

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from Calhoun County

S.C. Supreme Court

Maite Murphy, Circuit Court Judge

MICHAEL SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001537

APPENDIX

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STATE OF SOUTH CAROLINA)
 ;
 COUNTY OF DORCHESTER)

STATE OF SOUTH CAROLINA,)
)
 Plaintiff,)
)
 -vs-)
)
 MICHAEL SMITH,)
)
 Defendant.)

04-GS-09-0145
 04-GS-09-0202

August 30, 2005

****.

Before the Honorable
 Deadra Jefferson

APPEARANCES:

For the State:
 David Pasco, Esquire
 Carol Frick, Esquire

For the Defendant:
 Charles Johnson, Esquire

Hilda M. Jordan, CVR
 Circuit Court Reporter

1 (State Exhibit Nos. 1 through 22,
2 crime scene photographs, were pre-marked for ID only.)

3 THE COURT: Good morning, ladies and gentlemen.
4 I hope that you all are well.

5 I am Deadra Jefferson. I am one of your circuit
6 judges for the State of South Carolina. The state is
7 divided into 16 circuits. We have 46 circuit judges who
8 rotate throughout the state.

9 Most people don't know, but pursuant to the
10 Constitution, circuit judges rotate throughout the state
11 and generally what we do is we have court outside of the
12 circuit for six months. Generally between the months of
13 January and June and then we're usually home between the
14 months of July through December. But, because of the
15 budget crisis we have not traveled as much as usual, and we
16 have been traveling about one week a month, which, really,
17 has been quite nice, actually. In the words of one of my
18 colleagues he said, 'it's very nice to have colored sheets.
19 Because when you travel you sleep in hotels and all the
20 sheets in hotels are white, so -- it took me a little while
21 to catch it, too. What is he talking about, but anyway --
22 So it's a pleasure for me to be with you this week.

23 My home circuit is the 9th Circuit, which is made up
24 of Charleston and Berkeley Counties. So I'm about 80 miles
25 from home. But, it has been wonderful to enjoy the

1 hospitality of St. Matthews.

2 We are going to have one term of court this week. It
3 is a term of General Sessions Court, which most people
4 commonly refer to as criminal court. Again, as I've
5 indicated, it is my personal pleasure and my privilege to
6 serve with you this week in Calhoun County.

7 This term is for one week. I'm not aware of your
8 service going beyond this week. So your service will
9 conclude on Friday. We anticipate that we will be
10 selecting a jury for one trial this week. So in all
11 practicality, if you are not selected for this jury you
12 will be able to go about your business as usual and you
13 will have satisfied your service as jurors for this week.

14 Our purpose this morning is to determine your
15 qualifications and eligibility to serve as jurors. In
16 South Carolina we have three sources from which names are
17 selected for jury service. Each of you is here because at
18 least one of those three sources applies to you. That is,
19 if you are a registered voter, if you are a licensed South
20 Carolina driver or if you have an identification card from
21 the highway department then you are subject to jury
22 service.

23 I need to tell you at the outset that we understand
24 the inconvenience that jury service poses both to your
25 personal and to your professional lives and we thank you

1 for being here this morning. We know that it is a
2 sacrifice to you. We will do our best to minimize the
3 inconvenience and hopefully make this an enjoyable and
4 educational week for you. As I often tell jurors across
5 the state, real court is nothing like Judge Judy, Judge Joe
6 Brown, Judge Matais, The People's Court. All of those t.v.
7 shows that you see, while entertaining, are really not
8 reality.

9 So I hope that you will learn this week how your
10 system of justice operates, how integral you are to its
11 operation and how very important and unique is, because
12 after all, it is the only system where 12 citizens sit and
13 listen to the issues between other citizens and render a
14 verdict, and that is very unusual. It is the only system
15 like it in the world. So hopefully, this will be
16 educational for you.

17 As you look around the room there are some people that
18 I'd like to introduce to you. Our Clerk of Court, of
19 course, you've already been introduced to, Mr. Hasty. Our
20 deputy clerk, who will be assisting us this week Ms.
21 Pauling, as well as, Mr. Fidel Garcia, who is our bailiff
22 with us this week. If you need any assistance please see
23 these three individuals. They generally know the answers
24 to most of the questions that you will have and if they do
25 not have an answer to a question they certainly can get to

5
1 me very quickly and get an answer for you. Or if you have
2 some emergency or otherwise they certainly are -- will be
3 of great assistance to you.

4 Also seated to my right and to your left, is Hilda
5 Jordan, my court reporter for the week. Each judge has a
6 court reporter who takes down all of the proceedings. They
7 are highly trained professionals who really are quite
8 proficient at what they do and sometimes I feel that I
9 short-change them a little when I call them court
10 reporters, because of the difficulty of the equipment that
11 they now us, which is really quite -- South Carolina really
12 is on the cutting edge in terms of technology for the court
13 reporters as well as the court system.

14 Seated to my left and to your right is my law clerk,
15 Ms. Summer Dicus. The state is very generous, they provide
16 us each with lawyers licensed to practice in South Carolina
17 who help us with our duties. You see these little gray
18 boxes that we have. They are our laptop computers. The
19 system has almost gone paperless. So if you see us huddled
20 over these computers clicking away, please don't think that
21 we're being inattentive to the proceedings. We are simply
22 -- they have become almost an appendage, quite frankly. I
23 hate to have to admit that, but we can't function without
24 our computers or our internet is how we communicate with
25 Court Administration as well as our offices. We don't get

1 anything by mail any more. Everything comes via the
2 internet. So it saves you a lot of money as taxpayers,
3 quite frankly, but with out these instruments we wouldn't
4 be able to operate. So please don't think that we're being
5 inattentive to the proceeds, we're simply trying to make
6 the most efficient use of your time. And I say that, and I
7 give that explanation because often when I'm excusing
8 jurors they ask me how my Solitaire game was. And I have
9 to let them know that we don't even have games on our
10 laptops. So we don't have that luxury of being able to
11 play them. So when you see us huddled over them, we're --
12 all of our research, everything, is on those computers. We
13 don't even really use books any more. So please indulge us
14 in that regard.

15 Also, you will see in the courtroom lawyers seated
16 around the courtroom. Mr. Grant is with us. He's here on
17 a separate matter, but he is with us. Mr. Charlie Johnson,
18 who is also with the defense bar will be trying a case this
19 week.

20 Seated to my right and to your left is Mr. Pasco, the
21 solicitor, as well as his assistant, Ms. Frick. And also,
22 I believe, assisting them this week is Ms. Fogle, who is
23 the courtroom coordinator and Ms. Martin, who is their
24 administrative assistant.

25 We also have with us this morning the sheriff, Mr.

1 Summers, and the public defender. I thought I saw Mr.
2 Banks somewhere. He may be outside the courtroom, but he
3 certainly -- you may also see him this week, as well as,
4 the Chief of Police, Mr. Wannamaker, who will be assisting
5 us in our responsibilities this week.

6 Jury qualification is done in several stages. At the
7 end of this process I will share with you some general
8 guidelines in an effort to make you feel more comfortable
9 in what I am certain are unfamiliar surroundings.

10 The first stage of jury qualifications is what we call
11 roll call, and you have already participated in that where
12 you provided us with your name, your juror number, your
13 employment and otherwise.

14 The next part of the process requires that I
15 administer an oath to you. I would ask that you stand for
16 me and raise your right hands so that I might administer
17 the oath. If you all would stand and raise your right
18 hands.

19 (Jury panel complies.)

20 THE COURT: All right. Do you swear or affirm
21 that you will provide truthful and complete responses and
22 answers during this jury qualification process. If you
23 accept the oath, please indicate by saying I do.

24 (Jury panel answers in the affirmative.)

25 THE COURT: Thank you, you may be seated.

1 Ladies and gentlemen, I now have certain questions to
2 ask of you to determine your qualifications as jurors.
3 These questions determine your general eligibility to
4 serve. State law requires that I ask these questions, and
5 I will tell you at the outset that some of these questions
6 are intensely personal and you may not want to stand and
7 disclose this information openly and in the presence of
8 your fellow jurors. After each question if any juror needs
9 to respond I will ask you to stand and give me your name,
10 your juror number and the response to the question. If you
11 do not want to stand that is fine. At the end of this
12 process I will give you an invitation to come forward and
13 that will be the opportunity for you to come and speak with
14 me privately with the court reporter and the clerk of
15 court.

16 I emphasize that we do not want any of you to suffer
17 any embarrassment, however, as I've indicated, if you do
18 not want to stand, please make a mental note and remember
19 to come forward at the end when I ask you to do so. It is
20 absolutely essential that we have accurate information
21 consistent with the oath that you have just taken.

22 Here are the questions regarding your general
23 eligibility to serve.

24 Is there any member of the panel not now a citizen of
25 the United State; if so please stand at this time.

1 (No one stands.)

2 THE COURT: Is there any member of the panel not
3 now a citizen and resident of Calhoun County, State of
4 South Carolina; is so please stand.

5 (No one stands.)

6 THE COURT: Is there any member of the panel
7 unable to read, write, speak, or understand the English
8 language; if so please stand.

9 (No one stands.)

10 THE COURT: Is there any member of the panel that
11 has less than a sixth grade education or its equivalent; if
12 so please stand.

13 (No one stands.)

14 THE COURT: Is there any member of the panel
15 incapable by reason of mental or physical infirmity to
16 render efficient jury service; for example, does any member
17 have any medical or mental condition that would prevent you
18 from serving on a jury this week.

19 I would explain to you that there are certain
20 conditions that the Court is acutely familiar with and used
21 to dealing with. This list is no, however, exhaustive. It
22 would be those who have back problems, leg problems that
23 require more frequent standing. Those who have high blood
24 pressure and diabetes that require more frequent restroom
25 and snack breaks, as well as those who take medications

1 that require more frequent snack and restroom breaks.

2 Court generally runs an hour to less in between
3 breaks. We generally start at 9:30, have an hour and 15
4 minutes for lunch and then try to break between the hours
5 of 5:00 and 5:30, because we know you have other
6 responsibilities to attend to.

7 With that explanation in mind, is there any member of
8 the panel that is incapable by reason of mental or physical
9 infirmity to render efficient service; I would ask that you
10 stand at this time.

11 (No one stands.)

12 THE COURT: However, I know this is an intensely
13 personal question and if you don't want to stand, please
14 make a mental note and speak with me when you are invited
15 to do so.

16 Has any member of the panel been convicted by guilty
17 plea or trial in a state and/or federal court of record of
18 a crime punishable by imprisonment for more than one year
19 and your civil rights have not been restored by pardon or
20 amnesty.

21 By a court of record, we mean the circuit court,
22 general sessions court or federal court. That does not
23 include magistrate's court, municipal court or city court.

24 When we say punishable by more than one year it means
25 that even if you received probation, if you could have

1 received a year and a day or more, that is what we mean by
2 punishable by imprisonment for more than one year. Again,
3 keeping in mind that I know that's intensely personal, and
4 if you don't want to stand, please make a mental note to
5 speak with me privately. However, if you feel you come
6 within this category, and you wish to stand I would ask
7 that you do so at this time.

8 (No one stands.)

9 THE COURT: Is there any member of the panel a
10 clerk of court, deputy clerk of court, constable, sheriff,
11 or other commissioned law enforcement officer, probate
12 judge, county commissioner, magistrate or other county
13 officer or any person employed within the walls of any
14 courthouse; if so I would ask that you stand at this time.

15 (No one stands.)

16 THE COURT: Is there any member of the panel that
17 has previously served on jury duty in a court of record,
18 that means the circuit court, general sessions court. Not
19 city court, magistrate's court, municipal court or the
20 federal court during this calendar year, which is 2005; if
21 so please stand at this time.

22 (No one stands.)

23 THE COURT: Is there any member of the panel that
24 has served on the Calhoun County Grand Jury during the past
25 several years; if so I would ask that you stand at this

1 time.

2 (No one stands.)

3 THE COURT: We will now move to jury exemptions.

4 State law provides for several exemptions to jury service.

5 An exemption does not mean that you're not qualified to

6 serve. It simply means in some instances you have the

7 right to say I choose not to serve. For example; those of

8 you who are 65 years of age or older may be exempted from

9 service as jurors, however, I would emphasize that those

10 who are 65 years of age or older represent a tremendous

11 pool of talent for jury service and we would encourage you

12 to remain with us if you are inclined to do so, however, if

13 you are 65 years of age or older and you wish to be

14 exempted I would ask that you stand at this time.

15 (One juror stands.)

16 THE COURT: Yes, ma'am.

17 MS. GLADDEN: Well, I'm kind of like down in my

18 legs and I would like to be exempt.

19 THE COURT: Okay, ma'am. If you could tell me

20 your name and your juror number?

21 MS. GLADDEN: My name is Eloise Gladden, and my

22 address is 034.

23 THE COURT: And do you know your juror number?

24 MS. GLADDEN: Juror number is 034.

25 THE COURT: Okay, ma'am, how old are you? I know

1 that's an indelicate question?

2 MS. GLADDEN: I'm 80 years old.

3 THE COURT: Wow. You don't look it. You look
4 wonderful. You may be exempt, ma'am, if you would like to.
5 You're excused at this time. Have a wonderful day.

6 MS. GLADDEN: Thank you.

7 THE COURT: Another exemption concerns prior jury
8 service. You'll recall that prior jury service this
9 calendar year disqualifies that juror from further service
10 this year. Prior jury service also gives rise to an
11 exemption, because no person is required to serve more than
12 once every three calendar years. Therefore, if any member
13 has served during the previous two calendar years, which
14 would be 2004 and 2003, and you wish to exercise the
15 exemption I would ask that you stand at this time. That
16 exemption, however, does not apply if your service was in
17 magistrate's court, municipal court or federal court.

18 (No one stands.)

19 THE COURT: The next exemption deals with those of
20 you have a small child or small children. Please listen
21 very carefully to this exemption it has several parts all
22 of which must apply for you to be exempted on this basis.

23 You may be exempted from jury service if you have a
24 small child or small children under the age of seven years
25 and you have legal custody of your child or children and

1 you have their principle care, custody, and control, and
2 you are unable to make arrangements for their adequate care
3 while performing jury duty. If all these requirements
4 apply to you, then you may be exempted on this basis, but
5 only if all of these requirements are present. If this
6 exemption applies and you wish to exercise it, I would ask
7 that you stand at this time.

8 (No one stands.)

9 THE COURT: The next exemption deals with those of
10 you who may be attending school at this time or working in
11 some capacity with the school. Is there any member of the
12 panel who is a full-time student, school teacher, school
13 crossing guard, school bus driver, or serves in any other
14 school related function who is unable to serve on jury duty
15 this week as a result of that school involvement. If this
16 exemption applies to you and you wish to exercise it we
17 will transfer you to a term that does not conflict with
18 your school responsibilities. If so I would ask that you
19 stand at this time.

20 (No one stands.)

21 THE COURT: The next exemption involves those of
22 you who perform services for a business, commercial, or
23 agricultural enterprise. Is there any member of the panel
24 who performs services for a business, commercial, or
25 agricultural enterprise and whose services are so essential

1 to the operation of that enterprise that the enterprise
2 must close or cease to function if you are required to
3 perform jury duty. If this exemption applies to you and
4 you wish to exercise it, we will transfer you to another
5 term of court. I would add the following explanation; this
6 exemption is geared toward seasonal type workers. It is
7 not for those who are self-employed, those who are hourly
8 workers and will not be paid and are their family's source
9 of income as well as commissioned type workers who are only
10 paid by commission. If you feel this exemption applies to
11 you and you wish to exercise it, I would ask that you stand
12 at this time.

13 (No one stands.)

14 THE COURT: Is there any member of the panel who
15 is employed with the Department of Corrections as a guard
16 at a penitentiary; if so I would ask that you stand at this
17 time because state law provides that you shall be exempted
18 on this basis.

19 (No one stands.)

20 THE COURT: Is there any member of the panel who
21 is the primary care-taker of a severely disabled person who
22 is unable to care for himself or herself or cannot be left
23 unattended and desires to be excused from jury duty. That
24 would also include a person aged 65 years of age or older
25 or a disabled person who you have the sole care-taking

1 responsibility for and they cannot be left unattended and
2 you cannot make alternate arrangements for adequate care.
3 If so I would ask that you stand at this time.

4 (No one stands.)

5 THE COURT: Ladies and gentlemen, that concludes
6 the statutory list of qualifications and exemptions for
7 jury service. It may be that you're qualified and that no
8 exemption applies to you, but that jury service this week
9 would constitute an extreme hardship upon you for a
10 particular reason. I cannot permanently excuse a qualified
11 juror from jury service, but under extreme and compelling
12 circumstances I may excuse a juror from this term of court
13 and transfer the juror to another term of court,
14 particularly jurors who have not been previously
15 transferred. Please recognize that general inconvenience
16 is not a sufficient basis to transfer you to another term
17 of court. To justify a transfer service this week must
18 constitute an extreme hardship upon you. I would explain
19 that the following are not considered extreme hardships;
20 the hourly worker who will not be paid and is his or her
21 family's only source of income, self-employed workers,
22 commissioned type workers, the handling of jurors doctor
23 related appointments, transfer of a previously transferred
24 juror, and jurors who refuse to sit in judgment of a fellow
25 human being. However, if you have a doctor's appointment

1 this week, please make the Court aware of it, because we
2 can make alternate arrangements so that you are able to
3 make your appointment. We know how difficult it is to get
4 doctors appointments.

5 (No one stands.)

6 Ladies and gentlemen, this will now be the opportunity
7 for those of you who did not respond earlier to those
8 personal questions that were asked or any other question
9 that was asked including those of you who have a compelling
10 reason to request a transfer of your jury service to
11 another work.

12 Very briefly, the qualifications for jury service are
13 that you are a citizen of the United States, a citizen and
14 resident of Calhoun County. That you are able to read,
15 write, speak, and understand the English language. That
16 you have at least a sixth grade education or its
17 equivalent. That you are able physically and mentally to
18 render efficient service. That you have not been convicted
19 of a crime punishable by imprisonment for more than one
20 year and your civil rights have not been restored by pardon
21 or amnesty. That you are not employed as a law enforcement
22 officer, county officer or employed within the walls of any
23 courthouse, and that you've not previously served on jury
24 duty during this calendar year in a court of record.

25 If any of these qualifications concerns you or if you

1 have a question about any of these qualifications as they
2 may apply to you and to your situation or if you have a
3 question or concern about an exemption or if you wish to
4 seek a transfer to another term of court, I would ask that
5 you line up in the aisle to speak with the Court

6 individually at this time.

7 (Jury panel members line up.)

8 THE COURT: If you'll wait for the bailiff, I'll
9 be right down.

10 Sir, please tell me your name and your juror number.

11 Sir, you've been excused already.

12 JUROR NO. 98: I did?

13 THE COURT: Yes, sir. You have a good day.

14 THE COURT: Juror 98 is excused.

15 Yes, ma'am. Tell me your name and your juror number?

16 JUROR NO. 52: Juror number 52.

17 THE COURT: Yes, ma'am.

18 You might have to stay just because we'll real close
19 on our numbers. You may not be selected. If you can just
20 bear with us just a little while and let me see what I can
21 do.

22 JUROR No. 52: Yes, ma'am.

23 JUROR NO. 87: Juror number 87.

24 THE COURT: Yes, and do you work?

25 JUROR NO. 87: Yes, ma'am.

1 THE COURT: Who takes care of them when you work?

2 JUROR No. 87: They're at school.

3 THE COURT: Oh, school has already started hadn't
4 it. And then when you get off you pick them up?

5 JUROR NO. 87: Yes, ma'am.

6 THE COURT: Who will pick them up if you late?

7 JUROR NO. 87: Their grandmother.

8 THE COURT: I'm going to have to ask that you stay
9 because the exemption really doesn't -- is really tailored
10 for folk who stay at home full-time. And unfortunately it
11 doesn't address folk who tailor their schedules to take
12 care of their children. It really should, but it doesn't,
13 but usually when I can cut you a break I will, but we're
14 really tight with our numbers, and I need you to remain
15 with us. But if you're not selected you can go about your
16 day as usual.

17 JUROR NO 87: Okay, thank you.

18 THE COURT: No. 87 will remain with us.

19 Yes, sir.

20 JUROR NO. 63: (inaudible) Thursday.

21 THE COURT: Juror No. 63 is protected for
22 Thursday.

23 If No. 6 could approach, please?

24 THE CLERK: It's Percy Barefoot.

25 THE COURT: And Mr. Mulligan, No. 70, if you could

1 approach for me, please.

2 (Juror Nos. 6 and 70 come forward.)

3 THE COURT: No 6 is exempt.

4 THE CLERK: And 70 John Mulligan, Millibar.

5 THE COURT: Millibar.

6 SOLICITOR: This is a DUI causing great bodily
7 injury.

8 THE COURT: Sir, you are exempt from service.

9 No. 70 is exempt.

10 Is that everybody?

11 Thank you ladies and gentlemen, the panel is now
12 qualified. Please permit me to share with you some general
13 guidelines for your service this week.

14 By Order of the Chief Justice of South Carolina there
15 can be no pagers, cell phones, or other electronic devices
16 in the courthouse in the on position during jury service.
17 I just need to tell you at the outset that if you're
18 selected for a jury your cell phones will be collected when
19 you arrive in the morning. They will be returned to you at
20 lunch. They will be collected after lunch and returned to
21 you after recess. The reason we do this is one -- cell
22 phones and other electronic devices can be very disruptive.
23 People -- myself sometimes forget that I have it on and it
24 goes off and it can be disruptive during testimony and
25 otherwise. And so that is why they are excluded. In

1 addition to that in this information and technological age
2 that we live in, you have access to a great deal of
3 information on those devices and it is essential when
4 trying a case that because you are the fact finders that
5 you remain fair and impartial and uninfluenced by anything
6 that you hear outside of the evidence. So in order for us
7 to protect that impartiality we have to make sure that you
8 don't have any outside interactions.

9 I would ask, especially in a small environment that
10 we're in, that you have no interaction with anyone in or
11 about the courthouse unless you know them to be a juror or
12 a member of the court staff. That means that you should
13 not have any interaction with lawyers, with law enforcement
14 that you think maybe a witness in a case or potential
15 witnesses or the lawyers. I would hate for an innocent
16 conversation to be observed by someone, a third party, and
17 for it to be misconstrued.

18 We would ask that you be prompt. It is unfair when we
19 have to delay the proceedings because someone is late. By
20 the same token, if you run into some emergency coming to
21 court, please let us know. In most instances we can assist
22 you, especially if it's something like a flat tire or
23 otherwise. It's no need in you being flustered on the side
24 of the road when you could get assistance or if you have an
25 emergency at home or otherwise please make us aware of it.

1 Now, having said that, I need to also tell you that
2 there will be times during the proceeds that you have to
3 wait on us. Please know that while you're waiting that we
4 value your time, we're not wasting it and that we are
5 working. There are many things during this process that
6 you cannot see. Again, that is because you are the fact
7 finders. And when ruling on certain pre-trial matters as
8 well as other matters of law, sometimes it's necessary for
9 the Court to make comments about the facts and we would not
10 want you to be influenced in any way by that.

11 So that is sometimes why you are excluded from
12 proceedings. So know that when you're waiting, that the
13 Court and the lawyers are working and that we do not take
14 your time for granted. Again, as I've already indicated,
15 if an emergency occurs at home, work, or otherwise, please
16 advise the court or the clerk staff immediately so that we
17 can assist you.

18 As I've already indicated generally court begins
19 between the hours -- begins about 9:30. We generally break
20 about 12:30 or 1:00 for lunch, take an hour or an hour and
21 15 minutes for lunch, and then we generally break between
22 the hours of 5:00 and 5:30 for the evening.

23 If you are not selected for a jury today, you will
24 simply need to call the jury information line, which is
25 803.874.1283, after 6:00 p.m., and there will be a message

1 regarding what you need to do. However, I anticipate, as
2 I've indicated, that this will be the only trial we have
3 this week and if you're not selected you will be able to go
4 about your business as normal, and you will not have to
5 come back up to the courthouse.

6 I'm going to give you all a five minute -- well, take
7 a 10 minute break until 11:00 o'clock. Please return to
8 the courtroom promptly at that time, and at that time I
9 anticipate that we will begin the voir dire process and
10 begin the selection of the jury.

11 Thank you very much.

12 (Jury panel out for break at 9:50 a.m.)

13 (Jury panel in after break at 11:15 a.m.)

14 THE COURT: All right, is the State ready to
15 proceed on Mr. Smith's case?

16 MR. PASCO: Yes, Your Honor.

17 THE COURT: Is the defense ready to proceed?

18 MR. JOHNSON: Yes, ma'am.

19 THE COURT: Could counsel approach for me, please?

20 (Off record bench conference with Mr. Pasco, Ms. Frick, and
21 Mr. Johnson.)

22 THE COURT: Okay, Mr. Johnson, does the defense
23 wish to have a formal arraignment?

24 MR. JOHNSON: No, Your Honor, we wish to waive the
25 formal arraignment.

1 THE COURT: Okay.

2 Ladies and gentlemen, we're going to select the case
3 for the -- select the jury for the following cases, the
4 State verses Mike A. Smith, an indictment for murder, 2004-
5 GS-09-0145. That indictment alleges as follows: That Mike
6 A. Smith did in Calhoun County on or about March 9th, 2000,
7 with malice aforethought kill one William Marion by
8 shooting him in his right side with a hand gun. And the
9 said victim did die as a proximate result thereof. This
10 offense being a violation of the common law of South
11 Carolina and Section 16-310 of the Code of Laws as amended,
12 alleging that it was the peace and dignity of this state
13 and contrary to the statutes and such case as made and
14 provided.

15 And indictment 2004-GS-09-202, which is an indictment
16 for possession of a firearm during the commission of a
17 crime of violence, and that indictment alleges that Mike A.
18 Smith did in Calhoun County on or about March 9, 2000,
19 unlawfully have a handgun in his possession. This offense
20 -- alleging this offense occurred during the commission of
21 a murder as a result violating Section 16-23-490 of the
22 Code of Laws as amended.

23 May I ask counsel for the State to please stand and
24 introduce themselves, as well as those who will be
25 assisting them in the trial, and also if you would name the

1 members of your office.

2 MR. PASCO: Thank Your Honor.

3 THE COURT: Your welcome.

4 MR. PASCO: Good morning ladies and gentlemen, my
5 name is David Pasco. I'm the Solicitor for Calhoun County.
6 I'll be trying this case today with my Assistant Solicitor,
7 Carol Frick.

8 MS. FRICK: Good morning.

9 MR. PASCO: Also assisting me will be Andrea Fogle
10 from Lone Star. Angie Martin and, of course, Sheriff
11 Thomas Summers.

12 And Your Honor, this will be my Calhoun County staff.

13 THE COURT: Okay, and also your Orangeburg County,
14 if you could.

15 MR. PASCO: In Orangeburg I have first assistant
16 solicitor, Brian Jeffries. First assistant solicitor Tommy
17 Scott, who is actually here today. Assistant solicitor
18 Kelly Burbage, assistant solicitor Rob Clariday. Assistant
19 solicitor Kyle Parker and assistant solicitor Laura
20 McCants.

21 Do you want me to go over my Dorchester, too.

22 THE COURT: Yes, you probably need to.

23 MR. PASCO: In Dorchester County I have deputy
24 solicitor Don Sorenson, senior assistant solicitor Harrison
25 Bell, assistant solicitor Virgil Deas, assistant solicitor

1 Susan Williams, and assistant solicitor Bill McIntosh.

2 Also, one very important person we have here today, my
3 victims advocate, Ms. Tammy Fraser from Orangeburg.

4 Thank you, Your Honor.

5 THE COURT: Thank you very much.

6 ~~Mr. Johnson~~ Mr. Johnson, if you would stand and provide us with
7 the same information as well as introducing your client to
8 the panel.

9 MR. JOHNSON: Thank you, Your Honor.

10 THE COURT: You're welcome.

11 MR. JOHNSON: Good morning. My name is Charles
12 Johnson. I'm an attorney from Columbia. I have a law
13 office there in Columbia. I've been practicing
14 approximately nine years in this area. I do a number of
15 cases in Columbia, Bishopville, across the state.

16 This is my client, Michael Smith, who has been charged
17 with the case that is going to be heard today.

18 This is my investigator, Mr. Young. He's assisting me
19 in this case as my investigator and he also is from
20 Columbia and has worked with me over the past years.

21 Your Honor, that's basically it.

22 THE COURT: Thank you.

23 Ladies and gentlemen, as a part of this process there
24 are certain questions that I'm going to ask of you. I know
25 that some of them may seem intensely personal. If there's

1 a question that you do not want to answer in the presence
2 of your fellow jurors please make the Court aware of it so
3 that I can speak with you privately with the lawyers and
4 the court reporter. We don't want any of you to suffer
5 any embarrassment, but it is essential that we have
6 accurate information during the jury selection process.

7 Is there any member of the panel related by blood or
8 marriage to either Mike A. Smith or William Marion. If so
9 I would ask that you stand at this time.

10 (No one stands.)

11 THE COURT: Does any member of the panel have a
12 close personal, social, or business relationship or
13 previously with William Marion or Mike A. Smith; if so
14 please stand at this time.

15 (One juror stands.)

16 THE COURT: Yes, sir, if you would tell me your
17 name and your juror number?

18 JUROR NO. 21: David Dantzler, I don't have my
19 number.

20 THE COURT: Tell me your name again, I couldn't
21 hear you.

22 JUROR NO. 21: David Dantzler.

23 THE COURT: Yes, sir. We'll look up your number

24 -- number 21.

25 Yes, sir.

1 JUROR NO. 21: He was my next door neighbor.

2 THE COURT: Mr. Smith, is that who you are
3 referring to?

4 JUROR NO. 21: Yes, ma'am.

5 THE COURT: How long ago was that, sir?

6 JUROR NO. 21: A couple of years ago.

7 THE COURT: How many years ago?

8 JUROR NO. 21: It was a couple of years.

9 THE COURT: When you say a couple, do you mean
10 three, four, five, two; can you give me an estimate?

11 JUROR NO. 21: (Inaudible)

12 THE COURT: Okay. When you say next door
13 neighbor, was he someone that you spoke with regularly or
14 was he somebody you just saw in passing?

15 JUROR 21: Saw him.

16 THE COURT: Sir, as a result of this experience do
17 you feel that you can remain fair and impartial and render
18 a fair and impartial decision in this case, based solely on
19 the evidence as it will be presented and on the law as the
20 Court will charge?

21 JUROR NO. 21: No, ma'am.

22 THE COURT: I'm sorry, I can't hear you?

23 JUROR NO. 21: No, ma'am.

24 THE COURT: Okay. Sir, you will be excused from
25 this case only. You may take your seat.

1 The following are a list of potential witnesses in
2 this case. I would ask that you listen very carefully.

3 Sheriff Thomas Summers, Detective Lynn Shearer, Deputy
4 Bobby Jones, Doctor Joel Sexton, Agent David Black of South
5 Carolina Law Enforcement Division, as well as Agent Kim
6 Black, Agent Dan DeFreese and Agent Philip Coonfield, all
7 of SLED. George Rast, Louis Rivers, Mike Robinson, George
8 Rivers, Shirley Rivers, Janie Glover, Otis Backman,
9 Hercules Huggins, Darren Brown, John Haynes, Frank Brown,
10 Rose Haynes, Lelia Jones, Randy King, and Becky Spiegner,
11 both of the Calhoun County EMS.

12 Is there any member of the panel that is related by
13 blood or marriage to any of the people that I've just
14 listed or does anyone have a close person, social, or
15 business relationship with any of these people; if so I
16 would ask that you stand at this time.

17 (Two jurors stand.)

18 THE COURT: Yes, ma'am, if you could tell me your
19 name and your juror number?

20 JUROR NO. 45: Amy Hayes, Juror No. 45.

21 THE COURT: Yes, ma'am.

22 JUROR NO. 45: I am Calhoun County 911 Dispatch --

23 THE COURT: I'm sorry, say that one more time?

24 JUROR NO. 45: I work at 911 dispatch.

25 THE COURT: Uh-huh?

1 JUROR NO. 45: On the third shift. I have a
2 business relationship with the Sheriff's Department and
3 EMS:

4 THE COURT: Have you had any contact with any of
5 the individuals that I've just listed?

6 JUROR NO. 45: I have contact with the Sheriff's
7 Department and EMS on a daily basis.

8 THE COURT: Because you dispatch their calls; is
9 that correct?

10 JUROR NO. 45: Yes, ma'am.

11 THE COURT: Okay. As a result of this experience,
12 do you feel that you can remain fair and impartial and
13 render a fair and impartial decision in this case based
14 solely on the evidence as it will be presented and on the
15 law as the Court will charge?

16 JUROR NO. 45: No, ma'am, I know --

17 THE COURT: Okay. Don't say any more. Ma'am, you
18 will be excused from this case only. You may take your
19 seat.

20 Yes, ma'am.

21 JUROR NO. 61: My husband Danny Kirkland, is a
22 very close friend of Sheriff Thomas Summers.

23 THE COURT: And your name and your number, ma'am.

24 JUROR NO. 61: My juror number is 61, and my name
25 Margaret Kirkland.

1 THE COURT: Okay, when you say close, could you
2 define that for me?

3 JUROR NO. 61: Well, they're both in law
4 enforcement --

5 THE COURT: Uh-huh.

6 JUROR NO. 61: -- and served in the county as
7 deputies together. I guess they have contact a couple
8 times a month.

9 THE COURT: Okay. As a result of this experience
10 do you feel that you can remain fair and impartial and
11 render a fair and impartial decision in this case based
12 solely on the evidence as it will be presented and on the
13 law as the Court will charge?

14 JUROR NO. 61: Yes, ma'am.

15 THE COURT: Thank you, ma'am. You may take your
16 seat.

17 Has any member of the panel ever been represented by
18 any of the attorney's involved in this case or by anyone
19 with whom they practice law; if so please stand at this
20 time.

21 (No one stands.)

22 THE COURT: Is there any member of the panel that
23 is related by blood or marriage to or have a close personal
24 or social relationship with any of the attorneys involved
25 in this case or with anyone with whom they practice law; if

1 so please stand.

2 (No one stands.)

3 THE COURT: Is there any member of the panel that
4 has formed or expressed an opinion about any issue or
5 matter involved in this case; if so please stand at this
6 time.

7 (No one stands.)

8 THE COURT: Is there any member of the panel aware
9 of any bias or prejudice toward either the State or the
10 defense in this case; if so please stand at this time.

11 (No one stands.)

12 THE COURT: Is there any member of the panel that
13 was a member of the Grand Jury which issued the indictments
14 in this case; if so please stand at this time.

15 (No one stands.)

16 THE COURT: Is there any member of the panel who
17 is a member of or contributor to any group which has as its
18 primary concern the promotion of law enforcement or victims
19 rights. These groups would include, but certainly are not
20 limited to, Mothers Against Drunk Driving, Students against
21 Drunk Driving, Citizens Against Violent Crime, People
22 Against Rape, or Citizens Advocating A Return To Decency
23 and Ethics; if so please stand at this time.

24 (No one stands.)

25 THE COURT: Is there any member of the panel that

1 has ever been employed by any civilian or military law
2 enforcement agency; if so please stand at this time.

3 (No one stands.)

4 THE COURT: Is there any member of the panel that
5 is related by blood or marriage to a member of any law
6 enforcement agency; if so please stand at this time.

7 (Juror stands.)

8 THE COURT: Okay, if you would tell me your name
9 and your number and how you're related to the person.

10 JUROR NO. 61: My name is Margaret Kirkland. I'm
11 Juror No. 61, and my husband is a Public Safety Officer
12 with the Orangeburg Department of Public Safety.

13 THE COURT: Ma'am, as a result of this experience
14 do you feel that you can remain fair and impartial and
15 render a fair and impartial decision in this case based
16 solely on the evidence as it will be presented and on the
17 law as the Court will charge?

18 JUROR NO 61: Yes, ma'am.

19 THE COURT: Thank you, ma'am, you may take your
20 seat.

21 (Two jurors stand.)

22 THE COURT: Is there any member of the panel that
23 has read -- I'm sorry -- Yes, ma'am.

24 JUROR NO. 95: My name is Lydia Spires. I'm not
25 sure of my juror number. My son-in-law is in law

1 enforcement.

2 THE COURT: Okay, we'll find it for you.

3 MS. FRICK: Number 95, Your Honor.

4 THE COURT: Thank you.

5 And you said your son-in-law is in law enforcement?

6 JUROR NO. 95: Deputy for Richland County.

7 THE COURT: If you would remain standing for me.

8 Number 45, I've already excused you from this panel so
9 you may take your seat.

10 Yes, ma'am, in the blue?

11 JUROR NO. 26: My number, my juror number is 0026.

12 My husband is on the board of the DNR and I don't know if
13 that qualifies for what you're asking.

14 THE COURT: Okay. It might come within that
15 category, so that's fine.

16 (Juror stands.)

17 As a result -- you can remain standing for me. I'm
18 sorry.

19 Yes, ma'am.

20 JUROR NO. 110: My juror number is 0110. Your
21 question about employed by the military, does that mean
22 Army or Navy or --

23 THE COURT: Military Police.

24 JUROR NO. 110: Okay.

25 THE COURT: Okay. Thank you.

1 (One juror stands.)

2 THE COURT: Yes, ma'am, in the back.

3 JUROR NO. 54: (Inaudible), Ft. Jackson.

4 THE COURT: For who?

5 JUROR NO. 54: Ft Jackson military.

6 THE COURT: Okay. And ma'am, your name?

7 JUROR NO. 54: Jessica James.

8 THE COURT: Okay.

9 As a result of these experiences do you all feel that
10 you can remain fair and impartial and render a fair and
11 impartial decision in this case based solely on the
12 evidence as it will be presented and on the law as the
13 Court will charge.

14 Number 95?

15 JUROR NO. 95: Yes, ma'am.

16 THE COURT: Number 26?

17 JUROR NO. 26: Yes, ma'am.

18 THE COURT: Thank you.

19 And Number 54?

20 JUROR No. 54: Yes, ma'am.

21 THE COURT: Thank you. You may all take your
22 seats.

23 Is there any member of the panel that has read or
24 heard anything about this case either in the print media or
25 on radio or internet; if so I would ask that you stand at

1 this time.

2 (One juror stands.)

3 THE COURT: Yes, ma'am. You're No. 110, is that
4 correct?

5 JUROR NO. 110: Correct.

6 THE COURT: And your name?

7 JUROR NO. 110: Kathleen Virello. It was just
8 mentioned -- my husband called the Sheriff's Department to
9 ask if they needed metal detectors and it was just quickly
10 mentioned that there was a murder this week and that I was
11 on the jury duty. We dropped the subject right then.

12 THE COURT: So you did not hear anything about the
13 specifics.

14 JUROR NO. 110: It was dropped immediately.

15 THE COURT: As a result, ma'am, have you formed
16 any fixed opinion about this case?

17 JUROR NO. 110: Absolutely not.

18 THE COURT: And do you feel that you can remain
19 fair and impartial?

20 JUROR NO. 110: Yes, ma'am.

21 THE COURT: Do you feel that you can render a fair
22 and impartial decision in this case based solely on the
23 evidence as it will be presented and on the law as the
24 Court will charge?

25 JUROR NO. 110: Yes.

1 THE COURT: Thank you, ma'am, we appreciate your
2 candor. You may be seated.

3 Is there any member of the panel or any member of your
4 family ever been the victim of a murder, car jacking,
5 assault or any similar offense; if so I would ask that you
6 stand at this time.

7 (One juror stands.)

8 THE COURT: Yes, sir. If you would tell me your
9 name and your juror number?

10 JUROR NO. 63: I'm number 63. My name is Dennis
11 Larrymore.

12 THE COURT: Okay.

13 JUROR NO. 63: I had a cousin that was murdered.

14 THE COURT: Sir, as a result of this experience,
15 do you feel that you can remain fair and impartial and
16 render a fair and impartial decision in this case based
17 solely on the evidence as it will be presented and on the
18 law as the Court will charge?

19 JUROR NO. 63: Yes.

20 THE COURT: Thank you, sir.

21 Is there any member of the panel that has ever been
22 charged with (inaudible).

23 (Juror stands.)

24 THE COURT: Yes, ma'am, your name and your juror
25 number?

1 JUROR NO. 61: (Inaudible).

2 THE COURT: Okay, and I know that's intensely
3 personal, ma'am.

4 JUROR NO. 61: Bad check back in 1990.

5 THE COURT: Say that one more time?

6 JUROR NO. 61: Fraudulent check in 1990.

7 THE COURT: And you are number 61.

8 JUROR NO. 61: Number 61.

9 THE COURT: Ma'am, as a result of this experience
10 do you feel that you can remain fair and impartial and
11 render a fair and impartial decision based solely on the
12 evidence as it will be presented and on the law as the
13 Court will charge.

14 JUROR NO. 61: Yes, ma'am.

15 THE COURT: Thank you, ma'am.

16 Is there any member of the panel who has a religious
17 or moral opposition to the consumption of alcohol; if so I
18 would ask that you stand at this time.

19 (No one stands.)

20 THE COURT: Is there any member of the panel who
21 has ever been a witness in a criminal trial; if so I would
22 ask that you stand at this time.

23 (No one stands.)

24 THE COURT: Does any member of the panel know of
25 any reason whatsoever why he or she should not serve as a

1 juror in this case with particular emphasis being placed on
2 your ability to be fair and impartial to both the State and
3 the Defendant; is so I would ask that you stand at this
4 time.

5 (No one stands.)

6 THE COURT: Are there any additional questions
7 from the State?

8 MR. PASCO: No additional questions, but I would
9 like to approach with the defense counsel, Your Honor.

10 THE COURT: Okay.

11 Any additional questions from defense?

12 MR. JOHNSON: Nothing from defense, Your Honor.

13 THE COURT: Okay. Please approach.

14 (Off record bench conference with Mr. Pasco, Ms. Frick, and
15 Mr. Johnson.)

16 MR. PASCO: Thank you, Your Honor.

17 THE COURT: You're welcome.

18 Is there any member of the panel who has ever been
19 arrested for a crime but never convicted; if so I would ask
20 that you stand at this time.

21 (Juror stands.)

22 THE COURT: Yes, ma'am. You don't have to
23 respond. You've already stood.

24 Is there anyone who does not understand the question?
25 That means if you've ever been picked up, arrested, but the

1 charges were either nol prossed or they were not prosecuted
2 or you were not convicted; if so please stand at this time.

3 (Juror stands.)

4 JUROR NO. 16: Uh --

5 THE COURT: Uh-huh.

6 JUROR NO. 16: I had the same thing; fraudulent
7 check. I wasn't picked up or went to Court.

8 THE COURT: Okay.

9 If anyone else falls into that category where you were
10 not actually picked up by law enforcement or arrested, but
11 you were charged with an offense which could be fraudulent
12 check or any other number of offenses and you feel you may
13 not understand the question I would ask that you let me
14 know or that you would stand at this time.

15 (Two jurors stand.)

16 Okay. If you'd remain standing for me, ma'am.

17 Yes, sir.

18 JUROR NO. 7: I got picked up for public drunk.

19 THE COURT: Okay, sir, and what is your name and
20 number?

21 JUROR NO. 7: Beech, number 7.

22 THE COURT: Okay, and yes, ma'am, in the back?

23 JUROR NO. 54: Jessica James.

24 THE COURT: What is your name and number, again,
25 ma'am? You're No. 54, correct?

1 JUROR NO. 54: Uh-huh.

2 THE COURT: And tell me your name?

3 JUROR NO. 54: Jessica James

4 THE COURT: Okay.

5 As a result of these experiences do you all feel that
6 you can remain fair and impartial and render a fair and
7 impartial decision in this case based solely on the
8 evidence as it would be presented and on the law as the
9 Court will charge.

10 Number 16?

11 JUROR NO. 16: Yes.

12 THE COURT: Number 7?

13 JUROR NO. 7: Yes, ma'am.

14 THE COURT: And number 54?

15 JUROR NO. 54: Yes, ma'am.

16 THE COURT: Okay. Thank you. You may all be
17 seated.

18 Any additional questions from the State?

19 MR. PASCO: No, Your Honor.

20 THE COURT: From the defense?

21 MR. JOHNSON: None from defense, Your Honor.

22 THE COURT: Okay. Strikes will be 10 and five.

23 Ladies and gentlemen, if you would listen very

24 carefully as your names are called, if you would bring all
25 of your personal belongings -- and Mr. Johnson, could I

1 prevail on you to demonstrate where they should stand for
2 me, like right in front of this microphone.

3 If you would look at how Mr. Johnson is standing. If
4 you would bring all of your personal belongings, come
5 forward and stand just like he is if your name is called.

6 ~~Thank you.~~ Thank you.

7 MR. JOHNSON: And Your Honor, if I could ask --

8 THE COURT: Yes. They took your client to the
9 bathroom. We'll just wait just a moment.

10 If you all could bear with us.

11 MR. JOHNSON: Thank you.

12 THE COURT: We appreciate your patience.

13 (Defendant seated in courtroom.)

14 THE COURT: Is the State ready to proceed?

15 MR. PASCO: Yes, Your Honor.

16 THE COURT: Is the defense ready to proceed?

17 MR. JOHNSON: Defense is ready, Your Honor.

18 THE COURT: Okay. You may proceed.

19 MR. JOHNSON: Your Honor, for clarification, five
20 and 10?

21 THE COURT: Ten and five, yes, sir.

22 MR. JOHNSON: Thank you.

23 THE CLERK: Juror No. 0068, Dennis Miller.

24 MR. PASCO: What number is that?

25 THE CLERK: Number 0068. What says the State?

1 MR. PASCO: Please present Mr. Miller.

2 MR. JOHNSON: Please seat the juror.

3 THE CLERK: Juror No. 0095, Ms. Lydia B. Spires.

4 What says the State?

5 MR. PASCO: Please present Ms. Spires.

6 MR. JOHNSON: Please excuse this juror.

7 THE CLERK: Juror No. 0011, Ms. Diane Brigman.

8 What says the State?

9 MR. PASCO: Please present Ms. Brigman.

10 MR. JOHNSON: Please seat the juror.

11 THE CLERK: Juror No. 0097, Mr. Richard L.

12 Stabler.

13 What says the State?

14 MR. PASCO: Please present Mr. Stabler.

15 MR. JOHNSON: Please seat the juror.

16 THE CLERK: Juror No. 0081, Mr. Tracy W. Poston,

17 Sr.

18 What says the State?

19 MR. PASCO: Please present Mr. Poston.

20 MR. JOHNSON: Please dismiss the juror.

21 THE CLERK: Juror No. 0063, Mr. Dennis Larrymore.

22 What says the State?

23 MR. PASCO: Please present Mr. Larrymore.

24 MR. JOHNSON: Please dismiss the juror.

25 THE CLERK: Juror No. 0010, Mr. Thomas J. Bovain.

1 What says the State?

2 MR. PASCO: Please present Mr. Bovain.

3 MR. JOHNSON: Please dismiss the juror.

4 THE CLERK: Juror No. 0016, Ms. Gail D. Chisholm.

5 What says the State?

6 MR. PASCO: Please present Ms. Chisholm.

7 MR. JOHNSON: Please seat the juror.

8 THE CLERK: Juror No. 0069, Ms. Kimmie J. Miller.

9 What says the State?

10 MR. PASCO: Please present Ms. Miller.

11 MR. JOHNSON: Please seat the juror.

12 THE CLERK: Juror No. 0116, Mr. Johnny L. White.

13 THE COURT: Could you repeat that number for me?

14 THE CLERK: No. 116.

15 THE COURT: Okay, thank you.

16 THE CLERK: What says the State.

17 MR. PASCO: Please present Mr. White.

18 MR. JOHNSON: Please seat the juror.

19 THE CLERK: Juror No. 0038, Mr. Mayreo A.

20 Guinyard.

21 What says the State?

22 MR. PASCO: Please excuse Mr. Guinyard.

23 THE CLERK: Juror No. 0023, Benjamin J. Driggers.

24 What says the State?

25 MR. PASCO: Please present Mr. Driggers.

1 MR. JOHNSON: Please excuse the juror.

2 THE CLERK: Juror No. 0087, Mr. Eric M. Roach.

3 What says the State?

4 MR. PASCO: Please present Mr. Roach.

5 MR. JOHNSON: Please seat the juror.

6 THE CLERK: Juror No. 0044, Ms. Maggie Hart.

7 What says the State?

8 MR. PASCO: Please present Ms. Hart.

9 MR. JOHNSON: Please dismiss the juror.

10 THE CLERK: Juror No. 45, Ms. Amy M. Hayes.

11 MS. FRICK: She's been excused.

12 THE CLERK: Oh, that's right. Excused.

13 Juror No. 0015, Mr. Terry Canty.

14 What says the State?

15 MR. PASCO: Please excuse Mr. Canty.

16 THE CLERK: Juror No. 0061, Ms. Margaret S.

17 Kirkland.

18 What says the State?

19 MR. PASCO: Please present Ms. Kirkland.

20 MR. JOHNSON: Please seat the juror.

21 THE CLERK: Juror No. 0094, Mr. Benjamin K.

22 Snelgrove.

23 What says the State?

24 MR. PASCO: Please present Mr. Snelgrove.

25 MR. JOHNSON: Please seat the juror.

1 THE CLERK: Juror No. 0067, Ms. Edith McDonald.

2 What says the State?

3 MR. PASCO: Please present Ms. McDonald.

4 MR. JOHNSON: Please seat the juror.

5 THE CLERK: Juror No. 0037, Mr. Sammy L. Green,

6 Jr.

7 What says the State?

8 MR. PASCO: Please present Mr. Green.

9 MR. JOHNSON: Please seat the juror.

10 THE CLERK: Juror No. 0041, Mr. Antonio Hamilton.

11 What says the State?

12 MR. PASCO: Please excuse Mr. Hamilton.

13 THE CLERK: Juror No. 0052, Ms. Rene J. Jackson.

14 What says the State?

15 MR. PASCO: Please present Ms. Jackson.

16 MR. JOHNSON: Please seat the juror.

17 THE CLERK: Juror No. 0029, Ms. Susan Flinton.

18 THE COURT: That's 12, isn't it. Yes. One

19 alternate.

20 THE CLERK: One alternate.

21 THE COURT: Strikes are one and two.

22 You may proceed.

23 THE CLERK: Ms. Flinton.

24 THE COURT: Could you repeat that number for me,

25 please?

1 THE CLERK: It's 0029, Ms. Susan Flinton.

2 What says the State?

3 MR. PASCO: Please present Ms. Flinton.

4 MR. JOHNSON: Please excuse the juror.

5 THE CLERK: Juror No. 0026, Ms. Christian S.
6 Evans.

7 What says the State?

8 MR. PASCO: Please present Ms. Evans.

9 MR. JOHNSON: Please seat the juror.

10 THE CLERK: Ma'am, I think that's it.

11 THE COURT: Any motions regarding selection of the
12 jury from the State?

13 MR. PASCO: None from the State, Your Honor.

14 THE COURT: From the Defense?

15 MR. JOHNSON: None from the Defense, Your Honor.

16 THE COURT: To the balance of the panel, you're
17 excused for the day. We thank you for your time and our
18 patience. Please call the jury information line after 6:00
19 o'clock this evening for further instructions regarding
20 your jury service. Again, that number is 803.874.1283.

21 Thank you very much. You are excused.

22 THE COURT: All right. I need for you to do
23 something for me. I need you to fill up the first two rows
24 and I need the alternate to take -- I need each of you to
25 move down a little for me. Then, our alternate, I need you

1 to come around for me. I'm going to need y'all -- I'm
2 going to need you to come around and sit in this last chair
3 on the very back where he's sitting. Yes, ma'am.

4 All right. Thank you very much.

5 Are there any matters before we swear the jury from
6 the State?

7 MR. PASCO: No, Your Honor.

8 THE COURT: From the Defense?

9 MR. JOHNSON: Nothing from the Defense, Your
10 Honor.

11 THE COURT: Ladies and gentlemen, if you would
12 stand for me and raise your right hands to be sworn.

13 (Jury panel complies.)

14 THE COURT: You may proceed when you're ready.

15 THE CLERK: Yes, ma'am.

16 Ladies and gentlemen of the jury, please stand and
17 raise your right hand. You shall well and truly try and in
18 true deliverance make between the State of South Carolina
19 and the Defendant at the bar whom you shall have in charge
20 a true verdict give, according to the law and to the
21 evidence so help you.

22 THE COURT: Please respond by saying, I do.

23 JURY PANEL: I do.

24 (Jury panel is sworn.)

25 THE COURT: Thank you. You may all be seated.

1 Ladies and gentlemen, I'm going to excuse you to your
2 jury room for a short while. I'm going to have you elect
3 your foreperson. Your foreperson is your spokesperson here
4 in the courtroom. They don't have any greater vote or
5 voice than you do. It is simply an administrative
6 function, and what they do is they communicate with the
7 Court during jury deliberations and they also preside
8 during jury deliberations and they fill out the verdict
9 form for you.

10 The alternate may observe the process, but is not
11 allowed to vote during the process.

12 Once you have completed that I'm going to have the
13 Bailiff to provide you with a notebook or a pad or a piece
14 of paper and a pen. Please write that person's name and
15 juror number down, knock on the door and let the Bailiff
16 know that you've completed that process and at that time I
17 will let you know how we will be proceeding. I am inclined
18 to break for lunch and then come back so that we will have
19 a better use of our afternoon. I will let you all know
20 that when you return after electing your foreperson.

21 During this break, please do not discuss the case in
22 any way. Do not speculate about what you think it may be
23 about or could be about. And as soon as you have completed
24 that process I will let you know how we will be proceeding
25 for the afternoon.

1 You may go with the Bailiff.

2 (Jury out to select foreperson at 12:05 p.m.)

3 (Off record bench conference with attorneys and clerk.)

4 BAILIFF: One of the jurors has a question about
5 her time --

6 ~~THE COURT:~~ Bring her out.

7 JUROR: I just need to know about time -- because
8 I'm a full-time student. I'm pursuing my master's degree,
9 and I just wanted to know, like, what time will court be
10 adjourned?

11 THE COURT: We generally break at 5:00. Why
12 didn't you tell me that during the qualifications -- voir
13 dire.

14 JUROR: I wasn't thinking about it at that time.

15 THE COURT: Okay.

16 JUROR: I figured, you know, court (inaudible).

17 THE COURT: Okay, what time are your classes?

18 JUROR: At 5:00.

19 THE COURT: Where do you have to go to school?

20 JUROR: South Carolina State University.

21 THE COURT: How far a ride is that for you?

22 JUROR: About 15 minutes, about 15 or 20 minutes.

23 THE COURT: Okay, will your professors allow you,
24 maybe to be a little bit late?

25 JUROR: It's a possibility.

1 THE COURT: If we give you a note will they allow
2 you to be late?

3 JUROR: Probably.

4 THE COURT: Okay, can you enquire -- is it
5 everyday?

6 JUROR: Yes. I have classes Monday through
7 Thursday.

8 THE COURT: Okay, if you could find out for me and
9 what we can do is I can have the Clerk to write you an
10 excuse. Or -- if I need to call I can do that, also.
11 Okay. And what we will do generally, I try to break right
12 at 5:00, but sometimes there may be times depending on
13 where we are in the testimony that we may break earlier
14 than that. Okay.

15 JUROR: All right.

16 THE COURT: Thank you.

17 (Juror goes back to jury room.)

18 THE COURT: Please give them a pen and a pad to
19 write down the foreperson's name and number.

20 THE CLERK: Yes, ma'am.

21 (Off record to wait for selection of foreperson.)

22 THE COURT: The jury had elected No. 16 as their
23 foreperson.

24 We'll have that marked as a Court's Exhibit.

25 (Court's Exhibit No. 1, selection

1 of jury foreperson, was marked and entered.)

2 THE COURT: What I'm thinking is we'll adjourn
3 until 1:15 p.m. for lunch and resume at that time.

4 Is there any exception to proceeding that way from the
5 State?

6 Mr. Pasco: No, Your Honor.

7 THE COURT: From the Defense?

8 MR. JOHNSON: No, Your Honor.

9 THE COURT: I think that gives us better use of
10 our afternoon.

11 Yes, sir. I'm sorry, I didn't hear. Oh, 1:30 p.m.,
12 because I have a probation revocation. We'll break until
13 1:30 because of the probation revocation.

14 Okay, if you'll please bring in the jury.

15 (Jury in at 12:10 p.m.)

16 THE COURT: Ladies and gentlemen, we are going to
17 break for lunch until 1:30. I have another matter
18 unrelated to this case that I need to deal with prior to
19 going to lunch. That's why we have a little more extended
20 lunch hour.

21 During the break, please have no discussion about this
22 case among yourselves or with anyone else. Please do not
23 read, watch, or listen to any media reports about this
24 case. That includes anything that you could read in the
25 newspaper, that could be on television, on the radio, or on

1 the internet. In addition, you are prohibited from doing
2 any independent research of any type about this case or any
3 issue involved in this case. That also includes anything
4 that you could find or that could be accessible to you on
5 the internet.

6 When you return to the courthouse at 1:30, please
7 return directly to your jury room. Again, please do not.
8 have any contact with anyone in or about the courthouse. I
9 would hate for an innocent conversation to be observed by
10 someone and misconstrued.

11 I hope you all enjoy your lunch, and I'll see you at
12 1:30.

13 (Jury out for lunch break at 12:12 p.m.)

14 (Court at recess until 1:30 p.m.)

15 THE COURT: All right.

16 MR. JOHNSON: Well, Your Honor, until I actually
17 examine the report --

18 THE COURT: Oh, I see what you're saying.

19 MR. JOHNSON: I would not know --

20 THE COURT: He was charged with giving false
21 information?

22 MR. JOHNSON: Yes, he was.

23 THE COURT: But he was not ever prosecuted for
24 giving false information?

25 MR. JOHNSON: Right. From what I can gather, I

1 think the Solicitor has informed me that she think that was
2 part of the plea to nol pross that and plead guilty to the
3 burglary charge.

4 THE COURT: So really under the Rules it would not
5 have been admissible as an impeachable offense, correct --

6 MR. JOHNSON: That is correct, Your Honor.

7 THE COURT: -- since he was not convicted of it?

8 MR. JOHNSON: That's my understanding as well,
9 Your Honor, however, as I said, without being able to
10 actually see the report and see it actually, I can only
11 guess that it wouldn't have been admissible, but I --

12 THE COURT: Say that one more time?

13 MR. JOHNSON: Without actually being able to have
14 seen the report --

15 THE COURT: Uh-huh?

16 MR. JOHNSON: -- and not knowing exactly what it
17 was, what statement was given or what was the false
18 information or any of the facts of the case --

19 THE COURT: But he wasn't prosecuted for it?

20 MR. JOHNSON: He was not prosecuted --

21 THE COURT: So it's not a conviction under Rule
22 609?

23 MR. JOHNSON: That's correct, Your Honor.

24 THE COURT: Okay.

25 MR. JOHNSON: That would have been my

1 understanding, but it would have assisted me in my
2 discovery efforts.

3 THE COURT: Okay, I think under the Rules they're
4 required to give you anything that is in their possession
5 that would have the potential to be exculpatory. I think
6 the State, by nature -- do you all believe it would have
7 been exculpatory?

8 MS. FRICK: No, ma'am. Not at all.

9 THE COURT: Okay.

10 MR. JOHNSON: And, of course, Your Honor, we would
11 disagree with that analysis that it wasn't exculpatory. We
12 think it was. I think he is the major -- I would consider
13 him to be a major witness in this case, and I think a lot
14 of this case is going to be based on the credibility of the
15 witnesses and there might have been something that would
16 have fallen as far as credibility. I don't know it's
17 admissible or not, Your Honor, because I'm not sure what
18 was in the report.

19 THE COURT: Well, okay. Rule 609 provides for
20 impeachment by evidence of a conviction of a crime. Not
21 having been charged with a crime. Of course, you could go
22 into whether in terms of bias or prejudice as to whether
23 the nol prossing of the charge if it is connected to this
24 charge. Say for example, they nol prossed a charge in
25 exchange for him testifying. That would be a different

1 sort of scenario, but where he's only been charged with a
2 crime, that crime was subsequently not pressed and he was
3 not actually convicted -- of course, under 609(a)(2),
4 evidence that any witness has been convicted of a crime
5 shall be admitted if it involved dishonesty or false
6 statement regardless of the punishment, but where there is
7 no indication that he was actually convicted of the crime I
8 don't know of how much use it could have been to you since
9 it would not have been admissible under the Rule, and I'm
10 not aware of any exception that would have allowed the
11 admissibility of it except what I've indicated regarding
12 his credibility and any sort of bias or prejudice or motive
13 in the charge being not pressed, if in fact it was
14 connected to this charge, but where it wasn't -- I mean,
15 it's -- you know, it's a fifty-fifty call. I mean, I'd
16 have to hear it in a context --

17 MR. JOHNSON: I understand.

18 THE COURT: -- of it as to whether that in some
19 way would bare on his credibility. So I guess -- I don't
20 know that that is foreclosed to you, but you would have to
21 bring it up at the appropriate time. And based on the
22 rules, of course, the Criminal Rules of Procedure, the
23 State is required to disclose any information, of course,
24 that would be exculpatory to the Defendant. But they are
25 only required to turn over that which is available to them

1 or within their possession or that reasonable -- or
2 something that they could reasonably get their hands or
3 direct someone else to turn over to you.

4 I have no reason to question Ms. Frick's
5 representations to the Court as an officer of the Court
6 that the applicable department made a diligent search for
7 the records and could not find them, and there's been no
8 indication for this record of anything other than them
9 being diligent. So --

10 MR. JOHNSON: I understand, Your Honor. I just
11 wanted to make that a part of the record.

12 THE COURT: Okay. It's noted for the record.
13 Anything further before we proceed?

14 MR. PASCO: No, Your Honor.

15 MR. JOHNSON: I have nothing else, Your Honor.

16 THE COURT: Okay. Please bring in the jury.

17 (Jury in after lunch break at 1:55 p.m.)

18 THE COURT: Ladies and gentlemen of the jury, the
19 case that we're about try is the case of the State of South
20 Carolina verses Michael A. Smith, the Defendant. What I
21 will not say is intended to serve as an introduction to the
22 trial of this case. These remarks are not a charge on the
23 law in this case. I will instruct you on the law
24 applicable to this case at the end of the trial before you
25 retire to consider your verdict. This is merely an

1 explanation of the procedure that we will follow in the
2 trial of this case so that you may better understand what
3 may be happening.

4 During the course of this trial you will be allowed to
5 take notes, and I will give you additional instruction
6 regarding that prior to the conclusion of the Court's
7 remarks, and we will also provide you with pads and pencils
8 for the purpose of note-taking.

9 The Defendant is charged by two indictments filed with
10 this Court with the crime of murder and the crime of
11 possession of a firearm during the commission of a violent
12 crime. The elements of which will be explained to you
13 later. The indictments are simply the charge by which
14 these cases are brought into Court and they are not in any
15 sense evidence of any of the allegations they contain. The
16 Defendant has pled not guilty to the indictment. The State
17 therefore has the burden of proving each of the elements of
18 each indictment beyond a reasonable doubt, and it will be
19 your duty, ladies and gentlemen, to decide whether or not
20 the State has met that burden or not.

21 Your purpose as jurors is to find and determine the
22 facts. You are the sole judges of the facts. If at any
23 time I make any comment regarding the facts you must
24 disregard it. You are to determine the facts from the
25 testimony you hear and the other evidence introduced in

1 Court. It is up to you to determine the inferences which
2 you feel may be properly drawn from the evidence. It is
3 especially important that you perform your duty of
4 determining the facts diligently and conscientiously
5 because ordinarily there is no way to correct an erroneous
6 determination of facts made by a trial jury.

7 On the other hand, and with equal emphasis, the same
8 law that makes you the judges of the facts makes me the
9 judge of the law. The law as given by the Court is the
10 only law that you may consider. You must accept and follow
11 it even though you may disagree with it. I cannot tell you
12 what the facts are and you cannot disagree with me about
13 what the law is or what the law should be.

14 Your job is to take the law as it is given to you and
15 apply it to the facts as you find them from the testimony
16 of the witnesses and any other evidence that is introduced.
17 After doing that you will render your verdict, a true and
18 just verdict, under the solemn oath that you have taken as
19 jurors in this case.

20 Until I advise you to begin your deliberations you
21 must not discuss this case with anyone. That includes your
22 family members, friends, fellow jurors and anyone involved
23 in the case.

24 After the case is submitted to you, you must discuss
25 it only in the jury room with your fellow jurors.

1 I know it may seem innocent to talk about the case
2 with someone, because it's very difficult when you go home
3 or you're around friends and they find out you're on jury
4 duty and they ask what type of case you're hearing, but
5 even to discuss what you're doing other to simply say I'm
6 on jury duty would be improper, because by discussing the
7 case it requires you to begin to process the information
8 that you've heard and to draw conclusions from it, and that
9 by it's very nature is deliberations. And that's why we
10 ask that you not discuss the case in any way.

11 The attorneys and the parties in this case have been
12 advised that they are not to talk to you at all. So if you
13 should see them in the parking lot or at a local restaurant
14 or even in the grocery store or otherwise and they don't
15 speak to you, please don't think that they are being rude.
16 They are simply following the Court's instructions.

17 During the trial you are strictly instructed that you
18 are not to read listen to or watch any news reports about
19 this case. This includes anything that may be in the
20 newspapers or on the internet, radio, or television. In
21 addition to that as I instructed you earlier you're not to
22 do any independent research or any type on the internet
23 regarding any issue that is involved in this case. You
24 must not consider anything that you may have read or heard
25 about this case outside of the courtroom whether before or

1 during the trial. It is essential that you keep an open
2 mind and not decide any issue in this case until all of the
3 evidence has been presented, the parties have made their
4 closing argument and I have instructed you on the law
5 applicable to this case. It is your solemn responsibility
6 to determine the guilt or innocence of the defendant and
7 your verdict must be based solely on the evidence as it is
8 presented to you in this trial and on the law as I will
9 instruct you during and at the close of this trial.

10 In just a moment the solicitor will make an open --
11 what is called an opening statement, in which the Solicitor
12 will explain the issues in this case or at least what the
13 Solicitor believes the issues to be in this case.

14 The attorney for the Defendant may also make an
15 opening statement although he is not required to do so.

16 What the attorneys tell you during their opening
17 statements is not evidence in this case. It is only their
18 contention as to what they believe the issues to be in this
19 case. The evidence in this case will be presented to you
20 by the testimony sworn witnesses from the witness stand and
21 or by exhibits that may be introduced into evidence.

22 From time to time during the trial you may hear one of
23 the attorneys say something like, Your Honor, I believe we
24 have a question of law or a matter of law to discuss with
25 you. Or they may ask to approach th bench or I may ask

1 them to approach the bench or we may find it necessary to
2 excuse you from the courtroom for a short while so that the
3 attorneys and I can discuss a matter of law.

4 The reason we do this is because you are the judges of
5 the facts in this case and sometimes when I'm discussing
6 matters of law with the attorneys it may be necessary for
7 me to make some comment about the facts with regard to
8 ruling whether or not a particular law, statute, or rule of
9 evidence applies and for this reason we excuse you from the
10 courtroom so that in no way will you be influenced by
11 anything that I might say or do in connection with the
12 facts of this case.

13 Also from time to time you may hear one of the
14 attorneys say something like Your Honor, I object. Just
15 like in sports or business or any other structured activity
16 there are rules that must be obeyed in the presentation of
17 evidence. These rules insure that you receive the most
18 reliable and trustworthy evidence available to you, and for
19 this reason, you should not hold an attorneys objection
20 against him or her, nor should you conclude from the
21 Court's ruling that I favor one side or the other.

22 In determining what the true facts are in this case
23 you must decide whether or not the testimony of a witness
24 is believable. It will be my responsibility to rule as a
25 matter of law as to whether certain testimony is admissible

1 at all, but once the testimony is admitted whether or not
2 you believe it is solely a matter for you to determine.

3 In deciding whether to believe a witness you have a
4 right to consider the interest of any witness, the bias of
5 any witness, the prejudice of any witness, the opportunity
6 to have seen the matters and things about which the witness
7 is testifying, and the way the witness acts on the witness
8 stand. You have a right to consider anything that is in
9 the record that will help you evaluate the testimony of
10 each witness that testified in this case. That means that
11 it is your duty to pay close attention to the witnesses, to
12 observe them, to listen to them, and to pay close attention
13 to the attorneys and to the Court.

14 I know that it's very difficult especially in the
15 beautiful old courthouse where we have these wonderful
16 windows and such a beautiful landscape to look at and I
17 know it is difficult sometimes not to allow your thoughts
18 to wander, especially after lunch, but I would ask that you
19 give strict attention to the testimony in this case so that
20 at the end of all the testimony, after the arguments of
21 counsel and a charge on the law is given by the Court you
22 will be in a position to determine what the true facts are,
23 and to apply those facts to the law and thus render a true
24 and just verdict.

25 It is your added duty, Madam Forelady, to preside in

1 the jury room and to be the jury spokesperson here in the
2 courtroom. It will also be your duty to write the verdict,
3 but I will give you further instructions regarding that at
4 the conclusion of this case when the Court gives its charge
5 on the law.

6 As I've indicated, during this trial you will be given
7 the opportunity to take notes. Note-taking is a privilege
8 that you may choose to exercise or choose not to exercise.
9 Please do not feel compelled to take notes. Not everyone
10 finds notes helpful to them. If you should decide to take
11 notes I would ask that you use, maybe, some of these
12 suggestions as a guideline for you.

13 Again, as I've indicated please do not feel that you
14 are required to take notes. Please do not try to record
15 everything that is said. The only person who is qualified
16 to do that is the court reporter, and that's because she
17 has a specialized form or shorthand that allows her to take
18 down a lot of words per minute, and believe it or not most
19 of us talk -- and I'm not talking about a fast talker, talk
20 at about the rate of 250 words a minute. So really,
21 physically, there's no way that you would be capable of
22 taking down every word, word-for-word.

23 And as I've explained to you, you are the judges of
24 the facts and the judges of the credibility and
25 believability of witnesses and because of that you have to

1 rely on your powers of observation. And if you are
2 distracted in note-taking that will distract you, of
3 course, from observing the witnesses as you should and
4 making those credibility determinations. You may want to
5 keep an outline of the main points and concepts that are
6 being made.

7 Once you are sent to your jury room to deliberate you
8 may want to take a few minutes to review your notes and
9 allow them to refresh your memory of the trial evidence and
10 the general arguments that have been made to you. During
11 breaks you will have to leave your note pads in your seats
12 and during the evening recess we will secure them.

13 Please know that your privacy will be protected and
14 that no one will read your notes, and we do this to ensure
15 that no deliberation takes place until such time that it is
16 appropriate.

17 I would remind you that your notes are for your
18 specific and your individual purposes. Please use them
19 only for the purpose of refreshing your own recollection.
20 You are not to share them with anyone else. And I would
21 remind you that juror notes should not be given any greater
22 weight than the recollections of other jurors. The
23 recollections of other jurors should be considered just as
24 reliable as notes taken by other jurors.

25 In order to preserve everyone's rights I will give

1 each party an object to anything that the Court has said by
2 way of opening instruction.

3 Are there any exceptions from the State?

4 MR. PASCO: None, Your Honor.

5 THE COURT: From the Defense?

6 MR. JOHNSON: None from Defense.

7 THE COURT: If you all would bear with us for just
8 one moment, I think the Clerk went to get note pads and
9 pens, and as soon as he returns with those we will begin
10 the trial testimony.

11 You can go ahead and prepare your first witness,
12 however.

13 MR. PASCO: Thank you. Opening statements, Your
14 Honor.

15 THE COURT: Oh, I'm sorry. You know, when you
16 need a vacation, you need a vacation.

17 Y'all bear -- sometimes I get a little ahead of
18 myself. I apologize. You may proceed -- but actually if
19 you still would wait on the note pads though.

20 MR. PASCO: Yes, ma'am.

21 THE COURT: They may want to make some notes
22 regarding the general concepts that you and Mr. Johnson are
23 going to argue to them.

24 We appreciate your patience.

25 (Off record to wait for Clerk of Court.)

1 THE COURT: Okay, does everybody have something to
2 write with and some paper. Okay.

3 You may proceed.

4 MR. PASCO: May it please the Court.

5 THE COURT: Yes, sir.

6 MR. PASCO: Malice, cold, evil, malignant heart. A
7 person void of social responsibility. These are the
8 elements necessary to commit a murder. On the afternoon of
9 Thursday, March 9, 2000, this was the definition of that
10 man right there, the Defendant, Michael Smith.
11 Specifically, and as you'll hear from the evidence, this
12 was the definition of that man and his two friends. His
13 step-brother Lewis Rivers, another co-defendant by the name
14 of Roger Brown, when they have 41 year old Bill Marion pull
15 his vehicle over right down the road from here in Cameron,
16 South Carolina. They had Billy Marion pull his vehicle
17 over, the Defendant pulled out a 9 millimeter pistol and he
18 shot him one time, leaving him there to die. Forty-one
19 year old Billy Marion, a brother, an uncle, a friend, a
20 son, gunned down for absolutely nothing. And whether the
21 Defendants killed Billy Marion to rob him or just out of
22 pure evil that was in their hearts, the most important
23 reason they did it was they thought they'd get away with
24 it..

25 Well, ladies and gentlemen, in this crime an isolation

1 -- and that's what this is -- murder -- they don't happen
2 in front of a lot of witnesses, but in this crime of
3 isolation the Defendant left behind a trail of evidence, a
4 trail of deceit, and a trail of witnesses that lead
5 directly to his guilt, holding him responsible for the
6 cold-blooded murder of Billy Marion.

7 Ladies and gentlemen, again, my name is David Pasco.
8 I'm the Solicitor here in Calhoun County. I, along with
9 Carol Frick, will be prosecuting this case on behalf of the
10 State of South Carolina. Also seated at the State's table
11 is Sheriff Thomas Summers, the Sheriff of Calhoun County.
12 Seated behind the State's table in the front row are just
13 some of the family members and friends of Billy Marion.

14 On behalf of Mr. Marion's family and the State of
15 South Carolina, I want to thank each and every one of you
16 for your service.

17 As Judge Jefferson has told you, the Defendant is
18 charged with one count of murder, one count of possessing a
19 firearm during the commission of a violent crime. Before I
20 go further with more of the facts that are going to be in
21 this case I want to very briefly go over the law with
22 regards to these crimes. I promise to be very brief,
23 because you're going to have an number of opportunities to
24 hear about the law. The most important to come from Judge
25 Jefferson's charge on the law.

1 The first crime I want to talk to you about is murder.
2 While murder is the most heinous crime a person can commit
3 it has the shortest and simplest definition of any crime on
4 our books. Murder is defined as the unlawful killing of
5 another with malice aforethought either express or implied.
6 That's it. The unlawful killing of another with malice
7 aforethought. Thus, to prove murder all you have to
8 establish is malice. And malice has a number of
9 definitions. A person void of social responsibility. The
10 reckless disregard for the welfare of another. How much
11 more reckless can you get than pointing a gun at somebody.
12 It's an act of violence. Malice has no time limit. It can
13 happen at the snap of the finger and the blink of an eye.
14 That's murder, unlawful killing of another is malice
15 aforethought.

16 Next, the Defendant is charged with possessing a
17 firearm during the commission of a violent crime. Very
18 simply, murder is a violent crime. If you possess a hand
19 gun, whether it's a .9 millimeter or any kind of hand gun
20 during a murder you're guilty of this crime as well.

21 Now, these are the charges against not only this
22 Defendant, but against all three co-defendants. As I told
23 you, there are two co-defendants in this action. Two co-
24 defendants in this case. And they're facing the same
25 murder charge, and I tell you that only to let you know

1 that this week we're only concerned about that Defendant
2 right there, Michael Smith. Trust me when I say the other
3 two will have their day in court as well, because in South
4 Carolina the hand of one is the hand of all. If two or
5 more people set out to commit a crime together, each is
6 guilty no matter what their roles are. That's why three
7 people can be guilty of murder even if only one person
8 pulls the trigger. And the standard of proof to which the
9 State must prove the Defendant's guilt is just proof beyond
10 a reasonable doubt, and this phrase means exactly as it
11 sounds. It's not proof beyond any doubt, it's not proof
12 beyond any possible doubt, it's proof beyond a reasonable
13 doubt. In essence, what proof beyond reasonable doubt
14 means is after you've looked at all the evidence if you're
15 firmly convinced, just firmly convinced of the Defendant's
16 guilt you must find him guilty.

17 I submit the evidence in this case will leave you
18 much, much, more than firmly convinced. The evidence will
19 be on the afternoon -- sometime around 3:00 o'clock on the
20 afternoon on Thursday, March 9, 2000. The year, 2000.
21 Billy Marion got off work. He worked in Orangeburg. He
22 lived in Cameron, and he was coming home from work that
23 afternoon to Cameron where he felt safe, where he felt
24 secure. And in order to get home he'd go down Highway 33
25 and he would take a right on Nates Store Road in Cameron.

1 There's church right there -- there's some pictures of it.

2 You'll hear that as he took a right on Nates Store
3 Road, the Defendants stopped him, and they flagged him
4 down. The Defendants talked to him for a matter of
5 seconds, at which point the Defendant pulled out a 9
6 millimeter pistol, Michael Smith pulled out a 9 millimeter
7 pistol. Michael Smith was on the passenger side of the
8 car, Lewis Rivers was on the driver's side, and Roger Brown
9 was walking back and forth from the driver's side to the
10 passenger side. All three defendants. The evidence will
11 be that the Defendant fired the pistol one time. Bullet
12 striking Billy in the arm, the right arm. Went through his
13 right arm into the right side of his chest, perforated his
14 rib, perforated his liver and exited out the right side of
15 his body. After the gun shot the defendants took off
16 running. Billy, probably knowing he was in trouble started
17 to drive off. His injury was so bad that he could only
18 get about a few hundred feet down the road until he went
19 off the road in a dirt field off of Nates Store Road where
20 he died within minutes.

21 You're going to hear the Calhoun County Sheriff's
22 office and the South Carolina Law Enforcement Division came
23 to the scene that afternoon. They took pictures, they
24 processed the vehicle. They're looking for fingerprints,
25 trying to look for witnesses. You're going to hear the big

1 break in this case happened about a day and a-half later on
2 the late night hours of Friday, March 10th and into the
3 early morning hours of Saturday, March 11th. A man by the
4 name of John Hayes, who lives in Cameron, South Carolina,
5 heard that the Sheriff's Office was looking for information
6 and he came forward that late Friday night and he told the
7 Sheriff's Office, hey, about 3:00 o'clock that afternoon, I
8 saw three people that Thursday afternoon on Nates Store
9 Road, they were Michael Smith, Lewis Rivers, and Roger
10 Brown.

11 With that information early Saturday morning, I'm
12 talking 1:00 o'clock in the morning immediately went to the
13 homes of those three defendants. They went to the home of
14 Roger Brown and then they went to the home of Lewis Rivers
15 and Michael Smith who were step-brothers. And they learned
16 that that night, that Thursday night, after the murder the
17 defendants went to Georgia. The Defendants returned from
18 Georgia on Saturday afternoon, September 11th. The police
19 arrested Roger Brown on a probation violation. He wasn't
20 supposed to leave the state. He had a probation violation.
21 On Saturday, March 12th, you'll hear that Roger Brown gave
22 a statement to the police and as a result of that statement
23 the police got the murder warrants for Roger Brown, Michael
24 Smith, and Lewis Rivers.

25 Now, this is just some of the evidence that you're

1 going to hear about in this case, because you're also going
2 to hear about how minutes after this murder, this Thursday
3 afternoon, the Defendant, Michael Smith, was seen in the
4 possession of a 9 millimeter pistol. You're also going to
5 hear that all three defendants fingerprints on the victim,
6 Billy Marion's vehicle. Specifically, this Defendant's
7 fingerprints are right on it -- or his palm print is right
8 on the passenger side door of Billy Marion where that shot
9 was fired.

10 And you're also going to hear that after the police
11 got those warrants on those three defendants, Roger Brown
12 was already in jail. Lewis Rivers, the Defendant's step-
13 brother, turned himself in that day to the police. Michael
14 Smith ran. We finally found him some four years later in
15 the State of New York using a different name. This is just
16 some of the evidence you're going to hear about.

17 In closing, I want to thank you for your attention. I
18 want to let you know it is an absolute privilege to come
19 before you on behalf of the Marion family, on behalf of the
20 State of South Carolina, after five years and ask for
21 justice.

22 I want to throw one last thing out at you, which is
23 while there are no classes on how to be a good juror, I
24 submit each and every one of you have been training for
25 this job your whole lives. Some of you have been as

1 teachers, students, housekeepers, parents, and this is a
2 diversity of experience that you bring together to use your
3 common sense to render a verdict.

4 Judge Jefferson told you that the verdict comes from
5 the word, Verdict. It's Latin. It means to speak the
6 truth. All I'm asking you this week, finally, after five
7 years is to tell us what the truth is about March 9, 2000.
8 I submit if you do that, your true verdict is that Michael
9 Smith is guilty of murder.

10 Thank you.

11 THE COURT: Mr. Johnson.

12 MR. JOHNSON: Thank Your Honor --

13 THE COURT: You're welcome.

14 MR. JOHNSON: -- please the Court.

15 Ladies and gentlemen, of the jury, that is Michael
16 Smith sitting next to me, the person charged in this
17 matter.

18 Now, as I was sitting there I was trying to think to
19 talk to you about your purpose here. Your purpose here
20 today is to look at the case and to give, not only the
21 family, but my client a fair trial. You are the trier of
22 the facts. The judge is the trier of the law. She will
23 tell you the proper law to use, but as far as the fact, as
24 far as determining who tells the truth, who's lying, if my
25 client is guilty of these charges as the State indicated,

1 that's up to you.

2 Now, we all grow up with that t.v.; we look at soap
3 operas, we look at a whole lot of crime shows and stuff
4 like that and all the defense attorney is scrupulous. He
5 walks around and tries to trick the jury and play smokes
6 and mirrors. Well, in reality that's not true. In
7 reality, it's my job to present the same evidence that the
8 State has and take that evidence and put it in a light I
9 feel will show that my client is innocent.

10 It is not for me to make up evidence. It's not for me
11 to trick you. It is for me to do my best to represent my
12 client and show the reasons of why you should have
13 reasonable doubt. It is my purpose to doubt check the
14 State because if you will just take the State's word for
15 it, why would we have a trial. The State would arrest
16 someone, bring them to jail, say what the sentence is and
17 send them to jail or either release them or take away their
18 freedom.

19 But the reason you are here is that you are that
20 double check in our system. You are there to make sure that
21 the proper person is sentenced with this charge.

22 I believe that most of the family would want for
23 someone who murdered their family member to be found guilty
24 and sentenced. I do not feel that is closure for the
25 family because a person is sent to jail for it. Thus, is

1 where you come in. You make the determination whether my
2 client is actually the person who killed Billy Marion. You
3 make the determination. It is not up to you to be bias one
4 way or the other. Remember, my client, under our
5 constitution is innocent until proven guilty.

6 Now, I grew up in the country in a little small town
7 like that, and when I was growing up you couldn't talk back
8 to older folks. You sit around with older folks, the older
9 people say you sit down and kept your mouth shut and
10 listen. And I listened quite a bit, and I actually
11 listened to little stories and things they would say when
12 they was talking and one of the things they would say that
13 I learned they would talk about different people in the
14 neighborhood, and they would say well, you know, Mr. Brown,
15 he talks a lot. He say a lot of things and I'm not saying
16 he's a liar but if he tell you that it's raining outside
17 you better look out the window.

18 Well, in this case, it's the same thing. You're going
19 to hear different people who are going to give all kind of
20 testimony and they're going to tell you different facts and
21 different things. What I'm asking you is not to say that
22 you will hear a lot of lies, but I'm asking you as a jury
23 every now and then if something doesn't sound right, look
24 out the window, check, make sure that what that person is
25 telling you is the truth. That it matches up with the

1 evidence, because I submit to you that if someone would lie
2 to you on Monday, they will lie to you on Tuesday, and if
3 they can lie to you on Tuesday they can possibly be lying
4 to you about the circumstances surrounding this case.

5 Now, yes, someone was killed. But that does not
6 necessarily mean my client was the person who pulled the
7 trigger, but the State has told you there are two co-
8 defendants who I'm sure the State will present them to you
9 on this case. They have every reason to be biased. My
10 client was not the person who pulled the trigger it had to
11 be one of those two. And that the State, just as much as
12 they had my clients finger prints on this truck, the other
13 two defendant's finger prints on that truck.

14 Mr. Brown's finger prints is on same side as my client
15 right by his. I ask you only to look at the case and take
16 your time and look at the case and make a fair decision
17 that at the end of the day you would know within your
18 hearts that you did the right thing. And that's all I'm
19 going to ask you, that is your job. It is not necessarily
20 to find my client innocent, it's not to find him guilty,
21 it's to render a fair verdict and the only way you can do
22 that is to take your time and look at this case and ask the
23 questions.

24 Do not jump to judgment. Just because my client is
25 charged with murder does not mean that he committed the

1 murder.

2 Now, reasonable doubt. The prosecution will say that
3 reasonable doubt is just that you -- that you are beyond a
4 reasonable doubt that you would show the defendant guilty.

5 Well, to me, reasonable doubt is sort of different.

6 Reasonable doubt is the doubt that a reasonable person
7 would have after listening to the evidence, as to determine
8 if my client is guilty. It would be the doubt that you, as
9 a reasonable people, if after listening to all the
10 evidence, there is some doubt that is reasonable doubt.

11 To me that is enough to find my client innocent. That
12 is my determination of reasonable doubt. The judge will
13 give you the Court's and the law interpretation, but for my
14 interpretation that is how I look at reasonable doubt.

15 Reasonable doubt is nothing that you can draw a line and
16 say anything on this side of the line is reasonable doubt
17 and everything on this side is not. It's not that clear.
18 It would be very easy in light of the facts to present you
19 just a plain simple case, where it would be black or white,
20 but in life things are not like that. There are gray

21 areas. This is a case where there are a lot of gray areas.

22 All I ask that you do is just take your time and listen..

23 Examine the case, make sure that the State proves their
24 case, not let the State -- make the State prove their case,
25 because we are dealing here with people freedom, with the

1 rights of everybody.

2 As I stated before, there is someone that was killed,
3 there is someone that is suffering. The question you've
4 got to determine is whether my client is the person that
5 actually killed the one that is dead.

6 I submit to you that if you look at the evidence as
7 presented to you, question the evidence and look at it with
8 a fair eye you will come to the conclusion that my client
9 is not guilty of the charge, and you will find him not
10 guilty.

11 Thank you.

12 THE COURT: Mr. Pasco, you may proceed.

13 MR. PASCO: Thank Your Honor.

14 State calls George Rivers.

15 THE CLERK: Do you solemnly swear or affirm that
16 the evidence you're about to give in this case is the
17 truth, the whole truth, so help you.

18 MR. RIVERS: Yes, I do.

19 THE CLERK: State your full name for the record,
20 please.

21 MR. RIVERS: My full name is George Rivers, Jr.

22 THE CLERK: Thank you, sir.

23 Your witness, Mr. Pasco.

24 MR. PASCO: Thank you, Mr. Hasty.

25 THE COURT: You may proceed.

1 MR. PASCO: May it please the Court.

2 THE COURT: Yes, sir.

3 GEORGE RIVERS, JR. - DIRECT EXAMINATION

4 BY MR. PASCO:

5 Q Good afternoon, Mr. Rivers.

6 A Good afternoon.

7 Q Do me a favor, speak up as loud as you can, okay.

8 A All right.

9 Q All right, that's good. Thank you.

10 Where do you live, Mr. Rivers?

11 A Uh, down there on the George Raft Subdivision,
12 Cameron, South Carolina.

13 Q How long have you lived in Cameron?

14 A Um -- ten years, been up there now.

15 Q Did you know the Defendant, Michael Smith, back in
16 March of 2000?

17 A No, sir.

18 Q Okay, did you know Lewis Rivers or Frank Roger Brown
19 back then?

20 A I know a Lewis Rivers, but I don't know about this
21 Frank Roger Brown.

22 Q Let me ask you this; did you know the victim, Billy
23 Marion?

24 A No.

25 Q You didn't know the victim, Billy Marion?

- 1 A Oh, yeah, Billy Marion. Yeah, uh-huh.
- 2 Q Okay, how well and how long had you known Billy?
- 3 A I know Billy for quite some time because back then
- 4 when I got to knowing Billy we used to work together.
- 5 Q Okay.
- 6 A Airplane, a crop duster back there, Bob (inaudible),
- 7 so we was working there -- I worked there for about three
- 8 years.
- 9 Q Yes, sir.
- 10 A That's how I got to know him.
- 11 Q So you knew him pretty well?
- 12 A I knew him well enough, because I had his -- he had
- 13 gone to his house like for lunch time, I had eat sandwich
- 14 at his house right there at his mother's house on the front
- 15 porch right along with him.
- 16 Q So he'd take you to his house to eat?
- 17 A Yeah.
- 18 Q Let me ask you this; I want to take you now to
- 19 Thursday, March 9, 2000 --
- 20 A Bradfield Apartments.
- 21 Q Is that off of Nates Store Road?
- 22 A Off of Nates Store Road, sir.
- 23 Q Okay. Tell the jury what you were doing just after
- 24 3:30 that Thursday afternoon?
- 25 A I had leave coming out from my house and was getting

1 ready to take one of my sister -- I think it was that
2 Orangeburg Regional -- back at the Orangeburg Regional
3 Hospital to get her leg taken care or something.

4 Q Okay.

5 A And we came out to the stop sign, we done stop and
6 looked both ways before we pull off to make sure the road
7 was clear. So after we make the turn then here's the truck
8 over in the field --

9 Q What's in the field? I'm sorry, Mr. Rivers?

10 A A Jeep truck.

11 Q Oh, the truck. Okay, yes, sir. Go ahead.

12 A And only thing I'm concerned right then it was just
13 kicking, flinging dirt up in the air. I said, something is
14 wrong. So I told my sister, I'm going to pull on the side
15 of the road and stop. I got out, I took my time and I
16 walked across that field. I got over to the truck, it was
17 just still -- the truck was running. I didn't even realize
18 to look down to see if the foot was on the accelerator or
19 whatever still. So I just took my time and reached over in
20 there and turned the ignition off because I got scared. I
21 said, well, if he decide to wake up or feel better he going
22 to try to go ahead on, and if something is wrong with him
23 or something like that then he going to cause a wreck or
24 either kill himself.

25 Q Uh-huh.

1 A So I turned the truck off. I came back across the
2 field, started toward the truck, so I told my sister and
3 then, I said, this here don't seem right to me. I said,
4 call the police.

5 Q Okay, and did she do that?

6 A Yes, sir. We called the police and the police came
7 before we leave there. I said, what I want y'all to do is
8 stay here, because you can't leave a crime like this here,
9 because it's against the law. So we stayed there until the
10 policeman came. Policeman came, I said, I'm on my way to
11 go to Orangeburg with my sister because we have to get her
12 the hospital. He talked to me a little bit. He said,
13 okay, Mr. Rivers you can go ahead on.

14 Q Okay, so you did talk to the police and you told them
15 what you saw?

16 A Yes.

17 Q And you knew that something was wrong with Billy's
18 condition?

19 A Yeah.

20 Q Was he talking?

21 A No.

22 Q Was he moving?

23 A He just was laying on the seat and some sand was
24 already down there on his pants from that truck spinning so
25 bad.

1 Q Got you. I'm going to show you some photographs,
2 okay, Mr. Rivers?

3 A Okay.

4 Q The first one I'm going to show you has been marked as
5 State's Exhibit -- you can stay right there if you want to.

6 How's that?

7 A That's good.

8 Q I want to show you what's been marked as State's
9 Exhibit Nos. 6 and 7.

10 Do you recognize what's in those photographs?

11 A Uh-huh.

12 Q What is that?

13 A That's where he died in that truck. And you see how
14 you put those little things across round all in that field.

15 Q Yes, sir.

16 A Something happen. He's dead, but I didn't know he had
17 been shot or whatever.

18 Q And does that accurately depict the way the truck was
19 when you saw it that day to go turn it off?

20 A Uh-huh.

21 Q Under -- of course, when you saw it the wheel was
22 spinning and dirt was --

23 A Yeah, I was just turning it off. Yeah, just like
24 that.

25 MR. PASCO: I'd ask that State's Exhibit Nos. 6

1 and 7 be admitted into evidence, Your Honor.

2 THE COURT: Any objection?

3 MR. JOHNSON: No objection, Your Honor.

4 THE COURT: Marked and admitted without objection.

5 (State's Exhibit Nos. 6 and 7,
6 photographs of Mr. Marion's truck, were marked and entered)

7 BY MR. PASCO:

8 Q That's the location where you saw Billy's truck after
9 3:30 that afternoon, Mr. Rivers?

10 A That's right.

11 MR. PASCO: May I publish this to the jury, Your
12 Honor.

13 THE COURT: Any objection?

14 MR. JOHNSON: No objection, Your Honor.

15 (Mr. Pasco passes photographs to the jury.)

16 BY MR. PASCO:

17 Q Now, I want to show you what's been marked as State's
18 Exhibit Nos. 21 and 22.

19 Do you recognize those photos, sir; who is in those
20 photos?

21 A Yes. I recognize Mr. Billy -- right there -- I ain't
22 seen none of that.

23 Q You didn't see any blood when you were there?

24 A No.

25 Q That's right. But is that how Mr. -- the victim was

1 when you came to the vehicle?

2 A Yeah, he was laying just like that there.

3 Q Slumped over. That actually depicts the way he was?

4 A Right.

5 MR. PASCO: I'd ask that State's Exhibit Nos. 21

6 and 22 be admitted into evidence.

7 THE COURT: Any objections?

8 MR. JOHNSON: I have no objection, Your Honor.

9 THE COURT: Marked and admitted without objection.

10 (State's Exhibit Nos. 21 and 22,
11 photos of Mr. Marion laying in truck were marked and
12 entered.)

13 MR. PASCO: Thank you, Your Honor. I'll publish
14 these to the jury?

15 THE COURT: You may.

16 MR. PASCO: Thank you.

17 BY MR. PASCO:

18 Q And finally, Mr. Rivers, you testified that you know
19 Billy real well?

20 A That's right.

21 Q You knew his habits, his routines?

22 A Billy -- to me, Billy never bothered anybody. He been
23 just as nice as he could be. If he seen somebody need
24 help, that's what he's going to do.

25 Q That's what I was going to ask you. If somebody

1 flagged him down to pull over is he the type of person to
2 pull over?

3 MR. JOHNSON: Your Honor --

4 A Yeah. Yeah, definitely.

5 THE COURT: Is there an objection? Basis?

6 MR. JOHNSON: He's leading the witness.

7 THE COURT: Let me see you all just a second.

8 (Off record bench conference with Mr. Pasco, Ms. Frick and
9 Mr. Johnson.)

10 THE COURT: The objection is sustained. Leading.
11 You may proceed.

12 MR. PASCO: That's all I have, Your Honor.

13 Thank you, Mr. Rivers. Answer any questions that Mr.
14 Johnson has for you.

15 THE COURT: Any cross-examination of the witness?

16 MR. JOHNSON: Just one question, Your Honor.

17 THE COURT: You may proceed.

18 Sir, if you would remain seated for me, so he can
19 question you. Thank you.

20 GEORGE RIVERS, JR. - CROSS-EXAMINATION

21 BY MR. JOHNSON:

22 Q Mr. Rivers, how are you today?

23 A Good.

24 Q Mr. Rivers, have you ever seen my client, Michael
25 Smith, before?

1 A No.

2 Q And you didn't see him on that day did you?

3 A Mike -- you're talking about the same Michael in those
4 photographs?

5 Q No, this gentleman right here. You didn't see him
6 that day did you?

7 A No.

8 Q And --

9 A I ain't seen nobody that particular day.

10 MR. JOHNSON: No further questions.

11 THE COURT: Any redirect?

12 MR. PASCO: No ma'am.

13 THE COURT: Any objections to the witness being
14 excused?

15 MR. JOHNSON: No objection from the defense, Your
16 Honor.

17 THE COURT: Any objection from the State?

18 MR. PASCO: No, Your Honor.

19 THE COURT: Sir, you're excused. Have a good day.
20 You may call your next witness.

21 MS. FRICK: Your Honor --

22 MR. RIVERS: Judge, Your Honor, --

23 THE COURT: Yes.

24 MR. RIVERS: -- Excuse me, I have something to
25 say.

1 MR. PASCO: Sir --.

2 THE COURT: Sir, no, you can't say anything.

3 There's already been direct and cross-examination.

4 MR. RIVERS: Okay.

5 THE COURT: Thank you. You have a good day.

6 MS. FRICK: Your Honor, the State calls Becky
7 Spigner.

8 THE CLERK: Do you solemnly swear the evidence
9 you're about to give in this case will be the truth, the whole
10 truth, nothing but the truth, so help you?

11 MS. SPIGNER: I do.

12 THE CLERK: Thank you. State your full name for
13 the record, please, ma'am.

14 MS. SPIGNER: Okay. Becky Spigner.

15 MS. FRICK: Thank you.

16 THE COURT: You may proceed.

17 MS. FRICK: Thank Your Honor, may it please the
18 Court.

19 BECKY SPIGNER - DIRECT EXAMINATION

20 BY MS. FRICK:

21 Q Ms. Spigner, what is your occupation?

22 A I'm a paramedic for Calhoun County EMS.

23 Q If you could speak up just a little?

24 A I'm a paramedic for Calhoun County EMS.

25 Q Ms. Spigner, I want to call your attention to March 9,

1 2000; were you working that day?

2 A Yes, I was.

3 Q And did you receive a call with regard to an incident
4 which occurred on Nates Store Road in Cameron?

5 A Yes, I did.

6 Q And what time did you receive that call?

7 A Um -- 3:30.

8 Q And when did you arrive on the scene?

9 A At 3:44.

10 Q And what did you find when you arrived?

11 A There was a vehicle that had run off the road. We got
12 called to a wreck. There was a guy in the middle of a
13 field. We walked up to it and he was slumped over, and he
14 was --

15 Q Please --

16 A -- there was no movement or anything. We checked for
17 pulse, we couldn't find a pulse. So I went back to the
18 truck to get a monitor to pronounce him or to see if we had
19 anything on the cardiac monitor. And we pulled up his
20 shirt to see -- to put the leads on and we saw an exit
21 wound, which was a bullet wound.

22 Q Did you later find out the identity of that person?

23 A Yes.

24 Q And who was that?

25 A William Marion.

1 Q And did you observe anything about the vehicle when
2 you were at the vehicle?

3 A The driver's side window was up and the passenger side
4 window was down.

5 Q And where was the vehicle?

6 A In --

7 Q In so far as the roadway --

8 A About 30 foot off the road.

9 Q And so after you attached Mr. Marion to the leads, I
10 believe you called them; what did you do after that to Mr.
11 Marion?

12 A Well, we pulled up his shirt and we noticed it was a
13 bullet hole. We -- I think there was a couple of deputies
14 already there. One of those was a first responder. And we
15 made a statement that it was a bullet hole, and they asked
16 us to back off.

17 Q Was Mr. Marion responsive at all?

18 A No.

19 Q Did he have a pulse at all?

20 A No.

21 Q Did you transport Mr. Marion anywhere?

22 A No, we did not.

23 Q So when you left the scene, where was Mr. Marion?

24 A He was still in the vehicle.

25 Q And when did you depart the scene?

1 A That was about 30 minutes later. I mean, they made us
2 back off from the scene, but we were kind of hanging
3 around, you know.

4 Q Thank you, Ms. Spigner.

5 THE COURT: Any questions for the witness?

6 MR. JOHNSON: Just a few, Your Honor.

7 BECKY SPIGNER - CROSS-EXAMINATION

8 BY MR. JOHNSON:

9 Q Ms. Spigner?

10 A Spigner.

11 Q Did I pronounce it right? You said that you remember
12 that the passenger -- the driver window was up and the
13 passenger was down?

14 A Yes, sir.

15 Q Why would you remember that?

16 A Just noticed it.

17 Q Did --

18 A You know, you kind of look around because we're kind
19 of taught to look at the scene when you pull up, especially
20 when you don't know why a person is laying there slumped
21 over and there's no damage to the vehicle. We went out for
22 a wreck, you know. Why is this person slumped over?

23 Q Well, my question then is; did you happen to discuss
24 your testimony with the State prior to today?

25 A No, sir.

1 Q You didn't?

2 A Did I discuss it with them?

3 Q With the prosecution?

4 A I read back over my incident report that we wrote.

5 Q Was anybody mention anything to you to mention about
6 the windows being noted?

7 A It's in my incident report that we wrote five years
8 ago:

9 Q Right.

10 A Right, and she just asked me -- she told me that she
11 would ask me that.

12 Q About the windows?

13 A About the windows.

14 Q So that's why you mentioned the windows?

15 A Yes, sir. I mean, I thought that was what she was
16 getting at.

17 Q Okay. So you brought that up because she mentioned it
18 to you before to mention it; is that correct?

19 A Right.

20 MR. JOHNSON: No other questions.

21 THE COURT: Any redirect of the witness.

22 MS. FRICK: Just briefly, Your Honor.

23 BECKY SPIGNER - REDIRECT EXAMINATION

24 BY MS. FRICK:

25 Q Ms. Spigner, when you go to a scene, do you make a

1 report with regard to that incident?

2 A Yes, we do.

3 Q And did you make a report --

4 MR. JOHNSON: Your Honor?

5 THE COURT: Yes?

6 MR. JOHNSON: I need to approach.

7 THE COURT: Or if you want to make your objection;
8 basis?

9 MR. JOHNSON: The basis, Your Honor, that this is
10 re --

11 THE COURT: Is it outside the scope of cross; is
12 that the objection?

13 MR. JOHNSON: It's outside the scope of my --

14 That's correct, Your Honor.

15 (Off the record bench conference with Mr. Johnson and Ms.
16 Frick.)

17 THE COURT: Objection is overruled. Within the
18 scope.

19 BY MS. FRICK:

20 Q So Ms. Spigner, you said you make a report with regard
21 to responding to a scene?

22 A Right.

23 Q And did you make a report in this incidence?

24 A Yes, I did.

25 Q And with regard to your testimony about the windows

1 and in what position they were; did you not that in your
2 report?

3 A Yes, I did.

4 Q And when would that report have been written?

5 A Right after the incident.

6 Q Thank you, Ms. Spigner.

7 THE COURT: Anything further from the witness?

8 MR. JOHNSON: Nothing further, Your Honor.

9 THE COURT: Any objection to the witness being
10 excused from the State?

11 MS. FRICK: No, ma'am, Your Honor.

12 THE COURT: From the Defense?

13 MR. JOHNSON: None from defense, Your Honor.

14 THE COURT: Ma'am, you're excused. Have a good
15 day.

16 You may call your next witness.

17 MS. FRICK: Your Honor, the State calls Leila
18 Jones.

19 THE CLERK: Place your left hand on the Bible and
20 raise your right hand. Do you solemnly swear the evidence
21 you're about to give in this case will be the truth, the
22 whole truth, and nothing but the truth so help you.

23 MS. JONES: I do.

24 THE CLERK: State your full name for the record,
25 please.

1 MS. JONES: Lelia M. Jones.

2 MR. JOHNSON: Your Honor?

3 THE COURT: Yes.

4 MR. JOHNSON: Might we approach?

5 THE COURT: Yes.

6 (Off the record bench conference with Mr. Johnson, Ms.

7 Frick, and Mr. Pasco.)

8 THE COURT: You may proceed, Madam Solicitor, when
9 you're ready.

10 MS. FRICK: Thank Your Honor.

11 THE COURT: You're welcome.

12 LELIA JONES - DIRECT EXAMINATION

13 BY MS. FRICK:

14 Q Ms. Jones, where do you live?

15 A [REDACTED] in Cameron, South Carolina.

16 Q And is that right off of Nates Store Road?

17 A Yes, it is.

18 Q And how long -- is that in Cameron?

19 A In Cameron.

20 Q And how long have you lived in Cameron?

21 A About 14 years.

22 Q I want to ask you about the afternoon of Thursday,
23 March 9, 2000. Where were you on that day?

24 A I was at school.

25 Q And when would you have been coming home from school?

1 A It was after 3:00 o'clock I was coming home.

2 Q And -- so you were coming home around 3:00 o'clock?

3 A Probably -- yeah, probably a little bit after.

4 Q And you said you were coming from school; what school
5 would that have been?

6 A Calhoun County Technical College.

7 Q And what route would you take to come home?

8 A I take Highway 33.

9 Q And off of Highway 33, where would you turn?

10 A On Nates Store Road.

11 Q And would you have been driving at the time?

12 A Yes, I would.

13 Q Tell the jury what you saw that day as you got to
14 Nates Store Road?

15 A I saw three young men in the road trying to stop me.

16 Q Trying to stop you how?

17 A Just waving their hands.

18 Q And did you recognize any of those young men?

19 A Just one, a neighbor.

20 Q And who was that?

21 A Roger Brown.

22 THE COURT: I'm sorry, could you please repeat
23 your answer?

24 BY MS. FRICK:

25 Q Who was it that you recognized?

1 A Roger Brown.

2 THE COURT: Thank you.

3 You may proceed.

4 BY MS. FRICK:

5 Q And did you think it was unusual that those
6 individuals were trying to flag you down?

7 A Yes, I did.

8 Q And why did you think that?

9 A Cause he didn't live far from where he was at and I
10 thought well, he walked there he can walk back.

11 Q And who is he that you're speaking of?

12 A Roger.

13 Q Did Roger Brown live near you?

14 A Yes, he does.

15 Q And did you see anyone else besides those three young
16 men at the intersection or in that area?

17 A I didn't see anybody else.

18 Q Now, later that day did you find out that something
19 unusual had happened in that area?

20 A Yes, I did.

21 Q And what were you told?

22 MR. JOHNSON: Your Honor, objection. Calls for
23 hearsay.

24 THE COURT: Please approach.

25 (Off the record bench conference with Mr. Johnson, Ms.

1 Frick, and Mr. Pasco.)

2 THE COURT: Objection sustained. Hearsay.

3 You may proceed.

4 MS. FRICK: Thank Your Honor.

5 THE COURT: You're welcome.

6 BY MS. FRICK:

7 Q Ms. Jones, I'm going to show you what's been marked as
8 State's Exhibit Nos. 1 and 2, and ask if you recognize
9 this.

10 A Yes.

11 Q And what is that?

12 A It's a picture of the church (inaudible).

13 MR. JOHNSON: Your --

14 BY MS. FRICK:

15 Q You're going to have to speak up just a little bit.

16 MR. JOHNSON: Your Honor, I can't hear.

17 THE COURT: Yes, ma'am. I need you to speak
18 directly into the microphone. I know you're soft-spoken,
19 but I need you to speak up a little bit more for me.

20 A I recognize the church, the highway, the Highway 33,
21 and the road that goes to my house.

22 BY MS. FRICK:

23 Q And do these photographs accurately depict where you
24 saw those three young men on that day?

25 A Yes, it does. Sort of right in front of the church.

1 MS. FRICK: Your Honor, at this time, I'd move
2 State's Exhibit Nos. 1 and 2 into evidence.

3 THE COURT: Any objection?

4 MR. JOHNSON: No objection.

5 THE COURT: Marked and admitted without objection.

6 (State's Exhibit Nos. 1 and 2,
7 Photographs, were marked and entered.)

8 MS. FRICK: May I publish these to the jury?

9 THE COURT: You may.

10 MS. FRICK: That's all I have of Ms. Jones, Your
11 Honor.

12 THE COURT: Any questions for the witness?

13 MR. JOHNSON: Yes, Your Honor.

14 THE COURT: You may proceed.

15 LELIA JONES - CROSS-EXAMINATION

16 BY MR. JOHNSON:

17 Q Ms. Jones, do you remember giving a statement on this
18 matter?

19 A Yes, I do.

20 Q All right. Do you remember saying that you couldn't
21 remember what day it was?

22 A I don't -- I can't remember what day it was.

23 Q You can't?

24 A I don't know.

25 MR. JOHNSON: No other questions, Your Honor.

1 THE COURT: Any redirect?

2 MS. FRICK: No, ma'am, Your Honor.

3 THE COURT: Any objection to the witness being
4 excused from the State?

5 MS. FRICK: No, ma'am.

6 THE COURT: From the Defense?

7 MR. JOHNSON: Nothing from Defense, Your Honor.

8 THE COURT: Ma'am, you're excused. Have a good
9 day.

10 You may call your next witness.

11 MR. PASCO: John Haynes.

12 THE CLERK: Place your left hand on the Bible and
13 raise your right hand, please. Do you solemnly swear the
14 evidence you are about to give in this case are the truth,
15 the whole truth, and nothing but the truth, so help you?

16 Please state your full name for the record, please.

17 MR. HAYNES: John Allen Haynes.

18 THE CLERK: Thank you, sir.

19 THE COURT: You may proceed.

20 MR. PASCO: Thank you.

21 MR. HAYNES - DIRECT EXAMINATION

22 BY MR. PASCO:

23 Q Good afternoon, Mr. Haynes.

24 A Good afternoon.

25 Q That's good. Speak up just like that okay.

- 1 A Okay.
- 2 Q Where do you live, Mr. Haynes?
- 3 A In Cameron.
- 4 Q How long have you lived in Cameron?
- 5 A I've lived there years and years.
- 6 Q Okay, and what street do you live off of in Cameron?
- 7 A (Inaudible).
- 8 Q How long have you lived there?
- 9 A (Inaudible).
- 10 Q Okay, who do you live with?
- 11 A Just me and my wife.
- 12 Q How long have you been married?
- 13 A I've been married about 21 years.
- 14 Q Do you work?
- 15 A Yes, I do.
- 16 Q Where do you work, sir?
- 17 A I work at Wal-mart.
- 18 Q (Inaudible) Cameron, sir?
- 19 A (Inaudible) Cameron.
- 20 Q Okay, so right around that area?
- 21 A Yes, right around that area.
- 22 Q I want to take you back to and ask you some questions
- 23 about Thursday, March 9, 2000, okay?
- 24 A Okay.
- 25 Q Did you know the Defendant, Michael Smith, back then

1 in March of 2000?

2 A Not personally, but I knew of him.

3 Q Okay, did you know him by name and face?

4 A Yes.

5 Q Did you know the co-defendant, Lewis Rivers?

6 A Yes, I do.

7 Q And did you know co-defendant, Roger Brown?

8 A Roger, yes.

9 Q On that Thursday, March 9, 2000, where did you end up
10 going at approximately 3:15 that afternoon?

11 A Well, I was going to put up my wife --

12 Q Wait let the court reporter catch up with me.

13 A Okay.

14 Q Okay, she's way ahead of me.

15 All right, where were you going at 3:15?

16 A Well, at 3:15 I was going to pick up my wife from
17 work.

18 Q Okay, where does your wife work that you had to pick
19 her up at?

20 A She works at (inaudible).

21 Q Speak up as loud as you can, okay?

22 A Okay.

23 Q And how would you go to go pick your wife up; what
24 route would you take?

25 A I would take Nates Store Road (inaudible).

1 Q And did you see anything unusual that afternoon on
2 Nates Store Road as you were going to pick your wife up?

3 A Yes, I saw them guys standing out there.

4 Q Where exactly were they standing -- speak up, okay.

5 A Lewis was standing at the end of Nates Store Road and
6 Michael was standing about 45 feet back standing up in the
7 road and Roger was sitting down.

8 Q And when you say Michael, you mean the Defendant,
9 Michael Smith?

10 A Yes, sir.

11 Q And Roger, Roger Brown?

12 A Roger Brown.

13 Q What were they doing?

14 A Standing there.

15 Q Anyone else with them?

16 A No.

17 Q At that time?

18 A No.

19 THE COURT: Sir, push the mic just a little bit
20 from you mouth. I think that being so close is muffling
21 your sound.

22 MR. PASCO: It is.

23 THE COURT: Okay, let's try it that way.

24 MR. PASCO: Good.

25 THE COURT: You may proceed.

1 BY MR. PASCO:

2 Q And let me show you what's already in evidence as
3 State's Exhibit Nos. 1 and 2; is that the intersection of
4 33 and Nates Store Road?

5 A Yes, that's it.

6 Q Is that where you saw them?

7 A Yes.

8 Q Did anybody have anything on them that you could see?

9 A Mike has a bag.

10 Q Mike Smith had a bag?

11 A Yes, sir.

12 Q Now, this, you testified was approximately 3:15 in the
13 afternoon?

14 A Yes, sir. That's right.

15 Q Did you have an opportunity -- and at that time was
16 there anything unusual in the field; was there a Blazer
17 there at 3:15 in the afternoon?

18 A No, sir.

19 Q Okay. Did you have an opportunity to come home later
20 that afternoon?

21 A Yes, I did.

22 Q And approximately what time would that have been when
23 you came home, just approximately?

24 A A little bit (inaudible).

25 Q Okay. Did you see anything unusual when you were

1 coming home to your house then off Nates Store Road?

2 A (Inaudible) I saw the Sheriff's deputy on the left-
3 hand side and I saw the neighbors on the right-hand side of
4 the road.

5 Q Did you see anything in the field?

6 A Yes. In the field across I saw a truck over far in
7 the field.

8 Q Is that the truck in State's Exhibit Nos. 6 and 7 --

9 A Yes --

10 Q -- that you saw?

11 A Yes, it is.

12 Q What did you do when you saw that and saw the police;
13 where did you end up going?

14 A Well, I had gone to my Aunt's house, which was across
15 from (inaudible) and where I got out my car. I went to
16 where the neighbors were and I saw Roger and Lewis there.

17 Q So they were watching the scene as well?

18 A Yes.

19 Q Lewis Rivers?

20 A Lewis Rivers.

21 Q And Roger Brown?

22 A Roger Brown.

23 Q Did you see the Defendant, Michael Smith watching the
24 scene?

25 A I didn't Michael Smith.

1 Q Did you notice anything different about Brown and
2 Rivers when you saw them a couple of hours later watching
3 the scene, as everybody has gathered to watch the police
4 work on the Blazer?

5 A Yes. I saw Roger (inaudible) and Lewis had on a
6 (inaudible).

7 Q Where exactly did you see them, sir?

8 A I seen them right there at the scene where the
9 neighbors were.

10 Q Now, let me ask you; this information that you've just
11 told the jury --

12 A Uh-huh.

13 Q -- about seeing the Defendants there, seeing two of
14 them later, did you tell the police this on March 11th, two
15 days later?

16 A Yes, I did.

17 Q Less than two days later?

18 A Yeah.

19 Q You gave them a written statement?

20 A Right.

21 Q How did you get in -- why did you get in touch with
22 the police?

23 A (Inaudible) I really don't know why that happened. I
24 know (inaudible) Lewis Rivers --

25 MR. JOHNSON: Your Honor --

1 THE COURT: Is there an objection?

2 MR. JOHNSON: Yes.

3 THE COURT: Basis of the objection?

4 MR. JOHNSON: The witness states hearsay.

5 MR. PASCO: It's not offered for the truth of the
6 matter asserted, but I could ask him another question.

7 THE COURT: You want to withdraw the question?

8 MR. PASCO: Let me rephrase it. Yes, ma'am.

9 THE COURT: The question is withdrawn. You may
10 rephrase.

11 MR. PASCO: Thank you, Judge.

12 BY MR. PASCO:

13 Q Let me just ask; did you hear that the police needed
14 information?

15 A Yes, I did.

16 Q Okay. And you contacted the Calhoun County Sheriff's
17 Office on your own?

18 A Yes, I did.

19 Q And just to refresh your memory, I'm going to mark it
20 -- do you recognize that statement, Mr. Haynes?

21 A Yes, I do.

22 Q That's what you gave to the police?

23 A That's correct.

24 Q At 12:29 a.m.?

25 A Yes, sir.

1 Q On 11 March of 2000?

2 A That's correct.

3 Q Right after midnight on Saturday, March 11th?

4 A Right.

5 Q I'll just show you a few more photographs, okay.

6 A Okay.

7 Q Let me show you what's been marked as State's Exhibit

8 Nos. 3 and 4; do you recognize the area depicted in this

9 photograph?

10 A Yes, I do.

11 Q What road, specifically, what road is in State's

12 Exhibit No. 4, right here?

13 A That's Nates Store Road.

14 Q Okay. Is that another photograph on State's Exhibit

15 No. 3 of Nates Store Road going that way?

16 A That's right.

17 Q That accurately depicts that area?

18 A Right.

19 MR. PASCO: I'd ask that State's Exhibit Nos. 3

20 and 4 be admitted into evidence, Your Honor.

21 THE COURT: Any objection?

22 MR. JOHNSON: Yeah. Can I view them first?

23 THE COURT: Yes, you can.

24 MR. JOHNSON: No objection, Your Honor.

25 THE COURT: Marked and admitted without objection.

1 (State's Exhibit Nos. 3 and 4,
2 photographs, were marked and admitted.)

3 BY MR. PASCO:

4 Q Specifically, just to -- on State's Exhibit No. 3 is
5 the field where the victim was found going farther down
6 that road, Nates Store Road?

7 A Yes, sir.

8 Q Let me show you a couple more photographs. State's
9 Exhibit Nos. 5 and 8. Do you recognize those, Mr. Haynes?

10 A Yes, sir.

11 Q Is that the scene you were testifying about with the
12 Blazer in the field?

13 A Yes, sir.

14 MR. PASCO: I don't think there's any objection,
15 Your Honor. I'd ask that State's Exhibit Nos. 5 and 8 be
16 admitted into evidence.

17 MR. JOHNSON: No objection.

18 THE COURT: Marked and admitted without objection.

19 (State's Exhibit Nos. 5 and 8,
20 photographs, were marked and admitted.)

21 BY MR. PASCO:

22 Q And the reason I was showing you these, you testified
23 about people around Rast's Trailer Park or in homes that
24 were looking at the scene that were across the street --

25 MR. JOHNSON: Your Honor. He's leading the

1 witness again.

2 MR. PASCO: We'll --

3 THE COURT: Sustained. Leading.

4 MR. PASCO: Okay.

5 THE COURT: You may rephrase.

6 MR. PASCO: Okay, can I try --

7 THE COURT: You can try.

8 BY PASCO:

9 Q Okay, you testified about where Rast's Trailer Park
10 was and people watching the scene.

11 A Uh-huh.

12 Q Now, let me ask you is that depicted in this
13 photographs?

14 A Yes, it is.

15 Q Thank you.

16 And finally, Mr. Haynes, the person you know as
17 Michael Smith, that was hanging out at the corner on Nates
18 Store Road and Highway 33 with Roger Brown and Lewis
19 Rivers; do you see him in the courtroom today?

20 A I see him -- Michael sitting there.

21 Q Right there between the two gentlemen in coats?

22 A Yes.

23 Q Did you ever see the Defendant, Michael Smith, again
24 in Cameron after March 9th of 2000?

25 A No, I didn't.

1 Q Answer any questions that Mr. Johnson has for you.

2 THE COURT: Mr. Johnson, you may proceed.

3 MR. JOHNSON: Thank Your Honor.

4 THE COURT: You're welcome.

5 JOHN HAYNES - CROSS-EXAMINATION

6 BY MR. JOHNSON: THE PROSECUTOR ASKED YOU

7 Q Mr. Haynes, how are you doing today?

8 A I'm all right.

9 Q Mr. Haynes --

10 A Yes, sir.

11 Q -- is this a copy of the statement that you were
12 referring to a minute ago?

13 A Yes, sir.

14 Q That was dated on the 11th of March of 2000?

15 A Yes, sir.

16 Q And that's the same statement that the State was just
17 -- that the prosecutor was just talking to you about; is
18 that correct?

19 A Yes, sir.

20 Q I want you to look at that. Now, I want you to -- you
21 made that statement right after -- within two days of this
22 incident; is that correct?

23 A Yes, sir.

24 Q And you -- it was fresh in you memory; is that
25 correct?

1 A Uh-huh.

2 Q And you wrote down everything you knew about the
3 scene; is that correct?

4 A Yes, as far as I could remember.

5 Q So you put down everything on that paper that you knew
6 about the scene; is that correct?

7 A Yes, sir.

8 Q Then why is it you don't have anything on that about a
9 bag being held by my client in this statement?

10 A Because by that time -- during that time, I told what
11 I could remember and what time, because of the amount --
12 because I was just tired.

13 Q So four years later you now remember there's a bag?

14 A No, sir, because I have -- I haven't had no
15 (inaudible) with anyone, with anyone concerning this case.

16 Q But what I'm asking you that on that statement you did
17 not mention anything about Michael Smith having a bag did
18 you?

19 A No, sir, I didn't -- I did not.

20 Q When you saw Michael Smith, Mr. Rivers, and Mr. Brown
21 together did it threaten you in any way?

22 A No, sir.

23 Q They didn't try to sign you down or do anything to
24 you?

25 A Well, I was going by I looked at them -- I looked at

1 Michael and Roger Brown and they were standing in the road,
2 and I looked over there and Roger Brown, and Roger Brown
3 gave me a scary look so I kept going.

4 Q Roger Brown gave you a scary look?

5 A Yes.

6 Q Not Michael?

7 A No.

8 Q Roger Brown.

9 A Yes. Roger Brown.

10 MR. JOHNSON: No other questions.

11 THE COURT: Any redirect?

12 MR. PASCO: Yes, Your Honor.

13 THE COURT: You may proceed.

14 JOHN HAYNES - REDIRECT EXAMINATION

15 BY MR. PASCO:

16 Q Describe the look that Roger gave you; why did you not
17 stop?

18 A I did not stop because Roger give me that scary look.

19 Q Did he look scary?

20 A And I saw he --

21 Q He looked scary, Roger looked scary?

22 A Yes.

23 MR. PASCO: That's all I have.

24 THE COURT: Anything further.

25 MR. JOHNSON: Just for clarification.

1 JOHN HAYNES - RE-CROSS-EXAMINATION

2 BY MR. JOHNSON:

3 Q Roger looked scary or that Roger looked scared?

4 A Scary.

5 Q Scary?

6 A Yeah. Roger looked -- he gave me that look that said,
7 don't stop and I didn't stop, because normally when I see
8 them like that I decide I'm going to stop and ask them
9 what's wrong or could I help them. But that particular
10 look.

11 Q So Roger was the one that had the look in his eye?

12 A Right.

13 MR. JOHNSON: No other questions.

14 THE COURT: Anything further from the State?

15 MR. PASCO: No, Your Honor. Thank you.

16 THE COURT: Any objection to this witness being
17 excused?

18 MR. JOHNSON: No objection from Defense, Your
19 Honor.

20 THE COURT: Any objection from the State?

21 MR. PASCO: No, Your Honor.

22 THE COURT: Sir, you're excused. Have a good day.

23 Madam Forelady, ladies and gentlemen, you all have

24 been sitting a little over an hour. I'm going to give you
25 about a ten minute break to refresh yourselves since you've

1 been sitting since lunch, give you an opportunity to use
2 the restroom and get refreshed. If you need anything
3 please let the Bailiff know. Please do not discuss this
4 case during this break and please leave your notes in your
5 seats.

6 We should break until about 3:20, at which time we'll
7 resume testimony.

8 Thank you.

9 (Jury out for break at 3:11 p.m.)

10 THE COURT: We're in recess.

11 (Court in session after break at 3:25 p.m.)

12 THE COURT: You want to pre-mark some things?

13 MR. PASCO: Yes, ma'am.

14 THE COURT: Did you show them to Mr. Johnson?

15 MR. PASCO: He wants to put it on the record as
16 well.

17 THE COURT: Okay.

18 MR. PASCO: I'll just mark these.

19 May I please the Court?

20 THE COURT: Yes.

21 MR. PASCO: I'll put some things on the record.

22 In the interest of time, Mr. Johnson and I got
23 together to go over the photographs to see what he would
24 have an objection to and not have an objection to. He has
25 no objections to State's Exhibit Nos. 9 through 13 to be

1 admitted into evidence.

2 THE COURT: Is that correct?

3 MR. JOHNSON: That's correct, Your Honor.

4 THE COURT: Marked and admitted without objection.

5 (State's Exhibit Nos. 9 through
6 13, photographs, were marked and admitted.)

7 MR. PASCO: He did tell me, Your Honor, that he
8 did object to State's Exhibit Nos. 14, 15, and 20.

9 THE COURT: I need to see them.

10 MR. PASCO: I went ahead and consented to these
11 three, and I'll just throw them in my briefcase, Your
12 Honor.

13 THE COURT: That's fine.

14 MR. PASCO: Then he objected to State's Exhibit
15 Nos. 19, 18, 17, and 16; and with your permission I'll pass
16 them up to the Court.

17 THE COURT: I'll take up the objection prior to
18 the admission of the document -- of the pictures. I don't
19 want to take up that time now.

20 MR. PASCO: Yes, ma'am.

21 MR. JOHNSON: Thank you, Your Honor.

22 THE COURT: You can leave them -- well, I'll turn
23 them face-down.

24 MR. PASCO: That's -- the next witness, Your
25 Honor, is going to be Roger Brown. I don't know if you

1 want to bring him in now or he --

2 THE COURT: Is he in shackles?

3 MR. PASCO: My understanding --

4 THE COURT: Is there any secret he's in jail?

5 MR. PASCO: No.

6 MR. JOHNSON: No.

7 THE COURT: You can go ahead and bring him in now.

8 MR. PASCO: Okay.

9 THE CLERK: Do you want to swear him now?

10 THE COURT: No, we'll swear him in the presence of
11 the jury.

12 THE COURT: How many other witnesses other than
13 this do you anticipate calling?

14 MR. PASCO: Today, Your Honor, I'm hoping to call
15 Roger Brown and then I need to call David Black, because
16 he's got to be at a murder trial in Horry County. Then
17 tomorrow I anticipate calling no more than -- let's see --

18 THE COURT: Is Roger Brown the same person as
19 Frank Brown?

20 MR. PASCO: Frank Roger Brown. Yes, ma'am.

21 THE COURT: Okay.

22 PASCO: May four witnesses tomorrow. Four or five
23 at most -- so six.

24 THE COURT: How many witnesses do you have Mr.
25 Johnson?

1 MR. JOHNSON: Your Honor, as of yet, no more than
2 three if my client decides to testify.

3 THE COURT: Okay. You need to have them ready
4 tomorrow.

5 MR. JOHNSON: They'll be ready.

6 THE COURT: Okay.

7 MR. PASCO: I anticipate resting in the morning,
8 Your Honor.

9 THE COURT: Okay.

10 MR. JOHNSON: And for the Court notice, Your
11 Honor, I suspect we should be finished by tomorrow as well.

12 THE COURT: Okay.

13 Please bring in the jury.

14 (Jury in after break at 3:40 p.m.)

15 THE COURT: Ladies and gentlemen, I hope that you
16 enjoyed your break. We'll now resume with the trial of the
17 State's case.

18 You may proceed.

19 MR. PASCO: May it please the Court, the State
20 calls Frank Roger Brown, Your Honor.

21 THE COURT: Sir, if you would stand and be sworn.

22 THE CLERK: Place your left hand on the Bible and
23 raise your right hand. Do you solemnly swear or affirm

24 that evidence you're about to give in this case will be the
25 truth, the whole truth, and nothing but the truth, so help

1 you?

2 MR. BROWN: Yes, sir.

3 THE CLERK: State your full name for the record,
4 please.

5 MR. BROWN: Frank Roger Brown, Jr.

6 THE CLERK: Okay. Please be seated.

7 MR. PASCO: Thank you.

8 THE COURT: You may proceed.

9 FRANK ROGER BROWN, JR. - DIRECT EXAMINATION

10 BY MR. PASCO:

11 Q Good afternoon, Mr. Brown.

12 A Good afternoon.

13 Q You need to speak up as loud as you can, okay.

14 A Yes, sir.

15 Q How old are you?

16 A Twenty-four.

17 Q So back in March of 2000, you'd have been 18 years
18 old?

19 A Yes, sir.

20 Q Okay. Where are you from?

21 A Elloree.

22 Q Born and raised in Elloree, Cameron area?

23 A Yes, sir.

24 Q Where were you living back in March of 2000.

25 A Cameron, South Carolina.

1 Q And where was that in relation to Nates Store Road?

2 A Right off of Nates Store Road.

3 Q Did you know the victim Billy Marion.

4 A No, sir.

5 Q Now, Mr. Brown, you're currently residing at the
6 Orangeburg-Calhoun Detention Center; is that correct?

7 A Yes, sir.

8 Q Either there or in prison since 2000?

9 A Yes, sir.

10 Q And you are charged with the murder of Mr. Billy
11 Marion, correct?

12 A Yes, sir.

13 Q Do you know the co-defendant by the name of Lewis
14 Rivers?

15 A Yes, sir.

16 Q Do you know the co-defendant, or the defendant on
17 trial today, Mr. Michael Smith?

18 A Yes, sir.

19 Q And back in January, February, and March of 2000, who
20 were you hanging out with at that time?

21 A Mike and Lewis, sir.

22 Q Are Lewis Rivers and the Defendant Michael Smith
23 related in any way?

24 A Yes, sir.

25 Q How are they related?

- 1 A Step-brothers.
- 2 Q Okay. And were they living together back in 2000?
- 3 A Yes, sir.
- 4 Q Where were they living?
- 5 A On Rabon Road.
- 6 Q How far was that from you?
- 7 A About -- right down the road, not too far.
- 8 Q Okay. And where exactly did you live in Cameron off
- 9 Nates Store Road back then?
- 10 A Right down the road.
- 11 Q Do you remember the name of the road?
- 12 A It's Chimney Swift Circle.
- 13 Q Chimney Swift Circle?
- 14 A Yes, sir.
- 15 Q And you said you hung out with the Defendants back in
- 16 March, February, and January, 2000; how long had you known
- 17 Lewis Rivers and the Defendant Michael Smith?
- 18 A Maybe about three or four months, sir.
- 19 Q Are they from South Carolina?
- 20 A No, sir.
- 21 Q Where are they from?
- 22 A Georgia.
- 23 Q I want to take you to Thursday, March 9, 2000, okay.
- 24 A Yes, sir.
- 25 Q Where were you that afternoon prior to say around noon

1 that day. Where were you around noon that day.

2 A Home.

3 Q And who did you end up hanging out with that
4 afternoon?

5 A Michael and Lewis.

6 Q How did you end up getting with them?

7 A They came to my house.

8 Q Was it just the three of you?

9 A Yes, sir.

10 Q And where did y'all end up hanging out at?

11 A At the end of Highway 33.

12 Q How did y'all get there?

13 A Walked.

14 Q How long would it take you to walk from your house to
15 Highway 33 and Nates Store Road.

16 A Less than three minutes.

17 Q Well, let me show you what's been marked as State's
18 Exhibit No. 3. Can you see it from there; can you see it
19 now?

20 A Yes, sir.

21 Q Is that 33 and Nates Store Road?

22 A Yes, sir.

23 Q What were y'all doing hanging out on this corner that
24 day?

25 A We was just right there, chilling, talking.

1 Q How long approximately did you stay at that corner of
2 Nates Store Road and 33 with Lewis Rivers and Michael
3 Smith?

4 A Maybe approximately 45 minutes.

5 Q Anyone else hang out with you during that 45 minutes?

6 A No, sir.

7 Q Did a vehicle, at some time around 3:30 take a right
8 on Nates Store Road?

9 A Yes, sir.

10 Q And what type of vehicle was that?

11 A I was a Blazer.

12 Q And State's Exhibit No. 10; do you recognize that
13 Blazer?

14 A Yes, sir.

15 Q What Blazer is that?

16 A The one we saw.

17 Q That turned on Nates Store Road?

18 A Yes, sir.

19 Q And how many people were in the vehicle?

20 A One.

21 Q Tell the jury in detail what happened after that red
22 Blazer turned onto Nates Store Road?

23 A He turned on Nates Store Road. I can't say what
24 happened then. I can tell you what happened approximately
25 during the time we was on Highway 33 when the Blazer pulled

1 up.

2 Q Okay. Speak up, okay. Tell us what happened?

3 A When it pulled up, we was at 33 when the Blazer pulled

4 up. Michael was on the passenger side talking to Mr.

5 Marion. And Lewis walked up to the driver's side and

6 opened the door, two guns was drawn.

7 Q Let me ask you -- you just testified two guns were
8 drawn.

9 A Yes, sir.

10 Q Who drew guns?

11 A Michael and Lewis.

12 Q Okay. Where exactly where was Lewis Rivers when he
13 drew the gun.

14 A On the driver's side.

15 Q Okay. Where was the Defendant Michael Smith when he
16 drew his gun?

17 A On the passenger side.

18 Q Do you know what type of weapon Lewis Rivers had when
19 he drew a gun?

20 A Yes, sir.

21 Q What kind of weapon?

22 A A 380.

23 Q What type of weapon did the Defendant Michael Smith
24 have?

25 A A 9 millimeter.

1 Q Okay. Tell the jury what happened next?

2 A Well, I was going from side to side, talking. The
3 gunshot was fired.

4 Q You said you were going from side to side; which side
5 of the vehicle were you at when you first saw the gun
6 drawn?

7 A Sir?

8 Q What side of the vehicle were you at when you first
9 saw the gun drawn?

10 A The driver's side.

11 Q Okay. And that would have been who, with the gun?

12 A On the passenger side?

13 Q On the driver's side.

14 A Lewis.

15 Q Lewis. What did you do when you saw Mr. Rivers pull a
16 gun on the driver's side?

17 A I started talking to him.

18 Q What did you say to him?

19 A I said, fall back, you know.

20 Q And what did Mr. Rivers do?

21 A He kind of fall back.

22 Q Then where did you go?

23 A Around on the passenger side.

24 Q And who did you see on the passenger side?

25 A Michael Smith.

1 Q And what was the doing?

2 A He had his gun drawn on the inside.

3 Q Where was the gun?

4 A On the inside the window, where he had his gun.

5 Q Inside the vehicle?

6 A Yes, sir.

7 Q Inside the window? On the passenger side?

8 A Yes, sir.

9 Q And what happened when you were watching Mr. Smith
10 holding the gun inside on the passenger side; what
11 happened?

12 A The gun got shot.

13 Q Who fired the weapon?

14 A Michael Smith.

15 Q Did anyone else fire a weapon?

16 A No, sir.

17 Q What did the three of you do after the shots were
18 fired?

19 A Took off running.

20 Q Where exactly -- to help the jury out -- can you tell
21 on this photograph where the shooting took place?

22 A Yes, sir.

23 Q All right. Just stay right there. But if this is

24 Highway 33 and this is Nates Store Road, right?

25 A Yes, sir.

1 Q Can you point out where the shooting took place?

2 A I'd say right here.

3 Q So it was actually on 33 as it's turning into Nates
4 Store Road?

5 A Yes, sir.

6 Q Now, before the shooting took place and y'all took off
7 running, did you ever -- do you know whether or not you
8 ever touched the vehicle?

9 A Might have.

10 Q And where do you think you would have touched the
11 vehicle?

12 A Maybe on the driver's side, maybe on the back, maybe
13 as I was working my way around to the passenger side.

14 Q Were you the only person who went from side to side?

15 A Yes, sir.

16 Q And using State's Nos 7 and 10 to orientate the jury;
17 is that the driver's side?

18 A Yes, sir.

19 Q You could have touched the driver's side?

20 A Yes, sir.

21 Q And the passenger as well?

22 A Yes, sir.

23 Q You don't know whether you touched it or not, you're
24 just testifying you could have?

25 A Yes, sir.

1 Q Now, shots fired. Where did you run to?

2 A Between Shady Grove Church and a wooded area.

3 Q And you ran through the woods what happened?

4 A I lost my shoe.

5 MR. JOHNSON: No objection, Your Honor.

6 THE COURT: Marked and admitted without objection.

7 (State's Exhibit No. 33, shoe, was
8 marked and entered.)

9 BY MR. PASCO:

10 Q I'm going to show you what's been marked as State's
11 Exhibit No. 33, now in evidence. Do you recognize that?

12 A yes, sir.

13 Q What do you recognize that to be?

14 A My shoe.

15 Q Is that the shoe you lost in the woods?

16 A Yes, sir.

17 Q As you were running from the scene?

18 A Yes, sir.

19 Q Where did you end up going to as you ran through the
20 woods?

21 A Turned back around and went a little piece down 33 to
22 a little back route I know to get to my house.

23 Q To your house?

24 A Yes, sir.

25 Q Do you know where Lewis Rivers and Michael Smith went?

- 1 A They was right behind me, sir.
- 2 Q So whose house did they go to?
- 3 A My house.
- 4 Q How long did you stay at your house?
- 5 A Maybe -- probably about 4:30 or 5:00 o'clock.
- 6 Q Okay. Did you do anything while you were at your
- 7 house?
- 8 A No, sir.
- 9 Q What did you do with the clothes you were wearing?
- 10 A Changed.
- 11 Q How long did Michael Smith stay at your house?
- 12 A Probably about the same time.
- 13 Q What about Lewis?
- 14 A Same time.
- 15 Q So when you left around 4:30 or 5:00 o'clock, where
- 16 did you end up going?
- 17 A To the scene.
- 18 Q To where the Blazer ended up in the field?
- 19 A Yes, sir.
- 20 Q Did anyone else go to the scene with you?
- 21 A Lewis Rivers.
- 22 Q Do you know whether or not he changed, as well?
- 23 A yes, sir.
- 24 Q Did he?
- 25 A Yes, sir.

1 Q Did the Defendant Michael Smith go back with you to
2 the scene to go see what was going on with the Blazer?

3 A No, sir.

4 Q Where'd he go?

5 A To play basketball.

6 Q And obviously -- well, let me ask you this; the scene
7 where the Blazer ended up in the field, is that the same
8 place where he was shot?

9 A No, sir.

10 Q Okay. Was it down Nates Store Road, the field is?

11 A Yes, sir.

12 Q Approximately how far is the field from where the
13 shooting took place, approximately?

14 A Couple hundred yards.

15 Q At any time on that Thursday did you come forward and
16 tell law enforcement what had happened?

17 A No, sir.

18 Q In fact, where did you end up going Thursday night?

19 A Savannah, Georgia.

20 Q Okay, and who went to Georgia with you Mr. Brown?

21 A Lewis and Michael.

22 Q The Defendant, Mike Smith?

23 A Yes, sir.

24 Q Do you know where y'all ended up getting the vehicle
25 from to go to Georgia Thursday night?

1 A Some people they know.

2 Q Do you know what Michael Smith did with the gun that
3 he used to shoot the victim?

4 A No, sir.

5 Q Do you know what Lewis Rivers did with his 380 that he
6 pulled out?

7 A No, sir.

8 Q Did you or any of the co-defendants talk about the
9 murder that night?

10 A No, sir.

11 Q What about Friday?

12 A No, sir.

13 Q Did you go to law enforcement on Friday?

14 A No, sir.

15 Q When did the three of you get back into town?

16 A Saturday.

17 Q That would be March 11th, that afternoon?

18 A Yes, sir.

19 Q And did you go to the Calhoun County Sheriff's Office?

20 A Yes, sir.

21 Q And at that time you didn't tell them what happened
22 either did you?

23 A No, sir.

24 Q Now, were you on probation at the time for a burglary
25 third degree?

1 A Yes, sir.

2 Q And did you get locked up for that probation
3 violation, I guess, for leaving the state?

4 A Yes, sir.

5 Q Now, let me ask you about Sunday, March 12th, which
6 would have been the next day when you'd been locked up.
7 Did you approach the police?

8 A Yes, sir.

9 Q How did you go about approaching the police?

10 A Contacted my mother and told my mother to bring them
11 down there.

12 Q And before somebody from the Sheriff's Office came to
13 you did they read your rights?

14 MR. JOHNSON: Your Honor, he's leading the witness
15 again.

16 THE COURT: Sustained.

17 MR. PASCO: Okay.

18 THE COURT: You may rephrase.

19 BY MR. PASCO:

20 Q When the person from the Sheriff's Office came to
21 interview you, did they do anything with you, did they go
22 over anything with you?

23 A No, sir.

24 Q Okay. Do you know what an advice of rights are, sir?

25 A Yes, sir.

1 Q Did they go over that with you?

2 A Yes, after I told them what had happened.

3 Q Okay. And just to refresh your memory, okay, on the
4 time. Is this a copy of your statement right here? Take a
5 look at it, Mr. Brown. Is that a copy of it?

6 A Yes, sir.

7 Q And does it have the date and time that you gave your
8 statement to the police?

9 A Yes, sir.

10 Q At 2:53 p.m. on 12th March of 2000?

11 A Yes, sir.

12 Q And did you tell the police then who shot Billy
13 Marion?

14 A Yes, sir.

15 Q Same person you told the jury?

16 A Yes, sir.

17 Q Now, as a result of your statement were you charged
18 with the murder of Billy Marion?

19 A Yes, sir.

20 Q That Sunday, March 12th?

21 A Yes, sir.

22 Q And you're still charged with murder; is that correct?

23 A Yes, sir.

24 Q The fact that you testified to, you're in jail right
25 now?

1 A Yes, sir.

2 Q And do you have an attorney?

3 A Yes, sir.

4 Q Mr. Martin Banks?

5 A Yes, sir.

6 Q And you know you're looking at 30 years to life on
7 that murder charge, correct?

8 A Yes, sir.

9 Q Have I made any promises or deals for your testimony?

10 A No, sir.

11 Q Has Mr. Banks or anyone promised you any deals
12 whatsoever for your testimony?

13 A No, sir.

14 Q And what you testified to is what you've already told
15 the police on March 12th of 2000?

16 A Yes, sir.

17 Q Mr. Brown, have you had any more contact with the
18 Defendant, Michael Smith, since March the 10th or 11th of
19 2000?

20 A No, sir.

21 Q Any more contact with the co-defendant, Lewis Rivers?

22 A No, sir.

23 MR. PASCO: Beg the Court's indulgence.

24 THE COURT: Yes, sir.

25 BY MR. PASCO:

1 Q And finally, sir, just a few more questions. What
2 hand did the Defendant have the gun in when he shot Billy
3 Marion?

4 A Right.

5 Q His right hand?

6 A Yes, sir.

7 Q Do you know whether or not he's left-handed or right-
8 handed?

9 A No, sir.

10 Q Did you ever play any sports with him?

11 A No, sir.

12 Q The person you saw that shot the victim, Billy Marion,
13 do you see him in the courtroom today?

14 A Yes, sir.

15 Q If you could point him out to the jury?

16 A Yes, sir. (Indicating.)

17 Q Is it the Defendant Michael with his lawyer Charlie
18 Johnson?

19 A Yes, sir.

20 Q Answer any questions that Mr. Johnson has for you.

21 THE COURT: Mr. Johnson, you may proceed.

22 MR. JOHNSON: Thank Your Honor. Please the Court.

23 THE COURT: Yes, sir, you may proceed.

24 FRANK ROGER BROWN, JR. - CROSS-EXAMINATION

25 BY MR. JOHNSON:

1 Q Good afternoon, Mr. Brown.

2 A Good afternoon, sir.

3 Q Mr. Brown, are you presently in jail?

4 A Yes, sir.

5 Q So you're not residing there, you're locked up; is
6 that correct?

7 A Sir?

8 Q You're locked up, right; you're locked up in jail, is
9 that correct?

10 A Yes, sir.

11 Q You're not living there; that's where they placed you,
12 is that correct?

13 A On these charges.

14 Q And what are the charges?.

15 A Murder, car jacking.

16 Q Mr. Brown, at the time in 2000, in March, how old were
17 you?

18 A Eighteen.

19 Q How old was Mr. -- how old was my client, Mr. Smith?

20 A I don't know.

21 Q He was younger than you; is that correct?

22 A Yes, sir.

23 Q If I was to say about sixteen; would you say that was
24 about right?

25 A Sixteen, seventeen; something like that.

1 Q You was the oldest person there; is that correct?

2 A Yes, sir.

3 Q You was the only person there at that time that had a
4 prior record; is that correct?

5 A I don't believe that, Your Honor, sir.

6 Q But you did have a record at that time, is that
7 correct?

8 A Yes, sir.

9 Q And you that if you was involved in any kind of
10 criminal activity that would be a violation of your
11 probation; is that correct?

12 A Yes, sir.

13 Q So you knew once this incident happened that you were
14 in trouble; is that correct?

15 A Yes, sir.

16 Q You gave a statement to the police; do you remember
17 that?

18 A Yes, sir.

19 Q In that statement, and even prior to the written
20 statement do you remember giving the investigating officer
21 a statement saying that you were standing behind the truck?

22 A Sir?

23 Q Do you remember telling the investigating officer that
24 you were standing behind the truck?

25 A Yes, sir. I was standing behind the truck.

1 Q Do you remember telling them that initially?

2 A No, sir.

3 Q So you never said that?

4 A Can't say that I did.

5 Q Excuse me?

6 A Can't say that I did. I was all around the vehicle.

7 Q Okay. So are you saying that you never told the
8 investigator that?

9 A No, sir.

10 Q Also, -- so there was no discussion -- you're saying
11 that no one discussed anything about robbing anyone or
12 doing anything to anybody; is that correct?

13 A No, sir.

14 Q And that my client, Michael Smith, was actually
15 talking to the individual; is that correct?

16 A Yes, sir.

17 Q Did you know of any reason -- was there any drug deal
18 going on?

19 A Can't say if it was or not, sir.

20 Q Was you there?

21 A Yes, sir, I was there.

22 Q Did you see any drug dealing going on or anything?

23 A No, sir.

24 Q So there was none then, right?

25 A Ain't no transaction, so I can't as it was.

1 Q Was -- was there any attempt to steal -- did you
2 attempt to steal something from someone?

3 A No, sir.

4 Q Let me ask you a question, you said that you was all
5 over the truck; was that correct?

6 A Yes, sir.

7 Q You said you might have touched something; is that
8 correct?

9 A Yes, sir.

10 Q Isn't it true that they've got your palm print on at
11 least four different locations on that truck?

12 A That's what I said, I could have touched the vehicle.
13 I was all around the vehicle.

14 Q So in actuality --

15 A I wasn't just in one individual spot. I was from the
16 driver's side to the passenger side.

17 Q Isn't it true that you have -- you actually was the
18 person with the gun?

19 A No, sir.

20 Q Isn't it true that you actually went to the driver's
21 side with the gun in an attempt to shoot the victim?

22 A No, sir.

23 Q Isn't it true that you actually came to the second
24 side of the truck, put your hands up against the window and
25 stuck the gun in it, and when the victim attempt to pull

1 off you shot him?

2 A No, sir.

3 Q Let me ask you a question. Why did you change
4 clothes?

5 A Sir?

6 Q Why did you go home and change clothes?

7 A Change clothes, just to change clothes?

8 Q Why?

9 A Just to change clothes, sir.

10 Q Just to change clothes. So you weren't trying to
11 cover up nothing?

12 A No, sir.

13 Q You didn't feel guilty about anything?

14 A No, sir, I ain't did nothing.

15 Q Then why didn't you tell the police at the scene?

16 A. Because at the time everywhere I went they was right
17 there behind me.

18 Q Well, it seems like if you was not guilty of anything
19 and you had not done anything wrong why didn't you tell the
20 police that Michael Smith had done something then; he
21 wasn't there?

22 A Sir?

23 Q He wasn't present when you went back to the scene was
24 he?

25 A He wasn't but his brother was.

1 Q Why didn't you tell the police at that time that
2 Michael Smith was the shooter and did it?

3 A I feared for my life, sir.

4 Q You feared for your life?

5 A Yes, sir.

6 Q Why did you wait until two to three days until after
7 you was arrested to then tell the police that Michael Smith
8 was the shooter.

9 A Because I was to myself.

10 Q Explain that to me?

11 A Okay. During the time after all this happen, they was
12 always with me.

13 Q Is that it?

14 A Yes, sir. They was always there with me everywhere I
15 went, they was always right there behind me.

16 Q But you say that you went home and changed and y'all
17 went to the scene the night that it happened; is that
18 correct?

19 A Yes, sir.

20 Q And you say you never saw Michael any more since then;
21 is that correct?

22 A No, sir.

23 Q Okay, correct me, explain. When did you see Michael
24 again?

25 A Sir?

1 Q When did you see Michael again?

2 A I seen him again after he finished playing basketball.

3 We went to Savannah, Georgia.

4 Q But y'all didn't discuss anything, you said?

5 A No, sir.

6 Q So did he threaten you?

7 A No, sir.

8 Q Okay. Why would you feel threatened?

9 A Because if you see a man like that taken, and
10 everywhere you go he's always there behind you, what would
11 you do in the situation?

12 Q Why did you go with them to Georgia if you felt
13 threatened?

14 A Can't never get rid of them.

15 Q Once again. They went to Georgia to pick up a family
16 member; is that correct?

17 A Yes, sir.

18 Q Why did you volunteer to go; they didn't make you
19 come?

20 A I didn't volunteer to go, sir.

21 Q Why did you go?

22 A They told me to come on.

23 Q But if you were threatened why did you go?

24 A Because they told me to come on, sir. I know they got
25 guns, sir.

1 Q You say you didn't see any more guns after that point?

2 A I didn't see any more guns after we got to Savannah,

3 Georgia, sir.

4 Q Isn't it true that you -- that you had a gun?

5 A No, sir.

6 Q Isn't it true that 9 millimeter was actually your gun?

7 A No, sir.

8 Q Did -- you say that nothing had been promised to you

9 for your testimony today; is that correct?

10 A That is correct, sir.

11 Q But you are aware that depending on your testimony it

12 might effect what sentence you get; is that correct?

13 A Yes, sir.

14 Q And that's why you're doing this; is that correct?

15 A Yes, sir.

16 Q So in actuality you're not just doing it out of the

17 goodness of your heart are you?

18 A Yes, I am, sir.

19 MR. JOHNSON: One moment, Your Honor.

20 THE COURT: Uh-huh.

21 BY MR. JOHNSON:

22 Q Mr. Brown?

23 A Sir?

24 Q On the statement that you gave the police you stated

25 that you might have touched the car?

1 A Yes, sir.

2 Q In that statement you were not aware that you touched
3 the car?

4 A No, sir. I might have touched the vehicle, sir.

5 Q Are you aware that your fingerprints are located on
6 that car in at least four different locations?

7 A No, sir.

8 Q You have not discussed that with your attorney?

9 A Yes, sir.

10 Q So you're aware of it, right?

11 A Yes, sir.

12 Q Are you aware of how many times the evidence show that
13 my client's fingerprints was on that car?

14 MR. PASCO: Objection. Relevance, Your Honor.

15 THE COURT: Please approach.

16 (Off the record bench conference with Mr. Pasco, Ms. Frick
17 and Mr. Johnson.)

18 THE COURT: Sustained. Speculation and hearsay.

19 You may proceed.

20 BY MR. JOHNSON:

21 Q Mr. Brown, just finally, as a result of this incident
22 you were so afraid that you ran out of your shoes; is that
23 correct?

24 A No, sir. I got stuck in some mud so that's how I lost
25 my shoes, sir.

1 Q But you left your shoes?

2 A Yes, sir.

3 Q I mean, after your shoes got stuck in the mud you were
4 aware you didn't have shoes on; isn't that correct?

5 A When I got stuck in the mud sir, I couldn't see them.

6 Q So you left your shoes.

7 A Yes, sir.

8 Q And you ran?

9 A Yes, sir.

10 Q And you're now telling the jury that you had nothing
11 to do with this murder?

12 A Yes, sir.

13 MR. JOHNSON: No other questions.

14 THE COURT: Any redirect?

15 MR. PASCO: Very briefly, Your Honor.

16 THE COURT: You may proceed.

17 FRANK ROGER BROWN, JR. - REDIRECT EXAMINATION

18 BY MR. PASCO:

19 Q You left your shoes, correct, sir?

20 A Yes, sir.

21 Q Who went back to the scene to go watch the Blazer?

22 A Me and Lewis.

23 Q Did Lewis' shoot Billy Marion?

24 A No, sir.

25 Q Did you shoot Billy Marion?

1 A No, sir.

2 Q Did Michael Smith go back to the scene?

3 A No, sir.

4 Q Who shot Billy Marion?

5 A Michael Smith, sir.

6 MR. PASCO: That's all I have, Your Honor.

7 THE COURT: Any objection to this witness being
8 excused?

9 MR. JOHNSON: Your Honor, I just have one follow-
10 up.

11 THE COURT: You may proceed.

12 FRANK ROGER BROWN, JR. - RE-CROSS-EXAMINATION

13 BY MR. JOHNSON:

14 Q Did you go back to the scene and get your tennis shoes
15 or did you go back to show the police where they was?

16 A I didn't go back. I ain't went back to get my tennis
17 shoes, sir.

18 Q But you told them in your statement; is that correct?

19 A Sir?

20 Q You told them that you left your tennis shoes there?

21 A Yes, sir.

22 MR. JOHNSON: No further questions.

23 THE COURT: Anything further from the State?

24 MR. PASCO: No thank you, Your Honor.

25 THE COURT: Any objection to the witness being

1 excused?

2 MR. JOHNSON: No objections, Your Honor.

3 THE COURT: Any objection from the State?

4 MR. PASCO: No, Your Honor.

5 THE COURT: Sir, you're excused. Have a good day.

6 You may call your next witness.

7 MR. PASCO: State calls Agent David Black.

8 THE CLERK: Place your left hand on the Bible and
9 raise your right hand, sir. Do you solemnly swear the
10 evidence you give in this case will be the truth, the whole
11 truth, and nothing but the truth so help you?

12 MR. BLACK: Yes, I do.

13 THE CLERK: State your full name for the record,
14 please.

15 MR. BLACK: My name is David Warren Black. The
16 last name is spelled B-l-a-c-k.

17 THE COURT: You may proceed.

18 MR. PASCO: May it please the Court.

19 THE COURT: Yes, sir.

20 DAVID WARREN BLACK - DIRECT EXAMINATION

21 BY MR. PASCO:

22 Q Where do you work, Agent Black?

23 A I'm employed with the South Carolina State Law
24 Enforcement Division, better known as SLED.

25 Q And how long have you been in law enforcement

1 altogether?

2 A Twenty years.

3 Q All that time at SLED?

4 A No, sir.

5 Q How long at SLED?

6 A I've been at SLED going on -- over 13 years and I was
7 at the Richland County Sheriff's Office for seven years.

8 Q And in what capacity are you currently employed at
9 SLED?

10 A I'm currently a fire arms and tool mark examiner,
11 assigned to the fire arms and tool mark department in the
12 forensic laboratory.

13 Q And you actually wanted to go to the department, you
14 voluntarily wanted that department?

15 A Yes, sir. I had an opportunity to go into another
16 field of identification and I was approached by that
17 department supervisor and I went.

18 Q What did you do at SLED before that?

19 A For 11 years I was assigned to the latent print and
20 crime scene department.

21 Q How long were you in the forensic crime scene
22 department as an investigator for SLED?

23 A At SLED for 11 years, but when I was at Richland
24 County Sheriff's Office three of those years were spent
25 also in their latent print crime scene department for a

1 total of fourteen years.

2 Q Okay.

3 MR. JOHNSON: Your Honor. If I may, we'll
4 stipulate to Agent Blacks' expert in the area of latent
5 fingerprint and analysis.

6 THE COURT: Okay.

7 Is that what you're offering him for?

8 MR. PASCO: I'm actually going to offer him as an
9 expert in both the field of collection of fingerprints at
10 crime scenes and fingerprint analysis.

11 THE COURT: Any objection?

12 MR. JOHNSON: No objection.

13 THE COURT: So stipulated, so admitted.

14 You may proceed.

15 MR. PASCO: For purposes of -- I'm still just
16 going to go over a few questions in that area.

17 THE COURT: Certainly.

18 MR. PASCO: Thank Your Honor.

19 THE COURT: You're welcome.

20 BY MR. PASCO:

21 Q If you could, tell the jury what exactly -- is it okay
22 to call it a crime scene technician?

23 A That will be fine.

24 Q All right. Tell the jury exactly a crime scene
25 technician does or what you do?

1 A With SLED, if a request is made for us to respond to a
2 crime scene we'll do a crime scene investigation. With
3 that we will document the crime scene -- and when I'm
4 saying we -- normally, it's at least a two-person team that
5 goes to the crime scene. And in this case Agent Philip
6 Coonfield responded with me. He was a trainee at the time.
7 When we arrived on the scene you will document the crime
8 scene. The documentation is usually through crime scene
9 photographs. It will include overall of the scene, it will
10 also include medium range photographs to point out the
11 particular items of evidence and also close-up photographs
12 of that evidence.

13 It is our responsibility to not only document these
14 things through photographs, but also sometimes a crime
15 scene sketch or diagram may be done. Once the evidence is
16 identified it's preserved and collected and it's taken back
17 with us to the forensic laboratory for whatever analysis
18 that needs to be done.

19 Q And the Defense has stipulated that you're an expert
20 in the collection of evidence and fingerprint analysis, but
21 how many times have you had to testify in Court as an
22 expert before?

23 A In strictly in the area of crime scene investigations?

24 Q Sure, just for that?

25 A Over a hundred times in 14 years.

1 Q Let's start with the basics, okay. Tell the jury what
2 a latent fingerprint is; explain to the jury about the
3 fingerprint?

4 A In law enforcement terms a latent print is the unknown
5 or questioned print that's developed at a crime scene or
6 evidence associated with a crime scene.

7 Q Okay, is a smudge necessarily going to be a
8 fingerprint or a latent fingerprint?

9 A The smudge may be considered a latent print, but that
10 smudge has to be evaluated by the latent print examiner on
11 the scene and back in the office to determine whether or
12 not it has any value; whether or not it can be identified
13 to anyone.

14 Q Okay. The mere fact that I'm touching this podium or
15 this wall right here, am I going to leave a latent
16 fingerprint?

17 A Not necessarily. It's going to depend on the surface
18 that's touched and the condition of the hands. Generally,
19 with wood just touching and using fingerprint powder,
20 generally you will not develop a print, however, you might
21 go to use some chemicals that may develop a print.

22 What you have to remember with a latent print, a
23 latent print is a random touching. It's an accident, it's
24 not meant to happen. You're not consciously taking into
25 effect that I've touched this surface. There's movement

1 involved, also, with your hands, depending upon the amount
2 of sweat or oil or greases that may be on it may depend
3 whether or not those ridges or detail transfers to that
4 surface.

5 Q How many crime scenes have you been to in the last 20
6 years to look specifically for fingerprints?

7 A Well, pretty much all the scenes I've worked in 14
8 years fingerprints were involved. When I was in Richland
9 County Sheriff's Office I averaged 600 crime scenes a year.
10 Seventy-five percent of those were property crimes, the
11 other 25 percent being violent crime. The 11 years at
12 SLED, my first year I was a new man, low man on the totem
13 pole and I was at every scene. I responded to 175 crime
14 scenes, however, 125 of those were death investigation
15 homicides.

16 After that initial year the remaining 10 years, I
17 averaged 50 crime scenes a year and most of those were
18 homicides, also.

19 Q Well over 1,000 crimes?

20 A Yes, sir.

21 Q And do you always find fingerprints at all those crime
22 scenes?

23 MR. JOHNSON: Your Honor.

24 A No, sir.

25 THE COURT: Yes.

1 MR. JOHNSON: Relevance.

2 THE COURT: I think it goes to foundation.

3 It's appropriate.

4 MR. JOHNSON: Well, Your Honor, we've already
5 stipulated that he's an expert in the area.

6 MR. PASCO: Still goes to foundation.

7 THE COURT: It still goes to foundation.

8 Overruled. You may proceed.

9 BY MR. PASCO:

10 Q Do you always find fingerprints?

11 A No, sir, I do not.

12 Q For a number of the reasons you've already explained
13 why you wouldn't?

14 A That is correct?

15 Q Okay. Now, I want to take you back to Thursday, March
16 9, 2000. And are you using your notes to assist you in
17 your testimony if you need it today?

18 A Yes, sir, if I may?

19 Q Were you on duty on that day, sir?

20 A Yes, sir. I was the crime scene examiner on duty, and
21 my back-up was Agent Philip Coonfield.

22 Q Okay, and what, if anything, were you called upon to
23 do that afternoon?

24 A On March 9, 2000, at about ten after 4:00 in the
25 afternoon, I was notified by the Sheriff of Calhoun County,

1 requesting assistance in a death investigation. That a
2 vehicle had left the road-way and was in a field. There
3 was a single occupant and it appeared the occupant had a
4 gun shot wound.

5 I and Agent Coonfield responded and we arrived on the
6 scene at 5:28 p.m., off of Nates Store Road.

7 Q Tell the jury just very briefly, for now, while you're
8 on the stand, what you first observed and what you first
9 did when you got to the scene?

10 A When I was arriving on the scene, as I was going down
11 Nates Store Road, I noticed there were some houses to the
12 right. To the left was a field and in the field appeared
13 to be a dark red or burgundy colored Chevrolet Blazer, two-
14 door. Prior -- the road that would give you access to the
15 field past that by several feet. I could see where the
16 vehicle had left the road, went over the ditch or the
17 depression and went into the field. Once I arrived on the
18 scene I met up with the investigators that were present
19 with the Sheriff's Office. Also present was Coroner Porth
20 with the Coroner's Office.

21 At that time they gave me some preliminary information
22 of some things that had or had not been done. Also, I
23 noticed that the scene was secure. There was yellow crime
24 scene tape up and orange cones had been set out. There
25 were other people present, but they were nowhere near the

1 scene. They were kept away from the scene.

2 From the roadway I could see that the passenger window
3 to the passenger door was down. I could also see that
4 there was a white sheet over the person, the occupant of
5 the car. That was done to prevent anyone from seeing the
6 individual from the roadway. There were onlookers.

7 Also, I noticed from the roadway you could actually
8 see where the rear tires were bogged down, dug into the
9 dusty soil of the field, and you could see from the roadway
10 that the front tires were turned to the right. Also, from
11 the roadway on the passenger side, I could see latent
12 prints on the vehicle because the dust had settled onto
13 those prints.

14 Q Let me ask you, did you actually take the photographs
15 at the scene, you and Philip Coonfield, that day?

16 A Yes, sir, we did. We -- again, Agent Coonfield was in
17 training. I would take some photographs, but then he would
18 take photographs, but it was always under my supervision.

19 Q And would it assist you in explaining to the jury what
20 exactly what you did that afternoon if you could show these
21 pictures to the jury?

22 A Yes, sir, it would. It's an accurate depiction of
23 what I saw that day.

24 MR. PASCO: Could I have Agent Black step down,
25 Your Honor?

1 THE COURT: You may.

2 MR. PASCO: To go over these photographs. Thank
3 you.

4 MR. BLACK: Thank you, Your Honor.

5 THE COURT: You're welcome.

6 BY MR. PASCO:

7 Q I want you to do me a big favor, though, when you come
8 down here, Agent Black, stand right here where the court
9 reporter can hear you.

10 A Sure.

11 Q Also, I'm going to let you show the -- go over
12 individually these photographs. When you go through them
13 tell the court reporter which exhibit you're showing to the
14 jury and describe it.

15 A If I may ask, you just want me to not move, stand
16 right here --

17 Q And show the jury, yes, sir. You can move around as
18 long as the court reporter can hear you.

19 A If I may, I'm just going to stand right here. Thank
20 you.

21 State's Exhibit No. 5, is a photograph that depicts
22 Nates Store Road. It also shows the Chevrolet Blazer
23 vehicle I was referring to between the first two cones you
24 can actually where tire marks or tire tracks have gone off
25 the roadway, across the grassy depression of the ditch and

1 into the field.

2 And if I may, where my left index finger is pointing
3 these are tire tracks I'm referring to that's in the grassy
4 area.

5 This is an overall photograph of the area, State's
6 Exhibit No. 5. State's Exhibit No. 6, is another
7 photograph a little bit closer that shows the path of the
8 vehicle going through the field. Barely visible on State's
9 Exhibit No. 6, is -- will be a section of the front bumper
10 and I'm going to place my finger on it, but I think I made
11 a couple of photographs that may show a closer up
12 photograph of it. This goes from the front bumper of the
13 Blazer.

14 State's Exhibit No. 8, is a photograph that shows the
15 driver's side of the Blazer and behind the Blazer you can
16 see Nates Store Road and some of the houses that I was
17 referring to. Also, the driver's door is open. It was
18 open when I arrived on the scene. I was informed by EMS
19 and emergency personnel that when they arrived on the scene
20 the door was closed. They opened the door to check on the
21 occupant. They also stated the vehicle was on. When I
22 looked in the vehicle the keys were in the ignition and the
23 vehicle had been turned off for safety purposes.

24 State's Exhibit No. 7, is a photograph showing the
25 rear and passenger side of the victims vehicle, a Chevrolet

1 Blazer. Also in the photograph you can see in the front.
2 bumper -- one section of the front bumper. Also you can
3 see from the rear passenger tire has actually bogged down
4 into the surface, and the front passenger tire is turned to
5 the right and it's also slightly bogged down, also. And
6 also the tire is partially off the axil wheel.

7 State's Exhibit No. 10 is a photograph, closer
8 photograph showing the driver's side of the Chevrolet
9 Blazer. You can see the victim who is seat belted in. The
10 white sheet is still on the victim, but also present on the
11 -- the rear vent glass on the driver's side you can see in
12 the dust fingerprints, the latent prints that we talked
13 about earlier.

14 State's Exhibit No. 9, is a photograph of the Blazer,
15 the front door open and the sheet still present on the
16 victim. The front driver side tire is turned to the right,
17 however, you'll notice it's elevated slightly. It is not
18 dug in or bogged into the surface. You can see the rear
19 driver's side tire is bogged in, and behind the vehicle you
20 can see some of the residents and Nates Store Road. You
21 can also see a black Suburban that's on the roadway.
22 That's the crime scene vehicle that I and Agent Coonfield
23 responded in.

24 Also present in the photographs that I've talked about
25 are the cones and you can see the yellow banner tape that

1 was up to secure the scene.

2 State's Exhibit No. 11, is a photograph, a close-up
3 photograph that is showing the driver's side -- excuse me
4 --the passenger side of the Chevrolet Blazer. In particular
5 it is showing the latent prints in the dust. This
6 photograph was taken at the garage where we had the vehicle
7 towed to stay with us where we did further processing.

8 Q While you're showing that photograph, Agent Black, I'd
9 like to ask you one question.

10 The fact that this vehicle ran into a field with a lot
11 of dust, would that assist or hinder possibly the location
12 of the fingerprints?

13 A It can do both. In this particular case it assisted
14 us. What happened -- when I talked about latent prints
15 earlier -- if you take a moment and look at your fingers
16 and your palms. There's two surfaces on your body, the
17 fingers and the palms and the soles of your feet. This
18 skin is unique. It had ridges on it. On the tops of these
19 ridges are very small sweat pores. And 99 percent of sweat
20 is water, the other one percent being greases and oils and
21 amino acids. When the ridges of the fingers or palms or
22 feet touch a surface that water, that perspiration, those
23 oils and greases may transfer those ridges to prints on
24 that surface. What happens is dust acts like fingerprint
25 powder. It adheres to those secretions, and what happens,

1 it told me on the scene that prints were placed on that
2 vehicle prior to the vehicle going into the field, because
3 the dust from the field settled on those prints like they
4 settled on the my shoes and my uniform from processing the
5 scene or anybody walking in or out of this field. The dust
6 is actually acting like fingerprint powder in this case.
7 It's able to show us where the places on the vehicle were
8 touched. What's interesting was when Philip Coonfield and
9 I were processing the vehicle with the exception of the
10 dust being on the outside and inside the vehicle, the
11 vehicle was clean, it was immaculate. So this would
12 indicate to me that this was a person who took care of
13 their property. That also further assisted us. And
14 sometimes when dust gets on a surface first and then you
15 touch on it, what's happening was the oils were touching --
16 the water is touching the dust not the actual surface. So
17 there's a process -- it's like a broom sweeping sand,
18 you're brushing it away. In this case, it helped us.

19 State's Exhibit No. 12. This is a medium range
20 orientation photograph that's going to show the front
21 passenger seat, the front passenger floorboard area and it
22 is going to show a fired cartridge case. This fired
23 cartridge case is on the rubber stripping between the seat
24 and the door. The door is open. We opened the door to
25 take the photographs. I'm placing my left finger on the

1 fired cartridge case. This particular cartridge case was a
2 9 millimeter caliber.

3 Q That's the passenger side?

4 A Yes, sir, it is. The passenger door window is rolled
5 down. Like I said, you can see that from the road, but the
6 door was closed. We opened the door to take the
7 photographs and to find evidence.

8 State's Exhibit No. 13, is a close-up photograph of
9 the fired cartridge case.

10 State's Exhibit No. 22, is a photograph standing in
11 front of the vehicle, the sheet has been removed --

12 MR. JOHNSON: Your Honor.

13 A -- from the victim.

14 MR. JOHNSON: Your Honor.

15 THE COURT: Is there an objection?

16 MR. JOHNSON: Yes, Your Honor. Objection to these
17 pictures. These are the ones that were rescinded earlier.

18 THE COURT: Okay.

19 Counsel, please approach.

20 (Off the record bench conference with Mr. Johnson, Mr.
21 Pasco, and Ms. Frick.)

22 THE COURT: Madam Forelady, ladies and gentlemen,
23 I have a matter of law that I need to take up with the
24 attorneys. It will be very brief, less than five minutes.
25 During the break, please do not discuss the case. If you

1 need anything, please, let the bailiffs know and please
2 leave your note pads in your seats.

3 (Jury out for break at 4:25 p.m.)

4 THE COURT: Sir, you can take your seat.

5 MR. BLACK: Thank you, Judge.

6 THE COURT: You're welcome.

7 There are objections to the Defense's No. 18, 19, 17,
8 -- they're out of order. Let me put them in order. That's
9 16, 17, 18, and 19, as well as, 21 and 22, which are crime
10 scene photos that accurately, based on the testimony that
11 has been previously let it, the crime scene and the way the
12 decedents body was found at the scene. I understand that
13 the Defense has an objection to the photos.

14 MR. JOHNSON: Yes, I do, Your Honor.

15 THE COURT: If you would state your objection for
16 the record.

17 MR. JOHNSON: Objections are they are cumulative,
18 they've extremely prejudicial, serve no probative value.
19 They're already been pictures entered that show the
20 position of the victim. I think that there's no question
21 that the victim was shot and killed at that particular
22 point, and that by adding those will certainly be
23 prejudicial and serve no probative value, as well as being
24 not relevant.

25 THE COURT: Would you like to respond to the

1 objection.

2 MR. PASCO: Yes, Your Honor.

3 Could I go through each photo individually so I can
4 tell you the probative value?

5 THE COURT: Sure.

6 MR. PASCO: Maybe what our argument is.

7 Thank you.

8 THE COURT: You're welcome.

9 MR. PASCO: I'm looking at State's Exhibit No. 16,
10 Your Honor. It's the State's position -- we had other
11 photographs that were just like this, but we just wanted to
12 put this one in because it shows where the exit wound was
13 to the victim. It would also go, we believe, to
14 corroborate the testimony of one of our witnesses who said
15 that the driver's side door was open, because the
16 projectile was never located inside the car. So we feel
17 that that -- as far as photographs of the deceased victim
18 go, I don't believe it's that prejudicial.

19 State's Exhibit No. 17, Your Honor, very probative
20 because, again, it corroborates our witnesses. The keys
21 are in the ignition and that's all we're really showing in
22 that, and all you can see of the victim here are the
23 victims legs.

24 State's Exhibit No. 18, Your Honor, shows -- very
25 probative because it shows where the entrance wound is in

1 relation -- also will show the jury, give them a good idea
2 of where in relation to the passenger side door because the
3 entrance wound is to the right side of the victim.

4 State's Exhibit No. 19, Your Honor, shows the victims
5 feet on the gas pedal, which again, corroborates not only
6 Agent Black, but one of the first witnesses to go to the
7 car that the victims feet were still on the gas in the car,
8 that the tire was still moving.

9 And with regards to State's Exhibit Nos. 22 and 21,
10 it's the State's position we would like to have one of the
11 photographs in because it shows the entire --

12 THE COURT: You have it upside down.

13 MR. PASCO: -- positioning -- I'm sorry.

14 THE COURT: And I've already looked at them. You
15 don't have to show them to me.

16 MR. PASCO: Okay. Of the victims body.

17 Now, State's Exhibit Nos. 21 and 22 are actually
18 already in evidence. I point that out as well.

19 THE COURT: They came in without objection,
20 correct?

21 MR. PASCO: Yes, ma'am.

22 THE COURT: That's 21 and 22?

23 MR. PASCO: Yes, ma'am.

24 THE COURT: Mr. Johnson. I believe they did come
25 in without objection. So I believe that objection would

1 have been waived.

2 MR. JOHNSON: I'm sorry, Your Honor.

3 THE COURT: That's okay.

4 MR. PASCO: Do you want me to pass them back up to
5 Your Honor.

6 THE COURT: I've already looked at them.

7 MR. PASCO: Okay. Thank you. And -- that's all I
8 have, Your Honor.

9 MR. JOHNSON: Your Honor, may I address the
10 Court on that?

11 THE COURT: Give me one second.

12 Yes, sir?

13 MR. JOHNSON: Your Honor, as stated before, my
14 objection to the pictures are because the State has already
15 had pictures without objection -- State's 21 and 22. It
16 clearly shows the wounds that they are trying to bring in
17 with the second photographs as well. It shows the position
18 of the body, which they indicate they are trying to show in
19 this case. I'm not aware that -- the entry wound, the
20 victim injuries or the location of the shots are even an
21 issue in this case, Your Honor.

22 I think they have stated, they have presented evidence
23 that state that it came through the window, that the window
24 was down. They have evidence to show that the shell was on
25 that side. That the only purpose of this would be

1 prejudicial. It serves no more probative value by adding
2 these pictures to the case. It can only be prejudicial to
3 my client.

4 THE COURT: Okay. Thank you.

5 Mr. Hasty, could you hand me those photos again and
6 let me look at them one more time.

7 MR. PASCO: These are the ones that are not in, is
8 that what you want?

9 THE COURT: No. I want the ones that are in.

10 MR. PASCO: Okay.

11 THE COURT: And then I want the ones that are
12 objected to.

13 MR. PASCO: Yes, ma'am.

14 THE COURT: Yeah, and then 16 through the balance.

15 MR. PASCO: Yes, ma'am.

16 THE COURT: Mr. Pasco, let me ask you a quick
17 question.

18 MR. PASCO: Yes, Your Honor.

19 THE COURT: Aren't Nos. 16 and 18 the same as 21
20 except one is more of a close-up -- actually, one is an
21 entrance and one's an exit, isn't it --

22 MR. PASCO: Let me see --

23 THE COURT: Which one is a blow-up of this one?

24 MR. PASCO: I'll tell you what -- that -- that one
25 right there.

1 THE COURT: This one?

2 MR. PASCO: Yes, ma'am. So I would agree with you
3 that that really depicts the same thing as that photo
4 that's already in evidence.

5 THE COURT: Okay, so you want to withdraw No. 16,
6 then?

7 MR. PASCO: I can do that -- Yes, ma'am.

8 THE COURT: No. 16 is the same as No. 21, which
9 has already been admitted, correct?

10 MR. PASCO: Shows the same thing. Yes, ma'am.

11 THE COURT: Then that resolves that.

12 (State's Exhibit No. 16, crime
13 scene photograph, was removed from evidence.)

14 THE COURT: And then what -- tell me again, you
15 said 18 depicts the entrance wound?

16 MR. PASCO: Yes, Your Honor.

17 THE COURT: Does 21 also depict the entrance
18 wound?

19 MR. PASCO: I don't believe so. Can I see it,
20 Your Honor?

21 THE COURT: Yes.

22 MR. PASCO: That's the exit wound.

23 THE COURT: Okay. And this is the entrance wound?

24 MR. PASCO: Yes, Your Honor.

25 THE COURT: And that other one you withdrew is

1 cumulative because it is the same picture of the same
2 thing?

3 MR. PASCO: Yes, Your Honor.

4 THE COURT: So then the only thing we're really
5 dealing with are; No. 19, which is his foot on the gas
6 pedal, No. 17, which are keys in the ignition, and No. 18,
7 which is an entrance wound?

8 MR. PASCO: Yes, Your Honor.

9 THE COURT: Okay.

10 MR. PASCO: Thank you.

11 THE COURT: You're welcome.

12 Based on what has been presented to the Court I would
13 find that the objection is overruled. That the pictures
14 are necessary to establish the crime scene. They are also
15 relevant to establish malice in the murder prosecution, and
16 any probative value that they have are outweighed by any
17 potential for prejudice pursuant to South Carolina Rules of
18 Evidence, Rule 403.

19 And also, I am relying -- well, actually, backtrack a
20 little bit. The sort of prejudice that the rules and the
21 case law anticipate -- must create a tendency to suggest a
22 decision on an improper basis. Commonly, though, not
23 necessarily an emotional one. And I do not think that the
24 photographs as they are presented are geared to that nor
25 would they meet the definition of unfair prejudice that is

1 contemplated by the rules and case law.

2 I think they're -- really in terms of on a scale of 1
3 to 10 in terms of the pictures that we generally see are
4 really rather mild. I do not think that they are -- that
5 they would arouse the passions of the jury in any way. And
6 I'm relying on State verses Kelly which is found at 319
7 South Carolina 173-460 SE 2nd. 368, which is a 1995 Supreme
8 Court case and in that case the Court was allowed to admit
9 not only photo but also the video of the body that was nude
10 and swollen from a gross beating, and I think when you
11 compare that that clearly that these are within the realm
12 of what the Court contemplated as admissible.

13 Is there anything before we bring in the jury?

14 MR. PASCO: No, Your Honor.

15 MR. JOHNSON: Nothing from the Defense, Your
16 Honor.

17 MR. PASCO: Thank you.

18 THE COURT: Okay. Nos. 21 and 22 have already
19 been admitted, therefore Nos. 18, 17, and 19 will be
20 admitted subject to the objection.

21 (State's Exhibit Nos. 17, 18, 19,
22 crime scene photographs were marked and admitted subject to
23 objection.)

24 THE COURT: Thank you. Please bring in the jury.

25 And also, before they come back in the

1 Court would note that any cumulative photos have been
2 withdrawn.

3 (Jury in after break at 4:40 p.m.)

4 THE COURT: You may proceed.

5 MR. PASCO: Thank Your Honor.

6 THE COURT: You're welcome.

7 MR. PASCO: Agent Black, if you would step back
8 down for me, please.

9 THE COURT: Yes, sir, you may step down.

10 DAVID BLACK - CONTINUED DIRECT EXAMINATION

11 BY MR. PASCO:

12 Q You stand right there and I'll hand the photos to you
13 this time. State's Exhibit No. 17. Tell us what that
14 depicts and --

15 THE COURT: What was that? It was a bell?

16 Oh, maybe it was the spring on my chair, you think. It's
17 possible. You may continue. It sounded like a bell,
18 didn't it. It's the spring on the chair.

19 You may proceed.

20 A State's Exhibit No. 17, is a photograph that shows the
21 key in the ignition of the Chevrolet Blazer. Again, when I
22 arrived on the scene the car was - the key was in the car
23 and the engine was not running. Again, as I was informed
24 by the first responders it was cut off for the safety of
25 the responders.

1 BY MR. PASCO:

2 Q State's Exhibit No. 19?

3 A State's Exhibit No. 19, is a close-up photograph of
4 the driver's side and in particular it shows the right foot
5 of the victim has the gas pedal accelerator is pressed
6 completely down to the floor board of the car. I'm using
7 my left index finger just to point to the right foot, shoe,
8 and the gas pedal. .

9 Q State's Exhibit No. 22?

10 A State's Exhibit No. 22, is a photograph from the
11 position of the victim if you're looking to the front of
12 the vehicle. It shows the front windshield and his
13 position. He is seat belted in. The victim is leaning
14 towards the passenger side.

15 Q State's Exhibit Nos. 18 and 21?

16 A State's Exhibit No. 18, shows the entry wound or the
17 point where the bullet came into the victim, is going to be
18 on the right side of the victim, upper torso. Kind of near
19 the arm pit area. That's State's Exhibit No. 18. The
20 bullet entered the right side of the victim.

21 Q State's Exhibit No. 21?

22 A State's Exhibit No. 21, is a photograph that shows the
23 exit of the victim. It's on the victim's left side. In
24 the lower torso area, it's above the waistline.

25 Q Did you look for the projectile inside the vehicle,

1 sir?

2 A Oh, yes, sir. We looked for the projectile. When I
3 saw we, I'm referring to myself and Agent Coonfield, inside
4 the vehicle, outside the vehicle. We went over the area,
5 field, woods with metal detectors. We searched the entire
6 area. Based on the prior testimony of Mr. Brown, it makes
7 sense now because I could not see any damage to the inside
8 of the vehicle, the outside of the vehicle to show where a
9 bullet had gone through. Hearing that the door was open
10 and based on the where the exit wound was that makes sense
11 that the projectile had traveled through the victim and out
12 of the victim out through the door. Just based on where it
13 was located that door had been closed it should have hit
14 the inside of that door -- in the frame of the vehicle.

15 Q Now, tell the jury, while you're standing there, we'll
16 use the diagram in a minute, but tell the jury if you would
17 about trying to look for fingerprints on the vehicle?

18 A Yes, we did.

19 Q Briefly, how did you do that and did you locate any
20 prints?

21 A Fortunately, to start off with -- what we're doing is
22 something called (inaudible)light, and what you're doing is
23 you're taking light from a flashlight or another light
24 source and you're shining it at different angles. As with
25 some of the photographs and the flashing that went off it

1 actually illuminated the prints. It's the same technique
2 that we used -- once the prints were located we decide
3 (inaudible). Now, in the case where we have the prints
4 were in dust. The first thing we use is what's known as a
5 gelatin lifter. You're familiar with gelatin. The gelatin
6 lifter is the consistency of Jello on one side. It looks
7 like -- it looks like jello, but it's not, but it has an
8 adhesive tackiness to it, and you place that -- lifter --
9 called rubber lifter, gelatin lifter onto the dusty print
10 it will lift the print off in dust. That's the first thing
11 that was done. Next we follow behind with the fingerprint
12 powder, which is black fingerprint powder made out of
13 charcoal and other things, and you use a fiberglass brush
14 and you dust the surface. The prints -- you develop the
15 fingerprint powder kind of like they were developed with
16 the dust. Transparent scotch tape was placed over the
17 developed print and lifted and put on a lift card where
18 it's backed. It's covered on the glossy side of the lift
19 backer because it helps give a better contrast whenever
20 we're doing a latent examine, when you're comparing the
21 latent prints to the ink prints, it just helps give it a
22 better contrast to see the prints.

23 Q Did you lift prints off the vehicle?

24 A Yes. Yes, sir, we did.

25 Q Let me show you what's been marked as State's Exhibit

1 Nos. 27 through 32. You just look at those very quickly.

2 A Yes, sir.

3 Q Do you recognize those --

4 A Yes, sir, I do.

5 Q What do you recognize those to be?

6 A These are the latent lifts that were lifted from the
7 Chevrolet Blazer by myself, the prints developed by me and
8 Agent Coonfield, and they were lifted by myself and Agent
9 Coonfield.

10 Q Do Nos. 27 through 32 the actual prints you lifted
11 from the Blazer?

12 A They are the actual lifts latent prints from the
13 Blazer.

14 Q Same condition as they were in on March 9, 2000?

15 A Yes, sir.

16 MR. PASCO: I'd ask that State's Exhibit Nos. 27
17 through 32 be admitted into evidence?

18 THE COURT: Any objection?

19 MR. JOHNSON: No objection, Your Honor.

20 THE COURT: Marked and admitted without objection.

21 (State's Exhibit Nos. 27 through
22 32, fingerprint cards, were marked and admitted.)

23 BY MR. PASCO:

24 Q And let me show you what's been marked as State's
25 Exhibit No. 27, tell the jury where you lifted that?

1 A At. SLED.

2 Q I'm sorry. Would it assist you to use the diagram to
3 show where you --

4 A It would. May I also grab my --

5 Q Absolutely.

6 A Thank you.

7 Q All right. Let me show you what's been marked as
8 State's Exhibit No. 23. Have you see that, sir?

9 A Yes, sir, I have.

10 Q And what do you recognize that to be?

11 A This is a diagram of the Chevrolet Blazer and the
12 particular areas have been marked where the latent prints
13 were developed and lifted from?

14 Q This was actually generated at SLED?

15 A Yes, sir. Specifically by Agent Coonfield.

16 Q And assist you in telling the jury where you found the
17 prints, these prints?

18 A Yes, sir.

19 Q Okay. I'm going to stand to the side. I'm going to
20 show you State's Exhibit No. 32.

21 A If I may, I'm going to pull out the State Exhibit
22 number, in this example, No. 32, and when I say Item 5,
23 that is the Item number that was assigned to this case by
24 the forensic lab, and that's where the numbers that we have
25 here are actually the items numbers.

1 Q Okay.

2 A State's Exhibit No. 32, Item 5, is located here on the
3 driver's side window.

4 Q What was it, fingerprint, palm print?

5 A Yes, sir. There were two identifiable prints. One is
6 a thumb print, the other is a palm print. Item -- it is
7 the right thumb of Mr. Rivers and the right palm print of
8 Mr. Rivers.

9 Q Well, we're going to jump ahead. Let me ask you.

10 Did you -- one second. Obviously, to compare prints
11 what did you have to have?

12 A On different occasions we have to make a case print.
13 The field that we look at. In this case, we made a case
14 print of the victim. Done here in Calhoun County. The
15 finger and palm print -- you use those compared to the
16 prints that were found on the vehicle. Also on two
17 different occasions and Agent Coonfield fingerprinted and
18 palm printed two other individuals on March 29, 2000, at
19 Orangeburg Calhoun Detention facility. We case printed a
20 Frank Roger Brown and on April 5, 2000, at Santee
21 Department of Juvenile Justice, Agent Coonfield and I
22 fingerprinted a Lewis Rivers, Jr.

23 Q State's Exhibit Nos. 24 and 25 are Mr. Rivers and Mr.
24 Brown's fingerprints?

25 A Yes, sir, they are.

1 MR. PASCO: Any objection to them Mr. Johnson?

2 MR. JOHNSON: No objection.

3 (State's Exhibit Nos. 24 and 25,
4 fingerprints of Mr. Rivers and Mr. Brown, were marked and
5 entered.)

6 BY MR. PASCO: I would like to ask you a few questions.

7 Q So back in March, April, and May of 2000, you had Mr.
8 Rivers' and Mr. Brown's fingerprints made?

9 A Along with the victims's, that's correct.

10 Q Along with Mr. Marion. Did you have the Defendant,
11 Michael Smith's?

12 A At the time, we did not.

13 Q Now, let's go ahead --

14 THE COURT: Hilda, could I see the first Court's
15 Exhibit?

16 COURT REPORTER: Yes, ma'am.

17 THE COURT: Hold up one second for me. I need the
18 court reporter to do something for me.

19 COURT REPORTER: Here it is, Your Honor. Is this
20 what you're looking for?

21 THE COURT: Yes, ma'am.

22 You may proceed when you're ready.

23 MR. PASCO: Thank you, Your Honor.

24 BY MR. PASCO:

25 Q Now, State's Exhibit No. 22. Did I ask you about

1 that?

2 A Yes, sir, you did.

3 Q You've already testified where you lifted those?

4 A Yes, sir.

5 Q What's the next one?

6 A State's Exhibit No. 32, which is Item 5, is what I'm
7 pointing to on the rear exterior of the vent window on the
8 driver's side. Now, you notice there's a 5.1 and a 5.2,
9 that designates the proof to print. A 5.1 is the right
10 thumb of Mr. Rivers and 5.2 is the right palm of Mr.
11 Rivers.

12 Q So right hand of -- Mr. Rivers?

13 A Yes, sir.

14 Q Okay. Now, let me show you State's Exhibit No. 31.

15 A State's Exhibit No. 31, which is Item 4. Item 4, is
16 also located on the driver's side exterior rear vent
17 window, and Item 4 is the right palm of Mr. Rivers.

18 Q And which one is it, sir?

19 A Item No. 4.

20 Q Mr. Rivers?

21 A Yes, sir.

22 Q State's Exhibit No. 30?

23 A State's Exhibit No. 30, which is Item 3, which is also
24 located on the driver's side exterior rear vent window are
25 the prints of Mr. Brown. In particular, there were several

1 identifiable prints to the left little, left ring, left
2 index, and his left palm twice to Frank Roger Brown.

3 Q That's this one right here?

4 A Yes, sir.

5 Q And now, I'm going to ask you some questions about
6 this a little bit later on, but as an expert how certain
7 are you that those are Lewis Rivers' fingerprints and that
8 was Frank Brown's fingerprints on the driver side of the
9 vehicle?

10 A It's very plain.

11 Q Is there any doubt whatsoever?

12 A No doubt in my mind it was their prints on there.

13 Q Let me show you what's been marked as State's Exhibit
14 No. 29.

15 A State's Exhibit No. 29 which is our Item 2, is going
16 to be located on the passenger side of the vehicle. In
17 particular it's located on the rear on the exterior of the
18 rear vent window on the passenger side where I'm pointing
19 to.

20 Q Whose fingerprint is that or palm print is that?

21 A It's -- again, it's fingers and palms. They belong to
22 Frank Roger Brown.

23 Q Make sure I get it right. It's this one right here?

24 A No, sir, it's this one.

25 Q This one. Okay.

1 A And I stand corrected on that. Yeah, this is Mr.
2 Frank Roger Brown. On Item 3, they are Frank Roger Brown's
3 prints but I incorrectly stated which ones. On Item 3,
4 it's going to be a right index finger, his right ring
5 finger, his right little finger and his right palm.

6 On Item 2, which the Solicitor just wrote his name
7 down on the passenger side vent window, those would be his
8 left little finger, left ring finger, left index finger,
9 and his left palm, twice.

10 Q I'm going to show you what's marked as State's Exhibit
11 No. 28.

12 A State's Exhibit No. 28 is Item 6. It's also located
13 on the passenger side exterior rear vent window. It's above
14 and to the right of Item 2, and these are also the prints
15 of Frank Roger Brown. In particular, they are his left
16 middle and left ring finger.

17 Q Now, when did you make these comparisons to find Mr.
18 Brown's prints and Mr. Rivers' prints on the Blazer?

19 A Um -- immediately after I printed Mr. Brown -- I first
20 compared the victim's prints to the latent prints to
21 determine if they were his or not, and they were not. When
22 I got the major case prints of Mr. Brown, I did compare
23 those. And that again, March 29, 2000, as of that date. I
24 made the comparisons, made the identification. On the
25 April 5, 2000, when I got the prints of Lewis Rivers' his

1 palm and fingerprints, I then made the comparison then at
2 around April 5, 2000.

3 Q Okay. Now, you had also testified that on March 9,
4 you found a sixth print on the vehicle print, right?

5 A Seventh print.

6 Q Seventh print. I'm sorry.

7 A Well, you're correct. Sixth. You're correct.

8 Q Sixth print on the vehicle?

9 A You're correct.

10 Q Did you compare that fingerprint that you found on the
11 vehicle to Lewis Rivers?

12 A I did. It -- actually, seven is actually a palm
13 print, a left palm. I did compare that to Lewis Rivers.

14 Q Did Lewis Rivers leave that palm print?

15 A No, he did not.

16 Q And as you marked that back in when you compared that
17 print?

18 A That's correct, I did.

19 Q Did you compare that palm print to Frank Roger Brown?

20 A I did.

21 Q Did it match, is it Frank Roger Brown that left that
22 palm?

23 A No, sir, he did not.

24 Q And did you mark that back your SLED notes at the time
25 that you found that he didn't match that print?

1 A Not only is it my notes, it's also in the initial
2 report, no he did not make this print.

3 Q Did you have Michael Smith's prints in 2000 to compare
4 it to that?

5 A I did not.

6 Q In 2001?

7 A Not in 2001. At some point -- in 2001, a photostatic
8 copy was supplied to me of a name, Michael Smith. That was
9 all that was on it. However, those were a photostatic copy
10 and not only was it not a quality, but the area that I was
11 in particular looking for was not represented on those
12 prints. So I couldn't tell you if it was his or not.

13 Q And in 2004 and in 2005, did you actually get Michael
14 Smith's prints to compare to that print on the door?

15 A Yes, sir. We did in 2004.

16 Q And is that State's Exhibit No. 26?

17 A Yes, sir, it is.

18 MR. PASCO: Any objection to putting State's
19 Exhibit No. 26 into evidence?

20 MR. JOHNSON: No objection, Your Honor.

21 THE COURT: Marked and admitted without objection.

22 (State's Exhibit No. 26,
23 fingerprint card, was marked and entered.)

24 BY MR. PASCO:

25 Q If I could, I want you to look at State's Exhibit No.

1 27. Tell the jury where you found that print and what it
2 was?

3 A Basically, State's Exhibit No. 27, which is indicated
4 as Item 7, on the diagram, is on the exterior of the
5 passenger door above the door handle. It is a left palm
6 print.

7 Q And did you determine whose left palm print was on the
8 passenger door of Billy Marion's Blazer?

9 A Yes, sir, I did.

10 Q Who was that?

11 A It is the left palm print of the card with the name of
12 Michael Angelo Smith.

13 Q The Defendant?

14 A I have never met the Defendant, so I don't know if
15 that's him or not.

16 Q Agent Coonfield is going to testify tomorrow as to who
17 took the prints?

18 A Agent Coonfield is the one who actually took the
19 prints and he will testify; that's correct.

20 Q Agent Black, as an expert in collecting evidence, was
21 there any significance on where you found this palm print
22 of Michael Smith in relation to where you found the shell
23 casings?

24 A Yes, sir.

25 Q What's that.

1 A The relationship of that left palm print of Michael
2 Smith, if you were to open that passenger door, the shell
3 casing would be right down on the floorboard between the
4 passenger seat and that door. Also, the significance of
5 that palm print, where it's located it puts that individual
6 in line with the entrance wound of the victim. He was shot
7 here on the right side in the upper torso, kind of under
8 his right arm pit area.

9 Q If you could, very briefly, tell the jury the
10 difference between say a 9 millimeter pistol and a revolver
11 with regards to maybe shell casings.

12 A With a revolver, the revolver has a cylinder. Most
13 revolvers, modern revolvers today have a cylinder that will
14 hold six cartridges, and to load and unload the revolver
15 you have to open and swing out the cylinder and actually use
16 an ejector rod to dump the cartridges or fired cartridge
17 cases out. With a pistol, when the trigger is pulled and
18 the firing pin strikes the primer of the cartridge and the
19 bullet is fired from the cartridge, the empty hull or fired
20 cartridge case is normally ejected from the pistol. Part
21 of the gases and pressures that's used to force the bullet
22 down the barrel also force the slide back, which in turn
23 will extract and eject the fired cartridge case. It is a
24 part of the operation of pulling the trigger.

25 Q Let me ask you a little bit about your policy at SLED.

1 Are you the only person at SLED that had reviewed the
2 fingerprints that were lifted from the vehicle and compared
3 them to the defendants in these cases?

4 A No, sir, I'm not.

5 Q Okay. Well, what's the policy at SLED with regards to
6 that?

7 A The policy at SLED is whomever works the case will
8 examine and independently render their conclusion. Also
9 after that is done a technical review is done by another
10 tenured court qualified fingerprint examiner. And also, in
11 this case, a step beyond was taken. And in this case, at
12 that time, the departmental supervisor also looked at the
13 prints in this case.

14 Q And yes or not, do you allow experts to come in from
15 anywhere and look behind you to also compare those
16 fingerprints?

17 A Oh, yes, sir. It is SLED policy that an expert, a
18 qualified fingerprint expert can come in and view it as
19 long as it's been cleared through the appropriate
20 solicitor's office. They have the right -- yes, sir, they
21 can look at it. It's provided them to look at and examine.

22 Q How long has law enforcement used fingerprints as a
23 method of identification?

24 A As a method of identification since the late 1800s.

25 Q And when we talk about certainty that this is

1 someone's fingerprints are you talking one in a million,
2 one in a trillion; how certain are you when you look at
3 someone's fingerprints and you can identify it as -- that
4 person left the fingerprint?

5 A Not only can you identify the print of an individual
6 you can also exclude an individual. In other words,
7 meaning that they didn't make this print. It is beyond a --
8 - I can't give you a number figure. I just know through
9 the 14 years that I have looked at fingerprints I've yet to
10 find two people to have the same print. In this case in
11 particular I examined the victim -- I compared the victim's
12 prints to the these prints. They weren't his. I compared
13 the various suspects in the case to the prints, and certain
14 prints were made by individuals and others were not to the
15 exclusion of all others.

16 Q And due to your 20 years in law enforcement and your
17 other 10 years as an expert in analyzing fingerprints have
18 you ever heard in your training of any two people having
19 the same fingerprints?

20 A No, sir. As a matter of fact, I'm a member of the
21 International Association for Identification and the
22 purpose of that as a governing body for training and what
23 we do as fingerprint examiners. Part of that is we get --
24 the training conferences and seminars we get a bi-monthly
25 journal and if there ever would happen the word would get

1 out very quickly through that purpose. In my training and
2 in the talk of other fingerprint examiners no two persons
3 have been known to have the same print.

4 Q Ever?

5 A Ever.

6 Q And finally, based on your experience as an expert,
7 who is the only person in the history of the world to leave
8 their palm prints --

9 MR. JOHNSON: Your Honor. Objection to the
10 question.

11 THE COURT: Basis? Basis of the objection?

12 MR. JOHNSON: The question is -- he's leading the
13 witness.

14 THE COURT: Sustained.

15 You may rephrase. Leading.

16 MR. PASCO: May I ask the question again?

17 THE COURT: Uh-huh.

18 BY MR. PASCO:

19 Q Agent Black, before you answer just listen. Who is
20 the only person in the history of the world that --

21 MR. JOHNSON: Your Honor, once again --

22 THE COURT: Still leading. Sustained.

23 You may rephrase.

24 BY MR. PASCO:

25 Q Who left their palm print right there?

1 A Michael -- Michael Angelo Smith.

2 Q Tell us whether or not anyone else in the history of
3 the world --

4 MR. JOHNSON: Your Honor -- once again, he's
5 leading, Your Honor.

6 THE COURT: Please approach.

7 (Off the record bench conference with Mr. Johnson, Mr.
8 Pasco and Ms. Frick.)

9 THE COURT: There's another way to ask it.

10 MR. PASCO: And I know how I'm going to ask it.
11 Thank you.

12 THE COURT: You're welcome.

13 BY MR. PASCO:

14 Q You just testified that Michael Smith left that print?

15 A Yes, sir.

16 Q Tell us who else in the history of the world left that
17 print?

18 MR. JOHNSON: Your Honor, it asks for answer
19 already --

20 MR. PASCO: No.

21 THE COURT: No. I'm going to overrule it. Let him
22 answer.

23 MR. PASCO: Thank Your Honor.

24 BY MR. PASCO:

25 Q Who else in the history of the world left that print?

1 A The particular print you're talking about was left by
2 Michael Angelo Smith.

3 Q And no one else?

4 A It is the left palm print of Michael Angelo Smith.

5 Q Thank you. Answer any questions --

6 MR. PASCO: Oh -- I'd ask that State's Exhibit No.
7 23 be admitted into evidence, Your Honor.

8 THE COURT: Any objection?

9 MR. JOHNSON: No objection, Your Honor.

10 THE COURT: Marked and admitted without objection.

11 You may proceed with cross examination. Thank you.

12 (State's Exhibit No. 23,
13 fingerprint card, was marked and entered.)

14 MR. JOHNSON: Thank Your Honor. May it please the
15 Court.

16 DAVID BLACK - CROSS-EXAMINATION

17 BY MR. JOHNSON:

18 Q Investigator, what's your name; what do you prefer to
19 be called, investigator?

20 A I'm David Black. You can call me Agent or
21 Investigator, whichever you're comfortable with.

22 Q Investigator Black be okay?

23 A That would be fine.

24 Q Investigator Black, you stated that you did examine
25 these in the truck and found a number of fingerprints

1 located in different locations; is that correct?

2 A Yes, sir, that is correct.

3 Q Of your examination --

4 MR. JOHNSON: Your Honor, may I approach?

5 THE COURT: You may.

6 BY MR. JOHNSON:

7 Q Is that a copy of your results as prior to the
8 examination of Michael Smith?

9 A Yes, sir, it is.

10 Q Looking at that, how many points of contact did you
11 discover that you was able to analyze for fingerprint
12 analysis?

13 A We had a total of six latent lifts from the vehicle
14 and with -- from the six latent lifts we had a total of --
15 from the six latent lifts we had a total of 15 identifiable
16 prints.

17 Q You found 15 identifiable prints?

18 A Yes, sir.

19 Q Out of those 15 identifiable prints how many prints
20 matched Michael Smith?

21 A One.

22 Q Out of the remaining 14, who did the remaining prints
23 matches?

24 A If I may -- three belong to Mr. Rivers, and --

25 Q That would leave 11?

1 A -- eleven belong to Mr. Brown.

2 Q Mr. Brown?

3 A Yes, sir.

4 Q Other than Michael Smith print, which was found by the
5 door, who other prints was located in the area the shot
6 could have came from?

7 A It was Mr. Brown's prints.

8 Q Would you please come down from the stand.

9 MR. BLACK: May I, Your Honor?

10 THE COURT: Uh-huh, you may.

11 (Mr. Black steps down from witness stand.)

12 BY MR. JOHNSON:

13 Q Officer Black, I'm going to present to you a picture
14 that's been previously marked as State's Exhibit No. 10.
15 Please take a look at that.

16 A Yes, sir.

17 Q What do you see on that print; what do you see as the
18 latent print that you took off?

19 A You can see where there has been multiple touching,
20 multiple latents that are on the driver's side rear vent
21 window.

22 Q And you can see the actual latent prints on the
23 window?

24 A Yes, I can. That's again with the dust that has
25 settled onto the surface.

1 Q And that's on the driver's side window?

2 A This is on the driver's side window, rear window.

3 Q Did Michael Smith touch -- prints located in that
4 area?

5 A No, sir.

6 Q Whose prints is those?

7 A Two individuals -- two are palm prints belong to Mr.
8 Rivers and then other prints belong to Mr. Brown.

9 Q On that side of the truck?

10 A On this side of the truck. Mr. Brown, if I may --
11 what I'm pointing to here and here. These are the two palm
12 prints of Mr. Rivers, and the palm print and thumb of Mr.
13 Brown are in this area.

14 Q So Mr. Brown was on that side of the truck?

15 A Yes, sir.

16 Q There's no doubt in your mind?

17 A He was on that side of the truck.

18 Q In the history of the world, do you know of anybody
19 else who had been on that side?

20 A That is his print.

21 Q Thank you. Let me ask you another question. Okay,
22 this is State's Exhibit No. 11, do you recognize that?

23 A Yes, sir, I do.

24 Q What does that depict?

25 A This is -- State's Exhibit No. 11, a photograph that

1 shows two areas. It shows first the passenger side
2 exterior rear vent window, in particular it shows the
3 latent prints that were identified as Mr. Brown. It also
4 shows above the door handle on the passenger door, a palm
5 print here, this is the print of Mr. Brown on the window
6 and above the door handle is the print of -- the palm print
7 of Mr. Smith.

8 Q Right there, that little --

9 A Area right above the door handle.

10 Q But these hand prints there, who are those?

11 A These are identified as Mr. Brown.

12 Q Would that put Mr. Brown -- but that is a left-hand,
13 is that correct?

14 A His left hand.

15 Q So he was standing at the truck with his left hand to
16 some degree --

17 A To some degree an angle like this. Now, as far as the
18 angle goes, if that's what you're asking now, it is not
19 straight on like he's facing the truck. It's more of an
20 angle like he's looking this way and not actually looking
21 into the vehicle.

22 Q But that could be attempting to put your hand up
23 against the truck you're walking towards the window?

24 A Yes, sir. That is not a stationary print.

25 Q Oh, it's not.

1 A If you'll note that -- holding that you can --

2 Q How many actual points of contact did you find in this
3 area?

4 A That -- as far as identifiable prints in this frame, I
5 have a left little, his left ring, his left index, his left
6 palm, and his left thumb.

7 Q So you found his left palm, so how many would that be,
8 five?

9 A Yes, sir. That's one, two, three, four, five.

10 Correct. Five identifiable prints for Mr. Brown.

11 Q On the side that the shot came from?

12 A Yes, sir, that is correct.

13 Q Even in the location -- that individual standing there
14 could have shot the victim?

15 A Yes, sir.

16 Q And how many points of contact did you find for
17 Michael Smith in that same location?

18 A Just one.

19 Q Could that have been a sign that someone was talking
20 to the individual; could they have made that same print?

21 A Yes, sir.

22 Q So they're not necessarily a contact that indicates
23 somebody was going to shoot somebody is that, it's just a

24 print; is that correct?

25 A It's just a print. I doesn't necessarily mean that

1 they fired the shot or was put in the position of the shot
2 where it could have come from.

3 Q Could have come from?

4 A Yes, sir.

5 Q You can take your seat.

6 A Okay. Thank you. ~~very nice and fast~~

7 (Mr. Black returns to the witness stand.)

8 Q Thank you.

9 A Yes, sir.

10 Q Now, let's take this a little further. You stated
11 later that the location of the print for Mr. Smith, my
12 client, was in line with the shot.

13 Do you remember saying that?

14 A Yes, sir.

15 Q Did you do a projectile analysis to see the line of
16 the shot?

17 A If you're asking me did I run a dowel through the
18 victim, no sir, I did not do that, and no one would do
19 that. What it would be dependent upon was getting the
20 information from the autopsy that I know from looking at
21 the scene with the shot being on his right side, his right
22 torso, the fact that the window was rolled down, and the
23 fact where the shell casing was located, which was an
24 indicator that when the casing was ejected at least the
25 front part of the fire arm where the ejection point was had

1 to be inside of the vehicle where it could fall to where it
2 was located between the passenger seat and the door.

3 Q So you're estimated that just as the shot came through
4 that window?

5 A Yes, sir.

6 Q Not necessarily that it was in the exact location that
7 my client was standing?

8 A Not necessarily, but it would put them in -- they
9 would have to be standing in or near that front window to
10 fire, yes, sir

11 Q So therefore it's possible that it could have come
12 from someone else standing in that window or near that
13 window, such as where Mr. Brown was standing?

14 A If Mr. Brown were leaned into -- turned and faced the
15 victim and leaned into, then, yes, sir, that is possible.

16 Q And normally when you lean forward you try to support
17 yourself; is that correct?

18 A Yes, sir, just like the left palm print that's on the
19 door.

20 Q Just like the left -- and just like the left palm
21 print of his hand that's on the window; is that correct as
22 well?

23 A Yes, sir.

24 Q Next question. The round found, you say was a 9
25 millimeter round?

- 1 A The fired shell casing --
- 2 Q I mean the shell casing.
- 3 A -- was a 9 millimeter luger, yes, sir.
- 4 Q Did you check to see if it had just been fired; was an
5 analysis done?
- 6 A ~~It was sent to the fire arms department, yes, sir.~~
- 7 Q Do you know of any report of it just being fired?
- 8 A I have no idea.
- 9 Q But when you make a statement that the 9 millimeter
10 round was a round that came from the gun that killed the
11 victim; you don't know, do you?
- 12 A I don't know if -- if I understand your question
13 correctly, I don't know that was the fired casing from the
14 fire arm that was used. No, I don't know that.
- 15 Q So that's just a round you found in the truck; is that
16 correct?
- 17 A Yes, sir, a fired casing, yes, sir.
- 18 Q As a matter of fact, you do not know of any evidence
19 as to what type of gun was used to kill the victim do you,
20 because you didn't find the shell?
- 21 A We found the shell casing, but not the bullet.
- 22 Q Right. But you just said that you don't know if that
23 was the shell that was actually -- that actually contained
24 the round that killed the victim?
- 25 A No, I don't know that.

1 Q So in actuality you don't know what killed -- what
2 round killed the victim do you?

3 A No, I do not.

4 Q So when you make that statement that was an incorrect
5 statement; is that correct?

6 A Excuse -

7 Q That that 9 millimeter was the round used to kill the
8 victim?

9 A It was a 9 millimeter round that was fired that was
10 found at the crime scene, and the fact that the victim had
11 been shot and the fact that it was on the victims right
12 side and the casing fell down on the passenger side it
13 indicated that the shot came from that direction from the
14 right and exited from the left.

15 Q Once again, though, suppose it was a shot, such as a
16 revolver that is not to specification isn't it possible
17 that that individual could have been shot by some other
18 round that you just didn't find and because you found a 9
19 millimeter casing laying there you assumed that was the
20 round?

21 A Yes, sir, that's correct.

22 Q So you really don't know what killed the victim do
23 you?

24 A Only that it was by gun shot would, that is all. That
25 is correct.

1 Q Let's go further. Let's talk about Mr. Brown. You
2 did initial fingerprint of Mr. Brown?

3 A Yes, sir, fingerprint and palm prints.

4 MR. JOHNSON: Your Honor, may I approach?

5 THE COURT: You may.

6 BY MR. JOHNSON:

7 Q Do you recognize that?

8 A Yes, sir, I do.

9 Q And what is that?

10 A These are notes that I took after Agent Coonfield and
11 I made the case print and finger and palm printed him at
12 the Orangeburg Detention Center on March 29, 2000.

13 Q That's March 29, 2000?

14 A Yes, sir.

15 Q So roughly, that's about -- about 20 days after this
16 matter happened?

17 A Yes, sir, it is.

18 Q And at that time, Mr. Brown made certain statements to
19 you didn't he?

20 A Yes, sir, he did.

21 MR. PASCO: Objection. Hearsay.

22 MR. JOHNSON: Your Honor --

23 THE COURT: It's being offered for its truth?

24 MR. PASCO: Yes.

25 THE COURT: Please approach.

1 (Off the record bench conference with Mr. Pasco, Mr.
2 Johnson and Ms. Frick.)

3 THE COURT: The objection is sustained.

4 BY MR. JOHNSON:

5 Q When you met with Mr. Brown to take his fingerprints
6 was he cooperative?

7 A Eventually. When we first met Mr. Brown, we
8 identified ourselves. Agent Coonfield and I being SLED
9 agents, that we were there strictly and finger and palm
10 print him. He became hostile. He used some profanity. It
11 was obvious he did not like our presence, he did not like
12 us being there.

13 Q Did --

14 MR. JOHNSON: Your Honor, if I could have a
15 moment?

16 THE COURT: Uh-huh.

17 MR. JOHNSON: Thank Your Honor.

18 THE COURT: You're welcome.

19 BY MR. JOHNSON:

20 Q Investigator Black, in looking at the print of my
21 client that you found on the truck, you'd said that you
22 initially had prints; is that correct?

23 A They were photostatic copies that were submitted by
24 the Sheriff's Office, however, the photostatic copies were
25 -- as a copy can be there were as best quality, however,

1 the areas of the left palm that I was looking for were not
2 present in that photostatic copy. The Sheriff's Department
3 got those photostatic copies from another law enforcement
4 agency.

5 Q So was it that you just did not have a print of the
6 portion of the palm that you was looking for?

7 A That is correct. The area that I was looking for was
8 not represented, so I couldn't say truthfully or honestly
9 whether it was him or not him.

10 Q If this his left hand, is that correct?

11 A Yes, sir, the left palm.

12 MR. JOHNSON: Your Honor, may I approach the
13 witness?

14 THE COURT: You may.

15 BY MR. JOHNSON:

16 Q I'm going to present to you a diagram of the left
17 hand. Is that basically an accurate depiction of someone
18 left hand?

19 A Yeah, it appears to be, yes, sir.

20 Q Could I ask you to note on that description of what
21 part of the hand you were trying to get your description
22 off of. I'll get you a pen to mark that with.

23 A This is only an approximation. Somewhat like in that
24 area.

25 Q Could you -- mark -- just be a line like that or would

1 you mark the general area where you were trying to get a
2 print?

3 A Like that -- I can draw an arrow if you want me to?

4 Q That would be fine.

5 A Okay.

6 Q Showing the general area of the palm --

7 MR. PASCO: Is that in evidence, Your Honor?

8 MR. JOHNSON: Your Honor, I can submit this as
9 Defense Exhibit No. 1.

10 THE COURT: Anything?

11 MR. PASCO: No objection, Your Honor.

12 THE COURT: Marked and admitted as Defense next in
13 line without objection.

14 (Defendant's Exhibit No. 1,
15 drawing of hand, was marked and entered.)

16 BY MR. JOHNSON:

17 Q So this little area where you drew the arrow?

18 A In general, yes, sir. Basically, what I'm trying to
19 point to is on the left palm you have what's known as a
20 delta region that I'm pointing to on my left palm. This is
21 only as an example. But basically the area is going away
22 from the delta into the blade of the palm, into the edges
23 of the palm. That's the area that I'm referring to.

24 Q And that was the only area that you was able to match
25 to my client?

1 A That is correct.

2 Q And for clarification, so you say it was 15 actual --

3 A Out of 15 identifiable prints, yes, sir.

4 Q My client was located in one?

5 A That is correct.

6 Q Mr. Rivers located in how many; three?

7 A Three.

8 Q And Mr. Brown?

9 A Eleven.

10 Q Eleven locations on that truck?

11 A Yes, sir.

12 Q And five of those locations -- five of the prints that
13 were found were located in the area where the shot could
14 have come from; is that correct?

15 MR. JOHNSON: No other questions.

16 THE COURT: Anything further?

17 MR. PASCO: Yes, Your Honor.

18 THE COURT: You may proceed.

19 DAVID BLACK - REDIRECT EXAMINATION

20 BY MR. PASCO:

21 Q How many shell casings did you find in the car?

22 A One.

23 Q Did it take an expert to know that Billy Marion was
24 shot to death?

25 A No, sir.

1 Q Whose fingerprints were on the driver's side and the
2 passenger side of the vehicle?

3 A Mr. Brown's.

4 Q Is there anyway Mr. Brown or Mr. Rivers' could have
5 shot the victim from the driver's side?

6 A No, sir.

7 Q And come down here, if you have the Court's
8 permission.

9 THE COURT: You may.

10 A Thank you.

11 BY MR. PASCO:

12 Q Mr. Johnson turned you away from this discussion, but
13 explain to the jury how Mr. Brown's fingerprints are on
14 this car and the angle in which he would probably would be
15 facing?

16 A Looking at where the prints were located, if this is
17 -- where I'm touching is the exterior of the rear passenger
18 side window, they were at an angle. The hand was not flat
19 on touching the glass. He was not -- when it was pressed
20 here it's not facing the car, the body would have been
21 turned more towards the right. More toward the direction
22 as I'm looking out at the back of the courtroom. There was
23 movement with this. Now, whether he -- these individual
24 touches or for whatever reason the hands slide when this
25 hand movement occurred, I just don't know.

1 Q Let's just say that this, right here is the passenger
2 side of the rear window, that window right there of the
3 Blazer, this right here is that window. Where in relation
4 to this window did you find Michael Smith's print?

5 A Michael Smith in relation to the window is above --
6 would be above the car handle.

7 Q Where I'm standing right now?

8 A Where you're standing right now.

9 Q And what would Mr. Brown be doing if Mr. Smith is
10 standing right here?

11 MR. JOHNSON: Your Honor, that calls for
12 speculation.

13 THE COURT: Please approach.

14 (Off record bench conference with Mr. Johnson, Mr. Pasco,
15 and Ms. Frick.)

16 BY MR. PASCO:

17 Q Based on your -- I'm going to hypothetical based on
18 your expertise using your training, based on your expertise
19 with a reasonable level of certainty; if this is the window
20 the rear window of the Blazer and Frank Brown is standing
21 where you said he was going to be standing, where are
22 Michael Smith's prints in relation to Frank Brown's prints?

23 A Michael Smith's prints, his left palm print is above
24 the passenger door handle on the outside and If I am Mr.
25 Brown, Mr. Smith would be to his right, as he was be

1 standing looking -- where you're at now.

2 Q Exactly where I am right now?

3 A Yes, sir.

4 Q Okay, and show the jury how, based on your expertise
5 again, the way Mr. Brown's print was, how he was standing
6 on the vehicle?

7 A With the print -- he was not -- the hand was not
8 pressed straight into the glass. It was more of an angle.
9 There was movement. Now, whether that movement was the
10 fact that he lifted the hand each time, I can't tell you
11 that, or was it movement where the hand was sliding --
12 whether he was sliding his hand or the vehicle was driving
13 off and the hand slid. I can't tell you that.

14 Q Now, if this was the passenger side door right here.

15 A Yes, sir.

16 Q Show the jury how Michael Smith's palm print are on
17 the passenger side door?

18 A This is the door handle.

19 Q Yes, sir.

20 A His left print would be like so.

21 Q And which way is he leaning?

22 A He would be facing towards the victim.

23 Q Inside the vehicle?

24 A Inside the vehicle.

25 Q Forward?

1 A I'm sorry?

2 Q Facing forward?

3 A Yes, sir.

4 Q Okay.

5 A Facing toward the victim inside the vehicle, yes, sir.

6 Q So of all these points that Mr. Johnson -- how many
7 points are there, 19, 25, how many fingerprints?

8 A As far as identifiable prints there were 15.

9 Q Fifteen. Of all 15, which one was by far the most
10 consistent with one having been able to fire a weapon
11 through the passenger side door?

12 MR. JOHNSON: Your Honor, objection.

13 THE COURT: Basis?

14 MR. JOHNSON: It calls for a conclusion that this
15 witness is not an expert to say. He's an expert in
16 fingerprints --

17 THE COURT: Please don't argue the motion. I
18 asked you to state an objection for the record.

19 Please approach.

20 (Off record bench conference with Mr. Johnson, Mr. Pasco,
21 and Ms. Frick.)

22 BY MR. PASCO:

23 Q Before you answer the question --

24 THE COURT: The objection is sustained.

25 You may rephrase.

1 BY MR. PASCO:

2 Q I'm just asking you about firing a weapon, not asking
3 you about trajectory or anything like. Whose prints are
4 consistent with being able to be in a position to fire any
5 weapon through this passenger side window?

6 MR. JOHNSON: Your Honor, once again --

7 THE COURT: Please approach.

8 (Off the record bench conference with Mr. Johnson, Mr.
9 Pasco, and Ms. Frick.)

10 BY MR. PASCO:

11 Q All right, let me ask you this; what does this show
12 right here; the fact that that palm print is --

13 MR. JOHNSON: Your Honor, he's leading the witness
14 again.

15 THE COURT: Sustained. Leading.

16 BY MR. PASCO:

17 Q What does that show based on your expertise?

18 A That prints shows is that left palm print of Michael
19 Angelo Smith touched the surface above the door handle on
20 the passenger side.

21 Q Anyone else's prints there?

22 A No, sir.

23 MR. PASCO: That's all I have.

24 THE COURT: Anything further for the witness?

25 MR. JOHNSON: Your Honor, just one follow up.

1 THE COURT: You may proceed.

2 Sir, you may take your seat.

3 MR. BLACK: Thank you, Your Honor.

4 THE COURT: You're welcome.

5 DAVID BLACK - RE-CROSS EXAMINATION

6 BY MR. JOHNSON: ~~Q~~ ~~Investigator Black, except for the location of the~~

7 Q Investigator Black, except for the location of the
8 fingerprints on the truck you do not know who fired the gun
9 or anything else connecting my client to that vehicle do
10 you?

11 A No, I do not.

12 MR. JOHNSON: No other questions.

13 THE COURT: Anything further from the State?

14 MR. PASCO: No, Your Honor.

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

17 MR. PASCO: No, Your Honor.

18 THE COURT: From the Defense?

19 MR. JOHNSON: None from Defense, Your Honor.

20 THE COURT: Sir, you're excused. Have a good
21 afternoon.

22 MR. BLACK: Thank you.

23 THE COURT: All right. Madam Forelady, ladies and
24 gentlemen, we're going to take advantage of this break in
25 testimony to take our evening recess. During the break

1 please have no discussion about the case, and as I've
2 indicated please don't watch read or listen to any media
3 reports about this case. And do not do any independent
4 research of any type about any issue involved in this case,
5 and that includes anything that you could find on the
6 internet.

7 Please leave your notes in your seats and, again, as
8 I've indicated we will safeguard them during the recess.
9 You privacy will be protected.

10 We will resume the trial of this case at 9:30 in the
11 morning, please be prompt and return directly to your jury
12 room.

13 Have a good evening. And we have an excuse for me,
14 ma'am, for class.

15 JUROR: Thank you.

16 THE COURT: You're welcome.

17 (Jury out for the evening recess at 5:29 p.m.)

18 THE COURT: Okay, is there anything we need to
19 take up prior to recessing for the evening? From the
20 State?

21 MR. PASCO: No, Your Honor.

22 THE COURT: From the Defense?

23 MR. JOHNSON: Nothing from the Defense, Your
24 Honor.

25 THE COURT: Okay. Just as a caveat I apologize

1 that I did not tell you this earlier. I did tell you at
2 the bench, but I do not take speaking objections. If
3 there's an objection I expect you to stand, state
4 succinctly the basis for your objection. If I need
5 additional argument consistent with the criminal rules of
6 procedure I will ask for that, but in the absence of that I
7 do not expect there to be any extraneous argument in the
8 presence of the jury.

9 In addition, I do not expect you to direct any
10 arguments to one another. I know that this is a hotly
11 contested case and as in litigation people's tempers run
12 high, but I expect all decorum to be maintained in the
13 courtroom and I intend to make sure that it is preserved.

14 Y'all have a good evening.

15 MR. PASCO: Thank you, Your Honor.

16 MS. FRICK: Thank you.

17 THE COURT: See y'all in the morning at 9:30.

18 (Court at recess for the evening at 5:31 p.m.)

19 (Court in session 8/31/05 at 10:15 a.m.)

20 THE COURT: You all may be seated.

21 I appreciate you giving me the time to take care of
22 that other matter.

23 Is the State ready to proceed?

24 MR. PASCO: Yes, Your Honor.

25 THE COURT: Is the Defense ready to proceed?

1 MR. JOHNSON: Yes, Your Honor.

2 THE COURT: Please bring in the jury.

3 (Jury in at 10:16 a.m.)

4 THE COURT: All right, ladies and gentlemen, I
5 hope that you all had a restful evening. I hope you
6 enjoyed your donuts this morning that the Clerk provided,
7 which was very generous. I know that I enjoyed mine. I
8 wasn't supposed to have it. I really tried diligently to
9 eat my oatmeal so that I would avoid eating one. It didn't
10 work.

11 I appreciate y'all being so patient. I had some other
12 matters I need to attend to this morning that were
13 unrelated to this case. So we don't take your time for
14 granted and I wanted you to know that I appreciate it.

15 We now move forward to the trial of the State's case.
16 You may proceed.

17 MS. FRICK: Your Honor, the State calls Dr. Joel
18 Sexton.

19 THE CLERK: Please place your left hand on the
20 Bible and raise your right hand. Do you solemnly swear or
21 affirm that the evidence you're about to give in this case
22 will be the truth, the whole truth, and nothing but the
23 truth?

24 DR. SEXTON: I do.

25 THE CLERK: Thank you. State your full name for

1 the record, please and take your seat.

2 DR. SEXTON: Dr. Joel Steven Sexton.

3 THE COURT: You may proceed.

4 MS. FRICK: Thank Your Honor.

5 THE COURT: You're welcome.

6 DR. SEXTON - DIRECT EXAMINATION

7 BY MS. FRICK:

8 Q Dr. Sexton, what is your occupation?

9 A I'm a physician with specialization in pathology and
10 sub-specialization in forensic pathology, and work in
11 Newberry as the Director of Pathology for the hospital and
12 consulting forensic pathologist for approximately 26 of the
13 46 county coroners.

14 Q And Dr. Sexton if you'll just tell the jury about your
15 education and experience?

16 MR. JOHNSON: Your Honor, if I may address the
17 Court. We have no problem letting Dr. Sexton in as a
18 expert --

19 THE COURT: You stipulate?

20 MR. JOHNSON: -- we stipulate to it.

21 THE COURT: Okay.

22 Any exceptions?

23 MS. FRICK: No, ma'am, Your Honor.

24 THE COURT: So stipulated in the area of Forensic
25 Pathology?

1 MS. FRICK: Yes, ma'am, and Your Honor, Dr. Sexton
2 could just publish his educational experience to the jury?

3 THE COURT: Certainly. You may proceed.

4 A I graduated from the University of Virginia. I served
5 three years in the Navy, because I was on a Navy
6 scholarship. I then attended, at that time, the Medical
7 College of South Carolina, and proceeded to achieve a
8 Master's in Chemistry, then entered the Medical University,
9 graduating in 1968, becoming licensed in the state. I then
10 trained in forensic pathology, anatomical pathology, and
11 clinical pathology in the Department of Pathology at the
12 Medical University and became nationally certified in those
13 areas in 1972. I then taught from that University until
14 1983, when I moved to Newberry, South Carolina where I am
15 now. While I was at the University, I was also appointed
16 the Charleston County Medical Examiner, which is the
17 medical equivalent of the coroner, and in that capacity I
18 was in charge of the forensic cases that occurred in
19 Charleston County and also was consulting forensic
20 pathologist for all 46 counties at that time.

21 Q Dr. Sexton, you've been qualified as an expert in the
22 area of pathology; could you tell the jury how many times
23 you've been qualified as an expert?

24 A Over 700 times.

25 Q Doctor, if you could explain to the jury; what is

1 pathology?

2 A A pathologist is an M.D., who after finishing training
3 in medicine studies pathology, which is the study of
4 disease. What we do in pathology is try to understand how
5 to recognize disease from looking at the diseased tissue.

6 In the hospital I see the tissue removed in surgery to tell
7 whether there's cancer present or some other condition. I
8 also supervise the laboratory where the various fluids are
9 analyzed to make sure they're analyzed properly, under
10 proper techniques. And to help your physician interpret
11 those results.

12 In addition, pathologist do autopsies. In the case of
13 a person in the hospital setting it's to learn more about
14 that disease or illness. My specialized training enables
15 me to do autopsies on persons dying sudden or violent
16 deaths to learn more about how they died, not just the
17 cause of death, which is very obvious if they're stabbed or
18 shot, but the circumstances surrounding that death as to
19 whether it was at their own hands or the hands of another,
20 and under what circumstances.

21 So the pathologist are physicians who specialized
22 training, in my case in examining tissue in determine
23 disease and examing bodies after death to determine
24 circumstances surrounding their deaths.

25 Q And I think you've been over this, doctor, but what

1 specifically, for the jury's clarification, is forensic
2 pathology?

3 A Forensic pathologist, like I say, examines a persons
4 that die sudden or violent deaths to learn not only their
5 cause of death, but the circumstances surrounding that
6 death.

7 Q And what specifically is -- what is an autopsy; what
8 do you do in an autopsy?

9 A We ask that the body be brought just as it's found
10 once it's pronounced dead. And we examine the external
11 surface, photographing and documenting the evidence that's
12 present. Then undress the body and clean it up, again
13 looking for any evidence and documenting that and
14 collecting it, then we do a complete internal examination
15 to see what injuries may have resulted as well as any
16 disease or illness that might be present. All of this is
17 documented in writing as well as with various tests and
18 diagrams, as well as, photographs and then we issue a
19 report to the coroner and to the law enforcement if it's a
20 violent death for their use.

21 Q And Doctor, do you have any idea of how many autopsies
22 you've done?

23 A I've performed over 8,000 and probably supervised more
24 than that many because at the medical university head of
25 the forensic section for about 17 years, and then in

1 Charleston -- in Newberry, I have a group of pathologist
2 that do autopsies and I supervise those and I review them
3 before they go out.

4 Q Dr. Sexton, did you perform an autopsy on Billy
5 Marion?

6 A I did. That was March 9th of 2000.

7 Q And with regard to Billy's external examination what
8 did you find?

9 A There was only one injury. There was a gunshot wound
10 that entered his right arm and passed through the right arm
11 just through the fleshy part of the arm. Then reentered
12 the chest and exited the left side of the body, but it
13 passed completely through him injuring the liver, and the
14 vena cava, which is a large vein carrying blood back to the
15 heart, as well as, an artery under the rib, the seventh
16 rib, arteries that come off of the aorta and distribute
17 themselves around the chest wall or just under the base of
18 the ribs on each side in a little group. The bullet passed
19 through that area so it lacerated that artery causing
20 internal bleeding into the right chest and into the
21 abdominal cavity.

22 Q And Doctor, if you would, with the Court's permission,
23 if you could step off the stand and just using me as -- for
24 illustration purposes, if you'd show them the path of that
25 bullet?

1 A The bullet enters the right arm at this location, it
2 passes through the arm into the side, then exits over here
3 on this side on the left side.

4 Q When you're examining gunshot wounds is there a manner
5 in which you can determine the distance the person was from
6 the person who was actually shot?

7 A Yes. When a gun discharges, if you've ever seen a gun
8 shot at night, there're flames that come out the end of the
9 gun, so if the gun's close enough, within a matter of a few
10 inches those flames actually char or sear the skin. In
11 addition completely burned powder travels out the end of
12 the gun for generally eight to 10 inches and it will coat
13 the skin or the clothing, whatever is outer-most, and it
14 can be washed off or wiped off. Powder particles that are
15 burning hit the skin during the several feet or a foot and
16 a-half to two feet and they can actually tattoo the skin.
17 They produce a tattoo with little purple marks where this
18 chemical boding change underneath the skin so there's
19 actually a tattoo that has to be removed surgically if a
20 person survives. Sometimes the powder particles are not
21 burning hit the skin, make a little crater that we call a
22 stipple and they fall out. So that if the gun is close
23 enough, within several feet, that varies from gun to gun,
24 these things happen. Either the skin is burned, coated
25 with soot or has tattooing and stippling.

1 In this case, the outer garment was a khaki, light tan
2 shirt, and went through that shirt and I saw nothing in the
3 way of powder on the outside of the shirt or any soot,
4 indicating the gun was probably a foot and a-half to two
5 feet or further away at the time the shot was fired.

6 Q Doctor, based on your experience was Billy's wound
7 consistent with a 9 millimeter?

8 A It was. We do a lot of gunshot wounds, unfortunately.
9 The 9 millimeter has the propensity to pass completely
10 through the body and if it's a jacketed bullet, will leave
11 nothing behind.

12 The xray that we took, or xrays showed no little
13 grains of lead that sometimes will swawn off of a lead
14 bullet and no bone fragments. It simply went straight
15 through the body without creating any of this, and
16 particularly the 9 millimeter has the propensity to do
17 this. A fairly small bullet, but it had a reasonably high
18 velocity, and so the jacket of the bullet tend to go
19 completely through people.

20 Q Doctor, let me show you what's been marked and
21 admitted as State's Exhibit No. 18, and ask you what this
22 shows?

23 A Okay. This is the right side of Mr. Marion, showing
24 the entrance wound in the clothing and in the shirt.

25 Q And that would have been the entrance wound?

1 A Yes, that's correct.

2 Q And so which side of the vehicle would that shot have
3 been fired?

4 A Assuming he's seated in the driver's seat, it would
5 have been fired from the right side. It would have been
6 very difficult, if not impossible, to turn all the way
7 around toward the driver's side and have it come in the
8 right side and still go out the left as it goes straight
9 across the body. So it would have to come from his right,
10 and it would more consistent coming through the right
11 window or the back of the vehicle on the right side.

12 Q And so with regard to whether it was driver's side or
13 passenger side window, which side would it have come from?

14 A It would be more consistent with the passenger side.

15 Q And that is State's Exhibit No. 18, showing the
16 entrance wound; is that correct?

17 A That's correct. It shows the blood around the hole in
18 the chest. It doesn't actually show where it goes into the
19 shirt.

20 Q And with regard to State's Exhibit No. 21, which has
21 been admitted into evidence, if you could hold that up
22 where the jury could see that; what does that show?

23 A This shows Mr. Marion in the vehicle. Seatbelt
24 shoulder harness still attached, and you can see blood
25 around the exit hole in this left side just above the waist

1 level on the left side.

2 Q And that exit wound would have been on the driver's
3 side; is that correct?

4 A Yes, that's correct.

5 Q Now, with regard to Billy's internal examination what
6 did you find of significance?

7 A Bullet, as I mentioned, passed through the seventh rib
8 lacerating that artery and producing blood -- releasing
9 blood into the right chest cavity. It went through the
10 liver and the vena cava before exiting the left side,
11 causing bleeding into the abdomen.

12 You can go donate a pint of blood and generally after
13 a few minutes drink your fluids, get up and walk away, but
14 when you loose as he did, three pints in a short period of
15 time in a matter of minutes, then there's not enough blood
16 in the heart for the heart to function so it stops. We
17 refer to that as just exanquination or bleeding to death
18 internally. In this case, from a gunshot wound.

19 Q So just to clarify, Dr. Sexton, based on your
20 examination of Billy Marion, do you have an opinion within
21 a reasonable degree of medical certainty as to the cause of
22 death of Billy Marion?

23 A I do.

24 Q And what would that be?

25 A In my opinion, within reasonable medical certainty the

1 cause of death was bleeding to death or exanguination from
2 the gunshot wound that he sustained.

3 Q And Doctor, how long would Billy have survived after
4 the fatal shot?

5 A The vena cava is a fairly large vein, but it has very
6 little pressure in it. The artery that it went through was
7 a very small artery about the size of a thick pencil lead.
8 So I would have taken a matter of minutes for him to have
9 bled out, and, of course, that variable depending on the
10 individual as to whether those arteries go into spasm or
11 not. But certainly a matter of minutes. Anywhere from two
12 or three minutes up to maybe 10 or 12 minutes.

13 Q Thank you, Doctor. That's all I have. If you could
14 answer any questions Mr. Johnson may have.

15 THE COURT: Mr. Johnson.

16 MR. JOHNSON: Thank Your Honor, please the Court.

17 DR. SEXTON - CROSS EXAMINATION

18 BY MR. JOHNSON:

19 Q Good morning, Dr. Sexton.

20 A Good morning.

21 Q The injury, you stated that it's consistent with a 9
22 millimeter; is that correct?

23 A Yes, that's correct.

24 Q Are there any other rounds that it would be consistent
25 with, that injury?

1 A There are other rounds that it possible could. A
2 round nose 38 caliber bullet, which is about the same size
3 as the 9 millimeter. They are both about a third of an
4 inch. One is about .380, one is .359, could have caused it
5 if it was a high velocity 38, but most of the 38s that we
6 see have partially jacketed bulletted, but hollow nosed may
7 tend to expend. But if it's a round nose jacketed 38 of
8 high velocity -- that conceivably could have done it.

9 The hole was too small for it to have been a 40
10 caliber or a 10 millimeter, which also could tend to go all
11 the way through. The thing we see most commonly, though,
12 is a 9 millimeter that goes all the way through. There's
13 one round called a parabolic round that's -- that has a
14 more pointed nose and tends to go through bone and still go
15 out the other side.

16 Q But because there were no round recovered, in your
17 opinion it was a 9 millimeter or it could have been a 38;
18 is that correct?

19 A I think it's more likely a 9 millimeter, but I cannot
20 say with certainty it was because, as you mentioned, there
21 was no bullet recovered.

22 Q Thank you.

23 MR. JOHNSON: No other questions.

24 THE COURT: Any redirect?

25 MS. FRICK: No, ma'am, Your Honor.

1 THE COURT: Any objection to the witness being
2 excused?

3 MS. FRICK: No, ma'am.

4 MR. JOHNSON: No, objection, Your Honor.

5 THE COURT: Thank you.

6 Doctor, you're excused. Have a good day.

7 DR. SEXTON: Thank you.

8 THE COURT: You may call your next witness.

9 MR. PASCO: Darren Brown.

10 THE CLERK: Place your left hand on the Bible and
11 raise your right hand. Do you solemnly swear or affirm
12 that the evidence you're about to give in this case will
13 the the truth, the whole truth, and nothing but the truth,
14 so help you?

15 MR. DARREN BROWN: I do.

16 THE COURT: Sir, if you will have a seat.
17 You may proceed.

18 MR. PASCO: Thank Your Honor.

19 DARREN BROWN - DIRECT EXAMINATION

20 BY MR. PASCO:

21 Q Would you go ahead and state your name, please, one
22 more time, loud enough so the jury can hear you?

23 A Darren Brown.

24 Q How old are you, Mr. Brown?

25 A Twenty.

1 Q Twenty-two?

2 A Twenty.

3 Q Twenty. I'm sorry. You've got to speak up; the

4 acoustics are bad and my hearing is bad, so you've got to

5 speak up.

6 Q Where do you currently reside?

7 A Bristol, Tennessee.

8 Q Okay. Why are you in Tennessee?

9 A Job Corps.

10 Q How long have you been in the Job Corps. Speak up,

11 now. Sit up and speak up.

12 A Since May 31st.

13 Q What type of work are you doing in the job corps in

14 Bristol, Tennessee?

15 A Brick mason.

16 Q Where are you originally from?

17 A Cameron, South Carolina.

18 Q And are you related to Frank Roger Brown?

19 A That's my brother.

20 Q Where were you living back in March of 2000?

21 A With mom and dad.

22 Q In Cameron, South Carolina?

23 A (Nods head affirmatively.)

24 Q And who was your brother, Frank Roger Brown, hanging

25 out with back in January, February, and March of 2000?

1 A Michael Smith and Lewis Rivers.

2 Q And back in March of 2000, you were only what, 14
3 years old?

4 A Yes, sir.

5 Q Okay. And do you remember talking to the police back
6 on March 11, 2000?

7 A About 1:30 in the morning.

8 Q And in fact, just to refresh your memory, state the
9 time for the jury -- do you recognize this document, and
10 you can hold it, take a good look at it.

11 A Yes, sir.

12 Q And does it have the date and time when you gave that
13 statement to the police?

14 A Yes, sir.

15 Q What time was it when you talked to the police?

16 A Let's see -- 1:05.

17 Q In the morning on what day?

18 A On the 11th of March, 2000.

19 Q So that would have been early Saturday morning at 1:00
20 o'clock in the morning, you gave a statement to the police?

21 A Yes, sir.

22 Q And you were only 14 years old, and did you tell the
23 police the truth?

24 A Yes, sir.

25 Q I want you to tell this jury what you saw on the

1 afternoon of March 9th, that Thursday afternoon, and what
2 you told the police you saw?

3 A Well, I got home after school around 4:00 o'clock.
4 Normally, my mom would be there, but she wasn't there. So
5 I was kind of worried and so I walked down the hallway and
6 in my room was Mike, Lewis, and my brother. They were all
7 sitting on the beds and when I stepped in, I guess, it kind
8 of scared them a little bit because they didn't know
9 anybody was in the house or whatnot. But they tried to
10 stash the gun or whatever. Well, Lewis tried to stash the
11 gun and my brother was sitting next to him and he tried to
12 pass it over, but I had already seen it by then, you know.
13 So I'm like -- I'm telling them -- might as well give it
14 back because I'm going to tell anyway.

15 Q Who were you going to tell?

16 A My mama.

17 Q Who had the gun when you first saw the gun?

18 A Mike.

19 Q Mike who?

20 A Mike Smith.

21 Q Okay, and what were they trying to do with it?

22 A Stash it. Hide it.

23 Q And after you told them that you were going to tell on
24 them did they --

25 MR. JOHNSON: Your Honor, he's leading the

1 witness?

2 BY MR. PASCO:

3 Q -- what did he do --

4 MR. PASCO: That's what I've got to ask him --
5 he's already --

6 THE COURT: Don't argue in front of the jury.
7 Please approach.

8 (Off the record bench conference with Mr. Pasco, Ms. Frick,
9 and Mr. Johnson.)

10 BY MR. PASCO:

11 Q Now, you testified that you told the that you were
12 going to tell?

13 A Yes, sir.

14 Q What did they do after you told them that?

15 A Let's see -- actually, I don't even remember because I
16 went in an argument with Lewis because he had on a pair of
17 my pants and my shirt.

18 Q Okay. Let me ask you about that. So other than the
19 gun did you see anything else unusual?

20 A Yeah. The Dude had on my clothes.

21 Q Who had on your clothes?

22 A Lewis.

23 Q Lewis who?

24 A Rivers.

25 Q When you gave your statement to the police on March

1 11th, was your brother with you?

2 A No, sir.

3 Q Did you have any more contact with your brother after
4 that afternoon of Thursday March 9th?

5 A No, sir.

6 Q And finally, sir, the person that you saw that was in
7 possession of that gun in your home sometime after 4:00
8 o'clock that afternoon, that Thursday, March 9th; do you
9 see him in the courtroom?

10 A Yes, sir.

11 Q If you could, point him out to the jury.

12 A Right there.

13 Q What's he wearing?

14 A White shirt with black tie.

15 Q White shirt with black tie between the other
16 gentlemen?

17 A Yes, sir.

18 Q Answer any questions that Mr. Johnson has for you.

19 THE COURT: Mr. Johnson, you may proceed.

20 MR. JOHNSON: Thank you, Your Honor.

21 THE COURT: You're welcome.

22 DARREN BROWN - CROSS-EXAMINATION

23 BY MR. JOHNSON:

24 Q Good morning, Darren.

25 A Morning.

1 Q Darren, let me ask you a question. You said a few
2 minutes ago that Lewis tried to snatch the gun as you was
3 walking in?

4 A Lewis tried to snatch the gun? I never said that,
5 sir.

6 Q I thought that's what I heard you say. If you didn't
7 say that, please correct me.

8 A I didn't say tried to snatch the gun. I said he tried
9 to stash the gun right next to him or whatever -- all I
10 know --.

11 Q Oh, he tried to stash the gun?

12 A Stash -- stash.

13 Q Okay. I'm sorry. I misheard. And you say Lewis
14 tried to do that?

15 A Yeah.

16 Q Not Michael, but Lewis?

17 A Michael.

18 Q But you said Lewis.

19 A I didn't meant to say Lewis. My fault. My fault. I
20 was just kind of bothered because he had on my clothes. Put
21 it that way.

22 Q But, now, the statement that the prosecutor just gave
23 you a few minutes ago, do you remember that?

24 A (Shakes head negatively.)

25 Q The one that you just read.

1 A Oh.

2 MR. JOHNSON: Your Honor, may I approach the
3 witness?

4 THE COURT: You may.

5 A The one that I wrote?

6 BY MR. JOHNSON: [REDACTED]

7 Q Yes.

8 A I know that statement I wrote.

9 Q Okay, you didn't mention that in your statement?

10 A What did I mention in my statement?

11 Q What -- I'm not trying to be argumentative, but you
12 said you knew what you wrote, so --

13 A I understand.

14 Q Did -- you didn't put that in your statement; do you
15 remember that?

16 A It was a lot of pressures that morning, early that
17 morning when the cops came. My mom told me to tell the
18 truth. My mom and my dad sat right there and tell me to
19 tell them the truth. I did.

20 Q I understand that. But when you wrote the statement
21 you were telling the truth?

22 A Yeah, and at the time that I saw the gun I didn't know
23 what was going on.

24 Q Now, how many people was in the room?

25 A Three besides me. Well, four. When I came in it was

1 four.

2 Q So you don't know who brought who brought the gun into
3 the room do you?

4 A No, I don't.

5 Q And you don't know who took the gun out the room do
6 you?

7 A No, I don't.

8 Q And you don't know what happened to the gun, do you?

9 A No, I don't.

10 Q And you don't know who shot the victim in this case do
11 you?

12 A No, I don't.

13 MR. JOHNSON: No other questions.

14 THE COURT: Any redirect?

15 MR. PASCO: Yes, Your Honor.

16 THE COURT: You may proceed.

17 DARREN BROWN - REDIRECT EXAMINATION

18 BY MR. PASCO:

19 Q And just for clarification, who did you tell the
20 police had the gun?

21 A Mike Smith had it.

22 Q On March 11th?

23 A (Nods head affirmatively.)

24 MR. PASCO: That's all I have.

25 MR. JOHNSON: No other questions, Your Honor.

1 THE COURT: Any objections to the witness being
2 excused?

3 MR. PASCO: None from the State, Your Honor.

4 MR. JOHNSON: None from Defense, Your Honor.

5 THE COURT: Sir, you're excused. Have a good day.

6 You may call your next witness.

7 MS. FRICK: Your Honor, the State calls Agent
8 Philip Coonfield.

9 THE CLERK: Place your left hand on the Bible and
10 raise your right hand. Do you solemnly swear that the
11 evidence you're about to give will be the truth, the whole
12 truth, and nothing the truth, so help you.

13 AGENT COONFIELD: I do.

14 THE CLERK: State your full name for the record,
15 please.

16 AGENT COONFIELD: Philip Coonfield.

17 THE COURT: You may proceed.

18 MS. FRICK: Thank Your Honor.

19 THE COURT: You're welcome.

20 AGENT COONFIELD - DIRECT EXAMINATION

21 BY MS. FRICK:

22 Q Where are you employed, Agent Coonfield?

23 A I'm employed with the South Carolina Law Enforcement
24 Division. Commonly known as SLED.

25 Q What's your position there?

1 A I'm a Special Agent in the Latent Print Crime Scene
2 Unit.

3 Q And how long have you been employed with SLED?

4 A I've been employed with SLED approximately seven
5 years.

6 Q And if you could tell the jury a little bit about your
7 educational background and your experience?

8 A I'm a certified law enforcement officer in the State
9 of South Carolina. I have a Bachelor of Science Degree
10 from Francis Marion University. I have completed the SLED
11 two-year in-house training program serving under a court
12 qualified senior examiner. I've also completed courses in
13 basic fingerprints, advanced fingerprint ridgeology, crime
14 scene reconstruction, blood stain pattern analysis, foot
15 wear and tire tread comparison.

16 Q Have you testified in Court previously?

17 A I have.

18 Q And have you previously been qualified as an expert?

19 A Yes, ma'am.

20 MS. FRICK: Your Honor, at this time, I'd move to
21 qualify Agent Coonfield as an expert in fingerprints
22 identification and analysis.

23 THE COURT: Any objection?

24 MR. JOHNSON: I have no objection, Your Honor.

25 THE COURT: So admitted.

1 BY MS. FRICK:

2 Q Agent Coonfield, did you assist Agent David Black with
3 the investigation of this matter, the murder of Billy
4 Marion?

5 A Yes, ma'am.

6 Q And at some point during that investigation did you
7 take the major case prints of Michael Smith?

8 A Yes, ma'am, I did.

9 Q And when did you do that?

10 A I took the major case prints of Michael Smith on June
11 17, 2004.

12 Q And Agent, let me show you what's been marked and
13 admitted as State's Exhibit No. 26, and ask if you
14 recognize that?

15 A Yes, ma'am.

16 Q And are those prints that you took from Mr. Smith?

17 A Yes, ma'am, they are.

18 Q And do you see Mr. Smith in the courtroom?

19 A Yes, ma'am.

20 Q And where is he?

21 A Sitting at the table.

22 Q Now, after you took the major case prints of Mr.
23 Smith; did you then compare them to stray latent which was
24 found above the passenger door handle of Mr. Marion's
25 Blazer?

1 A Yes, ma'am.

2 Q And when did you perform this comparison?

3 A I performed this comparison on 8/15/2005.

4 Q Let me show you what's been marked and admitted as
5 State's Exhibit No. 27, and ask you if you recognize this?

6 A Yes, ma'am.

7 Q And is that the latent that you compared to the major
8 case prints of Mr. Smith?

9 A That's correct.

10 Q And what were the results of your comparison?

11 A The results of my comparison were that the latent
12 print was identified to the left palm of Mr. Smith.

13 Q And if you would show the jury specifically on your
14 palm which area of his left palm was on the passenger door
15 handle of the Blazer?

16 A On the left palm it would be right in this region.

17 Q After your identification of his left palm print above
18 the passenger door handle, were your results then reviewed
19 by someone; tell the jury how that process works?

20 A Yes, ma'am. We have at SLED what's called a 100
21 percent case review, which means all our results are
22 verified and analyzed another examiner, another qualified
23 examiner. In this case, this latent was examined by three
24 other examiners, and they all, independently, came to the
25 same conclusion that the latent print was identified to Mr.

1 Smith.

2 Q Agent Coonfield, based on your experience who besides
3 Michael Angelo Smith could have left that print above the
4 passenger door handle of Billy's Blazer?

5 A No one else could have left that print. That print
6 has been identified to Mr. Smith.

7 Q Now, you assisted Agent Black in this investigation, I
8 believe you testified; is that correct?

9 A That's correct.

10 Q And have you, yourself, reviewed all the results of
11 the finger print analysis of this case?

12 A No, ma'am, I have not.

13 Q Have not. Have you reviewed Agent Black's report with
14 regard to the finger print analysis in this case?

15 A I reviewed, basically, his results and he reviewed my
16 final result.

17 Q Let me ask you this, Agent Coonfield, is the print
18 which you found of Michael Smith above the passenger door
19 handle consistent with him leaning in the passenger window?

20 MR. JOHNSON: Objection, Your Honor.

21 THE COURT: Basis of the objection?

22 MR. JOHNSON: Calls for the conclusion.

23 THE COURT: Please approach.

24 (Off the record bench conference with Mr. Pasco, Ms. Frick
25 and Mr. Johnson.)

1 THE COURT: Objection sustained.

2 You may rephrase.

3 BY MS. FRICK:

4 Q Agent Coonfield, based on your experience, what is
5 your opinion as to the position of Mr. Smith's when he left
6 that print on the Billy's Blazer?

7 A The position or orientation of the latent was, as I
8 showed you before, it was in this area of the left palm,
9 and it was actually in this position. It was above the
10 door handle on the passenger side of the vehicle with a
11 direct on contact, straight in.

12 Q So based on that analysis, in your opinion, which way
13 would Mr. Smith have been facing to have left the print in
14 that manner?

15 A My opinion, he would have to have been facing straight
16 into the window with his left hand above the door handle.

17 Q And with regard to your review of Agent Black's
18 fingerprint analysis, who was the only person who left both
19 left and right -- left hand and right hand impressions on
20 Billy Marion's Blazer?

21 A Based on Agent Black's report that would have been Mr.
22 Frank Roger Brown.

23 MS. FRICK: That's all I have, Your Honor.

24 Please answer any questions Mr. Johnson may have.

25 THE COURT: Any cross-examination of the witness?

1 MR. JOHNSON: Thank Your Honor. May it please the
2 Court.

3 THE COURT: You may proceed.

4 AGENT COONFIELD - CROSS EXAMINATION

5 BY MR. JOHNSON:

6 Q Agent Coonfield, from your examination of the prints
7 on the car, does it just indicates that Michael Smith
8 touched the car at that particular location?

9 A Yes, sir.

10 Q That's all it indicates; I mean, that's all you can
11 tell by that print, is that correct?

12 A Yes, sir.

13 Q you cannot tell that Michael Smith shot a gun at that
14 location or not can you?

15 A No, sir.

16 Q You cannot tell if Michael Smith even had a gun at
17 that location can you?

18 A No, sir.

19 Q Did you take the prints of Frank Roger Brown?

20 A Of Frank Roger Brown?

21 Q Right.

22 A No, sir, I don't think so.

23 Q If I had the report to refresh your memory?

24 A Yes, sir.

25 MR. JOHNSON: Your Honor, may I approach the

1 witness?

2 THE COURT: You may.

3 BY MR. JOHNSON:

4 Q Can you take a look at that?

5 A Thank you.

6 Q Do you recognize that?

7 A Yes, sir. This is the notes from Agent Black that he
8 took on March 29, 2000. Yes, sir, March -- on that day, I
9 under the direct supervision of Agent Black, I printed Mr.
10 Brown.

11 Q So do you remember that now?

12 A Yes, sir.

13 Q Was she cooperative?

14 A I'm sorry, sir.

15 Q Was he cooperative with you when you took the prints?

16 A To the best of my knowledge, no, sir.

17 Q But you was able to get the prints at that time?

18 A Yes, sir.

19 Q And you was present at that time -- you was actually
20 present doing the prints?

21 A Yes, sir.

22 Q You took the prints of Mr. Smith; is that correct?

23 A Yes, sir.

24 Q Was he cooperative?

25 A Yes, sir.

1 Q Did you have any problems at all when you were taking
2 his prints?

3 A No, sir.

4 Q Second, also --

5 MR. JOHNSON: Your Honor, I have no other
6 questions.

7 THE COURT: Any redirect?

8 MS. FRICK: No, ma'am, Your Honor.

9 THE COURT: Any objection to the witness being
10 excused?

11 MS. FRICK: No, ma'am.

12 MR. JOHNSON: Your Honor.

13 THE COURT: Sir, you're excused.

14 MR. JOHNSON: We do.

15 MR. PASCO: I would agree with Mr. Johnson.

16 THE COURT: Subject to recall?

17 MR. PASCO: Yes, ma'am.

18 THE COURT: Sir, you're excused subject to recall.

19 AGENT COONFIELD: Thank you.

20 THE COURT: You're welcome.

21 You may call your next witness.

22 MS. FRICK: Your Honor, the State calls Sheriff
23 Thomas Summers.

24 THE CLERK: Place your left hand on the Bible and
25 raise your right hand. Do you solemnly swear or affirm

1 that the evidence you're able to give in this case will be
2 the truth, the whole truth, and nothing but the truth so
3 help you?

4 SHERIFF SUMMERS: I do.

5 THE CLERK: State your full name for the record,
6 please, sir.

7 SHERIFF SUMMERS: Thomas S. Summers, Jr.

8 MS. FRICK: Your Honor, may it please the Court.

9 THE COURT: You may proceed.

10 SHERIFF THOMAS SUMMERS - DIRECT EXAMINATION

11 BY MS. FRICK:

12 Q Sheriff, how long have you been in law enforcement?

13 A Approximately, 20 years.

14 Q And where were you employed in March of 2000?

15 A I was the Chief of Police of the St. Matthews Police
16 Department.

17 Q And when were you sworn in as Sheriff of Calhoun
18 County?

19 A January 7, 2001.

20 Q And when you were sworn in as Sheriff of Calhoun
21 County were you familiar with the case involving the murder
22 of Billy Marion?

23 A I was somewhat familiar with the case. The family
24 contacted me a few days after I was sworn in and set up a
25 meeting, and that's when I reviewed everything.

1 Q And did you, in fact, meet with the Marion family?

2 A I did.

3 Q Were you aware that a suspect was still at large in
4 that case?

5 A We were.

6 Q And who was that suspect?

7 A Michael Smith.

8 Q And what, if anything, did you do to try and apprehend
9 Michael Smith?

10 A I started calling different law enforcement agencies
11 and I ended up calling Johnny Taylor with the FBI. So he
12 contacted the U.S. Marshall's Fugitive Task Force, and I
13 told him what we had and asked for their assistance in
14 finding him.

15 Q Did you review the case file?

16 A I did.

17 Q And upon your review of the file what, if anything,
18 did you find that you felt may be significant in attempting
19 to locate Mr. Smith?

20 A I found out that Michael Smith's father's name was
21 Tommy Williams and his mother was Callie Williams. So we
22 provided the FBI with some aliases; Michael Williams, for
23 one. Tommy Williams for another one. And -- in hopes of
24 maybe finding him under an alias name.

25 Q And what would they have done with those aliases?

1 A We took those aliases and entered them into NCIC,
2 which is the National Crime Information Center -- it's just
3 a giant data base that if Mike would have ever gotten
4 stopped or Michael Williams or Michael Smith and they ran
5 his rap sheet it would come back as wanted in Calhoun
6 County for murder.

7 Q And on what date did you enter the names of Tommy
8 Williams and Michael Williams into the NCIC?

9 A I believe it was January of '03.

10 Q And what happened as a result of your entering those
11 names in the NCIC?

12 A We stayed in touch with the FBI on and off, but in
13 December -- if I'm not mistaken, late December of '04, --
14 of '03, actually, we found Mike Smith in New York.

15 Q And when you found him what name was he using?

16 A Michael Williams.

17 Q And did someone from your agency go pick him up?

18 A We did. I went myself, and I took Detective Chris
19 Goldman, Detective Pat Regalos and Chief Capers Wannamaker
20 from St. Matthews Police Department.

21 Q And when was --

22 A Go head. I'm sorry.

23 Q When was he arrested?

24 A The 6th of January of '04, I think.

25 Q And the area where this murder happened, Highway 33

1 and Nates Store Road; is that in Calhoun County?

2 A It is in Calhoun County.

3 Q And just to review, Sheriff, how long was it from the
4 time of this crime until the Defendant was finally arrested
5 for the murder of Billy?

6 A Almost four years. . . .

7 MS. FRICK: Your Honor, that's all I have for the
8 Sheriff.

9 THE COURT: Mr. Johnson?

10 MR. JOHNSON: I have no questions, Your Honor.

11 THE COURT: Sir, you may step down.

12 SHERIFF SUMMERS: Thank you.

13 THE COURT: You're welcome.

14 Any further witnesses?

15 MR. PASCO: If I can have the Court's indulgence.

16 I think we're going to rest, but I want to make sure.

17 THE COURT: Sure.

18 MR. PASCO: Your Honor, at this time the State
19 rests.

20 THE COURT: Madam Forelady, ladies and gentlemen,
21 there's some matters of law that I need to take up with the
22 attorneys. It may take about 10 or 15 minutes.

23 During the break please do not discuss the case among
24 yourselves. Please leave your note pads in your seats and
25 if you need anything, please let the bailiff know.

1 (Jury out for break at end of State's case at 10:55 a.m.)

2 THE COURT: Are there any motions?

3 MR. JOHNSON: Your Honor, at this time, I would
4 like to make a directed verdict motion. I do not think
5 that the State has met its burden of proof in this matter.
6 The evidence given by the State is the testimony of a co-
7 defendant that --

8 THE COURT: Wait a minute -- have them close that
9 door. That's okay.

10 MR. JOHNSON: -- is the testimony of a co-
11 defendant that states that my client was the shooter.
12 There is no physical evidence that has been presented that
13 would indicate that my client had a gun at that time.
14 There were no rounds recovered, there was no gun recovered.
15 I think that the State has not met it's burden of proof at
16 this time, and we request a directed verdict returned.

17 THE COURT: Okay. Would anyone like to respond to
18 the motion?

19 MR. PASCO: Your Honor, I think in looking at the
20 evidence in the light most favorable to the State you have
21 an eye-witness that says the Defendant shot the victim.
22 You also have circumstantial evidence with the Defendant's
23 fingerprint on the vehicle, positioned where the gunman may
24 have been when he shot the victim.

25 So I think there is more than enough evidence.

1 THE COURT: Anything further, Mr. Johnson:

2 MR. JOHNSON: Nothing further except, Your Honor,
3 I'd like to renew any previous objections I made during the
4 trial.

5 THE COURT: In considering a motion for directed
6 verdict it is appropriate for the Court to view that motion
7 in the light most favorable to the State and all reasonable
8 inferences.

9 The Court must determine if there is direct evidence
10 or substantial circumstantial evidence which reasonably
11 tends to prove the guilt of the accused, or from which his
12 guilt may be fairly and logically deduced. In determining
13 and considering that motion the Court is only concerned with
14 the existence or non existence of evidence and not its
15 weight, because, of course, it does not the Court's job to
16 be the fact finder. And considering the evidence in this
17 case without me going back through the State's case in
18 chief, because I believe the record speaks for itself,
19 there is certainly direct evidence in the form of
20 statements of co-defendant as well as substantial
21 circumstantial evidence which reasonably tends to prove his
22 guilt and the motion is denied.

23 Now, is there anything further -- any further motions
24 before we proceed me advising the Defendant of his
25 constitutional rights.

1 MR. JOHNSON: I have nothing else from defense,
2 Your Honor.

3 MR. PASCO: Nothing, Your Honor.

4 THE COURT: Okay.

5 Sir, if you would stand for me and raise your right
6 hand to be sworn.

7 (Mr. Smith complies with the Court's request.)

8 Sir, do you swear or affirm the testimony you give
9 will be the truth?

10 MR. SMITH: Yes, I do.

11 THE COURT: State your full name for the record?

12 MR. SMITH: Michael Angelo Washington Smith.

13 THE COURT: You can put your right hand down.

14 Sir, at this time I'm going to explain to you certain
15 of your rights. If you do not understand anything that I
16 say, please let me know. If you want me to explain
17 anything in more detail please let me know.

18 Do you understand?

19 MR. SMITH: Yes.

20 THE COURT: We have now reached the stage of the
21 trial where you may present your defense. You have the
22 right to claim the protections given to you by the Fifth
23 Amendment to the Constitution of the United States. This
24 amendment states in part that no person shall be compelled
25 in any criminal case to be a witness against himself. This

1 means that you cannot be required to testify in this case.
2 You have the right to testify on your own behalf; however,
3 no one can make you testify. This is a personal right and
4 no one can waive this right except you. If you decide to
5 testify you will be subject to the same rules that govern
6 other witnesses and you may be examined and cross-examined
7 on any relevant issue in this case. In addition, if you
8 have any convictions involving dishonesty or false
9 statement or for crimes punishable by imprisonment for more
10 than one year and this Court determines that the probative
11 value of admitting this evidence outweighs its prejudicial
12 effect to you the Solicitor will be able to introduce your
13 record to attack your credibility. If you decide to
14 testify this must be freely, voluntarily, and intelligently
15 with knowledge of the protections given to you by the Fifth
16 Amendment and the consequences of your decision to testify.

17 If you decide not to testify I will instruct the
18 jurors that they cannot give the fact that you did not
19 testify any consideration whatsoever, that there's to be
20 absolutely no prejudice to you because you did not testify.
21 It is left entirely up to you whether or not you testify.

22 You may talk with your attorney, your family and
23 friends or anyone else, but the final decision will be left
24 entirely up to you.

25 Do you understand your rights as I have just explained

1 them to you?

2 MR. SMITH: Yes, I do.

3 THE COURT: Do you have any questions about what
4 I've just explained to you?

5 MR. SMITH: No, I do not.

6 THE COURT: Have you discussed with your lawyer
7 whether you should or should not testify?

8 MR. SMITH: Yes, I did.

9 THE COURT: Do you wish to talk with him any more
10 at this time?

11 MR. SMITH: No, ma'am.

12 THE COURT: Okay. Now, what -- offenses would the
13 State -- are there any offenses, any prior record that the
14 State would be seeking to introduce if he testifies?

15 MR. PASCO: Your Honor, I had mentioned the
16 obstruction charge earlier. I withdraw that at this time
17 if he decides to testify unless he somehow opens the door.

18 THE COURT: Okay.

19 Mr. Johnson, do you need to speak with your client any
20 more at this time regarding whether he -- whether he wishes
21 or does not wish to testify?

22 MR. JOHNSON: Your Honor, we do not need any more
23 time.

24 THE COURT: Okay.

25 Sir, do you wish to testify?

1 MR. SMITH: Yes, I do.

2 THE COURT: Okay. We will take about a -- Mr.
3 Johnson, do you have any other witnesses other than your
4 client?

5 MR. JOHNSON: I intend on recalling Roger Brown,
6 Your Honor.

7 THE COURT: Okay. And --

8 MR. JOHNSON: He's present. I subpoenaed him last
9 night.

10 THE COURT: Okay. Is there anyone else other
11 than that?

12 MR. JOHNSON: No other than just be Roger Brown
13 and my client. If possible I will recall Officer Coonfield
14 if -- for impeachment purposes. That will depend on Mr.
15 Brown's testimony.

16 THE COURT: Okay, so that's about three witnesses.
17 Probably put us around lunch time. Okay. We'll figure
18 that out once we get done.

19 Okay, we'll be at ease for about 10 minutes.

20 MR. JOHNSON: Thank Your Honor.

21 THE COURT: You're welcome.

22 (Court at recess 11:05 a.m.)

23 (Court in session after recess at 11:39 a.m.)

24 THE COURT: Please bring in the jury.

25 (Jury in after break at 11:40 a.m.)

1 THE COURT: Ladies and gentlemen, I hope you
2 enjoyed your break. We will now resume with the trial of
3 the case.

4 Mr. Johnson, are you ready to proceed?

5 MR. JOHNSON: Yes, we are, Your Honor.

6 THE COURT: Your may proceed.

7 MR. JOHNSON: Your Honor, at this time the Defense
8 calls Frank Roger Brown.

9 THE COURT: Sir, I would remind you that you're
10 still under oath.

11 You may proceed, Mr. Johnson.

12 MR. JOHNSON: Thank Your Honor.

13 THE COURT: You're welcome.

14 FRANK ROGER BROWN - DIRECT EXAMINATION

15 BY MR. JOHNSON:

16 Q Good morning, Mr. Brown.

17 A Good morning, sir.

18 Q Mr. Brown, yesterday when you testified, I asked you a
19 question concerning your fingerprints being taken; do you
20 remember when your initial fingerprints was taken by two
21 officers, a Mr. Coonfield, Officer Coonfield and Officer
22 Black?

23 A Yes, sir.

24 Q And that was on March 29th of 2000?

25 A Yes, sir.

1 Q At 10:00 a.m.?

2 A Yes, sir.

3 Q Do you remember being very difficult with them at that

4 time or not cooperating?

5 A Yes, sir.

6 Q So you admit that you didn't cooperate?

7 A Yes, sir.

8 Q Do you also remember telling them, and I quote, I

9 don't like mother-fucking cops?

10 A I don't remember.

11 MR. JOHNSON: Your Honor, can I approach.

12 THE COURT: You may.

13 BY MR. JOHNSON:

14 Q This is a statement that was written by one of the

15 officers. Can you please read that?

16 (Mr. Brown reads to himself.)

17 Q Okay, now after reading that I'm going to ask you once

18 again, do you remember when the officers were initially

19 taking your fingerprint did you use profanity to them?

20 A Yes, sir.

21 Q Do you also remember that you told them, I do not like

22 fucking cops?

23 A Yes, sir.

24 Q So you did say that?

25 A Sir?

1 Q So you did say that?

2 A Yes, sir.

3 Q Do you also remember telling the police, you won't
4 find my prints -- I was at the rear of the car?

5 A No, sir.

6 Q So you didn't say that?

7 A No, sir.

8 Q But just for clarification you admit that you didn't
9 cooperate?

10 A Sir?

11 Q You admit that you didn't cooperate before then?

12 A Yes, sir.

13 Q You admit that you used profanity?

14 MR. PASCO: Objection. Asked and answered, Your
15 Honor, three times now.

16 THE COURT: I'm giving him a little latitude. You
17 may proceed. Overruled.

18 BY MR. JOHNSON:

19 Q So you admit that you used profanity towards them?

20 A Yes, sir.

21 Q But you do not admit that you said that you -- they
22 would not find your fingerprints, you were standing at the
23 rear of the car?

24 A No, sir.

25 Q You didn't say that?

1 A No, sir.

2 MR. JOHNSON: I have no other questions.

3 THE COURT: Any questions for the witness?

4 MR. PASCO: Yes, Your Honor.

5 THE COURT: You may proceed?

6 ROGER FRANK BROWN - CROSS-EXAMINATION

7 BY MR. PASCO:

8 Q Mr. Brown, you're represented by Public Defender
9 Martin Banks?

10 A Yes, sir.

11 Q And I've given you absolutely no deals for your
12 testimony?

13 A No, sir.

14 Q And today you're here under defense subpoena, correct?

15 A Yes, sir.

16 Q And you're aware that because you were charged with a
17 crime you can't even be forced to testify, correct?

18 A Yes, sir.

19 Q Now, let me show you -- what's been marked as State's
20 Exhibit No. 11, okay. Where was Defendant Michael Smith
21 when --

22 MR. JOHNSON: Objection, Your Honor.

23 THE COURT: Basis?

24 MR. JOHNSON: Not within the realm of my direct
25 examination.

1 THE COURT: Please approach.

2 (Off record bench conference with Mr. Johnson, Mr. Pasco,
3 and Ms. Frick.)

4 THE COURT: Objection is overruled.

5 You may proceed. However, please try not to re-plow
6 old ground.

7 MR. PASCO: I'm not. I'm almost through.

8 THE COURT: Thank you.

9 MR. PASCO: Thank you, Your Honor.

10 THE COURT: You're welcome.

11 BY MR. PASCO:

12 Q Show the jury on State's Exhibit No. 11, where the
13 Defendant Michael Smith was when he shot and killed the
14 victim?

15 (Mr. Brown indicates.)

16 Q Right there on the passenger side door through the
17 window?

18 A Yes, sir.

19 Q Show the jury on State's Exhibit No. 11, where you
20 were standing when Michael Smith shot and killed the
21 victim?

22 A Right there.

23 Q Right around that area where the prints are?

24 A Yes, sir.

25 Q How were you leaning when Michael Smith shot the

1 victim; how were you leaning on the Blazer?

2 A Like that, sir.

3 Q Did Lewis Rivers; did he have the driver's side door
4 open when the shot was fired?

5 A Yes, sir.

6 Q Do you have any idea where the bullet went?

7 A No, sir.

8 Q Now, make no mistake about it, you admit that you were
9 very belligerent with law enforcement in March 2000?

10 A Yes, sir.

11 Q You didn't like law enforcement in March 2000, did
12 you?

13 A No, sir.

14 Q And did you hang out with other people that didn't
15 like law enforcement?

16 A Yes, sir.

17 Q Let me ask you this; and you even tried to tell law
18 enforcement your prints weren't going to be on the vehicle?

19 A Yes, sir.

20 Q You told them that?

21 A Yes, sir.

22 Q Your prints are all over the vehicle aren't they?

23 A Yes, sir.

24 Q In fact, both of your hands -- let me show you State's
25 Exhibit No. 23. Both of your prints from both hands were

1 all over the vehicle aren't they?

2 A Yes, sir.

3 Q Your right hand is on the driver's side, correct?

4 A Yes, sir.

5 Q And your left hand is on the passenger side?

6 A Yes, sir.

7 MR. PASCO: Beg Court's indulgence?

8 THE COURT: Uh-huh.

9 MR. PASCO: That's all I have.

10 Thank you, sir.

11 THE COURT: Any further questions of the witness?

12 MR. JOHNSON: Yes. May it please the Court.

13 THE COURT: You may proceed.

14 FRANK ROGER BROWN - REDIRECT EXAMINATION

15 BY MR. JOHNSON:

16 Q Mr. Brown --

17 MR. JOHNSON: Your Honor, may I approach the
18 witness?

19 THE COURT: You may approach the witness.

20 BY MR. JOHNSON:

21 Q This is a copy of your statement that you gave the
22 police; do you recognize that?

23 A Yes, sir.

24 Q At the bottom of your statement right here, would you
25 please read that back to the jury?

1 A I was on the back of the vehicle. I might have touched
2 the car.

3 Q So you did say that you was at the back of the
4 vehicle?

5 A Yes, sir. I was all around the vehicle.

6 Q But now you're saying that you wasn't?

7 A I never said that, sir. I was all around the vehicle,
8 sir.

9 Q A few minutes ago, did you not tell me that you did
10 not tell the police you was at the back of the vehicle?

11 A Yes, sir.

12 Q So were you telling the truth then or are you telling
13 the truth now?

14 A Telling the truth now, sir.

15 MR. JOHNSON: I have no other questions.

16 THE COURT: Any further questions for the witness?

17 MR. PASCO: Thank Your Honor. Just for
18 clarification only with regards to the statement he just
19 showed him.

20 THE COURT: Uh-huh.

21 FRANK ROGER BROWN - RE-CROSS EXAMINATION

22 BY MR. PASCO:

23 Q Just to let the jury know, you did tell the police
24 that you might have touched the car and when did you tell
25 the police that?

1 A At 2:53 p.m. on March 12, 2000.

2 Q Thank you.

3 MR. PASCO: That's all I have.

4 THE COURT: Anything further for the witness?

5 MR. JOHNSON: I have nothing further, Your Honor.

6 THE COURT: Sir, you may be excused.

7 You may proceed, Mr. Johnson.

8 MR. JOHNSON: Your Honor, may we approach?

9 THE COURT: Yes, you may.

10 (Off record bench conference with Mr. Johnson, Mr. Pasco,
11 and Ms. Frick.)

12 MR. JOHNSON: Your Honor, at this time I'd like to
13 call Investigator Coonfield.

14 THE COURT: Sir, I would remind you, you're still
15 under oath.

16 You may proceed when you're ready.

17 MR. JOHNSON: Thank Your Honor.

18 THE COURT: You're welcome.

19 AGENT COONFIELD - DIRECT EXAMINATION

20 BY MR. JOHNSON:

21 Q Investigator Coonfield, you was present on March 23,
22 2000, and examine -- did the fingerprinting of Mr. Brown?

23 A Yes, sir.

24 MR. JOHNSON: Your Honor, may I approach the
25 witness?

1 THE COURT: You may.

2 BY MR. JOHNSON:

3 Q This is the statement that was given; do you recognize
4 that report?

5 A Yes, sir, this is the results -- excuse, me the notes
6 written by Agent Black.

7 Q During your examination of Mr. Brown did he cooperate
8 with you?

9 A No, sir.

10 Q What did he specifically do or say to you?

11 A Specifically, and I'm quoting from Agent Black's
12 notes; I don't like mother-fucking cops, unquote. Also,
13 based on Agent Black's notes; quote, you won't find my
14 prints, I was at the rear of the car, unquote.

15 Q And that is what he told you at that time; did you
16 take -- was the reason that was written was that of any
17 significance, I mean, as an investigator, I guess you've
18 done this numerous times; is that correct?

19 A Yes, sir.

20 Q When a possible suspect makes statements like that do
21 you find that of any significance?

22 A Yes, sir, any statements along these lines we like to
23 write down in the report.

24 Q Why would that be significant?

25 A Just to -- for our notes and for future reference on

1 the behavior of the suspect at the time.

2 Q And is that usually used for some reason as far as in
3 case the suspect says something different at another time?

4 A Possible use. Yes.

5 MR. JOHNSON: No other questions.

6 THE COURT: Any questions of the witness?

7 MR. PASCO: Yes, ma'am.

8 AGENT COONFIELD - CROSS-EXAMINATION

9 BY MR. PASCO:

10 Q Just a few questions, actually -- looking at State's
11 Exhibit No. 23 --

12 A Yes, sir.

13 Q -- to get from the driver's side of the vehicle --

14 A Uh-huh.

15 Q -- to the passenger side of the vehicle what area of
16 the vehicle would you maybe or most probably pass by?

17 A By the rear of the vehicle.

18 Q The back or the rear of the vehicle?

19 A Yes, sir.

20 Q And the only person you found both left hand
21 fingerprints on this vehicle were Mr. Frank Roger Brown?

22 A Yes, sir.

23 Q Both of his hands --

24 A That's correct.

25 Q -- had time to touch the vehicle, however, Michael

1 Smith's prints, he only had one hand on the vehicle,
2 correct?

3 A Yes, sir.

4 Q His left palm?

5 A That's correct.

6 Q And are -- is Michael Smith's left palm print the best
7 -- the only one that was truly consistent with having
8 someone leaning in the vehicle --

9 MR. JOHNSON: Your Honor --

10 Q -- and able to fire a weapon?

11 MR. JOHNSON: -- I object.

12 THE COURT: What's the basis of the objection?

13 MR. JOHNSON: You want me to --

14 THE COURT: Yes, the basis of the objection?

15 MR. JOHNSON: It's uh --

16 THE COURT: Basis, if you can state it succinctly.

17 MR. JOHNSON: The basis of the objection, Your
18 Honor, is calling for conclusion.

19 THE COURT: Please approach.

20 (Off record bench conference with Mr. Johnson, Mr. Pasco,
21 and Ms. Frick.)

22 THE COURT: The objection is overruled with the
23 instruction.

24 MR. PASCO: Thank Your Honor.

25 THE COURT: You're welcome.

1 BY MR. PASCO:

2 Q With regard to the orientation of the fingerprints
3 whose palm print or fingerprint is the only one that is
4 most consistent or consistent with leaning through the
5 passenger side door of the victims's Blazer?

6 A That would be Michael Smith.

7 MR. PASCO: That's all I have. Thank you, Judge.

8 THE COURT: Your welcome.

9 Anything further?

10 MR. JOHNSON: One follow up.

11 THE COURT: You may proceed.

12 AGENT COONFIELD - REDIRECT EXAMINATION

13 BY MR. JOHNSON:

14 Q Agent, are there other fingerprints that are
15 consistent with someone that could have shot in the car?

16 A I -- could you rephrase the question?

17 Q Are there other fingerprints that are located on the
18 car --

19 A Yes, sir.

20 Q -- on the passenger side --

21 A Yes, sir.

22 Q Who other fingerprints are located on that side?

23 A Brown, Mr. Brown.

24 Q Are those fingerprints also consistent with someone
25 that could have possibly could have shot in the car?

1 A It is possible.

2 MR. JOHNSON: No other questions.

3 THE COURT: Any further questions, Mr. Pasco?

4 MR. PASCO: No, Your Honor.

5 THE COURT: Any objections to the witness being
6 excused from the State?

7 MR. PASCO: No, Your Honor.

8 THE COURT: From the Defense?

9 MR. JOHNSON: No, Your Honor.

10 THE COURT: Sir, thank you very much. You're
11 excused.

12 AGENT COONFIELD: Thank you.

13 THE COURT: Does the Defense have any further
14 witnesses?

15 MR. JOHNSON: Yes, Your Honor. At this time, I
16 call Michael Smith to the stand.

17 THE COURT: Sir, if you would come to the witness
18 stand to be sworn.

19 THE CLERK: Please place your left hand on the
20 Bible and raise your right hand. Do you solemnly swear or
21 affirm the evidence you give in this case will be the
22 truth, the whole truth, and nothing but the truth so help
23 you?

24 MR. SMITH: Yes, I do.

25 THE CLERK: State your full name for the record.

1 MR. SMITH: Michael Angelo Washington Smith.

2 THE CLERK: Please have a seat.

3 THE COURT: Your may proceed.

4 MR. JOHNSON: Thank Your Honor.

5 MICHAEL SMITH - DIRECT EXAMINATION

6 BY MR. JOHNSON:

7 Q Michael, let start -- when this happened back in March
8 of 2000, how old were you?

9 A I was 16 at the time, sir.

10 Q Now, let's go back to that date. Do you remember the
11 date?

12 A It was a while ago, but yes, I do, sir.

13 Q Okay. So where were you that day -- let's go through
14 that day. What time did you get up that day?

15 A Well, I got up, I'd say, about 10:00, 10:30, 11:30
16 that morning. I'm not sure.

17 Q And where were you living at that time?

18 A In Cameron, South Carolina on (inaudible) Road.

19 Q And who were you living with?

20 A I was living with my mother, my three sisters, my two
21 brothers, which is one of my co-defendants, and my step-
22 father.

23 Q Now, what did you do after you got up that day?

24 A Well, usually, we get up that day we went outside, I
25 smoked a blunt early that morning.

1 Q When you say you smoked a blunt, what is a blunt?

2 A Marijuana, you know, marijuana filler like tobacco,
3 cigar.

4 Q And who did this?

5 A Me and my brother.

6 Q Okay, and when you speak about your brother, what's
7 his name?

8 A Lewis Rivers.

9 Q So he's a co-defendant in this case.

10 A Yes, sir.

11 Q Was Lewis older than you?

12 A No, sir. I think he was maybe a year younger than me
13 at the time.

14 Q Now, when did you have the opportunity to come in
15 contact with Mr. Brown?

16 A I'm not sure. Maybe 2:30 that afternoon. I'm not
17 sure, sir.

18 Q And where did you meet him at?

19 A At my house. He came over to my house.

20 Q Did y'all have any discussions or talked about
21 anything?

22 A No, sir, just that earlier that afternoon, I told him
23 I was going to call some females because I was going to
24 Calhoun County High School at the time, and I knew we could
25 have went up to the high school and meet the females, but

1 we needed a ride to get there.

2 Q And then what did y'all decide to do?

3 A We decided to go to William, where he live at at the
4 trailer park, and try to get a ride from one of his
5 relatives when we would get up there because there was
6 supposed to be a basketball game up there at the time,
7 also.

8 Q When you say trailer park, where are they located?

9 A Like off of Nate's Store Road.

10 Q Nate's Store Road?

11 A Yes, sir.

12 Q And that's where this incident occurred?

13 A No, sir. It actually occurred on Highway No. 33, off
14 of Nate's Store Road.

15 Q Is that up by the church?

16 A Yes, sir.

17 MR. JOHNSON: Your Honor, may I approach the
18 witness?

19 THE COURT: Yes, you may.

20 BY MR. JOHNSON:

21 Q I want to present you with four pictures that have
22 previously marked prosecution exhibit one, prosecution
23 exhibit four, prosecution exhibit two, and prosecution
24 exhibit three.

25 Do you recognize those four pictures?

1 a ride.

2 Q That he wasn't going that way towards the school?

3 A Exactly. Yes, sir.

4 Q And you have no idea why your brother, Lewis Rivers
5 would open the driver's side door?

6 A No, sir.

7 Q Did you see the '380 in your brother, Lewis Rivers'
8 hands?

9 A Yes, sir.

10 Q So he held the victim at gunpoint as well, correct;
11 Lewis Rivers?

12 A Yes, sir.

13 Q But you don't know why or why he did that?

14 A No, I couldn't tel you that, sir.

15 Q Your brother did that who you had been hanging out
16 with for two years and you were shocked that he did such a
17 thing, correct?

18 A Yeah. We've not twins, sir. We're not twins.

19 Q Were you shocked that he did that?

20 A Of course, sir.

21 Q And it's your testimony that you were at the passenger
22 side door, correct?

23 A Can you repeat that, sir?

24 Q And it's your testimony that you were at the passenger
25 side door?

1 A Yes, sir

2 Q Okay. State's Exhibit No. 23, and then you testified
3 on direct examination that Roger Brown originally was on
4 the driver's side, right; originally?

5 A No. He was originally on the passenger side, sir.

6 Q Originally on the passenger side?

7 A Yes, sir.

8 Q And what do you allege that Mr. Brown did while on the
9 passenger side?

10 A Run around to the driver's side.

11 Q What did he do after he ran around to the driver's
12 side?

13 A He came back over to the passenger side.

14 Q He came back around -- so he's running around the car?

15 A Yes, he was running around the car. Not running
16 around the car, just the rear end of the car. He never
17 came around the front of the car.

18 Q And that's what I want to clarify. I thought I heard
19 on direct that you said he ran around the driver's --

20 A Did not -- no, sir. He never ran around the front.

21 Q Okay. And you were standing right there on the
22 passenger side when he allegedly shot, correct?

23 A Yes, sir.

24 Q Where was he in relation to you on the passenger side?

25 A Right on my left side, sir.

1 Q How would he --

2 A He was originally had been standing at before he got
3 that shot.

4 Q So you're trying to have this jury believe that he
5 actually reached around you to fire the weapon?

6 A Well, honestly, sir, I'm not trying to have you
7 believe nothing. I'm telling you what happened.

8 Q Well, tell us what happened. Did he reach around you
9 to fire the weapon?

10 A Yes, sir.

11 Q And then after the shot was fired you yelled something
12 out that was very interesting, didn't you? Come on, let's
13 go.

14 A Exactly.

15 Q You brother has just pulled a gun on someone, you
16 allege that Roger Brown just shot someone and what are you
17 yelling to the two gunmen?

18 A I'm telling them to come on let's go. I was only 16
19 at the time, sir. I was scared out of my life.

20 Q You were --

21 A Only think you could have did was get out of here. I
22 wasn't going to stay there, sir. Somebody just got killed
23 and I know it wasn't the right thing that happened. I know
24 that wasn't right. So I had to get out of there, sir. I
25 wasn't going to stand there.

- 1 Q You were 16 years old?
- 2 A Yes, sir.
- 3 Q You sold drugs, sir?
- 4 A Yes, sir.
- 5 Q You smoked dope?
- 6 A Well, not dope, sir. Marijuana.
- 7 Q You didn't go to school?
- 8 A I was on my way to Job Corp.
- 9 Q You smoke dope, you didn't go to school, you're a drug
10 dealer, you're old enough to pull the trigger of a gun,
11
12 weren't you?
- 13 A No, sir.
- 14 Q You were old enough to run to New York, weren't you?
- 15 A Yes, sir.
- 16 Q You're old enough to let that family wait five years
17 before you are brought to trial, weren't you?
- 18 A Yes, sir.
- 19 Q Didn't you allege that you just saw Roger Brown shoot
20 the victim and tell the jury where you ran to?
- 21 A We ran to his house.
- 22 Q Roger Brown's house. You told this jury that you were
23 raised to keep your mouth shut?
-
- 24 A Yes, sir.
- 25 Q You were also raised to lie weren't you?

- 1 A No, sir.
- 2 Q Well, you lied about your name in New York, you just
3 testified to that on cross-examination. So you've lied
4 before, right?
- 5 A Yes, I have. I told you I'm not a saint, sir.
- 6 Q So you've been raised to lie; correct?
- 7 A I wasn't raised to lie, no, sir.
- 8 Q You've been raised to run?
- 9 A No, sir.
- 10 Q You just told the jury on the record that your mother
11 told you to run.
- 12 A Yeah, but that's not necessarily being raised, sir.
- 13 Q And just for clarification you also said that you were
14 arrested on March 11th. You were never arrested on March
15 11th.
- 16 A Sir, I didn't exactly say what date I was arrested on.
17 I was took by the guy -- when we got back I was arrested.
- 18 Q Well, let me ask you this; why did you go to Georgia
19 that Thursday night, March 9th, after the murder?
- 20 A Like I said, the week before we had plans to go get my
21 brother.
- 22 Q Isn't it true that the only person who had plans to
23 get your brother was your brother, Lewis Rivers?
- 24 A No, sir.
- 25 Q That you weren't supposed to go?

1 we needed a ride to get there.

2 Q And then what did y'all decide to do?

3 A We decided to go to William, where he live at at the
4 trailer park, and try to get a ride from one of his
5 relatives when we would get up there because there was
6 supposed to be a basketball game up there at the time,
7 also.

8 Q When you say trailer park, where are they located?

9 A Like off of Nate's Store Road.

10 Q Nate's Store Road?

11 A Yes, sir.

12 Q And that's where this incident occurred?

13 A No, sir. It actually occurred on Highway No. 33, off
14 of Nate's Store Road.

15 Q Is that up by the church?

16 A Yes, sir.

17 MR. JOHNSON: Your Honor, may I approach the
18 witness?

19 THE COURT: Yes, you may.

20 BY MR. JOHNSON:

21 Q I want to present you with four pictures that have
22 previously marked prosecution exhibit one, prosecution
23 exhibit four, prosecution exhibit two, and prosecution
24 exhibit three.

25 Do you recognize those four pictures?

1 A Yes, sir.

2 Q Okay.

3 MR. JOHNSON: Your Honor, if I could ask for my
4 witness to come down show the pictures --

5 THE COURT: Uh-huh.

6 BY MR. JOHNSON:

7 Q (Inaudible) first show us where y'all were standing,
8 standing by the road.

9 A Here.

10 THE COURT: You're going to have to speak up so
11 the court reporter can hear you.

12 BY MR. JOHNSON:

13 Q Right.

14 A This picture right here.

15 Q This is prosecution exhibit number four. Okay, I was
16 you to point out exactly where everybody was.

17 A Well, that's -- (inaudible)

18 Q And that's prosecution exhibit number two; that shows
19 the -- that shows the church area?

20 A The church -- (inaudible).

21 Q Where exactly were you standing when the three of you
22 were there.

23 A Over here in front of the church (inaudible).

24 Q Okay. And there isn't a picture to show exactly where
25 you were standing?

1 A No.

2 Q Okay. So this is the best exhibit. All right.

3 Now, what happened as you were standing there -- was
4 you standing, sitting?

5 A We were standing there.

6 Q What was the first thing did there?

7 A We was trying to find a ride. We was going down 33
8 toward the high school.

9 Q So what was you doing in attempting to catch a ride?

10 A We was trying to wave them down, somebody (inaudible).

11 Q Then what happened?

12 A I seen him pass by, five or six, seven cars passed by
13 without stopping. And Mr. Marion stopped.

14 Q How did he stop; how did you get him to stop?

15 A We waved him down.

16 MR. PASCO: Your Honor, I'd ask that he speak up.

17 I can't --

18 THE COURT: Yes. If could speak up.

19 BY MR. JOHNSON:

20 Q Speak up. Okay. And then what happened?

21 A And Mr. Marion pulled up (inaudible).

22 Q And speak up.

23 A And he pulled up --

24 Q And what did you do?

25 A And he thought something was wrong. I walked up to

1 the car and I asked Mr. Marion if we could get a ride,
2 we're going to (inaudible).

3 Q Look at the jury, now.

4 A All right. We wanted a ride to (inaudible). At this
5 point in time, as I approached the vehicle to ask Mr.
6 Marion, he's fixing to leave -- at this point in time my
7 brothers went on the driver's side of the car and as he was
8 pulling the door open while Mr. Marion was talking to me,
9 because I've his undivided attention. So he proceeded to
10 pull the door open. As he proceeded to pull the door open
11 Mr. Marion (inaudible) other side of the car. He came back
12 around to the other side and out of nowhere he shot Mr.
13 Marion.

14 Q Now, why did he do this?

15 A We don't know. We've asked him (inaudible).

16 THE COURT: Let me ask a question. Are you going
17 to make any more referrals to pictures?

18 MR. JOHNSON: Oh, okay.

19 THE COURT: Because he can retake the stand if
20 you're not.

21 MR. JOHNSON: Thank Your Honor. I'm sorry.

22 THE COURT: Yes. That's okay. Thank you.

23 You may proceed. Please speak loudly so that the jury
24 and court reporter can hear you.

25 BY MR. JOHNSON:

1 Q So you say you walked -- let's start this again. You
2 flagged down the car?

3 A Yes, sir.

4 Q What happened then?

5 A At that time, Mr. Marion proceed to slow down in the
6 road. I guess he felt like something was wrong. He wanted
7 to know why was three guys on the side of the road trying
8 to get people to stop.

9 Q What did you do?

10 A I proceed to walk up to the truck. I asked Mr. Marion
11 can we get a ride because we was going to Calhoun County
12 High School. And he proceed to tell us that he wasn't
13 going that way at the time.

14 Q What happened next?

15 A At that time while I was talking to him my brother
16 snatched the door open, because I had his attention, which
17 Mr. Brown was standing right beside me.

18 Q Did you know your brother was going to snatch the door
19 open?

20 A No, sir, not at all. No, sir.

21 Q Then what happened?

22 A At that point in time, Mr. Brown was right beside me.
23 He ran around to the driver's side and as he ran he came --
24 he came around me and he shot inside the door and he shot
25 Mr. Marion.

1 Q He shot into the car?

2 A Yes, sir. I was still standing there at the time.

3 He just came and shot the guy.

4 Q What did you do then?

5 A At that time, I panicked. I did what anybody would

6 do, I ran, sir.

7 Q What --

8 A And as I ran I was telling them to come on, let's go.

9 Q Why didn't you stop and try to help Mr. Marion?

10 A Because I was just scared, sir. I was only 16 at the

11 time. At this point in time in my life, I'm older now. So

12 I know that you just can't do things like that, just leave

13 the scene like that when somebody is killed.

14 Q Well, before we go further, how old are you now?

15 A I'm 22, sir.

16 Q All right. Now, you say you ran?

17 A Yes, sir.

18 Q Where did you run?

19 A We proceed to run in between the church and the woods,

20 sir.

21 Q And is that that path that was mentioned earlier?

22 A Yes, sir.

23 Q Where the shoe was found?

24 A Yes, sir, exactly.

25 Q What happened then?

1 A We proceeded to go back to Ms. Brown -- Mr. Brown
2 house.

3 Q You went back to Roger Brown's house?

4 A Yes, sir.

5 Q What happened there, was there any discussions between
6 running back to the house before you got to the house?

7 A No, sir. We was too scared for any discussion. We
8 just ran to try to get out of there.

9 Q What happened once you got at the house?

10 A Well, we asked him, like, why would you do this, to
11 shoot the guy. We was only trying to get a ride. And he
12 was telling us just don't worry about it, don't worry about
13 it. He couldn't give us no explanation.

14 Q Why did your brother snatched the door open?

15 A I don't know. I couldn't tell you that either, sir.

16 Q Did you ask him that?

17 A No, sir.

18 Q Why?

19 A I don't know. It was my brother, my brother -- so, I
20 didn't ask him.

21 Q Well, is he actually your brother or half-brother or -
22 -

23 A He was my half-brother.

24 Q On whose side, mother or father?

25 A My father side -- well, yeah, my father side, step-

1 father.

2 Q Now, what happened next?

3 A As we were in there talking Mr. Darren Brown, his
4 brother, he walks in the room, and at that time, my
5 brother, Lewis had the gun and he put it just like sitting
6 on the side so Mr. Brown couldn't see it.

7 Q What happened after that?

8 A After that Mr. Brown just left out the room.

9 Q Were there any words said or something said that --
10 did he --

11 A I'm not sure, sir. I'm not sure. I can't remember
12 what exactly was said at that time.

13 Q What happened next?

14 A Well, I went home because I was scared. So I went
15 back home.

16 Q Did you go back to the scene?

17 A No, sir. I never went back to the scene.

18 Q Did you change your clothes?

19 A No, sir.

20 Q What happened -- do you know what Mr. Brown or your
21 brother did?

22 A Sir?

23 Q Do you know what Mr. Brown or your brother, Lewis did?

24 A No, sir.

25 Q So you left -- when was the last time you saw the gun?

1 A . Was when I was in the room.

2 Q Later on that afternoon, y'all got back together; is
3 that correct?

4 A Yes, sir.

5 Q Where was that at?

6 A At my house.

7 Q How did that came about?

8 A Mr. Roger just happened to come over there, which is
9 -- he walks in my house and he came to get us and he had
10 told us that -- because we made plans earlier when we --
11 maybe a week before to go pick up my brother from Savannah,
12 which was my half-brother. And that night Mr. Brown came
13 and told us to let us know that he had a vehicle and we can
14 go to get my brother.

15 Q But now you said that was your half-brother, not Lewis
16 that we're talking about, this is another brother?

17 A Yeah, this is another brother, another half-brother,
18 which is Lewis brother.

19 Q What is his name?

20 A Demetrius from Savannah, Georgia.

21 Q Now, who car did you take?

22 A We didn't take nobody car, sir. Roger had the car we
23 came in -- we walked back to the car --

24 Q But that wasn't what I'm saying -- whose car was it,
25 whose car did you drive to Savannah?

1 A I couldn't tell you who car it was. I don't know who
2 car he got.

3 Q Who brought the car there?

4 A Mr. Brown.

5 Q Did y'all have any discussions on the way going there
6 or coming back concerning the incident?

7 A Well, not too much, sir, because -- I guess we was
8 just trying not to think about what happened, trying to put
9 it behind us. But, once again, we did want to know, I did
10 want to know why did he just shoot the guy like that for no
11 reason. He told me not to worry about it. That he had it
12 under control.

13 Q And you didn't pursue it any further?

14 A Sir, can you repeat that?

15 Q You didn't pursue it any further?

16 A No, sir. No, sir.

17 Q Why didn't you call the police?

18 A Because where I'm from sir, you see no evil, you do no
19 evil. It's like you see something, you keep it to
20 yourself. You don't call the police on nobody. Whatever
21 you see you don't say nothing about it. That's just how it
22 is where I grewed up there. If you see something, you tel
23 something the people you tell on will come back and take
24 your life. So therefore, you don't say nothing on nobody.
25 That's just something that I was raised up like that. Just

1 to keep my mouth shut no matter what.

2 Q So what did you do then?

3 A (No response.)

4 Q Well, what did you do next after you got back -- well,
5 you went to Georgia; anything happen in Georgia?

6 A No, sir.

7 Q Did you see the gun or anything in the car when you
8 were going to Georgia?

9 A No, sir. No, sir.

10 Q Did you ever see the gun anymore since that time?

11 A I've never seen the gun since I left the room, sir.

12 Q When you was at the stop before the victim was shot,
13 did you know that your brother and Mr. Brown had a gun?

14 A Yes, sir.

15 Q And you still went with them?

16 A Yes, sir. But those guns was only because we was
17 going out of town to another town. God forbid something
18 happen if you were somewhere else. It was for our
19 protection, I guess.

20 Q So y'all took guns with you?

21 A Well, I never had a gun, sir. But, yes, we did. Yes.

22 Q Now, when you got back from Georgia what happened
23 next?

24 A Well, everybody just went their separate ways. Me and
25 my brother, we stay in the same house, so it was regular.

1 I guess Mr. Brown went back to his house. I'm not sure
2 where he went at. I just know that he dropped us off and
3 he left from there. And I say, maybe a day later, I'm not
4 sure, we was arrested.

5 Q You was arrested as well?

6 A Yes, sir.

7 Q What happened?

8 A They took us up to the Sheriff's Department, which is
9 I guess next door, and asked us a few questions.

10 Q And did you give a statement?

11 A No, sir.

12 Q And what happened after that?

13 A Sir?

14 Q What happened after that?

15 A Nothing. They released us. Let us go home.

16 Q What did you do -- what did you then do?

17 A I went back home and I told my mother and dad, I ain't
18 want to be nowhere around this, what happened. I cried and
19 I cried and I cried. And she felt like the best thing for
20 me to do is leave.

21 Q Did you tell her what happened; what you saw?

22 A Yes, sir.

23 Q And what did she suggest that you do?

24 A She suggested I leave.

25 Q To go where?

1 A To New York.

2 Q Is that why you left?

3 A Yes, sir.

4 Q Did you leave trying to run away from this or what?

5 A No, sir.

6 Q Why did you leave?

7 A Because my mother suggested that I leave. I was only
8 16 at the time. I figured mother knows best, sir. She's
9 not (inaudible) and that's what I did, because she felt
10 that's the only thing -- that's what she would have did.

11 Q Let's be realistic, you saw a murder.

12 A Yes, sir.

13 Q Didn't you feel committed to tell somebody about this?

14 A Yes, I did.

15 Q Why didn't you?

16 A Well, like I said, where I was raised up from we don't
17 tell on nothing. It's like this little core of people
18 because we feel like if it don't happen to you or your
19 family you don't say nothing. Which is real -- it's cruel,
20 but that's just how it is where I'm from, sir. You just
21 don't tell on nobody. That's just how it is.

22 Q Did you shoot the victim in this case?

23 A No, sir, I didn't.

24 Q Did you have a gun that day?

25 A No, sir, I didn't.

1 Q Who shot the victim in this case?

2 A Mr. Frank Roger Brown, sir.

3 Q Did you see him shoot?

4 A Yes, sir, I did.

5 Q Is there anything that you'd like to say to the jury
6 that I have not asked you that you want to make them aware
7 of?

8 A I just want to let them know that I'm not a killer.
9 I'm not the guy that they're looking for. Yes, I'm not
10 saying I'm a saint, I did a lot of evil deeds in my life.
11 I sold drugs, I smoked drugs, but I'm not the killer. My
12 heart goes out to the family because I am (inaudible)
13 because I lost a loved one back in 2003.

14 MR. PASCO: Objection, Your Honor.

15 THE COURT: Basis?

16 MR. PASCO: Unresponsive to his question and also
17 too broad a question.

18 THE COURT: I think -- well, --

19 MR. PASCO: And irrelevant.

20 THE COURT: I'm going to sustain the objection on
21 the grounds of the --

22 (Judge Jefferson motions attorneys to the bench.)

23 (Off record bench conference with Mr. Johnson, Mr. Pasco,
24 and Ms. Frick.)

25 THE COURT: You may rephrase. The objection is

1 sustained.

2 BY MR. JOHNSON:

3 Q Just finally, are you the person that was responsible
4 for the death of the victim in this case?

5 A No, sir, I'm not.

6 MR. JOHNSON: No other questions.

7 THE COURT: You may proceed.

8 MR. PASCO: Thank Your Honor

9 MICHAEL SMITH - CROSS EXAMINATION

10 BY MR. PASCO:

11 Q Good afternoon, Mr. Smith.

12 A Good afternoon, sir.

13 Q You do go by Michael Smith, now, is that right?

14 A Yes, sir.

15 Q You've also gone, in the last five years by Michael
16 Williams?

17 A Yes, sir.

18 Q You've gone by Tommy Williams?

19 A Not to my knowledge, sir.

20 Q And you've gone by Tommy Smith?

21 A Not to my knowledge, sir.

22 Q Are there other names that we don't know about that
23 you've gone by in the last five years?

24 A I wouldn't tell you that, sir.

25 Q In fact, you've lied repeatedly when you were up in

1 New York about what your name was, didn't you?

2 A Yes, I did, sir.

3 Q Lied to law enforcement?

4 A Yes, I did, sir.

5 Q You've also lied about your date of birth, repeatedly
6 in the last five years, haven't you?

7 A Yes, I did, sir.

8 Q And you are from Georgia, Mr. Smith?

9 A Yes, sir.

10 Q When did you come to Cameron?

11 A I'm not sure, sir.

12 Q How long prior to January, 2000, approximately, do you
13 think you came to Cameron?

14 A January of 2000? Maybe two or three years.

15 Q And Lewis Rivers is your step-brother?

16 A Yes, he is, sir.

17 Q And the two of you were living together back in March
18 of 2000?

19 A Yes, we were, sir.

20 Q And both of you were raised together, correct?

21 A Well, not raised -- no, sir, we wasn't.

22 Q How long have the two of you lived together?

23 A Well, off and on -- off and on -- maybe two years,
24 this year, three years another -- we never raised -- I was
25 raised with my sister from the age I was born until I was

1 12 years old.

2 Q But you lived together for at least two years?

3 A Yes, sir. Yes, sir.

4 Q Why was he raised to do the right thing and turn
5 himself into the police on March 12th, but you ran?

6 A Because, like I said, sir, where I'm from we don't
7 tell on people, sir. We keep things like that to
8 ourselves.

9 Q Is it because you were the gunman and Lewis Rivers was
10 not the gunman; is that why he turned himself in and you
11 ran?

12 A No.

13 Q Did you know the victim, Billy Marion?

14 A No, sir, I didn't.

15 Q Let's talk about the version of events that day. You
16 testified you got up between 10:00 and 10:30 that morning
17 on Thursday, March 9th?

18 A Yes, sir.

19 Q What did you do the night before, Wednesday, March
20 8th, to have to get up so late the next day?

21 A Staying up late, drinking and smoking.

22 Q Okay, and you were smoking pot on Thursday, March 9th?

23 A I'm not sure. On that Thursday. You just said the
24 night before? I told you the night before I was smoking
25 pot.

1 Q You also testified that that morning when you woke up
2 on March 9th, you decided to smoke a blunt?

3 A Exactly. I used to smoke every day.

4 Q Smoke every day. And in fact you were a drug dealer
5 back in March of 2000?

6 A No, sir.

7 Q You've testified that you sold drugs?

8 A Yeah, but it wasn't March 2000, sir.

9 Q Okay, tell the jury what drug dealers and people that
10 people that sell drugs usually carry?

11 A Sir?

12 Q Don't drug dealers usually carry guns?

13 A I can't tell you that they usually carry guns, but
14 it's know that they do. Yes, sir.

15 Q You never carried a gun, though, right?

16 A No, sir.

17 Q We'll get to that in a minute. Now, you testified
18 that you were going to Calhoun County High School, correct?

19 A Yes, sir.

20 Q Fact of the matter is, you weren't going to school
21 were you?

22 A No, sir. I was not -- I was getting ready to go to
23 Job Corps.

24 Q You were smoking pot and sleeping until 10:30 in the
25 morning?

1 A Can you repeat that, sir?

2 Q Instead of going to school you were smoking pot and
3 getting up at 10:30 in the morning?

4 A (No response.)

5 Q Now, I want to get this straight. The person who came
6 up with the idea of getting a ride that Thursday morning to
7 go see some girls was you?

8 A Yes, sir.

9 Q You're the one that wanted to go see some girls at
10 Calhoun County High School?

11 A Well, we all wanted to see girls, sir.

12 Q But that was your idea?

13 A Yeah. I told them I had a couple of females we could
14 check out.

15 Q Oh, that's good. Well, let me ask you this -- now,
16 let's go to the event at the Blazer, okay, when the murder
17 occurred. Why did your brother, Lewis Rivers open the
18 driver's side door?

19 A I couldn't tell you that, sir. He can tell you that.
20 I can't tell you that.

21 Q Because it's your testimony that the victim, Billy
22 Marion, Mr. Marion --

23 A Uh-huh.

24 Q -- said he couldn't give y'all a ride, correct?

25 A Well, I never said that, sir, that he couldn't give us

1 a ride.

2 Q That he wasn't going that way towards the school?

3 A Exactly. Yes, sir.

4 Q And you have no idea why your brother, Lewis Rivers
5 would open the driver's side door?

6 A No, sir.

7 Q Did you see the '380 in your brother, Lewis Rivers'
8 hands?

9 A Yes, sir.

10 Q So he held the victim at gunpoint as well, correct;
11 Lewis Rivers?

12 A Yes, sir.

13 Q But you don't know why or why he did that?

14 A No, I couldn't tell you that, sir.

15 Q Your brother did that who you had been hanging out
16 with for two years and you were shocked that he did such a
17 thing, correct?

18 A Yeah. We've not twins, sir. We're not twins.

19 Q Were you shocked that he did that?

20 A Of course, sir.

21 Q And it's your testimony that you were at the passenger
22 side door, correct?

23 A Can you repeat that, sir?

24 Q And it's your testimony that you were at the passenger
25 side door?

- 1 Q You were 16 years old?
- 2 A Yes, sir.
- 3 Q You sold drugs, sir?
- 4 A Yes, sir.
- 5 Q You smoked dope?
- 6 A Well, not dope, sir. Marijuana.
- 7 Q You didn't go to school?
- 8 A I was on my way to Job Corp.
- 9 Q You smoke dope, you didn't go to school, you're a drug
10 dealer, you're old enough to pull the trigger of a gun,
11
12 weren't you?
- 13 A No, sir.
- 14 Q You were old enough to run to New York, weren't you?
- 15 A Yes, sir.
- 16 Q You're old enough to let that family wait five years
17 before you are brought to trial, weren't you?
- 18 A Yes, sir.
- 19 Q Didn't you allege that you just saw Roger Brown shoot
20 the victim and tell the jury where you ran to?
- 21 A We ran to his house.
- 22 Q Roger Brown's house. You told this jury that you were
23 raised to keep your mouth shut?
-
- 24 A Yes, sir.
- 25 Q You were also raised to lie weren't you?

1 A No, sir.

2 Q Well, you lied about your name in New York, you just
3 testified to that on cross-examination. So you've lied
4 before, right?

5 A Yes, I have. I told you I'm not a saint, sir.

6 Q So you've been raised to lie; correct?

7 A I wasn't raised to lie, no, sir.

8 Q You've been raised to run?

9 A No, sir.

10 Q You just told the jury on the record that your mother
11 told you to run.

12 A Yeah, but that's not necessarily being raised, sir.

13 Q And just for clarification you also said that you were
14 arrested on March 11th. You were never arrested on March
15 11th.

16 A Sir, I didn't exactly say what date I was arrested on.
17 I was took by the guy -- when we got back I was arrested.

18 Q Well, let me ask you this; why did you go to Georgia
19 that Thursday night, March 9th, after the murder?

20 A Like I said, the week before we had plans to go get my
21 brother.

22 Q Isn't it true that the only person who had plans to
23 get your brother was your brother, Lewis Rivers?

24 A No, sir.

25 Q That you weren't supposed to go?

- 1 A Yes, sir
- 2 Q Okay. State's Exhibit No. 23, and then you testified
- 3 on direct examination that Roger Brown originally was on
- 4 the driver's side, right; originally?
- 5 A No. He was originally on the passenger side, sir.
- 6 Q Originally on the passenger side?
- 7 A Yes, sir.
- 8 Q And what do you allege that Mr. Brown did while on the
- 9 passenger side?
- 10 A Run around to the driver's side.
- 11 Q What did he do after he ran around to the driver's
- 12 side?
- 13 A He came back over to the passenger side.
- 14 Q He came back around -- so he's running around the car?
- 15 A Yes, he was running around the car. Not running
- 16 around the car, just the rear end of the car. He never
- 17 came around the front of the car.
- 18 Q And that's what I want to clarify. I thought I heard
- 19 on direct that you said he ran around the driver's --
- 20 A Did not -- no, sir. He never ran around the front.
- 21 Q Okay. And you were standing right there on the
- 22 passenger side when he allegedly shot, correct?
- 23 A Yes, sir.
-
- 24 Q Where was he in relation to you on the passenger side?
- 25 A Right on my left side, sir.

1 Q How would he --

2 A He was originally had been standing at before he got
3 that shot.

4 Q So you're trying to have this jury believe that he
5 actually reached around you to fire the weapon?

6 A Well, honestly, sir, I'm not trying to have you
7 believe nothing. I'm telling you what happened.

8 Q Well, tell us what happened. Did he reach around you
9 to fire the weapon?

10 A Yes, sir.

11 Q And then after the shot was fired you yelled something
12 out that was very interesting, didn't you? Come on, let's
13 go.

14 A Exactly.

15 Q You brother has just pulled a gun on someone, you
16 allege that Roger Brown just shot someone and what are you
17 yelling to the two gunmen?

18 A I'm telling them to come on let's go. I was only 16
19 at the time, sir. I was scared out of my life.

20 Q You were --

21 A Only think you could have did was get out of here. I
22 wasn't going to stay there, sir. Somebody just got killed
23 and I know it wasn't the right thing that happened. I know
24 that wasn't right. So I had to get out of there, sir. I
25 wasn't going to stand there.

1 A No, sir.

2 Q Now, if you were so scared why did you go to Georgia
3 with the two gunmen when you could have stayed home?

4 A Because I just went along with them, sir.

5 Q Why, you were scared; they just killed a man. Why
6 would you go with them?

7 A I was scared because of what happened. I wasn't
8 scared of them. I had no fear from them that they was
9 going to take my life or anything like that.

10 Q And, of course, the two of you also took Roger Brown,
11 right?

12 A Took Roger Brown?

13 Q Yeah, to Georgia?

14 A No, sir.

15 Q Did Frank Roger Brown go to Georgia with you?

16 A He went -- he was driving. We went with him. I
17 didn't take nobody nowhere, sir.

18 Q Okay. Do you remember telling your brother, Lewis
19 Rivers, on the way to Georgia that you had shot and killed
20 the victim, Billy Marion, that you had to do it?

21 A No, sir. Not at all, sir.

22 Q And that was your step-brother, Lewis Rivers, right?

23 A Yes, sir, he is.

24 Q Then you came back to South Carolina on March 11th,
25 that Saturday?

1 A I'm not sure what day it was, sir.

2 Q Whatever day you came back you had an opportunity to
3 tell te police what happened to Billy Marion, correct?

4 A Yes, sir, I did.

5 Q And you didn't do it?

6 A No, sir.

7 Q And on that Saturday, March 11th, Roger Brown was
8 locked up, and you had another opportunity after Mr. Brown
9 was locked up to do the right thing and talk to the police
10 did you?

11 A If he was locked up I had no ideas as to --

12 Q But you didn't talk to the police did you?

13 A No, sir.

14 Q You never came forward?

15 A No, sir.

16 Q Instead you took off and ran to New York. When did
17 you run to New York?

18 A I couldn't say, sir, honestly.

19 Q Was it Saturday, the 11th?

20 A Saturday -- I don't know if it was the 11th.

21 Q Give me an approximate date?

22 A I don't know, sir.

23 Q We know you were gone by the next day, Sunday, March
24 12th, correct?

25 A No, sir, I don't.

1 Q Well, the police came --

2 A I'm not sure.

3 Q -- if the police came to your house why couldn't they
4 find you on Sunday, March 12th?

5 A I'm not sure, sir.

6 Q Why couldn't they find you on March 13th?

7 A I'm not sure.

8 Q Why couldn't they find you on March 14th?

9 A (No response.)

10 Q Who'd you live with in New York?

11 A My baby mother.

12 Q Your baby's mother?

13 A Yes, sir. And my daughter, sir.

14 Q How many children did you have at the age of 16?

15 A At the age of 16 I had no kids at the time, sir.

16 Q How many did you have -- when did you have them?

17 A 2003.

18 Q But it's definitely the fact that you were in New York
19 by May 16, 2000, right?

20 A I can't say that, sir.

21 Q Isn't that the first time that you absolutely lied
22 about your name when you were in New York?

23 A May 16th?

24 Q Uh-huh.

25 A It's a possibility, sir.

1 Q When you were approached -- I'm sorry. Go ahead.

2 A It's a possibility.

3 Q And you were finally caught and identified on
4 December, 2003?

5 A Yes, sir.

6 Q Brought back to South Carolina in January, 2004?

7 A Yes, sir.

8 MR. PASCO: Beg the Court's indulgence one moment.

9 THE COURT: Uh-huh.

10 BY MR. PASCO:

11 Q Finally, I want to ask you about your -- you testified
12 that you never possessed a pistol?

13 A Yes, I did.

14 Q You never possessed a pistol; is that your testimony?

15 A Yes, sir.

16 Q Under oath to this jury? Do you remember possessing
17 or owning a black 9 millimeter pistol within two to three
18 weeks of the murder of Billy Marion?

19 A No, sir.

20 Q Do you remember showing a Mr. Hercules Huggins and a
21 Mike Robinson a 9 millimeter pistol within a couple of
22 weeks of the murder of Billy Marion?

23 A No, sir.

24 MR. PASCO: That's all I have. Thank Your Honor.

25 THE COURT: Anything further.

1 MR. JOHNSON: Judge, just one follow up.

2 THE COURT: You may proceed when you're ready.

3 MR. JOHNSON: Thank Your Honor.

4 THE COURT: You're welcome.

5 MICHAEL SMITH - REDIRECT EXAMINATION

6 BY MR. JOHNSON:

7 Q Michael, let's clarify something. When you were
8 standing up by the truck talking to the victim in this
9 case?

10 A Yes.

11 Q Do you remember that?

12 A Yes, sir.

13 Q When Mr. Brown came back around to the side of the
14 truck where you were standing do you remember that?

15 A Yes, sir.

16 Q Did he reach around you or did he reach in front and
17 shoot the victim in this case?

18 A He reached around me, sir.

19 Q You was leaning in and he reached around or --

20 A No, I never was leaning in, sir.

21 Q So will you please explain to the jury exactly how it
22 was done so we can clarify this?

23 A I was standing up on the passenger side of the truck
24 as Mr. Brown came and just reached around and stuck his
25 hand inside the window. He was around the truck, he just

1 stuck his hand in the window and shot him.

2 Q So he stuck his hand inside the window with you
3 standing there and he reached around your back?

4 A Yes, sir.

5 Q Okay. So will you demonstrate how that's done,
6 because I want to clarify this.

7 A You want me to come down?

8 Q I'll stand here and --

9 MR. JOHNSON: Your Honor, can he come down?

10 THE COURT: Uh-huh.

11 BY MR. JOHNSON:

12 Q You be Mr. Brown. I'm standing in the window here.
13 I'm looking in the window. Now, how did he do it?

14 A Just like that. (Indicating.)

15 Q And that's what happened?

16 A Yes, sir.

17 MR. JOHNSON: No other questions.

18 THE COURT: Anything further?

19 MR. PASCO: Oh, no, Your Honor.

20 THE COURT: Sir, you may take your seat.

21 Anything further from the Defense?

22 MR. JOHNSON: Nothing further from Defense, Your
23 Honor.

24 THE COURT: Any rebuttal witnesses?

25 MR. PASCO: Yes, Your Honor. I have at least one

1 that waiting --

2 THE COURT: I just wanted to ascertain that.

3 MR. PASCO: Can we approach real fast?

4 THE COURT: Yes.

5 (Off the record bench conference with Mr. Pasco, Mr.

6 Johnson, and Ms. Frick.)

7 THE COURT: State may proceed.

8 MR. PASCO: Thank Your Honor.

9 THE COURT: You're welcome.

10 MR. PASCO: State calls Hercules Huggins.

11 THE CLERK: Place your left hand on the Bible and
12 raise your right hand. Do you solemnly promise that the
13 evidence you're about to give in this case will be the
14 truth, the whole truth and nothing but the truth so help
15 you?

16 MR. HUGGINS: I do.

17 THE CLERK: State your full name for the record.

18 MR. HUGGINS: Hercules Huggins, Sr.

19 THE CLERK: All right. Mr. Pasco.

20 MR. PASCO: Thank you, Mr. Hasty.

21 THE COURT: Sir, you may be seated.

22 MR. HUGGINS: Thank you, ma'am.

23 THE COURT: You may --

24 MR. JOHNSON: Your Honor, before we start, may we
25 approach?

1 THE COURT: Yes.

2 (Off the record bench conference with Mr. Johnson, Mr.
3 Pasco and Ms. Frick.)

4 THE COURT: You may proceed.

5 HERCULES HUGGINS - REBUTTAL EXAMINATION

6 BY MR. PASCO:

7 Q Good afternoon, Mr. Huggins.

8 A Oh, how are you doing.

9 Q Good, sir. You need to speak up as loud as you can,
10 okay, sir?

11 A Oh, okay.

12 Q Thank you. Where were you born and raised, sir?

13 A Calhoun County, [REDACTED] [REDACTED].

14 Q Okay. And have you ever lived outside of Cameron in
15 your life?

16 A Only time I lived outside of Cameron I served in the
17 military, Viet Nam.

18 Q Yes, sir. When was that?

19 A During the year, 1967, 1968.

20 Q And in your service for this country, in Viet Nam, did
21 you become familiar with firearms?

22 A Yes.

23 Q Okay. Do you know the Defendant, Michael Smith,
24 seated at the Defense table?

25 A Yes.

1 Q Have you ever -- prior to March 9th of 2000, did you
2 ever see him in possession of anything?

3 A (No response.)

4 Q In possession of anything?

5 A Of a weapon.

6 Q Yes, sir.

7 A A 9 millimeter weapon.

8 Q I was going to ask, sir. What type of weapon have you
9 seen him in possession of?

10 A It was a 9 millimeter.

11 Q No doubt in your mind that that man possessed a 9
12 millimeter handgun?

13 A No doubt in my mind.

14 Q In your presence, sir?

15 A Yes, sir.

16 Q And just approximately how long before the murder of
17 Billy Marion on March 9, 2000, was it that you saw that man
18 in possession of a 9 millimeter handgun?

19 A Before the incident, before the incident it was about
20 two weeks.

21 Q Thank you, sir. Answer any questions that Mr. Johnson
22 has for you.

23 A All right.

24 THE COURT: You may proceed.

25 HERCULES HUGGINS, SR. - CROSS EXAMINATION

1 BY MR. JOHNSON:

2 Q Good morning, Mr. Huggins.

3 A Good morning. How are you doing.

4 Q Good. Do you remember -- you say you saw him
5 possessing a handgun?

6 A Yes, sir.

7 Q How did you know it was a 9 millimeter handgun?

8 A How did I know?

9 Q Yes, sir.

10 A Because he had an altercation with Mike Haynes.

11 Q Mike Haynes?

12 A Yes, sir, and he was firing the gun up into the air,
13 and his sister called the Sheriff's Department and they
14 came out and the cartridges what came out the pistol was a
15 9 millimeter. A 9mm cartridge.

16 Q Well, what I'm saying, how do you know it was a 9
17 millimeter?

18 A How do I know it was a 9 millimeter?

19 Q Yes, sir.

20 A That was the gun he was firing.

21 Q I understand that's what you're saying. I'm saying
22 how do you personally have personal knowledge that it was a
23 9 millimeter?

24 A I have been around military-wise, right, been around
25 weapons --

1 Q I understand that.

2 A -- all sorts.

3 Q Did he hand the gun to you?

4 A No.

5 Q How close were you standing?

6 A About from here to the window right there.

7 Q The window right there? (Indicating.)

8 A Yeah.

9 Q So you just could see the gun or you just knew it was
10 a 9 millimeter or --

11 A I could see the gun and see that he was firing it. He
12 was firing the gun up in the air.

13 Q So he wasn't shooting -- he shot in the air, he didn't
14 shoot at anyone or anything like that?

15 A No. No, he shot anyone. He was shooting up in the
16 air because of the altercation between him and Mr. Haynes.

17 Q But he never pointed at Mr. Haynes or anything like
18 that did he; I mean, he was shooting in the air, but he
19 wasn't shooting at Mr. Haynes or anything like that; is
20 that what you're saying?

21 A What I seen was him shooting in the air.

22 MR. JOHNSON: No other questions.

23 THE COURT: Anything further of the witness?

24 MR. PASCO: No, Your Honor. Thank you.

25 THE COURT: Any objection to the witness being

1 excused, from the State?

2 MR. PASCO: No, Your Honor.

3 THE COURT: From the Defense?

4 MR. JOHNSON: No, Your Honor.

5 THE COURT: Sir, you're excused. Have a good day.

6 MR. HUGGINS: Okay. Thank you, ma'am.

7 MR. PASCO: That's all I have Your Honor. Thank
8 you.

9 THE COURT: Madam Forelady, ladies and gentlemen,
10 there are some matters of law that I need to take up with
11 the attorneys. I am really not certain how long it will
12 take. I estimate it will be about 10 or 15 minutes. After
13 that I will tell you how we will be proceeding for the rest
14 of the afternoon. I anticipate, however, that we will
15 break for lunch, but we may well break -- there is a
16 possibility that we might break for the rest of the day and
17 have closing arguments and charge in the morning. I have
18 not decided yet, because I'm going to have to estimate how
19 long we here. And if we begin closing arguments and charge
20 say around 2:00 or 3:00 o'clock, that would keep us well
21 beyond 5:00, and I'm not inclined to do that because I know
22 you have other responsibilities for your evening. So we're
23 going to kind of play it by ear and once I make that
24 decision I will determine how we will be proceeding, but if
25 I anticipate that we will not be able to get the case to

1 you by 3:00 to begin your deliberations I really see no
2 point and sending you to lunch and bring you back just to
3 tell you you can go for the rest of the day. I think it
4 would probably be a better use of your time to get some
5 thing accomplished this afternoon and be fresh in the
6 morning, but I will let you know after this break how we
7 will be proceeding.

8 I appreciate your patience and enjoy your break.
9 Please do not discuss the case, and please leave your note
10 pads in your seats.

11 (Jury out for break at 12:40 p.m.)

12 THE COURT: I promised you all that what I would
13 do is skip over the directed verdict motions so that we
14 just have better use of our time.

15 Now, that the Defense has rested, are there any
16 motions?

17 MR. JOHNSON: Your Honor, once again, I would
18 renew my directed verdict motion. The prior motion and all
19 the prior motions previously stated to the Court.

20 THE COURT: Okay.

21 MR. JOHNSON: I do not think that the State have
22 met their burden of proof in this case, and I ask that the
23 charges against my client dismissed.

24 THE COURT: Okay, any response from the State?

25 MR. PASCO: I ask that Your Honor deny the motion.

1 THE COURT: I think the record is replete and
2 speaks for itself, based on the evidence that has been
3 presented there is certainly as well as substantial
4 circumstantial evidence reasonably tending to prove the
5 guilt of the accused.

6 The Court is concerned with the existence and non-
7 existence of evidence and not its weight, and considering
8 the evidence in the light most favorable to the State,
9 clearly, there's sufficient evidence with which this matter
10 should go to the jury, and the motion is denied.

11 Now, as you all heard me indicate to the jury, I am
12 anticipating -- I would imagine the State is going to open.
13 and close?

14 MR. PASCO: Yes, ma'am.

15 THE COURT: And the Defense -- how long do you all
16 anticipate -- I'm thinking that if we go to lunch now,
17 that's twenty of two, at a conservative estimate, really
18 more like 2:00 o'clock, and we come back, and I would
19 imagine that your arguments would be at least an hour. The
20 Defense arguments would be at least an hour. The Court's
21 charge is 45 minutes. That then puts the jury deliberating
22 at 5:00 o'clock. I just don't think that's prudent. We
23 have a student on the jury who has a class and we gave her
24 an excuse yesterday when testimony went over. She's in a
25 master's program at State, and it's every night at 5:00

1 o'clock. Last night that made her about an hour late for
2 class, which we gave her an excuse. I'm certain her
3 professor was nice to her, but when you have a concentrated
4 class like that I'm concerned about her losing a lot of her
5 instruction, although, she told me she just wasn't paying
6 attention when I asked during general qualification. So I
7 told her we'd work with her. You just have folk that have
8 responsibilities in the evening, they have children to pick
9 up. I just think it's bad form to have them late into the
10 evening.

11 So what I'm inclined to do is to excuse them for the
12 rest of the day, because we have -- one of the jurors is a
13 controller or accountant or something for a local company
14 here and she is -- actually, I was hoping one of y'all
15 would excuse her, but she's -- I told her that just by
16 telling me that she'd get picked for the jury. If she'd
17 sat in the audience and not said anything she probably
18 would never have gotten picked. It's just the way the odds
19 run, but in any event, I'm thinking that that may even give
20 her time to go over to her job and do some of the things
21 she needs to do to close out her reports for the end of the
22 year, which would probably make her a lot more amenable in
23 the morning.

24 But, I'm thinking of just going ahead and dismissing
25 them for the afternoon, having them come back in the

1 morning and do close and charge at 9:30, which gives them
2 the balance of the day to deliberate if they so desire.

3 Is there any -- and we'll do charge conference and all
4 that today, because I've already done the charge and that
5 will give you all an opportunity to look at verdict forms.

6 Is there an exception to us proceeding that way from
7 the State?

8 MR. PASCO: None, Your Honor.

9 MR. JOHNSON: None from Defense, Your Honor.

10 THE COURT: Okay, if you could bring in the jury
11 for me.

12 (Jury in after break at 12:43 p.m.)

13 THE COURT: Madam Forelady, ladies and gentlemen,
14 after discussion with counsel, there are some matters of
15 law that we will have to take up that probably will take us
16 another 30 minutes or so. And what I anticipated was that
17 if I let you all go for lunch that we would not be able to
18 really begin closing arguments until 2:00 o'clock, which by
19 the time we did closing arguments and the Court's charge
20 would have you all beginning deliberations around 5:00.

21 I just did not think that was prudent, a good use of
22 your time, and quite frankly, I thought you'd be a little
23 weary by that point, because everybody has responsibilities
24 in the evening to their families, and I just did not think
25 that would be fair to you all.

1 So I thought it would be a better use of your time and
2 counsel agrees with me, that I allow you to leave for the
3 afternoon. Give you the opportunity to get some use out of
4 your afternoon, and we'll resume closing arguments and
5 charge in the morning at 9:30.

6 During this break, however, I would strictly admonish
7 you not to discuss this case with anyone; that includes,
8 your family members, your friends, your co-workers or even
9 among yourselves. You have heard all of the evidence in
10 this case, but you've not heard closing arguments, nor have
11 you heard the Court's charge on the law. And, as I've
12 indicated to you earlier, you are the fact-finders in this
13 case, and at all times you have to protect your
14 impartiality in this matter so that you will have an open
15 mind as you hear the closing arguments and the Court's
16 instruction so that you will be able to apply the facts as
17 you find them to the law and come with -- and arrive at a
18 true and just verdict in this case.

19 I know it may seem innocuous to discuss it with
20 someone, but as I indicated before, when you talk about
21 what you've heard you begin to process that information and
22 that by its very nature is deliberations and you should
23 only do that among yourselves in your jury room once you've
24 heard, again, as I've indicated, closing arguments and
25 charge.

1 Also, I'm aware that there has been some media
2 coverage of this trial, and, again, you are strictly
3 admonished that you are not to read, watch, or listen to
4 any media reports about this case. Again, it is vital that
5 you only consider the evidence that you've heard from the
6 lips of the sworn lips of this case and the other evidence
7 that has been introduced. So that you are not influenced
8 by anything that is outside of the evidence. So please do
9 not watch, read, or listen to any reports to this case.
10 Please again, do not do any independent research of any
11 type on the internet or otherwise.

12 When you return to the courthouse in the morning,
13 please have no contact with anyone in or about the
14 courthouse. I would hate, at this stage, for an innocent
15 conversation to be misconstrued by someone that is
16 observing it who does not -- is not able to hear the
17 conversation.

18 If you would leave your notes in your seats, and I
19 hope you all have a wonderful afternoon. We'll see you in
20 the morning at 9:30.

21 We appreciate your patience. And also, if you could,
22 for me, and I apologize I didn't tell you to do this
23 earlier, many of you have your notes folded. If you could
24 write your juror number on the outside so that you will be
25 able to easily identify those in the morning.

1 (Jury out for the day at 12:50 p.m.)

2 THE COURT: Okay. As it regards the request to
3 charge that have been submitted to the Court, State -- and
4 I'm going to number your requests, Mr. Pasco. State's
5 request as I will number one, deals with circumstantial and
6 direct evidence. That is -- when I say a matter is covered
7 by my charge it does not mean that I use your language, it
8 just means that the general concept is covered by one of my
9 standard charges, and I will give a charge on direct and
10 circumstantial evidence, but it uses the language is State
11 verses Grippon.

12 I will number as number two, your request of the hand
13 of one is the hand of all. The Court will charge the hand
14 of one, which is accomplice liability, but will charge its
15 general standard charge.

16 Number three, the request on malice. The Court will
17 charge on malice, inferred as well as express, but will use
18 its standard charge. I will have your requests marked as
19 Court's Exhibits.

20 As regards the State's request to charge on flight --

21 MR. PASCO: That's Defense, Your Honor.

22 MR. JOHNSON: That's Defense.

23 THE COURT: Defense. I'm sorry, did I say State,
24 I apologize.

25 COURT REPORTER: State's request to charge is

1 Court's Exhibit No. 2.

2 (Court's Exhibit No. 2, State's
3 request to charge, was marked and entered.)

4 THE COURT: As regards the Defendant's request to
5 charge, number one, which is flight. The Court will not
6 charge flight, and I'm referring to State verses Grant,
7 which is found at 275 SC 404, 272 SE 2nd, 169, which is a
8 1980 Supreme Court decision that instructs the trial court
9 that it is improper to charge flight. It cites that citing
10 that in most jurisdictions that a charge on flight has been
11 acceptable, henceforth, in South Carolina it is appropriate
12 for the Court to decline any charge whatsoever on the issue
13 of flight. At least a charge on flight or evidence of
14 flight refers to circumstantial evidence at the worst it
15 places an undue emphasis upon the evidence. Evidence of
16 flight is only marginally probative as to the ultimate
17 issue of guilt or innocence. It is best reserved for
18 counsel's argument with little if any comment from the
19 bench.

20 Of course, we are all aware as there has been evidence
21 in this trial that evidence of flight, however, remains
22 proper and the parties, of course, can argue whatever
23 inferences they feel appropriate from that evidence.

24 On the issue of guilty knowledge or intent as well as
25 what Mr. Johnson has cited here which deals with the fact

1 that some people plead because they're hesitant to deal
2 with the police. You certainly are able and capable of
3 doing that, but our Supreme Court has said it is improper
4 to charge that and so the Court declines to charge that.

5 As it regards the instruction of mere presence, I
6 think there is conflicting evidence created by the
7 testimony of the co-defendants as to whether the Defendant
8 was merely present at the scene of a crime. I would
9 imagine there's no exception to the charge on mere
10 presence?

11 MR. PASCO: None, Your Honor.

12 THE COURT: Court will use its standard charge on
13 mere presence. As well as, I believe three and four of the
14 Defendant's requests cover the same topic and the Court
15 will use its standard charge.

16 As regards request number five, which is bias, that is
17 encompassed in the Court's general charge to the jury
18 regarding how they are to judge witness credibility and
19 believability.

20 And I believe there was some testimony that Mr. Brown
21 had a previous record; is that correct?

22 MR. JOHNSON: That's correct, Your Honor.

23 THE COURT: The Court will charge -- give a very
24 brief charge when it is charging on credibility and
25 believability regarding the prior record of a witness. And

1 for what purpose the jury is to use that.

2 The Defense request to charge will be marked as one
3 exhibit. Court's exhibit next in line.

4 (Court's Exhibit No. 3, Defense
5 request to charge, was marked and entered.)

6 THE COURT: The Court will charge as follows. I
7 will give the jury a general charge, regarding their
8 function and my function. Well, my function as telling
9 them regarding the law of the case as well as their
10 function in determining the credibility and believability
11 of witnesses. And how they are to judge witness
12 credibility and believability. Also, give them a general
13 charge on expert witness testimony.

14 I will charge State verses Grippon on direct and
15 circumstantial evidence, also, however, I need to backtrack
16 a little. Before I charge on expert testimony I will give
17 the charge on prior record of a witness.

18 I will charge that the arrest charge in the indictment
19 are not evidence, also charge on the presumption of
20 innocence. I will charge Victor verses Nebraska on
21 reasonable doubt.

22 I will then charge the elements of murder followed by
23 the charge on the element of possession of a weapon during
24 the commission or attempt to commit a violent crime
25 pursuant to 1623-490. Then charge the hand of one -- which

1 is a accomplice liability. Then charge mere presence.

2 I'll then charge that Defendant is charged with
3 multiple crime -- multiple charges. That there are two
4 separate indictments and each are separate and distinct,
5 and they must decide one uninfluenced by their decision on
6 the other, although, they can only find him guilty of
7 possession of a firearm during the commission of a violent
8 crime if they find him guilty of murder, but I think that's
9 self-explanatory within the charge on possession of a
10 firearm.

11 I will then charge them on the forms of the verdict,
12 which there are four possible verdicts in this case.
13 Guilty or not guilty on murder and guilty or not guilty on
14 the charge of possession of a firearm during the commission
15 of a violent crime.

16 Now, as it regards any lesser included offenses, I do
17 not think the record supports that in that there has been
18 no testimony regarding sudden heat of passion or sufficient
19 legal provocation for an involuntary manslaughter charge.
20 Therefore, I've not included that nor do I think there is
21 probably any evidence to support -- there certainly isn't
22 any -- I don't think there's any evidence to support a
23 lesser included offense.

24 Is there any exception to the charge as proposed, from
25 the State?

1 MR. PASCO: No, Your Honor.

2 THE COURT: From the Defense?

3 MR. JOHNSON: None from Defense, Your Honor.

4 THE COURT: Okay. I'll see you all in the morning
5 at 9:30. Have a wonderful day.

6 MR. PASCO: Thank Your Honor.

7 MR. JOHNSON: Thank Your Honor.

8 THE COURT: You're welcome.

9 (Court at recess for the day at 1:00 p.m.)

10 (Court in session at 9:30 a.m.)

11 THE COURT: Is the State ready?

12 MR. PASCO: State is ready, Your Honor

13 THE COURT: Is the Defense ready?

14 MR. JOHNSON: The Defense is ready, Your Honor.

15 THE COURT: Is State going to open and close?

16 MR. PASCO: Yes, ma'am. Let me ask you one thing.

17 The Grand Juror is here.

18 THE COURT: Okay.

19 MR. PASCO: Did you want to do that before?

20 THE COURT: They're here working or they're here
21 to make their report?

22 MR. PASCO: To make their report.

23 THE COURT: Oh, we can take their report now.

24 (Court at recess to hear Grand Jury report at 9:33 a.m.)

25 (Court in session after Grand Jury report at 9:35 a.m.)

1 THE COURT: Is there anything further before we
2 proceed?

3 MR. PASCO: No, ma'am.

4 THE COURT: Please bring in the jury. Well,
5 actually, you're going to open and close?

6 MR. PASCO: Yes, ma'am.

7 THE COURT: Okay.

8 (Jury in at 9:46 a.m.)

9 THE COURT: Madam Forelady, ladies and gentlemen,
10 I hope that you all have a restful evening. We're now, as
11 I've indicated, on yesterday, at the stage of the trial
12 where we have closing arguments of the attorneys and the
13 Court's charge.

14 I would ask that you give the attorneys your undivided
15 attention. You will first hear from the Solicitor Office,
16 you will then hear from the Defense counsel, and then you
17 will again hear from the Solicitor's Office. The rules of
18 evidence and procedure allow for the State to do what we
19 call open and close, because they have the burden of proof
20 and are therefore under the law they get the last word.

21 You may proceed.

22 MR. PASCO: May it please the Court.

23 THE COURT: Yes, sir.

24 MR. PASCO: Madam Forelady, ladies and gentlemen
25 of the jury, good morning.

1 I want to start off again by thanking each and every
2 one of you for your service. It's often said that jury
3 duty is the most important duty you can perform for your
4 country, and I certainly concur with that.

5 And your job is not only important to the Defense, but
6 to the State of South Carolina, to the Marion family, and
7 to every witness that took that witness stand.

8 In fact, the fact of the matter is that we all have
9 our jobs in this courtroom. It's the State's job under the
10 Code of Ethics to administer justice. It's Defense
11 counsel's job to represent his client zealously. It's the
12 Judge's job to administer the law and it's your job -- the
13 most important of all -- to render a verdict. Whether your
14 verdict is guilty or not guilty, as long as it speaks the
15 truth no one will be able to question it.

16 If you recall the most important thing you've done up
17 to now is you took an oath. You took an oath that you were
18 going to set aside any bias or prejudice that you may have
19 either against the Defendant or the State of South Carolina
20 and base your verdict, your truthful verdict on just two
21 things; the evidence and the law. Not on assertions, not
22 on fiction, but on the evidence and the law.

23 What I'm going to do right now is I'm going to take no
24 more than 10 more minutes of your time. I'm going to talk
25 to you about some of the law in this case. Then I'm going

1 to sit down and Mr. Johnson is going to present his closing
2 argument, then I'm going to get one more opportunity to
3 come up here and talk to you about the facts. And as I go
4 over the law with you let me give you one caveat, which is
5 if I ever say anything that contradicts the law that Judge
6 Jefferson tells you, you take the law according to Judge
7 Jefferson, not the law according to Pasco. It's just like
8 you're the sole triers of the facts in this case, Judge
9 Jefferson is the sole trier of the law.

10 Now, as we all know by now, the Defendant is charged
11 with murder, and murder is the unlawful killing of another
12 with malice or aforethought, either expressed or implied.
13 That's it.

14 Premeditation is not an element of murder. Again,
15 murder is just the unlawful killing of another with malice
16 aforethought.

17 What is malice. Malice is the reckless disregard for
18 the welfare of another. How much reckless can you get than
19 pointing a firearm at another human being, much less
20 shooting. It's conduct that shows a conscious effort of
21 creating a high risk of serious bodily injury to another.
22 As I said, malice can be either expressed or implied.
23 Examples of implied malice would be just the mere use of a
24 deadly weapon such as a knife or in this case a gun. The
25 actual infliction of serious bodily injury is an example of

1 malice. And malice may attach at the very moment the fatal
2 blow is given. That's murder. The unlawful killing of
3 another with malice aforethought.

4 Next the Defendant is charged with possessing a
5 firearm during the commission of a violent crime. Very
6 simple. If you possess a gun or a firearm when you commit
7 a murder you're guilty of that crime too. Very simple.

8 And ladies and gentlemen, I submit your job is easy in
9 this case. It's not to tell us what happened, there is
10 absolutely no doubt that Billy Marion was murdered. You
11 job is just to tel us whether that man is responsible, just
12 like the other two. Whether that man is responsible for
13 Billy Marion's death.

14 The Judge is going to tell you that in South Carolina
15 that mere presence or mere association to a crime is not
16 enough by itself to convict someone. Now, that doesn't
17 mean that mere presence and mere association isn't evidence
18 of guilt. It is certainly evidence of guilt, it just means
19 you're not automatically guilty. And in South Carolina if
20 two or more people set out to commit a crime together, each
21 are guilty no matter what roles they play.

22 A principle in a crime is one who actually commits the
23 crime or who is present, aiding, abetting, or assisting in
24 the commission of the crime. When two or more people
25 acting with a common plan are present at the commission of

1 a crime it doesn't matter who actually commits the crime,
2 all are guilty. That's why all three defendants are guilty
3 of murder even though this one is the only one who pulled
4 the trigger. When one joins with another to accomplish an
5 illegal purpose is liable for everything done by his
6 confederates incidental to the execution to the common
7 design or purpose. Ladies and gentlemen, more simply, the
8 hand of one is the hand of all. The hand of one is the
9 hand of all.

10 The Judge is also going to tell you that you and you
11 alone assess the credibility of the witnesses. You can
12 believe some, all or none of what a witness told you on
13 that witness stand. And when you assess the credibility of
14 the witnesses all I ask that you do what you've been doing
15 your entire life. You assess people's credibility each and
16 every day. You know when somebody's telling the truth.
17 You know when somebody is lying.

18 And just some other factors that you can consider when
19 determining the credibility of a witness; what was the
20 demeanor of the witness on the witness stand. Was the
21 witness forthright or hesitant, was the witnesses testimony
22 consistent of did other witnesses come in here and say
23 something different and prove him to be a liar. Was the
24 testimony of a witness corroborated by the circumstantial
25 evidence, such as the prints, by other witnesses and the

1 facts of this case. Did the witness have a reason to be
2 prejudiced or biased. Does that witness have a reason to
3 lie.

4 And when you're determining your verdict and you're
5 determining the credibility of the witnesses you look at
6 the evidence. There are only two types of evidence you can
7 have, and we are very fortunate in this case, because we
8 have both types of evidence in this case and both are equal
9 under the law; direct and circumstantial evidence.

10 Direct evidence is what a witness sees, hears,
11 touches, smells. Examples of this would be; John Haynes'
12 testimony. I saw the three defendants down on Nate's Store
13 Road, at the corner of 33, acting odd, Brown looked scared.

14 Circumstantial evidence is evidence where you can infer
15 something from the circumstances. It's chain of events
16 that prove the existence of a fact. Just a couple of
17 examples of circumstantial evidence in this case; the fact
18 that the Defendant ran. In fact, all three defendants have
19 their fingerprints on Billy Marion's vehicle and much,
20 much, much, more.

21 The last legal phrase I'm going to talk to you about
22 is proof beyond a reasonable doubt, and this phrase, again,
23 means exactly as it sounds. It's not proof beyond any
24 doubt. It's not proof beyond any possible doubt. It's
25 proof beyond a reasonable doubt.

1 The simple fact of the matter is we have doubts about
2 everything in this world. Some may doubt whether the earth
3 revolves around the sun. But you have to ask yourself is
4 it real. And in essence what proof beyond a reasonable
5 doubt means is after you look at all the evidence, not just
6 one piece, but after you look at all the evidence in its
7 entirety if you're firmly convinced, just firmly convinced
8 of the Defendant's guilt, then you must find him guilty.

9 I want to thank you for your attention. I'm sure
10 you'll give Mr. Johnson the same degree of attention that
11 you've given me.

12 All I ask during this closing argument, the only thing
13 I ask of you is that you keep an open mind and give me one
14 more opportunity to come up here and talk about the facts
15 in this case.

16 Thank you.

17 THE COURT: Mr. Johnson, you may proceed.

18 MR. JOHNSON: Thank you, Your Honor.

19 THE COURT: You're welcome.

20 MR. JOHNSON: May it please the Court, Your Honor.

21 THE COURT: Yes, sir. You may proceed.

22 MR. JOHNSON: Good morning. I want to thank you,
23 first of all, for setting through this trial for the last
24 three days. I know that many of you have lives of your own
25 and you want to get back those lives, but part of your life

1 is to be a part of this community. And part of this
2 community means being a part of this trial. It means
3 sitting here listening to the evidence presented to you and
4 making decisions about the guilt or innocence of Michael
5 Smith.

6 Now, as I said in the beginning, I would have loved to
7 have been able to give you this real clean case where you
8 can just sit there and say, yes or no, but just as
9 everything in life this is the same. Everything is not
10 what is expected. There is evidence of guilt, we believe
11 there is equal evidence that he is not guilty. This is
12 really going to come down to who you believe.

13 Michael Smith agrees that he was present during this
14 incident which killed Mr. Marion. He agrees that he was
15 with the two individuals that was there. He agrees that
16 all the things that happened that resulted in the death of
17 the victim in this case happened. The only thing that we
18 disagree with is that he was not the person that pulled the
19 trigger that killed this individual.

20 And as much as I would have liked to have all kinds of
21 evidence ways to demonstrating to you that he's innocent or
22 guilty is really going to come down to whether you believe
23 my client is innocent or whether you believe in the crime.
24 We could look at the evidence. There is evidence that
25 places my client there. There is evidence that places Mr.

1 Brown there. The evidence that clearly state that if my
2 client was not the shooter then Mr. Brown was the shooter.
3 And that's the evidence that the State put up. There was
4 testimony that Mr. Brown was in position to do that. So
5 what you have to do, it's my belief that what you have to
6 do is look at the evidence and make a determination as to
7 who has told you the truth as far who was the shooter.

8 No one has admitted or has said anything that they
9 agreed or there was some plan to kill Billy Marion.
10 Michael Smith came to you and said that they were
11 attempting to catch a ride. Which I think evidence backs
12 that up. They were attempting to waive people down. They
13 attempted to waive people down that they knew. They
14 attempted to waive people down that they didn't know.
15 There is no evidence that they were planning on doing this
16 thing or there was any plan that the three of them got
17 together, which is very important, because under the hand
18 of one is the hand of all, as the State has told you,
19 people have to agree or to aid and abet -- to aid and
20 assist each other in committing a crime or my client would
21 be guilty of the hand of one. If you believe that he did
22 not shoot, then I submit to you that there is no evidence
23 that he had anything to do with the crime. All witnesses
24 clearly stated that there was no agreement with anyone to
25 do anything to the victim in this case.

1 So what I would like to do is, first of all, go over
2 some of the evidence with you that was presented to you in
3 the trial. I'm sure that you were listening. I will not
4 try to take up a lot of your time. I will be very short as
5 we go over the testimony.

6 ~~The first witness was Mr. George Rivers.~~ Now, he
7 basically testified that he went to the truck and the truck
8 was running and he turned the truck off. He did not see my
9 client, Michael Smith. He did not see who pulled the
10 trigger. He did not see how the victim got to that point.
11 So therefore his testimony is just corroborating how the
12 truck got there.

13 We then had the EMS worker and she basically arrives
14 after the incident as well. She just confirmed what she
15 saw, where the victim was seated in the car. And how those
16 things lead out to it. But she had no evidence that said
17 that Michael Smith was the shooter.

18 You then had Mr. -- Leilia Jones. Now, remember that
19 she said that she saw Roger Brown and Michael Smith and
20 they were there located together, the three of them
21 together, so she placed them at the scene. And that is not
22 in dispute. My client admitted that he was present, but
23 once again, she did not see who pulled the trigger or who
24 killed the victim. She just placed the three of them
25 together which is not in dispute in this case.

1 We have Mr. John Haynes, he was the fourth person who
2 came -- now, Mr. Haynes got up and said something about he
3 saw Michael Smith with a bag. Nobody else ever said
4 anything about a bag. Mr. Haynes didn't even say in his
5 original statement that he saw a bag. This just came out
6 the blue some five or six years after the incident. I
7 understand Mr. Smith (sic) was a friend of the victim in
8 this case and maybe he's trying to assist in some way in
9 the conviction of my client and I submit to you that that's
10 the only reason that the bag ever came up. Remember no one
11 else -- no one else, every one that said they saw the three
12 individuals together ever said they saw Michael Smith with
13 a bag. There was no indication of that and I submit to you
14 that that was an incorrect statement.

15 Next the State put up Mr. Frank Roger Brown. I would
16 like to get to him last, so please forgive me I will jump
17 over him and go to the investigator, the fingerprint --
18 now, he testified that he found 15 points of contact or
19 fingerprints, basically, that connected the three
20 individuals to this car. Now, remember what he said, he
21 found three fingerprints -- three fingerprint locations on
22 the driver's side of the car that put Lewis Rivers on the
23 driver's side of the car. He found 11 points of contact
24 for Mr. Brown on both sides of the car which indicated that
25 he traveled to both sides of the car, and they found one --

1 just one point of contact of my client. They did not even
2 find this point of contact until almost the 15th of this
3 year, five years later.

4 I submit to you that that states that Lewis Brown was
5 on both sides. He clearly stated in his statement that I
6 brought out with Mr. Brown when he said -- told the police
7 he was very unruly. They had a hard time taking his
8 fingerprints. Remember he told them, you won't even find
9 my fingerprints. I was standing behind the truck. Then
10 when they do the evidence they found out he was lying. He
11 was not telling the truth.

12 Now, after that they had Dr. Sexton. Dr. Sexton came
13 and he basically stated the fact that he believed that it
14 was a 9 millimeter gun that killed the victim in this case.
15 And he stated that as a medical opinion. And -- but he
16 also stated that he could not say exactly that it was,
17 because they had not recovered the round. But it is
18 believable that they found a 9 millimeter round in the car
19 and that the victim killed, that it was a 9 millimeter.
20 But remember, the State does not have the gun, they do not
21 have the bullet, they did not find fingerprints on this
22 gun. They have very little physical evidence in this case
23 connecting Michael Smith to anything.

24 The State is very dependent on Roger Brown's statement
25 because without his statement there is no evidence that

1 Michael Smith killed anybody. There is just evidence that
2 Michael Smith was merely present at the scene of the crime
3 or was there a few minutes prior or during the commission
4 of the crime.

5 The State is required to prove that Michael Smith have
6 did this crime, not that he could have committed the crime,
7 not that he may have committed the crime, but that he
8 committed the crime. The State is required to do that.
9 Before we take anyone's freedom in America we're required
10 that we prove beyond a reasonable doubt. That is not like
11 a 51/49 weighing of the scales. It is beyond a reasonable
12 doubt, it is much more than that. It is not absolutely,
13 and I agree with that. But before we make decisions about
14 someone freedom I think we're required to examine this to
15 the utmost attempt, but once your decision is made it is
16 done, and therefore, I think that it is required that you
17 look at the definition, that you make the State prove this
18 case.

19 The State is committed to Mr. Brown. They have placed
20 all their eggs in a one basket, and if Mr. Brown is on that
21 (inaudible) during the trial. Mr. Brown is the only
22 person, the only person other than my client who could have
23 committed this crime. He is the one person that had the
24 reason to lie. He has a past criminal record, he was the
25 only person present at the scene. He was identified as

1 having a gun at his house by his brother.

2 Now, the State would say that they say that Michael
3 Smith was snatching the gun away, but remember what the
4 brother said when he testified, which was Darren Brown, who
5 came up -- Darren said that he saw Lewis snatching the gun
6 away, and then finally when it was brought up don't you
7 mean Michael Smith, he looked around from the stand and
8 said, yeah, yeah, Michael.

9 Well, remember what he said when he first said, I
10 walked in the room and Lewis was snatching his gun --
11 putting his gun away up under the bed or wherever they was
12 sitting. No one every said they saw Michael with the gun.
13 The only person who said Michael had a gun was Mr. Brown.
14 The only person that even put Michael with the gun was Mr.
15 Brown. The State has no evidence that can put Michael with
16 a gun at the time that the victim was killed.

17 Now, remember Mr. Brown said that he left the scene --
18 after this Lewis Rivers and Frank -- and Mr. Brown changed
19 clothes and went back to the scene. That is not a sign of
20 someone who is afraid and worried. That's a sign of
21 someone who's trying to cover up the act that they did.

22 I submit to you that somebody that is afraid of what
23 happened would do just what Michael Smith did, would run.
24 He's 16 years old, he understands that someone has been
25 killed and he was a witness to it. He understands that he

1 is in a lot of trouble. While we can say well, I would
2 have assisted -- I would have done those things, I think
3 Michael Smith, when he got on the stand, he told you the
4 truth. It might not be -- it might not be the kind of
5 truth that you wish that your kids would grow up with that
6 type of attitude but it's the truth of his life. In his
7 life, you see something like that you keep your mouth shut
8 and you get away.

9 And unfortunately that's the way crime is organized.
10 We are -- in times that we live in now very few people even
11 know the person living next door to them. It is very easy
12 to understand how Michael Smith can see this happen, could
13 see what went on, but keep his mouth shut and get out of
14 town, and try to go on with his life.

15 People, unfortunately, are just that cold, but it
16 doesn't mean that he killed anyone, it just means that he
17 made the wrong decision about coming forward.

18 This about this, if Michael Smith had came forward and
19 said, I saw Frank Roger Brown kill Mr. Marion. Michael
20 Smith would be in Mr. Brown's place and Mr. Brown would be
21 sitting over here, because other than that, the State's got
22 no evidence as to who did it.

23 All we're hearing is that the first person -- there's
24 a saying when you have multiple crimes, the first person to
25 the trough gets the most of the hog feed. Mr. Brown was

1 the first person, because of his past experience with the
2 law, he that he better come up with a story and convince
3 the State to take the story so he would get the best deal.

4 Now, I submit to you that the State has said that they
5 have no agreement with Mr. Brown, but Mr. Brown told you on
6 the stand, when he was on the stand that his testimony
7 could help what kind of sentence if he's said that. He
8 understands that. And I'm sure you understand that.

9 Mr. Brown is not no pillar of the community, he's
10 trying to look out for his skin. He's trying to look out
11 and find some reason to believe or show that he's some
12 person that should deserve to get less time or no time.
13 And, of course, he would put it on anybody.

14 Now, let's talk about the law. There's two key laws
15 that I believe that you as the jury will have to decide
16 this case on. The first one is the hand of one theory,
17 which the State explained to you. The hand of one says
18 that if you have three people, basically, that are robbing
19 a store together and one of the persons kills someone, then
20 the other two people who are there during the robbery are
21 just as responsible as the person that pulled the trigger,
22 and that's understandable.

23 However, if three people walked into a store together
24 and one of the other persons and one person -- one of the
25 three people pull out a gun and shoots somebody without the

1 prior knowledge of the other two, and without the
2 assistance of the other two, and they all run out the store
3 together. Those two people that are with him at that time
4 are not responsible for that killing. They have to have
5 assisted, had prior knowledge, or participated in some way.
6 And I submit to you that there is no evidence that Michael
7 Smith assisted in any way in this case. If anything, he
8 ran. He did not go back to the scene. Remember -- and
9 this is a key element, too. Remember what Darren Brown
10 said, he was mad with Lewis Rivers because Lewis Rivers had
11 his clothes on. So Lewis Rivers went back to Mr. Brown
12 house and Mr. Brown allows Lewis Rivers to put his
13 brother's clothes on as well as Mr. Brown changed clothes.
14 Michael Smith went home and told his mother what happened.

15 Now, of course, that evening when they got together
16 and they went to Georgia; well, who came to pick up Michael
17 Smith and Mr. Rivers -- Mr. Brown and his car. But
18 remember on the stand he said he was afraid. Well, why
19 would you get in your car and go back to somebody house
20 that you're afraid of and pick them up and go to Georgia by
21 himself with them if you're afraid. I submit to you he
22 lied to you, once again.

23 Now, we talk about direct evidence and circumstantial
24 evidence. There is one piece of direct evidence that
25 places my client at the scene and that is his fingerprint

1 or the palm print, which is this quarter of the palm.
2 There is no direct evidence. There is no direct evidence.
3 The only direct evidence that says that my client is guilty
4 of this crime is Mr. Brown's statement saying that my
5 client was the person that pulled the trigger. That's it.
6 Do not let the State confuse you with anything else.
7 That's it. You have my client palm print on the door that
8 places him there at the car, and everybody agreed that --
9 even Mr. Brown said, not that my client was fussing with
10 the victim, or arguing with the victim. He said Michael
11 Smith flagged down the victim and was talking to him in the
12 window. He did not try -- he did not say Michael Smith
13 opened the door. He did not say that Michael Smith grabbed
14 the victim. Lewis Rivers on the other side, grabbed the
15 door and was opening the door. Mr. Brown was on the other
16 side. When you get a chance look at the pictures. I'm not
17 even going to -- look at the pictures, look at the palm
18 prints. Two full palm prints on that truck. Not Michael
19 Smith, but Frank Brown. You can see where he's coming down
20 the side of the truck.

21 Also remember Michael Smith told you that when Brown
22 came around the truck and reached around him and shot.
23 Now, how could this happen. A number of people later on
24 mentioned to me, that seemed weird, it seemed like he would
25 just reach in front. And I remember even asking him,

1 didn't he reach in the front and shoot. And Michael Smith
2 said, no, he reached around me and shot him.

3 Now, if a person is going to lie, I submit to you,
4 that they would not make up something about reaching around
5 because that didn't seem reasonable. Now, in order -- if
6 Michael Smith is so intelligent that he's placing a lie
7 here, he would easily have told you, no, he reached in the
8 window and shot. I submit to you he told you the truth.
9 He told you what happened. It might sound weird but it's
10 kind of believable. That he was in the window, that Mr.
11 Brown is trying to get a gun in the window, because Mr.
12 Rivers on the other side trying to snatch the door open,
13 that he should be reaching around Michael Smith. I submit
14 to you that's how the shot came. That he came around and
15 for whatever reason -- the gun could have went off, he
16 could have attempt to be shot, but I don't know. We were
17 not there. What Michael Smith told you exactly what
18 happened. He was the only one that got up there and
19 admitted that he smoked drugs, that he sold drugs, that he
20 did wrong things. He told you the truth. You may not like
21 what he said, you may not agree with what he did, but he
22 was the only one that got up there and admitted that he
23 sold drugs, he smoked drugs -- that day, he admitted it to
24 you. He told you the truth.

25 Mr. Brown gets up there with a suit on and acts like

1 he's running for Congress. That he's an outstanding
2 citizen. Then you hear about him with the police, the
3 cussed the police out saying that "f" the police. I don't
4 trust them. You cannot find my fingerprints, I'm standing
5 behind -- all those things were lies.

6 I submit to you, how can you have a person who is
7 lying about 10 things and you believe them about the 11th
8 thing. That is credibility. Those are the things that you
9 have to look at. And I'm not saying that you have an easy
10 choice to make. It is not easy, but I have request that
11 you take the time to look at the evidence. This is very
12 important. It's the same thing that I would request of
13 anyone. The family -- the family has lost a love one.
14 They deserve to have some closure. I agree with that, but
15 that I submit to you is it closure that the wrong person is
16 convicted of this crime.

17 I submit to you that it's not. That to please take
18 your time and look at this. This is not a case where I'm
19 trying to present smoking mirrors or do anything. I only
20 have to present to you what I present to you.

21 Finally, ladies and gentlemen, as I've found out over
22 the years, you get up every day, you do the best you can.
23 When you go home at night before you go to bed you look
24 into the mirror and you ask yourself, have I done what I
25 was supposed to do that day. And you can look at that

1 person in the mirror and say that I've done all I can do
2 then you can lay down in peace.

3 All I ask is that when you go to bed tonight you that
4 you're able to look into the mirror and say that whatever
5 decision that you come up with, that I've done all that I
6 can do. I think that if you do all that you can do, look
7 at this case, look at the evidence in this case you will
8 find my client not guilty.

9 Thank you.

10 THE COURT: You may proceed.

11 MR. PASCO: May it please the Court.

12 THE COURT: Yes, sir. The Court's pleased.

13 MR. PASCO: Now, as I was sitting at this desk
14 this morning before I was -- you know, I was going over my
15 closing argument. I started thinking about what a
16 contradiction we have in this case. I started thinking
17 about the irony in this case.

18 George Rivers got on that witness stand and he told
19 you about the type of person Billy Marion was. He was the
20 type of person that would help anyone. He would pull over
21 by the side of the road if he saw someone that he thought
22 needed help. He cared about human life, and it cost him
23 his human life. It cost him his life.

24 The taking of a human life is the most serious act you
25 can do, but did that man right there, the Defendant,

1 Michael Smith, and his two friends Billy Marion's life
2 wasn't worth the blink of an eye. And what does Mr. Scared
3 do after he guns down Billy Marion; he goes and plays
4 basketball. He runs to Georgia. Then when the police find
5 out the truth he runs to New York.

6 Well, if there's one thing we've learned in this trial
7 it's that you cannot hide from the truth. You can run to
8 Georgia, you can run to New York. You can change your name
9 and lie to law enforcement, but the truth is going to catch
10 up to you. It's going to catch you. You think that
11 Sheriff Thomas Summers is going to forget about this case.
12 You think SLED was going to forget about this case. Do you
13 think Billy Marion's family was going to let anyone forget
14 what that man did to their son, to their brother. No way.

15 Forty-one year old Billy Marion didn't stand a chance
16 that afternoon because that man and his two friends could
17 care less about human life. How is there any doubt, much
18 less reasonable doubt, that he's guilty. How is there any
19 doubt, much less a reasonable doubt that that man gunned
20 down Billy Marion and then he ran like a coward. And if
21 I'm wrong, find him not guilty. Find him not guilty.

22 He knows where his gun is. Mr. Johnson keeps talking
23 about his gun. Find him not guilty. Let him go back to
24 it. But I submit to do that you'd have to disregard every
25 piece of evidence in this case, because the evidence in

1 this case just doesn't prove the Defendant's guilt beyond a
2 reasonable doubt, it proves it beyond any doubt whatsoever.
3 Facts are stubborn things. And in a little bit I'm going
4 to talk to you about those stubborn facts that dictate that
5 the Defendant's guilt.

6 First, I want to put a few things to rest right now,
7 which is why the State of South Carolina we have the sole
8 burden of proof. The defense didn't even have to ask a
9 question, throw up an assertion, or even put up a case, but
10 once they do start throwing out assertions and once they do
11 put up a case they're subject to scrutiny just like
12 anything else.

13 First and foremost, assertions; things we say as
14 attorneys are not evidence. The only thing you consider
15 for your purpose is what you consider to be the credible
16 testimony from that witness stand and what you get to take
17 back with you to that deliberation room.

18 And before I forget, you heard a lot of testimony
19 about statements given by witnesses and if you remember I
20 would even show the witness their statement to bring out
21 when they gave their statements to the police. Well,
22 you're not going to get to take those statements back there
23 with you, and I'll tell you that because jurors wonder why.

24 It's not my fault and it's not Mr. Johnson's fault, and
25 it's certainly not Judge Jefferson's fault. Those are just

1 the rules. But the reason for that is that you've heard
2 their testimony and they told you when they gave it to us.

3 But the defense doesn't want you to base your verdict
4 on the evidence. They want you to base your verdict on
5 assertions. Assertions like; well, there's no gun.

6 Remember when Agent Black and in Mr. Johnson's closing
7 argument, he said we don't have a gun to test the shell
8 casing to see if this is the shell, blah-blah-blah. You're
9 kidding me. We don't reward defendants for hiding
10 evidence. We don't reward defendants for running to New
11 York and taking the gun to Georgia or wherever he hid it.

12 The next assertion; Frank Brown's got more prints on
13 the car than the Defendant, so Frank Brown must be the
14 gunman. Not only is that an assertion, but that proves the
15 Defendant is the gunman. The fact that the Defendant has
16 the fewest or the least amount of prints on the car is
17 because he's holding the gun. It proves that he's the
18 gunman. The fact that Brown's got the most fingerprints on
19 the car proves that he's not the gunman. He's going from
20 side to side of the car just like he said and just like the
21 prints show, and more important, Mr. Brown is the only
22 person whose right hand is on the car and whose left hand
23 is on the car, because he's not holding a gun.

24 He's involved in this. He's part of it. He helped
25 flag that car down. He's guilty, but he didn't have his

1 hands on a gun. The only person -- the only person who did
2 have just his left hand on the car is the Defendant. I
3 wonder where his right hand was. I wonder where his right
4 hand is.

5 Then the defense wants you to base your verdict on
6 absolute pure fiction. The Defendant's testimony. Ladies
7 and gentlemen, the problems of the Defendant, however, is
8 that his own testimony convicts him. After you listen and
9 watched him yesterday how can you have any reasonable doubt
10 at all about his guilt.

11 What have we learned about Michael Smith. First of
12 all, he's a liar. He can lie. He lied to law enforcement
13 about his name. He lied to law enforcement about his date
14 of birth. He's a liar. We learned he's a drug dealer. We
15 learned he was smoking pot just hours before he killed
16 Billy Marion. Then he says, I ran -- first he says I ran
17 because I was young and I didn't know any better. Then he
18 says, well, I ran because my parent told me to run. Then
19 he says I ran because that's what I was taught to do.

20 Well, you remember this quote and I wrote it down, he
21 told you, at least on two or three occasions; hear no evil,
22 see no evil. Remember that. Hear no evil, see no evil

23 Well, what I'm asking of you today is that your
24 verdict be so loud, so clear, that you let him know just
25 how evil an act he committed. As loud as you can voice it.

1 Then he testified, and this proves that all three
2 defendants were involved in this. He testified that after
3 the victim was gunned down, Billy Marion was gunned down,
4 he admits to the alleged, according to him, two gunmen,
5 let's go. Let's go.

6 Now, if they're not all three involved in this, this
7 really goes to more to -- to Rivers and Brown, but if
8 they're not all three involved why is he yelling -- why is
9 he yelling -- why didn't he just run if he's scared. He
10 yelling for them, let's go.

11 He wants you to believe that his step-brother, who
12 he's lived with for two to three years, and Brown are the
13 only ones that conspired in this. That he didn't conspire
14 in with his step-brother. Does that make sense.
15 Especially when it was his idea to flag down cars. It was
16 his idea, let's go.

17 Then, he wants you to believe absolute impossible.
18 How the shot was fired. And I will tell you exactly why he
19 got on the witness stand and lied about how the shot was
20 fired and exactly why he had to say that Mr. Brown reached
21 around me, because he's not smart and because he has looked
22 at the prints and he heard the testimony and he knows that
23 you are going back there and say, wait a minute, the
24 Defendant's print is right there. Wait a minute, Brown's
25 prints are way over here. He had -- there's no way that

1 Brown could have fired the gun while he was standing in the
2 passenger side window so he had to come up with a lie. And
3 he did. It is absolutely impossible. And I'm going to let
4 the Sheriff who is -- he is going to act as the Defendant
5 Michael Smith, much bigger than Mike Smith. You saw Mr.
6 Brown -- excuse me. He's going to act as Mr. Brown. Much
7 bigger than Mr. Brown, you saw him, and I'm going to be
8 Mike Smith, and I'll probably, with the exception of a
9 couple of you, the shortest person in this courtroom.

10 The Defendant claims that he's here talking to the
11 victim, asking about a ride with just his left palm is on
12 the vehicle. He claims that Mr. Brown's hand is on the
13 truck, and if you recall, according to SLED, the print that
14 Mr. Brown is not consistent with leaning forward, it's
15 consistent with leaning back.

16 For the sake of argument, let's go ahead and have the
17 sheriff, who is much bigger than Mr. Brown, even lean
18 forward. Sheriff show the jury how the shot was fired.
19 (Sheriff Summers complies.)

20 MR. PASCO: Absolutely impossible. And even if it
21 could be fired that way there is no way that bullet could
22 leave that gun and go through Mr. Billy Marion's right
23 side. Absolutely impossible. Let me show you one more
24 thing I thought of.

25 Do you have an ink pen Sheriff. Where is his right

1 palm. If he's being shoved into the car where is the
2 Defendant's right palm. It's on the gun, because he gunned
3 down Billy Marion. They're all guilty, but he's the
4 gunman.

5 Then we also learned, really, how bad he's a liar.
6 Something Mr. Johnson didn't even want to preface in his
7 closing argument. I don't blame him. I don't know how
8 you'd address it.

9 He got on the witness stand and he adamantly denied
10 every possessing any kind of handgun. No, I would never
11 possess a gun. Never have I possessed a gun. And then I
12 specifically asked him; you've never possessed a gun in
13 front of Hercules Huggins. No, never.

14 And what did we learn; well, ladies and gentlemen, you
15 can either believe a man that's been lying for the last
16 five years and gunned down another human being or you can
17 believe a Viet Nam veteran from Cameron, South Carolina. A
18 Viet Nam veteran who served his country and told you; not
19 only have I seen the Defendant possess a 9 millimeter
20 pistol, I've seen him get in an altercation with it about
21 two weeks before this murder, pull it out and fire it in
22 the air to scare the other person. That's the kind of
23 person we're dealing with; a liar, a drug dealer, a man who
24 totes a gun and shoves it at people to scare them.

25 Proof beyond a reasonable doubt after his testimony

1 and Hercules Huggins testimony this case was over. It was
2 absolutely over whether I put nothing up or anything up. It
3 was over.

4 Ladies and gentlemen, if you look at the assertions in
5 this case, if you look at the lies you'll find the truth.
6 Now, the truth is that the Defendant Michael Smith is a
7 cold-blooded murderer. A cold-blooded murderer.

8 Judge Jefferson is going to tell you there are very
9 few things in this world we know about you, sir. And the
10 State of South Carolina doesn't have to prove the
11 Defendant's guilt beyond any and all certainty. But if
12 there's ever a case, ever a case this is it.

13 Now, I'm going to very quickly, very briefly go over
14 the evidence with you in this case and some of the
15 testimony.

16 Very quickly. First you have the testimony of Leila
17 Jones. Ms. Jones told you that Mr. Brown and two other men
18 were trying to flag cars down. She told you that. They
19 were looking for a vehicle.

20 Then you have the testimony of John Haynes. Why is
21 John Haynes really important; because he gave his statement
22 to the police on Saturday morning, March 11, 2000 at 2:29
23 a.m. That was the first break in the case, because we
24 don't have any prints yet. They haven't been -- we don't
25 have anybody to compare them to.

1 He told you all three defendants were at the end of
2 the road acting odd. He told you that Brown looked scared.
3 Not scary, but scared. He told you that the Defendant was
4 holding a bag. And again, -- oh, and then he told you when
5 he gets back home around 5:00 o'clock that afternoon, he
6 sees Rivers and Brown at the crime scene because they're
7 not the trigger man. They wanted to know what was going on.
8 Trigger man is playing basketball, and they're going to
9 tell him later what's going on.

10 Then you heard from George Rivers. George Rivers told
11 you that Billy was the kind of person that would pull over
12 and help another person. He told you that. That's exactly
13 what Billy did that day. You know what else he told you,
14 of the -- you know the shooting took place hundreds of
15 yards down the road and that the car ended up in the dirt
16 field. That car had ended up in that field and that dust
17 has kicked up on that vehicle and we had the fingerprints.

18 Then you heard from Darren Brown, again, why is he
19 important, because he gave a statement to the police on
20 March 11, 2000, the police go straight to the Brown's
21 residence at 1:05 a.m. He's 14 years old. He's had no
22 time to conspire with his brother to make up a lie. And
23 what does he tell the police on Saturday, March 11th, and
24 you, but tell the police on March 11th; he implicates both
25 Michael Smith and his own brother. He says that Michael

1 Smith was trying to stash the gun or give the gun to my
2 brother and I told them you better put that away or I'm
3 going to tell my mother.

4 Why is he credible, not only because he gives a
5 statement to the police way back then at the age of 14, but
6 he implicated not only the Defendant, but his own brother.
7 Let me tell you, that takes courage. That's courage.
8 That's not an easy thing to do.

9 Then you have the testimony of the co-defendant, Frank
10 Roger Brown. Mr. Brown told you that he walked around the
11 vehicle consistent with the way the fingerprints are. He
12 told you that Rivers was on the driver's side and that
13 Rivers opened the door. Consistent with the fingerprints.
14 He told you that -- and he told the police on March 12th,
15 he told police on March 12th, that the Defendant fired his
16 gun in the passenger side window. Lo and behold, months
17 later, whose fingerprints did we find, palm prints did we
18 find.

19 And I'll also let you know, and I did this twice,
20 there is absolutely no deal for his testimony. None, zero.
21 He doesn't deserve any deal. He already gave his statement
22 to the police back in March. He doesn't deserve any deal.
23 He's part of this killing, too. But you know what he
24 really -- how was Frank Roger Brown originally charged in
25 this case, the only way -- listen now, the only way that he

1 is prejudiced in this case is to ease guilt. That's --
2 because if it wasn't for his statement he wouldn't have
3 even have been charged. And if he's not guilty, then Frank
4 Roger Brown is not guilty. That's the only way he's
5 prejudiced. You don't get any more credible than that.

6 Then you have the shell casing. State's Exhibit No.
7 12. Where is it found, passenger side window. Exactly
8 where the gunshot came from. You do not have to be an
9 expert to know. You don't have to listen to Dr. Sexton or
10 even Agent Black to know that the victim by a 9 millimeter
11 pistol.

12 Finally, what does this reasonable doubt do; before I
13 get to that, just very briefly, because you've already
14 heard -- then we have the fingerprints. Look at State's
15 Exhibit No. 23. I apologize I didn't put down which hand
16 is where, but you've heard their testimony, about how Mr.
17 Brown's right hand is on the driver's side and his left
18 hand is on the passenger side. And the only person who has
19 one print is the gunman, right where the shots were fired,
20 Michael Smith.

21 Finally, you have the fact that the Defendant ran.
22 What is the -- when the police know the truth -- even
23 before the police know the truth, Mr. Reasonable Doubt, he
24 takes off and runs. He takes off and runs. It's like the
25 great Joe Lewis once said, I'm a big boxing fan. Joe Lewis

1 once said, well, he can run, but he can't hide.

2 On March 9, 2000, that Thursday afternoon, when
3 Michael Smith gunned down Billy Marion in cold blood and
4 ran to New York he thought he got away with murder. You
5 prove him wrong. You let him know that Billy Marion's life
6 meant something.

7 Ladies and gentlemen, I've never had to serve on a
8 jury before, and I cannot imagine what it's like to have to
9 sit there and not be able to talk. But soon you will have
10 the most powerful voice in this courtroom. And with one
11 word you can let the Defendant know that his violence will
12 not be tolerated. With one word, you can let him know that
13 Billy Marion's life meant something. With one word, you
14 can finally give that family, after five years, some
15 closure. And that word is guilty.

16 As your Solicitor, on behalf of the State of South
17 Carolina, I respectfully ask that you find the Defendant,
18 Michael Smith, guilty of murder.

19 Thank you.

20 THE COURT: Madam Forelady, ladies and gentlemen,
21 you all have been sitting about an hour, and I don't know
22 if you all are much like me, but you do a lot of drinking
23 in the morning of water and coffee and other things, and I
24 would imagine that you all probably need a short break
25 before the Court's charge. So I'm going to do that; take

1 about 10 minutes for you to refresh yourselves after which
2 you will hear the Court's charge on the law.

3 You have heard the parties arguments. You're strictly
4 instructed not to have any conversation among yourselves
5 about what you've just heard.

6 As soon as you've completed refreshing yourselves
7 please knock on the door and let the Bailiff know and at
8 that time we will immediately resume the trial of the case
9 with the Court's charge.

10 Please leave your notes in your seats.

11 Thank you.

12 (Jury out for break at 10:37 a.m.)

13 THE COURT: All right. As soon as they knock,
14 we'll resume. I suggest you all refresh yourselves, also.

15 MR. PASCO: Thank Your Honor.

16 MR. JOHNSON: Thank Your Honor.

17 (Court at recess for break at 10:37 a.m.)

18 (Court in session after break at 11:00 a.m.)

19 THE COURT: Anything before we bring in the jury?

20 MR. PASCO: Nothing from the State, Your Honor.

21 THE COURT: Anything from the Defense?

22 MR. JOHNSON: Nothing from the Defense, Your
23 Honor.

24 THE COURT: Wonderful. Please bring in the jury.

25 (Jury in after break at 11:01 a.m.)

1 THE COURT: Ladies and gentlemen, I hope that you
2 enjoyed your break. The Court will now provide for you,
3 the charge as I indicated.

4 During this trial, ladies and gentlemen, you and I
5 have certain duties to perform. As the trial judge it is
6 my responsibility to preside over the trial of this case
7 and I also have the duty to rule upon or pass upon the
8 admissibility of the evidence during this trial.

9 You are to consider only the competent evidence that
10 is before you, and you are to disregard and disabuse from
11 your mind any testimony ordered stricken from the record in
12 this case during the progress of this trial, if there has
13 been any.

14 You are to consider only the testimony which has been
15 presented from the witness stand. Together with any
16 exhibits which have been made a part of the record in this
17 case, and any stipulations of counsel made into the record.

18 I have the additional duty to charge you on the law
19 applicable to this case. As the presiding judge, I'm the
20 sole judge of the law in this case and it is your duty as
21 jurors to accept and apply the law as I now state it to
22 you.

23 If you have a preconceived idea as to what the law is
24 or what the law ought to be in a case or in this case, and
25 it should not agree with what I now tell you the law

1 actually is, you are obligated under the oath which you
2 have taken to abandon this preconception on your part
3 because you are sworn to accept the law and apply the law
4 precisely as I now state it to you.

5 In every case tried in this court before a jury the
6 jury becomes the sole and exclusive judges of the facts in
7 a case. You, the jury, are the judge of the facts in this
8 case. This Court is the judge of the law.

9 The Constitution of our state has declared that a
10 trial judge shall not intimate, state, comment upon or make
11 any statement to a trial jury about the facts in a case.
12 Since you the jury are the sole judges of the facts in this
13 case you are not to infer anything from what I've said
14 during the progress of this trial in ruling upon the
15 admissibility of evidence or otherwise, or anything that I
16 now say to you during the course of this instruction to
17 you, that I have any opinion about the facts in this case.
18 The law does not permit me to have an opinion about the
19 facts. This is a matter solely for you, the jury, to
20 determine.

21 As jurors, then, it is your duty, as I have instructed
22 you to determine the effect, the value, the weight, and the
23 truth of the evidence that has been presented during the
24 course of this trial. Necessarily, you must assess the
25 credibility of witnesses who have testified in this case.

1 Credibility is simply a legalistic term which means the
2 believability of witnesses.

3 It becomes your duty as jurors to analyze and to
4 evaluate the evidence and to determine that evidence which
5 convinces you of its truth.

6 I instruct you that in determining the question of the
7 credibility or believability of the witnesses who have
8 testified in this case, you may believe one witness as
9 against several witnesses, or several witnesses as against
10 one witness. You may believe a part of the testimony of a
11 witness and reject the remaining part of the testimony of
12 that same witness. If you have a good and sound reason you
13 may believe the testimony of a witness in its entirety or
14 reject the testimony of a witness in its entirety. You may
15 consider whether any witness has exhibited to you any
16 interest, any bias, any prejudice, or other motive in this
17 case. You may consider the demeanor of the witness, that
18 is the appearance and manner of the witness from the
19 witness stand. You can believe as much or as little of
20 each witnesses testimony as you think is proper. You may
21 believe the testimony of a single witness against that of
22 many witnesses or just the opposite. Of course, you do not
23 determine the truth merely by counting the number of
24 witnesses presented by each side.

25 Throughout this process you have but one objective; to

1 seek the truth regardless of its source.

2 I further charge you that the rules of evidence
3 ordinarily do not permit witnesses to testify to opinions
4 or conclusions. An exception to this rule exist for
5 witnesses we call expert witnesses. A witness, who by
6 education and experience has become an expert in some art,
7 science, profession or calling, may state an opinion as to
8 relevant and material matters in which the witness claims
9 to be an expert and may also state the reasons for the
10 opinion.

11 You should consider any expert opinion received in
12 evidence in this case like any other evidence. Give it the
13 weight you think that it deserves. If you decide that the
14 opinion of an expert witness is not based on sufficient
15 education and experience or if you conclude that the
16 reasons given in support of the opinion are not sound or
17 that the opinion is outweighed by other evidence you may
18 disregard the opinion entirely. An expert witnesses
19 testimony is to be given no greater weight than other
20 witnesses simply because the witness is an expert.
21 Further, you are not required to accept an expert's opinion
22 even though it is not contradicted.

23 I further charge you that a person who has a past
24 criminal record is competent to testify during a trial. A
25 past record does not effect the ability of that witness to

1 testify. The past record may only be considered by you if
2 at all in determining the witnesses believability.

3 Remember, you are the sole judges of the facts in this
4 case, and of the believability of any and all witnesses.

5 I charge you that there are two types of evidence
6 which are generally presented during a trial. Direct
7 evidence and circumstantial evidence. Direct evidence is
8 the testimony of a person who asserts or claims to have
9 actual knowledge of a fact, such as an eye witness.
10 Circumstantial evidence is proof of a chain of facts and
11 circumstances indicating the existence of a fact. The law
12 makes absolutely no distinction between the weight or value
13 to be given to either direct or circumstantial evidence,
14 nor is a greater degree of certainty required of
15 circumstantial evidence than of direct evidence. You
16 should weigh all of the evidence in this case. After
17 weighing all of the evidence if you are not convinced of
18 the guilt of the Defendant beyond a reasonable doubt, you
19 must find the Defendant not guilty. Conversely, if you are
20 convinced of the guilt of the Defendant beyond a reasonable
21 doubt then you must find him guilty.

22 I instruct you that the fact that the Defendant was
23 arrested, charged, and indicted in this case is not
24 evidence in this case, and cannot be considered by you as
25 evidence of guilt in this case, nor does it create any

1 presumption or inference of guilt. This documentation,
2 ladies and gentlemen, are simply the formal written
3 instruments which contain the charge or charges made
4 against a defendant. It serves as the formal document by
5 which this case is processed or brought into this court.

6 The Defendant has pled not guilty to the indictment
7 and that plea casts the burden on the State to prove the
8 Defendant guilty, because a person charged with committing
9 a criminal offense in South Carolina is never required to
10 prove himself innocent.

11 I charge you, Madam Forelady, and ladies and gentlemen
12 of the jury, that it is a cardinal and important rule of
13 the law of evidence that the defendant in a criminal trial,
14 no matter what the seriousness of the charge made against
15 him may be will always be presumed to be innocent of the
16 crime for which he is indicted unless his guilt has been
17 proved by evidence satisfying you of that guilt beyond a
18 reasonable doubt. This presumption of innocence does not
19 cease when you retire, but it accompanies the Defendant
20 from the time of his appearance throughout the trial until
21 you reach a verdict of guilt based upon evidence satisfying
22 you of that guilt beyond a reasonable doubt.

23 Our Supreme Court has said that the presumption of
24 innocence is like a robe of righteousness placed about the
25 shoulders of the Defendant, and it remains with him and

1 assigns him to that class, the innocent, until that
2 presumptive robe of righteousness has been striped from his
3 person by evidence satisfying you of that guilt beyond a
4 reasonable doubt.

5 Madam Forelady, and ladies and gentlemen, the
6 presumption of innocence is not mere legal theory. It is
7 not just a legal phrase. It is a substantial right to
8 which every defendant is entitled unless you, the jury, are
9 satisfied from the evidence of his guilt beyond a
10 reasonable doubt.

11 You may ask, what is a reasonable doubt in the law.
12 The State has the burden of proving the Defendant guilty
13 beyond a reasonable doubt. Some of you may have served as
14 jurors in civil cases where you were told it is only
15 necessary to prove that a fact is more likely true than not
16 true.

17 In criminal cases, the State's proof must be more
18 powerful than that. It must be beyond a reasonable doubt.
19 Proof beyond a reasonable doubt is proof that leaves you
20 firmly convinced of the Defendant's guilt.

21 There are very few things in this world that we know
22 what absolute certainty, and in criminal cases the law does
23 not require proof that overcomes every possible doubt. If
24 based on your consideration of the evidence, you are firmly
25 convinced that the Defendant is guilty of the crime

1 charged, you must find him guilty. If, on the other hand,
2 you think there is a real possibility that he is not
3 guilty, you must give him the benefit of that doubt and
4 find him not guilty.

5 The Defendant is charged with murder. The State must
6 prove beyond a reasonable doubt that the Defendant killed
7 another person with malice aforethought. Malice is hatred,
8 ill will, or hostility towards another person. It is the
9 intentional doing of a wrongful act without just cause or
10 excuse and with an intent to inflict an injury or under
11 circumstances that the law will infer an evil intent.

12 Malice aforethought does not require that malice
13 exists for any particular time before the act is committed,
14 but malice must exist in the mind of the Defendant just
15 before and at the time the act is committed. Therefore,
16 there must be a combination of the previous evil intent and
17 the act.

18 Malice aforethought may be expressed or inferred.
19 These terms; expressed and inferred, do not mean different
20 kinds of malice, but merely the manner in which malice may
21 be shown to exist. That is either by direct evidence or by
22 inference from the facts and circumstances which are
23 proved.

24 Expressed malice is shown when a person speaks words
25 which express hatred or ill will for another or when the

1 person prepared beforehand to do the act which was later
2 accomplished. For example; lying in wait for a person or
3 any other acts of preparation going to show that the deed
4 was within the Defendant's mind would be expressed malice.

5 Malice may be inferred from conduct showing a total
6 disregard for human life. Inferred malice may also arise
7 when the deed is done with a deadly weapon. A deadly
8 weapon is any article, instrument, or substance which is
9 likely to cause death or great bodily harm. Whether an
10 instrument has been used as a deadly weapon depends on the
11 facts and circumstances of each case.

12 The following are examples of instruments which may be
13 deadly weapons; a pistol, a shotgun, a rifle, a dirk, a
14 dagger, a knife, a slingshot, metal knuckles, a razor,
15 gasoline, a fire bomb or Molotov cocktail, and lighter
16 fluid.

17 A gun may be a deadly weapon even if it is not
18 operating.

19 I further charge you that the Defendant is charged
20 with possession of a weapon during the commission of or
21 attempt a violent crime. The State must prove beyond a
22 reasonable doubt that the Defendant was in possession of a
23 firearm or visibly displayed what appeared to be a firearm
24 during the commission of a violent crime. A firearm means
25 any machine gun, automatic rifle, revolver, pistol, or any

1 weapon which will, is designed to, or may be readily
2 converted to expel a projectile.

3 In order to find the Defendant guilty of possession of
4 a weapon during the commission of a violent crime you must
5 first find the Defendant guilty of either committing a
6 violent crime or attempting to commit a violent crime.

7 I charge you that murder is defined as a violent crime
8 as specified by South Carolina Code Annotated 16-1-60.

9 I further charge you, ladies and gentlemen, that the
10 hand -- that if a crime is committed by two or more people
11 who are acting together in committing a crime the act of
12 one is the act of all. A person who joins with another to
13 accomplish an illegal purpose is criminally responsible for
14 everything done by the other person which occurs as a
15 natural consequence of that act done in carrying out the
16 common plan and purpose. For example; two people can be
17 guilty of killing another person when only one of the two
18 had a gun. There was only one bullet and only one of the
19 two fired the shot that caused the death. If two or more
20 people are together, acting together, assisting each other
21 in committing the offense, the act of one is the act of
22 all. Or as it is sometimes said, the hand of one is the
23 hand of all.

24 Prior knowledge that a crime is going to be committed
25 without more is not sufficient to make a person guilty of

1 that crime. Mere knowledge that another person is going to
2 commit a crime even if the Defendant is present when the
3 crime is committed is not sufficient to convict the
4 Defendant as a principal. Guilt as a principal is shown by
5 actual or constructive presence at the scene as a result of
6 prior arrangement, therefore, a finding of a prior arranged
7 plan or common scheme is necessary for a finding of guilt
8 as a principal. The State must prove beyond a reasonable
9 doubt by competent evidence the theory of the hand of one
10 is the hand of all.

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

19 The hand of one is the hand of all.

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

25 Intent is also a necessary element, for there must

1 have been a common design or intent to commit the crime.
2 And the crime must have been committed pursuant thereto
3 with the person aiding and abetting by some overt act.
4 Intent means intending the result which actually occurs.
5 Not accidentally or involuntarily. Intent may be shown by
6 acts and conduct of the Defendant and other circumstances
7 from which you may naturally and reasonably infer intent.

8 The State must prove these elements beyond a
9 reasonable doubt.

10 I further charge you that mere presence at the scene
11 is not sufficient to prove someone guilty of a crime. A
12 defendant's presence where a crime is being committed or
13 mere association with a person who commits a crime does not
14 make a defendant an accomplice or an aider and abetter of
15 the person committing the crime.

16 The burden is on the State to prove every element of
17 the crime charged.

18 If you find after reviewing all the evidence that the
19 State has proved that the Defendant was only present at the
20 scene of a crime and that they have not proved beyond a
21 reasonable doubt any other participation in the crime, then
22 you must find the Defendant not guilty.

23 The law is that proof at the scene of the crime is not
24 sufficient to find someone guilty.

25 Madam Forelady, ladies and gentlemen, the indictment

1 in this case allege several different offenses against the
2 Defendant. Those charges are as follows: As to Indictment
3 2004-GS-09-145, murder. And Indictment 2004-GS-09-202,
4 possession of a firearm during the commission of a crime of
5 violence. Each indictment charges a separate and distinct
6 offense. You must decide each indictment separately on the
7 evidence and the law applicable to it uninfluenced by your
8 decision as to any other indictment.

9 The Defendant may be convicted or acquitted on any or
10 all of the offenses charged.

11 You will be asked to write a separate verdict of
12 guilty or not guilty for each indictment.

13 There are four possible verdicts in this case.
14 There's no significance whatsoever to the order in which I
15 state these possible verdicts. It is simple that one must
16 be stated first.

17 Madam Forelady, ladies and gentlemen, your verdict
18 must be a unanimous one.

19 Madam Forelady, when the jury agrees on a verdict, you
20 will write the verdict on the back -- on the verdict forms
21 as they will be provided to you. It will also be your
22 responsibility to knock on the door and advise the Bailiff
23 that you have completed your deliberations. It is also
24 your responsibility to preside during jury deliberations
25 and if the jury needs to communicate with the Court it is

1 also your responsibility to write out any questions so that
2 the can be presented to the Court.

3 I tell you at the outset that if you all have any
4 questions there's a procedure that we must follow in
5 answering those questions, so if there's some delay please
6 do not think that we have ignored you. We are simply in
7 the process of adhering to that process.

8 Again, as I've indicated, your verdict must be a
9 unanimous one.

10 The forms of the verdicts are as follows, and these
11 forms will go into the jury room with you. As to
12 Indictment 2004-GS-09-145, we the jury by unanimous consent
13 find the Defendant guilty of murder or not guilty. As to
14 Indictment 2004-GS-09-202, we the jury by unanimous consent
15 find the Defendant guilty of possession of a firearm during
16 the commission of a crime of violence or not guilty.

17 Again there is no significance whatsoever to the order
18 in which these verdicts are state, it is simply that one
19 must be stated first.

20 I'm going to ask now that you return to your jury room
21 but do not begin your deliberations. There are some
22 matters of law that I need to take up with the attorneys
23 that may require further instruction or clarification of an
24 instruction. If there be no further instruction we will
25 send your notes into you, along with the evidence and the

1 verdict forms and at that time you will be allowed to begin
2 your deliberations.

3 I need to also let you know that we've ordered lunch
4 for you and it will probably be here about -- by noon.
5 Okay.

6 Please return to your jury room and leave your notes
7 in your seats for me.

8 (Jury out to jury room to wait for evidence and verdict
9 form to begin deliberation at 11:22 a.m.)

10 THE COURT: I need for you all to go through all
11 of the evidence and make sure it's in order.

12 Okay, Mr. Clerk, I'll give that to you to put with the
13 evidence and then as soon as we print the other one, I'll
14 give you the other one and then you can take it in, and we
15 can dismiss the alternate.

16 All right. Is there any exception to excusing the
17 alternate and allowing the jury to begin their
18 deliberations?

19 MR. JOHNSON: No exceptions, Your Honor.

20 MR. PASCO: No, ma'am.

21 THE COURT: If you could bring the alternate for
22 me. And we probably need to go ahead and collect their
23 notes too, so it all can go in at one time.

24 Oh, I need to ask -- are there any exceptions to the
25 charge from the State?

1 MR. PASCO: No exceptions from the State.

2 THE COURT: From the Defense?

3 MR. JOHNSON: No exceptions from the Defense, Your
4 Honor.

5 THE COURT: Okay.

6 THE CLERK: Get the notes?

7 THE COURT: All but the alternate. We'll just
8 destroy hers. You don't have to get the alternate. We'll
9 -- yeah, we'll give her hers when she come back out and let
10 her destroy them.

11 THE COURT: They can go ahead.

12 Ma'am, on behalf of the State as well as the Defense
13 counsel, we thank you for your time and your attention to
14 this case. I've watched you, you've been very diligent,
15 you've been punctual and being an alternate is such a
16 thankless job. You get to do all the work, but you don't
17 get to actually deliberate.

18 What I was going to tell you is that you are free to
19 leave or you're free to stay with us. Your service on this
20 case is ended. You are free to discuss the case if you
21 would like, but I would ask that you wait until the jury
22 has reached its verdict before you would discuss it. If,
23 however, you don't want to discuss it, and someone should
24 persist in trying to speak to you, please contact Mr. Hasty
25 so that we can take action to make sure that your privacy

1 is protected.

2 If you'd like you may stay for lunch if you'd like or
3 you may also wait while the jury deliberates, but again as
4 I've indicated you're free to leave if you'd like to. And
5 we've kept your notes for you. You can do whatever you
6 like with them. If you want to destroy them or keep them,
7 it's up to you, but we thank you on behalf of the court
8 system. We know your sacrifice. You're excused.

9 Thank you.

10 (Alternate juror is released at 11:39 a.m.)

11 THE COURT: All right. We'll be at ease.

12 (Court at recess for jury deliberation at 11:40 a.m.)

13 (Court in session for verdict at 2:02 p.m.)

14 THE COURT: You may be seated.

15 The Court has been advised that the jury has reached a
16 verdict.

17 Is there anything from the State before we receive the
18 jury's verdict?

19 MR. PASCO: No, Your Honor.

20 THE COURT: From the Defense?

21 MR. JOHNSON: Nothing from Defense, Your Honor.

22 THE COURT: If you could bring in the jury.

23 (Jury in with verdict at 2:05 p.m.)

24 THE COURT: Madam Forelady, is it correct that the
25 jury has reached a verdict?

1 JURY FORELADY: Yes, we have, Your Honor.

2 THE COURT: If you could give the verdict to the
3 Bailiff for me.

4 (Verdict form passed to bailiff.)

5 THE COURT: Thank you. You can take your seat.

6 Thank you.

7 Mr. Clerk, if you could publish the form with the
8 verdict.

9 THE CLERK: Yes, ma'am.

10 THE COURT: Thank you.

11 THE CLERK: Will the Defendant please rise.

12 The State verses Mike A. Smith, as to Indictment No.
13 2004-GS-09-0145, we the jury by unanimous consent find the
14 Defendant guilty of murder. As to Indictment No. 2-4-GS-
15 09-0202, we the jury by unanimous consent find the
16 Defendant guilty of possession of a weapon during the
17 commission of/or an attempt to commit a violent crime.

18 Madam Forelady, ladies and gentlemen of the jury, if
19 that be your verdict so say you all?

20 (Jury responds in the affirmative.)

21 THE COURT: Is there any request to poll the jury
22 from the State?

23 MR. PASCO: No, Your Honor.

24 THE COURT: From the Defense.

25 MR. JOHNSON: Your Honor, I would request you poll

1 the jury.

2 THE CLERK: Okay.

3 Mr. Clerk, if you would proceed with polling the jury.

4 You all can take your seats as the jury is polled.

5 THE CLERK: Each juror beginning with Madam
6 Forelady, because a juror has a right to descent from the
7 verdict at any time, the Court is required to poll the jury
8 members have been discharged and (inaudible) and still may
9 descent until they're excused.

10 Each?

11 THE COURT: Each juror.

12 THE CLERK: Madam Forelady, what is your verdict?

13 JURY FORELADY: Guilty.

14 THE CLERK: What is your verdict?

15 JUROR: Guilty.

16 THE CLERK: And your verdict?

17 JUROR: Guilty.

18 THE CLERK: And your verdict?

19 JUROR: Guilty.

20 THE CLERK: And your verdict?

21 JUROR: Guilty.

22 THE CLERK: And your verdict?

23 JUROR: Guilty.

24 THE CLERK: And your verdict?

25 JUROR: Guilty.

1 THE CLERK: And your verdict?

2 JUROR: Guilty.

3 THE CLERK: And your verdict?

4 JUROR: Guilty.

5 THE CLERK: And your verdict?

6 JUROR: Guilty.

7 THE CLERK: And your verdict?

8 JUROR: Guilty.

9 THE CLERK: And your verdict?

10 JUROR: Guilty.

11 THE CLERK: It is unanimous consent.

12 THE COURT: Thank you.

13 Madam Forelady, ladies and gentlemen, on behalf of the
14 State as well as the Defense counsel we thank you for your
15 time and your attention to this case.

16 We know that jury duty is at its very best difficult.
17 It requires you to take time from your work
18 responsibilities as well as your family responsibilities.
19 I hope this week, as I told you during jury qualification,
20 that you have found this experience educational. I hope
21 that leave it knowing how your system of justice actually
22 operates. It's a little different from Law and Order and
23 The People's Court. Because I hope, at the very least that
24 you leave knowing how integral you are to it. Our system
25 is very unique. It is the only system where your peers

1 hear a case or a cause of action and make a decision and
2 act as fact finders. So it is very unique in that way.

3 I hope you know that we have appreciated your time.
4 Your work excuses as well as your checks will be mailed to
5 you. If any of you need work excuses or otherwise before
6 that time, please let us know and I will have the Clerk
7 staff provide you with that before you leave today.

8 Immediately following my remarks to you, we will hear
9 post-trial motions as well as have the sentencing for the
10 Defendant. If any of you wish to remain for that process
11 you are welcome to do so.

12 You are welcome, now that this case has concluded, to
13 discuss this case with anyone that you would like. By the
14 same token, if you do not want to discuss the case you are
15 free to do that also. If someone should persist in trying
16 to speak with you please get their information and provide
17 that to Mr. Hasty so that the Court can take appropriate
18 action to make sure that your privacy is protected and that
19 you are not harassed in any way.

20 With the thanks of the Court, you're excused. If you
21 would to stay for sentencing, please let the Bailiff know
22 and we will have you escorted to the gallery of the
23 courtroom.

24 (Jury is released at 2:07 p.m.)

25 THE COURT: We will be at ease for a moment at

1 which time I'll hear post-trial motions and sentencing.

2 (Court at recess for short break at 2:07 p.m.)

3 (Court in session after break at 2:11 p.m.)

4 THE COURT: You may be seated.

5 Are there any post-trial motions?

6 MR. JOHNSON: Your Honor, I'd just like to renew
7 the previous motions, prior, I ask for a judgment not
8 withstanding the verdict. I still feel there was not
9 sufficient evidence for the jury to reach that verdict.

10 THE COURT: Okay. Would the State like to respond
11 to the post-trial motion?

12 MR. PASCO: Your Honor, there was certainly enough
13 evidence, we believe, in this case. We very much
14 appreciate the jury's verdict in this case. Thank you.

15 THE COURT: Okay. I will stand by my earlier
16 ruling. I think there is sufficient direct as well as
17 substantial circumstantial evidence which reasonably tends
18 to prove the guilt of the accused. And the record, I'm not
19 going to go back through all the evidence. We were all
20 here -- we heard it and certainly -- I think there is
21 sufficient evidence in the record to support the jury's
22 verdict. And the motion is denied.

23 MR. JOHNSON: Thank you, Your Honor.

24 THE COURT: You're welcome. Is there anything
25 further with regard to sentencing from the State?

1 MR. PASCO: Your Honor, the Defendant does have a
2 record --

3 THE COURT: Okay.

4 MR. PASCO: -- he's got some adjudications as a
5 juvenile in Georgia back in 1998, criminal trespass,
6 obstructing a police officer. He also has convictions in
7 New York, after he fled to New York. Interestingly, he was
8 arrested in April of 2000, so just a month after he
9 murdered Mr. Marion. He's got convictions for marijuana,
10 assault with intent to cause physical injury and resisting
11 arrest.

12 There are some family members of Mr. Billy Marion that
13 would like to address the court.

14 THE COURT: Certainly, I'll be glad to hear from
15 them.

16 Does the State take any position on sentence?

17 MR. PASCO: We would just ask for substantial
18 sentence, Your Honor. We'll leave that up to the Court and
19 as you know, there is a range of 30 years to life. We'd
20 ask for a substantial sentence. I would like to mention
21 one other sad note in this case.

22 THE COURT: Certainly.

23 MR. PASCO: Number one, also I want to express
24 appreciation to one person. The person I want to express
25 appreciation to is the Sheriff's Office, because when I

1 took office in January this was one of the first cases he
2 was asking about. He pushed me and he pushed my office to
3 make sure and call this case, and did everything possible
4 to get me prepared for this case so this family could have
5 some closure.

6 On a sad note, Billy's father, for five years, his name
7 was Kenneth Marion, he waited for five years to get some
8 closure, and to watch this man brought to trial, and he
9 passed away last month. I say that because I just felt
10 like the whole time we were getting ready for this case and
11 while we were in this courtroom we all felt his presence,
12 because this case just kept getting better and better. I
13 wanted to tell the family that.

14 Ms. Frick has some of the family members of Billy
15 Marion and they'd like to address the Court.

16 THE COURT: I'd be glad to hear from them.

17 MS. FRICK: Your Honor.

18 THE COURT: If they could identify themselves for
19 the record.

20 MS. FRICK: And I'll identify them as well, Your
21 Honor. There are a number of family members present, two
22 of which wanted to address Your Honor and one is Billy
23 Marion's niece, Crystal.

24 THE COURT: Okay. Yes, ma'am.

25 CRYSTAL MARION: First of all, I want to start off

1 by saying what a wonderful person my Uncle Billy was. He
2 was the type of person that if he was doing something and
3 you came to him for help, he would drop everything he was
4 doing just to help you.

5 MR. PASCO: I'll go ahead and read it.

6 THE COURT: Certainly. You may proceed.

7 MR. PASCO: Uncle Billy stayed at home with my
8 grandfather and my disabled uncle. He did all the cleaning
9 and yard work around the house. He loved to work. His
10 greenhouse and garden and flowers were his specialties. In
11 the morning he would go to work and he would get off around
12 3:00. He had a friend he worked with but really never
13 talked to him outside of work because of his
14 responsibilities at home after work. On the weekends, if
15 he left to go to town, my grandfather and uncle would ride
16 with Uncle Billy. He never had a family of his own,
17 meaning he never married or had children. He never had
18 time to get to know someone to have a relationship with
19 because he chose a life with us as a care-taker, taking
20 care of their family instead of raising his own family. At
21 the death of my grandfather, my Uncle Billy assumed all the
22 responsibility of helping my grandfather care for my
23 disabled uncle. My grandfather couldn't do it all,
24 especially when he got older and it was hard for him to be
25 outside in the heat and even to walk. So this

1 responsibility became a part of my Uncle Billy's life.
2 When I was growing up I always looked up to Uncle Billy. I
3 would just light up when he would come over or I would go
4 over to see him. He sat down and played games and listened
5 to me, he listened to music with me, he played the piano.
6 Since he didn't have any children of his own he would spoil
7 me. He took up a lot of time with me and I am so glad that
8 I didn't take that for granted. The day of March 9, 2000,
9 I was at my future school for an orientation. My office
10 called my mother in there and told her she had a phone
11 call. She came out and told my dad that he needed to call
12 his father. So my dad went out and came back in and said
13 we have to go. Well, we didn't know what was going on. My
14 mother stopped my daddy in the hall and asked what was
15 wrong. I have never seen him act like that. So I knew
16 something was wrong. He told my mom that his brother had
17 been shot. After we found out all the facts that my Uncle
18 Billy had been the one and he had passed away I just cried
19 and cried and cried all day and night. It effected every
20 one in my family, especially me, personally. I couldn't
21 sleep at night. I was scared to go or be by myself thinking
22 that something like that would happen to me. I would
23 constantly watch my back, specifically, one time I had an
24 attack like someone was chasing me when I was coming out of
25 a store. The day we had to lay Uncle Billy to rest was the

1 first time I ever saw my dad cry and get emotionally upset,
2 to me, I didn't like seeing my dad cry, because I looked up
3 to him and I was daddy's little girl. It really hurt my
4 grandfather, too. He recently passed away hoping that he
5 could see this day. I know that he is looking down seeing
6 it from a good perspective. The result of my uncle passing
7 away hurt our family a lot because every week or sometimes
8 more I would go to my grandfather's to clean and help him
9 out with things around the house. My dad would also go
10 over there and would clean with me, but most of the time
11 there he would spend doing yard work. I enjoyed going over
12 there and spending time with them but sometimes it was
13 stressful when I had other priorities, but I knew I needed
14 to be with my grandfather. I also had a brother. He was
15 born after the death of my Uncle Billy. I wish my brother
16 could have known Uncle Billy. Because of this tragedy all
17 of my brother has are my memories of Uncle Billy that I
18 will share with him. No matter what I tell my brother he
19 will never be able to actually feel or see the kindness,
20 gentleness and generosity that my uncle showed everyone
21 during his lifetime. My dad's brother and family that
22 lives in New Jersey is also hurt by what happen because
23 there were so many miles apart and didn't get to see each
24 other too often because of the distance between them. I
25 just wanted to tell you, Your Honor, how Uncle Billy was

1 such a nice, caring, and loving person that would never
2 intentionally harm someone. Also, I wanted to express my
3 family's experience through this hard and difficult time.
4 It bothers me tremendously to think about or even realize
5 the fear my Uncle Billy must have suffered right before he
6 died. This is something that will trouble my whole family
7 for the rest of our lives. I feel the only way that he
8 will receive peace in his heart for what has been done to
9 my Uncle Billy and our family is to admit his guilt, this
10 being the Defendant, and ask our forgiveness and show some
11 remorse to my family and to the Lord. This is something
12 that he will have to live with for the rest of his life.
13 The fear and pain he has caused my uncle to experience at
14 his death, the void in my family's life living with out my
15 Uncle Billy, and the pain in our hearts will always be
16 there, forever..

17 MS. FRICK: And, Your Honor, this is Mr. Marion's
18 brother, Kenny Marion, who would also like to address the
19 Court.

20 THE COURT: Yes, sir. You may proceed.

21 KENNY MARION: I think my niece did a very good
22 job of what she said what I have to saw about my brother.
23 One thing I have to say about my brother is that he was the
24 backbone of this -- he was the one that kept this family
25 going, because my father being very ill, this five years of

1 my father's life. He went downhill, because he didn't have
2 my brother Billy there to take care of him because he was
3 buried. And my other brother that lives with my father, he
4 is not very well, himself. I don't think that this was
5 fair that this happened to my brother.

6 THE COURT: Thank you, sir.

7 Is there anything further from the State. Any other
8 family members that wish to address the Court?

9 MS. FRICK: No, ma'am. That's all.

10 MR. PASCO: No, Your Honor. Thank you for your
11 patience.

12 THE COURT: You're welcome.

13 Mr. Johnson, the Court will be glad to hear from you.

14 MR. JOHNSON: Your Honor, I'm not sure how you'd
15 like to do it, but I have the mother and father.

16 THE COURT: Certainly, I'll be glad to hear --
17 I'll be glad to hear from them whenever they wish to
18 address the Court. Are they present?

19 MR. JOHNSON: They --

20 THE COURT: I thought I saw his father --

21 MR. JOHNSON: Your Honor, one moment.

22 THE COURT: Certainly.

23 Mr. Smith, you can take your seat while Mr. Johnson
24 finds your mother.

25 MR. JOHNSON: Your Honor, this is his mother.

1 THE COURT: Yes, ma'am.

2 MR. JOHNSON: This is Caroline and his father. I
3 think they both would like to address the Court.

4 THE COURT: Certainly. If you would just state
5 your name for the record before making any comments.

6 TOMMY SMITH: I'm sorry. My name is Tommy Smith.

7 THE COURT: Yes, sir.

8 TOMMY SMITH: I don't know where to start. Your
9 Honor, in this Court, this has been a long drawn out ordeal,
10 for myself. I have never been through nothing like this in
11 my life. This was the oldest son that I had. And I didn't
12 raise him this way, Your Honor. He went to school. I
13 tried to teach him all the right things in life. I
14 understand sometimes kids go astray. I didn't raise him up
15 to have to be before you in Court like this. In no trouble
16 like this. I've never been in any myself. I ask Your
17 Honor, if it be your will, I know that this has been a bad
18 thing that happened, and -- to the family, and I want to
19 say to the family that I didn't know anything about this,
20 I'm sorry that this took place. If it would have been me I
21 would have felt the same way that you guys felt. And I
22 know that don't say a whole lot, and I know that can't
23 bring your loved one back to you, but all I can say is I
24 will forever be sorry that this thing happened to your
25 loved one, because it could have happened to somebody in my

1 family. I will ask that you forgive my family and find it
2 in your heart someway to find it in your heart as you begin
3 your closure to this ordeal, to find it in your heart to
4 forgive my son for what has happened here. I ask that, one
5 day sooner or later, that you do find some forgiveness in
6 your heart.

7 Your Honor --

8 THE COURT: Yes, sir.

9 TOMMY SMITH: -- I ask that, please, my son is
10 just a 22 year old kid, really. And he was a kid when this
11 happened. He was younger then than he is now. I ask that
12 you spare him some time. I know he got to go to jail. I
13 ask that you at least be lenient so he can get out one day.
14 I know that this is a bad thing. But I ask for the Court,
15 I ask for the mercy of the Court, that is, that if you can
16 show some leniency so he may can get out one day so he
17 won't have to stay in there for the rest of his life. I
18 know that he has to pay for the penalties and the costs for
19 being involved in such a thing. But I ask Your Honor, with
20 this being my only child in the world that I have, I ask
21 that the Court show some leniency so that he may can get
22 out some time or another and still have some sort of life.
23 I know he has to pay for whatever he has participated in.
24 But, I ask the Court, I beg the Court, and everybody in it,
25 for their forgiveness and to give him some sort of chance

1 somewhere down the road.

2 I don't know what else to say, Your Honor, besides the
3 fact that I am sorry that this ever took place, and if it
4 was up to me this would never have happened. My son don't
5 listen to me.

6 THE COURT: Thank you very much, sir. I know this
7 has been very difficult for you to address the Court, as
8 well as it had been for the victims family.

9 Does his mother -- is his mother able to compose
10 herself sufficiently to address the Court or does she not
11 wish to address the Court.

12 MR. JOHNSON: I'll talk to her.

13 CAROL WILLIAMS: My name is Carol Williams. I'm
14 Michael Smith's mother. I can't tell you how sorry I am
15 that this happened. I tried to raise him the best way I
16 knew how. Maybe I was wrong for letting him run, but I was
17 so scared, a mother -- I did not know what would happen to
18 him. I admit that. But, if I can tell you, please God,
19 knows I would. If I could bring back your loss I would.
20 I'm so sorry that this happened, and please Jesus, God,
21 forgive my son, please. One day, somehow, someday, please
22 find forgiveness, because I'm sorry this happen, because I
23 could not imagine losing a loved one. I lost my mother and
24 I know how that felt, and this, you know, you lose somebody
25 -- I'm so sorry that it happen. Please, Your Honor, I just

1 ask some forgiveness for my son. That's all I can do, and
2 the rest, I give it to God. I can't do this. It's hard,
3 trying to raise kids and they don't listen to you and
4 whatnot, and that's all you can do is try to do your best
5 as far as your kids. And teach them right from wrong, and
6 I'm just so sorry. I am so sorry, and I know it's not
7 enough, but that's all I can say. I'm sorry that this
8 happened.

9 MR. JOHNSON: Thank you, Your Honor.

10 THE COURT: Thank you for your candor. I know it's
11 been difficult.

12 MR. JOHNSON: Your Honor, I think my client would
13 also like to address --

14 THE COURT: Certainly. I'd be glad to hear from
15 him.

16 MR. JOHNSON: Your Honor, before he starts
17 addressing the Court, I think I just want to say what I
18 need to say now.

19 THE COURT: Certainly.

20 MR. JOHNSON: All right.

21 THE COURT: Certainly if you want to or you can
22 wait until after he addresses the Court. It's up to you,
23 how you'd like to proceed.

24 MR. JOHNSON: Well, Your Honor, I basically, told
25 Michael a few minutes ago that before -- it's almost like

1 something when I was in the Mason's before you have
2 somebody pray for you, now you have to pray for yourself.
3 I told Michael that I spoke for him during this trial, and
4 now he has to address the Court for himself. He's decided
5 he wants to address the Court.

6 THE COURT: Okay. Yes, sir. I'll be glad to hear
7 from you.

8 MICHAEL SMITH: First I'd like to apologize to the
9 family for Mr. Marion's death. I know it was something I
10 could hardly believe that it happen. I do apologize. I
11 don't know how it could happen.

12 TOMMY SMITH: I can't do this thing. Please don't
13 make it harder. Why you do your family like this.

14 MICHAEL SMITH: I know it was wrong. The thing
15 that happened was it wasn't anticipated or nothing like
16 that. I still to this day say, I'm not the one who shot
17 Mr. Marion, because I'm not. I feel like there's no
18 justice has been done here today because y'all are sending
19 the wrong person to jail for something like this. Well, I
20 do apologize to the victim's family. I apologize to my
21 family, to the jury, to you, Judge Jefferson, people in
22 court and everybody in my family.

23 MR. JOHNSON: Your Honor, finally, as I said, I
24 know the Court is limited in the sentencing in this stage.
25 I know there is a minimum of 30 years that Michael is

1 looking at up to his life. I ask the Court -- you have
2 extremely more experience than I have, in the sentencing
3 matter, Your Honor, but there are extremes. There are
4 gross extremes of murder and there are minimum extremes of
5 murder and I ask the Court to look at this with the wisdom
6 that I'm sure the Court has in its sentencing.

7 THE COURT: Thank you very much.

8 Is there anything further that you wish to present on
9 behalf of the Defendant?

10 MR. JOHNSON: Nothing further, Your Honor.

11 THE COURT: Okay, thank you. You may be seated.
12 Anything further from the State?

13 MR. PASCO: No, Your Honor. Thank you.

14 THE COURT: You're welcome.

15 The most difficult thing I think, and I -- I don't
16 want to speak for all of my colleagues, because I certainly
17 cannot. I -- you know, we're all -- all 46 of us are -- I
18 think we have more than 46 now, but -- are very different.
19 We are all different people. I would assume that's why we
20 all serve in the office and the capacity that we serve in
21 because we all bring a different perspective to the bench.
22 But I think that if I were to have them all here with me
23 today, and I would ask them what is the most difficult
24 thing that a circuit judge has to do. I think probably
25 unanimously they would say to me the sentencing of

1 defendants is probably the most difficult thing that a
2 judge has to do, because -- well, for many reason, but I
3 think the main reason would be because it is incumbent upon
4 the Court and is our responsibility to do justice. Not
5 only to the families and victims of crimes, but also to do
6 justice to the defendants to ensure that fair trials are
7 given so that the public is instilled with a confidence in
8 our system and that it works. And also sufficiently to
9 make sure that the interest of the community are protected
10 and there's appropriate consequences for what, at best, can
11 be described as abhorrent behavior.

12 I sat and -- for those of you who know me know I'm a
13 great lover of people. Probably if you had -- I often tell
14 jurors when I am instructing them not to talk around the
15 courtroom to people that as Southerners we are very social.
16 We can have the most animated of conversations about the
17 weather and anything else. I'm that way by nature, and
18 those of you who know that I have a great concern for
19 people. It's just my nature. It's who I am. And I sat
20 and I watched and I observed. I've observed -- you know,
21 sometimes as a judge, as you sit and observe, people don't
22 realize you're observing. I think sometimes they think
23 we're disinterested or that we really aren't paying
24 attention, but you develop a way of listening and observing
25 without people actually knowing you're doing it, and by

1 doing that you really get a true sense of who people are to
2 some extent if you have a good level of discernment, and
3 you get a real good sense of a trial and the evidence that
4 is presented during a trial, as well as, those who are
5 involved. You get a very good sense of the credibility and
6 believability of witnesses, as well as, all of the other
7 things that are introduced during the course of the trial,
8 and I've watched very intently. I've watched the effect
9 that this trial has had on the State, and when I say the
10 State, I mean, Mr. Pasco, and Ms. Frick, and their
11 associates, as well as, Mr. Johnson and his investigator
12 and his other staff that have been assisting him in the
13 trial of this case. I've watched the gallery. I've
14 watched those attached to the decedent in this case, and
15 I've watched those attached to Mr. Smith.

16 And I think the great tragedy of this entire situation
17 is I'm watching and I'm watching two families who are
18 completely devastated over something that probably took
19 less than an hour to conceive and to follow through, and as
20 a result now, we are left with the remnants of that
21 devastation. I have a family sitting here who really in
22 the voices of Crystal Marion and Kenny Marion, who've been
23 very candid with this Court, who have told this Court how
24 ~~much they loved their uncle and brother, and really what a~~
25 unique human being he was. There are not many people who

1 would give up their future to care for their family, at
2 least not in this day and age. And it appears from all
3 accounts of what they have presented to the Court that he
4 really was quite an exceptional person.

5 And then I have the other side of the equation to deal
6 with, Mr. Smith, who was at the time of this incident 16
7 years old. He is now 21. Who in the eyes of the law is a
8 man, but we know that men, as much as I hate to tell you
9 all this, mature much less quickly than women, and who
10 really for all intents and purposes in terms of his
11 maturity level is probably about 17. Who I still think has
12 not even remotely grasped the severity of where he finds
13 himself. Or the severity of what has happened. I watched
14 his father, I watched his mother and I believe
15 wholeheartedly, and again I appreciate their candor. I --
16 you know, I often think how difficult it would be if I had
17 to stand before a stranger and talk about the most intimate
18 of details of my life. I don't know that I would have the
19 intestinal fortitude to do it. So I'm always overwhelmed
20 by the candor with which victims, as well as, families of
21 defendants are able to stand before me, who for all intents
22 and purposes are a stranger and confide in me in this open
23 forum the most intimate details of their feelings, and of
24 the things they've experienced and will continue to
25 experience. And I am clear from having listened to his

1 parents that they are substantial people, that as my daddy
2 would often say, they have done the best they can with what
3 they have.. And they have tried the best they can to raise
4 decent children who know right from wrong. And I think
5 most telling for me has been watching Mr. Smith, as he
6 watched the reaction of his parents. No level of empathy.
7 I found that very troubling.

8 If my father were to break down in my presence and cry
9 I couldn't hold it together. The sheer fact that I had
10 disappointed him to that level would devastate me. The
11 fact that he is able to observe his parents with a
12 completely flat affect and have absolutely no empathy for
13 their pain tells me a lot about who he is as a person. And
14 to some extent it is corroborated for me what I have
15 observed during the course of this trial.

16 I don't know what happened that night. I wasn't there.
17 I don't know how this ill-fated situation came to be. And
18 I am certain that if both Mr. Smith and the other young
19 gentleman who testified could go back and redo it that they
20 may have done it differently. I would hope that they would
21 have done it differently, but I listened very intently to
22 the trial in this case. I listened very intently to the
23 evidence and while largely circumstantial I did find the
24 ~~testimony of the gentleman who testified, and I believe his~~
25 name was Mr. Brown, if I'm correct, and I don't want to

1 mis-speak to make sure I'm accurate. Yes. Frank Brown,
2 Jr., and I found it really compelling that really he had no
3 incentive to come here and tell the truth. He's facing the
4 same thing Mr. Smith is facing. And yet in spite of that he
5 was candid with this Court and said what happened that
6 night.

7 Now, do I know who actually had the gun. I don't
8 know. I wasn't there, and you know, I'm not clairvoyant,
9 so there's no way for me to be able to ascertain that. The
10 record, however, as far as what I have been able to observe
11 clearly supports the accomplice liability. It really is
12 not -- it's really at some point, I guess, immaterial who
13 had the gun because in our State the hand of one is the
14 hand of all. Doesn't really matter who shot the gun. So
15 to that extent I think the record more than supports the
16 conviction on the charge of murder.

17 Normally, and my clerk -- and Summer's only been with
18 me -- hadn't been a full week, my previous -- we're in the
19 process of changing law clerks. My previous law clerks
20 will tell you that during the course of sentencing I say
21 very little. One, because we're encouraged by Court
22 Administration to say very little, and one, because
23 sometimes there just doesn't need to be anything said.

24 But, sometimes in circumstances I feel compelled to
25 say something, and I hope that -- I don't think there's

1 anything that I could say to bring comfort to either of
2 these families. That just -- I wish that I could, but I
3 can't. But I would hope that today, both for the victims
4 family in this case, as well as, for Mr. Smith's family,
5 and I say that in all earnesty that some healing would
6 start, and that they will all be able to bring closure to
7 this incident. Although the older I get I'm beginning to
8 believe closure is really a word we use as a catch all that
9 I'm not certain actually exists, but nevertheless, I'm
10 hoping that some healing will come about for both of these
11 families as a result of this trial.

12 Considering the age of Mr. Smith, the nature of the
13 crime, as it was committed, and I have to some extent give
14 some consideration to his age, his lack of maturity, his
15 lack of experience, and his lack of wisdom, I think for
16 lack of a better way of being able to articulate things
17 that I'm considering.

18 We all know that on the charge of murder is minimum is
19 30 years, the maximum is life. And the possession of a
20 firearm during the commission of a violent crime the
21 minimum is -- well, the sentence is five years, which the
22 Court has the ability to enhance by running that sentence
23 consecutive.

24 ~~As such, the Court finds it appropriate, sir, and if~~
25 you would stand for me, for the imposition of sentence. On

1 the crime of possession of a firearm during the commission
2 of a violent crime you are sentenced to the State
3 Department of Correction for a period of five years. I'm
4 going to run that concurrently.

5 On the crime of murder, sir, you are sentenced to the
6 State Department of Corrections for a period of forty-five
7 years.

8 The State has asked for a substantial sentence in this
9 case and they have not advocated for a life sentence, which
10 we know in South Carolina life is life. It means you never
11 have the opportunity for parole or release. Because of Mr.
12 Smith's age, I did not think a life sentence would be
13 appropriate not because of the nature of the crime, but
14 because of his lack of maturity and discretion at the time.
15 I do think that the Court should give that some
16 consideration. While the Court has given him more than the
17 minimum, and while he -- for all intents and purposes I
18 don'[t represent how the Department of Corrections
19 calculates sentences. I have no authority in that regard,
20 but it my understanding that they calculate that day for
21 day.

22 MR. JOHNSON: Yes, ma'am.

23 THE COURT: But he still has the opportunity for
24 parole. He still has the opportunity to max out the
25 sentence, and I think that still gives him an opportunity

1 for release and to make some measure of his life and to do
2 something other than what he's done -- what is indicative
3 of what he's been convicted of. I also just for -- as I
4 discussed with you all, often times when I have young
5 defendants I consider the life expectancy of the person who
6 was killed and often think that that is a good benchmark in
7 terms of considering what is an appropriate sentence.

8 And so I say that to you. I give all that so you can
9 understand the Court's reasoning and understand why --

10 I thank you all for your time and our attention.
11 Mr. Pasco and Ms. Frick, as well as Mr. Johnson. I thank
12 you for your time. You-all have been very generous to the
13 Court. You've tried a well fought case, zealously
14 advocated for your respective interest, and I appreciate
15 all the courtesies that you've extended to the Court.

16 MR. JOHNSON: Thank Your Honor.

17 MR. PASCO: Thank Your Honor.

18 THE COURT: You're welcome.

19 We will be in recess.

20 (This proceeding was concluded 2:44 p.m.)

August 30, 2005

APPEARANCES:

For the State:

David Pasco, Esquire

Carol Frick, Esquire

For the Defendant:

Charles Johnson, Esquire

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CERTIFICATE

This is to certify that the foregoing matter, The State of South Carolina verses Michael Smith, 04-GS-09-0145, 04-GS-09-0202, having taken place on the 30th day of August, 2005, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said proceeding was reported by the method of Stenomask with backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

Hilda M. Jordan

Hilda M. Jordan, CVR
Circuit Court Reporter
March 18, 2006

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Calhoun County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL SMITH,

APPELLANT

FINAL ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Deputy Chief Attorney for Capital Appeals

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to direct a verdict where there was no substantial circumstantial evidence of appellant's guilt and the state's only evidence appellant shot the decedent was the self-serving claim of Frank Roger Brown, Jr. who was also the primary suspect in the shooting?

STATEMENT OF THE CASE

Appellant was indicted at the June 14, 2004 term of the Calhoun County grand jury for the offenses of murder and possession of a firearm during the commission of a crime of violence. R. 399 - 402.¹ His case was called to trial on August 30, 2005 before the Honorable Deadra Jefferson, and a jury. Charles Johnson represented appellant. David Pasco and Carol Frick were the solicitors. R. 1.

At the conclusion of the trial the jury found appellant guilty on both counts. R. 368, ll. 11 - 19. Judge Jefferson sentenced appellant to forty-five years imprisonment for murder and five years imprisonment for possession of a firearm during a violent crime. R. 391, l. 24 - 392, l. 7.

This appeal follows.

¹ The cover page of the transcript references Dorchester County. However the indictment and the introduction of counsel indicate this is a Calhoun County case.

Appellant said he left the jurisdiction after the shooting "because my mother suggested that I leave. I was only sixteen at the time. I figured mother knows best . . ." R. 281, ll. 6 – 11.³

Discussion

A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged. State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006). The trial court is only obligated to submit the case to the jury if there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused. State v. Nicholson, 367 S.C. 568, 623 S.E.2d 100 (Ct. App. 2005); State v. Parris, 363 S.C. 477, 611 S.E.2d 501 (2005); State v. Zeigler, 364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005).

Where, as here, the evidence merely raises a suspicion of the defendant's guilt the court should direct a verdict. "Suspicion" implies a belief or opinion on guilt based upon facts or circumstances which do not amount to proof. State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001); State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001).

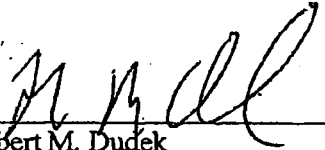
This case is similar to State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000) where the Supreme Court held that a directed verdict should have been issued. The state merely offered evidence that provided a suspicion of Martin's guilt.

Here, the state's only evidence that appellant shot the decedent was the testimony of Frank Roger Brown, Jr. Brown was charged with murder in this case, and he was not a credible witness. His testimony was totally self-serving, and it did not reasonably tend to

³ The defense later requested a charge on flight that informed the jurors that people were often hesitant to face the uncertain prospect of a criminal trial. The trial judge citing State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1990) refused to instruct the jury on flight. The traditional instruction on flight was that conflicting statements and attempts to run away were some evidence of guilty knowledge and intent.

prove appellant's guilt. Further, there was not any substantial circumstantial evidence of appellant's guilt when placing aside, as appellant submits this Court should, Brown's claim that appellant was the shooter. Appellant should be granted an order of acquittal.

Respectfully submitted,



Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

ATTORNEY FOR APPELLANT

April 2, 2007

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Calhoun County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL SMITH,

APPELLANT

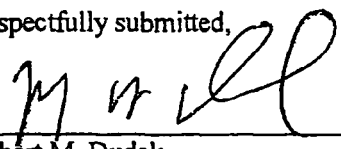
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael Smith states:

1. He is Deputy Chief Attorney for Capital Appeals for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Deadra L. Jefferson, which was held on September 1, 2005, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Michael Smith.

Respectfully submitted,


Robert M. Dudek

Deputy Chief Attorney for Capital Appeals

ATTORNEY FOR APPELLANT

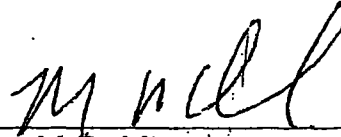
April 2, 2007

10

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

April 2, 2007



Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589
(803) 734-1343

Attorney for Appellant

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Calhoun County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

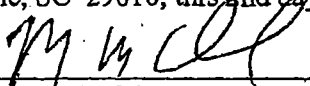
V.

MICHAEL SMITH,

APPELLANT

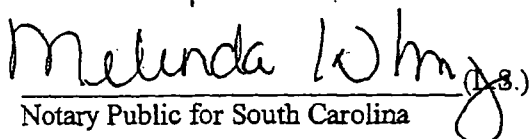
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, Assistant Deputy Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201 and the Final Anders Brief of Appellant and Record on Appeal on Michael Smith, #311064 at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 2nd day of April, 2007.


Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of April, 2007.


Notary Public for South Carolina

My Commission Expires: November 16, 2008

ATTORNEY GENERAL'S OFFICE
RECEIVED 9-4-09

THIS OPINION HAS NO PRECEDENTIAL VALUE. ~~IT~~ SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Michael Smith,

Appellant.

Appeal From Calhoun County
Deadra L. Jefferson, Circuit Court Judge

Unpublished Opinion No. 2009-UP-415
Submitted September 1, 2009 – Filed September 3, 2009

APPEAL DISMISSED

Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek, of Columbia, for Appellant.

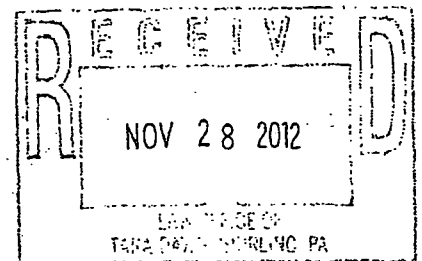
Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Donald J.

Zelenka, all of Columbia; and Solicitor David Michael Pascoe, Jr., of Orangeburg, for Respondent.

PER CURIAM: Michael Smith appeals his convictions and sentences for murder and possession of a firearm during the commission of a crime of violence, arguing the trial judge erred in denying his directed verdict motion. After a thorough review of the record, counsel's brief, and Smith's pro se brief, pursuant to Anders v. California, 386 U.S. 738 (1967) and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), we dismiss the appeal and grant counsel's motion to be relieved.¹

APPEAL DISMISSED.

HEARN, C.J., and KONDUROS and LOCKEMY, JJ., concur.



¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

Document File Copy
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 in 15-150 File
 By SA [Signature] 11/28/12



South Carolina Court of Appeals

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9-22-09

ADMINISTRATIVE INSTRUCTIONS

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OFFICE STREET

COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE (803) 734-1820

FAC (803) 734-1839

WWW.SCCOURTS.ORG

September 21, 2009

REMITTITUR

The Honorable Kenneth Hasty
PO Box 709
St. Matthews, SC 29135-0709

Re: The State v. Smith, Michael
2004-GS-09-00145; 2005-GS-09-00202

Dear Mr. Hasty:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Sincerely,

V. Claire Allen

V. Claire Allen
Deputy Clerk of Court

VCA/lm

cc: Michael A. Smith, #311064
Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka
David Michael Pascoe, Jr., Esquire

FORM 5

2010-CP-09-00088

STATE OF SOUTH CAROLINA

COUNTY OF CALHOUN

MICHAEL A. SMITH, #311064,
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

APPLICATION FOR
POST-CONVICTION RELIEF

2010 APR 19 PM 27

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention LEE CORRECTIONAL INSTITUTION, 970 WISBECKY HIGHWAY, BISHOPVILLE, SOUTH CAROLINA 29010
2. Name and location of Court which imposed sentence CALHOUN COUNTY COURT OF GENERAL SESSIONS, CALHOUN COUNTY S.C.
3. Name(s) of co-defendant(s) (if any) LEON RIVERS, JR.; FRANK R. BROWN
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2004-95-M-0145; MURDER;
 - (b) 2004-95-M-0202; POSSESSION OF A FIREARM DURING
 - (c) COMMISSION OF A VIOLENT CRIME.
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) SEPTEMBER 1, 2005; FORTY-FIVE (45) YEARS
 - (b) SEPTEMBER 1, 2005; FIVE (5) YEARS

ATTEST TRUE COPY

K. Hasty
KEVIN HASTY
CLERK OF COURT
CALHOUN COUNTY

- (b) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES, I DID
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. SOUTH CAROLINA COURT OF APPEALS
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. DISMISSED
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. SEPTEMBER 3, 2009
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. NO. 2 2009-UP-415
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) CONSTITUTIONAL VIOLATION(S)

(b)

(c)

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

(a) INEFFECTIVE ASSISTANCE OF COUNSEL;

(b) TRANSFER OF JURISDICTION

(c)

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? NO.

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO.

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO.

(d) any other petitions, motions or applications in this or any other Court? NO.

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

(a) the specific nature thereof:

i. N/A

ii.

iii.

iv.

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

i. N/A

ii.

iii.

iv.

(c) the disposition thereof:

i. N/A

ii.

iii.

ix. _____

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

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

i. N/A

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO, THEY HAVE NOT.

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

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

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

i. N/A

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) ALL THE ISSUES RAISED ARE NOT FOR THE
 (b) APPEALS COURT REVIEW AND ARE FOR POST-
 (c) CONVICTION RELIEF.

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

- (a) your arraignment and plea? N/A
- (b) your trial, if any? YES, I WAS.
- (c) your sentencing? YES, I WAS.
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES, I WAS.
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A

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

- (a) the name and address of each attorney who represented you:
 - i. CHARLES JOHNSON, JR., Post Office Box 11212, COLUMBIA, S.C. 29211
 - ii. ROBERT DUDEN, Post Office Box 11589, COLUMBIA, S.C. 29211
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. TRIAL and SENTENCING
 - ii. COURT OF APPEALS
 - iii. _____

19. State clearly the relief you seek in filing this application:
BASED ON THE FOREGOING ALLEGATIONS, THE CONVICTION AND SENTENCE BE VACATED OR REVERSED AND REMANDED FOR A NEW TRIAL.

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

N/A, I AM NOT.

STATE OF SOUTH CAROLINA)

VERIFICATION

County of CALHOUN)

I, MICHAEL A. SMITH #311064,
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.

Michael A. Smith

SWORN to and subscribed before me this 16
day of APR, 2010

[Signature] (L.S.)
Notary Public

My Commission Expires: 5-16-11

2010 APR 19 P 3:27

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

MICHAEL A. SMITH, #311064,
I, Michael A. Smith, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

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

Michael A. Smith
Applicant

SWORN or affirmed to and subscribed before me this

16 day of April, 2010

[Signature]
Notary Public

My Commission Expires: 5-16-11

2010 APR 19 P 3:27

STATE OF SOUTH CAROLINA

COUNTY OF CALHOUN

Michael A. Smith, #311064,

Applicant,

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2010-CP-09-0088

RETURN

(Appointment of Counsel Requested)

The Respondent, making its Return to the application for post conviction relief (PCR) filed April 19, 2010, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Calhoun County Clerk of Court. The Applicant was indicted for Murder (2004-GS-09-0145). Applicant was represented by Charlie Jay Johnson, Jr., Esquire. Applicant proceeded to a jury trial before the Honorable Deadra Jefferson. Applicant was found guilty and on September 1, 2005, he was sentenced to forty-five (45) years imprisonment.

A notice of appeal was filed and an Anders brief filed. The appeal was dismissed. State v. Smith, Op. No. 2009-UP-415 (S.C. Ct. App. filed September 3, 2009). The Remittitur was sent on September 21, 2009.

Attached herewith and incorporated herein are the records of the Calhoun County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina

Department of Corrections, the appellate records, and the trial transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

- I. ~~7A.5~~ "Constitutional violations."
 - a. ~~11.1~~ "Ineffective assistance of counsel."
 - b. "Transfer of jurisdiction."

Applicant has failed to set forth with specificity the grounds upon which the application is based and facts in support thereof. S.C. Code §17-27-50. Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCP.

III.

For purposes of this Return, Respondent interprets the allegations to be allegations of ineffective assistance of counsel. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MARY S. WILLIAMS
Assistant Attorney General

By: Mary S. Williams
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

July 26, 2010.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

STATE OF SOUTH CAROLINA
COUNTY OF CALHOUN

IN THE COURT OF COMMON PLEAS

2010-CP-09-0088

MICHAEL A. SMITH, 311064

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:

Jeffrey P. Bloom, Esquire
1911 Pickens Street
Columbia SC 29201

DATED this 27th day of July, 2010.

Aughtry E. K. Randall
Aughtry E. K. Randall, Legal Assistant
For Respondent

State of South Carolina) In the Court of Common Pleas
)
 County of Dorchester) First Judicial Circuit
 2010-CP-09-00088

Michael A. Smith,
 Plaintiff,

Vs.

State of South Carolina,
 Defendant.

Transcript of Record

June 6, 2011

St. George, South Carolina

B e f o r e:

The Honorable Diane S. Goodstein, Judge

A p p e a r a n c e s:

Mary Williams, Esquire
 Attorney for the Defendant

Nicole Singletary, Esquire
 Attorney for the Plaintiff

Bonnie H. Kelly, CVR
 Circuit Court Reporter

EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EV.</u>

NO EXHIBITS INTRODUCED

1 THE COURT: Yes, ma'am.

2 MS. WILLIAMS: May it please the Court. This is
3 Michael Smith. This is case 2010-CP-09-0088. Mr. Smith
4 was represented by Charlie Johnson. He was charged with
5 murder, and he had a trial in 2005. On September 1, 2005,
6 Judge Jefferson sentenced him to 45 years. He did have an
7 appeal. There was an Anders brief filed and that appeal
8 was dismissed, the remittitur sent September 21, 2009.

9 And he filed this application April, 2010. He is
10 alleging ineffective assistance of counsel, constitutional
11 violations. He's represented today by Ms. Singletary, and
12 I'll let her take over now.

13 THE COURT: Great. Yes, ma'am.

14 MS. SINGLETARY: Thank you, Your Honor. If it pleases
15 the Court. Your Honor, Mr. Smith has just notified me
16 that he wants to ask the Court for a continuance.

17 He tells me that he feels that he needs additional
18 time with me; that the -- the information that we have
19 actually discussed and went over -- he would like to go
20 into more detail with the information. And he just asks
21 that I respectfully ask the Court to grant a continuance.

22 Your Honor, I will tell you that I am ready to go
23 forward. It's the wishes of my client, Your Honor.

24 THE COURT: Let me ask you this question: Are there -
25 - are there -- has he been able to articulate for you

1 additional grounds or new grounds?

2 MS. SINGLETARY: No, Your Honor.

3 THE COURT: Okay.

4 MS. SINGLETARY: He has not.

5 THE COURT: Okay. Very well. I'll hear from you, Ms.
6 Williams.

7 MS. WILLIAMS: Your Honor, the State's prepared to go
8 forward today.

9 THE COURT: I'm with you. You know, you're prepared
10 to go forward. Ms. Singletary, the State's ready to go
11 forward. If there were perhaps new or novel or different
12 issues, that would be one thing. You are prepared to go
13 forward, and there's no reason for us not to be able to do
14 that at this time.

15 MS. SINGLETARY: Thank you, Your Honor.

16 THE COURT: Yes. You know, we certainly want to be
17 able to efficiently have folk's PCR hearings held, and --
18 and I think it's appropriate that we go forward.

19 If you'd be so kind as to call your first witness.

20 MS. SINGLETARY: Yes, Your Honor. I call Michael
21 Smith to the stand.

22 THE COURT: All right. Yes, sir. Come along, Mr.
23 Smith.

24 All right. Good morning.

25 THE APPLICANT: Good morning.

DIRECT EXAMINATION BY MS. SINGLETARY - MICHAEL SMITH

6

1 THE COURT: Raise your right hand for me as best you
2 can.

3 MICHAEL SMITH, having been first
4 duly sworn, testifies as follows:

5 THE COURT: If you'd please be seated, and state your
6 full name for the record.

7 THE APPLICANT: Michael Angelo Rasheen Smith.

8 THE COURT: How do you spell "Rasheen"?

9 THE APPLICANT: R-a-s-h-e-e-n.

10 THE COURT: Thank you. Thank you very much.

11 Your witness.

12 MS. SINGLETARY: Thank you, Your Honor.

13 THE COURT: Uh-huh.

14 MS. SINGLETARY: May it please the Court.

15 THE COURT: Yes.

16 DIRECT EXAMINATION BY MS. SINGLETARY:

17 Q Mr. Smith --

18 A Yes.

19 Q -- could you tell this Court where you're currently
20 housed at?

21 A Lee County; Lee CI.

22 Q So you're currently housed at Lee County Correctional
23 Institution.

24 A Yes, ma'am.

25 Q And how did it come to you being incarcerated at Lee

DIRECT EXAMINATION BY MS. SINGLETARY - MICHAEL SMITH

7

1 County Correctional Institution?

2 A I was charged for murder and possession of a weapon
3 within commission of a violent crime.

4 Q And you pled not guilty to this offense, correct?

5 A Yes, ma'am.

6 Q And you actually went to trial.

7 A Yes.

8 Q And who was your attorney at this time?

9 A Mr. Charlie J. Johnson.

10 Q And do you recognize Mr. Johnson here in court today?

11 A Yes, I do.

12 Q And how long, prior to the date of your trial, was Mr.
13 Johnson representing you?

14 A I'm gonna say about two years, maybe 18 months,
15 something around there.

16 Q And in the course of those 18 months to two years, how
17 many times did you actually see Mr. Johnson?

18 A Maybe two to three times.

19 Q So in the course of 18 months to two years, you only
20 saw Mr. Johnson two or ---

21 A Two or three times.

22 Q --- three times.

23 And how long would you say the duration of those
24 meetings were?

25 A Anywhere, maybe, from 45 minutes to a hour.

DIRECT EXAMINATION BY MS. SINGLETARY - MICHAEL SMITH

8

1 Q Okay. So you would estimate that in about two years,
2 you saw Mr. Johnson for a total of three hours?

3 A Yes, ma'am.

4 Q And in these meetings with Mr. Johnson, did you
5 actually get an opportunity to review the discovery with
6 Mr. -- with Mr. Johnson?

7 A Yes, ma'am.

8 Q Okay. And did you and Mr. Johnson come up with any
9 trial strategies?

10 A No.

11 Q Okay. And did you and Mr. Johnson come up with any
12 defenses?

13 A No.

14 Q And did -- did you all have an occasion to actually
15 hire a private investigator on this case?

16 A Yes, ma'am.

17 Q Do you recall that private investigator's name?

18 A No, ma'am. I can't remember his name, to be honest
19 with you.

20 Q Did this private investigator ever meet with you?

21 A Yes.

22 Q How many times did the private investigator meet with
23 you?

24 A That's a good question. I'm thinking once; maybe once
25 or twice. Thinking once, though.

DIRECT EXAMINATION BY MS. SINGLETARY - MICHAEL SMITH

9

1 Q And did you ever get any reports from this private
2 investigator?

3 A No. None.

4 Q Did -- this private investigator didn't assist you at
5 all in your trial?

6 A He was at my trial during trial, but he never assist
7 me with nothing, no.

8 Q You never got any reports or no nothing.

9 A No.

10 Q Okay. And did -- let's go to the trial. Prior to the
11 actual trial date, about how much time would you say you
12 and Mr. Johnson spent on preparing for the trial?

13 A Prior to -- to the trial date?

14 Q Yes.

15 A We never really prepared a defense. He came to me; he
16 talked to me about I'm going to trial. He let me know
17 that -- what the State had against me or what the time --
18 whatever they was offering me.

19 But we never really -- we never discuss a defense far
20 as how we was gonna attack certain issues that the State
21 was raising against me.

22 Q And let me ask you this: Did you ever on an occasion
23 ask Mr. Johnson to subpoena any witnesses on your behalf
24 in the trial?

25 A Yes.

1 Q What witnesses, if any?

2 A Lewis Rivers. But he was telling me that he was
3 supposed to testify against me. You get a trial
4 transcript -- a trial list of everybody gonna testify
5 against you, and he was supposed to be somebody to testify
6 against me. So I don't know if that was the reason for
7 him not calling him to subpoena -- to subpoena him to
8 testify during my trial.

9 Q And who is Lewis Rivers?

10 A My stepbrother. He was a co-defendant in my case.

11 Q Did he testify at your trial?

12 A No.

13 Q Do you know whether or not Mr. Johnson was able to --
14 or the investigator was able to reach out to Mr. Lewis's
15 [sic] attorney to talk to them about him being a possible
16 witness?

17 A Can you please -- can you ask that question again?

18 Q Okay. Do you have any memory of Mr. Johnson actually
19 contacting your brother's attorney?

20 A No. No.

21 Q Were there any other witnesses that you would have
22 liked subpoenaed at your trial?

23 A No. Just my brother.

24 Q Okay. And you made some allegations as we were
25 speaking that you felt that Mr. Johnson was ineffective.

DIRECT EXAMINATION BY MS. SINGLETARY - MICHAEL SMITH

11

1 Could you tell us why do you feel that Mr. Johnson was
2 ineffective in your case?

3 A Because he never created a defense, period. He never
4 did nothing to create a defense. There's certain things -
5 --

6 Q And what do you mean "he didn't create a defense"?

7 A It's certain things that he let the prosecutor say,
8 far as discrediting my character during closing arguments,
9 that I felt he should have objected to, that he never
10 objected to.

11 Being if he would have objected to these certain
12 issues, maybe the outcome of my case would have been
13 different; because a lot of things that he did, far as the
14 prosecutor, he relieved the jury of being fair.

15 Q Okay. And -- and let's get back to that, because
16 we've discussed that. You felt that your character was
17 improperly discredited during the ---

18 A Yeah.

19 Q --- closing remarks of the prosecutor.

20 A Yes.

21 Q Could you narrow it down, be more specific for the
22 Court, so they can realize what you're actually referring
23 to.

24 A He just was letting them know that -- he was just
25 saying I'm a cold-blooded murderer; I'm a drug dealer; I'm

1 a liar; I'm a coward because I ran, vasically relieving
2 the Court of being fair. Telling them, "Okay, he ran; let
3 him go back to his gun; let him go find his gun. But I'll
4 show you that you would have disregarded every piece of
5 evidence in this case." Basically just letting them know
6 that I'm guilty.

7 It was one of the witnesses who made a statement,
8 like, during my trial. And he told him after Mr. Huggins
9 made his statement, that the case was over with. He
10 didn't have to put up no evidence, period, for no other
11 reason, because the case was completely over with by that
12 one witness getting on the stand, the rebuttal witness,
13 Mr. Huggins; because it was over with, basically relieving
14 them of being fair.

15 Q Okay. And you're referring to the rebuttal witness,
16 Mr. Huggins.

17 A Yes.

18 Q And you're referring to the fact that Mr. Huggins
19 brought up a prior bad act --

20 A Yes, ma'am.

21 Q -- by yourself?

22 A But the act couldn't -- was not -- he -- Mr. -- Mr.
23 Huggins said that I shot up in the air two weeks prior to
24 this -- this guy getting killed. But it was never no
25 police report of this ever happening.

DIRECT EXAMINATION BY MS. SINGLETARY - MICHAEL SMITH

13

1 So I'm saying Mr. Huggins was lying because I don't
2 even know Mr. Huggins, period. I don't know this guy.
3 But he get on the stand and said two weeks prior to this
4 guy dying, he seen me shooting a gun in the air.

5 They asked him, "Okay. If you saw this guy shooting a
6 gun in the air two weeks prior to this, what did you do?"

7 He say he called the police officer and they made a
8 report. There was never no report filed; there was never
9 no call made, period, about nothing.

10 Q And you're bringing that up because you feel that Mr.
11 Johnson should have objected to that prior bad act.

12 A Exactly.

13 Q And that he did not object to it.

14 A Exactly.

15 Q And when we were actually preparing for this hearing,
16 you actually brought up some information about possible
17 tampering of witnesses.

18 A Yes.

19 Q Could you explain that to the Court.

20 A Miss Becky Springer -- she was the EMS worker during
21 my trial. And the State spoke with Ms. Becky prior to my
22 trial about the driver-side window being up, and the
23 passenger-side window being down.

24 When Mr. Johnson spoke to her about it, she said that
25 she spoke to the Court prior to my trial to mention that

1 they told her to make sure she mentioned that the
2 passenger-side window was up and the -- where the driver-
3 side window was up and the passenger-side window was down.

4 Q And you felt that Mr. Johnson should have brought up
5 that information during his cross-examination of the
6 witness...

7 A Well, he brought it up. But I felt like he should
8 have suppressed it more, far as just getting more out of
9 her, if -- if he could have. Because basically, she was
10 letting the Courts know that prior to that case, that the
11 State contacted her to -- to let her know, during trial,
12 to mention this beforehand.

13 Yeah. She said she wrote it in her report, like,
14 years ago, that it was in her report. But they called her
15 and contacted her; and let her know, "Okay. We're gonna
16 be asking you this. You need to mention this during
17 trial."

18 Q Now, Mr. Smith, also you referred to the fact that you
19 did testify at your trial.

20 A Yes, ma'am.

21 Q Could you tell this Court the reason why you said that
22 you testified, and that it wasn't knowingly and willfully?

23 A Because my -- Mr. Johnson -- he -- he suggested that I
24 get up there and testify on my behalf, which is -- I was
25 the only witness that -- that I had a lot of witnesses

DIRECT EXAMINATION BY MS. SINGLETARY - MICHAEL SMITH

15

1 against me. I was the only witness who could testify on
2 my behalf, far as for myself, being that I was there. So
3 Mr. Johnson felt like I should testify on my behalf.

4 Q And did Mr. Johnson explain to you that you getting on
5 the witness stand could actually open up the door for
6 other incidences, or for the prosecutor to bring out
7 damning evidence against you?

8 A No.

9 Q So when you took the stand, you just took the stand --
10 explain to the Court. We need to understand why ---

11 A I took the stand because my lawyer suggested that I
12 take the stand and let the people know what was going on,
13 let them know what was happening; let them know what
14 happened that day, actually. And that's why I took the
15 stand.

16 Q So why do you -- why do you think that that makes Mr.
17 Johnson ineffective?

18 A Because he should have -- if -- if he know it was
19 gonna discredit my character or make the people look at me
20 some type of way, in the wrong light, he should have -- he
21 should have told me not to get on the stand, period; and I
22 would have never got on the stand. But being -- him being
23 my lawyer, I took his word and I went up there and got on
24 the stand.

25 But by I got on the stand, he -- I opened up all type

1 of things and discredit my character to make me look like
2 the bad guy. And that's another reason I feel like the
3 jury came up with the decision they came up with. Part of
4 it is me getting on the stand.

5 Q Okay. And you also -- tell me about the jury
6 instructions.

7 A The hand of one, hand of all: They was saying that
8 the hand of one is the hand of all. And they gave three
9 different charges. The judge gave one charge on the hand
10 of one/hand of all; the prosecutor gave a charge on the
11 hand of one/hand of all, like, two different times.

12 And they -- one of them would say one thing, and
13 another hand of all instruction say something different;
14 which confused the juror. They don't know what to go off
15 of: Either what he's saying or what she's saying far as
16 the hand of one/hand of all theory.

17 He -- the prosecutor was basically saying that
18 everybody would have their day in court; everybody would
19 be charged with murder. We just gonna focus on me that
20 particular day.

21 But everybody wasn't charged with murder. Only I was
22 charged with murder. But he relieved the jury -- he made
23 the jury think, like, everybody was gonna be charged with
24 murder because the hand of one is the hand of all.

25 Q Did Mr. Johnson object to any jury instructions?

DIRECT EXAMINATION BY MS. SINGLETARY - MICHAEL SMITH

17

1 A No.

2 Q To your knowledge, was there a jury charge conference
3 between the prosecutor, Mr. Johnson, and the judge?

4 A I have no idea.

5 Q You also made up some allegations as to a change of
6 venue.

7 A Uh-huh.

8 Q You felt that your trial should not have been held in
9 the county that it was actually held in.

10 A Well, I felt like -- I was 16 when it happened. I
11 felt like I supposed to went through Family Court,--and it-
12 was supposed to be transferred over, maybe to General
13 Sessions, before I just -- before they charged me as an
14 adult.

15 I felt like my age should have been tookeen [sic] into
16 consideration, being that I was 16 at the time when it
17 happened. And I never went through no type of process
18 that you go through during court, even though when I --
19 when I got to court, I was 20. But I never went through
20 no proper process or no procedures being that I was 16
21 when it happened.

22 Q So what you're basically telling this Court is that at
23 the time that this incident occurred, you were 16 years
24 old --

25 A Yes, ma'am.

DIRECT EXAMINATION BY MS. SINGLETARY - MICHAEL SMITH 18

1 Q -- and that you were automatically charged as an adult

2 --

3 A Yes, ma'am.

4 Q -- that you did not go through the Family Court
5 system.

6 A No, ma'am.

7 Q And that you didn't have a *Wayburn* hearing.

8 A No, ma'am.

9 Q And that you were just initially in General Sessions
10 court.

11 A Yes, ma'am.

12 Q And as it relates to the jurisdiction issue also,
13 isn't it -- did your actual -- lawyer actually bring up
14 the fact that you had never had a *Wayburn* hearing or that
15 you were 16 at the time that this incident occurred?

16 A If I'm not mistaken, I think he brought that up. It's
17 a possibility that he may have brung it up that I was 16
18 at the time. But I don't -- I don't really recall him
19 saying that I never went through the waiver [sic] --
20 through the waiver. I don't -- I don't recall that. But
21 it's a possibility he might let them know that I was 16 at
22 the time.

23 Q And Mr. Smith, is there any other words that you would
24 like to say to the Court as it relates to the
25 representation of yourself by Mr. Johnson?

CROSS-EXAMINATION BY MS. WILLIAMS - MICHAEL SMITH

19

1 A No. I just feel like he was ineffective, because he
2 didn't -- he never created a defense prior to my trial.
3 It's a lot of things he let into -- into evidence that
4 should never -- should have never been into evidence.

5 There's a lot of things that he didn't object to that
6 I feel like he should have objected to. And I felt like
7 maybe if he would have objected to those, to certain
8 issues, to certain things that went into -- into evidence,
9 maybe the outcome of my trial could have been different.

10 Q And again, you're saying within the 18 months to two
11 years that Mr. Johnson represented you, you only saw him
12 for a total of three hours?

13 A Like -- like -- yeah. Like three times, that's it.

14 Q And again, you're saying that you all never sat down
15 and talked about trial strategy.

16 A No.

17 Q Trial defenses.

18 A No.

19 Q Were you ever prepped for testimony?

20 A No.

21 MS. SINGLETARY: Your Honor, I have no further
22 questions.

23 THE COURT: Very well. Cross-examination.

24 CROSS-EXAMINATION BY MS. WILLIAMS:

25 Q Mr. Smith, how soon after your arrest did Mr. Johnson

1 take over your case?

2 A I don't know. I know he was just my lawyer for about
3 18 months, maybe two years.

4 Q Okay. So you were arrested, brought back to South
5 Carolina in January of 2004, you don't have any idea when
6 you first met with him?

7 A No, ma'am.

8 Q Okay. Did the Court inform you that you had a right
9 not to testify?

10 A No, ma'am. Well, maybe the judge. She probably
11 mentioned it during trial.

12 Q When she asked you several questions about that,
13 whether you understood you didn't have to testify that
14 day, right?

15 A (No audible response.)

16 Q Look at page 249 of your transcript and go on from
17 there.

18 A I don't have it. My transcript's over there.

19 Q Okay. I'll grab it.

20 (Ms. Williams hands a document to the witness.)

21 A Okay.

22 Q So you remember going through those questions with the
23 judge now?

24 A Yes, ma'am.

25 Q Okay. And Mr. Johnson did bring out on cross-

CROSS-EXAMINATION BY MS. WILLIAMS - MICHAEL SMITH

21

1 examination the information regarding the EMT worker, that
2 the solicitor had told her he was going to point those
3 things out; is that correct?

4 A Uh-huh.

5 Q Okay.

6 THE COURT: That's a "yes"?

7 THE WITNESS: Yes.

8 Q And do you recall anybody during those arguments --
9 you talk about closing arguments and the hand of one is
10 the hand of all, do you recall people, multiple times,
11 saying that attorneys' arguments are not the law, it's
12 just argument? Recall the judge telling the jury that?

13 A Yeah.

14 Q And Solicitor Pascoe himself even said that once, I
15 believe.

16 A I'm not sure.

17 Q Okay. And was Mr. Rivers present at your trial, do
18 you recall?

19 A No, ma'am.

20 Q You know if he was under subpoena by the State?

21 A No, ma'am. I don't know.

22 Q Did you hear his name being called as a potential
23 witness?

24 A No. But I seen his name on a trial list that he was
25 supposed to testify.

DIRECT EXAMINATION BY MS. WILLIAMS - CHARLIE J. JOHNSON, JR. 22

1 Q Okay.

2 MS. WILLIAMS: I think that's all the questions I have
3 for him. Thank you.

4 THE COURT: All right. Re-direct?

5 MS. SINGLETARY: None, Your Honor.

6 THE COURT: All right. Come on back to your lawyer.

7 (The witness exits the stand.)

8 THE COURT: All right. Call your next witness,
9 please.

10 MS. SINGLETARY: Your Honor, we have no further
11 witnesses at this time.

12 THE COURT: All right. Thank you.

13 MS. WILLIAMS: Your Honor, the State would call Mr.
14 Charlie Johnson.

15 THE COURT: Okay. All right.

16 CHARLIE J. JOHNSON, JR. having
17 been first duly sworn, testifies as follows:

18 THE COURT: And if you would please be seated and
19 state your full name for the record.

20 THE WITNESS: Charlie J. Johnson, Jr.

21 THE COURT: Your witness.

22 DIRECT EXAMINATION BY MS. WILLIAMS:

23 Q Mr. Johnson, can you tell me a little bit about your
24 legal experience? How long have you been practicing law?

25 A I've been practicing law for approximately 16 years.

DIRECT EXAMINATION BY MS. WILLIAMS - CHARLIE J. JOHNSON, JR. 23

1 Q And do you do a lot of criminal law?

2 A I do basically exclusively criminal law.

3 Q Okay. What kind of -- do you have any special
4 qualifications, do any kind of particular case, or --

5 A I am death penalty qualified. I've tried a number of
6 death penalty cases. I've done numerous murder cases.
7 I've probably tried, I don't know, 30 or 40 trials over
8 the last 16 years of murder, rape, those type trials.
9 Mainly serious -- serious cases.

10 Q Now tell me, how did you come to represent Mr. Smith
11 in this case?

12 A I was appointed.

13 Q Okay. And he's told us that you met two or three
14 times. Can you tell me do you have any recollections of
15 meeting with Mr. Smith?

16 A I don't have my paperwork with me. It was back in
17 2005. I -- but I'm sure that I met with him more than two
18 or three times over that 18 month period.

19 We had an investigator whose name was Amos Jones. Me
20 and Mr. Jones, I know, at least met with him three times
21 - three or four times prior to trial.

22 I'm sure that once I got appointed to him, I met with
23 him within 10 to 15 days, which is my usual thing that I
24 do whenever I get an appointment. And then I usually try
25 to meet with the client at least once every 2 to 3 months,

DIRECT EXAMINATION BY MS. WILLIAMS - CHARLIE J. JOHNSON, JR. 24

1 or if not every month, at -- at least every other month
2 until trial.

3 Q Tell me about your trial strategy -- excuse me --
4 preparing this case for trial.

5 A Well - well, in looking at the case, it wasn't an
6 argument about who was there. The only argument in the
7 case, as I stated in my opening, was that -- our argument
8 was that -- that Michael was not the person that pulled
9 the trigger.

10 The strategy was to try to convince the jury that the
11 other co-defendant -- one of them was the one that
12 actually killed the individual.

13 The State -- there was no gun; there was no other
14 witnesses as to what happened and stuff for the three co-
15 defendants. The only other witness was dead; and
16 therefore, my strategy was Michael didn't have much of a
17 past record, so it wouldn't have hurt him to testify.

18 And I -- and I've always told Michael to tell the
19 truth. I believe that he had to convince the jury himself
20 of -- of whether he did or not.

21 At first, prepping him for trial, I met with Michael.
22 We talked; he was cooperate. He's always -- was adamant
23 to me he was not the person to pull the trigger, that he
24 left town because he was scared.

25 And I told him we would put him on the stand and he

DIRECT EXAMINATION BY MS. WILLIAMS - CHARLIE J. JOHNSON, JR. 25

1 would just go over the same thing that we discussed over.
2 And that as long as he tell [sic] the truth that -- that
3 we would do our best, but it was to come down to whether a
4 jury believed him or not.

5 Q All right. And so basically, you were arguing that he
6 was merely present; is that right?

7 A Well, I -- I argued that he was present, but that he
8 wasn't the person who pulled the trigger. Like I say, the
9 State's position was Michael was the person to actually --
10 was the one that -- to pull the trigger and was the one to
11 actually kill the individual.

12 Q And -- and Mr. Smith's story was he didn't know why
13 they pulled these guns out at all; is that accurate?

14 A That's correct. And then Mr. Rivers, who was
15 Michael's co-defendant, the half-brother -- he refused to
16 testify. And that's why the State never called him. At
17 least that's my understanding.

18 And then also, his being a co-defendant, I couldn't
19 subpoena him to testify against his own interest.

20 Q Let's see, tell me, was there anything about this
21 being in Family Court? He was 16. Guess he was brought
22 back some years later.

23 A I mean, I looked into it when I first got it. But he
24 was -- at the time that he was arrested, he was already 20
25 years old.

DIRECT EXAMINATION BY MS. WILLIAMS - CHARLIE J. JOHNSON, JR. 26

1 As far as Family Court, it was my understanding that
2 it was the option of the Solicitor's Office whether to
3 place it in Family Court or in adult court.

4 And from my looking -- looking at it, I didn't think I
5 had any issues or there was any credible issues to bring
6 up as relate to Family Court, because at the time that he
7 was arrested, it was some four years after the -- the
8 incident. And as he stated, I think he was like 20 years
9 old at that time.

10 Q And do you feel from your conversations that Mr. Smith
11 understood what the defense was gonna be at this trial?

12 A Oh, we talked about it and I explained to him -- I --
13 I -- as I explain to all my clients. I tell them that at
14 some point we will put up all the evidence, and at some
15 point, if the jury -- the jury will have two choices:
16 They will either believe you or not.

17 There was no direct evidence that specifically said
18 Michael shot anyone. The only evidence they had was some
19 fingerprints on the side of the window. But the other co-
20 defendant prints was on the same side of the car.

21 One co-defendant had prints on both side of the car,
22 which meant that he was -- went from both sides. The
23 second co-defendant prints was on the driver's side of the
24 car, where the shot didn't come from. So that kind of
25 excluded him, or technically excluded him.

DIRECT EXAMINATION BY MS. WILLIAMS - CHARLIE J. JOHNSON, JR. 27

1 And Michael and the other co-defendant prints was on
2 one side.

3 Q And you actually argued that some of the things that
4 he admitted regarding drug use, etc., indicated his
5 truthfulness; is that correct?

6 A Right. Because one thing I told Michael, when he got
7 on the stand, to tell the truth. If they actually
8 questioned about in the past, to tell the truth.

9 That -- it was -- it was important that a jury had
10 believed him to be telling the truth in order to believe
11 that he didn't shoot, because no one was there.

12 And Michael told the truth. He did what I asked him
13 to do. I'm -- I'm sorry about the outcome because, I
14 mean, I didn't go in there with the intent to lose. But I
15 -- as I told Michael, I'd do the best I could.

16 MS. WILLIAMS: I believe that's all the questions I
17 have.

18 THE COURT: All right. Yes, ma'am. Cross-
19 examination.

20 MS. SINGLETARY: Thank you, Your Honor.

21 THE COURT: Uh-huh.

22 MS. SINGLETARY: If it pleases the Court.

23 CROSS-EXAMINATION BY MS. SINGLETARY:

24 Q Attorney Johnson, you heard my client -- earlier said
25 that you didn't object to the jury charges, and that there

1 was no jury charge conference. What do you remember?

2 A Well, there's always a jury trial conference, and we
3 had one. There was nothing there to object to that I saw
4 in the jury charges.

5 The jury charges were clear, and I thought was fair;
6 and I thought was not swayed one way or another. They
7 were just straight-forward jury trial -- jury charges.

8 Q And you also heard that my client said that within 18
9 months to two years that he had only met you three times.

10 A As he -- as he -- as he stated, it's been a long time
11 ago, but there was no way that I would go forward with a -
12 - with a murder trial and have somebody's life in my hands
13 and not meet with them but three hours.

14 Now, as far as telling you how many times, I could not
15 tell you. But it's usually my usual standard that I would
16 have met with him at least -- numerous times and we would
17 have fully prepared before I went forward or I'd never
18 went to court.

19 Q And you also understand that my client is actually
20 saying that you never discussed any trial strategy or
21 defenses.

22 A We discussed trial strategy. The trial strategy was
23 for him to testify and convince the jury that he didn't do
24 it.

25 Q And you said that you guys discussed about him

CROSS-EXAMINATION BY MS. SINGLETARY - CHARLIE J. JOHNSON, JR. 29

1 testifying. What did you specifically -- if you can
2 remember; I know this was a long time ago. What type of
3 discussion was it as it related to you telling my client
4 whether or not he should take the witness stand or should
5 not take the witness stand?

6 A I told him it was my belief that if he didn't take the
7 witness stand, that the jury would truly find him guilty,
8 because the jury would wonder why are you sitting there
9 and people saying you killed someone and you said nothing.

10 I said in some circumstances, some individuals do not
11 testify because of their past record or they're worrying
12 about things like that. He didn't have that problem.

13 I told him that he could get up, and the same way he'd
14 been explaining to me since day one that he was not the
15 person that killed someone, that he could explain it to
16 the jury. And that at some point, in -- in -- as
17 everybody life, sometime you gotta get up and speak for
18 yourself, and that this was his opportunity.

19 Q Now, after reading the trial transcript, I see that
20 there was some photos of the victim that were actually
21 introduced.

22 A Right.

23 Q And my client believes that you were ineffective for
24 objecting to those photos being introduced.

25 A I was ineffective for objecting to it?

1 Q Of not objecting to the photos.

2 A Oh.

3 Q I'm sorry.

4 A There was a number of photos shown and there was some
5 photo taken out. I think I did object to some of the
6 photos. I'm not -- I don't have the record before me, but
7 I believe I did.

8 It wouldn't --

9 Q And -- and -- and -- and -- and in the transcript, with
10 all candor to the Court, there are certain photos that you
11 did object to.

12 A Right.

13 Q Now, my client also made the allegations that you
14 never subpoenaed any of the witnesses that he actually
15 wanted you to subpoena.

16 A Well, the only witness was his brother, who was a co-
17 defendant.

18 Q Uh-huh.

19 A Who I did -- could not subpoena because he is the co-
20 defendant. And that ---

21 Q And did you explain -- I'm sorry.

22 A And I did explain to Michael. I -- I thought I did.
23 I mean, it's been awhile and maybe I didn't, but I believe
24 I did.

25 Q And there was actually a fingerprint expert that

1 testified in this actual case. Is there any reason why
2 you didn't object to the fingerprint expert being tendered
3 as an expert in this case?

4 A No. Because I -- my objection really wasn't to any of
5 the evidence. I mean, it wasn't objection to the
6 fingerprint or nothing like that. Michael -- I think in
7 his own testimony stated that he was on that side, but he
8 didn't do anything. So his fingerprint being there just
9 supported Michael's whole story.

10 MS. SINGLETARY: Your Honor, I have no further
11 questions.

12 THE COURT: All right. Re-direct?

13 MS. WILLIAMS: Nothing further from the State.

14 THE COURT: Okay. Thanks.

15 THE WITNESS: Thank you, Your Honor.

16 THE COURT: Is this witness free to leave?

17 MS. WILLIAMS: He is. And we have no further
18 witnesses.

19 THE COURT: Very well. Very well. All right. Is
20 there any rebuttal or reply?

21 MS. SINGLETARY: No, Your Honor.

22 THE COURT: Very well. All right. Any other
23 submissions, other than what I already have, which, of
24 course, is the transcript and the pleadings?

25 MS. SINGLETARY: No, Your Honor.

1 THE COURT: Very well. I will take the matter under
2 advisement, ask one of you to please draft an order for
3 me. I will notify you by letter. Thank you all so much.

4 MS. SINGLETARY: Thank you, Your Honor.

5 THE COURT: Uh-huh.

6 -- END OF TRANSCRIPT RECORD --

CERTIFICATE

I, the undersigned Bonnie H. Kelly, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the First Circuit Court for Dorchester County, South Carolina, on the 6th day of June, 2011.

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

Bonnie H. Kelly, CVR
Official Court Reporter

Columbia, South Carolina

June 12, 2013

STATE OF SOUTH CAROLINA

FILED

COUNTY OF CALHOUN

IN THE COURT OF COMMON PLEAS

2011 SEP 26 P 2:57

2010-CP-09-0088

Michael Smith, #311064,

Applicant,

KEMED HASTY
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, SC

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 19, 2010. The Respondent made its Return July 27, 2010. An evidentiary hearing into the matter was convened on June 6, 2011, at the Dorchester County Courthouse. The Applicant was present at the hearing and was represented by Nicole Singletary, Esquire. The Respondent was represented by Mary S. Williams of the South Carolina Attorney General's Office.

At the hearing, the Applicant began by making a motion for a continuance, which this Court respectfully denied. Upon the commencement of the hearing, the Applicant testified on his own behalf. Also testifying was Charlie Johnson, Jr., Esquire. This Court had before it the records of the Calhoun County Clerk of Court, the guilty plea transcript, and the Applicant's records from the South Carolina Department of Corrections.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Calhoun County Clerk of Court. The Applicant

was indicted for Murder (2004-GS-09-0145). Applicant was represented by Charlie Jay Johnson, Jr., Esquire. Applicant proceeded to a jury trial before the Honorable Deadra Jefferson. Applicant was found guilty and on September 1, 2005, he was sentenced to forty-five (45) years imprisonment.

A notice of appeal was filed and an Anders brief filed. The appeal was dismissed. State v. Smith, Op. No. 2009-UP-415 (S.C. Ct. App. filed September 3, 2009). The Remittitur was sent on September 21, 2009.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Constitutional violations."
 - a. "Ineffective assistance of counsel."
 - b. "Transfer of jurisdiction."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. 17-27-80.

Ineffective Assistance of Counsel

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) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as

a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, *id.* The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland, *supra*). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Ineffective Assistance of Trial Counsel

Applicant alleges that trial counsel was ineffective because Counsel didn't adequately prepare a defense strategy, didn't object to statements by the Solicitor that "improperly called [Applicant's] character into question", didn't object to the testimony of

an EMS worker named Becky Springer who Applicant believed the State improperly communicated with prior to the start of the trial and Counsel improperly advised Applicant to take the witness stand in his defense. On cross-examination, Applicant admitted that the trial court did advise him of his Constitutional right not to testify and even had a brief colloquy with Applicant about that right on the record. Further, Applicant testified at the PCR hearing that trial Counsel had brought out the testimony of EMS worker Becky Springer on cross-examination as being unreliable due to a potential improper communication between the State and her. Applicant also admitted that the Court had given the explicit instruction to the jury that statements made during closing arguments made by the lawyers, such as the "improper character evidence" Applicant alleges, are not evidence in the case for the jury to consider as such.

Upon taking the stand at the PCR hearing, Mr. Johnson ("counsel") stated that he tried to meet with Applicant roughly every two months during his nearly two years of representing Applicant, during which he reviewed the discovery with him and discussed potential trial strategy. Counsel stated that he also hired a private investigator with whom he and Applicant met with three times together reviewing various evidence in the case each time. Counsel stated that based on the evidence in the case, there was no doubt that Applicant was present at the scene of the crime, but because there was proof of only one shooter and no eye witnesses testifying, his trial strategy was to show that a co-defendant, not Applicant, was the one who pulled the trigger in the murder. According to his testimony, this was a strategy that he and Applicant had discussed in depth and had both agreed upon as the best course of action at trial. Counsel further

stated that he had advised Applicant to take the witness stand in his defense because, not only did Applicant have no prior criminal record, but Applicant was adamant he was not the shooter. Counsel believed that the smartest tactic to prove Applicant's innocence was to have Applicant take the stand and simply testify truthfully to the jury. Additionally, counsel articulated that he was unable to subpoena Applicant's half-brother, Mr. Rivers, to testify on Applicant's behalf as Applicant requested because Mr. Rivers was a co-defendant in the case and had refused to testify absent a subpoena. On cross-examination, trial counsel stated that he also objected to the admissibility of photos of the crime scene and victim, and in fact had several of the photos suppressed from being introduced by the State during the course of the trial. On cross-examination, counsel said that he almost always took part in a jury charge conference with the judge prior to the charge being given and that, based on the charges agreed upon, he saw nothing to object to as the charges were very straight forward and correct.

Based on the testimony presented at the PCR hearing, this Court finds that the Applicant has failed to meet his burden in proving counsel's performance fell below the objective standard of reasonableness based on professional norms as required under Strickland v. Washington. Counsel thoroughly investigated the case, interviewed and investigated potential witnesses, hired an investigator and met with Applicant several times to discuss the charges Applicant was facing, all relevant discovery and potential defenses to be used at trial. Additionally, Counsel presented a logical and strong trial strategy that was discussed and prepared with Applicant prior to proceeding to trial. Where counsel articulates a valid reason for employing certain trial strategy, such conduct should not be

deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). Defense counsel is not ineffective for making valid trial strategy decisions. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). Therefore, Applicant has failed to prove by a preponderance of the evidence that counsel's performance fell below the objective standard of reasonableness required of criminal defense attorneys based on professional norms.

Further, Applicant has failed to prove that there is a reasonable probability that the result at trial would have been different had trial counsel done what the applicant alleges he should or should not have done. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). This Court finds the allegation of ineffective assistance of trial counsel to be without merit. Therefore, this Court finds that the application must be denied and dismissed with prejudice.

Other Allegations

No other allegations were raised at the PCR hearing. Therefore, any additional allegations are deemed waived because no evidence was presented.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. His

attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be DENIED AND DISMISSED WITH PREJUDICE; and
2. The Applicant must be remanded to the custody of the Respondent.

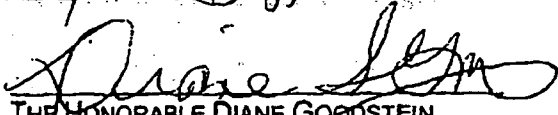
AND IT IS SO ORDERED this

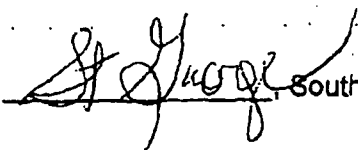
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day of

Sept 2011

200


THE HONORABLE DIANE GOODSTEIN
Presiding Judge
First Judicial Circuit


South Carolina.

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF Cathoun

Michael A. Smith, # 311064
 Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2012 SEP 14 P 12:14

2012-CP-09-00174

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Lee Correctional Institution, 990 WISACKY HIGHWAY
Blacksburg, South Carolina, 29010
2. Name and location of Court which imposed sentence Cathoun County Court of General Session
Cathoun County South Carolina
3. Name(s) of co-defendant(s) (if any) LUIS RIVERS JR.; FRANK R. BROWN
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2004 - GS - 09 - 0145; MURDER;
 - (b) 2004 - GS - 09 - 0202; Possession of a Firearm during Commission of
 - (c) A Violent Crime
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) September 1, 2005, Fourty Five (45) Years
 - (b) September 1, 2005; Five (5) Years

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. SOUTH CAROLINA COURT OF APPEALS
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. DISMISSED
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. SEPTEMBER 3, 2009
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. NO.: 2009 - UP - 415
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) CONSTITUTIONAL VIOLATIONS
- (b) _____
- (c) _____

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

- (a) INEFFECTIVE ASSISTANCE OF COUNSEL;
- (b) TRANSFER OF JURISDICTION
- (c) PROSECUTOR MISCONDUCT

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? yes
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO

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

(a) the specific nature thereof:

- i. Post Conviction Relief Application / Filed Complaints AGAINST ATTORNEY
- ii. DIRECT APPEAL Nicole L. Singletary
- iii. _____
- iv. _____

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

- i. Cathay County Clerk of Court (PCR) SAINT MATTHEWS, S.C.
- ii. SOUTH CAROLINA COURT OF APPEALS COLUMBIA SOUTH CAROLINA
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. P.C.R. WAS DENIED
- ii. DIRECT APPEAL WAS DENIED
- iii. _____

iv. _____

(d) the date of each such disposition:

i. Received Notice of PCR Denial on September 24, 2011ii. September 3, 2009

iii. _____

iv. _____

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

i. Dismissedii. Dismissed

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

yes

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

(a) which grounds have been presented:

i. Ineffective Assistance of Counselii. Transfer of Jurisdiction

iii. _____

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

i. P.C.R. hearing

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

~~(a)~~ _____~~(b)~~ _____~~(c)~~ _____

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

- (a) your arraignment and plea? _____
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

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

- (a) the name and address of each attorney who represented you:
 - i. Charles Johnson JR. Post office Box 11212, Columbia, S.C. 29211
 - ii. Robert DuDer. Post office Box 11589, Columbia, South Carolina 29211
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. TRIAL AND Sentencing
 - ii. Court OF APPEALS
 - iii. _____

19. State clearly the relief you seek in filing this application:

A Belated Austin Review And to have my conviction VACATED OR Remanded
 OR A PLEA

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

NO

STATE OF SOUTH CAROLINA

2012-EP-09-00174

VERIFICATION

County of Calhoun

Michael A. Smith # 311064

I, , 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.

Michael A. Smith

SWORN to and subscribed before me this 5
day of Sept, 2012.

Debra Sine

Notary Public

(L.S.)

My Commission Expires: 11-4-2015

RECEIVED
CLERK OF COURT
SOUTH CAROLINA
SEP 14 2012

2012 SEP 14 P 12:15

FILED

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

Michael Smith # 311064

2012-CP-09-00174

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

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

Michael A. Smith
Applicant

SWORN or affirmed to and subscribed before me this
5 day of Sept, 2012

Debra Jones
Notary Public

My Commission Expires: 11-1-2015



2012 SEP 14 P 12:15

11/1/12

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Michael A. Smith, #311064,)

Case No. 2012-CP-09-00174

Applicant,)

v.)

**RETURN AND MOTION TO DISMISS
ALL CLAIMS EXCEPT AUSTIN REVIEW**

State of South Carolina,)

Respondent.)

In response to the post-conviction relief application filed September 14, 2012, the Respondent would show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Calhoun County Clerk of Court. The Applicant was true bill indicted during the June 2004 term of the Calhoun County Grand Jury Murder (2004-GS-09-0145) and Possession of a Weapon During the Commission of a Crime of Violence (2004-GS-09-0202). Applicant was represented by Charlie Jay Johnson, Jr., Esquire. Applicant proceeded to a jury trial before the Honorable Deadra Jefferson. Applicant was found guilty and on September 1, 2005, he was sentenced to forty-five years imprisonment for Murder and five years imprisonment for Possession of a Firearm During the Commission of a Crime of Violence, with the sentences to be served concurrently.

A timely notice of appeal was filed and an Anders brief submitted. The appeal was dismissed. State v. Smith, Op. No. 2009-UP-415 (S.C. Ct. App. filed September 3, 2009). The Remittitur was sent on September 21, 2009.

Applicant filed his first application for post-conviction relief on April 19, 2010 (C.A. No. 2010-CP-09-0088), alleging ineffective assistance of counsel. The State made its Return on July 27, 2010. An evidentiary hearing was convened into the matter on June 6, 2011, at which Applicant was present and represented by Nicole Singletary, Esquire. The application was denied and dismissed with prejudice by the Honorable Diane S. Goodstein by written order dated September 14, 2011, and entered September 26, 2011. No notice of appeal was filed.

II.

In his current application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Constitutional Violations."
 - a. "Ineffective Assistance of Counsel."
 - b. "Transfer (sic) of Jurisdiction."
 - c. "Prosecutor misconduct."

As his relief, Applicant requests "a belated Austin Review and to have my conviction vacated or remanded of a plea."

Attached herewith and incorporated herein by reference are the records of the Calhoun County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, appellate records, and the relevant records from the Applicant's prior post-conviction relief proceeding. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Except for Applicant's claim that he was denied an appeal from his first post-conviction relief application, the Court should summarily dismiss any additional allegations brought forth herein or at an evidentiary hearing because they would be successive to the previous application

for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." [Emphasis in original]. Id., 305 S.C. at 450, 409 S.E.2d at 394. If the Applicant could have raised the allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, 274 S.C. 243, 262 S.E.2d 735 (1980). Accordingly, Respondent will move for a summary dismissal of any additional grounds brought forth by Applicant at an evidentiary hearing because they would be successive in nature.

IV.

There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

Therefore, "the contention that prior post-conviction relief counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive post-conviction relief application under § 17-27-90." Aice, 305 S.C. at 451, 409 S.E.2d at 394.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation" Aice, 305 S.C. at 452, 409 S.E.2d at 394. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. Respondent requests an evidentiary hearing solely on the matter of the Applicant's entitlement to an Austin Review.

V.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VI.

WHEREFORE, Respondent requests an evidentiary hearing solely on the matter of the Applicant's entitlement to an Austin Review.

[Signature on following page.]

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Senior Assistant Deputy Attorney General

MEGAN E. HARRIGAN
Assistant Attorney General

By:

Megan E. Harrigan
Attorneys for the Respondents
Post Office Box 11549
Columbia, South Carolina 29211

November 27, 2012.

STATE OF SOUTH CAROLINA)

COUNTY OF CALHOUN)

IN THE COURT OF COMMON PLEAS

2012-CP-09-00174

MICHAEL A. SMITH, 311064,)

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 and Motion to Dismiss All Claims Except Austin Review** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Tara Dawn Shurling, Esquire
 Law Office of Tara Dawn Shurling, PA.
 3614 Landmark Drive, Ste. A
 Columbia, SC 29204

DATED this 27th day of November, 2012.

Lauren Meara
 Lauren Meara, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF CALHOUN

MICHAEL A. SMITH, 311064
Applicant,

v.

State of South Carolina,
Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE FIRST JUDICIAL CIRCUIT
)

2012-CP-09-0174

CONSENT ORDER
FOR AUSTIN REMEDY

KEENE HASTY
CLERK OF COURT
CALHOUN COUNTY
JAIL AT THEWS, SC

2014 JUN 27 P 1:10

FILED

This matter comes before the Court by way of an Application for Post-Conviction Relief dated September 14, 2012. The Respondent filed its Return on November 27, 2012. A hearing is currently scheduled for Thursday, May 29, 2014. The Applicant is represented in this matter by his court-appointed attorney, Tara Dawn Shurling, Esquire. The State is represented by Megan E. Harrigan, Assistant Attorney General.

The Applicant previously filed a Post-Conviction Relief action docketed at 2010-CP-09-0088. That application was denied by Order of Dismissal filed in this case on September 26, 2011. This Court is now advised that due to an oversight by Applicant's PCR attorney, Nicole Singletary, a Notice of Appeal was not filed from the Order of Dismissal in Applicant's first PCR action. An Affidavit signed by Attorney Singletary is attached to this order.

In the Applicant's current PCR Application, which was filed *pro se*, he alleges the following:

- I. "Constitutional Violations."
 - a. "Ineffective Assistance of Counsel."
 - b. "Transfer (sic) of Jurisdiction."
 - c. "Prosecutor misconduct."

The parties now agree that the only remedy available to the Applicant in response to his current PCR action is a belated PCR appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).¹ Counsel for the Respondent and Counsel for the Applicant have therefore joined in a request that this matter be disposed of without a hearing, and consent to this Court's Order granting a belated PCR appeal as evidenced by their signatures below. This Court is further advised by Counsel for the Applicant that she has met with the Applicant to discuss this matter and he too wishes to waive his right to a hearing in favor of

¹ Counsel for the Applicant has further informed this Court that the Applicant has been advised that claims of ineffective assistance of PCR Counsel do not provide a basis upon which an Applicant may have a successive application heard on its merits if the new allegations raised therein could have been presented in the initial PCR action. *Michael Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991).

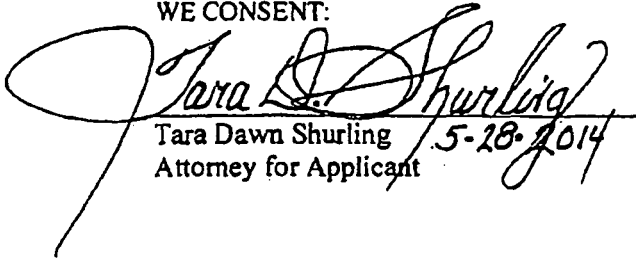
a Consent Order for *Austin Review*. Wherefore it is hereby ordered that the Applicant receive a belated appeal from the denial of his original Post-Conviction Relief action docketed at 2010-CP-09-0088.

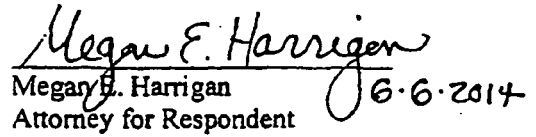
IT IS SO ORDERED.


The Honorable Maite Murphy
Circuit Court Judge
First Judicial Circuit

This 19 day of June, 2014.
St. George, South Carolina

WE CONSENT:


Tara Dawn Shurling
Attorney for Applicant 5-28-2014


Megan E. Harrigan
Attorney for Respondent 6-6-2014

STATE OF SOUTH CAROLINA
COUNTY OF CALHOUN

MICHAEL A. SMITH, 311064
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

2012-CP-09-0174

AFFIDAVIT OF
NICOLE SINGLETARY

FILED
2014 JUN 27 P 1:10
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY
MATTHEWS, SC

PERSONALLY appeared before me, Nicole Singletary, who being duly sworn, deposed and says:

1. I was counsel of record in a previous Post-Conviction Relief action filed by Michael A. Smith which was docketed at 2010-CP-09-0088. An evidentiary hearing was held in that action on June 6, 2011 before the Honorable Diane Goodstein presiding circuit judge. That application for Post-Conviction Relief was denied by Order dated September 14, 2011 and filed on September 26, 2011.
2. Through an oversight on my part, the Applicant's right to appeal the Order of Dismissal entered in his 2010 Post-Conviction Relief action was not preserved. My failure to file a Notice of Appeal from said Order as required by Rule 71.1 (g), SCRCP, was entirely due to my oversight and did not reflect a knowing and voluntary waiver of the client's right to a Post-Conviction Relief appeal.
3. This client advised me of his desire to appeal the Order of Dismissal in this Post-Conviction Relief case.

FURTHER AFFIANT SAYETH NAUGHT:

Nicole A. Singletary
Nicole Singletary

SWORN TO before me this 28th day
of May, 2014.

Annelle P. Clapham (L.S.)
Notary Public for South Carolina

My Commission Expires May 23, 2022

48

WITNESSES

DOCKET NO. 2004GS09-0145

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

The State of South Carolina

County of

CALHOUN

I hereby appear in my own proper person and plead guilty to the within indictment or to

LIN SHIRER

COURT OF GENERAL SESSIONS

Arresting Agency:

June 14, 2004 TERM

CCSD

Defendant

ARREST WARRANT NUMBER

E483159

Arrested: Jan 08, 2004

Witness:

C.C.C. PLS. AND G.S.

ACTION OF GRAND JURY

Date 6-14-04

For person of Grand Jury
Date: June 14, 2004

VERDICT

Guilty

Preperson of Heitl Jury
Date:

Mike A. Smith

THE STATE

vs.

Indictment for

MURDER

SC Code: 16-03-10
CDR Code: 0116
Class: FEL-EXM

05:14 PM JUN 14 2004

ATTEST TRUE COPY

Kenneth Hasty
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)

INDICTMENT
2004GS09-0145

At a Court of General Sessions, convened on June 14, 2004 the Grand Jurors of Calhoun County present upon their oath:

MURDER

That Mike A. Smith, did in Calhoun County, on or about March 9, 2000, with malice aforethought, kill one William Marion by shooting him in his right side with a handgun, and the said victim did die as a proximate result thereof. This offense being in violation of the Common Law of South Carolina, and Section 16-3-10 of the Code of Laws of South Carolina, as amended.

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



Robert D. Robbins SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATE

Calhoun

2005 SEP

P 3 154

INDICTMENT/CASE#:

GS- 09 0145
E483159

AKA:

Race:

DOB:

Address:

City, State, Zip

DL#

SID#

KENNE

CLERK

AWAY

Date of Offense:

S.C. Code §:

CDR Code #:

☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

TO:

in violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 011116

☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 04-GS-09-0202☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

§14-1-206 (Assessments 107.5%)	\$	\$
§14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>10.00</u>
§14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§56-5-2995 (DUI Assessment)	\$12	\$
§ 35.13 (Public Def/Prob)	\$500	\$
§73.3, 1B TP (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§33.7, 1B TP (Drug Court Surcharge)	\$100	\$
§50-21-114(BUI Breath Test Fee)	\$50	\$
§56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)	\$	\$ <u>3.75</u>
TOTAL		\$ <u>18.75</u>

PTUP

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

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

pmts. of \$ beginning\$ paid to Public Defender FundOther:

☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

ATTEST TRUE COPY

Kenneth Hasty
KENNETH HASTY
CLERK OF COURT

Court Reporter:

Clerk of Court/ Deputy Clerk

WITNESSES

DOCKET NO. 2004GS09-0202

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

The State of South Carolina

Defendant

County of

CALHOUN

I hereby appear in my own proper person and plead guilty to the within indictment or to

LIN SHIRER

COURT OF GENERAL SESSIONS

Arresting Agency:

June 14, 2004 TERM

CCSD

Defendant

ARREST WARRANT NUMBER

04CAL08

Arrested:

C.C.C. PLS. AND G.S.

Witness:

ACTION OF GRAND JURY
TRUE BILL

Mike A. Smith

Indictment for

POSSESSION OF A FIREARM DURING
THE COMMISSION OF A CRIME OF
VIOLENCE

Person of Grand Jury
June 14, 2004

VERDICT

Guilty

SC Code: 16-23-490

CDR Code: 0549

Class: FEL-F

05:14 h1 NIN 1002

ATTEST TRUE COPY

Kenneth Hasty
CLERK OF COURT

Person of Petit Jury

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)

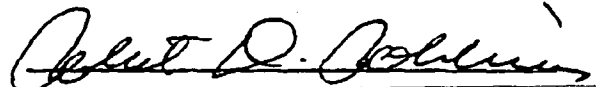
INDICTMENT
2004GS09-0202

At a Court of General Sessions, convened on June 14, 2004 the Grand Jurors of Calhoun County present upon their oath:

**POSSESSION OF A FIREARM DURING THE COMMISSION OF A CRIME
OF VIOLENCE**

That Mike A. Smith, did in Calhoun County, on or about March 9, 2000, unlawfully have a handgun in his possession. This offense occurred during the commission of a Murder, and as a result violated Section 16-23-490, Code of Laws of South Carolina, 1976, as amended.

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



Robert D. Robbins SOLICITOR

STATE OF SOUTH CAROLINA

FILED

IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATE

Calhoun

2005 SEP 2

VS

AKA:

Race:

DOB:

Address:

City, State, Zip

DL#

SID#

Mike A. Smith

KENNETH

A/W#:

Date of Offense:

S.C. Code §:

CDR Code #:

INDICTMENT/CASE#:

-GS-

04 CAL 08

0202

☐ CASE RESTORED

SENTENCE

☐ PLEA☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Possession of a Firearm during the Commission of a Crime of Violence
in violation of § 16-23-490 of the S.C. Code of Laws, bearing CDR Code # 0151419
☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

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

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation,
which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 04-GS-09-0145
☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

§14-1-206 (Assessments 107.5%)

§14-1-211(A)(1) (Conv. Surcharge)

§14-1-211(A)(2) (DUI Surcharge)

§56-5-2995 (DUI Assessment)

§ 35.13 (Public Def/Prob)

§73.3, 1B TP (Law Enforce. Funding)

§33.7, 1B TP (Drug Court Surcharge)

§50-21-114(BUI Breath Test Fee)

§56-5-2942(J) (Vehicle Assessment)

3% to County (if paid in installments)

TOTAL

Michael W. Pringle

Clerk of Court/ Deputy Clerk

Court Reporter:

Wanda J. Hester

PTUP

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

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

pmts. of \$ beginning\$ paid to Public Defender FundOther:

☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

ATTEST TRUE COPY

Kenneth Hasty
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY

Pink - Defendant

White - Clerk

Green - Corrections

Cyan - Probation

SCCA/217 (7/2003)