

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable James Barber, Circuit Court Judge
Case No. 2013-CP-40-2107
Appellate Case No. 2014-000967

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S.C. Supreme Court

STATE OF SOUTH CAROLINA,..... PETITIONER,

v.

ADAMS GIBSON,.....RESPONDENT.

APPENDIX

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1 FRIENDS TO REWARD OR ANY ENEMIES TO PUNISH. YOU HAVE GOT TO
2 DECIDE WHETHER -- WHETHER THE STATE HAS BROUGHT TO YOU
3 SUFFICIENT PROOF TO CONVINCE YOU FIRMLY AND THAT IS BEYOND A
4 REASONABLE DOUBT THAT MY CLIENT IS GUILTY AS CHARGED.

5 I DON'T KNOW HOW MANY OF YOU ARE OLD ENOUGH TO REMEMBER:
6 THERE WAS A SERIES ON TELEVISION, A VERY POPULAR SERIES,
7 CALLED "DALLAS," AND WHEN THAT SERIES GOT TO ITS CLIMAX, AT
8 THE CLOSING OF THAT SERIES THE QUESTION WAS, "WHO SHOT J.R.?"
9 AND THAT THING BUILT UP FOR WEEKS AND WEEKS. WHO SHOT J.R.?

10 AND THE QUESTION IN THIS CASE IS: WHO SHOT DENNIS IRBY?
11 AND IT IS NOT A PROCESS OF ELIMINATION FOR YOU TO MAKE THAT
12 DECISION, AS MS. CAMPBELL WOULD SUGGEST TO YOU. IT IS THEIR
13 DUTY, THEIR RESPONSIBILITY, TO COME FORWARD WITH AFFIRMATIVE
14 PROOF THAT JACQUES GIBSON KILLED DENNIS IRBY. YOU CAN'T RELY
15 ON SPECULATION THAT IT MAY HAVE HAPPENED THIS WAY. IT MIGHT
16 HAVE HAPPENED THIS WAY. IT PROBABLY COULD HAVE HAPPENED THIS
17 WAY. IT POSSIBLY COULD HAVE HAPPENED THIS WAY. THEY ARE
18 RESPONSIBLE FOR BRINGING YOU EVIDENCE THAT IT HAPPENED, AND
19 WHAT YOU HAVE SEEN IN THIS CASE IS A SERIES OF CONFLICTING
20 VERSIONS OF WHAT HAPPENED. YOU'VE BEEN HEAR FOUR DAYS, FOUR
21 DAYS, AND IT'S VERY ELEMENTARY TO ASK: WHO SHOT DENNIS IRBY?

22 BASED ON WHAT YOU HAVE HEARD, YOU CANNOT EVEN -- BASED
23 ON WHAT THEIR WITNESSES SAID, YOU CAN'T EVEN TELL WHERE
24 DENNIS IRBY WAS. PEOPLE HAVE GIVEN YOU DIFFERENT VERSIONS OF
25 WHERE HE WAS, AND LET'S BACK UP FURTHER THAN THAT.

1 LET'S GO INSIDE CHANCE'S. SOME PEOPLE SAID THERE WAS AN
2 ARGUMENT; SOME PEOPLE SAID THERE WASN'T. WAS THERE AN
3 ARGUMENT? YOU'VE GOT CONFLICTING VERSIONS EVEN ABOUT THAT
4 BASIC POINT. SOME PEOPLE SAID THAT THERE WAS AN ARGUMENT
5 ABOUT THE C.D.; PEOPLE CONTRADICTED THAT.

6 WHERE DID THE FIGHT TAKE PLACE? WHERE DID THE FIGHT
7 TAKE PLACE? I MEAN, IF THEY HAVE PROVEN THEIR CASE, YOU WILL
8 KNOW EXACTLY NOW WHERE THE FIGHT TOOK PLACE. SOME PEOPLE
9 SAID IN FRONT OF CHANCE'S. SOME PEOPLE SAID IN BETWEEN THE
10 CARS. SOME PEOPLE SAID OUTSIDE THE CARS. CONFLICTS ABOUT
11 WHERE THE FIGHT WAS TAKING PLACE...

12 AND WHERE WAS DENNIS IRBY WHEN THE FIGHTING WAS GOING
13 ON? WHERE WAS HIS BODY FOUND? LOOK AT THESE PHOTOGRAPHS.
14 DO THEY TELL YOU WHERE HIS BODY WAS WHEN HE WAS SHOT? WAS
15 HIS BODY MOVED? DID HE MOVE? I MEAN, THESE ARE THINGS THAT
16 IN A MURDER CASE THAT IF THE CASE IS NOT AS SLOPPILY
17 INVESTIGATED AND AS POORLY INVESTIGATED, THEY WILL HAVE
18 EVIDENCE TO PROVE TO YOU ALL OF THESE FUNDAMENTAL, ELEMENTARY
19 THINGS.

20 YOU KNOW, IN THESE CASES IF YOU -- IF YOU WANT TO TELL
21 THE WAY THE WIND IS BLOWING, YOU LOOK AT THE LEAVES, THE
22 SMALL THINGS. YOU DON'T LOOK AT THE TRUNK OF THE TREE. YOU
23 EXPECT THEM TO COME IN HERE AND SAY, OH, YEAH, THERE WAS A
24 MURDER. THERE WAS A SHOOTING, AND THIS WAS A NINE MILLIMETER
25 AND THIS WAS A GUN HERE AND A GUN THERE. BUT YOU LOOK AT THE

1 LITTLE THINGS. THERE ARE NO EYEWITNESSES. OUT OF ALL OF
2 THESE PEOPLE WHO WERE THERE THAT NIGHT, NOT A SINGLE ONE OF
3 THEM, NOT A SINGLE ONE OF THEM HAVE TESTIFIED THAT THEY SAW
4 JACQUES GIBSON SHOOT DENNIS IRBY.

5 LET'S CALL -- LET'S CALL THE ROLL. YOU REMEMBER TORRI
6 BOYD. TORRI BOYD CAME IN HERE AND TESTIFIED. WELL, WHAT DID
7 HE TESTIFY TO ABOUT WHO SHOT DENNIS IRBY? DID TORRI BOYD SAY
8 HE SAW DENNIS IRBY BEING SHOT BY JACQUES? HE DID NOT SEE
9 JACQUES SHOOT DENNIS IRBY, AND YOU CAN GO RIGHT DOWN THE
10 LINE. EACH ONE OF THESE PEOPLE, IF YOU WERE TO ASK THE
11 QUESTION, "WHO SHOT DENNIS IRBY?" ALL OF THEM WOULD ANSWER,
12 "NO, I DID NOT SEE IT." I'M NOT GOING TO GO THROUGH ALL OF
13 THEM, BUT EACH ONE OF THEM WOULD ANSWER THE SAME THING: I
14 DID NOT SEE. NOW, THAT IS WHAT WE CALL DIRECT EVIDENCE, AN
15 EYEWITNESS. ALL OF THE EYEWITNESSES SAY THEY DID NOT SEE
16 JACQUES SHOOT DENNIS IRBY. NOW, OBVIOUSLY THESE POLICE
17 OFFICERS WHO WERE NOT THERE, THEY CAN'T TESTIFY TO THAT, THAT
18 THEY SAW MY CLIENT SHOOT DENNIS IRBY. NO ONE SAW HIM SHOOT
19 DENNIS IRBY.

20 NOW, IT IS INTERESTING TO NOTE THAT THERE REALLY WERE
21 TWO PEOPLE IN A POSITION TO TESTIFY TO THAT. THE TWO BEST
22 WITNESSES WERE VERNON DAVIS AND STEPHON WILLINGHAM BECAUSE
23 THEY WERE RIGHT THERE IN THE CAR. THEY WERE RIGHT THERE IN
24 THE CAR. THEY WERE RIGHT THERE WITH JACQUES. IF JACQUES
25 SHOT DENNIS IRBY, THEY COULD HAVE SEEN IT, BUT IT'S

1 INTERESTING THAT NEITHER ONE OF THEM EVEN SAID THAT THEY SAW
2 DENNIS IRBY. NOT A SINGLE ONE OF THEM SAID THAT THEY SAW
3 JACQUES GIBSON SHOOT AT DENNIS IRBY. NOT A SINGLE ONE OF
4 THEM SAW -- SAID THAT THEY SAW JACQUES GIBSON FIRING IN THE
5 DIRECTION OF DENNIS IRBY. WHAT DID THE TWO PEOPLE WHO WERE
6 CLOSEST TO JACQUES GIBSON SAY? "I SAW HIM SHOOTING IN THE
7 AIR. I SAW HIM SHOOTING IN THE AIR."

8 THINK BACK, LADIES AND GENTLEMEN, OF THE CHRONOLOGY OF
9 EVENTS. WHAT WAS THE SEQUENCE OF EVENTS WHEN THE SHOOTING
10 TOOK PLACE? ANTONIO SMITH, YO-YO, PROBABLY IS THE BEST
11 WITNESS OF THAT. WHAT DID HE TELL YOU? A FIGHT WAS GOING
12 ON. A FIGHT WAS GOING ON. A FIGHT WAS GOING ON, AND HE WAS
13 GOING TO TRY TO BREAK IT UP. AS HE WAS GOING TO TRY TO BREAK
14 IT UP, JACQUES THOUGHT HE WAS GOING TO ATTACK HIS BROTHER,
15 KARTEZ, AND HE SAID, "DON'T TRY IT," AND HE'S POINTING THE
16 GUN AT -- JACQUES IS POINTING THE GUN AT YO-YO, AND THAT'S
17 WHEN HE HEARD GUNSHOTS. AND THEN HE TURNED AROUND, AND
18 THAT'S WHEN DENNIS IRBY WAS SHOT. THERE HAS NOT BEEN A
19 SINGLE WITNESS TO COME IN HERE AND TESTIFY THAT AFTER THAT
20 FIGHT WAS TAKING PLACE AND JACQUES WAS STILL UP BY WHERE THE
21 FIGHT WAS TAKING PLACE THAT DENNIS IRBY WAS SHOT SOMETIME
22 THEREAFTER.

23 NOW, ALL OF THIS ABOUT JACQUES HAD A NINE MILLIMETER AND
24 THIS YOUNG MAN WAS KILLED WITH A NINE MILLIMETER BULLET --
25 OBVIOUSLY THE GUN IS MISSING. AND THERE'S NO EVIDENCE AND

1 YOU CAN'T SPECULATE - THERE'S NO CONJECTURE INVOLVED - THAT
2 THAT BULLET CAME FROM THE WEAPON THAT JACQUES HAD THAT NIGHT.
3 YOU CAN GUESS AT IT.

4 WHEN YOU GO BACK IN YOUR JURY ROOM AND SOMEBODY SAYS,
5 "WELL, HE SHOT HIM," WHERE IS THE PROOF? BECAUSE YOU DON'T
6 KNOW WHERE THAT PROJECTILE BULLET REALLY CAME FROM. WELL,
7 THERE'S A PIECE -- THERE WAS A PIECE OF A NINE MILLIMETER.
8 REMEMBER WHAT MR. COLLINS TOLD Y'ALL. YOU CAN'T RELY -- YOU
9 CAN'T DEPEND ON CASINGS THAT YOU FIND AT A SCENE BECAUSE
10 THEY'RE MOBILE. PEOPLE CAN KICK THEM AROUND. PEOPLE CAN
11 THROW THEM AROUND; THEY'RE MOVEABLE. YOU JUST DON'T KNOW,
12 AND NOBODY HAS COME IN HERE AND TESTIFIED HOW LONG THOSE
13 CASINGS HAD BEEN OUT THERE. DON'T YOU KNOW THEY HAVE THE
14 EXPERTISE TO DETERMINE IF THAT CASING WAS FRESH OR HAD BEEN
15 OUT THERE FOR A LONG TIME? NOBODY TESTIFIED TO THAT, NOT AT
16 ALL.

17 LADIES AND GENTLEMEN, THEY HAVE GIVEN YOU PIECES OF A
18 PUZZLE, AND WHAT THEY'RE TRYING TO DO IS TO ASK YOU TO PUT
19 THESE PIECES OF A PUZZLE TOGETHER AND MAKE OUT A GUILTY
20 VERDICT AGAINST JACQUES GIBSON, AND THAT IS NOT YOUR JOB.
21 THAT IS NOT YOUR RESPONSIBILITY.

22 NOW, WHEN YOU GET IN THE JURY ROOM -- AND YOU HEARD
23 INVESTIGATOR MCDANIELS TALK ABOUT THAT HE TOOK A STATEMENT
24 FROM MY CLIENT. AND WHEN YOU LOOK AT THAT STATEMENT, AT
25 FIRST BLUSH YOU'RE GOING TO SAY, "WOW. WHAT IS HE SAYING?"

1 AND IT IS DIFFICULT IN THIS SETTING TO EXPLAIN TO Y'ALL IN A
2 CULTURE OF WHAT GOES ON WHEN A CITIZEN IS PRESENT AT A POLICE
3 STATION. I MEAN, YOU JUST CAN'T DESCRIBE IT WHEN YOU'RE
4 THERE AT A POLICE STATION AND YOU'RE BEING INTERROGATED BY
5 THESE EXPERIENCED POLICE OFFICERS AND THEY'RE ASKING YOU
6 QUESTIONS.

7 PEOPLE ARE RUNNING AROUND WITH GUNS ON THEIR -- ON THEIR
8 SIDES, AND YOU'RE 19 YEARS OLD AND THE DISPARITY BETWEEN YOUR
9 EXPERIENCE AND THEIR EXPERIENCE AND HOW THEY CAN GET YOU TO
10 SAY ALMOST ANYTHING... AND IT'S HARD TO -- IT'S HARD TO
11 EXPLAIN THAT TO PEOPLE. AND IT'S HARD TO CONVEY TO Y'ALL
12 HOW -- HOW UNDER THAT SITUATION THAT WHEN THEY COME IN HERE
13 WITH THESE STATEMENTS, JUST QUESTIONS AND ANSWERS, QUESTIONS
14 AND ANSWERS, YOU GET THE IMPRESSION THAT THEY MUST HAVE SAID
15 SOMETHING BAD OR THEY MUST HAVE DONE SOMETHING BAD, AND THEN
16 YOU FORGET ABOUT HOW WITNESS AFTER WITNESS HAVE SAID TO
17 Y'ALL, "THAT'S NOT WHAT I TOLD THAT OFFICER. YES, I SIGNED
18 THAT STATEMENT, BUT THAT'S NOT WHAT I TOLD HIM."

19 AND THEN YOU HEAR THESE OFFICERS COME IN HERE AND PUT
20 THEIR HAND ON THE BIBLE: "WELL, WE DON'T USE TAPE RECORDERS.
21 WE NEVER DO THAT. WE DON'T USE VIDEO. WE NEVER DO THAT."
22 DO YOU KNOW WHY THEY DON'T DO IT? BECAUSE THEY DON'T WANT
23 YOU TO SEE WHAT REALLY HAPPENS IN THOSE INTERVIEW ROOMS. OH,
24 SURE, THESE KIDS, THESE YOUNG CHILDREN, SIGNED THEIR NAMES TO
25 THOSE STATEMENTS. BUT THEY COME IN HERE WITH THESE BLUE

1 SUITS ON AND THESE UNIFORMS, AND YOU SEE WHEN THEY TAKE THE
2 WITNESS STAND. WHEN THEY START TESTIFYING, ALL THESE YOUNG
3 PEOPLE, THEY BE UP HERE UP ON THE MIC AND THEY CAN'T HARDLY
4 TALK. BUT YOU SEE WHEN THESE OFFICERS COME IN HERE, THEY SIT
5 HERE. THEY TALK; THEY TURN AROUND. THEY'RE PROFESSIONAL
6 WITNESSES, AND YOU ARE IMPRESSED.

7 YOU'RE THINKING -- YOU THINK THEY'RE EXPERTS BECAUSE
8 THEY ARE EXPERTS IN HERE IN SAYING THE RIGHT THING, AND THEY
9 START USING WORDS LIKE CONSISTENT. THEY DON'T TELL YOU
10 CONCLUSIVELY THAT THAT IS THE BULLET. THEY START USING THOSE
11 FANCY WORDS "CONCLUSIVE," AND YOU -- AND YOU -- YOU GET
12 ABSORBED WITH STYLE INSTEAD OF SUBSTANCE. YOU DON'T LOOK
13 AT -- YOU'RE LOOKING AT THE TRUNKS AND YOU DON'T LOOK AT THE
14 LEAVES, AND THE LEAVES TELL YOU THAT HERE THIS EXPERIENCED
15 OFFICER -- 80 HOURS OF TRAINING IN HOW TO INTERROGATE. WHY
16 HAVE YOU GOT TO TAKE 80 HOURS TO LEARN HOW TO INTERROGATE TO
17 FIND OUT THE TRUTH? DO YOU KNOW WHY? BECAUSE YOU'VE GOT TO
18 LEARN THE TRICKS. YOU'VE GOT TO LEARN THE TACTICS. YOU'VE
19 GOT TO USE THE WORDS TO MAKE PEOPLE SAY THINGS THAT THEY
20 DON'T REALLY MEAN.

21 AND WHEN YOU LOOK AT HIS STATEMENT, YOU'LL FIND HOW THIS
22 YOUNG BOY WAS INDUCED INTO SAYING... YOU KNOW, I'M GOING TO
23 SAY IT. IS IT POSSIBLE YOU COULD HAVE? IN FACT, HE TOLD HIM
24 REPEATEDLY, "I SHOT IN THE AIR. I SHOT IN THE AIR. I SHOT
25 IN THE AIR. EVERYBODY ELSE SAID I SHOT IN THE AIR."

1 AND THEN THIS OFFICER, THE LAST ONE -- ISN'T IT
2 INTERESTING MR. MCDANIELS IS THE LAST ONE TO INTERVIEW HIM?
3 AND THEN HE GETS HIM -- HE SAID, "I MAY HAVE. I MIGHT HAVE.
4 I COULD HAVE." IF HE MAY HAVE, IF HE MIGHT HAVE OR HE COULD
5 HAVE, THAT'S REASONABLE DOUBT. THAT IS WHAT REASONABLE DOUBT
6 IS.

7 YOU'VE HEARD ON THIS WITNESS STAND FROM ALL OF THESE
8 PEOPLE, AND LOOK AT THESE PHOTOGRAPHS AND HOW DARK IT WAS OUT
9 THERE THAT NIGHT. JUST GO THROUGH THESE PHOTOGRAPHS, AND
10 IT'S ONLY THOSE PICTURES WHERE THEY'RE RIGHT UP ON IT THAT IT
11 LOOKS LIKE IT WAS -- LIKE THERE WAS SOME KIND OF LIGHTING OUT
12 THERE. YOU KNOW, IT'S DARK OUT THERE.

13 AND EVERYBODY THAT HAS COME IN HERE -- AND THEY'VE SAID,
14 WHEN WE'RE TALKING ABOUT HOW MANY SHOTS THERE WERE -- TORRI
15 BOYD, IN HIS STATEMENT HE SAYS ZERO SHOTS. IN HIS TESTIMONY
16 HE SAYS ZERO SHOTS. RAVARIS HENRY: THE FIRST TIME ON
17 SEPTEMBER 5TH HE SAYS SIX SHOTS. THEN THE NEXT DAY HE SAID
18 FROM SEVEN TO EIGHT SHOTS. IN THE COURTROOM HE TOLD Y'ALL
19 NINE SHOTS. THAT'S NOT CONFLICTING TESTIMONY? THAT'S NOT
20 REASONABLE DOUBT? WHERE ARE ALL THESE SHOTS COME FROM?

21 DO YOU BELIEVE THAT THERE WERE ONLY TWO GUNS OUT THERE
22 THAT NIGHT? DO YOU BELIEVE THAT ONLY TWO PEOPLE WERE
23 SHOOTING GUNS THAT NIGHT? THIS EVIDENCE PROVES THAT THERE
24 WERE MORE THAN ONE -- MORE THAN TWO GUNS OUT THERE THAT
25 NIGHT. AND -- AND WHAT -- WHERE WAS JACQUES WHEN HE -- WHEN

1 HE SHOT DENNIS IRBY? WHERE WAS DENNIS IRBY? YOU KNOW, WHAT
2 DIRECTION DID THE GUNFIRE GO?

3 YOU HAVE NOT HEARD ANYBODY TESTIFY THAT THERE WAS ANY
4 HOSTILITY BETWEEN JACQUES AND DENNIS IRBY. THEY WEREN'T
5 FIGHTING. AS A MATTER OF FACT, JACQUES TRIED TO GET THEM TO
6 CHILL IT. BUT TRAMELE SAYS THAT -- TRAMELE SAYS, "I WAS
7 FIGHTING DENNIS IRBY," BUT MS. CAMPBELL SAID HE'S TRYING TO
8 BE A PEACEMAKER. HE SAID, "I HAD TO KICK HIM OFF OF ME."

9 NOW, THOSE CONFLICTS -- AND LOOK AT ANTWAN MARTIN. HE
10 SAYS IN HIS STATEMENT THREE, THEN IN HIS TESTIMONY FIVE TO
11 SIX. MELVIN DEWITT: TWO IN HIS STATEMENT. AND HE WAS THE
12 BEST OF ALL IN HIS LITTLE -- IN HIS INITIAL STATEMENT HE
13 SAYS, "I HEARD TWO POPS." DO YOU REMEMBER THAT? HE SAID TWO
14 POPS. AND THEN IN HIS TESTIMONY BEFORE Y'ALL HE SAID, "WELL,
15 IT WAS FOUR. I HEARD TWO POPS FIRST AND THEN TWO POPS LATER."
16 SO WE'VE GOT FOUR POPS.

17 WELL, ISN'T IT INTERESTING THAT ON THE NIGHT HE TALKS
18 ABOUT TWO POPS WHEN IT HAPPENED, WHEN IT'S FRESH ON HIS MIND?
19 AND THEN HE COMES UP HERE LAST FRIDAY TO PREPARE HIS
20 TESTIMONY FOR COURT, AND THEN HIS TESTIMONY GETS A LOT OF
21 YEAST IN IT. YOU KNOW, IT RISES. THERE'S MORE TO IT THEN.
22 FROM SEPTEMBER 5TH, 2005, TO MAY 2007, NOT A SINGLE WORD FROM
23 HIM ABOUT HIS CHANGE IN HIS TESTIMONY.

24 LAKISHA DAVIS: HER STATEMENT, TWO. AND SHE WAS
25 CONSISTENT WITH TWO. DEMETRIC DAVIS, BAM, FROM THREE TO

1 FOUR, AND IN COURT HIS TESTIMONY SAYS MULTIPLE.

2 NOW, WHAT IS INCONSISTENT HERE IS THAT THEY'RE CLAIMING
3 THAT THEY FOUND THREE .25 CASINGS. THEY FOUND ONE NINE
4 MILLIMETER CASING, AND THEN THEY FOUND A FRAGMENT IN SHUNTA
5 WILSON'S TIRE. NOW, THAT'S FIVE.

6 WHERE ARE ALL THESE OTHER BULLETS COMING FROM? WHO IS
7 FIRING THOSE OTHER GUNS? HOW DO YOU HAVE ALL THOSE SHOTS?
8 IT JUST DOESN'T ADD UP. ACCORDING TO THE CASINGS, THERE HAD
9 TO BE MORE THAN TWO AND THERE HAD TO BE -- THERE HAD TO BE
10 MORE THAN THREE.

11 TRAMELE DAVIS: HIS STATEMENT, FROM THREE TO FOUR, AND
12 THEN HE COMES IN THE COURTROOM AND HE SAYS FOUR. ANTONIO
13 SMITH, HE INITIALLY SAYS FIVE, AND THEN HE SAYS FROM EIGHT TO
14 NINE THE NEXT DAY, AND THEN IN COURT HE SAYS FROM FIVE TO
15 SEVEN. IT KEEPS CHANGING, LADIES AND GENTLEMEN, AND THAT'S
16 WHAT REASONABLE DOUBT IS ALL ABOUT.

17 STEPHON WILLINGHAM: I HEARD TWO, AND THEN HE COMES INTO
18 COURT AND HE HEARS MULTIPLE. MARCUS TUCKER: MULTIPLE IN HIS
19 FIRST STATEMENT. THEN ON -- IN HIS TESTIMONY, FROM TWO TO
20 THREE. AND SHUNTA WILSON, FROM FIVE AND THEN SHE GOES ALL
21 THE WAY TO NINE. THOSE WITNESSES CAME IN HERE AND PUT THEIR
22 LEFT HAND ON THE BIBLE AND RAISED THEIR RIGHT HAND TO THE
23 SKY, AND THEY LIED OUT OF THEIR MOUTHS.

24 LADIES AND GENTLEMEN, I SINCERELY HOPE THAT Y'ALL WILL
25 RECOGNIZE THAT DENNIS IRBY'S DEATH WAS VERY UNFORTUNATE.

1 NONE OF US HERE THINK OTHERWISE, BUT EQUALLY AS BAD IS
2 FINDING SOMEBODY GUILTY OF A CRIME THAT THEY DID NOT COMMIT.
3 A NOT GUILTY VERDICT DOES NOT MEAN YOU CONDONE CRIME. A NOT
4 GUILTY VERDICT DOES NOT MEAN THAT YOU THINK THESE YOUNG
5 PEOPLE SHOULD BE OUT AT THESE NIGHTCLUBS ENGAGED IN THAT TYPE
6 OF CONDUCT.

7 A NOT GUILTY VERDICT SIMPLY MEANS THAT IN THIS ISOLATED
8 CASE, IN THIS CASE THAT WE HAVE HERE, THAT THE STATE HAS
9 FAILED TO GIVE YOU SUFFICIENT PROOF TO CONVICT. THAT'S ALL
10 IT MEANS. THAT'S ALL A NOT GUILTY VERDICT MEANS, THAT
11 THERE'S NOT ENOUGH EVIDENCE.

12 I AM SURE AS I LOOK AT THE CLOCK -- IT'S 6 MINUTES 'TIL
13 4, AND AFTER I FINISH, JUDGE JOHN IS GOING TO GIVE YOU THE
14 APPLICABLE LAW. AND I DON'T KNOW WHAT THE SCHEDULE IS AND I
15 DON'T KNOW IF HE'S GOING TO GIVE YOU THE LAW TODAY AND HAVE
16 YOU DELIBERATE TODAY, BUT IF HE DOES, WHEN YOU GET BACK IN
17 THAT JURY ROOM, YOU'RE GOING TO HAVE A STRONG URGE TO GO
18 HOME. YOU'RE GOING TO HAVE A STRONG FEELING TO LEAVE THIS
19 BUILDING AND GET THIS CASE BEHIND YOU. YOU'RE GOING TO SAY,
20 "I'VE GOT OTHER THINGS TO DO," BUT I HOPE YOU WILL APPRECIATE
21 THE IMPORTANT ROLE THAT YOUR DECISION IS GOING TO MAKE.
22 WHATEVER YOU DECIDE IN THIS CASE IS PERMANENT.

23 IF DURING THE COURSE OF THIS TRIAL I HAVE MADE A
24 MISTAKE, THERE'S A HIGHER AUTHORITY THAT WILL DEAL WITH ME.
25 IF JUDGE JOHN HAS MADE A MISTAKE, THERE ARE HIGHER COURTS TO

1 CORRECT HIS MISTAKE, BUT FOR YOU THERE IS NO HIGHER
2 AUTHORITY. WHATEVER YOU DECIDE IS FINAL, AND THAT IS WHY IT
3 IS SO IMPORTANT THAT YOU ACCEPT YOUR RESPONSIBILITY
4 SERIOUSLY, THAT YOU ACCEPT YOUR RESPONSIBILITY BASED ON THE
5 FACT THAT MY CLIENT IS PRESUMED INNOCENT, THAT THE BURDEN IS
6 ON THE STATE TO PROVE HIS GUILT BEYOND A REASONABLE DOUBT,
7 AND IF THEY HAVEN'T DONE THAT, UNDER YOUR OATH OF OFFICE YOU
8 MUST FIND HIM NOT GUILTY.

9 A STORY IS TOLD OF -- ABOUT THIS -- THIS OLD MAN WHO
10 LIVED IN THIS COMMUNITY, AND HE WAS KNOWN FOR HIS WISDOM AND
11 HIS SAGED ADVICE. AND ONE DAY THESE TWO YOUNG KIDS, THEY
12 DECIDED THEY WERE GOING TO CHALLENGE HIM TO SEE HOW SMART HE
13 WAS. AND WHAT THEY DID WAS THEY CAUGHT A BIRD AND THEY TOOK
14 THAT BIRD AND THEY PUT THAT BIRD BEHIND THEIR HAND -- BEHIND
15 THEIR BACK, AND THEY WENT UP TO THE OLD MAN AND SAID, "OLD
16 MAN, OLD MAN, WHAT IS IT THAT I HAVE BEHIND MY BACK?" AND
17 THE OLD MAN GUESSED CORRECTLY, "IT'S A BIRD, MY SON. IT'S A
18 BIRD." AND THEN THEY ASKED HIM THE QUESTION, "IS IT DEAD OR
19 ALIVE?" AND THE OLD MAN RESPONDED, "BOYS, THE BIRD IS IN
20 YOUR HAND, AND WHETHER IT LIVES OR DIES IS UP TO YOU."

21 MR. FOREMAN AND LADIES AND GENTLEMEN OF THE JURY,
22 WHETHER MY CLIENT, JACQUES GIBSON, IS FOUND GUILTY OR NOT
23 GUILTY IS LEFT TO YOU. I DID NOT SAY IT PERFUNCTORILY OR
24 ROUTINELY AT THE OPENING THAT WE CAREFULLY SELECTED YOU
25 BECAUSE WE THOUGHT THAT Y'ALL WOULD BE FAIR AND GIVE US A

1 FAIR TRIAL.

2 WE'VE BEEN WAITING FOR THIS FOR NEARLY THREE YEARS TO
3 COME INTO THIS COURT TO CHOOSE SOMEBODY, A PANEL OF PEOPLE,
4 WHO WILL MAKE A DECISION BASED ON THE FACT THAT THERE'S
5 INSUFFICIENT EVIDENCE, THAT THE STATE HAS FAILED TO PROVE
6 THEIR CASE BEYOND A REASONABLE DOUBT. THERE'S NO QUESTION
7 THEY HAVE RAISED SUSPICION. IT'S JUST LIKE A MYSTERY NOVEL.
8 YOU READ A MYSTERY NOVEL. ALL THROUGH THE COURSE OF THE
9 NOVEL THEY'RE POINTING IN A DIRECTION. THEY'RE POINTING IN A
10 DIRECTION, AND AT THE END IT'S SOMEBODY ELSE. AND THEY'VE
11 RAISED SUSPICION ABOUT JACQUES GIBSON, BUT THE PROOF -- THE
12 CONCLUSION YOU HAVE TO DRAW IS THAT IT HAD TO BE SOMEBODY
13 ELSE. THANK YOU SO MUCH FOR YOUR ATTENTION.

14 THE COURT: ALL RIGHT. LADIES AND GENTLEMEN, WE HAVE
15 BEEN IN HERE FOR A LITTLE WHILE. I'M GOING TO HAVE YOU GO
16 BACK TO YOUR JURY ROOM FOR ABOUT 10 MINUTES. I TELL YOU THAT
17 WHEN YOU COME BACK I WILL GIVE YOU THE LAW THAT APPLIES TO
18 THIS PARTICULAR CASE. I AM GOING TO SUBMIT THIS CASE TO YOU
19 FOR YOUR DELIBERATIONS AND YOUR UNANIMOUS DECISION.

20 SO WHEN YOU'RE BACK IN YOUR JURY ROOM IN THIS BREAK, IF
21 THERE'S ANYBODY YOU NEED TO CALL AT HOME AND TELL THEM WHERE
22 YOU ARE AND WHERE YOU MIGHT BE FOR AWHILE, THEN PLEASE DO SO.
23 THANK YOU VERY MUCH. GO TO YOUR JURY ROOM. EVERYONE ELSE
24 REMAIN SEATED.

25 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT AT 4:02

1 P.M.)

2 MR. JOHNSON: YOUR HONOR, BEFORE WE ADJOURN...

3 THE COURT: YES, SIR.

4 MR. JOHNSON: YOUR HONOR, I WOULD RESPECTFULLY ASK THAT
5 YOU POSTPONE CHARGING THE JURY AND HAVING THEM DELIBERATE
6 'TIL IN THE MORNING. YOUR HONOR, AS YOU KNOW FROM
7 EXPERIENCE, WHEN YOU GIVE A JURY A CASE AT THIS LATE IN THE
8 AFTERNOON -- IT'S ONE MINUTE -- ACCORDING TO MY WATCH, IT'S
9 4:00, AND IT'S GOING TO TAKE YOU ABOUT 45 MINUTES TO GIVE THE
10 CHARGE AND THEN IT'LL GOING TO BE QUARTER 'TIL 5. AND THERE
11 IS AN URGE -- THERE'S SORT OF A PRESSURE TO GET OUT OF THE
12 JURY ROOM FAST AND MAKE A QUICK DECISION AND NOT GIVE A CASE
13 OF THIS MAGNITUDE THE ATTENTION THAT IT REQUIRES.

14 AND I DON'T -- I THOUGHT THERE WAS SOME -- SOME -- SOME
15 COURT ORDER FROM THE SUPREME COURT THAT WE WERE SUPPOSED TO
16 TRY TO END COURTS AROUND 5 OR 5:30 IN THE DAY. I'M NOT SURE
17 IF THAT -- IF THAT'S THE CASE, BUT, YOUR HONOR, FROM A
18 PRACTICAL POINT OF VIEW THEY'VE HAD -- THEY'VE HAD TO LISTEN
19 TO OUR ARGUMENTS FOR TWO HOURS AND NOW THEY'VE GOT TO HEAR
20 YOUR CHARGE. AND THEY -- IT IS -- IT WOULD BE IMPOSSIBLE FOR
21 THEM, YOUR HONOR, TO GIVE THE ATTENTION TO THIS MATTER THIS
22 AFTERNOON, AND I WOULD RESPECTFULLY ASK THAT WE COME BACK IN
23 THE MORNING TO GIVE THE CHARGE AND TO ALLOW THEM TO
24 DELIBERATE.

25 THE COURT: ALL RIGHT, SIR. I APPRECIATE WHAT YOU'VE

1 SAID TO ME, MR. JOHNSON, BUT I HAVE FOUND DURING THIS
2 PARTICULAR TRIAL THAT THE JURY HAS PAID CLOSE ATTENTION TO
3 EVERYTHING THAT HAS TRANSPIRED. I HAVE THE UTMOST CONFIDENCE
4 IN THEM THAT THEY WILL GIVE THE ATTENTION AND THE TIME
5 NECESSARY TO REACH A TRUE AND JUST VERDICT IN THIS PARTICULAR
6 MATTER.

7 AFTER I CHARGE THEM AND I SUBMIT THE CASE TO THEM FOR
8 THEIR DELIBERATIONS AND THEY HAVE BEEN IN THERE FOR SOME
9 PERIOD OF TIME WITHOUT REACHING A DECISION, IF THAT IS THE
10 CASE, I MAY CONSIDER LETTING THEM GO FOR THE EVENING AND
11 COMING BACK TOMORROW. BUT I THINK THIS CASE DESERVES THE
12 FACT THAT Y'ALL HAVE NOW ARGUED TO THE JURY, THAT THEY NEED
13 TO HEAR THE LAW AND HAVE SOME PERIOD OF TIME TO DISCUSS THIS
14 CASE BEFORE WE MAKE THAT DECISION.

15 NOW, I APPRECIATE YOUR REQUEST OF THE COURT, BUT I WOULD
16 RESPECTFULLY DECLINE TO DO SO. ALL RIGHT. WE'LL BE BACK IN
17 HERE IN ABOUT 10 MINUTES THANK YOU VERY MUCH.

18 (WHEREUPON, A SHORT BREAK WAS TAKEN.)

19 THE COURT: THANK YOU VERY MUCH. YOU MAY BE SEATED.
20 THANK Y'ALL. ALL RIGHT. IS THE STATE READY FOR THE JURY TO
21 COME IN?

22 MS. CAMPBELL: THE STATE'S READY.

23 THE COURT: MR. ROBERSON?

24 MR. ROBERSON: THE DEFENSE IS READY, YOUR HONOR.

25 THE COURT: MR. JOHNSON?

1 MR. JOHNSON: YES, SIR.

2 THE COURT: THANK YOU VERY MUCH. ALL RIGHT. ASK THE
3 JURY TO COME IN, PLEASE, SIR.

4 (WHEREUPON, THE JURY WAS BROUGHT INTO OPEN COURT AT 4:25
5 P.M.)

6 THE COURT: ALL RIGHT. LADIES AND GENTLEMEN, IT'S NOW
7 MY RESPONSIBILITY TO GIVE YOU THE LAW TO APPLY TO THE FACTS
8 AS YOU SO FIND THEM TO BE IN THIS PARTICULAR MATTER. AS I
9 TOLD YOU AT THE BEGINNING, YOU COLLECTIVELY ARE THE JUDGES OF
10 THE FACTS OF THIS PARTICULAR CASE, AND I WOULD NOT INVADE
11 THAT PROVINCE. I WOULD NOT INDICATE TO YOU IN ANY FASHION
12 WHAT I BELIEVE THE FACTS OF THIS CASE TO BE BECAUSE THAT IS
13 NOT MY JOB. THAT IS YOUR JOB AND YOUR RESPONSIBILITY. AND I
14 KNOW THAT I MADE SOME RULINGS REGARDING OBJECTIONS AND
15 MOTIONS BY THE STATE IN YOUR PRESENCE AND I TOLD YOU THAT I
16 WOULD DO SO AT THE VERY BEGINNING, AND I REMIND AGAIN THOSE
17 RULINGS WERE MERELY TO TELL THE ATTORNEYS HOW THE TRIAL WILL
18 PROCEED. THEY WERE NOT ANY INDICATION BY THE COURT OF WHAT I
19 BELIEVE OR DO NOT BELIEVE ABOUT THE FACTS OF THIS CASE. ONCE
20 AGAIN, THAT'S YOUR JOB; THAT'S YOUR RESPONSIBILITY.

21 NOW, IN THE SAME VEIN THAT YOU ARE THE JUDGES OF THE
22 FACTS, IT IS ONE OF MY RESPONSIBILITIES TO GIVE YOU THE LAW,
23 AND IF YOU CAME INTO THIS COURTROOM WITH ANY PRECONCEIVED
24 IDEAS OF WHAT THE LAW IS, WHAT IT OUGHT TO BE, WHAT IT SHOULD
25 BE, WHAT YOU HOPE IT WOULD BE, YOU'RE GOING TO DISREGARD

1 THAT. YOU'RE GOING TO TAKE THE LAW AS I NOW GIVE IT TO YOU
2 AND APPLY IT TO THE FACTS AS YOU SO FIND THEM TO BE.

3 ONE OF YOUR JOBS IN THIS PARTICULAR CASE, COLLECTIVELY
4 AS A JURY, IS TO JUDGE THE CREDIBILITY, THAT IS, THE
5 BELIEVABILITY OF THE WITNESSES WHO HAVE TESTIFIED BEFORE YOU
6 IN THIS PARTICULAR MATTER. NOW, IN DOING SO, IN JUDGING THAT
7 CREDIBILITY AND BELIEVABILITY, YOU CAN BELIEVE ONE WITNESS
8 AGAINST SEVERAL, SEVERAL AGAINST ONE. YOU CAN BELIEVE A
9 PORTION OF WHAT A WITNESS SAYS AND DISREGARD THE REMAINING
10 PORTION OF IT. IF YOU'VE GOT A GOOD AND SOUND REASON FOR
11 DOING SO, YOU CAN DISREGARD IN ITS ENTIRETY THE TESTIMONY OF
12 A PARTICULAR WITNESS.

13 NOW, HOW DO YOU JUDGE THIS CREDIBILITY AND
14 BELIEVABILITY? HOW DO YOU EXAMINE THESE WITNESSES TO FIND
15 THE TRUTH OF THIS PARTICULAR MATTER? WELL, IN DOING SO YOU
16 LOOK AT WHETHER OR NOT THAT WITNESS HAS EXHIBITED TO YOU ANY
17 KIND OF INTEREST, MOTIVE, BIAS, PREJUDICE THAT THEY MIGHT
18 HAVE IN GIVING YOU THE TESTIMONY THEY GAVE YOU FROM THE
19 WITNESS STAND. YOU CONSIDER THEIR Demeanor. HOW DID THEY
20 APPEAR WHEN THEY GAVE YOU THE TESTIMONY FROM THE WITNESS
21 STAND? AND OBVIOUSLY YOU CONSIDER THE OPPORTUNITY FOR
22 KNOWLEDGE. HOW DID THEY COME ABOUT THAT INFORMATION THAT
23 THEY GAVE YOU FROM THE WITNESS STAND? IT'S YOUR JOB, LADIES
24 AND GENTLEMEN, TO FIND THE TRUTH OF THIS PARTICULAR MATTER,
25 AND YOU CAN ONLY DO THAT BY LOOKING AT THE EVIDENCE THAT HAS

1 BEEN SUBMITTED IN THIS PARTICULAR TRIAL.

2 IF YOU THINK ABOUT IT FOR A MINUTE, JUDGING CREDIBILITY
3 AND BELIEVABILITY IS SOMETHING YOU DO EVERY SINGLE DAY OF
4 YOUR LIFE. WHEN SOMEBODY TELLS YOU SOMETHING, YOU ARE
5 AUTOMATICALLY JUDGING WHETHER OR NOT YOU BELIEVE WHAT THAT
6 PERSON TOLD YOU. AND HOW DO YOU DO THAT? YOU USE YOUR GOOD
7 COMMON SENSE, YOUR GOOD JUDGMENT THAT YOU USE IN CONDUCTING
8 YOUR OWN AFFAIRS, AND THAT'S WHAT WE'RE ASKING YOU TO DO
9 TODAY. USE YOUR GOOD COMMON SENSE, YOUR GOOD JUDGMENT.
10 APPLY IT TO THE FACTS THAT YOU'VE HEARD IN THIS -- AND
11 EVIDENCE YOU'VE HEARD IN THIS CASE AND FIND THAT TRUTH OF
12 THIS PARTICULAR MATTER. FIND THE EVIDENCE WHICH CONVINCES
13 YOU OF ITS TRUTH.

14 YOU DON'T HAVE ANY FRIENDS TO REWARD. YOU DON'T HAVE
15 ANY ENEMIES TO PUNISH. YOUR VERDICT CAN'T BE THE RESULT OF
16 ANY KIND OF PASSION, PREJUDICE, OR SYMPATHY. IT HAS TO BE AN
17 EXAMINATION OF THE FACTS TO FIND THOSE FACTS WHICH CONVINCED
18 YOU OF THEIR TRUTH.

19 IN THIS PARTICULAR CASE I QUALIFIED A COUPLE OF
20 WITNESSES TO GIVE THEIR OPINION. NORMALLY WE DON'T ALLOW
21 WITNESSES TO GIVE THEIR OPINION. THEY HAVE TO STATE WHAT
22 THEY SAW OR OBSERVED, BUT SOME WITNESSES, BECAUSE OF THEIR
23 EXPERIENCE, TRAINING, EDUCATION, BACKGROUND, THE COURT MAY
24 QUALIFY THEM TO GIVE THEIR OPINION. NOW, THAT DOESN'T GIVE
25 THEM ANY SPECIAL STATUS. YOU JUDGE ALL THE WITNESSES THE

1 SAME. YOU LOOK AT ALL THE WITNESSES THE SAME AND JUDGE THE
2 CREDIBILITY AND BELIEVABILITY OF ALL THE WITNESSES THE SAME
3 TO FIND THE FACTS AND EVIDENCE WHICH CONVINCES YOU OF ITS
4 TRUTH.

5 THERE ARE TWO TYPES OF EVIDENCE IN VIRTUALLY EVERY
6 SINGLE CASE THAT'S TRIED ANYWHERE AROUND, AND THAT'S DIRECT
7 AND CIRCUMSTANTIAL EVIDENCE. NOW, WHAT'S DIRECT EVIDENCE?
8 DIRECT EVIDENCE IS EVIDENCE AND IT'S THE TESTIMONY OF A
9 PERSON WHO ASSERTS OR CLAIMS TO HAVE ACTUAL KNOWLEDGE OF A
10 FACT. CIRCUMSTANTIAL EVIDENCE: THAT'S A PROOF OF A CHAIN OF
11 FACTS AND CIRCUMSTANCES INDICATING THE EXISTENCE OF A FACT.
12 THE LAW DOESN'T MAKE ANY DISTINCTION BETWEEN DIRECT OR
13 CIRCUMSTANTIAL EVIDENCE. THE LAW DOESN'T HAVE A GREATER
14 DEGREE OF CERTAINTY OR PROOF REQUIRED OF ONE OVER THE OTHER.
15 YOU JUDGE AND LOOK AT ALL THE EVIDENCE THE SAME. YOU WEIGH
16 ALL ITS CREDIBILITY AND BELIEVABILITY THE SAME TO FIND THAT
17 EVIDENCE WHICH CONVINCES YOU OF ITS TRUTH.

18 ONE OF THE RULES THAT WE HAVE AND A RULE OF EVIDENCE
19 STATES THAT TESTIMONY OF A WITNESS CAN BE DISCREDITED OR
20 IMPEACHED BY SHOWING THAT WITNESS HAS BEEN CONVICTED OF A
21 CRIME FOR WHICH THAT PERSON COULD HAVE BEEN IMPRISONED FOR
22 MORE THAN ONE YEAR FOR A CRIME THAT INVOLVES DISHONESTY.
23 NOW, AS TO THAT KIND OF EVIDENCE, IT'S ONLY OFFERED FOR YOU
24 ON THE ISSUE OF CREDIBILITY AND BELIEVABILITY AND FOR NO
25 OTHER PURPOSE, AND YOU GIVE IT WHAT WEIGHT, IF ANY, YOU

1 DECIDE IT SHOULD HAVE.

2 ALSO, THE TESTIMONY OF A WITNESS CAN BE DISCREDITED OR
3 IMPEACHED BY SHOWING THAT THAT WITNESS PREVIOUSLY MADE
4 STATEMENTS THAT ARE INCONSISTENT WITH CURRENT TESTIMONY OR
5 CURRENT STATEMENTS. THE EARLIER CONTRADICTORY STATEMENTS ARE
6 ADMISSIBLE ONLY TO IMPEACH THE CREDIBILITY OF THE WITNESS AND
7 NOT TO ESTABLISH THE TRUTH OF THE STATEMENTS, AND ONCE AGAIN,
8 YOU GIVE IT WHAT WEIGHT, IF ANY, YOU DETERMINE IT SHOULD
9 HAVE.

10 IN THIS PARTICULAR CASE THE DEFENDANTS DID NOT TESTIFY.
11 BEFORE I GO INTO IT -- AND I'LL TELL YOU THIS AGAIN: I THINK
12 IT'S IMPORTANT AGAIN TO, AS I TOLD YOU AT THE VERY BEGINNING,
13 TO EMPHASIZE THE FACT WE'RE TRYING TWO CASES HERE. YOU MUST
14 MAKE TWO DECISIONS, TWO SEPARATE DECISIONS. YOU HAVE TWO
15 DEFENDANTS. THOUGH THEY MAY BE CHARGED WITH THE SAME OFFENSE
16 OF MURDER, YOU HAVE TWO DIFFERENT CASES BEING TRIED IN ONE.
17 SO WHEN I TALK ABOUT -- AND I MAY SAY SOMETIME THE DEFENDANT
18 OR THE DEFENDANTS. OBVIOUSLY YOU UNDERSTAND YOUR
19 RESPONSIBILITY IS TO MAKE A SEPARATE AND DISTINCT DECISION AS
20 TO BOTH CASES.

21 IN THIS MATTER THE DEFENDANTS DID NOT TESTIFY. I
22 INSTRUCT YOU, I TELL YOU, AND I EMPHASIZE TO YOU THAT FACT IS
23 NOT A FACTOR IN THIS CASE. YOU MAY NOT USE IT IN MAKING A
24 DECISION IN THIS MATTER. YOU MAY NOT TALK ABOUT IT IN THE
25 JURY ROOM. IT IS NOT PART OF THIS CASE THE FACT THAT THEY

1 DECIDED NOT TO TESTIFY. AS I TOLD YOU AT THE BEGINNING, ANY
2 PERSON CHARGED WITH A CRIMINAL OFFENSE HAS THE CONSTITUTIONAL
3 RIGHT TO REMAIN SILENT. THE ASSERTION OF THIS RIGHT CANNOT
4 BE CONSIDERED BY ANYONE IN YOUR DELIBERATIONS OR YOUR
5 DECISION.

6 THE DEFENDANTS ARE NOT REQUIRED TO PROVE ANYTHING TO
7 YOU. THE BURDEN IS ON THE STATE OF SOUTH CAROLINA. THE
8 STATE OF SOUTH CAROLINA MUST PROVE TO YOU BY THE EVIDENCE IT
9 PRESENTS THE GUILT OF THE DEFENDANTS BEYOND A REASONABLE
10 DOUBT, AND IT'S YOUR JOB TO DECIDE WHETHER OR NOT THE STATE
11 HAS CARRIED ITS BURDEN OF PROOF.

12 WHEN THE DEFENDANTS PLED NOT GUILTY TO THE INDICTMENTS,
13 AS THEY DID IN THIS CASE, THE CHARGES THAT BROUGHT THIS
14 MATTER TO COURT, THAT PUT THE BURDEN OF PROOF UPON THE STATE
15 OF SOUTH CAROLINA. IT'S AN IMPORTANT RULE OF LAW THAT A
16 DEFENDANT IN A CRIMINAL TRIAL, NO MATTER WHAT THE CHARGE MAY
17 BE, WHAT THE SERIOUSNESS OF THE CHARGE MAY BE, IS ALWAYS
18 PRESUMED INNOCENT OF THE CRIME FOR WHICH THAT CHARGE WAS
19 ISSUED UNLESS GUILT HAS BEEN PROVEN BY EVIDENCE THAT
20 SATISFIES YOU OF THAT GUILT BEYOND A REASONABLE DOUBT.

21 NOW, THAT PRESUMPTION OF INNOCENCE DIDN'T END AT THE
22 BEGINNING OF THE TRIAL. IT HASN'T ENDED NOW. IT DOES NOT
23 END UNTIL YOU COLLECTIVELY BELIEVE THE STATE HAS PROVEN TO
24 YOU BY THE EVIDENCE IT PRESENTED OF THE GUILT OF THE
25 DEFENDANTS BEYOND A REASONABLE DOUBT. THIS PRESUMPTION OF

1 INNOCENCE IS LIKENED TO A ROBE OF RIGHTEOUSNESS. IT'S PLACED
2 UPON THE SHOULDERS OF THE DEFENDANT, AND IT REMAINS UPON THE
3 SHOULDERS OF THE DEFENDANTS UNTIL THE STATE STRIPS THAT ROBE
4 FROM THE SHOULDERS OF THE DEFENDANTS BY PROOF WHICH CONVINCES
5 YOU OF THE GUILT OF THAT DEFENDANT BEYOND A REASONABLE DOUBT.

6 THIS PRESUMPTION OF INNOCENCE IS NOT A MERE LEGAL
7 THEORY. IT'S NOT JUST SOME LEGAL PHRASE. IT'S AN IMPORTANT
8 RIGHT TO WHICH EVERY DEFENDANT, TO WHICH EVERY AMERICAN, IS
9 ENTITLED. YOU HAVE TO DECIDE WHETHER OR NOT THE STATE HAS
10 PROVEN TO YOU THE GUILT OF THE PARTICULAR DEFENDANT BEYOND A
11 REASONABLE DOUBT.

12 WHAT'S REASONABLE DOUBT? REASONABLE DOUBT IS THE KIND
13 OF DOUBT THAT WILL CAUSE AN ORDINARY, NORMAL, REASONABLE
14 PERSON TO HESITATE TO ACT. PROOF BEYOND A REASONABLE DOUBT
15 IS PROOF THAT LEAVES YOU FIRMLY CONVINCED OF THE DEFENDANT'S
16 GUILT. THE LAW DOES NOT REQUIRE THE STATE OF SOUTH CAROLINA
17 TO PROVE GUILT WITH ABSOLUTE CERTAINTY OR BEYOND ANY POSSIBLE
18 DOUBT. WHAT IS REQUIRED IS THROUGH THE EVIDENCE THE STATE
19 PRESENTS AND YOUR CONSIDERATION OF THAT EVIDENCE IF YOU ARE
20 FIRMLY CONVINCED THAT THE DEFENDANT CHARGED OR THE DEFENDANTS
21 CHARGED ARE GUILTY OF THAT CRIME, YOU MUST FIND THE
22 DEFENDANTS GUILTY. ON THE OTHER HAND, BASED UPON YOUR
23 CONSIDERATION OF THE EVIDENCE, IF YOU ARE NOT FIRMLY
24 CONVINCED THAT THE DEFENDANT IS GUILTY OF THE CRIME CHARGED,
25 YOU MUST GIVE THAT DEFENDANT THE BENEFIT OF THE DOUBT AND

1 FIND HIM NOT GUILTY.

2 AN ISSUE IN THIS CASE IS IDENTIFICATION OF SOMEONE OR A
3 PERSON WHO COMMITTED THE CRIME CHARGED. THE STATE HAS THE
4 BURDEN OF PROVING IDENTITY BEYOND A REASONABLE DOUBT. YOU
5 MUST BE SATISFIED BEYOND A REASONABLE DOUBT OF THE ACCURACY
6 OF THE IDENTIFICATION BEFORE YOU MAY CONVICT A PERSON.
7 IDENTIFICATION TESTIMONY IS AN EXPRESSION OR BELIEF OR
8 IMPRESSION BY A WITNESS. YOU MUST DETERMINE THE ACCURACY OF
9 THE IDENTIFICATION BY THE WITNESS. YOU MUST DETERMINE THE
10 ACCURACY OF THE IDENTIFICATION OF THE DEFENDANT. YOU MUST
11 CONSIDER THE BELIEVABILITY OF EACH IDENTIFICATION WITNESS.
12 YOU CONSIDER WHETHER OR NOT THE WITNESS HAD AN ADEQUATE
13 OPPORTUNITY TO OBSERVE THE OFFENDER AT THE TIME OF THE
14 OFFENSE. YOU CAN LOOK AT HOW LONG OR HOW SHORT A TIME WAS
15 AVAILABLE, HOW FAR OR HOW CLOSE THE WITNESS WAS, THE LIGHTING
16 CONDITIONS, WHETHER THE WITNESS HAD A CHANCE TO SEE OR KNOW
17 THE PERSON IN THE PAST. THOSE ARE JUST SOME OF THE THINGS
18 THAT YOU CONSIDER. YOU CONSIDER ALL THE EVIDENCE IN DECIDING
19 THIS. THE BURDEN IS ON THE STATE OF SOUTH CAROLINA, AS I'VE
20 TOLD YOU, AND IT REMAINS ON THE STATE OF SOUTH CAROLINA AND
21 EXTENDS TO EVERY ELEMENT OF THE CRIME CHARGED AND INCLUDES
22 THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT THE IDENTITY
23 OF THE DEFENDANT OR DEFENDANTS AS THE PERSON WHO COMMITTED
24 THE CRIME.

25 NOW, A STATEMENT HAVE BEEN -- STATEMENTS HAVE BEEN

1 ADMITTED INTO EVIDENCE ALLEGED TO HAVE BEEN MADE BY THE
2 DEFENDANTS IN THIS CASE. NOW, WHILE THE COURT DETERMINED
3 THAT YOU COULD HEAR THESE STATEMENTS, I INSTRUCT YOU THAT YOU
4 MAKE, YOU COLLECTIVELY, THE JURY, MAKE THE DECISION OF
5 WHETHER OR NOT, ONE, THE STATEMENTS WERE MADE BY THE
6 DEFENDANTS, TWO, THE ACCURACY OF THOSE STATEMENTS AND, THREE,
7 WHETHER OR NOT THOSE STATEMENTS WERE GIVEN BY -- WITH THE
8 DEFENDANTS HAVING AN UNDERSTANDING OF THEIR CONSTITUTIONAL
9 RIGHTS. IF YOU DETERMINE THE DEFENDANTS DID MAKE THE
10 STATEMENTS, YOU MUST DETERMINE WHETHER THE STATEMENT WAS MADE
11 BY THE DEFENDANT VOLUNTARILY AND OF HIS OWN FREE WILL. THIS
12 MEANS THAT THE STATEMENT WAS NOT CAUSED BY PRESSURE, FORCE,
13 FEAR, THREATS, COERCION, INTIMIDATION, OR BY HOPE OR PROMISE
14 OF LENIENCY OR A REWARD OF ANY KIND.

15 IN DETERMINING WHETHER THE STATEMENT WAS VOLUNTARY, YOU
16 CAN CONSIDER ANY NUMBER OF THINGS, SOME OF THOSE BEING: THE
17 AGE OF THE DEFENDANT, THE DEFENDANT'S EDUCATION OR LACK
18 THEREOF, THE DEFENDANT'S MENTAL ABILITY OR CAPACITY, THE
19 DEFENDANT'S BACKGROUND AND ENVIRONMENT, THE PLACE AND LENGTH
20 OF THE DETENTION, THE NATURE OF THE QUESTIONING, THE ADVICE
21 OR LACK THEREOF TO THE DEFENDANT OF HIS CONSTITUTIONAL RIGHTS
22 INCLUDING BUT NOT LIMITED TO THE RIGHT TO REMAIN SILENT, THAT
23 ANY STATEMENT CAN BE USED AGAINST YOU IN A COURT OF LAW, THAT
24 YOU HAVE THE RIGHT TO HAVE A LAWYER PRESENT AND THAT IF YOU
25 CANNOT AFFORD A LAWYER, ONE WILL BE APPOINTED TO REPRESENT

1 YOU, THAT YOU CAN STOP MAKING A STATEMENT AT ANY TIME. THE
2 STATE HAS THE BURDEN OF PROOF OF PROVING BEYOND A REASONABLE
3 DOUBT THE ALLEGED STATEMENTS WERE VOLUNTARY, AND THEN IF YOU
4 DECIDE ALL THOSE FACTORS HAVE BEEN DONE, YOU GIVE THOSE
5 STATEMENTS WHATEVER WEIGHT YOU DETERMINE THEY SHOULD HAVE, IF
6 ANY. OBVIOUSLY IF YOU FOUND THAT THE STATEMENT WAS NOT
7 VOLUNTARY OR NOT OF THE DEFENDANT, YOU OBVIOUSLY DON'T
8 CONSIDER IT AT ALL.

9 BOTH DEFENDANTS IN THIS CASE HAVE BEEN CHARGED WITH THE
10 OFFENSE OF MURDER. THE STATE HAS TO PROVE BEYOND A
11 REASONABLE DOUBT THAT THE DEFENDANT CHARGED KILLED ANOTHER
12 PERSON WITH MALICE AFORETHOUGHT. MALICE: THAT'S HATRED, ILL
13 WILL, HOSTILITY TOWARDS ANOTHER PERSON. IT'S THE INTENTIONAL
14 DOING OF A WRONGFUL ACT WITHOUT JUST CAUSE OR EXCUSE AND WITH
15 AN INTENT TO INFLECT AN INJURY OR UNDER SUCH CIRCUMSTANCES
16 THAT THE LAW WOULD INFER AN EVIL INTENT.

17 NOW, MALICE AFORETHOUGHT DOES NOT REQUIRE THAT THAT
18 MALICE EXIST FOR ANY PARTICULAR TIME BEFORE THE ACT WAS
19 COMMITTED, BUT MALICE HAS TO EXIST IN THE MIND OF THE
20 DEFENDANT JUST BEFORE AND AT THE TIME THE ACT WAS COMMITTED.
21 THEREFORE, THERE HAS TO BE THAT COMBINATION OF THE PREVIOUS
22 EVIL INTENT AND THE ACT.

23 NOW, MALICE AFORETHOUGHT CAN EITHER BE EXPRESS OR
24 INFERRED. EXPRESS MEANS THAT MALICE IS SHOWN WHEN A PERSON
25 SPEAKS WORDS WITH EXPRESS HATRED OR ILL WILL FOR ANOTHER OR

1 THE PERSON PREPARED BEFOREHAND TO DO THE ACT WHICH WAS LATER
2 ACCOMPLISHED. MALICE CAN BE INFERRED FROM CONDUCT SHOWING A
3 TOTAL DISREGARD FOR HUMAN LIFE. INFERRED MALICE MAY ALSO
4 ARISE WHEN THE DEED IS DONE WITH A DEADLY WEAPON. A DEADLY
5 WEAPON IS ANY ARTICLE, INSTRUMENT, OR SUBSTANCE WHICH IS
6 LIKELY TO CAUSE DEATH OR GREAT BODILY HARM. WHETHER AN
7 INSTRUMENT HAS BEEN USED AS A DEADLY WEAPON DEPENDS UPON THE
8 FACTS AND CIRCUMSTANCES OF EACH CASE.

9 I'LL JUST GIVE YOU SOME EXAMPLES OF DEADLY WEAPONS.
10 THERE'S A LOT OF THEM, AND I'M NOT -- THIS IS OBVIOUSLY NOT
11 AN EXHAUSTIVE LIST. IT COULD BE A KNIFE, A DAGGER, A
12 SLINGSHOT, METAL KNUCKLES, A RIFLE, A SHOTGUN, A PISTOL, A
13 RAZOR, GASOLINE. ANY NUMBER OF THINGS THAT YOU DETERMINE
14 FROM THE FACTS WOULD BE A DEADLY WEAPON.

15 I TELL YOU THAT IN THE STATE OF SOUTH CAROLINA MOTIVE IS
16 NOT AN ELEMENT OF THE OFFENSE OF MURDER AND, THEREFORE, THE
17 STATE NEED NOT PROVE MOTIVE.

18 ALSO, IN THIS CASE THE DEFENDANT JACQUES GIBSON IS ALSO
19 CHARGED IN ADDITION WITH A VIOLATION OF 16-23-30, AND THAT
20 IS: IT IS UNLAWFUL FOR A PERSON UNDER THE AGE OF 21 TO
21 POSSESS OR ACQUIRE HANDGUNS WITHIN THIS STATE. THE
22 EXCEPTIONS ARE THIS SHALL NOT APPLY TO THE ISSUE OF HANDGUNS
23 TO THE MEMBERS OF THE ARMED FORCES, ACTIVE OR RESERVE,
24 NATIONAL GUARD, STATE MILITIA, OR WHEN ON DUTY OR TRAINING
25 REGARDING THE TEMPORARY USE OF A HANDGUN FOR INSTRUCTIONS

1 UNDER THE IMMEDIATE SUPERVISION OF A PARENT OR INSTRUCTOR.

2 I TELL YOU THAT MERE PRESENCE AT THE SCENE OF A CRIME IS
3 NOT SUFFICIENT TO PROVE SOMEONE GUILTY OF A CRIME. THE
4 BURDEN IS ON THE STATE OF SOUTH CAROLINA TO PROVE EVERY
5 ELEMENT OF THE CRIME CHARGED. IF YOU FIND AFTER REVIEWING
6 ALL THE EVIDENCE THAT THE STATE HAS PROVED THAT THE DEFENDANT
7 WAS ONLY PRESENT AT THE SCENE OF THE CRIME AND THEY HAVE NOT
8 PROVED BEYOND A REASONABLE DOUBT ANY OTHER PARTICIPATION IN
9 THE CRIME, THEN YOU MUST FIND THAT DEFENDANT NOT GUILTY. THE
10 LAW IS THAT PROOF OF SOMEONE AT THE SCENE OF A CRIME IS NOT
11 SUFFICIENT TO FIND SOMEONE GUILTY. A DEFENDANT'S MERE
12 PRESENCE WHERE A CRIME IS BEING COMMITTED OR MERE ASSOCIATION
13 WITH A PERSON WHO COMMITS A CRIME DOES NOT IN AND OF ITSELF
14 MAKE A PARTICULAR PERSON A CO-CONSPIRATOR OR AN ACCOMPLICE
15 WHO HAS AGREED TO JOIN IN THE COMMISSION OF A CRIME.

16 IN THE STATE OF SOUTH CAROLINA THERE'S A RECOGNIZED
17 THEORY OF LAW CALLED THE HAND OF ONE IS THE HAND OF ALL. IF
18 A CRIME IS COMMITTED BY TWO OR MORE PEOPLE WHO ACT TOGETHER
19 IN COMMITTING A CRIME, THE ACT OF ONE IS THE ACT OF ALL. A
20 PERSON WHO JOINS WITH ANOTHER TO ACCOMPLISH AN ILLEGAL
21 PURPOSE IS CRIMINALLY RESPONSIBLE FOR EVERYTHING DONE BY THAT
22 OTHER PERSON WHICH OCCURS AS A NATURAL AND PROBABLE
23 CONSEQUENCE OF THE ACTS DONE IN CARRYING OUT THAT COMMON PLAN
24 AND PURPOSE. IF TWO OR MORE PEOPLE ARE TOGETHER, ACTING
25 TOGETHER, ASSISTING EACH OTHER IN COMMITTING AN OFFENSE, THE

1 ACT OF ONE IS THE ACT OF ALL OR, AS IT IS SAID, THE HAND OF
2 ONE IS THE HAND OF ALL.

3 PRIOR KNOWLEDGE THAT A CRIME IS GOING TO BE COMMITTED
4 WITHOUT MORE IS NOT SUFFICIENT TO MAKE THAT PERSON GUILTY OF
5 A CRIME. MERE KNOWLEDGE THAT ANOTHER PERSON IS GOING TO
6 COMMIT A CRIME, EVEN IF THE DEFENDANT IS PRESENT WHEN THE
7 CRIME IS COMMITTED, IS NOT SUFFICIENT TO CONVICT THAT PERSON
8 OF THE CRIME. THE STATE HAS TO PROVE BEYOND A REASONABLE
9 DOUBT BY COMPETENT EVIDENCE OF THAT THEORY OF THE HAND OF ONE
10 IS THE HAND OF ALL, AND IT HAS TO PROVE THAT TO YOU BEYOND A
11 REASONABLE DOUBT.

12 A PRINCIPAL IN A CRIME IS ONE WHO EITHER ACTUALLY
13 COMMITS A CRIME OR WHO IS PRESENT AIDING, ABETTING, OR
14 ASSISTING IN THE COMMITTING OF THAT CRIME. WHEN A PERSON
15 DOES AN ACT IN THE PRESENCE OF AND WITH THE ASSISTANCE OF
16 ANOTHER, THE ACT IS DONE BY BOTH. WHERE TWO OR MORE ACTING
17 WITH A COMMON PLAN OR INTENT ARE PRESENT AT THE COMMISSION OF
18 THE CRIME, IT DOES NOT MATTER WHO ACTUALLY COMMITS THE CRIME.
19 ALL ARE GUILTY. ONCE AGAIN, THE HAND OF ONE IS THE HAND OF
20 ALL.

21 I TELL YOU AGAIN THOUGH: PRESENCE AT THE COMMISSION OF
22 A CRIME OR MERE PRESENCE AT THE SCENE OF THE CRIME IS NOT
23 SUFFICIENT TO CONVICT SOMEONE. INTENT IS ALSO A NECESSARY
24 ELEMENT FOR THERE MUST HAVE BEEN A COMMON DESIGN OR INTENT TO
25 COMMIT THE CRIME, AND THE CRIME MUST HAVE BEEN COMMITTED WITH

1 THE PERSON AIDING AND ABETTING BY SOME ACT. AGAIN, INTENT
2 MEANS INTENDING THE RESULT WHICH ACTUALLY OCCURS, NOT
3 ACCIDENTALLY OR INVOLUNTARILY, BUT INTENT MAY BE SHOWN BY THE
4 ACTS AND CONDUCT OF THE DEFENDANT AND ANY OTHER FACTS FROM
5 WHICH YOU COULD NATURALLY AND REASONABLY INFER INTENT.

6 AS I TOLD YOU EARLIER, THERE ARE TWO DEFENDANTS, EACH OF
7 WHOM IS CHARGED WITH THE CRIME OF MURDER. ADAMS GIBSON IS
8 CHARGED WITH THE CRIME OF MURDER, AND JACQUES GIBSON IS
9 CHARGED WITH THE CRIME OF MURDER AND THE VIOLATION OF THAT
10 CODE SECTION OF THAT OF POSSESSING A WEAPON UNDER THE AGE OF
11 21. THE CASE OF EACH DEFENDANT AND THE EVIDENCE AND LAW
12 CONCERNING THAT DEFENDANT MUST BE CONSIDERED BY YOU
13 SEPARATELY AND INDIVIDUALLY. YOUR VERDICT DOES NOT HAVE TO
14 BE THE SAME FOR EACH DEFENDANT. THE FACT IS: YOU COULD FIND
15 ONE DEFENDANT GUILTY OR NOT GUILTY AND FIND AN OPPOSITE
16 RESULT FOR THE OTHER DEFENDANT. WHETHER OR NOT YOU FIND ONE
17 DEFENDANT GUILTY OR NOT GUILTY SHOULD NOT AND DOES NOT
18 CONTROL YOUR VERDICT AS TO THE OTHER DEFENDANT.

19 WHERE MORE THAN ONE PERSON IS CHARGED WITH A CRIME, IF
20 THE EVIDENCE WARRANTS IT, YOU CAN CONVICT ONE, ACQUIT
21 ANOTHER. YOU CAN ACQUIT BOTH, THAT IS, FIND THEM NOT GUILTY
22 OR YOU MAY CONVICT BOTH. IT DEPENDS UPON YOUR VIEW OF THE
23 TESTIMONY AND THE EVIDENCE, CONSIDERING EACH CASE SEPARATELY.
24 YOU MUST TAKE EACH DEFENDANT AND CONSIDER THE EVIDENCE AS TO
25 THAT DEFENDANT AS WELL AS THE INSTRUCTIONS ON THE LAW THAT I

1 HAVE GIVEN TO YOU AND THEN ARRIVE AT A TRUE AND JUST VERDICT
2 REGARDING THAT PARTICULAR DEFENDANT FOR THE PARTICULAR CRIME
3 CHARGED.

4 THAT, LADIES AND GENTLEMEN, IS THE LAW THAT YOU SHALL
5 APPLY TO THE FACTS AS YOU SO FIND THEM TO BE IN THIS
6 PARTICULAR MATTER. NOW, I HAVE PREPARED VERDICT FORMS FOR
7 YOUR USE TO AID YOU IN RECORDING YOUR UNANIMOUS VERDICTS IN
8 THIS PARTICULAR MATTER. NOW, I SAID UNANIMOUS ANY NUMBER OF
9 TIMES. UNANIMOUS MEANS EXACTLY WHAT YOU THINK IT MEANS. IT
10 MEANS TWELVE/ZERO, NOT ELEVEN/ONE, TEN/TWO, ANY COMBINATION
11 THEREOF. WHATEVER THE VERDICT OF THE JURY IS, IT IS A
12 VERDICT TO WHICH EVERY MEMBER OF THE JURY AGREES TO. IT IS
13 EVERYBODY'S VERDICT.

14 SO, MR. FOREMAN, WHEN YOU TAKE THESE VERDICT FORMS AND
15 YOU CHECK THE APPROPRIATE BLOCK, YOU ARE SAYING TO THE COURT
16 THAT EVERY MEMBER OF THE JURY AGREES TO THAT VERDICT,
17 WHATEVER THAT VERDICT MAY BE. THE VERDICT FORMS ARE VERY
18 STRAIGHTFORWARD. THEY HAVE THE CAPTION OF THE CASE.

19 WE HAVE ONE VERDICT FORM FOR MR. ADAMS GIBSON, AND IT
20 HAS MURDER. ON THE CHARGE OF MURDER, WE, THE JURY, BY
21 UNANIMOUS CONSENT, FIND THE DEFENDANT ADAMS GIBSON -- AND
22 THERE'S TWO CHOICES. I PUT ONE BEFORE THE OTHER. OBVIOUSLY
23 DON'T ASSIGN ANYTHING TO THAT. YOU'VE GOT TWO BLOCKS: NOT
24 GUILTY OR GUILTY. WHATEVER THE VERDICT IS, MR. FOREMAN, YOU
25 CHECK THAT BLOCK. YOU SIGN YOUR NAME AND PUT THE CORRECT

1 DATE.

2 THERE ARE TWO VERDICT FORMS FOR THE DEFENDANT JACQUES
3 GIBSON, HE BEING CHARGED WITH TWO OFFENSES: THE ONE VERDICT
4 FORM FOR MURDER AND IT'S VIRTUALLY IDENTICAL TO THE ONE FOR
5 MR. ADAMS GIBSON EXCEPT OBVIOUSLY IT IS FOR THE VERDICT FORM
6 FOR MR. JACQUES GIBSON ON THAT PARTICULAR OFFENSE OF MURDER.
7 THERE IS ALSO THE VERDICT FORM FOR UNLAWFUL POSSESSION OF A
8 PISTOL BY A PERSON UNDER 21 YEARS OF AGE, AND IT STATES ON
9 THE CHARGE OF UNLAWFUL POSSESSION OF A FIREARM BY A PERSON
10 UNDER THE -- UNDER 21 YEARS OF AGE, WE, THE JURY, BY
11 UNANIMOUS CONSENT FIND THE DEFENDANT JACQUES GIBSON -- AND
12 ONCE AGAIN YOU'VE GOT TWO CHOICES: NOT GUILTY OR GUILTY.
13 SO, MR. FOREMAN, YOU WILL USE THOSE TO RECORD THE UNANIMOUS
14 VERDICT OF THE JURY REGARDING THESE MATTERS.

15 WHAT I'M GOING TO HAVE YOU DO, MR. FOREMAN, IS TAKE YOUR
16 JURY TO YOUR JURY ROOM. DO NOT BEGIN YOUR DELIBERATIONS
17 UNTIL THE BAILIFF BRINGS IN TO YOU THE VERDICT FORMS AND ALL
18 THE EVIDENCE. I DO NEED TO TALK TO THE LAWYERS ONE MORE TIME
19 BEFORE I SUBMIT ALL THAT TO YOU, SO DO NOT BEGIN YOUR
20 DELIBERATIONS. I WILL PLEASE ASK THE TWO ALTERNATES IN THIS
21 CASE TO REMAIN WITH US. SO, MR. FOREMAN, TAKE YOUR 12
22 MEMBERS OF THE JURY TO THE JURY ROOM AT THIS TIME, PLEASE,
23 SIR. THE ALTERNATES REMAIN IN THE COURTROOM, PLEASE.

24 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT AT 4:53
25 P.M., AND THE ALTERNATES REMAINED IN THE COURTROOM.)

1 THE COURT: ALL RIGHT. GENTLEMEN, THOUGH IT APPEARS
2 THAT THE JURY IS READY, WILLING, AND ABLE TO PERFORM THEIR
3 DUTIES AS THE JURORS IN THIS CASE, I CANNOT EXCUSE YOU AT
4 THIS POINT IN TIME BECAUSE THERE MAY BE SOME UNFORESEEN
5 EVENTUALITY THAT MAY CAUSE ONE OF THEM TO FALL OUT FOR ANY
6 NUMBER OF REASONS. BECAUSE OF THAT, I'M GOING TO HAVE TO
7 HAVE YOU TWO REMAIN HERE.

8 OBVIOUSLY, YOU WILL NOT BE IN THE JURY ROOM WHILE
9 THEY'RE CONDUCTING THEIR DELIBERATIONS UNLESS ONE OF THEM OR
10 ONE OR MORE OF THEM NEEDS TO BE EXCUSED FOR SOME REASON.
11 WHAT I'M GOING TO HAVE YOU DO IS WE'LL HAVE YOU IN ONE OF THE
12 EXTRA JURY ROOMS, NOT IN THAT OTHER JURY ROOM. SO, MR.
13 BAILIFF, IF YOU'LL PLEASE ESCORT THESE TWO JURORS TO ANOTHER
14 JURY ROOM, PLEASE, SIR.

15 (WHEREUPON, THE ALTERNATE JURORS WERE EXCUSED FROM OPEN
16 COURT AT 4:54 P.M.)

17 THE COURT: ALL RIGHT. EXCEPTIONS, DELETIONS, ADDITIONS
18 TO THE CHARGE FROM THE STATE?

19 MS. CAMPBELL: NO, SIR.

20 THE COURT: FROM THE DEFENDANT ADAMS GIBSON?

21 MR. ROBERSON: YOUR HONOR, LET ME EXPLAIN WHAT MY
22 CONCERN IS. I TRIED A CASE IN SUMTER SOME YEARS AGO AND MY
23 CLIENT WAS FOUND GUILTY, BUT HE SUBSEQUENTLY DIED ABOUT THREE
24 MONTHS AFTER THAT. WELL, I WAS IN SUMTER ONE DAY SHOPPING
25 WITH A COUSIN OF MINE, AND ONE OF THE JURORS CAME UP TO ME

1 AND SAID, "YOU KNOW, MAN, YOU KNOW, I THOUGHT YOUR CLIENT WAS
2 INNOCENT, BUT THE JUDGE INSTRUCTED US THAT THE VERDICT HAD TO
3 BE UNANIMOUS AND WE TALKED ABOUT IT. SO WE WENT ON AND MADE
4 IT UNANIMOUS." AND WHAT I'M SAYING TO YOU---

5 THE COURT: WELL, I APPRECIATE THAT. IF THE JURY
6 HAPPENS TO REACH A VERDICT TO WHICH YOU DISAGREE WITH, YOU
7 OBVIOUSLY HAVE THE OPPORTUNITY TO HAVE EACH AND EVERY JUROR
8 SEPARATELY POLLED AT THE -- AT THE END, AND IF YOU SO
9 REQUEST, I WILL BE GLAD TO HAVE THAT DONE.

10 MR. ROBERSON: WELL---

11 THE COURT: ARE YOU ASKING ME TO CHANGE MY CHARGE IN ANY
12 FASHION, SIR?

13 MR. ROBERSON: I MEAN, I'M JUST POINTING OUT THAT---

14 THE COURT: WELL, I APPRECIATE WHAT YOU'RE TELLING ME.

15 MR. ROBERSON: YEAH.

16 THE COURT: AND I DON'T MEAN TO CUT YOU OFF, BUT ARE YOU
17 ASKING ME TO CHANGE MY CHARGE IN ANY FASHION, SIR?

18 MR. ROBERSON: JUDGE, I WISH THAT THERE'S A WAY YOU
19 COULD MAKE IT CLEAR TO THEM THAT THEY ARE TO DELIBERATE THOSE
20 ISSUES AND IF, IN FACT, THEY AGREE ON WHAT IS THEIR VERDICT,
21 THEN SO AGREE, BUT DON'T AGREE FOR THE SAKE OF AGREEING
22 BECAUSE THE JUDGE SAYS IT HAS TO BE UNANIMOUS.

23 THE COURT: WELL, I DO NOT BELIEVE THAT MY CHARGE
24 INDICATES THAT TO THEM. IF YOU HAVE ANYTHING TO SUGGEST TO
25 ME TO SAY OTHERWISE TO THEM, I'LL BE GLAD TO HEAR YOU, BUT AT

1 THE PRESENT TIME I DO NOT INTEND TO CALL THEM BACK OUT AND
2 RECHARGE THEM.

3 MR. ROBERSON: OTHER THAN THAT, YOUR HONOR, I DON'T HAVE
4 ANYTHING ELSE.

5 THE COURT: ALL RIGHT. THANK YOU. MR. JOHNSON?

6 MR. JOHNSON: YOUR HONOR, WE OBJECT TO THE CHARGE OF
7 DEFINING MALICE, THAT YOU STARTED GIVING EXAMPLES OF IT COULD
8 BE INFERRED FROM THE USE OF A DEADLY WEAPON. THEN YOU
9 STARTED SAYING A KNIFE OR A RAZOR, GASOLINE, AND A PISTOL.
10 AND, YOUR HONOR, GIVING THEM EXAMPLES OF A DEADLY WEAPON WAS
11 UNNECESSARY, AND IN MY OPINION, IT CONSTITUTES COMMENTS ON
12 THE FACTS OF THE CASE.

13 THE COURT: ALL RIGHT, SIR. I APPRECIATE YOUR OBJECTION
14 AND IT'S NOTED FOR THE RECORD, AND I RESPECTFULLY DECLINE TO
15 CALL THEM OUT TO RECHARGE THEM. ALL RIGHT. ANYTHING
16 FURTHER, MR. JOHNSON?

17 MR. JOHNSON: YOUR HONOR, WE RENEW OUR REQUESTS FOR
18 THOSE CHARGES ON INVOLUNTARY MANSLAUGHTER AND ON SELF-
19 DEFENSE.

20 THE COURT: ALL RIGHT, SIR. AND I REAFFIRM THE PRIOR
21 RULINGS THAT I MADE AND RESPECTFULLY DECLINE TO GRANT THOSE
22 REQUESTS THAT YOU MADE, MR. JOHNSON, AND THAT YOU MADE, MR.
23 ROBERSON, FOR THOSE PARTICULAR REQUESTS. THANK YOU VERY
24 MUCH. ALL RIGHT. WHAT I'D LIKE Y'ALL TO DO IS MAKE SURE
25 THAT WE HAVE ALL OF THE EXHIBITS.

1 BEFORE YOU GET UP AND DO THAT I WANT TO -- I WANT TO
2 TELL YOU, BOTH SOLICITORS, YOU, MR. ROBERSON AND MR. JOHNSON,
3 ALL FOUR OF YOU TRIED THIS CASE AS WELL AS ANY FOUR LAWYERS
4 IN THIS STATE. YOU DID EXACTLY WHAT THE COURT WOULD HAVE
5 EXPECTED OF ALL OF YOU REPRESENTING THE INTERESTS OF YOUR
6 CLIENT. ALL OF YOU DID AN EXCELLENT JOB ON BEHALF OF YOUR
7 RESPECTIVE PARTY OR CLIENT. I COMMEND YOU FOR THAT AND THANK
8 YOU.

9 PLEASE GET WITH THE COURT REPORTER AND MAKE SURE WE HAVE
10 ALL THE PROPER EXHIBITS. THANK YOU, GENTLEMEN. WE'LL BE AT
11 EASE UNTIL THE JURY NEEDS US.

12 MR. JOHNSON: THANK YOU VERY KINDLY, YOUR HONOR.

13 (WHEREUPON, THE JURY BEGAN DELIBERATING AT 5:02 P.M.)

14 (COURT'S EXHIBIT 4 WAS MARKED FOR IDENTIFICATION ONLY.)

15 THE COURT: THANKS VERY MUCH. YOU MAY BE SEATED. THANK
16 Y'ALL. ALL RIGHT. IS THE -- AS I UNDERSTAND IT, THE JURY
17 HAS REACHED A VERDICT. IS THE STATE READY TO RECEIVE IT?

18 MS. CAMPBELL: YES, SIR.

19 THE COURT: IS THE DEFENDANT ADAMS GIBSON READY TO
20 RECEIVE IT?

21 MR. ROBERSON: YES, SIR.

22 THE COURT: AND THE DEFENDANT JACQUES GIBSON?

23 MR. JOHNSON: YES, SIR, YOUR HONOR.

24 THE COURT: ALL RIGHT. LADIES AND GENTLEMEN, I WANT TO
25 TELL ANYONE IN THE AUDIENCE -- I DO NOT KNOW WHAT THE VERDICT

1 IS OF THIS JURY IN THESE TWO CASES. WHATEVER THAT VERDICT
2 IS, IT WILL BE RECEIVED WITH RESPECT. IT WILL BE RECEIVED
3 WITH SILENCE. I WILL NOT TOLERATE ANY KIND OF OUTBURST OR
4 SHOWING OF EMOTION TO THE VERDICT OF THE JURY.

5 IF YOU CANNOT FOLLOW THESE INSTRUCTIONS, PLEASE LEAVE
6 THE COURTROOM. IF YOU VIOLATE THESE DIRECTIONS OF THE COURT,
7 I WILL HOLD A HEARING. YOU CAN BE SUBJECT TO BEING HELD IN
8 CONTEMPT OF COURT. THE MAXIMUM POTENTIAL PUNISHMENT IS ONE
9 YEAR IN THE DEPARTMENT OF CORRECTIONS. IF YOU CANNOT FOLLOW
10 THESE INSTRUCTIONS, LEAVE THE COURTROOM NOW. THANK YOU VERY
11 MUCH. ASK THE JURY TO COME IN, PLEASE.

12 (WHEREUPON, THE JURY RETURNED TO OPEN COURT WITH A
13 VERDICT AT 7:47 P.M.)

14 THE COURT: MR. FOREMAN, HAS YOUR JURY REACHED A VERDICT
15 IN THIS PARTICULAR MATTER?

16 FOREMAN: YES, YOUR HONOR.

17 THE COURT: COULD YOU HAND THE VERDICT FORMS TO THE
18 BAILIFF? THANK YOU, SIR. THANK YOU, MA'AM. MADAM CLERK,
19 YOU MAY PUBLISH THE VERDICTS.

20 THE CLERK: YES, SIR. INDICTMENT NUMBER
21 2005-GS-40-9086, THE STATE OF SOUTH CAROLINA VERSUS JACQUES
22 GIBSON. MURDER. ON THE CHARGE OF MURDER, WE, THE JURY, BY
23 UNANIMOUS CONSENT, FIND THE DEFENDANT JACQUES GIBSON GUILTY.

24 INDICTMENT NUMBER 2005-GS-40-9739, THE STATE OF SOUTH
25 CAROLINA VERSUS JACQUES GIBSON. UNLAWFUL POSSESSION OF A

1 PISTOL BY A PERSON UNDER 21 YEARS OF AGE. ON THE CHARGE OF
2 UNLAWFUL POSSESSION OF A FIREARM BY A PERSON UNDER 21 YEARS
3 OF AGE, WE, THE JURY, BY UNANIMOUS CONSENT, FIND THE
4 DEFENDANT JACQUES GIBSON GUILTY.

5 INDICTMENT NUMBER 2005-GS-40-9085, THE STATE OF SOUTH
6 CAROLINA VERSUS ADAMS GIBSON. MURDER. ON THE CHARGE OF
7 MURDER, WE, THE JURY, BY UNANIMOUS CONSENT, FIND THE
8 DEFENDANT ADAMS GIBSON GUILTY. SIGNED THOMAS YARBROUGH,
9 FOREPERSON, MAY THE 24TH, 2007.

10 MR. FOREMAN, WAS THIS YOUR VERDICTS AND THE VERDICTS OF
11 THE ENTIRE JURY?

12 FOREMAN: IT IS.

13 THE CLERK: THANK YOU.

14 MR. JOHNSON: YOUR HONOR, WE RESPECTFULLY REQUEST TO
15 POLL THE JURY.

16 THE COURT: I WAS JUST GOING TO ASK. DOES THE -- DO THE
17 DEFENDANTS WISH THE JURY POLLED? MR. ROBERSON?

18 MR. ROBERSON: YES, SIR.

19 THE COURT: AND MR. JOHNSON?

20 MR. JOHNSON: YES, SIR.

21 THE COURT: ALL RIGHT, SIR. MADAM CLERK?

22 THE CLERK: YES, SIR. LADIES AND GENTLEMEN OF THE JURY,
23 I'M GOING TO ASK YOU TWO QUESTIONS RELATING TO YOUR VERDICTS.
24 AS I CALL YOUR NAME, PLEASE ANSWER YES OR NO TO BOTH
25 QUESTIONS. THOMAS YARBROUGH, WAS THIS YOUR VERDICTS?

1 JUROR YARBROUGH: YES.

2 THE CLERK: IS IT STILL YOUR VERDICTS?

3 JUROR YARBROUGH: YES.

4 THE CLERK: ANDREA WEBB, WAS THIS YOUR VERDICTS?

5 JUROR WEBB: YES.

6 THE CLERK: IS IT STILL YOUR VERDICTS?

7 JUROR WEBB: YES.

8 THE CLERK: SUSAN MCCLAM, WAS THIS YOUR VERDICTS?

9 JUROR MCCLAM: YES.

10 THE CLERK: IS IT STILL YOUR VERDICTS?

11 JUROR MCCLAM: YES.

12 THE CLERK: CAMERON MOWEN, WAS THIS YOUR VERDICTS?

13 JUROR MOWEN: YES.

14 THE CLERK: IS IT STILL YOUR VERDICTS?

15 JUROR MOWEN: YES.

16 THE CLERK: TREY RODERICK, WAS THIS YOUR VERDICTS?

17 JUROR RODERICK: YES.

18 THE CLERK: IS IT STILL YOUR VERDICTS?

19 JUROR RODERICK: YES.

20 THE CLERK: KAREN HEID, WAS THIS YOUR VERDICTS?

21 JUROR HEID: YES.

22 THE CLERK: IS IT STILL YOUR VERDICTS?

23 JUROR HEID: YES.

24 THE CLERK: XENIA JONES, WAS THIS YOUR VERDICTS?

25 JUROR JONES: YES.

1 THE CLERK: IS IT STILL YOUR VERDICTS?

2 JUROR JONES: YES.

3 THE CLERK: MEGAN BURBAGE, WAS THIS YOUR VERDICTS?

4 JUROR BURBAGE: YES.

5 THE CLERK: IS IT STILL YOUR VERDICTS?

6 JUROR BURBAGE: YES.

7 THE CLERK: SHONELLE DOWNER, WAS THIS YOUR VERDICTS?

8 JUROR DOWNER: YES.

9 THE CLERK: IS IT STILL YOUR VERDICTS?

10 JUROR DOWNER: YES.

11 THE CLERK: ADRIAN ADDISON, WAS THIS YOUR VERDICTS?

12 JUROR ADDISON: YES.

13 THE CLERK: IS IT STILL YOUR VERDICTS?

14 JUROR ADDISON: YES.

15 THE CLERK: CHRISTOPHER SHIRER, WAS THIS YOUR VERDICTS?

16 JUROR SHIRER: YES.

17 THE CLERK: IS IT STILL YOUR VERDICTS?

18 JUROR SHIRER: YES.

19 THE CLERK: BELINDA PEARSON-TOATLEY, WAS THIS YOUR

20 VERDICTS?

21 JUROR PEARSON-TOATLEY: YES.

22 THE CLERK: IS IT STILL YOUR VERDICTS?

23 JUROR PEARSON-TOATLEY: YES.

24 THE CLERK: THE JURY HAS BEEN POLLED, YOUR HONOR.

25 THE COURT: THANK YOU VERY MUCH. THE JURY HAVING BEEN

1 POLLED AND AFFIRMED THEIR VERDICTS, IS THERE ANYTHING FURTHER
2 AS TO THE JURY FROM THE STATE?

3 MS. CAMPBELL: NO, SIR.

4 THE COURT: FROM THE DEFENDANT ADAMS GIBSON?

5 MR. ROBERSON: NOTHING, YOUR HONOR.

6 THE COURT: FROM THE DEFENDANT JACQUES GIBSON?

7 MR. JOHNSON: NOTHING, YOUR HONOR.

8 THE COURT: ALL RIGHT, SIR. ALL RIGHT. LADIES AND
9 GENTLEMEN OF THE JURY, I'M ABLE TO EXCUSE YOU FROM YOUR
10 SERVICE IN THESE PARTICULAR CASES AND FROM YOUR JURY SERVICE
11 FOR THIS PARTICULAR WEEK. YOU DID EXACTLY WHAT THE COURT
12 ASKED YOU TO DO, THAT IS TO WELL AND TRULY DELIBERATE AND
13 FIND THE TRUTH OF THIS MATTER, AND BY RENDERING YOUR VERDICTS
14 IN THIS MATTER YOU HAVE DONE SO.

15 I WANT TO THANK YOU AS YOUR PRESIDING JUDGE FOR THE
16 ATTENTION AND THE CONSCIENTIOUSNESS THAT YOU DISPLAYED DURING
17 THE ENTIRETY OF THIS TRIAL AND DURING THIS PROCESS. I
18 UNDERSTAND AND I EXPECT THAT THE PRESIDING JUDGE THAT
19 QUALIFIED YOU TOLD YOU YOU HAVE EARNED AN EXEMPTION FOR THREE
20 YEARS FROM COMING TO CIRCUIT COURT. SO IF YOU GET A SUMMONS
21 IN THE NEXT THREE YEARS FOR CIRCUIT COURT DUTY, PLEASE LET
22 YOUR FINE CLERK OF COURT KNOW AND YOU WILL BE EXCUSED. YOU
23 ARE NOW RELEASED FROM YOUR JURY NOTICES AND SUBPOENAS. THANK
24 YOU VERY MUCH. PLEASE LET THE TWO ALTERNATES KNOW ALSO,
25 PLEASE, SIR.

1 (WHEREUPON, THE JURY WAS EXCUSED FROM THE TRIAL.)

2 THE COURT: ALL RIGHT. MOTIONS ON BEHALF OF THE
3 DEFENDANT ADAMS GIBSON?

4 MR. ROBERSON: IF YOUR HONOR PLEASES, YOUR HONOR, WE ASK
5 THAT THE COURT GRANT A JUDGMENT NOTWITHSTANDING THE VERDICT.
6 SET ASIDE THIS CONVICTION BASED ON MY PREVIOUS MOTIONS, BASED
7 ON THE FACT THAT THE THEORY OF THE HAND OF ONE IS THE HAND OF
8 ALL IS THE ONLY THING THAT LINKS MY CLIENT TO THIS MURDER.
9 THAT EVIDENCE WAS INSUFFICIENT.

10 I BELIEVE THE JURY'S VERDICT WAS BASED ON PASSION,
11 SYMPATHY, AND, THEREFORE, VIOLATED THE TENETS FOR WHICH THIS
12 COURT CHARGED THEM TO RENDER AND DELIVER A VERDICT IN THIS
13 CASE. IT IS FOR THAT REASON, YOUR HONOR, I ASK THAT THE
14 COURT SET ASIDE THE VERDICT.

15 THE COURT: ALL RIGHT, SIR.

16 MR. ROBERSON: AND IN THE ALTERNATIVE, GRANT A NEW
17 TRIAL.

18 THE COURT: ALL RIGHT. AND, MR. ROBERSON, I UNDERSTAND
19 YOUR POSITION AND THE POSITION YOU HAVE TAKEN ON BEHALF OF
20 YOUR CLIENT. THERE WAS EVIDENCE THAT WAS PRESENTED IN THIS
21 TRIAL AS TO THE COMPLICITY AND THE ACTIONS OF YOUR CLIENT,
22 ADAMS GIBSON, REGARDING THE DEATH IN THIS CASE OF THE VICTIM,
23 THAT IS, ROBERT DENNIS IRBY. THE COURT FINDS THAT THERE WAS
24 SUFFICIENT EVIDENCE PRESENTED BY THE STATE AND IS CONTAINED
25 IN THIS RECORD WHICH SUPPORTS THE VERDICT OF THE JURY.

1 THERE WAS SUFFICIENT EVIDENCE IN THE RECORD, IF SO
2 BELIEVED BY THE JURY, TO SUSTAIN A CONVICTION BEYOND A
3 REASONABLE DOUBT ON THE CHARGE OF MURDER AS AGAINST YOUR
4 CLIENT, AND, THEREFORE, THE COURT RESPECTFULLY DECLINES TO
5 GRANT YOUR MOTION FOR A DIRECTED VERDICT AND FOR A NEW TRIAL.
6 THANK YOU, SIR. ANY FURTHER MOTIONS?

7 MR. ROBERSON: NOTHING FURTHER, YOUR HONOR.

8 THE COURT: ALL RIGHT, SIR. MR. JOHNSON?

9 MR. JOHNSON: YOUR HONOR, I MAKE THE ADDITIONAL -- THE
10 SAME MOTION AS TO JACQUES GIBSON ON THE GROUNDS, YOUR HONOR,
11 THAT THE VERDICT HAD TO BE SPECULATIVE AND BASED ON
12 CONJECTURE, AND THE STATE HAS FAILED TO INTRODUCE SUFFICIENT
13 EVIDENCE TO CONVINCE A FAIR AND REASONABLE JURY THAT MY
14 CLIENT IS GUILTY AS CHARGED. YOUR HONOR, DURING THE COURSE
15 OF THE TRIAL WE MADE APPROPRIATE OBJECTIONS AND MADE
16 APPROPRIATE ARGUMENTS, AND THERE'S NO WAY, YOUR HONOR, THAT A
17 REASONABLE AND FAIR JURY COULD HAVE COME TO THE CONCLUSION...

18 THIS CASE WAS BASED ON CIRCUMSTANTIAL EVIDENCE. THERE
19 WAS NO EYEWITNESSES TO THE -- TO THE CRIME. THE
20 CIRCUMSTANTIAL EVIDENCE DID NOT -- THERE WASN'T A CHAIN OF
21 FACTS THAT WOULD LEAD TO THE LOGICAL CONCLUSION THAT MY
22 CLIENT KILLED THE DECEASED, AND WE WOULD, THEREFORE,
23 RESPECTFULLY ASK FOR A JUDGMENT NOTWITHSTANDING THE VERDICT
24 AND A NEW TRIAL.

25 THE COURT: ALL RIGHT, SIR. MR. JOHNSON, I WOULD

1 RESPECTFULLY DECLINE TO GRANT YOUR MOTIONS FOR A DIRECTED
2 VERDICT AND A NEW TRIAL IN THIS MATTER. THE COURT FINDS THAT
3 THERE WAS SUFFICIENT EVIDENCE PRESENTED BY THE STATE, IF SO
4 BELIEVED BY THE JURY AND AS THEY MUST HAVE TO HAVE RENDERED
5 THE VERDICT AS THEY DID AS AGAINST JACQUES GIBSON. THERE WAS
6 SUFFICIENT EVIDENCE TO SHOW BEYOND A REASONABLE DOUBT THAT
7 THE DEFENDANT JACQUES GIBSON WAS GUILTY OF THE OFFENSE OF
8 MURDER AND GUILTY OF THE OFFENSE OF POSSESSION OF A PISTOL BY
9 A PERSON UNDER THE AGE OF 21. THEREFORE, THE COURT
10 RESPECTFULLY DECLINES TO GRANT YOUR MOTION FOR A DIRECTED
11 VERDICT ON BOTH CHARGES AND FOR A NEW TRIAL ON BOTH CHARGES.
12 FURTHER MOTIONS ON BEHALF OF THE DEFENDANT JACQUES GIBSON,
13 SIR?

14 MR. JOHNSON: NONE, YOUR HONOR.

15 THE COURT: ALL RIGHT, SIR. IS THE STATE READY TO
16 PROCEED WITH SENTENCING IN THESE MATTERS?

17 MS. CAMPBELL: YES, SIR.

18 THE COURT: IS THE DEFENDANT ADAMS GIBSON READY TO
19 PROCEED?

20 MR. ROBERSON: YES, YOUR HONOR, WE ARE.

21 THE COURT: DEFENDANT JACQUES GIBSON READY TO PROCEED,
22 SIR?

23 MR. JOHNSON: YES, SIR, YOUR HONOR.

24 THE COURT: ALL RIGHT. ALL RIGHT. SOLICITOR, BE GLAD
25 TO HEAR FROM YOU, MA'AM.

1 MS. CAMPBELL: MAY IT PLEASE THE COURT, YOUR HONOR? I
2 DID TALK TO MR. AND MRS. IRBY WHO ARE DENNIS IRBY'S PARENTS.
3 I ASKED THEM IF THEY WISHED TO SPEAK. THEY JUST WISHED FOR
4 ME TO EXPRESS THEIR THANKS TO YOU FOR PRESIDING OVER THE
5 TRIAL. AS FAR AS PRIOR RECORD GOES, I THINK YOU HEARD
6 EARLIER HE DIDN'T HAVE A SIGNIFICANT PRIOR RECORD.

7 THE COURT: ALL RIGHT. ALL RIGHT. MR. ROBERSON, ON
8 BEHALF OF MR. ADAMS GIBSON, I'LL BE GLAD TO HEAR FROM YOU,
9 SIR.

10 MR. ROBERSON: MAY IT PLEASE THE COURT? YOUR HONOR, YOU
11 HEARD THAT MR. GIBSON IS THE FATHER OF TWO BOYS, BORN AND
12 RAISED IN FAIRFIELD COUNTY. HE ATTENDED SCHOOL THERE. HE'S
13 WORKING THERE. HE IS ONE OF I THINK ABOUT 14 OR 15 CHILDREN.
14 HE'S BEEN SUPPORTING HIMSELF ALL HIS ADULT LIFE. HE TAKES
15 CARE OF HIS CHILDREN. AND I HATE -- I HATE TO BUT I'M
16 COMPELLED, YOUR HONOR, TO REITERATE THAT THE ONLY REASON MY
17 CLIENT WAS INVOLVED IN ANYTHING OTHER THAN COMING TO COLUMBIA
18 WITH LAKISHA WAS TO ACCOMPANY HER, TO GET HER AWAY FROM A
19 GRIEVING FAMILY WHO HAD LOST THEIR LOVED ONE.

20 THAT FIGHT HAD ABSOLUTELY NOTHING TO DO WITH ADAMS
21 GIBSON. IT WAS ABOUT, AS I UNDERSTAND IT, SOME ROBBERY THAT
22 HAPPENED SOMETIME IN THE DISTANT PAST. WE STILL MAINTAIN
23 THAT THE ONE PHONE CALL THAT HE DID MAKE THAT WAS OVERHEARD
24 BY AT LEAST ONE OF THE STATE'S WITNESSES WAS TO THE EFFECT
25 THAT, "THOSE BOYS HAVE GOTTEN INTO A FIGHT. COME AND GET ME

1 OUT OF COLUMBIA." THEY GAVE THE DIRECTIONS HOW TO GET HERE.
2 HIS POSITION WAS THEN, "WHEN MY BROTHER GETS HERE, I AM
3 GETTING OUT OF TOWN. THERE WAS NO, NO, DISCUSSION ON THE
4 PART OF ANYONE TO COME AND SETTLE A SCORE. THE SCORE THAT
5 WAS ABOUT TO BE SETTLED, I REITERATE, HAD NOTHING TO DO WITH
6 ADAMS GIBSON.

7 YOUR HONOR, I UNDERSTAND THE JURY'S VERDICT. I, FROM A
8 PROFESSIONAL POINT OF VIEW, RESPECT THAT. I MOST
9 RESPECTFULLY DISAGREE WITH ITS FINDING. THE INTEGRITY OF THE
10 SYSTEM, VIEWING THE TESTIMONY AND THE CONDUCT OF MY CLIENT,
11 REQUIRES THAT THIS COURT SHOW WHATEVER COMPASSION IT CAN
12 TOWARD ADAMS GIBSON UNDER THESE CIRCUMSTANCES.

13 THE COURT: THANK YOU, SIR. DOES YOUR CLIENT WISH TO
14 ADDRESS THE COURT IN ANY FASHION?

15 MR. ADAMS GIBSON: YES, SIR. I'M SORRY FOR WHAT
16 HAPPENED. I NEVER MEANT TO HURT NOBODY. I'M SORRY.

17 THE COURT: ANYONE ELSE ON HIS BEHALF WISH TO ADDRESS
18 THE COURT, MR. ROBERSON?

19 MS. DEIDRA GIBSON: I DO.

20 MR. ROBERSON: YES, MA'AM.

21 MS. DEIDRA GIBSON: MY PERSONAL OPINION IS THAT ALL THE
22 GUYS WAS OUT THERE FIGHTING, AND WHY ARE THEY THE ONLY ONES
23 BEING PUNISHED? JUST BECAUSE ONE IS FROM WINNSBORO AND
24 THEY'RE GOOD FRIENDS WITH THE PARENTS -- I FEEL THAT
25 EVERYBODY SHOULD BE PENALIZED.

1 THE COURT: ALL RIGHT, MA'AM. AND I'M SORRY, MA'AM.
2 COULD YOU TELL ME YOUR NAME, PLEASE, MA'AM?

3 MS. DEIDRA GIBSON: MY NAME IS DEIDRA GIBSON.

4 THE COURT: THANK YOU, MA'AM. ANYTHING ELSE, MR.
5 ROBERSON?

6 MR. ROBERSON: I BELIEVE THAT'S IT, YOUR HONOR.

7 THE COURT: ALL RIGHT, SIR. MR. JOHNSON, BE GLAD TO
8 HEAR FROM YOU, SIR.

9 MR. JOHNSON: MAY IT PLEASE THE COURT, YOUR HONOR? AS I
10 INDICATED IN MY CLOSING ARGUMENT, I'VE BEEN DOING THIS FOR 39
11 YEARS, AND EVEN AFTER 39 YEARS THERE'S NO WAY YOU CAN GET
12 ACCUSTOMED TO A GUILTY VERDICT, ESPECIALLY ONE INVOLVING
13 MURDER. YOUR HONOR, THROUGHOUT THIS -- MY REPRESENTATION OF
14 JACQUES, I WAS FIRMLY CONVINCED OF HIS INNOCENCE. I ENGAGED
15 IN MORE PREPARATION AND CONSULTATION WITH HIM, AND HE AND I
16 WERE A TEAM IN THE PREPARATION FOR THIS TRIAL.

17 I HAVE BEEN IMPRESSED WITH HIS INTELLIGENCE. I'VE BEEN
18 IMPRESSED WITH HIS CHARACTER. I'VE BEEN IMPRESSED WITH HIS
19 MANNERS. AND IT IS INTERESTING TO NOTE, YOUR HONOR, THAT
20 EVEN IN THE ACCOUNTS BY THE INVESTIGATING OFFICERS, A COMMON
21 THEME RAN THROUGHOUT AND THAT IS THAT HE WAS COOPERATIVE, AND
22 CAPTAIN SMITH, I BELIEVE, WROTE THAT HE WAS REMORSEFUL. THE
23 STATEMENT HE GAVE TO INVESTIGATOR MCDANIELS ALSO REFLECTED
24 HIS REMORSEFULNESS.

25 YOUR HONOR, WHEN THIS HAPPENED HE WAS OF THE YOUNG,

1 TENDER AGE OF 17. A BRIGHT FUTURE BEFORE HIM. HE IS ONE OF
2 12 CHILDREN. HE STANDS HERE NOW WITH HIS FATHER, HIS
3 GRIEVING FATHER, WHO IS STANDING UP HERE WITH TWO OF HIS SONS
4 WHO HAVE BEEN CONVICTED OF MURDER. IT IS FREQUENTLY
5 OVERLOOKED IN SITUATIONS LIKE THIS THAT THESE INCIDENTS HURT
6 BOTH FAMILIES. BOTH FAMILIES ARE PERMANENTLY AND INDELIBLY
7 DAMAGED.

8 BASED ON THE CONVICTIONS, THIS MEANS THAT THIS YOUNG MAN
9 WHO HAS SO MUCH POTENTIAL WILL BE LOST AS A PRODUCTIVE
10 CITIZEN TO OUR COMMUNITY. I AM CONVINCED THAT HE HAS SO MUCH
11 TO OFFER; HE HAS SO MUCH POTENTIAL. NOW THAT IS LOST.

12 YOUR HONOR, I DO NOT SAY IT PERFUNCTORILY THAT HE WAS
13 REMORSEFUL. HE WAS DEEPLY GRIEVED THAT DENNIS IRBY DIED, AND
14 I DO NOT BELIEVE AND I DON'T BELIEVE -- AS MR. ROBERSON
15 INDICATED, I RESPECT THE JURY'S VERDICT. I DON'T AGREE WITH
16 IT, BUT I DON'T BELIEVE THERE WAS EVIDENCE THAT HE
17 INTENTIONALLY WITH A WICKED HEART, WITH AN EVIL INTENT KILLED
18 DENNIS IRBY.

19 I'M MINDFUL OF THE OPTIONS THAT YOU HAVE AT THIS POINT
20 AND THE LIMITATIONS IN YOUR DISCRETION, BUT UNDER THE
21 CIRCUMSTANCES, YOUR HONOR, I TRUST THAT YOU WILL TAILOR A
22 SENTENCE THAT WILL GIVE HIM SOME LEASE ON LIFE. THANK YOU
23 VERY KINDLY.

24 THE COURT: THANK YOU VERY MUCH, MR. JOHNSON. DOES YOUR
25 CLIENT WISH TO ADDRESS THE COURT?

1 MR. JACQUES GIBSON: YES, SIR. I'M SORRY ABOUT FOR THE
2 IRBY FAMILY BEING HURT, BUT I NEVER MEANT FOR ANY OF THIS TO
3 HAPPEN. I'M SORRY THEY'RE HURT.

4 THE COURT: THANK YOU, SIR.

5 MR. JACQUES GIBSON: YES, SIR.

6 THE COURT: DOES ANYONE ELSE, MR. JOHNSON, WISH TO
7 ADDRESS THE COURT?

8 MR. JOHNSON: NO, SIR. I THINK HIS TEARS SAYS IT ALL,
9 YOUR HONOR.

10 THE COURT: YES, SIR. REGARDING 2005-GS-40-9086, THE
11 STATE OF SOUTH CAROLINA, COUNTY OF RICHLAND, VERSUS JACQUES
12 GIBSON AND 2005-GS-40-9085, THE STATE OF SOUTH CAROLINA,
13 COUNTY OF RICHLAND, VERSUS ADAMS GIBSON, BOTH OF THOSE
14 REGARDING THE CHARGE OF MURDER, THE COURT WOULD FIRST SAY
15 THAT THIS IS JUST AN UNBELIEVABLY SAD AND TRAGIC DAY. YOU
16 HAVE A YOUNG MAN WHO WAS THE VICTIM OF THIS INCIDENT, ROBERT
17 DENNIS IRBY, WHO LOST HIS LIFE, WILL NEVER HAVE THE ABILITY
18 TO HAVE HIS FULL POTENTIAL IN LIFE.

19 NOW WE HAVE THESE TWO YOUNG MEN IN FRONT OF US THAT IF
20 WEAPONS HAD NOT BEEN INVOLVED, LIFE WOULD BE COMPLETELY
21 DIFFERENT, AND NOW THEY'RE GOING TO BE SPENDING A
22 CONSIDERABLE PORTION OF THE REST OF THEIR LIVES IN THE
23 CUSTODY OF THE STATE IN THE DEPARTMENT OF CORRECTIONS. IT'S
24 JUST AN INCREDIBLY SAD, TRAGIC EVENT ALL THE WAY AROUND.

25 MR. JACQUES GIBSON, ON THE CHARGE -- ON THE CRIME OF

1 MURDER, THE DEFENDANT IS COMMITTED TO THE STATE DEPARTMENT OF
2 CORRECTIONS FOR A DETERMINATE TERM, FOR THE MINIMUM TERM
3 ALLOWED BY LAW, OF 30 YEARS. THE DEFENDANT IS TO BE GIVEN
4 CREDIT FOR THE TIME THAT HE HAS ALREADY SERVED.

5 MR. ADAMS GIBSON, ON THE CRIME OF MURDER, THE DEFENDANT
6 IS COMMITTED TO THE STATE DEPARTMENT OF CORRECTIONS FOR THE
7 MINIMUM TIME ALLOWED BY LAW, A DETERMINATE TERM OF 30 YEARS.
8 THE DEFENDANT IS GIVEN CREDIT FOR THE TIME SERVED.

9 REGARDING MR. JACQUES GIBSON, UNLAWFUL POSSESSION OF A
10 PISTOL, THE DEFENDANT IS COMMITTED TO THE STATE DEPARTMENT OF
11 CORRECTIONS FOR A DETERMINATE TERM OF SIX MONTHS, CONCURRENT
12 WITH THE SENTENCE IN 2005-GS-40-9086. CREDIT FOR TIME
13 SERVED. THANK YOU VERY MUCH.

14 MR. JOHNSON: THANK YOU, YOUR HONOR.

15 MR. ROBERSON: THANK YOU, YOUR HONOR.

16 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED. PER THE
17 COURT'S INSTRUCTIONS OFF THE RECORD TO THE COURT REPORTER,
18 THE CONTEMPT OF COURT PROCEEDINGS PERTAINING TO W. SHAWN
19 MCDANIELS ARE CONSIDERED A SEPARATE PROCEEDING AND ARE NOT TO
20 BE MADE A PART OF THIS TRIAL RECORD.)

21

22

23

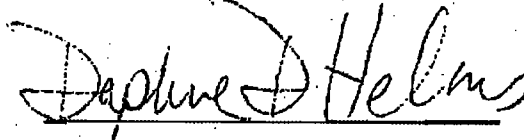
24

25

I, THE UNDERSIGNED DAPHNE D. HELMS, 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 TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE 21ST THROUGH 24TH DAYS OF MAY, 2007.

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

FEBRUARY 1, 2008

A handwritten signature in cursive script, reading "Daphne D. Helms", written over a horizontal line.

DAPHNE D. HELMS, COURT REPORTER

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State,

Respondent,

v.

Adams Gibson,

Appellant.

Appeal From Richland County
Steven H. John, Circuit Court Judge

Opinion No. 4747
Heard May 19, 2010 – Filed September 29, 2010

AFFIRMED

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

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Donald J.
Zelenka, Assistant Attorney General Alphonso
Simon, Jr., Warren Blair Giese, Solicitor, all of
Columbia, for Respondent.

THOMAS, J.: During an altercation in a parking lot, Dennis Irby was shot and killed by a single 9mm gunshot. Adams Gibson and his brother Jacques Gibson were each indicted and convicted for the murder. Adams appeals, arguing the trial court erred in failing to grant a directed verdict and in failing to instruct the jury on involuntary manslaughter. We affirm.

FACTS

In September 2005, two groups of individuals, one from Ridgeway and one from Winnsboro, met at Chance's Bar in Columbia. Although the groups seemed to be getting along most of the evening, at some point, animosity developed between Demetric Davis, of Ridgeway, and Torri Boyd, of Winnsboro. Adams testified that shortly after the initial confrontation between Davis and Boyd, he called his brother, Jacques, to request a ride home.

Twenty to thirty minutes later, Jacques and two friends, Stephon and Vernon, arrived at Chance's in Jacques's white Ford sedan to pick up Adams. Jacques went inside to find Adams, while Stephon and Vernon waited in the car. Shortly thereafter, the dispute that had brewed inside Chance's spilled out into the parking lot and erupted into a physical altercation between numerous members of each group. According to several witnesses, neither Adams nor Jacques initially engaged in the fight; however, James Smith testified he saw Adams swing at someone and when Smith approached Adams in an effort to keep him away from one of the Winnsboro fellows, Jacques brandished a gun and told him "[not to] even think about it." Smith testified he fled at the sight of the gun.

Soon after the fight erupted, witnesses testified to hearing several shots. The witness accounts of the evening provide no clear picture of who fired weapons or how many shots were fired. However, many witnesses testified to seeing either Jacques, Adams, or both, or "someone" in the vicinity of Jacques's white car, firing multiple shots.

One of the State's key witnesses, Shunta Williams,¹ testified that she left the bar and walked out to the parking lot to watch the fight. Most of the witnesses testified that Jacques remained near his white sedan, away from the fight, while Adams may have engaged in the melee. However, Williams testified that Jacques was engaging in the fight and that she saw Adams walk over to the white sedan, sit in the driver seat, reach under it, pull out a gun, and fire what she recognized as a small caliber handgun, either a .22 or .25.² When the shots began, she retreated to the doorway of the bar to take cover. Moments later she claimed she heard another set of gunshots in the distance. She identified Adams as wearing jeans and a black tee shirt, although the other witnesses and evidence presented at trial indicated it was Jacques in the black tee shirt, and Adams was wearing a white tee shirt. Many of the accounts point to multiple sources of gunfire, but Williams maintains that Adams was the only shooter. During the melee, Dennis Irby was shot and killed by a single 9mm shot to the back of the left shoulder.

Adams spoke with the police twice. He first stated that he was not in the white Ford sedan with Jacques and did not see who did the shooting because he was in Lakisha Davis's car. He later admitted that after the altercation in the parking lot began, he exited Lakisha's car, at her request, to retrieve her cousin, Demetric. Adams denied having or firing a gun that night.

Jacques also gave two statements to the police. First he told the police that after he and his brother exited the bar, Adams went to Lakisha Davis's car and he returned to his white Ford sedan. He said he noticed a man retrieve something from a nearby SUV and place it behind his back, he suspected it was a gun but did not see it. After the fight broke out, Jacques stated Adams drove around in Lakisha's car, got out, and walked over toward the fighting. Although in his first statement Jacques denied he had a gun, Jacques later admitted that upon suspecting Smith was going to hit Adams, he pulled a gun and told Smith to "back off." Jacques said he then heard two

¹ Although there are many witness accounts, the State relies heavily on this testimony for many of the issues in this case.

² Shell casings from a .25 caliber gun were found at the scene.

shots and in response fired his 9mm three or four times "into the air" as he got in his car and drove away. He later disposed of his gun by tossing it over a bridge.

Adams and Jacques were both indicted for murder; Jacques was also indicted for possession of a firearm by a person under the age of twenty-one. The pair was tried together. At the close of the State's case, Adams unsuccessfully moved for a directed verdict. In addition, the trial court denied Adams's request to instruct the jury on involuntary manslaughter. Both Adams and Jacques were convicted of murder and sentenced to thirty years' imprisonment. Adams appeals.

ISSUES ON APPEAL

- I. Did the trial court err in failing to direct a verdict on the charge of murder?
- II. Did the trial court err in failing to instruct the jury on involuntary manslaughter?

STANDARD OF REVIEW

In criminal cases an appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

LAW/ANALYSIS

I. Directed Verdict

Adams argues the trial court erred in failing to direct a verdict on the charge of murder. We disagree.

When ruling on a motion for a directed verdict, the trial court is concerned only with the existence of evidence, not the weight. State v. Al-Amin, 353 S.C. 405, 411, 578 S.E.2d 32, 35 (Ct. App. 2003). When reviewing the denial of a motion for a directed verdict, an appellate court must review the evidence, and all inferences therefrom, in the light most

favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). The trial court's denial of a directed verdict will not be reversed if supported by any direct evidence or substantial circumstantial evidence of the defendant's guilt. Id.

In this case, the trial court denied Adams's motion for directed verdict, finding sufficient evidence had been presented to allow the case to proceed to the jury on the "hand of one is the hand of all" theory of liability. Adams argues the State presented insufficient evidence that he is responsible for the victim's murder under an accomplice theory.

Under the "hand of one is the hand of all" theory of accomplice liability, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. A defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense. [However, m]ere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt. [Rather,] presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal.

State v. Thompson, 374 S.C. 257, 261-62, 647 S.E.2d 702, 704-05 (Ct. App. 2007) (internal quotations and citations omitted).

"Under an accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.' " See State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002) (quoting State v. Langley, 334 S.C. 643, 648-49, 515 S.E.2d 98, 101 (1999)). In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but

rather can prove the same by circumstantial evidence and the conduct of the parties. Id. at 193, 562 S.E.2d at 324 (stating that under the hand of one is the hand of all theory, "[a] formally expressed agreement is not necessary to establish the conspiracy" which brings the accomplice to the scene of the crime).

In this case, the State does not contend Adams fired the fatal shot. Rather, the State simply maintains there is sufficient circumstantial evidence that Adams agreed to, and did, act in concert with Jacques to assault the Winnsboro group; thus, sufficient evidence of Adams's guilt existed to submit the issue to the jury under the hand of one is the hand of all theory. In order to demonstrate that Adams and Jacques intended to join together in a common design to achieve an illegal purpose, the State maintains: (1) Adams called Jacques to the scene; (2) when Jacques arrived he went inside the bar and Adams pointed out the group of Winnsboro men, rather than leaving straight away; (3) Williams testified Adams approached Jacques's white sedan in the parking lot and retrieved a gun moments before the shooting; and (4) although separately, the two men fled the scene after the shooting.

Here, at minimum, the evidence creates the inferences that Adams informed Jacques of the situation, that the reason for the call may not have been solely for the purpose of removing Adams from the scene, and that Adams was aware a firearm was available for him to retrieve from Jacques's white sedan. When viewed in the light most favorable to the State, the circumstantial evidence in this case infers Adams and Jacques may have acted in concert in assaulting the men from Winnsboro. See State v. Ward, 374 S.C. 606, 615, 649 S.E.2d 145, 150 (Ct. App. 2007) (holding in a case with similar facts, that evidence the defendant and his co-defendant together chased after two men in the melee of a parking lot brawl and fired shots, killing a bystander, was sufficient to overcome a directed verdict motion); see also Langley, 334 S.C. at 649, 515 S.E.2d at 101 (indicating evidence that the defendant and co-defendant were seen together, circumstantial evidence placing defendant at the scene of the crime, and eye-witness testimony, was sufficient to warrant submitting the case to the jury on any theory of liability, including the hand of one is the hand of all theory). Accordingly, we find the trial court did not abuse its discretion and affirm its denial of Adams's motion for a directed verdict.

II. Jury Instruction

Adams next alleges the trial court erred in failing to instruct the jury on involuntary manslaughter. We disagree.

The evidence presented at trial determines the law to be charged, and a trial court commits reversible error in failing to give a requested charge on an issue raised by the evidence. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). In determining whether to charge the lesser included offense of manslaughter the court must view the evidence in the light most favorable to the defendant. Id. Declining to charge the lesser included offense is warranted when it "very clearly appear[s] that . . . *no evidence whatsoever* [exists] tending to reduce the crime from murder to manslaughter." State v. Brayboy, 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct. App. 2010); State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000). In order to amount to reversible error, the failure to give a requested charge must be both erroneous and prejudicial. State v. Patterson, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (Ct. App. 2006).

Involuntary manslaughter is:

(1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. To constitute involuntary manslaughter, there must be a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others. Recklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating. A person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the

shooting. The negligent handling of a loaded gun will support a charge of involuntary manslaughter.

Brayboy, 378 S.C. at 180, 691 S.E.2d at 485 (internal citations and quotations omitted).

The State argues that under the hand of one is the hand of all theory, Adams is not entitled to this charge because Jacques was either acting unlawfully or was not lawfully armed in self-defense. More specifically, the State argues extensively that because Jacques was not acting in such a manner as to entitle him to a self-defense instruction, he is thereby not lawfully armed in self-defense for the purposes of an involuntary manslaughter charge. However, our supreme court has specifically pointed out there is a difference between being "armed in self-defense" and "acting in self-defense."³ State v. Light, 378 S.C. 641, 649, n.6, 664 S.E.2d 465, 469, n.6 (2008); State v. Burriss, 334 S.C. 256, 265, n.10, 513 S.E.2d 104, 109, n.10 (1999); see State v. Crosby, 355 S.C. 47, 52, 584 S.E.2d 110, 112 (2003)⁴ (stating "[a] person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting"). Thus, for the purposes of involuntary

³ The issue of instructing the jury on self-defense is not appealed.

⁴ The State makes a brief argument that Jacques was convicted of unlawful possession of a pistol by a person under twenty-one years of age and because of this he was "unlawfully armed." However, our supreme court has indicated section 16-23-30(c) of the South Carolina Code (2003), which outlawed possession of handguns by persons under the age of twenty-one, to be in violation of the plain language of South Carolina Constitution Article XVII, section 14. See State v. Bolin, 378 S.C. 96, 100, 662 S.E.2d 38, 40 (2008) (stating that with the exception of the General Assembly's ability to restrict the sale of alcohol to individuals until age twenty-one, every citizen who is eighteen years of age or older shall be deemed *sui juris* and be given all, and full, legal rights and responsibilities). It suffices that although a non-issue in this appeal, under the jurisprudence as it currently exists, Jacques's possession of the pistol is not unlawful *per se*, by virtue of his age.

manslaughter, the inquiries associated with whether or not to instruct on the defense of self-defense are not applicable. Light, 378 S.C. at 648-49, 664 S.E.2d 468-69. Rather, the court is "concerned only with whether [the defendant] had a right to be armed for purposes of determining whether he was engaged in a lawful act, i.e. was [he] lawfully armed, and not whether he actually acted in self-defense when the shooting occurred." Id. at 649 n.6, 664 S.E.2d at 469 n.6.

However, regardless of whether Jacques was lawfully armed in self-defense, the essence of involuntary manslaughter is the involuntary nature of the killing. See Douglas v. State, 332 S.C. 67, 74, 504 S.E.2d 307, 310 (1998) (finding no involuntary manslaughter charge warranted where defendant admitted he intentionally fired a gun into a crowd in self-defense despite testimony that the defendant had been rushed by a group of people during a fight); State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996) (holding where a defendant admitted he intentionally shot his gun, contending he was acting recklessly but lawfully in self-defense, involuntary manslaughter charge was not warranted); State v. Morris, 307 S.C. 480, 483-84, 415 S.E.2d 819, 821-22 (Ct. App. 1991) (noting that under involuntary manslaughter, the act must be unintentional and defendant intentionally shot his gun though he claimed self-defense); accord Light, 378 S.C. at 648-49 664 S.E.2d at 468-69 (finding the defendant had lawfully armed himself in self defense and was entitled to an instruction on involuntary manslaughter, in a case in which there existed evidence the gun *unintentionally discharged*); Brayboy, 387 S.C. at 181-82, 691 S.E.2d at 486 (holding that although unlawful to point and present a firearm, when a defendant lawfully armed himself in self defense his failure to immediately disarm himself when the threat subsided did not amount to unlawful pointing and presenting a firearm and evidence suggesting the gun *accidentally discharged* was sufficient to warrant instruction on involuntary manslaughter).

In this case, because by Jacques's own admission he voluntarily and intentionally fired his weapon, the trial court properly denied instructing the jury on involuntary manslaughter.

CONCLUSION

For the aforementioned reasons, the rulings of the trial court are

AFFIRMED.

FEW, C.J., and PIEPER, J., concur.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ADAMS GIBSON,

PETITIONER.

Appellate Case No. 2010-180806

BRIEF OF PETITIONER

ROBERT M. DUDEK
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ATTORNEY FOR PETITIONER.

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ISSUE PRESENTED

Whether the Court of Appeals erred by ruling petitioner was properly denied a directed verdict on the charge of murder where there was no substantial circumstantial evidence petitioner was acting in concert with his brother, Jacques, when Jacques apparently accidentally shot the decedent during a bar parking lot melee since the state's case against petitioner was essentially Shunta Wilson's discredited claim that she saw petitioner reach for a gun inside the automobile, and at some point shoot it, where the state did not even assert petitioner shot anyone, and the fact petitioner earlier telephoned Jacques about the problem at the club were insufficient to send the case to the jury on suspicion alone?

STATEMENT OF FACTS

Procedural history

Petitioner was indicted by the Richland County grand jury, along with his brother, Jacques Gibson for the offense of murder. Jacques Gibson was also indicted for possession of a firearm by a person under twenty-one years of age. R. 770. Their joint case came on for trial on May 21, 2007 before the Honorable Steven H. John and a jury. Nathaniel Roberson represented petitioner. I.S. Levy Johnson represented Jacques Gibson. Detrich Lake and Kathryn "Luck" Campbell were the assistant solicitors. R. 1.

At the conclusion of the trial on May 24, 2007 the jury found both petitioner and his brother guilty. R. 766, l. 20 – 767, l. 9. Judge John sentenced both petitioner and his brother to thirty-years imprisonment. R. 769, ll. 5 – 20.

The Court of Appeals affirmed petitioner's conviction in State v. Adams Gibson, 390 S.C. 347, 701 S.E.2d 766 (2010). App. 1-6. Petitioner sought rehearing. App. 7-11. Rehearing was denied. App. 12-13.

Petitioner sought certiorari which was granted by this Court. This brief of petitioner follows.

Relevant facts

On the night of September 5, 2005 Torri Boyd went to Chance's Sports Bar on Two Notch Road in Columbia. Boyd was twenty-six years old, and he was from Winnsboro. A dispute, and then chaos, broke out between the men from Winnsboro and the men from Ridgeway in the parking lot of the club that night. R. 2, l. 13 – 7, l. 18.

Boyd claimed petitioner Adams Gibson told him at one point inside the Sports Bar: "Don't be looking at my girl . . ." R. 6, ll. 8 – 22. When the fight later broke out Boyd recalled: "I grabbed

the first person I could grab and fell to the ground, and I was getting kicked and hit basically.” Boyd said he had “no idea” who was hitting him “when everything started breaking loose.” R. 16, l. 1 – 17, l. 5. Boyd claimed petitioner Adams was involved in the fight in some manner. R. 31, ll. 7 – 9. (Hereinafter “Adams.”)

Winnsboro native Ravaris Henry was also at Chance’s that night with Boyd and the decedent. R. 54, l. 3 – 56, l. 24. Henry testified the evening with the Winnsboro men and the Ridgeway men started out well with everybody shaking hands “hugging, talking, laughing . . .” R. 57, l. 15 – 58, l. 7. However, Henry testified that when the fight later started there was “total chaos, yelling and all that.” R. 62, ll. 3 – 18.

During the chaos Henry saw petitioner’s brother, Jacques, shooting his gun in the air as he was driving away. R. 65, l. 5 – 66, l. 3. There would be evidence Jacques was responsible for the decedent being hit. Jacques acknowledged in his brief before the Court of Appeals that he probably was responsible for unintentionally shooting the decedent.

Marcus Tucker was from Ridgeway. He knew Adams and his brother Jacques. R. 296, l. 10 – 299, l. 22. Tucker remembered the fight starting that night with the men from Winnsboro. R. 299, l. 6 – 303, l. 18. He did not see Adams with a gun or shooting a gun that evening. R. 299, ll. 8 – 11.

The only person at Chance’s Sports Bar that night who claimed to have seen Adams with a gun was Shunta Wilson. Wilson claimed the manager told the men to either keep the noise down, or leave the club. R. 311, l. 11 – 314, l. 22. Wilson said things “kind of died down a little bit” after that and then the fight later started outside the club. R. 314, l. 7 – 315, l. 22.

Wilson said she saw a “white Escort” pull up, and “a girl gets out.” This woman attempted to break up the fight. Wilson claimed she saw Adams go to the Escort at this time, reach underneath

the seat, and pull out a gun. R. 315, l. 18 – 316, l. 16. Wilson said as people were trying to get back inside the bar she heard some shots go off and she saw the Escort “speed off.” R. 316, l. 15 – 317, l. 13.

Wilson would later identify Adams from a photo line-up. She claimed she saw Adams shooting a gun that evening amid the chaos. R. 329, l. 2 – 330, l. 19. However, as will be seen infra, the state *did not claim it was petitioner Adams* that shot the decedent, and her identification testimony *was discredited*.

Lakisha Davis went to pick-up Adams from the Sports Bar with Jacques. Davis testified she heard shots fired that night but she never saw Adams involved in the fight. R. 186, l. 7 – 187, l. 13. Lakisha also said she did not see Adams with a gun. R. 193, ll. 7 – 18.

Demetric Davis testified he was with Lakisha and Adams that evening. R. 197, ll. 3 – 21. Demetric also said he did not see Adams involved in the fight or shooting a gun. R. 209, l. 25 – 211, l. 21.

Stephon Willingham, Jr., also went with Jacques to get Adams from the Sports bar. R. 280, l. 18 – 286, l. 20. Willingham said he saw Jacques get a gun but he never saw Adams with a gun. R. 285, l. 12 – 294, l. 6.

Adams gave a statement to the police in which he said he telephoned Lakisha and his brother Jacques “to come and pick me up from down there [at the Sports Bar]” because he thought there was going to be trouble. R. 606, l. 15 – 607, l. 6. Adams denied that he possessed a gun that evening or that he was responsible for the shooting. R. 608, l. 2 – 609, l. 8.

Vernon Davis testified that Jacques fired a weapon that evening and he claimed Adams was involved in the fist fight. R. 568, ll. 5 – 23.

Motions and request to charge

Defense counsel moved for a directed verdict noting that only one witness -- Wilson -- claimed Adams even had a weapon, or discharged that weapon. Defense counsel further noted that Wilson's description of the man involved clearly did not match Adams. Defense counsel argued the judge should direct a verdict under these circumstances. R. 656, l. 11 -- 661, l. 11.

The solicitor responded that the state never claimed Adams "fired the fatal shot" but she maintained Adams was still responsible for the decedent's death in the bar fight under the "hand of one is the hand of all." R. 656, l. 14 -- 697, l. 22. The judge denied the directed verdict motion. R. 658, l. 23 -- 659, l. 3.

Defense counsel would renew his directed verdict motion. R. 662, l. 25 -- 663, l. 22. Defense counsel argued there was no evidence Adams shot and killed the victim and that the evidence was insufficient to go to the jury under the "hand of one is the hand of all theory." R. 662, l. 25 -- 663, l. 22. The motion was again denied.

Court of Appeals

The Court of Appeals noted that "the State does not contend Adams fired the fatal shot. Rather, the State simply maintains there is *sufficient* circumstantial evidence that Adams agreed to, and did, act in concert with Jacques to assault the Winnsboro group; thus, sufficient evidence of Adams's guilty existed to submit the issue to the jury under the hand of one is the hand of all theory." App. 4. (emphasis added).

The Court of Appeals also wrote that the evidence created an inference "that Adams informed Jacques of the situation [by telephone] and the reason for the call "may not have been

solely for the purpose of removing Adams from the scene, and that Adams was aware a firearm was available for him to retrieve from Jacques's white sedan." App. 4.

Rehearing

Adams argued on rehearing that "even with this inference about the telephone call, and the inference petitioner was aware of a gun in the Jacques car, this respectfully did not constitute substantial circumstantial evidence that petitioner was guilty of murder. State v. Adams Gibson, 390 S.C. 347, 701 S.E.2d 766 (2010); [the present Southeastern digest citation added]; See State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000)" App. 7.

Petitioner wrote that comparing the facts of this case to State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000) where this Court held the defendant was entitled to a directed verdict, where the *inferences in favor of the state raised a strong case* that Martin was guilty showed the unfairness of the Court's holding here:

The evidence in this case was only sufficient to allow the jury to speculate that it may have been petitioner who was responsible for the victim being shot. As this Court acknowledged, "the witness accounts of the evening provide no clear picture of who fired weapons or how many shots were fired." State v. Adams Gibson, Op. No. 4747, Shearouse's Adv. Sh. #40 at p. 63.

Holding petitioner responsible for shooting the victim during this mêlée can respectfully not be reconciled with the holding in Martin.¹ This evidence, including the sole "eyewitness account" of [Wilson], which was contradicted by evidence that the man she was identifying as petitioner by his clothing *was really Jacques*, was insufficient under the precedents of our Supreme Court to take the case to the jury, and the judge should have directed a verdict for petitioner. See, also, State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984).

In essence, the facts of this case show Adams telephoned Jacques who later arrived. Jacques then independent of petitioner is

¹ Petitioner for ease of reference change "appellant" to "petitioner" in this brief.

involved in an altercation. A melee develops in which Jacques shoots his gun. Petitioner is convicted of murder. That is intuitively unfair even while *not considering* the evidence of self-defense and that Jacques did not fire the first shot.

App. 8-9. (emphasis added).

ARGUMENT

The Court of Appeals erred by ruling petitioner was properly denied a directed verdict on the charge of murder where there was no substantial circumstantial evidence petitioner was acting in concert with his brother, Jacques, who apparently shot the victim during a bar parking lot melee. The state's case against petitioner was essentially one discredited witness, Shunta Wilson, who claimed she saw petitioner reach for a gun inside the automobile, and at some point shoot it, since this isolated claim, and the fact petitioner earlier called Jacques about the problem at the club was insufficient to send the case to the jury. Petitioner's case should not have gone to the jury as this in reality is a guilt by association and not a substantial circumstantial evidence case.

As seen, the Court of Appeals relied heavily on the inference that the call from Adams to Jacques may not have been solely for the purpose of removing Adams from the scene, and that Adams knew Jacques had a gun in his car. Respectfully, this is speculation and conjecture and it does not rise to the level of *substantial* circumstantial evidence Adams was guilty of murder under the "hand of one is the hand of all" theory. It much more closely resembles a case of allowing the jury to convict of murder under an impermissible inference of *guilty by association*. That guilt by association was as impermissible in an accomplice liability case as it was a conspiracy case. Holding Petitioner Adams Gibson in essence *strictly liable* for the actions of his brother Jacques attacks the fundamental fairness of our criminal justice system. See, State v. Barroso, 328 S.C. 268, 272, 273, 493 S.E.2d 854, 856 (1997).

The only witness attributing a gun to Adams was Wilson. "She [Wilson] testified that she saw Adams . . . holding a gun. R. 375, ll. 6-9. She also heard the shots. R. 375, l. 11. However, she did not answer whether she saw Adams shoot the gun. R. 375, ll. 13-17." The *state* quickly

acknowledged the shakiness of *even this vague evidence given identification problems*. See Respondent's brief at 10; Respondent's brief at 10, n. 16.

The Court of Appeals correctly noted that the state *did not contend* Adams was guilty of murder because he shot the decedent. Rather, Adams could allegedly be found guilty of murder because of the actions of Jacques under the "hand of one is the hand of all" theory. This goes too far under the facts of this bar fight – which got out of control – and where some young people were unfortunately armed.

There was no substantial circumstantial evidence that should have allowed the Court to allow the jury to speculate that Adams was acting in concert with Jacques during the chaos that clearly was happening at Chance's Sports Bar on Two Notch Road that night. Since there was not substantial circumstantial evidence Adams and Jacques were acting in concert at all, and that Jacques's actions were the natural and foreseeable result of what they contemplated, the judge erred by refusing to direct a verdict. See State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000); State v. Cherry, 348 S.C. 281, 559 S.E.2d 297 (2002); State v. Al-Amin, 353 S.C. 405, 478 S.E.2d 32 (Ct. App. 2003).

Where the state relies exclusively on circumstantial evidence, the trial judge is only required to submit the case to the jury if there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001); State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000); State v. Williams, 321 S.C. 327, 332, 468 S.E.2d 626, 629 (1996).

If the state fails to produce substantial circumstantial evidence the defendant committed the particular crime the defendant is entitled to a directed verdict. State v. Rothschild, 351 S.C. 238, 569 S.E.2d 346 (2002); State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002). "Mere suspicion" of

guilt is insufficient to take the case to the jury, and beyond a directed verdict motion. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001).

In State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), this Court held the state failed to produce substantial circumstantial evidence Bostick killed his neighbor, Ms. Polite, and set her house on fire. The state's case was that Ms. Polite worked at her church and always brought the collection proceeds home on Sunday afternoon. The state presented evidence that investigators found her personal items burned by an accelerant, including a watch and two sets of car keys in a burn pile on Bostick's next door property. Bostick's mother testified she never used accelerants in the burn pile.

This Court noted that the evidence also revealed that Bostick had a pattern of gasoline on his shoes and gasoline was the accelerant used to start the fire at the Polite home. This Court held this evidence raised a suspicion that Bostick may have been guilty but it was not sufficient for the case to have gone to the jury.

Earlier, and similarly, in State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000) this Court held that the state's circumstantial evidence against Martin was insufficient to take the case to the jury. In Martin the defendant borrowed his girlfriend's car which was later placed near the scene of the murder.

On the morning after the murder the manager of a restaurant found several bags of garbage near the bar where defendant Martin and co-defendant Wilson picked up Martin's girlfriend late the prior night. Inside the trash were items belonging to the victim. Also found were inside were latex gloves similar to those Martin's girlfriend used to clean her dogs.

When Martin girlfriend's asked him why he and co-defendant Wilson were so late in picking her up from the bar, defendant Martin replied "some shit happened" and co-defendant Wilson added "someone may have died tonight."

This Court held that this circumstantial evidence was not substantial circumstantial evidence, and it was insufficient to take the case to the jury. The Court in Martin cited State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984) which was a case which provided a strong suspicion of the defendant's guilt.

In State v. Schrock, Schrock admitted to the police that he smoked Marlboro brand cigarettes – the same brand as the cigarette butts found at the murder scene. However, a saliva test could not match a cigarette butt to the defendant. A similar footprint to Schrock's was found at the scene and nearby the scene. Schrock apparently later disposed of the clothes and shoes he had been wearing and he did not present an alibi. This Court held this evidence only raised a suspicion of Schrock's guilt and that he was entitled to a directed verdict.

Further, in State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004), this Court affirmed the holding of the Court of Appeals that a directed verdict should have been issued. The victim, Cox, was shot, and his body found off of a road in Colleton County. On the last day Cox was seen alive he borrowed a friend's BMW Z3 to go to the dentist's office. The car was found in a parking lot in Johnson City, Tennessee and there was evidence the defendant telephoned a friend from 10 miles away from the car. The defendant's fingerprints were found inside the car. This Court reasoned the state only proved that the defendant was in the BMW on the last day that Cox was seen alive, and that was insufficient evidence to make this a jury question.

In State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000), as this Court wrote: "Hugh Mathis's home was burglarized and two guns were stolen. Mitchell, 341 S.C. at 408, 535 S.E.2d at

127. Mitchell had been a guest at Mathis's home on several occasions. Id. The day after the burglary was reported, investigators found a fingerprint on a screen leaning up against the house which matched Mitchell. Id. Mitchell was arrested and convicted of burglary; during his trial, Mitchell moved for a directed verdict, which was denied by the circuit court. Id.

The fingerprint was the only evidence linking Mitchell to the burglary. Id. at 409, 535 S.E.2d 126. After first commenting that the evidence presented was entirely circumstantial, this Court determined "the fact that [Mitchell's] fingerprint was on a screen that was propped up against the house does not prove entry where [Mitchell] had been in and around [Mathis's] house at least three times prior to the burglary." Id. The State did not produce any evidence concerning whether the screen was on the window when the window was broken or when the screen had been removed. Id. The Court accordingly affirmed the Court of Appeals' ruling that Mitchell was entitled to a directed verdict. Id." State v. Bostick, 392 S.E.2d at 141, 708 S.E.2d at 777-778.

Petitioner Adams Gibson was most respectfully entitled to a directed verdict in this case. This case is an extension of the dangerous "hand of one is the hand of all" to a perilous "strict liability," guilt by association "corruption of blood" extent.

CONCLUSION

By reason of the foregoing argument, an order of acquittal should be issued.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', is written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 23rd day of July, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Richland CountySteven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

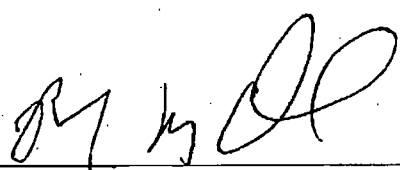
V.

ADAMS GIBSON,

APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Alphonso Simon, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of July, 2012.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of July, 2012.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
The Honorable Steven H. John, Circuit Court Judge

Certiorari to the Court of Appeals
Opinion No. 4747 (S.C. Ct. App. filed 9/30/2010)
Appellate Case No. 2010-180806

THE STATE

RESPONDENT.

V.

ADAMS GIBSON,

PETITIONER

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PETITIONER'S QUESTION PRESENTED

Whether the Court of Appeals erred by ruling petitioner was properly denied a directed verdict on the charge of murder where there was no substantial circumstantial evidence petitioner was acting in concert with his brother, Jacques, when Jacques apparently accidentally shot the decedent during a bar parking lot melee since the state's case against petitioner was essentially Shunta Wilson's discredited claim that she saw petitioner reach for a gun inside the automobile, and at some point shoot it, where the state did not even assert petitioner shot anyone, and the fact petitioner earlier telephoned Jacques about the problem at the club were insufficient to send the case to the jury on suspicion alone?

RESPONDENT'S COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals erred when it upheld the trial court's denial of Petitioner's directed verdict motion when there was substantial circumstantial evidence Petitioner acted in concert with his brother Jacques when there was evidence that Adams requested his brother come to the bar, and there was evidence both brothers fired weapons in concert in the parking lot after a fight broke out between Adams' friends and another group?

STATEMENT OF THE CASE

On June 2-3, 2008, Petitioner Adams Gibson ("Adams") was tried by a jury for the murder of Dennis Irby. He was tried in the Richland County Court of General Sessions with his co-defendant brother, Jacques Gibson, before the Honorable Steven H. John, Circuit Court Judge. Nathaniel Roberson, Esquire, represented Adams Gibson. I.S. Leevy Johnson, Esquire, represented Jacques. The State was represented by Dietrich Lake, Esquire, and Kathryn "Luck" Campbell, Esquire, Assistant Solicitors for the Fifth Judicial Circuit. On May 24, 2007, Adams was convicted of murder. (R. p. 767). He was sentenced to a period of confinement of thirty (30) years for the Murder conviction. (R. p. 769).

Petitioner timely filed a notice of appeal. After full briefing and oral argument, the South Carolina Court of Appeals issued a published opinion affirming petitioner's conviction. State v. Gibson, 390 S.C. 347, 701 S.E.2d 766 (S.C. Ct. App. 2010). (App. pp. 1-6). Petitioner filed a Petition for Rehearing on October 13, 2010. (App. pp. 7-12). Respondent filed a Return to the Petition for Rehearing on November 8, 2010. The Court of Appeals denied the petition on November 22, 2010. (App. pp. 13-14). Petitioner subsequently filed a Petition for Writ of Certiorari seeking review of the two issues raised in the direct appeal before the South Carolina Court of Appeals. This Court granted a writ of certiorari to review the issue raised in the first question presented in the petition.

STATEMENT OF FACTS

The victim, Dennis Irby, was shot in the midst of a fight between a group of young men from Ridgeway, South Carolina and a group of young men from Winnsboro, South Carolina. On September 4, 2005, Torri Boyd ("Boyd"), Antwan Martin¹ ("Martin"), Ravaris Henry ("Henry"), and the victim, Dennis Irby ("Irby"), all from Winnsboro, decided to drive to Columbia for an evening out. (R. pp. 4, 57, 120-21). Martin drove the group in his gray Chevrolet Tahoe to a bar called Chance's. (R. pp. 4, 56-7, 121). They later met up with Antonio Smith ("Smith") at the bar. (R. pp. 57, 121, 253). That same evening, Lakisha Davis ("Lakisha"), Demetric Davis ("Demetric"), Tramele Davis ("Tramele"), and Petitioner Adams Gibson ("Adams"), all from Ridgeway,² also drove to Columbia for an evening out.³ (R. p. 219). Lakisha drove the group in her burgundy Nissan Altima. (R. pp. 176, 193, 197, 606). Initially, the group went to a bowling alley. (R. pp. 197, 198). They later decided to go to Chance's. (R. pp. 197, 198, 219). They met up with Marcus Tucker ("Tucker") at Chance's. (R. p. 219; see R. p. 177). Some of the group from Winnsboro knew members of the group from Ridgeway, and vice-versa. (R. pp. 5, 175, 55, 123, 199, 218).

There were initially no problems between the two groups inside Chance's. (R. pp. 9, 58, 200, 253-54, 298). Boyd testified that he spoke with one of the Davis fellows. (R. p. 9). Smith testified that he talked with Tucker for a few minutes inside Chance's. (R. pp. 253-54). Henry and Tramele bought each other beers. (R. p. 58; see R. pp. 225-

¹ Antwan Martin is also known and referred to as A.J. (See R. p. 3).

² Ravaris Henry is also known and referred to as B. (R. p. 3; see R. p. 61). Antonio Smith is also known and referred to as YoYo. (R. p. 4). Lakisha Davis is also known and referred to as Punkin. (R. p. 7). Demetric Davis is also known and referred to as Bam. (R. p. 173). Tramele Davis is also known and referred to as Smoke. (R. p. 624). Adams Gibson is also known and referred to as Kartez. (R. p. 197).

³ Lakisha testified that Tramele did not ride with the group to Columbia. (R. p. 176). In his statement, Adams stated that Tucker was in the car on the drive down, but did not mention Tramele. (R. p. 606).

26). However, at some point during the evening, animosity developed between Demetric and Boyd.⁴ (See R. p. 254). The two had other disputes in the past. (R. p. 7). Shunta Wilson ("Wilson"), a patron at Chance's that evening, testified that being a confrontation between two groups of guys inside of Chance's. (R. p. 311-13). The bar manager intervened, and asked the men to either quiet down or go outside. (R. p. 314). Adams called his brother, Jacques ("Jacques"), to come pick him up from the bar. (R. pp. 280, 487, 515, 544, 606; see R. pp. 35-6, 255). According to Jacques' statements and Adams' statement to police, he made the call because Demetric had gotten into an argument with someone at the bar. (R. p. 487; see R. p. 608).

When Jacques received the call from his brother, he was hanging out with two friends, Stephon Willingham ("Willingham") and Vernon Davis ("Vernon").⁵ (R. pp. 486, 544). The three drove down to Columbia in a white Ford Escort⁶ to pick up Adams. (R. pp. 279-80, 487, 515, 544, 547). They arrived twenty to thirty minutes after the call was made. (See R. p. 36). When they arrived, Jacques went inside Chance's to retrieve his brother. (R. pp. 280, 515, 544). The other two stayed in the car. *Id.* According to both of Jacques' statements, Adams pointed out the group with whom the Ridgeway guys had a conflict. (R. pp. 515, 623).

Soon thereafter, the two groups proceeded to leave the bar. (R. pp. 201, 314, 515; see R. pp. 61, 125, 544). Once outside, Boyd and Demetric engaged in a heated

⁴ Boyd also asserted that he had a confrontation with Adams over a conversation he had with Lakisha. (R. p. 10). Lakisha testified that she did speak with Boyd, but stated she did not talk with Boyd about the topic he claims they discussed. (R. p. 179). Smith also testified that Boyd told him about his confrontation with Adams over the conversation Boyd had Lakisha. (R. p. 254). He had no firsthand knowledge of the conversation between Boyd and Lakisha. (R. p. 254).

⁵ Jacques Gibson is also known and referred to as Sha Sha. (R. p. 36). Stephon Willingham is also known and referred to as Fat Man. (R. p. 607). Vernon Davis is also known and referred to as Duwop. (R. p. 541).

⁶ The Ford Escort was registered to Adams' girlfriend's uncle. (R. p. 607).

argument. (R. pp. 13, 14, 61-2, 224-25, 202, 299-300, 516, 606-07). Several witnesses testified that the argument was regarding Boyd's involvement in the robbery of one of Demetric's relatives. (R. pp. 13, 606-07). The argument escalated into a physical fight when Tramele hit Henry. (R. pp. 15, 64, 126, 199, 228, 301). Tramele and Henry fought one another. (R. pp. 62-3). Boyd and Demetric fought one another. (R. pp. 203, R. 301). Martin and Tucker also fought one another. (R. p. 126; see R. p. 301). According to most of the witnesses, Irby, the victim, was not involved in the fight. (R. pp. 62, 137, 235; see R. p. 257). Tramele testified that Irby did hit him one time. (R. p. 244). However, he also stated that Irby just mainly stood over him, watching the fight. (R. p. 243). Smith testified that Irby was attempting to break up the fight. (R. p. 257). Smith was not a participant in the fight. (R. pp. 62, 182, 270, 302). He stated that he tried to serve as a peacemaker. (R. p. 270).

Most of the witnesses testified that they did not see Jacques get involved in the fight.⁷ (See R. pp. 41-2, 45, 103, 560). Several witnesses also testified that they did not see Adams involved in the fight. (R. pp. 210-11, 282, 294, 302).⁸ Lakisha saw Adams standing near the fight, but she testified that he was not involved in it. (R. p. 187). However, Smith testified that he observed Adams hit and kick Boyd while Boyd was on the ground. (R. p. 259). Vernon also testified that he saw Adams swinging at someone. (R. pp. 545, 550, 571).

Smith told Adams to stop jumping on Boyd. (R. p. 259). As Smith headed towards Boyd, Demetric, and Adams, Smith testified Jacques confronted him. Id. Jacques pulled a gun on Smith and told him, "YoYo, don't even think about it." Id.

⁷ Two witnesses, Lakisha and Tramele, did not recall seeing Jacques at Chance's at all that night. (R. pp. 184, 208, 213).

⁸ In a statement to police, Jacques also asserted that Adams was not involved in the fight. (See R. p. 626).

Smith testified he backed off, and then ran away from the fight. Id. Shortly thereafter, Smith recalled hearing a gunshot that was not from Jacques. (R. pp. 260, 275). Someone else was shooting around the same time. (R. p. 275). Smith ducked and hid. (R. p. 260; see R. p. 273). He did not know what happened after that. (R. p. 260). Smith then heard more shots coming from the Ford Escort. (R. p. 261). At that point, the car had moved. Id. Irby had been shot. (R. p. 262). Smith did not know who shot Irby. (R. p. 276). He saw Adams getting into the rear passenger door of the white Ford Escort. (R. p. 263). He did not know if Adams got into the car. (R. p. 264). Smith did state the white Escort sped away. Id. Jacques was the last person Smith saw drive that car. Id.

Willingham testified he told police that he saw Smith walk towards Adams, and Jacques told Smith, "don't do it, YoYo." (R. p. 285). Willingham testified Antonio backed up after Jacques made the statement. (R. p. 286). Willingham had observed Jacques had a black object in his hand that night. (R. p. 284). Willingham saw Jacques point the object to the sky, and then he heard a gunshot. (R. p. 285). Willingham noted it could have been a gun in Jacques's hand. Id. He never saw Jacques point the object at Smith. Id. Then Willingham heard multiple gunshots. (R. p. 287). He could not say if the shots came from Jacques. Id. He noted Jacques had the black object in his hand after he made the statement to Antonio. (R. p. 286). Willingham also stated the car never moved until they got ready to go. (R. p. 284).

Vernon heard shots fired while the groups were arguing. (R. p. 550). He saw Jacques with a gun while the argument was still going on. Id. Vernon specifically recalled Jacques pointed the gun at Smith and told him "don't do it." (R. p. 551).

Vernon did not know what Jacques meant when he said that to Smith. (R. p. 571). Smith just looked, holding a beer in his hand. (R. pp. 551-52). Vernon then heard one shot. (R. p. 544). Vernon did not know who fired the first shot. (R. p. 552). He looked up and saw a second shot, which was taken by Jacques. (R. pp. 544, 552). That shot was fired into the air. (R. pp. 545, 582). Jacques told everyone to chill out. (R. pp. 545, 581). Vernon lay down in his seat. (R. p. 545). He heard more shots, which led him to hop on the floor. (R. pp. 545, 583). He did not know where those shots were coming from. (R. p. 584). Vernon testified Jacques' hand was out of the car when the shots were fired. (R. pp. 553-54). He did not see what Jacques did with the gun after then. (R. p. 551). He never saw Jacques shoot at anyone. (R. p. 584). Vernon only saw Jacques point the gun into the air. Id.

Wilson testified she went outside to watch the fight. (R. p. 314). Shortly thereafter, shots were fired. (R. p. 312). Wilson noted that a white Ford Escort pulled up. (R. p. 315). She then stated Adams went to the Escort, opened the driver's side door, sat down in the door, and reached underneath to pull out a gun. (R. p. 316). Someone yelled out that he had a gun. Id. She saw the gun in his hands. Id. After seeing the gun, others tried to run back into Chance's. Id. Wilson heard four or five shots. Id. Then, the Escort sped off. (R. pp. 316-17).

Wilson testified she only saw Adams shooting a gun that night.⁹ (R. p. 330). She identified Jacques as one of the fighters. (R. p. 329). She saw Adams with a gun, and she saw Jacques fighting a smaller guy. (R. p. 341). She said Jacques hit the guy, the

⁹ Wilson described Adams as wearing a black tee shirt and blue jeans. (R. p. 332). She saw him on the driver side of the Ford Escort. (R. p. 332). Other witnesses testified that it was Jacques wearing a black tee shirt and blue jeans, and Adams was wearing a white tee shirt and blue jeans. (R. pp. 193, 210, 272, 293-94). Adams told police that he was wearing a white tee shirt and gray Dickey pants. (R. p. 608). In his first statement, Jacques also says he was wearing a black tee shirt and blue jeans. (R. p. 517).

guy hit the ground, and that was the end of the fight. (R. pp. 341, 361). She only saw one gun. (R. p. 349). She recalled Adams was arguing inside of Chance's. (R. p. 357). She also recalled Jacques was arguing inside the bar. Id. However, she said he was not talking too much. Id. Wilson reiterated that the guys all left the bar after the bar manager asked them to leave. (R. p. 360). She stayed inside Chance's until a friend told her there was a fight. (R. p. 361). She testified she saw Adams holding a gun. (R. p. 375). She also heard the shots. Id. However, she did not answer whether she saw Adams shoot the gun. Id.

Melvin Dewitt was a patron at Chance's on the night of the shooting. (R. p. 140). He was not connected with either of the two groups. Id. Dewitt testified that he was at the door when the fight started. (R. p. 142). He saw one man being double-teamed by two others. Id. He then saw a small white car start off as they two groups were dispersing from the scene. (R. p. 143). As Dewitt went to his car, he stated they started shooting. Id. Dewitt saw the gunfire, and he asserted there were two guns at the scene. Id. He testified that one of the guns was inside the white car, and another was outside of the car. (R. p. 145). He could not tell who was firing the shots. (R. p. 170). However, he testified the two guns were fired almost simultaneously. Id.

Henry testified he saw Jacques shooting at the white car he was driving. (R. p. 65). Henry saw someone had a gun aimed at something, but he could not tell who had the gun. Id. Henry recalled Jacques shooting a gun into the air. (R. p. 66). The first time he heard shots, he saw Jacques shooting in the air. (R. p. 101). Soon after, he heard a second set of shots. (R. p. 67). Then Irby yelled he was hit. Id. He saw Jacques driving the white car. (R. pp. 82, 103). He saw Adams over by the white car. (R. p. 84).

Adams spoke with police twice about the incident. First, he told Captain James Smith of the Richland County Sheriff's Department that he did not see who actually did the shooting because he was sitting in another car. (R. p. 534). He also told Captain Smith that he was not in the white Ford Escort that night. (R. p. 534-35). He said that Jacques was in the white Ford Escort. (R. p. 535). Adams further denied he fired a gun that night. Id. Adams later gave a statement to the lead investigator, Walter Shawn McDaniels of the Richland County Sheriff's Department. Adams told McDaniels that when the verbal altercation started, he was in Lakisha's car. (R. p. 607). She told him to go and get Demetric because he was her cousin. Id. Adams also stated he told Antonio to let the fight be between Boyd and Demetric. Id. Adams told McDaniels that he did not have a gun that night. (R. p. 608). He also stated that he did not call his brother to participate in the fight because "that wasn't my beef." Id. He also asserted that he heard that Tramele might have done the shooting. Id.

Jacques gave the police two statements about what happened that evening.¹⁰ According to Jacques's first statement, Jacques went to the Escort, and Adams went to the burgundy car after they exited the bar. (R. p. 516). One of the guys from Winnsboro went to the gray SUV and put something in his pocket. Id. He then put something behind his back and then walked back to the group. Id. Jacques stated that he thought it was a gun, but he did not see one. Id. Then, the fight broke out. Id. Adams pulled up in the burgundy car. Id. He got out and walked over by the fighting. Id. Jacques stated he then heard three shots. (R. p. 516). After hearing the three shots, he jumped into the car and headed back to Ridgeway. Id. He also stated he did not have a gun, and Adams did

¹⁰ Jacques initially provided police with a handwritten note. In the note, Jacques claimed that the two groups left the bar shortly after he arrived. According to the note, Jacques told the guys to chill out. (R. p. 487). Then they started fighting. Id. He pulled off after he heard shooting. Id.

not have a gun. (R. p. 517). In his second statement, Jacques admitted some of the events were different from what he had stated in his first statement. (R. p. 623). The statement he first gave police was true up until the point where he stated that he did not shoot from inside of the car. Id. He observed someone going to the gray SUV and reach for something. (R. p. 624). He did not see what the man retrieved from the SUV. Id. He told police Adams went to the burgundy car and drove it around. Id. He then stated he saw Smith acting like he was going to hit Adams. (R. pp. 624, 626). Jacques pulled the gun on Smith and told Smith not to try to hit his brother. (R. p. 624). Smith backed away. Id. Then Jacques heard two shots. Id. He shot his gun into the air while he was driving away from the scene in the Escort. (R. pp. 624, 625). Jacques told police he fired a 9-millimeter handgun three or four times. (R. p. 624, 625). He later threw the gun over a bridge. (R. p. 625). He admitted he shot the gun into the air, but it may have dropped down while he was shooting. (R. pp. 625, 626). Jacques told police he may have shot in the direction where Irby was standing, but he did not aim at Irby. (R. p. 626). Jacques stated he told Adams, Willingham, and Vernon he thought he may have been the one who shot Irby. Id. Jacques said it was possible he shot Irby. (R. p. 650).

After this second set of shots, Henry and Martin both heard Irby yell he was hit. (R. pp. 67-8, 128). Henry stated Irby held his back, and then fell to the ground. (R. p. 68). When Irby was hit by the shot, he was standing over Tramele. (R. pp. 233, 244). At first, Tramele did not realize Irby had been shot. It was only after he moved Irby off of him that he learned of Irby's injuries. (R. pp. 232, 233). Martin saw Irby fall to his knees, then to his stomach. (R. p. 128). Irby was shot in the back. (R. p. 69). At that

point, Wilson came out and assisted Irby. (See R. p. 69). Wilson saw Irby was hurt. (R. p. 318). She assisted him by keeping him propped up and breathing. (R. p. 318).

Lakisha, Adams, Demetric, Tramele, and Tucker returned to Ridgeway in Lakisha's burgundy Altima.¹¹ (R. pp. 190, 204-05, 219, 237, 304, 607; see R. pp. 187-88). Jacques and his friends returned in the white Escort. (R. pp. 545, 607, 608).

Irby died as a result of complications from the bleeding from the lung. (R. pp. 524-25). The bullet was recovered by the forensic pathologist and turned over to law enforcement. (R. p. 435). According to an X-ray, the bullet was close to the victim's spine. (R. p. 435). David Collins, a firearms and toolmarks examiner for the Richland County Sheriff's Department, testified that the bullet found in Irby was a 9 millimeter round.¹² (R. pp. 446-47, 448). It was not fired from the same weapon as three .25 caliber shell casings found on the scene.¹³ (R. p. 446). Several of the witnesses testified that none of the men in the group from Winnsboro had weapons that night. (R. pp. 59-60, 129, 204, 255). Also, no one saw Demetric, Tramele, or Tucker with weapons that night.¹⁴ (R. pp. 60, 74, 129, 204, 255). In his first statement to the police, Jacques stated that neither Vernon nor Willingham had a weapon that night. (R. p. 518).

¹¹ Lakisha did not recall Tucker being in the car. (R. p. 187).

¹² Collins could not make a determination as to whether the 9-millimeter bullet in Irby matched the 9-millimeter casing found on the scene. (R. pp. 449-51).

¹³ Four casings were found on the scene: three .25 caliber casings and one 9 millimeter casing. (R. p. 401).

¹⁴ Several others did not see Adams with a firearm that evening. (R. pp. 294, 272, 572).

ARGUMENT

THE COURT OF APPEALS CORRECTLY FOUND THE TRIAL COURT DID NOT ERR IN DENYING ADAM'S MOTION FOR A DIRECTED VERDICT. THERE WAS SUFFICIENT EVIDENCE THAT ADAMS WAS ACTING IN CONCERT WITH HIS BROTHER WHEN THE FATAL SHOTS WERE FIRED.

Motion for Directed Verdict Raised at Trial

After the State rested, Adams moved for a directed verdict on the murder indictment. (R. p. 655). Counsel asserted the State presented evidence of two guns being at the scene, with the murder weapon being a nine-millimeter handgun. (R. p. 656). Trial counsel asserted that only one of the nine witnesses who were physically present identified Adams as having a weapon or discharging a weapon. *Id.* The witness who identified Adams' description of him was inconsistent with the description of all of the other witnesses who testified as to what he was wearing that evening. (R. pp. 656-57). Then counsel asserted the State had to show Adams was the one who pulled the trigger of the gun that killed the victim. (R. p. 657). He then claimed that the State had implied there was some complicity on Adams' part because he called for his brother to come and pick him up. *Id.* Counsel claimed that the testimony regarding the phone call clearly indicated that the only purpose for calling his brother was to avoid being involved in any encounter. *Id.* Then counsel pointed out the only other person who claims to have seen Adams involved in the fight was Vernon, and Vernon only said he saw Adams swinging down. *Id.* Counsel alleged that was not enough to establish Adams was the one who pulled the trigger of the gun that killed the victim. (R. pp. 657-58).

In response, the State did not contend Adams fired the fatal shot. (R. p. 658). The State noted there was evidence Adams called his brother to the scene with his car, and testimony showed Adams approached the car after his brother arrived at the scene.

Id. Two people observed one shooter outside the car, and several witnesses testified Jacques was shooting from inside the car. Id. The State argued there was evidence that Adams and Jacques were the two shooters, and Adams' argument went towards the weight, and not the existence of the evidence. Id. The court respectfully declined to grant the motion and found there was sufficient evidence presented that would allow the case to proceed. (R. pp. 658-59). After the defense rested, Adams renewed his motion for a directed verdict. (R. pp. 662-63). The court again denied Adams' request for a directed verdict. (R. p. 663).

The Court of Appeals found there was sufficient evidence to support the murder charge going to the jury.

In this case, the State does not contend Adams fired the fatal shot. Rather, the State simply maintains there is sufficient circumstantial evidence that Adams agreed to, and did, act in concert with Jacques to assault the Winnsboro group; thus, sufficient evidence of Adams's guilt existed to submit the issue to the jury under the hand of one is the hand of all theory. In order to demonstrate that Adams and Jacques intended to join together in a common design to achieve an illegal purpose, the State maintains: (1) Adams called Jacques to the scene; (2) when Jacques arrived he went inside the bar and Adams pointed out the group of Winnsboro men, rather than leaving straight away; (3) Williams testified Adams approached Jacques's white sedan in the parking lot and retrieved a gun moments before the shooting; and (4) although separately, the two men fled the scene after the shooting.

Here, at minimum, the evidence creates the inferences that Adams informed Jacques of the situation, that the reason for the call may not have been solely for the purpose of removing Adams from the scene, and that Adams was aware a firearm was available for him to retrieve from Jacques's white sedan. When viewed in the light most favorable to the State, the circumstantial evidence in this case infers Adams and Jacques may have acted in concert in assaulting the men from Winnsboro. See State v. Ward, 374 S.C. 606, 615, 649 S.E.2d 145, 150 (Ct.App.2007) (holding in a case with similar facts, that evidence the defendant and his co-defendant together chased after two men in the melee of a parking lot brawl and fired shots, killing a bystander, was sufficient to overcome a directed verdict motion); see also Langley, 334 S.C. at 649, 515 S.E.2d at

101 (indicating evidence that the defendant and co-defendant were seen together, circumstantial evidence placing defendant at the scene of the crime, and eye-witness testimony, was sufficient to warrant submitting the case to the jury on any theory of liability, including the hand of one is the hand of all theory). Accordingly, we find the trial court did not abuse its discretion and affirm its denial of Adams's motion for a directed verdict.

Gibson, 390 S.C. at 354-55, 701 S.E.2d at 770.

Standard of Review

“‘Murder’ is the killing of any person with malice aforethought, either express or implied.” S.C. Code Ann. § 16-3-10 (2003). “‘Malice’ is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong.” State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). “Under the ‘hand of one is the hand of all’ theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.” State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct.App.2002) (citing State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999)). “Under an accomplice liability theory, ‘a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.’” Condrey, 349 S.C. at 194, 562 S.E.2d at 325 (citing Langley, 334 S.C. at 648-49, 515 S.E.2d at 101).

A case should be submitted to the jury when the evidence is circumstantial “if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.” State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000); see also State v. Williams, 321 S.C. 327, 332, 468 S.E.2d 626, 629 (1996). “The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict....” State v. Schrock, 283 S.C. 129, 134, 322 S.E.2d 450, 452-53 (1984). Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt. Id. at 133, 322 S.E.2d at 452 (citing State v. Manis, 214 S.C. 99, 51 S.E.2d 370 (1949)). “Unless there is a total

failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error.” State v. Irvin, 270 S.C. 539, 543, 243 S.E.2d 195, 197 (1978) (citing State v. Massey, 267 S.C. 432, 229 S.E.2d 332 (1976)). On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the State. State v. Martin, 340 S.C. 597, 602, 533 S.E.2d 572, 574 (2000).

State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776-77 (2011). In ruling on a motion for a directed verdict, a trial judge is concerned only with the existence of evidence, not with its weight. State v. Nichols, 325 S.C. 111, 122, 481 S.E.2d 118, 124 (1997); State v. Al-Amin, 353 S.C. 405, 411, 578 S.E.2d 32, 35 (Ct.App.2003) (citing State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002)). “[A] trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.” State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged. State v. Gaines, 380 S.C. 23, 32, 667 S.E.2d 728, 733 (2008). An appellate court may reverse a trial court’s denial of a motion for a directed verdict if there is no evidence to support the trial court’s ruling or if the ruling is based on an error of law. State v. Dantonio, 376 S.C. 594, 603, 658 S.E.2d 337, 342 (Ct.App.2008).

The trial court’s denial of Petitioner’s motion for a directed verdict was proper and is supported by the record. There was direct evidence and substantial circumstantial evidence that Adams was acting in concert with Jacques when he fired the shots. Under “the hand of one is the hand of all” theory, “one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.” State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999). Here, the Gibson brothers set out to assault Boyd and the

other men from Winnsboro. Wilson testified she observed Adams walk to the white Escort, open the driver's side door and retrieve a gun. (R. p. 316). She then saw and heard four or five shots from either a .22 or .25 caliber handgun. (R. pp. 316, 317). Respondent would note that Petitioner's argument regarding the reliability of Wilson's testimony does not impact upon whether the trial court was correct in finding there was sufficient evidence for Petitioner's case to go to the jury. In assessing a motion for a directed verdict, the court looks to the existence of evidence, not its weight. Nichols, supra; Al-Amin, supra.

The police found shell casings for two different guns at the scene; three .25 caliber shells and one 9mm casing. (R. pp. 399-401). Dewitt testified he saw two people firing guns that night. (R. p. 143). One was inside a white car, and the other was outside the white car. (R. p. 145). They were both shooting in the same direction at the same person. (R. p. 145). Vernon testified Adams came to the white Escort and stood outside the car. (R. p. 549). The testimony at trial clearly indicated that none of the other combatants in the fight possessed a gun. (R. pp. 59-60, 74, 129, 204, 255). Furthermore, the testimony clearly indicated that neither Smith nor Irby had weapons. (R. p. 255).

Several witnesses testified that Adams called Jacques to come to Chance's. (R. pp. 280, 487, 515, 544, 606; see R. pp. 35-6, 255). While both Adams and Jacques alleged in their statements that Adams called Jacques to pick him up to avoid a fight, Adams did not leave the bar immediately after Jacques came to pick him up. Neither brother left the bar's parking lot prior to the beginning of the fight. Adams did not ride home with Jacques in the white Ford Escort. (See R. pp. 190, 204-05, 219, 237, 304, 545, 607, 608; see also R. pp. 187-88). Boyd testified he had a confrontation with

Adams inside the bar concerning Boyd's conversation with Lakisha. (R. p. 10). Smith further testified Boyd informed him of this confrontation while they were still inside the bar. (R. p. 254). When Jacques arrived at the bar, he went inside to get his brother. (R. pp. 280, 515, 544). According to both of Jacques' statements, his brother pointed out the group with whom the guys from Ridgeway were having trouble. (R. pp. 515, 623). There was also testimony indicating Adams attacked Boyd in the parking lot, and Jacques interceded in Smith's attempt to stop Adams' attack on Boyd. (R. p. 259). Finally, both brothers fled the scene in different cars. Flight from the scene of a crime can be evidence of guilty knowledge and intent. Al-Amin, 358 S.C. at 413, 578 S.E.2d at 36-7.

Contrary to Petitioner's assertions, this case is not analogous to the situations that arose in State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000); State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004); or State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011). In Martin, the South Carolina Supreme Court found there was not substantial circumstantial evidence the defendant was involved in a murder because there was no evidence that placed the defendant in the apartment where the crime occurred. Martin, 340 S.C. at 602-03, 533 S.E.2d at 574-75. The evidence presented indicated that a car matching the defendant's description was at the victim's apartment complex. However, the Supreme Court noted there was no evidence that conclusively indicated the car seen was the defendant's car, and there was no evidence that both the defendant and his co-defendant arrived at the scene in the car. Further, the Supreme Court found there was no evidence either defendant entered the victim's apartment, and there was no evidence the victim's death occurred during the time the car matching the defendant's was at the apartment complex. Id.

In Schrock, this Court reversed the trial court's denial of a directed verdict motion because nothing in evidence placed Schrock at the scene of the crime. Id. at 132, 322 S.E.2d at 452. The State had presented a footprint found at the murder scene that was similar to footprints found in an area where the defendant had admitted he had been; cigarette butts that were of the same brand the defendant smoked; and an oil can found at the scene that could not be tied to the defendant. Id. at 131-32, 322 S.E.2d at 451. Also, the State presented testimony that could only place the defendant within, at best, one mile of the murder scene. Id.

In Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004), this Court affirmed the Court of Appeals' reversal of a denial of a motion for a directed verdict in a murder case. This Court noted the fact that the BMW the victim borrowed on the last day he was seen alive was found abandoned in Tennessee (which was where the defendant located), raises a suspicion of guilt but is not evidence that the defendant killed the victim. Id. at 390, 605 S.E.2d at 531. This Court also noted that there was no evidence the defendant was at the scene of the crime, which according to the State's theory was in Colleton County. Id.

In Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), this Court reversed the trial court's denial of a motion for a directed verdict. This Court found there was no direct evidence linking Bostick to the crime scene or the items found in the burn pile. Id. at 141, 708 S.E.2d at 778. There was also no testimony tending to establish that Bostick had control over the burn pile. Id. This Court determined that the circumstantial evidence that was introduced by the State at trial at most, only raised a mere suspicion that Bostick committed the murder. Id. at 142, 708 S.E.2d at 774.

Petitioner's case is inapposite to all four of these preceding cases. There was both direct evidence and substantial circumstantial evidence establishing Petitioner was at the scene when the murder occurred, and that he was a participant in the actions that led to the death of Dennis Irby. Numerous eyewitnesses place Adams in the parking lot during the time of the fight and shooting. As already noted, one eyewitness, Ms. Wilson, saw Petitioner retrieving a gun from the white Escort shortly before shots were fired. Other eyewitnesses confirmed Petitioner was at or near the white Escort when they heard shots. Another eyewitness indicated that two gunmen were shooting from around the co-defendant's car (i.e. the white Escort). Unlike the facts in Martin, Arnold, Schrock, and Bostick, the evidence presented in Petitioner's case did more than just cast mere suspicion that Adams may be involved in the shooting.

Contrary to Petitioner's contentions, this case is also not analogous to State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). In Mitchell, this Court affirmed the Court of Appeals' reversal of the denial of a directed verdict and found the defendant was entitled to a directed verdict in a first-degree burglary case because the circumstantial evidence that was presented only raised a mere suspicion of guilt. Mitchell, 341 S.C. at 409, 535 S.E.2d at 127. This Court noted the only evidence linking Mitchell to the burglary was a fingerprint on a screen. Id. The State did not present any evidence whether the screen was on the window at the time the window was broken or when the screen had been removed. This Court found the fact that Mitchell's fingerprint was on a screen propped up against the house did not prove entry because Mitchell had been in and around the victim's house as least three times prior to the burglary. Id.

This case is clearly distinguishable from Mitchell in that there is sufficient evidence that Petitioner was guilty of murder. First, there was testimony indicating Petitioner and one of the members of the Winnsboro group engaged in a confrontation regarding Lakisha Davis. (R. pp. 10, 254). Second, testimony indicated that another member of Petitioner's group also got involved in a confrontation with the same member of the Ridgeway group. (R. pp. 7, 487, 255, 608). Third, Petitioner called his co-defendant brother to come to the bar after an argument developed between one person from the Winnsboro group and one person from Petitioner's group. (R. p. 487; see R. pp. 255, 608). Fourth, Petitioner's co-defendant drives Petitioner's car and brings two friends to Chance's. (R. pp. 279-80, 487, 515, 544, 547). When Petitioner's brother, Jacques, arrived and went inside the bar, Petitioner pointed out the group with whom his friends were arguing. (R. pp. 515, 623). Petitioner's group went outside. The fight between the two groups ensued. Shunta Wilson testified she saw Petitioner go to the white Ford Escort and pull out a gun. (R. pp. 315-16). Other witnesses place Jacques in the white Escort when the shooting started. (R. 259-60, 275, 284-87, 550-52). Melvin Dewitt testified that he saw two people shooting that night; one was inside the white car and the other was outside. (R. pp. 145, 169-70). His assessment that there were two guns being shot was supported by evidence by way of shell casings found at the scene and the projectile from the victim being fired by different guns. (R. pp. 401, 446-48). Dewitt indicated that both guns were fired in the same direction. (R. p. 170). Jacques admitted in his statement to police that he fired a 9mm handgun in the parking lot during the fight. (R. pp. 624-26). Wilson also indicated that she heard shots shortly after seeing Petitioner with a gun. (See R. pp. 316-17, 375). Overall, there was substantial

circumstantial evidence that Jacques and Adams acted in concert in firing shots at the group of men from Winnsboro.

Furthermore, malice could be inferred by the fact that both Petitioner and Jacques were using deadly weapons, handguns, in the shooting. See generally State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009)(permissive inference of malice from use of deadly weapon can be charged when no evidence to reduce, mitigate, excuse or justify the killing; also noting in fn. 9 that State may still argue inference applies even when charge not appropriate). As noted by the Court of Appeals, the facts of this case are akin to those in State v. Ward, 374 S.C. 606, 615, 649 S.E.2d 145, 150 (Ct.App.2007).

As a result, there was sufficient evidence upon which a jury could have found Adams guilty of murder under the theory of hand of one/hand of all. Since there was substantial circumstantial evidence to support the murder charge under the hand of one/hand of all theory, the trial court was correct in denying Adams' motion for a directed verdict.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court affirm the Court of Appeals' opinion, deny Petitioner's appeal, and affirm Petitioner's murder conviction.

Respectfully submitted,

ALAN WILSON
Attorney General

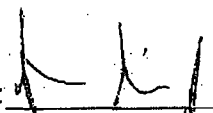
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October 12, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
The Honorable Steven H. John, Circuit Court Judge

Certiorari to the Court of Appeals
Opinion No. 4747 (S.C. Ct. App. Filed 9/30/10)
Appellate Case No. 2010-180806

THE STATE

RESPONDENT.

V.

ADAMS GIBSON,

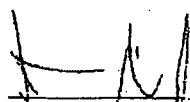
PETITIONER.

PROOF OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Brief of Respondent on Petitioner by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record, Robert M. Dudek, Esq., SCCID/Division of Appellate Defense, 1330 Lady St., Ste #401, Columbia, SC 29201-3332.

I further certify that all parties required by Rule to be served have been served.

This 12th day of October, 2012.



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ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Adams Gibson, Petitioner.

Appellate Case No. 2010-180806

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
Steven H. John, Circuit Court Judge

Opinion No. 27221
Heard January 10, 2013 – Filed February 13, 2013

DISMISSED AS IMPROVIDENTLY GRANTED

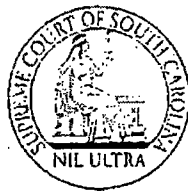
Appellate Defender Robert Michael Dudek, of Columbia,
for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Donald J. Zelenka, Assistant
Attorney General Alphonso Simon, Jr., and Solicitor
Daniel Edward Johnson, all of Columbia, for
Respondent.

PER CURIAM: We granted certiorari to review the Court of Appeals' direct appeal decision in *State v. Gibson*, 390 S.C. 347, 701 S.E.2d 766 (Ct. App. 2010). After careful consideration of the record, appendix, and briefs, we dismiss certiorari as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

**ACTING CHIEF JUSTICE PLEICONES, KITTREDGE, HEARN, JJ., and
Acting Justices James E. Moore, and R. Markley Dennis, Jr., concur.**



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734-1080
FAX (803) 734-1499
www.sccourts.org

March 1, 2013

The Honorable Jeanette W. McBride
Clerk of Court
PO Box 2766
Columbia SC 29202-2766

REMITTITUR

Re: The State v. Adams Gibson - Appellate Case No. 2010-180806
Lower Court Case No. 2005GS4009085

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc: Robert Michael Dudek, Esquire
✓ Alphonso Simon, Jr., Esquire
Daniel Edward Johnson, Esquire
The Honorable Steven H. John

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

ADAMS GIBSON, #322094

Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2013-CP-40-2107

APPLICATION FOR

POST-CONVICTION RELIEF

2013 APR - 8

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 Broad River Correctional Institution
2. Name and location of Court which imposed sentence Richland County Court of General Sessions; 1701 Main Street, Columbia, SC 29202
3. Name(s) of co-defendant(s) (if any) Jacques Gibson
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2005-GS-40-09085: Murder
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 5/24/07: Thirty years imprisonment
 - (b) _____
 - (c) _____

6. Check whether a finding of guilty was made:
 - (a) after a plea of guilty _____
 - (b) after a plea of not guilty X
 - (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
 - (a) the name of each Court to which you appealed:
 - i. South Carolina Court of Appeals
 - ii. Supreme Court of South Carolina
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. Affirmed
 - ii. Dismissed as Improvidently Granted
 - iii. _____
 - (c) the date of each such result:
 - i. 9/29/10
 - ii. 2/13/13
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. Op. No. 4747
 - ii. Op. No. 27221
 - 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) Ineffective Assistance of Trial Counsel
 - (b) Ineffective Assistance of Appellate Counsel

- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Defense counsel failed to conduct an adequate investigation into the Applicant's case.
- (b) Defense counsel failed to adequately prepare for trial and failed to make appropriate objections and motions at trial.
- (c) Appellate counsel failed to raise all meritorious claims on appeal.
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. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (c) the disposition thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

i. _____

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) This Application for Post-Conviction Relief provides the first opportunity to present these issues.

(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. Nathaniel Roberson, Esquire; Roberson Law Firm; 1708 Richland Street, Columbia, SC 29201

ii. Robert M. Dudek, Chief Appellate Defender; South Carolina Commission on Indigent Defense, Division of Appellate Defense; 1330 Lady Street, Suite 401, Columbia, SC 29201

iii. _____

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

i. Trial and sentencing

ii. Appeal

iii. _____

19. State clearly the relief you seek in filing this application:

To vacate the Applicant's conviction and sentence and to remand for a new trial.

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

No

STATE OF SOUTH CAROLINA)

VERIFICATION)

County of Richland)

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

SWORN to and subscribed before me this 12th
day of Aug, 2013.

[Signature] (L.S.)
Notary Public

My Commission Expires: 7/10/2022

2013 APR -8 PM 12:58
CCP 860

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

ADAMS GIBSON, #322094

Plaintiff(s)

vs.

STATE OF SOUTH CAROLINA

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2013CP400-2107

Submitted By: Jeremy A. Thompson, Esquire
 Address: Law Office of Jeremy A. Thompson, LLC
 P.O. Box 12891
 Columbia, SC 29211

SC Bar #: 76091
 Telephone #: 803-779-2555
 Fax #: 803-779-2556
 Other:
 E-mail: jeremyatlaw@yahoo.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

2013 APR - 8

- | | | | |
|--|--|---|--|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199) | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20 -CP- -
☐ Notice/ File Med Mal (230)
☐ Other (299) | Torts - Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399) | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
| Inmate Petitions
☒ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | Administrative Law/Relief
☐ Reinstate Drv. License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899) | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Confession of Judgment (770)
☐ Petition for Workers Compensation Settlement Approval (780)
☐ Other (799) | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Comm. (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in an Out-of-County Action (660)
☐ Sexual Predator (510) | | |

Submitting Party Signature:

Date: April 8, 2013

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Adams Gibson, #322094,)

Case No. 2013-CP-40-02107

Applicant,)

v.)

RETURN

State of South Carolina,)

Respondent.)

Respondent, making its Return to the Application for post-conviction relief filed April 8, 2013, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was true bill indicted during the October 2005 term of the Richland County Grand Jury for Murder (2005-GS-40-9085). Nathaniel Roberson, Esquire, represented Applicant. On May 21-24, 2007, Applicant proceeded to a jury trial before the Honorable Steven H. John, where he was convicted as indicted. On May 24, 2007, Judge John sentenced Applicant to thirty years imprisonment.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Robert M. Dudek, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence on September 29, 2010. State v. Gibson, No. 4747 (Ct. App. Sept. 29, 2010).

Applicant thereafter filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. The Supreme Court subsequently dismissed Applicant's Petition as Improvidently

Granted. State v. Gibson, No. 27221 (February 13, 2013). The Remittitur was issued on March 1, 2013.

Attached herewith and incorporated herein are the records of the Richland County Clerk of Court regarding the subject convictions, Applicant's trial transcript, the Applicant's records from the South Carolina Department of Corrections, and Applicant's appellate records. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. Ineffective assistance of trial counsel
 - a. Defense counsel failed to conduct an adequate investigation into the Applicant's case.
 - b. Defense counsel failed to adequately prepare for trial and failed to make appropriate objections and motions at trial.
2. Ineffective assistance of appellate counsel
 - a. Appellate counsel failed to raise all meritorious claims on appeal.

Any claims not specifically enumerated in the Application or amendments will be opposed by Respondent at an evidentiary hearing, and Respondent will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRPC.

III.

In his application, Applicant alleges ineffective of assistance of trial 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 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The applicant must overcome this presumption in order to receive relief. Cherry 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 trial 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.

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of trial counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant also alleges ineffective assistance of appellate counsel. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Respondent contends that Applicant's appellate attorney rendered effective assistance of counsel. However, this ground for relief may raise factual issues that are not conclusively refuted by the record. Therefore, Respondent requests an evidentiary hearing on this allegation also.

V.

Each and every allegation contained within the Application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, Respondent requests that an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

MEGAN E. HARRIGAN
Assistant Attorney General

By: Megan E. Harrigan
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

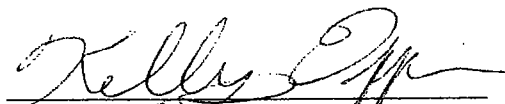
July 31, 2013.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
	)	2013-CP-40-02107
	)	
ADAMS GIBSON, #322094	)	
	)	
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:

Jeremy A. Thompson, Esq.
PO Box 12891
Columbia, SC 29211

DATED this 31st day of July, 2013.


Kelly Oppenheimer, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

ADAMS GIBSON, #322094,)

CASE NO.: 2013-CP-40-2107

Applicant,)

v.)

**AMENDED APPLICATION FOR
POST-CONVICTION RELIEF**

STATE OF SOUTH CAROLINA,)

Respondent.)

NOW COMES the Applicant in the above-captioned case, acting by and through undersigned counsel, respectfully moving to amend his Application for Post-Conviction Relief. In general, the Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated prior to and during his trial, as well as on his direct appeal. The Applicant would further amend his Application for Post-Conviction Relief to contain the following specific allegations of ineffective assistance of counsel:

1. Trial counsel was ineffective for failing to request a jury instruction on the lesser-included offense of voluntary manslaughter;
2. Trial counsel was ineffective for failing to object to the introduction of Jacques Gibson's statement on Confrontation Clause grounds;
3. Trial counsel was ineffective for failing to request a jury instruction that Jacques Gibson's statements could only be considered as evidence against Jacques Gibson;
4. Trial counsel was ineffective for failing to move to sever and for failing to request a separate trial from Jacques Gibson;
5. Trial counsel was ineffective for failing to request that the jury be reinstructed regarding reasonable doubt following the jury's note to the Court marked as Court's Exhibit #4;

6. Trial counsel was ineffective for failing to object to the implied malice instructions inasmuch as the implied malice instructions did not contain explicit instructions to the jury that they could accept or reject the implication of malice;
7. Trial counsel was ineffective for failing to preserve his argument that the jury should be instructed that prior inconsistent statements of witnesses could be considered by the jury as substantive evidence and not simply as evidence of impeachment;
8. Appellate counsel was ineffective for failing to argue on appeal that the trial court erred in failing to instruct the jury that prior inconsistent statements of witnesses could be considered by the jury as substantive evidence and not simply as evidence of impeachment;

The Applicant asks that the above-referenced allegations be considered in addition to those allegations previously raised in his original Application for Post-Conviction Relief.

Respectfully submitted,

Jeremy A. Thompson
Attorney and Counselor at Law
Law Office of Jeremy A. Thompson, LLC
P.O. Box 12891
Columbia, SC 29211
803-779-2555
803-779-2556 FAX
jeremyatlaw@yahoo.com
Attorney for the Applicant.

This ____ day of September, 2013.

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	Case No(s) : 2013CP4002107
	)	
Adams Gibson,	)	
	)	
Applicant,	)	
	)	
-VS-	)	TRANSCRIPT OF RECORD
	)	
State of South Carolina	)	
	)	
Respondent,	)	
	)	

October 01, 2013
Richland, South Carolina

B E F O R E:

HONORABLE JAMES R. BARBER, III, Judge.

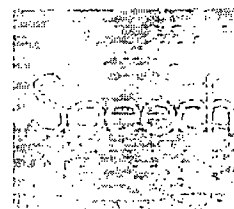
A P P E A R A N C E S:

MARY S. WILLIAMS, Esquire
Attorney for the Plaintiff

JEREMY A. THOMPSON, Esquire
Attorney for the Defendant

Teresa B. Johnson
Certified Verbatim Reporter
P.O. Box 2812
Greenville, S.C. 29602

Records are
taken and
produced via



CAT 7

I N D E XDIRECT CROSS REDIRECT RECROSS

Motions	4		
Nathaniel Roberson			
by Mr. Thompson	10, 33		
by Ms. Williams	44		
James Truitt			
by Mr. Thompson	31		
Adams Gibson			
by Mr. Thompson	48		
by Ms. Williams		49	
Arguments of Counsel	50		
Certificate of Reporter	73		

EXHIBITS PAGE

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
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APPLICANT EXHIBITS

A-1	Affidavit of Robert Dudek	9	9
A-2	Jury Note	32	32

RESPONDENT EXHIBITS

R-1	Statement	45	45
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COURT EXHIBITS

(No exhibits offered.)

P R O C E E D I N G S

MS. WILLIAMS: May it please the Court?

THE COURT: Yes, ma'am.

MS. WILLIAMS: This is the case of Adams Gibson. Mr. Gibson was tried along with a codefendant, his brother, Jaques Gibson. They were tried for murder. Mr. Gibson was sentenced to 30 years. At that time, his appeal was subsequently dismissed and this application was filed.

I included in your packet the amended application submitted by Mr. Thompson with about eight allegations. With that, I will turn it over to him.

MR. THOMPSON: May it please the Court, Your Honor. Uh, I apologize if I -- I've got a bit of a sinus infection so if I sniffle and cough my way through this proceeding, I apologize.

Just briefly, Your Honor, uh, for the record, my name is Jeremy Thompson. I do represent the applicant in this proceeding. He alleges ineffective assistance of counsel and violation of the 6th and 14th amendments to the rights to the United States Constitution as

1 well as similar corresponding provisions of the
2 South Carolina Constitution. Specifically,
3 Your Honor, we alleged ineffective assistance
4 of counsel on both the trial and the appeal
5 although the focus of this case will primarily
6 be on the trial aspect of it.

7 Just by way of brief factual background,
8 Your Honor, -- I will hand that up. The facts
9 of this case -- there were a lot of people
10 involved. The facts, in my opinion at least
11 with regard to this case, are pretty simple.

12 There were two groups of individuals that
13 met up in a bar called Chances here in
14 Columbia. One group was from Ridgeway. The
15 other group was from Winnsboro. Uh, the victim
16 was a part -- Mr. Dennis Irby was the victim in
17 this case. He was part of the group from
18 Winnsboro. My client was part of the group
19 from Ridgeway.

20 Uh, there is a significant amount of
21 testimony that the two groups met up in the bar
22 and that they were, uh, at least some dispute.
23 Some of the witnesses testified they were all
24 happy and shaking hands. Others testified
25 there were some issues going on in the bar with

1 people saying mean things to each other and
2 things like that.

3 Eventually, they all ended up outside of
4 the bar. Uh, a fight broke out between many of
5 the individuals involved. I put on there, Your
6 Honor, that known fighting groups are at
7 minimum, Tremail Davis, Revaris Henry, Demetra
8 Davis, Tory Boyd and Antwan Martin and Marcus
9 Tucker. Uh, while this dispute was going on
10 inside the bar, my client called his brother,
11 uh, to come pick him up and take him home and
12 leave.

13 Uh, Mr. Jaques Gibson arrived at the scene.
14 Uh, and as the fight was going on, by all
15 accounts, Jaques took a firearm, a nine
16 millimeter pistol, and fired it a couple -- at
17 least one time. His statement says he fired it
18 more than once. Fired it and eventually a
19 bullet struck the victim and killed the victim.

20 The case was prosecuted by accomplice
21 liability. There is -- there is some dispute.
22 Virtually everyone involved in the case, Your
23 Honor, testified that my client was either
24 doing nothing during the fight or was involved
25 in the fight, fighting somebody else. So he

1 would not have been the shooter.

2 There was only one individual that
3 identified my client as a potential shooter.
4 She actually describe the individual who -- the
5 clothing of the individual was the clothing of
6 the codefendant. There is virtually no
7 evidence, uh, that my client was actually
8 involved in the fight.

9 But that being said, they did present the
10 case on accomplice liability. There were a
11 couple of shell casings from a couple of
12 different guns found at the scene. The state
13 argued that my client was the second shooter,
14 that he was the one firing the second time,
15 that even though he did not actually kill the
16 victim, Jaques did, he was guilty as an
17 accomplice.

18 Our allegations here today, Your Honor, are
19 set forth in the amended application for
20 postconviction relief. I filed this last
21 Friday. However, I had spoken with Ms.
22 Williams about the allegations. I don't think
23 there is any issue with what we are going
24 forward on here today.

25 Specifically, Your Honor, we are alleging

1 that trial counsel was ineffective in failing
2 to request jury instruction on involuntary
3 manslaughter. There were a number of the
4 issues, uh, with a statement given by the
5 codefendant that we are going to address. That
6 relates to objecting to the statement of the
7 codefendant and requesting instruction that the
8 evidence only be considered against the
9 codefendant and asking for severance. There is
10 an issue with a, uh, jury note that comes back,
11 Your Honor, that we will get into.

12 There is, uh, an issue with being implied
13 malice instruction. Specifically, the implied
14 malice instruction -- normally, the implied
15 malice instruction says that you can infer
16 malice from the use of a deadly weapon but you
17 must -- this is only an evidentiary fact for
18 the jury to accept or reject and to give it
19 whatever weight they see fit. None of that is
20 included. Basically, the implied malice
21 instruction that's charged, Your Honor, says
22 you may infer use -- you may infer malice from
23 the use of a deadly weapon. We contend that
24 was burden shifting and is a presumptive charge
25 and that it should've been objected on common

1 law grounds.

2 Finally, Your Honor, there are a number of
3 inconsistent statements. We allege that
4 defense counsel was ineffective for failing --
5 he made kind of a request for an instruction on
6 considering prior inconsistent statements as
7 substantive evidence but it's not really
8 preserved for appeal. That is our main issue
9 with regard to that was that he failed to
10 preserve that issue for appeal.

11 I alleged in the alternative that appellate
12 counsel was ineffective for failing to raise
13 that issue. I obtained an affidavit from my
14 client's appellate attorney, Robert Dudek, who
15 is now the Chief Appellate Defender at
16 Appellate Defense that I would like to admit as
17 Applicant's 1.

18 **MS. WILLIAMS:** We have spoken with Mr.
19 Dudek. We felt this was the most efficient way
20 to handle his testimony today.

21 **(WHEREUPON, Applicant's 1 is marked for**
22 **identification and admitted into the record.)**

23 **MR. THOMPSON:** So with that background in
24 mind, Your Honor, we would call Daniel
25 Roberson, my client's trial attorney as the

1 applicant's first witness.

2 **NATHANIEL ROBERSON**

3 having first been duly sworn, testifies as follows:

4 **THE COURT:** Tell us your full name.

5 **THE WITNESS:** My full name is Nathaniel
6 Roberson. R-O-B-E-R-S-O-N.

7 **THE COURT:** All right. Thank you.

8 **DIRECT EXAMINATION**

9 **BY MR. THOMPSON:**

10 **Q** Mr. Roberson, how are you doing this
11 morning?

12 **A** I think I am doing okay.

13 **Q** I know -- I think you've got places to be
14 so I won't try to keep you here too long.

15 **A** I most certainly do, but he is important
16 right now.

17 **Q** Thank you. Do you recall your
18 representation of Mr. Gibson?

19 **A** I do.

20 **Q** Were you appointed or retained to represent
21 him?

22 **A** I was retained.

23 **Q** How soon after he was arrested did you get
24 hired? How quickly did you get involved in this
25 case?

1 A It had to be shortly after he was arrested
2 because I reviewed my files and I requested the
3 preliminary hearing and that has to be done within 10
4 days after the arrest.

5 Q So pretty early on?

6 A Yes.

7 Q Uh, do you know round about how many
8 meetings you had with Mr. Gibson prior to the trial
9 of this case?

10 A I can't recall.

11 Q Was he incarcerated --

12 A He was.

13 Q -- at the detention center?

14 A Yes, sir.

15 Q So he never made bond?

16 A No, I don't think so.

17 Q Did you have a good working relationship
18 with him?

19 A Absolutely, and his family.

20 Q So you had no trouble communicating with
21 him?

22 A None.

23 Q Now how long did you have this case prior
24 to the trial?

25 A I don't recall. I am saying to you I got

1 appointed -- I mean, I was hired at less than 10 days
2 after the arrest and whatever time it took to get
3 into trial.

4 Q Were there plea negotiations in this case?

5 A Yeah, we -- I think we attempted some plea
6 negotiations, but I don't believe there were any
7 serious offers of anything coming from the state. I
8 think they felt they had a pretty solid case.

9 Q Was it always -- so it was always a trial
10 in your mind?

11 A Any time somebody's child is murdered and I
12 represent them, I prepare it as a trial even up until
13 the day anything changes.

14 Q Now what was your strategy heading into the
15 trial?

16 A Well, let -- in your presentation to the
17 judge -- let me clarify something. In your
18 presentation, you stated that there were two groups
19 and that Adams Gibson was a part of the group from
20 Winnsboro. I think that is what you said. Adams was
21 not a part of any group in the sense that he is from
22 Winnsboro, but when Adams arrived at the club, my
23 understanding is the two groups were there.

24 Adams had a -- an acquaintance who I think
25 it was either her uncle or her father had passed. I

1 think the service would have been either the
2 Wednesday or Thursday before this weekend. She
3 wanted to get out of town. She had something else to
4 do and she came by and just asked Adams if he would
5 ride with her to Columbia. I think it was to a
6 restaurant of some kind. When they got there, the
7 club had closed.

8 Chances was down the street, so they ended
9 up at Chances. That is when Adams, for lack of a
10 better word, ran into these groups who were already
11 at the club.

12 Q Right.

13 A I want to clarify that. I don't want it to
14 look as if Adams was a part of something that was
15 happening between these people because it eventually
16 turned out there were some animosities among the
17 groups. It did not have anything to do with him.

18 Q All right. Thank you for that
19 clarification.

20 A Sure.

21 Q So your strategy therefore going into the
22 trial was what? Adams wasn't involved?

23 A My strategy was, and it was after my
24 interview with the client, that he had not shot
25 anybody, neither was he a part of any strategy to get

1 into a fight. My investigation and all the evidence
2 beared out that Adams Gibson was not the shooter and
3 he was not a part of the group who had some bad blood
4 that started the fight that resulted in this young
5 man losing his life. My strategy was based on the
6 investigation and the evidence that he did not shoot
7 anybody neither was he a part of any plan that had
8 anything to do with a fight that resulted in the
9 young man's death.

10 Q When you got to the trial, did you feel the
11 evidence bore that strategy out?

12 A Yes, it did.

13 Q Did you -- would you consider the evidence
14 that was presented at trial against your client weak
15 or strong?

16 A If I remember correctly, there was only one
17 person who implicated him in a shooting and in the
18 fight. Even her identification of him turned out to
19 be the identification of the codefendant. And in her
20 description of the fight, Adams was only in the
21 purview of where the fight and the arguments took
22 place. Because when the argument first started,
23 Adams, if I remember correctly, was at or leaving the
24 restaurant.

25 Uh, on his way out, he heard some argument

1 among the two fashions. Being from Winnsboro, I
2 think he knew about the proclivities of some of this
3 stuff. When he came out, I don't think he saw the
4 lady who he came to the restaurant with. So he got
5 on the phone and called his brother to come pick him
6 up because he felt that this was going to get out of
7 hand and he didn't want to be a part of it.

8 I think he slowly probably worked his way
9 coming out of the club. By that time, I believe his
10 brother had not arrived. When he got out, I think
11 he'd look down the parking lot and I think he saw the
12 car of the lady he came with. He made his way to the
13 car. My understanding from the facts and I think the
14 trial may bear it out except for this one witness
15 that that is exactly what he did. If you are ask me
16 whether or not I thought the case was weak, I thought
17 it was super weak.

18 Q Were you surprised when the jury came back
19 with their verdict?

20 A I was. I was very surprised. To be candid
21 with you, I was very disappointed.

22 Q Were you expecting the way the case had
23 gone for a not guilty verdict to have been returned?

24 A Yes, sir.

25 Q Now, in terms of the case against a

1 codefendant, Jaques Gibson, was the evidence stronger
2 against him?

3 A I think just even a casual reading of the
4 facts would probably bear that out.

5 Q Did he not, in fact, actually admit to
6 firing the gun?

7 A I think he did. He also -- again, this was
8 back in '05 and '06 now. I believe he made a
9 statement that was introduced into evidence where he
10 said that his brother was not firing a gun on that
11 night.

12 Q And maybe you don't recall -- the
13 transcript bears this out. Do you know what the
14 caliber of the victim -- caliber of the bullet that
15 came out of the victim was?

16 A I don't recall.

17 MR. THOMPSON: Your Honor, it was a nine
18 millimeter. Mr. Gibson admitted to firing --
19 Jaques Gibson admitted to firing a nine
20 millimeter.

21 BY MR. THOMPSON:

22 Q So given the statement then obviously the
23 case was stronger against Jaques than it was against
24 Adams?

25 A If you read those facts and you digest

1 those facts, you would think the weight of the
2 evidence was against Jaques and not Adams.

3 Q So given that that was the stated evidence,
4 did you consider moving for a severance prior to
5 trial to ensure that your client was not sitting
6 there next to the individual there that admits to
7 firing the gun and that most of the witnesses are
8 going to point at as the shooter?

9 A I think we -- I think we discussed the
10 severance. I think I may not have moved because we
11 would not have to run the risk of putting him on the
12 witness stand to testify to what he did not do
13 because Jaques' statement, who is a codefendant,
14 clearly says that my client was not a shooter and was
15 not a part of that. It was strategic. I did it for
16 the benefit of being able to feed off of Jaques'
17 statement saying that he didn't have anything to do
18 with the shooting and didn't have anything to do with
19 the argument.

20 Q Now, by the time you got to the end of the
21 trial, Jaques' statement -- Jaques or Jaques -- was
22 introduced, hadn't everyone else in the trial except
23 for Shanta Wilson said that he wasn't involved? Your
24 client by "he".

25 A Yeah. Yeah. Yeah. I -- if I remember

1 correctly, yes, you are right.

2 Q So it wasn't the need for Jaques' statement
3 to come in and say that Adams did not have anything
4 to do with it. Wasn't that pretty much obviated by
5 the fact that no one else had indicated Mr. Gibson
6 was the shooter?

7 A If you asking me to ask for a severance at
8 the end of the trial, that would not be practical.
9 This was going into the case. Let me give you a
10 little history about some other things that came into
11 play. Adams' family was assisting me in getting to
12 people who were involved. Our strategy was to
13 interview those people even though they were a part
14 of the fight who we think would not have identified
15 Adams as having anything to do with the shooting or
16 the argument.

17 On one Saturday morning, I believe, uh, one
18 of his relatives or somebody met me in Winnsboro. We
19 went to Ridgeway to interview what would have been
20 three witnesses, I think. When we got there, that is
21 when I discovered that those people had been charged
22 with some low-level offense relating to this
23 incident. So when I found out they had counsel, I
24 immediately ceased any further communication with
25 them. I did get the name of those attorneys and I

1 spoke with those attorneys. Of course, they would
2 not let me speak to them.

3 I filed a motion in Circuit Court asking
4 that I be allowed to interview all of those witnesses
5 in hopes that they will confirm what Adams had said
6 and what I had gotten from other sources. We had a
7 hearing before the judge. Of course, those lawyers
8 stood firm that they did not want me to talk to these
9 people and that even if they gave permission, they
10 may not want to speak. So that destroyed any
11 possibility of getting anybody else to verify who was
12 a part of it actually what happened. So that left me
13 with the codefendant as the only person who could
14 confirm the reality of what happened. That was
15 Jaques, who is the brother and the codefendant, who
16 completely exonerated his brother.

17 Q And I certainly understand that. But
18 that's at the end of the trial.

19 A Yeah.

20 Q We're talking about the end of the trial
21 here ---

22 A Yeah.

23 Q --- where everybody, all these witnesses
24 that you tried to interview had come forward and said
25 that your client was not involved.

1 A Right.

2 Q Right. So at that point in time, at the
3 time when Adams or Jaques' statement is going to be
4 introduced, did you reconsider your thought at that
5 point in time about moving for a severance, about not
6 moving for a severance?

7 A Move for a severance in the middle of a
8 trial?

9 Q Yes.

10 A No. I still stand firm that even though
11 the ones who did testify still didn't implicate him,
12 we still were better off with -- there at trial with
13 his brother saying he did not do it because he is a
14 codefendant and he's implicating himself.

15 Q Speaking of implicating himself, would --
16 if you had a separate trial, would Jaques' statement
17 had been admissible at a separate trial against
18 Adams?

19 A Well, in order for me to get his statement
20 in, I would either have to call him -- and of course,
21 his lawyer would object to him testifying in the
22 trial.

23 Q And I am not asking about you calling him.
24 Could the State had presented Jaques' statement at a
25 separate trial against Adams?

1 A I don't think the state would have
2 presented Jaques' statement against Adams saying he
3 did not have anything to do with the shooting. They
4 charged him with murder. That same conduct, their
5 argument would have been the hand of one is the hand
6 of all and they were saying he and Jaques were acting
7 in concert.

8 Q But is there any other evidence, to the
9 best of your knowledge, outside of Jaques' statement
10 where anybody says that Jaques was firing a nine
11 millimeter handgun?

12 A There was some confusion that I believe
13 that there were some witnesses who claimed that they
14 saw Jaques' car moving at a slow pace and saw the gun
15 fire coming from the driver side.

16 Q Right, but that's not necessarily a nine
17 millimeter.

18 A I don't know that they can tell what a fire
19 looks like coming from the caliber weapon.

20 Q That is what I'm trying to get at. The
21 only evidence linking the actual gun to the actual
22 bullet found from the victim comes from Jaques'
23 statement, right?

24 A I'm assuming that's the case, yes.

25 Q So you testified earlier that you wanted

1 Jaques' statement to come in because he exonerates
2 Adams?

3 A Yes.

4 Q At the end of the trial, again, uh, did you
5 consider requesting that Jaques' statement be
6 redacted to remove any mentions of Adams because at
7 that point in time, at the end of the trial, no one
8 had implicated him outside of Tremail Wilson?

9 A Why would I want something redacted from
10 the statement that exonerates my client?

11 Q Because Jaques told the police that after
12 the shooting --

13 THE COURT: Wait. Wait a minute. Wait a
14 minute. He doesn't get to ask you questions and
15 you respond to them. You ask the questions and
16 Mr. Roberson will answer.

17 BY MR. THOMPSON:

18 Q Didn't Jaques tell the police that after
19 the shooting occurred, he spoke to your client and
20 they talked about they weren't going to say they had
21 a gun?

22 A That may well be the case because he was
23 not arrested until some days after the actual
24 shooting took place.

25 MR. THOMPSON: Your Honor, for the record,

1 that occurs on Page 84, lines 12 through 22
2 where Jaques admits that he talked to Adams
3 about having a gun the night of the shooting and
4 possibly shooting somebody. They talked about
5 telling police they didn't have a gun.

6 **BY MR. THOMPSON:**

7 **Q** With that portion of the -- did you not feel
8 that that was damaging? That portion of the statement
9 was damaging.

10 **A** It could had been.

11 **Q** So was it still important to you in
12 considering that to because -- let me rephrase that.
13 Given that everybody up to that point had not
14 indicated that Adams was involved in the shooting or,
15 for that matter, primarily with the fight, wouldn't
16 it had been more beneficial to keep out the evidence
17 that he was planning on lying to police --

18 **MS. WILLIAMS:** Your Honor, I'm going to
19 object. That completely mischaracterizes what
20 was said there.

21 **THE COURT:** I don't know how long -- Mr.
22 Roberson has testified that he was aware of all
23 of this stuff and his strategy was that he
24 wanted that statement in, that he thought,
25 weighing it against every other possibility, it

1 still was in his client's best interest to have
2 the brother come in and say I was the shooter
3 and my brother wasn't. I mean, you know, that
4 is what he's testified to. That's what he has
5 to do. Based upon the conditions as they
6 existed at that time.

7 MR. THOMPSON: Yes, Your Honor. I'm trying
8 to --

9 THE COURT: Let's move on. You can ask
10 him 60 times about it and he's going to give you
11 the same answer.

12 MR. THOMPSON: Your Honor, I apologize.
13 I'm going to get into kind of a similar issue.
14 I'm expecting a similar response. I apologize
15 in advance.

16 Do you recall --
17 Your Honor, it occurs primarily on Page
18 940, Line 25 through 941, Line 10 or so.

19 BY MR. THOMPSON:

20 Q Uh, do you recall the judge asking you if
21 -- during colloquy on the charge, if you wanted him
22 to give a charge that they can only consider -- the
23 jury can only consider Jaques' statement against
24 Jaques?

25 A Do I remember the colloquy?

1 Q Yes.

2 A If you would refer specifically -- I mean,
3 I could...

4 Q It is there. . . (Pointing.)

5 A (Reviewing.) The judge asked did he want
6 me to use whatever is contained in that can not be
7 used against anyone else. Him saying that my client
8 didn't have anything to do with the shooting wasn't
9 anything that would be used against him. I was going
10 to use it to help my client.

11 Q That's the -- that's the -- that's kind of
12 what I am trying to get at. Did you not think it was
13 important to request that that instruction be given
14 so that the damaging portions of Jaques' statement
15 could not be considered against Adams?

16 A The judge wasn't going to give an
17 instruction where he commented on the facts. I had
18 to be careful with what I asked, but I still wanted
19 the statement to come in from the brother saying his
20 brother had nothing to do with the shooting.

21 Q Speaking of jury instructions, do you
22 recall requesting a jury instruction on the charge of
23 involuntary manslaughter?

24 A I don't know that I would have -- did I
25 request a charge on involuntary manslaughter?

1 **Q** Yes, you did.

2 **MR. THOMPSON:** Your Honor, that starts on
3 Page 927 at Line 17 through 21 were the first
4 few pages was discussion about it.

5 **THE WITNESS:** My thinking must have been
6 at the time that that was the lesser included
7 offense of a murder charge and that if a jury
8 would have concluded that Jaques' shooting was
9 an accident, I would certainly want to put that
10 in part of my argument to the jury that if they
11 found Jaques' shooting was an accident, I would
12 want him to be exposed to liability no greater
13 than that of the person who did the shooting.

14 **BY MR. THOMPSON:**

15 **Q** Did you consider requesting a charge of
16 voluntary manslaughter?

17 **A** Voluntary manslaughter is the unlawful
18 killing of another without malice of forethought upon
19 the sudden heat and passion. I would be admitting
20 that Adams actually did a shooting and that there was
21 some legal justification for doing so and, at the
22 same time, I'm going to be asking the jury to find
23 him not guilty of the shooting? I saw that being so
24 inconsistent. I didn't want the jury to think that I
25 am just throwing darts and hope something sticks.

1 Q So you wanted the verdict to be murder or
2 nothing?

3 A Yes.

4 Q Or involuntary manslaughter?

5 A If they felt like they had to find
6 something because a life was lost.

7 Q You didn't want to give them a lesser
8 option of voluntary manslaughter if a life was lost
9 -- given a life was lost?

10 A I don't think the judge would have given a
11 charge of voluntary manslaughter based on the facts.
12 The judge has to look at the facts and the law. If
13 there is any evidence in the record justifying the
14 lesser included charge, then he would be required to
15 give it. I don't think we presented anything that
16 would show that this was entitled to voluntary
17 manslaughter charge.

18 Q I don't disagree with the overall strategy
19 of arguing that he was not involved whatsoever. But
20 wasn't there testimony that he was involved in the
21 fight, that he was swinging at somebody?

22 A Well, that is what that confused witness
23 said. She was the only one that said that.

24 Q Didn't Vernon Davis also testify that your
25 client was swinging down at somebody during the

1 fight?

2 MR. THOMPSON: Your Honor, that is Page
3 808, lines 3 to 18.

4 THE WITNESS: If I remember correctly, my
5 argument should have been that Vernon Davis
6 wasn't in a position to even see that. My
7 client left and went straight down the parking
8 lot and got in the car with the lady who bought
9 him to the club.

10 BY MR. THOMPSON:

11 Q Didn't Antonio Smith also testify that your
12 client was kicking and hitting Tory Boyd? That's at
13 Page 506, lines 1 through 11.

14 A My argument would have been the same thing.

15 Q But given that you wanted some other option
16 for the jury if they wanted to find somebody guilty
17 of something for some death occurring, couldn't you
18 argue that your client was involved in the fight and
19 that the killing was in response to voluntary
20 manslaughter?

21 A I could have, but it would have been
22 inconsistent with my overall theory of the case.

23 Q Now, do you recall requesting that the jury
24 be instructed that they could consider the truth --
25 or prior inconsistent statement as the truth instead

1 of for just impeachment purposes?

2 A Say that again?

3 Q Did you request -- do you recall requesting
4 an instruction by the court that the jury could
5 consider prior inconsistent statements of witnesses
6 as the truth and not just for impeachment?

7 A I do not recall that.

8 MR. THOMPSON: May I approach the witness,
9 Your Honor?

10 BY MR. THOMPSON:

11 Q I am just going to ask you to read right
12 here, this page to about right there. (Pointing.)

13 A Okay. (Reviewing.)

14 Yes. Okay. I remember that.

15 Q You remember that?

16 A Yes.

17 Q In that colloquy, why were you making that
18 request? What was the purpose of making that
19 request?

20 A Because the judge was going to charge the
21 jury about witnesses' statements that they could
22 believe some, all, none or could disregard a
23 statement altogether. If they found, based on the
24 statement, that they are inconsistent with the facts
25 as they view them, they could give whatever weight

1 they see to or no weight -- uh, accept some or
2 disregard some.

3 So my theory is my client left out of the
4 club and walked straight to the car. Even though
5 some people are saying they saw him fighting, I want
6 to be able to argue that you ought to disregard this
7 because this is inconsistent from the statement from
8 his brother who said he wasn't in the car and he was
9 not shooting and some statement that he walked
10 straight from the club and got in the car and left
11 with the lady who bought him.

12 Q That instruction was not given, was it?
13 The judge said he was not going to charge that.

14 A (Reviewing.)

15 Now, what was your question?

16 Q I said the judge did not charge what you
17 wanted him to charge, did he?

18 A It seemed like he rejected it.

19 Q Okay.

20 A I will say the testimony of a witness may
21 be discredited or impeached by showing that a witness
22 previously made statements that are inconsistent with
23 that present testimony. Earlier contradictory
24 statements are admissible to impeach for credibility
25 of a witness and not to establish the truth of the

1 statement. I think the judge was saying maybe what I
2 was asking him was getting too close to him
3 commenting on the facts.

4 Q Okay.

5 THE COURT: Would you and Ms. Williams
6 come up here for just a minute?

7 (WHEREUPON, a bench conference is held off the
8 record.)

9 THE COURT: We can let your client step
10 down -- I mean Mr. Roberson and we can take two
11 minutes.

12 MR. THOMPSON: Yeah, let's go ahead and do
13 that.

14 THE COURT: Mr. Roberson, we are going to
15 take a witness out of order that needs to go
16 somewhere. It will take about two minutes to
17 take his testimony. If you was step down a
18 second, we will bring you right back.

19 Come on up here, Mr. Truitt. We will put
20 you under oath.

21 JAMES TRUITT

22 having first been duly sworn, testifies as follows:

23 THE COURT: State your full name.

24 THE WITNESS: James Dale Truitt.

25 T-R-U-I-T-T.

DIRECT EXAMINATION

BY MR. THOMPSON:

Q Mr. Truitt, what is your occupation?

A Deputy clerk.

Q What are your responsibilities as deputy clerk?

A Uh, supervise bailiffs, of course, uh, court staff, evidence room.

Q In connection with the evidence room, can you identify this document for me?

A Court's Exhibit Number 4 out of the evidence room. A copy of it.

Q Was that out of the trial of this case?

A Yes.

MR. THOMPSON: I would like to admit this as Applicant's 2.

MS. WILLIAMS: Without objection, Your Honor.

THE COURT: So admitted.

(WHEREUPON, Applicant's 2 is marked for identification and admitted into the record.)

MR. THOMPSON: I don't believe I have any further questions for this witness, Your Honor.

THE COURT: Ms. Williams?

MS. WILLIAMS: Nothing from the state, Your

1 Honor.

2 **THE COURT:** You are no longer the court
3 administrator?

4 **THE WITNESS:** Courtroom administrator, Your
5 Honor.

6 **THE COURT:** Are you no longer the court
7 administrator?

8 **THE WITNESS:** Courtroom administrator.

9 **THE COURT:** All right, Deputy, step down.

10 **THE WITNESS:** Yes, sir.

11 **THE COURT:** All right. Mr. Roberson, you are
12 back on the stand please, sir.

13 **MR. THOMPSON:** I apologize, Your Honor, I did
14 not realize Mr. Truitt was sitting there. The copy
15 I handed up -- uh, there is an actual exhibit that
16 says Court's Exhibit Number 4 on the bottom and
17 further information about the judge. That's the
18 judge's signature at the bottom on the copy I've
19 handed up.

20 **THE COURT:** All right.

21 **NATHANIEL ROBERSON**

22 having previously been duly sworn, testifies as
23 follows:

24 **DIRECT EXAMINATION (con't)**

25 **BY MR. THOMPSON:**

1 Q Going back to -- Mr. Roberson, going back to
2 the prior inconsistent statement instruction, did you
3 file a proposed instruction with the court? Did you
4 draft a proposed instruction up about prior inconsistent
5 statements?

6 A No, sir. I made it orally on the record.

7 Q Okay. Is there any reason why at the close of
8 the charge you did not renew your objection or renew your
9 request to make that prior inconsistent statement charge?

10 A He already ruled he wouldn't give what I
11 requested. It would be superfluous. I'm sure he would
12 rule the same way.

13 Q But you wanted that instruction to be given?

14 A Yes.

15 Q Did you get a copy of the proposed charge, if
16 you remember, before the charge was given?

17 A You're asking whether or not the judge gave us
18 a copy of his full charge?

19 Q Yes.

20 A I don't recall.

21 **MR. THOMPSON:** May I approach the witness,
22 Your Honor?

23 **BY MR. THOMPSON:**

24 Q I am going to ask you to read Page 119, lines 2
25 through 4.

1 A Yeah. (Reviewing.)

2 You want me to read just a full paragraph?

3 This paragraph?

4 Q Go ahead.

5 A (Reviewing.)

6 Okay.

7 Q Okay. Is that the implied malice instruction
8 for the use of a deadly weapon given by the judge?

9 A It's not implied malice. It's inferred malice.

10 Q Is that the inferred malice charge, portion of
11 the charge given by the trial judge?

12 A It is not the implied. He gave an inferred
13 malice charge. Implied malice is not a legal charge in
14 South Carolina. The courts already ruled that implied
15 malice is too strong. They said the jury may be allowed
16 to infer malice based on certain conduct and certain
17 elements that's standard in the malice charge.

18 Q How many murder cases have you tried?

19 A Uh, you mean that I have tried as a sole
20 practitioner?

21 Q Ballpark.

22 A Many.

23 Q Many?

24 A Many. You want to know how many death penalty
25 cases I have been through?

1 Q Sure.

2 A Probably a total, say, the new death penalty
3 law would be around, between 30 and 40. Not just in
4 South Carolina now. Other states as well. I do a lot of
5 work with Team Defense which established a lot of the
6 death penalty strategy after Gregg and Furman. I was
7 involved in cases in Virginia, South Carolina, Georgia.
8 I was consulted in many instances.

9 Q So you are familiar with the inferred malice
10 instruction?

11 A Yes.

12 Q The standard inferred malice instruction?

13 A Yes, sir.

14 Q Are you aware that the inferred malice
15 instruction should include a portion where it says that
16 the jury may consider the evidence, may give it such
17 weight as they see fit, the inference malice in the use
18 of a deadly weapon?

19 A If I remember correctly, when judges give
20 charges on how the jury can weigh evidence, it would be
21 duplicating what he gives as a charge on how they can
22 view the evidence and at the same time recharging it
23 under the inferred malice status.

24 Q But isn't that frequently done?

25 A I don't know how frequent. I can't answer

1 that. There may be some judges who can look at how he
2 would instruct the jury to weigh evidence and it may be
3 so slight or it may be so missing that he may feel it
4 necessary to get the jury to really focus on the issue.
5 It is hard for me to answer that question.

6 Q Does the instruction that you can infer malice
7 solely from the use of a deadly weapon, is that something
8 that you might -- as a defense counsel, is that something
9 you would want the jury to be instructed on?

10 A It depends on the facts of my case. It depends
11 on what my defense is.

12 Q In this case, how much evidence -- what other
13 evidence of malice was there other than the use of a
14 deadly weapon?

15 A On the part of my client, none.

16 Q Even on the part of Jaques?

17 A I wasn't defending Jaques.

18 Q I understand. I am asking you to consider it
19 from the point of --

20 A I didn't have to do that. Jaques admitted
21 that he fired the weapon.

22 Q Didn't he admit first that he fired into the
23 air?

24 A He may have.

25 Q And that he wasn't trying to kill anybody?

1 A He may have said that.

2 Q All right. So given that, there is no other
3 way to get to malice for your client other than the use
4 of a deadly weapon, is that correct? Is that a fair
5 statement? From your review of the evidence.

6 A From my view of the evidence, there was no
7 evidence to get to malice because the person who would
8 have been the most vulnerable to the charge admitted that
9 the person who the state had accused of being a part of
10 it did not fire a weapon.

11 Q Didn't the state allege that your client was
12 acting in concert with Jaques?

13 A I am sure they did. But the state wasn't there
14 during the night that this incident took place. Jaques
15 was.

16 Q I understand that. But don't you have to
17 request -- isn't it your responsibility to try and get as
18 many favorable jury charges for your client as possible?

19 A The judge was going to charge malice in that
20 case whether I requested it or not.

21 Q Wouldn't it had been more beneficial for the
22 jury to be instructed if they could accept or reject the
23 inference of malice than to just say it arises when you
24 use a deadly weapon?

25 A Isn't that what the judge charged?

1 Q No, he did not.

2 A Read the instruction.

3 Q Malice can be inferred from conduct showing a
4 total disregard for human life. Inferred malice may also
5 arise when the deed is done with a deadly weapon. Is
6 there any instruction in that portion that I just read --

7 A Read the rest of it. Read the rest of it.

8 Q A deadly weapon is any article, instrument or
9 substance which is likely to cause death or great bodily
10 harm. Whether an instrument is being used as a deadly
11 weapon depends on the facts and circumstances of each
12 case.

13 A So then that moves it away from just a gun.
14 Inferred malice could be any other instrument, am I
15 correct?

16 Q Yes, but the inference in this case is the use
17 of a gun.

18 A He also gave the other instructions that the
19 use of an instrument can be inferred. He did not rely on
20 just the instrument being a gun.

21 Q The only instrument used to kill somebody in
22 this case was a gun, right?

23 MS. WILLIAMS: Your Honor, there is not a
24 question. This has been asked and answered.

25 THE COURT: You have asked him. He has

1 answered.

2 **BY MR. THOMPSON:**

3 **Q** Do you have any reason why you did not
4 object to the charge as given and request that the
5 jury be specifically instructed that they could
6 accept or reject the inference of malice and to give
7 it such weight as they saw fit?

8 **A** That is what the judge charged them.

9 **Q** Where?

10 **A** You just read it.

11 **Q** In that charge?

12 **MR. THOMPSON:** Forgive me, Your Honor.

13 I'll move on.

14 **BY MR. THOMPSON:**

15 **Q** So you didn't consider that charge to be
16 burden shifting at all?

17 **A** No.

18 **Q** I am going to show you what is been
19 admitted as Applicant's 2. Do you recall that note
20 being sent by the jury?

21 **A** (Reviewing.)

22 **THE COURT:** What is your contention here?
23 That the court is obligated to give a written
24 copy of the charge to the jury?

25 **MR. THOMPSON:** No. My contention is two-

1 fold. One, I am concerned as to whether or not
2 Mr. Roberson even saw the note before a response
3 was given. And two, that the jury requested
4 further instruction on reasonable thought and in
5 parentheses wrote doubt. Which in my mind gives
6 me a lot of cause for concern that they may not
7 have understood the charge and standard of
8 proof.

9 THE WITNESS: You're waiting on my answer
10 now? Are you waiting on my answer? You are
11 asking me whether or not --

12 BY MR. THOMPSON:

13 Q Did you see the note?

14 A You know, I really don't recall.

15 MR. THOMPSON: Your Honor, the record only
16 says at Page 1028, Line 14, Court Exhibit 4 was
17 marked for identification only.

18 BY MR. THOMPSON:

19 Q So you don't recall an issue with that note
20 being sent back?

21 A It may or may not have been. I really
22 can't say.

23 Q In reading over that note, is there
24 anything that gives you any concern? Are you
25 concerned about the fact that the jury used the

1 phrase "reasonable thought"?

2 A I don't expect jurors to be as prepared on
3 the law as we are. But they did -- it does say, can
4 we get a whole copy of the law as stated and
5 reasonable thought. And under it, they put in
6 parentheses "doubt". Uh, let me answer this way. If
7 I had seen this and the judge would've asked me my
8 opinion, I would've stated probably the same thing
9 the judge said that he would have to charge them all
10 of the law on reasonable doubt as opposed to just
11 separating out some portion of all of the testimony,
12 which means again he probably would have been getting
13 too close to commenting on the facts.

14 Q Were you concerned by the phrase reasonable
15 doubt that the jury did not understand what they were
16 supposed to do, the standard of proof?

17 A I think clearly that they were asking the
18 court to again explain to them what reasonable doubt
19 is.

20 Q And is there any reason why you did not, on
21 the record, ask that the judge give the reinstruction
22 -- reinstruct them on reasonable doubt?

23 A I don't -- again, I'm telling you I don't
24 recall seeing this document. Even if I had, my
25 answer still is I would have said to the judge that

1 the only charge he can give to them would be the
2 total charge on that question and they would be
3 asking about reasonable doubt which means he would
4 have to charge them all of his instructions on
5 reasonable doubt, which is what I think he -- what he
6 was saying to the jury.

7 Q Would you have wanted that reinstruction to
8 be given based on the question presented?

9 A I would have wanted the judge to tell this
10 jury my client wasn't guilty.

11 Q I understand that. That is not my
12 question. Would you have wanted him to give the full
13 reinstruction based on the question?

14 A If he have responded by saying the jury has
15 sent back a question and I am uncertain as to whether
16 or not I can answer that question without given the
17 full charge on reasonable doubt I would have said to
18 him that you shouldn't charge them anything unless
19 you are going to charge them all of it.

20 Q Is that what you would have wanted to do in
21 response to that question? Would you have requested
22 that that reinstruction be given?

23 THE COURT: Mr. Thompson, he testified
24 that's what the Court did. What do you want him
25 to do? Instruct the jury that -- give them the

1 whole charge if that's what you want? I don't
2 know what else you need him to say.

3 MR. THOMPSON: Beg the Court's indulgence
4 one moment. (Pause)

5 No further questions for this witness, Your
6 Honor.

7 THE COURT: All right. Anything?

8 MS. WILLIAMS: Uh, just briefly, Your
9 Honor.

10 CROSS-EXAMINATION

11 BY MS. WILLIAMS:

12 Q Did you receive -- you received discovery
13 in this case, is that correct?

14 A An enormous amount of discovery.

15 Q You do have a big box there. Does that
16 include three statements given by Jaques Gibson?

17 A It did.

18 Q Can I ask you to look at these and tell me
19 if that looks like what you had in your file?

20 A (Reviewing.)

21 This does appear to be the three statements
22 that he give -- that he did give.

23 MS. WILLIAMS: Your Honor, I would like to
24 move these into evidence not for any truth but
25 going towards the reasonableness of Mr.

1 Roberson's assessment of these statements. I've
2 got copies for the court.

3 MR. THOMPSON: I have no objection.

4 THE COURT: So admitted.

5 (WHEREUPON, Respondent's 1 is marked for
6 identification and admitted into the evidence.)

7 BY MS. WILLIAMS:

8 Q Mr. Roberson, briefly, tell me how long you
9 have been practicing law.

10 A Could I just say over 15 years?

11 Q Sure.

12 THE COURT: Over what?

13 THE WITNESS: Over 15.

14 THE COURT: 50 years?

15 THE WITNESS: 15.

16 THE COURT: Oh.

17 THE WITNESS: I ain't over 50 years old,
18 Judge.

19 THE COURT: That's why I was getting
20 concerned.

21 THE WITNESS: I grew up real fast.

22 BY MS. WILLIAMS:

23 Q Did you work with Mr. Johnson in trial
24 preparation in this case?

25 A You want me to explain what I consider to

1 be working with?

2 Q Please do.

3 A I think we had defenses that would have
4 been antagonistic. So to the extent that, uhm, I
5 didn't want to offend Mr. Johnson's strategy but at
6 the same time benefit from what his client had said
7 that would benefit my client, I carefully worked with
8 him toward some harmonization of his strategy and my
9 defense.

10 Q You guys visited the scene together?

11 A Uhm, --

12 Q And if you don't recall, that's fine.

13 A I really don't recall.

14 Q But you felt ultimately that that harmony
15 was more than important than severing these trials?
16 Excuse me.

17 A Yes, because at that point, I felt I wasn't
18 certain whether or not his client would take the
19 witness stand. There's a lot of danger in taking the
20 witness stand and being subject to cross-examination
21 in the heat of battle and those kinds of things. It
22 wasn't worth the risk at that stage.

23 MS. WILLIAMS: I don't have any further
24 questions. Thanks.

25 THE COURT: Anything further, Mr.

1 Thompson?

2 MR. THOMPSON: Nothing further, Your Honor.

3 THE COURT: All right. Thank you. You
4 may step down.

5 THE WITNESS: Thank you, Your Honor.

6 MR. THOMPSON: May this witness be excused,
7 Your Honor?

8 MS. WILLIAMS: If his client is going to
9 testify, I would ask to keep him just in case
10 anything came up that I needed to --

11 THE COURT: All right. Stick around for
12 just a minute.

13 MS. WILLIAMS: I apologize.

14 THE WITNESS: I like being in your company
15 anyway.

16 THE COURT: All right. Mr. Thompson,
17 call your next witness.

18 MR. THOMPSON: I would call Mr. Adams
19 Gibson, Your Honor.

20 ADAMS GIBSON

21 having first been duly sworn, testifies as follows:

22 THE COURT: All right. Have a seat and
23 tell us your full name.

24 THE WITNESS: Adams Gibson. Can you hear
25 me?

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1 **A** Yes, sir.

2 **Q** And is there anything else pertinent to
3 your case that you feel the judge needs to know?

4 **A** No, sir.

5 **MR. THOMPSON:** I have no further questions
6 for this witness, Your Honor.

7 **THE COURT:** All right.

8 **CROSS-EXAMINATION**

9 **BY MS. WILLIAMS:**

10 **Q** You testified in August of this year at
11 your brother's PCR hearing, is that correct?

12 **A** Yes, sir -- I mean -- yes, ma'am. Sorry
13 about that.

14 **Q** You recall telling me that you had rushed
15 into this fight and started throwing some punches?

16 **A** I said I throwed a punch. Yes, ma'am.

17 **Q** That's all that I have.

18 **THE COURT:** All right. Thank you, sir.
19 You may step down.

20 **THE WITNESS:** Thank you.

21 **THE COURT:** Any objection to Mr. Roberson
22 being allowed to leave?

23 **MS. WILLIAMS:** No objection.

24 **THE COURT:** Thank you.

25 All right. Mr. Thompson.

1 **MR. THOMPSON:** Your Honor, that would be
2 the applicant's case. I do have some argument
3 that I would like to present to the court at the
4 appropriate time.

5 **MS. WILLIAMS:** Your Honor, no further
6 witnesses from the state.

7 **THE COURT:** All right. What do you want
8 to tell me, Mr. Thompson?

9 **MR. THOMPSON:** All right. For ease of use,
10 Your Honor, I printed out a number of cases
11 pertaining to each of the issues in this case.
12 They are labeled as to each issue, uh, and are
13 in order in terms of issues that were presented
14 in the amended application.

15 Your Honor, just briefly, the arguments
16 that were presented in the amended application
17 for postconviction relief, I will start with
18 voluntary manslaughter. Your Honor, it's our
19 position that this case was essentially handed
20 to defense counsel on a silver platter so to
21 speak. There is, uh, -- out of the entire trial
22 transcript -- this transcript is over 1000 pages
23 long -- Mr. Roberson, uh, -- there's eight pages
24 of cross-examination and recross examination of
25 Tory Boyd, 12 of Melvin Dewitt and 19 of Shanta

1 Wilson. There is one other witness, Demetra
2 Davis, that is five pages. Everyone else's is
3 four or below. That's every other witness in
4 this case, Your Honor.

5 Mr. Roberson did not have to do much.
6 Virtually every witness in this case -- and I
7 have page numbers for each. Tory Boyd says he
8 did not know where my client was at Page 256,
9 Line 22 to 257, Line 1. I'm going to try to do
10 this quickly because I know we have another
11 hearing after this one. Revaris Henry testifies
12 to not finding no gun not in the Escort which
13 Jaques Gibson was driving. That's where the
14 shots were fired from. That's Page 333, lines 3
15 through 13.

16 **THE COURT:** Let me ask you something. Is
17 it your position that there is no evidence so
18 the court should have directed a verdict?

19 **MR. THOMPSON:** No, Your Honor. That
20 argument was raised on direct appeal. It was
21 unsuccessful.

22 **THE COURT:** All right. So your position
23 is there is some evidence which would allow it
24 to get to the jury, but it's an open and shut
25 case and the jury should have found otherwise?

1 **MR. THOMPSON:** My position, Your Honor, is
2 it was an extremely weak case for the state as
3 Mr. Roberson testified to and that had Mr.
4 Roberson taken any of the actions that we have
5 alleged he should have taken, the result --
6 there is a reasonable possibility that the
7 result of the trial would have been different
8 and that this case once -- by the time this case
9 got to the end and every witness outside of
10 Shanta Wilson who testified that -- who
11 misidentified Adams as a shooter and described
12 the shooter as the person who's -- as Jaques'
13 clothing -- basically, wearing Jaques' clothing,
14 that all Mr. Roberson had to do to get this case
15 to a not guilty verdict was make sure the jury
16 was given the proper instructions at the end of
17 the case. That's our primary allegation here,
18 Your Honor, and he failed to do it.

19 **THE COURT:** Proper instructions being
20 involuntary?

21 **MR. THOMPSON:** Voluntary manslaughter.

22 **THE COURT:** Voluntary manslaughter?

23 **MR. THOMPSON:** Voluntary manslaughter,
24 prior inconsistent statements and implied
25 malice, Your Honor, primarily and also not

1 considering the co-defendant's statement against
2 Mr. Adams Gibson. Those are the primary issues
3 with regard to the jury instructions and
4 evidence of the case. And again, had Mr.
5 Roberson take any of these actions, there was
6 more than --

7 **THE COURT:** You believe if he had been
8 charge -- if the jury had been charged with
9 voluntary manslaughter, then your client
10 would've been convicted on that?

11 **MR. THOMPSON:** I think there is a
12 reasonable probability of that, Your Honor.
13 They clearly found that he was involved. That
14 is the thing. If you read the State's closing
15 argument, the State argues that there are two
16 shooters, that Jaques is the one that hits the
17 victim with the nine millimeter and Adams Gibson
18 is standing right next to him firing the other
19 firearm.

20 We believe that it could be argued, Your
21 Honor that -- especially under accomplice
22 liability, which is the way this case was being
23 presented, that my client was involved in a
24 fight, that there were multiple witnesses saying
25 he was fighting that night and that that --

1 there was a prior argument. I know it is
2 contrary to the central defense of the case that
3 he was not involved but that it could have been
4 argued that my client was involved in both the
5 altercation, because there were angry stares,
6 mean glances and angry words being exchanged
7 inside of the club that spilled outside. There
8 was a massive brawl that erupted outside that my
9 client was involved in that fight, that he was
10 punching at multiple people perhaps. There is
11 testimony in the records of that.

12 I mentioned it during the examination of
13 Mr. Roberson. Antonio Smith testifies that my
14 client was kicking and hitting Tory Boyd.
15 That's at Page 506, Lines 1 through 11. Vernon
16 Davis said my client was swinging down at
17 somebody.

18 Especially once the State's closing
19 argument was made where they allege that he was
20 definitively a second shooter, but certainly
21 before that as well, I think in view of the
22 evidence, it could have supported a charge of
23 voluntary manslaughter and defense counsel was
24 ineffective for failing to request such charge.
25 He testified himself he wanted another option

1 other than murder. When involuntary
2 manslaughter fell through, he should have
3 requested voluntary manslaughter. We alleged
4 that he was ineffective for failing to do that.

5 With regard to the codefendant statement,
6 Your Honor, I submit I'm just going to have to
7 agree to disagree with Mr. Roberson on this. By
8 the time that statement came in, it came in at
9 the very final witness, the last witness of the
10 trial, every other witness involved, aside from
11 Shanta Wilson says that my client was either
12 involved in the fight which would mean that he
13 should have pretty much been charged with breach
14 of peace like the other witnesses who were
15 involved in a fight or that he wasn't involved
16 altogether. Either one -- uh, either one is
17 easily a not guilty verdict.

18 He didn't need at that point a full
19 statement coming in from Jaques Gibson saying
20 that Adams was not involved. Every other
21 witness had already testified to that. He
22 didn't need that. Whereas, Jaques goes further
23 and says this is not -- not only did we talk
24 about it, not only did my brother and I talk
25 about this --

1 **THE COURT:** Any evidence anywhere that
2 your client was the shooter?

3 **MR. THOMPSON:** The state claims there is.
4 There is no one who -- Shanta Wilson is the only
5 witness who identified him as the shooter.

6 **THE COURT:** So there is evidence that he
7 was the shooter?

8 **MR. THOMPSON:** Yes, but the state even
9 argues in their closing argument that she got it
10 wrong.

11 **THE COURT:** But there is evidence?

12 **MR. THOMPSON:** There is evidence that he is
13 the shooter.

14 **THE COURT:** All right.

15 **MR. THOMPSON:** Yes. Going back to the
16 voluntary manslaughter argument, Your Honor, you
17 can use that testimony and say that he was the
18 shooter, that he was the shooter who killed her
19 despite what Jaques says. Not killed her, but
20 killed the victim.

21 Going back to the codefendant's statement,
22 Your Honor, the codefendant's statement clearly
23 says that I spoke with him after the fact. I
24 may have shot somebody and we agreed that we
25 weren't going to -- we were going to lie to the

1 police and tell them that we did not have a gun.
2 That is, uh, part and parcel of a conspiracy,
3 accomplice liability that these two were working
4 together and trying to protect each other that
5 night and that portion of the statement would
6 have been excluded, Your Honor.

7 I handed up Richardson versus Marsh for
8 that issue. They would've had to -- I'm sorry,
9 Gray versus Maryland, 523 U.S. 185. That's in
10 1998 decision from the United States Supreme
11 Court. They would have had to redact -- upon a
12 proper objection by Mr. Roberson, the judge
13 would have -- the state would've had to redact
14 the statement to omit all reference to Mr. Adams
15 Gibson. We believe that defense counsel was
16 ineffective for failing to request that that be
17 done giving the damaging statement. I can
18 understand perhaps maybe at the beginning of the
19 case thinking you're going to need the
20 statement. But by the end, he didn't need that.
21 He didn't need it. The damaging portion of it
22 should've been excluded.

23 **THE COURT:** Mr. Roberson testified that
24 there was evidence that he was the shooter and
25 that he wanted the statement that indicated that

1 he was not the shooter. Are you saying that Mr.
2 Roberson could've asked the court to redact that
3 because it was not favorable to your client and
4 leave in that which is favorable?

5 MR. THOMPSON: No, I'm saying the whole
6 thing needs to be redacted. I understand the
7 desire to have the favorable portion brought in.
8 But by the point in time that that statement got
9 introduced, everybody else other than Shanta
10 Wilson said that Adams was not involved.

11 Similarly, Your Honor, we alleged that the
12 jury should have been instructed, uh, that they
13 could consider the statement only as to Jaques
14 Gibson and not as to Adams for similar reasons
15 because there was damaging statements made as to
16 Adams in that statement and they should've been
17 -- they should have been instructed they could
18 not consider those against Adams.

19 THE COURT: Mr. Roberson testified that it
20 was his strategy to have that in there.

21 MR. THOMPSON: Yes.

22 THE COURT: Both of those.

23 MR. THOMPSON: Yes.

24 THE COURT: I understand your position. I
25 understand his. Talk to me about this, uh, --

1 it's not implied malice, inferred malice charge.

2 **MR. THOMPSON:** Your Honor, that's, uh, --

3 **THE COURT:** Didn't the law change on this
4 some time after this case?

5 **MR. THOMPSON:** It did, Your Honor. Uh,
6 that's one of the cases that I handed up. The
7 Supreme Court in State versus Belcher and I'm
8 not -- I want to make sure I clarify this. I'm
9 not alleging that Mr. Roberson should have made
10 a Belcher argument. Belcher clearly says that
11 it is not applicable to cases on collateral
12 review. It was not available at the time of
13 this trial. However, Your Honor, Belcher says
14 that you can't give the implied or inferred
15 malice charge, uh, unless -- if there is
16 anything to mitigate the charge. Uh, if there's
17 any lesser included offense or something along
18 those lines.

19 The primary issue here is we have two
20 separate claims with regard to implied malice
21 and inferred malice -- however you want to
22 characterize it -- instruction. The first is
23 that by failing to include any instructions that
24 the jury is free to accept or reject any portion
25 of or the inference of malice that may arise.

1 **THE COURT:** Specifically with respect to
2 the inferred malice.

3 **MR. THOMPSON:** Yes. That made the charge
4 burden shifting. If you just read this charge,
5 Your Honor, it essentially reads --

6 **THE COURT:** I've read the charge.

7 **MR. THOMPSON:** Right. The inference may
8 arise from the use of a deadly weapon. Then it
9 stops. That's all you have got. There's
10 nothing else that tells the jury they don't have
11 to find malice, they don't have to simply
12 because the use of a deadly weapon is there that
13 they don't have to find malice. We argued that
14 made the charge burden shifting. The defense
15 counsel should have objected to it on that
16 basis.

17 The reason for it kinds leads into the
18 common-law aspect of the case, Your Honor, is
19 that our Supreme Court and Court of Appeals have
20 made very clear that that instruction has to be
21 given. State versus Elmore is the first case I
22 handed up on that issue, Your Honor. That's 279
23 S.C. 417, 308 S.E. 2d 781. In particular, it's
24 on the fifth page of the one that I've handed
25 out. Anyway, the Supreme Court says with use,

1 this charge specifically has to be charged
2 for --

3 **THE COURT:** What has to be charged?

4 **MR. THOMPSON:** The law says that if one
5 intentionally kills another with a deadly
6 weapon, the implication of malice may arise. If
7 facts are proved beyond a reasonable doubt
8 sufficient to raise an inference of malice to
9 your satisfaction, this inference would simply
10 be an evidentiary fact to be taken into
11 consideration by you, the jury, along with other
12 evidence in this case. You may give it such
13 weight as you determine it should receive. Then
14 the very next sentence, Your Honor, in the opinion
15 is --

16 **THE COURT:** What is the date of that case?

17 **MR. THOMPSON:** 1983. The very next section
18 of the opinion is -- rec cautioned the bench that
19 here after only slight deviations from this
20 charge will be tolerated. This is more than a
21 slight deviation.

22 **THE COURT:** Let me hear from the state on
23 that.

24 **MS. WILLIAMS:** I may have been
25 misinterpreting when Mr. Thompson told me. I

1 thought his argument was about this issue when I
2 prepared this case so I misunderstood him on
3 that. I checked the bench book charge of that
4 year. This is the exact charge from the bench
5 book of 2006. I don't see that this anything
6 that was not a standard charge given at the time
7 of the case.

8 **THE COURT:** The standard charge might be
9 in error. You have any position to that?

10 **MS. WILLIAMS:** Even if it was an error or
11 later determined to be in error, at the time of
12 this trial, there was nothing so obvious about
13 it being an error that Mr. Johnson should have
14 objected to it. I also believe that there are
15 parts of the closing argument in which the judge
16 encouraged the jury to accept or reject any part
17 or except none of the evidence, some of it or
18 none of it at all.

19 **THE COURT:** You are saying the overall
20 telling of the general charge and the portions
21 of the general charge, in fact, say that is
22 sufficient for the jury.

23 **MS. WILLIAMS:** I do.

24 **THE COURT:** All right. What else do you
25 want to tell me about anything else, Mr.

1 Thompson?

2 MR. THOMPSON: Your Honor, just for the
3 record on the two further cases I handed up on
4 that point.

5 THE COURT: All right.

6 MR. THOMPSON: Going to the severance
7 issue, Your Honor, we argue that severance was
8 warranted in this case. I have handed up, uh,
9 Zafiro or is it Zafiro versus the United States,
10 506 U.S. 534. It is a 1993 decision from the
11 United States Supreme Court. The United States
12 of Supreme Court says that severance should be
13 granted when a risk might occur that the jury
14 should not consider -- such a risk might occur a
15 prejudice when evidence is the jury should not
16 consider against the defendant and that would
17 not be admissible if the defendant were tried
18 alone is admitted against a codefendant.

19 THE COURT: That would be when someone
20 requested severance.

21 MR. THOMPSON: Yes. We are arguing that
22 Mr. Roberson should have requested a severance.

23 THE COURT: He specifically said not only
24 did he not request it, he wanted this case to be
25 tried together.

1 **MR. THOMPSON:** Yes, Your Honor. What we
2 are arguing is that that strategy is objectively
3 unreasonable as it was with the codefendant
4 statement issue.

5 **THE COURT:** All right.

6 **MR. THOMPSON:** Because the only evidence
7 that the co-defendant fired a nine millimeter
8 handgun, that was the same gun that hit the
9 victim, the bullet that hit the victim, the only
10 evidence of that comes from the codefendant.
11 There's no other evidence whatsoever that puts
12 that kind of a gun in the hands of anybody on
13 the side of the defense. That evidence would
14 not have been admissible against the defendant
15 in this case had the charges been severed. That
16 is our primary basis for arguing for a
17 severance. Severance should have been moved for
18 and granted in this case, Your Honor.

19 **THE COURT:** All right.

20 **MR. THOMPSON:** With regard to the jury
21 instruction, Your Honor, I wasn't sure how this
22 issue would play out. I handed up a couple of
23 cases dealing with, uh, what should happen in
24 the event of a jury question. Rogers versus the
25 United States. It's a 1975 opinion from the

1 United States Supreme Court, 422 U.S. 35 as well
2 as -- I'm going to butcher this one too --
3 United States versus Berrigan Dennis, Fed Court
4 3rd, 1987, a 1968 decision out of the Ninth
5 Circuit Appeals. Basically, I know those are
6 dealing with federal procedural rules, but I
7 think there is a constitutional intervention in
8 place as well. That way, when the jury sends a
9 question to the judge, the procedure that needs
10 to be followed is they need to have a proceeding
11 on the record about what to do about the
12 question and the appropriate response to be
13 given.

14 In this case, Your Honor, the only thing
15 that's -- the only thing that's noted in the
16 record is that, uh, whereupon Court's Exhibit
17 Number four -- jury note was marked Court's
18 Exhibit Number four and that's it. Uh, we
19 allege that Mr. Roberson, assuming that he did
20 -- actually that he was consulted about the
21 instruction and what to -- about the note and
22 what instruction to give back to the jury, was
23 ineffective for failing to request that the jury
24 specifically be reinstructed on reasonable
25 doubt.

1 The phrase reasonable thought with the word
2 doubt in parentheses gives me a lot of pause,
3 uh, raises a great deal of concerned for me.
4 The jury may not have even understood the exact
5 phrase that they needed to find. They needed to
6 find something was guilty beyond a reasonable
7 doubt. They didn't even understand the burden
8 of proof and Mr. Roberson should have requested
9 that they be reinstructed on reasonable doubt,
10 uh, and perhaps the whole charge as a whole.

11 **THE COURT:** Your position is if he didn't
12 know about it, he was deficient because he
13 didn't know about it. But if he did know about
14 it, even though the jury had the opportunity
15 after receiving the response to request the
16 whole jury charge and apparently elected not to
17 do so, he should have gotten the jury to want to
18 hear it?

19 **MR. THOMPSON:** No, he should have insisted
20 that even if the jury didn't want to hear it
21 that they be brought in because they didn't
22 understand. With regards to the first aspect of
23 your question, Your Honor, uh, dealing with if
24 he didn't know about it, I'm not even -- I will
25 be quite honest. I am not even sure that that's

1 appropriate. I'm not sure how to procedurally
2 bring that issue up.

3 **THE COURT:** Wouldn't that have to be done
4 on direct --

5 **MR. THOMPSON:** Direct appeal? I think it
6 would be and there's no record of that. So to
7 the extent that Mr. Roberson was ineffective for
8 failing to examine the court file after the fact
9 and see if there was a note given and perhaps
10 filed a motion for new trial, that's about the
11 only thing I could think of that he could have
12 done. I will admit it's pretty difficult to
13 argue given Mr. Roberson's assertions that he
14 can't remember if he saw the charge or not, if
15 he saw the note. It is pretty difficult for me
16 to argue substantively that he should be -- that
17 Adams Gibson should be granted relief. There is
18 no conclusive proof as to whether or not he was
19 ever shown it.

20 Finally, Your Honor, in regard to the prior
21 inconsistent statements issue. I handed up
22 State versus Copeland, 278 S.C. 572, 300 S.E. 2d
23 63. Uh, that's a 1982 decision from the Supreme
24 Court. It's under Headnote 16. South Carolina
25 used to instruct the jury, uh, that they can

1 consider prior inconsistent statements only for
2 purposes of impeachment. That's what this judge
3 instructed them. They said, henceforth, we
4 shall allow whenever a prior inconsistent
5 statement is admitted that, if requested, the
6 judge should give a charge that, uh, -- that
7 they can consider those statements for the
8 truth, some or in part, to give it whatever
9 weight they see fit.

10 In the second case I handed up Your Honor,
11 State versus Caulder, 287 S.C. 507, 339 S.E.2d
12 876, 1986 decision from the South Carolina Court
13 of Appeals. The Court of Appeals held that the
14 failure to give that instruction is reversible
15 error in an appropriate case.

16 Here, the prior inconsistent statements --
17 and there are three in particular. They are
18 Shanta Wilson's prior inconsistent statement,
19 there's Melvin DeWitt's prior inconsistent
20 statement and there's Jaques Gibson's prior
21 inconsistent statement. In Shanta Wilson's
22 prior inconsistent statement, she gives far less
23 information and does not identify anybody as the
24 potential shooter in this case. In Melvin
25 DeWitt's statement, he alleges that he only

1 heard one set of shots. At trial, he testified
2 that there were two sets of shots. Uh, that
3 testimony was seized at the closing argument by
4 the state as the primary evidence that there
5 were two shooters and they were standing right
6 next to each other. Adams Gibson was one of
7 them and Jaques was the other. That Adams
8 Gibson was standing right outside the car and
9 was firing shots.

10 Those prior inconsistent statements, the
11 jury should have been instructed that they can
12 consider the prior inconsistent statements but
13 did not go to near the level of detail that even
14 their subsequent statements and subsequent
15 testimony did. They should be able to believe
16 that as the truth. That is a monumental issue
17 in this case, Your Honor.

18 I think it's -- again, going back to the
19 amount of time Mr. Roberson spent cross-
20 examining individuals. The two individuals he
21 spent the most time cross-examining are Melvin
22 DeWitt and Shanta Wilson and it's because of the
23 prior inconsistent statements. Mr. Roberson
24 testified he wanted that instruction should be
25 given to the jury.

1 The affidavit of --

2 **THE COURT:** Did he request that
3 instruction?

4 **MR. THOMPSON:** That's what I am getting to.
5 He requested an instruction. However, the
6 affidavits that I submitted ---

7 **THE COURT:** He didn't think it was
8 preserved.

9 **MR. THOMPSON:** By Bob Dudek. Yeah, by Bob
10 Dudek --- says that for a number of reasons for
11 failing to submit a proposed charge, for failing
12 to mention Copeland by name, for failing -- for
13 basically acquiescing this is to charge I'm
14 going to give and he says yes, sir. And for
15 failing to reobject to the charge, uh, at the
16 end, uh, the conclusion of the charge. All
17 those reasons the issue was not preserved.
18 Mr. Roberson wanted that charge. He just failed
19 in his duty to ensure that it was preserved.

20 **THE COURT:** All right. Ms. Williams, what
21 do you want to tell me?

22 **MS. WILLIAMS:** Your Honor, I think the
23 prior inconsistent statement issue is somewhat
24 mischaracterized in that these were not
25 statements that were admitted at trial as

1 impeachment of these witnesses.

2 This was just cross-examination where the
3 attorney drew things out from these witnesses
4 and they said, oh, these are -- things are
5 different in my prior statement. I think the
6 charge given about they could believe some, none
7 or all is exactly what Mr. Roberson was asking
8 for. That's what he told us he was asking for.
9 It was the appropriate charge because the jury
10 did not actually have actual witness statements
11 that were prior inconsistent statements to
12 compare that testimony to which is the subject
13 of cross-examination. Mr. Roberson's request
14 was, in essence, and I believe what he told us
15 was --

16 **THE COURT:** Tell me about be inferred
17 malice.

18 **MS. WILLIAMS:** Your Honor, I'll be candid
19 with you. When I prepared this case, I believed
20 that the argument was a Belcher argument. The
21 argument that's been made today was kind of new
22 for me. I will be glad to -- I apologize.

23 **THE COURT:** All right. I will give you 10
24 days to submit something in writing.

25 **MS. WILLIAMS:** Okay.

1 **THE COURT:** Anything further?

2 **MR. THOMPSON:** Nothing further. Would you
3 like me to submit a memorandum as well?

4 **THE COURT:** If you want to. You've argued
5 yours today. If you want to submit a memorandum
6 summarizing your argument -- I understand your
7 argument. But if you want to submit something
8 in response to what she does, then I'll give you
9 five days after that.

10 **MR. THOMPSON:** Okay. Will do.

11 **MS. WILLIAMS:** Your Honor, I do invite you
12 to look at the statements I have entered. It is
13 mischaracterization. There is nothing in those
14 statements about conspiring to say that we
15 didn't have a weapon that night. This was --

16 **THE COURT:** He is inferring that that is
17 what they said. We got together and said,
18 hey, --

19 **MS. WILLIAMS:** Well, those were other
20 witnesses. That was not in Jaques' statement.

21 **THE COURT:** All right. Thank y'all.

22 **MR. THOMPSON:** Thank you, Judge.

23 **END OF PROCEEDING**

24

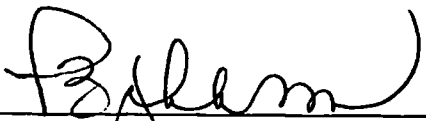
CERTIFICATE

73

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

I, the undersigned, Teresa B. Johnson, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Richland, South Carolina, on this 6th day of August, 2014.

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



Teresa B. Johnson
Official Court Reporter

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
ADAMS GIBSON, #322094,	)	CASE NO.: 2013-CP-40-2107
	)	
Applicant,	)	
	)	
v.	)	AFFIDAVIT OF ROBERT M. DUDEK
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

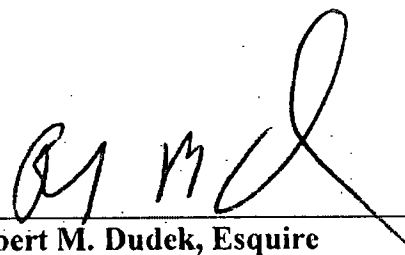
PERSONALLY appeared before me, **Robert M. Dudek**, who being duly sworn, deposes and says:

1. I am an attorney licensed to practice law in South Carolina. I am currently the Chief Appellate Defender for the South Carolina Office of Appellate Defense.
2. In connection with my employment at Appellate Defense, I represented the Applicant on his direct appeal to the South Carolina Court of Appeals and to the Supreme Court of South Carolina from his conviction and sentence in Richland County.
3. I have recently had an opportunity to review portions of the trial transcript in this matter. In particular, I reviewed pages 944-946, wherein counsel for the Applicant makes a request to charge the jury that they can accept some, none, or part of a prior inconsistent statement.
4. It is my opinion that this colloquy would not have preserved for appeal a claim that the trial court erred in failing to instruct the jury that they could consider a prior inconsistent statement as substantive evidence, and not merely for impeachment purposes, pursuant to State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982). This is my opinion because counsel would have needed to either specifically cite to Copeland, some other authority

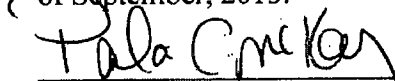
such as a specific charge book, or to file a specific request to charge with the trial court in order to preserve the denial of such a charge for appeal. The index to the trial transcript also does not show that any request to charge was made a court's exhibit or otherwise and the appellant obviously has the duty to make a record sufficient for appellate review. Finally, it strongly appears defense counsel acquiesced in the judge's offer to cover the request to charge with alternative language.

5. While I do not specifically recall the reasons for not raising an issue regarding the prior inconsistent statement charge on appeal, because it is my opinion that the request to charge issue was preserved for appeal for the reasons above, I would not have raised that issue on the Applicant's appeal.

FURTHER, AFFIANT SAYETH NOT.

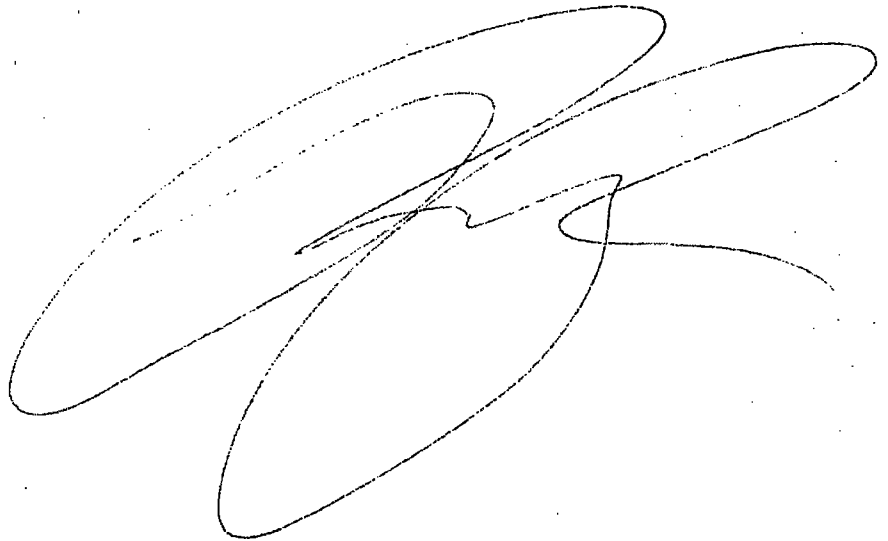

Robert M. Dudek, Esquire

SWORN TO BEFORE me this 29th day
of September, 2013.



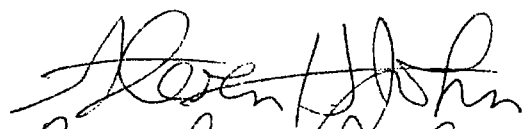
Notary Public for South Carolina
My Commission Expires: July 24, 2022

Can we get a whole copy - the law
as stated and reasonable thought?
(doubt)



5/24/07

I cannot comply with your request.
I can recharge the entire law given, or
recharge any particular portion that you
would like. This will need to be done
in the courtroom so the court reporter
can record it.



STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

ADAMS GIBSON, #322094,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2013-CP-40-2107

**MEMORANDUM OF LAW IN
SUPPORT OF APPLICATION FOR
POST-CONVICTION RELIEF**

NOW COMES the Applicant in the above-captioned action, acting by and through undersigned counsel, hereby submitting this Memorandum of Law in support of his Application for Post-Conviction Relief. The Applicant would respectfully show unto this Honorable Court the following:

I.
PROCEDURAL HISTORY

The Applicant and his co-defendant Jacques Gibson ("Jacques") were indicted by the Richland County Grand Jury for murder.¹ On May 21-24, 2007, the Applicant and Jacques proceed to a joint trial by jury before the Honorable Steven H. John. Both the Applicant and Jacques were convicted as charged. Judge John sentenced each defendant to thirty years' imprisonment for the murder offenses.

Following an unsuccessful direct appeal, the Applicant filed an Application for Post-Conviction Relief on April 8, 2013, which was subsequently amended on September 27, 2013. An evidentiary hearing was convened in this matter on October 1, 2013, at the conclusion of which this Court took the case under advisement but requested that the parties submit memoranda on the implied malice issue raised by the Applicant. The State filed its

¹ Jacques was also indicted for the offense of unlawful possession of a firearm by an individual under the age of 21.

Memorandum (hereinafter referred to as "Memorandum") on October 8, 2013. The Applicant now submits this memorandum of law in support of his contention that relief should be granted.

II. ALLEGATIONS

The Applicant alleges that his constitutional right to the effective assistance of counsel at trial, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, was violated in the following regards:

1. Trial counsel was ineffective for failing to object to the implied malice instructions inasmuch as the implied malice instructions did not contain explicit instructions to the jury that they could accept or reject the implication of malice.

As noted by the State in its Memorandum, this allegation contains two specific sub-allegations that defense counsel was ineffective for failing to object to the charge because: (1) the implied malice charge as given was burden-shifting; and (2) the implied malice charge as given did not substantively convey the common law of implied malice in South Carolina. See Memorandum at 1. This memorandum addresses both sub-allegations.

III. STANDARD OF REVIEW

The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRCP. In evaluating an Application for Post-Conviction Relief, the Applicant must demonstrate that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standard for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Strickland v.

Washington, 466 U.S. 668 (1984). In other words, the Applicant must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.; Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

IV. FACTUAL BACKGROUND

The South Carolina Court of Appeals' decision in this matter provides a good overview of the facts as presented at trial:

In September 2005, two groups of individuals, one from Ridgeway and one from Winnsboro, met at Chance's Bar in Columbia. Although the groups seemed to be getting along most of the evening, at some point, animosity developed between Demetric Davis, of Ridgeway, and Torri Boyd, of Winnsboro. Adams testified that shortly after the initial confrontation between Davis and Boyd, he called his brother, Jacques, to request a ride home.

Twenty to thirty minutes later, Jacques and two friends, Stephon and Vernon, arrived at Chance's in Jacques's white Ford sedan to pick up Adams. Jacques went inside to find Adams, while Stephon and Vernon waited in the car. Shortly thereafter, the dispute that had brewed inside Chance's spilled out into the parking lot and erupted into a physical altercation between numerous members of each group. According to several witnesses, neither Adams nor Jacques initially engaged in the fight; however, James Smith [sic] testified he saw Adams swing at someone and when Smith approached Adams in an effort to keep him away from one of the Winnsboro fellows, Jacques brandished a gun and told him "[not to] even think about it." Smith testified he fled at the sight of the gun.

Soon after the fight erupted, witnesses testified to hearing several shots. The witness accounts of the evening provide no clear picture of who fired weapons or how many shots were fired. However, many witnesses testified to seeing either Jacques,

Adams, or both, or "someone" in the vicinity of Jacques's white car, firing multiple shots.

One of the State's key witnesses, Shunta Williams [sic], testified that she left the bar and walked out to the parking lot to watch the fight. Most of the witnesses testified that Jacques remained near his white sedan, away from the fight, while Adams may have engaged in the melee. However, Williams testified that Jacques was engaging in the fight and that she saw Adams walk over to the white sedan, sit in the driver seat, reach under it, pull out a gun, and fire what she recognized as a small caliber handgun, either a .22 or .25. When the shots began, she retreated to the doorway of the bar to take cover. Moments later she claimed she heard another set of gunshots in the distance. She identified Adams as wearing jeans and a black tee shirt, although the other witnesses and evidence presented at trial indicated it was Jacques in the black tee shirt, and Adams was wearing a white tee shirt. Many of the accounts point to multiple sources of gunfire, but Williams maintains that Adams was the only shooter. During the melee, Dennis Irby was shot and killed by a single 9mm shot to the back of the left shoulder.

Adams spoke with the police twice. He first stated that he was not in the white Ford sedan with Jacques and did not see who did the shooting because he was in Lakisha Davis's car. He later admitted that after the altercation in the parking lot began, he exited Lakisha's car, at her request, to retrieve her cousin, Demetric. Adams denied having or firing a gun that night.

Jacques also gave two statements to the police. First he told the police that after he and his brother exited the bar, Adams went to Lakisha Davis's car and he returned to his white Ford sedan. He said he noticed a man retrieve something from a nearby SUV and place it behind his back, he suspected it was a gun but did not see it. After the fight broke out, Jacques stated Adams drove around in Lakisha's car, got out, and walked over toward the fighting. Although in his first statement Jacques denied he had a gun, Jacques later admitted that upon suspecting Smith was going to hit Adams, he pulled a gun and told Smith to "back off." Jacques said he then heard two shots and in response fired his 9mm three or four times "into the air" as he got in his car and drove away. He later disposed of his gun by tossing it over a bridge.

State v. Gibson, 390 S.C. 347, 351-353, 701 S.E.2d 766, 768-769 (Ct. App. 2010) (footnotes omitted).²

During the trial court's charge to the jury, the trial judge instructed the jury regarding murder as follows:

Both defendants in this case have been charged with the offense of murder. The State has to prove beyond a reasonable doubt that the defendant charged killed another person with malice aforethought. Malice: that's hatred, ill will, hostility towards another person. It's the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under such circumstances that the law would infer an evil intent.

Now, malice aforethought does not require that that malice exist for any particular time before the act was committed, but malice has to exist in the mind of the defendant just before and at the time the act was committed. Therefore, there has to be that combination of the previous evil intent and the act.

Now, malice aforethought can either be expressed or inferred. Express means that malice is shown when a person speaks words with express hatred or ill will for another or the person prepared beforehand to do the act which was later accomplished. Malice can be inferred from conduct showing a total disregard for human life. *Inferred malice may also arise when the deed is done with a deadly weapon.* A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends upon the facts and circumstances of each case.

I'll just give you some examples of deadly weapons. There's a lot of them, and I'm not—this is obviously not an exhaustive list. It could be a knife, a dagger, a slingshot, metal knuckles, a rifle, a shotgun, a *pistol*, a razor, gasoline. Any number of things that you determine from the facts would be a deadly weapon.

I tell you that in the State of South Carolina motive is not an element of the offense of murder and, therefore, the State need not prove motive.

² The Applicant believes that the Court of Appeals intended to refer to Antonio Smith as opposed to James Smith, and to Shunta Wilson as opposed to Shunta Williams. The Westlaw reproduction of the opinion erroneously refers to Torri Boyd as "Torn" Boyd; however, the Court of Appeals' original opinion correctly refers to Torri.

Trial Tr. p. 1018, line 9-p. 1019, line 17 (emphasis added). Defense counsel did not object to this portion of the jury charge. See Trial Tr. p. 1025, line 20-p. 1027, line 3. In his testimony before this Court, defense counsel testified that the only evidence of malice that he saw in this case—as to either the Applicant or his co-defendant Jacques—was the use of a deadly weapon.

V. DISCUSSION

In State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), the Supreme Court set forth a standard permissive inference charge to be used when instructing the jury on drawing an inference of malice when a deadly weapon was used in a homicide:

The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

279 S.C. at 421, 308 S.E.2d at 784. Immediately after promulgating the standard charge, the Supreme Court issued the following warning: “We caution the bench, that hereafter only slight deviations from this charge will be tolerated.” Id.

In the present case, the trial court gave an instruction similar to the first sentence of Elmore’s standard instruction but omitted the second sentence. The Applicant contends that the failure to include Elmore’s second sentence—“the general permissive inference instruction”—rendered the charge infirm under South Carolina’s common law. State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 811 (2009) (footnote 9). The Applicant further contends that the omission of the permissive inference instruction converted the charge into an unconstitutional presumptive charge. The Applicant argues that defense counsel’s failure to object to the charge on both of these bases constituted deficient conduct, and that this failure unquestionably prejudiced the

Applicant. The Applicant will first address the common law argument before turning to the unconstitutional nature of the charge.

A. The Inferred Malice Charge Violated the Common Law

1. The Substance of Elmore Was not Charged to the Jury

The Applicant contends that the inferred malice charge as given by the trial court was improper under South Carolina's common law. As noted above, the Supreme Court explicitly stated in Elmore that "only slight deviations" from its inferred malice charge "will be tolerated." 279 S.C. at 421, 308 S.E.2d at 784. Subsequently, both the Supreme Court and the Court of Appeals have consistently reaffirmed the importance of giving *both* sentences of the instruction. See generally State v. Lewellyn, 281 S.C. 199, 201, 314 S.E.2d 326, 327 (1984) ("The trial bench is reminded that the proper charge on implied malice is that suggested in Elmore");³ State v. Peterson, 287 S.C. 244, 247, 335 S.E.2d 899, 802 (1985) ("The judge *should make it clear to the jury* that it is free to accept or reject these permissive inferences depending on its view of the evidence") (emphasis added); Belcher, *supra*, 385 S.C. at 612, 685 S.E.2d at 811 (2009) (footnote 9);⁴ State v. Wilds, 355 S.C. 269, 277, 584 S.E.2d 138, 142 (Ct. App. 2003) ("In a charge to the jury, the judge *should make clear to the jury* that it is free to accept or reject the permissive inferences depending on its view of the evidence") (emphasis added). Given these

³ In Lewellyn, the Supreme Court also cited with approval the language set forth in State v. Mattison, 276 S.C. 235, 277 S.E.2d 598 (1981), which is very similar to Elmore in its suggested instruction:

[W]e strongly suggest to the Trial Bench that a more appropriate instruction on implied malice would deal with the evidentiary nature of the presumption and that the implication does not require the jury to infer malice but only permits it. *In other words, the presumption or inference of malice from the use of a deadly weapon is simply an evidentiary fact to be taken into consideration by the jury, along with other evidence in the case, and to be given such weight as the jury determines it should receive. The inference of malice may be drawn from proof of the use of a deadly weapon if the jury concludes such is proper after considering all of the facts and circumstances in evidence.*

276 S.C. at 238, 277 S.E.2d at 600 (emphasis added).

⁴ Belcher's ninth footnote will be addressed in greater detail below.

repeated reaffirmations of giving Elmore's instruction in its entirety, the Applicant contends that the Supreme Court's command that the jury be instructed that they can give the inference of malice whatever weight they see fit is a requirement that cannot be removed from a jury charge.

The charge given in this case was a significant deviation from Elmore because it gave only the first sentence of Elmore's standard charge and omitted the second sentence completely. While the State argues in its memorandum that the charge did not give "the exact language suggested in Elmore, the trial court's charge encompasses Elmore's essential concept," the charge did no such thing. Memorandum at 3. The instruction did not couch the inference in terms that permitted the jury to consider the inference in light of the other evidence admitted at the trial. Instead, the jury charge informed the jury that they could find malice existed from the simple use of a deadly weapon, thus ending the malice inquiry once the jury concluded that a deadly weapon was used. Elmore's second sentence places a requirement on the jury that they must hesitate to convict based solely on the inference of malice until after they've considered the inference in the context of the entire case. A similar instruction was not given in this case.

Moreover, if the State's assertion that the trial court charged the jury on "Elmore's essential concept" was correct, then there would be no need for the second sentence of Elmore's standard instruction. Instead, the Supreme Court would have just promulgated the following instruction: "The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise." The Supreme Court did not do so. By including the second sentence, the Supreme Court clearly conveyed its intent that the second sentence was just as necessary as the first sentence. Inasmuch as Elmore's second sentence was never given to the jury, the inferred malice instruction given in this case was erroneous.

2. Defense Counsel's Performance Was Deficient

A defense attorney's failure to object to jury instructions that fail to convey the proper standard for intent constitutes deficient conduct. See McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008) (improper standard on homicide by child abuse); Taylor v. State, 312 S.C. 179, 439 S.E.2d 820 (1993) (burden-shifting charge on possession with intent to distribute crack cocaine and marijuana). Similarly, a defense attorney's failure to object to improper charges on malice constitutes deficient conduct. Tate v. State, 351 S.C. 418, 570 S.E.2d 522 (2002).

The Applicant respectfully submits that defense counsel's failure to object to the jury charge on common law grounds constituted deficient performance. Elmore was decided in 1983, and the substance of its proposed charge has not been modified or overruled.⁵ Furthermore, defense counsel recognized that the most likely avenue for the jury to conclude that Jacques and the Applicant acted with malice was through the use of a deadly weapon. Given the centrality of the issue at the trial and the longstanding propriety of the charge, defense counsel's failure to object that the complete instruction be given as set forth in Elmore can be nothing less than deficient conduct.

The State attempts to argue that defense counsel's performance was not deficient because the charge as given was considered "textbook" by State v. Belcher, 385 S.C. 597, 601, 685 S.E.2d 802, 804 (2009), and because it is "almost verbatim the suggested jury charge promulgated in the Circuit Court Bench Book." Memorandum at 3. Both contentions are without merit.

With regard to the State's argument as to the "textbook" charge given in Belcher, the charge that was given by the trial judge in that case actually read:

⁵ Elmore was overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

Malice can ... be inferred from facts and circumstances that are proven by the State. Malice may be inferred by the use of a deadly weapon. *But these inferences are evidentiary only and may be considered by you along with all the other evidence and given such weight, if any, as you determine that they should receive.*

385 S.C. at 601, 685 S.E.2d at 804 (emphasis added). The Supreme Court considered the charge given in Belcher "textbook," therefore, because it conveyed all of the information provided by Elmore, including Elmore's second sentence. Later in the opinion, the Supreme Court reaffirmed Elmore by quoting with approval its second sentence in its entirety:

The standard implied malice charge remains valid, as does the general permissive inference instruction: "If facts, are proved beyond a reasonable doubt, sufficient to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, along with other evidence in the case, and you may give it such weight as you determine it should receive."

385 S.C. at 612, 685 S.E.2d at 810 (footnote 9). Therefore, if the citation to Belcher proves anything, it's to show that the Supreme Court still considers Elmore's instruction to be the standard instruction that must be given to juries in South Carolina when an implied malice charge is to be given. Consequently, Belcher actually supports the Applicant's position and undercuts the State's argument.

With regard to the State's argument that the Circuit Court Bench Book demonstrates that Elmore's second sentence is not always given, the Applicant contends that this fact, standing alone, is not dispositive. As an initial matter, the Bench Book is not easily accessible by the public,⁶ so it is difficult to know how defense counsel should know what is in the Bench Book.

⁶ In preparation for this Memorandum, undersigned counsel contacted the Supreme Court's library, the University of South Carolina School of Law's library, and Court Administration to obtain copies of the Bench Book. Neither library had copies of the Bench Book, and Court Administration informed undersigned counsel that the Bench Book could not be given to someone who was not a member of the judiciary. The only location where contents of the Bench Book can be publicly accessed, to undersigned counsel's knowledge, is the Charleston County Bar's website, which states that it has permission from Chief Justice Toal to publish the instructions on its website: <http://www.charlestonbar.org/CM/Custom/Jury-Charges.asp>. The citations to the Bench Book that follow are taken

Moreover, a proposed charge set forth in the Bench Book is not an equivalent for the actual charge set forth by the Supreme Court. It was incumbent upon defense counsel to make a proper objection based on Elmore, regardless of what was in the Bench Book.

Even if defense counsel should have known what was in the Bench Book, and the Bench Book is a standard by which defense counsel's performance should be judged, the Bench Book itself instructs trial judges that "[t]he suggested charge on malice inferred from the use of a deadly weapon is set out in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983)" in its Appendix, Note 1.7(2). Furthermore, while the Applicant cannot explain why the Bench Book does not contain similar provisions in its murder instruction charge, Elmore's permissive inference charge is given on sample charges for the offenses of administering poison, assault with intent to kill, and assault and battery with intent to kill. The permissive inference charge is also given in the felony murder inference. It's clear that the creators of the Bench Book intended for the Elmore charge to be given, and that the failure to include it specifically for murder may just be an oversight. Therefore, while Elmore's standard instruction is not set forth verbatim in the Bench Book's instruction on malice, the Bench Book clearly provides that the full Elmore instruction should be given.

In any event, other sources, aside from the Bench Book, recognize that Elmore's standard instruction should be given in full. Most recently, §§ 1-18—permissive inferences—and 2-1—murder—of South Carolina Requests to Charge-Criminal by Ralph King Anderson, Jr. (2nd Ed., 2012), quote Elmore largely verbatim. Similarly, the requested instruction on permissive inferences contained in Jury Instructions for Criminal Cases in South Carolina: Defendants' Requested Instructions by F. Patrick Hubbard (2nd Ed., 2001), states that the jury should be

from that website. It is likely not a posting of the most current copy of the Bench Book, as no decisions after 2004 are cited.

“free to accept or reject [a] permissive inference depending on your view of the evidence.” Finally, the proposed jury instruction for murder found at § 31-7 of Ervin's South Carolina Requests to Charge: Criminal by Tom J. Ervin (1994), quotes Elmore largely verbatim on multiple occasions. Using these sources as a guide, it is clear that the better practice of at least the last twenty years has been to charge Elmore in its entirety.⁷ Inasmuch as defense counsel did not object to the trial court's failure to charge Elmore in its entirety, it is clear that his performance was deficient.

3. The Improper Charge Prejudiced the Applicant

The Applicant respectfully submits that the prejudice that flowed from the erroneous and incomplete malice instruction given in this matter is stark and clear. During its closing argument, the State forcefully argued that the jury could infer malice simply through the use of a firearm without taking any other evidence into account. See Trial Tr. p. 956, lines 3-4 (“Malice may be inferred from the use of a deadly weapon alone”); p. 957, lines 4-5 (“The fact that a deadly weapon is used – the use of a deadly weapon, you can infer malice from that alone”). If the jury convicted the Applicant by following the State's argument, he was plainly prejudiced because the jury needed to understand that the inference of malice was only to be applied once the rest of the evidence in the case was considered.

Additionally, the evidence against the Applicant was extraordinarily weak, as virtually every witness at the trial testified that the Applicant was not involved in the fighting or the shooting.⁸ Furthermore, the State did not even contend that the Applicant was the fatal shooter.

⁷ The selected portions of these sources are attached to this memorandum.

⁸ The witness accounts of the Applicant's actions during the altercation are located in the record as follows:

Torri Boyd: Doesn't know (p. 256, line 22-p. 257, line 1)

Ravaris Henry: Not fighting; no gun; not in the Escort (p. 333, lines 3-13)

Antwan Martin: No gun (p. 375, lines 13-16)

Lakisha Davis: Standing outside; not involved in the fight (p. 431, lines 8-13)

See Trial Tr. p. 965, lines 12-14 (“There is no dispute and the State does not submit that the .25 caliber handgun that Kartez Gibson had caused the death of Dennis Irby”). However, one witness—Shunta Wilson—did testify that the Applicant fired shots and that Jacques was involved in the fight. See Trial Tr. p. 565, line 25-p. 567, line 2. Consequently, the jury could have convicted the Applicant on the basis that he was the shooter who killed the victim. By not including the permissive inference instruction set forth in Elmore, the trial court failed to instruct the jury that they did not have to convict the Applicant simply because they found that the Applicant used a firearm. The jury needed to know that they did not have to convict simply because a firearm was used. There is a very real possibility that they convicted the Applicant on this basis alone. Consequently, the Applicant contends that he was prejudiced by the trial court’s failure to give the permissive inference instruction set forth in Elmore.

Even if the jury convicted the Applicant as an accomplice and found that Jacques was the fatal shooter, the Applicant was still prejudiced because there was not overwhelming evidence that Jacques acted with malice. Jacques’ statements reveal that he did not intentionally shoot the victim and that he tried to shoot into the air without the intent of hurting anyone. See Trial Tr. p. 881, line 8-p. 885, line 10. There is no evidence of express malice. As in Belcher, “[i]t is entirely conceivable that the only evidence of malice was [Jacques’] use of a handgun.” 385 S.C. at 612, 685 S.E.2d at 810. The jury needed to be instructed that they had to review the

Demetric Davis: No gun; not fighting (p. 457, line 21-p. 458, line 1)

Tramele Davis: Definitely no gun (p. 488, line 21-p. 489, line 4)

Antonio Smith: Kicking and hitting Boyd (p. 506, lines 1-11)

Stephon Willingham: Standing away from the fight (p. 529, line 9-p. 530, line 8); no gun; not fighting (p. 541, lines 3-9)

Marcus Tucker: Standing off to the side; not fighting (p. 552, lines 7-17); no gun (p. 559, lines 8-11)

Shunta Wilson: Shooter (p. 565, line 25-p. 567, line 2)

Vernon Davis: Swinging down at someone; no gun (p. 808, lines 3-18; p. 829, line 11-p. 830, line 2)

inference of malice *in conjunction with* the other evidence in the case before concluding that Jacques acted with malice and convicting him, and the Applicant on an accomplice liability basis, of murder. Had they been given such an instruction, it is highly likely that the jury would have concluded that Jacques did not act with malice even though he possessed a firearm. Therefore, the Applicant contends that he was prejudiced by the trial court's failure to give the full Elmore instruction on an accomplice liability theory of guilt as well.

The Applicant also draws support for his conclusion that he was prejudiced from similar cases where favorable defense instructions were not given. The Supreme Court has found prejudice from a trial court's failure to give a mere presence charge, see Brunson v. State, 324 S.C. 117, 477 S.E.2d 711 (1996), and from a trial court's failure to give an alibi charge, see Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). In these cases, the Supreme Court concluded that the jury needed to have specific instructions on these legal principles lest the jury not understand that they could acquit on these bases. Cf. Memorandum at 3 (arguing that the charge was proper because the trial court "additionally instructed the jury that the burden of proof remained on the State"). Similarly, in this case, it is highly likely that the jury did not understand that they did not have to accept the inference of malice, and did not realize that they could acquit the Applicant and Jacques even if they found that either one used a deadly weapon. Accordingly, the failure to give Elmore's complete instruction prejudiced the Applicant.

As a final consideration, the Applicant would note that the Supreme Court overturned numerous convictions based on Elmore in an unmistakable effort to ensure that Elmore's standard instruction was given in the future. See Elmore, supra; Lewellyn, supra; Peterson, supra. These decisions were replete with warnings to trial judges that the failure to give the charge would constitute reversible error. Elmore, 279 S.C. at 421, 308 S.E.2d at 784 ("We

caution the bench, that hereafter only slight deviations from this charge will be tolerated”); Lewellyn, 281 S.C. at 201, 314 S.E.2d at 327 (“The trial bench is reminded that the proper charge on implied malice is that suggested in Elmore”). Here, Elmore was not given in full, and the failure to object to the charge unmistakably prejudiced the Applicant. The Applicant respectfully requests that this Court order a new trial.

B. The Inferred Malice Charge Was Unconstitutional

1. The Burden-Shifting Nature of the Charge

The Fifth and Fourteenth Amendments to the United States Constitution require that the State prove beyond a reasonable doubt each element of a crime before a criminal defendant can be convicted of that crime. In re Winship, 397 U.S. 358 (1970). “[A] State must prove every ingredient of an offense beyond a reasonable doubt, and ... it may not shift the burden of proof to the defendant” through a presumptive jury charge. Patterson v. New York, 432 U.S. 197, 215 (1977). Jury charges which create a presumption that malice existed in murder cases are unconstitutional. See generally Mullaney v. Wilbur, 421 U.S. 684 (1975); Yates v. Aiken, 484 U.S. 211 (1988).

“If a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption that relieves the State of its burden of persuasion on an element of an offense, the potentially offending words must be considered in the context of the charge as a whole.” Francis v. Franklin, 471 U.S. 307, 315 (1985). A reviewing court must determine if “‘there is a reasonable likelihood that the jury has applied the challenged instruction in a way’ that violates the Constitution.” Estelle v. McGuire, 502 U.S. 62, 72 (1991) (quoting Boyde v. California, 494 U.S. 370, 380 (1990)).

jury that inferred malice arises whenever a deadly weapon was used. This is particularly true when the instruction is read in conjunction with the previous sentence, which instructed the jury that “[m]alice can be inferred from conduct showing a total disregard for human life.” Trial Tr. p. 1019, lines 2-3. With the “total disregard” instruction, the jury would have to review all of the evidence before concluding that the inference of malice arose. However, the “deadly weapon” instruction placed no such limitations on when the inference of malice arose. Instead, the jury would have logically concluded that malice arose if they found that a deadly weapon was used. This reading of the instruction makes the instruction burden-shifting.

2. Defense Counsel’s Performance Was Deficient

The Petitioner contends that defense counsel’s performance “fell below an objective standard of reasonableness” when he failed to object to the malice charge. Simpson v. Moore, 367 S.C. 587, 595-596, 627 S.E.2d 701, 706 (2006). The Supreme Court has squarely held that the failure to object to a burden-shifting malice charge constitutes deficient conduct. See Lowry v. State, 376 S.C. 499, 507, 657 S.E.2d 760, 764 (2008) (“[W]e hold that the jury’s application of the instruction violated Petitioner’s due process rights and therefore, that counsel was deficient in failing to object to the charge”). Furthermore, it is difficult to envision a scenario where a trial attorney could “articulate[] a valid reason” for failing to object to such an unconstitutional charge. Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000); see also Smith v. State, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010) (“[W]e can discern no defensible basis for trial counsel’s failure to challenge the forensic interviewer’s objectionable testimony”). Defense counsel’s only explanation for failing to object to the charge was that he didn’t believe that it was burden-shifting. As that explanation is an admission that he did not realize the improper nature of the charge, defense counsel did not take any valid strategic action

in failing to object to the charge. Consequently, the Petitioner submits that defense counsel's performance was unquestionably deficient under Strickland.

3. The Improper Charge Prejudiced the Applicant

In determining prejudice, this Court must "address the issue of whether 'beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.'" Arnold & Plath v. State, 309 S.C. 157, 165, 420 S.E.2d 834, 838 (1992) (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). This analysis requires this Court to "take two quite distinct steps." Yates v. Evatt, 500 U.S. 391, 404 (1991), overruled on other grounds by Estelle v. McGuire, *supra*. "First, it must ask what evidence the jury actually considered in reaching its verdict." Id. "Once a court has made the first enquiry into the evidence considered by the jury, it must then weigh the probative force of that evidence as against the probative force of the presumption standing alone." Id. This inquiry is the same for evaluating the prejudice prong of Strickland. Lowry, *supra*.

As has been shown above, there was little to no evidence of malice aside from the use of a firearm with regard to either the Applicant (if Shunta Wilson was believed) or Jacques (if Shunta Wilson was not believed). Consequently, the evidence that the jury actually considered in reaching its verdict is likely only the evidence that a firearm was used. Furthermore, as was discussed in greater detail above, there was a significant amount of evidence that neither the Applicant nor Jacques acted with malice in firing a firearm, aside from the actual firing of a firearm. Accordingly, the probative force of the evidence does not compel a conviction for murder without the presumptive malice charge. Given the lack of evidence of malice and the presumptive nature of the charge, it is highly likely that the jury convicted the Applicant based

solely on the burden-shifting nature of the jury charge. The proper remedy for such an error is a new trial. See Lowry, supra.

VI
CONCLUSION

The jury instruction given in this case was a significant deviation from a standard charge promulgated by the Supreme Court almost thirty years ago.¹⁰ and reaffirmed in full by the Supreme Court as recently as Belcher. By failing to convey Elmore's substantive instructions, the trial court failed to comply with Elmore. Defense counsel's failure to object to the implied malice charge constituted deficient conduct, and the Applicant was clearly prejudiced by this deficient performance. The Applicant respectfully requests that this Court grant him a new trial.

Respectfully submitted,

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This ____ day of October, 2013.

¹⁰ Elmore was decided on November 1, 1983.

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Adams Gibson, #322094,)

Case No.: 2013-CP-40-2107

Applicant,)

v.)

MEMORANDUM

State of South Carolina,)

Respondent.)

This matter comes before the court by way of an application for post-conviction relief filed April 8, 2013. Following a hearing on the merits of that application on October 1, 2013, the court requested a memorandum on one of the issues raised in the application.

Applicant alleges that trial counsel was ineffective in failing to object to a jury charge on inferred malice as the court's charge (1) was a presumptive charge and (2) even if not burden shifting, failed to convey essential language required by South Carolina law as stated in State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983). The charge as given by the trial court in this matter in 2007 developed from a series of cases clarifying the proper content of the charge on inference of malice. The charge as a whole constitutes a proper statement of law, does not constitute impermissible burden shifting, and is almost verbatim the Circuit Court Benchbook charge given both before and for many years after Applicant's trial. For these reasons, Counsel was not ineffective in failing to object.

In 1983, the South Carolina Supreme Court set forth the following suggested charge on the inference of malice:

The law says that if one intentionally kills another with a deadly weapon, the inference of malice may arise. If facts are proved beyond a reasonable doubt sufficient to raise an inference of the

malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983).

In 1985, in State v. Peterson, 287 S.C. 244, 335 S.E.2d 800, the Supreme Court found erroneous a charge containing multiple uses of the terms "presumption," "rebuttable," and "implied and presumed," calling them "constitutionally infirm phrases." The Court guided the trial bench to replace such terms with phrases such as "might infer" or "may be presumed" to denote a permissive inference.

In keeping with this guidance, in the case at bar, the trial court charged the jury on murder and the inference of malice as follows:

Both defendants in this case have been charged with the offense of murder. The State has to prove beyond a reasonable doubt that the defendant charged killed another person with malice aforethought.

Malice: that's hatred, ill will, hostility towards another person. It's the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under such circumstances as that the law would infer an evil intent.

Now, malice aforethought does not require that that [sic] malice exist for any particular amount of time before the act was committed but malice has to exist in the mind of the defendant just before and at the time the act was committed. Therefore, there has to be that combination of the previously evil intent and the act.

Now, malice aforethought can either be express or *inferred*. Express means that malice is shown when a person speaks words with express hatred or ill will for another or the person prepared beforehand to do the act which was later accomplished. Malice *can be inferred* from conduct showing a total disregard for human life. *Inferred malice may also arise* when the deed is done with a deadly weapon. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon *depends upon the facts and circumstances of each case*.

I'll just give you some examples of deadly weapons. There's a lot of them, and I'm not – this is obviously not an exhaustive list. It could be a knife, a dagger, a slingshot, metal knuckles, a rifle, a shotgun, a pistol, a razor, gasoline. Any number of things that you *determine from the facts* would be a deadly weapon.

[Emphasis supplied.] (Tr. p. 1018, line 9 – p. 1019, line 14.) While not charging the exact language suggested in Elmore, the trial court's charge encompasses Elmore's essential concept. The trial court's charge clearly conveys to the jury a permissive inference instead of a presumption, relying on phrases such as "can be inferred," "may arise," and "depends on the facts and circumstances of each case." The court also additionally instructed the jury that the burden of proof remained on the State. (See for example Tr. p. 1014, line 6 – p. 1015, line 11; p. 106, lines 18-24; p. 1020, lines 2-5.) The charge as a whole therefore constitutes a proper charge on the law. See for example State v. Burton, 302 S.C. 494, 397 S.E.2d 90 (1990) (jury instruction is sufficient if, when considered as a whole, it covers the law applicable to the case).

Further, as noted in Belcher v. State, 385 S.C. 597, 601, 685 S.E.2d 802, 804 (2009), the charge given by the trial court has long been considered "textbook." The charge given by the trial court in this case is substantially similar to the charge considered in Belcher and almost verbatim the suggested jury charge promulgated in the Circuit Court Bench Book. Compared with Bench Books of 2006, 2007, 2008, 2009, and 2011 the trial court's charge tracks the suggested charge nearly verbatim.¹ Therefore, the charge given in the present case was the charge commonly given at the time of Applicant's trial and is still a permissible charge in cases such as this one where no evidence was presented to reduce, mitigate, excuse or justify the homicide.² See Belcher, supra. (where a jury is asked to consider a lesser included offense of murder or a defense, the permissive inference charge violates common law). Even if this court

¹ Copies of the cited Bench Book charges are attached to this memorandum.

² No lesser offense was charged, and Applicant's defense consisted primarily of a theory that he was merely present, not acting in concert with his brother and co-defendant, Jacques Gibson.

should determine that the charge is no longer appropriate, it is well accepted that Counsel is not required to be clairvoyant. Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994). For all these reasons, in noting no objection to the court's charge, trial counsel performed within the range of accepted practice.

Finally, even if the charge were erroneous and counsel considered deficient in failing to object, the charge would not be considered prejudicial where, as here, there were no defenses or circumstances tending to reduce, mitigate, or justify the homicide. Belcher at 611-612, 685 S.E.2d 809-810; see also State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008) (to warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant).

The State therefore requests that the relief requested by the Applicant be denied and that this allegation, along with all others contained in the application, be dismissed.

Respectfully submitted,

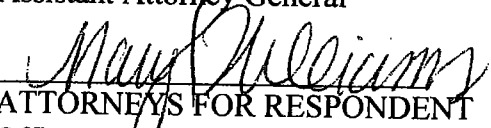
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Oct. 8, 2013.

2006 Bench Book ChargeMURDER

THE DEFENDANT IS CHARGED WITH MURDER. THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT KILLED ANOTHER PERSON WITH MALICE AFORETHOUGHT.

MALICE IS HATRED, ILL WILL, OR HOSTILITY TOWARDS ANOTHER PERSON. IT IS THE INTENTIONAL DOING OF A WRONGFUL ACT WITHOUT JUST CAUSE OR EXCUSE AND WITH AN INTENT TO INFLICT AN INJURY OR UNDER CIRCUMSTANCES THAT THE LAW WILL INFER AN EVIL INTENT.

MALICE AFORETHOUGHT DOES NOT REQUIRE THAT MALICE EXISTS FOR ANY PARTICULAR TIME BEFORE THE ACT IS COMMITTED, BUT MALICE MUST EXIST IN THE MIND OF THE DEFENDANT JUST BEFORE AND AT THE TIME OF THE ACT IS COMMITTED. THEREFORE, THERE MUST BE A COMBINATION OF THE PREVIOUS EVIL INTENT AND THE ACT.

MALICE AFORETHOUGHT MAY BE EXPRESS OR INFERRED. THESE TERMS, "EXPRESS" AND "INFERRED" DO NOT MEAN DIFFERENT KINDS OF MALICE BUT MERELY THE MANNER IN WHICH MALICE MAY BE SHOWN TO EXIST. THAT IS EITHER BY DIRECT EVIDENCE OR BY INFERENCE FROM THE FACTS AND CIRCUMSTANCES WHICH ARE PROVED. EXPRESS MALICE IS SHOWN WHEN A PERSON SPEAKS WORDS WHICH EXPRESS HATRED OR ILL WILL FOR ANOTHER OR WHEN THE PERSON PREPARED BEFOREHAND TO DO THE ACT WHICH WAS LATER ACCOMPLISHED; FOR EXAMPLE, LYING IN WAIT FOR A PERSON OR ANY OTHER ACTS OF PREPARATION GOING TO SHOW THAT THE DEED WAS WITHIN THE DEFENDANT'S MIND WOULD BE EXPRESS MALICE.⁴¹

MALICE MAY BE INFERRED FROM CONDUCT SHOWING A TOTAL DISREGARD FOR HUMAN LIFE. INFERRED MALICE MAY ALSO ARISE WHEN THE DEED IS DONE WITH A DEADLY WEAPON. A DEADLY WEAPON IS ANY ARTICLE, INSTRUMENT, OR SUBSTANCE WHICH IS LIKELY TO CAUSE DEATH OR GREAT BODILY HARM. WHETHER AN INSTRUMENT HAS BEEN USED AS A DEADLY WEAPON DEPENDS ON THE FACTS AND CIRCUMSTANCES OF EACH CASE.

THE FOLLOWING ARE EXAMPLES OF INSTRUMENTS WHICH MAY BE DEADLY WEAPONS: A PISTOL, A SHOTGUN, A RIFLE, A DIRK, A DAGGER, A KNIFE, A SLING SHOT, METAL KNUCKLES, A RAZOR, GASOLINE, A FIRE BOMB OR MOLOTOV COCKTAIL, AND LIGHTER FLUID.⁴² A GUN MAY BE A DEADLY WEAPON EVEN IF IT IS NOT OPERATING.⁴³

2007 Circuit Court Bench Book ChargeMURDER

THE DEFENDANT IS CHARGED WITH MURDER. THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT KILLED ANOTHER PERSON WITH MALICE AFORETHOUGHT.

MALICE IS HATRED, ILL WILL, OR HOSTILITY TOWARDS ANOTHER PERSON. IT IS THE INTENTIONAL DOING OF A WRONGFUL ACT WITHOUT JUST CAUSE OR EXCUSE AND WITH AN INTENT TO INFLICT AN INJURY OR UNDER CIRCUMSTANCES THAT THE LAW WILL INFER AN EVIL INTENT.

MALICE AFORETHOUGHT DOES NOT REQUIRE THAT MALICE EXISTS FOR ANY PARTICULAR TIME BEFORE THE ACT IS COMMITTED, BUT MALICE MUST EXIST IN THE MIND OF THE DEFENDANT JUST BEFORE AND AT THE TIME OF THE ACT IS COMMITTED. THEREFORE, THERE MUST BE A COMBINATION OF THE PREVIOUS EVIL INTENT AND THE ACT.

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THE FOLLOWING ARE EXAMPLES OF INSTRUMENTS WHICH MAY BE DEADLY WEAPONS: A PISTOL, A SHOTGUN, A RIFLE, A DIRK, A DAGGER, A KNIFE, A SLING SHOT, METAL KNUCKLES, A RAZOR, GASOLINE, A FIRE BOMB OR MOLOTOV COCKTAIL, AND LIGHTER FLUID.⁴² A GUN MAY BE A DEADLY WEAPON EVEN IF IT IS NOT OPERATING.⁴³

2008 Circuit Court Bench Book ChargeMURDER

THE DEFENDANT IS CHARGED WITH MURDER. THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT KILLED ANOTHER PERSON WITH MALICE AFORETHOUGHT.

MALICE IS HATRED, ILL WILL, OR HOSTILITY TOWARDS ANOTHER PERSON. IT IS THE INTENTIONAL DOING OF A WRONGFUL ACT WITHOUT JUST CAUSE OR EXCUSE AND WITH AN INTENT TO INFLICT AN INJURY OR UNDER CIRCUMSTANCES THAT THE LAW WILL INFER AN EVIL INTENT.

MALICE AFORETHOUGHT DOES NOT REQUIRE THAT MALICE EXISTS FOR ANY PARTICULAR TIME BEFORE THE ACT IS COMMITTED, BUT MALICE MUST EXIST IN THE MIND OF THE DEFENDANT JUST BEFORE AND AT THE TIME OF THE ACT IS COMMITTED. THEREFORE, THERE MUST BE A COMBINATION OF THE PREVIOUS EVIL INTENT AND THE ACT.

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MALICE MAY BE INFERRED FROM CONDUCT SHOWING A TOTAL DISREGARD FOR HUMAN LIFE. INFERRED MALICE MAY ALSO ARISE WHEN THE DEED IS DONE WITH A DEADLY WEAPON. A DEADLY WEAPON IS ANY ARTICLE, INSTRUMENT, OR SUBSTANCE WHICH IS LIKELY TO CAUSE DEATH OR GREAT BODILY HARM. WHETHER AN INSTRUMENT HAS BEEN USED AS A DEADLY WEAPON DEPENDS ON THE FACTS AND CIRCUMSTANCES OF EACH CASE.

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2009 Circuit Court Bench Book ChargeHOMICIDEMURDER

THE DEFENDANT IS CHARGED WITH MURDER. THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT KILLED ANOTHER PERSON WITH MALICE AFORETHOUGHT.

MALICE IS HATRED, ILL WILL, OR HOSTILITY TOWARDS ANOTHER PERSON. IT IS THE INTENTIONAL DOING OF A WRONGFUL ACT WITHOUT JUST CAUSE OR EXCUSE AND WITH AN INTENT TO INFLICT AN INJURY OR UNDER CIRCUMSTANCES THAT THE LAW WILL INFER AN EVIL INTENT.

MALICE AFORETHOUGHT DOES NOT REQUIRE THAT MALICE EXISTS FOR ANY PARTICULAR TIME BEFORE THE ACT IS COMMITTED, BUT MALICE MUST EXIST IN THE MIND OF THE DEFENDANT JUST BEFORE AND AT THE TIME OF THE ACT IS COMMITTED. THEREFORE, THERE MUST BE A COMBINATION OF THE PREVIOUS EVIL INTENT AND THE ACT.

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2010 Bench Book Charge**MURDER**

THE DEFENDANT IS CHARGED WITH MURDER. THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT KILLED ANOTHER PERSON WITH MALICE AFORETHOUGHT.

MALICE IS HATRED, ILL WILL, OR HOSTILITY TOWARDS ANOTHER PERSON. IT IS THE INTENTIONAL DOING OF A WRONGFUL ACT WITHOUT JUST CAUSE OR EXCUSE AND WITH AN INTENT TO INFLICT AN INJURY OR UNDER CIRCUMSTANCES THAT THE LAW WILL INFER AN EVIL INTENT.

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2011 Bench Book ChargeMURDER

THE DEFENDANT IS CHARGED WITH MURDER. THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT KILLED ANOTHER PERSON WITH MALICE AFORETHOUGHT.

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
		2013-CP-40-2107
Adams Gibson, #322094,	)	
	)	
Applicant,	)	
	)	
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 8, 2013. An evidentiary hearing into the matter was convened on October 1, 2013, at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Jeremy Thompson, Esquire. The Respondent was represented by Mary S. Williams of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying was Nathaniel Roberson, Esquire ("Counsel"). This Court had before it the records of the Richland County Clerk of Court, the trial transcript, the appellate records, and the Applicant's records from the South Carolina Department of Corrections.

PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was true bill indicted during the October 2005 term of the Richland County Grand Jury for Murder (2005-GS-40-9085). Nathaniel Roberson, Esquire, ("Counsel") represented Applicant. On May 21-24, 2007, Applicant proceeded to a jury trial before the

Honorable Steven H. John, where he was convicted as indicted. On May 24, 2007, Judge John sentenced Applicant to thirty years imprisonment.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Robert M. Dudek, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence on September 29, 2010. State v. Gibson, No. 4747 (Ct. App. Sept. 29, 2010). Applicant thereafter filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. The Supreme Court subsequently dismissed Applicant's Petition as Improvidently Granted. State v. Gibson, No. 27221 (February 13, 2013). The Remittitur was issued on March 1, 2013.

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

1. Ineffective assistance of trial counsel
 - a. Defense counsel failed to conduct an adequate investigation into the Applicant's case.
 - b. Defense counsel failed to adequately prepare for trial and failed to make appropriate objections and motions at trial.
2. Ineffective assistance of appellate counsel
 - a. Appellate counsel failed to raise all meritorious claims on appeal.

In his amended application for post-conviction relief (PCR), Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Trial counsel was ineffective for failing to request a jury instruction on the lesser-included offense of voluntary manslaughter;
2. Trial counsel was ineffective for failing to object to the introduction of Jacques Gibson's statement on Confrontation Clause grounds;
3. Trial counsel was ineffective for failing to request a jury instruction that Jacques Gibson's statements could only be considered as evidence against Jacques Gibson;
4. Trial counsel was ineffective for failing to move to sever and for failing to request a separate trial from Jacques Gibson;

5. Trial counsel was ineffective for failing to request that the jury be reinstructed regarding reasonable doubt following the jury's note to the Court marked as Court's Exhibit #4;
6. Trial counsel was ineffective for failing to object to the implied malice instructions inasmuch as the implied malice instructions did not contain explicit instructions to the jury that they could accept or reject the implication of malice;
7. Trial counsel was ineffective for failing to preserve his argument that the jury should be instructed that prior inconsistent statements of witnesses could be considered by the jury as substantive evidence and not simply as evidence of impeachment;
8. Appellate counsel was ineffective for failing to argue on appeal that the trial court erred in failing to instruct the jury that prior inconsistent statements of witnesses could be considered by the jury as substantive evidence and not simply as evidence of impeachment.

SUMMARY OF FACTS ADDUCED AT TRIAL

On September 4, 2005, a group of young men from Winnsboro travelled to Chance's Sports Bar on Two Notch Road in Columbia. The group consisted of Torri Boyd, Ravaris Henry (known as "B"), Antwan Martin (known as "AJ"), and Dennis Irby. The Winnsboro group met with another friend from Winnsboro, Antonio Smith (known as "Yo-Yo"), at Chance's. The same evening, another group from Ridgeway went to Columbia for a night out. The Ridgeway group planned to go to a bowling alley, but when it was closed, they proceeded to Chance's. The Ridgeway group at Chance's consisted of Lakisha Davis (known as "Punkin"), Marcus Tucker, Demetric Davis (known as "Bam"), Tramele Davis, and Applicant. The Ridgeway group arrived in Lakisha's burgundy car. Various members of the groups knew one another, having attended the same schools and being from the same general community. Initially there were no problems between the groups; Henry and Tramele even bought drinks for one another at the bar.

The mood soon soured, however. Boyd testified about his minor run-ins with Applicant and Demetric on prior occasions. Boyd stated that Lakisha went to the jukebox, and he warned

her not to waste her money as the machine had taken his money earlier. According to Boyd, Applicant was angry and told Lakisha not to speak to Boyd. Boyd stated that he attempted to smooth things over, following Applicant to the bathroom to talk. When Applicant left the bathroom, Boyd heard him on a cell phone telling someone how to get to Chance's. Testimony established Applicant called his younger brother, Jacques, and directed him to Chance's. The defense maintained that the phone call was made simply to have Jacques pick Applicant up because Applicant was concerned that there may be fighting. The State's theory was that Applicant summoned Jacques to the scene as back up and because Jacques was driving Applicant's car with a weapon inside. Jacques arrived in a white Ford Escort.¹ Leaving his friends Stephon Willingham (known as "Fat Man") and Vernon Davis, Jr. (known as "Du Wop") in the car, Jacques went inside Chance's to locate Applicant. According to some witnesses, words were exchanged inside the bar, and the proprietor addressed the groups about the unruly behavior.

The groups ultimately exited Chance's and spilled into the parking lot. Applicant did not go to Jacques' car. Instead, he went to Lakisha's burgundy sedan. While witnesses vary in details, it was generally agreed that Boyd and Demetric began arguing in the parking lot. The quarrel apparently arose from an allegation that Boyd's cousin had robbed Demetric, and Demetric believed that Boyd had a role in it. As the quarrel escalated, Tramele took off his shirt, ran around the vehicle, and hit Henry with a beer can. At that point, a physical fight erupted.

Through testimony of the various parties, it was posited that Boyd was fighting with Demetric, Henry was fighting with Tramele, and Tucker was fighting with Martin. Each man

¹ The white Escort was actually registered to Applicant's girlfriend's uncle, but Applicant exercised ownership of the car. He apparently loaned the car to Jacques on this occasion. For ease of reference, the vehicle is referred to as Jacques' car as Jacques drove the white Escort to and from the scene. However, part of the State's theory was that Applicant knew there was a weapon(s) in his vehicle, prompting him to tell Jacques to come to Chance's.

involved in pairs fighting denied that his opponent had a gun and claimed to hear shots after the physical fight began. Smith was also eliminated as a possible shooter because Jacques claimed to have a gun aimed at him when the shots rang out. Tramele testified that Irby hit him once but mostly observed the fight. Smith apparently tried to serve as a peacemaker, and Smith testified that Irby was also attempting to break up the fight. According to several witnesses Applicant was not involved in the fight, though Smith reported seeing Applicant kick Boyd and Vernon reported seeing Applicant swinging at someone. As Smith moved toward Applicant to intervene, Jacques drew a pistol, pointed it at Smith, and said, "Yo-yo, don't even think about it." Thereafter, shots were fired, suddenly sending everyone scurrying. Irby, however, had been shot in the back with a single nine-millimeter bullet. A patron of Chance's unconnected with the groups from Winnsboro and Ridgeway, Shunta Wilson, attempted to render aid. Irby died of complications from the wound later that night.

Various witnesses were unable to identify precisely where the shots came from but nearly unanimously agreed that there were louder shots as well as quieter shots, more like popping. In addition to the nine-millimeter bullet recovered from Irby's body, .25 caliber casings were found at the scene. Additional fragments were consistent with nine-millimeter shells. Pursuant to testimony and shell fragments found in tires of two vehicles, the gunfire appeared to be aimed or at least consistently in the area where the individuals were fighting.

Willingham saw a black object in Jacques' hand, possibly a gun, and saw Smith back away when Jacques approached. Willingham then heard gunshots. Vernon saw Jacques fire from the vehicle, though Vernon stated that the weapon was not pointed at anyone. Wilson, watching from just inside Chance's, claimed that Applicant had approached the white Escort, retrieved a gun, and fired. Wilson believed that Applicant was the shooter, and Jacques was involved in the

fight.² Another patron unconnected to the groups, Melvin DeWitt, saw a gun fired from the white car and stated there was another gun outside the car. Henry reported seeing Jacques with a gun firing into the air then hearing a second set of shots. By eliminating the pairs fighting, Smith in Jacques' control, Irby on the sidelines, and Stephon and Vernon inside Applicant's vehicle uninvolved in the fight, the State theorized that in addition to Jacques' nine-millimeter weapon, Applicant was the only possible remaining shooter. (Tr. p. 968, line 5 – p. 969, line 22.)

Applicant initially gave a statement stating that he had not seen who was firing as he sat in Lakisha's car. He later stated that, at Lakisha's request, he had entered the fray to get her cousin Demetric. Applicant consistently denied possessing or firing a gun. Jacques provided a handwritten statement on notebook paper when police took him into custody from his high school. In the handwritten statement, Jacques claimed that he responded to a call from Applicant to pick him up because a conflict was brewing at Chance's. Jacques claimed that he went in to retrieve Applicant, and an argument broke out. Applicant went to Lakisha's car, and Jacques returned to the white car. Jacques claimed that he "was like y'all chill out" before fighting broke out, and gunshots followed. Jacques wrote that he pulled away when he heard the shots. Thereafter, Jacques gave two statements to police. In the first, Jacques recounted the phone call from Applicant and arriving at Chance's to pick him up. In this statement, Jacques claimed that a man from Winnsboro who he did not know "went over to a grey SUV and got something out of the back and put it in his pocket. Then he put it behind his back and walked back over by the group. I thought it might be a gun but I didn't see one." Jacques denied having a gun and maintained that he drove off upon hearing "maybe three" gunshots, later seeing Applicant in the

² Wilson stated that Applicant wore a black tee shirt and blue jeans. Other witnesses testified that Jacques had been wearing a black tee shirt and Applicant white tee shirt. Applicant also told police he had been wearing a white tee shirt.

burgundy car as they passed on the way to Ridgeway. In his second statement, Jacques admitted that he was not completely forthright in his earlier statement. Jacques explained that the first statement to law enforcement was true "except when you get to the part where I said 'I didn't shoot out of the car.'" In this statement, Jacques stated that he had pulled around in the white car while Applicant pulled around in the burgundy car. Arguing started, and Jacques saw "the big dude reach in his SUV, and he pulled something and put it in his pocket, but I didn't see what it was." Fighting broke out. Jacques then saw Smith approach Applicant, and Jacques pulled out a gun and told Smith not to try to hit Applicant. Jacques reported that Smith backed away while the others were still fighting. He then claimed to hear two gunshots before pulling away in the white car. Jacques admitted that he was firing as he pulled away. Jacques reflected that he "was shooting the gun in the air when [he] first started but the gun may have dropped down." Jacques conceded he may have shot Irby, but stated "I didn't just look at him and shoot him... I promise I don't remember seeing him and aiming."

Jacques guided police to a bridge where he disposed of the gun, but conditions at the site prevented divers from locating the weapon. Jacques also described a location where he had thrown shells from the window of the car, but a search was unsuccessful. Law enforcement found no additional evidence linking the brothers to the scene during a search of their homes and the white Escort days later. However, in addition to Jacques' statements regarding disposal of evidence, there was testimony that Jacques had stopped along the route home, though his passengers did not see what he did when he got out of the car. Additionally, witnesses reported that the Ridgeway group met at Demetric's house afterward, and the State theorized that they discussed their stories at that point.

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).

Failure to Request Jury Charge on Voluntary Manslaughter

Applicant argues that Counsel was ineffective in failing to request a jury charge on voluntary manslaughter.

The evidence presented at trial determines the law to be charged, and a trial court commits reversible error in failing to give a requested charge on an issue raised by the evidence. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). This court finds that Counsel was not unreasonable in failing to request a charge on voluntary manslaughter as it was not supported by the evidence. As set forth in State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009):

Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. State v. Pittman, 373 S.C. 527, 572, 647 S.E.2d 144, 167 (2007). The sudden heat of passion, upon sufficient legal provocation, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence. Id. To warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. Id. at 572, 647 S.E.2d at 168.

There is no evidence in the record to support sufficient legal provocation. Under the hand of one, hand of all theory, Jacques introduced a weapon into the fight based on a belief that Smith was

about to punch his brother. According to the evidence presented at trial, neither Jacques nor Applicant had been confronted with a weapon and neither man had been confronted in such a way as to constitute provocation..³

Counsel also testified that he did not request a voluntary manslaughter charge because such a request would require arguing that there was a justification for the shooting; this argument would require concession that either his client was a shooter or there was a common plan with Jacques. Counsel summarized the defense theory in two parts: (1) Applicant was not the shooter and (2) Applicant was not trying to get into a fight. Since he was arguing that his client did not know there was a weapon in the vehicle and was not part of the shooting, he felt that also arguing that, in the alternative, Applicant was shooting but it was justified would not play well to the jury.

I find Counsel's explanation for failing to request a jury charge on voluntary manslaughter to be reasonable. Moreover, even if Counsel had made such a request, the charge is unsupported by the evidence. Therefore I find that Counsel has failed to show either deficiency by Counsel or prejudice therefrom.

Failure to Object to Admission of Co-Defendant Statements/Jury Instruction

Applicant further argues that Counsel was ineffective in failing to object to the admission of Jacques' statements on the basis of the Confrontation Clause. Counsel testified that, in his opinion, Jacques' statements were not harmful to his client's case. Counsel noted that Jacques' statements bore out his theory that Applicant had called his brother Jacques to pick him up in order to avoid the fight and was not armed. This evidence, coupled with Applicant's statement, allowed the defense to counter the State theory that the call was made to call for backup. Counsel

³ At PCR hearing, Applicant admitted that he actually entered the fray unprovoked.

testified that he therefore did not want the jury to be instructed to ignore the statements as to his client.

Confrontation clause rights are violated by the admission of a non-testifying co-defendant's statement which implicates the defendant. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Jacques was a non-testifying co-defendant. However, none of his statements are inculpatory for Applicant. In Jacques' first statement, he mentions that his brother left for the bowling alley then later called him to pick him up "because Bam them got into it with some boys." In later statements, Jacques expressly denies that Applicant was fighting, he denies that Applicant has a gun at all, and says that Applicant wasn't fighting, only that Yo-Yo was about to hit him. None of these statements are inculpatory as to Applicant – if anything the statements are exculpatory.

Moreover, Applicant's own statement mirrors information given in Jacques' statements – Applicant admits he was present, was not fighting, was trying to break up the fight, did not have a gun, did not see anyone with a gun, and called Jacques to pick him up because of "beef" involving Boyd and the other men. (Tr. p. 786, line 6 – p. 787, line 10.) Therefore, the information contained in Jacques' statements as to Applicant's participation was cumulative to Applicant's own statement. See State v. Page, 378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008) (portions of unredacted co-defendant's statement harmless where portions relating to defendant was either cumulative or corroborated by other witnesses.)

For all these reasons, I find Counsel's decision to forego redaction of the statements or instruction that they not be considered as to his client was reasonable in this instance. Further, because Jacques' statements were not inculpatory as to Applicant and were cumulative to Applicant's own statement, I find no prejudice from Counsel's decision.

Severance

Applicant next asserts that Counsel should have moved for severance at some point before or during the trial. Counsel stated that they discussed moving for a severance but ultimately did not. Counsel explained that prior to trial he ultimately felt that having Jacques' statements denying Applicant's involvement in the incident would be to Applicant's benefit. When making this decision prior to trial, Counsel noted that he had been unable to talk to witnesses Stephon Willingham and Vernon Davis as they were also charged in the incident and represented by counsel. Therefore, he was not certain that they would also testify they had not seen Applicant with a weapon. Counsel maintained that even in hindsight he did not feel the admission of Jacques' statements was harmful to his client. I find Counsel's strategy not unreasonable in this instance.

I further find an absence of prejudice from failure to make a motion for severance. "An appellate court should not reverse a conviction achieved at a joint trial in the absence of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial." Hughes v. State, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001) (citing People v. Greenberger, 58 Cal.App.4th 298, 68 Cal.Rptr.2d 61, 86 (1997)). I find that Applicant has not shown a reasonable probability of a more favorable result in a separate trial. In the present case, the Applicant and Jacques were tried under the theory of the "hand of one is the hand of all." Thus, the majority of the evidence would be the same in separate trials. Counsel reasonably believed that Jacques' statements supported his position. Their defenses were not antagonistic – both denied Applicant and Jacques conspired to have Jacques arrive as back up and both denied Applicant had a weapon and fired shots. For all these reasons, Counsel's failure to make such a fruitless motion was not unreasonable, and Applicant was not prejudiced from Counsel's

decision not to move for severance.

Jury Note/Instruction

Applicant next argues that Counsel was ineffective in failing to request a charge on reasonable doubt following receipt of a note from the jury. The note read:

Can we get a whole copy the law as stated and reasonable thought?
(doubt)

The word “(doubt)” appeared underneath the word “thought.” The trial court replied:

I cannot comply with your request. I can recharge the entire law given, or recharge any particular portion that you would like. This will need to be done in the courtroom so the court reporter can record it.

The jury apparently made no additional requests. Discussion of the note is not recorded in the trial transcript. However, the note was presented by the Clerk of Court as court’s exhibit 4 from trial, and the trial transcript lists four court’s exhibits, including three jury notes.⁴ The transcript reflects that deliberations commenced at 5:02 PM. (Tr. p. 1028, line 13.) On the next line, the transcript notes that court’s exhibit 4 was marked for identification. (Tr. p. 1028, line 14.) Counsel stated that he simply did not have an independent recollection of the jury note or any discussions thereof. However, he felt that the judge’s reply was correct and reflected the answer he would suggest. Counsel stated that he was not troubled by the verbiage “reasonable thought? (doubt)” in the jury’s note because juries are inherently less schooled in the law and its terminology. Counsel did not feel that the note reflected that the jury necessarily lacked fundamental understanding of reasonable doubt, especially since the word “doubt” appeared under the question.

⁴ One jury note regarding taking of notes is addressed within the transcript. (Tr. p. 296.)

Even assuming that Counsel should have been consulted upon receipt of the jury note and was not, I find in this case that such would be harmless. As Counsel articulated at PCR hearing, his sentiments on the subject were included in the trial court's response. I concur with Counsel's opinion that the trial court's response was appropriate. Therefore, I find that Counsel was not ineffective in this regard.

Failure to Object to Inferred Malice Instruction – Presumptive Charge & Elmore v. State

Applicant alleges that trial counsel was ineffective in failing to object to a jury charge on inferred malice as the court's charge (1) was a presumptive charge and (2) even if not burden shifting, failed to convey essential language required by South Carolina law as stated in State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983). The charge as given by the trial court in this matter in 2007 developed from a series of cases clarifying the proper content of the charge on inference of malice. The charge as a whole constitutes a proper statement of law, does not constitute impermissible burden shifting, and is almost verbatim the Circuit Court Benchbook charge. For these reasons, Counsel was not ineffective in failing to object.

In 1983, the South Carolina Supreme Court set forth the following suggested charge on the inference of malice:

The law says that if one intentionally kills another with a deadly weapon, the inference of malice may arise. If facts are proved beyond a reasonable doubt sufficient to raise an inference of the malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983) (overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)).

In 1985, in State v. Peterson, 287 S.C. 244, 335 S.E.2d 800, the Supreme Court found erroneous a charge containing multiple uses of the terms "presumption," "rebuttable," and "implied and presumed," calling them "constitutionally infirm phrases." The Court guided the trial bench to replace such terms with phrases such as "might infer" or "may be presumed" to denote a permissive inference.

In keeping with this guidance, in the case at bar, the trial court charged the jury on murder and the inference of malice as follows:

Both defendants in this case have been charged with the offense of murder. The State has to prove beyond a reasonable doubt that the defendant charged killed another person with malice aforethought.

Malice: that's hatred, ill will, hostility towards another person. It's the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under such circumstances as that the law would infer an evil intent.

Now, malice aforethought does not require that that [sic] malice exist for any particular amount of time before the act was committed but malice has to exist in the mind of the defendant just before and at the time the act was committed. Therefore, there has to be that combination of the previously evil intent and the act.

Now, malice aforethought can either be express or *inferred*. Express means that malice is shown when a person speaks words with express hatred or ill will for another or the person prepared beforehand to do the act which was later accomplished. Malice *can be inferred* from conduct showing a total disregard for human life. *Inferred malice may also arise* when the deed is done with a deadly weapon. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon *depends upon the facts and circumstances of each case*.

I'll just give you some examples of deadly weapons. There's a lot of them, and I'm not – this is obviously not an exhaustive list. It could be a knife, a dagger, a slingshot, metal knuckles, a rifle, a shotgun, a pistol, a razor, gasoline. Any number of things that you *determine from the facts* would be a deadly weapon.

[Emphasis supplied.] (Tr. p. 1018, line 9 – p. 1019, line 14.)

As to Applicant's first assertion, that the charge is a presumptive charge, I find that the trial court's charge clearly conveys to the jury a permissive inference instead of a presumption, relying on phrases such as "can be inferred," "may arise," and "depends on the facts and circumstances of each case." The court also additionally instructed the jury that the burden of proof remained on the State. (See for example Tr. p. 1014, line 6 – p. 1015, line 11; p. 106, lines 18-24; p. 1020, lines 2-5.) I therefore find that Counsel was not deficient in failing to object to the charge on the basis that the charge created a presumptive rather than permissive inference.

Applicant further asserts that Counsel should have made an objection and request for the second sentence in the recommended charge from Elmore so that the jury would have been instructed:

If facts are proved beyond a reasonable doubt sufficient to raise an inference of the malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

It flows from the permissive inference that the jury is free to accept or reject the use of the weapon as evidence of malice. Furthermore, the jury was explicitly instructed that the burden was upon the State to prove every element of the offense charged beyond a reasonable doubt. In total, the instructions on the law of inferred malice made it clear that whether malice had been proved was an issue of fact for the jury to determine under all of the evidence. Therefore, even though the charge given does not contain the specific language suggested in Elmore, specifically the second sentence, the charge as a whole constitutes a proper charge on the law. See for example State v. Burton, 302 S.C. 494, 397 S.E.2d 90 (1990) (jury instruction is sufficient if, when considered as a whole, it covers the law applicable to the case). As an additional basis for

finding that Counsel was not deficient in failing to pose an objection based on Elmore, I note that the charge given was a customary one at the time.⁵ While the fact that a charge is customary does not mean that it is a correct statement of law, I do find it relevant to the standard of practice at the time of trial. See Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994) (counsel is not required to be clairvoyant).

Further, I find that even if Counsel had made an objection and the requested the specific language from Elmore, the result of trial would have been no different. The use of the deadly weapon alone was not the only evidence supporting the jury's finding of malice. For example, the State theorized that Applicant called Jacques in anticipation of the fight knowing there was a weapon in the car. There was also testimony that the gunfire was aimed toward the crowd. (Tr. p. 308, lines 13-25.) Jacques' actions in firing into the crowd also exemplify conduct showing a total disregard for human life, the very definition of malice. In no reasonable juror's mind can the act of shooting into a crowd fall short of total disregard for human life. Finally, there were no defenses or circumstances tending to reduce, mitigate, or justify the homicide.⁶ For all these reasons, I find no prejudice in failing to charge the specific verbiage suggested in Elmore.

Prior Inconsistent Statements as Substantive Evidence

Applicant further attributes error to Counsel's failure to request a jury charge stating that that the jury should be instructed that prior inconsistent statements of witnesses could be

⁵This court has reviewed the standard charges recommended by the South Carolina Supreme Court Staff Attorneys Office during the time of Applicant's trial. The charge given does coincide with the recommended charge contained therein. This court does not consider this fact as indication of the correctness of the charge and heeds the notation that the charges are "merely suggestions" and are not sanctioned by the Supreme Court.

⁶To the extent that Applicant cites State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009) for the proposition that a shooting such as this can fail to be voluntary manslaughter or involuntary manslaughter and likewise fail to meet the basis for a mitigating defense such as accident or self-defense yet still not be murder, I find such interpretation to be erroneous. In Wharton, the Court held that voluntary manslaughter was improperly charged to the jury and no evidence supported the jury's verdict of voluntary manslaughter. The Court does not state that a charge and verdict of guilt for murder would be improper.

considered by the jury as substantive evidence and not simply as evidence of impeachment and/or failed to properly object to the jury charge on that basis. Counsel requested a charge on inconsistent statements, stating that "the jury need to understand that they can accept some, non, or part of all of that and use that as a part of their strategy in determining the truth of what happened." (Tr. p. 945, lines 7-11.) The trial court found that Counsel's request was essentially covered in his charge on credibility. (See Tr. p. 1010, line 3 – p. 1011, line 13.) The trial court also added a charge

Also, the testimony of a witness can be discredited or impeached by showing that that witness previously made statements that are inconsistent with current testimony or current statements. The earlier contradictory statements are admissible only to impeach the credibility of the witness and not to establish the truth of the statements, and once again, you give it what weight, if any, you determine it should have.

(Tr. p. 1013, lines 2-9.) Counsel made no objection to the court's charge. Appellate counsel, Robert Dudek, upon review of the transcript, did not believe that Counsel's statements properly put forth a request for a jury charge that prior inconsistent statements could be considered for their substantive as well as impeachment value. Dudek also opined that because Counsel acquiesced to the court's stated intention to charge credibility and to charge that prior inconsistent statements could be used for impeachment, the issue was not preserved for appeal.

I agree with Dudek that the issue was not properly preserved for appeal. Therefore, I find that Dudek was not ineffective in failing to raise the issue on direct appeal. Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (2002).

The trial court's instruction that prior inconsistent statements could only be used for impeachment and not as substantive evidence was incorrect. Testimony of prior consistent statements may be used as substantive evidence when the declarant testifies at trial and is subject

to cross examination. State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982). However, I find that the error was harmless.

Applicant specifically addressed this issue as it pertained to witnesses DeWitt, Wilson, and Jacques. As to DeWitt, Counsel cross-examined DeWitt on facts given in his testimony that were not in his statement. (See Tr. p. 391, line 5 – p. 393, line 13; p. 396, line 8 – p. 397, line 25.) The absence of facts in a prior statement would not be offered as substantive evidence; the lack of details in the prior statement calls credibility into question. As to Wilson, Counsel focused on her statement that the weapon she saw was a .25 caliber as opposed to testimony that she heard a .22 or .25 caliber. (Tr. p. 581, line 20 – p. 587, line 7.) The gist of her testimony was that she had heard a louder sound, which she associated with a 9mm, and a sound more like a “pop” which she associated with a smaller caliber weapon. She did testify that she only saw one gun. Had the jury determined that the second weapon was a .25 instead of a .22 or .25, the outcome of trial would not be affected under the circumstances of this case. Counsel then asked Wilson about a previous instance where she had been asked if she had given a written statement(s) to police, and she answered in the negative. Wilson explained that she thought the question meant a statement in her own handwriting; she acknowledged that officers had written down things she said. (Tr. p. 588, line 2 – p. 591, line 5.) As to this discrepancy, there was no factual determination pertinent to the case as to who wrote Wilson’s statements; the discrepancy was noted for the purpose of impeachment alone. Counsel also examined Wilson as to the number of shots she heard. In her original statement, Wilson apparently informed the officer that she heard five shots, and Wilson testified she heard 4-5 shots from the smaller gun. (Tr. p. 594, line 16 – p. 596, line 10.) Wilson also testified that she heard additional shots for a total of about nine. The number of shots fired was not in issue in the case, and the number of shots fired in this

case did not affect the jury's determination of guilt. Counsel clearly used this examination as impeachment and not as soliciting substantive testimony.

Jacques' statements do not fall under the rule cited as he did not testify and was not subject to cross examination. The court instructed separately as to Jacques' statements (as well as Applicant's), including an instruction that the jury was to determine the accuracy of the statements. (Tr. p. 1016, line 25 – p. 1018, line 8.) Therefore, Jacques' statements do not factor into the analysis of this instruction.

In conclusion, while the court erred in instructing the jury to consider prior inconsistent statements solely for impeachment value, this error would have been found harmless. I therefore conclude that Applicant has failed to meet his burden in this regard.

Other Allegations

No other allegations were raised at the PCR hearing. Therefore, any additional allegations are deemed abandoned 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 ____ day of _____, 20__.

JAMES R. BARBER, III
Presiding Judge
Fifth Judicial Circuit

_____, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

ADAMS GIBSON, #322094,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2013-CP-40-2107

ORDER GRANTING APPLICATION
FOR POST-CONVICTION RELIEF

RICHLAND COUNTY
FILED
2014 MAR 20 AM 9:52
JEREMY A. THOMPSON
P. & G.S.

THIS MATTER comes before the Court by way of an Application for Post-Conviction Relief filed April 8, 2013. The State made its Return on July 31, 2013. An evidentiary hearing into this matter was convened on October 1, 2013. The Applicant was present and was represented by Jeremy A. Thompson, Esquire. The Respondent was represented by Mary S. Williams, Assistant Attorney General.

I. PROCEDURAL HISTORY

The Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Richland County Clerk of Court's orders of commitment. At the October 19, 2005, term of General Sessions, the Richland County Grand Jury indicted the Applicant for murder (2005-GS-40-9085). The Applicant's co-defendant Jacques Gibson ("Jacques") was also indicted for murder and for unlawful possession of a firearm by an individual under the age of 21. On May 21-24, 2007, the Applicant and Jacques proceeded to a joint trial by jury. Nathaniel Roberson, Esquire, represented the Applicant at this proceeding. At the conclusion of the trial, the jury convicted both defendants as charged. The Honorable Steven H. John, presiding circuit court judge, sentenced the Applicant to thirty years' imprisonment.

The Applicant pursued a direct appeal to the South Carolina Court of Appeals, and was represented in this proceeding by Robert M. Dudek, Appellate Defender. On September 29, 2010, the South Carolina Court of Appeals affirmed the Applicant's conviction and sentence in a published opinion. State v. Gibson, 390 S.C. 347, 701 S.E.2d 766 (Ct. App. 2010). Although the Supreme Court of South Carolina initially granted certiorari to review the Court of Appeals' decision, the Supreme Court ultimately dismissed the petition as improvidently granted. State v. Gibson, 401 S.C. 569, 737 S.E.2d 853 (2013).

II. ALLEGATIONS RAISED

In his Application for Post-Conviction Relief, the Applicant alleged that he is being held unlawfully for the following reasons:

1. Ineffective assistance of trial counsel; and
2. Ineffective assistance of appellate counsel;

He alleged generally that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, were violated prior to, during, and after his trial, as well as during his direct appeal.

In an Amended Application for Post-Conviction Relief filed September 27, 2013, the Applicant submitted the following specific allegations of trial and appellate counsel:

1. Trial counsel was ineffective for failing to request a jury instruction on the lesser-included offense of voluntary manslaughter;
2. Trial counsel was ineffective for failing to object to the introduction of Jacques Gibson's statement on Confrontation Clause grounds;
3. Trial counsel was ineffective for failing to request a jury instruction that Jacques Gibson's statements could only be considered as evidence against Jacques Gibson;

4. Trial counsel was ineffective for failing to move to sever and for failing to request a separate trial from Jacques Gibson;
5. Trial counsel was ineffective for failing to request that the jury be reinstructed regarding reasonable doubt following the jury's note to the Court marked as Court's Exhibit #4;
6. Trial counsel was ineffective for failing to object to the implied malice instructions inasmuch as the implied malice instructions did not contain explicit instructions to the jury that they could accept or reject the implication of malice;
7. Trial counsel was ineffective for failing to preserve his argument that the jury should be instructed that prior inconsistent statements of witnesses could be considered by the jury as substantive evidence and not simply as evidence of impeachment;
8. Appellate counsel was ineffective for failing to argue on appeal that the trial court erred in failing to instruct the jury that prior inconsistent statements of witnesses could be considered by the jury as substantive evidence not simply as evidence of impeachment.

At the evidentiary hearing in this matter, the Applicant proceeded on these allegations. During that hearing, and in the parties' memoranda on the issue submitted following after the hearing, the parties clarified that the implied malice issue includes two separate claims for relief:

1. Trial counsel was ineffective for failing to object to the implied malice instruction because the instruction was burden-shifting; and
2. Trial counsel was ineffective for failing to object to the implied malice instruction because the instruction did not substantively convey the common law of implied malice in South Carolina.

See Respondent's Memorandum at 1; Applicant's Memorandum at 2. This Court has considered all of these allegations.

III. EVIDENCE BEFORE THE COURT

At the Post-Conviction Relief hearing held in this case on October 1, 2013, the Applicant presented testimony from defense counsel Nathaniel Roberson, Esquire, as well as his own testimony. In addition to this testimony, this Court has before it a transcript of the trial, a copy of the briefs filed on direct appeal, a copy of the Court of Appeals' opinion on direct appeal, a copy of the Supreme Court's opinion on direct appeal, a copy of the records of the Richland County Clerk of Court regarding the subject conviction, a copy of the Applicant's records with the South Carolina Department of Corrections, and the exhibits introduced by the parties during the evidentiary hearing. What follows below are findings of fact and rulings of law made by this Court in accordance with the Uniform Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 *et seq.*

As a threshold matter, this Court would note that the Applicant was represented by an experienced attorney who is generally regarded for his competence in criminal matters. On the facts of this case, however, this Court finds that the combined effects of defense counsel's errors and omissions was such that the Applicant was denied the effective assistance of counsel at trial. For that reason, this Court finds that defense counsel failed to provide the Applicant reasonable, professional assistance of counsel.

IV. RELEVANT FACTS

The South Carolina Court of Appeals' decision in this matter provides a good overview of the facts as presented at trial:

In September 2005, two groups of individuals, one from Ridgeway and one from Winnsboro, met at Chance's Bar in Columbia. Although the groups seemed to be getting along most of the evening, at some point, animosity developed between Demetric

Davis, of Ridgeway, and Torri Boyd, of Winnsboro. Adams testified that shortly after the initial confrontation between Davis and Boyd, he called his brother, Jacques, to request a ride home.

Twenty to thirty minutes later, Jacques and two friends, Stephon and Vernon, arrived at Chance's in Jacques's white Ford sedan to pick up Adams. Jacques went inside to find Adams, while Stephon and Vernon waited in the car. Shortly thereafter, the dispute that had brewed inside Chance's spilled out into the parking lot and erupted into a physical altercation between numerous members of each group. According to several witnesses, neither Adams nor Jacques initially engaged in the fight; however, James Smith [sic] testified he saw Adams swing at someone and when Smith approached Adams in an effort to keep him away from one of the Winnsboro fellows, Jacques brandished a gun and told him "[not to] even think about it." Smith testified he fled at the sight of the gun.

Soon after the fight erupted, witnesses testified to hearing several shots. The witness accounts of the evening provide no clear picture of who fired weapons or how many shots were fired. However, many witnesses testified to seeing either Jacques, Adams, or both, or "someone" in the vicinity of Jacques's white car, firing multiple shots.

One of the State's key witnesses, Shunta Williams [sic], testified that she left the bar and walked out to the parking lot to watch the fight. Most of the witnesses testified that Jacques remained near his white sedan, away from the fight, while Adams may have engaged in the melee. However, Williams testified that Jacques was engaging in the fight and that she saw Adams walk over to the white sedan, sit in the driver seat, reach under it, pull out a gun, and fire what she recognized as a small caliber handgun, either a .22 or .25. When the shots began, she retreated to the doorway of the bar to take cover. Moments later she claimed she heard another set of gunshots in the distance. She identified Adams as wearing jeans and a black tee shirt, although the other witnesses and evidence presented at trial indicated it was Jacques in the black tee shirt, and Adams was wearing a white tee shirt. Many of the accounts point to multiple sources of gunfire, but Williams maintains that Adams was the only shooter. During the melee, Dennis Irby was shot and killed by a single 9mm shot to the back of the left shoulder.

Adams spoke with the police twice. He first stated that he was not in the white Ford sedan with Jacques and did not see who did the

shooting because he was in Lakisha Davis's car. He later admitted that after the altercation in the parking lot began, he exited Lakisha's car, at her request, to retrieve her cousin, Demetric. Adams denied having or firing a gun that night.

Jacques also gave two statements to the police. First he told the police that after he and his brother exited the bar, Adams went to Lakisha Davis's car and he returned to his white Ford sedan. He said he noticed a man retrieve something from a nearby SUV and place it behind his back, he suspected it was a gun but did not see it. After the fight broke out, Jacques stated Adams drove around in Lakisha's car, got out, and walked over toward the fighting. Although in his first statement Jacques denied he had a gun, Jacques later admitted that upon suspecting Smith was going to hit Adams, he pulled a gun and told Smith to "back off." Jacques said he then heard two shots and in response fired his 9mm three or four times "into the air" as he got in his car and drove away. He later disposed of his gun by tossing it over a bridge.

State v. Gibson, 390 S.C. 347, 351-353, 701 S.E.2d 766, 768-769 (Ct. App. 2010) (footnotes omitted).¹ Additional facts—both as to the evidence presented at trial and before this Court—will be discussed in greater detail below in conjunction with each individual allegation for relief.

V. STANDARD OF REVIEW

This Application for Post-Conviction Relief generally raises specific allegations of ineffective assistance of counsel. The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRPC. In evaluating an Application for Post-Conviction Relief, the Applicant must demonstrate that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standard for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a

¹ This Court believes that the Court of Appeals intended to refer to Antonio Smith as opposed to James Smith, and to Shunta Wilson as opposed to Shunta Williams.

fair trial. Strickland v. Washington, 466 U.S. 668 (1984). In other words, the Applicant must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.; Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In the context of an allegation of ineffective assistance of appellate counsel, the operative question becomes whether but for appellate counsel's errors and omissions, the result on appeal would have been different. Smith v. Murray, 477 U.S. 527 (1986); see also Smith v. Robbins, 528 U.S. 259, 285 (2000) ("[T]he proper standard for evaluating Robbins' claim that appellate counsel was ineffective in neglecting to file a merits brief is that enunciated in Strickland v. Washington"). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

VI.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Applicant's Application presents numerous allegations for relief. This Court, however, finds that only the issues regarding the implied malice charge are worthy of granting relief. This Court will begin its analysis of the Applicant's allegations by discussing the implied malice charge claims before turning to the claims which are not meritorious.

A. Defense Counsel was Ineffective for Failing to Object to the Implied Malice Charge

During the trial court's charge to the jury, the trial judge instructed the jury regarding murder as follows:

Both defendants in this case have been charged with the offense of murder. The State has to prove beyond a reasonable doubt that the defendant charged killed another person with malice aforethought. Malice: that's hatred, ill will, hostility towards another person. It's the intentional doing of a wrongful act without just cause or

excuse and with an intent to inflict an injury or under such circumstances that the law would infer an evil intent.

Now, malice aforethought does not require that that malice exist for any particular time before the act was committed, but malice has to exist in the mind of the defendant just before and at the time the act was committed. Therefore, there has to be that combination of the previous evil intent and the act.

Now, malice aforethought can either be expressed or inferred. Express means that malice is shown when a person speaks words with express hatred or ill will for another or the person prepared beforehand to do the act which was later accomplished. Malice can be inferred from conduct showing a total disregard for human life. *Inferred malice may also arise when the deed is done with a deadly weapon.* A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends upon the facts and circumstances of each case.

I'll just give you some examples of deadly weapons. There's a lot of them, and I'm not—this is obviously not an exhaustive list. It could be a knife, a dagger, a slingshot, metal knuckles, a rifle, a shotgun, *a pistol*, a razor, gasoline. Any number of things that you determine from the facts would be a deadly weapon.

I tell you that in the State of South Carolina motive is not an element of the offense of murder and, therefore, the State need not prove motive.

Trial Tr. p. 1018, line 9-p. 1019, line 17 (emphasis added). Defense counsel did not object to this portion of the jury charge. See Trial Tr. p. 1025, line 20-p. 1027, line 3. In his testimony before this Court, defense counsel testified that he did not object to this portion of the jury charge because he did not see any error in the trial court's instructions. He further testified that the only evidence of malice that he saw in this case—as to either the Applicant or his co-defendant Jacques—was the use of a deadly weapon.

In State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), the Supreme Court set forth a standard charge to be used when instructing the jury on drawing a permissive inference of malice when a deadly weapon was used in a homicide:

The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

279 S.C. at 421, 308 S.E.2d at 784. Immediately after promulgating the standard charge, the Supreme Court issued the following warning: “We caution the bench, that hereafter only slight deviations from this charge will be tolerated.” Id. In State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), the Supreme Court explained that Elmore’s first sentence constituted “[t]he standard implied malice charge” whereas the second sentence constituted “the general permissive inference instruction.” 385 S.C. at 612, 685 S.E.2d at 811 (footnote 9).²

It is unquestioned that the trial court did not give the general permissive inference instruction set forth in Elmore. The Applicant contends that the trial court’s failure to give Elmore’s permissive inference instruction violated the common law and rendered the malice instruction burden-shifting. The Applicant further contends that defense counsel was ineffective for failing to object to the charge on these bases. This Court agrees with the Applicant on both counts. This Court will begin its inquiry with the common law argument before addressing the burden-shifting argument.

² This Court will utilize Belcher’s description of Elmore’s charge throughout this Order.

1. The Implied Malice Charge Violated the Common Law

a. The Trial Court did not Convey Elmore's Permissive Instruction to the Jury

The Applicant contends that the inferred malice charge as given by the trial court was improper under South Carolina's common law because it did not substantively convey Elmore's general permissive instruction to the jury. This Court agrees.

The Supreme Court explicitly stated in Elmore that "only slight deviations" from its inferred malice charge—which included the permissive inference charge—"will be tolerated." 279 S.C. at 421, 308 S.E.2d at 784. Since Elmore, South Carolina's appellate courts have repeatedly instructed trial courts to give the general permissive inference charge when the standard implied malice instruction is given. See generally State v. Lewellyn, 281 S.C. 199, 201, 314 S.E.2d 326, 327 (1984) ("The trial bench is reminded that the proper charge on implied malice is that suggested in Elmore");³ State v. Peterson, 287 S.C. 244, 247, 335 S.E.2d 899, 802 (1985) ("The judge *should make it clear to the jury* that it is free to accept or reject these permissive inferences depending on its view of the evidence") (emphasis added); Belcher, *supra*, 385 S.C. at 612, 685 S.E.2d at 811 (2009) (footnote 9) (distinguishing the standard implied malice charge from the general permissive inference charge); State v. Wilds, 355 S.C. 269, 277, 584 S.E.2d 138, 142 (Ct. App. 2003) ("In a charge to the jury, the judge *should make clear to the*

³ In Lewellyn, the Supreme Court also cited with approval the language set forth in State v. Mattison, 276 S.C. 235, 277 S.E.2d 598 (1981), which, like Elmore, stresses the need for the jury to consider all of the evidence in conjunction with the inference of malice:

[W]e strongly suggest to the Trial Bench that a more appropriate instruction on implied malice would deal with the evidentiary nature of the presumption and that the implication does not require the jury to infer malice but only permits it. In other words, the presumption or inference of malice from the use of a deadly weapon is simply an evidentiary fact to be taken into consideration by the jury, along with other evidence in the case, and to be given such weight as the jury determines it should receive. The inference of malice may be drawn from proof of the use of a deadly weapon if the jury concludes such is proper after considering all of the facts and circumstances in evidence.

276 S.C. at 238, 277 S.E.2d at 600 (emphasis added).

jury that it is free to accept or reject the permissive inferences depending on its view of the evidence”) (emphasis added). Given these repeated directives from the Supreme Court and the Court of Appeals, this Court concludes that the inclusion of a general permissive inference instruction is mandatory under South Carolina’s common law.

The charge given in this case was a significant deviation from Elmore because it failed to give Elmore’s general permissive inference instruction. Instead, the charge only instructed the jury on Elmore’s implied malice charge. The instruction did not couch the inference in terms that permitted the jury to consider the inference in light of the other evidence admitted at the trial. This was improper under Elmore.

Moreover, this Court finds that Elmore’s general permissive instruction was not conveyed to the jury through the standard implied malice instruction. Cf. Respondent’s Memorandum at 3 (“[T]he trial court’s charge encompasses Elmore’s essential concept”). If the standard implied malice instruction conveyed the general permissive instruction, the Supreme Court would have just promulgated the standard implied malice instruction in Elmore and found it sufficient. The Supreme Court did not do so. By including the general permissive instruction in the standard charge, the Supreme Court clearly conveyed its intent that the general permissive instruction was just as necessary as the implied malice instruction. Inasmuch as Elmore’s general permissive instruction was never given to the jury, the inferred malice instruction given in this case was erroneous.

b. Defense Counsel’s Performance Was Deficient

A defense attorney’s failure to object to jury instructions that fail to convey the proper standard for intent constitutes deficient conduct. See McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008) (improper standard on homicide by child abuse); Taylor v. State, 312 S.C. 179, 439

S.E.2d 820 (1993) (burden-shifting charge on possession with intent to distribute crack cocaine and marijuana). Similarly, a defense attorney's failure to object to improper charges on malice constitutes deficient conduct. Tate v. State, 351 S.C. 418, 570 S.E.2d 522 (2002).

This Court concludes that defense counsel's failure to object to the trial court's instruction on common law grounds constituted deficient conduct. Elmore was decided in 1983 and its directive that the general permissive inference instruction be given has been repeatedly reinforced. Moreover, malice was one of the central issues, if not *the* central issue, in the trial. Defense counsel admitted before this Court that there was very little evidence that either the Applicant or Jacques acted with malice aside from the use of a deadly weapon—a statement with which this Court agrees. Accordingly, given the Supreme Court's longstanding command that the general permissive inference instruction must be given and the significance of the existence of malice in this case, this Court concludes that defense counsel was deficient in failing to object to the trial court's failure to give the general permissive inference instruction.

c. Defense Counsel's Deficient Performance Prejudiced the Applicant

This Court also finds that defense counsel's failure to object to the trial court's implied malice instruction on common law grounds prejudiced the Applicant. The central question that this Court must answer in this regard is whether or not there is a reasonable probability that had the jury been given the correct instruction, then the result of the Applicant's trial would have been different. Stated differently, this Court must determine if there is overwhelming evidence of malice such that the failure to give the general permissive instruction would not have prejudiced the Applicant. See generally Arnold & Plath v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (finding no prejudice because an erroneous malice charge "beyond a reasonable doubt did not contribute to the verdict" due to the overwhelming evidence of malice); Lowry v.

State, 376 S.C. 499, 508, 657 S.E.2d 760, 765 (2008) (“Harmless error review looks to the basis on which the jury actually rested its verdict”). This Court concludes that the Applicant has met his burden with regard to this issue.

This Court finds that there are two bases that the jury could have found the Applicant guilty of murder. First, and least likely, the jury could have believed Shunta Wilson and found that the Applicant acted with malice as the fatal shooter. Second, and more likely, the jury could have found that the Applicant was acting as an accomplice to Jacques, and that Jacques acted with malice in discharging his firearm. Under either scenario, there was not overwhelming evidence of malice.

Beginning with the argument that the Applicant was the fatal shooter, there is no evidence that the Applicant acted with malice other than from the use of a firearm. Aside from Wilson, nearly every witness at the trial testified that the Applicant was not involved in the fighting or the shooting.⁴ Had the jury been instructed that they must consider all of the evidence—much of which showed that the Applicant had no desire to harm anyone that night—there is a reasonable probability that they would have concluded that the Applicant did not act

⁴ The witness accounts of the Applicant’s actions during the altercation are located in the trial transcript as follows:

- Torri Boyd: Doesn’t know (p. 256, line 22-p. 257, line 1);
- Ravaris Henry: Not fighting; no gun; not in the Escort (p. 333, lines 3-13);
- Antwan Martin: No gun (p. 375, lines 13-16);
- Lakisha Davis: Standing outside; not involved in the fight (p. 431, lines 8-13);
- Demetric Davis: No gun; not fighting (p. 457, line 21-p. 458, line 1);
- Tramele Davis: Definitely no gun (p. 488, line 21-p. 489, line 4);
- Antonio Smith: Kicking and hitting Boyd (p. 506, lines 1-11);
- Stephon Willingham: Standing away from the fight (p. 529, line 9-p. 530, line 8); no gun; not fighting (p. 541, lines 3-9);
- Marcus Tucker: Standing off to the side; not fighting (p. 552, lines 7-17); no gun (p. 559, lines 8-11);
- Shunta Wilson: Shooter (p. 565, line 25-p. 567, line 2);
- Vernon Davis: Swinging down at someone; no gun (p. 808, lines 3-18; p. 829, line 11-p. 830, line 2); and
- Jacques Gibson: Not fighting (p. 884, lines 8-11).

with malice in firing a firearm. Therefore, the Applicant was prejudiced by the trial court's failure to give the general permissive instruction if the jury concluded that the Applicant was the shooter.

Turning to the argument that Jacques was the fatal shooter, Jacques' statement is clear that he fired his firearm in the air and that he "didn't mean to shoot [the victim]." Trial Tr. p. 885, line 8; see also Trial Tr. p. 883, lines 7-14. An inadvertent killing is a killing done without malice. See Yates v. Evatt, 500 U.S. 391, 411 (1991) (concluding that a defendant convicted on an accomplice liability basis was prejudiced by a presumptive malice charge because one of the victims "could have been killed inadvertently" by the principal) overruled on other grounds by Estelle v. McGuire, *supra*. This is because "[m]alice is the wrongful *intent to injure another* and indicates a wicked or depraved spirit intent on doing wrong." State v. Zeigler, 364 S.C. 94, 103, 610 S.E.2d 859, 864 (Ct. App. 2005) (emphasis added). Pursuant to Elmore's full charge, the jury could have concluded that Jacques acted without malice because he did not intend to kill—or even harm—the victim. The trial court's failure to give the general permissive inference charge, however, likely defeated any possibility of an acquittal on that basis, as the jury would have simply stopped its malice inquiry once it concluded that a firearm was used. There was no evidence of express malice, and there is little other evidence that the jury could have used to conclude Jacques acted with malice. Accordingly, there is a reasonable probability that the jury would have acquitted *both* the Applicant and Jacques if they had been given the full Elmore instruction because they would have considered the inference in conjunction with Jacques' explanation for shooting his firearm.

Additionally, the State, in its closing argument, largely argued that the jury could infer malice simply through the use of a firearm without taking any other evidence into account. See

Trial Tr. p. 956, lines 3-4 ("Malice may be inferred from the use of a deadly weapon alone"); p. 957, lines 4-5 ("The fact that a deadly weapon is used – the use of a deadly weapon, you can infer malice from that alone"). If the jury convicted the Applicant by following the State's argument—which would have been permitted by the trial court's instruction—then he was plainly prejudiced because the jury needed to understand that the inference of malice was only to be utilized once the rest of the evidence in the case was considered in conjunction with that inference. The State's closing argument only further demonstrates the prejudice the Applicant suffered by the trial court's failure to give the general permissive inference charge.

The Respondent erroneously argues that the Applicant can only show prejudice by demonstrating that "there were no defenses or circumstances tending to reduce, mitigate, or justify the homicide." Respondent's Memorandum at 4 (citing Belcher). The State errs by limiting Strickland's prejudice standard to Belcher's prejudice standard. Belcher dealt with the propriety of the standard implied malice instruction—which is not at issue here—not the general permissive inference instruction. Accordingly, Belcher's prejudice inquiry is inapposite. Furthermore, the Respondent's contention that there must be a lesser-included offense or applicable defense in order to demonstrate prejudice from an erroneous malice charge is simply not supported by the law. There are countless decisions by South Carolina's appellate courts, as well as by the United States Supreme Court, concluding that an erroneous malice instruction prejudiced the defendant even when there were no defenses or lesser-included offenses charged. See Francis v. Franklin, 407 U.S. 371 (1985) (defendant claimed he fired a gun accidentally but no indication that a formal defense of accident was charged); Yates, *supra* (defendant stabbed a victim but no indication that any defenses or lesser-included offenses were charged); Elmore, *supra* (no indication of lesser-included offenses or defense charged); Peterson, *supra* (same);

Lewellyn, supra (no indication of lesser-included offense or defense for conviction of malicious injury to real property). The reason underlying these decisions is simple: the inquiry is not what other options the jury had available to them but, rather, whether or not there was overwhelming evidence that the State met its burden of proof in establishing all of the elements of the crime. Here, there is not overwhelming evidence of malice with regard to either the Applicant or Jacques. Accordingly, this Court concludes that the Applicant has met his burden of proof in establishing prejudice, and that he is entitled to a new trial.

2. The Implied Malice Charge was Unconstitutional

a. The Implied Malice Charge Shifted the Burden of Proof to the Applicant

The Fifth and Fourteenth Amendments to the United States Constitution require that the State prove beyond a reasonable doubt each element of a crime before a criminal defendant can be convicted of that crime. In re Winship, 397 U.S. 358 (1970). “[A] State must prove every ingredient of an offense beyond a reasonable doubt, and ... it may not shift the burden of proof to the defendant” through a presumptive jury charge. Patterson v. New York, 432 U.S. 197, 215 (1977). Jury charges which create a presumption that malice existed in murder cases are unconstitutional. See generally Mullaney v. Wilbur, 421 U.S. 684 (1975); Yates v. Aiken, 484 U.S. 211 (1988).

“If a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption that relieves the State of its burden of persuasion on an element of an offense, the potentially offending words must be considered in the context of the charge as a whole.” Francis v. Franklin, supra, 471 U.S. at 315. A reviewing court must determine if “there is a reasonable likelihood that the jury has applied the challenged instruction

in a way' that violates the Constitution." Estelle v. McGuire, 502 U.S. 62, 72 (1991) (quoting Boyde v. California, 494 U.S. 370, 380 (1990)).

This Court finds that the failure to give the general permissive inference instruction renders the standard implied malice instruction burden-shifting. As noted above, Belcher reaffirmed that both instructions must be given when an implied malice instruction is warranted. 385 S.C. at 612, 685 S.E.2d at 810 (footnote 9). Consequently, this Court concludes that if the implied malice charge sufficiently conveyed the permissive inference instruction in its language, then there would be no need for the separate permissive inference instruction. It can be presumed, therefore, that the implied malice charge does not sufficiently inform the jury that they do not have to infer malice from the use of a deadly weapon. This failure to sufficiently convey the permissive inference instruction renders the standard implied malice instruction—standing alone—burden-shifting.

b. Defense Counsel's Performance was Deficient

This Court finds that defense counsel was deficient in failing to object to the burden-shifting malice charge. The Supreme Court has squarely held that the failure to object to a burden-shifting malice charge constitutes deficient conduct. See Lowry v. State, *supra*, 376 S.C. at 507, 657 S.E.2d at 764 (“[W]e hold that the jury’s application of the instruction violated Petitioner’s due process rights and therefore, that counsel was deficient in failing to object to the charge”). Furthermore, it is difficult to envision a scenario where a trial attorney could “articulate[] a valid reason” for failing to object to such an unconstitutional charge. Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000); see also Smith v. State, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010) (“[W]e can discern no defensible basis for trial counsel’s failure to challenge the forensic interviewer’s objectionable testimony”). Defense counsel testified before

this Court that his only explanation for failing to object to the charge was that he didn't believe that it was burden-shifting. As this Court has concluded that the charge was burden-shifting, this Court construes this testimony as an admission that defense counsel did not realize the improper nature of the charge. Consequently, this Court concludes that defense counsel was deficient in failing to object to the charge and that defense counsel did not articulate a valid strategic reason for this deficiency.

c. Defense Counsel's Deficient Performance Prejudiced the Applicant

In determining prejudice, this Court must "address the issue of whether 'beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.'" Arnold & Plath v. State, *supra*, 309 S.C. at 165, 420 S.E.2d at 838 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). This analysis requires this Court to "take two quite distinct steps." Yates v. Evatt, *supra*, 500 U.S. at 404. "First, it must ask what evidence the jury actually considered in reaching its verdict." *Id.* "Once a court has made the first enquiry into the evidence considered by the jury, it must then weigh the probative force of that evidence as against the probative force of the presumption standing alone." *Id.* This inquiry is the same for evaluating the prejudice prong of Strickland. Lowry, *supra*.

The Court has largely already resolved these issues in favor of the Applicant. As there was little evidence of malice aside from the use of a firearm, this Court concludes that the evidence that the jury actually considered in reaching its verdict was the evidence that either the Applicant or Jacques used a firearm. Furthermore, this Court concludes that there was not overwhelming evidence of malice as most of the testimony showed that the Applicant acted peacefully the night of the incident and Jacques' statements indicated that he inadvertently killed the victim. In other words, the probative force of the evidence—independent of the

presumption—does not require a conviction for murder as to either defendant. The presumptive charge, however, *did* require such a conviction because it mandated a finding of malice if the jury concluded that either the Applicant or Jacques used a firearm. As Jacques admitted that he did so in his statement, and Shunta Wilson claimed the Applicant fired a weapon, it's clear that the jury likely convicted the Applicant based solely on the burden-shifting nature of malice charge. Accordingly, this Court finds that the Applicant has met his burden of proof with regard to this issue, and he is entitled to a new trial. See Lowry, supra.

B. The Applicant's Remaining Allegations

Although this Court's rulings on the implied malice claims are dispositive of this Application, this Court must address all of the Applicant's allegations which were presented at the evidentiary hearing in this matter. See S.C. Code Ann. § 17-27-80 ("The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented"); Marlar v. State, 375 S.C. 407, 408, 653 S.E.2d 266 (2007) (concluding that a PCR court's failure to comply with § 17-27-80 "precludes appellate review of the issues" not addressed in the order). This Court finds that the Applicant's remaining allegations are without merit.

1. Allegation #1: Voluntary Manslaughter

The Applicant alleges that defense counsel was ineffective for failing to request a jury instruction on the lesser-included offense of voluntary manslaughter. This Court finds that defense counsel's performance was not deficient with regard to this issue as a charge on voluntary manslaughter was not warranted on these facts.

"Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." State v. Johnson, 333 S.C. 62, 65, 508 S.E.2d 29, 31

(1998). Here, the element of sufficient legal provocation has not been established. There is no evidence that the victim provoked either the Applicant or Jacques "either by possessing a weapon or through hostile acts" which would have given rise to sufficient legal provocation. State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). As there was no basis for requesting the lesser-included offense, defense counsel's performance cannot be deficient for failing to request the charge. Accordingly, this Court denies and dismisses this allegation.

2. Allegation #2: Jacques' Statement

The Applicant alleges that defense counsel was ineffective for failing to object to the introduction of Jacques Gibson's second statement on Confrontation Clause grounds. This Court finds that defense counsel's performance was not deficient with regard to this issue as defense counsel gave a valid strategic reason for not objecting to the statement.

In Bruton v. United States, 391 U.S. 123 (1968), the United States Supreme Court held that the admission of a non-testifying co-defendant's statement which inculpatates the defendant at a joint trial violated the Confrontation Clause of the Sixth Amendment. The Supreme Court, however, has permitted such statements to be introduced if they are redacted in such a fashion to eliminate all references to the defendant whose rights would be violated by the introduction of the statement. See Richardson v. Marsh, 481 U.S. 200 (1987).

Here, Jacques' statement clearly violates Bruton and its progeny as it was introduced unredacted and the statement contained several references to the Applicant, some of which were inculpatory. See Trial Tr. p. 881, line 8-p. 885, line 10. The fact that the statement violated the Applicant's Confrontation Clause rights, however, does not end the inquiry. If a defense attorney articulates a valid strategic reason for not objecting to inadmissible evidence, then that attorney's performance will not be deemed deficient. See generally Watson v. State, 370 S.C.

68, 634 S.E.2d 642 (2006). Defense counsel testified before this Court that he chose not to require that Jacques' statement be redacted because he wanted the helpful information from the statement—that the Applicant was not involved in the altercation—to be presented to the jury. This is a valid strategic decision entitled to deference by this Court, and the Applicant has not persuaded this Court that this decision was unreasonable. Accordingly, this allegation is denied and dismissed.⁵

3. Allegation #3: Jury Instruction as to Jacques' Statements

The Applicant alleges that defense counsel was ineffective for failing to request a jury instruction that Jacques' statements could only be considered as evidence against Jacques, and could not be considered as evidence against the Applicant. For largely the same reasons discussed above with regard to Allegation #2, this Court finds that defense counsel's performance was not deficient with regard to this issue.

During the colloquy on the jury charge, the trial court asked defense counsel if he wanted an instruction that the jury could only consider Jacques' statement against Jacques. Trial Tr. p. 941, lines 2-6. Defense counsel responded that he didn't want the court "to be that restrictive" and that he did not want such an instruction to be given. Trial Tr. p. 941, lines 7-8. The record reveals that no such instruction was given during the court's instruction to the jury. See Trial Tr. pp. 1009-1024.

The Applicant is correct that such an instruction, if requested, must be given in a joint trial where a statement given by a co-defendant which inculpatates the defendant is introduced against the co-defendant. See generally Richardson, supra, 481 U.S. at 211 ("We hold that the

⁵ Inasmuch as the inquiry on the deficiency prong of Strickland is dispositive of this issue, this Court does not reach the prejudice inquiry. See Strickland, supra, 466 U.S. at 697 (holding that "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one").

Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession *with a proper limiting instruction* when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence") (emphasis added). As with Allegation #2, however, the fact that such an instruction must be given if requested does not end the inquiry. Defense counsel testified before this Court that he did not want the instruction to be given because he wanted the jury to consider Jacques' statements as evidence that the Applicant did not participate in the fight or in any crime. The Applicant has not met his burden in establishing that this strategy was unreasonable. Accordingly, this allegation is denied and dismissed.⁶

4. Allegation #4: Severance Motion

The Applicant alleges that defense counsel was ineffective for failing to move for a severance from Jacques prior to trial. This Court disagrees, and concludes that the Applicant had not met his burden of proof with regard to prejudice on this issue.

"Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right." State v. Dennis, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999). "[S]everance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt." Id. at 282 (citing Zafiro v. United States, 506 U.S. 534 (1993)).

Essentially, the Applicant contends that had he received a separate trial, Jacques' statement that he fired a nine millimeter gun could not have been admitted against him. See Trial Tr. p. 882, line 23-p. 883, line 6. This Court is unpersuaded by the Applicant's arguments

⁶ As this Court's analysis of this issue pursuant to Strickland's performance prong is dispositive, this Court does not reach the prejudice inquiry. See footnote 5.

that Jacques' admission of this minor detail warranted severance. Multiple witnesses testified that Jacques fired a gun, and Shunta Wilson testified that the Applicant fired a gun. This evidence would have been admissible against the Applicant in a separate trial. The fact that Jacques admitted to firing a nine millimeter weapon in the same statement where he also claimed that he shot that firearm into the air—and that the Applicant was not involved with the shooting or the fight—simply does not constitute prejudicial evidence warranting severance. Accordingly, even assuming that defense counsel should have asked for a severance, the Applicant has failed to meet his burden of proof by establishing that there is a reasonable likelihood that such a motion would have been granted. This allegation is denied and dismissed.

5. Allegation #5: The Jury Note

The Applicant alleges that defense counsel was ineffective for failing to request that the jury be reinstructed regarding reasonable doubt after the jury sent a note to the trial judge that read: "Can we get a whole copy the law as stated and reasonable thought (doubt)?" Court's Exhibit #4.⁷ This Court finds that the Applicant has not met his burden of proof with regard to establishing that he was prejudiced by the trial judge's response to the note.

In response to the note, the presiding judge handwrote a message back to the jury that reads in full:

I cannot comply with your request. I can recharge the entire law given, or recharge any particular portion that you would like. This will need to be done in the courtroom so the court reporter can record it.

Court's Exhibit #4. This Court finds that the response given by the trial judge was proper and appropriate under the circumstances. The Court does not share the Applicant's concern that the jury did not understand the appropriate burden of proof. Although the jury used the phrase

⁷ This document was also admitted as an exhibit by the Applicant in this case.

"reasonable thought," they also included the word "doubt," indicating that they understood the instructions given by the judge. Furthermore, if there was any confusion, the trial court's response informed the jurors that they could rehear the charge if they wanted clarification. The fact that the jury did not request further instruction, even after being invited to do so by the trial judge, shows that the jury did understand the instructions provided by the jury charge. Accordingly, the Applicant has failed to demonstrate there is a reasonable probability that a different response would have resulted in an altered verdict. This allegation is denied and dismissed.

6. Allegations #7 and 8: Jury Instruction on Prior Inconsistent Statements

The Applicant alleges that both defense counsel and appellate counsel were ineffective regarding the trial judge's failure to instruct the jury that they could consider prior inconsistent statements of witnesses as substantive evidence. With regard to defense counsel, this Court finds that the Applicant has failed to demonstrate prejudice. With regard to appellate counsel, this Court finds that the Applicant has failed to demonstrate both deficient conduct and prejudice.

In State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982), the Supreme Court recognized that "South Carolina has followed the traditional rule that testimony of inconsistent statements is admissible only to impeach the credibility of the witness." 278 S.C. at 581, 300 S.E.2d at 69. The Supreme Court then changed that rule, and stated "[h]enceforth from today, we will allow testimony of prior inconsistent statements to be used as substantive evidence when the declarant testifies at trial and is subject to cross-examination." Id. The Court of Appeals has held that a trial court's failure to give Copeland's instruction is error. State v. Caulder, 287 S.C. 507, 513, 339 S.E.2d 876, 879-880 (Ct. App. 1986).

During the colloquy on the jury charge, defense counsel asked the trial judge if he intended to charge the jury "that they can accept some, none, or part of all of" a witness' prior inconsistent statement "and use that as a part of their strategy in determining the truth of what happened." Trial Tr. p. 945, lines 7-11. The trial judge responded that he would charge the jury "[e]arlier contradictory statements are admissible to impeach the credibility of the witness and not to establish the truth of the statements." Trial Tr. p. 946, lines 5-7. In response, defense counsel stated "[y]es, sir." Trial Tr. p. 946, line 8. In its charge to the jury, the trial court instructed the jury that "earlier contradictory statements are admissible only to impeach the credibility of the witness and not to establish the truth of the statements." Trial Tr. p. 1013, lines 5-7. Defense counsel did not renew any objection at the close of the trial court's charge to the jury. See Trial Tr. p. 1025, line 20-p. 1027, line 4. In an affidavit, appellate counsel stated that he would not have raised this issue on appeal because trial counsel failed to preserve the claim for appeal by failing to specifically cite to any authority regarding the charge, by failing to file any proposed charge on the issue as an exhibit, and by acquiescing to the trial court's proposed charge. See Affidavit of Robert M. Dudek at 1-2.⁸

Beginning with appellate counsel, this Court agrees with appellate counsel that defense counsel failed to preserve any issue related to the jury instruction for direct appeal. See generally State v. Williams, 319 S.C. 54, 56, 459 S.E.2d 519, 520 (Ct. App. 1995) (holding that a party's "express[] agree[ment] with the trial court regarding the instructions that the trial court planned to give the jury" waives an argument that the trial court erred in giving the charge). Therefore, this Court finds that appellate counsel's performance was not deficient in failing to raise this issue on appeal because defense counsel failed to preserve the issue for appeal. The

⁸ This affidavit was filed as an exhibit with this Court and is properly considered as substantive evidence pursuant to S.C. Code Ann. § 17-27-80 ("The court may receive proof by affidavits").

issues that appellate counsel did raise on appeal were sufficiently strong that the Court of Appeals published its decision disposing of those issues and that the Supreme Court initially granted certiorari to review. Given the strength of the issues that appellate counsel did raise on appeal, it is likely that raising an unpreserved issue such as this one would have detracted from the preserved claims. Accordingly, this Court concludes that appellate counsel was not deficient in failing to raise this claim on direct appeal.

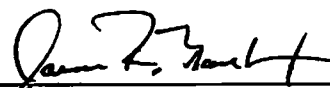
This Court also finds that the Applicant has failed to establish prejudice stemming from the trial court's failure to give Copeland's charge. The Applicant points to three prior inconsistent statements that were admitted at trial that he claims the jury should have been permitted to consider as substantive evidence: (1) Shunta Wilson's statement regarding the number of shots that were fired and the kinds of firearms she saw; (2) Melvin DeWitt's statement regarding the number of shots that were fired; and (3) Jacques' statement where he did not admit to firing a firearm. This Court concludes that the Applicant cannot show that there is a reasonable likelihood that the result of the trial would have been different had the jury been able to consider these prior statements as substantive evidence. With regard to Wilson's and DeWitt's statements, the ballistics evidence reveals that it is highly likely that two guns were fired the night of the incident, so it is not likely that the jury would have considered their prior inconsistent statements as substantive evidence that only one gun was fired and acquitted the Applicant on that basis. With regard to Jacques' statement, multiple witnesses identified Jacques as a shooter, so it is not likely that the jury would have considered his prior inconsistent statement that he did not fire a gun and acquitted the Applicant on that basis. Accordingly, this Court finds that the Applicant has failed to demonstrate that defense counsel's deficient conduct prejudiced him. Furthermore, this Court finds that the Applicant has failed to demonstrate that

there is a reasonable likelihood that the result on appeal would have been different had this issue been presented on appeal. Accordingly, these allegations are denied and dismissed.

**VII.
CONCLUSION**

This Application for Post-Conviction Relief is hereby **GRANTED**. The Applicant's conviction and sentence for murder are vacated, and this matter is remanded to the Richland County Court of General Sessions for a new trial.

IT IS SO ORDERED.



James R. Barber, III
Presiding Circuit Court Judge
Fifth Judicial Circuit

This 20th day of MARCH, 2014.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Adams Gibson, #322094,

Case No. 2013-CP-40-2107

Applicant,

**RESPONDENT'S MOTION TO
RECONSIDER, ALTER OR AMEND
PURSUANT TO RULE 59, SCRPC**

v.

State of South Carolina,

Respondent.

Respondent, by and through undersigned counsel, pursuant to Rule 59, SCRPC, moves this Court to reverse its earlier decision and deny post-conviction relief where Applicant failed to meet his burden as set forth in Strickland v. Washington, 466 U.S. 668 (1984).¹

In addition to all grounds previously argued, Respondent requests this court's reconsideration of its findings particularly with regard to prejudice. The Respondent maintains that Counsel was not ineffective in failing to raise and objection to the absence of the following language in State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983) (overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)):

If facts are proved beyond a reasonable doubt sufficient to raise an inference of the malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

Respondent specifically calls attention to the findings regarding prejudice resulting from the absence of this charge.

There were various theories upon which Applicant could be convicted in this case. The evidence showed that Applicant summoned his younger brother, Jacques, to drive Applicant's own car to the scene of a budding conflict. Applicant himself had exchanged words with a

¹ The order was filed on March 21, 2014, and a copy was received by Respondent on March 26, 2014.

member of the rival group, and another conflict between two other group members was brewing. Jacques left his two friends, also younger, in Applicant's car and went inside the bar. The two spoke, Applicant presumably apprising Jacques of the situation. The tensions soon spilled into the parking lot, and a fistfight erupted. The testimony of the witnesses and the physical evidence at the scene (shell casings from a .25 caliber weapon were found in addition to evidence of the 9mm which killed the victim) reveal that two weapons were ultimately fired on the scene. The jury arrived at a conclusion of guilt as to both parties based on the Applicant and Jacques acting in concert. The possible scenarios were:

1. Applicant and his brother, Jacques, were both firing weapons, with Jacques firing the fatal shot. Per Jacques' statement and some witness accounts, the 9mm was fired by Jacques, and shots from another weapon were also heard. The evidence from all witnesses leads to the inescapable conclusion that Applicant was the only other possible shooter. All others around the melee are accounted for. Three pairs are exchanging punches and kicks and each confirms that his opponent was unarmed at the time the shots rang out. Tramele Davis is fighting Ravaris Henry; Demetric Davis is fighting Tori Boyd; Antwan Martin is fighting Marcus Tucker. Stephon Willingham and Vernon Davis are mutually accounted for as unarmed in Applicant's white Escort. Lakisha Davis was in her burgundy Altima alone, left there as Applicant went toward the fighting. Antonio Smith, who had been on the sidelines and was unarmed by all accounts, was confronted by an armed Jacques and froze. By all accounts, the victim, Dennis Irby, was unarmed and not participating in the fight. This left Applicant as the remaining shooter. Shunta Wilson's identification of Applicant as the shooter would seem to support this hypothesis.

2. Jacques fired the fatal shot as per his statements and witness accounts identifying him as the shooter, and it is unknown who the second shooter was.

Applicant's arguments and this court's findings regarding prejudice hinge on there being a lack of malice in the shootings. In any scenario, Respondent submits there was overwhelming evidence of malice in addition to the use of a weapon (which alone was clear in this case), and had the jury been specifically charged the language from Elmore directing them to consider other evidence along with the use of a gun as a basis for finding malice, the result of the trial would have been no different. Applicant did not innocently telephone his gun-wielding younger brother, Jacques, for a ride. Applicant summoned Jacques and his young friends to bring Applicant's own car to the scene of a fight brewing, a car he presumably knew contained one or more weapons. When Jacques entered the bar the two did not leave, contrary to Applicant's stated desire to leave. As they talked, Applicant presumably apprised Jacques of the situation. Following the shooting, the two fled to the home of a mutual acquaintance.

The evidence in this case was such that the use of the weapon alone constituted overwhelming evidence of malice. Even analyzing the case purely under the theory that Jacques was the only shooter, under "hand of one/hand of all" the court's finding that Jacques' actions could have been found to have been perpetrated without malice – yet not satisfy the requirements of any other lesser offense (e.g. involuntary manslaughter, voluntary manslaughter) or defense (e.g. accident, self-defense, defense of others) produces an absurd result. Under this reasoning, a defendant could arrive at the scene of a brewing conflict, purposefully pull the trigger of a gun, fire randomly into a crowd at will, and merely by claiming lack of intent as to the possible fatal results of his actions evade punishment, essentially committing a legal murder simply by claiming he didn't mean to kill anyone when he did so. Our case law has made clear that

unprovoked, unmitigated firing into a crowd constitutes murder – the killing of another with malice. State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007) (Defendant approaching altercation in which he had no prior involvement with weapon and intending to fire shots into the air not entitled to self-defense instruction); State v. Ross, 55 S.E. 977, 978 (1906) (“If you would take the pistol and deliberately fire it into that crowd, with no intention of killing any particular man, but recklessly shot into that crowd and killed someone, that would be murder.”) The solicitor’s statement in closing and the judge’s instruction that malice could be inferred from the use of a deadly weapon is correct. Moreover, here we have overwhelming evidence of malice even in the attendant circumstances where weapons were deliberately brought to a scene and fired into an unarmed crowd. If the jury accepts that Applicant was in fact the second shooter, the evidence of malice becomes even more pronounced. Clearly, the evidence of malice in this instance is such that had the specific charge from Elmore referenced above been added to the trial court’s charge, the result of trial would have been no different.

CONCLUSION

Based on all the foregoing, this Respondent requests that this Court reconsider its prior ruling and deny Applicant post-conviction relief. Respondent requests a hearing to fully argue this 59(e) motion and address each of the raised issues before this Court.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN RATIGAN
Senior Assistant Deputy Attorney General

[Signatures continued on next page.]

MARY S. WILLIAMS
Assistant Attorney General

By: Mary Williams 4/2/14
Attorneys for Respondent
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

ADAMS GIBSON, #322094,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2013-CP-40-2107

**RETURN TO RESPONDENT'S
MOTION TO RECONSIDER, ALTER
OR AMEND PURSUANT TO RULE 59,
SCRCP**

NOW COMES the Applicant in the above-captioned case, acting by and through undersigned counsel, respectfully filing this Return to the Respondent's motion to alter or amend the Order Granting Post-Conviction Relief. The Applicant respectfully requests that this Honorable Court deny the Respondent's Rule 59(e), SCRCP, motion for the following reasons:

The primary thrust of the Respondent's Rule 59(e) motion is that this Court erred in finding that the Applicant was prejudiced by defense counsel's deficient performance. The matter of prejudice is thoroughly addressed in the Order. See Order at 12-16; 18-19. Moreover, the matter of prejudice was litigated in the arguments before this Court at the PCR hearing, in memoranda submitted by both parties following the PCR hearing, and in the proposed orders submitted by both parties to this Court following the filing of the memoranda. The Respondent's motion does not contend that this Court overlooked or misapprehended any of its arguments; instead, the Respondent's motion simply requests that this Court agree with the Respondent's arguments, made previously and rejected, regarding prejudice. This Court reached its conclusion to grant the Applicant's PCR following extensive deliberation on the issue of prejudice; this Court should not now reconsider its ruling and deny relief when the Respondent has presented no arguments that have not previously been made.

Moreover, distilled to its essence, the Respondent's argument amounts to the following: since a firearm was discharged and no lesser-included offenses or defenses were charged, there is overwhelming evidence of malice. That argument is simply not the law. In State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009), the defendant fired a firearm in a small area where multiple people were standing, killing the victim unintentionally. The jury acquitted the defendant of murder, and the Supreme Court held that the defendant was not entitled to jury charges of voluntary manslaughter, involuntary manslaughter, accident, or, by implication, self-defense. Id.¹ In other words, the defendant knowingly fired a firearm into a crowd, killing someone, and should not have been convicted of a crime. Consequently, there is at least one documented and verified occurrence of the Respondent's claimed impossibility.

As much as the Respondent appears to argue that it is not the case, intent is a required element of murder. The use of a firearm does not conclusively prove that a defendant acted with the required mental state of malice. It is for this very reason that the Supreme Court adopted the standard charge in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), and why it was necessary for the entire charge to be given. This Court was correct to conclude that the Applicant was prejudiced by defense counsel's failure to object to the trial court only instructing the jury as to a portion of Elmore's charge. The Applicant respectfully submits that this Court should deny the Rule 59(e) motion.

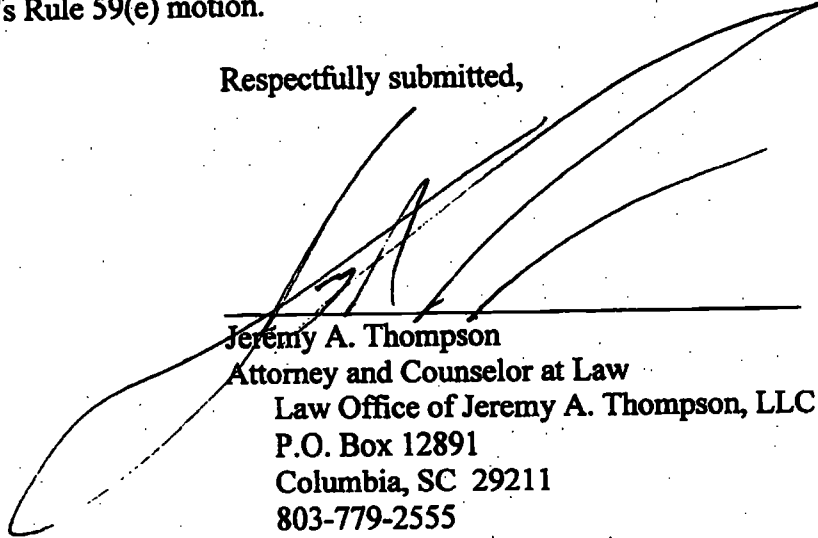
As a final matter, the Respondent requests that this Court hold a hearing on its motion. While the Applicant obviously defers to this Court's discretion on scheduling a hearing, the Applicant does not believe that such a hearing is necessary. The Respondent's arguments have

¹ While the issue of self-defense was not specifically addressed on the appeal, the Supreme Court noted, in its discussion of the accident defense, that "there is no evidence he was lawfully armed in self-defense." Id. at 216, 672 S.E.2d at 789.

been hashed and rehashed before this Court over the course of the last several months. The Applicant does not believe that a hearing is necessary to re-rehash the arguments again.

WHEREFORE, having set forth his grounds, the Applicant respectfully requests that this Court deny the Respondent's Rule 59(e) motion.

Respectfully submitted,



Jeremy A. Thompson
Attorney and Counselor at Law
Law Office of Jeremy A. Thompson, LLC
P.O. Box 12891
Columbia, SC 29211
803-779-2555
803-779-2556 FAX
jeremyatlaw@yahoo.com
Attorney for the Applicant.

This 23rd day of April, 2014.

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

ADAMS GIBSON, #322094,)

Applicant,)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

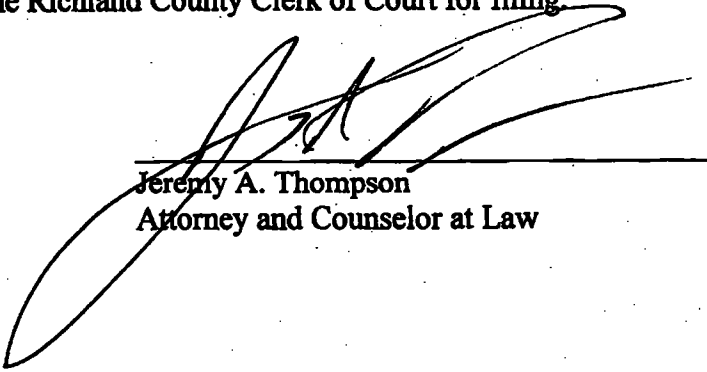
CASE NO.: 2013-CP-40-2107

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Respondent's Motion to Reconsider, Alter or Amend Pursuant to Rule 59, SCRPC in the above matter has been served on the presiding judge this 23rd day of April, 2014, by hand-delivery to:

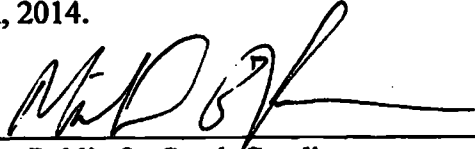
The Honorable James R. Barber, III
Presiding Circuit Judge
P.O. Box 2766
Columbia, SC 29202

The original having been sent to the Richland County Clerk of Court for filing.



Jeremy A. Thompson
Attorney and Counselor at Law

SWORN TO BEFORE ME this 23th day of
April, 2014.



Notary Public for South Carolina

(L.S.)

My Commission Expires:

7/10/2022

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

ADAMS GIBSON, #322094,)

Applicant,)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

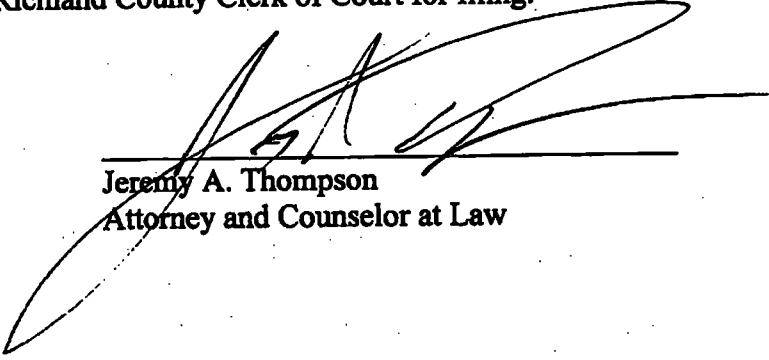
CASE NO.: 2013-CP-40-2107

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Respondent's Motion to Reconsider, Alter or Amend Pursuant to Rule 59, SCRPC in the above matter has been served on opposing counsel this 23rd day of April, 2014, by mailing in an envelope properly addressed with postage prepaid to:

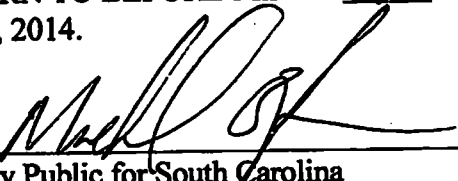
Mary S. Williams, Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

The original having been sent to the Richland County Clerk of Court for filing.



Jeremy A. Thompson
Attorney and Counselor at Law

SWORN TO BEFORE ME this 23rd day of
April, 2014.



(L.S.)
Notary Public for South Carolina

My Commission Expires: 7/1/2022

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2013-CP-40-2107

Adams Gibson, #322094

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Non suit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

The State's Rule 59(e) motion is denied without oral argument.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

James L. Smith

Judge Code 2110

Date 4/23/14

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 25 day of April, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

Court Reporter _____

ATTORNEY(S) FOR THE DEFENDANT(S)

Clerk of Court

Jeanette W. McBride

STATE OF SOUTH CAROLINA

COUNTY OF
STATERichland

VS.

Adams Gibson

AKA:

Race: BSex: M

Age: _____

DOB: _____

SS#: _____

Address: _____

City, State, Zip _____

DL# _____

SID# _____

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

2005

- GS -

409085

A/W#:

I915528

Date of Offense:

9-5-05

S.C. Code §:

16-3-10

CDR Code #:

0 / 1 / 1 / 6☐ CASE RESTORED

SENTENCE SHEET

☐ PLEA☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADSTO: Murderin violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 0 / 1 / 1 / 6☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS (CSC ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

[Signature]
Solicitor

Defendant

[Signature]
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 30 ~~years~~ or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of
\$ _____ plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years
and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which
are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the
State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

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

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: _____

§14-1-206 (Assessments 107.5%) _____

§14-1-211(A)(1) (Conv. Surcharge) \$100 \$ ☒§14-1-211(A)(2) (DUI Surcharge) \$100 \$ ☐§56-5-2096 (DUI Assessment) \$12 \$ ☐§35-13 (Public Def. Prob) \$500 \$ ☐§33-13 (B TP (Law Enforce. Funding) \$25 \$ ☒§33-7-13 (TP (Drug Court Surcharge) \$100 \$ ☐§50-14-174 (BUI Breath Test Fee) \$50 \$ ☐§56-5-2042(J) (Assessable Assessment) \$40/ea \$ ☐3% to County (if paid in installments) \$ 3.75TOTAL: \$ 128.75[Signature] Clerk of Court/ Deputy ClerkCourt Reporter: [Signature]

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 Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP

Requires \$500 be paid to Clerk during probation

PRESIDING JUDGE [Signature]

Judge Code: _____

Sentence Date: 5/29/07

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

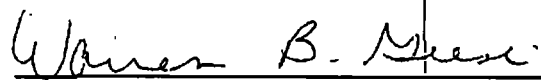
INDICTMENT

At a Court of General Sessions, convened on October 19, 2005, the Grand Jurors of Richland County present upon their oath:

MURDER

That ADAMS GIBSON did in Richland County on or about September 5, 2005, feloniously, willfully and with malice aforethought, kill one Robert Dennis Irby by means of using a handgun to shoot the victim and that the said victim died as a proximate result thereof. All in violation of SC Code of Laws § 16-3-10.

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


Warren B. Giese, SOLICITOR

WITNESSES

(S) Investigator Walter McDaniels, RCSD

DOCKET NO. 2005-GS-40-9085

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

OCTOBER TERM 2005

42

THE STATE
VS.

ADAMS GIBSON

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

ARREST WARRANT NUMBER

I915528

ACTION OF GRAND JURY

TRUE BILL

Landra Pherige
Foreperson of Grand Jury
Date: OCT 19 2005

VERDICT

Foreperson of Petit Jury
Date:

Indictment for

MURDER

SC Code: 16-3-10
CDR Code: 0116
Class FEL/EXM(V)CERTIFIED TRUE COPY
OF ORIGINAL FILED
J. [Signature] S.
RICHLAND COUNTY
SOUTH CAROLINA

ARREST WARRANT

I-915528

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland / Dentsville Magistrate

THE STATE

RCSD05090409

against

Adams Gibson

Address: 2546 Mood Harrison Rd Bx 33

Ridgeway, SC 29130

Phone: SSN: [REDACTED]
Sex: M Race: B Height: 5 10 Weight: 185

DL State: SC DL #: 011266021

DOB: [REDACTED] Agency ORI #: 04000

Prosecuting Agency: Richland County Sheriff Department

Prosecuting Officer: Walter Mcdaniels

Offense: Murder / Murder

Offense Code: 0116

Code/Ordinance Sec: 16-03-0010, 0020

This warrant is CERTIFIED FOR SERVICE in the

☒ County/ ☐ Municipality ofThe accused
is to be arrested and brought before me to be
dealt with according to the law.

Signature of Judge

Date: 9-07-05 (L.S.)

RETURN

A copy of this arrest warrant was delivered to

defendant Adams Gibson

on 9-7-05

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Richland General Sessions
1701 Main Street
P O Box 192
Columbia, SC 29202

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland / Dentsville Magistrate

Personally appeared before me the affiant Walter Mcdaniels

being duly sworn deposes and says that defendant Adams Gibson

did within this county and state on 09/05/2005

violate the criminal laws of the

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of

Richland / Dentsville Magistrate

in the following particulars:

DESCRIPTION OF OFFENSE:

Murder / Murder

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:That on 9/5/2005 while at 8102 Two Notch Rd in the Dentsville Magisterial District of Richland County, one Adam
Kartez Gibson did commit the crime of Murder in that he did along with a co-defendant use a handgun to shoot the
victim (Dennis Irby) in the left shoulder, thus causing the victim's death. The incident occurred as a result of a
physical altercation that took place prior to the shooting. Both the defendant and co-defendant were observed by
several witnesses shooting at the victim from a 4 door white in color sedan. The defendant was identified in a photo
line-up by multiple witnesses. Affiant and others are witness to prove the same.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland / Dentsville Magistrate

Affiant's Address 5623 Two Notch Road

Columbia, SC 29223-

Affiant's Telephone (803)576-3000

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on 9/5/2005 defendant Adams Gibson

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Richland / Dentsville Magistrate

) as set forth below:

DESCRIPTION OF OFFENSE:

Murder / Murder

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable

Sworn to and subscribed before me

on 09/06/2005

Signature of Issuing Judge
Phillip F Newsom

Judge Code: 5014

Judge's Address 2500 Decker Blvd

Columbia, SC 29206-2323

Judge's Telephone (803)576-2560

Issuing Court: ☒ MagistrateCERTIFIED TRUE COPY
OF ORIGINAL FILEDRICHLAND COUNTY
SOUTH CAROLINA

BAIL set by

WITNESSES

1286

Judge Lloyd
on 9/12/05
Type and Amount: DENIED
Name of Surety: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

PRELIMINARY HEARING held by

Judge _____
on _____
Defendant Attorney: _____

Name: _____
Address: _____
Telephone: _____

Decision: _____

Name: _____
Address: _____
Telephone: _____

DISPOSITION before

Judge _____
on _____
by _____
(indicate jury trial, bench trial, plea, nol. pros., etc.)

Name: _____
Address: _____
Telephone: _____

Disposition: _____

Name: _____
Address: _____
Telephone: _____

Sentence: _____

Name: _____
Address: _____
Telephone: _____

JURORS

Name: _____
Address: _____
Telephone: _____

CODEFENDANTS

CMTI339D SCDC OFFENDER MANAGEMENT SYSTEM 05/08/13
OMCOMITA RELEASE DATE SCREEN C023981
SCDC# > 322094 LOC: BROAD RIVER
GIBSON, ADAMS - SCDC CLASSIFICATION...: VIOLENT
OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE SEXUAL REGISTRY...: N
SEXUAL PREDATOR...: NOT APP
DNA STATUS...: COMPLETED
GPS REQUIREMENT...: N
PREA DECISION...:
CURRENT SENTENCE: 030-00-000 CONSECUTIVE SENTENCE ...: N
030-00-000 CURRENT SENT START DATE: 09/07/2005
PROJECTED COMPLETION DATES
MAXOUT DATE ...: 08/31/2035
YOA SIX YEAR DATE: / /
INITIAL PAROLE DATE: 00/00/0000
CURRENT EWC ..: NOT CURRENTLY EARNING EWC
CURRENT EEC ..: NOT CURRENTLY EARNING EEC
NEXT PAROLE HEARING DATE: 00/00/0000
TOTAL GT DAYS EARNED ...: 000000
TOTAL EARNED WORK CREDITS ...: 000000
TOTAL EDUCATION CREDITS ...: 000000
TOTAL EXTRA EARNED CREDITS ..: 000
TOTAL SERVICE TIME EARNED ...: 002761
LABOR CREW/WORK PROG DATE: 99/99/9999
LABOR CREW DISQ REASON:
CATEGORY 4 OR 5 OFFENSE
SUPERVISED REENTRY DATE...: 00/00/00
ISS...:
PFKEYS: 5:HISTORY OF DATE CHANGES
4-@ 1 Sess-1 167.7.50.33 SCDC1396 3/11

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

RECORD SUMMARY REPORT DATED 05/08/13

C0239

GIBSON, ADAMS - FBI # 265837VB6 SID# SC01396653 SCDC # 322094

OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE
 INSTITUTION ...: BROAD RIVER CORR. INST.
 SECURITY/CUST.: 3 SHORT TERM LOCKUP
 CURR INCARC SENT....: 30 YRS 0 MOS 0 DYS
 CENTRAL MONITORING.: YES
 SOCIAL SECURITY #....: [REDACTED]

DORM.....: S0246A
 RACE.....: B SEX....: M
 PROJ MAXOUT DATE: 08/31/2035
 PROJ PAROLE DATE: 00/00/0000
 EWC JOB...: NO CURRENT JOB
 EDUC PGM.: GED/HS GRAD INDEPEND
 EWC LEVEL: 0 EEC LEVEL:
 ASSIGNMENT...: LOCKED - UP

CURRENT PROGRAM...: AIDS EDUCATION WORKSHOP
 AGE....: 30 DATE OF BIRTH...: [REDACTED]

PREVIOUS NUMBERS:

** NO PREVIOUS NUMBERS **

CURRENT OFFENSES	SENTENCE YRS MOS DYS COUNTY	SENTENCE START V/NV CATEGORY
MURDER	30 0 0 RICHLAND	9/ 7/20 5 V 5

PRIOR COMMITMENTS OVER 90 DAYS:
 NO PRIOR COMMITMENTS OVER 90 DAYS

DETAINERS (HOLD, WANTED, NOTIFY):

- *NO DETAINERS*
- *NO DETAINERS*

ESCAPES:

- *NO ESCAPE HISTORY*

CRIMINAL CHARGES:

- *NO CRIMINAL CHARGES WHILE IN CUSTODY*
- *NO CRIMINAL CHARGES HISTORY*

ASSAULTIVE DISCIPLINARIES:

- 5/ 2/13 STRIKING AN EMPLOYEE WIT PENDING
- 10/18/12 POSSESSION OF A WEAPON DROPPED
- 9/22/10 STRIKE I/M W/NO WEAPON DROPPED

MAJOR STAFF
 CHARG
 CHARG INMATE WEAPON

NON-ASSAULTIVE DISCIPLINARIES:

- 6/14/ 8 OUT OF PLACE

OTHER

HISTORY OF MOVEMENTS:

DATE	LOCATION	STATUS	REASON
4/16/13	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
4/16/13	KIRKLAND	INCARCERATED	MEDICAL
2/27/13	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
2/27/13	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
12/18/12	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
12/18/12	PALMETTO RCHLAN	AUTH ABSENCE (AWL)	MEDICAL
11/28/12	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
11/28/12	KIRKLAND	INCARCERATED	MEDICAL
9/29/10	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
7/ 2/ 7	MCCORMICK	INCARCERATED	ADMINISTRATIVE
5/31/ 7	KIRKLAND	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON	JOB LVL
PLUMBER HELPER	03/01/12	5/ 2/13	PLACED IN ST/SP CUSTODY	3F5
FOOD SERVICE AIDE	10/12/10	2/29/12	LATERAL TRANSFER	3F5
FOOD SERVICE AIDE	09/30/10	9/30/10	PLACED IN ST/SP CUSTODY	3F5
GENERAL WORKER	05/25/10	9/22/10	PLACED IN ST/SP CUSTODY	3F5
MEDICAL ORDERLY	06/23/09	3/11/10	PLACED IN ST/SP CUSTODY	3F5
GENERAL WORKER	05/28/09	6/22/ 9	LATERAL TRANSFER	3F5
MEDICAL ORDERLY	12/20/07	3/13/ 9	UNSAT JOB PERFORM	3F5
WARDKEEPER ASSISTANT	07/03/07	12/19/ 7	LATERAL TRANSFER	3F5

HISTORY OF EARNED EDUCATION CREDITS:

EEC	START	END	TERMINATION
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GIBSON, ADAMS - FBI # 265837VB6 SID# SC01396653 SCDC # 322094 (CONTINUED)
BONUS 8-11 HRS/WK 01/25/11 5/ 2/13 PLACED IN ST/SP CUSTODY
BONUS 8-11 HRS/WK 09/22/09 3/11/10 PLACED IN ST/SP CUSTODY
BONUS 4-7 HRS/WK 09/15/07 9/21/ 9 PROMOTION
***** END OF REPORT *****