the end I think.

8 Q And that expert did -- allegedly did some testing and
9 concluded that that was, in fact, the murder weapon;
10 correct?

11 A That's what he claimed, yes, sir.

12 Q And during this process -- at the time, let me ask
13 you this, at the time, did you believe that that
14 weapon could be fired to actually kill anyone?

15 A I couldn't even tell what kind of weapon it was. It
16 looked like pieces of metal, you know, rusted and
17 mashed. I couldn't tell you what kind of gun it was.
18 It didn't even look like a gun. It looked like
19 pieces of remains of a gun that had been destroyed is
20 what it looked like.

21 Q And you now have learned that there's been a expert
22 hired by the family --

23 And you've seen this, haven't you?

24 MR. SUMNER: Yeah, I have.

25 MR. RICHEY: Judge, can I approach?

1 THE COURT: Yes, absolutely.

2 BY MR. RICHEY:

3 Q You've seen that there was an expert retained to
4 actually review those records about the testing of
5 those gun, correct?

6 A That's right, yes, sir.

7 Q And you read the statement recorded by the expert,
8 correct?

9 A Yes, sir.

10 Q And some of the issues the expert talked about in
11 terms of testing the gun, those are issues that you
12 had at the time of the trial, is that correct?

13 A Yes.

14 Q Did you and Mr. Sumner retain an expert, talk about a
15 expert, at all?

16 A No, sir, not that I recall. Any conversation -- I
17 know we didn't get one for sure. I don't remember
18 any conversation about it.

19 Q And do you believe that based off of this report that
20 an expert would have been beneficial to your case?

21 A Yes, now I definitely do. At the time, I didn't
22 really even think of an expert witness being involved
23 at all from their side until he showed up in court.
24 And when he did, of course, I was flabbergasted. And
25 then I would have loved to have had one but it was

1 too late.

2 Q Okay. And this case the jury stayed out a long time,
3 is that correct?

4 A Yes. Yes.

5 Q And the jury actually told the Judge at some point
6 they couldn't come to a verdict on one of the
7 charges?

8 A Right.

9 Q Correct. And in this case, with all frankness, that
10 charge had to be the murder charge because the drug
11 charge was pretty straightforward; is that correct?

12 A That is correct. Everything else I basically
13 admitted to during the trial. But that, of course, I
14 was not.

15 Q Right. So the issue was the murder charge?

16 A That's right.

17 Q Okay. And your testimony is that Mr. Sumner was
18 ineffective for having an expert look at the gun?

19 A That's right, yes. I would have thought -- from my
20 standpoint it seemed obvious in the courtroom. But
21 as a lawyer I would have thought that would have been
22 something very much worth looking at.

23 Q And also in Mr. Sumner's -- second Mr. Sumner's
24 closing argument, he made references to a statement
25 by Mr. Hamby, is that correct?

1 A Yes.

2 Q And he used those statements -- he was using those
3 statements to try to impeach that testimony, is that
4 correct?

5 A That is correct.

6 Q And those statements were not admitted in the trial,
7 is that correct?

8 A Those statements were not admitted as evidence, that
9 is right.

10 Q And the jury, in fact, on page, let's see, on page
11 571 on the transcripts, line 11 through 14, the jury
12 actually came back with a question, wanted to see
13 those statements; correct?

14 A Yes, after deliberating and not being able to find an
15 answer, they were asking for those in particular.
16 That seems to be what was holding them up.

17 Q Because there was some inconsistencies in the
18 statements?

19 A Yes. Continually lied in a pattern to the place
20 where those statements were -- I believe my lawyer
21 even used the word impeach, I impeached him on those
22 statements. And along with other statements that he
23 had made. Almost everything he said in the courtroom
24 was a lie actually.

25 Q And so it's your position counsel was ineffective for

1 not admitting those statements?

2 A Yes. They were not available for the jury and they
3 wanted to read those statements and wanted to know
4 the dates of them and compile them with the other
5 inconsistencies. And none of them was available.
6 And that's what they were claiming to be holding them
7 up from not being able to make a decision, of course,
8 on what was apparently the murder decision.

9 Q So this basically murder trial, it was hinging on
10 threads either way, basically?

11 A Absolutely. That's what it appeared to be.

12 Q And you believed that if the expert had testified
13 that that was the -- because the State alleged that
14 was the murder weapon?

15 A Right.

16 Q And the Solicitor in his closing argument told the
17 jury the expert came in, looked you in the face and
18 told the truth and all that, correct?

19 A Right.

20 Q So it was your position that because this case was
21 going either way, the jury stayed out that long that
22 the lack of this evidence prejudiced you, hurt you?

23 A Absolutely.

24 Q And you believe that if the jury had this evidence
25 that the outcome could have been different?

1 A Absolutely. They actually came in and out several
2 times. Going on for a couple of days, period. Two
3 days, maybe better and they at least on several
4 occasions they wanted to come back in the courtroom
5 and have these things explained. And, of course,
6 there were no explanations. There was no information
7 for them. All they could do is listen to the
8 testimonies that Hamby and I had said.

9 Q Okay.

10 (WHEREUPON, Applicant's Exhibit No. 1 was marked
11 for identification only.)

12 BY MR. RICHEY:

13 Q Mr. Rice, I want to past up to you what's been
14 designated as Plaintiff's or Applicants Number 1, and
15 I want you to look through that. Are those copies of
16 the three statements that the jury was requesting?

17 A Yes, they are.

18 Q So these statements do exist?

19 A The three statements of Johnny Hamby, they were
20 inconsistent. That appears to be them.

21 MR. RICHEY: Your Honor, we offer this as
22 Applicant's 1 at this time.

23 MS. RATIGAN: I have no objection, Your Honor.

24 THE COURT: All right, without objection same is
25 entered into evidence as Applicant's Number 1.

1 (WHEREUPON, Applicant's Exhibit No. 1 was
2 admitted into evidence.)

3 MR. RICHEY: Thank you, answer any questions
4 Ms. Ratigan has for you.

5 MS. RATIGAN: I don't have any questions for
6 this witness, Your Honor.

7 THE COURT: Okay, thank you, Mr. Rice. You can
8 take your seat.

9 MR. RICHEY: We call Mr. Sumner at this time.

10 THE CLERK: Mr. Sumner, place your left hand on
11 the Bible, please, raise your right hand.

12 STEVE SUMNER, after being duly sworn, testified
13 as follows:

14 THE CLERK: Thank you, you may be seated. State
15 your full name for the record, please.

16 THE WITNESS: Steven Wayne Sumner, with an N.
17 With a V, I'm sorry, with a V, not ph.

18 DIRECT EXAMINATION

19 BY MR. RICHEY:

20 Q Mr. Sumner, do you recall representing Russell Rice?

21 A Yes, I do.

22 Q And you represented him on a drug charge and a murder
23 charge, is that correct?

24 A I did.

25 Q And I think we discussed the drug charge, meaning

1 that case was (inaudible) case, correct?

2 A Yes, I do remember making, I believe, a series of
3 pre-trial motions regarding suppression that were
4 denied. I think those issues were appealed. But
5 yeah, if the drug -- if the drugs were not going to
6 be suppressed, I believe, my recollection is he was
7 driving the vehicle and it was his vehicle. So I
8 think if they came into evidence that was going to be
9 difficult.

10 Q Right. The issue that we have raised, there's two of
11 them, I'll take them in Order. One is about the gun.
12 Okay. You've had the opportunity to read this report
13 from this expert that we have retained?

14 A I have. But if you'll let me look at it a little bit
15 more close, Mr. Richey, thank you. Give me just one
16 second, please. I reviewed it.

17 Q And this expert, and I'm going to paraphrase it,
18 essentially said that the State's test was not valid,
19 is that correct?

20 A It says that the State's test was not the type test
21 that he would have done.

22 Q Right. And do you believe that this evidence would
23 have been beneficial to you in your case?

24 A I suppose it would have been, yes.

25 Q And actually the transcript, some of the things that

1 this expert says, you cross-examined the expert on
2 some of these issues, do you recall that?

3 A I do believe -- I vaguely recall that, Mr. Richey,
4 but I do believe that I cross-examined the State's
5 expert pretty thoroughly on the gun issue.

6 Q And as to the -- I'm going to go to the statements.
7 The statements that you recall in closing argument
8 basically referred to the statements that are in
9 Applicant's number --

10 May I approach the witness, Your Honor?

11 THE COURT: Sure, absolutely.

12 BY MR. RICHEY:

13 Q Applicant's Number 1, do you recall in your closing
14 argument you told the jury that you have impeached
15 these, why take so many statements from the Hamby, do
16 you recall that line of argument?

17 A I do. Vaguely, again, but I do.

18 Q Okay. And you recall the jury -- this case -- this
19 jury was hung up a long time, correct? Do you recall
20 that?

21 A I think it was out of good -- I don't remember the
22 amount of time but I want to say yes, the jury was
23 out a pretty good while.

24 Q And so this was a tough case for them to decide,
25 would you agree with that?

1 A To my recollection, yeah, I think the jury was out
2 maybe 10, 12 hours. Yeah, I think it was pretty
3 close on the murder charge.

4 Q And the transcript reflects on page 571 that the jury
5 asked for these statements?

6 A Okay. I'll take your word on that, I'm sure that's
7 correct.

8 Q And that these statements were not introduced so
9 therefore they couldn't be produced, is that correct?

10 A I believe that was Judge Pyle's ruling, yes.

11 Q And do you believe in this type case, that close of a
12 call that the lack of introduction of the statements
13 hurt Mr. Rice's case at all?

14 A I think in retrospect it could have hurt Mr. Rice's
15 case. My recollection of this, if I can answer your
16 question fully on this point was that was a strategy
17 decision. Because I think at that point it was
18 unclear whether or not the defense would put up a
19 case. So in order to have the last argument, my
20 understanding would be that we could not have put any
21 evidence in. So my recollection on that, Judge
22 Stillwell, was I believe that he read the statements
23 into the jury and then I went of over portion of the
24 statement. Of the three statements that were taken
25 to point out inconsistencies with his testimony. And

1 I did not enter them into evidence or make a move to
2 enter them into evidence at that time because it was
3 unclear whether or not Mr. Rice might want to testify
4 or whether or not we would put up a defense. And if
5 we had not done that, then my understanding of the
6 rules of evidence is I would have had the final
7 argument to the jury.

8 Q Okay. And the statements could have been very well
9 admitted through another witness after the State put
10 up their testimony?

11 A I believe they could have been entered yes, sir,
12 through Detective Floyd or -- I believe it'd been
13 Detective Floyd who took the statements.

14 MR. RICHEY: Thank you, answer any questions
15 Ms. Ratigan has.

16 CROSS-EXAMINATION

17 BY MS. RATIGAN:

18 Q Were you appointed in this case or were you retained?

19 A I was retained.

20 Q Okay. And did you file discovery motions in this
21 case?

22 A I believe I took the -- my recollection is that I did
23 but I believe Dan Farnsworth had been appointed
24 initially and I believe the discovery had already
25 been furnished to Mr. Farnsworth.

1 Q Would it be fair to say that you had several meetings
2 with Mr. Rice before that trial?

3 A Numerous.

4 Q And did you review the discovery materials with him
5 at the time?

6 A Yes.

7 Q And the State's theory of the case, what they were
8 going to do at trial?

9 A My recollection is that it was very well laid out for
10 both, Rusty and myself, as to where they were going
11 with the case.

12 Q And you and Mr. Rice discussed kind of his story, his
13 version of the events?

14 A Multiple times.

15 Q So what was your strategy going to be at trial?

16 A The strategy at trial to my recollection was going to
17 be, as Mr. Richey said, I'm going totally from
18 recollection here, Judge, that there was no direct
19 proof that -- I don't believe anybody saw Rusty out
20 behind the hotel. I believe that it was basically
21 going to be that nobody could put him there. And
22 cross-examining of the State's witnesses and creating
23 or establishing a reasonable doubt as to really level
24 of proof regarding the murder charge. And also --
25 because there were inconsistencies, I believe, in

1 some statements that had been given as to that.

2 And also, in terms of the drug charge, I believe
3 it was going to be, extensive suppression motions
4 that were made and argued, trying to keep that out of
5 the case.

6 Q Did you also get to the issue of third party guilt
7 about Johnny Hamby and maybe another individual?

8 A I believe I got into as much of that as Judge Pyle
9 would let me.

10 Q And once you decided to put up a defense case, you
11 also called a couple of alibi witnesses for your
12 client, do you recall?

13 A I don't recall right now. I'd have to defer to the
14 transcript on that. It's been, I think, six plus
15 years ago. So whatever's there on the transcript
16 would be accurate.

17 Q And going back a little bit, so you were aware prior
18 to trial that Mr. Armstrong was going to testify as
19 to ballistic's expert regarding the cut up riffle?

20 A Yes. I had been provided the reports from
21 Mr. Armstrong. To my knowledge I had reviewed the
22 reports, yes.

23 Q On -- did you ever -- did you contemplate hiring an
24 expert at that time?

25 A Rusty and I met a good bit. I recall that Rusty, I

1 don't believe was out on bond at all. So we were
2 over at the jail a good bit and we went through all
3 the discovery. And if it was mentioned it was
4 mentioned briefly, at all. And there was never any
5 serious discussion between myself and Rusty at all
6 about hiring an expert that I can remember. And I
7 also spoke a good bit with his family. I know
8 they're here in court today. I mean, we all
9 conversed. And I don't recall any discussion of any
10 significance about an expert. From either me or from
11 them.

12 Q Although the riffle was cut up into several pieces,
13 the expert could only offer an opinion, would it have
14 been helpful to have hired a defense expert?

15 A I just didn't see it as anything that we really
16 needed to do. My recollection was that
17 Mr. Armstrong's testimony was -- I thought that I was
18 able, totally from recollection, to pretty
19 extensively cross-examine him regarding the
20 methodology that had been used to determine that it
21 was to opine that that was the riffle used. And I'm
22 going totally from memory, I don't believe that there
23 were any fingerprints on the gun, I'm going totally
24 from memory on that, Judge. I don't believe there
25 were any prints on the gun that would have connected

1 Mr. Rice to it. And I also did not believe that
2 there were any fingerprints on the cartridges that
3 had been recovered. I recall that. And I mainly
4 just went with the cross-examination of Mr. Armstrong
5 and felt that, again, going toward the reasonable
6 doubt standard that that had been established through
7 him.

8 MS. RATIGAN: I have nothing further.

9 THE COURT: Any redirection?

10 MR. RICHEY: None. We have no questions. We'd
11 call Ms. Beverly Rice.

12 THE COURT: Thank you, Mr. Sumner, you can step
13 down.

14 MR. SUMNER: Sure.

15 THE CLERK: Ms. Rice, if you'd step up here
16 please. Place your left hand on the Bible, raise your
17 right hand.

18 BEVERLY RICE, after being duly sworn, testified
19 as follows:

20 THE CLERK: You may be seated. State your full
21 name for the record, please.

22 THE WITNESS: Beverly Jo Klingerman Rice.

23 THE CLERK: Thank you.

24 DIRECT EXAMINATION

25 BY MR. RICHEY:

1 Q Ms. Rice, do you know Russell Rice?

2 A Yes.

3 Q You got to speak up.

4 A Yes, he's my son.

5 Q Okay. And you were here at the courthouse all of
6 that when this initial trial was going on, correct?

7 A Yes?

8 Q And you had conversation with Mr. Sumner as well as
9 your son?

10 A Yes.

11 Q And at the time of this case you had the ability to
12 hire an expert, meaning the money?

13 A Yes. Oh, yes.

14 Q That was not an issue?

15 A That was not an issue, no.

16 MR. RICHEY: Thank you, ma'am, no other
17 questions.

18 MS. RATIGAN: I have no questions of Ms. Rice.

19 THE COURT: Thank you, Ms. Rice, I appreciate
20 you being here.

21 MR. RICHEY: Your Honor, we briefly met in
22 chambers, the attorney general, there's a witness we're
23 going to call, the expert. I would ask we put 30 days we
24 would depose him, send the transcript of the deposition to
25 His Honor.

1 THE COURT: All right, and I'll leave the record
2 open for purposes of reviewing that deposition transcript.

3 MR. RICHEY: Thank you.

4 THE COURT: Yes, sir.

5 MR. RICHEY: That's all we have at this time.

6 THE COURT: Anything from the State?

7 MS. RATIGAN: Your Honor, the State would rest,
8 Your Honor. I think all the witness that were necessary
9 have been called. And we would simply -- we would
10 obviously just to put on the record we consent to leaving
11 the record open for the deposition as long as it's
12 conducted within 30 days. We have no problem with that,
13 Your Honor.

14 THE COURT: All right, good enough. And I will
15 keep the record open. And I'll take it under advisement
16 pending review of that deposition transcript. And I will
17 order that it has to be taken within 30 days of today's
18 date and so we can move it along.

19 MR. RICHEY: Yes, sir.

20 THE COURT: Okay, good enough. Thank you.

21 MS. RATIGAN: Thank you, Your Honor.

22 MR. RICHEY: Thank you, Your Honor.

23 Your Honor, that's the actual taking--

24 THE COURT: The taking. I don't want you to be
25 subject to the vagaries of that transcript.

1 MR. RICHEY: Yes, sir.

2 (WHEREUPON, the proceedings were concluded.)

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

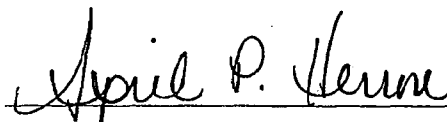
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, APRIL P. HERRON, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 15th day of November, 2010.

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

May 30, 2010



APRIL P. HERRON, Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

RUSSELL W. RICE,

Plaintiff,

vs.

CASE NO.: SCDC 301294

THE STATE OF SOUTH CAROLINA,

Defendant.

COPY

DEPOSITION OF: KELLY FITE, Expert

DATE: December 12, 2010

TIME: 9:00 a.m.

LOCATION: Richey and Richey
24 Vardry Street
Greenville, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: SHARON G. HARDOON,
Court Reporter, Notary Public

1 APPEARANCES:

2 ATTORNEYS FOR THE PLAINTIFF
3 RUSSELL W. RICE:

4 RICHEY AND RICHEY
5 BY: RODNEY RICHEY
6 24 Vardry Street
7 Greenville, SC 29603
8 (864) 467-0503

9 ATTORNEYS FOR THE DEFENDANT
10 THE STATE OF SOUTH CAROLINA:

11 STATE OF SOUTH CAROLINA ATTORNEY
12 GENERAL'S OFFICE
13 BY: KAREN KATIGAN
14 1000 Assembly Street
15 Columbia, SC 29201
16 (803) 734-3970
17 kratigan@scag.gov
18
19
20
21
22
23
24
25

INDEX

WITNESS/EXAMINATION

Witness Name

Page Line

Kelly Fite

Examination By Mr. RICHEY

4 16

Examination By MS. KATIGAN

9 23

Certificate of Reporter

11 15

1 STIPULATION

2 It is stipulated by and between counsel
3 that this deposition is being taken in accordance
4 with the South Carolina Rules of Civil procedure,
5 Rule 30; that all objections as to notice of this
6 deposition are hereby waived; that all objections
7 except as to form are reserved until the time of
8 trial; and that the deponent waives reading and
9 signing of this deposition.

10 P R O C E E D I N G S

11 MR. RICHEY: We're going to stip to
12 being sworn in over the phone.

13 MS. RATIGAN: Yes.

14 KELLY FITE,

15 being first duly sworn, testified as follows:

16 EXAMINATION

17 BY MR. RICHEY:

18 Q. Sir, can you state your name, please?

19 A. Kelly Fite.

20 Q. Can you spell the last name?

21 A. F-I-T-E.

22 Q. Where are you employed?

23 A. I'm retired. I do consulting work for both
24 prosecutors and defense.

25 Q. How long have you done that?

1 A. I retired in 1999. I've been doing it for 11
2 years.

3 Q. What did you retire from?

4 A. I worked for the Georgia Investigation Crime
5 Laboratory for 31 years.

6 Q. What did you do in that capacity?

7 A. I was a firearms examiner. I was the
8 firearms supervisor for the last two years, but I
9 carried a full case load the whole time.

10 Q. What type of education do you have?

11 A. I have a B.S. degree in chemistry.

12 Q. Did you have any training in firearms
13 testing?

14 A. I'm a life member of the Association of
15 Firearms and Tool Mark Examiners. I've attended
16 schools and seminars all over the country
17 concerning firearms and firearms-related
18 evidence. I testified in State and Federal
19 courts in the southeast about 2700 times.

20 Q. 2700?

21 A. Yes.

22 Q. So you have been qualified as an expert in
23 courts. Have you been qualified as an expert in
24 any court in South Carolina?

25 A. Yes. I've testified -- I think I testified

1 in Greenville and in Columbia.

2 Q. Okay.

3 A. Of all the times that I've been to court,
4 I've always been qualified as an expert.

5 Q. You understand we're taking your deposition
6 in the case of Russell Rice vs. The State of
7 South Carolina?

8 A. Yes, sir.

9 Q. You had an opportunity to review some records
10 regarding a firearm that was tested in that
11 case?

12 A. Yes.

13 Q. Can you tell me about what you reviewed in
14 terms of the testing?

15 A. The crime lab reports put out by the
16 Greenville laboratory and also the court
17 testimony of their expert.

18 Q. In reviewing those documents, do you have an
19 opinion about the test or the testing of the
20 rifle in question?

21 A. Yes.

22 Q. What is that?

23 A. Well, I do not believe in the type of test
24 that was done on this evidence and the condition
25 of the evidence that it was in when it was tested

1 that you can make a comparison and come out with
2 a positive answer.

3 Q. Can you explain that a little bit for us when
4 you say the testing that was used?

5 A. The expert says that when he first examined
6 the Remington 30 ot 6 barrel that there was a
7 dirt plug in the barrel and there was also
8 oxidation in the barrel. Well, all of the many
9 guns that I've looked at that came into the lab
10 with a dirt plug in the barrel, when you remove
11 that dirt plug, you would find oxidation because
12 the dirt plug usually got in the barrel because
13 it was there to start with.

14 So when you remove that dirt plug, you
15 have oxidation. You can try to remove the
16 oxidation, but it still pits the barrel and
17 leaves characteristics that weren't there before
18 the oxidation.

19 After he did this, he cleaned the barrel.
20 He had some 30 ot 6 from the body and from the
21 scene that he wanted to compare to this barrel.
22 So because the chamber was cut off at the barrel,
23 he couldn't fire the barrel. He couldn't fire a
24 bullet through the barrel.

25 And also, not only was the chamber cut

1 off of the barrel, but at the very muzzle of the
2 gun, the manufacturer, Remington, put a crown on
3 the barrel. This crown is to protect the muzzle
4 of the gun to protect the rifling should you drop
5 it on a hard service.

6 The expert also says that this crown is
7 cut partially off, which when you do that, you
8 leave little tiny metal burs that protrude over
9 into the bore of the gun which puts other
10 microscopic characteristics in the barrel that
11 wasn't there when it was originally fired. So
12 you have oxidation and then you have these burs
13 from cutting the crown off.

14 The first thing he did is, he pushed --
15 this is a 30 caliber -- 30 ot 6 caliber. He
16 pounded a 32 caliber, or I think he said three --
17 32 caliber S&W led bullets in the bore and then
18 he pounded them out and these are the tests that
19 he used to start with.

20 When you pound a led bullet into a bore
21 that has oxidation in it and also has had the
22 crown cut off, and then when you pound that
23 bullet out, you're leaving red residue in that
24 barrel from these led tests that you pounded in
25 and pounded out.

1 And then he wasn't successful doing the
2 test with the led bullet so he pounded a 32 ACP
3 of metal jacketed bullets into the bore, and then
4 pounded them out.

5 Of all of the guns that I've had where I
6 couldn't file them and had to push a bullet
7 through the barrel, I was not able to match back
8 to a bullet that was fired normally from that
9 barrel.

10 So based on what I've seen from this
11 report, I don't think that it's -- I think it's
12 unlikely that you could get a positive
13 identification comparing these 32 led bullets or
14 the 32 metal jacketed bullets to the 30 ot 6
15 bullets. I don't think you can get a positive
16 identification.

17 MR. RICHEY: Okay. That's all the
18 questions I have.

19 Ms. Ratigan, do you have any questions.

20 MS. RATIGAN: I have just a couple
21 of questions just to make sure I understand
22 you correctly.

23 EXAMINATION

24 BY MS. RATIGAN:

25 Q. So reviewing what you did, it was the crime

1 lab reports and testimony from the expert?

2 A. Yes.

3 Q. Okay. Did you actually speak to the
4 expert?

5 A. No, I have not.

6 Q. And did you actually review the physical
7 evidence, the pieces of the firearm in this
8 case?

9 A. No, but I'd love to.

10 Q. Okay.

11 A. One another thing: This is a county
12 laboratory and apparently there wasn't a peer
13 review done on this evidence. And that's
14 something that, in this day and time, is
15 extremely important.

16 Q. How do you know there wasn't a peer review?

17 A. I don't see that in his notes and I don't see
18 that in his testimony.

19 Q. So you're just assuming there was no peer
20 review in this case?

21 A. Yes.

22 Q. Since you didn't speak to the examiner and
23 you didn't look at the physical evidence, you're
24 basing that on conclusions just on your
25 experience in the field?

1 A. Yes. My experience of looking at evidence
2 similar to this and some cases trying to do this
3 same type of examination.

4 MS. RATIGAN: Okay. I believe
5 that's all I have.

6 MR. RICHEY: That's all I have,
7 Mr. Fite.

8 THE WITNESS: Yes, sir.

9 MR. RICHEY: Thank you. If I need
10 anything else, I'll let you know.

11 THE WITNESS: Thank you.

12 (The deposition was concluded at 9:11 a.m.)
13
14
15
16
17
18
19
20
21
22
23
24
25

1 CERTIFICATE OF REPORTER

2 I, SHARON G. HARDOON, Court Reporter,
3 Notary Public, State of South Carolina at Large,
4 do hereby certify that the foregoing transcript
5 is a true, accurate and complete record.

6 I further certify that I am neither
7 related to nor counsel for any party to the cause
8 pending or interested in the events thereof.

9 Witness my hand, I have hereunto affixed
10 my official seal this 16th day of December 2010
11 at Greenville, Greenville County, South Carolina.

12
13 COPY
14

15
16 Sharon G. Hardoon
17 Court Reporter, Notary Public
18 My commission expires:
19 April 7, 2018
20
21
22
23
24
25

A

a 4:19,21,23 5:1,4,7,7,9
5:11,11,14,14,21,25
6:3,8,10,12,15,21,23
7:1,2,3,5,6,10,23 8:2
8:5,15,16,20,20 9:2,6
9:8,12,15,20 10:2,5,9
10:11,11,12,16,17,21
11:1 12:3
able 9:7
about 5:19 6:13,19
accordance 4:3
accurate 12:3
ACP 9:2
actually 10:3,6
affixed 12:7
After 7:19
all 4:5,6 5:16 6:3 7:8
9:5,17 11:5,6
also 6:16 7:7,25 8:6,21
always 6:4
am 12:5
an 5:22,23 6:4,9,18
and 1:12 2:3 4:2,8,8,24
5:15,16,17,18 6:1,16
6:24 7:1,7,16,20,25
8:12,17,18,21,22,25
9:1,3,6 10:1,6,12,13
10:14,17,22 11:2
12:3
another 10:11
answer 7:2
any 5:12,24 9:19 12:6
anything 11:10
apparently 10:12
APPEARANCES 2:1
April 12:17
are 4:6,7,22 8:18
as 4:5,7,15 5:22,23 6:4
Assembly 2:9
Association 5:14
assuming 10:19
at 7:9,22 8:1 10:23 11:1
11:12 12:2,8
attended 5:15
ATTORNEY 2:8
ATTORNEYS 2:2,6
a.m. 1:11 11:12

B

back 9:7
barrel 7:6,7,8,10,12,16
7:19,21,22,23,24 8:1
8:3,10,24 9:7,9
based 9:10
basing 10:24
because 7:11,12,22
been 5:1,22,23 6:3,4
before 7:17

being 4:3,12,15
believe 6:23 11:4
between 4:2
bit 7:3
body 7:20
bore 8:9,17,20 9:3
both 4:23
bullet 7:24 8:20,23 9:2
9:6,8
bullets 8:17 9:3,13,14
9:15
burs 8:8,12
but 5:8 7:16 8:1 10:9
by 1:14,15 2:4,9 3:4,5
4:2,17 6:15 9:24
B.S. 5:11

C

C 4:10
caliber 8:15,15,16,17
came 7:9
can 4:18,20 6:13 7:1,3
7:15 9:15
capacity 5:6
Carolina 1:1,6 2:7,8
4:4 5:24 6:7 12:2,8
carried 5:9
case 1:5 5:9 6:6,11 10:8
10:20
cases 11:2
cause 12:6
Certificate 3:6 12:1
certify 12:3,5
chamber 7:22,25
characteristics 7:17
8:10
chemistry 5:11
Civil 4:4
cleaned 7:19
Columbia 1:2 2:10 6:1
come 7:1
commission 12:16
compare 7:21
comparing 9:13
comparison 7:1
complete 12:3
concerning 5:17
concluded 11:12
conclusions 10:24
condition 6:24
consulting 4:23
correctly 9:22
could 9:12
couldn't 7:23,23 9:6
counsel 1:14 4:2 12:6
country 5:16
county 10:11 12:8
couple 9:20
court 1:1,16 5:24 6:3
6:16 12:2,16

courts 5:19,23
crime 5:4 6:15 9:25
crown 8:2,3,6,13,22
cut 7:22,25 8:7,22
cutting 8:13

D

D 4:10
DATE 1:10
day 10:14 12:8
December 1:10 12:8
Defendant 1:7 2:6
defense 4:24
degree 5:11
deponent 4:8
deposition 1:9 4:3,6,9
6:5 11:12
did 5:3,6,12 7:19 8:14
9:25 10:3,6
didn't 10:22,23
dirt 7:7,10,11,12,14
DISTRICT 1:1,1
DIVISION 1:2
do 4:23 5:6,10 6:18,23
8:7 9:19 10:16 11:2
12:3
documents 6:18
doing 5:1 9:1
done 4:25 6:24 10:13
don't 9:11,15 10:17,17
drop 8:4
duly 4:15

E

E 4:10,10
education 5:10
else 11:10
employed 4:22
events 12:6
evidence 5:18 6:24,25
10:7,13,23 11:1
examination 3:4,5 4:16
9:23 11:3
examined 7:5
examiner 5:7 10:22
Examiners 5:15
except 4:7
experience 10:25 11:1
expert 1:9 5:22,23 6:4
6:17 7:5 8:6 10:1,4
expires 12:16
explain 7:3
extremely 10:15

F

Federal 5:18
field 10:25
file 9:6
find 7:11
fire 7:23,23

firearm 6:10 10:7
firearms 5:7,8,12,15,17
firearms-related 5:17
fired 8:11 9:8
first 4:15 7:5 8:14
Fite 1:9 3:3 4:14,19
11:7
follows 4:15
for 1:1,14 2:2,6 4:23
5:1,4,5,8 7:3 12:6
foregoing 12:3
form 4:7
from 5:3 7:20,20 8:13
8:24 9:8,10 10:1
full 5:9
further 12:5
F-I-T-E 4:21

G

G 1:15 4:10 12:2,15
GENERAL's 2:8
Georgia 5:4
get 9:12,15
going 4:11
got 7:12
Greenville 1:13 2:5 6:1
6:16 12:8,8
gun 8:2,4,9
guns 7:9 9:5

H

had 6:9 7:20 8:21 9:5,6
hand 12:7
hard 8:5
Hardoon 1:15 12:2,15
has 8:21,21
have 4:25 5:10,11,12
5:22,23 6:18 7:15
8:12,12 9:18,19,20
10:5 11:5,6 12:7
he 7:5,19,19,20,21,23
7:23 8:14,14,15,16
8:18,19 9:1,2
hereby 4:6 12:3
hereunto 12:7
his 10:17,18
How 4:25 10:16

I

I 4:10,23 5:1,4,7,7,8,11
5:18,25,25 6:23 8:16
9:5,7,11,11,15,18,20
9:21 10:5,17,17 11:4
11:5,6,9 12:2,5,5,7
identification 9:13,16
If 11:9
important 10:15
in 1:1 4:3,12 5:1,6,11
5:12,18,19,22,23,24
6:1,1,6,10,13,18,20

6:23,25 7:7,8,10,12
8:10,17,21,23,24
10:7,14,17,18,20,25
12:6

INDEX 3:1

interested 12:6
into 7:9 8:9,20 9:3
Investigation 5:4
is 4:2,3 6:22 8:3,6,14
8:15 10:11,14 12:3
it 4:2 5:1 6:25,25 7:13
7:16 8:5,11,21 9:25
it's 9:11,11
I'd 10:9
I'll 11:10
I'm 4:23 5:14
I've 5:1,15,25 6:3,4 7:9
9:5,10

J

jacketed 9:3,14
just 9:20,21 10:19,24

K

KAREN 2:9
KATIGAN 2:9 3:5
Kelly 1:9 3:3 4:14,19
know 10:16 11:10
kratigan@scag.gov
2:11

L

lab 6:15 7:9 10:1
laboratory 5:5 6:16
10:12
Large 12:2
last 4:20 5:8
leave 8:8
leaves 7:17
leaving 8:23
led 8:17,20,24 9:2,13
let 11:10
life 5:14
Line 3:2
little 7:3 8:8
load 5:9
LOCATION 1:12
long 4:25
look 10:23
looked 7:9
looking 11:1
love 10:9

M

make 7:1 9:21
manufacturer 8:2
many 7:8
Mark 5:15
match 9:7
me 6:13

member 5:14
metal 8:8 9:3,14
microscopic 8:10
Mr 3:4 4:11,17 9:17
11:6,7,9
Ms 3:5 4:13 9:19,20,24
11:4
muzzle 8:1,3
my 11:1 12:7,8,16

N

N 4:10
name 3:2 4:18,20
need 11:9
neither 12:5
no 1:5 10:5,9,19
nor 12:6
normally 9:8
not 6:23 7:25 9:7 10:5
Notary 1:16 12:2,16
notes 10:17
notice 4:5

O

O 4:10
objections 4:5,6
of 1:1,6,9 2:7,8 3:6 4:4
4:5,7,9 5:10,14,14
6:3,6,6,14,17,19,23
6:25 7:8 8:1,1,4,9 9:3
9:5,5,21 10:7 11:1,3
12:1,2,8
off 7:22 8:1,7,13,22
OFFICE 2:8
official 12:8
Okay 6:2 9:17 10:3,10
11:4
on 6:24 8:2,5 9:10
10:13,24,24
One 10:11
only 7:25
opinion 6:19
opportunity 6:9
or 6:19 8:16 9:13 12:6
originally 8:11
ot 7:6,20 8:15 9:14
other 8:9
out 6:15 7:1 8:18,23,25
9:4
over 4:12 5:16 8:8
oxidation 7:8,11,15,16
7:18 8:12,21

P

P 4:10
Page 3:2
partially 8:7
party 12:6
peer 10:12,16,19
pending 12:6

phone 4:12
physical 10:6,23
pieces 10:7
pits 7:16
Plaintiff 1:4,14 2:2
please 4:18
plug 7:7,10,11,12,14
positive 7:2 9:12,15
pound 8:20,22
pounded 8:16,18,24,25
9:2,4

procedure 4:4
prosecutors 4:24
protect 8:3,4
protrude 8:8
Public 1:16 12:2,16
push 9:6
pushed 8:14
put 6:15 8:2
puts 8:9

Q

Q 4:18,20,22,25 5:3,6
5:10,12,20,22 6:2,5,9
6:13,18,22 7:3 9:25
10:3,6,10,16,19,22
qualified 5:22,23 6:4
question 6:20
questions 9:18,19,21

R

R 4:10
Ratigan 4:13 9:19,20
9:24 11:4
reading 4:8
record 12:3
records 6:9
red 8:23
regarding 6:10
related 12:6
Remington 7:6 8:2
remove 7:10,14,15
report 9:11
REPORTED 1:15
Reporter 1:16 3:6 12:1
12:2,16
reports 6:15 10:1
reserved 4:7
residue 8:23
retire 5:3
retired 4:23 5:1
review 6:9 10:6,13,16
10:20

reviewed 6:13
reviewing 6:18 9:25
Rice 1:3 2:2 6:6
Richey 1:12,12 2:3,3,4
3:4 4:11,17 9:17 11:6
11:9
rifle 6:20

rifling 8:4
RODNEY 2:4
Rule 4:5
Rules 4:4
Russell 1:3 2:2 6:6

S

S 4:10
said 8:16
same 11:3
say 7:4
says 7:5 8:6
SC 1:13 2:5,10
SCDC 1:5
scene 7:21
schools 5:16
seal 12:8
see 10:17,17
seen 9:10
seminars 5:16
service 8:5
Sharon 1:15 12:2,15
should 8:4
signing 4:9
similar 11:2
Since 10:22
sir 4:18 6:8 11:8
so 5:22 7:14,22 8:11
9:2,10,25 10:19
some 6:9 7:20 11:2
something 10:14
South 1:1,6 2:7,8 4:4
5:24 6:7 12:2,8
southeast 5:19
speak 10:3,22
spell 4:20
start 7:13 8:19
state 1:6 2:7,8 4:18
5:18 6:6 12:2
STATES 1:1
still 7:16
stip 4:11
stipulated 4:2
STIPULATION 4:1
Street 1:13 2:4,9
successful 9:1
supervisor 5:8
sure 9:21
sworn 4:12,15
S&W 8:17

T

taken 1:14 4:3
taking 6:5
tell 6:13
terms 6:14
test 6:19,23 9:2
tested 6:10,25
testified 4:15 5:18,25
5:25

testimony 6:17 10:1,18
testing 5:13 6:14,19 7:4
tests 8:18,24
Thank 11:9,11
that 4:3,5,6,8,25 5:6
6:3,10,10,22,24,25
7:1,3,4,5,6,9,9,11,14
7:17,21 8:6,7,8,10,18
8:21,22,23,24 9:5,8,8
9:11,12 10:14,17,18
10:24 12:3,5
that's 9:17 10:13 11:5,6
the 1:1,1,6,14 2:2,6,7
4:4,7,8,12,20 5:4,7,8
5:9,14,16,19 6:3,6,6
6:14,15,15,16,19,19
6:19,23,24,25 7:4,5,6
7:7,8,8,9,10,12,12,15
7:16,18,19,20,20,22
7:22,23,24,25 8:1,1,1
8:2,3,3,4,4,6,9,9,10
8:13,14,17,18,21 9:1
9:2,3,5,7,14,14,17,25
10:1,3,6,7,7,22,23,25
11:8,11,12 12:3,6,6
their 6:17
them 8:18 9:4,6
then 8:12,17,22 9:1,3
there 7:6,7,13,17 8:11
10:12,16,19
thereof 12:6
these 8:12,18,24 9:13
thing 8:14 10:11
think 5:25 8:16 9:11,11
9:15
this 4:3,5,9 6:24 7:19
7:21 8:3,6,15 9:10
10:7,11,13,14,20
11:2,2 12:8
those 6:18
three 8:16
through 7:24 9:7
time 1:11 4:7 5:9 10:14
times 5:19 6:3
tiny 8:8
to 4:5,7,11,11 6:3,9
7:13,15,21,21 8:3,4
8:19 9:6,7,8,14,21
10:3,9,22 11:2,2 12:6
12:6
Tool 5:15
training 5:12
transcript 12:3
trial 4:8
true 12:3
try 7:15
trying 11:2
two 5:8
type 5:10 6:23 11:3

U

understand 6:5 9:21
UNITED 1:1
unlikely 9:12
until 4:7
us 7:3
used 7:4 8:19
usually 7:12

V

Vardry 1:13 2:4
very 8:1
vs 1:5 6:6

W

W 1:3 2:2
waived 4:6
waives 4:8
wanted 7:21
was 5:7,7 6:10,24,25,25
7:4,6,7,13,22,25 8:11
9:7,8,25 10:19 11:12
wasn't 8:11 9:1 10:12
10:16
Well 6:23 7:8
weren't 7:17
we're 4:11 6:5
what 5:3,6,10 6:13,22
9:10,25
when 6:25 7:3,5,10,14
8:7,11,20,22
where 4:22 9:5
which 8:7,9
whole 5:9
with 4:4 7:1,10,13 8:19
9:2
Witness 3:2 11:8,11
12:7
WITNESS/EXAMIN...
3:1
work 4:23
worked 5:4
would 7:11

Y

years 5:2,5,8
Yes 4:13 5:21,25 6:8,12
6:21 10:2,21 11:1,8
you 4:18,20,22,25 5:3,6
5:10,12,22,23 6:5,9
6:13,13,18 7:1,3,4,10
7:11,14,14,15 8:4,7,7
8:12,12,20,22,24
9:12,15,19,22,25
10:3,6,16,22,23 11:9
11:10,11
your 4:18 6:5 10:24
you're 8:23 10:19,23

1
1000 2:9
11 3:6 5:1
12 1:10
15 3:6
16 3:4
16th 12:8
1999 5:1
2
2010 1:10 12:8
2018 12:17
23 3:5
24 1:13 2:4
2700 5:19,20
29201 2:10
29603 2:5
3
30 4:5 7:6,20 8:15,15
9:14
301294 1:5
31 5:5
32 8:16,17 9:2,13,14
4
43:4
467-0503 2:5
6
67:6,20 8:15 9:14
7
7 12:17
734-3970 2:10
8
803 2:10
864 2:5
9
9 3:5
9:00 1:11
9:11 11:12

Page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

RUSSELL W. RICE,

Plaintiff,

vs.

CASE NO.: SCDC 301294

THE STATE OF SOUTH CAROLINA,

Defendant.

DEPOSITION OF: KELLY FITE, Expert

DATE: December 12, 2010

TIME: 9:00 a.m.

LOCATION: Richey and Richey
24 Vardry Street
Greenville, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: SHARON G. HARDOON,
Court Reporter, Notary Public

Page 3

INDEX
WITNESS/EXAMINATION

Witness Name

Page Line

Kelly Fite

Examination By Mr. RICHEY 4 16

Examination By MS. KATIGAN 9 23

Certificate of Reporter 11 15

Page 2

Page 4

1 APPEARANCES:
2 ATTORNEYS FOR THE PLAINTIFF
3 RUSSELL W. RICE:

RICHEY AND RICHEY
BY: RODNEY RICHEY
24 Vardry Street
Greenville, SC 29603
(864) 467-0503

ATTORNEYS FOR THE DEFENDANT
THE STATE OF SOUTH CAROLINA:
STATE OF SOUTH CAROLINA ATTORNEY
GENERAL'S OFFICE
BY: KAREN KATIGAN
1000 Assembly Street
Columbia, SC 29201
(803) 734-3970
kratigan@scag.gov

STIPULATION

It is stipulated by and between counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil procedure, Rule 30; that all objections as to notice of this deposition are hereby waived; that all objections except as to form are reserved until the time of trial; and that the deponent waives reading and signing of this deposition.

PROCEEDINGS

MR. RICHEY: We're going to stip to being sworn in over the phone.

MS. RATIGAN: Yes.

KELLY FITE,
being first duly sworn, testified as follows:

EXAMINATION

BY MR. RICHEY:

Q. Sir, can you state your name, please?

A. Kelly Fite.

Q. Can you spell the last name?

A. F-I-T-E.

Q. Where are you employed?

A. I'm retired. I do consulting work for both prosecutors and defense.

Q. How long have you done that?

Page 5

1 A. I retired in 1999. I've been doing it for 11
 2 years.
 3 Q. What did you retire from?
 4 A. I worked for the Georgia Investigation Crime
 5 Laboratory for 31 years.
 6 Q. What did you do in that capacity?
 7 A. I was a firearms examiner. I was the
 8 firearms supervisor for the last two years, but I
 9 carried a full case load the whole time.
 10 Q. What type of education do you have?
 11 A. I have a B.S. degree in chemistry.
 12 Q. Did you have any training in firearms
 13 testing?
 14 A. I'm a life member of the Association of
 15 Firearms and Tool Mark Examiners. I've attended
 16 schools and seminars all over the country
 17 concerning firearms and firearms-related
 18 evidence. I testified in State and Federal
 19 courts in the southeast about 2700 times.
 20 Q. 2700?
 21 A. Yes.
 22 Q. So you have been qualified as an expert in
 23 courts. Have you been qualified as an expert in
 24 any court in South Carolina?
 25 A. Yes. I've testified -- I think I testified

Page 6

1 in Greenville and in Columbia.
 2 Q. Okay.
 3 A. Of all the times that I've been to court,
 4 I've always been qualified as an expert.
 5 Q. You understand we're taking your deposition
 6 in the case of Russell Rice vs. The State of
 7 South Carolina?
 8 A. Yes, sir.
 9 Q. You had an opportunity to review some records
 10 regarding a firearm that was tested in that
 11 case?
 12 A. Yes.
 13 Q. Can you tell me about what you reviewed in
 14 terms of the testing?
 15 A. The crime lab reports put out by the
 16 Greenville laboratory and also the court
 17 testimony of their expert.
 18 Q. In reviewing those documents, do you have an
 19 opinion about the test or the testing of the
 20 rifle in question?
 21 A. Yes.
 22 Q. What is that?
 23 A. Well, I do not believe in the type of test
 24 that was done on this evidence and the condition
 25 of the evidence that it was in when it was tested

Page 7

1 that you can make a comparison and come out with
 2 a positive answer.
 3 Q. Can you explain that a little bit for us when
 4 you say the testing that was used?
 5 A. The expert says that when he first examined
 6 the Remington 30 ot 6 barrel that there was a
 7 dirt plug in the barrel and there was also
 8 oxidation in the barrel. Well, all of the many
 9 guns that I've looked at that came into the lab
 10 with a dirt plug in the barrel, when you remove
 11 that dirt plug, you would find oxidation because
 12 the dirt plug usually got in the barrel because
 13 it was there to start with.
 14 So when you remove that dirt plug, you
 15 have oxidation. You can try to remove the
 16 oxidation, but it still pits the barrel and
 17 leaves characteristics that weren't there before
 18 the oxidation.
 19 After he did this, he cleaned the barrel.
 20 He had some 30 ot 6 from the body and from the
 21 scene that he wanted to compare to this barrel.
 22 So because the chamber was cut off at the barrel,
 23 he couldn't fire the barrel. He couldn't fire a
 24 bullet through the barrel.
 25 And also, not only was the chamber cut

Page 8

1 off of the barrel, but at the very muzzle of the
 2 gun, the manufacturer, Remington, put a crown on
 3 the barrel. This crown is to protect the muzzle
 4 of the gun to protect the rifling should you drop
 5 it on a hard service.
 6 The expert also says that this crown is
 7 cut partially off, which when you do that, you
 8 leave little tiny metal burs that protrude over
 9 into the bore of the gun which puts other
 10 microscopic characteristics in the barrel that
 11 wasn't there when it was originally fired. So
 12 you have oxidation and then you have these burs
 13 from cutting the crown off.
 14 The first thing he did is, he pushed --
 15 this is a 30 caliber -- 30 ot 6 caliber. He
 16 pounded a 32 caliber, or I think he said three --
 17 32 caliber S&W led bullets in the bore and then
 18 he pounded them out and these are the tests that
 19 he used to start with.
 20 When you pound a led bullet into a bore
 21 that has oxidation in it and also has had the
 22 crown cut off, and then when you pound that
 23 bullet out, you're leaving red residue in that
 24 barrel from these led tests that you pounded in
 25 and pounded out.

Page 9

Page 11

1 And then he wasn't successful doing the
2 test with the led bullet so he pounded a 32 ACP
3 of metal jacketed bullets into the bore, and then
4 pounded them out.

5 Of all of the guns that I've had where I
6 couldn't file them and had to push a bullet
7 through the barrel, I was not able to match back
8 to a bullet that was fired normally from that
9 barrel.

10 So based on what I've seen from this
11 report, I don't think that it's -- I think it's
12 unlikely that you could get a positive
13 identification comparing these 32 led bullets or
14 the 32 metal jacketed bullets to the 30 ot 6
15 bullets. I don't think you can get a positive
16 identification.

17 MR. RICHEY: Okay. That's all the
18 questions I have.

19 Ms. Ratigan, do you have any questions.

20 MS. RATIGAN: I have just a couple
21 of questions just to make sure I understand
22 you correctly.

23 EXAMINATION

24 BY MS. RATIGAN:

25 Q. So reviewing what you did, it was the crime

1 A. Yes. My experience of looking at evidence
2 similar to this and some cases trying to do this
3 same type of examination.

4 MS. RATIGAN: Okay. I believe
5 that's all I have.

6 MR. RICHEY: That's all I have,
7 Mr. Fite.

8 THE WITNESS: Yes, sir.

9 MR. RICHEY: Thank you. If I need
10 anything else, I'll let you know.

11 THE WITNESS: Thank you.

12 (The deposition was concluded at 9:11 a.m.)
13
14
15
16
17
18
19
20
21
22
23
24
25

Page 10

Page 12

1 lab reports and testimony from the expert?

2 A. Yes.

3 Q. Okay. Did you actually speak to the
4 expert?

5 A. No, I have not.

6 Q. And did you actually review the physical
7 evidence, the pieces of the firearm in this
8 case?

9 A. No, but I'd love to.

10 Q. Okay.

11 A. One another thing: This is a county
12 laboratory and apparently there wasn't a peer
13 review done on this evidence. And that's
14 something that, in this day and time, is
15 extremely important.

16 Q. How do you know there wasn't a peer review?

17 A. I don't see that in his notes and I don't see
18 that in his testimony.

19 Q. So you're just assuming there was no peer
20 review in this case?

21 A. Yes.

22 Q. Since you didn't speak to the examiner and
23 you didn't look at the physical evidence, you're
24 basing that on conclusions just on your
25 experience in the field?

1 CERTIFICATE OF REPORTER

2 I, SHARON G. HARDOON, Court Reporter,
3 Notary Public, State of South Carolina at Large,
4 do hereby certify that the foregoing transcript
5 is a true, accurate and complete record.
6
7

8 I further certify that I am neither
9 related to nor counsel for any party to the cause
10 pending or interested in the events thereof.
11
12
13
14
15

16 Witness my hand, I have hereunto affixed
17 my official seal this 16th day of December 2010
18 at Greenville, Greenville County, South Carolina.
19
20
21
22
23
24
25

Sharon G. Hardoon
Court Reporter, Notary Public
My commission expires:
April 7, 2018

A

a 4:19,21,23 5:1,4,7,7,9
5:11,11,14,14,21,25
6:3,8,10,12,15,21,23
7:1,2,3,5,6,10,23 8:2
8:5,15,16,20,20 9:2,6
9:8,12,15,20 10:2,5,9
10:11,11,12,16,17,21
11:1 12:3
able 9:7
about 5:19 6:13,19
accordance 4:3
accurate 12:3
ACP 9:2
actually 10:3,6
affixed 12:7
After 7:19
all 4:5,6 5:16 6:3 7:8
9:5,17 11:5,6
also 6:16 7:7,25 8:6,21
always 6:4
am 12:5
an 5:22,23 6:4,9,18
and 1:12 2:3 4:2,8,8,24
5:15,16,17,18 6:1,16
6:24 7:1,7,16,20,25
8:12,17,18,21,22,25
9:1,3,6 10:1,6,12,13
10:14,17,22 11:2
12:3
another 10:11
answer 7:2
any 5:12,24 9:19 12:6
anything 11:10
apparently 10:12
APPEARANCES 2:1
April 12:17
are 4:6,7,22 8:18
as 4:5,7,15 5:22,23 6:4
Assembly 2:9
Association 5:14
assuming 10:19
at 7:9,22 8:1 10:23 11:1
11:12 12:2,8
attended 5:15
ATTORNEY 2:8
ATTORNEYS 2:2,6
a.m. 1:11 11:12

B

back 9:7
barrel 7:6,7,8,10,12,16
7:19,21,22,23,24 8:1
8:3,10,24 9:7,9
based 9:10
basing 10:24
because 7:11,12,22
been 5:1,22,23 6:3,4
before 7:17

being 4:3,12,15
believe 6:23 11:4
between 4:2
bit 7:3
body 7:20
bore 8:9,17,20 9:3
both 4:23
bullet 7:24 8:20,23 9:2
9:6,8
bullets 8:17 9:3,13,14
9:15
burs 8:8,12
but 5:8 7:16 8:1 10:9
by 1:14,15 2:4,9 3:4,5
4:2,17 6:15 9:24
B.S. 5:11

C

C 4:10
caliber 8:15,15,16,17
came 7:9
can 4:18,20 6:13 7:1,3
7:15 9:15
capacity 5:6
Carolina 1:1,6 2:7,8
4:4 5:24 6:7 12:2,8
carried 5:9
case 1:5 5:9 6:6,11 10:8
10:20
cases 11:2
cause 12:6
Certificate 3:6 12:1
certify 12:3,5
chamber 7:22,25
characteristics 7:17
8:10
chemistry 5:11
Civil 4:4
cleaned 7:19
Columbia 1:2 2:10 6:1
come 7:1
commission 12:16
compare 7:21
comparing 9:13
comparison 7:1
complete 12:3
concerning 5:17
concluded 11:12
conclusions 10:24
condition 6:24
consulting 4:23
correctly 9:22
could 9:12
couldn't 7:23,23 9:6
counsel 1:14 4:2 12:6
country 5:16
county 10:11 12:8
couple 9:20
court 1:1,16 5:24 6:3
6:16 12:2,16

courts 5:19,23
crime 5:4 6:15 9:25
crown 8:2,3,6,13,22
cut 7:22,25 8:7,22
cutting 8:13

D

D 4:10
DATE 1:10
day 10:14 12:8
December 1:10 12:8
Defendant 1:7 2:6
defense 4:24
degree 5:11
deponent 4:8
deposition 1:9 4:3,6,9
6:5 11:12
did 5:3,6,12 7:19 8:14
9:25 10:3,6
didn't 10:22,23
dirt 7:7,10,11,12,14
DISTRICT 1:1,1
DIVISION 1:2
do 4:23 5:6,10 6:18,23
8:7 9:19 10:16 11:2
12:3
documents 6:18
doing 5:1 9:1
done 4:25 6:24 10:13
don't 9:11,15 10:17,17
drop 8:4
duly 4:15

E

E 4:10,10
education 5:10
else 11:10
employed 4:22
events 12:6
evidence 5:18 6:24,25
10:7,13,23 11:1
examination 3:4,5 4:16
9:23 11:3
examined 7:5
examiner 5:7 10:22
Examiners 5:15
except 4:7
experience 10:25 11:1
expert 1:9 5:22,23 6:4
6:17 7:5 8:6 10:1,4
expires 12:16
explain 7:3
extremely 10:15

F

Federal 5:18
field 10:25
file 9:6
find 7:11
fire 7:23,23

firearm 6:10 10:7
firearms 5:7,8,12,15,17
firearms-related 5:17
fired 8:11 9:8
first 4:15 7:5 8:14
Fite 1:9 3:3 4:14,19
11:7
follows 4:15
for 1:1,14 2:2,6 4:23
5:1,4,5,8 7:3 12:6
foregoing 12:3
form 4:7
from 5:3 7:20,20 8:13
8:24 9:8,10 10:1
full 5:9
further 12:5
F-I-T-E 4:21

G

G 1:15 4:10 12:2,15
GENERAL's 2:8
Georgia 5:4
get 9:12,15
going 4:11
got 7:12
Greenville 1:13 2:5 6:1
6:16 12:8,8
gun 8:2,4,9
guns 7:9 9:5

H

had 6:9 7:20 8:21 9:5,6
hand 12:7
hard 8:5
Hardoon 1:15 12:2,15
has 8:21,21
have 4:25 5:10,11,12
5:22,23 6:18 7:15
8:12,12 9:18,19,20
10:5 11:5,6 12:7
he 7:5,19,19,20,21,23
7:23 8:14,14,15,16
8:18,19 9:1,2
hereby 4:6 12:3
hereunto 12:7
his 10:17,18
How 4:25 10:16

I

I 4:10,23 5:1,4,7,7,8,11
5:18,25,25 6:23 8:16
9:5,7,11,11,15,18,20
9:21 10:5,17,17 11:4
11:5,6,9 12:2,5,5,7
identification 9:13,16
If 11:9
important 10:15
in 1:1 4:3,12 5:1,6,11
5:12,18,19,22,23,24
6:1,1,6,10,13,18,20

6:23,25 7:7,8,10,12
8:10,17,21,23,24
10:7,14,17,18,20,25
12:6

INDEX 3:1

interested 12:6
into 7:9 8:9,20 9:3
Investigation 5:4
is 4:2,3 6:22 8:3,6,14
8:15 10:11,14 12:3
it 4:2 5:1 6:25,25 7:13
7:16 8:5,11,21 9:25
it's 9:11,11
I'd 10:9
I'll 11:10
I'm 4:23 5:14
I've 5:1,15,25 6:3,4 7:9
9:5,10

J

jacketed 9:3,14
just 9:20,21 10:19,24

K

KAREN 2:9
KATIGAN 2:9 3:5
Kelly 1:9 3:3 4:14,19
know 10:16 11:10
kratigan@scag.gov
2:11

L

lab 6:15 7:9 10:1
laboratory 5:5 6:16
10:12
Large 12:2
last 4:20 5:8
leave 8:8
leaves 7:17
leaving 8:23
led 8:17,20,24 9:2,13
let 11:10
life 5:14
Line 3:2
little 7:3 8:8
load 5:9
LOCATION 1:12
long 4:25
look 10:23
looked 7:9
looking 11:1
love 10:9

M

make 7:1 9:21
manufacturer 8:2
many 7:8
Mark 5:15
match 9:7
me 6:13

member 5:14
metal 8:8 9:3,14
microscopic 8:10
Mr 3:4 4:11,17 9:17
11:6,7,9
Ms 3:5 4:13 9:19,20,24
11:4
muzzle 8:1,3
my 11:1 12:7,8,16

N

N 4:10
name 3:2 4:18,20
need 11:9
neither 12:5
no 1:5 10:5,9,19
nor 12:6
normally 9:8
not 6:23 7:25 9:7 10:5
Notary 1:16 12:2,16
notes 10:17
notice 4:5

O

O 4:10
objections 4:5,6
of 1:1,6,9 2:7,8 3:6 4:4
4:5,7,9 5:10,14,14
6:3,6,6,14,17,19,23
6:25 7:8 8:1,1,4,9 9:3
9:5,5,21 10:7 11:1,3
12:1,2,8
off 7:22 8:1,7,13,22
OFFICE 2:8
official 12:8
Okay 6:2 9:17 10:3,10
11:4
on 6:24 8:2,5 9:10
10:13,24,24
One 10:11
only 7:25
opinion 6:19
opportunity 6:9
or 6:19 8:16 9:13 12:6
originally 8:11
ot 7:6,20 8:15 9:14
other 8:9
out 6:15 7:1 8:18,23,25
9:4
over 4:12 5:16 8:8
oxidation 7:8,11,15,16
7:18 8:12,21

P

P 4:10
Page 3:2
partially 8:7
party 12:6
peer 10:12,16,19
pending 12:6

phone 4:12
physical 10:6,23
pieces 10:7
pits 7:16
Plaintiff 1:4,14 2:2
please 4:18
plug 7:7,10,11,12,14
positive 7:2 9:12,15
pound 8:20,22
pounded 8:16,18,24,25
9:2,4

procedure 4:4
prosecutors 4:24
protect 8:3,4
protrude 8:8
Public 1:16 12:2,16
push 9:6
pushed 8:14
put 6:15 8:2
puts 8:9

Q

Q 4:18,20,22,25 5:3,6
5:10,12,20,22 6:2,5,9
6:13,18,22 7:3 9:25
10:3,6,10,16,19,22
qualified 5:22,23 6:4
question 6:20
questions 9:18,19,21

R

R 4:10
Ratigan 4:13 9:19,20
9:24 11:4
reading 4:8
record 12:3
records 6:9
red 8:23
regarding 6:10
related 12:6
Remington 7:6 8:2
remove 7:10,14,15
report 9:11
REPORTED 1:15
Reporter 1:16 3:6 12:1
12:2,16
reports 6:15 10:1
reserved 4:7
residue 8:23
retire 5:3
retired 4:23 5:1
review 6:9 10:6,13,16
10:20
reviewed 6:13
reviewing 6:18 9:25
Rice 1:3 2:2 6:6
Richey 1:12,12 2:3,3,4
3:4 4:11,17 9:17 11:6
11:9
rifle 6:20

rifling 8:4
RODNEY 2:4
Rule 4:5
Rules 4:4
Russell 1:3 2:2 6:6

S

S 4:10
said 8:16
same 11:3
say 7:4
says 7:5 8:6
SC 1:13 2:5,10
SCDC 1:5
scene 7:21
schools 5:16
seal 12:8
see 10:17,17
seen 9:10
seminars 5:16
service 8:5
Sharon 1:15 12:2,15
should 8:4
signing 4:9
similar 11:2
Since 10:22
sir 4:18 6:8 11:8
so 5:22 7:14,22 8:11
9:2,10,25 10:19
some 6:9 7:20 11:2
something 10:14
South 1:1,6 2:7,8 4:4
5:24 6:7 12:2,8
southeast 5:19
speak 10:3,22
spell 4:20
start 7:13 8:19
state 1:6 2:7,8 4:18
5:18 6:6 12:2
STATES 1:1
still 7:16
stip 4:11
stipulated 4:2
STIPULATION 4:1
Street 1:13 2:4,9
successful 9:1
supervisor 5:8
sure 9:21
sworn 4:12,15
S&W 8:17

T

taken 1:14 4:3
taking 6:5
tell 6:13
terms 6:14
test 6:19,23 9:2
tested 6:10,25
testified 4:15 5:18,25
5:25

testimony 6:17 10:1,18
testing 5:13 6:14,19 7:4
tests 8:18,24
Thank 11:9,11
that 4:3,5,6,8,25 5:6
6:3,10,10,22,24,25
7:1,3,4,5,6,9,9,11,14
7:17,21 8:6,7,8,10,18
8:21,22,23,24 9:5,8,8
9:11,12 10:14,17,18
10:24 12:3,5
that's 9:17 10:13 11:5,6
the 1:1,1,6,14 2:2,6,7
4:4,7,8,12,20 5:4,7,8
5:9,14,16,19 6:3,6,6
6:14,15,15,16,19,19
6:19,23,24,25 7:4,5,6
7:7,8,8,9,10,12,12,15
7:16,18,19,20,20,22
7:22,23,24,25 8:1,1,1
8:2,3,3,4,4,6,9,9,10
8:13,14,17,18,21 9:1
9:2,3,5,7,14,14,17,25
10:1,3,6,7,7,22,23,25
11:8,11,12 12:3,6,6
their 6:17
them 8:18 9:4,6
then 8:12,17,22 9:1,3
there 7:6,7,13,17 8:11
10:12,16,19
thereof 12:6
these 8:12,18,24 9:13
thing 8:14 10:11
think 5:25 8:16 9:11,11
9:15
this 4:3,5,9 6:24 7:19
7:21 8:3,6,15 9:10
10:7,11,13,14,20
11:2,2 12:8
those 6:18
three 8:16
through 7:24 9:7
time 1:11 4:7 5:9 10:14
times 5:19 6:3
tiny 8:8
to 4:5,7,11,11 6:3,9
7:13,15,21,21 8:3,4
8:19 9:6,7,8,14,21
10:3,9,22 11:2,2 12:6
12:6
Tool 5:15
training 5:12
transcript 12:3
trial 4:8
true 12:3
try 7:15
trying 11:2
two 5:8
type 5:10 6:23 11:3

U

understand 6:5 9:21
UNITED 1:1
unlikely 9:12
until 4:7
us 7:3
used 7:4 8:19
usually 7:12

V

Vardry 1:13 2:4
very 8:1
vs 1:5 6:6

W

W 1:3 2:2
waived 4:6
waives 4:8
wanted 7:21
was 5:7,7 6:10,24,25,25
7:4,6,7,13,22,25 8:11
9:7,8,25 10:19 11:12
wasn't 8:11 9:1 10:12
10:16
Well 6:23 7:8
weren't 7:17
we're 4:11 6:5
what 5:3,6,10 6:13,22
9:10,25
when 6:25 7:3,5,10,14
8:7,11,20,22
where 4:22 9:5
which 8:7,9
whole 5:9
with 4:4 7:1,10,13 8:19
9:2
Witness 3:2 11:8,11
12:7
WITNESS/EXAMIN...
3:1
work 4:23
worked 5:4
would 7:11

Y

years 5:2,5,8
Yes 4:13 5:21,25 6:8,12
6:21 10:2,21 11:1,8
you 4:18,20,22,25 5:3,6
5:10,12,22,23 6:5,9
6:13,13,18 7:1,3,4,10
7:11,14,14,15 8:4,7,7
8:12,12,20,22,24
9:12,15,19,22,25
10:3,6,16,22,23 11:9
11:10,11
your 4:18 6:5 10:24
you're 8:23 10:19,23

1

1000 2:9
11 3:6 5:1
12 1:10
15 3:6
16 3:4
16th 12:8
1999 5:1

2

2010 1:10 12:8
2018 12:17
23 3:5
24 1:13 2:4
2700 5:19,20
29201 2:10
29603 2:5

3

30 4:5 7:6,20 8:15,15
9:14
301294 1:5
31 5:5
32 8:16,17 9:2,13,14

4

4 3:4
467-0503 2:5

6

6 7:6,20 8:15 9:14

7

7 12:17
734-3970 2:10

8

803 2:10
864 2:5

9

9 3:5
9:00 1:11
9:11 11:12

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
Russell W. Rice, Jr.,	)	C.A. No. 2008-CP-23-3945
S.C.D.C. No. 301294,	)	
	)	
Applicant,	)	
	)	
v.	)	ORDER OF DISMISSAL
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

2011 FEB 18 A 11:58
FILED CLERK OF COURT
GREENVILLE CO. S.C.
PAUL R. WICKENS JR.

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed May 28, 2008. The Respondent made its return on August 27, 2008. An evidentiary hearing into the matter was convened on November 15, 2010 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Rodney W. Richey, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying were Beverly Rice and the Applicant's trial counsel, Steven W. Sumner, Esquire. The Court had before it the trial transcript, the records of the Greenville County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the Respondent's return, and the appellate records.¹

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections

¹ At the end of the PCR hearing, the record was held open to allow the parties to depose Mr. Kelly Fite. The deposition transcript was forwarded to this Court for review.

1
R33

pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the May 2003 term of the Greenville County Grand Jury for trafficking cocaine (2003-GS-23-3612), unlawful carrying of a pistol (2003-GS-23-3614), and murder (2003-GS-23-3615) and at the December 2003 term for possession of a weapon during commission of a violent crime (2003-GS-23-8779). He was represented by Steven W. Sumner, Esquire.

After the State called the case to trial, the Applicant was found guilty. On April 15, 2004, the Honorable C. Victor Pyle, Jr. sentenced the Applicant to concurrent terms of twenty-five (25) years for trafficking cocaine, one (1) year for unlawful carrying of a pistol, life imprisonment for murder, and five (5) years for possession of a weapon during commission of a violent crime.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences on April 24, 2006. State v. Rice, 368 S.C. 610, 629 S.E.2d 393 (Ct. App. 2006). The South Carolina Supreme Court denied the Applicant's petition for writ of certiorari by order dated October 18, 2007.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

- I. Ineffective assistance of trial counsel:
 - a. Failed to introduce John Hamby's three inconsistent statements into evidence.
 - b. Failed to object when the trial court impermissibly commented upon the facts of the case during the jury charge.
 - c. Failed to object to the trial court's charge that used confusing language and impermissibly directed a verdict for the State.
 - d. Failed to object to the trial court's Allen charge that was coercive and erroneous.

The Applicant, through counsel, submitted an amendment to his application dated November 24, 2008, in which he alleged the following:

1. Ineffective assistance of counsel:
 - a. Failed to conscientiously discharge professional responsibilities.
 - b. Failed to effectively challenge search and seizure.
 - c. Failed to act as a diligent and conscientious advocate.
 - d. Failed to give complete loyalty.
 - e. Did not have Applicant's best interest in mind.
 - f. Failed to serve the cause in good faith.
 - g. Neglected necessary investigations and preparation.
 - h. Did not do necessary factual investigations.
 - i. Did not do necessary legal research.
 - j. Did not conscientiously gather information to protect rights.
 - k. Did not try to have the case settled in a manner that would have been to my best advantage.
 - l. Did not advise me of all my rights or take any of the actions that were necessary to protect and preserve them.
 - m. Never properly ascertained whether or not I actually understood or comprehended all of the issues involved in the case.
 - n. Never properly consulted with me or kept me informed.
 - o. Never explained to me or discussed with me any of the elements.
 - p. Never made any attempt to ascertain whether or not I actually knew the elements of the crime charge or whether or not I understood exactly what "criminal element" meant.
 - q. Never explained or discussed with me how the elements of the crime charged and the evidence that the prosecution planned to introduce into evidence against me related to one another and did not discuss how the sentencing would be done especially as it related to the elements of the crime as in State v. Boyd.
 - r. Never informed me of any of the defenses that were available to me.
 - s. Never intended to offer any defense to the court on my behalf.
 - t. Never explained to me or discussed with me any kind of defense strategy.
 - u. Never explained to me or discussed with me any of the tactical choices that were made or planned to be made.
 - v. Dictated to me exactly how my case was going to be handled and offered no alternative options.
 - w. Failed to properly acquaint herself with the law and facts surrounding my case and, as a result, there was a very serious error in the assessment of both the law and the facts.

- x. No defense at all was put in issue for me during the Court proceedings.
- y. Did not subject the prosecution's case to any adversarial testing.
- z. Failed to oppose the prosecution's case with any adversarial litigation.
- aa. Failed to function as the government's adversary in any sense of the word.
- bb. Failed to pursue any of the legal recourse that was available.
- cc. Failed to function as the counsel that the Constitution's Sixth Amendment guarantees.
- dd. Failed to call alibi witnesses on my behalf.
- ee. Failed to appeal my case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant

must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated the only conviction he was concerned about was the murder conviction. The Applicant stated the case against him was based on circumstantial evidence. The Applicant stated the police found a rifle in the trunk of his car that had been sawed into several pieces. The Applicant testified the State's expert witness said this was the murder weapon. The Applicant testified trial counsel should have hired an independent witness to examine the rifle pieces. The Applicant testified that, as the jury deliberated for a long time and could not decide one of the charges, that it was clearly the murder charge. The Applicant testified that trial counsel should have entered Johnny Hamby's statements into evidence because: (1) Hamby was impeached with those statements, (2) trial counsel referred to the statements in his closing argument, and (3) the jury asked whether they could examine those statements.

Beverly Rice, the Applicant's mother, stated that she had enough money to have hired an expert witness in this case.

Mr. Kelly Fite - a former firearms examiner in the Georgia Investigation Crime Laboratory - was deposed concerning the State's testing of the rifle pieces in this case. Fite stated that he had examined the Greenville County crime lab reports and the trial testimony of the State's expert witness. Fite stated he "did not believe in the type of test that was done on this evidence and the condition of the evidence that it was in when it was tested that you can make a

comparison and come out with a positive answer." (Deposition transcript, pp.6-7). Fite admitted, however, that he had neither spoken to the State's expert witness (who prepared the firearm report testified at trial) nor actually examined the rifle pieces.

Trial counsel testified he and the Applicant discussed the discovery materials, the State's theory of the case, and their defense strategy. Trial counsel testified the defense strategy at trial was to argue there was no direct evidence against the Applicant and that the State's witnesses were inconsistent. Trial counsel testified he and the Applicant had a brief discussion about hiring an expert to examine the rifle. Trial counsel testified, however, that he did not see the need for a defense expert. Trial counsel stated he extensively cross-examined the State's expert witness and believed he moved the case towards reasonable doubt. Trial counsel stated he impeached Hamby with his inconsistent statements. Trial counsel stated it was a strategic decision not to enter Hamby's statements into evidence because he was not sure at that point if he would be presenting a defense case.

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have hired an expert to examine the rifle pieces. Trial counsel testified that, while he and the Applicant had a brief discussion about obtaining an expert witness, it was not something he seriously considered. Trial counsel testified he decided instead to attack the methodology of the State's witness and raise the issue of reasonable doubt. This Court finds that, as the rifle had been cut into several pieces, this was a valid trial tactic. Further, this Court finds Mr. Fite's

testimony unpersuasive, as he neither examined the evidence in question nor contacted the State's expert witness to discuss the methodology of the original test.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have entered Hamby's inconsistent statements into evidence. Trial counsel testified he did not want to move those statements into evidence because he did not know whether he would present a defense case. If these statements had been entered and trial counsel had later decided against presenting defense witnesses, he would have lost the ability to have final argument. This Court finds trial counsel articulated a credible reason to justify his decision not to enter those statements. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel). Further, this Court finds trial counsel properly cross-examined Hamby about the inconsistencies between his statements and his trial testimony.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this

7
R/S

matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation. Therefore, this application for PCR must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 10th day of February, 2011.



The Honorable Robin B. Stilwell
Presiding Judge, Thirteenth Judicial Circuit

Greenville, South Carolina.