

VOLUME TWO OF TWO

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
J. Cordell Maddox, Jr., Circuit Court Judge

RECEIVED

FEB 23 2015

S.C. Supreme Court

LUTHER GARNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001312

APPENDIX

LARA M. CAUDY
Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

INDEX.....	i
TRIAL TRANSCRIPT (MAY 29 – 30, 2007)	1
TRIAL TRANSCRIPT (MAY 31, 2007 – JUNE 1, 2007).....	312
FINAL BRIEF OF APPELLANT	557
FINAL BRIEF OF RESPONDENT.....	588
COURT OF APPEALS’ OPINION NO. 4680 (FILED APRIL 28, 2010).....	623
PETITION FOR REHEARING (MAY 13, 2010).....	629
RETURN TO PETITION FOR REHEARING (JULY 2, 2010)	638
ORDER DENYING PETITION FOR REHEARING (AUGUST 27, 2010	646
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS (JANUARY 27, 2011).....	648
RETURN TO PETITION FOR WRIT OF CERTIORARI (MARCH 31, 2011).....	678
ORDER DENYING PETITION FOR WRIT OF CERTIORARI (FEBRUARY 8, 2012)	704
APPLICATION FOR POST-CONVICTION RELIEF (FILED MARCH 13, 2012)	705
RETURN (FILED APRIL 19, 2012)	712
SUPPLEMENTAL GROUNDS FOR POST-CONVICTION RELIEF (FILED AUGUST 27, 2013).....	718
POST-CONVICTION RELIEF HEARING TRANSCRIPT (AUGUST 27, 2013)	720
PLAINTIFF’S EXHIBIT #1	856
ORDER OF DISMISSAL (FILED FEBRUARY 3, 2014)	861
MOTION TO RECONSIDER (FILED MARCH 4, 2014).....	877

ORDER DENYING APPLICANT'S RULE 59(E) MOTION (FILED MAY 14, 2014)	885
INDICTMENTS	888

Closing by Mr. Richardson

190

1 was up against the wall hitting the wall and he said that
2 that blood marking was at about three feet. Tell me if this
3 isn't consistent with being pulled by the hair, led down the
4 hallway, you see, I mean, I've already brushed up against
5 this thing. There's the brushing of the blood down the
6 hallway. That's how your head gets at three feet. What
7 Peter Cestare is telling you is actually what she told you.
8 She said, "When I came in he was down in the den. He was
9 down in the den portion of it but then he was pulled down the
10 hallway, down the hallway and he was beaten," and Peter
11 Cestare told you that he saw spatter all the way down which
12 meant he was being beaten all the way down that hallway.
13 Well, didn't it have to come from a left-handed man? You've
14 just seen here me demonstrate it. This is the hallway and
15 you're being pulled and you're being hit like that, well,
16 where's the castoff going to be? Right against the wall
17 right where they found it. He was being beat. Now, that
18 doesn't narrow it down an awful lot for you; does it?
19 There's a lot of right-handed people. That doesn't exclude
20 anybody but trying to trick the man into saying it was left-
21 handed that's not fair; is it? He -- Luther Garner pulled
22 him right down that hallway hitting him all the way and you
23 saw where the man was on the dirt and hit again down on the
24 dirt or, excuse me, on the hallway because it wasn't but a
25 foot. Then this guy gets pulled over. Lonya told you he's

1 laying in the room, this back bedroom, and that Luther or
2 Kariem cast her the extension cord and says, "Tie his feet."
3 She says, "I'm not going to tie his feet." She said Luther
4 tied his feet there. Now, that's very consistent with what
5 Pete Cestare told you before he ever heard anything from her.
6 There's no way that he could have drug him down the hallway
7 with that cord. I mean, you're looking at this thing. Think
8 of what would have to happen to pull him by this cord down
9 this hallway like Mr. Axelrod wants you to believe. Well,
10 when you get to the door here you have got to get him in the
11 door. What's coming in the door? His feet has got to come
12 in the door. That's not consistent at all. That's
13 unreasonable. He was beat down in that door again. As he
14 was dead he was beaten. He was beaten. He begged for his
15 life in the den. He begged for his life down the hall and he
16 was beaten the entire time.

17 She says, "I can understand Spanish, and he was begging,
18 'I don't want to die. Senorita, I don't want to die.'"
19 Yeah, she was there. She was there and Lee Pierce was there
20 also, and listen to me, don't get rung into this trick. Lee
21 Pierce is another matter for another day. Another jury just
22 like you is going to hear Lee Pierce and they're going to
23 have to make a decision whether or not to turn Lee Pierce
24 loose because Lee Pierce is going to be saying, "It wasn't
25 me. It was Kariem. It wasn't me." That's just, that comes

Closing by Mr. Richardson

192

1 with the territory. When you got a murder nobody wants to
2 say it's me. They're going to all point fingers and it would
3 have been nice to have tried them all together but you can't
4 try them all together. Now, don't get hung up on Lee Pierce.
5 Judge Cottingham here today told you, don't chase that red
6 herring. He told you that the hand of one is the hand of
7 all. Do you remember that? If the two of us go to a
8 convenience store and I say, "Hey, we're going to rob this
9 place. They don't have any security. Just hang loose here a
10 minute. You watch and make sure that nobody -- no police
11 comes up." You don't have any idea what I'm going to do. If
12 I walk inside and shoot that guy and grab the money, guess
13 what, you are just as guilty as I am, not of just the robbery
14 but of the murder, too. If he had anything to do with this
15 robbery and he was inside that house searching for it, it
16 doesn't matter what he was doing. I am telling you he was
17 beating him, but you haven't even got to get to that
18 conclusion. If he died as a result of that burglary he's
19 guilty. I'm not asking you to make that leap of faith.
20 There is substantial evidence, several people saw him covered
21 in blood. Several people saw him covered in blood.

22 Mr. Axelrod threw off that A.J. may, may be covering up
23 for his first cousin, Lee, and I'm sure A.J. likes Lee.
24 Certainly he likes Lee better than he likes Luther but they
25 all sold drugs together. When they talked about selling drugs

1 to Paul Graham Mr. Axelrod was convenient to leave out one of
2 them, but Paul Graham bought and drove around Kariem Ward and
3 Lee and A.J. So, Paul knew all of them and he ain't, he
4 ain't got a dog in the fight at all, but Lee may. Well, what
5 did Lee do? Lee said, "I was there at the planning stage. I
6 was there when they said we're going to rob Pablo. I was
7 there when they left, when they -- and Luther or Kariem
8 looked back and said, 'Sit your ass down. This ain't for
9 you.'" You know what, it's easy to say he's covering up, but
10 think about what he just told you. "I am in on it. I would
11 have went. I was ready to go." He is a felon. He ain't a
12 preacher, but I don't pick my witnesses. He sit up there and
13 told you, "I'm ready to go. Me and the Courtney Brown," I
14 believe it was his name. "We were ready to go, too, but we
15 didn't. We were told not to." Why? I don't know. There is
16 supposed to be \$70,000. There is supposed to be a bunch of
17 cocaine. Maybe it's better to split \$70,000 two ways or
18 three ways because I'm not telling you, I will not stand here
19 and tell you that Lonya wasn't in on it. I don't know that
20 she was in on the murder, but I'm not going to sit here and
21 ask you to believe that she just was in the wrong place at
22 the wrong time, come riding up, didn't know no better. She
23 was in on it to some extent. She was in on getting drugs
24 from it. They were all into getting drugs and they were all
25 into getting money on it, but please don't run down that

Closing by Mr. Richardson

194

1 rabbit path either. What had happened here was these two
2 individuals along with Lonya got together and decided to rob
3 Pedro. Now, Pedro ain't -- Pablo ain't home. Pablo ain't
4 home. Remember that what Lonya told them is that when she
5 was talking to the guy he said, "Pablo gone to Mexico, no
6 drugs, no money." Let me assure you of something, had there
7 been drugs and money in there he would have given it up
8 because you don't take a beating like Amadro took without
9 turning it over. He'd give up anything he had, but Pablo
10 wasn't there. They just hit at the wrong time.

11 Better cover it while it's on my mind, even then they
12 take that. Remember his pants pockets were pulled out of his
13 pants. There's your attempted armed robbery. He had a gun
14 and went through his pockets. The only thing we couldn't
15 prove, you remember when we started off, I had him indicted
16 for armed robbery, too, just wasn't enough evidence to say
17 that he ever left with a penny. If he had took one cent and
18 I could have proved it, armed robbery would have been up
19 here, too. What you've got is attempted armed robbery, and
20 that comes from that argument about the money in the car at
21 Paul Graham's. There is just so much evidence that is here.
22 Lonya was there, yes. Mr. Axelrod discredited her on a bunch
23 of stuff but he stayed away from the house, and the reason he
24 stayed away from the house because he would have attacked
25 that, too, but what was substantiated about the inside of

1 that house? Is there any doubt in your mind that somebody
2 could have come up with what happened inside of that house
3 without being there? She told them that a gun was used, a
4 big long 22 was used to beat him to death and that the gun
5 fired and went through a wall. If you had just heard bits
6 and pieces from around the way about how somebody died and
7 you heard a gunshot went off and then a person was dead as a
8 result of it, the obvious thing is to say he shot him. She
9 didn't do that. She said he beat him to death, he beat him
10 to death, he continuously hit him, but he never shot him.

11 She also told you the first place in that house was in
12 the den. It would have taken being inside to know that. It
13 would have taken being inside knowing every detail to know
14 that he bumped up and down against that wall being pulled by
15 the hair as he was led down the hall, struck the entire time
16 across the face, across the bridge of the nose, across the
17 front of the head, the back of the head, all the way down
18 until where he finally met his maker in that hallway or in
19 that back bedroom. It would have taken somebody being on the
20 inside of that house to know that while all this was going on
21 Lee Pierce was in the back room turning everything over,
22 turning it all over, flipping the house. That thing about
23 she's lying to frame Luther Garner and she is lying to get
24 herself and Lee out of trouble, well, it probably would have
25 been a good chance if you were going to do that to leave

Closing by Mr. Richardson

196

1 Lee's name out of it altogether and leave your name out of it
2 altogether being she's the one that initially calls. Nobody
3 knew Lonya Snowden from Adam's house cat. Nobody knew Luther
4 Garner or Kariem from Adam's house cat, nor did they know
5 Lee, but she told them that and she told them and you go back
6 to and listen to it. She told them that, "When we arrived I
7 was driving. Luther was in the passenger seat and Lee was in
8 the backseat. When we left, I was driving. Luther was in the
9 passenger seat and Lee was in the backseat and we went" --
10 she did, I don't know what's the correct story, where she
11 went, it doesn't really matter whether she went to Summer
12 Drive first or to Paul Graham's first. Again, it's a red
13 herring. It doesn't matter if she stopped at Sonic. That's
14 where the bulk of all of this stuff took place. You didn't
15 hear a thing in arguments about what happened on the inside
16 of that house, and I would submit to you the reason you
17 didn't is that nobody wants you to focus on what's inside of
18 that house and what's inside of that house is a man that
19 could not understand why he was getting the crap beat out of
20 him, led down the hallway and ultimately left to die and
21 beaten while he was dead. You see the photographs of him
22 laying on his stomach. The woman told you he was on his
23 stomach and this guy is hammering away at the back of his
24 head with a gun. It would have been merciful to shoot him.
25 Dr. Proctor said he felt every one of those blows until he

1 was down at the back. He lived for a good long time and he
2 felt all of it. You might say, "I don't care nothing about
3 Amadro. He was living in a drug house. Well, what did Dr.
4 Proctor tell you? Amadro didn't have a dab of cocaine,
5 heroin, alcohol, nothing in his body, nothing. That's a
6 terrible way to die. That is a terrible way to die.

7 I want you to think about something. We have all been
8 to a funeral or a wake. We've all heard, "Well, doesn't this
9 person look natural? At least he died in peace." I don't
10 know if this man had a mamma or a father. We will come back
11 to that. He did not have a peaceful death by any stretch of
12 the imagination, none whatsoever, broke nose, head split
13 open. He's in pretty bad shape, tortured. It would have
14 been, it would have been merciful to have shot him instead of
15 beating him to death, but it takes somebody, when the Judge
16 when Judge Cottingham tells you about malice it takes a
17 wicked person to continuously beat somebody while they beg
18 for their life. It takes a wicked person to do that. That's
19 malice for you.

20 Now, let me, let me go to something else just a minute
21 because I know this has troubled you. This is -- we'll
22 pretend again this is the car seat and there is no blood up
23 here, no blood down there. There is blood in that kick
24 plate. You've heard several people talk about that. Here it
25 goes and you can look at that. You see a little bit of blood

Closing by Mr. Richardson

198

1 but there's not a lot of blood. Several of them told you
2 when you walk you see bloody footprints through the kitchen.
3 So, certainly blood is coming off the bottom of the shoe and
4 then out into the parking lot and down the gravel and back to
5 the car. There's blood but there's just a little bit of
6 blood on the side of this kick plate. Now, how does that
7 happen? I ask you for just a minute to think about -- I hate
8 to pick a particular store but in my mind for whatever reason
9 I'm thinking IGA. A lot of them don't have butchers anymore,
10 but if you've ever been to a butcher shop or a grocery store
11 you can watch a man that slices hogs or steaks or whatever
12 blood all day; right? Any of you know what I'm talking about
13 with a butcher? What you'll notice, what's he wearing? He
14 doesn't wear a poncho; does he? He wears an apron. He wears
15 an apron, and why would you wear an apron instead of a
16 poncho? Well, unless you're cutting something back here
17 you're not going to get blood on your back side. I mean,
18 unless you are sitting in it or rolling in it backwards,
19 unless he sat down in the floor to beat the fellow you're not
20 going to have blood back here or on the back of your shirt or
21 if he wasn't wearing a shirt, whatever, you wouldn't have it,
22 but he can walk out of that IGA or wherever, Jamestown
23 Grocery, looking like he slaughtered a hog and everybody
24 would say, "Old Butcher Dan is covered in blood," and he will
25 be. It'll be right here. I mean, think about where the

1 action is going on. When you've beaten somebody down the
2 hall, when you are on top of him pounding him in the back of
3 the head this is where the blood is at. It's not going to be
4 back here. Let me show you what happens when you sit in this
5 seat. I didn't plan this, but everything from here up on
6 these pants could be bloody as a stuck hog, just like I had
7 butchered hogs all day. All this could be bloody, but unless
8 I sat in that blood look what's touching this seat. Just
9 this. I don't know why they didn't find blood on the door
10 handle, but I do know why they didn't find it down here
11 because he didn't scrub his behind across the hallway. He
12 beat the fellow to death. Guys, he beat that man to death,
13 and he was bloody and Paul Graham said when he come out --
14 tell me what Paul Graham, what part in this has got him so
15 riled up with Luther or Kariem? Why is Paul so mad to want
16 to frame Kariem? That is an independent witness if there is
17 one. Hey, you all, he was partying with him the night
18 before. He smoked \$200 worth of crack with him and Lonya the
19 night before. He ain't want to be here. He has left this
20 whole area. He's nowhere to be found. He come here under a
21 subpoena because he had to, but Paul Graham ain't here to
22 grind an ax against Kariem Ward. You saw how nervous he was.
23 He didn't even want to get up here and do this, scared to
24 death. He knows what's happened. When he walks outside his
25 friend Lee comes to the door and says, "I need several

Closing by Mr. Richardson

200

1 changes of clothes. This won't do. Give me more clothes.
2 This won't do. Give me." You've got a picky killer over
3 here. You've got somebody that's picky about what he's going
4 to wear, may it's too hot or too cold. Maybe it doesn't suit
5 his style, but for whatever reason he sent set of clothes
6 after set of clothes back and when Paul Graham come out he
7 said why. He said he was out of his mind. Now, if the
8 State's setting all this up, it's going to be, "Oh, look,
9 man, you've got to go easy on Lonya. Lonya's the State's
10 friend." Huh-uh (negative response), he said Lonya is just
11 as high as he was sitting right out there with him. Well,
12 where was Lonya sitting? Driver's side door, driver's side
13 of the car. Where is Luther sitting? Over here in the
14 passenger side. And what's Luther doing? Isn't that just an
15 odd thing? I mean, if you are going to make up something
16 where do you come with just rubbing the blood off? Well,
17 that's what Paul said he was doing. He was arguing over
18 money. He was brushing the blood down and he said when he
19 held up the clothes to see if they would even fit him he held
20 them up like that to keep the blood off of, to keep the blood
21 off of the clothes. Do you see how somebody can sit down and
22 only really the thighs of your legs and your behind, for lack
23 of a better term, is going to be touching the seat and your
24 back and he's sitting there holding this stuff up, and I
25 don't know how much blood was there. I know that it was a

1 blood letting inside of that house, but I don't know how much
2 blood Luther had on him. I'd submit to you if I come in and
3 had poured a half a cup of, I don't know, Kool-Aid or
4 something on my shirt you'd say, "Well, he's covered with
5 Kool-Aid, the fellow can't even put on a shirt that's clean."
6 I don't know how much blood it was. I would imagine that it
7 was a pretty good bit because he has been in a
8 slaughterhouse. It was a crack house/slaughterhouse and he
9 was in there administering justice just like he told A.J.
10 that he had set out to do. "Sit down young whatever," I
11 forget what they call him, but, "Sit down. This ain't you.
12 This is me."

13 He told what he was going to do and let me tell you
14 something else. Your job is to extract from what you heard
15 reasonable inferences. I want you to think about -- you think
16 it just went in to effect this plan to rob Pablo that night
17 or maybe, just maybe it was maybe easier by the ingestion
18 of \$200 worth of crack. Maybe when you are just wild out of
19 your mind it's time to go and rob Pablo. Well, he certainly
20 didn't mind. Lee probably worked up a sweat hisself in there
21 turning over beds and looking for safe keys all because some
22 stripper had told him there is \$70,000 and a pile of cocaine
23 at the house. It's because of that this man lost his life.
24 There's no doubt that they went into that house. Talk about
25 an intent to commit a crime, that was it, but I'll tell you

Closing by Mr. Richardson

202

1 something, the brutality of this it would have really been
2 merciful to have shot him, shot him and left him. He's going
3 to be dead either way. He wouldn't be near this messed up.
4 Look at him. He's beat right down to the skull, and Dr.
5 Proctor said that that was a rounded object, whatever it was,
6 could be the barrel of a gun, you know how a gun rounds out.
7 It could be the butt of a gun because they come down. That's
8 another thing. I mean, hey, Lonya if she's making up stuff,
9 you got a 50-50 chance of picking a revolver, but you already
10 heard there was a shell casing, a 22 shell casing left
11 behind. You men, I don't know, women maybe, too, but if you
12 know anything about a gun, an automatic kicks the shell out.
13 A revolver will hold it inside. She knew all of that. She
14 was in there. She was in there, and she was up to a lot more
15 than she let on. Yeah, she did a good bit of stuff to
16 minimize it, and that ain't right to lie at any time. I'll
17 tell you what ain't right, to turn somebody loose that's
18 capable of such stuff as this right here. I mean, this girl
19 came in here and told you and they didn't even -- they, they
20 stayed away from it like it was like the plague what happened
21 inside of that house, but they were more than willing to talk
22 about where she had spent the last three weeks.

23 I'm sitting over here, I don't even know what to
24 question the guy about. I guess Jerry Linsky is a fair
25 enough guy. I don't doubt where she was staying, but I'll

1 ask the same question I have asked myself, what day of the
2 week was January 25th, 2005? I ain't got a clue. Paul
3 Graham said, "I don't know. I know it was the day that
4 Espinozat. I do know that because I know I was with them the
5 night before. I know when they came back the next day just a
6 few hours later they stayed, I don't know if it was three,
7 four, whatever, time, when they come back Luther is covered
8 in blood. I know that." So, don't let anybody tell you that
9 there wasn't any blood in the car. Don't let anybody tell
10 you that this man wasn't there. That just is not true. It's
11 not true at all. I don't seek to stand here and minimize
12 what Lonya did. Lonya ain't on trial. If Lonya was on trial
13 for driving people around, hiding guns, if she was on trial
14 for going to [REDACTED] there'd be enough evidence to
15 convict her, but on what happened inside of that house she's
16 telling you the truth because people that hadn't even heard
17 what she said come in and said, "This is how it happened,"
18 and either she's -- you have to have a better -- I don't know
19 if they ever gave her a percentage of guesstimation, but
20 apparently 72 percent which whatever remembrance she must
21 have remembered what happened in that house pretty well
22 because everything is justified all the way down, that
23 beating all the way down the hall, where he would fall, all
24 of it is justified, beating in the back of the head, all of
25 it.

Closing by Mr. Richardson

204

1 Now, I -- you remember when Judge Cottingham asked me
2 would I waive on the, on the law, and I did because of course
3 it's my job as the State to talk with you a little bit about
4 the law, and I'm not going to hold you much longer. Let me
5 take a, let me take a murder first because the Judge has
6 already instructed you on the law, but it may be easier just
7 to look at it, and if it's not it won't take but a minute. Is
8 somebody killed? Ain't no doubt about it. You've got a
9 body, Amadro Espinozat, he's more than a body. He is dead
10 and gone. He died what Lonya says was January 10th, Dr.
11 Proctor said it could have been the 10th, more probably the
12 11th. Do you see anything up here on what you've got to
13 determine that says they got it down on a certain date? No.
14 Even Judge Cottingham when he read you the indictment he said
15 on or about. It doesn't have to be a particular day. Lonya
16 says it was the 10th. Dr. Proctor said it was consistent
17 with that. They found him on the 11th. He's dead. There's a
18 killing, he is a person or he was, with malice aforethought.
19 Now, whether or not -- there really shouldn't be any question
20 the way the man died there's malice. You can call it
21 inferred, direct malice. There's enough malice to cover
22 every type of malice. It is an evil heart the way this man
23 died. Luther Garner, the man covered in blood, is guilty of
24 murder. Every element of this has been met. There is
25 killing of another with malice aforethought, no self-defense

1 to worry about.

2 I have got this marked armed robbery, but again, I told
3 you there wasn't enough, there wasn't enough to say that
4 anything was taken from him. So, it's not armed robbery.
5 It's attempted armed robbery, and I just, you know, didn't
6 have time to go back, but under the same thing it says taking
7 or attempting, attempted taking. The fact that the man's
8 pockets were pulled out that's enough. The fact that his bed
9 was turned over, you could tell that the purpose of this
10 thing was to take something from him, whether it was the
11 \$70,000 or the kilos of cocaine. There was an attempted
12 taking. May very well have been a taking. Remember at
13 Paul's house, now, Paul said before A.J. and Julianne ever
14 pulled up, when he walked out there there was a bad argument
15 going on between Lee and Luther and Lonya regarding money,
16 but you know, if you can't show money -- it could have been
17 over the -- anything. It could have been over gas money.
18 It's likely that they could have been arguing about money
19 that was taken but I don't know that but it's at least an
20 attempt at taking. Personal property, well, cocaine, we may
21 not like it, but it's personal property, so is money personal
22 property, with the intent to deprive, they did more than
23 that. This guy wasn't going to argue about cocaine. He would
24 have gladly give it up, but the intent to deprive or take
25 possession from it by force. You can't, you can't look at

Closing by Mr. Richardson

206

1 this thing and not say that there was a tremendous amount of
2 force or intimidation, don't worry about intimidation, the
3 man is beat to death. It is force. Armed with a deadly
4 weapon, didn't say he had to shoot him, but while armed with
5 a deadly weapon, and a pistol is a deadly weapon. Lonya said
6 there was two pistols. There was only one being used for
7 business, and that was that long 22 and that is the deadly
8 weapon. You don't have to shoot him with that, but hey,
9 there's a picture of a bat in here, in the back of that car
10 and I think Mr. Axelrod entered that, but you can see it
11 laying up against the car. You want to make up a story about
12 somebody being beat to death, you're going to make it up
13 right, go ahead and throw the bat in there. She told you it
14 was with a pistol, a 22, and burglary first this, this is
15 another thing you're going to have to decide. Entering a
16 dwelling, a dwelling is nothing more, I believe Judge
17 Cottingham told you, but a dwelling is just a place where
18 people live, and definitely the house is somewhere where a
19 person would live. Without consent, now, it seems as though
20 from Lonya's testimony that Kariem goes to the door and says
21 home inspection. There is, I think there's photographs
22 showing that there's no forced entry to the house. You might
23 say, "Well, how is that without consent?" Well, Judge
24 Cottingham told you if it's by trickery it's without consent,
25 and if Amadro didn't know that, "I'm opening the door to have

1 somebody beat me to death," then that's trickery. Even if
2 you don't believe the stuff about home inspection or
3 whatever, he probably didn't understand that to start with,
4 but if, if he is tricked into opening that door by simply
5 thinking this guy isn't going to kill me, also what he
6 thought the man is there to buy dope or apparently that's
7 where a lot of it was sold, but if he didn't understand he
8 was about to be killed that's trickery, and intent to commit
9 a crime therein, you know, it don't have to be the intent to
10 murder him therein. He doesn't have to -- you don't have to
11 say, "Well, when he entered the place I believe that he
12 intended to steal some stuff," that's enough, that's a crime.
13 I don't know if Kariem entered this place intending to kill
14 him or just got happy, but there was a lot of joy in how long
15 it would have taken because if you think about that it's
16 going to, it's going to wear you out pumping somebody a
17 hundred times or 60 times.

18 Aggravating circumstance, now, the deadly weapon, of
19 course, the pistol, you don't even have to go on to this, but
20 physical injury is another one, any one of these, these are
21 all ors, or, or, or the Judge told, dangerous instrument, any
22 of those is aggravating circumstances. Otherwise, it would
23 have been a burglary second, but that's what adds to it,
24 makes the burglary first.

25 I almost forgot about telling you something. Remember

Closing by Mr. Richardson

208

1 Stuart Cottingham, certainly he doesn't have a dog in the
2 fight, a Federal marshal. Mr. Cunningham said that they
3 started looking for Luther at the request of Horry County
4 Police. I believe it was at the beginning of February, but
5 you can listen to it again. I don't want to tell you
6 something that ain't right, but it took them February, March,
7 April, May, June. I think they found him in July, July, six
8 months, a Federal marshal and they knew where he was going,
9 took off to New Jersey. That's where they found him.
10 Evidence of a flight, you can consider that in determining
11 whether or not someone is guilty, not just of murder, but of
12 burglary, of armed robbery, of all of that, you can consider
13 all of that. You have got the facts before you today to
14 convict this man. You've got an eyewitness that told you
15 what happened with this man. You might not like that
16 eyewitness but she told you things that only somebody on the
17 inside could have known. Nobody showed any bias that Lonya
18 had toward this man. Lonya had also moved away. Lonya came
19 under a subpoena. She had to come back, but there ain't no
20 bias, no more bias against him than there would be Lee or any
21 other body. If she had a bias, probably your better bias is
22 going to be why didn't she want to pin this on Jerry Linsky
23 or whatever his name is. He just kicked her out of a house.
24 If she was mad at anybody it should have been him, but she
25 enjoyed crack cocaine to the degree of about \$200 worth with

1 this man the night before, I say the night before, just
2 several hours before. Hey, she minimized a lot of what she
3 was doing, but you got an eyewitness. Don't get caught on
4 this rabbit trail running around worried about where she went
5 afterwards. She ain't on trial for that. He ain't on trial
6 for going to [REDACTED] He's on trial because on either
7 January 10th or January 11th he took a pistol and he beat
8 Espinozat to death. He beat him to death, and that's why
9 he's on trial and I'll promise you if you'll narrow it down
10 to what happened in that house you'll be all right. You've
11 got a great burden. I've had it. I've had this burden all
12 week, but I'm fixing to -- and Ms. Lively and Mr. Axelrod.
13 This is about to go to you all. You have got to do what is
14 right. Remember, the Judge told you, "Hey, you're not here
15 to look for reasonable doubt." What did he tell you?
16 "You're here to find the truth. That's your job, ain't
17 asking you to find nothing but the truth. I appreciate this
18 whole week, not just this afternoon because I'm long-winded,
19 a little bit, but Mr. Axelrod is worse than I am I believe,
20 but still you've sat patiently from a very awful set of facts
21 and circumstances, and I just ask you to go back and do
22 justice. This man died and he deserves that. Your state,
23 the State of South Carolina deserves that. Kariem Ward
24 deserves that. There ain't nobody here asking you for
25 nothing but justice. You didn't kill him. That wasn't your

Instructions by Court

210

1 job. Your job is to find justice. I appreciate it, and I
2 hope to see you all on better circumstances. I'm through,
3 Your Honor.

4 THE COURT: Thank you, Mr. Richardson, Ms. Lightsey
5 [sic], Mr. Axelrod. Ladies and gentlemen, you have now heard
6 all of the testimony in the case. You will have with you the
7 various exhibits that I've permitted in the trial of this
8 case. I have given you the extensive instructions in the
9 law. As you begin your deliberations, I ask that you
10 remember the various instructions that I have given you, you
11 would specifically remember that this Defendant is presumed
12 innocent, they have to prove him guilty beyond a reasonable
13 doubt. Upon one indictment he is charged with murder and I
14 have given you the elements of murder the State must prove
15 beyond a reasonable doubt. He is charged with attempted
16 armed robbery. I have given you the elements there that the
17 State must prove beyond a reasonable doubt and he is charged
18 with burglary and I have given you the elements that the
19 State must prove beyond a reasonable doubt. To these
20 indictments this Defendant has specifically pled not guilty.
21 Now, I ask that you remember the various propositions of law
22 that I have given to you during your deliberations. I remind
23 you, Sir, that if any, you or any member of your jury wants
24 additional instructions in the law please write that question
25 down, let me know. I will be glad to let you have -- bring

1 you back out. I am not going to send the recording into the
2 jury room, but if you desire to hear it played again we'll
3 either bring you out and play it or get somebody to go in
4 there and turn it on for you. Just you let me know what you
5 need, and so, at this time now I'm going to ask that you go
6 to the jury room, do not begin your deliberation until I send
7 these indictments in to you along with everything that I have
8 introduced in the trial. You may proceed to the jury room.
9 The alternates remain in the courtroom, please, both
10 alternates.

11 (Whereupon, the following takes place outside the
12 presence of the jury.)

13 THE COURT: I wish I could let you go but I've had
14 from my experience I've seen things happen where I need you.
15 So, we'll make you comfortable outside the presence of the
16 jury. At this time, let the jury (sic) reflect that I have
17 taken the alternates away from the panel. Go ahead.

18 All right, first from the State. Any exceptions or
19 additions? That's all right. Any exceptions or addition to
20 the charge?

21 MR. RICHARDSON: None.

22 THE COURT: For the Defense?

23 MR. AXELROD: No, sir, Your Honor.

24 THE COURT: All right, gentlemen, now come forward.

25 I want these indictments to go to the jury room and everybody

Instructions by Court

212

1 agree now on what's in evidence.

2 Now, you remember now, there are several court exhibits
3 that I do not want to go in the jury room. Jimmy ---

4 MR. RICHARDSON: Yes, sir.

5 THE COURT: I want to make sure now that those things
6 are not going in the jury room, Ms. Lightsy [sic].

7 (Exhibits reviewed and approved by counsel for the State
8 and counsel for the Defendant.)

9 MR. AXELROD: Judge, I ask that the calendar be put in
10 also. I have one page of a calendar.

11 THE COURT: Let the calendar go in. There is no
12 problem with that. All right, let the record now reflect
13 that counsel for the State and the Defense have reviewed all
14 the exhibits and by unanimous agreement agree that what's in
15 there is appropriate and in evidence, and there's one
16 question, counsel for the Defense asked that the calendar go
17 in. I think we put it in, but I permit it to go anyway with
18 the consent of the Solicitor.

19 MR. RICHARDSON: Yes, sir.

20 THE COURT: Anything further, Mr. Axelrod?

21 MR. AXELROD: No, sir, Your Honor.

22 THE COURT: All right.

23 (Whereupon, deliberations begin at 6:12 p.m.)

24 *****OFF THE RECORD*****

25 (On the record.)

1 (Whereupon, the following takes place outside the
2 presence of the jury.)

3 THE COURT: We have one jury issue we need to get on
4 the record. They're bringing the jury out. I understand her
5 husband is being operated on at 9:30 tomorrow. We may have
6 to let her go and get an alternate. We'll see.

7 Bring that one juror out.

8 (Whereupon, Juror Number 73, Susan M. Depaul, enters
9 courtroom.)

10 THE COURT: Yes, ma'am. May I have your name,
11 please?

12 MS. DEPAUL: Susan M. Depaul.

13 THE COURT: And what is your problem, please? I want
14 to ---

15 MS. DEPAUL: My dad has to have surgery tomorrow
16 morning at 7:30. I was just informed about it, and I wasn't
17 sure if there would be a problem if I didn't get here exactly
18 at 9:30. I'm hoping he won't run into any kind of problem.
19 He's had MVS which is a form of ischemia and he's going in to
20 have a fluoroscope.

21 THE COURT: And I'm taking if at all possible you
22 would like to continue on the jury?

23 MS. DEPAUL: Yes, sir, I would.

24 THE COURT: Well, this is what we'll do. We will
25 keep you on the jury. If it develops -- try and be here at

1 9:30. If something happens to your father and something
2 serious, call and let us know.

3 MS. DEPAUL: Yes, sir.

4 THE COURT: And we'll make arrangements to let you
5 off and get an alternate.

6 MS. DEPAUL: Okay.

7 THE COURT: But as I understand it, what kind of
8 surgery is he going to have?

9 MS. DEPAUL: He's having a port put in but his numbers
10 right now are really low, so.

11 THE COURT: How old is your father?

12 MS. DEPAUL: That's a trick question. I'll have to
13 think. I'm sorry. He is 73.

14 THE COURT: 73, and he's having what kind of
15 operation?

16 MS. DEPAUL: He's having a port installed in his
17 chest.

18 THE COURT: How long does that, how long does that
19 take?

20 MS. DEPAUL: They said it should only take 45 minutes
21 and it starts at 7:30. So, I'm hoping I would be here by
22 9:30.

23 THE COURT: Okay, Donna, give her a number that she
24 can call in case she can't get here for some reason. I tell
25 you what let's do. I'll have the jury come back at ten.

1 That'll give you another 30 minutes. Would that help you?

2 MS. DEPAUL: That would be wonderful. Thank you, Your
3 Honor.

4 MR. AXELROD: That's fine, Your Honor.

5 THE COURT: All right, that suit everybody?

6 MR. AXELROD: Yes.

7 MR. RICHARDSON: Yes.

8 THE COURT: All right, bring the jury in, please.

9 Okay, that's fine, I'll leave you here and if -- you got
10 her number? Give her a phone number, and if something
11 develops you let me know. Otherwise, we'll expect you at ten
12 o'clock.

13 MS. DEPAUL: Thank you, Your Honor.

14 THE COURT: Okay, thank you. Yes, bring them in and
15 the alternates.

16 (Whereupon, the following takes place in the presence of
17 the jury.)

18 THE COURT: Mr. Foreman, ladies and gentlemen, the
19 clerk advises me that you wish to recede for the evening and
20 to return in the morning, which is certainly understandable.
21 You have been here for three days. Obviously, you didn't
22 get the case till about six o'clock. So, two hours
23 deliberation in a case like this is obviously not sufficient.
24 One of your jurors has a problem with her father being
25 operated on in the morning at 7:30 and she needs a little

1 extra time to get back here. So, instead of reporting at
2 9:30 I'm going to ask you to come back to your jury room
3 promptly at 10:00 o'clock in the morning and you will have
4 all opportunities, all day tomorrow and Saturday if necessary
5 to resolve the issues in this case. It is our intention that
6 this jury resolve the issues in this case and we'll give you
7 ample opportunity to do so.

8 Now, I'm going to require that both of the alternates
9 return in the morning at 10:00 o'clock and to be here in the
10 event this one lady can't get here and sometimes other things
11 happen. So, you never know when you're going to -- everybody
12 looks healthy, but my experience has been that things happen
13 sometimes. So, please remember my admonition. Now, don't
14 discuss this case with anyone, let no one discuss it with you
15 and make no independent inquiry. I continue to tell you that
16 whatever your verdict is it's got to be based on the law and
17 the evidence in this courtroom and from no other source. Any
18 further instructions required of the jury?

19 MR. RICHARDSON: May I approach?

20 THE COURT: Yes, sir, come forward.

21 (Whereupon, a bench conference was held in the presence
22 but out of the hearing of the jury.)

23 THE COURT: Now, there may or may not be media
24 coverage in this thing in the morning's paper, and I would
25 ask that you not read that. My experience has been sometimes

1 papers get confused over what happens. As a matter of a fact
2 I've tried a case and read about it the next morning and
3 didn't realize it was my case. So, again, if it's in the
4 newspaper tomorrow turn it aside, please, for me. So, I'll
5 now excuse you to be back in the jury room at ten o'clock in
6 the morning. Thank you so much.

7 (Whereupon, the following takes place outside the
8 presence of the jury.)

9 THE COURT: All right, anything further from the
10 State?

11 MR. RICHARDSON: No, sir.

12 THE COURT: Anything further from Defense?

13 MR. AXELROD: No, sir, Your Honor. Good evening.

14 THE COURT: Thank you. We are in recess until ten
15 o'clock in the morning.

16 MR. AXELROD: Thank you, Your Honor.

17 *****OFF THE RECORD*****

18 (On the record, Friday, June 1, 2007.)

19 (Jury returned at 10:00 a.m. Question from jury at
20 10:15. Jury enters courtroom at 10:33 a.m.)

21 (Whereupon, the following takes place in the presence of
22 the jury.)

23 THE COURT: Good morning, Mr. Foreman, ladies and
24 gentlemen. How is your father, ma'am?

25 MS. DEPAUL: He's doing fine, sir.

Recharge

218

1 THE COURT: Good, that's wonderful. Certainly glad
2 you were able to join us again today. Mr. Foreman, ladies
3 and gentlemen, I appreciate all of you coming back on this
4 beautiful Friday morning. I'm glad that you decided to go
5 home and rest this last night so that we could begin anew the
6 reconsideration of this case. We'll have, we will have, of
7 course, all day and tomorrow if necessary to resolve this
8 case.

9 Now, Mr. Foreman, your jury has asked of me several
10 questions and that's most appropriate because I ask you to do
11 that if you had any questions. You asked for clarification
12 of the burden of proof, beyond a reasonable doubt, which I
13 will give to you, and then, "What we are able to use to make
14 a decision." You may use circumstantial evidence and you
15 also may use direct evidence, and I'm going to talk to you
16 about it in just a minute and then you've asked a question,
17 "Does eyewitness testimony fall under direct?" Yes, it does,
18 but let me explain to you the difference between direct
19 evidence and circumstantial evidence, and basically there is
20 no difference. If you determine it's appropriate in your
21 consideration then one is just as strong as the other. There
22 are two types of evidence which we are generally presented
23 with during a trial, direct evidence and circumstantial
24 evidence. Direct evidence, ladies and gentlemen, is the
25 testimony of a person who asserts or claims to have actual

1 knowledge of a fact meaning that they saw it, such as an
2 eyewitness. Circumstantial evidence is proof of a chain of
3 facts and circumstances indicating the existence of that
4 fact. The law makes absolutely no distinction between direct
5 evidence and circumstantial evidence, and no distinction
6 between the weight or value to be given to either direct or
7 circumstantial evidence, nor is a greater degree of certainty
8 required of circumstantial evidence than of direct evidence.
9 Evidence is evidence be it circumstantial or direct. You
10 must weigh all of the evidence in this case, and after
11 weighing all of the evidence if you are not convinced of the
12 guilt of the Defendant beyond a reasonable doubt you must
13 find him not guilty. Circumstantial evidence is just as
14 strong as direct evidence. You determine the value that
15 direct evidence and circumstantial evidence should receive.

16 Now you asked, too, for a definition of reasonable
17 doubt. I have told you and I emphasize again that the State
18 has the burden of proof of every element of the various
19 crimes alleged beyond a reasonable doubt. The State has the
20 burden of proving the Defendant guilty beyond a reasonable
21 doubt. Now, some of you may have served as jurors in civil
22 cases where you were told that it is only necessary to prove
23 that a fact is more likely true than not. In criminal cases
24 the government's proof must be more powerful than that, it
25 must be beyond a reasonable doubt. Now, ladies and

Recharge

220

1 gentlemen, proof beyond a reasonable doubt is proof that
2 leaves you firmly convinced of the Defendant's guilt. There
3 are very few things in this wide world that we know with
4 absolute certainty and in criminal cases the law does not
5 require proof that overcomes every possible doubt. If based
6 on your consideration of the evidence, direct and
7 circumstantial, you are firmly convinced that the Defendant
8 is guilty of the crime charged you must find him guilty. If
9 on the other hand you think there is a real possibility that
10 he is not guilty, you must give him the benefit of that doubt
11 and find him not guilty. Now, that is the reasonable doubt
12 charge. Proof beyond a reasonable doubt is proof that leaves
13 you firmly convinced of the Defendant's guilt and I emphasize
14 again there are very few things in this world that we know
15 with absolute certainty, and in criminal cases the law does
16 not require proof that overcomes every possible doubt.

17 Now, you have asked of me another question and I again
18 thank you for it. "If the jury is not in a position at this
19 time to reach a unanimous verdict, must our final decision in
20 this case be not guilty," and the answer is absolutely not.
21 Your verdict must be unanimous either guilty or unanimous not
22 guilty. In the event that you are unable to reach a verdict
23 then that's what we call a hung jury and that simply means
24 that nobody wins. It simply means that sometime in the
25 future some 12 folks chosen just like you will come into this

1 courtroom, basically hear the same testimony, some jury just
2 like you will hear the whole thing again and that issue will
3 then be resolved. I have no reason to suggest or suspect
4 that I will ever get 12 more people more dedicated, more
5 anxious to do their duty than you 12; and so, don't walk away
6 thinking that somebody wins and somebody loses. It means
7 everybody loses and our system has failed.

8 Now, I charge you as I only can the only mode providing
9 by our laws for a direct -- deciding questions of fact is by
10 a verdict of the jury just like you. In most all cases,
11 ladies and gentlemen, absolute certainty cannot be obtained
12 or expected where the matter is in dispute initially. It
13 isn't always even, easy for even two people to initially
14 agree; and so, when 12 people must agree it becomes
15 correspondingly more difficult. I tell you it is very
16 unusual for a jury to go out and to immediately or quickly
17 retain a verdict. You have only been deliberating two hours.
18 The case lasted three days. That's not unusual. You've got
19 a voluminous amount of matters to deal with. That is what
20 would happen if a jury was in agreement to begin with. At
21 the same time, ladies and gentlemen, we usually get a verdict
22 under our system of jurisprudence. So, while it is normal
23 for jurors to disagree at first, and I fully understand that,
24 we nevertheless get a verdict after the jury has laid aside
25 all extraneous or outside matters and have determined to try

Recharge

222

1 this case on its merits and on the basis of the law and
2 evidence in this case, direct and circumstantial.

3 It has been said that jury service is perhaps the
4 highest service a citizen can perform for his or her own
5 country or state during peacetime, and I certainly agree with
6 that. However, a juror does not render good service who
7 arbitrarily says, "I know what I want to do in this case and
8 when everybody else agrees with me then we will write a
9 verdict and we will not write a verdict until that time." It
10 was never intended that the verdict of the jurors should be
11 the verdict of any one person, never intended for that. At
12 the same time I tell you that every juror has a right to his
13 or her own opinion, and if he or she needs, he or she need
14 not give up that merely for the purpose of being in
15 agreement. I would never say that to you. However, the
16 verdict of a jury is the collective reasoning of all jurors
17 and that is why we have a jury of 12. It is the duty of each
18 of a jury to tell the others how he or she feels and why he
19 or she may feel that way. Since the verdict of a jury is the
20 result of the collective reasoning, it can be said that a
21 verdict is a result of give and take. With this in mind, I
22 tell you that if the much larger of your number of panels are
23 in favor of one position a dissenting juror or jurors should
24 consider whether I not his or her position is a reasonable
25 one, which makes no impression upon the minds of the

1 majority. In other words, if a majority of you are of one
2 position, the minority ought to seriously ask themselves
3 whether they can reasonably doubt the correctness of the jury
4 and judgment of the majority. Although the verdict to which
5 a jury agrees must, of course, be his or her own verdict, the
6 result of his or her own convictions and not merely
7 acquiescence in the conclusion of his or her fellow jurors,
8 yet in order to bring 12 minds to a unanimous result you must
9 examine the questions submitted to you with candor and with a
10 proper regard to and a respect for the opinions of each
11 other. You should also consider that you were selected in
12 the same manner from the same source which any future jury
13 will be and as I indicated a while ago there is certainly no
14 reason for me to suppose that this case will ever be
15 submitted to 12 people more intelligent, impartial and
16 competent than you and note there's no reason for me to
17 suspect that more or clearer evidence will ever be produced
18 on one side or the other. Ladies and gentlemen, in other
19 words a mistrial of this case is an unfortunate thing. If
20 you do not agree on a verdict of not guilty or guilty
21 unanimously it does not mean that everybody wins. It just
22 means that at some future time, at some future time, I will
23 try this case with some jury sitting just exactly where you
24 are, the same participants will come and the same lawyers
25 will ask basically the same questions and probably get

Recharge

224

1 basically the same answers, and we will go through the entire
2 process again. In conclusion, if the State of South Carolina
3 and the people it represents is entitled to a verdict in this
4 case, they are entitled to it today, not tomorrow, not next
5 week, not next year. Equally important, if this Defendant is
6 entitled to a verdict, he is entitled to it today, not next
7 month nor next year, today, and so it is, Mr. Foreman, ladies
8 and gentlemen, recognizing that there are difficult issues
9 for you to consider, understanding the voluminous evidence
10 that has been in the trial of this case, I would ask that you
11 go back, continue deliberations, have a give and take between
12 the majority and the minority, however, however it falls,
13 would not ask anybody ever to give up their heartfelt
14 opinions, but at the same time, regardless of which side your
15 decision is on consider, too, the positions of the other side
16 to ascertain whether or not that position, be it in the
17 minority or majority, is a reasonable one.

18 Now, to emphasize several things that I've told you, you
19 are the sole and only finders of the facts. We will not be
20 trying this case on Boston legal or CSI or these things you
21 see on TV. That's not where the real world is in our system
22 of jurisprudence. You are to decide this case on the law and
23 the evidence heard in this courtroom and from no other place.
24 So, don't look for TV guidance. Look to the evidence in the
25 case. Give direct evidence and circumstantial evidence that

1 you find appropriate the same weight. There's absolutely no
2 difference in the weight. Circumstantial evidence is just as
3 good as direct, direct is just as good as circumstantial.
4 I've given you the definition of probable -- of reasonable --
5 beyond a reasonable doubt, going to read that to you one more
6 time so that there can be no question as to what we are
7 talking about when we say beyond a reasonable doubt. Now,
8 ladies and gentlemen, let me read this again to you and this
9 has been approved by the United States Supreme Court, by the
10 South Carolina Supreme Court, and by most any other state in
11 this country with regard to that, and the State has a burden
12 of proving the Defendant guilty beyond a reasonable doubt.
13 As I said to you, some of you may have served in civil cases
14 where you were told that it is only necessary to prove that a
15 fact is more likely true than not. In criminal cases the
16 state's burden is more powerful than that. It must be beyond
17 a reasonable doubt. Now, ladies and gentlemen, let me say
18 again to you since you've asked me, proof beyond a reasonable
19 doubt is proof that leaves you firmly convinced of the
20 Defendant's guilt. There are very few things in this wide
21 world that we know with absolute certainty, and in criminal
22 cases the law does not require proof that overcomes every
23 possible doubt. If based on your consideration of the
24 evidence you are firmly convinced that the Defendant is
25 guilty of the crime charged you must under your oath find him

Recharge

226

1 guilty. If on the other hand you think there is a real
2 possibility that he is not guilty, you must give him the
3 benefit of that doubt and find him not guilty. To answer
4 your question again and that is this, if the jury is unable
5 to reach a unanimous verdict must our final decision in the
6 case be not guilty? The answer is absolutely no, no, never.
7 Your verdict is either unanimously either not guilty or
8 guilty. The only other thing would be no verdict at all, in
9 which event I would have to declare a mistrial and we'd come
10 in and do this whole thing again. Does that answer that
11 question? Let there be no question about that. Your verdict
12 has got to be unanimous either not guilty or guilty, and
13 we've got today and tomorrow to work through those issues.
14 Mr. Foreman, I appreciate the questions that you have
15 provided to me. I'll be here to answer any other questions
16 that you've got remembering that you are the finders of the
17 facts in the case. You take in arriving at your decision,
18 you take the totality of all of the evidence, being it
19 testimony and such physical evidence as introduced in
20 arriving at ultimately what will be a unanimous decision.

21 You may now retire to the jury room and begin your
22 deliberations anew and we will be here for any further
23 questions. Again, now, the alternates cannot go in the jury
24 room.

25 (Whereupon, the following takes place outside the

1 presence of the jury.)

2 THE COURT: All right, any exceptions or additions to
3 the charge?

4 MR. AXELROD: None.

5 MS. LIVELY: No, Your Honor.

6 THE COURT: How about it?

7 MR. AXELROD: No, sir, Your Honor.

8 THE COURT: All right, sir, fine, thank you. These
9 two requests of the jury for further instructions are
10 specifically made a part of the record. We are in recess
11 subject to the call of the Court.

12 *****OFF THE RECORD*****

13 (On the record.)

14 (Verdict reached at 11:27 a.m.)

15 (Whereupon, the following takes place outside the
16 presence of the jury.)

17 THE COURT: Now, I don't know what this verdict is
18 but I don't want any outbursts or any comment from anybody
19 and if I hear of anything they will meet and be found in
20 contempt of court and I'll deal with them accordingly. Bring
21 the jury in.

22 (Whereupon, the following takes place in the presence of
23 the jury.)

24 THE COURT: Mr. Foreman, you and your distinguished
25 jurors reached a unanimous verdict?

Verdict

228

1 FOREPERSON: Yes, yes, Your Honor, we have.

2 THE COURT: If this be the unanimous verdict of all
3 12 please signify by raising your right hand.

4 (All jurors raise right hand.)

5 THE COURT: The jury has so signified that the
6 verdict is unanimous. Madam Clerk, accept the verdict.
7 Publish the verdicts. They'll be in three. The jury has
8 signified that the verdicts are unanimous.

9 THE CLERK: Indictment number 2007-GS-26-928, The
10 State of South Carolina versus Luther Garner, a/k/a Kariem
11 Ward, indictment for murder, the verdict is guilty; 2007-GS-
12 26-1536, The State versus Luther Garner, a/k/a Kariem Ward,
13 indictment for attempted armed robbery, the verdict is
14 guilty; 2007-GS-26-927, The State of South Carolina versus
15 Luther Garner, a/k/a Kariem Ward, indictment for burglary
16 first degree the verdict is guilty, Frank Pervola, foreman,
17 dated June 1st, 2007.

18 THE COURT: Before I discharge the jury is there any
19 other thing regarding the jury? Any reason, I'll hear you.

20 MR. AXELROD: Your Honor, I'd like a polling of the
21 jury officially.

22 THE COURT: Okay, poll the jury. You're entitled to
23 that.

24 THE CLERK: When I call your name, please stand. I
25 will ask you two questions. Please answer separately and

Polling of Jury

229

1 then be seated.

2 Frank Pervola, is this your verdict?

3 MR. PERVOLA: Yes.

4 THE CLERK: Is it still your verdict?

5 MR. PERVOLA: Yes.

6 THE CLERK: Thank you.

7 Martha Allen, is this your verdict?

8 MS. ALLEN: Yes.

9 THE CLERK: Is it still your verdict?

10 MS. ALLEN: Yes.

11 THE CLERK: Thank you.

12 Brett Barentine, is this your verdict?

13 MR. BARENTINE: Yes.

14 THE CLERK: Is it still your verdict?

15 MR. BARENTINE: Yes.

16 THE CLERK: Thank you.

17 Susan Depaul, is this your verdict?

18 MS. DEPAUL: Yes, it is.

19 THE CLERK: Is it still your verdict?

20 MS. DEPAUL: Yes.

21 THE CLERK: Thank you.

22 Thomas Hazzard, is this your verdict?

23 MR. HAZZARD: Yes.

24 THE CLERK: Is it still your verdict?

25 MR. HAZZARD: Yes.

Polling of Jury

230

1 THE CLERK: Thank you.
2 Teresa Lawson, is this your verdict?
3 MS. LAWSON: Yes.
4 THE CLERK: Is it still your verdict?
5 MS. LAWSON: Yes.
6 THE CLERK: Thank you.
7 Janice Lincourt, is this your verdict?
8 MS. LINCOURT: Yes.
9 THE CLERK: Is it still your verdict?
10 MS. LINCOURT: Yes, ma'am.
11 THE CLERK: Thank you.
12 Caryn Maerlender, is this your verdict?
13 MS. MAERLENDER: Yes.
14 THE CLERK: Is it still your verdict?
15 MS. MAERLENDER: Yes.
16 THE CLERK: Thank you.
17 Anthony Magdits, is this your verdict?
18 MR. MAGDITS: Yes.
19 THE CLERK: Is it still your verdict?
20 MR. MAGDITS: Yes.
21 THE CLERK: Thank you.
22 Ben Tinnin.
23 MR. TINNIN: Yes, ma'am.
24 THE CLERK: Is this your verdict?
25 MR. TINNIN: Yes.

Polling of Jury

231

1 THE CLERK: Is this still your verdict?
2 MR. TINNIN: Yes.
3 THE CLERK: Thank you.
4 Nikoletta Wilbanks, is this your verdict?
5 MS. WILBANKS: Yes.
6 THE CLERK: Is it still your verdict?
7 MS. WILBANKS: Yes.
8 THE CLERK: Thank you.
9 Rodney Williams.
10 MR. WILLIAMS: Yes, ma'am.
11 THE CLERK: Is this your verdict?
12 MR. WILLIAMS: Yes, ma'am.
13 THE CLERK: Is it still your verdict?
14 MR. WILLIAMS: Yes, ma'am.
15 THE CLERK: Thank you.
16 THE COURT: All right, anything further from the
17 State before I discharge the jury?
18 MR. RICHARDSON: No, sir, Your Honor.
19 THE COURT: Anything from the Defendant?
20 MR. AXELROD: No, sir, Your Honor.
21 THE COURT: Mr. Foreman, ladies and gentlemen, let me
22 again thank you on behalf of this Court and me personally,
23 the people of Horry County, the State of South Carolina and
24 for our system of justice.
25 You know, none of you asked to come into the court this

Polling of Jury

232

1 week and none of you, of course, asked to sit on this trial,
2 but having done so you have done a great service to your
3 state, to your fellow man, and to your community. You were
4 the finders of the facts and you have found them in
5 accordance with the facts, and I can tell you that the law of
6 this case and the facts as adduced in this courtroom
7 certainly justifies your verdict. I am permitted to say that
8 at the conclusion of a verdict and it's certainly justified
9 in this case. This was a horrible case, an individual
10 tending to his own business, though he may have been a drug
11 dealer beaten unmercifully to death. He didn't need to die
12 in such a manner.

13 In our country and in our civilization, jury service is
14 the first time that most folks will ever, only time most
15 folks will ever be called upon to participate in their
16 government unless you are elected or appointed, but now
17 having served on a case such as this you have actually
18 participated and been a part of your system of government,
19 your system of justice. People look at the jury verdicts.
20 You don't, sometimes you don't realize it, but folks read in
21 the paper and about things read in the paper and criminals
22 read in the paper and they determine for themselves what is
23 or is not acceptable under our system of civilization, and
24 the word has got to go out to these drug dealers that there
25 is a penalty to pay for their continued use of drugs and it

1 has got to go out that this sort of conduct can never be
2 acceptable in a civilized society. You have reached your
3 verdict in accordance with your oath and no one will have a
4 right to criticize your verdict and no one will. I would not
5 have criticized your verdict the other way because that was
6 your call, but I can say to you that the law and evidence in
7 this case certainly justifies all three verdicts, certainly
8 does. I'm going to discharge you now with my profound thanks
9 for having reached the unanimous verdict in this case, and
10 you are discharged for the day and for the week. Thank you
11 so much, and I particularly appreciate your willingness to
12 come back and serve given the -- your father's physical
13 condition. Thanks. Thank you so much. You are now
14 discharged. Thank you.

15 (Jury exits courtroom.)

16 THE COURT: Mr. Bailiff, tell the foreman I would
17 like to speak to him in my chambers just a minute.

18 All right, Mr. Axelrod, I'll never know more about the
19 case than I know right now. So, I'll hear any post-trial
20 motions, please.

21 MR. AXELROD: Yes, sir, Your Honor, I would like to
22 renew two motions. I'd like to renew the motion that Lonya,
23 this Court permitted her to testify to hearsay and the
24 Court's -- and it was when she saying she was at the scene
25 and at Paul Graham's trailer and she said that Paul said this

Motions

234

1 and someone else said that, and the Court's ruling at that
2 time was that because it was said in the presence of the
3 Defendant that it was admissible and it was not hearsay and I
4 want to preserve it once more that I believe that it flies in
5 the face of the confrontation clause of the Sixth Amendment
6 that ---

7 THE COURT: Well, Paul did subsequently testify and
8 was subject to cross examination.

9 MR. AXELROD: Yes, but I will say that I think what
10 makes it a reversible error and why I would ask for a new
11 trial is that it bolsters, by her saying this and saying that
12 it bolstered her testimony to the jury, and I think that was
13 impermissible. It surely could have come out from Paul or
14 whoever else said it but basically by her saying this and
15 saying that it gave the jury the sense, "Well, she had to be
16 there because these people said it," and I think it
17 improperly bolstered her and I'd like to renew that and ask
18 for a new trial.

19 THE COURT: I understand your motion and it is
20 respectfully denied. That would be an issue for the
21 Appellate Court.

22 MR. AXELROD: I would ask for a new trial, that this be
23 taken away from the jury at this point also for a new trial.

24 THE COURT: I would respectfully deny that.

25 MR. AXELROD: And I have one more that I would like to

1 bring out. I think that, I think I was entitled to a
2 mistrial and a new trial when the Court specifically did not
3 allow in non-testimonial testimony of Detective Oz Santiago
4 and I want to fully put this on the record if I may to
5 preserve that.

6 THE COURT: Sure. Well, it's a murder case. I want
7 you fully protected.

8 MR. AXELROD: And he proffered it. He proffered that
9 he spoke to the roommates in Spanish and he wrote a report
10 and in that report it said that Monday night all the
11 roommates were there, and when the roommates went to work on
12 Tuesday morning, the next morning when they went to work, the
13 victim was alive and then Tuesday evening when he came home
14 that's when he found it, that's when he called 911. The
15 State argued that that was testimonial and he could have died
16 on Monday and they could have cleaned up that drug house and
17 all the drugs could have been taken out because prior to the
18 Solicitor saying that you were going to allow that evidence
19 in now. What's interesting is that the case I cited ---

20 THE COURT: No, sir, I never was going to allow that
21 in.

22 MR. AXELROD: No, the Court did say you were going to
23 allow him to say that on Monday tonight they were all there.
24 Now, I cited the case. I don't have it with me right now,
25 but you had Crawford and Davis, but you have that brand new

Motions

236

1 South Carolina case that specifically says, and I want this
2 on the record, that testimonial evidence, non-testimonial
3 evidence is evidence taken from a police officer in the
4 furtherance of trying to stop an emergency. It wasn't taken
5 ever -- Santiago's -- can I finish?

6 THE COURT: Well, you forget one, you forget -- wait
7 a minute, no, you forget one thing about that entire line of
8 cases unless the declarant should know or should know that
9 that testimony is likely to be called in the trial of the
10 case. That's the part that you're missing, but go ahead.
11 You're protected on the issue.

12 MR. AXELROD: Your Honor, there's a brand new case out
13 there.

14 THE COURT: I'm going to let Ms. -- I read the case.

15 MR. AXELROD: But the brand new case says and this is
16 what it says though. I want to put it on the record, Judge.
17 Please let me put it on the record.

18 THE COURT: Cite the case, put it on the record.

19 MR. AXELROD: Thank you. Thank you. I appreciate
20 that.

21 THE COURT: I don't need all this conversation. Go
22 ahead and put the case on the record.

23 MR. AXELROD: That Oz Santiago was taking non-
24 testimonial testimony because he was asking the people what
25 happened. He wasn't trying to prosecute these people. He

1 was just trying to find out what was happening so he could
2 maybe go out and find who did the killing and that
3 specifically is non-testimonial testimony and should have
4 been allowed in, and I just wanted to preserve that there
5 because nobody ever went for the roommates to arrest them,
6 and that wasn't the purpose of what I was going to ask him
7 and that wasn't the purpose of what he was asking them
8 himself. He was first on the scene. They asked him to come
9 talk to the roommates. They were at work. So, I just want
10 to preserve that and ask for a new trial and a mistrial on
11 that.

12 THE COURT: All right, sir, good enough.

13 MR. AXELROD: And that's all, and that's all, sir.

14 THE COURT: Okay, Ms. Lightsy [sic], let me hear you
15 respond. You're the one that made the objections now as to
16 the testimonial and non-testimonial issue.

17 MS. LIVELY: Absolutely, Your Honor, the concern that
18 I brought up to the Court is the same concern that if the
19 Defense were to bring it up, if we, the State tried to bring
20 in something and that is the reliability of that statement.
21 The statement that Officer Santiago received from these two
22 roommates who lived in a drug house which was very obvious
23 was they had gotten home at 6:15. They did not even speak
24 with Officer Santiago until almost 9:00 o'clock that night.
25 They had the opportunity to go into the house, contaminate

Motions

238

1 the scene, do whatever it is that they needed to do before
2 they ever made this statement to the officers. So, their
3 reliability and to what they gave Officer Santiago was
4 paramount because they could have made up that story knowing
5 at this time, "Okay, we're going to call the police and go in
6 there and this is what our story is going to be." We can't
7 do anything to cross examine these people. They're gone.
8 They are not available anymore. Our officers have tried to
9 get them. Our detectives, they were there that one time, so,
10 yes it's testimonial and it would -- it does not offer
11 anything to help this case except to add more confusion and
12 to not allow us the opportunity for our right to cross
13 examine these witnesses who obviously had a reason to lie to
14 the officers that evening.

15 THE COURT: Well, there's another thing, too, the
16 testimony that he wanted to elicit. They were trying to
17 change the date of the occurrence, which is crucial to the
18 State's case.

19 MS. LIVELY: Absolutely.

20 THE COURT: And in addition to that, in giving this
21 testimony they had to know as occupants and fellow livers in
22 that apartment that they were going to be called upon to
23 testify, and I conclude that that was testimonial testimony,
24 there's nothing in it about non-testimonial. I under State
25 v. Lender and I understand the preceding cases beginning with

1 the United States versus Gardner or Crawford.

2 MS. LIVELY: And Crawford and v. Washington, yes.

3 THE COURT: And Crawford, before Crawford clearly
4 eliminates all of that factual finding, but this in my
5 opinion was clearly testimonial, subject to cross
6 examination. It would have been unfair to the State to have
7 permitted that testimony without their Prosecution having a
8 right to cross examine. He's protected on the record on it,
9 but I'm clear that the ruling was correct.

10 MR. AXELROD: And, Your Honor, I would just like 30
11 more seconds. I'm not trying to beat a horse, but I just want
12 to keep my record totally clear here. The reason I wanted the
13 testimony in was because it clearly established, it was the
14 only establishment we had of when the murder occurred because
15 up until the trial the murder occurred on a Tuesday and it
16 suited everybody to change it to Monday, but by the roommate
17 finding him that Tuesday it was critical. What the State says
18 I think is incomplete because what they did, they threw it up
19 and now nobody knows when it was, but with Oz Santiago he
20 could have clearly established the murder occurred on Tuesday
21 and I believe the jury was entitled to that.

22 THE COURT: Well, as a practical matter, what
23 difference did it make where it occurred on a Monday or a
24 Tuesday? That, that ---

25 MR. AXELROD: I think it made a big difference because

Motions

240

1 Lonya Snowden's, all her testimony she said it occurred on
2 Monday and it couldn't have occurred on Monday because the
3 man was alive on Monday and I thought the jury was entitled
4 to know that and I thank you for allowing me to protect my
5 record.

6 THE COURT: You are protected on the record.

7 MR. AXELROD: Thank you.

8 THE COURT: It is not that significant whether it
9 occurred on Monday or Tuesday. The indictment says on or
10 about the 11th; and so, that's not particularly crucial
11 anyway but anyway, excuse me, Ms. Lightsy [sic].

12 MS. LIVELY: Yes, sir, and we've -- and we addressed
13 that even whenever we had Dr. Proctor on the stand. I think
14 Mr. Axelrod addressed that issue as well as our expert. So,
15 I believe that we've -- we have beaten that dead horse, but
16 one thing I do want to respond to, Your Honor, and regarding
17 Mr. Graham's testimony and whether or not Lonya was able to
18 make hearsay statements, first of all, I very well remember
19 that a lot of those statements came in without objection by
20 Mr. Axelrod, and then whenever he did make the objection at
21 that time I believe it was harmless error, if any error at
22 all. Also, we brought in the other individuals who were
23 there, these people being Paul Graham and A.J., and Your
24 Honor, by his request these parties were sequestered. So, he
25 had the opportunity, ample opportunity to cross examine them

1 on any of the statements made by Lonya, Paul or A.J. during
2 the trial. So, we believe that he was -- he had the
3 opportunity to do what he needed to do.

4 THE COURT: Well, I agree with you that a great part
5 of it and I wondered why at the time that he didn't object,
6 but he didn't and I think he didn't object because what they
7 were saying was basically harmless anyway based on the
8 totality of everything said. At some point in time he did
9 object and the record will reflect that.

10 MR. AXELROD: And Your Honor, I would like to say that
11 I objected to what I objected to, that she testified, Lonya
12 testified to what Paul said. That's when I stood up and I
13 objected to that because that bolstered her testimony, not
14 that I could cross examine the people, but she bolstered it
15 and that's impermissible and that's what I want that record
16 protected.

17 THE COURT: I understand and given the totality of
18 the evidence, the evidence in this case in my view was just
19 simply overwhelming. Now, as his attorney you did an
20 excellent job with what you had to work with, but here is a
21 man beaten to death and here is an eyewitness, and there was
22 one witness there, Paul, who had no friends to reward, no
23 enemies to punish, said that this Defendant came to his house
24 with bloody clothes on the night of the incident and asked
25 for new clothes. There was no way in the world that 12

Sentencing

242

1 people seeking the truth could disregard the fact that a
2 disinterested witness testified that he came with bloody
3 clothes and that was killing him. If that -- if he didn't
4 have that a jury may have concluded, "Well, we're not going
5 to believe Lana," or whatever her name was, but her
6 testimony, coupled with the fact that the fellow was beaten
7 to death, coupled with the fact that there is no question
8 about the fact that he came with bloody clothes on caused the
9 verdict unanimously of guilty. It was just overwhelming.
10 All right, thank you.

11 MS. LIVELY: That's all, Your Honor.

12 THE COURT: Have the Defendant come around, please.

13 The State, what -- the Defendant did not testify as was
14 his right. What is his prior record?

15 MR. RICHARDSON: Your Honor, Mr. Garner's prior
16 record would include felony possession of a handgun in 2004,
17 and a marijuana charge in 2004, in '94 eluding the police,
18 possession of a handgun, conspiracy to commit carjacking,
19 that was a lesser included of carjacking and kidnapping. He
20 also has pending charges that the feds have awaiting this
21 trial and those are for drug and weapon charges. He's also
22 got accessory charges pending this trial which relate to a
23 burglary, also with his Co-Defendant, Alonzo Pierce.

24 MR. AXELROD: Your Honor, he tells me that the federal
25 charges have been dismissed.

1 THE COURT: All right, sir, he doesn't dispute the
2 other charges.

3 MR. AXELROD: The burglary, the burglary charge he said
4 is dismissed, but the ones back in '94 he doesn't.

5 THE COURT: What do you want to tell me about him
6 please?

7 MR. AXELROD: He says the carjacking has been dropped
8 also. You have a conviction for something there though.

9 THE COURT: All right, what is it you care to tell
10 me, please?

11 MR. AXELROD: Your Honor, as the Court is aware we had
12 an offer of 18 going into this trial. I still say to the
13 Court that, you know, the Court might ---

14 THE COURT: You understand in fairness to him a
15 judge, whoever would have been the trial judge, including
16 this one, may or may not have accepted that.

17 MR. AXELROD: Absolutely, Your Honor, but -- and I do,
18 I do want to bring to the Court's attention that even if the
19 Court feels that it was overwhelming evidence there is some
20 issues in this case that -- whether there -- something should
21 have been where it wasn't or something wasn't where it should
22 be and I would ask that whatever mercy this Court can give.

23 THE COURT: Well, I only have two choices as you well
24 know.

25 MR. AXELROD: Absolutely, and I would ask for whatever

Sentencing

244

1 mercy you give. My client is 41 years old. Is there
2 anything you want to tell the Court? You don't have to.

3 THE COURT: Well ---

4 MR. AXELROD: Anything you want to say to the Court?

5 THE COURT: Anything you care to tell me?

6 MR. GARNER: I thank the State for a fair trial.

7 THE COURT: All right, sir, upon the charge of murder
8 it is the judgment and sentence of this Court that you be
9 confined for a period of 30 years. Upon the charge of
10 attempted armed robbery, the sentence and judgment of this
11 Court that you be confined for ten years consecutive to the
12 murder, which is a total of 40 years. Upon the charge of
13 burglary first degree, the sentence and judgment of the Court
14 that you be confined for a period of 30 years concurrent to
15 the previous charges. All right, sir, thank you. That will
16 be the judgment of the Court.

17 (Adjourned.)

18

19

20

21

22

Certificate

C E R T I F I C A T E

1
2
3
4 I, the undersigned, Grace L. Hurley, Official Court
5 Reporter for the State of South Carolina, do hereby certify
6 that the foregoing is a true, accurate and complete
7 Transcript of Record of the hearing held in the case of The
8 State versus Luther Garner, a/k/a Kariem Ward, held in the
9 Court of General Sessions for Horry County, Horry County
10 Courthouse, Conway, South Carolina, on May 31 through June
11 1, 2007.

12 I do hereby certify that I am neither of kin, counsel,
13 nor interest to any party hereto.

14

15

16

17

18

19

20

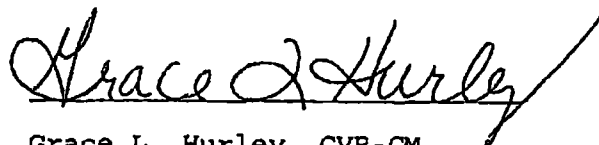
21

22

23 August 21, 2007.

24

25



Grace L. Hurley, CVR-CM

Official Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry CountyEdward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LUTHER GARNER,

APPELLANT

FINAL BRIEF OF APPELLANT

M. CELIA ROBINSON
Appellate DefenderSouth Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343STUART M. AXELROD, ESQUIRE
Axelrod Law Firm
604 16th Ave. W.
Myrtle Beach, South Carolina 29577

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES.....	2
STATEMENT OF ISSUE ON APPEAL	3
STATEMENT OF THE CASE	4
ARGUMENT	5
CONCLUSION	29

TABLE OF AUTHORITIES

Cases

<u>Davis v. Washington</u> , 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)	22, 23
<u>State v. Brown</u> , 317 S.C. 55, 451 S.E.2d 888 (1994)	23
<u>State v. Dennis</u> , 337 S.C. 275, 523 S.E.2d 173 (1999)	24, 25
<u>State v. Johnson</u> , 318 S.C. 194, 456 S.E.2d 442 (Ct.App.1995)	23
<u>State v. Ladner</u> , 373 S.C. 103, 644 S.E.2d 684 (S.C. 2007)	21, 22, 24, 26
<u>State v. Rice</u> , 652 S.E.2d 409 (S.C.App.,2007)	23
<u>State v. Saltz</u> , 346 S.C. 114, 551 S.E.2d 240 (2001)	20
<u>State v. Sims</u> , 348 S.C. 16, 558 S.E.2d 518 (2002)	25
<u>State v. Thompson</u> , 352 S.C. 552, 575 S.E.2d 77 (Ct.App.2003)	23
<u>United States v. Love</u> , 767 F.2d 1052 (1985), cert. denied, 474 U.S. 1081, 106 S.Ct. 848, 88 L.Ed.2d 890 (1986)	23

Rules

Rule 402, SCRE	20

STATEMENT OF ISSUE ON APPEAL

- I. Did the trial judge err in excluding relevant defense evidence on the erroneous grounds of hearsay and thereby interfere with appellant's right to present a defense?
2. Did the trial judge erred as a matter of law in allowing in evidence the hearsay statements of Lonya Sowdon made to a 911 operator?
3. Did the trial judge err as a matter of law in allowing the State's chief witness to bolster and corroborate her testimony through the repetition of inadmissible hearsay statements over defense objection?

STATEMENT OF THE CASE

Luther Garner, appellant, was indicted by the Horry County Grand Jury for murder, first degree burglary, armed robbery, and attempted armed robbery. On May 29, 2007, appellant appeared before the Honorable Edward B. Cottingham and a jury for trial. The jury reached guilty verdicts on the charges of murder, first degree burglary, and attempted armed robbery. The trial judge directed a verdict of not guilty on the charge of armed robbery. Judge Cottingham sentenced appellant to confinement for thirty years for murder, to ten years confinement, to be served consecutively, for attempted armed robbery, and to thirty years confinement, to be served concurrently, for first degree burglary.

STATEMENT OF THE FACTS

The charges against appellant arose from the murder of Amadro Flores Espinozat. The State's key witness was Lonya Sowdon, an admitted crack addict and a stranger to the truth. Lonya told what seemed to be a straightforward story. She testified that in December of 2005, she had been staying at the Red Roof Inn and that her room was generously paid for by her employer, Gerald Linsky. Lonya testified that she was a crack addict and that she knew appellant and Lee Pierce because they were her crack dealers. (R. p. 44, lines 14-18). Lonya testified that on January 10, 2005, she met appellant and Lee Pierce at an apartment in Myrtle Beach for the purpose of giving them a ride. Lonya testified that she had been staying at the Red Roof Inn and that Lee and appellant had been asking her repeatedly to give them a ride. Lonya testified that they had asked her the week before, that they called her again on Saturday, but that she had moved from the Red Roof Inn and was house sitting for her employer in Murrell's Inlet. (R. p. 88, lines 10-13). Lonya testified that she house-sat for her boss off and on when he traveled. (R. p. 100).

Lonya testified that her employer, Gerald Linsky, owns a national marketing company. Lonya testified that she did all Mr. Linsky's taxes, payroll, filing, trip itineraries, travel arrangements, and that she prepared any new dealer packets in her job as Mr. Linsky's office manager. (R. p. 89). Lonya testified that she had worked for Mr. Linsky since the end of 2000 and that she worked "off and on part-time for a period of about eight months before going full-time with Mr. Linsky. Lonya testified that she was a 1099 independent contractor. (R. p. 90). Lonya explained that part of her compensation package was that she could drive her boss's Mustang convertible when she needed to. (R. p. 91).

In fact, Mr. Gerald Linsky testified that he moved to the South Carolina area in the summer of 2004, and that he met Lonya Sowdon that fall of 2004. (R. p. 427, lines 1-3). Mr. Linsky testified that he did not live in South Carolina in 2000 and that if Lonya Sowdon indicated that she knew him in 2000, that would be "a lie." (R. p. 428, lines 1-3). Mr. Linsky testified that Lonya "had had a story that her and her kids had been thrown out on the street and it was Christmas and they had nowhere to live. So, I put up my credit cards so they could stay at a hotel." (R. p. 427, lines 11-16). Mr. Linsky testified that Lonya Sowdon also told him that she had a big medical settlement coming so that she would be able to pay him back. Mr. Linsky testified that he never had any sort of personal relationship with Lonya Sowdon but that he was lending her money in an attempt to be a good Samaritan. (R. p. 427, lines 17-21; p. 438, lines 1-5). Mr. Linsky testified that he did not always pay for Lonya's hotel room; however, he explained, "I mean, she was over at her mother's and then she would call me and say that she got thrown out and it was freezing cold and it was raining and the kids had nowhere to go." (R. p. 434-435). Mr. Linsky testified that he suspected but did not know certainly about Lonya Sowdon's crack addiction at the time. (R. p. 437, lines 18-24).

Mr. Linsky testified that his business involves doing sales seminars nationally. He testified that he was sure that Lonya Sowdon was aware of his work, but that she was "never a part of it" and that she never worked for him. Mr. Linsky testified that in the four months he knew Lonya, she never had a job although, "she had all sorts of things she said were pending, but no." (R. p. 439, lines 1-2). Mr. Linsky specifically refuted the notion that Lonya Sowdon did his payroll or taxes, indicating, "No, I have had the same accountant for 17 years." (R. p. 428, lines 15-24).

Mr. Linsky testified that he stopped paying for Lonya's room at the Red Roof in the week before January 9, 2005, because he had come back from a business trip and found things missing from his home and decided at that point to cut his losses. (R. p. 429, lines 2-20). Mr. Linsky further testified that he owns a 2001 Mustang convertible; however, he testified that he never gave Lonya Sowdon the use of his car. He testified that Lonya had called his godson and told him that she needed to borrow a car to drive to visit her "sick mother or her sick grandmother" and that his godson had told her that she could borrow his "old beater," a 1995 Nissan, but that she apparently "ended up" taking Mr. Linsky's Mustang. (R. p. 435, lines 7-16). Mr. Linsky testified that he was in Los Angeles when he learned that Lonya had been driving his car. He testified that his godson called to tell him that there were "a bunch of police over at our house." Mr. Linsky testified that he talked to one of the officers and that he was informed that his car was being impounded because it had been reported as being at the scene of a crime. (R. p. 430, lines 10-19). Mr. Linsky testified that when he finally recovered his Mustang, he found three or four little, round, numbered circles on the right passenger floor. However, Mr. Linsky testified that he saw no blood anywhere on the cloth seats or carpet of his car. He testified that he would have noticed if there was blood in his car.

Lonya testified that she moved out of the Red Roof Inn on the morning of Saturday, December 8, 2005. Lonya testified that she was sick on Sunday, December 9, 2005, and that appellant and Lee had "called me and wanted me to come and pick them up Monday morning, December 10, 2005. (R. p. 45, lines 9-19). Despite the fact that she had testified that she vacated the Red Roof on Saturday, Lonya testified that on Sunday night she saw appellant and Lee at the Red Roof Inn making deliveries. (R. p. 92). She explained that she

had had to go back to the hotel to pick up things she had left there in Room 514. (R. p. 95). Lonya testified that she clearly recalled that the girl in room 514 was holding her belongings, "Because the girl that lived there, she was one of the more decent people on the floor, and I befriended her when I saw her." (R. p. 96). Lonya firmly testified that she was not staying at the Red Roof on Sunday night. She had no explanation for why she told the police that appellant and Lee had come to her room at the Red Roof on Sunday night and that it was very late. (R. p. 93). Lonya testified that the tape was wrong because that visit to her room took place on Friday night, not Sunday night. (R. p. 93). Lonya had further indicated that on Monday morning, appellant and Lee knocked on her door asking her to take them somewhere. Lonya testified, "That would have been Saturday morning prior to my vacating the Red Roof Inn." (R. p. 94).

The general manager of the Red Roof Inn at the time of the murder, David Helman, presented registration slips which showed the date and time of check-in and receipts showing the dates stayed. Mr. Helman testified that Red Roof records established that Gerald Linsky rented room 403 on December 16, 2004, that Lonya Sowdon was also registered on that room, and that she stayed in that room until January 9, 2005. (R. p. 419, lines 3-25; p. 421, lines 13-16). Mr. Helman testified that on Sunday, January 9, 2005, at 2:39 a.m. Lonya rented a second room, room 402, in addition to room 403. (R. p. 422, lines 15-25). Mr. Helman testified that Lonya checked out of room 403 at 12:29 p.m. and that she checked out of room 402 at 2:30 p.m. on January 9, 2005. (R. p. 423). Mr. Helman testified that he could not identify anyone as staying in room 514 at the Red Roof on Sunday January 9, 2005, for the simple reason that the hotel has only four floors and there is no room 514. (R. p. 423, lines 22-25).

Lonya testified that she picked Lee and appellant up on Monday morning at 8:00 a.m. She testified that she was driving her employer, Mr. Linsky's, 2001 Mustang convertible at the time. (R. p. 46). Lonya testified that she drove where they told her to drive and turned where they told her to turn and that they eventually arrived at [REDACTED]

[REDACTED] Lonya testified that Lee and appellant used the ruse of a home inspection to gain entry to the house. She testified that soon they motioned for her to come into the house. Lonya testified that upon entering the house, she heard the victim moan and she saw him lying on the floor, bleeding. Lonya testified that Lee was in the back of the house throwing things and tearing things up. She testified that appellant was standing over the victim and that he was "sweating, pouring sweat, eyes that big." (R. p. 49, lines 17-19). She testified that she saw two guns, one in appellant's hand and one in his pants. Lonya testified that appellant was "hollering at the man wanting to know where money and cocaine was, but the victim could not understand English. Lonya testified that she speaks a little Spanish and that appellant asked her to translate. Lonya testified that the victim begged her to help him and to get appellant to stop hitting him. Lonya testified that the victim indicated that "Pablo was gone to Mexico with the money to get more cocaine" and that there was no money or cocaine at the house. (R. p. 51, lines 13-18). Lonya testified that the victim was begging for his life and that she was screaming for appellant to stop beating the victim, but that appellant continued to drag the victim through the house, beating him, until he had beaten the victim to death. (R. p. 51). Lonya testified that Lee was in the back of the house and never touched the victim. (R. p. 55).

Lonya testified that after the killing, she, Lee, and appellant left in her boss's convertible and that they drove to [REDACTED] where they dropped the Glock off.

(R. p. 58). Lonya testified that she heard Lee and appellant saying that a topless dancer had told them that there was \$75000 in cash and 8-10 kilos of cocaine at the victim's house because the people who lived there were cocaine dealers. (R. p. 58). She testified that after they dropped the Glock off at [REDACTED] they then drove to the trailer where Paul Graham was staying in order to borrow a change of clothes.

Lonya testified that appellant needed a change of clothing because he was covered with blood, "all over his pants, his shoes, his shirt, all over him." (R. p. 60). Lonya testified that appellant changed in the car and that he never left the car, but that his legs were outside the car door. (R. p. 62). Lonya testified that after they left Paul Graham's trailer, she and appellant drove to Debbie Stokes' home. She testified that they stayed at Ms. Stokes' home "all that day." (Tr. p. 77). However, she then testified that they left the Stokes' home to take Henry Brown to Aynor. She testified that during this trip, appellant burned the bloody clothing at a little block store where people hang out on Gum Street. (R. p. 63). Lonya testified, "When I was able - - when I got to a phone, I called 911."

On cross-examination, Lonya was confronted with two prior statements she had given to the authorities on January 12, and 14, 2005. Counsel for appellant indicated that while during her direct testimony, Lonya had indicated that appellant was in the front passenger seat, in her prior statement, she indicated that appellant rode in the back seat. (Tr.p. 123). Lonya responded, indicating, "That's not correct." (R. p. 108). In fact,, the prior statement indicates that when Lonya told the officer, "He got in the back," the officer asked, "In the back seat of your car?" to which Lonya answered, "Yes." (R. p. 105). Lonya protested that she said Lee got in the back of the car and that appellant was in the passenger

seat. However, in the prior statement, the officer clarified, "So, Keriem sat in the back. Where was Lee?" and Lonya responded, "Lee was up front with me." (R. p. 106).

Lonya had testified on direct that after leaving the crime scene, they drove to [REDACTED] before going to Paul's house. However, in her prior statement to the authorities, Lonya had indicated that she was told to "Go to Paul's" and that she drove the car directly to Paul's house. (R. p. 123-124). Lonya had testified on direct that she had no blood on her or on her clothing after the killing. However, counsel for appellant confronted her with her prior statements indicating that she had blood on her face, arms, hands, neck and clothing. Lonya responded to her prior statement, indicating, "I don't - - no, that's not true. I didn't have blood on my hands." (R. p. 121). Counsel asked, "So, on the tape that was transcribed when you say you had blood on your hands, you're telling the jury that you never said that?" Lonya answered, "I'm saying that I didn't have blood on my hands." (R. p. 122). Lonya eventually indicated, "I'm refuting several of these different statements. This is the truth." (R. p. 126). Indeed, Lonya "refuted" several of her prior statements which were contradicted by her direct testimony. Lonya testified that she had known Paul for "not a long, long time. Maybe seven, eight months, something like that." (R. p. 128). When confronted with her prior statement that she had known Paul for "a long time," she testified, "Well, I say a long time. It was longer than I'd known him. I'd only known him five days." (R. p. 129).

Lonya testified that appellant changed clothes in the car at Paul's; she testified, "He sure did. He changed his pants in the car. . . right there in the car." (R. p. 130). Moments later, Lonya testified that appellant had changed his shirt but that he did not change his pants until later. (R. p. 131). Lonya elaborated, adding that she was positive that she had the car in

reverse and was backing out of Paul's when appellant changed his pants in the car. (R. p. 131). Lonya was then confronted with her prior statement indicating, "He didn't ever change. He just took clothes with him. He never changed into them." (R. p. 132). Lonya responded indicating that she never said that appellant did not change his clothes. In fact, the question asked was, "Did he change while he was in the car?" to which Lonya responded, "He didn't ever change into them." (R. p. 134). She then indicated that she would have to hear the tape in order to understand this discrepancy. (R. p. 133).

There was a bloody footprint found in the kitchen at the crime scene. Lonya was asked about her previous statement indicating that appellant was wearing sneakers at the time of the killing as compared to her trial testimony indicating that appellant was wearing work boots. In all her prior statements, Lonya consistently indicated that appellant was wearing tennis shoes at the time of the killing. Lonya responded, "That was Lee. Lee had on tennis shoes." In fact, Lonya had previously indicated, "Lee had on a pair of slip your feet in rubber black shoes." (R. p. 138). Lonya testified that she never said that and that Lee would never wear such slip on shoes. (R. p. 138).

Lonya testified that that afternoon, she and appellant met Lee at the Sonic and that Lee gave something to appellant. Counsel asked Lonya to try to recall what she told the police Lee gave to appellant. Lonya hazarded a guess, "He gave him crack." (R. p. 154). Counsel corrected her, indicating that she had previously told the police that Lee gave appellant the Glock at the Sonic. Upon being confronted with her previous statement, Lonya launched into a story about the man at [REDACTED] not wanting to hold the gun and that Lee went out and retrieved the gun from him at some point that day. (R. p. 154-156). Lonya testified that she never said that they met Lee at the Sonic where Lee gave the

Glock back to appellant. She testified, "well that's wrong because I was incorrect about the location of where it transpired." (R. p. 159).

The murder indictment reads "on or about December 11, 2005; however, the State asserted that the victim was killed on December 10, 2005. Lonya confirmed again her direct testimony that she drove appellant and Lee to the victim's home on Monday December 10, 2005, and that after the murder, they left at 9:23 a.m. on the morning of the 10th. (R. p. 147; p. 205, lines 13-17). However, while Dr. Proctor, who performed the autopsy, testified that the victim *could have* died on the tenth of December, based on the decomposition of the body, he was saying he died on December 11, 2005. Dr. Proctor testified that he was told that the murder occurred on December 11, that the victim was found on the 11th, and that he found nothing to dispute that time of death. (R. p. 227).

A.J. Pierce testified that he did not know on what day the victim died, but he knew that on the night before the murder, he, Calvin, Lee, and Julianne stayed at Julianne's house. However, he testified that Lonya Sowdon was not there that night. A.J. testified that that day, he knew that "they was going over" to Pablo's house. (R. p. 347, lines 14-24). A.J. testified that appellant and Lee rode with Lonya, who was with them, and that Lonya drove. (R. p. 352, lines 1-15). A.J. testified that, that same day, he rode with Julianne to Paul Graham's house in order to pick Lee up. (R. p. 351, lines 6-13). A.J. testified that he saw appellant at Graham's house and he observed blood on appellant and that he was holding a pistol, wrapped in his shirt, in his lap. (R. p. 354, lines 8-15). A.J. testified that his cousin Lee was wearing a Hawaiian shirt, khaki pants, and violet red boots. (R. p. 366).

Paul Graham testified that he was a cocaine addict in 2005, and that for a long time, he drove Lee and appellant around and they would give him cocaine in exchange for driving

them. (R. p. 380, lines 16-19). Graham then explained that actually, "Most of the time it was myself and Lee, 90 percent of the time it was Lee and myself." (R. p. 384, lines 8-14). Graham testified that he "partied" with appellant and Lonya on Sunday night at his trailer. Graham testified, "Lonya, Kariem, and myself, we stayed up that evening and smoked a lot of crack." (R. p. 369, lines 10-16). Graham testified that Lonya had a bad crack problem and that Lee Pierce was his drug supplier. (R. p. 369, lines 17-24). Graham testified that he knew Lee Pierce "extensively" "for a long, long, period of time" but that appellant was Lee's acquaintance. He testified that he had known Lonya maybe a month or so at that point.

Graham testified that Lonya and appellant left his apartment late on the night before, as he understood, the murder took place. Graham testified that he and Lonya had partied all night. (R. p. 382). Graham then estimated that they left at one or two o'clock in the morning. Graham testified that when they left, he went to bed because he was "out of dope at that point." (R. p. 370, lines 12-13). However, Graham had given a statement indicating that Lonya and appellant *arrived* at two or three o'clock in the morning. (R. p. 388; p. 392). Graham testified that the next day, Lee was pounding on the door for at least 15 minutes without going away before he finally let him in. Graham testified that Lee "came in needing clothes." (R. p. 370, lines 14-19). He testified that Lee was "very rattled, high strung, not his normal - - he's usually calm around me." (R. p. 371, lines 2-4). Graham testified that the clothes were for appellant and not for Lee, explaining that Lee took sets of clothing out to the car but that he came "kept coming back in and saying these weren't acceptable." Paul Graham testified that he finally walked outside by himself because he was aggravated. (R. p. 371). He testified that when he walked outside, appellant and Lonya were in the car and

Lee was outside the car. (R. pp. 371-372). Paul testified that appellant was "highly agitated" and that he, Lonya, and Lee were "bickering back and forth" about clothing and money. Paul Graham testified that the argument was about clothing and money and that Lonya "seemed to be in on the argument as much as any." (R. p. 372, lines 17-25). He testified that Lonya was complaining and that she was "jonesing" for more crack at that point. (R. p. 377, lines 8-11). However, in his statement to authorities, Paul Graham had indicated that Lonya was "just high as hell sitting in the front." Graham had indicated that Lonya looked like she was "deaked up or stoned" at the time. (R. p. 395, lines 8-14).

Paul Graham testified that appellant was not wearing a shirt, that his pants and shoes were covered with blood, and that appellant was rubbing his hands down his pants as if to remove the blood. (R. p. 373, lines 16-20). However, he further testified that appellant never left the car and that his legs were never outside the car. (R. p. 374, lines 4-5). In his statement to the authorities, Graham described Lee's appearance: he stated, "He didn't have his shirt on. I think he had - - they were like overalls or coveralls. They didn't look like his normal clothing." (R. p. 386, lines 8-12). Paul Graham testified that approximately five minutes after the arrival of Lonya, Lee, and appellant, A.J. and another blonde, Julianne, came in her Mustang. (R. p. 375, lines 8-11). Graham testified that an argument over a missing jewelry box broke out between Lonya and Julianne and that, at that point, he told everyone to leave. Graham testified that A.J. left in the Mustang with Julianne, and Lee left with appellant and Lonya. (R. p. 378, lines 2-7).

The State's law enforcement and expert witnesses could offer no hint of evidence probative of appellant's guilt. There were no fingerprints and no other physical evidence to even suggest that appellant was ever in the victim's house or that he was involved in

the victim's violent and extremely bloody death. Crime scene analyst, Peter Cestare, testified that from the evidence found at the crime scene, including the body of the victim, there was no way to tell who committed the murder or even how many people were involved. (R. pp. 331-332). Cestare agreed that the transfer of blood evidence from clothing would begin as soon as the clothing came in contact with some other object. (R. p. 343, lines 16-25). Investigator Caulder testified that there were several stains, less than a drop, which presumptively tested positive for blood found on the plastic kick plate on the right side of the convertible's passenger floor, "where your feet are." (R. p. 256, lines 6-8; p. 273, lines 4-8; 279, lines 2-7). These drops were collected and sent to SLED for analysis; however there was not enough to get a DNA profile from the tiny amount of blood collected. Investigator Caulder testified that he found no other blood anywhere in the car and he testified that he searched the car thoroughly. (R. p. 259, lines 9-12). Caulder testified that no physical evidence could identify appellant as being associated with this crime. (R. p. 269, lines 2-4).

ARGUMENT

- I. The trial judge err in excluding relevant defense evidence on the erroneous grounds of hearsay and thereby interfered with appellant's right to present a defense.

The State began its case with the testimony of its key witness, Lonya Sowdon, late in the afternoon. Counsel for appellant attempted to avoid having the judge and jury hear, digest, and sleep on Lonya's testimony and to accept it as plausibly true before he had the opportunity to show them that Lonya was a startlingly unreliable source. Counsel asked the judge not to begin Lonya's testimony that afternoon so that his cross-examination would have to wait until the morning; unfortunately that motion was denied. (R. p. 30, line 20- p. 31, line 21; p. 85, lines 20-23). Therefore, despite the fact that

appellant had argued from the start that Lonya's account was a complete fabrication, right down to the time and date of the murder, as the defense commenced, the judge was so set on Lonya's story that he refused to allow the defense to submit critical, contrary, evidence.

Appellant sought to present the testimony of Officer Santiago as to the statements made by the victim's roommates when officers responded to the scene after the victim's body was discovered by his roommate. Former Detective Oz Santiago testified that on January 11, 2005, he was the interpreter at the interview of several Spanish speaking persons in the vicinity of [REDACTED] as part of the investigation of the murder that had occurred at that location. Counsel for appellant attempted to have the former officer testify that he interviewed Jonas and Rene Trujillo within three hours of their return to their shared house to find their roommate had been beaten to death. On proffer, Santiago testified that the Trujillos shared the house with the decedent, Espinozat, that they all were at the house on Monday night, December 10, 2005; that when Jonas and Rene Trujillo went to work on Tuesday morning, December 11, 2005, Espinozat was alive, but that when they returned home at 6:50 p.m. on Tuesday, December 11, 2005, they discovered Espinozat's corpse in the house. (R. p. 410, lines 1-13). The officers asked those on the scene routine questions: if they knew the victim and when they last saw him. This was the standard information obtained at the crime scene from persons whom the prosecution has never suggested were involved in the murder. Therefore, the judge's initial reaction was, "I'm going to let that sort of stuff in. That's obviously non-testimonial, but - - -" (R. p. 407, lines 6-8). However, the assistant solicitor objected on the basis that the Trujillos were not available to be cross-examined.

The trial judge indicated that if what they said was said in anticipation of coming to court, he would find that that was testimonial and therefore inadmissible hearsay. (R. p. 407, lines 13-25). Counsel for appellant argued that the Trujillos' statements were given to law officers Detective Large and Officer Santiago as they conducted their initial routine investigation at the crime scene and that the statements were admissible as non-testimonial, relevant evidence. The assistant solicitor, perhaps disconcerted at the notion that the true date and time of death would be admitted before the jury, argued that *the Trujillos* "had over two hours to fabricate a story to tell the police and to go through the house, contaminating the scene and all of these things." (R. p. 407).

Thus, the State, having taken the statements and having been fully aware that the decedent's roommates had indicated to their officers that he was alive on Tuesday morning, but dead when they got home from work on Tuesday evening, actually successfully argued during trial that *the State* was unable to cross-examine these people and that their statement was "extremely important to us as well because we could have gotten more information." (R. p. 411). Despite this incomprehensible objection, apparently indicating that if the authorities had known anyone would hear the Trujillo's statements, they would have made more of an effort to investigate the case, the trial judge ruled that the statements of the Trujillos were inadmissible hearsay because they were not available for the State to cross-examine - - as to when they last saw their roommate alive. It should be remembered that, according to Lonya and the State's espoused theory of the case, the victim and his roommates, *the Trujillo's*, were the proposed *victims* of this supposed burglary turned murder.

The trial judge plainly erred in accepting the State's disingenuous argument that these prospective victims, whom the State had never so much as suggested were in any way involved in the murder had had over two hours to conspire and come up with a story to tell the authorities about when they last saw their roommate. The judge erred in excluding the non-hearsay statements of the Trujillos upon mistakenly concluding that this was testimonial evidence. The trial judge ruled that he would not permit the testimony of Officer Santiago as to the statements made by the victim's roommates. (R. p. 411, lines 12-22 p. 412, lines 22-25). In an "abundance of fairness," the trial judge permitted the police officer's statement to be made a Court's Exhibit. (R. p. 413, lines 1-5). Therefore, counsel for appellant questioned Officer Santiago regarding his official actions on the night of December 11, 2005. The officer could only testify that he interviewed the two individuals who lived with the victim and that he relayed the information obtained to Detective Large. (R. p. 414, lines 6-16).

On proffer, Officer Santiago testified that he did not make a report of his conversation with the roommates; however, he testified that he made a tape recording of the roommates' statements in Spanish and that he turned the recording over to Detective Large. (R. p. 415, lines 12-16). However, he was not permitted to testify that according to statements taken at the scene, the victim was alive and well on the morning of December 11, 2005. (R. p. 414). This information should have been the final straw that broke the collapsing back of the State's Lonya-centered case. Instead, this information was wrongly withheld from the jury.

The trial judge stated that he excluded the Trujillo statements because that evidence went to a crucial element of the case, i.e., the timeline. The judge observed, "It

would be totally unfair to the State of South Carolina to let somebody come in and change the time zone who's not even here subject to cross-examination, particularly given the fact that they are closely related by being a roommate to the victim." (R. p. 411, lines 15-22). In this case, appellant would certainly have preferred to present his case before anyone ever got the idea that Mr. Espinozat was murdered on December 10, 2005; however, it is the defendant's lot to go last. The trial judge erred in ruling in the interest of preserving the time-line as supposedly established by the State and in not allowing testimony to "come in and change" the facts according to the State. With all due respect, that is what can happen when a defendant is allowed to present a defense; everything gets all messed up and it is no longer easy for the jury to find in favor of the prosecution. The trial judge's conclusion that the State was somehow entitled to its obviously faulty timeline, despite all evidence to the contrary, prompted him to err as a matter of law in refusing to allow the presentation of defense evidence on the erroneous basis that it was inadmissible hearsay.

Relevant evidence is admissible. Rule 402, SCRE; State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. The Trujillo statements proved not just that the State's theory of the case, that appellant murdered Mr. Espinozat on December 10, 2005, was less probable, but that it could not be true. The evidence was relevant and admissible, non-testimonial, non-hearsay.

In opposition to the hearsay ruling, Counsel for appellant aptly referred the trial judge to the Supreme Court's decision in State v. Ladner, 373 S.C. 103, 644 S.E.2d 684

(S.C. 2007). The Ladner Court noted the Sixth Amendment's Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. The Court recognized the Crawford Court's holding that the admission of testimonial hearsay statements against an accused violates the Confrontation Clause if: (1) the declarant is unavailable to testify at trial, and (2) the accused has had no prior opportunity to cross-examine the declarant. Crawford, 541 U.S. at 54, 124 S.Ct. 1354 (emphasis added.)

First, appellant would argue that the State's confrontation clause argument was misplaced in light of the fact that the statements were elicited by the State's representative. The State had no right or need to cross-examine the roommates as to the statements the State itself had elicited. Second, the statements were admissible as non-testimonial evidence. The Court in Ladner recognized the Crawford Court's suggestions as to the "core class of 'testimonial' statements," including ex parte in-court testimony or its functional equivalent; pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial; and statements taken by police officers in the course of interrogations. Crawford, 541 U.S. at 51-52, 124 S.Ct. 1354. Notably, as counsel for appellant pointed out, the Trujillos' statements do not fit under any of the categories of testimonial evidence identified by the Court. It is not reasonable to suppose that the basic statements of the uninvolved witnesses at the scene given in response to routine crime scene questioning by the authorities as they went about

their investigation would be used prosecutorially or used at a later trial. Critically, the Trujillo's were not suspects and they were not being interrogated at the time of their statements.

The Ladner Court observed the further guidance on the Crawford decision provided in Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). There, the Court dealt with two different domestic violence cases and held that a victim's identification of her abuser in response to initial questions from a 911 emergency operator was not testimonial. The Davis Court explained:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 126 S.Ct. at 2273-74. The Ladner Court indicated that Davis arguably "declared that the Sixth Amendment simply has no application outside the scope of testimonial hearsay." The Ladner Court held that given the circumstances surrounding the statement identifying the perpetrator, the statement there was non-testimonial, noting that questions answered there were not designed to implicate the perpetrator. Likewise, the routine questions asked of the victim's roommates after they discovered the body were not designed to implicate the perpetrator.

The responding officers had a dead body and, at the outset of the investigation, they were informed that the victim was alive on December 11, 2005. This early information informed the inception of the investigation, which is likely why the

indictment was drafted to read, "on or about December 11, 2005." An out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken. State v. Rice, 652 S.E.2d 409 (S.C.App.,2007). The leading case in South Carolina in regard to the principle that general testimony in regard to a law enforcement investigation is not hearsay is State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1994). The Court in Brown observed that an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken. United States v. Love, 767 F.2d 1052 (1985), cert. denied, 474 U.S. 1081, 106 S.Ct. 848, 849, 88 L.Ed.2d 890 (1986). In State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct.App.2003), the rule that testimony concerning a statement from a bystander to the police was not hearsay because it was not offered to prove the truth of the matter asserted but rather to explain and outline the investigation and the officer's reason for going to the defendant's home was announced. Similarly, here, the roommate statements were not proposed for admission to prove any person's guilt of the crime; they should have been admitted for the non-hearsay purpose of explaining why and at what point the officers began their investigation. Evidence explaining why law enforcement is in a particular area has been held to be relevant information for the jury to consider. State v. Johnson, 318 S.C. 194, 456 S.E.2d 442 (Ct.App.1995); State v. Davis, 309 S.C. 56, 419 S.E.2d 820 (Ct.App.1992). The rationale of the rule in Crawford is to exclude from evidence statements that have not been cross-examined that were gathered for the purpose of use at a later trial. Here, the statements of the victim's roommates were not elicited for the purpose of preparing to prosecute anyone but rather to gain information about what happened and to further the initial

investigation at the crime scene. Just as in Ladner, the roommates' statements were made under circumstances objectively indicating that the primary purpose of the interrogation was to enable the police assistance to meet an ongoing emergency. The statements of the roommates were non-testimonial; accordingly, there was no Confrontation Clause violation and the trial judge erred in finding one and in excluding the defense evidence.

Even assuming that the roommates' statements were testimonial, they were nonetheless admissible as excited utterances. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. The general rule is that hearsay is not admissible. Rule 802, SCRE. There are, however, numerous exceptions to this rule, such as the excited utterance exception. The rules of evidence define excited utterance as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE. An excited utterance may be admitted whether or not the declarant is available as a witness. Moreover, when a statement is admissible because it falls within a Rule 803 exception, it may be used substantively, that is, to prove the truth of the matter asserted. State v. Dennis, 337 S.C. 275, 283-84, 523 S.E.2d 173, 177 (1999). Consequently, in the instant case, where the statements of the roommates qualified as an excited utterance, the State's objection was erroneously sustained.

To be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition. State v. Sims, 348 S.C. 16, 21, 558 S.E.2d 518, 521 (2002). The

excited utterance exception is based on the rationale that "the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication." Dennis, 337 S.C. at 284, 523 S.E.2d at 177. A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception, and that determination is left to the sound discretion of the trial court. Sims, *supra*.

Here, even if the judge correctly determined that the statements given at the crime scene within hours of the roommates discovering the corpse of their house-mate, Espinozat, were hearsay, the statements were plainly admissible as excited utterances. Clearly, the statements related to the startling event of the Trujillos' roommate being beaten to death in their house. The roommates were interviewed at the scene while still under the stress of discovering the corpse. Finally, this stress obviously was caused by the startling event of the murder itself. The requirements of Rule 803(2), SCRE, were easily satisfied in this case.

The proffered defense evidence was admissible as non-testimonial or as excited utterances. The trial judge erred and improperly prevented appellant from presenting a defense by his ruling, thereby violating the guarantee of due process. Appellant's convictions should be overturned where the defense evidence was wrongly excluded.

II. The trial judge erred as a matter of law in allowing in evidence the hearsay statements of Lonya Sowdon made to a 911 operator.

The State was allowed over defense objection to present in evidence a dispatch tape of Lonya's call to 911 on the afternoon of Wednesday, December 12, 2005. (R. p. 195). Counsel for appellant argued that it was improper to allow the 911 tape to be admitted through Lonya as opposed to an appropriate 911 representative. The admission

of Lonya's statements on the 911 tape was further improper in that this was inadmissible hearsay.

As indicated above, the Court in Ladner held that an identification of the perpetrator in response to initial questions from a 911 emergency operator was not testimonial because made under circumstances objectively indicating that the primary purpose of the interrogation is to enable the police assistance to meet an ongoing emergency. According to Lonya, she made the call to 911 two days after the murder and only after she had supposedly reached safety. It is clear from the timing, circumstances, and substance of Lonya's call to 911 that she did not seek to assist the authorities in an emergency, but instead she sought to set up her story and to implicate appellant. The 911 tape was admitted for the truth of the matter asserted; however, there is no indication that the statements included in the tape were true. The admission of the 911 tape served admirably to corroborate and bolster Lonya's account of the events leading up to, during, and following the murder. The admission of the 911 tape was prejudicial error necessitating reversal.

III. The trial judge erred as a matter of law in allowing the State's chief witness to bolster and corroborate her testimony through the repetition of inadmissible hearsay statements over defense objection.

During the testimony of Lonya Sowdon, she testified, "Paul came outside and said" Counsel for appellant objected to the coming hearsay. However, his objection was overruled. The judge explained that he would admit out of court statements as long as the defendant was present. The judge advised the prosecutor, "Ask her was the defendant present when this alleged conversation took place." (R. p. 60, lines 2-7). Upon Lonya testifying that she alleged that appellant was present, just as he was supposedly present

during all her contacts after the supposed murder, the judge instructed, "All right. You may testify." (R. p. 60, lines 8-11).

The prosecutor was careful to ask Lonya if appellant was present during the out of court conversations; she testified, "He was sitting beside me in the car with the door open." (R. p. 60, lines 16-29). When the prosecution elicited the testimony indicating that Julianne came to the scene and accused Lonya of stealing her jewelry, the trial judge interjected, "Wait a minute now. I don't want to get into that conversation. That's hearsay unless the defendant was present." (R. p. 61, lines 10-20). Upon Lonya indicating that appellant was "right there," the trial judge indicated, "You may proceed." (R. p. 61, lines 18-19). Thereafter, Lonya was improperly allowed to testify to out of court statements made in the presence of appellant.

Counsel objected contemporaneously to Lonya Sowdon's recitation of the alleged out of court statements. Counsel for appellant then moved for a new trial on the basis that the trial judge had erred in allowing, over objection, Lonya to testify as to these hearsay statements. As Counsel argued, when he objected to these hearsay statements contemporaneously his objections were overruled on the grounds that hearsay statements are admissible as long as the accused was present at the time the statement was made. Counsel correctly argued that there is no such exception to the rule against hearsay and that the judge had erred in allowing this testimony over his objections. The trial judge indicated, "You may or may not be right on that, but that's an appellate issue. It's not before me." The judge further erroneously indicated that any error would be harmless. (R. p. 398, lines 7-14).

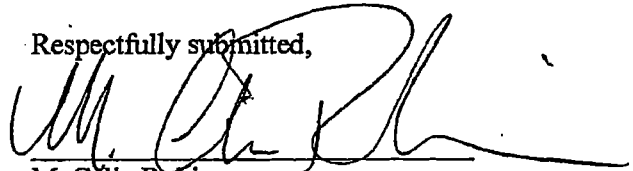
Counsel for petitioner argued that the judge's error in allowing the hearsay statements to be admitted was not harmless because the hearsay served to corroborate

Lonya's testimony and to bolster her version of events. (R. p. 398, line 16-p. 102, line 5; p. 143. lines 6-9). Counsel argued for a mistrial and a new trial on the basis of this error. The trial judge erroneously ruled that there was no basis for a mistrial and that even assuming his admission of the hearsay testimony was an error of law, that would be an appellate issue. (R. p. 399, lines 6-9). To the contrary, where the judge tacitly acknowledged that he had ruled under a mistaken impression of the law, a mistrial was warranted. Through the judge's error, the testimony of the State's key witness was seemingly corroborated and bolstered. In a case this close where the prosecution wholly depended on the testimony of Lonya Sowdon, this error warrants reversal.

CONCLUSION

For all the forgoing reasons, appellant's convictions should be reversed and a new trial ordered.

Respectfully submitted,



M. Celia Robinson
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of November, 2008.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

November 17, 2008

A handwritten signature in black ink, appearing to read 'M. Celia Robinson', written over a horizontal line.

M. Celia Robinson
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

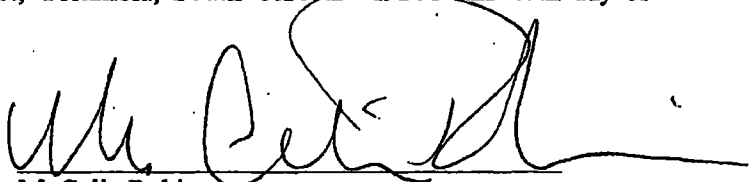
V.

LUTHER GARNER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Meldoy J. Brown, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201 this 17th day of November, 2008.

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

M. Celia Robinson
Appellate Defender

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions
Edward B. Cottingham, Circuit Court Judge

The State,

Respondent,

vs.

Luther Garner,

Appellant.

FINAL BRIEF OF RESPONDENT

HENRY D. MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

J. GREGORY HEMBREE
Solicitor, Fifteenth Judicial Circuit
Post Office Drawer 1276
Conway, South Carolina 29526
(843) 915-5460

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
APPELLANT'S STATEMENT OF ISSUES ON APPEAL	1
RESPONDENT'S STATEMENT OF THE CASE	2
RESPONDENT'S STATEMENT OF FACTS	3
ARGUMENT	13

I.

The trial judge did not err in declining to admit, through the translating officer, statements that victim's roommates made during the investigative interview regarding the victim's and roommates activities and dates of interaction in order to prove the exact day of the murder, as the statements were clearly hearsay without applicable exception to allow its admission.	13

II.

The trial judge did not err in admitting the 911 call made by Witness Sowdon into evidence even though a 911 operator was not called to authenticate the tape, as the Witness identified her own voice on the tape recording thereby authenticating the tape pursuant to the South Carolina Rules of Evidence.	20

III.

Appellant's issue regarding whether the trial judge erred in denying his mistrial motion and his subsequent motion for new trial based on improperly admitted and prejudicial hearsay is not preserved for review as appellant failed to timely move for mistrial.	23

CONCLUSION	29

TABLE OF AUTHORITIES

Cases:

<i>Arnold v. State</i> , 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)	18
<i>Floyd v. Floyd</i> , 365 S.C. 56, 84, 615 S.E.2d 465, 480 (Ct. App. 2005)	26
<i>In re Michael H.</i> , 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004)	25
<i>Montana v. Egelhoff</i> , 518 U.S. 37, 42 (1996)	15
<i>State v. Bailey</i> , 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989)	18
<i>State v. Beckham</i> , 334 S.C. 302, 513 S.E.2d 606 (1999)	17
<i>State v. Caulder</i> , 287 S.C. 507, 339 S.E.2d 876 (Ct.App. 1986)	16
<i>State v. Craig</i> , 267 S.C. 262, 267, 227 S.E.2d 306, 309 (1976)	26
<i>State v. Dunbar</i> , 356 S.C. 138, 142, 587 S.E.2d 691, 693 - 694 (2003)	25
<i>State v. Evans</i> , 662 S.E.2d 489, 491 (Ct. App. 2008)	15
<i>State v. Gentry</i> , 363 S.C. 93, 610 S.E.2d 494 (2005)	15
<i>State v. Hamilton</i> , 344 S.C. 344, 359, 543 S.E.2d 586, 594 (Ct.App. 2001)	15, 16
<i>State v. Haselden</i> , 353 S.C. 190, 577 S.E.2d 445 (2003)	20, 26
<i>State v. Holliday</i> , 333 S.C. 332, 339, 509 S.E.2d 280, 283 (Ct. App. 1998)	25
<i>State v. Jackson</i> , 54 P.3d 739, 741 (Wash.App. Div. 2 2002)	21
<i>State v. King</i> , 334 S.C. 504, 510, 514 S.E.2d 578, 581 (1999)	26
<i>State v. Lyles</i> , 665 S.E.2d 201, 209 (Ct. App. 2008)	15
<i>State v. Pickens</i> , 320 S.C. 528, 531, 466 S.E.2d 364, 366 (1996)	18
<i>State v. Price</i> , 368 S.C. 494, 500, 629 S.E.2d 363, 366 (2006)	18, 21, 27
<i>State v. Plyler</i> , 275 S.C. 291, 270 S.E.2d 126 (1980)	20
<i>State v. Rice</i> , 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct. App. 2007)	14, 20, 26, 27

<i>State v. Stanley</i> , 365 S.C. 24, 33, 615 S.E.2d 455, 459 (Ct. App. 2005)	24
<i>State v. Washington</i> , ___ S.C. ___, 665 S.E.2d 602, 604 (2008)	16
<i>State v. Weaver</i> , 361 S.C. 73, 87, 602 S.E.2d 786, 793 (Ct. App. 2004)	21, 25
<i>Taylor v. Illinois</i> , 484 U.S. 400, 410 (1988)	15

Rules and Other Authorities:

Rule 208(b)(2), SCACR	26
Rule 220(c), SCACR	26
Rule 801(c), SCRE	15
Rule 901, SCRE	20, 21

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- [1]. Did the trial judge err in excluding relevant defense evidence on the erroneous grounds of hearsay and thereby interfere with appellant's right to present a defense?
2. Did the trial judge erred as a matter of law in allowing in evidence the hearsay statements of Lowna Snowden made to a 911 operator?
3. Did the trial judge err as a matter of law in allowing the State's chief witness to bolster and corroborate her testimony through the repetition of inadmissible hearsay statements, over defense objection?

(BOA, p. 3).

RESPONDENT'S STATEMENT OF THE CASE

An Horry County Grand Jury indicted appellant, Luther Garner, during a March 2007 term, for burglary, first degree (2007-GS-26-927), and murder (2007-GS-26-928); and, at an April 2007 term, attempted armed robbery (2007-GS-26-1536).¹ (R. p. 570 - 575). All charges stem from one incident involving the victim, Amadro Flores Espinozat, on or about January 10, 2005. Stuart Axelrod, Esq., represented Petitioner on the charges. A jury trial was held May 29, 2007, through June 1, 2007, before the Honorable Edward B. Cottingham. The jury convicted appellant as charged. (R. p. 525, lines 9-17). The judge sentenced appellant to thirty (30) years imprisonment for murder; ten (10) years, consecutive, for the attempted armed robbery; and thirty (30) years, concurrent for the burglary conviction. (R. p. 538, lines 7-16). This appeal follows.

¹ Appellant was also indicted for armed robbery; however, the trial judge directed a verdict in favor of appellant on that charge at the conclusion of the State's case, and that charge is not at issue in this appeal. (R. p. 399, line 15-p. 400, line 11).

RESPONDENT'S STATEMENT OF FACTS

On January 11, 2005, at approximately 6:30 p.m., the Horry County Police Department dispatched officers to a private residence on a report that a deceased male had been discovered. (R. p. 228, line 13-p. 229, line 8). The victim in this case, Amadro Flores Espinozat, had been found by his roommates in a back bedroom of house he shared with them. (R. p. 403, line 15 - p. 404, line 9; p. 414, lines 4-12). All three of the men spoke Spanish, and apparently did not understand English. (R. p. 51, lines 1-4; II Tr. p. 403, lines 18-24). The victim had been "badly beaten" and left in his home. (R. p. 216, lines 18-19). The forensic pathologist who performed the autopsy, Dr. Edward Leroy Proctor, Jr., testified:

There were lacerations on the anterior forehead, lacerations on top of the head. There was a laceration on the bridge of the nose with the nose being fracture and displaced under it... there was a lot of edema about the hands which constitute defense wounds. He was putting his hands up to try to defend himself... the internal examination revealed contusions which are large bruises, hematomas which are collections of blood in the subcutaneous tissues of the scalp. There was blood within the cranial cavity, and looking at the brain itself, there were what we call hemorrhages in the brain which occurred as a consequence of blunt trauma.

(R. p. 216, line 20-p. 217, line 6).

The doctor explained the mechanics of the death:

A beating of this type causes the brain to swell, and that takes some time, and the had blood inside the cranial cavity, and as the blood becomes increased, the increased amount, there's just a finite space inside the skull, and, actually, what happened is that blood compressed the brain tissue and actually tried to force it down through the frame and the magnum in the base of the skull. So he... knew what had happened, and it took a period of time for the brain to swell. So, yes, ma'am, he did suffer.

(R. p. 222, lines 3-13).

The doctor also opined that the wound reflected "linear lacerations" suggesting a "blunt object" was used, but a "blunt object... that had more of a rounded edge...it certainly

could be the barrel of a gun. (R. p. 222, lines 14-23). Further autopsy test results showed no blood ethanol was detected, and the "drug screen was negative. (R. p. 223, lines 24-25). The victim had clearly died as the result of this severe beating. (R. p. 217, lines 13-15). Dr. Proctor testified the victim could have died on the January 10th or the 11th, but he opined the victim died on the 11th based upon the information given to him by the Horry County coroner and the investigating authorities. (R. p. 224, line 9 - p. 226, line 5).

Investigator John R. Caulder, II, with the Horry County Police Department's crime scene unit, described the home and the victim's condition. The home had three entries, back, front and side. The back was blocked off. The side door had some blood transfer tracks leading to it, and was open. The living room reflected that "some kind of struggle had taken place inside of the living room due to the items being strewn about in the living room and the large pool of blood." (R. p. 231, lines 1-21; p. 240, lines 1-20). There was also blood leading toward the back hallway. (R. p. 238, lines 3-7). In the hallway, the investigator discovered a bullet hole in the wall, and a shell casing on the floor. There was also a section of the drywall that had been cut and "pulled away with some type of force." (R. p. 241, lines 12-16). The bullet was recovered, but, due to extensive damage, was of no evidentiary value. The casing, however, showed that the weapon "would have been a 22 caliber semi-automatic." (R. p. 242, lines 14-25). The victim was found on the floor leading into one of the back bedrooms. His feet had been tied with orange electrical cord. His "pajama-type" pants were "a little lower than his waist" indicating he had been "dragged down the hallway," his pant pockets had been turned out, and there was a "black wire bound around his left wrist." (R. p. 245, lines 4-22; p. 246 lines 13-21). A bloody shoe impression was found on a pair of shorts slightly above the victim's head, and a bloody hand print was found on the

doorway leading into the room. (R. p. 246, line 25 - p. 247, line 7). The entire house "from the living room all the way including the bedroom where the victim was found, the bathroom and the other two bedrooms had completely been ransacked," including closets, mattresses, and even the attic, where insulation had been pulled out, all which indicated someone had been searching for something. (R. p. 247, line 22 - p. 248, line 8; p. 249, lines 7-17). Further, Peter Cestare, a specialist in the same crime scene unit - - who had never seen any of the subsequently taken statements in the case, but based his opinion solely on the condition of the crime scene, (R. p. 328, lines 3-9) - - testified that the blood spatter in the hallway indicated that either "a hand or object struck someone" leaving the spray on the wall, and several areas of blood "smears" consistent "with somebody being struck with an object" rather low, in a crouching position or on their knees, and hair striking or brushing the wall. (R. p. 316, line 1-p. 320, line 22). Investigator Cestare concluded the patterns, overall, indicated that "the struggle began somewhere in the living room, continued into the hallway, and ended up, ending here at the last bedroom here on the left where the victim was found deceased." (R. p. 324, lines 16-19). The bloody hand print on the bedroom door molding indicated "someone who is down either on their knees or in a crouched position and who grabbed that molding on the hallway in a motion either to support themselves to try and regain their footing and get up or prevent themselves from being taken into that room. You can see that it pulls backwards." (R. p. 325, line 16 - p. 326, line 8). In sum, the blood patterns were consistent with "someone going down the hallway, being dragged down the hallway" and "pulled back into the back room." (R. p. 327, line 20 - p. 328, line 2).

Though the forensic investigation revealed essentially how the crime was committed, there was no forensic evidence revealing who actually committed the crime. (R. p. 268, line

14 - p. 269, line 4; p. 326, lines 17-20). The investigation was aided when a 911 operator received a call from Lonya Sowdon. Ms. Sowdon reported she had witnessed the homicide. (R. p. 67, lines 9-25).

Ms. Sowdon testified that she was a crack addict at the time of the murder. She purchased cocaine from defendant, whom she knew as "Kariem Ward," and from Lee Pierce. (R. p. 44, lines 3-17). Ms. Sowdon testified that appellant and Lee Pierce had learned from a stripper/topless dancer that the three men at a home on T***** Drive had large amounts of cash (approx. \$75,000) and large amounts of cocaine (8 to 10 kilos), and that "the people who lived there were cocaine dealers." (R. p. 58, lines 12-17). She testified that she drove them to the home and appellant gained entry, claiming he needed to inspect the home. Lee Pierce subsequently entered. Appellant later motioned for Ms. Sowdon to enter the home. (R. p. 47, line 3 - p. 48, line 18). When she did, she saw the victim on the floor in the living room. Appellant was in the living room with the victim. Lee was "somewhere at the back of the house" and she could hear what "[s]ound[ed] like he was tearing the house down." Describing appellant, the witness testified: "He was crazy. Sweating, pouring sweat, eyes that big." He had already hit the victim. Appellant had two guns. What appeared to be a Glock, "45 or 40 caliber... semi-automatic with a clip in it... in his pants" and a large, long barreled gun in his hand, which she testified resembled a "Desert Eagle Target" .22 caliber gun. Appellant demanded she translate, and ask the victim "where the f***** cocaine and the money is." The victim responded that "Pablo had gone to Mexico with the money" on a drug run. He also begged for help, begged for appellant to stop hitting him, and begged for his life. Appellant would not stop. "He was like a rabid dog," according to the witness, and hit the victim multiple times with the gun handle - - in the front room (den or living room)

and "going up the hallway," switching hands when he began to tire. (R. p. 48, line 21 - p. 53, line 4). Ms. Sowdon testified that the gun went off during the beating, and she thought appellant had tried to shoot her, but the shot lodged in the wall. (R. p. 53, lines 6-12). The victim tried to crawl down the hallway. Appellant grabbed him by the hair lifting him and hitting him. The victim fell against the wall and slid down. Appellant dragged the victim toward a back bedroom. Appellant ordered Ms. Sowdon to tie the victim's feet with a orange, heavy duty, extension cord. When she refused, appellant tied him. Appellant "was still screaming and hollering about the money and something about a key, a key under a mattress for a safe," but the victim could not respond. Ms. Sowdon checked for a pulse and could find none. She maintained throughout the testimony that Lee advised appellant to stop before he killed him, and that Lee "[d]idn't lay a hand on the man." (R. p. 53, line 14 - p. 56, line 16). Appellant "ordered" the group to leave, (R. p. 56, lines 24-25), and they left the home through the side door, (R. p. 83, lines 4-5). Ms. Sowdon drove, with appellant in the passenger seat, and Lee in the back seat. (R. p. 58, lines 4-9). Ms. Sowdon drove to another residence, this one on S***** W*** Drive, and appellant dropped off the Glock. When asked if it had "a body behind it," appellant replied, "not this one." (R. p. 58, line 21 - p. 59, line 3). The three then continued to Paul Graham's home where appellant sent Lee in to find a change of clothes. Appellant needed to change because he was covered in blood. (R. p. 59, lines 5-22; p. 60, lines 20-22). Ms. Sowdon testified appellant kept sending Lee back, expressing the clothes Lee brought out from Mr. Graham's trailer were unacceptable. (R. p. 59, line 23 - p. 60, line 1). Mr. Graham apparently came out at some point and spoke to appellant. (R. p. 60, lines 1-2). Appellant told Mr. Graham to "get him something he could wear" and Mr. Graham supplied a pair of "sweat pants and a zip-up sweat jacket." (R.

p. 61, lines 4-8). Ms. Sowdon testified "Julianne" drove up with "A.J." (R. p. 61, line 9 - p. 62, line 8). Julianne was Lee's girlfriend. Ms. Sowdon had picked up appellant and Lee from her house earlier that morning, just prior to going to T***** Drive. (R. p. 45 lines 2-19). A. J. is Allen Pierce, Lee's first cousin, who was also at Julianne's apartment that morning. (R. p. 346, line 8 - p. 347, line 13). Ms. Sowdon testified that Julianne was "yelling" about "missing jewelry, and questioning everyone." (R. p. 61, lines 10-13). While she and Julianne were looking for her jewelry, appellant asked Lee "how much money he had," and Lee replied none. Appellant then requested the crack Lee had, then Lee asked A.J. for money. Appellant made A.J. give appellant his money. Lee left with Julianne and A.J. (R. p. 62, line 11 - p. 63, line 25). Ms. Sowdon then drove appellant to Debbie Stokes' home in Aynor. Appellant knew Ms. Stokes from New Jersey, and appellant wanted her to take him back to New Jersey. (R. p. 64, lines 2-5; p. 67, lines 17-19). Henry Brown was also there. He still had the bloody gun used to bludgeon the victim, wrapped in a white t-shirt, and the bloody clothes. He later burned the clothes - jeans, a dress shirt, t-shirt, jacket, socks and boots - near a small store in Aynor. He dropped the gun in an "electrical wire spool" near Henry Brown's mother's home in Aynor. (R. p. 64, line 7 - p. 67, line 4). Ms. Sowdon testified that "when [she] was able - - when [she] got to a phone, [she] called 911" and tried to help them recover evidence of the crime. (R. p. 67, lines 9-14). She testified she was "in shock" and "hysterical for days. I was high for days, and after I came down and had some clarity and was able to realize the magnitude of what had happened, I called for help" by calling 911. (R. p. 195, lines 11-14). She also told investigators that she thought appellant may be in New Jersey. (R. p. 67, lines 15-19).

Investigator Caulder examined the Ford Mustang she was driving at the time of the murder. The car actually belonged to Gerald Linsky. Apparently Mr. Linsky befriended Ms. Sowdon at some point, and helped her to obtain a hotel room, allowed her to house sit, on occasion, and allowed her, on occasion, the use of the car. (R. p. 434, line 20 - p. 438, line 21). Though the testimony differed on their relationship, Mr. Linsky testified that she did have permission to use the car at the that time. (R. p. 435, lines 7-24). The investigator found four areas that tested positive under a presumptive test for blood in Mr. Linsky's car. These areas were on the plastic kick plate on the passenger side of the car. The amounts were insufficient for DNA testing. (R. p.255, line 14 - p. 256, line 8; p. 270, lines 11-24; p. 272, lines 3-10).

A call for help to locate appellant went out to the United States Marshal Service, and the Marshall Service began a search in February 2005. U.S. Marshals found Petitioner in New Jersey in July 2005 and returned him to the State. (R. p. 306, line 13 - p. 307, line 14).

Allen "A.J." Pierce testified for the State. A.J., who is a first cousin to co-defendant Lee Pierce, testified that he was in Julianne's apartment the day of the murder and heard both appellant and Lee talking about going to "Pablo's" house regarding drugs. (R. p. 346, line 8 - p. 348, line 22). A.J., along with his friend Calvin Brown, stood up to leave with appellant and A.J., but they would told to sit back down as the two left. (R. p. 349, lines 3-12). He confirmed that Lonya Sowdon was with appellant and Lee. (R. p. 352, lines 14-15). Lee called him approximately three hours later. As a result of their conversation, A.J. told his cousin to run. (R. p. 350, lines 17 - p. 351, line 4). He went to Paul Graham's house to pick up A.J. He rode with Julianne. Though not sure of the date, he recalled it was still morning when he went to Mr. Graham's. (R. p. 351, lines 6-16; p. 352, lines 16-22; p. 359,

lines 13-19). He saw Lee Pierce, Lonya Sowdon, and appellant at Mr. Graham's. Ms. Sowdon was in the driver's seat of her car, appellant was in the passenger seat. Appellant was covered with blood. Appellant asked for money, and A.J. initially would not give him any, but appellant took it anyway. Lee told him to give the money to appellant. He saw a long .25 (or possibly .22) pistol with a brown handle in appellant's lap. The gun was in a t-shirt in appellant's lap. Ms. Sowdon looked "scared and stuff," and appellant appeared "crazy." A.J. admitted appellant and his cousin were "in on it... because they was talking about it." (R. p. 353, line 1 - p. 357, line 13; p. 365, lines 14-19). A.J. admitted to either buying or selling drugs at times, and that he has a conviction of burglary first. (R. p. 349, lines 20-25). He also had a charge from one of his pit bulls killing a relative's rabbit. He was working as a result of the charge in the facility where appellant was housed. Appellant approached him and told him he was going to kill him and Lee when he was out of jail, then spit on him. (R. p. 356, line 24 - p. 357, line 18). He also testified he saw appellant at the "fire pit" in Aynor, burning clothes. (R. p. 358, lines 8-22).

Paul Graham also testified for the State. Mr. Graham was a crack addict at the time of the murder and Lee was his supplier. He knew appellant through Lee, and apparently knew Ms. Sowdon through appellant. The night before the murder, he, appellant and Ms. Sowdon, and Mr. Graham's girlfriend, smoked several hundred dollars of crack, each. Appellant and Ms. Sowdon left late that night, but returned sometime during the morning hours of the next day. Lee woke Mr. Graham looking for clothes for appellant. He recalled Lee took out three sets of clothes, all of which were rejected. Then aggravated, Mr. Graham walked outside and saw appellant and Ms. Sowdon in a car. Appellant was in the passenger seat. Ms. Sowdon was driving. Both were "highly agitated" and arguing about clothes and

money. Appellant's pants and shoes were covered with blood. He also recalled that A.J. and "another blonde" also showed up at his home. There was an argument about money, but A.J. eventually gave appellant money. The girl and Ms. Sowdon were "agitated" over a jewelry box. Fearful that his land lord would dislike the commotion, he eventually told everyone to leave, and they did. (R. p. 369, line 2 - p. 378, line 21).

Defense counsel called Officer Santiago of the Horry County Police Department - - the officer who provide translation during the interview of the roommates after the victim's body was found in their home - - to establish that the murder did not occur on the 11th but on the 10th of January, and also to question the officer on his personal belief as to the credibility of the roommates. The State objected to the question eliciting hearsay, and the court would not allow the question on credibility, ruling that credibility was an issue for the jury. The trial judge declined to admit the testimony. (R. p. 403, line 15 - p. 414, line 25). The defense also called David Helman, general manager of the Red Roof Inn where Ms. Sowdon had stayed prior to the murder to challenge Ms. Sowdon's recall of the exacts days she was there, and room numbers. He however confirmed that Ms. Sowdon stayed there during December 2004 and the first part of January 2005, and that Gerald Linsky had paid by credit card for Ms. Sowdon's room. (R. p. 416, line 12 - p. 423, line 12). Defense counsel also called Gerald Linsky to challenge Ms. Sowdon on her assertions of the scope and length of their relationship. Mr. Linsky denied that Ms. Sowdon worked for him, or that they had know each other any longer than Fall of 2004 forward. He acknowledged she wanted to have a dating relationship but he declined. He admitted that he had paid for her room at the Red Roof Inn, but also qualified that she had promised to pay him back from a big settlement she was expecting. He admitted that she had stayed at his condo to look after his dogs, that she

had used his mustang before, and had permission to use his car on the day of the murder.

(R. p. 426, line 21 - p. 438, line 21).

In closing, the defense generally attacked the recall, motive and credibility of the witnesses - - witnesses who, Respondent notes, had been sequestered at trial, (R. p. 29, lines 19-21), but still have given substantially similar testimony on the facts. (See, for example, R. p. 462, lines 2-21 (detailing date inconsistencies in Sowdon's testimony); p. 477, line 20 - p. 478, line 25 (attacking A.J. Pierce's testimony based on inconsistencies in testimony, drug dealing, and prior record)). The State admitted the faults of these witnesses, but also argued that "Lonya did tell you some stuff that the evidence backs up right down the line, and its some of the same stuff that Specialist Cestare told you." (R. p. 486, lines 15-18). He reminded the jury, in part, of the wealth of forensic evidence that fully supported the testimony concerning the murder, and the powerful motives of money and drugs. (R. p. 486, line 18 - p. 491, line 10).

ARGUMENT

I.

The trial judge did not err in declining to admit, through the translating officer, statements that victim's roommates made during the investigative interview regarding the victim's and roommates activities and dates of interaction in order to prove the exact day of the murder, as the statements were clearly hearsay without applicable exception to allow its admission.

Relevant Facts:

The indictment reflected that the murder occurred on or about January 11, 2005. (R. p. 573). At the beginning of the trial, the assistant solicitor advised the trial judge the State understood the date to actually be January 10th. The following exchange followed:

The Court: The indictment says on or about. He's charged with having killed this person on or about the 11th of January. They say with specificity it's the 10th. What is your objection to that?

Mr. Axelrod: May I look at the indictment, first, Your Honor?

The Court: I've looked at it and, I can assure it says on or about. He needs to know the approximate time and the victim, allegedly, what he's charged with. He's charged with killing this particular named defendant on or about January 11th. Now, absence some kind of alibi for that date, what is your objection to it being the 10th?

Mr. Axelrod: No objection, Your Honor.

(R. p. 25, line 21- p. 26, line 8).

The solicitor thereafter made a motion to amend "the indictment to reflect the 10th instead of the 11th." (R. p. 26, lines 11-12). Defense counsel objected, but acknowledged the proof may support January 10th and he had no notice objection. Further, he did not object to the trial judge's finding that the language was sufficient to give notice. (R. p. 26, line 15 - p. 27, line 5). However, defense counsel consistently referenced possible

uncertainty in the actual date as part of the defense.² (See, for example, R. p. 87, line 23 - p. 89, line 5; p. 93, lines 3-25 (Ms. Sowdon); p. 224, lines 9-15 (Dr. Proctor); p. 260, lines 15-24 (Investigator Caulder). He did not, however, move for relief based on any variance in the dates.

Defense counsel did, however, attempt to offer the victim's Spanish-speaking roommates' statements relating the last time they saw the victim alive through the translator (Detective Santiago) who facilitated the interview after the body was discovered. He also questioned the officer on the officer's personal belief as to the credibility of the roommates. The State objected to the question eliciting hearsay, and the court would not allow the question on credibility ruling that credibility was an issue for the jury. The trial judge declined to admit the testimony. (R. p. 403, line 15 - p. 414, line 25).

Discussion:

"Evidentiary rulings of the trial court will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant." *State v. Rice*, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct. App. 2007). An abuse of discretion is defined as a ruling "based on an error of law or a factual conclusion that is without evidentiary support." *Id* 375 S.C. at 315. Here, the evidence was clearly hearsay,

² Though not in the least necessary to the disposition of this issue, appellant begins by asserting the defense counsel "attempted to avoid having the judge and jury hear, digest, and sleep on Lonya's testimony and to accept it as plausibly true before he had the opportunity to show them that Lonya was a startling unreliable source." (BOA, p. 16). Defense counsel made no such argument. While he did argue the testimony should start the next day, he never suggested there may be prejudice to the appellant. (R. p. 30, line 20 - p. 31, line 9; p. 35, lines 4-7). Moreover, the assertion of the trial judge having made any determination or taken any action to deny admissibility of evidence based on a belief of Lonya Sowdon's testimony is simply unfounded. (BOA, p. 17).

did not fall under any recognized exception, and was inadmissible. The trial judge did not err, and appellant is not entitled to any relief.

Hearsay is defined as a "statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Defense counsel offered the testimony to prove the death occurred on the 11th and not the 10th. The issue, though contested, was not fatal to the prosecution, but appellant sought admission of this evidence, not as a failure of proof but as a way to attack the credibility of the Lonya Sowdon. Instead of calling the declarants, Petitioner offered the statements through the translator. The State correctly argued that the statement, clearly offered for the truth of the matter, offended the rule against hearsay, and the trial judge agreed. On appeal, appellant argues the trial judge erred, and the error was fatal to the defense i.e. the fatal to the defense's concerted effort and perceived necessity of impeaching Ms. Sowdon concerning her recollection of the day and date of the murder. (BOP, p. 19). The record does not support his assertions.

"While defendants are entitled to a fair opportunity to present a defense, that right does not encompass the right to present any evidence, regardless of its admissibility under the rules of evidence." *State v. Hamilton*, 344 S.C. 344, 359, 543 S.E.2d 586, 594 (Ct. App. 2001), *overruled on other grounds State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). "The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." " *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996), *quoting Taylor v. Illinois*, 484 U.S. 400, 410 (1988). *See also State v. Lyles*, 665 S.E.2d 201, 209 (Ct. App. 2008)(quoting same). "Defendants are entitled to a fair opportunity to present a full and complete defense, but this right does

not supplant the rules of evidence and all proffered evidence or testimony must comply with any applicable evidentiary rules prior to admission." *Hamilton*, 344 S.C. at 359, 543 S.E.2d at 594. Defense evidence that constitutes hearsay may be properly rejected. *State v. Caulder*, 287 S.C. 507, 339 S.E.2d 876 (Ct.App. 1986)(affirming trial judge's ruling not admitting defense evidence on hearsay grounds where "[d]espite the stated intention of Caulder's counsel to introduce the telephone conversations for purposes other than the truth of the statements, there could have been no other purpose for their introduction than to prove the truth of the conversations....").

Defense counsel conceded the evidence was hearsay by simply arguing the evidence should be admissible as "non-testimonial hearsay" recorded in an investigation in response to an emergency situation. (R. p. 412, lines 16-21). Further, it appears the argument was based on an excited utterance theory. (R. p. 412, lines 16-19, "... it's an ongoing investigation, there's an emergency, it wasn't, the statements weren't given to ultimately try and have somebody arrested later down the line..."). However, the State argued that the statements proffered were taken *hours* after the body was found, time to tinker with the substance of the statements to offer during the investigation. (R. p. 410, line 15 - p. 411, line 8). See *State v. Washington*, __ S.C. __, 665 S.E.2d 602, 604 (2008)(" statement to police does not qualify as excited utterance" where made "in a formal interview with law enforcement at police headquarters almost ninety minutes after the events... in response to the Officer's questions" and were not "independent assertions or exclamations regarding the events"). Moreover, while the appellant apparently argues this evidence was unassailable, (BOA, p. 18, "the trial judge ruled that the statements of the Trujillos were inadmissible hearsay because they were not available for the State to cross-examine - - as to when they last saw their roommate

alive”), and crucial to the defense, (BOA, p. 19, “should have been the final straw that broke the collapsing back of the State’s Lonya-centered case”), he completely misses that the roommates may very well have wished to obscure the fact they were in Mexico on a drug run, as referenced in prior testimony. (See R. p. 51, lines 16-18). Yet, what this demonstrates is simply the statements were unreliable without the testing fire of cross-examination, which is exactly why the evidence was not admitted. The evidence offended the prohibition against hearsay. The trial judge did not err. Moreover, if the judge had erred in not admitting this testimony, the error could only have been harmless as it was merely cumulative. Investigator Caulder had already established when the body was found, January 11th, and the forensic pathologist, Dr. Proctor, opined the death was on January 11th according to his information from the investigative authorities. (See R. p. 228, line 13 - p. 229, line 8; p. 226, lines 24-25). Lastly, even though the issue is presented as representing a dire strait, and the omitted testimony characterized as crucial to the defense, the record shows that the actual date of the murder is simply much less important than the fact of the murder. Both A.J. and Mr. Graham admitted there were unsure of the exact date, but distinctly remembered the circumstances surrounding the murder, and most specifically, the blood on appellant. (See R. p. 359, lines 13-25; p. 388, lines 19-22; p. 389, lines 9-10). More testimony that confused the dates between the 10th and 11th simply would (again) be cumulative and harmless. *State v. Beckham*, 334 S.C. 302, 513 S.E.2d 606 (1999) (exclusion of cumulative evidence, even if error, is harmless). Lastly, even if the ruling could possibly be considered error, it could only be harmless in light of the overwhelming evidence of guilt.

"[A]n insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." *State v. Price*, 368 S.C. 494, 500, 629 S.E.2d 363, 366 (2006), citing *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). "Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." *Price*, 368 S.C. at 499, 629 S.E.2d at 366, citing *State v. Pickens*, 320 S.C. 528, 531, 466 S.E.2d 364, 366 (1996).

Here, there is substantial and solid evidence of guilt. The time of death was narrowed to on or about January 11, 2005. There was no alibi at issue. (See R. p. 25, line 19 - p. 26, line 20). The blood spatter evidence supported and retelling of the specifics of the beating death by Ms. Sowdon, specifically the beating started in the living room, the victim was dragged down the hallway, pulled up, hit again, and left in the back bedroom. (R. p. 316, line 1-p. 320, line 22; p. 324, lines 16-19; p. 325, line 16 - p. 326, line 8; p. 327, line 20 - p. 328, line 2); the bullet hole in the wall and the shell casing indicating a .22 (R. p. 241, lines 12-14; p. 242, lines 14-25); the ransacked home (R. p. 247, line 22 - p. 248, line 8); prints indicating flight by the side door as opposed to the front door (I Tr. p. 240, lines 1-20); multiple sightings of appellant covered with blood (See R. p. 654, lines 8 - 9; p. 373, lines 16-20); appellant seen attempting to hide a .22 (R. p. 354, line 10 - p. 355, line 13; appellant's flight from the jurisdiction (R. p. 306, line 13 - p. 307, line 14); and, appellant's attempt to intimidate witnesses, threatening to kill them (R. p. 175, lines 1-4; p. 357, lines 12-18). In short, the evidence, when taken together, conclusively shows that no other rational conclusion may be reached but that guilt was proven beyond a reasonable

doubt. *State v. Price, supra.* Appellant is not entitled to any relief. Appellant's argument to the contrary must be rejected.

II.

The trial judge did not err in admitting the 911 call made by Witness Sowdon into evidence even though a 911 operator was not called to authenticate the tape, as the Witness identified her own voice on the tape recording thereby authenticating the tape pursuant to the South Carolina Rules of Evidence.

Relevant Facts:

Ms. Sowdon testified that when she was able, she called 911 to report the crime and assist police. (R. p. 67, lines 9-19). The assistant solicitor asked if she could identify her voice on the 911 tape. Ms. Sowdon identified her voice on the 911 tape as the call she made to 911. (R. p. 67, lines 20 - 25). The Court asked defense counsel if he had heard the tape. He replied no. The assistant solicitor asserted the tape had been provided to the defense. Defense counsel objected to the tape, "coming in at this point." The Court sent the jury out and held a hearing to determine admissibility. The tape was played and Ms. Sowdon identified her own voice on the tape. Defense counsel argued that a 911 custodian was required in order to complete the chain of custody and allow the tape to be admitted. The Court admitted the tape based on Ms. Sowdon's identification of her own voice. (R. p. 68, line 3-p. 71, line 25).

Discussion:

As with the proceeding evidentiary issue, this issue is reviewed for abuse of discretion. *State v. Rice, supra*. Here, there is factual support for the ruling and no error of law; thus, appellant is not entitled to any relief.

Respondent construes appellant's argument as an objection the tape was not properly authenticated. Rule 901, SCRE, provides that: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to

support a finding that the matter in question is what its proponent claims.” The rule further provides examples of ways to meet this requirement, including “testimony of a witness with knowledge” and “voice identification.” Rule 901 (1) and (5). Clearly, Ms. Sowdon could identify her own voice on the recording. Moreover, and specifically, as the tape was a “telephone conversation,” the conversation can be identified by “self-identification.” Rule 901 (6). Respondent also notes that precedent supports that telephone conversations are admissible upon identification by a participant of the participant’s own voice. *See State v. Plyler*, 275 S.C. 291, 270 S.E.2d 126 (1980)(allowing admission on voice identification). *See also State v. Jackson*, 54 P.3d 739, 741 (Wash.App. Div. 2 2002)(“Just as a proponent can authenticate a photo by ‘eyewitness comparison,’ a proponent can authenticate a tape recording by ‘earwitness comparison’”). This instance is no different. There is no error. At any rate, even if the error could be found, it is merely cumulative to the evidence elicited by defense counsel, including counsel’s choice to play the tape again for the jury, and underscore the tone and delivery of Ms. Sowdon’s voice and information. (See R. p. 194, line 14 - p. 202, line 17). Any error in admission of tape would be harmless. *State v. Haselden*, 353 S.C. 190, 577 S.E.2d 445 (2003) (improper evidence harmless where merely cumulative to other evidence); *State v. Weaver*, 361 S.C. 73, 87, 602 S.E.2d 786, 793 (Ct. App. 2004)(even if contested testimony was hearsay, admission would be considered harmless where cumulative to other evidence in the record). At any rate, any error should be considered harmless based on the overwhelming evidence of guilt, including: the blood spatter evidence supported and retelling of the specifics of the beating death by Ms. Sowdon, specifically the beating started in the living room, the victim was dragged down the hallway, pulled up, hit again, and left in the back bedroom. (R. p. 316, line 1-p. 320, line 22; p. 324,

lines 16-19; p. 325, line 16 - p. 326, line 8; p. 327, line 20 - p. 328, line 2); the bullet hole in the wall and the shell casing indicating a .22 (R. p. 241, lines 12-14; p. 242, lines 14-25); the ransacked home (R. p. 247, line 22 - p. 248, line 8); prints indicating flight by the side door as opposed to the front door (R. p. 240, lines 1-20); multiple sightings of appellant covered with blood (R. p. 354, lines 8 - 9; p. 373, lines 16-20); appellant seen attempting to hide a .22 (R. p. 354, line 10 - p. 355, line 13); appellant's flight from the jurisdiction (R. p. 306, line 13 - p. 307, line 14); and, appellant's attempt to intimidate witnesses, threatening to kill them (R. p. 175, lines 1-4; p. 357, lines 12-18). In short, the evidence, when taken together, conclusively shows that no other rational conclusion may be reached but that guilt was proven beyond a reasonable doubt. *State v. Price, supra*. Petitioner is not entitled to any relief.

Appellant's argument to the contrary should be summarily rejected.

III.

Appellant's issue regarding whether the trial judge erred in denying his mistrial motion and his subsequent motion for new trial based on improperly admitted, and prejudicial hearsay is not preserved for review as appellant failed to timely move for mistrial.

Relevant Facts:

During Ms. Sowdon's testimony, she attempted to relate what Paul Graham had said, when the three came to his house for a change of clothes, and defense counsel objected. (R. p. 60, lines 1-4). The judge ruled the testimony admissible because the defendant was present with the conversation took place. Defense counsel did not object to the ruling based on an error of law, he merely asserted the defendant was not there "at this point." (R. p. 60, lines 5-13). However, she did not relate any statements attributed to Mr. Graham. (See R. p. 61, lines 6-8).

Respondent also notes that Ms. Sowdon testified that, while at Paul Graham's house getting clothes for appellant so he could change out of his bloody ones, "Julianne" and "A.J." drove up. (R. p. 61, lines 9-10). Julianne was Lee's girlfriend. Sowdon had picked up appellant and Lee from her house earlier that morning, just prior to going to T***** Drive. (R. p. 45, lines 2-19). A. J. is Allen Pierce, Lee's first cousin, who was also at Julianne's apartment that morning. (R. p. 346, line 8 - p. 347, line 13). Ms. Sowdon testified that Julianne was "yelling" about "missing jewelry, and questioning everyone. (R. p. 61, lines 10-13). Defense counsel did not object, but the Court interrupted and stated the court would allow the testimony because the defendant was present. Defense counsel did not object. Again, she did not relate any specific statement -- she summarized that Julianne was "basically accusing all of us, but ... primarily... she approached me about her jewelry. (R. p. 61, lines 21-25).

Respondent further notes that Ms. Sowdon also testified that when appellant was demanding money, "A.J. said, "Well, no - - you know, I've got a little bit but I have to get home... [a]nd said something about he had to pay his rent or something but anyway," appellant made him give up the money. (R. p. 62, lines 20-24). Defense counsel did not object to this testimony.

During cross-examination, defense counsel objected to an answer that elicited a hearsay response, relating the question of whether there was "a body behind" the gun dropped off on S***** W*** Drive. The judge sustained defense counsel's objection. (R. p. 117, line 7 - p. 118, line 6).

Thereafter, counsel finished his cross-examination of Ms. Sowdon. Further, the jury heard testimony from six other witnesses, the State rested, and defense counsel made a motion for a directed verdict based on the insufficiency of the evidence. (See R. p. 396, line 19 - p. 397, line 18). Then, defense counsel moved for mistrial for a mistrial as follows:

... I objected to, I'm trying to think who, Lonya Snowden, in her - - Snowden in her direct examination said what - - I think she said something what Lee said or what A.J. said but she said some things, and I objected to that, that was hearsay. It goes against the confrontation clause for my client's constitutional rights. The Court said that and correct me if I'm wrong that the Court said and correct me if I'm wrong, but the Court said that the statements were made in the presence of the Defendant. Therefore, therefore it would be admissible. I think it's not admissible at all.

(R. p. 397, line 20 - p. 398, line 6).

The trial judge concluded that if error, the error was harmless in light of the record and given that "there was subsequent testimony that would have cleared up that issue." The judge also indicated that "used to be the rule" but he had not permitted the testimony after that. (R. p. 398, lines 7 -15). Defense counsel maintained there was an error of law, but

added, "I will agree with you to a degree that it was - - what she testified to, what she said really wasn't of value to a degree," but maintained the testimony was not harmless because it tended to "bolster" Ms. Sowdon's testimony. (R. p. 398, line 20 - p. 399, line 5). The Court denied the mistrial motion finding, "to the extent any hearsay came in, it was harmless in that it didn't go to any significant issue." (R. p. 399, lines 6-13).

After the verdict, defense counsel again moved for a mistrial, or in the alternative a new trial, on the same basis, and specifically referencing the testimony concerning conversations at Paul Graham's trailer, that "Paul said" and "someone else said" something else. (R. p. 527, line 21 - p. 528, line 18).

Discussion:

As a first matter, the issue is not preserved for appeal, in several different ways. First, though appellant initially objected to hearsay as to what Mr. Graham might have said, he offered no argument as to legal error. Therefore, he failed to properly object. It is well settled that "[i]ssues not raised and ruled upon in the trial court will not be considered on appeal." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 - 694 (2003). "[T]he trial court must be given an opportunity to resolve the issue before it is presented to the appellate court." *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004). Second, he did not move for mistrial until after multiple other witnesses testified, the State rested, and his motion for a directed verdict had been denied. A defendant is not required to move for mistrial if his objection was overruled. *State v. Holliday*, 333 S.C. 332, 339, 509 S.E.2d 280, 283 (Ct. App. 1998). However, to the extent he sought to include A.J.'s testimony in the mistrial, he clearly failed to object, and the mistrial does not cure a late objection. *State v. Stanley*, 365 S.C. 24, 33, 615 S.E.2d 455, 459 (Ct. App. 2005) ("a failure to contemporane-

ously object to the introduction of evidence claimed to be prejudicial cannot be later bootstrapped by a motion for a mistrial"). The same is true of appellant's motion for new trial. *State v. King*, 334 S.C. 504, 510, 514 S.E.2d 578, 581 (1999).

Even so, the issue is otherwise without merit, also in several different ways. First, though Ms. Sowdon initially indicated she would repeat what Mr. Graham said, she never did. There was no hearsay admitted. The same is true of the testimony referencing Julianna. There was no hearsay admitted. As to the testimony from A.J., again, there was no hearsay admitted for the simple reason that the statement offered was not offered for the truth of the matter asserted, i.e. whether A.J. had to pay rent, but to establish a basis for appellant's statement, clearly admissible under Rule 801 (d)(2)(A), SCRB (statement not hearsay where it is offer against a party and is the party's own statement). Though not argued below, it is clear that evidence tended to show that Petitioner attempted to gain funds as part of his effort to flee the state, which he did.³ Therefore, the issue was not asserted for the truth of the matter, and was, by definition, not hearsay. *Rice*, 375 S.C. at 324, 652 S.E.2d at 420 ("a statement that is not offered to prove the truth of the matter asserted should not be excluded as hearsay"); *Floyd v. Floyd*, 365 S.C. 56, 84, 615 S.E.2d 465, 480 (Ct. App. 2005)(same). Second, even if any minor assertion of a statement was admitted in error, the Confrontation Clause was not offended as both A.J. and Mr. Graham testified at trial. See *State v. Craig*, 267 S.C. 262, 267, 227 S.E.2d 306, 309 (S.C. 1976); *State v. Weaver*, 361 S.C. 73, 86 n. 1, 602 S.E.2d 786, 793 n. 1 (Ct. App. 2004). As to the inferences to Julianna's statements, the

³ See Rule 208(b)(2), SCACR ("Respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)"). Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal).

gist of the issue there was completely collateral, (about a jewelry box and specific only to Ms. Sowdon), and could not have possibly impacted the defense, as there was no issue relating to the charge affected by the testimony. To be reversible error, the error must result in prejudice. *Rice*, 375 S.C. at 314, 652 S.E.2d at 415. Third, the testimony was harmlessly cumulative. As noted above, A.J. and Mr. Graham actually testified. Moreover, defense counsel later questioned the witnesses on the same testimony complained of regarding the jewelry box and Julianna. (R. p. 131, lines 8-11). Clearly, the minor evidence complained of was simply cumulative to other evidence admitted without object and harmless. *State v. Haselden*, *supra*.; *State v. Evans*, 662 S.E.2d 489, 491 (Ct. App. 2008)(evidence "merely cumulative, insubstantial" did not affect the result of trial and considered harmless). At any rate, any error should be considered harmless based on the overwhelming evidence of guilt, including: the blood spatter evidence supported and retelling of the specifics of the beating death by Ms. Sowdon, specifically the beating started in the living room, the victim was dragged down the hallway, pulled up, hit again, and left in the back bedroom. (R. p. 316, line 1-p. 320, line 22; p. 324, lines 16-19; p. 325, line 16 - p. 326, line 8; p. 327, line 20 - p. 328, line 2); the bullet hole in the wall and the shell casing indicating a .22 (R. p. 241, lines 12-14; p. 242, lines 14-25); the ransacked home (R. p. 247, line 22 - p. 248, line 8); prints indicating flight by the side door as opposed to the front door (R. p. 240, lines 1-20); multiple sightings of appellant covered with blood (See R. p. 354, lines 8 -9; p. 373, lines 16-20); appellant seen attempting to hide a .22 (R. p. 354, line 10 - p. 355, line 13); appellant's flight from the jurisdiction (R. p. 306, line 13 - p. 307, line 14); and, appellant's attempt to intimidate witnesses, threatening to kill them (R. p. 175, lines 1-4; II Tr. p. 357, lines 12-18).

In short, the evidence, when taken together, conclusively shows that no other rational

conclusion may be reached but that guilt was proven beyond a reasonable doubt. *State v. Price, supra.* Appellant is not entitled to any relief. Appellant's argument to the contrary must be rejected.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the lower court should be affirmed.

Respectfully submitted,

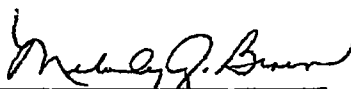
HENRY D. MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Assistant Attorney General

J. GREGORY HEMBREE
Solicitor, Fifteenth Judicial Circuit

BY: 
MELODY J. BROWN
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

December 8, 2008.
Columbia, South Carolina.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, pursuant to Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

BY:


MELODY J. BROWN

December 8, 2008.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions
Edward B. Cottingham, Circuit Court Judge

The State,

Respondent,

vs.

Luther Garner,

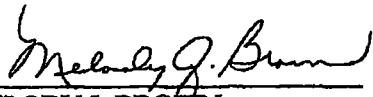
Appellant.

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the Initial Brief of Respondent and Designation of Matter on Appellant by depositing three (3) copies of same in the United States mail, postage prepaid, addressed to his attorney of record:

M. Celia Robinson, Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

This 8th day of December, 2008.


MELODY J. BROWN
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Luther Garner,

Appellant.

Appeal From Horry County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 4680
Heard December 10, 2009 – Filed April 28, 2010

AFFIRMED

Appellate Defender M. Celia Robinson, of Columbia;
and Stuart Mark Axelrod, of Myrtle Beach, for
Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Donald J.
Zelenka, and Assistant Attorney General Melody J.
Brown, all of Columbia; Solicitor John Gregory
Hembree, of Conway, for Respondent.

THOMAS, J.: In this criminal matter, Luther Garner (Appellant) was convicted of murder, first-degree burglary, and attempted armed robbery, stemming from an incident at the home of Amadro Flores Espinozat (Victim). The State's key eyewitness was Lonya Sowdon. Appellant now appeals three evidentiary rulings of the trial court as to various parts of Sowdon's testimony. We affirm.

FACTS

On December 11, 2005, authorities found Victim deceased in his home. Investigators determined Victim was severely beaten in the living room and subsequently dragged down the hallway, where he was left to die. The scene yielded one bloody shoe print, a bloody handprint, and a single bullet hole and casing from a .22 caliber bullet.

The same day, detective Oz Santiago interviewed Victim's housemates, Jonas and Rene Trujillo (collectively the Trujillos). Among other standard information, the housemates told him Victim was alive when they left for work on the morning of December 11. At trial, Appellant attempted to introduce Santiago's testimony that the housemates stated Victim was alive the morning of December 11. However, the State objected and the trial court ruled because the Trujillos were not available for cross-examination, the testimony was inadmissible hearsay.

At trial, the State offered the testimony of Sowdon to establish that on or around December 10 or 11, 2005, Appellant, Sowdon, and Lee Pierce went to Victim's home. Sowdon testified she went in the home shortly after Appellant and Pierce and found Appellant had already beaten Victim quite badly. She testified that Appellant was "hollering at [Victim] wanting . . . money and cocaine . . . but [Victim] could not understand English." Appellant allegedly dragged Victim down the hallway, while continuing to beat him with the butt of a pistol. Meanwhile, Pierce was in the back of the house looking for money and cocaine. Unable to find money or drugs, Sowdon testified the trio left and proceeded to [REDACTED] to dispose of one of the pistols and then traveled to the home of Paul Graham so Appellant could change his bloody clothes.

Sowdon testified that she remained high on crack cocaine for the remainder of the day of the murder and possibly up to two days following. When she "came down" on the afternoon of December 12, 2005, she realized the magnitude of what had occurred and called 911. The trial court admitted the recording of this call based on Sowdon's identification of her own voice. Appellant objected to the introduction of the tape through Sowdon rather than the 911 representative.

A jury found Appellant guilty of murder, first-degree burglary, and attempted armed robbery. The trial court sentenced him to forty years' imprisonment. This appeal followed.

ISSUES ON APPEAL

- I. Did the trial court err in preventing Santiago from testifying as to the Trujillos' statement of seeing Victim alive on the morning of December 11, 2005?
- II. Did the trial court err in admitting the recording of Sowdon's 911 call?
- III. Did the trial court err in allowing certain portions of Sowdon's testimony when Appellant alleged it was inadmissible hearsay?

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). Evidentiary rulings are within the sound discretion of the trial court, and such rulings will not be reversed absent an abuse of discretion or the commission of legal error that prejudices the defendant. State v. Rice, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct. App. 2007). The trial court abuses its discretion when the ruling is based on an error of law or factual conclusion that is without evidentiary support. Id. at 315, 652 S.E.2d at 415.

LAW/ANALYSIS

I. Suppression of the Trujillos' Statement

Appellant contends the Trujillos' statement to Santiago that Victim was alive the morning of December 11, 2005, is "relevant and admissible, non-testimonial, non-hearsay." We disagree.

In this case, Appellant attempted to introduce the evidence through Santiago, arguing "it's admissible . . . [as] non-testimonial evidence under State v. L[a]dner." The trial court ruled the evidence inadmissible hearsay. Because Appellant made no argument the statement was either admissible as non-hearsay or admissible as hearsay under the excited utterance exception, both of which he now argues on appeal, the only issue before this court is whether the evidence is admissible as an alleged non-testimonial statement. See S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (stating in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge); Knight v. Waggoner, 359 S.C. 492, 496, 597 S.E.2d 894, 896 (Ct. App. 2004) (indicating arguments raised for the first time on appeal are not preserved for our review).

On this issue, Appellant's argument is premised on the notion that non-testimonial evidence is admissible as a matter of course. However, we find the distinction between testimonial and non-testimonial hearsay is significant only in the context of determining whether there has been a Sixth Amendment Confrontation Clause violation. The Supreme Court has held testimonial hearsay against a defendant violates the Confrontation Clause if (1) the declarant is unavailable to testify at trial and (2) the accused has had no prior opportunity to cross-examine the witness. Crawford v. Washington, 541 U.S. 36, 54 (2004). Similarly, the South Carolina Supreme Court has recognized the Sixth Amendment is not implicated by non-testimonial hearsay. See State v. Ladner, 373 S.C. 103, 113, 644 S.E.2d 684, 689 (2007) (noting "the Sixth Amendment simply has no application outside the scope of testimonial hearsay"). However, the fact that the Sixth Amendment is not implicated by non-testimonial hearsay does not mandate the evidence be admitted. See id. at 111, 644 S.E.2d at 688 (indicating the rule in this regard

to be: the admission of admissible hearsay violates the Sixth Amendment when such evidence is testimonial in nature).

The Crawford court indicates "that not all hearsay implicates the Sixth Amendment[]." Crawford, 541 U.S. at 51. If a statement is admissible hearsay, the Confrontation Clause may operate to render this otherwise admissible hearsay inadmissible if testimonial in nature. See id. at 68 (stating that testimonial evidence implicates the Sixth Amendment and the admission of non-testimonial evidence remains the province of each state's rules of evidence). However, this does not imply the inverse; that otherwise inadmissible hearsay becomes admissible if non-testimonial in nature. See Rules 801 to 806, SCRE (providing no support for excluding non-testimonial evidence from the definition of hearsay or excluding non-testimonial evidence from the prohibition against hearsay). Rather, if evidence is deemed inadmissible hearsay, the inquiry is concluded and a determination of whether such evidence is testimonial or non-testimonial is irrelevant. Thus, Appellant's argument is without merit.¹

II. The 911 Tape

Appellant argues the trial court erred in allowing the 911 tape into evidence through Sowdon rather than a 911 representative. We find this allegation of error to be abandoned.

To this issue, Appellant's argument states in total: "Counsel for [A]ppellant argued that it was improper to allow the 911 tape to be admitted through Lonya as opposed to an appropriate 911 representative." Accordingly, this issue is abandoned on appeal. See State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) (stating an argument is deemed abandoned on appeal when conclusory and without supporting authority).

¹ Furthermore, we note the record indicates Dr. Proctor specifically testified that his medical opinion was that Victim died on December 11, 2005. Thus, the evidence Appellant attempted to introduce through Santiago was introduced through Dr. Proctor.

III. Sowdon's testimony

Appellant argues the trial court erred in admitting certain hearsay statements through Sowdon. We disagree.

"[I]mproper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice." State v. Vick, 384 S.C. 189, 199, 682 S.E.2d 275, 280 (Ct. App. 2009). Such error is deemed harmless when it could not have reasonably affected the result of the trial, and an appellate court will not set aside a conviction for such insubstantial errors. Id. An insubstantial error is harmless when guilt is proven by competent evidence such that no other rational decision could be reached or when the evidence is merely cumulative of other evidence. Id. at 199-200, 682 S.E.2d at 280.

At trial, Appellant objected to a portion of Sowdon's testimony regarding the events that transpired at Graham's house, specifically objecting in anticipation of Sowdon testifying to a hearsay statement made by Graham. On appeal, Appellant alleges that the trial court erred in allowing Sowdon to bolster and corroborate her own testimony through the repetition of these inadmissible hearsay statements.

Notwithstanding that the record does not demonstrate any of Graham's hearsay statements were actually admitted, we fail to find, and Appellant fails to bring to our attention, any prejudice caused by the alleged bolstering and corroboration of Sowdon's testimony.

CONCLUSION

For the aforementioned reasons, the ruling of the trial court is

AFFIRMED.

SHORT and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

LUTHER GARNER,

APPELLANT

COPY
RECEIVED
MAY 13 2010
SC Court of Appeals

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

Opinion No. 4680

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Luther Garner, petitioner, seeks rehearing of the opinion of this Court, State v. Garner, Op. No. 4680 (Ct. App. filed April 28, 2010). Petitioner respectfully submits that the Court may have misapprehended or overlooked his arguments that the trial judge erred reversibly in excluding relevant defense evidence on the erroneous grounds of hearsay and thereby interfered with appellant's right to present a defense in violation of the guarantee of due process and that the judge further erred in allowing in evidence the hearsay statements of Lonya Sowdon made to a 911 operator.

- I. The trial judge erred in excluding relevant defense evidence on the erroneous grounds of hearsay and thereby interfered with appellant's right to present a defense.

Petitioner respectfully seeks rehearing of the Court's decision that the Trujillos' statements were properly suppressed. The Opinion indicates that the fact that the Sixth Amendment was not implicated by the attempted admission of the Trujillos' statements does not mandate that the evidence be admitted. Petitioner would ask the Court to reconsider this finding in light of his argument that he was constitutionally entitled to present a defense and that the statements in dispute were critical defense evidence so that the trial judge erred in suppressing the evidence to the detriment of the defense.

Petitioner would further ask the Court to reconsider its finding that there was no positive basis for admission of the Trujillo statements in light of petitioner's argument at trial and on appeal that relevant evidence is admissible, relying on Rules 401 and 402, SCRE and State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). Petitioner would ask the Court to reconsider its decision in light of his argument that the Trujillo statements were relevant to prove not just that the State's theory of the case, that appellant murdered Mr. Espinozat on December 10, 2005, was less probable, but that it could not be true.

The Opinion indicates that petitioner made no argument at trial that the statements were admissible as non-hearsay. Petitioner would respectfully ask that the Court reconsider this finding in light of trial counsel's extensive argument at trial, relying on State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (2007), to the effect that these statements were not properly excluded as hearsay. The defense attempted to present the statements in evidence as regular, relevant, admissible evidence. The prosecution raised the issue of confrontation, arguing that it had not had the chance to cross-examine the Trujillos regarding their statements as to the last time the victim was seen alive. Trial counsel responded to the State's assertion that the statements were

inadmissible hearsay because the State had had no opportunity to confront by arguing to the contrary that the statements were admissible under Ladner and the line of cases wherein the appellate courts of South Carolina have found that statements made to officers in the course of their initial investigation are admissible as non-hearsay.

Petitioner argued at trial and on appeal that the statements made by the Trujillos were akin to the statements whose admission was approved on the basis of non-hearsay in Ladner, supra. The Ladner Court held that given the circumstances surrounding the statement identifying the perpetrator, the statement there was admissible as non-testimonial, non-hearsay, noting that the questions answered there were not designed to implicate the perpetrator. Petitioner argued that likewise, here, the routine questions asked of the victim's roommates after they discovered the body were not designed to implicate the perpetrator, and that the statements were non-testimonial, non-hearsay. Petitioner's argument at trial and on appeal was that the Trujillos' statements were relevant and admissible and that the statements were not properly excluded on the basis of hearsay in reliance on Ladner, State v. Rice, 652 S.E.2d 409 (Ct.App.2007), State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1994), State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct.App.2003); State v. Johnson, 318 S.C. 194, 456 S.E.2d 442 (Ct.App.1995), and State v. Davis, 309 S.C. 56, 419 S.E.2d 820 (Ct.App.1992).

The trial judge erroneously excluded the defense evidence upon finding that admission of the statements would constitute the admission of impermissible hearsay statements in violation of the State's right to confrontation. Petitioner would ask the Court to reconsider its ruling in light of his arguments to the contrary that the Trujillos' statements were non-testimonial; and that, where there was no Confrontation Clause violation given that no such protection is afforded the State, the trial judge erred in excluding the defense evidence on that basis. The Court's

opinion indicates, "On this issue, Appellant's argument is premised on the notion that non-testimonial evidence is admissible as a matter of course." The Court's Opinion further indicates that "where evidence is deemed inadmissible hearsay, the inquiry is concluded and a determination of whether such evidence is testimonial or non-testimonial is irrelevant." Petitioner would ask the Court to reconsider these findings in light of the fact that it was the State that asserted that the statements were excludable as testimonial statements and in light of the trial judge's corresponding and erroneous ruling that the statements were excluded on the stated grounds that they were "testimonial" and, thus, improper hearsay.

Upon defense counsel's asking Officer Santiago when the Trujillos had indicated they arrived home to discover the dead body of the victim in their apartment, the State objected. The assistant solicitor interjected, "Objection, Your Honor. That's hearsay and these declarants are unavailable for trial." The trial judge immediately replied, "I sustain that." (R. p. 405, lines 1-5). Defense counsel indicated that he intended to ask the officer when the Trujillos came home from work and what time they discovered the body and what time they went to work and "just those facts that this case [Ladner] specifically allows me to get to." (App. p. 406, line 24-p. 407, line 5). The judge, apparently well familiar with the line of cases following from Brown, supra, which indicate that general, basic, factual information given to law officers as part of their initial investigation is not excludable on the grounds of hearsay, responded, "I have no problem with that. . . . I'm going to let that, that sort of stuff in. That's obviously non-testimonial, but - - -" At this point, the State again asserted its objection that it had not had an opportunity to cross examine the Trujillos. The trial judge responded, indicating that he would listen to the defense proffer but maintaining that if he concluded that what the Trujillos said was said "in anticipation of coming to court, it's testimonial" and properly excluded. (R. pp. 407-408).

Defense counsel proffered the officer's testimony that the Trujillos told him that "they went to work Tuesday, came home from work Tuesday and found their roommate deceased." (R. p. 410, lines 11-13). However, the assistant solicitor renewed his objection, indicating that the State was prejudiced because the State had not had an opportunity to cross-examine the Trujillos who, along with their deceased roommate, were reportedly the intended victims of the robbery and assault. It was at this point, where the State had argued that the statements were testimonial and that it had not been able to cross-examine the Trujillos regarding the statements they made to the law officer that the trial judge ruled that the statements were excluded on the grounds that they constituted impermissible, testimonial, hearsay. (R. p. 411, lines 1-22).

The trial judge rejected trial counsel's argument that where statements are made to an officer not for the purpose of litigation but instead for the purpose of assisting an officer in his initial investigation the statements are non-testimonial and not properly excluded on the grounds of hearsay under the authority of Ladner. (R. p. 412, lines 16-22). The trial judge erroneously rejected counsel's argument on the stated grounds that the disputed evidence went to a "crucial issue" so that it would be unfair to the State to allow the statements in evidence where the statements contradicted the State's theory of the case. (R. p. 412, lines 22-25). The trial judge's ruling was in opposition to the holding of Brown, supra, and its progeny. The trial judge ruled that even where these were general statements made in response to an officer conducting his initial investigation, he was "not going to let any testimony in as to what somebody else told" the investigating officer. (R. p. 415, lines 3-6).

Petitioner argued at trial and on appeal that the statements were not excludable as hearsay statements because they could not be considered testimonial and should not be excluded on the basis that the statements were made out-of-court under the authority of Ladner, supra. However,

the State objected to admission of the statements on the basis that the statements were testimonial and thus, impermissible hearsay. The trial judge ruled with the State, finding that these statements were testimonial and that they were, therefore, properly excluded because the State had not had an opportunity to cross-examine the Trujillos. (R. p. 411, lines 12-22 p. 412, lines 22-25). Defense counsel argued that the Trujillos' statements were given to law officers Detective Large and Officer Santiago as they conducted their initial routine investigation at the crime scene and that the statements were admissible as non-testimonial, relevant evidence.

When the statements were first put forward, the defense had indicated that the statements made to the officer as part of the initial investigation were made by non-suspects, essentially bystanders, in response to standard, routine, crime-scene-questioning so that the judge's initial reaction was, "I'm going to let that sort of stuff in. That's obviously non-testimonial, but - -" (R. p. 407, lines 6-8). However, the judge's ruling changed upon the assistant solicitor's objecting to admission of the statements on the basis that the statements were testimonial and that the Trujillos were not available to be cross-examined by the State. Thus, the record clearly indicates that the statements would have been admitted but for the trial judge's erroneous finding that the statements constituted impermissible hearsay because, as the State had argued, the statements were testimonial and the State had not had an opportunity to confront the Trujillos. The Court's opinion indicates, "Rather if evidence is deemed inadmissible hearsay, the inquiry is concluded and a determination of whether such evidence is testimonial or non-testimonial is irrelevant." Petitioner would ask the Court to reconsider this finding in light of the record which establishes that the trial judge ruled that the statements were inadmissible hearsay because they were testimonial.

The Opinion indicates that the evidence petitioner sought to submit was submitted through Dr. Proctor's testimony that it was his medical opinion that the victim died on December 11, 2005. Petitioner would ask the Court to reconsider this finding in light of the record given that the doctor's opinion was doubtful whereas the Trujillos had no doubt that the victim was alive on the morning of the tenth. Petitioner would further ask the Court to reconsider the import of Dr. Proctor's testimony in light of the fact that the State questioned the doctor's conclusion and argued to the contrary that, consistent with Sowdon's testimony, the death took place on December 10, 2005. The assistant solicitor asked the doctor, "Could Mr. Espinozat have died on the 10th?" In response to the prosecution and defense questioning the doctor agreed that the victim could "very easily" have died on the tenth, just as Sowdon had claimed. (R. p. 226, lines 1-15). In contrast, the statements of the Trujillos, indicating that they saw the victim alive on the morning of the 10th would have conclusively put the lie to Sowdon's testimony.

Petitioner argued at trial and on appeal that it was fundamentally unfair for the trial judge to erroneously suppress defense evidence which disproved the State's case and impugned the credibility of the State's star witness. Petitioner respectfully asks the Court to reconsider its holding in light of his argument that the trial judge erred and improperly prevented appellant from presenting a defense by his ruling, thereby violating the guarantee of due process.

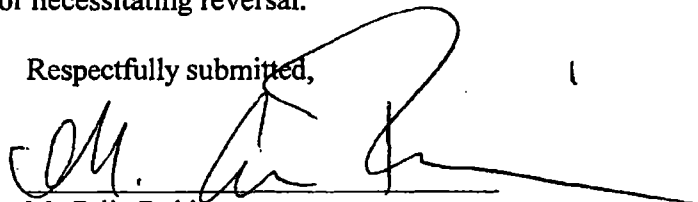
II. The trial judge erred as a matter of law in allowing in evidence the hearsay statements of Lonya Sowdon made to a 911 operator.

The Court's Opinion indicates that this issue was abandoned on appeal upon noting, "To this issue, Appellant's argument states in total, "Counsel for [A]ppellant argued that it was improper to allow the 911 tape to be admitted through Lonya as opposed to an appropriate 911 representative." Petitioner would ask the Court to reconsider this finding in light of the argument presented on appeal to the effect that the admission of Lonya's statements on the 911 tape

constituted inadmissible hearsay. (Final Brief of Appellant, Statement of the Issues on Appeal, pp. 3, 25-26).

Petitioner would ask the Court to reconsider its finding that the issue stated was abandoned in light of his argument on brief pointing out that his case was different from that of Ladner, supra, where the Court held that a statement identifying the perpetrator in response to initial questions from a 911 emergency operator was not improper hearsay and not testimonial because made under circumstances objectively indicating that the primary purpose of the interrogation is to enable the police assistance to meet an ongoing emergency. On brief, petitioner pointed out that, in contrast, here, according to Lonya, she made the call to 911 two days after the murder and only after she had supposedly reached safety. Petitioner would ask the Court to reconsider its finding that the issue stated was abandoned in light of his argument on brief that it was clear from the timing, circumstances, and substance of Lonya's call to 911 that she did not seek to assist the authorities in an emergency, but instead that she sought to set up her story and to implicate appellant and that accordingly, admission of Lonya's hearsay statements to the 911 operator constituted prejudicial error necessitating reversal.

Respectfully submitted,

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

M. Celia Robinson
Appellate Defender

This 13th day of May, 2010.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

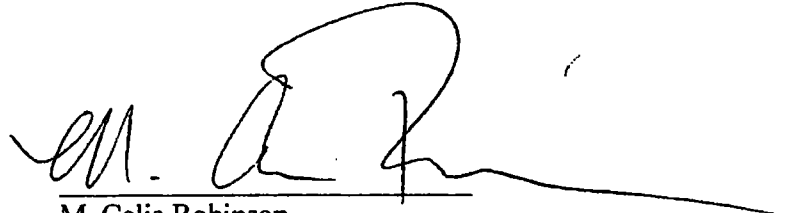
V.

LUTHER GARNER,

APPELLANT

CERTIFICATE OF SERVICE

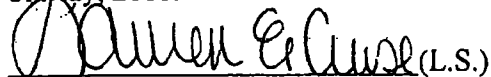
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Melody J. Brown, Esquire, this 13th day of May, 2010.



M. Celia Robinson
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 13th day
of May, 2010.



(L.S.)

Notary Public for South Carolina

My Commission Expires: August 23, 2014.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions
Edward B. Cottingham, Circuit Court Judge

Opinion No. 4680 (S.C.Ct.App. filed April 28, 2010)

The State,

Respondent,

v.

Luther Garner,

Appellant.

RETURN TO PETITION FOR REHEARING

This Court issued an opinion in the captioned case on April 28, 2010, affirming Garner's convictions for murder, first-degree burglary and attempted armed robbery. Appellant filed a petition for rehearing on May 13, 2010. By letter dated June 22, 2010, this Court requested Respondent file a return to the petition. Pursuant to Rules 221 and 224, SCACR, and at the request of the Court, Respondent makes its Return, and submits the petition for rehearing should be denied. In support of this position, Respondent would respectfully show the Court:

1. Appellant originally submitted three issues on appeal. (Slip Op. p. 3). Appellant contest the findings and rulings on only two of those issues, Issues I (admissibility of Trujillos' statement through Officer Santiago), and II (admission of 911 call).

2. Appellant submits that this Court erred in finding that "the Sixth Amendment was not implicated by the attempted admission of the Trujillos' statements" as the Sixth Amendment "does not mandate the evidence be admitted." (Petition, p. 2). In his brief, at argument, and now again in

his petition, appellant has offered a mash of different theories regarding admission of evidence in general, but not theories applicable to the specific fact pattern demonstrated here. At bottom, appellant failed to offer any ground for admissibility of the statements to the trial judge.

Appellant argued at trial that the evidence was admissible and fell into the category of “non-testimonial” hearsay. (R. p. 406; pp. 411-412). On appeal, he argued, “[t]he statements of the roommates were non-testimonial...” (FBOA, p. 24). He also argued the statements were relevant and admissible as an excited utterance, (FBOA, pp. 24-25) – grounds that were not raised below and properly found to be procedurally barred. (Slip Op. p. 4). Appellant, in the Petition for Rehearing, requests this Court reconsider its ruling, arguing that he did make an “argument at trial that the statements were admissible as non-hearsay.” (Petition, p. 2) (See also Petition, p. 5, “The trial judge rejected trial counsel’s argument that where statements are made to an officer not for the purpose of litigation but instead for the purpose of assisting an officer in his initial investigation the statements are non-testimonial and not properly excluded on the grounds of hearsay...”). Appellant relies upon circular logic and fails to make a case for error.

Again, the basic problem with the argument is the mash of competing theories. The Rules of Evidence govern the admissibility of evidence. See Rule 101, SCRE (“Except as otherwise provided by rule or by statute, these rules govern proceedings in the courts of South Carolina...”); Rule 1101(a), SCRE (“Except as otherwise provided by rule or statute, these rules apply to the courts of South Carolina”). See also *State v. Cope*, 385 S.C. 274, 283, 288, 684 S.E.2d 177, 182, 184 (Ct.App. 2009)(citing rules that “govern[]” admissibility of certain evidence). The Sixth Amendment may, however, *prohibit* the admission of evidence whether or not a hearsay exception applies. *State v. Davis*, 371 S.C. 170, 178, 638 S.E.2d 57, 61 (2006)(recognizing Sixth Amendment prohibition

not applicable where statement not testimonial, and analyzing admissibility under rules of evidence).¹

The Sixth Amendment may also allow for specific cross-examination, but does not open the flood gates to admissibility. *State v. Gillian*, 360 S.C. 433, 451, 602 S.E.2d 62, 71 (Ct. App. 2004), *affirmed as modified*, 373 S.C. 601, 646 S.E.2d 872 (2007) ("The Confrontation Clause does not, however, prevent a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness"). Similarly, the Fourteenth Amendment, and the Sixth Amendment, guarantee a right to present a defense,² but do not dispense with all rules of evidence. *Holmes v. South Carolina*, 547 U.S. 319, 326, 126 S.Ct. 1727 (2006) ("While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury."). There is, of course, overlap, between the Sixth Amendment guarantees, and the rules of evidence. However, they are separate and distinct theories. *See, for example, State v. Russell*, 383 S.C. 447, 451, 679 S.E.2d 542, 544 n. 2 (Ct. App. 2009) (noting distinction between rule based argument and Sixth Amendment based argument). In sum, the Court's ruling recognizes and respects this separation. Moreover,

1. It is particularly curious for appellant to rely on this "testimonial" versus "non-testimonial" statement theory where he would fail factually even if his argument was accepted. "Statements taken by police officers in the course of interrogations are considered testimonial." *State v. Stokes*, 381 S.C. 390, 401, 673 S.E.2d 434, 439 (2009).

2. *See Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142 (1986) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment... or in the Compulsory Process or Confrontation clauses of the Sixth Amendment... the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'") (internal citations omitted).

the record fully supports that appellant failed to offer any specific rule of evidence to allow the hearsay. The arguments offered for the first time on appeal – non-hearsay and, if hearsay, excited utterance exception – are properly considered procedurally barred. *See, e.g., State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (“A party may not argue one ground at trial and an alternate ground on appeal”). The record, and the cited precedent, fully and fairly support this Court’s rejection of appellant’s argument.

Moreover, the assertion that the evidence at issue was “critical,” (Petition, p. 2), cannot be reconciled with the record. These statements from the roommates only added to the confusion of the day of the murder (either the 10th or the 11th), not the fact of the murder. As the Court correctly noted, that confusion was already in the record, through Dr. Proctor. (Slip. Op. p. 5 n.1). So, the information appellant wished to elicit from this improper source was already admitted through a proper source. Again, there is no error. To the extent appellant argues that the doctor’s testimony was “doubtful” about the date, he again misses the point. First, whether the murder occurred on the 10th or the 11th simply was not a major issue. There was no alibi at issue. (See R. p. 25, line 19 - p. 26, line 20). Second, the fact of the murder – and the corroboration of the details of the murder as related by State’s witness Sowdon – was much more important and indicative of guilt. For instance, the blood spatter evidence supported the specifics of the beating death as related by Ms. Sowdon, specifically, that the beating started in the living room, the victim was dragged down the hallway, pulled up, hit again, and left in the back bedroom. (R. p. 316, line 1-p. 320, line 22; p. 324, lines 16-19; p. 325, line 16 - p. 326, line 8; p. 327, line 20 - p. 328, line 2). Other forensic evidence, and other witness testimony, also supported her testimony, i.e. the bullet hole in the wall and the shell casing indicating a .22 (R. p. 241, lines 12-14; p. 242, lines 14-25); the ransacked home (R. p. 247, line 22 - p. 248, line 8); multiple sightings of appellant covered with blood (see R. p. 654, lines 8 -

9; p. 373, lines 16-20); appellant seen attempting to hide a .22 (R. p. 354, line 10 - p. 355, line 13); appellant's flight from the jurisdiction (R. p. 306, line 13 - p. 307, line 14); and, appellant's attempt to intimidate witnesses, threatening to kill them (R. p. 175, lines 1-4; p. 357, lines 12-18). Even if this minor (and extremely suspect) testimony should somehow be considered admissible, any error in not allowing the testimony must be considered of minimal impact and harmless in light of the other evidence of trial. Again, appellant's argument must be rejected.

3. Appellant next argues that Court erred in determining his issue of whether "the trial judge erred as a matter of law in allowing in evidence the hearsay statements of Lonya Sowdon made to a 911 operator," (FBOA, p. 3), was abandoned on appeal. (Petition, pp. 7-8). His argument heading for the issue is as follows: "The trial judge erred as a matter of law in allowing in evidence the hearsay statements of Lonya Sowdon made to a 911 operator." (FBOA, p. 25). Only one sentence in the argument even remotely addresses same: "Counsel for appellant argued that it was improper to allow the 911 tape to be admitted through Lonya as opposed to an appropriate 911 representative." (FBOA, p. 25). He then returns to a "non-testimonial" statement analysis. Clearly, this Court appropriately found the issue abandoned. (Slip Op. pp. 5-6). *See, e.g., State v. Jones*, 344 S.C. 48, 58-59, 543 S.E.2d 541, 546 (2001)(issue deemed abandoned where only conclusory argument presented); *State v. Howard*, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009)(An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority.").

4. Lastly, Respondent reasserts that even if the first issue could be deemed error, and the second issue reached, the record demonstrates that appellant would not be entitled to relief, as the record demonstrates overwhelming evidence of guilt. "[A]n insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such

that no other rational conclusion can be reached.” *State v. Price*, 368 S.C. 494, 500, 629 S.E.2d 363, 366 (2006), citing *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). “Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed.” *Price*, 368 S.C. at 499, 629 S.E.2d at 366, citing *State v. Pickens*, 320 S.C. 528, 531, 466 S.E.2d 364, 366 (1996).

Here, there is substantial and solid evidence of guilt.

The time of death was narrowed to “on or about” January 11, 2005. There was no alibi at issue. (See R. p. 25, line 19 - p. 26, line 20). As noted above, the blood spatter evidence supported and the specifics of the beating death as related by Ms. Sowdon, specifically, that the beating started in the living room, the victim was dragged down the hallway, pulled up, hit again, and left in the back bedroom. (R. p. 316, line 1-p. 320, line 22; p. 324, lines 16-19; p. 325, line 16 - p. 326, line 8; p. 327, line 20 - p. 328, line 2). Additionally, also as noted above, other evidence corroborated Ms. Sowdon’s testimony and supported the finding of appellant’s guilt: the bullet hole in the wall and the shell casing indicating a .22 (R. p. 241, lines 12-14; p. 242, lines 14-25); the ransacked home (R. p. 247, line 22 - p. 248, line 8); multiple sightings of appellant covered with blood (see R. p. 654, lines 8 - 9; p. 373, lines 16-20); appellant seen attempting to hide a .22 (R. p. 354, line 10 - p. 355, line 13); appellant’s flight from the jurisdiction (R. p. 306, line 13- p. 307, line 14); and, appellant’s attempt to intimidate witnesses, threatening to kill them (R. p. 175, lines 1-4; p. 357, lines 12-18). In short, the evidence, when taken together, conclusively shows that no other rational conclusion may be reached but that guilt was proven beyond a reasonable doubt. *State v. Price*, *supra*.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for rehearing should be denied. Appellant has shown no error in this Court's opinion. Additionally, Respondent adheres to, and reasserts all additional arguments and defenses as presented in the Brief of Respondent as if repeated verbatim.

Respectfully submitted,

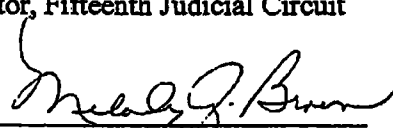
HENRY D. MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Assistant Attorney General

J. GREGORY HEMBREE
Solicitor, Fifteenth Judicial Circuit

BY: 

MELODY J. BROWN

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

July 2, 2010.
Columbia, South Carolina.

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL HORRY COUNTY
Court of General Sessions
Edward B. Cottingham, Circuit Court Judge

Opinion No. 4680 (S.C.Ct.App. filed April 28, 2010)

The State,

Respondent,

v.

Luther Garner,

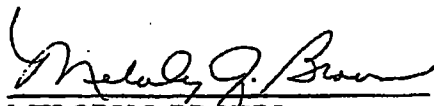
Appellant.

CERTIFICATE OF SERVICE

I, Melody J. Brown, certify that I have served the *Return to Petition for Rehearing* on appellant by depositing two (2) copies of same in the United States mail, postage prepaid, addressed to his attorney of record:

M. Celia Robinson, Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

This 2nd day of July, 2010.


MELODY J. BROWN
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

The South Carolina Court of Appeals

The State,

Respondent,

v.

Luther Garner,

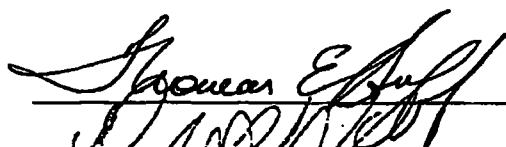
Appellant.

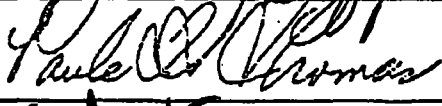
The Honorable Edward B. Cottingham
Horry County
Trial Court Case No. 2007-GS-26-00927
2007-GS-26-00928
2007-GS-26-01536

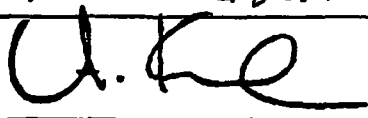
ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.



Thomas E. Huff J.


Paul C. Thomas J.


A. K. E. J.

Columbia, South Carolina
August 27, 2010

cc: Appellate Defender M. Celia Robinson
Stuart Mark Axelrod, Esquire .
Attorney General Henry Dargan McMaster
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General Melody J. Brown
John Gregory Hembree, Esquire

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 4680 (S.C. Ct. App. filed 4/28/2010)
07-GS-26-927-928; 1536.

THE STATE,

RESPONDENT,

V.

LUTHER GARNER,

PETITIONER.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

ELIZABETH A. FRANKLIN-BEST
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

INDEX

INDEX 1

CERTIFICATE OF COUNSEL.....2

ISSUE PRESENTED 3

STATEMENT OF CASE.....4

STATEMENT OF FACTS.....5

ARGUMENT I 17

ARGUMENT II.....25

ARGUMENT III.....26

CONCLUSION 28

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 8/27/2010.

ISSUES PRESENTED

- I. Did the trial judge err in excluding relevant defense evidence on the erroneous grounds of hearsay and thereby interfere with appellant's right to present a defense?

2. Did the trial judge err in allowing in evidence the hearsay statements of Lonya Sowdon made to a 911 operator?

3. Did the trial judge err in allowing the State's chief witness to bolster and corroborate her testimony through the repetition of inadmissible hearsay statements over defense objection?

STATEMENT OF THE CASE

Luther Garner, petitioner, was indicted by the Horry County Grand Jury for murder, first degree burglary, armed robbery, and attempted armed robbery. On May 29, 2007, petitioner appeared before the Honorable Edward B. Cottingham and a jury for trial. The jury reached guilty verdicts on the charges of murder, first degree burglary, and attempted armed robbery. The trial judge directed a verdict of not guilty on the charge of armed robbery. Judge Cottingham sentenced petitioner to confinement for thirty years for murder, to ten years confinement, to be served consecutively, for attempted armed robbery, and to thirty years confinement, to be served concurrently, for first degree burglary.

STATEMENT OF THE FACTS

The charges against petitioner arose from the murder of Amadro Flores Espinozat. The State's key witness was Lonya Sowdon, an admitted crack addict. Lonya told what seemed to be a straightforward story. She testified that in December of 2005, she had been staying at the Red Roof Inn and that her room was generously paid for by her employer, Gerald Linsky. Lonya testified that she was a crack addict and that she knew petitioner and Lee Pierce because they were her crack dealers. (R. p. 44, lines 14-18). Lonya testified that on January 10, 2005, she met petitioner and Lee Pierce at an apartment in Myrtle Beach for the purpose of giving them a ride. Lonya testified that she had been staying at the Red Roof Inn and that Lee and petitioner had been asking her repeatedly to give them a ride. Lonya testified that they had asked her the week before, that they called her again on Saturday, but that she had moved from the Red Roof Inn and was house sitting for her employer in Murrell's Inlet. (R. p. 88, lines 10-13). Lonya testified that she house-sat for her boss off and on when he traveled. (R. p. 100).

Lonya testified that her employer, Gerald Linsky, owns a national marketing company. Lonya testified that she did all Mr. Linsky's taxes, payroll, filing, trip itineraries, travel arrangements, and that she prepared any new dealer packets in her job as Mr. Linsky's office manager. (R. p. 89). Lonya testified that she had worked for Mr. Linsky since the end of 2000 and that she worked "off and on part-time for a period of about eight months before going full-time with Mr. Linsky. Lonya testified that she was a 1099 independent contractor. (R. p. 90). Lonya explained that part of her compensation package was that she could drive her boss's Mustang convertible when she needed to. (R. p. 91).

In fact, Mr. Gerald Linsky testified that he moved to the South Carolina area in the summer of 2004, and that he met Lonya Sowdon that fall of 2004. (R. p. 427, lines 1-3). Mr. Linsky testified that he did not live in South Carolina in 2000 and that if Lonya Sowdon indicated that she knew him in 2000, that would be "a lie." (R. p. 428, lines 1-3). Mr. Linsky testified that Lonya "had had a story that her and her kids had been thrown out on the street and it was Christmas and they had nowhere to live. So, I put up my credit cards so they could stay at a hotel." (R. p. 427, lines 11-16). Mr. Linsky testified that Lonya Sowdon also told him that she had a big medical settlement coming so that she would be able to pay him back. Mr. Linsky testified that he never had any sort of personal relationship with Lonya Sowdon but that he was lending her money in an attempt to be a good Samaritan. (R. p. 427, lines 17-21; p. 438, lines 1-5). Mr. Linsky testified that he did not always pay for Lonya's hotel room; however, he explained, "I mean, she was over at her mother's and then she would call me and say that she got thrown out and it was freezing cold and it was raining and the kids had nowhere to go." (R. p. 434-435). Mr. Linsky testified that he suspected but did not know certainly about Lonya Sowdon's crack addiction at the time. (R. p. 437, lines 18-24).

Mr. Linsky testified that his business involves doing sales seminars nationally. He testified that he was sure that Lonya Sowdon was aware of his work, but that she was "never a part of it" and that she never worked for him. Mr. Linsky testified that in the four months he knew Lonya, she never had a job although, "she had all sorts of things she said were pending, but no." (R. p. 439, lines 1-2). Mr. Linsky specifically refuted the notion that Lonya Sowdon did his payroll or taxes, indicating, "No, I have had the same accountant for 17 years." (R. p. 428, lines 15-24).

Mr. Linsky testified that he stopped paying for Lonya's room at the Red Roof in the week before January 9, 2005, because he had come back from a business trip and found things missing from his home and decided at that point to cut his losses. (R. p. 429, lines 2-20). Mr. Linsky further testified that he owns a 2001 Mustang convertible; however, he testified that he never gave Lonya Sowdon the use of his car. He testified that Lonya had called his godson and told him that she needed to borrow a car to drive to visit her "sick mother or her sick grandmother" and that his godson had told her that she could borrow his "old beater," a 1995 Nissan, but that she apparently "ended up" taking Mr. Linsky's Mustang. (R. p. 435, lines 7-16). Mr. Linsky testified that he was in Los Angeles when he learned that Lonya had been driving his car. He testified that his godson called to tell him that there were "a bunch of police over at our house." Mr. Linsky testified that he talked to one of the officers and that he was informed that his car was being impounded because it had been reported as being at the scene of a crime. (R. p. 430, lines 10-19). Mr. Linsky testified that when he finally recovered his Mustang, he found three or four little, round, numbered circles on the right passenger floor. However, Mr. Linsky testified that he saw no blood anywhere on the cloth seats or carpet of his car. He testified that he would have noticed if there was blood in his car.

Lonya testified that she moved out of the Red Roof Inn on the morning of Saturday, December 8, 2005. Lonya testified that she was sick on Sunday, December 9, 2005, and that petitioner and Lee had "called me and wanted me to come and pick them up Monday morning, December 10, 2005. (R. p. 45, lines 9-19). Despite the fact that she had testified that she vacated the Red Roof on Saturday, Lonya testified that on Sunday night she saw petitioner and Lee at the Red Roof Inn making deliveries. (R. p. 92). She explained that she had had to go back to the hotel to

pick up things she had left there in Room 514. (R. p. 95). Lonya testified that she clearly recalled that the girl in room 514 was holding her belongings, "Because the girl that lived there, she was one of the more decent people on the floor, and I befriended her when I saw her." (R. p. 96). Lonya firmly testified that she was not staying at the Red Roof on Sunday night. She had no explanation for why she told the police that petitioner and Lee had come to her room at the Red Roof on Sunday night and that it was very late. (R. p. 93). Lonya testified that the tape was wrong because that visit to her room took place on Friday night, not Sunday night. (R. p. 93). Lonya had further indicated that on Monday morning, appellant and Lee knocked on her door asking her to take them somewhere. Lonya testified, "That would have been Saturday morning prior to my vacating the Red Roof Inn." (R. p. 94).

The general manager of the Red Roof Inn at the time of the murder, David Helman, presented registration slips which showed the date and time of check-in and receipts showing the dates stayed. Mr. Helman testified that Red Roof records established that Gerald Linsky rented room 403 on December 16, 2004, that Lonya Sowdon was also registered on that room, and that she stayed in that room until January 9, 2005. (R. p. 419, lines 3-25; p. 421, lines 13-16). Mr. Helman testified that on Sunday, January 9, 2005, at 2:39 a.m. Lonya rented a second room, room 402, in addition to room 403. (R. p. 422, lines 15-25). Mr. Helman testified that Lonya checked out of room 403 at 12:29 p.m. and that she checked out of room 402 at 2:30 p.m. on January 9, 2005. (R. p. 423). Mr. Helman testified that he could not identify anyone as staying in room 514 at the Red Roof on Sunday January 9, 2005, for the simple reason that the hotel has only four floors and there is no room 514. (R. p. 423, lines 22-25).

Lonya testified that she picked Lee and appellant up on Monday morning at 8:00 a.m. She testified that she was driving her employer, Mr. Linsky's, 2001 Mustang convertible at the time. (R. p. 46). Lonya testified that she drove where they told her to drive and turned where they told her to turn and that they eventually arrived at [REDACTED]. Lonya testified that Lee and petitioner used the ruse of a home inspection to gain entry to the house. She testified that soon they motioned for her to come into the house. Lonya testified that upon entering the house, she heard the victim moan and she saw him lying on the floor, bleeding.. Lonya testified that Lee was in the back of the house throwing things and tearing things up. She testified that petitioner was standing over the victim and that he was "sweating, pouring sweat, eyes that big." (R. p. 49, lines 17-19). She testified that she saw two guns, one in petitioner's hand and one in his pants. Lonya testified that petitioner was "hollering at the man wanting to know where money and cocaine was, but the victim could not understand English. Lonya testified that she speaks a little Spanish and that petitioner asked her to translate. Lonya testified that the victim begged her to help him and to get petitioner to stop hitting him. Lonya testified that the victim indicated that "Pablo was gone to Mexico with the money to get more cocaine" and that there was no money or cocaine at the house. (R. p. 51, lines 13-18). Lonya testified that the victim was begging for his life and that she was screaming for petitioner to stop beating the victim, but that petitioner continued to drag the victim through the house, beating him, until he had beaten the victim to death. (R. p. 51). Lonya testified that Lee was in the back of the house and never touched the victim. (R. p. 55).

Lonya testified that after the killing, she, Lee, and petitioner left in her boss's convertible and that they drove to [REDACTED] where they dropped the Glock off. (R. p. 58). Lonya testified that she heard Lee and petitioner saying that a topless dancer had told them that there

was \$75000 in cash and 8-10 kilos of cocaine at the victim's house because the people who lived there were cocaine dealers. (R. p. 58). She testified that after they dropped the Glock off at [REDACTED] they then drove to the trailer where Paul Graham was staying in order to borrow a change of clothes.

Lonya testified that petitioner needed a change of clothing because he was covered with blood, "all over his pants, his shoes, his shirt, all over him." (R. p. 60). Lonya testified that petitioner changed in the car and that he never left the car, but that his legs were outside the car door. (R. p. 62). Lonya testified that after they left Paul Graham's trailer, she and petitioner drove to Debbie Stokes' home. She testified that they stayed at Ms. Stokes' home "all that day." (Tr. p. 77). However, she then testified that they left the Stokes' home to take Henry Brown to Aynor. She testified that during this trip, petitioner burned the bloody clothing at a little block store where people hang out on Gum Street. (R. p. 63). Lonya testified, "When I was able - - when I got to a phone, I called 911."

On cross-examination, Lonya was confronted with two prior statements she had given to the authorities on January 12, and 14, 2005. Counsel for petitioner indicated that while during her direct testimony, Lonya had indicated that petitioner was in the front passenger seat, in her prior statement, she indicated that petitioner rode in the back seat. (Tr.p. 123). Lonya responded, indicating, "That's not correct." (R. p. 108). In fact,, the prior statement indicates that when Lonya told the officer, "He got in the back," the officer asked, "In the back seat of your car?" to which Lonya answered, "Yes." (R. p. 105). Lonya protested that she said Lee got in the back of the car and that petitioner was in the passenger seat. However, in the prior statement, the officer clarified,

"So, Keriem sat in the back. Where was Lee?" and Lonya responded, "Lee was up front with me." (R. p. 106).

Lonya had testified on direct that after leaving the crime scene, they drove to [REDACTED] before going to Paul's house. However, in her prior statement to the authorities, Lonya had indicated that she was told to "Go to Paul's" and that she drove the car directly to Paul's house. (R. p. 123-124). Lonya had testified on direct that she had no blood on her or on her clothing after the killing. However, counsel for petitioner confronted her with her prior statements indicating that she had blood on her face, arms, hands, neck and clothing. Lonya responded to her prior statement, indicating, "I don't - - no, that's not true. I didn't have blood on my hands." (R. p. 121). Counsel asked, "So, on the tape that was transcribed when you say you had blood on your hands, you're telling the jury that you never said that?" Lonya answered, "I'm saying that I didn't have blood on my hands." (R. p. 122). Lonya eventually indicated, "I'm refuting several of these different statements. This is the truth." (R. p. 126). Indeed, Lonya "refuted" several of her prior statements which were contradicted by her direct testimony. Lonya testified that she had known Paul for "not a long, long time. Maybe seven, eight months, something like that." (R. p. 128). When confronted with her prior statement that she had known Paul for "a long time," she testified, "Well, I say a long time. It was longer than I'd known him. I'd only known him five days." (R. p. 129).

Lonya testified that petitioner changed clothes in the car at Paul's; she testified, "He sure did. He changed his pants in the car. . . right there in the car." (R. p. 130). Moments later, Lonya testified that petitioner had changed his shirt but that he did not change his pants until later. (R. p. 131). Lonya elaborated, adding that she was positive that she had the car in reverse and was backing out of Paul's when petitioner changed his pants in the car. (R. p. 131). Lonya was then

confronted with her prior statement indicating, "He didn't ever change. He just took clothes with him. He never changed into them." (R. p. 132). Lonya responded indicating that she never said that appellant did not change his clothes. In fact, the question asked was, "Did he change while he was in the car?" to which Lonya responded, "He didn't ever change into them." (R. p. 134). She then indicated that she would have to hear the tape in order to understand this discrepancy. (R. p. 133).

There was a bloody footprint found in the kitchen at the crime scene. Lonya was asked about her previous statement indicating that petitioner was wearing sneakers at the time of the killing as compared to her trial testimony indicating that petitioner was wearing work boots. In all her prior statements, Lonya consistently indicated that petitioner was wearing tennis shoes at the time of the killing. Lonya responded, "That was Lee. Lee had on tennis shoes." In fact, Lonya had previously indicated, "Lee had on a pair of slip your feet in rubber black shoes." (R. p. 138). Lonya testified that she never said that and that Lee would never wear such slip on shoes. (R. p. 138).

Lonya testified that that afternoon, she and petitioner met Lee at the Sonic and that Lee gave something to petitioner. Counsel asked Lonya to try to recall what she told the police Lee gave to petitioner. Lonya hazarded a guess, "He gave him crack." (R. p. 154). Counsel corrected her, indicating that she had previously told the police that Lee gave petitioner the Glock at the Sonic. Upon being confronted with her previous statement, Lonya launched into a story about the man at [REDACTED] not wanting to hold the gun and that Lee went out and retrieved the gun from him at some point that day. (R. p. 154-156). Lonya testified that she never said that they met Lee at the Sonic where Lee gave the Glock back to petitioner. She testified, "well that's wrong because I was incorrect about the location of where it transpired." (R. p. 159).

The murder indictment reads "on or about December 11, 2005; however, the State asserted that the victim was killed on December 10, 2005. Lonya confirmed again her direct testimony that she drove petitioner and Lee to the victim's home on Monday December 10, 2005, and that after the murder, they left at 9:23 a.m. on the morning of the 10th. (R. p. 147; p. 205, lines 13-17). However, while Dr. Proctor, who performed the autopsy, testified that the victim *could have* died on the tenth of December, based on the decomposition of the body, he was saying he died on December 11, 2005. Dr. Proctor testified that he was told that the murder occurred on December 11, that the victim was found on the 11th, and that he found nothing to dispute that time of death. (R. p. 227).

A.J. Pierce testified that he did not know on what day the victim died, but he knew that on the night before the murder, he, Calvin, Lee, and Julianne stayed at Julianne's house. However, he testified that Lonya Sowdon was not there that night. A.J. testified that that day, he knew that "they was going over" to Pablo's house. (R. p. 347, lines 14-24). A.J. testified that petitioner and Lee rode with Lonya, who was with them, and that Lonya drove. (R. p. 352, lines 1-15). A.J. testified that, that same day, he rode with Julianne to Paul Graham's house in order to pick Lee up. (R. p. 351, lines 6-13). A.J. testified that he saw petitioner at Graham's house and he observed blood on petitioner and that he was holding a pistol, wrapped in his shirt, in his lap. (R. p. 354, lines 8-15). A.J. testified that his cousin Lee was wearing a Hawaiian shirt, khaki pants, and violet red boots. (R. p. 366).

Paul Graham testified that he was a cocaine addict in 2005, and that for a long time, he drove Lee and petitioner around and they would give him cocaine in exchange for driving them. (R. p. 380, lines 16-19). Graham then explained that actually, "Most of the time it was myself and Lee, 90 percent of the time it was Lee and myself." (R. p. 384, lines 8-14). Graham testified that he

"partied" with petitioner and Lonya on Sunday night at his trailer. Graham testified, "Lonya, Kariem, and myself, we stayed up that evening and smoked a lot of crack." (R. p. 369, lines 10-16). Graham testified that Lonya had a bad crack problem and that Lee Pierce was his drug supplier. (R. p. 369, lines 17-24). Graham testified that he knew Lee Pierce "extensively" "for a long, long, period of time" but that petitioner was Lee's acquaintance. He testified that he had known Lonya maybe a month or so at that point.

Graham testified that Lonya and petitioner left his apartment late on the night before, as he understood, the murder took place. Graham testified that he and Lonya had partied all night. (R. p. 382). Graham then estimated that they left at one or two o'clock in the morning. Graham testified that when they left, he went to bed because he was "out of dope at that point." (R. p. 370, lines 12-13). However, Graham had given a statement indicating that Lonya and petitioner *arrived* at two or three o'clock in the morning. (R. p. 388; p. 392). Graham testified that the next day, Lee was pounding on the door for at least 15 minutes without going away before he finally let him in. Graham testified that Lee "came in needing clothes." (R. p. 370, lines 14-19). He testified that Lee was "very rattled, high strung, not his normal - - he's usually calm around me." (R. p. 371, lines 2-4). Graham testified that the clothes were for petitioner and not for Lee, explaining that Lee took sets of clothing out to the car but that he came "kept coming back in and saying these weren't acceptable." Paul Graham testified that he finally walked outside by himself because he was aggravated. (R. p. 371). He testified that when he walked outside, petitioner and Lonya were in the car and Lee was outside the car. (R. pp. 371-372). Paul testified that petitioner was "highly agitated" and that he, Lonya, and Lee were "bickering back and forth" about clothing and money. Paul Graham testified that the argument was about clothing and money and that Lonya "seemed to

be in on the argument as much as any." (R. p. 372, lines 17-25). He testified that Lonya was complaining and that she was "jonesing" for more crack at that point. (R. p. 377, lines 8-11). However, in his statement to authorities, Paul Graham had indicated that Lonya was "just high as hell sitting in the front." Graham had indicated that Lonya looked like she was "deaked up or stoned" at the time. (R. p. 395, lines 8-14).

Paul Graham testified that petitioner was not wearing a shirt, that his pants and shoes were covered with blood, and that petitioner was rubbing his hands down his pants as if to remove the blood. (R. p. 373, lines 16-20). However, he further testified that petitioner never left the car and that his legs were never outside the car. (R. p. 374, lines 4-5). In his statement to the authorities, Graham described Lee's appearance: he stated, "He didn't have his shirt on. I think he had - - they were like overalls or coveralls. They didn't look like his normal clothing." (R. p. 386, lines 8-12). Paul Graham testified that approximately five minutes after the arrival of Lonya, Lee, and petitioner, A.J. and another blonde, Julianne, came in her Mustang. (R. p. 375, lines 8-11). Graham testified that an argument over a missing jewelry box broke out between Lonya and Julianne and that, at that point, he told everyone to leave. Graham testified that A.J. left in the Mustang with Julianne, and Lee left with petitioner and Lonya. (R. p. 378, lines 2-7).

The State's law enforcement and expert witnesses could offer no hint of evidence probative of petitioner's guilt. There were no fingerprints and no other physical evidence to even suggest that petitioner was ever in the victim's house or that he was involved in the victim's violent and extremely bloody death. Crime scene analyst, Peter Cestare, testified that from the evidence found at the crime scene, including the body of the victim, there was no way to tell who committed the murder or even how many people were involved. (R. pp. 331-332). Cestare agreed

that the transfer of blood evidence from clothing would begin as soon as the clothing came in contact with some other object. (R. p. 343, lines 16-25). Investigator Caulder testified that there were several stains, less than a drop, which presumptively tested positive for blood found on the plastic kick plate on the right side of the convertible's passenger floor, "where your feet are." (R. p. 256, lines 6-8; p. 273, lines 4-8; 279, lines 2-7). These drops were collected and sent to SLED for analysis; however there was not enough to get a DNA profile from the tiny amount of blood collected. Investigator Caulder testified that he found no other blood anywhere in the car and he testified that he searched the car thoroughly. (R. p. 259, lines 9-12). Caulder testified that no physical evidence could identify petitioner as being associated with this crime. (R. p. 269, lines 2-4).

ARGUMENT

I. The trial judge err in excluding relevant defense evidence on the erroneous grounds of hearsay and thereby interfered with appellant's right to present a defense.

Petitioner sought to present the testimony of Officer Santiago as to the statements made by the victim's roommates when officers responded to the scene after the victim's body was discovered by his roommate. Former Detective Oz Santiago testified that on January 11, 2005, he was the interpreter at the interview of several Spanish speaking persons in the vicinity of [REDACTED] [REDACTED] as part of the investigation of the murder that had occurred at that location. Counsel for petitioner attempted to have the former officer testify that he interviewed Jonas and Rene Trujillo within three hours of their return to their shared house to find their roommate had been beaten to death. On proffer, Santiago testified that the Trujillos shared the house with the decedent, Espinozat, that they all were at the house on Monday night, December 10, 2005; that when Jonas and Rene Trujillo went to work on Tuesday morning, December 11, 2005, Espinozat was alive, but that when they returned home at 6:50 p.m. on Tuesday, December 11, 2005, they discovered Espinozat's corpse in the house. (R. p. 410, lines 1-13). The officers asked those on the scene routine questions: if they knew the victim and when they last saw him. This was the standard information obtained at the crime scene from persons whom the prosecution has never suggested were involved in the murder. Therefore, the judge's initial reaction was, "I'm going to let that sort of stuff in. That's obviously non-testimonial, but - - -" (R. p. 407, lines 6-8). However, the assistant solicitor objected on the basis that the Trujillos were not available to be cross-examined.

The trial judge indicated that if what they said was said in anticipation of coming to court, he would find that that was testimonial and therefore inadmissible hearsay. (R. p. 407, lines 13-25). Counsel for petitioner argued that the Trujillos' statements were given to law officers Detective Large and Officer Santiago as they conducted their initial routine investigation at the crime scene and that the statements were admissible as non-testimonial, relevant evidence. The assistant solicitor argued that *the Trujillos* "had over two hours to fabricate a story to tell the police and to go through the house, contaminating the scene and all of these things." (R. p. 407).

Thus, the State, having taken the statements and having been fully aware that the decedent's roommates had indicated to their officers that he was alive on Tuesday morning, but dead when they got home from work on Tuesday evening, successfully argued during trial that *the State* was unable to cross-examine these people and that their statement was "extremely important to us as well because we could have gotten more information." (R. p. 411). Despite this objection, the trial judge ruled that the statements of the Trujillos were inadmissible hearsay because they were not available for the State to cross-examine - - as to when they last saw their roommate alive. It should be remembered that, according to Lonya and the State's theory of the case, the victim and his roommates, *the Trujillo's*, were the proposed *victims* of this supposed burglary turned murder.

The trial judge erred in accepting the State's argument that these prospective victims, whom the State had never so much as suggested were in any way involved in the murder had had over two hours to conspire and come up with a story to tell the authorities about when they last saw their roommate. The judge erred in excluding the non-hearsay statements of the Trujillos upon mistakenly concluding that this was testimonial evidence. The trial judge ruled that he

would not permit the testimony of Officer Santiago as to the statements made by the victim's roommates. (R. p. 411, lines 12-22 p. 412, lines 22-25). In an "abundance of fairness," the trial judge permitted the police officer's statement to be made a Court's Exhibit. (R. p. 413, lines 1-5). Therefore, counsel for petitioner questioned Officer Santiago regarding his official actions on the night of December 11, 2005. The officer could only testify that he interviewed the two individuals who lived with the victim and that he relayed the information obtained to Detective Large. (R. p. 414, lines 6-16).

On proffer, Officer Santiago testified that he did not make a report of his conversation with the roommates; however, he testified that he made a tape recording of the roommates' statements in Spanish and that he turned the recording over to Detective Large. (R. p. 415, lines 12-16). However, he was not permitted to testify that according to statements taken at the scene, the victim was alive and well on the morning of December 11, 2005. (R. p. 414). This information was wrongly withheld from the jury.

The trial judge stated that he excluded the Trujillo statements because that evidence went to a crucial element of the case, i.e., the timeline. The judge observed, "It would be totally unfair to the State of South Carolina to let somebody come in and change the time zone who's not even here subject to cross-examination, particularly given the fact that they are closely related by being a roommate to the victim." (R. p. 411, lines 15-22). The trial judge erred in ruling in the interest of preserving the time-line as supposedly established by the State and in not allowing testimony to "come in and change" the facts according to the State.

Relevant evidence is admissible. Rule 402, SCORE; State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). Relevant evidence is "evidence having any tendency to make the existence of

any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. The Trujillo statements proved not just that the State’s theory of the case, that petitioner murdered Mr. Espinozat on December 10, 2005, was less probable, but that it could not be true. The evidence was relevant and admissible, non-testimonial, non-hearsay.

In opposition to the hearsay ruling, Counsel for petitioner referred the trial judge to the Supreme Court’s decision in State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (S.C. 2007). The Ladner Court noted the Sixth Amendment’s Confrontation Clause guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend. VI. The Court recognized the Crawford Court’s holding that the admission of testimonial hearsay statements against an accused violates the Confrontation Clause if: (1) the declarant is unavailable to testify at trial, and (2) the accused has had no prior opportunity to cross-examine the declarant. Crawford, 541 U.S. at 54, 124 S.Ct. 1354 (emphasis added.)

First, petitioner argues that the State’s confrontation clause argument was misplaced in light of the fact that the statements were elicited by the State’s representative. The State had no right or need to cross-examine the roommates as to the statements the State itself had elicited. Second, the statements were admissible as non-testimonial evidence. The Court in Ladner recognized the Crawford Court’s suggestions as to the “core class of ‘testimonial’ statements,” including *ex parte* in-court testimony or its functional equivalent; pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or

confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial; and statements taken by police officers in the course of interrogations. Crawford, 541 U.S. at 51-52, 124 S.Ct. 1354. Notably, as counsel for petitioner pointed out, the Trujillos' statements do not fit under any of the categories of testimonial evidence identified by the Court. It is not reasonable to suppose that the basic statements of the uninvolved witnesses at the scene given in response to routine crime scene questioning by the authorities as they went about their investigation would be used prosecutorially or used at a later trial. Critically, the Trujillo's were not suspects and they were not being interrogated at the time of their statements.

The Ladner Court observed the further guidance on the Crawford decision provided in Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). There, the Court dealt with two different domestic violence cases and held that a victim's identification of her abuser in response to initial questions from a 911 emergency operator was not testimonial. The Davis Court explained:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 126 S.Ct. at 2273-74. The Ladner Court indicated that Davis arguably "declared that the Sixth Amendment simply has no application outside the scope of testimonial hearsay." The Ladner Court held that given the circumstances surrounding the statement identifying the

perpetrator, the statement there was non-testimonial, noting that questions answered there were not designed to implicate the perpetrator. Likewise, the routine questions asked of the victim's roommates after they discovered the body were not designed to implicate the perpetrator.

The responding officers had a dead body and, at the outset of the investigation, they were informed that the victim was alive on December 11, 2005. An out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken. State v. Rice, 652 S.E.2d 409 (S.C.App.,2007). The leading case in South Carolina in regard to the principle that general testimony in regard to a law enforcement investigation is not hearsay is State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1994). The Court in *Brown* observed that an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken. United States v. Love, 767 F.2d 1052 (1985), cert. denied, 474 U.S. 1081, 106 S.Ct. 848, 849, 88 L.Ed.2d 890 (1986). In State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct.App.2003), the rule that testimony concerning a statement from a bystander to the police was not hearsay because it was not offered to prove the truth of the matter asserted but rather to explain and outline the investigation and the officer's reason for going to the defendant's home was announced. Similarly, here, the roommate statements were not proposed for admission to prove any person's guilt of the crime; they should have been admitted for the non-hearsay purpose of explaining why and at what point the officers began their investigation. Evidence explaining why law enforcement is in a particular area has been held to be relevant information for the jury to consider. State v. Johnson, 318 S.C. 194, 456 S.E.2d 442 (Ct.App.1995); State v. Davis, 309 S.C. 56, 419 S.E.2d 820 (Ct.App.1992). The rationale of the rule in Crawford is to exclude from evidence statements that have not been cross-

examined that were gathered for the purpose of use at a later trial. Here, the statements of the victim's roommates were not elicited for the purpose of preparing to prosecute anyone but rather to gain information about what happened and to further the initial investigation at the crime scene. Just as in Ladner, the roommates' statements were made under circumstances objectively indicating that the primary purpose of the interrogation was to enable the police assistance to meet an ongoing emergency. The statements of the roommates were non-testimonial; accordingly, there was no Confrontation Clause violation and the trial judge erred in finding one and in excluding the defense evidence.

Even assuming that the roommates' statements were testimonial, they were nonetheless admissible as excited utterances. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. The general rule is that hearsay is not admissible. Rule 802, SCRE. There are, however, numerous exceptions to this rule, such as the excited utterance exception. The rules of evidence define excited utterance as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE. An excited utterance may be admitted whether or not the declarant is available as a witness. Moreover, when a statement is admissible because it falls within a Rule 803 exception, it may be used substantively, that is, to prove the truth of the matter asserted. State v. Dennis, 337 S.C. 275, 283-84, 523 S.E.2d 173, 177 (1999). Consequently, in the instant case, where the statements of the roommates qualified as an excited utterance, the State's objection was erroneously sustained.

To be an excited utterance: (1) the statement must relate to a startling event or condition;

(2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition. State v. Sims, 348 S.C. 16, 21, 558 S.E.2d 518, 521 (2002). The excited utterance exception is based on the rationale that "the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication." Dennis, 337 S.C. at 284, 523 S.E.2d at 177. A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception, and that determination is left to the sound discretion of the trial court. Sims, *supra*.

Here, even if the judge correctly determined that the statements given at the crime scene within hours of the roommates discovering the corpse of their house-mate, Espinozat, were hearsay, the statements were admissible as excited utterances. Clearly, the statements related to the startling event of the Trujillos' roommate being beaten to death in their house. The roommates were interviewed at the scene while still under the stress of discovering the corpse. Finally, this stress obviously was caused by the startling event of the murder itself. The requirements of Rule 803(2), SCRE, were easily satisfied in this case.

The proffered defense evidence was admissible as non-testimonial or as excited utterances. The trial judge erred and improperly prevented petitioner from presenting a defense by his ruling, thereby violating the guarantee of due process. Chambers v. Mississippi, 410 U.S. 284 (1973). Petitioner respectfully asks this Court to grant his petition for writ of certiorari.

ARGUMENT II

II. The trial judge erred in allowing in evidence the hearsay statements of Lonya Sowdon made to a 911 operator.

The State was allowed over defense objection to present in evidence a dispatch tape of Lonya's call to 911 on the afternoon of Wednesday, December 12, 2005. (R. p. 195). Counsel for petitioner argued that it was improper to allow the 911 tape to be admitted through Lonya as opposed to an appropriate 911 representative. The admission of Lonya's statements on the 911 tape was further improper in that this was inadmissible hearsay.

As indicated above, the Court in Ladner held that an identification of the perpetrator in response to initial questions from a 911 emergency operator was not testimonial because made under circumstances objectively indicating that the primary purpose of the interrogation is to enable the police assistance to meet an ongoing emergency. According to Lonya, she made the call to 911 two days after the murder and only after she had supposedly reached safety. It is clear from the timing, circumstances, and substance of Lonya's call to 911 that she did not seek to assist the authorities in an emergency, but instead she sought to set up her story and to implicate petitioner. The 911 tape was admitted for the truth of the matter asserted; however, there is no indication that the statements included in the tape were true. The admission of the 911 tape corroborated and bolstered Lonya's account of the events leading up to, during, and following the murder. The admission of the 911 tape was prejudicial error necessitating reversal.

ARGUMENT III

III. The trial judge erred in allowing the State's chief witness to bolster and corroborate her testimony through the repetition of inadmissible hearsay statements over defense objection.

During the testimony of Lonya Sowdon, she testified, "Paul came outside and said" Counsel for petitioner objected to the coming hearsay. However, his objection was overruled. The judge explained that he would admit out of court statements as long as the defendant was present. The judge advised the prosecutor, "Ask her was the defendant present when this alleged conversation took place." (R. p. 60, lines 2-7). Upon Lonya testifying that she alleged that petitioner was present, the judge instructed, "All right. You may testify." (R. p. 60, lines 8-11).

The prosecutor was careful to ask Lonya if petitioner was present during the out of court conversations; she testified, "He was sitting beside me in the car with the door open." (R. p. 60, lines 16-29). When the prosecution elicited the testimony indicating that Julianne came to the scene and accused Lonya of stealing her jewelry, the trial judge interjected, "Wait a minute now. I don't want to get into that conversation. That's hearsay unless the defendant was present." (R. p. 61, lines 10-20). Upon Lonya indicating that petitioner was "right there," the trial judge indicated, "You may proceed." (R. p. 61, lines 18-19). Thereafter, Lonya was improperly allowed to testify to out of court statements made in the presence of petitioner.

Counsel objected contemporaneously to Lonya Sowdon's recitation of the alleged out of court statements. Counsel for petitioner then moved for a new trial on the basis that the trial judge had erred in allowing, over objection, Lonya to testify as to these hearsay statements. As Counsel argued, when he objected to these hearsay statements contemporaneously his objections were

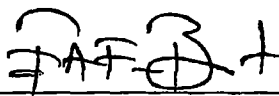
overruled on the grounds that hearsay statements are admissible as long as the accused was present at the time the statement was made. Counsel correctly argued that there is no such exception to the rule against hearsay and that the judge had erred in allowing this testimony over his objections. The trial judge indicated, "You may or may not be right on that, but that's an appellate issue. It's not before me." The judge further erroneously indicated that any error would be harmless. (R. p. 398, lines 7-14).

Counsel for petitioner argued that the judge's error in allowing the hearsay statements to be admitted was not harmless because the hearsay served to corroborate Lonya's testimony and to bolster her version of events. (R. p. 398, line 16-p. 102, line 5; p. 143, lines 6-9). Counsel argued for a mistrial and a new trial on the basis of this error. The trial judge erroneously ruled that there was no basis for a mistrial and that even assuming his admission of the hearsay testimony was an error of law, that would be an appellate issue. (R. p. 399, lines 6-9). Through the judge's error, the testimony of the State's key witness was seemingly corroborated and bolstered. In a case this close where the prosecution wholly depended on the testimony of Lonya Sowdon, this error warrants reversal.

CONCLUSION

For all the forgoing reasons, petitioner respectfully asks this Court to grant his petition for writ of certiorari.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'EAFB' followed by a stylized flourish.

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of January, 2011.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 4680 (S.C. Ct. App. filed 4/28/2010)
07-GS-26-927-928; 1536.

THE STATE,

RESPONDENT,

V.

LUTHER GARNER,

PETITIONER

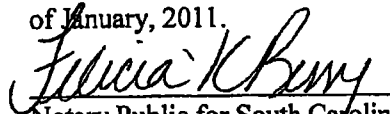
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Christina J. Catoe, Esquire, and the S.C. Court of Appeals this 27th day of January, 2011.



Elizabeth A. Franklin-Best
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day
of January, 2011.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: June 21, 2020.

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions
Edward B. Cottingham, Circuit Court Judge

On Certiorari to the Court of Appeals
Opinion No. 4680 (S.C.Ct.App. filed April 28, 2010)

The State,

Respondent,

vs.

Luther Garner,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

J. GREGORY HEMBREE
Solicitor, Fifteenth Judicial Circuit
Post Office Drawer 1276
Conway, South Carolina 29526
(843) 915-5460

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PETITIONER'S STATEMENT OF ISSUES PRESENTED 1

RESPONDENT'S STATEMENT OF THE CASE 2

RESPONDENT'S STATEMENT OF FACTS 3

ARGUMENT 13

I.

The Court of Appeals did not err in rejecting petitioner's argument that the Sixth Amendment provided an admissibility basis for evidence that is otherwise inadmissible under standard and ordinarily accepted rules of evidence. 13

II.

The Court of Appeals properly found petitioner's issue claiming error in the admission of the 911 call was abandoned by failure to present sufficient argument on appeal. 18

III.

Petitioner's hearsay issue is procedurally barred as petitioner failed to raise a contest to the Court of Appeal's ruling in regard to this issue in the petition for rehearing. 21

CONCLUSION 24

PETITIONER'S STATEMENT OF ISSUES PRESENTED

1. Did the trial judge err in excluding relevant defense evidence on the erroneous grounds of hearsay and thereby interfere with appellant's [sic] right to present a defense?
2. Did the trial judge err in allowing in evidence the hearsay statements of Lonya Sowdon made to a 911 operator?
3. Did the trial judge err in allowing the State's chief witness to bolster and corroborate her testimony through the repetition of inadmissible hearsay statements over defense objection?

(Petition for Writ of Certiorari, p. 3).

RESPONDENT'S STATEMENT OF THE CASE

An Horry County Grand Jury indicted petitioner, Luther Garner, during a March 2007 term, for burglary, first degree (2007-GS-26-927), and murder (2007-GS-26-928); and, at an April 2007 term, attempted armed robbery (2007-GS-26-1536).¹ (R. p. 570 - 575). All charges stem from one incident involving the victim, Amadro Flores Espinozat, on or about January 10, 2005. Stuart Axelrod, Esq., represented petitioner on the charges. A jury trial was held May 29, 2007, through June 1, 2007, before the Honorable Edward B. Cottingham. The jury convicted as charged. (R. p. 525, lines 9-17). The judge sentenced petitioner to thirty (30) years imprisonment for murder; ten (10) years, consecutive, for the attempted armed robbery; and thirty (30) years, concurrent for the burglary conviction. (R. p. 538, lines 7-16). Petitioner appealed.

After briefing and oral argument, the South Carolina Court of Appeals affirmed the convictions in *State v. Garner*, Opinion No. 4680 (S.C.Ct.App. filed April 28, 2010).² Petitioner filed a petition for rehearing on May 13, 2010. (Petition Appendix, pp. 5-12). Respondent filed a return on July 2, 2010. (Petition Appendix, pp. 13-19). The Court of Appeals denied the petition by order dated August 27, 2010. (Petition Appendix, pp. 21-22).

Petitioner filed a petition for writ of certiorari in this Court on January 27, 2011. This return follows.

¹ Petitioner was also indicted for armed robbery; however, the trial judge directed a verdict in favor of petitioner on that charge at the conclusion of the State's case, and that charge is not at issue in the appeal. (R. p. 399, line 15-p. 400, line 11).

² Reported at 389 S.C. 61, 697 S.E.2d 615 (2010).

RESPONDENT'S STATEMENT OF FACTS

On January 11, 2005, at approximately 6:30 p.m., the Horry County Police Department dispatched officers to a private residence on a report that a deceased male had been discovered. (R. p. 228, line 13-p. 229, line 8). The victim in this case, Amadro Flores Espinozat, had been found by his roommates in a back bedroom of house he shared with them. (R. p. 403, line 15 - p. 404, line 9; p. 414, lines 4-12). All three of the men spoke Spanish, and apparently did not understand English. (R. p. 51, lines 1-4; II Tr. p. 403, lines 18-24). The victim had been "badly beaten" and left in his home. (R. p. 216, lines 18-19). The forensic pathologist who performed the autopsy, Dr. Edward Leroy Proctor, Jr., testified:

There were lacerations on the anterior forehead, lacerations on top of the head. There was a laceration on the bridge of the nose with the nose being fracture and displaced under it.... there was a lot of edema about the hands which constitute defense wounds. He was putting his hands up to try to defend himself.... the internal examination revealed contusions which are large bruises, hematomas which are collections of blood in the subcutaneous tissues of the scalp. There was blood within the cranial cavity, and looking at the brain itself, there were what we call hemorrhages in the brain which occurred as a consequence of blunt trauma.

(R. p. 216, line 20-p. 217, line 6).

The doctor explained the mechanics of the death:

A beating of this type causes the brain to swell, and that takes some time, and the had blood inside the cranial cavity, and as the blood becomes increased, the increased amount, there's just a finite space inside the skull, and, actually, what happened is that blood compressed the brain tissue and actually tried to force it down through the frame and the magnum in the base of the skull. So he... knew what had happened, and it took a period of time for the brain to swell. So, yes, ma'am, he did suffer.

(R. p. 222, lines 3-13).

The doctor also opined that the wound reflected "linear lacerations" suggesting a "blunt object" was used, but a "blunt object... that had more of a rounded edge...it certainly

could be the barrel of a gun. (R. p. 222, lines 14-23). Further autopsy test results showed no blood ethanol was detected, and the "drug screen was negative. (R. p. 223, lines 24-25). The victim had clearly died as the result of this severe beating. (R. p. 217, lines 13-15). Dr. Proctor testified the victim could have died on the January 10th or the 11th, but he opined the victim died on the 11th based upon the information given to him by the Horry County coroner and the investigating authorities. (R. p. 224, line 9 - p. 226, line 5).

Investigator John R. Caulder, II, with the Horry County Police Department's crime scene unit, described the home and the victim's condition. The home had three entries - back, front and side. The back was blocked off. The side door had some blood transfer tracks leading to it, and was open. The living room reflected that "some kind of struggle had taken place inside of the living room due to the items being strewn about in the living room and the large pool of blood." (R. p. 231, lines 1-21; p. 240, lines 1-20). There was also blood leading toward the back hallway. (R. p. 238, lines 3-7). In the hallway, the investigator discovered a bullet hole in the wall, and a shell casing on the floor. There was also a section of the drywall that had been cut and "pulled away with some type of force." (R. p. 241, lines 12-16). The bullet was recovered, but, due to extensive damage, was of no evidentiary value. The casing, however, showed that the weapon "would have been a 22 caliber semi-automatic." (R. p. 242, lines 14-25). The victim was found on the floor leading into one of the back bedrooms. His feet had been tied with orange electrical cord. His "pajama-type" pants were "a little lower than his waist" indicating he had been "dragged down the hallway," his pant pockets had been turned out, and there was a "black wire bound around his left wrist." (R. p. 245, lines 4-22; p. 246 lines 13-21). A bloody shoe impression was found on a pair of shorts slightly above the victim's head, and a bloody hand print was

found on the doorway leading into the room. (R. p. 246, line 25 - p. 247, line 7). The entire house "from the living room all the way including the bedroom where the victim was found, the bathroom and the other two bedrooms had completely been ransacked," including closets, mattresses, and even the attic, where insulation had been pulled out, all which indicated someone had been searching for something. (R. p. 247, line 22 - p. 248, line 8; p. 249, lines 7-17). Further, Peter Cestare, a specialist in the same crime scene unit - who had never seen any of the subsequently taken statements in the case, but based his opinion solely on the condition of the crime scene, (R. p. 328, lines 3-9) - testified that the blood spatter in the hallway indicated that either "a hand or object struck someone" leaving the spray on the wall, and that there were several areas of blood "smears" consistent "with somebody being struck with an object" rather low - in a crouching position or on their knees - and their hair struck or brushed the wall. (R. p. 316, line 1-p. 320, line 22). Investigator Cestare concluded the patterns, overall, indicated that "the struggle began somewhere in the living room, continued into the hallway, and ended up, ending here at the last bedroom here on the left where the victim was found deceased." (R. p. 324, lines 16-19). The bloody hand print on the bedroom door molding indicated "someone who is down either on their knees or in a crouched position and who grabbed that molding on the hallway in a motion either to support themselves to try and regain their footing and get up or prevent themselves from being taken into that room. You can see that it pulls backwards." (R. p. 325, line 16 - p. 326, line 8). In sum, the blood patterns were consistent with "someone going down the hallway, being dragged down the hallway" and "pulled back into the back room." (R. p. 327, line 20 - p. 328, line 2).

Though the forensic investigation revealed essentially how the crime was committed, there was no forensic evidence revealing who actually committed the crime. (R. p. 268, line 14 - p. 269, line 4; p. 326, lines 17-20). The investigation was aided when a 911 operator received a call from Lonya Sowdon. Ms. Sowdon reported she had witnessed the homicide. (R. p. 67, lines 9-25).

Ms. Sowdon testified that she was a crack addict at the time of the murder. She purchased cocaine from defendant, whom she knew as "Kariem Ward," and from Lee Pierce. (R. p. 44, lines 3-17). Ms. Sowdon testified that petitioner and Lee Pierce had learned from a stripper/topless dancer that three men at a home on T***** Drive had large amounts of cash (approx. \$75,000) and large amounts of cocaine (8 to 10 kilos), and that "the people who lived there were cocaine dealers." (R. p. 58, lines 12-17). She testified that she drove them to the home and petitioner gained entry, claiming he needed to inspect the home. Lee Pierce subsequently entered. Petitioner later motioned for Ms. Sowdon to enter the home. (R. p. 47, line 3 - p. 48, line 18). When she did, she saw the victim on the floor in the living room. Petitioner was in the living room with the victim. Lee was "somewhere at the back of the house" and she could hear what "[s]ound[ed] like he was tearing the house down." Describing petitioner, the witness testified: "He was crazy. Sweating, pouring sweat, eyes that big." He had already hit the victim. Petitioner had two guns. What appeared to be a Glock, "45 or 40 caliber... semi-automatic with a clip in it... in his pants" and a large, long barreled gun in his hand, which she testified resembled a "Desert Eagle Target" .22 caliber gun. Petitioner demanded she translate, and ask the victim "where the f***** cocaine and the money is." The victim responded that "Pablo had gone to Mexico with the money" on a drug run. He also begged for help, begged for petitioner to stop hitting him, and begged

for his life. Petitioner would not stop. "He was like a rabid dog," according to the witness, and hit the victim multiple times with the gun handle - - in the front room (den or living room) and "going up the hallway," switching hands when he began to tire. (R. p. 48, line 21 - p. 53, line 4). Ms. Sowdon testified that the gun went off during the beating, and she thought petitioner had tried to shoot her, but the shot lodged in the wall. (R. p. 53, lines 6-12). The victim tried to crawl down the hallway. Petitioner grabbed him by the hair lifting him and hitting him. The victim fell against the wall and slid down. Petitioner dragged the victim toward a back bedroom. Petitioner ordered Ms. Sowdon to tie the victim's feet with a orange, heavy duty, extension cord. When she refused, petitioner tied him. Petitioner "was still screaming and hollering about the money and something about a key, a key under a mattress for a safe," but the victim could not respond. Ms. Sowdon checked for a pulse and could find none. She maintained throughout the testimony that Lee advised petitioner to stop before he killed him, and that Lee "[d]idn't lay a hand on the man." (R. p. 53, line 14 - p. 56, line 16). Petitioner "ordered" the group to leave, (R. p. 56, lines 24-25), and they left the home through the side door, (R. p. 83, lines 4-5). Ms. Sowdon drove, with petitioner in the passenger seat, and Lee in the back seat. (R. p. 58, lines 4-9). Ms. Sowdon drove to another residence, this one on S***** W*** Drive, and petitioner dropped off the Glock. When asked if it had "a body behind it," petitioner replied, "not this one." (R. p. 58, line 21 - p. 59, line 3). The three then continued to Paul Graham's home where petitioner sent Lee in to find a change of clothes. Petitioner needed to change because he was covered in blood. (R. p. 59, lines 5-22; p. 60, lines 20-22). Ms. Sowdon testified petitioner kept sending Lee back, expressing the clothes Lee brought out from Mr. Graham's trailer were unacceptable. (R. p. 59, line 23 - p. 60, line 1). Mr. Graham apparently came out at some point and spoke

to petitioner. (R. p. 60, lines 1-2). Petitioner told Mr. Graham to "get him something he could wear" and Mr. Graham supplied a pair of "sweat pants and a zip-up sweat jacket." (R. p. 61, lines 4-8). Ms. Sowdon testified "Julianne" drove up with "A.J." (R. p. 61, line 9 - p. 62, line 8). Julianne was Lee's girlfriend. Ms. Sowdon had picked up petitioner and Lee from her house earlier that morning, just prior to going to T***** Drive. (R. p. 45 lines 2-19). A. J. is Allen Pierce, Lee's first cousin, who was also at Julianne's apartment that morning. (R. p. 346, line 8 - p. 347, line 13). Ms. Sowdon testified that Julianne was "yelling" about "missing jewelry, and questioning everyone." (R. p. 61, lines 10-13). While she and Julianne were looking for her jewelry, petitioner asked Lee "how much money he had," and Lee replied none. Petitioner then requested the crack Lee had, then Lee asked A.J. for money. Petitioner made A.J. give petitioner his money. Lee left with Julianne and A.J. (R. p. 62, line 11 - p. 63, line 25). Ms. Sowdon then drove petitioner to Debbie Stokes' home in Aynor. Petitioner knew Ms. Stokes from New Jersey, and petitioner wanted her to take him back to New Jersey. (R. p. 64, lines 2-5; p. 67, lines 17-19). Henry Brown was also there. He still had the bloody gun used to bludgeon the victim, wrapped in a white t-shirt, and the bloody clothes. He later burned the clothes - jeans, a dress shirt, t-shirt, jacket, socks and boots - near a small store in Aynor. He dropped the gun in an "electrical wire spool" near Henry Brown's mother's home in Aynor. (R. p. 64, line 7 - p. 67, line 4). Ms. Sowdon testified that "when [she] was able - - when [she] got to a phone, [she] called 911" and tried to help them recover evidence of the crime. (R. p. 67, lines 9-14). She testified she was "in shock" and "hysterical for days. I was high for days, and after I came down and had some clarity and was able to realize the magnitude of what had happened, I called for help" by

calling 911. (R. p. 195, lines 11-14). She also told investigators that she thought petitioner may be in New Jersey. (R. p. 67, lines 15-19).

Investigator Caulder examined the Ford Mustang she was driving at the time of the murder. The car actually belonged to Gerald Linsky. Apparently Mr. Linsky befriended Ms. Sowdon at some point, and helped her to obtain a hotel room, allowed her to house sit, on occasion, and allowed her, on occasion, the use of the car. (R. p. 434, line 20 - p. 438, line 21). Though the testimony differed on their relationship, Mr. Linsky testified that she did have permission to use the car at the that time. (R. p. 435, lines 7-24). The investigator found four areas that tested positive under a presumptive test for blood in Mr. Linsky's car. These areas were on the plastic kick plate on the passenger side of the car. The amounts were insufficient for DNA testing. (R. p. 255, line 14 - p. 256, line 8; p. 270, lines 11-24; p. 272, lines 3-10).

A call for help to locate petitioner went out to the United States Marshal Service, and the Marshall Service began a search in February 2005. U.S. Marshals found Petitioner in New Jersey in July 2005 and returned him to the State. (R. p. 306, line 13 - p. 307, line 14).

Allen "A.J." Pierce testified for the State. A.J., who is a first cousin to co-defendant Lee Pierce, testified that he was in Julianne's apartment the day of the murder and heard both petitioner and Lee talking about going to "Pablo's" house regarding drugs. (R. p. 346, line 8 - p. 348, line 22). A.J., along with his friend Calvin Brown, stood up to leave with petitioner and A.J., but they would told to sit back down as the two left. (R. p. 349, lines 3-12). He confirmed that Lonya Sowdon was with petitioner and Lee. (R. p. 352, lines 14-15). Lee called him approximately three hours later. As a result of their conversation, A.J. told his cousin to run. (R. p. 350, lines 17 - p. 351, line 4). He went to Paul Graham's house to

pick up A.J. He rode with Julianne. Though not sure of the date, he recalled it was still morning when he went to Mr. Graham's. (R. p. 351, lines 6-16; p. 352, lines 16-22; p. 359, lines 13-19). He saw Lee Pierce, Lonya Sowdon, and petitioner at Mr. Graham's. Ms. Sowdon was in the driver's seat of her car, petitioner was in the passenger seat. Petitioner was covered with blood. Petitioner asked for money, and A.J. initially would not give him any, but petitioner took it anyway. Lee told him to give the money to petitioner. He saw a long .25 (or possibly .22) pistol with a brown handle in petitioner's lap. The gun was in a t-shirt in petitioner's lap. Ms. Sowdon looked "scared and stuff," and petitioner appeared "crazy." A.J. admitted petitioner and his cousin were "in on it... because they was talking about it." (R. p. 353, line 1 - p. 357, line 13; p. 365, lines 14-19). A.J. admitted to either buying or selling drugs at times, and that he has a conviction of burglary first. (R. p. 349, lines 20-25). He also had a charge from one of his pit bulls killing a relative's rabbit. He was working as a result of the charge in the facility where petitioner was housed. Petitioner approached him and told him he was going to kill him and Lee when he was out of jail, then spit on him. (R. p. 356, line 24 - p. 357, line 18). He also testified he saw petitioner at the "fire pit" in Aynor, burning clothes. (R. p. 358, lines 8-22).

Paul Graham also testified for the State. Mr. Graham was a crack addict at the time of the murder and Lee was his supplier. He knew petitioner through Lee, and apparently knew Ms. Sowdon through petitioner. The night before the murder, he, petitioner and Ms. Sowdon, and Mr. Graham's girlfriend, smoked several hundred dollars of crack, each. Petitioner and Ms. Sowdon left late that night, but returned sometime during the morning hours of the next day. Lee woke Mr. Graham looking for clothes for petitioner. He recalled Lee took out three sets of clothes, all of which were rejected. Then aggravated, Mr. Graham

walked outside and saw petitioner and Ms. Sowdon in a car. Petitioner was in the passenger seat. Ms. Sowdon was driving. Both were "highly agitated" and arguing about clothes and money. Petitioner's pants and shoes were covered with blood. He also recalled that A.J. and "another blonde" also showed up at his home. There was an argument about money, but A.J. eventually gave petitioner money. The girl and Ms. Sowdon were "agitated" over a jewelry box. Fearful that his land lord would dislike the commotion, he eventually told everyone to leave, and they did. (R. p. 369, line 2 - p. 378, line 21).

Defense counsel called Officer Santiago of the Horry County Police Department - - the officer who provide translation during the interview of the roommates after the victim's body was found in their home - - to establish that the murder did not occur on the 11th but on the 10th of January, and also to question the officer on his personal belief as to the credibility of the roommates. The State objected to the question eliciting hearsay, and the court would not allow the question on credibility, ruling that credibility was an issue for the jury. The trial judge declined to admit the testimony. (R. p. 403, line 15 - p. 414, line 25). The defense also called David Helman, general manager of the Red Roof Inn where Ms. Sowdon had stayed prior to the murder to challenge Ms. Sowdon's recall of the exacts days she was there, and room numbers. He confirmed that Ms. Sowdon stayed there during December 2004 and the first part of January 2005, and that Gerald Linsky had paid by credit card for Ms. Sowdon's room. (R. p. 416, line 12 - p. 423, line 12). Defense counsel also called Gerald Linsky to challenge Ms. Sowdon on her assertions of the scope and length of their relationship. Mr. Linsky denied that Ms. Sowdon worked for him, or that they had know each other any longer than Fall of 2004 forward. He acknowledged she wanted to have a dating relationship but he declined. He admitted that he had paid for her room at the Red

Roof Inn, but also qualified that she had promised to pay him back from a big settlement she was expecting. He admitted that she had stayed at his condo to look after his dogs, that she had used his Mustang before, and had permission to use his car on the day of the murder. (R. p. 426, line 21 - p. 438, line 21).

In closing, the defense generally attacked the recall, motive and credibility of the witnesses - - witnesses who, Respondent notes, had been sequestered at trial, (R. p. 29, lines 19-21), but still have given substantially similar testimony on the facts. (See, for example, R. p. 462, lines 2-21 (detailing date inconsistencies in Sowdon's testimony); p. 477, line 20 - p. 478, line 25 (attacking A.J. Pierce's testimony based on inconsistencies in testimony, drug dealing, and prior record)). The State admitted the faults of these witnesses, but also argued that "Lonya did tell you some stuff that the evidence backs up right down the line, and its some of the same stuff that Specialist Cestare told you." (R. p. 486, lines 15-18). He reminded the jury, in part, of the wealth of forensic evidence that fully supported the testimony concerning the murder, and the powerful motives of money and drugs. (R. p. 486, line 18 - p. 491, line 10).

ARGUMENT

I

The Court of Appeals did not err in rejecting petitioner's argument that the Sixth Amendment provided an admissibility basis for evidence that is otherwise inadmissible under standard and ordinarily accepted rules of evidence.

Relevant Facts:

The indictment reflects the State alleged the murder occurred *on or about* January 11, 2005. (R. p. 573). At the beginning of the trial, the assistant solicitor advised the trial judge the State understood the date to actually be January 10th, and made a motion to amend to "on or about" the 10th. (R. p. 25, line 21 - p. 26, line 14). Defense counsel had no objection to notice, but objected to the amendment. (R. p. 26, lines 1-24). The trial judge found amendment was not necessary given the "on or about" language, and further found no notice issue with the proof showing the murder on January 10th. (R. p. 26, line 25 - p. 27, line 5). Defense counsel consistently referenced possible uncertainty in the actual date as part of the defense. (See, for example, R. p. 87, line 23 - p. 89, line 5; p. 93, lines 3-25 (Ms. Sowdon); p. 224, lines 9-15 (Dr. Proctor); p. 260, lines 15-24 (Investigator Caulder). In the same vein, defense counsel attempted to offer the victim's Spanish-speaking roommates' statements relating the last time they saw the victim alive through the translator (Detective Santiago) who facilitated the interview after the body was discovered. The State objected to the question eliciting hearsay. Defense counsel argued the statements were non-testimonial therefore admissible. The trial judge declined to admit the testimony finding the testimony was testimonial and was hearsay. (R. p. 403, line 15 - p. 414, line 11).

On appeal to the Court of Appeals, Petitioner argued:

The trial judge erred in excluding relevant defense evidence on the erroneous grounds of hearsay and thereby interfered with appellant's right to present a defense.

(FBOA, p. 16).

The Court of Appeals found:

Because Appellant made no argument the statement was either admissible as non-hearsay or admissible as hearsay under the excited utterance exception, both of which he now argues on appeal, the only issue before this court is whether the evidence is admissible as an alleged non-testimonial statement.

(Petition Appendix, p. 3).

Thus, the court found that particular argument was procedurally barred from review.

Id. The Court of Appeals then considered petitioner's argument that the evidence was "non-testimonial" and admissible pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), and the Sixth Amendment. *Id.* The Court of Appeals rejected the argument finding:

... the fact that the Sixth Amendment is not implicated by non-testimonial hearsay does not mandate the evidence be admitted.

Id.

The Court of Appeals reasoned:

If a statement is admissible hearsay, the Confrontation Clause may operate to render... otherwise admissible hearsay inadmissible if testimonial in nature. However, this does not imply the inverse; that otherwise inadmissible hearsay becomes admissible if non-testimonial in nature....

Id.

In his petition for rehearing, petitioner asked the Court of Appeals to "reconsider its finding that there was no positive basis for admission ... in light of petitioner's argument at trial and on appeal that the evidence is admissible...." (Petition Appendix, p. 7).

Discussion:

The Court of Appeals properly rejected petitioner's argument. First, as the Court of Appeals found, the non-hearsay and hearsay exception arguments forwarded on appeal were not argued to the trial judge. Therefore, the arguments are properly considered procedurally

barred. *See, e.g., State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (“A party may not argue one ground at trial and an alternate ground on appeal.”). Second, petitioner cannot establish a Sixth Amendment rule of admissibility independent of the state’s evidentiary rules.

The Sixth Amendment protects a defendant’s confrontation right, but does not completely override ordinary and accepted rules of evidence. *See State v. Gillian*, 360 S.C. 433, 451, 602 S.E.2d 62, 71 (Ct.App. 2004), *affirmed as modified*, 373 S.C. 601, 646 S.E.2d 872 (2007) (“The Confrontation Clause does not, however, prevent a trial judge from imposing any limits on defense counsel’s inquiry into potential bias of a prosecution witness.”). Here, the Sixth Amendment neither prohibits or allows the testimony at issue. This is simply a matter of routine application of the evidence rules. Instead of calling the declarants, Petitioner offered the statements through the translator. The State correctly argued that the statements, clearly offered for the truth of the matter, offended the rule against hearsay, and the trial judge agreed. *See* Rule 801(c), SCRE (defining hearsay as a “statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.”).

“While defendants are entitled to a fair opportunity to present a defense, that right does not encompass the right to present any evidence, regardless of its admissibility under the rules of evidence.” *State v. Hamilton*, 344 S.C. 344, 359, 543 S.E.2d 586, 594 (Ct. App. 2001), *overruled on other grounds State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). “‘The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.’ ” *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996), *quoting Taylor v. Illinois*, 484 U.S. 400, 410 (1988).

See also State v. Lyles, 665 S.E.2d 201, 209 (Ct. App. 2008)(quoting same). Defense evidence that constitutes hearsay may be properly rejected. *State v. Caulder*, 287 S.C. 507, 339 S.E.2d 876 (Ct.App. 1986)(affirming trial judge's ruling not admitting defense evidence on hearsay grounds where "[d]espite the stated intention of Caulder's counsel to introduce the telephone conversations for purposes other than the truth of the statements, there could have been no other purpose for their introduction than to prove the truth of the conversations....").

Defense counsel conceded the evidence at issue was hearsay by simply arguing the evidence should be admissible as "non-testimonial hearsay" recorded in an investigation in response to an emergency situation. (R. p. 412, lines 9-21). Moreover, the record well demonstrates that the statements were offered for the truth of the matter, i.e. the exact date the victim died. At any rate, other evidence established when the body was found. Dr. Proctor testified that the body was found on January 11th, and that death was likely on the 11th, but could have been the 10th or 11th. (R. p. 225, line 14- p. 227, line 7). Investigator Caulder also testified the body was found on January 11th. (See R. p. 228, line 13 - p. 229, line 8). In essence, the evidence petitioner wanted before the jury was before the jury. Even so, the record shows that the actual date of the murder is simply much less important than the fact of the murder. Both A.J. and Mr. Graham admitted they were unsure of the exact date, but distinctly remembered the circumstances surrounding the murder, most specifically, the blood on petitioner. (See R. p. 359, lines 13-25; p. 388, lines 19-22; p. 389, lines 9-10).

Finally, any possible error in this short testimony would have been harmless due to the overwhelming evidence of guilt. "Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." *State*

v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006), citing *State v. Pickens*, 320 S.C. 528, 531, 466 S.E.2d 364, 366 (1996). Here, the blood spatter evidence supported the specifics of the beating death as recounted by Ms. Sowdon, specifically that the beating started in the living room, the victim was dragged down the hallway, pulled up, hit again, and left in the back bedroom. (R. p. 316, line 1-p. 320, line 22; p. 324, lines 16-19; p. 325, line 16 - p. 326, line 8; p. 327, line 20 - p. 328, line 2). Other evidence also supports the facts recounted, such as: the bullet hole in the wall and the shell casing indicating use of a .22, (R. p. 241, lines 12-14; p. 242, lines 14-25); the ransacked home, (R. p. 247, line 22 - p. 248, line 8); a bloody shoe print indicating flight by the side door as opposed to the front door, (R. p. 240, lines 1-20); multiple sightings of petitioner covered with blood, (See R. p. 654, lines 8 - 9; p. 373, lines 16-20); petitioner seen attempting to hide a .22, (R. p. 354, line 10 - p. 355, line 13); petitioner's flight from the jurisdiction, (R. p. 306, line 13 - p. 307, line 14); and, petitioner's attempt to intimidate witnesses, threatening to kill them, (R. p. 175, lines 1-4; p. 357, lines 12-18). In short, the evidence, when taken together, conclusively shows that no other rational conclusion may be reached but that guilt was proven beyond a reasonable doubt. *State v. Price, supra*.

However, the record and legal precedent both support that the Court of Appeals properly found there was no error in the trial judge's ruling, and its ruling need not be reviewed. The petition for writ of certiorari should be denied.

II.

The Court of Appeals properly found petitioner's issue claiming error in the admission of the 911 call was abandoned by failure to present sufficient argument on appeal.

Relevant Facts:

In his brief to the Court of Appeals, petitioner presented approximately one page of argument on the issue. (FBOA, pp. 24-25). His argument heading for the issue is as follows: "The trial judge erred as a matter of law in allowing in evidence the hearsay statements of Lonya Sowdon made to a 911 operator." (FBOA, p. 25). Only one sentence in the argument remotely addresses the argument as presented at trial: "Counsel for appellant argued that it was improper to allow the 911 tape to be admitted through Lonya as opposed to an appropriate 911 representative." (FBOA, p. 25). There is no citation to authority. The Court of Appeals found the issue abandoned. (Petition Appendix, pp. 3-4). Petitioner urged the Court of Appeals in the petition for rehearing to reconsider its finding because petitioner had argued that the statements on the tape were testimonial. (Petition Appendix, p. 11).

Discussion:

The record supports the Court of Appeals finding that petitioner abandoned the issue. Petitioner did not argue the authentication objection at all. Clearly, the issue was abandoned. *See, e.g., State v. Jones*, 344 S.C. 48, 58-59, 543 S.E.2d 541, 546 (2001)(argument is abandoned where conclusory without citation to authority).

Petitioner presents what appears to be the exact same argument to this Court (except for a change from "appellant" to "petitioner" in the first paragraph). (Petition for Writ of Certiorari, p. 25). Again, the issue has been abandoned. Moreover, to the extent he attempted to preserve another issue for this Court's review – that the statements on the tape were inadmissible because they were testimonial – by argument on same in the petition for

rehearing, he is again procedurally barred. "Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari" Rule 242(d)(2), SCACR. Petitioner did not address in his petition for rehearing the fact that the Court of Appeals only ruled upon the authentication issue. Rather, he appears to have argued in the petition for rehearing, and the petition to this Court, that the Court of Appeals should have considered his argument that the statements on the tape were testimonial, i.e. the "testimonial" argument in the brief should have been recognized as the reason for the inadmissibility, not a possible basis for prejudice in the improper admission. (Petition Appendix, p. 11). Yet, as essentially conceded by petitioner by his own description of trial counsel's argument, (FBOA, p. 25; Petition for Writ of Certiorari, p. 25), the only preserved basis would be to challenge the authentication of the tape. Thus, to argue the "testimonial" aspect of admissibility would be to present argument on a procedurally barred ground. In sum, he cannot argue a ground on appeal that was not argued at trial. *Dunbar, supra*. Again, he is procedurally barred. At any rate, the authentication issue as raised by counsel at trial is without merit.

Rule 901, SCRE, provides that: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The rule further provides examples of ways to meet this requirement, including "testimony of a witness with knowledge" and "voice identification." Rule 901 (1) and (5). Clearly, Ms. Sowdon could identify her own voice on the recording. Moreover, as the tape was a "telephone conversation," the conversation can be identified by "self-identification." Rule 901 (6). Respondent also notes that precedent supports that telephone conversations are admissible upon

identification by a participant of the participant's own voice. *See State v. Plyler*, 275 S.C. 291, 270 S.E.2d 126 (1980)(allowing admission on voice identification). *See also State v. Jackson*, 54 P.3d 739, 741 (Wash.App. Div. 2 2002)("Just as a proponent can authenticate a photo by 'eyewitness comparison,' a proponent can authenticate a tape recording by 'earwitness comparison'"). There is no error.

Lastly, Respondent would assert if error, the error could only be harmless. First, it is merely cumulative to the evidence elicited *by defense counsel*—including counsel's choice to play the tape *again* for the jury. (See R. p. 194, line 14 - p. 202, line 17). *See State v. Haselden*, 353 S.C. 190, 577 S.E.2d 445 (2003) (improper evidence harmless where merely cumulative to other evidence); *State v. Weaver*, 361 S.C. 73, 87, 602 S.E.2d 786, 793 (Ct. App. 2004)(even if contested testimony was hearsay, admission would be considered harmless where cumulative to other evidence in the record). Second, the minor error could only be harmless due to the overwhelming evidence of guilt. *Price, supra*. Respondent incorporates by reference the extensive harmless error analysis as presented in response to Issue I as if repeated verbatim. In short, the evidence, when taken together, conclusively shows that no other rational conclusion may be reached but that guilt was proven beyond a reasonable doubt. *Id.*

However, the Court of Appeals properly found the authentication issue was abandoned on appeal. Moreover, as Respondent has argued, any other issue would be procedurally barred as only the authentication issue was argued at trial. There is no cause to review the Court of Appeals ruling and the petition for writ of certiorari should be denied.

III.

Petitioner's hearsay issue is procedurally barred as petitioner failed to raise a contest to the Court of Appeal's ruling in regard to this issue in the petition for rehearing.

Relevant Facts:

The Court of Appeals found as follows:

At trial, Appellant objected to a portion of Sowdon's testimony regarding the events that transpired at Graham's house, specifically objecting in anticipation of Sowdon testifying of a hearsay statement made by Graham. ...

Notwithstanding that the record does not demonstrate any of Graham's hearsay statements were actually admitted, we fail to find, and Appellant fails to bring to our attention, any prejudice caused by the alleged bolstering and corroboration of Sowdon's testimony.

(Petition Appendix, p. 4).

In the petition for rehearing, petitioner failed to contest the ruling on this issue at all.

Discussion:

As a first matter, the issue is not preserved for appeal. Petitioner failed to argue any perceived misapprehension of fact, or incorrect application of law, in regard to this issue in the petition for rehearing. Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari ..."). The findings that petitioner contested only the Graham statements, that no hearsay statements were actually admitted, and that no prejudice was shown is now the law of the case and binding on petitioner. *See, e.g., Robinson v. Estate of Harris*, 388 S.C. 616, 627, 698 S.E.2d 214, 220 n.8 (2010) ("Petitioners...failed to raise any arguments in their petition for rehearing or initial brief to this Court regarding the...ruling as to the doctrine of laches. Accordingly, we find the doctrine of laches is the law of the case and this Court is justified in affirming on that basis."). At any rate, the record supports that though Ms.

Sowdon initially indicated she would repeat what Mr. Graham said, she never did. Thus, the record fully supports the finding that no hearsay was actually admitted.

During Ms. Sowdon's testimony, she attempted to relate what Paul Graham had said when the three came to his house for a change of clothes. Defense counsel objected. (R. p. 60, lines 1-4). The judge ruled the testimony admissible because the defendant was present with the conversation took place. Defense counsel did not object to the ruling based on an error of law; rather, he merely asserted the defendant was not there "at this point." (R. p. 60, lines 5-13).³ However, when Ms. Sowdon continued her testimony, she did not relate any statements attributed to Mr. Graham. (See R. p. 60, line 16 - p. 61, line 8).

Lastly, even if any minor assertion of a statement was admitted in error, the error could only have been harmless. First, Respondent notes that the Confrontation Clause was not offended as Mr. Graham testified at trial. See *State v. Craig*, 267 S.C. 262, 267, 227 S.E.2d 306, 309 (1976); *State v. Weaver*, 361 S.C. 73, 86 n. 1, 602 S.E.2d 786, 793 n. 1 (Ct. App. 2004). Further, because Mr. Graham testified, Sowdon's testimony was harmlessly cumulative. *State v. Haselden*, *supra*. At any rate, any error should be considered harmless based on the overwhelming evidence of guilt, as referenced more fully in response to Issue I, which is incorporated by reference as if repeated verbatim. The evidence conclusively

³ The legal error was later discussed in regard to a motion for mistrial based on Sowdon's testimony regarding statements from two other individuals; however, while acknowledging there may be error in the basis for the ruling, the trial judge denied the motion and found, "to the extent any hearsay came in, it was harmless in that it didn't go to any significant issue." (R. p. 397, line 20-p. 399, line 13). That ruling – as to the two other individuals – was not appealed. Petitioner moved for a new trial after the verdict based upon Sowdon's reference to Graham's statements, and referred to the legal error. The trial judge merely acknowledged he understood the argument, but did not further explain his reasoning. (R. p. 527, line 21 - p. 528, line 21). Of course, the question of whether there was legal error here is moot as no statement from Graham was actually admitted through Sowdon's testimony.

shows that no other rational conclusion may be reached but that guilt was proven beyond a reasonable doubt. *State v. Price, supra*.

However, the Court of Appeals properly found that petitioner utterly failed to show error or prejudice, and petitioner failed to contest the ruling. He may not do so now. The petition for writ of certiorari should be denied.

CONCLUSION

Rule 242(b), SCACR provides that “[a] writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Here, petitioner simply re-argues his evidentiary issues as presented to the Court of Appeals. He even includes Issue Three which he failed to contest – in any respect – in the petition for rehearing. Issue Three should not have even been included in the petition. Moreover, Issue Two was abandoned in the Court of Appeals, and a portion of the Issue One was procedurally barred. Petitioner completely fails to show any “special or important reason” to support the request for review of the ordinary application of procedural bars and evidentiary rules.

For all the foregoing reasons, respondent, the State, submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

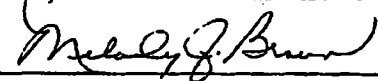
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General

J. GREGORY HEMBREE
Solicitor, Fifteenth Judicial Circuit

BY: 
MELODY J. BROWN

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

March 31, 2011.
Columbia, South Carolina.

ATTORNEYS FOR RESPONDENT



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

(803) 734-1080

FAX (803) 734-1499

February 8, 2012

Appellant Defender Elizabeth A. Franklin-Best
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Garner, Luther
Trial Court Case No. 2007-GS-1536; 927 & 928

Dear Counsel:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

"Petition for Writ of Certiorari Denied.

s/ Jean H. Toal C.J.
For the Court

February 8, 2012."

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,

CLERK

RECEIVED

FEB - 8 2012

SC OFFICE OF
APPELLATE DEFENSE

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF

HorryLuther Garner 322156

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

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

12

2015

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Lee County "Bishopville" S.C.
2. Name and location of Court which imposed sentence Horry County
3. Name(s) of co-defendant(s) (if any) Alonzo Lee Pierce
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

- (a) 2007-GS-26-1536
- (b) 2007-GS-26-928
- (c) 2007-GS-26-927

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

- (a) 6-1-07 murder Attempted Arm robbery 10yrs consecutive
- (b) 6-1-07 murder 30 concurrent

- (c) LA 01-07- Burglary 30 concurrent
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. The ~~8th~~ Supreme Court of South Carolina
- ii. Same " " " "
- iii. Same " " " "
- (b) the result in each such Court to which you appealed:
- i. Denied
- ii. "
- iii. "
- (c) the date of each such result:
- i. February 8, 2012
- ii. " " "
- iii. " " "
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Constitutional violations by solicitors & judge
- (b) Improper & prejudicial comments
- (c) ineffective assistance of counsel

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

- (a) Solicitors Improper comments
- (b) Improper & prejudicial comments/coercive statement by trial judge
- (c) Issue that was abandoned, and ^{no} objections

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? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____

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?

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) _____

(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? _____
- (c) your sentencing? _____
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
- (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. _____
- ii. _____
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. _____
- ii. _____
- iii. _____
19. State clearly the relief you seek in filing this application: *any other relief Court see just reversal for retrail/vacate sentence*
20. Are you now under sentence from any other court that you have not challenged?
NO

* *I would like to reserve right to amend.*

STATE OF SOUTH CAROLINA)

County of)

VERIFICATION ¹²

2015

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

Luther Garner Jr.

SWORN to and subscribed before me this 22
day of Feb, 2015

Braun Ann (L.S.)
Notary Public

My Commission Expires: 5-16-16

RECEIVED
12 MAR 13 AM 8:29
CLERK OF DISTRICT COURT

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

12

2015

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

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

Luther Garner Jr.
Applicant

SWORN or affirmed to and subscribed before me this
22 day of Feb, 2015

J. Bracey Simon
Notary Public

My Commission Expires: 5-16-17

RECEIVED
 12 MAR 13 PM 6:29
 CLERK OF COURT

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

2012-CP-26-2015

Luther Garner, 322156)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

RETURN

HORRY COUNTY
12 APR 19 PM 1:59
MELANIE HUGGINS-WARD
CLERK OF COURT

Respondent, making its Return to the Application for post conviction relief (PCR) filed March 13, 2012, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the March 2007 term of the Horry County Grand Jury for murder (2007-GS-26-928) attempted armed robbery (2007-GS-26-1536) and burglary first degree (2007-GS-26-927). Stuart Axelrod, Esquire, represented Applicant.

On June 1, 2011, the Applicant was tried before a jury. The Honorable Edward B. Cottingham sentenced Applicant to thirty years imprisonment on the murder charge, thirty years imprisonment on the burglary first degree charge, and ten years on the attempted armed robbery charge, with all charges to run concurrently. On information and belief from the PCR application,

Applicant appealed his conviction and sentence but his appeal was dismissed by the South Carolina Court of Appeals.

Attached herewith and incorporated herein are the records of the Horry County Clerk of Court regarding the subject conviction, and the trial transcript. Respondent will forward applicant's SCDC records upon receipt. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "constitutional violations by solicitors and judge"
2. "improper & prejudicial comments"
3. "ineffective assistance of counsel."

Applicant seeks "reversal for retrial/vacate sentence any other relief court see just" as a result of this proceeding.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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, 80 L.Ed.2d 674. 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 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.

With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, 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 alleges infringement of his rights under certain Amendments to the United States Constitution; however, the Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act (the Act) requires that the Applicant must "... specifically set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1985). In an application for PCR, it is

incumbent upon the Applicant to make at least a prima facie showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Since the Applicant has failed to make even a prima facie showing, the State would submit that this allegation should be summarily dismissed for failing to meet the requirements of the Act. In any event, the State submits this allegation is so vague that it is impossible for the State to more specifically respond.

V.

The State therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the State moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VI.

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

VII.

WHEREFORE, having made its Return, the State requests that the Application be denied and the matter dismissed with prejudice.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH

Chief Deputy Attorney General

SALLEY W. ELLIOTT

Senior Assistant Deputy Attorney General

TYSON ANDREW JOHNSON, SR.

Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General

P.O. Box 11549

Columbia, SC 29211

Telephone: (803) 734-3737

4/18, 2012.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

2012-CP-26-2015

LUTHER GARNER, #322156

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

AFFIDAVIT OF SERVICE BY MAIL

HORRY COUNTY
12 APR 19 PM 1:59
MELANIE HUGHES
CLERK OF COURT
TREASURY

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:

Paul Archer, Esquire
233 Muirfield Dr.
Pawleys Island, SC 29585

DATED this 18th day of April, 2012.


Norma Bigbee, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

LUTHER GARNER,

Applicant,

vs.

THE STATE OF SOUTH CAROLINA,

Respondent.

) IN THE COURT OF COMMON PLEAS
) THE FIFTEENTH JUDICIAL CIRCUIT

) Case No.: 2012-CP-26-2015

) SUPPLEMENTAL GROUNDS FOR POST-
) CONVICTION RELIEFFILED
Horry County
2013 AUG 27 AM 10:32
-ELANIE HUGGINS-WARD
CLERK OF COURT

Applicant through his appointed counsel, Tristan Shaffer, respectfully requests that this Court grant him post-conviction relief. In addition to the grounds for relief listed in the Application and those grounds that are raised at the hearing pursuant to Rule 15 (b) SCRCP, Applicant asks the court to consider the following additional grounds:

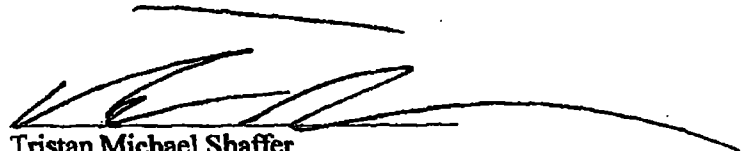
1. Ineffective assistance of counsel for not moving to admit the Turlijos' Statement under *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038 (1973).
2. Ineffective assistance of appellate counsel for failure to support the 911 argument.
3. Ineffective assistance of counsel for allowing Sowden to comment on Applicant's right to remain silent.
4. Ineffective assistance of counsel for failure to request a mere presence charge.
5. Ineffective assistance of counsel for not objecting to burden shifting argument. Vol 2, Tr. 209, ll. 13-17.
6. Ineffective assistance of counsel for failure to object to the *Allen* Charge.

7. Ineffective assistance of counsel for failing to object to Judge Cottingham's second reasonable doubt instruction and second circumstantial evidence charge. Vol. 2, Tr. 224, ll. 18-25.

8. Brady violation for failure to disclose Sowden's status as a confidential informant.

9. Ineffective assistance of counsel for failure to present evidence that Applicant was not physically able to drag the decedent.

RESPECTFULLY SUBMITTED,



Tristan Michael Shaffer
Attorney for Applicant

August 27, 2013

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

COURT OF COMMON PLEAS

LUTHER GARNER)
322156)
PETITIONER,)

v.)

TRANSCRIPT OF RECORD
12-CP-26-2015

STATE OF SOUTH CAROLINA,)

RESPONDENT.)

August 27, 2013
Conway, South Carolina

BEFORE :

THE HONORABLE J. CORDELL MADDOX, JR., JUDGE

APPEARANCES:

TRISTAN M. SCHAFFER, ESQ.
Attorney for the Petitioner

SUZANNE WHITE, ESQ.
Attorney for Respondent

FRANCES BAKIS-RAY, RPR
Circuit Court Reporter

INDEX

	Page
History of case	3
Factual background of case	4
Stuart M. Axelrod:	
Direct examination by Mr. Shaffer	6
Cross-examination by Ms. White	54
Redirect examination by Mr. Shaffer	78
Rosa Hopkins:	
Direct examination by Mr. Shaffer	88
Luther Garner:	
Direct examination by Mr. Shaffer	91
Cross-examination by Ms. White	125
Redirect examination by Mr. Shaffer	130
Recross-examination by Ms. White	131

EXHIBITS**PLAINTIFF'S:**

No.	Description	I.D./EVD.
1	Allen charge excerpt	33/33

1 MS. WHITE: This is the case of Luther
2 Garner versus the State, case number
3 2012-CP-26-2015. He's represented today by Mr.
4 Tristan Shaffer. Mr. Garner was indicted March of
5 '07 for murder, armed robbery, and burglary first.
6 He was represented by Stuart Axelrod at trial. At
7 trial he was convicted of murder, the lesser
8 included of attempted armed robbery, and burglary
9 first. He received 30 year sentences on the murder
10 and burg and a consecutive ten years on the
11 attempted armed robbery so he received 40 total.
12 There was an appeal to the conviction; sentences
13 were affirmed. He's filing this application
14 alleging ineffective assistance of counsel and
15 various violations, constitutional violations, by
16 the solicitor and judge. There were — and I don't
17 know, Tristan, do you have a copy for the judge?

18 MR. SHAFFER: I've already submitted them.

19 MS. WHITE: Okay. There were
20 amendments — there was an amendment that was filed.
21 I don't believe it's in the packet, but I believe
22 Mr. Shaeffer might have given you a copy. There
23 were numerous additional grounds, nine specific
24 grounds I think, of ineffective assistance of
25 counsel; and so I believe that's what they're

1 proceeding on today and I can turn it over to
2 Mr. Shaffer at this time.

3 THE COURT: Hold on just a minute, let me
4 read your form.

5 MR. SHAFFER: Thank you, Your Honor.
6 (Pause.)

7 THE COURT: Okay, yes, sir.

8 MR. SHAFFER: Yes, Your Honor. Basically
9 to give you a brief factual background of this case,
10 Mr. Garner was charged with or alleged to have
11 broken into a house or entered a home that was
12 essentially a drug spot. There was a — the
13 decedent who was inside the home was beaten to death
14 subsequently to this. There's no physical evidence
15 linking Mr. Garner to this crime. There's also —
16 but there is a eyewitness, the State's primary
17 witness is a Ms. Snowden (ph) who you'll hear from
18 later or you — we'll discuss a little bit more
19 further or later. Essentially this case was about
20 whether or not she was credible or not. The jury
21 deliberated, and in the — and then the actual Allen
22 charge was given because the jury at one point had
23 made an impasse.

24 We're alleging several things. One issue
25 involves — and by the way, this was appealed, Your

1 Honor. There's several instances of ineffective
2 assistance of appellate counsel based off of the
3 appeal. Essentially one of the issues was not
4 preserved as found by the Court of Appeals that it
5 was not preserved. They basically waived the issue
6 by not citing anything in their brief.

7 Your Honor, one of the, you know, we
8 have — or we have several different allegations
9 that we're supplementing on this, and I'm gonna go
10 through them the best way possible. It might take a
11 little while and I apologize for that, but I'll try
12 to go through them with the trial attorney, Your
13 Honor.

14 THE COURT: Okay.

15 MR. SHAFFER: And Your Honor, we will have
16 one additional witness as well — hold on one
17 second. Court's indulgence.

18 (Attorneys confer.)

19 MS. WHITE: Your Honor, I believe that
20 somebody is in the courtroom for a 403 and that is
21 perhaps why there might be an additional statement.
22 The State also submits that in this situation that
23 Mr. Garner is gonna fail to, fail to address the
24 deficiencies by counsel or be able to prove any of
25 those alleged deficiencies actually caused any

PW - S. AXELROD - DIRECT

1 prejudice to him based on the trial in general. And
2 we would submit that with the testimony presented
3 that his application should be denied.

4 THE COURT: Okay. You can call your first
5 witness.

6 MR. SHAFFER: All right. The Applicant
7 calls Stuart Axelrod to the stand.

8 THE CLERK: Please raise your right hand
9 and place your left hand on the Bible.

10 WHEREUPON,

11 **STUART M. AXELROD,**
12 having been duly sworn by the Clerk,
13 testified as follows:

14 THE CLERK: Have a seat please, sir.
15 State your name for the Court please, sir.

16 THE WITNESS: Stuart Mark Axelrod.

17 **DIRECT EXAMINATION**

18 BY MR. SHAFFER:

19 Q Good morning, Mr. Axelrod.

20 A Good morning, sir. Or good afternoon now.

21 Q I suppose so. You had mentioned — or I
22 apologize, you represented Mr. Garner, correct?

23 A I did.

24 Q Were you retained or appointed?

25 A I think I was appointed.

PW - S. AXELROD - DIRECT

1 Q Okay.

2 A I got to think for a second. I think I was
3 appointed.

4 Q Do you recall how long prior to the trial that
5 you were appointed to the case?

6 A What year was the trial? Was it '08?

7 Q I believe it was 2007.

8 A Seven.

9 Q May of 2007?

10 A I don't remember. Probably, I probably had it
11 for a while.

12 Q You had it maybe a year, six months?

13 A I wouldn't know at this point. I never looked to
14 that.

15 Q Okay. Tell us a little bit about the allegations
16 against Mr. Garner.

17 A Well, he was charged with murder. He was charged
18 with entering residence where allegedly they went to
19 a rob a Mexican group of people of cocaine, I think
20 a couple of pounds of cocaine. And subsequent to
21 that someone was killed. They were bludgeoned to
22 death with the back of a handgun allegedly. And
23 then they charged Mr. Garner with that murder and
24 had a trial and he got convicted and we're here
25 today.

PW - S. AXELROD - DIRECT

1 Q Did they have any physical evidence linking him
2 to it?

3 A No.

4 Q So was their, was the State's case based
5 primarily on eyewitnesses or what evidence?

6 A Well, they had a witness by the name of Lonya —
7 I think it was Snowden, and she basically, she
8 called the police a day later. I'm trying to
9 remember. She called the police a day later and she
10 said, you know, I can't live with myself, I have to
11 tell the truth, I was with these people, they were
12 gonna steal some drugs. And then I think she called
13 Luther Kareem, and he killed, he killed this
14 Mexican. And she goes into a big story to the
15 police about that. And they do the investigation,
16 and you know, they arrest, they arrest Luther and
17 then —

18 Q Will you — and I apologize.

19 A It's okay.

20 Q When you say she called the police did she call
21 9-1-1 or —

22 A She might have I think. Or, if I remember right
23 I think she had like a friend on the police force.
24 I forget. But she had a contact to the police and
25 she called, and she basically fabricated her story,

PW - S. AXELROD - DIRECT

1 I thought, and kept on fabricating her story, and —
2 you know, I'll give you just one example. She said
3 she was living on the — I remember this. She was
4 living on the fifth floor of the Red Roof Inn. Red
5 Roof Inn only had four floors, but she said she was
6 living on the fourth floor. I think she said the
7 fifth floor and it only had four floors. Everything
8 she said was always lies, but —

9 Q She also claimed she had a photographic memory,
10 right?

11 A She did.

12 Q Okay.

13 A She — and I brought — I lost my last close. I
14 brought her ex-boss, Mr. Lewinsky (ph), to trial. I
15 lost my close on this. I had to negate her lying.
16 And he had said, you know, that she was his book
17 keeper. She said she ran his business. And she
18 actually used his car while he was gone, the car
19 that was allegedly used at the murder scene at —
20 the green Mustang. And Lewinsky just got on the
21 stand basically and, you know, told the jury that
22 she had lied. And this was the — this was the only
23 credible piece of evidence, if you call it credible,
24 that they had against Luther was her testimony.

25 Q And it was really the only thing linking him to

PW - S. AXELROD - DIRECT

1 the actual, I mean, Luther as being the actual
2 person who committed the crime?

3 A Yeah, if I remember that there was no DNA. There
4 was nothing there. And even the date in question of
5 the murder was actually in question because the
6 roommates I tried — they wouldn't let me get to
7 it — but the roommates had told the police that
8 their roommate was alive Monday morning, or the
9 State alleged that the murder occurred on Sunday
10 evening. And you know, they didn't let it in as
11 hearsay; but you know, I thought it was, I guess, it
12 was in the course of police action that they got
13 that statement. I thought it should have been in,
14 but that was kept out.

15 Q Did you think it was exculpatory, that statement?

16 A It was. When the roommate said to the police,
17 well, I — the dead guy was alive this morning, we
18 went to work and Ms. Snowden, Lonya, she says, oh,
19 the murder occurred the night before. I believe
20 that roommate saying when they saw their roommate.
21 They saw him at breakfast and he was alive so how
22 could he have been killed the night before.

23 Q You said that they did not let you get into that;
24 is that correct? That didn't come out at trial?

25 A They argued, they argued that it was — I guess

PW - S. AXELROD - DIRECT

1 they argued it was testimony. I'm trying to
2 remember which way they argued it, testimonial. But
3 I thought it was non-testimonial, was taken under
4 the course of business conducted by the police.
5 I — they argued that it was hearsay. I did not
6 object. I think I could have argued that it was an
7 excited utterance. I don't think I did that; I
8 don't remember. But if I had said it was excited
9 utterance that would have been exception to the
10 hearsay; but 'cause Judge Cottingham denied it. But
11 you know, I know now at least that excited utterance
12 can be 24 hours later. I mean, they — the police
13 are talking to the two roommates. The roommates are
14 going, you know, my roommate that's dead was alive
15 this morning. I mean, I think, I think it's a
16 non-testimonial statement. I think it's an excited
17 utterance. I think it should have been admitted.
18 That was when Ms. Lively, the solicitor, was on that
19 part of the case, and she stood up to Judge
20 Cottingham and said, Judge Cottingham, this is
21 hearsay. Because if that had been allowed in I
22 guess, see, I should have said it was excited
23 utterance because if that had been allowed in it
24 would have called in question even more
25 Ms. Snowden's testimony. They didn't even have the

PW - S. AXELROD - DIRECT

1 day of when this murder occurred correct.

2 Q And Lonya — well, they did present the autopsy
3 report that it happened that the day that they found
4 the body, right? Do you recall that?

5 A No, I don't.

6 Q Do you recall some discussion with the
7 pathologist, the coroner, that said basically,
8 basically it could have happened either of the days?

9 A Yes.

10 Q Okay.

11 A They were unable to nail down when it occurred
12 so I think that when you have a roommate saying for
13 whatever purpose — the roommate had no reason to
14 lie —

15 Q Yeah.

16 A —was my argument, that he said my roommate was
17 alive this morning. And then Snowden saying that
18 the murder occurred the night before, it just seemed
19 to fit to the story that she had made.

20 Q And if — well, in fact they even, the solicitor
21 even moved to amend the indictment to include that
22 day, correct?

23 A Correct.

24 Q Because originally they said morning that they
25 found the body and then they changed it, right?

PW - S. AXELROD - DIRECT

1 A Correct.

2 Q So, I mean, obviously it wasn't a point, you
3 know, the day, the date of the death was actually
4 very important because Ms. Snowden was actually, y,
5 or Lonya was fairly sure that it happened the day
6 before they found the body, right?

7 A Correct.

8 Q She had given several statements of that?

9 A She did. She gave, you know, she gave her whole
10 story and then it was — then the State had to
11 figure a way to make that story hold water. You
12 know, the — because I felt at that time that none
13 of the evidence supported her story.

14 Q And she gave two different, two different
15 recorded statements going through everything,
16 correct?

17 A She did.

18 Q Okay. And they were fairly lengthy?

19 A They were.

20 Q Do you recall reviewing them all?

21 A I did.

22 Q And based off of your review of them you actually
23 cross-examined her, correct?

24 A I did. I did.

25 Q And you pointed out many inconsistencies in her

PW - S. AXELROD - DIRECT

1 story?

2 A I did.

3 Q You say upwards of ten? I haven't actually
4 counted so I can't tell you.

5 A Well, my position — and I don't know if I can
6 quantify it with a number, but my position was that
7 she was lying. My position was that she lied about
8 everything she said in that courtroom that day.

9 Q And you had her on the stand for 2 hours and 45
10 minutes, correct?

11 A If you say so. It was a while, I guess, maybe
12 not long enough if we look back at it.

13 Q But actually Judge Cottingham cut you off and
14 told you you had to stop, right?

15 A Well, I think — I don't know how to say this —
16 think a second. I think Judge Cottingham know I was
17 making some hay.

18 Q Okay. So you thought you were getting somewhere
19 with that witness?

20 A I do.

21 Q You don't think she came across very credible?

22 A No, she, you know, she lied. I mean, she lied
23 from the beginning to the end and that was what they
24 convicted him with. And I just tried to show the
25 jury that each lie was a lie and enough that I had

FW - S. AXELROD - DIRECT

1 to give up my closing argument to bring in
2 Mr. Lewinsky.

3 Q And you brought in Mr. Lewinsky who basically
4 said everything she said was a lie, right, about his
5 relationship to her?

6 A And about what she had testified to the jury
7 about, you know, that she was a business person, she
8 ran his business, she did this, she did that. And I
9 think the State knew that that was not true, but the
10 State let her say that. And I had to bring in
11 somebody to show the jury that she was lying on
12 these issues and, you know, it cost me my closing
13 argument, might have cost me my trial.

14 Q Now according to Lonya's testimony the murder
15 occurred and then — well, let me go back to the
16 actual allegations. This was not one or two hits,
17 correct, with a one or two pistol whippings, right?

18 A No, this was, it was very bloody. The person
19 was — I'll use the word bludgeoned to death. The
20 person was killed allegedly with the butt of a
21 revolver. And I don't know if you got to see the
22 pictures, but the victim was completely encased in
23 blood. The walls, the floor was soaked with blood.
24 The walls, the hallway walls, excuse me, were just,
25 they just had blood spatter going all up the walls.

PW - S. AXELROD - DIRECT

1 It was, it was horrific actually.

2 Q And —

3 A He died a very violent death.

4 Q And Lonya testified that Mr. Garner was covered
5 in blood, right?

6 A She did.

7 Q She testified that he was — the front of his
8 pants were covered in blood?

9 A She did.

10 Q And she testified that the — after being covered
11 in blood he got into that Mustang, right?

12 A She did.

13 Q And you had actually tried to get the jury to
14 view the Mustang, correct?

15 A Well, yeah, I — you know, I found Mr. Lewinsky
16 who still owned the Mustang. I mean, he wasn't a
17 happy camper 'cause I subpoenaed him and I
18 subpoenaed his Mustang. And it was a green, two
19 door Mustang, which Mustangs are two doors, green.
20 I don't know, it was like, maybe like in maybe a
21 2003, 2004 something, but it was completely cloth.
22 The entire car was just a standard low-end Mustang,
23 all cloth interior with not one drop of blood in it.
24 And I wanted to show the jury that there's no way
25 somebody could have got into the back seat 'cause

PW - S. AXELROD - DIRECT

1 they allege — I forget, I think she said he got
2 into the back seat. But there was people that got
3 into the back seat, that there's no way one could
4 get into the back seat of that Mustang covered in
5 blood and not have a drop of blood. That Mustang
6 was never at that murder scene and she lied about
7 that. And then Cottingham shut me down and wouldn't
8 let me show the jury the car, and I got befuddled
9 because I didn't know how to proffer a car. You
10 know, a lot of times if I get shut down on something
11 I would proffer the testimony for somebody to look
12 at later; but I didn't know how to physically
13 proffer a car, I still don't. Maybe I should have
14 cut a piece of a seat off or something; I don't
15 know. Mr. Lewinsky wouldn't have liked that though.
16 Q There wasn't a single drop of blood in that car
17 found?
18 A Not one. That car wasn't at that scene. And my
19 contention to show the jury the car, was if they
20 could see the car I thought that would be the straw
21 that broke that camel's back, that they would
22 realize that so I had to put Lewinsky up to lose my
23 close. And Snowden had lied from beginning, she
24 lied to the end. And I just think that phrase, a
25 picture is worth a thousand words, I think would

PW - S. AXELROD - DIRECT

1 have probably changed the outcome of that trial.

2 Q And although they showed pictures of that, do you
3 think the pictures adequately covered the interior
4 of the car?

5 A No, because I think that when you, you know, I
6 think that when you try to get into the back seat of
7 that cloth covered Mustang that you would realize
8 that you couldn't get into that car without smearing
9 blood. I mean, to this day I know that car wasn't
10 there. If it had been leather seats I could see an
11 argument that one could have wiped the seats, you
12 know, but there were footprints with blood on the
13 floor of that house and there was no blood on the
14 floorboards of that car. The passenger side, they
15 didn't have floor mats. I mean, there should have
16 been, there should have been blood somewhere in that
17 car.

18 Q And Lonya's testimony was actually that the —
19 his entire pants were covered in blood to the point
20 that he had to change clothes, right?

21 A Yes, I believe he changed clothes. I think it
22 was in that car, if I remember, I'm not sure. I
23 think he maybe changed them in the car and put on a
24 pair of sweat pants allegedly. And if your pants
25 are covered in blood and you took them off in the

PW - S. AXELROD - DIRECT

1 car, I think you will still get blood on the car.

2 Q But you think that —

3 A And Snowden said that after the murder, the
4 alleged murder, they left. It wasn't like they
5 stayed and at the murder scene for a lengthy period
6 of time to let the blood dry.

7 Q And do you think that that, had the jury seen
8 that car it might have created more doubt in their
9 mind?

10 A I've been doing this now, I guess, 18 years. I
11 always -- I've always learned in my course of being
12 a trial attorney I don't give up last close unless I
13 put my client up. And I didn't put my client up but
14 I gave up my close for that car because it was that
15 important, and Cottingham knew it. It's just my
16 opinion. I mean, it was, it was, you know, I think
17 they all knew it. I think the State knew it. And
18 it was like, how do you not get a drop of blood in
19 this car, that's wrong. It was, it meant that much
20 to me to lose my close. I had to show it and then
21 he wouldn't let me show it. I think that was just
22 wrong; but that's not why we're here, I guess, for
23 that.

24 Q Well, you said you've been doing this 18 years.
25 Is that primarily criminal trial work?

PW - S. AXELROD - DIRECT

1 A I've done, I think, in excess of 150 trials to
2 verdict.

3 Q Okay.

4 A Criminally. And I'm kind of going into the civil
5 arena now that maybe I can make a couple of dollars,
6 but I consider myself a criminal trial attorney.

7 Q And you won quite a few, correct?

8 A More than they thought I would.

9 Q All right. Now let's switch gears a little bit.
10 Let's talk about that statement again. Just to
11 clarify, you did say it was exculpatory, right, or
12 that you thought the statement was exculpatory?

13 A The one about the roommate, sir?

14 Q Yeah.

15 A Yeah, because it calls into question, I mean, if
16 somebody says their roommate is alive Monday
17 morning, that's pretty important. And then you got
18 Ms. Snowden which I thought was a liar saying it
19 occurred the night before. So you know, it made me
20 think that, you know, made me think that maybe
21 Ms. Snowden, if the man was alive Monday morning
22 maybe Ms. Snowden was involved in the murder and
23 then she just wanted to pin it back on someone else
24 and so she creates this story, you know, to cover
25 her butt.

PW - S. AXELROD - DIRECT

1 Q And Ms. Snowden, she, she — did she testify that
2 she was a confidential informant; is that right?

3 A Yes.

4 Q And in one of the calls she actually tries to
5 get — or in one of the statements given she tries
6 to get, tell about another crime that happened,
7 right?

8 A Yes.

9 Q Okay. Did you get anything from the State
10 regarding the, her being a confidential informant?

11 A No.

12 MR. SHAFFER: And Your Honor, just to
13 clarify so I'm not putting forth, I don't want the
14 Court to think I'm trying to mislead you. I did
15 talk to the solicitor this morning who indicated
16 that she has not been a confidential informant for
17 anyone. And he indicated that to me. I did put a
18 Brady issue on there regarding it, but I didn't want
19 to mislead the Court and make you think I had
20 evidence I didn't so...

21 THE COURT: Who alleged she's a
22 confidential informant?

23 MR. SHAFFER: She alleged she was a
24 confidential informant.

25 THE COURT: Okay.

PW - S. AXELROD - DIRECT

1 MR. SHAFFER: She also alleged that she
2 had a photographic memory, right?

3 MS. WHITE: And Your Honor, if I can,
4 while we're still on the confidential informant
5 stage, I know Mr. Shaffer says he spoke with the
6 solicitor who indicated she's not been a
7 confidential informant; but without any testimony
8 from any of the law enforcement as well, I don't
9 think we can put that in as a statement of fact.

10 MR. SHAFFER: And Your Honor, basically
11 what I'm doing is just clarifying the —

12 THE COURT: You just want to make sure you
13 don't think that you have evidence she was a
14 confidential informant?

15 MR. SHAFFER: Yes.

16 THE COURT: Okay.

17 BY MR. SHAFFER:

18 Q And she testified that she retained 82 percent,
19 correct, of everything that she saw or she took in;
20 is that right?

21 A Well, she — I don't know, the word grandiose, I
22 mean, it was like she had superpowers, you know.

23 Q So she basically testified that she was
24 infallible, right?

25 A Yeah, and — yes.

PW - S. AXELROD - DIRECT

1 Q She testified that one of the guns that was used,
2 or maybe not used but there at the scene, she
3 specifically said that it was a titanium made Glock;
4 is that correct?

5 A And she was very astute in her gunsmithing.

6 Q And you had asked her if there was -- if it could
7 have been stainless steel and she denied that,
8 right?

9 A Correct.

10 Q She said that it couldn't be stainless steel
11 because of the silver content in, or the -- I
12 forgot, she said silver but nickel content in
13 stainless steel wasn't that color, right?

14 A Correct. She attempted to appear to know a lot
15 about guns I guess.

16 Q And she attempted to appear that she knew a lot
17 about taxes, right?

18 A Yeah. She, you know, she said she did everything
19 for Mr. Lewinsky and that was the one place I was
20 able to impeach her, I thought, to show that she was
21 just lying.

22 Q And but you said that was the one place but
23 you're actually able to impeach her with
24 inconsistencies in her story other than that,
25 correct?

PW - S. AXELROD - DIRECT

- 1 A Well, I think she said she was staying in room
2 504. It's kind of weird how it all comes back to
3 you. I think it was 503 or 504 Red Roof Inn. I
4 think I brought in the manager of the Red Roof Inn
5 to say that there's only four floors. You know, I
6 think that's a pretty big thing when she tells you
7 exact room that she's staying in. And then I think,
8 if I remember, she wasn't even staying -- she had
9 checked out before that time, I think, if I
10 remember. I don't remember that. I don't think she
11 was staying there when she said she was.
- 12 Q And she was the only witness that could actually
13 place him hitting the decedent, correct?
- 14 A Yes.
- 15 Q Okay. Now are you familiar with Mr. Garner's
16 physical ability?
- 17 A In what way?
- 18 Q Was he -- did you ever hear anything about him
19 having knee problems?
- 20 A I don't remember.
- 21 Q Okay. There's a allegation that he dragged the
22 decedent down the hallway, correct?
- 23 A I think they said that the dead person was
24 dragged down the hallway by, I think, the smear
25 marks of the blood.

PW - S. AXELROD - DIRECT

1 Q Okay. And that would have taken a good bit of
2 physical ability, correct?

3 MS. WHITE: Your Honor, I would say that
4 calls for speculation.

5 THE COURT: I think -- yeah, I'll allow
6 that question, I mean...

7 THE WITNESS: I think that if I remember,
8 I don't know, maybe the guy weighed 170, 160, so
9 dead weight it would be pulling like three bags of
10 feed. I worked on a farm for a while. 150 pounds
11 is a lot to pull.

12 BY MR. SHAFFER:

13 Q Now, but you never introduced anything related to
14 his physical ability, right?

15 A No.

16 Q Okay. You were appellate attorney in this,
17 correct, or your name was on the appeal; is that
18 right?

19 A It was, yes.

20 Q How much of the appeal did you do?

21 A I didn't. I asked, I think it was Cecilia
22 Robinson I think was the appellate attorney and I
23 asked her to put my name on the brief.

24 Q Okay. And on the 9-1-1 issue you didn't write
25 that, correct?

PW - S. AXELROD - DIRECT

1 A I did not. I did no writing of the brief at all.

2 Q Okay.

3 A It was a courtesy that the office put my name on
4 there.

5 Q Okay. You wouldn't be able to testify to any
6 decision making regarding what was in the brief and
7 what was not?

8 A None. As I said, it was a courtesy they put my
9 name on the brief, and that was my only involvement
10 was my name was placed on the brief.

11 Q Okay. And you have no recollection of discussing
12 the denial of your motion to have the jury view the
13 car?

14 A I did speak with Ms. Robinson about that.

15 Q Okay. And she did not brief that issue, correct?

16 A I told her that — you know, and I sit here today
17 as many years as has gone by, I told her that the
18 car was, I thought, the most important thing in the
19 trial to go Luther's way, enough that I gave up that
20 close. You know, Lewinsky testified collaterally
21 about her being a bookkeeper and this and that, but
22 I had to bring him in to establish that it was the
23 car and that the car had not been re-covered or been
24 cleaned 'cause Lewinsky picked the car up from
25 impound. That's how he got the car back. He got it

PW - S. AXELROD - DIRECT

1 back from impound or at some point. He got the car
2 back and I had to identify that, you know, be able
3 to bring Lewinsky in for that. I told her that I
4 thought the car issue was not a harmless error and
5 it would have been proper. I've never asked for
6 anybody to see a car before. But as these facts
7 laid out I thought it was quite important that they,
8 that the jury view it, and I can only tell you that
9 I gave up my closing argument for that.

10 Q Now there was one other witness that saw
11 Mr. Garner with a gun, correct? It wasn't at the
12 scene?

13 A I don't remember. If you can —

14 Q Okay. There was someone at one of the locations
15 and they dropped by. Would you disagree with me if
16 I said that?

17 A Yes. At some point somebody said that they saw
18 Luther with a gun. I think it might have been at a
19 Sonic or something, I forget.

20 Q Okay.

21 A Work. I forget but. Was it a female witness
22 that had said that?

23 Q Well, I think.

24 A I'm asking you now; I don't know.

25 Q Yeah. You actually had a rebuttal witness that

PW - S. AXELROD - DIRECT

1 was a female witness; is that correct?

2 A Right. I think that -- if I remember right she
3 was a stripper, and we had to get her -- we got her
4 served and then she didn't show up I think, and then
5 they had to put her in an orange suit. They had to
6 lock her up before she testified, I think, if I
7 remember.

8 Q Now at one point during Ms. Snowden's
9 cross-examination she asked you to go ask your
10 client, do you remember that, whenever you asked her
11 a question about something her response was go ask
12 your client?

13 A No.

14 Q You don't recall? Okay.

15 A Do you remember the question I asked her?

16 Q Not offhand.

17 A Okay.

18 Q Do you have a copy of the transcript up there?

19 A I do not.

20 Q Okay. I'm gonna show you page 209, lines 13
21 through 17. This would have been 209 out of the
22 second transcript, volume two.

23 (Pause.)

24 BY MR. SHAFFER:

25 Q If you could read over that section real quick.

PW - S. AXELROD - DIRECT

1 A All right.

2 Q Do you find that section objectionable?

3 A Who's actually stating this?

4 Q This is the State.

5 A Okay, Mr. Richardson?

6 Q Yes, that's correct.

7 A Let me read it.

8 (Pause.)

9 THE WITNESS: I guess so actually. Hey,
10 you're not here to look for reasonable doubt.

11 BY MR. SHAFFER:

12 Q So you did find that objectionable?

13 A Reading it I do, yes.

14 Q Basically it's saying ignore reasonable doubt?

15 A Yes.

16 Q And he said you're here to find the truth, right?

17 A Correct.

18 Q Did you make any objection to that?

19 A No.

20 Q Are you familiar with State v. Alexi?

21 A No.

22 MR. SHAFFER: Your Honor, if I may hand up
23 a copy?

24 THE COURT: Sure.

25 BY MS. WHITE:

PW - S. AXELROD - DIRECT

1 Q This would have been 343 SC 20. It's a case
2 that, it's a Supreme Court case from 2003. And if
3 you could, flip to page 3 of what I —

4 A Yes, sir.

5 Q —showed you.

6 A Where would you like me to go from there?

7 Q I apologize, I actually meant to tell you to go
8 to 4?

9 A No problem.

10 Q Right there, that first full paragraph, could you
11 read that for us.

12 A Starting with jury instructions?

13 Q That's correct.

14 A Jury instructions and reasonable doubt which
15 charge this jury to seek the truth are disfavored
16 because they run a risk of unconstitutionally
17 shifting the burden of proof to a defendant.

18 Q Okay. And do you think that basically the
19 Solicitor is asking them to seek the truth in this?

20 A It's not basically, he's asking that. What he
21 said was you're here to find the truth.

22 Q So he's saying we're here to find the truth, not
23 to look for reasonable doubt, right?

24 A Correct. And I guess he shouldn't have said
25 that.

PW - S. AXELROD - DIRECT

1 Q And you find that objectionable?

2 A I do.

3 Q But there's no objection on the record, correct?

4 A No.

5 MR. SHAFFER: Court's indulgence, I
6 apologize.

7 THE COURT: That's all right.

8 BY MR. SHAFFER:

9 Q Now the jury got the case in the afternoon,
10 correct?

11 A Yes, sir.

12 Q They deliberated for a while?

13 A I believe so. I think they sent them home.

14 Q Okay. And then they came back the next morning,
15 right?

16 A Correct.

17 Q And do you recall if they had reached an impasse
18 at that point?

19 A I think they were deadlocked.

20 Q Okay. And do you recall any discussion you had
21 with the court regarding that, whether they were
22 deadlocked or not?

23 A I think so because I think my client at the time,
24 I had a discussion with him that they were
25 deadlocked, and I think I quoted to him the number

PW - S. AXELROD - DIRECT

1 of 10 to 2 or 11 to 1, not knowing which way.

2 Q So you think they were 10 to 2 or 11 to 1 and
3 you're not sure which way?

4 A I'm always hoping my way.

5 Q And then Judge Cottingham gave a Allen charge,
6 correct?

7 A He did.

8 Q And I'm gonna hand you an excerpt from the
9 transcript. It is page 220 on the second volume.

10 MR. SHAFFER: Your Honor, it's 220 through
11 224.

12 THE WITNESS: Would you like me to read
13 this to myself?

14 BY MR. SHAFFER:

15 Q Actually, yeah, if you wouldn't mind reading over
16 it yourself.

17 A Okay.

18 (Pause.)

19 THE COURT: I got to run for two minutes.
20 Let him read the whole thing and then I'll be back
21 two to five minutes maybe.

22 MR. SHAFFER: Thank you, Your Honor.

23 (WHEREUPON, a recess was taken from the
24 proceedings.)

25 BY MS. WHITE:

PW - S. AXELROD - DIRECT

1 Q Mr. Axelrod, during break you had a chance to
2 look over the transcript excerpt I handed up,
3 correct?

4 A I did.

5 MR. SHAFFER: And Your Honor, I apologize
6 for doing this out of turn but can I actually have
7 that marked as a —

8 THE COURT: The transcript?

9 MR. SHAFFER: Yes, Your Honor, the excerpt
10 from the transcript.

11 THE COURT: Any objection?

12 MS. WHITE: No, Your Honor, it's already
13 in the record.

14 THE COURT: Yeah, without objection.

15 MR. SHAFFER: Your Honor, is it admitted
16 without objection?

17 THE COURT: Yeah.

18 MS. WHITE: Thank you, Your Honor.

19 (WHEREUPON, Plaintiff's Exhibit No. 1 was
20 marked for identification and received
21 into evidence.)

22 BY MR. SHAFFER:

23 Q Mr. Axelrod, you had a chance to review
24 Applicant's Exhibit 1, correct?

25 A Yes.

PW - S. AXELROD - DIRECT

- 1 Q And you've also had a chance to review two cases
2 I handed up to you, correct?
- 3 A Yes.
- 4 Q That's Wendell v. Dawson. I mean, sorry, Dawson
5 v. State?
- 6 A Yes.
- 7 Q Of 2002, Supreme Court opinion?
- 8 A Yes, and the other was Tucker v. Cato.
- 9 Q And that's 346 SC 483, correct?
- 10 A Yes, sir.
- 11 Q And both of these cases dealt with Allen charges,
12 correct?
- 13 A Yes.
- 14 Q And if you could do me a favor, look at applicant
15 Exhibit 1 and go to the second page, which will be
16 221 of the second volume of the transcript. I
17 apologize, go to the third page which is 222 of the
18 volume two of the transcript.
- 19 A Yes.
- 20 Q And if you could, read for the Court lines 3
21 through 9.
- 22 A This is Judge Cottingham I believe.
- 23 Q That's correct. Is that your recollection that
24 Judge Cottingham gave this charge?
- 25 A Yes.

PW - S. AXELROD - DIRECT

1 Q Okay, thank you.

2 A "It has been said that jury service is perhaps
3 the highest service a citizen can perform for his
4 own country or state during peace time, and I
5 certainly agree with that. However, a juror does
6 not render good service who arbitrarily says, I know
7 what I want to do in this case and when everybody
8 else agrees with me, then we will write the verdict
9 and we will not write a verdict until that time."

10 Q Do you recall Judge Cottingham saying that?

11 A No.

12 Q You don't recall that being in the record?

13 A I believe it's in the record, I'm reading it
14 but.

15 Q You don't specifically recall it?

16 A Correct.

17 Q Okay. Now if you could do me a favor and go to
18 the Wendell v. Dawson, I mean, sorry, Wendell Dawson
19 v. State, the opinion that I handed up to you, one
20 of them?

21 THE COURT: Is the date on that one?

22 MR. SHAFFER: This would be a 2002 Supreme
23 Court opinion.

24 THE WITNESS: September 29th, Your Honor.

25 THE COURT: All right.

1 THE WITNESS: And it was filed
2 October 28th, 2002.

3 BY MR. SHAFFER:

4 Q And if you could, do me a favor and if you noted
5 that in the actual opinion some of the text is
6 underlined.

7 A It is.

8 Q Could you read that aloud for us?

9 A This is coming out of Dawson v. State. "I've
10 sometimes thought that the juror who could render
11 less service to the court and to the country than
12 any other juror is the juror who says, I know what I
13 want to do in this case and when and if everybody
14 agrees with me, then we'll write a verdict and we'll
15 not write a verdict until that time."

16 Q Okay. And in Dawson the Supreme Court
17 essentially finds that to be a coercive Allen
18 charge, that particular language, correct?

19 THE COURT: While he's looking at that,
20 just so I'm sure in my own head, didn't Judge
21 Cottingham say exactly the opposite though? In
22 other words, in Dawson it was the best juror holds
23 out until everybody agrees with them. And didn't
24 Judge Cottingham in his charge say the best juror is
25 someone who doesn't go in and say I'm gonna hold out

1 until. I just want to make sure I heard that right.

2 MR. SHAFFER: Your Honor, I believe
3 they're consistent. It says — and I'm reading from
4 the transcript, 222, line 6 through 9. It says,
5 however, a juror does not render good service who
6 arbitrarily says I do not want to do in this — or I
7 know what I want to do in this case and when
8 everybody agrees with me we will write a verdict, we
9 will write a verdict, and we will not write a
10 verdict until that time.

11 THE COURT: Okay, and what does Dawson
12 say?

13 MR. SHAFFER: Dawson says, I have
14 sometimes thought that a juror who could render less
15 service to the Court and to the country than any
16 other juror is a juror who says I know what I want
17 to do in this case and when and if everybody agrees
18 with me, then we'll write a verdict and we will not
19 write a verdict until that time.

20 THE COURT: But didn't Judge Cottingham —
21 again, I want to make sure I'm getting it right —
22 say, however, a juror does not render good service
23 who arbitrarily says, and then he almost uses the
24 exact wording of Dawson except he changes. Am I
25 reading that wrong or am I basically, looks to me

1 like he took into account Dawson and says exactly
2 the opposite.

3 MR. SHAFFER: And Your Honor, I believe
4 that the actual language from, I know what I want to
5 do in this case and if and when everyone agrees with
6 me, we will write a verdict at that time — I
7 believe that it's actually essentially saying that
8 the exact — Your Honor, I understand what you're
9 saying with the not in there.

10 THE COURT: Well, because he says — and
11 again, and I don't mean this to be combative. I'm
12 just — obviously I'm getting this for the first
13 time but. I do remember Dawson and I'm just reading
14 this and it says, however, a juror does not render
15 good service who arbitrarily says. So basically
16 he's complying with Dawson by saying if you do what
17 they, the judge — if he has charged what the judge
18 charged in Dawson might have been error and he's
19 you're not being a good juror if you do that.

20 MS. WHITE: And Your Honor, I think —

21 THE COURT: Just want to make sure I'm
22 right.

23 MS. WHITE: The facts in Dawson are
24 different than this too, I think, and that's what
25 distinguishes it. Dawson actually says the judge

1 can't give a course of Allen charge to the one
2 minority member that's holding out. They had come
3 out and said they were 11 to 1, and they couldn't
4 make a decision and so the judge in Dawson says,
5 well, you're not gonna do it if you're holding out
6 saying I'm gonna be the only one.

7 THE COURT: Right, and I understand that.
8 I just, what I heard, read, and what I read in the
9 transcript don't seem to be the same things. I
10 understand there's the same verbiage in there, but
11 there's a preemptive qualifier that says you're not
12 a good juror if you do. And again, I don't mean to
13 be combative, I want to make sure I —

14 MR. SHAFFER: And this is the basis of my
15 entire argument in this.

16 MS. WHITE: And Your Honor —

17 MR. SHAFFER: And I appreciate the State
18 interjecting that, you know, there was — it was 11
19 to 1 and the judge knew about that ahead of time.
20 And Your Honor, this, Dawson is not my entire
21 argument related to this.

22 THE COURT: Right, I understand but.

23 MR. SHAFFER: Thank you.

24 THE COURT: In my head I'm — and my notes
25 I'm just trying to keep track of it because...

1 MS. WHITE: I do think the judge, if you
2 look at line 15, finishes that paragraph — they
3 didn't read all the way down there — to where he
4 talks about I would never say that to you. I think
5 that's important to know as well.

6 THE COURT: Okay, I get it, and I
7 understand you got to dot your eyes and cross your
8 T's.

9 MR. SHAFFER: Yes, Your Honor.

10 THE COURT: I just want to make sure I
11 wasn't hearing it wrong or reading it wrong; and if
12 I was, I was going to take a break because I'm going
13 crazy. Go ahead.

14 MR. SHAFFER: I do want to point out one
15 thing. I believe there is consistency with Dawson,
16 you know, and I would like the judge to — and did I
17 hand up Dawson, Your Honor?

18 THE COURT: No, but I'm aware of it. I
19 actually — believe it or not.

20 MR. SHAFFER: And I believe that
21 essentially the judge in Dawson, the trial court in
22 Dawson is saying essentially the same thing. He
23 said a juror who can render less service to the
24 court and country than any other juror is the one
25 who says. He's basically saying a bad juror does

1 that. A bad juror is the one that comes in there
2 and says that. That's the language in Dawson that
3 I'm saying is consistent with Judge Cottingham's
4 language.

5 THE COURT: Well, you, I respectfully
6 disagree with you but that's okay; we may be reading
7 it wrong. I'm gonna take it with me tonight and
8 read it. The way I read it is he's saying, he's
9 saying exactly what you're saying: A bad juror goes
10 in and says I'm not doing anything until we all
11 agree with me. And I think Dawson is saying, you
12 can't say that as a juror you're going to go in
13 there with a predetermined decision and not leave
14 until everyone agrees with you. And I read
15 Cottingham's, Judge Cottingham's charge to say
16 exactly that, just backwards but —

17 MR. SHAFFER: Your Honor, may I pass up
18 Dawson as well?

19 THE COURT: Yeah, I mean, I'm —

20 THE WITNESS: Do you want mine for the
21 judge?

22 MR. SHAFFER: Yes, if that's possible.

23 (Document tendered to the Court.)

24 THE COURT: Yeah, I mean, I'm aware of I
25 have just want to make sure, I'm just trying to

PW - S. AXELROD - DIRECT

1 keep track of exactly where we are on each point.

2 MR. SHAFFER: And at the close I'll
3 actually address that argument a little bit further,
4 Your Honor, just so I'm clear.

5 THE COURT: Okay, you can go ahead.

6 BY MR. SHAFFER:

7 Q Now you've also reviewed Tucker v. Cato, correct?

8 A Yes.

9 Q Or parts of it?

10 A I have.

11 Q And Tucker v. Cato lays down several, several
12 requirements or basically things you can't do in an
13 Allen charge, right?

14 A Yes.

15 Q And if you could, that would have been page 6 on
16 that. Can you read out the things you can't do in
17 an Allen charge? It's a list?

18 MS. WHITE: Your Honor, if I — I would
19 just object and ask that maybe we instead of having
20 counsel or witness read the case that the cases just
21 be submitted.

22 THE COURT: Yeah, I'll take judicial
23 notice. Yeah, just...

24 MR. SHAFFER: Okay.

25 THE COURT: The only thing I'd ask is if

PW - S. AXELROD - DIRECT

1 that you point out the most glaring problem that you
2 think that was done that shouldn't have been done
3 and then I'll take judicial notice and read the
4 case.

5 MR. SHAFFER: All right. Thank you, Your
6 Honor.

7 BY MR. SHAFFER:

8 Q Now if you could also look at page 222.

9 A Okay.

10 Q And if you could, read line 21 through 25, or
11 actually through 1 on the last page. The sentence
12 ends on the one on the next page?

13 A With this in mind they tell you that if the much
14 larger of your number of panels are in favor of one
15 position the dissenting jurors should consider
16 whether I, not his or her position, is a reasonable
17 one which makes no impression upon the minds of the
18 majority. In other words, if the majority of you
19 are of one position, the minority ought to seriously
20 ask themselves whether they can reasonably doubt the
21 correctness of the jury and judgment of the
22 majority. Although the verdict to which a jury
23 agrees must of course be his or her own verdict —

24 Q And that's — I hate to interrupt you but that's
25 essentially what I wanted you to read.

PW - S. AXELROD - DIRECT

1 A Okay.

2 Q Now that sentence there is actually from, or they
3 are sentences from 222 line 21 through 223 line 4.

4 Do you think that speaking to the entire jury panel
5 or do you think it's primarily speaking towards the
6 minority?

7 A Speaking to the minority.

8 Q And it's basically telling them to re-evaluate
9 whether or not they have reasonable doubt actually,
10 right?

11 A Well, he's saying, line 2, minority ought to
12 seriously ask themselves whether they can reasonably
13 doubt the correctness of the jury. So he's, I guess
14 he's basically telling them in a way that you're
15 probably wrong following the majority.

16 Q And if you could look down on 223. Lines 19
17 through 21. I want you to start at that "if". If
18 you could read that sentence.

19 A "If you do not agree on a verdict of not guilty
20 or guilty unanimously it does not mean that
21 everybody wins. It just means that at some future
22 time, at some future time I will try this case with
23 some jury sitting just exactly where you are. The
24 same participants will come and the same lawyers
25 will ask basically the same questions and probably

PW - S. AXELROD - DIRECT

1 basically, and get basically the same answers and we
2 will go through the entire process again."

3 Q And could you actually go into 224, lines 2
4 through 7?

5 A Yes. Should I read them?

6 Q Yes, please.

7 A "In conclusion, if the State of South Carolina
8 and the people represents is entitled to a verdict
9 in this case, they're entitled to it today, not
10 tomorrow, not next week, not next year. Equally
11 important, if this defendant is entitled to a
12 verdict he's entitled to it today, not next month,
13 nor next year, today. And so it is, Mr. Foreman,
14 ladies and gentlemen, recognizing that there are
15 different issues for you to consider, understanding
16 the voluminous evidence that has been in the trial
17 of this case, I would say ask that you go back,
18 continue deliberations, have a give and take between
19 the majority —

20 Q I apologize, I was actually gonna get you to stop
21 at line 7.

22 A Sorry.

23 Q Now if you could read on page 221, line 6 through
24 7. And 6 through 7 is that last sentence. If you
25 could read that last sentence.

PW - S. AXELROD - DIRECT

1 A Where it starts "means"?

2 Q Or, I apologize, actually you'll probably, in
3 order get the right context you'll probably have to
4 read the sentence before that.

5 A Where would you like me to start?

6 Q Line 3 at I?

7 A Okay. "I have no reason to suggest or suspect
8 that I will ever get twelve more people more
9 dedicated, more anxious, to do their duty than you
10 twelve and so don't walk away thinking that somebody
11 wins and somebody loses, means everybody loses and
12 our system has failed."

13 Q Now there's three excerpts that I talked to you
14 about. Do you believe that essentially what
15 they're -- I apologize, hold on one second. You
16 find those objectionable?

17 A I do, and if I can expound just one second
18 further maybe. I think that it's one thing to read
19 it as I'm reading it, but I guess Judge Cottingham,
20 maybe the tone that he says it to them, actually
21 makes it objectionable for me to read it today
22 because he, he leans real hard on them.

23 Q So the tone that he used to that jury, he was
24 leaning on them to come back with a verdict, right?

25 A I believe so again.

PW - S. AXELROD - DIRECT

1 MS. WHITE: Your Honor, I would just
2 object to that being speculation.

3 MR. SHAFFER: It's — he was present, Your
4 Honor. He heard the tone of his voice.

5 MS. WHITE: I don't believe that he can
6 determine that his tone of voice was —

7 THE COURT: Yeah. The tone of his voice,
8 listen, stick around, you may hear something coming
9 out of me. I think the tone of his voice is — I
10 understand that part of your claim is that an Allen
11 charge is coercive; and I'll, to save a little time,
12 take notice and take into account that possibly he
13 read it in a coercive tone. That's basically where
14 you are with it?

15 MR. SHAFFER: Yes, Your Honor, that's
16 exactly where I was going.

17 THE COURT: Okay.

18 BY MR. SHAFFER:

19 Q I'm actually gonna move to a different issue, and
20 I touched on this earlier. Now do you — you said
21 you didn't receive any Brady information about her
22 being a CI, right?

23 A No, sir.

24 Q She testified that she was a CI, correct?

25 A Yes, sir.

PW - S. AXELROD - DIRECT

1 Q She actually said that she that she had the file
2 on court, I mean, on file with the court, right, or
3 with the police agency, correct?

4 A She did.

5 Q And that would have been -- Your Honor, I'm
6 referring to 211, 18-21. Now did the State ever
7 correct that statement?

8 A No.

9 Q But they never provided you with discovery
10 either?

11 A Not that I recollect, no.

12 Q Why do people generally become CIs?

13 A Two reasons. One, to work off a situation
14 they're in. Maybe they're in a bad situation, maybe
15 they have charges against them. And the second one
16 is they have an income doing it.

17 Q And both of those show bias, right?

18 A It could.

19 Q And both of those should have been covered under
20 your discovery motion, right?

21 MS. WHITE: Your Honor, I know we're
22 trying to get through; but I would object to the
23 leading nature, I think he is continuing to. It's
24 his witness so.

25 THE COURT: I understand. I'll allow you

PW - S. AXELROD - DIRECT

1 since there's no jury here. I'll allow you to lead
2 to a certain degree.

3 MR. SHAFFER: Thank you, Your Honor.

4 THE COURT: Okay.

5 THE WITNESS: Can you repeat the question.

6 BY MR. SHAFFER:

7 Q Do you recall — well, do you believe that those
8 items should have been disclosed to you in discovery
9 if they existed, the CI file?

10 A Yes.

11 Q But they were not?

12 A No.

13 Q And the State never corrected whether she was a
14 CI or not with the judge, correct?

15 A Correct, that I remember.

16 MR. SHAFFER: Court's indulgence.

17 THE COURT: Sure.

18 BY MR. SHAFFER:

19 Q You don't believe Luther Garner beat that man to
20 death, do you?

21 A No.

22 MR. SHAFFER: Your Honor, no further
23 questions at this time. I do have one issue I'd
24 like to bring up, Your Honor. Under Rule 15, South
25 Carolina Rules of Civil Procedure, I think it's

1 15 — 15(b) Your Honor. I'm actually gonna move to
2 orally amend the application based off of, for a
3 prosecutorial misconduct alternative to the Brady
4 issue, Your Honor, because there's that Napue v.
5 Illinois, US Supreme Court case. There's Riddle v.
6 Ozmint. I think it's 2007 South Carolina Supreme
7 Court case on not revealing basically this type of
8 information or not correcting it whenever someone
9 comes up because this information, which would have
10 been biased, should have either been disclosed to
11 her or the prosecutor would have been in affirmative
12 duty to actually correct it because the State knew
13 about it, Your Honor.

14 THE COURT: You mean the fact that she
15 testified she was a CI and —

16 MR. SHAFFER: Yes, Your Honor.

17 THE COURT: Here's the problem I got with
18 that.

19 MR. SHAFFER: Uh-huh.

20 THE COURT: I'm not sure the solicitor
21 would know she was a CI. I've done in twelve years
22 an awful lot of cases with police officers who
23 nobody knew, I mean, that's the point. And I'm a
24 little concerned that she comes in and says she's
25 got 82 percent memory and other sort of grandiose

1 things, but what evidence is there that she's not a
2 CI?

3 MR. SHAFFER: Your Honor, I think that's
4 alternative to the fact that it should have been
5 disclosed on Brady even —

6 THE COURT: What if she wasn't? I mean,
7 —

8 MR. SHAFFER: —If she was lying.

9 THE COURT: —if she gets up on the stand
10 and says, you know, I'm a CI and the solicitor's
11 office has no idea whether she's a CI or not, what
12 would they do?

13 MR. SHAFFER: Your Honor, I believe that
14 that information is imparted to the State. I cite,
15 I guess, Cosby Whitley for that proposition. Just
16 because the cop, the cop knew about it, then
17 essentially that information has been imparted to
18 the State. Clearly she would have been a CI with a
19 agency and I think she specifically says the agency.

20 THE COURT: Then wouldn't that be a Brady
21 issue more than a —

22 MS. WHITE: Well, and Your Honor, I'm not
23 sure the oral amendment issue. Number 8 on his
24 amendment is a Brady violation for failure to
25 disclose the status of the confidential informant so

1 I'm not even sure what —

2 THE COURT: Well, let me tell you, I will
3 allow the amendment. I mean, I think 15(b) allows
4 it. I'm just not so sure how persuasive that the
5 Solicitor didn't jump, stand up, and ask for a side
6 bar and say I, I mean, you've talked to him. I, he
7 said I didn't think she was a CI. Now I think it
8 goes to her credibility if she says she's a C.I. and
9 she isn't. And I don't know, I haven't read the
10 transcript but I don't know whether or not she was
11 questioned on that, but I'll allow you to amend it
12 and I understand where you are with that. I just
13 don't know what the Solicitor is supposed to do if
14 they don't know, okay?

15 MS. WHITE: Your Honor, if we could just
16 state our objection for the record.

17 THE COURT: Yeah, for the record. I'll
18 allow you to amend over the State's strenuous
19 objection to the amendment.

20 MS. WHITE: Thank you, Your Honor.

21 MR. SHAFFER: And Your Honor, I have no
22 further questions at this time.

23 THE COURT: Okay. Before you start —
24 well, that's the question. This is our last one for
25 the day. How much longer do y'all think we're gonna

1 be?

2 MS. WHITE: I know my speed. I'm not sure
3 of Mr. Shaffer. I know he indicated he had two
4 additional witnesses.

5 THE COURT: You have two more witnesses?

6 MR. SHAFFER: Yes, Your Honor, one is
7 going to be incredibly short, Your Honor.

8 THE COURT: What about the other one?

9 MS. WHITE: The other one is my client and
10 might take not — probably not as long as
11 Mr. Axelrod but he probably wants to clear up some
12 stuff. He's done a lot of work on his PCR case.

13 MR. SHAFFER: I can make it.

14 THE COURT: Well, I mean, and here's the
15 question, and I'm more worried about the people
16 around me. I can go till two. If we can finish by
17 two. Can you finish by two?

18 MS. WHITE: I can get my cross-examination
19 by 2. I don't think that he'll be able to —

20 THE COURT: But then we'll have two more
21 witnesses.

22 MS. WHITE: But then we'll have two more.

23 THE COURT: So we're going to be going
24 straight through to 3. Okay, we need to take a
25 lunch break. I mean, I'm like a camel, I can go

PW - S. AXELROD - CROSS

1 all day. All right, let's do this. Let's take
2 about an hour since this is the last one. So it's
3 1:30?

4 MR. SHAFFER: Yes, Your Honor.

5 THE COURT: We'll see you about 2:30 and
6 then we'll finish.

7 (WHEREUPON, a lunch break was taken.)

8 THE COURT: All right, you can continue
9 your questioning.

10 MS. WHITE: I think, Your Honor, we're
11 ready for our cross-examination.

12 THE COURT: Oh, okay, I'm sorry.

13 **CROSS-EXAMINATION**

14 BY MS. WHITE:

15 Q Mr. Axelrod, I'm gonna try to go through kind of
16 the same somewhat order a little and address the
17 things that we talked about earlier. You had
18 mentioned just to start off with some your history,
19 that you had tried about 150 criminal cases to
20 verdict.

21 A Approximately, yes.

22 Q Okay.

23 A Could be more, could it be a little less, but.

24 Q In your experience have you handled, what level
25 of cases, magistrate to murder? What types of cases

PW - S. AXELROD - CROSS

1 do you generally handle?

2 A From magistrate to capitol cases.

3 Q And in your general practice how do you — do you
4 perform research in preparation for those cases? Do
5 you have someone that helps you as an investigator,
6 or does it just —

7 A Yes.

8 Q —depend on each case?

9 A It depends on the case. Currently right now I've
10 recently — I have an investigator I put on every
11 single case when it starts.

12 Q And did you have an investigator in this case for
13 Mr. Garner, do you recall?

14 A I don't think so.

15 Q Okay.

16 A I don't remember. I don't think so though.

17 Q But you said it's your general practice to have
18 an investigator on those cases.

19 A It is now.

20 Q Okay. In —

21 A Ma'am, I don't want to mislead you. I mean, I
22 might have. I don't remember that. I mean, I just
23 don't remember.

24 Q Okay. In regards to the trial strategy for this
25 case, was it simply to attack — was it to attack

PW - S. AXELROD - CROSS

1 the credibility of the State's witnesses primarily?

2 A Well, it was the State's witnesses that were
3 circumstantially placing them there so the answer,
4 yes, the whole case hinged on that one witness
5 really, Lonya.

6 Q There was no discussion of self-defense alibi
7 defense, anything like that?

8 A Not that I recall.

9 Q Okay. So, and in fact, didn't -- and I believe
10 the record might reflect that there had been a plea
11 offer that had been not taken?

12 A Plea --

13 Q Is that correct?

14 A It might have been 16 years.

15 Q Okay. And --

16 A I'm not sure the -- I don't know if you have that
17 there but.

18 Q I do. Page 147 in the second record I think it
19 notes it was actually an 18 year plea.

20 A That sounds about right.

21 Q Okay. And so Mr. Garner turned down the plea--

22 A He did.

23 Q --after discussions with you?

24 A Yes.

25 Q Okay. And in regards to the procedure of the

PW - S. AXELROD - CROSS

1 case you had information about the State's witnesses
2 that they claim to present, was that correct?

3 A Yes. My client, Ms. Lonya Snowden, and there was
4 another witness, I forgot the man that lived at a
5 trailer. He was in that list. He was one of the
6 State's witnesses.

7 Q Okay. And had they provided in discovery all the
8 prior statements written or oral what these
9 witnesses had provided?

10 A I believe so.

11 Q Okay. And isn't it true that during this lengthy
12 cross-examination of Ms. Lonya, who was essentially
13 the star witness, she was the only person to testify
14 as an eyewitness that she saw Mr. Garner beat the
15 victim to death, you were able to point out to her
16 various inconsistencies in her story?

17 A And each time she would come back, I think, with
18 another fantasy answer if I remember.

19 Q And you were able to get her to testify of the
20 fact that she used crack on a regular basis and that
21 was how she was connected to Mr. Garner?

22 A Yes.

23 Q So the issue of her drug use and her living at
24 the motel and maybe having some issues domestically,
25 that all came out before the jury, right?

PW - S. AXELROD - CROSS

1 A Yeah. Yes, except she said, you know, she said
2 she was living there at the time and we were able to
3 show that she wasn't. Pretty much everything she
4 lied about when I cross-examined her she would make
5 up an excuse why she was wrong. She tried to cover
6 her track each time I showed a lie.

7 Q And that was pretty consistent. She tried to do
8 that various -- and explain maybe that she was in
9 shock that's why she might not have recalled this
10 situation the exact same as she did that night; is
11 that right?

12 A Right. And I had a hard time fathoming how she
13 would add another floor to the motel 'cause she was
14 specific about the room that she stayed in. And she
15 said why she was specific about that room and, you
16 know, she went to one of her friend's at this room
17 and she talked to him, and the room didn't exist.

18 Q And in fact, you were able to bring that out in
19 front of the jury with the manager of the hotel; is
20 that right?

21 A I did.

22 Q And in fact, bring also the fact that she had
23 lied about the dates that she was there?

24 A I did.

25 Q Okay. In regards to her testimony about her

PW - S. AXELROD - CROSS

1 involvement with this Mustang and how she was even
2 paid for the hotel room and why she was driving the
3 Mustang, did you feel like you were able to attack
4 that story with Mr. Lewinsky coming in to testify?

5 A No, not really because he was able to say it to
6 the jury. What he said, that she didn't work for
7 him and I think she didn't even — wasn't really
8 allowed to use the car. She used it against his
9 permission; but still I was prohibited from, you
10 know, the one thing, us showing the car.

11 Q Didn't Mr. Lewinsky testify that when he got the
12 car back he saw no blood?

13 A Yes.

14 Q So that the evidence that there was no blood on
15 the fabric of the seats, on the floorboard, on the
16 console, or anything on the car was presented to the
17 jury, not visually maybe but in Mr. Lewinski's
18 testimony?

19 A Yes, but I think it was — it wasn't sufficient
20 in and of itself. It was presented but not with
21 the, not with the force that visualization would
22 have been as much as — you know, I give you an
23 example. You know, in a lot of trials I'll — they
24 want to put in the autopsy photos and I would
25 stipulate to the judge that the man was dead. And

PW - S. AXELROD - CROSS

1 then the State would say that the photos allow the
2 jury to further understand the testimony of the
3 pathologist. I would say that analogy would hold
4 for that car that the car could have allowed the
5 jury to understand Mr. Lewinski's testimony.

6 Q And I'm trying to get specifically to it real
7 quick. He was -- he testified he didn't have the
8 car cleaned; didn't he?

9 A Correct.

10 Q He testified she had never done the taxes for him
11 like she claimed?

12 A Correct.

13 Q You testified also earlier that there were some
14 photos placed in the record about the car?

15 A I don't know if I testified earlier about that.

16 Q I've got that you didn't know how to proffer the
17 car but they would show you pictures; and you said
18 something about no floor mats, there were no floor
19 mats in the car.

20 A Maybe, yeah. There was pictures. We had
21 pictures of the car; but I didn't think the
22 pictures, I didn't think the pictures did the
23 justice of, you know, of -- if the car had leather
24 seats we wouldn't be talking about the car with me
25 right now. But I still cannot imagine, you know, I

PW - S. AXELROD - CROSS

1 get into a car with some chocolate on my hands and I
2 got it smeared over four-fifths of the car without
3 even realizing it.

4 Q And in regards to the roommates statement, that
5 was another big issue that you raised various
6 objections?

7 A I'm sorry?

8 Q The roommates, the victim's roommates, the
9 victim's roommates were unavailable for trial; is
10 that correct?

11 A Yes, ma'am.

12 Q They had essentially vanished or absconded or
13 were not able to be found?

14 A Yes, ma'am.

15 Q Okay. And these statements that were given, you
16 argued that obviously you should have the right to
17 be able to put those in because you thought it
18 affected the time line of the murder?

19 A Right. And I guess you would call them
20 non-testimonial, but they didn't need to be, they
21 didn't — they weren't hearsay. It was my opinion
22 and...

23 Q Okay. And the State argued, their argument was I
24 think that maybe these statements were made several
25 hours after they could have called the police about

PW - S. AXELROD - CROSS

1 their roommate so there might be some questions to
2 if they were hiding evidence or?

3 A Correct. And you know, when I look back on it I
4 think that what I should have done at that point and
5 I didn't was to say that it's excited utterance. I
6 don't think I preserved that that way, that I should
7 have.

8 Q Okay.

9 A That's just my hindsight looking at it a week
10 after that trial.

11 Q Now you said the hindsight at the time you felt
12 that you made sufficient argument to try to either
13 get the testimony in and/or preserve it for
14 appellate review?

15 A No, we -- well, if I have to look back on it now
16 I would say no because the one thing that I didn't
17 do, I should have said it was excited utterance. I
18 think that would have carried the weight of that
19 statement.

20 Q And I'm asking about the time at the time of
21 trial. Was there anything at the time of trial
22 that -- you thought at the time of trial that you
23 made a sufficient argument; is that right?

24 A I thought the case law was in my favor, and I
25 didn't think that -- I didn't -- I thought based on

PW - S. AXELROD - CROSS

1 the case law that I provided that I thought that
2 Judge Cottingham would have to, would have the allow
3 those non-testimonial statements in and I relied on
4 that. And when she said it was hearsay, Ms. Lively,
5 Solicitor Lively, I should have responded that it
6 was an excited utterance. That, that was the
7 mistake that I made I think when I look back
8 honestly that she said, Judge, this is hearsay.
9 It's testimonial and I should have come back as an
10 excited utterance 'cause I've looked at it in my
11 mind and what I think is, if it was reversed, if it
12 was reversed and the State wanted to get something
13 in and I would argue that it was hearsay, that it
14 was testimonial, I believe the State would have in
15 that situation would have said it's excited
16 utterance and the judge would have gone with it and
17 would have let the statement in. And that —
18 Q And that's — I'm sorry, go ahead.
19 A And that's why I feel like that I should have
20 gone that one other step because I don't think I
21 answered appropriately when she said it was hearsay.
22 Even though I'm saying it's I think it was
23 non-testimonial but based on the case law, I should
24 have come back and — I was wrong for not saying
25 it's excited utterance. The judge might have denied

PW - S. AXELROD - CROSS

1 that, and I don't know what the judge would have
2 done but I should have said that.

3 Q Okay. And you're speculating that you think the
4 State would have done that had the situation been
5 switched?

6 A I've had it happen to me so it's — I'm just
7 saying that, you know, what I think I did wrong was
8 I didn't say it's an excited utterance and I should
9 have and that's just the one thing I didn't say.

10 Q Sure. Now have you had a chance to see the
11 appellate opinion?

12 A I was sent a copy when it came out.

13 Q Okay. And you're aware that they found that you
14 preserved the issue of the suppression of the
15 statement of the roommates and that it was properly
16 preserved and that they also found that it was
17 proper not to have been allowed?

18 A I know they said I did the preservation of the
19 issue and, yeah, they for whatever reason they said
20 that shouldn't have come in; but I still go back to
21 say that if I had called it an excited utterance, if
22 I had done that, I don't think the court could have
23 come back with the answer that they came back with
24 because in actuality their statement to the police
25 was an excited utterance.

PW - S. AXELROD - CROSS

1 Q Okay.

2 A It was.

3 Q But the Court of Appeals found that there was no
4 merit in the argument that that statement, those
5 statements, should have come in and been allowed
6 under the arguments that you made?

7 A Well, they were saying for whatever have reason
8 they said that they were, I guess, testimonial.

9 Q Okay.

10 A And but they never got that issue — I mean, they
11 might work very well have said the same thing if I
12 had said it was excited utterance.

13 Q Right.

14 A But the reason we're here today, I guess, is for
15 me to tell you that I should have taken that one
16 last step that I did not take; and if I was to do
17 again, I would take.

18 Q And we are looking at what you did that day, not
19 hindsight, so we are looking at the actual
20 effectiveness of your representation that day so —

21 A Well, I don't think I was effective for not
22 raising that issue of excited utterance.

23 Q Sure.

24 A That's just my opinion there.

25 Q Okay. And you were able to talk to the — or

PW - S. AXELROD - CROSS

1 excuse me, in regards to your concerns over the
2 credibility of Ms. Savin or Snowden, however her
3 name is, there were two additional witnesses that
4 kind of corroborated her testimony that said they
5 saw Mr. Garner after the beating with blood on him
6 and with a gun; is that not right?
7 A Correct, and that Mustang.
8 Q But they said that they saw him with blood on
9 him, that he had a gun wrapped in a shirt?
10 A Right.
11 Q That he wanted money, that he wanted —
12 A Correct, in that Mustang.
13 Q Sure.
14 A And that's what I go back to saying is that if he
15 had blood on him there would have been blood in that
16 Mustang.
17 Q And the testimony was that he also had clothes
18 that had blood on him that he ended up burning?
19 A Yes.
20 Q Okay. There was a co-defendant in this case, was
21 there, Lee Pierce?
22 A If you say so.
23 Q I mean, Mr. Garner was not alleged to have gone
24 into the home on his own?
25 A Right, right.

PW - S. AXELROD - CROSS

- 1 Q There was another gentlemen?
- 2 A There was three people.
- 3 Q And this -- the lady was one of them?
- 4 A Right, Mr. Pierce was --
- 5 Q Lonya was one of them. Mr. Pierce was the
- 6 second.
- 7 A Yes.
- 8 Q Mr. Garner was the third. And in fact, one of
- 9 the witnesses what testified to corroborate Lonya's
- 10 can't's story was a relative and cousin of
- 11 Mr. Pierce; is that right?
- 12 A Yes, I recall something to that effect.
- 13 Q Okay. In regards to the mention of CI, did you
- 14 have a chance to look at the fact that it was
- 15 briefly mentioned one line in the other almost three
- 16 hour cross-examination that you had of Ms. Lonya?
- 17 A Say that again please.
- 18 Q I believe the applicant's raised issues that she
- 19 referenced being a CI?
- 20 A Okay.
- 21 Q It was mentioned once during the almost three
- 22 hour cross-examination that you had of her?
- 23 A Okay.
- 24 Q Do you recall that?
- 25 A No, but if you say so I will believe you.

PW - S. AXELROD - CROSS

1 Q Okay. And that was not anything that the State
2 used in their testimony, direct, to try to point the
3 finger at Mr. Garner, was it?

4 A I don't know if it was used in the closing
5 argument at all, but I understand your point. I
6 would say I would agree with there, but I don't know
7 if they extrapolated that into the closing argument.
8 I would have to look at that.

9 Q And this was not a case in which she was a CI for
10 a drug buy. The CI part was not related necessarily
11 to this case at all. Wasn't it actually an issue of
12 why she knew the name of a policeman when she called
13 9-1-1?

14 A I agree that she, she said she had some kind of
15 relationship with somebody that, I guess, she had
16 worked with or something.

17 Q And why she specifically asked to speak to this
18 one particular cop when she called?

19 A Yes.

20 Q Okay. About the Allen charge, is it your
21 understanding that -- or let me strike that and go
22 back. The questions from the jury came in after
23 they'd only been deliberating two hours; is that
24 correct?

25 A That's what I read in the transcript today.

PW - S. AXELROD - CROSS

1 Q So at that time this was a murder case, an armed
2 robbery — or excuse me. At that point the judge
3 had directed a verdict for you on armed robbery and
4 was only going to charge him with attempted armed
5 robbery; is that right?

6 A I guess, yeah.

7 Q So you made all the directed verdict motions and
8 argued those?

9 A Yes.

10 Q Okay. And preserved those to your best of your
11 ability?

12 A I think I preserved most of the issues in this
13 case.

14 Q Okay. And the jury had gone back and come back
15 with a couple of questions; is that right?

16 A I think they came back with a reasonable doubt
17 question.

18 Q Okay.

19 A And they came back with a question as to if they
20 were unable to have a unanimous verdict of guilty
21 would they have to find him not guilty.

22 Q And at that time did you discuss with your client
23 what an Allen charge was when y'all heard the
24 information or the question that they had come back
25 with?

PW - S. AXELROD - CROSS

1 A Well, let me — I'm confused now. If the judge
2 — are you asking me that if the judge told us he
3 was going to give an Allen charge did I then explain
4 that to my client?

5 Q I guess in the time period in which he either
6 gave the Allen charge, when you heard the jury
7 question or afterwards, did you have a chance to
8 talk with him about that?

9 A It would be — it would be my custom to speak to
10 him prior to that. If I know that a judge is going
11 to give an Allen charge I would explain to my client
12 what they're trying to accomplish by the Allen
13 charge.

14 Q In your experience an Allen charge after a two
15 hour deliberation for a verdict or two hour
16 deliberation for a murder trial, is that very long
17 deliberation?

18 A No, I think the Allen charge should not have been
19 given.

20 Q Did you object to it?

21 A I don't know if he had us in chambers, I don't
22 know if it's on the record, but I would have — I
23 object, I object to an Allen charge if the jury is
24 not out for at least four hours. Why would you, why
25 would you lean on them like that? I mean, because

PW - S. AXELROD - CROSS

1 it shows that they're deliberating, you know, they
2 reached an impasse. And a lot of times I've seen a
3 lot of judges just tell them, he'll bring them out
4 and say, listen, we're at an impasse but please go
5 back, and actually not do an Allen charge, maybe
6 like a little teeny weenie modified one and say just
7 go back and see if you can work through it. And
8 then if they come back with another note of an
9 impasse, then I think it's proper. The judge will
10 look at me say and say, I'm gonna do an Allen
11 charge. Cottingham wanted to move this case so
12 'cause two hours is -- I don't know if you've seen a
13 Judge Cottingham Allen charge, but it's unique in
14 itself.

15 Q Okay. Let me ask you about the specific question
16 that the jury asked in this situation. If the jury
17 is not in a position at this time to reach unanimous
18 verdict must our final decision in this case be not
19 guilty?

20 A I would have thought what should have been done
21 there was a note sent back, no, and just let the
22 jury keep deliberating.

23 Q Okay. You said that you think you talked about
24 it in chambers. There's no objection on the record.

25 A I guess I made a mistake.

PW - S. AXELROD - CROSS

1 Q So is that something you think you realized as
2 you prepared for this PCR?

3 A No. You're raising with me right now.

4 Q Okay.

5 A I'm agreeing with you I made a mistake there
6 because, you know, I realize a lot of times that
7 Judge Cottingham — and I love him to death; I
8 really like Judge Cottingham. I called him on his
9 birthday; he's 85 now. But you know, I just think
10 it was wrong what he did. I lost my train of
11 thought, I'm sorry.

12 Q That's all right. Now when he asked, and I guess
13 I'm trying to get clarification because you raised a
14 —

15 A I know what I was saying, I'm sorry if I'm
16 interrupting again. You know, a lot of times Judge
17 Cottingham liked to do a lot of things in chambers
18 and I try not to go back into chambers. And if it
19 was back there and it was discussed, and I guess I
20 didn't put it on the record but...

21 Q Okay. I guess I'm trying to get clarification
22 because and in this record it's pretty clear you
23 raised a number of objections.

24 A Yes, ma'am.

25 Q And at the end even after Allen charge any

PW - S. AXELROD - CROSS

1 exceptions or additions to the charge, none. So I
2 guess my question is to you at the time you didn't
3 think it was an issue?

4 A I might not have been paying attention to his
5 charge. I mean, really. I kind of read it today,
6 yesterday. Well, I read it I guess when I got the
7 transcript and re-read it today and saw the case law
8 that they gave me today; and you know, to be quite
9 honest with you, I sat here and I read it and I said
10 I'm learning something right now that I need to be
11 really particular in my attention to, how a judge
12 does give that Allen charge based on lowenfield
13 standards that they give right there.

14 Q Have you ever objected to an Allen charge?

15 A To be honest I might never have. Usually an
16 Allen charge, you know, is done verbatim. I guess I
17 think the judges have a judge book that has a
18 specific Allen charge in it. And you know, that's
19 why I said I think I learned something today that
20 maybe people add some things. But you know, Judge
21 Cottingham's Allen charge is different than most
22 because, you know, he leans real hard. Sometimes my
23 own opinion is that he tries to maybe, you know, in
24 a way make the jury feel stupid like, like, you
25 know, you need to come back with an answer, you need

PW - S. AXELROD - CROSS

1 to do this, you know, you're not stupid.

2 Q Now in the cases you read earlier provided by
3 Mr. Shaffer — I don't know if you had a chance to
4 review — but did in those not reference a
5 particular number of deadlocked 11 to 1 or
6 deadlocked 10 to 2?

7 A Yes, yes.

8 Q Did the jury reference a particular number or
9 issue with —

10 A Well, —

11 Q —in this case?

12 A And I don't remember this specifically, but I
13 talked to my former client about this, and he tells
14 me that when I came back to see him prior to the
15 Allen charge —

16 Q Mr. Axelrod, I hate to stop you. I'm just trying
17 to get your answer.

18 A I think —

19 Q Do you recall them coming back with a particular
20 number of how they were deadlocked in this
21 situation?

22 A No, but I think the judge was aware of it.

23 Q Okay.

24 A I don't think the note itself — and I'm not
25 sure. I'm not sure if the note referenced it.

PW - S. AXELROD - CROSS

1 Q So you don't have personal knowledge if the judge
2 was aware of it?

3 A Because I — well, I think the judge was aware of
4 it because according to my client I informed him of
5 the number. I'm only telling you what I was told by
6 my client, but I wouldn't have told my client
7 something if I didn't know know it. And I thought
8 the note would have been part of the court's record,
9 but the — Mr. Luther's attorney told me that he
10 couldn't find that. And maybe it wasn't the note
11 but, so, and I thought maybe the note would be
12 downstairs in this courthouse actually in the file.

13 Q Okay.

14 MR. SHAFFER: Your Honor, I, just for the
15 record I did check on it and they don't have any of
16 the exhibits downstairs. They have reference to
17 them by they weren't able to find any of the actual
18 exhibits.

19 THE COURT: You mean none of them?

20 MR. SHAFFER: Yes, Your Honor.

21 THE COURT: I mean, there are no exhibits
22 from this trial?

23 MR. SHAFFER: Your Honor, that's what —
24 well, they told me they exist but —

25 MS. WHITE: Storage probably.

PW - S. AXELROD - CROSS

1 MR. SHAFFER: No, they didn't say that.
2 They said they exist and I could check back later,
3 but they found the receipt. They went to a book
4 that had the receipt and the receipt for this
5 particular trial was missing out of it so they
6 weren't able to locate the receipt or where these
7 are.

8 MS. WHITE: And Your Honor, I will note
9 that in the record there's a remittitur where they
10 reference the fact that the 9-1-1 tape was a State's
11 Exhibit 1, Court's Exhibit 2, transcript video
12 interview, Defense Exhibits 1 through 12 and Defense
13 Exhibit 3 were at least provided during the appeal
14 and appeared to have been returned through that.

15 MR. SHAFFER: Your Honor, that certainly
16 doesn't mean those were all the exhibits as well.

17 MS. WHITE: No, I'm not, I'm not saying —
18 I'm just saying clearly at some point the exhibits
19 were put in the record, and they were available.

20 THE COURT: Okay.

21 MS. WHITE: Beg the Court's indulgence one
22 minute.

23 BY MS. WHITE:

24 Q One more question, in general your understanding
25 of a jury charge or court instruction, when it's

PW - S. AXELROD - CROSS

1 looked at it's looked at as a whole, is that right,
2 or do you cut, pick pieces out of it generally?
3 Maybe that's not a very clear question.

4 A It's not really. It's a compound question. Can
5 you simplify it for me a little.

6 Q Sure. When the appellate courts are looking at
7 the determination if a charge is proper or not, you
8 discussed harmless error up here earlier and talked
9 about whether or not things were objectionable, that
10 you thought were objectionable. In your past
11 experience a court instruction or jury charge, is it
12 looked at independent line by line, or is it taken
13 as a whole in review?

14 A I don't know if I can answer that question. I
15 might have to say I don't know really. I mean, I
16 think the best answer would be — I think sometimes
17 the courts, the appellate courts or supreme courts
18 mold and answer to what they want. Sometimes
19 they'll say something is harmless error based on the
20 overwhelming presence of, you know, guilt we'll say.
21 And I think that maybe in some instances if there
22 wasn't there then maybe that's not harmless error
23 but it could be the exact same error so I think, I
24 don't know.

25 Q Okay. Thank you very much. That's all I have

PW - S. AXELROD - REDIRECT

1 at this time.

2 THE COURT: Yes, sir, anything on
3 redirect?

4 MS. WHITE: Yes, Your Honor, a couple of
5 questions.

6 **REDIRECT EXAMINATION**

7 BY MR. SHAFFER:

8 Q Mr. Axelrod, you had talked about — well, first
9 of all, the attorney general had talked about a
10 confidential informant, correct?

11 A Yes.

12 Q She said that this wasn't a drug case, right, or
13 she asked you that question, right?

14 A Yes.

15 Q Do you think that if Lonya was a confidential
16 informant that would have been evidence of bias? Do
17 you think it would be discoverable?

18 A I would hope so; but in the course of my
19 practice, sometimes I've seen that it's not.

20 Q Okay.

21 A I would think it should be but...

22 Q Sometimes they don't turn it over; is that what
23 you mean by that?

24 MS. WHITE: Your Honor, I was going to say
25 that's testifying on his behalf I think.

PW - S. AXELROD - REDIRECT

1 THE COURT: Yeah, I mean, you don't turn
2 it over so they don't get killed; but I mean, you
3 know, go ahead. Yeah, don't testify if you would.
4 BY MR. SHAFFER:

5 Q Well, if Lonya was working off charges, if she
6 was, —

7 MS. WHITE: And Your Honor, this is
8 speculation. He's already said that they have no
9 evidence. I don't think that we can get into the
10 prob— if she was and if that affected.

11 MR. SHAFFER: But I mean, all I'm saying
12 is that it will be evidence of bias if she's working
13 on a murder, if she's working off charges you come
14 completely —

15 THE COURT: He can't know. Nobody knows.

16 MS. WHITE: No foundation for that
17 question.

18 THE COURT: Yes. Sustained.

19 MS. WHITE: Thank you, Your Honor.

20 MR. SHAFFER: Your Honor, may I go to my
21 point in a different direction?

22 THE COURT: Yeah, as long as we don't talk
23 about her being a CI because the only person that
24 said she was a CI was her. And the only evidence
25 that, or the only discussion I've heard in here is

PW - S. AXELROD - REDIRECT

1 that she wasn't, so I mean I, you know. I mean,
2 I'll allow you some leeway 'cause I understand this
3 is something that — this is his shot but...

4 MR. SHAFFER: Well, I believe, Your Honor
5 I'll actually move on because I believe I can make
6 that in argument.

7 THE COURT: Okay.

8 BY MR. SHAFFER:

9 Q You've handled quite a few murder cases; is that
10 correct.

11 A I have.

12 Q Not all of them were trials, right?

13 A No, sir.

14 Q You've done a lot of pleas as well, right?

15 A I have. Usually if I plea a murder case it will
16 be — I never pled a murder straight up. I would
17 plead the murder negotiated to a certain amount of
18 years or manslaughter so that there's no issues of a
19 PCR down the line. I think if you're gonna go to
20 jail for 30 years you need to know that prior to
21 doing a plea.

22 Q And is 18 years generally a good plea offer in a
23 murder case?

24 A Yes, sir. And 'cause that would have taken it
25 down to, I guess, to manslaughter.

PW - S. AXELROD - REDIRECT

1 Q Generally on strong cases you have had plea
2 offers; is that correct?

3 A Well, when you say was it a good plea offer —

4 Q I'm not saying for this particular case. I'm
5 saying in general.

6 MS. WHITE: I would just object to the
7 relevance if it's not dealing with this particular
8 case.

9 THE WITNESS: Well —

10 MR. SHAFFER: Your Honor, I didn't bring
11 up the plea argument. I didn't bring that up. I'm
12 just going into —

13 THE WITNESS: Your Honor, can I clarify?
14 I want to make sure that I was heard properly.

15 THE COURT: All right. Well, let him
16 rephrase, rephrase that question and, I mean, ask
17 that question again.

18 BY MR. SHAFFER:

19 Q I am from Columbia so I apologize if I'm a little
20 bit off. But you generally get 18 years for murder,
21 18 year offers in murder cases out here?

22 A All right. I'm trying to understand. I want to
23 be clear on this though. It was a good plea offer
24 for Luther in theory 'cause 18 years is a low offer.

25 Q Okay.

PW - S. AXELROD - REDIRECT

1 A And so I got a little confused when you were
2 saying good. If they have a good case as an
3 example, if the State, in my opinion, if they have a
4 good case they'll offer me 30. They won't budge
5 from 30. If I get lucky I might get manslaughter
6 and 30. But if they come down to a number that they
7 come down to, that means that they have questions
8 about their case.

9 Q Okay. 'Cause an 18 year offer indicates to you
10 that they might have had questions about the case?

11 A Yes.

12 Q Okay. Now you have mentioned something about the
13 excited utterance. You believe you should have
14 objected to the excited utterance?

15 A No, I think I should have objected to the hearsay
16 and said it was an excited utterance —

17 Q Okay.

18 A 'Cause I think it fits within that exception even
19 with the amount of time between it, given who it was
20 given to, the police officer.

21 Q Now just in case, what year model is that
22 Mustang?

23 A You know, I don't remember. It was like, it was
24 like the new body style of it, but it was like the
25 ones from like '99 to '04, something. It was, you

PW - S. AXELROD - REDIRECT

1 know, it was when they redesigned it after the '80s.

2 Q Okay.

3 A If you know the year I might disagree with you,
4 but I don't remember.

5 Q Was it a very big car inside?

6 A No, the — I don't know. If you look at the
7 doors the Mustang always been long doors I guess,
8 but to get into the back of the Mustang itself is
9 hard. I mean, it's just a tight spot. It's — it's
10 a tight spot to get in.

11 Q You -- was there cloth on the doors? Was the
12 doors upholstered?

13 A There's cloth in that whole car. Every bit of
14 that car was cloth. There wasn't any leather inside
15 that car. The only vinyl in that car, I think, was
16 on the arm rest possibly.

17 Q Now I ask you this, what do you think is more
18 effective demonstration, me saying I'm walking
19 between the podium and this chair verbally, or me
20 actually showing it to you?

21 A It's demonstrative.

22 Q Because they get to see side, right?

23 A Yes.

24 Q And they get to see the type space, right?

25 A Yes.

PW - S. AXELROD - REDIRECT

1 Q And they get to see the cloth on the doors,
2 correct?

3 A They do, yes.

4 Q But they don't get to see that on a picture,
5 right?

6 A No. And I told you, I gave my close up for that.

7 Q And let me ask you this, you didn't really get
8 a — is it safe to say that Ms. Snowden you
9 impeached pretty well, correct?

10 A Best as I could at the time, yes.

11 Q And the other two witnesses didn't have as much
12 impeachment evidence against them?

13 A No, sir.

14 Q Okay. But if they would have seen inside of the
15 car do you think that would have contradicted their
16 statement?

17 MS. WHITE: Your Honor, speculation.

18 THE COURT: Yeah, sustained.

19 BY MR. SHAFFER:

20 Q And just one followup. The inside of the — or
21 tell me this, did both of those other two witnesses
22 say he was riding in that car with bloody clothes?

23 A They did.

24 Q Okay. Now whenever you said you might have
25 talked to Judge Cottingham in chambers and told him

PW - S. AXELROD - REDIRECT

1 that, or told him that you didn't think that they
2 should be charged with the Allen charge, you weren't
3 objecting to a particular language at that point,
4 were you?

5 A No, just the event itself.

6 Q Okay. And for clarification, are you saying that
7 you are denying that or that you — tell me this,
8 are you saying that you didn't, didn't talk to him,
9 that that couldn't have happened about the Allen
10 charge about the division of the jury? You did talk
11 to Luther about that, or are you saying you don't
12 recall talking to Luther about that?

13 A I don't recall. I don't. I honestly don't
14 recall that conversation; but you know, I wish we
15 had that note 'cause I thought usually the notes
16 become court's exhibits.

17 Q Uh-huh.

18 A But that note very well might have had it on it;
19 I don't remember.

20 THE COURT: By the way I'm told the
21 exhibits are downstairs.

22 MR. SHAFFER: Okay, they are? Your Honor,
23 I did go downstairs and ask for them earlier, I
24 apologize.

25 BY MR. SHAFFER:

PW - S. AXELROD - REDIRECT

1 Q But you have no reason to doubt that conversation
2 took place with you and Luther about the division of
3 the jury?

4 A No, it — no, I have no reason to doubt it.

5 Q Okay. Now you said Judge Cottingham has a unique
6 way of giving an Allen charge, right?

7 A He does.

8 Q Okay. And you refer to it as leaning on the
9 jury, right?

10 A I did.

11 Q And could you clarify what you mean by the unique
12 way, the unique way of giving an Allen charge?

13 A I could. You want to hear it?

14 THE COURT: No.

15 MR. SHAFFER: No, Your Honor.

16 THE COURT: I got it in the transcript.

17 THE WITNESS: I didn't think the judge
18 wanted me to answer that so.

19 MR. SHAFFER: No further questions.

20 MS. WHITE: Nothing from the State, Your
21 Honor.

22 THE COURT: Okay, thank you, sir. You can
23 step down.

24 THE WITNESS: Your Honor, may I be
25 excused?

1 THE COURT: Any objection?

2 MR. SHAFFER: No.

3 MS. WHITE: No objection from the State,
4 Your Honor.

5 MR. SHAFFER: Your Honor, before he is
6 excused though, Your Honor, based off of what we
7 have previously done I just won't to make sure that
8 the State is okay with it, or what we have
9 previously talked about. I'm also moving to amend
10 based off excited utterance. I mean, he
11 specifically said that and I put the State on notice
12 of it and apparently my written thing merely
13 mentions chambers I believe. I don't think it
14 mentions excited utterance, Your Honor.

15 THE COURT: Okay. Well, I'll allow the
16 15(b) amendment to conform to the evidence.

17 MS. WHITE: And Your Honor, I will just
18 ask if there's some particular issues there may be,
19 since several things have been raised here today, we
20 may be allowed to brief if it's necessary.

21 THE COURT: Okay, that'll be fine.

22 MR. SHAFFER: And Your Honor, also the car
23 issue as well for ISC appellate counsel as well.

24 THE COURT: Okay. Yes, sir, you can call
25 your next witness.

PW - R. HOPKINS - DIRECT

1 MR. SHAFFER: At this time the Applicant
2 calls Rosa Hopkins.

3 THE CLERK: Would you raise your right
4 hand, place your left hand on the Bible.

5 WHEREUPON,

6 ROSA HOPKINS,
7 having been duly sworn by the Clerk,
8 testified as follows:

9 THE CLERK: Have a seat please, ma'am.
10 State your name for the court reporter.

11 THE WITNESS: Rosa Hopkins.

12 **DIRECT EXAMINATION**

13 BY MR. SHAFFER:

14 Q Ms. Hopkins, you're married to Luther Garner; is
15 that correct?

16 A That's correct.

17 Q All right. Where are you from?

18 A Jersey.

19 Q Okay. And you live there now?

20 A No.

21 Q Okay. Where do you live now?

22 A New York.

23 Q Okay. And what's your profession?

24 A Right now I'm in school.

25 Q Okay. And were you living with him at the time

PW - R. HOPKINS - DIRECT

- 1 this incident took place?
- 2 A Yes.
- 3 Q Where were you living at?
- 4 A [REDACTED] in Aynor.
- 5 Q [REDACTED] in Aynor, okay. And where were
- 6 you working at that time?
- 7 A J. Reuben Long.
- 8 Q And what were you working as?
- 9 A Correctional officer.
- 10 Q Okay. How long have you been a corrections
- 11 officer? How long were you a corrections officer?
- 12 A Over ten years.
- 13 Q Okay. If you could, where did you meet -- where
- 14 did you meet Luther?
- 15 A In Jersey.
- 16 Q Okay. And I'm gonna move this forward a little
- 17 bit. Are you aware that he was in a motorcycle
- 18 accident?
- 19 A Yes.
- 20 Q When was he in a motorcycle accident?
- 21 A Father's day 2002.
- 22 Q In 2002?
- 23 A Yes.
- 24 Q Was he injured?
- 25 A Yes.

PW - R. HOPKINS - DIRECT

- 1 Q How was he injured?
- 2 A He broke both his legs.
- 3 Q Okay. Did he heal up correctly? I mean, is he
- 4 fine now?
- 5 A No.
- 6 Q Was he disabled because of it?
- 7 A He still is.
- 8 Q Okay. And how is he disabled?
- 9 A He has rods and pins in both his legs.
- 10 Q Have you seen him — well, tell me this, have you
- 11 ever seen him be able to do strenuous work? Can he
- 12 pick up a chair or couch?
- 13 A No.
- 14 Q Okay. Ever seen him be able to move furniture?
- 15 A No.
- 16 Q Do the pins in his leg affect his mobility?
- 17 A Yes.
- 18 Q Okay. And would you say he was capable of
- 19 picking you up?
- 20 A I wish, but no.
- 21 Q Okay. Would you say he was capable of dragging
- 22 something that weighed 170 pounds?
- 23 A No.
- 24 Q And that's because of his legs?
- 25 A Yes.

PW - L. GARNER - DIRECT

1 Q No further questions.

2 THE COURT: Anything?

3 MS. WHITE: Nothing, Your Honor.

4 THE COURT: All right, thank you, ma'am.

5 You can step down.

6 MR. SHAFFER: Applicant calls Luther

7 Garner to the stand.

8 THE COURT: All right.

9 THE CLERK: Please raise your right hand
10 and place your left hand on the Bible.

11 WHEREUPON,

12 **LUTHER GARNER,**

13 having been duly affirmed by the Clerk,

14 testified as follows:

15 THE CLERK: State your name for the Court
16 please, sir.

17 THE WITNESS: Luther Garner.

18 **DIRECT EXAMINATION**

19 BY MR. SHAFFER:

20 Q Good afternoon, Mr. Garner.

21 A Good afternoon.

22 Q You're currently at Lee Correctional Institution,
23 right?

24 A Yes, sir.

25 Q You're currently living there, housed there?

PW - L. GARNER - DIRECT

- 1 A Yes, sir.
- 2 Q Okay. And what is the sentence you're currently
- 3 under?
- 4 A Forty years.
- 5 Q Forty years. How old are you, sir?
- 6 A 46, 47 this month.
- 7 Q And you're -- which is your projected max-out
- 8 date?
- 9 A 44 I think. I'm not sure. I don't pay attention
- 10 to it.
- 11 Q Okay. How old were you when you went in?
- 12 A 41.
- 13 Q So rough math, would I be correct in saying
- 14 you'll be 81 whenever you finish your sentence?
- 15 A Correct.
- 16 Q If you live that long?
- 17 A Correct.
- 18 Q Okay. Now I know you were represented by
- 19 Mr. Axelrod.
- 20 A That's correct.
- 21 Q When did you first get -- or when did you first
- 22 get appointed to him, or he was appointed?
- 23 A I think 2005 December sometime.
- 24 Q And you discussed the case with him?
- 25 A Yes.

PW - L. GARNER - DIRECT

- 1 Q You discussed plea offers with him, right?
- 2 A Yes.
- 3 Q What was the plea offer on your case?
- 4 A First a life sentence, then 25, then 18.
- 5 Q Okay. And you decided not to take the 18?
- 6 A None of them.
- 7 Q You regret that decision?
- 8 A No.
- 9 Q Okay. Now — well, tell me this, you had a
- 10 co-defendant, right?
- 11 A Yes.
- 12 Q And who was your co-defendant?
- 13 A Alonzo Lee Pierce.
- 14 Q And was one of the witnesses against you we've
- 15 talked about, Lonya, was she charged with anything
- 16 in this?
- 17 A No, she was not.
- 18 Q Did she allege that Alonzo struck the victim at
- 19 all?
- 20 A No, no.
- 21 Q She just claimed that you struck the victim,
- 22 right?
- 23 A That's correct.
- 24 Q Alonzo sells crack, right?
- 25 A That is correct.

PW - L. GARNER - DIRECT

1 Q Okay. And there was testimony from Lonya that
2 she did crack cocaine, right?

3 A Correct.

4 Q Okay. Now I know you've done a great bit of work
5 on this.

6 A Yes.

7 Q And you've also, you know, sent me lot of pro se
8 filings. Let's go through a couple of the issues
9 that you had, okay.

10 A Yes.

11 Q You had mentioned something about the other two
12 witnesses.

13 A Yes.

14 Q What do you — what do you believe concerning the
15 other two witnesses, not Lonya but the other two
16 witnesses that saw you with blood in the car? Do
17 you feel their statements are consistent?

18 A No.

19 Q How are they not consistent?

20 A Because I feel like at during trial the solicitor
21 was telling them what to say. I felt it wasn't
22 consistent because they were lying.

23 Q Okay. But they actually both said that they were
24 alone with you when you burned the clothes, right?

25 A Yes.

PW - L. GARNER - DIRECT

1 Q Okay.

2 A No, the witnesses were secluded, okay, so they
3 didn't hear each other's statements. When one of
4 them came in they said only me and them was
5 together, and they seen clothes get burned at a
6 pile. They said they seen the same gun get hidden
7 or whatever. They said the same thing both times,
8 and me and them was only supposed to been together
9 no one else there. Then the next witness came and
10 said the exact same thing so that led me to believe
11 that they was being told what to say because neither
12 one of them happened for them to get that mixed up.

13 Q And so both of them basically testified
14 inconsistent with each other?

15 A Correct.

16 Q Do you think Mr. Axelrod did a good job of
17 bringing that out?

18 A No.

19 Q Okay.

20 A I think the way things was going in my trial that
21 they were handling -- Mr. Axelrod, he knows what he
22 know, he's good at what he know, and I think he got
23 frustrated with the situation that was going on at
24 hand because he missed a couple of things that I
25 seen and after reading the law shouldn't have been

PW - L. GARNER - DIRECT

1 allowed or he should have objected to.

2 Q What things are you talking about not the stuff
3 that we discussed already but...

4 A The stuff that we say -- what things are we
5 talking about?

6 Q Yeah, is there anything I didn't cover?

7 A Well, the point that no one, no one said that
8 about as long as you being a CI, okay. Well, she
9 expressed that no one said anything about it; but
10 after doing homework, she testified that her real
11 name was Lonya Snowden. First of all, it's Lonya
12 Chapin, not Lonya Snowden. And Mr. Axelrod did not
13 have that name so how could he investigate her
14 background, okay. And as far as if the department,
15 the police department that is investigating with
16 this witness have knowledge of it, it's imputable to
17 the solicitor. It's imputable to the solicitor with
18 the same police force that's investigating the
19 murder. And it's a Fitzgerald versus Bass case,
20 6 -- it's a Virginia case, application 38366
21 Southeast 2(d) 65 1988 states that when law
22 enforcement agency investigating the crime has
23 actual knowledge of impeaching evidence regarding a
24 State key witness is the knowledge imputable to the
25 solicitor; and the answer is clear, yes.

PW - L. GARNER - DIRECT

1 Q All right, this tell me this, and I think I
2 raised that a little bit in the -- I cited to a
3 different case, but I believe I've already -- we
4 already discussed whether it's imputable or not.
5 But you had said that -- well, who were you housed
6 with when you were locked up?

7 A I was housed with Charles Odom.

8 Q Okay. And Mr. Odom was originally gonna be a
9 witness against you; is that right?

10 A Yes. Mr. Odom was going to be a witness against
11 me. He had two burglary firsts.

12 MS. WHITE: Your Honor, I would object to
13 the relevance of this and also to his knowledge.

14 THE COURT: Well, I'm not sure it's
15 relevant. I'm gonna give you a little lee way.
16 Just ask him how he knows.

17 BY MR. SHAFFER:

18 Q How do you know he had burglary charges?

19 A Because I know him personally. I seen his
20 paperwork.

21 Q Okay. And how do you know that he was going to
22 be a witness against you?

23 A Because I got his trans-- his court transcript
24 sent to me by mistake from the courthouse so I had
25 the whole complete transcript. And after that he

PW - L. GARNER - DIRECT

1 had got released from the county, which he was in my
2 pod. I read the whole transcript with the judge,
3 the solicitor, Mr. Richardson that did my case where
4 he informed the judge that he's being housed with a
5 murder and that he will be testifying for the State.

6 Q But at some point —

7 MS. WHITE: I'm sorry, I just want to note
8 that I don't believe his name is listed as a
9 potential witness at the beginning of the
10 Applicant's trial by the State, unless they can
11 point me —

12 BY MR. SHAFFER:

13 Q Did he testify against you?

14 A He did not testify.

15 Q Did you tell him anything that would warrant him
16 to testify against you?

17 A No, his name was on document.

18 Q Do you know the content of what statement he
19 would have given?

20 A Well, I called my attorney to let him know that I
21 had the transcript in possession, that Mr. Odom was
22 going to testify for the State. Mr. Odom had got
23 lock back up, and you know, I showed him his
24 paperwork and he said that Mr. Richardson offered
25 him a deal. He got out of jail and he'll be willing

PW - L. GARNER - DIRECT

1 to give a statement to my attorney. So I called my
2 attorney and he gave my attorney a written and
3 recorded statement.

4 Q But he didn't end up testifying against you?

5 A But he did not end up testifying against me, but
6 I wanted Mr. Axelrod to have him testify to showing
7 that the extent that the State was willing to go to
8 get a conviction.

9 Q Okay. But would he have testified — the
10 statement that he gave — did you tell him anything
11 inculpatory against you saying that you did
12 anything?

13 A No, not at all.

14 Q Did you see any paperwork or letter saying you
15 did anything?

16 A Not at all.

17 Q In fact, you're innocent of this, right?

18 A Correct.

19 Q Okay. Tell me about your leg.

20 A I was in a motorcycle accident, as my wife says,
21 on Father's Day in New Jersey where I had broke both
22 legs, had the bones come out the skin, that couldn't
23 walk for two years and disabled me permanently.

24 Q Okay. And you're walking okay now — or, I
25 wouldn't say you're walking okay now; but you know,

PW - L. GARNER - DIRECT

1 you're walking now, right, without assistance?

2 A Yes.

3 Q At the time that this occurred were you walking
4 with assistance or without assistance?

5 A Without assistance.

6 Q Okay. But how long did you have, did you need
7 assistance to walk?

8 A Two years.

9 Q Two years? And when did this crime allegedly
10 occur?

11 A 2005.

12 Q Okay. And when did you get in the motorcycle
13 wreck?

14 A 2002.

15 Q Okay.

16 A Yeah, 2002, Father's Day.

17 Q Okay. At the time that this event allegedly
18 occurred were you limited in your mobility?

19 A Yes.

20 Q How were you limited?

21 A Because I, you can't walk a whole block. I can't
22 lift. My strength is just not in my legs because my
23 knees give out.

24 Q Okay. So you're saying you can't lift a whole
25 lot?

PW - L. GARNER - DIRECT

- 1 A Correct.
- 2 Q Can you drag a whole lot?
- 3 A No.
- 4 Q Do you think you would have been able to drag a
5 170-pound person?
- 6 A Not at all.
- 7 Q Okay. Now did you ever tell this, about the
8 disability, to Mr. Axelrod?
- 9 A Yes.
- 10 Q Did he ever bring it up at trial?
- 11 A No, he didn't.
- 12 Q Okay. But what did you tell him about the
13 disability?
- 14 A That I was in the accident and my strength, my
15 strength is just not in my legs, that I wouldn't
16 have been able to pull no grown man.
- 17 Q All right.
- 18 A Or lift him.
- 19 Q Okay. Now the jury started deliberating on the
20 31st, right? Okay?
- 21 A Okay, yes.
- 22 Q Is that correct?
- 23 A Yes.
- 24 Q And they broke for the night; is that correct?
- 25 A Yes.

PW - L. GARNER - DIRECT

- 1 Q And then they started deliberating on again —
2 A That morning.
3 Q —the next morning; is that right?
4 A Yes.
5 Q And do you recall if there was an issue with one
6 of the jurors the night before?
7 A Yes. One of the jurors' father was having a
8 operation on his heart, and she asked that as long
9 as that went well that she continue to be on the
10 jury. I think that was Ms. DePaul (ph), Susan
11 DePaul, number 73.
12 Q Okay. And did she ask to come in late that day?
13 A Yes.
14 Q Okay. So they started late?
15 A Yes. She said depending on what time she got
16 there would they have to use the alternate juror.
17 Q Okay.
18 A But she made it on time.
19 Q And prior to, do you remember the Allen charge
20 being given?
21 A Yes.
22 Q Did you meet with your attorney before that?
23 A No.
24 Q You didn't meet with your attorney before the
25 Allen charge was given?

PW - L. GARNER - DIRECT

1 A No.

2 Q I mean, do you remember, do you remember some
3 conversation with your attorney?

4 A When he came, when he came back and told me that
5 they was 11 to 1, that was — I don't know if that
6 was the same day as the Allen charge or not, but
7 that was, I was back in the holding area and they
8 came and told me that they were at 11 to 1. He
9 didn't know which way it was going to go.

10 Q Okay. You don't know if that was before or after
11 the Allen charge?

12 A I know it was before.

13 Q Okay. Do you think it was the day before?

14 A I don't recall that part.

15 Q Okay. But you know it was before the Allen
16 charge was given?

17 A Yes.

18 Q You sure it wasn't after the verdict was given?

19 MS. WHITE: Your Honor, I think he
20 testified to when he had a conversation.

21 THE COURT: Yeah.

22 THE WITNESS: It wasn't after the verdict.

23 BY MR. SHAFFER:

24 Q How much did you talk with Mr. Axelrod after the
25 verdict?

PW - L. GARNER - DIRECT

1 A Not much, not much 'cause they got me out of
2 here.

3 Q So you didn't talk to him really after the
4 verdict?

5 A No.

6 Q Okay. Did he come visit you?

7 A No. No, sir.

8 Q Okay. But you remember him saying it was 11 to
9 1?

10 A Yes, I do.

11 Q And regarding the 11 to 1 did he tell you
12 anything else in that conversation?

13 MS. WHITE: Your Honor, I think that we've
14 had the witness up here. This would be hearsay. He
15 was available to ask questions and he said he didn't
16 recall conversation.

17 MR. SHAFFER: No, Your Honor, he said he
18 didn't, he didn't have any recollection one way or
19 another. That's different than saying he didn't
20 recall a conversation.

21 THE COURT: Well, he can't testify about
22 what he said though. I mean, that would be hearsay
23 unless you can think of an exception I can't think
24 of.

25 MR. SHAFFER: Your Honor, I'm actually

1 arguing it not for — I'm arguing it not for the
2 truth of the matter asserted. I'm not arguing what
3 he actually said. I'm just saying that a
4 conversation took place.

5 THE COURT: About the Allen charge?

6 MR. SHAFFER: I just wouldn't want the
7 State to then get up here and try to claim that
8 somehow, you know, it's very unlikely that he would
9 have just said it's 11 to 1 and then left. I'm
10 basically asking for details to show to essentially
11 lend credibility to his story. I just don't want to
12 be hamstrung by that argument later on.

13 THE COURT: If you do I'll let you do
14 that. Look, I think —

15 MR. SHAFFER: Thank you.

16 THE COURT: I mean, an Allen charge like
17 that the judge — in my experience and it's only 12
18 years of it, but I would speak with the lawyers and
19 make the decision myself. I mean, I don't think the
20 defendant has any say one way or the other about
21 whether I'm going to give an Allen charge; but if
22 that comes back up, I'll let you re-open the issue
23 but I don't believe it will.

24 MR. SHAFFER: Thank you, Your Honor.

25 THE COURT: I mean, you know, the wording

1 in the Allen charge is the only thing I really want
2 to look at.

3 MR. SHAFFER: Okay. Thank you, Your
4 Honor.

5 THE COURT: Sure.

6 MR. SHAFFER: There is one factor that
7 involves the whether or not the judge questioned the
8 jury about the division as well, and that's one of
9 the factors in that.

10 THE COURT: Well, if he — you can ask him
11 that if he knows. I mean, it's just the problem is,
12 he can't testify — and you understand you can't
13 testify about what someone else says; that's
14 hearsay.

15 THE WITNESS: Well, actually I don't
16 understand, Judge, because that same situation
17 happened when I was in court and Judge Cottingham
18 informed Mr. Axelrod that if the person was there,
19 if I was there, that he allowed the witness to say
20 what somebody else said.

21 MR. SHAFFER: And Your Honor —

22 THE WITNESS: And they allowed it.

23 MR. SHAFFER: For clarification, that is
24 actually what he, the judge's ruling at one point.
25 He said that if he was party to the conversation

1 that they could get into any hearsay statements that
2 he was a party to. We haven't an issue raised that.

3 THE COURT: Did he raise that as an
4 exception to hearsay rule?

5 MR. SHAFFER: No, Your Honor. They're
6 just saying if he —

7 THE WITNESS: If I was present.

8 MR. SHAFFER: The applicant was present in
9 the conversation they allowed hearsay in, and I can
10 give you a cite to that if you like, Your Honor.

11 THE COURT: Yeah, I mean, but I can't let
12 it happen here. Two wrongs don't make a right —

13 MR. SHAFFER: Yeah, I understand.

14 THE COURT: —but I'll look at it.

15 MS. WHITE: Your Honor, the State would
16 argue that they allowed it in because it was a
17 statement against interest by party opponent.

18 THE COURT: Well, that's what I'm
19 wondering —

20 MS. WHITE: Right.

21 THE COURT: —if there's an exception
22 which should be in here.

23 MR. SHAFFER: It was a third party saying
24 it, Your Honor. It's not a party opponent. The
25 party opponent was just part of the conversation.

1 Third parties said it and Judge Cottingham thought
2 it was admissible.

3 THE COURT: A third party said what he
4 said in a conversation with another person?

5 MR. SHAFFER: No, Your Honor. Third party
6 said, third party is in a conversation with the
7 applicant. He -- third party said something.
8 There's three people in a conversation: The
9 witness, a third party, and the applicant. They let
10 the witness testify to everything the third party
11 said because of the fact that.

12 THE WITNESS: Right. I was there.

13 MR. SHAFFER: He was part of the
14 conversation.

15 THE COURT: All right. Well, I'm getting
16 too far forward.

17 MR. SHAFFER: I can give you a copy, Your
18 Honor.

19 THE COURT: Well, let me tell you, what
20 was -- was the statement that he testified to a
21 statement against interest? In other words, was the
22 statement against interest? I won't give exact
23 thing it might be but.

24 MR. SHAFFER: No, Your Honor, I don't
25 remember what it was. It was -- do you have --

PW - L. GARNER - DIRECT

1 THE COURT: If y'all —

2 MS. WHITE: I was going to say if he wants
3 to point to a particular one we might have a
4 different argument, but I'm not —

5 THE COURT: I'll look at it. Look, I'm
6 taking this home with me tonight and read it so I'll
7 get it.

8 MR. SHAFFER: Thank you, Your Honor.

9 BY MR. SHAFFER:

10 Q You were present for the Allen charge being read,
11 were you?

12 A Yes, I was.

13 Q Okay. Did you feel like the tone of the judge's
14 s voice was —

15 MS. WHITE: Your Honor, I think —

16 THE COURT: Yeah.

17 MS. WHITE: This is not be appropriate.

18 THE COURT: Sustained.

19 MR. SHAFFER: Thank you, Your Honor.

20 THE COURT: Have you ever had Perry
21 Buckner come up here and try a case? You'd think he
22 hated everybody in your courtroom 'cause he can't
23 hear, and he's ugly but.

24 MR. SHAFFER: Your Honor, I have had the
25 pleasure to actually try a case in front of Judge

PW - L. GARNER - DIRECT

1 Cottingham. It was an experience.

2 THE COURT: Yeah.

3 BY MR. SHAFFER:

4 Q All right. Mr. Garner, I know that you have done
5 quite a bit of work, and I've probably taken a lot
6 of the arguments you've made and sort of pulled them
7 apart in different directions where it's hard to
8 follow, but I want to ask you this. Is there
9 anything I did not cover? Specifically that I
10 didn't cover it, actual argument that I didn't
11 cover that you wanted to address here today?

12 A Yes. The improper comments by the solicitor and
13 the judge. You said you was going to go over the
14 whole Allen charge, the wording of it.

15 THE COURT: Yeah, I'm going to look at it
16 tonight.

17 BY MR. SHAFFER:

18 Q Which improper comments are you referring to?

19 A Just a second please.

20 THE COURT: Yeah, take your time.

21 THE WITNESS: Okay. Before the, before I
22 get to the improper comments by the solicitor I want
23 to go to the attorney for the direct as far as the
24 9-1-1 tape. That was on direct. Okay. Issue, that
25 was my issue too and —

PW - L. GARNER - DIRECT

1 THE COURT: That's something the solicitor
2 put into evidence, right?

3 THE WITNESS: Yeah. Yes, correct.

4 MR. SHAFFER: And I have argued that it
5 was ineffective assistance of appellate counsel not
6 to do that —

7 THE WITNESS: Oh, okay.

8 MR. SHAFFER: So if that's not the
9 argument, I just...

10 THE WITNESS: Well, was it the argument on
11 for them being that they failed to supply supporting
12 authority, what made it —

13 MR. SHAFFER: Yeah, they waived the issue
14 on it.

15 THE WITNESS: Banned —

16 MR. SHAFFER: —not citing. I believe
17 I've covered that, Your Honor.

18 THE COURT: Well, the way I look at these
19 things, he's obviously the most interested person
20 here in this, and I take their PCR application and
21 any amendments that you've done and that's what I'll
22 look at. So I mean, it's not — I guess what I'm
23 telling you, it's not necessary to tell me what you
24 put down because I'm gonna take that and read it
25 with the transcript. But if there's something you

PW - L. GARNER - DIRECT

1 want me to know —

2 THE WITNESS: Right, I want — wanted you
3 to know outside of that —

4 THE COURT: —you need to tell me.

5 THE WITNESS: —because being that I
6 never experienced this on a PCR application, I just
7 was, the solicitor improper comments, the judge
8 improper comments, and ineffective assistance of
9 counsel, I had no authority written with that.

10 THE COURT: Okay.

11 THE WITNESS: So I didn't know.

12 THE COURT: I got you.

13 BY MR. SHAFFER:

14 Q And the improper comments by the solicitor could
15 you point us to those.

16 A Yes. The first one I have is on transcript page
17 199.

18 Q Is that the first or second volume? Is that the
19 second transcript?

20 A Let me make sure.

21 THE COURT: It's got to be the second,
22 right?

23 THE WITNESS: Yeah, towards the closing.

24 MS. WHITE: Both go through like 200
25 something.

PW - L. GARNER - DIRECT

1 THE COURT: But isn't most of this —

2 THE WITNESS: It's closing.

3 THE COURT: Yes, it's the end. That's the
4 second one, okay.

5 THE WITNESS: Correct.

6 BY MR. SHAFFER:

7 Q And which lines are you referring to?

8 A 9 to 13 would be the first ones.

9 Q And could you read those lines? Do you have them
10 written?

11 A Correct. "I don't know why they didn't find
12 blood on the door handle, but I do know why they
13 didn't find it down here because he didn't strut
14 (ph) up his behind across the hall way. He beat the
15 fella to death. Guys, he beat the man to death and
16 he was bloody." All right, supporting authority I
17 have Matthew versus State, 565 Southeast 2d, 766,
18 South Carolina 2002. I also added the solicitor has
19 the ethical responsibility of refraining from
20 expressing to the jury his personal beliefs about
21 the merits of the case, D-R 7 106(c)(4) code of
22 professional responsibility. While the solicitor
23 should prosecute vigorously, State versus Davis, and
24 is not to convict a defendant, but to see justice
25 done. This argument must be — his argument must be

PW - L. GARNER - DIRECT

1 carefully telling so he does not appeal to personal
2 bias of the jury, nor calculate, to arouse passion or
3 prejudice to the jury. And Mr. Axelrod did not
4 object to that so I found him to be ineffective on
5 that.

6 Q So you believe that based off personal opinion
7 and passion and prejudice, that's the basis of the
8 argument?

9 A Yes.

10 Q Okay, all right. And now the next, did you have
11 any other ones?

12 A Yes. Where improper remarks during closing on
13 transcript 199, 14, line 14 through line 23.

14 Q And why do you think that's improper?

15 A Because the solicitor testified and vouching for
16 one of his witnesses.

17 Q Okay.

18 A For his credibility. At line 14 it says tell me
19 what program, what part of this that got him so
20 roweled up with Luther or Kareem, why is he so mad
21 to want to frame him or that is an independent
22 witness if there is one.

23 Q So the why value as to independent witness if
24 there is one is essentially improper?

25 A Right.

PW - L. GARNER - DIRECT

1 Q Okay. Now do you have any other ones? Do you
2 want to go through the next one?

3 A Well, transcript 202 line 8 through 18, where he
4 says, I mean, if Lonya, if she's making up stuff you
5 got a 50/50 chance on picking a revolver but you
6 already heard she, heard there was a shell casing, a
7 22 left behind. You men — I don't know women, two
8 maybe — if you know anything about a gun an
9 automatic kicks out a shell. A revolver will hold
10 it inside. She knew all of that; she was in there.
11 She was in there and she was up to a lot more than
12 she led on. Yes, she did a good bit of stuff to
13 minimize it and that ain't right to lie any time.
14 I'll tell you what ain't right, to turn somebody
15 loose who's capable of stuff as this right here." I
16 feel that as though the Solicitor not only bolstered
17 and vouched for the witness, but he impressively
18 invited the jury to decide the case based on fear
19 and speculation and constituted a arbitrary factor
20 affecting the defendant's guilt.

21 MR. SHAFFER: And Your Honor, actually I
22 would also cite the case State v. Liberte. I think
23 it's 99 South Carolina Court of Appeals case.

24 MS. WHITE: State v. what?

25 MR. SHAFFER: L-I-B-E-R-T-E. Essentially

PW - L. GARNER - DIRECT

1 it's saying you can't make arguments that puts the
2 burden of keeping the, keeping society safe on the
3 jury.

4 THE COURT: Okay.

5 THE WITNESS: Again, improper comments by
6 the solicitor, transcript 187, line 9 through 17
7 where the solicitor states, "You heard several
8 people tell you that, and I would submit to you
9 that's whose blood it was. It is, it is all DNA
10 could confirm whose blood it is and you all did not
11 check your common sense when you came in here. If
12 you need a SLED report to tell you that that's who
13 blood it came from that individual, then the battle
14 is already lost. That's who blood it came from.
15 That's who blood it is. Now that's the truth and
16 you can go back and listen to it." The solicitor
17 here gave his personal opinion and successfully
18 became a witness.

19 BY MR. SHAFFER:

20 Q And vouch for the credibility —

21 A And vouch for the credibility of the witness.

22 Nowhere in the transcript, nowhere in the motion of
23 discovery was there any evidence that say to place
24 me at that scene. No one ever said that that was my
25 blood but the solicitor, and I felt he violated me

PW - L. GARNER - DIRECT

1 by putting that thought into the jury's head. And
2 once again, Mr. Axelrod did not object to that.

3 Q And just to give the judge a little clarification
4 of that blood, at trial they testified that the —
5 they found a that spot that they tested for blood,
6 right? Do you recall that?

7 A Yes.

8 Q But they also didn't have enough for DNA test; is
9 that correct?

10 A Yes, they said they sent the sample to SLED for
11 DNA test but SLED said allegedly that there wasn't
12 enough to get a DNA.

13 Q So, and that was on the driver's seat, right, up
14 underneath the driver's seat?

15 A I think — no, under the passenger seat.

16 Q It was up underneath the passenger seat? Front
17 or back?

18 A Front.

19 Q And they said it was up underneath or?

20 A They said it was on the floorboard of it, said
21 they had found four specks of what assumed to be
22 blood, which was tested presumption for blood; but
23 when it got to SLED, they said they never had any
24 return stating whatever it was. We never seen any
25 physical paperwork stating that.

PW - L. GARNER - DIRECT

1 Q Okay.

2 A That's just what the solicitor stated.

3 Q And there's — other than that presumptive test
4 there was no indication that the blood came from the
5 victim?

6 A No. But they never did, they never sent samples
7 of none of the people involved to SLED to have that
8 —

9 Q They testified to that, right? They never sent
10 the samples of the people involved?

11 A Yes.

12 Q Okay. Were the — but they also testified that
13 they didn't have enough to even test that four
14 specks, right?

15 A They testified to it, but we never seen any
16 paperwork to it.

17 Q Okay. So you've never seen the letter, that's
18 what they testified to?

19 A Yeah.

20 Q Okay. Were they big specks or small specks?

21 A I don't know, but I can't — I don't.

22 Q You don't recall the picture or anything?

23 A Naw.

24 Q Okay.

25 A Said it was four.

PW - L. GARNER - DIRECT

1 Q Okay. Now back to your argument — I'm sorry I
2 got you off track. I just wanted to explain that
3 for the judge's —

4 A Right. Okay. The transcript 209, 10, 17 where
5 the judge comments. You've got — no, the solicitor
6 comments, I'm sorry. You've got a great burden.
7 I've had it, I've had this burden all week. I'm
8 about to fix, I am — but I am fixing to Ms. Lively
9 and Mr. Axelrod, this is about to go to you all.
10 You have got to do what is right. Remember the
11 judge told you, hey, you're not here to look for
12 reasonable doubt. That's your job, ain't it?
13 You're here to find the truth. I have solicitor
14 should not use arguments to inflame passion or
15 prejudice the jury. I feel I was violated in that.
16 Also, because it's coercing the jury with false
17 information and I think you went over that?

18 Q I believe I went over the burden shifting aspect
19 of it.

20 A All right. And that was that one.

21 MR. SHAFFER: And just for another cite,
22 Your Honor, I'll go ahead and hand up State v.
23 Gregory Daniels.

24 MS. WHITE: Yeah, I got that.

25 MR. SHAFFER: Yeah.

PW - L. GARNER - DIRECT

1 THE COURT: Okay.

2 THE WITNESS: Okay. Transcript 191, line
3 21 through 25. It says, "Pierce" — this is the
4 solicitor talking. Pierce is another matter for
5 another day. A jury just like you are going to hear
6 Lee Pierce, and they're going to have to make a
7 decision whether or not to turn Lee Pierce loose
8 because Lee Pierce is going to say it wasn't me, it
9 was Kareem, it wasn't me. It is improper for the
10 solicitor to insulate — insinuate to the existence
11 of the evidence noting in record once could not be
12 introduced without the privilege of
13 cross-examination. The supreme court has held that
14 the testimony hearsay against the defendant violates
15 the confrontation clause. If the witness is
16 unavailable for trial and has an opportunity for
17 cross-examination. That's Crawford versus
18 Washington. Mr. Pierce was the —

19 Q Your co-defendant?

20 A —co-defendant, once was not at trial. And
21 Mr. Richardson testified to what he would say, and I
22 felt that shouldn't have been done. And once again,
23 Mr. Axelrod didn't object to that once it's clearly
24 hearsay as I learned through the judge today and I
25 felt he should have objected to that.

PW - L. GARNER - DIRECT

1 Q And it's also a violation of your appellate
2 rights to confront the witness?

3 A Right, confrontation.

4 Q Okay. All right.

5 A Okay. The other one I have is transcript 197,
6 line 7 through 18. It states, "I want you to think
7 about something. We all have been to a funeral, a
8 wake. Well, we all heard, well, doesn't this person
9 look natural, at least he died in peace. I don't
10 know if this man had a momma or father, or we will
11 come back to that. He did not have a peaceful death
12 by any stretch of imagination, none whatsoever.
13 Broke nose, head split open, he's in pretty bad
14 shape, tortured. It would have been merciful to —
15 it would have been merciful. It would have been, it
16 would have been merciful to have shot him instead of
17 beating him to death. It takes somebody — when the
18 judge, when Judge Cottingham tells you about malice.
19 It takes a wicked person to constantly beat somebody
20 while they beg for their life. It takes a wicked
21 person to do that. That's malice for you." I have
22 improper comments by solicitor should not use
23 argument to inflame the passion or prejudice the
24 jury. ABC standards, justice 3-5 8(c), 2(d), 8(d)
25 1980. And I have Burger versus United States, a

PW - L. GARNER - DIRECT

1 federal case, 295 United States 78-88-55 as court

2 —

3 Q All right.

4 MR. SHAFFER: And the state case, I guess,
5 on point would be Clinton Northcutt, Your Honor.
6 There's also the golden rule violation in there as
7 well, Your Honor.

8 THE COURT: Okay all right.

9 THE WITNESS: Another is transcript 204,
10 line 23 through 24. "Luther Garner, the man covered
11 in blood is guilty of murder." The solicitor, any
12 representation to the solicitor's personal belief in
13 the guilt of the accused is improper, and he planted
14 that into the jury and I thought, I feel that
15 Mr. Axelrod should have objected to that as well.

16 BY MR. SHAFFER:

17 Q Okay. And what else do you have?

18 A I have transcript 200, line 2 through 5. "You've
19 got a picky killer over here. You've got someone
20 that's picky about what he's gonna wear. Maybe it's
21 too hot or too cold. Maybe it doesn't suit his
22 style." Once again, this solicitor is inputting his
23 personal opinion to the jury, and that's something
24 that's irrelevant to the guilt, to my guilt or
25 innocence, and just talking, putting the State of

PW - L. GARNER - DIRECT

1 South Carolina behind his statements to the jury.

2 Q Okay.

3 A Page transcript 192, line 16 through 21. Where
4 it states, "I'm telling you he was beating him, but
5 you ain't got to get to that conclusion. If he died
6 as a result of that burglary he's guilty. I'm not
7 asking you to take a leap of faith. There is
8 substantial evidence. Several people saw him
9 covered in blood." I feel the solicitor got on the
10 stand, that he partake in giving me my time where by
11 any means necessary he was trying to get a
12 conviction, where, I mean, he's telling the jury
13 that I was beating him like he was there, that he
14 seen me personally. And once again, the jury
15 looking to catch the attention of this is his job,
16 his views.

17 Q Okay. And do you have any other ones, or is that
18 it?

19 A That's it. The other ones are just for the judge
20 when he leading the jury and coercing the jury into
21 getting a conviction, pressuring the jury.

22 Q And you're saying that based off the Allen
23 change?

24 A That's based off the Allen charge 'cause when —
25 if the jury was 11 to 1, and Mr. Axelrod, like he

PW - L. GARNER - DIRECT

1 said, had no reason to come back there and tell me a
2 number like that, all right. I have my life is at
3 stake. I'm not gonna forget anything like that,
4 where he said 11 to 1. We come out; the jury sends
5 out the note. The judge, absolutely not. I'm
6 looking at his conduct. I'm looking at his
7 perseverance the whole day, and I see his rapport.
8 He absolutely, not no, not never. The jury, if I'm
9 looking at the jury sees it, so the one juror that's
10 holding out that's not in agreement with them is
11 catching, he's looking to catch his views. So
12 whether that his demeanor or not, she's looking to
13 catch his views and this is — and he speaks for the
14 State. Once he supposed to be neutral, there's is
15 nothing neutral about saying I feel that this is the
16 voluminous amount of evidence in this case, I ask
17 that you go back there and continue deliberating,
18 you know. So I don't know about the court terms
19 that's like go back there and find this guy guilty.
20 I've been doing this for a while, I'm the judge, and
21 I feel — and after the verdict has been reached he
22 clearly states that he felt that they made the right
23 choice, the right decision. So if the jury later on
24 had felt, well, maybe I shouldn't have changed my
25 vote, he just killed that, he just stopped that

PW - L. GARNER - CROSS

1 because he planted that in their head too. I'm the
2 judge and you guys did a great job, and the State of
3 South Carolina, I'm telling you that I want a
4 conviction today, not next week, not next year but
5 today, and the State of North Carolina is entitled
6 to this and the defendant is entitled to this. So
7 he goes on to say that a mistrial would be, an
8 unfortunate thing. Unfortunate for who? The State,
9 not the defendant. And that's why I felt that the
10 Allen charge was just leaning on the juror that was
11 the one, the one juror that wasn't in agreement,
12 that wasn't in agreement.

13 Q All right. Mr. Garner, I'm going to — please
14 answer any questions. I don't have anymore
15 questions for you, but please answer any questions
16 that the State has?

17 A Sure.

18 MR. SHAFFER: Thank you.

19 **CROSS-EXAMINATION**

20 BY MS. WHITE:

21 Q Mr. Garner, you testified there was a lot of back
22 and forth between your attorney and Lonya; wasn't
23 there? I think you testified that he tried to
24 cross-examine her about inconsistencies?

25 A Yes.

PW - L. GARNER - CROSS

1 Q He brought out that she used crack?

2 A Yes.

3 Q And that she was involved in some, maybe shady
4 dealings with some people?

5 A Yes.

6 Q Okay. And Mr. Axelrod went on for almost three
7 hours trying to cross-examine her about her memory
8 and these stories that she had told and where there
9 might be inconsistencies with who was at a location
10 or what location they went, you know, went to first?

11 A Yes, he showed a lot of inconsistencies of her
12 lies, correct.

13 Q Now you said that you didn't think he really was
14 able to that on the other two, and I believe that
15 was Mr. Graham and Mr. Pierce is who you may be
16 referencing?

17 A Yes.

18 Q Okay. Now he did bring out that both of them had
19 prior records; did he not?

20 A Both of who?

21 Q That Mr. Pierce, during his testimony he asked
22 him about a prior arrest or conviction?

23 A Right.

24 Q And I believe Mr. Graham as well; is that right?

25 A Yes.

PW - L. GARNER - CROSS

1 Q Okay. He also tried to talk to them about their
2 statements about the fact that at one point somebody
3 said you had co— I mean, that Lee, the
4 co-defendant, had like coveralls on and different
5 shoes, and there were several things that were just
6 not consistent; is that right?

7 A Yes, that's right.

8 Q Okay. There was also some inconsistencies about
9 Lonya had said one of the gentleman had shown her a
10 gun before, he denied ever having a gun or showing
11 her a gun; is that right?

12 A Yes.

13 Q Okay. And that was all brought out to the jury?

14 A Yes.

15 Q Okay. Now you testified about the motorcycle
16 accident. In regards to getting that evidence in
17 front of the jury, when you talked with your
18 attorney about it did he talk with you about the
19 fact that you might have to testify to be able to
20 show the jury, talk about your injuries, and what
21 your abilities were?

22 A Well, we talked about it, but he told me that he
23 wanted the closing. He wanted to have the closing.
24 And after it went with Lonya, after the questioning
25 with Lonya, he decided that he wouldn't use me and

PW - L. GARNER - CROSS

1 he wanted go with Mr. Lewinsky.

2 Q Okay, so after her testimony during trial he
3 realized he needed to call Mr. Lewinsky to try to
4 make her look like a liar essentially?

5 A Essentially, yes, she lied.

6 Q And you also stated on the record, I think they
7 went through your right to testify and you told the
8 court that you did not want to testify; is that
9 right?

10 A I don't remember.

11 Q Okay. The court — you don't recall the court
12 going over with you your constitutional right to
13 testify?

14 A No, not offhand.

15 Q Okay. But if the record reflects that page 104
16 when the State rested and the judge directed a
17 verdict for you on the armed robbery charge, that
18 after that he reviewed with you your right to
19 testify, you would agree that probably happened?

20 A Yes.

21 Q Okay. Now your testimony is that your attorney
22 told you that the jury was 11 to 1. You didn't know
23 if they were 11 for you or 11 against you?

24 A No, 'cause he didn't express that to me.

25 Q Okay. And you said you didn't meet with him

PW - L. GARNER - CROSS

1 before the charge; but yet, you said that he told
2 you 11 to 1 before the charge?

3 A But I also told you that he came back, it was
4 before the Allen charge was given. I didn't know if
5 it was the day before or right before that same day.
6 That's what I said.

7 Q Okay. And I guess, it could be I wrote it down
8 wrong. I have that you said you didn't meet with
9 him before the Allen charge to discuss it, but then
10 you also said he gave you the information about 11
11 to 1.

12 A Right, that's when I corrected.

13 Q Before the jury charge?

14 A Correct.

15 Q So you did talk with him before the jury charge?

16 A Right, before the Allen charge, yes.

17 Q Okay. Excuse me, before the Allen charge, right.
18 Just one final question. You, at the sentencing
19 portion do you recall saying that you thank the
20 State for a fair trial?

21 A Yes, and that was being sarcastic.

22 Q Oh, okay. All right. Thank you.

23 MS. WHITE: That's all I have at this
24 time, Your Honor.

25 THE COURT: Anything else?

PW - L. GARNER - REDIRECT

REDIRECT EXAMINATION

BY MR. SHAFFER:

Q Just a few things. Mr. Garner, did your wife know your ability limitations?

A Yes.

Q Could she have testified to them?

A Yes.

Q Okay. And you had said that he didn't meet with you immediately before the Allen charge was given, right?

A Yes.

Q But you knew about it before the Allen charge?

A I knew definitely that Mr. Axelrod came back there and told me that it was 11 to 1. He didn't know which way, all right.

Q Could that have been the day before?

A Yes, it could have been the day before.

Q Okay.

A But I you know that's a fact that he told me that was 11 to 1.

Q No further questions.?

MS. WHITE: Can I just have one brief recross, Your Honor.

THE COURT: Brief.

RECROSS-EXAMINATION

PW - L. GARNER - RECROSS

1 BY MS. WHITE:

2 Q In regards to your wife, were you married to your
3 wife at the time?

4 A Yes.

5 Q Okay. And was she the one that you went to New
6 Jersey with after this alleged incident and where
7 the marshals had to pick you up?

8 A No.

9 Q Okay. So she — the testimony was presented that
10 you had been living with someone and that you went
11 to her house to go 'cause you wanted to be taken
12 back to New Jersey. That's not the woman we're
13 talking about?

14 A That's whose testimony?

15 Q The testimony at trial?

16 A That who gave?

17 Q If you will give me one second I'll go back and
18 look through it. I believe it was probably Lonya.

19 MR. SHAFFER: Marshal Cottingham. I
20 believe we're outside the scope of redirect.

21 THE COURT: Yeah, you probably are, but
22 you know, I mean, this is an important case is. I'm
23 willing to listen but.

24 MS. WHITE: I'll withdraw the question,
25 Your Honor, that's fine.

1 THE COURT: Okay. Thank you, sir, you can
2 step down.

3 THE WITNESS: Thank you.

4 THE COURT: Now we had some issues — do
5 you have another witness?

6 MR. SHAFFER: No, Your Honor.

7 THE COURT: All right. Y'all brought up
8 some issues, and I think at some point there was
9 some discussion about further briefing. You're
10 gonna need time to — do you have — specially with
11 the 15(b) amendments, do you need any time to add to
12 anything here?

13 MR. SHAFFER: Your Honor, with the — Your
14 Honor, I don't need any further time to add anything
15 to it.

16 THE COURT: Okay.

17 MS. WHITE: And Your Honor, we only would
18 request if you do need additional or want us to do
19 some additional research we'll be happy to do that.

20 MR. SHAFFER: And Your Honor, could I
21 briefly do a small, short summation?

22 THE COURT: Yeah, real brief. I mean,
23 I've got it all here. All I got to do is go through
24 because I've allowed you to amend and I've got
25 everything else, but sure.

1 MR. SHAFFER: And this is directly toward
2 the Allen charge issue only, Your Honor. I mean,
3 essentially what the judge did, he — Judge
4 Cottingham basically said, you know, that you will
5 be doing something wrong, you will be a bad juror if
6 you sat there and decided that you were not going to
7 agree with anyone else. He also pushed for the
8 verdict. I mean, there's four different factors
9 here. One is, you know, is related to essentially
10 saying that verdict has to be given. I mean, the
11 language relating to that is, everybody loses, the
12 system has failed, if you don't come back with a
13 verdict, you know. He also says, if you don't agree
14 on a verdict and it doesn't mean everybody wins, in
15 conclusion the State of South Carolina and the
16 people it represents are entitled to a verdict
17 today, they're — not tomorrow, not next week, not
18 next year. That specific language is inappropriate,
19 and I can — I will cite that in a brief, Your
20 Honor.

21 THE COURT: Okay.

22 MR. SHAFFER: And I believe the polling is
23 inappropriate as well.

24 THE COURT: Okay.

25 MR. SHAFFER: Thank you.

1 THE COURT: And I'll take into account
2 everything I read. Obviously this is one I'm gonna
3 have to take home and spend most of the time with.

4 MS. WHITE: And I guess just for
5 clarification, he said he was going to cite it in
6 the brief. I thought we were not briefing. Did I
7 mishear that?

8 MR. SHAFFER: Do you need briefs, Your
9 Honor?

10 THE COURT: Heck no, I got enough here.

11 MS. WHITE: I thought he said he cite it
12 in a brief.

13 THE COURT: He did, but I'm assuming that,
14 look, I'll let you go. We've been doing this for a
15 while. I mean, Mr. Garner seems like a very
16 intelligent man, and he's gone through this and
17 spent a lot of time thinking about it and I
18 understand that. And I'm gonna give it — I'm not
19 gonna just flip through it. I don't do that.

20 PETITIONER GARNER: Thank you, Your Honor.

21 THE COURT: I mean, quite frankly, every
22 judge in this state will tell you that there are
23 some that you flip through and you understand; but
24 I'm not going to do that on this one. I'll look at
25 it. I need you to just answer me this, and I let

1 him go. I didn't mean to let him go before I asked
2 this question. Did I hear Mr. Axelrod say that
3 Judge Cottingham cut him off from his
4 cross-examination because he was making* hay?

5 MR. SHAFFER: It was something to that
6 effect, Your Honor. He — what's happened in the
7 transcript is he said essentially, well, I'm going
8 to tell you this, you have ten more minutes, it
9 might have been 15, I can't recall, but at that
10 point we're stopping. And that's the end of it.

11 MS. WHITE: And that would have been a
12 couple of things before that where they had
13 mentioned time and things.

14 MR. SHAFFER: And then at that point he
15 goes — well, I'll just go ahead and ask one more
16 question then and he asked one more question and I
17 think he interpreted the motive behind the judge as
18 possibly cutting him off because of the fact he was
19 making hey, Your Honor.

20 THE COURT: Okay, all right. Thank y'all.
21 I'll read everything I got.

22

23 * * * END OF REQUESTED TRANSCRIPT OF RECORD * * *

24

25

C E R T I F I C A T E O F R E P O R T E R

STATE OF SOUTH CAROLINA }
COUNTY OF FLORENCE }

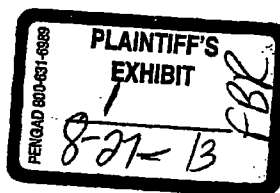
I, FRANCES BAKIS-RAY, Registered Professional Reporter (RPR), court reporter for the State of South Carolina, Third Judicial Circuit, do hereby certify that the foregoing proceeding is a stenographic report and was transcribed through computer-aided transcription; that the foregoing transcript contains a true record of the proceedings.

I further certify that I am neither counsel for, nor related to nor employed by any of the parties connected to the action, nor am I financially interested in the action.

Witness my hand at Florence, South Carolina, this 26th day of September, 2014.

Frances B Ray

FRANCES BAKIS-RAY, RPR



Recharge

220

1 gentlemen, proof beyond a reasonable doubt is proof that
2 leaves you firmly convinced of the Defendant's guilt. There
3 are very few things in this wide world that we know with
4 absolute certainty and in criminal cases the law does not
5 require proof that overcomes every possible doubt. If based
6 on your consideration of the evidence, direct and
7 circumstantial, you are firmly convinced that the Defendant
8 is guilty of the crime charged you must find him guilty. If
9 on the other hand you think there is a real possibility that
10 he is not guilty, you must give him the benefit of that doubt
11 and find him not guilty. Now, that is the reasonable doubt
12 charge. Proof beyond a reasonable doubt is proof that leaves
13 you firmly convinced of the Defendant's guilt and I emphasize
14 again there are very few things in this world that we know
15 with absolute certainty, and in criminal cases the law does
16 not require proof that overcomes every possible doubt.

17 Now, you have asked of me another question and I again
18 thank you for it. "If the jury is not in a position at this
19 time to reach a unanimous verdict, must our final decision in
20 this case be not guilty," and the answer is absolutely not.
21 Your verdict must be unanimous either guilty or unanimous not
22 guilty. In the event that you are unable to reach a verdict
23 then that's what we call a hung jury and that simply means
24 that nobody wins. It simply means that sometime in the
25 future some 12 folks chosen just like you will come into this

Recharge

221

1 courtroom, basically hear the same testimony, some jury just
2 like you will hear the whole thing again and that issue will
3 then be resolved. I have no reason to suggest or suspect
4 that I will ever get 12 more people more dedicated, more
5 anxious to do their duty than you 12; and so, don't walk away
6 thinking that somebody wins and somebody loses. It means
7 everybody loses and our system has failed.

8 Now, I charge you as I only can the only mode providing
9 by our laws for a direct -- deciding questions of fact is by
10 a verdict of the jury just like you. In most all cases,
11 ladies and gentlemen, absolute certainty cannot be obtained
12 or expected where the matter is in dispute initially. It
13 isn't always even, easy for even two people to initially
14 agree; and so, when 12 people must agree it becomes
15 correspondingly more difficult. I tell you it is very
16 unusual for a jury to go out and to immediately or quickly
17 retain a verdict. You have only been deliberating two hours.
18 The case lasted three days. That's not unusual. You've got
19 a voluminous amount of matters to deal with. That is what
20 would happen if a jury was in agreement to begin with. At
21 the same time, ladies and gentlemen, we usually get a verdict
22 under our system of jurisprudence. So, while it is normal
23 for jurors to disagree at first, and I fully understand that,
24 we nevertheless get a verdict after the jury has laid aside
25 all extraneous or outside matters and have determined to try

1 this case on its merits and on the basis of the law and
2 evidence in this case, direct and circumstantial.

3 It has been said that jury service is perhaps the
4 highest service a citizen can perform for his or her own
5 country or state during peacetime, and I certainly agree with
6 that. However, a juror does not render good service who
7 arbitrarily says, "I know what I want to do in this case and
8 when everybody else agrees with me then we will write a
9 verdict and we will not write a verdict until that time." It
10 was never intended that the verdict of the jurors should be
11 the verdict of any one person, never intended for that. At
12 the same time I tell you that every juror has a right to his
13 or her own opinion, and if he or she needs, he or she need
14 not give up that merely for the purpose of being in
15 agreement. I would never say that to you. However, the
16 verdict of a jury is the collective reasoning of all jurors
17 and that is why we have a jury of 12. It is the duty of each
18 of a jury to tell the others how he or she feels and why he
19 or she may feel that way. Since the verdict of a jury is the
20 result of the collective reasoning, it can be said that a
21 verdict is a result of give and take. With this in mind, I
22 tell you that if the much larger of your number of panels are
23 in favor of one position a dissenting juror or jurors should
24 consider whether I not his or her position is a reasonable
25 one, which makes no impression upon the minds of the

Recharge

223

1 majority. In other words, if a majority of you are of one
2 position, the minority ought to seriously ask themselves
3 whether they can reasonably doubt the correctness of the jury
4 and judgment of the majority. Although the verdict to which
5 a jury agrees must, of course, be his or her own verdict, the
6 result of his or her own convictions and not merely
7 acquiescence in the conclusion of his or her fellow jurors,
8 yet in order to bring 12 minds to a unanimous result you must
9 examine the questions submitted to you with candor and with a
10 proper regard to and a respect for the opinions of each
11 other. You should also consider that you were selected in
12 the same manner from the same source which any future jury
13 will be and as I indicated a while ago there is certainly no
14 reason for me to suppose that this case will ever be
15 submitted to 12 people more intelligent, impartial and
16 competent than you and note there's no reason for me to
17 suspect that more or clearer evidence will ever be produced
18 on one side or the other. Ladies and gentlemen, in other
19 words a mistrial of this case is an unfortunate thing. If
20 you do not agree on a verdict of not guilty or guilty
21 unanimously it does not mean that everybody wins. It just
22 means that at some future time, at some future time, I will
23 try this case with some jury sitting just exactly where you
24 are, the same participants will come and the same lawyers
25 will ask basically the same questions and probably get

1 basically the same answers, and we will go through the entire
2 process again. In conclusion, if the State of South Carolina
3 and the people it represents is entitled to a verdict in this
4 case, they are entitled to it today, not tomorrow, not next
5 week, not next year. Equally important, if this Defendant is
6 entitled to a verdict, he is entitled to it today, not next
7 month nor next year, today, and so it is, Mr. Foreman, ladies
8 and gentlemen, recognizing that there are difficult issues
9 for you to consider, understanding the voluminous evidence
10 that has been in the trial of this case, I would ask that you
11 go back, continue deliberations, have a give and take between
12 the majority and the minority, however, however it falls,
13 would not ask anybody ever to give up their heartfelt
14 opinions, but at the same time, regardless of which side your
15 decision is on consider, too, the positions of the other side
16 to ascertain whether or not that position, be it in the
17 minority or majority, is a reasonable one.

18 Now, to emphasize several things that I've told you, you
19 are the sole and only finders of the facts. We will not be
20 trying this case on Boston legal or CSI or these things you
21 see on TV. That's not where the real world is in our system
22 of jurisprudence. You are to decide this case on the law and
23 the evidence heard in this courtroom and from no other place.
24 So, don't look for TV guidance. Look to the evidence in the
25 case. Give direct evidence and circumstantial evidence that

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Luther Garner, #322156,)
Applicant,)

Case No. 2012-CP-26-2015

v.)

ORDER OF DISMISSAL

State of South Carolina,)
Respondent.)

HORRY COUNTY
CLERK OF COURT
14 FEB -3 PM 1:57

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed March 13, 2012. Respondent made its Return on or about April 18, 2012. The Court convened an evidentiary hearing into the matter on August 28, 2013, at the Horry County Courthouse. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office represented Respondent.

Applicant's plea counsel, Stuart M. Axelrod, Esquire, ("plea counsel") testified at the hearing. Applicant also called his wife, Ms. Hopkins, to the stand. Finally, Applicant testified on his own behalf. The Court had before it a copy of the trial transcript, the records of the Horry County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief and amendment, and the return.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Horry County Clerk of Court. In March 2007, the Horry County Grand Jury indicted Applicant for murder (2007-GS-26-928), attempted armed robbery

(07-GS-26-1536), and first degree burglary (07-GS-26-927). Trial counsel was appointed to represent Applicant on these charges.

From May 29 to June 1, 2013, Applicant proceeded to trial before the Honorable Edward B. Cottingham and a jury. The jury found Applicant guilty as indicted on all three charges. Judge Cottingham sentenced Applicant to thirty (30) years for murder, thirty (30) years for first degree burglary, and ten (10) years for attempted armed robbery. All sentences were to run concurrently.

Applicant filed a timely notice of appeal and M. Celia Robinson, Esquire, of the South Carolina Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed the convictions on April 28, 2010. State v. Garner, 389 S.C. 61, 697 S.E.2d 615 (Ct. App. 2010). The Court of Appeals denied Applicant's petition for rehearing on August 17, 2010, and the South Carolina Supreme Court denied a petition for writ of certiorari on February 8, 2012. The remitter was returned to the circuit court on February 10, 2012.

II. ALLEGATIONS

In his application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Constitutional violations by Solicitors & Judge
 - a. Solicitors Improper comments
2. Improper & prejudicial comments
 - a. Improper & prejudicial comments/coercive statement by trial judge
3. ineffective assistance of counsel
 - a. Issues that was abandond, and non objections"

On August 27, 2013, Applicant's counsel filed an amendment to the application titled "Supplemental Grounds for Post-Conviction Relief." In this amendment, Applicant asserts:

1. "Ineffective assistance of counsel for not moving to admit the Turllijos'

statement under Chambers v. Mississippi, 410 U.S. 284 (1973).

2. Ineffective assistance of appellate counsel for failure to support the 911 argument.
3. Ineffective assistance of counsel for allowing Sowden to comment on Applicant's right to remain silent.
4. Ineffective assistance of counsel for failure to request a mere presence charge.
5. Ineffective assistance of counsel for not objecting to burden shifting argument.
6. Ineffective assistance of counsel for failure to object to the Allen charge.
7. Ineffective assistance of counsel for failing to object to Judge Cottingham's second reasonable doubt instruction and second circumstantial evidence charge.
8. Brady violation for failure to disclose Sowden's status as a confidential informant.
9. Ineffective assistance of counsel for failure to present evidence that Applicant was not physically able to drag the decedent.

At the PCR hearing, the Applicant proceeded on the allegations included in the original application and the amendment.

III. SUMMARY OF TESTIMONY

Trial counsel testified he was appointed some time before the case was called to trial. He recalled the State's theory of the case was the Applicant entered a residence to rob the victim of drugs and that, in the process, Applicant bludgeoned the victim to death with a handgun. However, trial counsel testified the State produced no physical evidence linking Applicant to the crime. The State's key piece of evidence was the testimony of Lonya Sowden ("Sowden"). Sowden was allegedly a participant in the attempted robbery of the victim. Trial counsel testified that Sowden contacted police two days after the murder and implicated Applicant. On cross examination, trial counsel testified he never received any information regarding Sowden's status as a confidential informant because this was not a typical confidential informant case.

Trial counsel testified he thought Sowden was an unreliable witness and he felt she "was lying about everything." He further testified Sowden gave multiple stories at different stages of

the investigation. In an effort to discredit Sowden, trial counsel cross examined her on these inconsistent statements. He also called as a witness the individual she claimed to be her employer, Mr. Linsky. Linsky testified Sowden never worked for him. Trial counsel also called the manager of the hotel where Sowden claimed to reside on the fifth floor to testify that the hotel only had four floors.

Counsel also had Linsky testify that he owned the car allegedly used by Applicant and Sowden to travel to and from the crime scene. Trial counsel testified he asked the trial judge to allow the jury to view the car in person, but that the judge limited him to admitting photographs of the car. Trial counsel also testified he did not remember Applicant having any knee problems at the time of trial.

Trial counsel testified he also attempted to enter into evidence the statement of the victim's roommates, the Trujillos. According to trial counsel, this statement would have shown the victim was alive at a point after the State asserted he was murdered. However, the judge excluded the statement as testimonial hearsay. Trial counsel testified this statement would have bolstered the defense theory that the State's key witness was unreliable.

Trial counsel also testified he recalled discussing the Allen charge with opposing counsel and the trial judge in chambers. He did not recall whether he objected to the specific language of the charge in chambers, but he did object to its issuance at that time. On cross examination, trial counsel testified the basis of his objection was that it was too early in the deliberations to issue the charge. He further testified he would have discussed the charge with Applicant. However, on re-direct, counsel testified he does not recall if there was ever any indication of the numerical division in the jury or that he told Applicant how the jury was split.

Applicant's wife testified Applicant was in a car accident on Father's Day in 2002. As a result of that accident, Applicant has pins in both legs and cannot do strenuous work.

Applicant testified the State made him three plea offers. The first offer was for life; the second was for twenty-five (25) years; and the third was for thirteen (13) years. He further testified that his co-defendant was charged for the crime, but that Sowden was not charged with any crime. He testified the statements from Sowden and the other alleged witness were consistent with each other because they were both lying. He attributes this consistency to the State coaching the witness on what to say. He believes trial counsel did not do a good job bringing out the inconsistencies in their stories. However, on cross examination he admitted trial counsel brought out the fact Sowden used crack cocaine and the fact that other witnesses had prior criminal records.

Applicant further testified trial counsel did not call as a witness a Charles Odom ("Odom"). Odom was Applicant's cellmate in county detention. Applicant testified Odom gave the State a statement indicating Applicant admitted to the murder. Applicant contends Odom's statement was a complete fabrication. Applicant admitted Odom did not testify at trial on behalf of the State, but he believes trial counsel should have called him to show the extent to which the State was willing to go to secure a conviction.

Applicant also contends he told trial counsel about his prior accident and disability. He believes trial counsel should have brought up the disability to the jury. However, on cross examination Applicant admitted he did not want to testify at trial. He also testified his appellate counsel should not have abandoned the issue of a 911 tape in his appeal.

Applicant recalled meeting with trial counsel prior to the issuance of the Allen charge. He contends trial counsel at that time told him the jury was deadlocked eleven to one. However, on cross-examination, he admitted he could not remember whether the eleven were voting to convict or acquit.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003):

A. Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). 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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions

in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Regarding appellate counsel, the "applicant must prove ineffective assistance by showing counsel's performance deficient, and the deficient performance prejudiced the applicant." Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (citing Strickland, 466 U.S. at 668; Cherry, 300 S.C. at 115, 386 S.E.2d at 624; Butler, 286 S.C. at 441, 334 S.E.2d at 813). When counsel abandons an issue on appeal, the applicant must show he would have prevailed on appeal had the issue not been abandoned. Id. (citations omitted). Below are the Court's findings in regards to each of Applicant's allegations of ineffective assistance of trial and appellate counsel.

1. Ineffective assistance of counsel for not moving to admit the Turlijos' statement under Chambers v. Mississippi, 410 U.S. 284 (1973).

The Court finds trial counsel was not ineffective for being unsuccessful in admitting the roommate's statement. At the outset, the Court notes that Chambers v. Mississippi is inapposite to this case for two important reasons. First, the statements allowed in Chambers involved a

declaration against penal interest. Chambers, 410 U.S. 284, 299 (1973). There, the declarant told three individuals he was guilty of a crime. Id. at 300. Here, the statement sought to be introduced merely involved the declarant's recollection of the whereabouts of the victim in this case. (Trial Tr. vol. 2, 113:7-13).

Second, and more importantly, the declarant in Chambers was present in the courtroom. Chambers, 410 U.S. at 301. At Applicant's trial, the roommates were not available to testify because they could not be found. (Trial Tr. vol. 2, 114:4-6). Therefore, trial counsel would have had no reason to cite Chambers v. Mississippi as precedent for admission of the statement.

Furthermore, the Court finds trial counsel properly argued for the admission of the statements. Trial counsel made the argument that the statements were non-testimonial based on the ongoing nature of the investigation. (Trial Tr. vol. 2, 115:16-21). However, the trial judge disagreed and ruled the statements were clearly testimonial. (Trial Tr. vol. 2, 115:22-25). Therefore, the statements were inadmissible regardless of any exception to the hearsay rule. See Garner, 389 S.C. at 67, 697 S.E.2d at 618 ("If a statement is admissible hearsay, the Confrontation Clause may operate to render this otherwise admissible hearsay inadmissible if testimonial in nature." (citing Crawford v. Washington, 541 U.S. 36, 68 (2004))).

2. Ineffective assistance of appellate counsel for failure to support the 911 argument.

The Court finds Applicant's allegation that appellate counsel was ineffective to be without merit. The Court of Appeals ruled appellate counsel abandoned the argument the 911 tape was not properly authenticated. See Garner, 389 S.C. at 67, 697 S.E.2d at 618 ("To this issue, Appellant's argument states in total: 'Counsel for [A]ppellant argued that it was improper to allow the 911 tape to be admitted through Lonya as opposed to an appropriate 911

representative.' Accordingly, this issue is abandoned on appeal." In her brief, appellate counsel appears to only argue that the tape was inadmissible hearsay. (Appellant's Br. 26). She does not argue the tape was not properly authenticated by the custodian of the tape, which was the trial objection. (Trial Tr. vol. 1, 84:11-12). Thus, although appellate counsel raised a valid argument regarding the admissibility of the tape on hearsay grounds, this Court is constrained by the Court of Appeal's ruling that she abandoned the argument regarding the admissibility of the tape on authenticity grounds.

However, the Court finds no prejudice from appellate counsel's abandonment of this issue. Rule 903, SCRPC, provides that a tape of a voice is properly authenticated "under circumstances connecting it with the alleged speaker." In State v. Aragon the Court of Appeals held the trial court properly admitted a tape of a phone call made by the victim to the defendant at the behest of police. State v. Aragon, 354 S.C. 334, 336, 579 S.E.2d 626 (Ct. App. 2003). The defendant argued the State failed to properly authenticate the tape because the State did not establish a chain of custody. Id. However, the victim testified she recognized the voice on the tape and the tape fairly and accurately represented the phone conversation. Id., 579 S.E.2d at 627. Therefore, the court ruled the tape was properly authenticated. Furthermore, the court ruled that the chain of custody of the actual tape need not be proven where its contents are otherwise properly authenticated. Id. at 337, 579 S.E.2d at 627.

Aragon is directly on point here. Sowden testified she previously listened to the tape and recognized the voice as her own. (Trial Tr. vol. 1, 80:20-81:2). Thus, the tape was properly authenticated. Therefore, Applicant has not shown the Court of Appeals would have overturned his conviction if the issue was properly presented.

3. Ineffective assistance of counsel for allowing Sowden to comment on Applicant's right to remain silent.

The Court finds this ground is likewise without merit. Applicant presented no testimony at the hearing regarding Sowden's comments on Applicant's right to remain silent. From a review of the transcript, the Court discerns Applicant is referring to Sowden's responses during cross-examination to the effect of "you should ask your client that question." (Trial Tr. vol. 1, 168:9-10; 174:8-9). The Court finds this non-responsive answer does not rise to the level of a comment on the right to remain silent. Rather, Sowden was implying that she could not speculate about Applicant's behavior after the crime. Furthermore, even if it was a comment on his right to remain silent, it was not prejudicial to Applicant. State v. Hill, 382 S.C. 360, 369, 675 S.E.2d 764, 769 (Ct. App. 2009) (citing Gill v. State, 346 S.C. 209, 552 S.E.2d 26 (2001)). Sowden's cross-examination was heated, and her response can best be characterized as frustration with trial counsel's questions rather than a statement regarding Applicant's silence. Finally, the trial judge thoroughly charged the jury on Applicant's right to remain silent. Id. ("[A] curative instruction emphasizing the jury cannot consider the defendant's failure to testify will cure any potential error." (citing Gill, 346 S.C. at 221, 552 S.E.2d at 33)). Therefore, trial counsel was not ineffective for eliciting Sowden's non-responsive statement.

4. Ineffective assistance of counsel for failure to request a mere presence charge.

The Court finds Applicant's allegation regarding the mere presence charge to be without merit. Again, no testimony was presented regarding this issue at the hearing. However, a mere presence charge would only be available if there was some doubt over whether Applicant was guilty of a crime by virtue of accomplice liability. State v. Dennis, 321 S.C. 413, 420, 468 S.E.2d 674, 678 (Ct. App. 1996) (citations omitted). The State never presented any evidence

Applicant was guilty under a theory of accomplice liability; rather, all of the evidence implicated Applicant as the murderer. See State v. James, 386 S.C. 650, 654, 689 S.E.2d 643, 645 (Ct. App. 2010) ("Therefore, because there was no evidence of accomplice liability, a charge of mere presence on that basis was not necessary." (citing State v. Stokes, 339 S.C. 154, 528 S.E.2d 430 (Ct.App.2000))). Because Applicant was not entitled to a mere presence charge, trial counsel was not ineffective for not requesting one.

5. Ineffective assistance of counsel for not objecting to burden shifting argument.

The Court finds this allegation to likewise be without merit. Specifically, counsel points to the State's comments in closing arguments that the jury's job was to "find the truth." Generally, jury instructions that charge the jury to "seek the truth" are disfavored because they may shift the burden of proof to a defendant. State v. Aleksey, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000) (citing State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998)). However, such language is permissible if it only appears in the instructions on witness credibility. Id. at 27, 538 S.E.2d at 251-52. Here, the trial judge only used the "seek the truth" language in his instructions on witness credibility. (Trans, Vol 2, P. 152:18-24). Thus, the State's use of similar language referred to a proper jury charge.

The State references the judge's admonition to find the truth in its closing after discussing Sowden's testimony. (Trial Tr. vol. 2, 209:14-17). The record is clear that trial counsel's strategy was to discredit Sowden as a witness; the majority of his closing argument is dedicated to highlighting the inconsistencies in her story. In light of defense strategy, the State's argument to the jury to seek the truth in her testimony did not impermissibly shift the burden of proof to Applicant. Rather, it is a fair response to trial counsel's argument regarding Sowden's

believability. See Ellenburg v. State, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006). Therefore, trial counsel was not ineffective for not objecting.

6. Ineffective assistance of counsel for failure to object to the Allen charge.

The Court finds Applicant's allegation regarding the Allen charge to be without merit. Trial counsel testified he objected to the issuance of the Allen charge off the record in chambers. The Court finds trial counsel's testimony on this issue to be credible. However, because there is no record of an objection to the charge on the record, the Court cannot determine whether trial counsel's objection constituted adequate performance.

Nevertheless, the Court finds Applicant cannot show any prejudice from the lack of an objection to the issuance of the charge or to its specific language. The decision to issue an Allen charge is within the sound discretion of the trial judge. State v. Kelly, 372 S.C. 167, 171, 641 S.E.2d 468, 470 (Ct. App. 2007). The record clearly indicates the jury informed the court it could not reach a unanimous verdict at the time the charge was issued. Therefore, the trial judge did not abuse his discretion in issuing the charge.

Likewise, the charge contained no objectionable language. Applicant contends the language in the charge is identical to the language found coercive by the South Carolina Supreme Court in Dawson v. State, 352 S.C. 15, 572 S.E.2d 445 (2002). There, the trial judge charged the jury:

I have sometimes thought that the juror who could render less service to the Court and to the country than any other juror is the juror who says, I know what I want to do in this case and when and if everybody agrees with me, then we'll write a verdict, and we'll not write a verdict until that time.

Dawson, 352 S.C. at 18, 572 S.E.2d at 446. In Applicant's case, the trial judge recited that exact language to the jurors, and then followed it by saying "I would never say that to you." (Trial Tr.

vol. 2, 222:15). Therefore, Applicant's trial judge essentially told the jury the exact opposite of what the trial judge told the jury in Dawson.

Furthermore, the Dawson jury was deadlocked at eleven to one. Dawson, 352 S.C. at 17, 572 S.E.2d at 446. The Supreme Court indicated the issuance of the Allen charge in that circumstance was clearly coercive to the minority juror. Id. at 21, 572 S.E.2d 448. Applicant testified his jury was similarly deadlocked; however, trial counsel testified he did not recall ever knowing the exact numerical division. On this point, the Court finds trial counsel's testimony credible and Applicant's not credible. Therefore, the trial judge's charge would not be coercive because the judge was not aware of the division of the jury. Because the charge was not objectionable, trial counsel was not ineffective for failing to object to it.

7. Ineffective assistance of counsel for failing to object to Judge Cottingham's second reasonable doubt instruction and second circumstantial evidence charge.

The Court finds this allegation to be wholly without merit. The jury requested a re-charge on reasonable doubt and the types of evidence they could consider. The trial judge's re-charge was nearly identical to his initial charges on reasonable doubt and circumstantial evidence, which were not objectionable. Therefore, trial counsel was not ineffective for failing to object to the re-charge.

8. Brady violation for failure to disclose Sowden's status as a confidential informant.

The Court finds Applicant's allegation of a Brady violation to be without merit. Trial counsel testified he did not believe Sowden was acting as a confidential informant when she contacted the police regarding the murder. However, she did testify at trial she did informant work for the police in the past. The State questioned Sowden on re-direct regarding any offers made by any police officers in exchange for her testimony and she stated there were none. The

record does not support any nexus between Sowden's alleged prior informant work and her participation in Applicant's case. Therefore, the Court finds any information the State may have had regarding her prior informant work would have been neither favorable to Applicant nor material to his guilt or innocence. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 268 (1993) ("Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment." (citing Pennsylvania v. Ritchie, 480 U.S. 39 (1987))). Furthermore, the Court can discern no "reasonable probability the result [of Applicant's trial] would have been different" if the alleged information had been disclosed because trial counsel fully cross examined Sowden on her motivations to give false testimony. Id. at 389, 434 S.E.2d at 268. Likewise, Applicant presented no information at the PCR hearing regarding Sowden's alleged informant work. Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999). Therefore, no Brady violation occurred.

9. Ineffective assistance of counsel for failure to present evidence that Applicant was not physically able to drag the decedent.

The Court finds this allegation to likewise be without merit. Applicant alleges trial counsel should have presented evidence of his prior injury and disability to prove he was not capable of moving the victim's body. However, trial counsel testified Applicant never mentioned any injury or disability and Applicant did not appear to be disabled. On this issue, the Court finds trial counsel's testimony to be credible and Applicant's to be not credible. Because trial counsel had no reason to believe Applicant had any type of physical disability, he was not obligated to present any witnesses to that effect. Cf. Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992) (finding counsel not deficient for failing to present evidence of mental incompetence where counsel reasonably relied on his own perceptions that defendant was not

incompetent and neither the defendant nor his family ever indicated defendant may have a mental defect). Therefore, counsel was not ineffective for not presenting evidence of Applicant's alleged disability.

10. Allegations in Applicant's original application.

The Court finds Applicant's allegations regarding prejudicial comments by the solicitor and trial judge to be without merit. The Court reviewed each of the statements challenged by Applicant in his testimony and finds them to be neither improper vouching nor burden shifting.

Furthermore, the Court finds trial counsel provided competent representation in light of the overwhelming evidence against Applicant. Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009). Sowden testified to being a witness to the murder. Her testimony was corroborated by other witnesses who saw Applicant with Sowden and the co-defendant prior to and after the murder. Both of these witnesses testified to seeing Applicant with blood on his clothes after the murder. The record reflects some inconsistencies in Sowden's various stories. However, trial counsel vigorously cross-examined Sowden in an effort to highlight these inconsistencies. Thus, the key issue in this case was her credibility, and the jury clearly believed her to the extent it found Applicant guilty. Therefore, trial counsel was not ineffective.

B. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, the Court finds Applicant failed to present sufficient evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

V. CONCLUSION

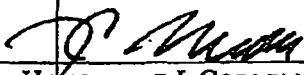
Based on the foregoing, the Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes that Applicant must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on the applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 30 day of January, 2014


THE HONORABLE J. CORDELL MADDOX, JR.
Presiding Judge

Anderson, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH CIRCUIT
COUNTY OF HORRY	)	
	)	Case No.: 2012-CP-26-2015
LUTHER GARNER,	)	
	)	MOTION TO RECONSIDER
Applicant,	)	
	)	
vs.	)	
	)	
THE STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

2
14 FEB -4 PM 1:39
CLERK OF COURT

On February 21, 2014,¹ Applicant received a copy of the Order of Dismissal in this case. Counsel objects to the factual findings that are not supported by the evidence presented at the PCR hearing. Pursuant to the arguments raised in the Application for Post-Conviction Relief (PCR), the arguments raised in Applicant's pro se filings, the arguments raised at the evidentiary hearing, and the following arguments, Applicant respectfully requests that the court reconsider its Order of Dismissal. *See* Rule 59(e), SCRPC. To support this motion Applicant will show the following:

I. Trial Counsel was ineffective for failing to object to the *Allen*² Charge.

A. Deficient Performance.

In the Order of Dismissal, this Court failed to make a finding on whether Trial Counsel rendered adequate performance because the Court found that trial counsel objected to the *Allen* charge in chambers. Specifically the Court held that "because there is no record of an objection

¹ The envelope indicates that this order was originally mailed to from the Horry County Clerk of Court on February 10, 2014. It appears that the letter was returned for insufficient postage and re-mailed on February 15, 2014. On that date it was sent to Counsel's former office (Counsel moved offices on February 7, 2014). Counsel received this order on February 21, 2014.

to the charge on the record, the Court cannot determine whether trial counsel's objection constituted adequate performance. Applicant argues that the failure to adequately place objections on the record is deficient performance under *Strickland*³. See *York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) ("An objection made during an off-the-record conference which is not mad part of the record does not preserve the question for review."). Therefore, Applicant asks that the Court find that counsel was deficient in failing to object to the *Allen* charge on the record.

B. Prejudice

The Court then held "[n]evertheless, the Court finds Applicant cannot show any prejudice form the lack of an objection to the issuance of the charge or its specific language." However the Order of Dismissal only addressed one part of the *Allen* charge.

At the hearing, Applicant argued that Applicant was prejudice because the *Allen* charge as a whole was coercive. Moreover Applicant argued that Trial Counsel was ineffective based on failing to object to the reading⁴ of the *Allen* charge. Specifically, Applicant advances the following bold print language to as being especially coercive:

Now you have asked me another question and I again thank you for it. "If the jury is not in a position at this time to reach a unanimous verdict, must our final decision in this case be not guilty," and the answer is absolutely not. Your verdict must be unanimous either guilty or unanimous not guilty. In the event that you are unable to reach a verdict that's what we call a hung jury and **that simply means that nobody wins**. It simply means that sometime in the future 12 folks chosen just like you will come into this courtroom, basically hear the same testimony, some jury just like you will hear the whole thing again and that issue will then be resolved. I have no reason to suggest or suspect that I will ever get 12 more people more dedicated more anxious to do

² *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154 (1896).

³ *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

⁴ Trial Counsel testified that Judge Cottingham read the *Allen* charge in a coercive way.

their duty than you 12; and so don't walk away thinking that somebody wins and somebody loses. It means everybody loses and our system has failed.⁵

Now I charge you as I only can the only mode providing by our laws for a direct – deciding questions of fact is by a verdict of a jury just like you. In most all cases, ladies and gentlemen, absolute certainty cannot be obtained or expected where the matter is in dispute initially.⁶ It isn't always even, easy for even two people to initially agree; and so, when 12 people must agree it becomes correspondingly more difficult. I tell you it is very unusual for a jury to go out and immediately or quickly retain a verdict. You have only been deliberating two hours. The case lasted three days. That's not unusual. You've got a voluminous amount of matters to deal with. That is what would happened if a jury was in agreement to begin with. At the same, ladies and gentlemen, we usually get a verdict under our system of jurisprudence, So, while it is normal for jurors to disagree at first, and I fully understand that we nevertheless get a verdict after the jury has laid aside all extraneous or outside matters and have determined to try this case on the merits and on the basis of law and evidence in this case, direct and circumstantial.⁷

It has been said that jury service is perhaps the highest service a citizen can perform for his or her own country or state during peacetime, and I certainly agree with that. However, a juror does not render good service who says, "I know what I want to do in this case and when everybody agrees with me then we will write down a verdict and we will not write a verdict until that time."⁸ It was never intended that

⁵ Judge Cottingham is essentially saying that our entire system will fail if the jury cannot reach a verdict. This language is highly coercive. See *Jenkins v. United States*, 380 U.S. 445, 85 S.Ct. 1059 (1965) (reversing a conviction after the trial court instructed a jury "You have to reach a decision in this case."). Asking a jurors to agree to prevent the failure of our system of justice is unduly coercive and inappropriately encourages the jurors to agree with other jurors based on their desire to have a functioning legal system. cf. *Liberte v. State*, 336 S.C. 648, 653-54, 521 S.E.2d 744, 746-47 (Ct. App. 2009) (holding that a Solicitor's arguments that reasonable doubt was a sword "to attack people who were trying to clean drugs off out streets" appealed to the jury's "passions and prejudices by playing on the jury's fears of the impact of drugs on our society.").

⁶ This language is coercive because it invites the jury to make a decision on evidence that does not convince them beyond a reasonable doubt.

⁷ This language is essentially stating that the jury must reach a verdict. Applicant also asserts that this language was especially coercive because Trial Counsel's closing argument was primarily arguing that the State had insufficient evidence to convict.

⁸ This portion of the *Allen* charge was ruled upon in the Order of Dismissal. Applicant asserts that the Court's ruling on this matter is not supported by the record. Applicant believes this

the verdict of jurors should be the verdict of any one person, never intended for that.⁹ At the same time I tell you that every juror has a right to his or her own opinion, and if he or she needs, he or she need not give up that merely for the purpose of being in agreement. I would never say that to you. However, the verdict is the collective reasoning of all jurors and that is why we have a jury of 12. It is the duty of each of a jury to tell the others how he or she feels and why he or she may feel that way.¹⁰ Since a jury verdict is the result of collective reasoning, it can be said that a verdict is a result of give and take. With this in mind, I tell you that if the much larger of your number of panels are in favor of one position a dissenting juror or jurors should consider whether I not his or her position is a reasonable one, which makes no impression upon the minds of the majority. In other words, if the majority of you are of one position, the minority ought to seriously ask themselves whether they can reasonably doubt the correctness of the jury and judgment of the majority.¹¹ Although the verdict to which a jury agrees must, of course be his or her own verdict, the result of his or her own convictions and not merely acquiescence in the conclusion of his or her fellow jurors. Yet in order to bring 12 minds to a unanimous result you must examine the questions submitted to you with candor and with a proper regard to and a respect for the opinions of each other. You should also consider that you were selected in the same manner from the same source which any future jury will be and as I indicated a while ago there is certainly no reason for me to suppose that this case will ever be submitted to 12 people more intelligent, impartial and competent than you and note there's no reason for me to suspect that more or clearer evidence will ever be produced on one side or the other. Ladies and gentlemen, in other words a mistrial of this case is an unfortunate thing. If you do not agree on a verdict of not guilty or guilty, unanimously it does not mean that everyone wins. It just means that at some future time, at some future time, I will try this case with some jury sitting exactly where you are, the same basic participants will come and the same lawyers will ask basically the same questions and probably get basically the same answers, and we will go through the

language is un-constitutionally coercive. See *Dawson v. State*, 352 S.C. 15, 572 S.E.2d 445 (2002).

⁹ Applicant contends that this language speaks directly to the minority. See *Tucker v. Catoe*, 346 S.C. 483, 493, 552 S.E.2d 712, 719 (2001).

¹⁰ Applicant contends that this language speaks directly to the minority. See *Tucker*, 346 S.C. at 493, 552 S.E.2d at 719.

¹¹ This part is very coercive to a minority. These strong words that are directed only to the minority. The trial court never asks the majority to "seriously ask themselves if they can reasonably doubt the correctness" of the minority.

entire process again. In conclusion, if the State of South Carolina and the people it represents is entitled to a verdict in this case, they are entitled to it today, not tomorrow, not next week, not next year. Equally important, if this Defendant is entitled to a verdict, he is entitled to it today,¹² and so it is, Mr. Foreman, ladies and gentleman, recognizing that there are difficult issues for you to consider, understanding the voluminous evidence that has been in the trial of this case, I would ask that you go back, continue deliberations, have a give and take between the majority and minority, however, however it falls, would not ask anybody to give up their heartfelt opinions, but at the same time regardless of which side your decision is on consider, too, the position of the other side to ascertain whether or not that position, be it in the minority or majority, is a reasonable one ... To answer your question again and that is this, if the jury is unable to reach a unanimous verdict must our final decision in the case be not guilty? The answer is absolutely no, no, never. Your verdict is either unanimously not guilty or guilty. The only other thing would be to have no verdict at all, in which event I would declare a mistrial and we'd come in and do this whole thing again. Does that answer your question? Let there be no question about that. Your verdict has got to be unanimous either not guilty or guilty and we've got today and tomorrow to work through those issues.¹³

Tr. 220, l. 17 – Tr. 224, l. 17; Tr. 226, ll.3-13.

Additionally, in the Order of Dismissal the Court found that the Trial Court was unaware of the split in the jurors. Applicant respectfully contends that this finding is not supported by the record. Trial Counsel testified that he does not recall whether Judge Cottingham knew, but

¹² In this language as well is the language found at Tr. 226, ll. 11-13, the jury was given a time limit in which to deliberate. Time limits are inappropriate. *See also, Cambareri v. State*, 746 So.2d 1215, 1216 (5th Dist. Fl. App., 1999) (noting that when giving *Allen* charges courts should avoid coercive timelines); *see also, Goff v. United States*, 446 F.2d 623 (10th Cir. 1971) (reversing the District Court for giving a *Allen* charge associated with a time limit for deliberations); *cf. Jenkins v. United States*, 380 U.S. 445, 85 S.Ct. 1059 (1965) (reversing a conviction after the trial court instructed a jury "You have to reach a decision in this case."). This appears to come from similar language that was approved in *State v. Pulley*, 216 S.C. 552, 59 S.E.2d 155 (1950); however, that case the judge did not use as strong of language and it was not coupled with the other coercive language that Judge Cottingham used in this charge.

¹³ Here Judge Cottingham not only sets a time limit for deliberations, but also is coercive by stressing that they must return a unanimous verdict. *See Tucker*, 346 S.C. at 493, 552 S.E.2d at

believed Judge Cottingham would have known. Trial Counsel also testified that while he has no independent recollection, he believed the Applicant's claim concerning this issue. Moreover, Applicant asserts that by use of the term "reasonable doubt" it implies that the Trial Court was aware that the majority was in favor of conviction and that a minority was not convinced. Tr. 223, ll. 1-4. Therefore, Applicant ask that the order be amended to exclude the factual finding that the Trial Court was unaware of the split.

Based on the arguments raised above and the arguments raised at the hearing, Applicant respectfully requests that a the Court amend its order to address the highlighted sections of the *Allen* charge and to include a finding that the Applicant was prejudiced by Trial Counsel's failure to object to the *Allen* charge on the record.

II. The *Allen* Charge Violated Applicant's Constitutional Rights to Due Process and A Fair Trial

At the PCR hearing Applicant asserted that his right to due process and a fair trial were violated due by the coercive *Allen* charge. This creates a proper claim for PCR that is independent of the alleged *Strickland* claim in Section I of this motion. However, this claim was not addressed in the Order of Dismissal, the Court merely found that "the [*Allen*] charged contained no objectionable language.

Based on the arguments raised at the hearing, in addition to those raised in Issue I, Subsection (b) of this motion, Applicant respectfully requests that the Court amend its order to include a finding that Applicant's rights to due process and a fair trial were violated by the Trial Court's *Allen* charge.

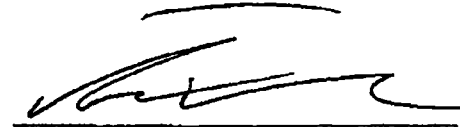
III. All Other Issues.

719; see also *Jenkins v. United States*, 380 U.S. 445, 85 S.Ct. 1059 (1965) (reversing a conviction after the trial court instructed a jury "You have to reach a decision in this case.").

Based on the arguments raised at the hearing, Applicant argues objects to the findings in the Order of Dismissal. Therefore, Applicant respectfully request that the Court reconsider Applicant's case and enter an order granting Post-Convict Relief.

CONCLUSION

Based on the above listed allegations as well as those listed in the application and pro se filings, Applicant respectfully request this Court reconsider its order of dismissal.

 3/2/14
Tristan Michael Shaffer
Attorney for Applicant

120 Gibson Road
Lexington, SC 29072
SC Bar # 77565

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

LUTHER GARNER,

Applicant,

vs.

THE STATE OF SOUTH CAROLINA,

Respondent.

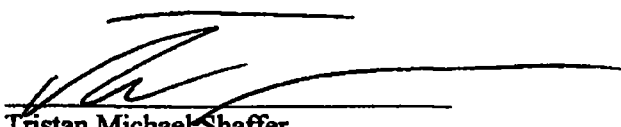
) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH CIRCUIT

) Case No.: 2012-CP-26-2015

) CERTIFICATE OF MAILING AND
) SERVICE

3
MAR-14 PM 1:39
CLERK OF COURT

I certify that on March 3, 2014, I placed a copy of the Motion to Reconsider in the U.S. mail with sufficient postage to mail this document to the Horry County Clerk of Court, Josh Thomas, and Judge Cordell Maddox.


 Tristan Michael Shaffer
 Attorney for Applicant

120 Gibson Road
 Lexington, SC 29072
 SC Bar # 77565

March 3, 2014

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Luther Garner, #322156,

Case No. 2012-CP-26-2015

Applicant,

**ORDER DENYING APPLICANT'S
RULE 59(E) MOTION**

v.

State of South Carolina,

Respondent.

FILED
CLERK OF COURT
2014 APR 14 PM 2:11
JUDICIAL CIRCUIT
FIFTEENTH

This matter comes before the Court on Applicant's "Motion to Reconsider" filed March 4, 2014. Applicant's motion appears to ask the Court to reconsider, pursuant to Rule 59(e), its order of dismissal filed February 3, 2014, on three grounds. First, Applicant alleges trial counsel was ineffective for failing to object to the Allen¹ charge. Second, he alleges the charge violated his right to due process and a fair trial. Finally, Applicant alleges the Court incorrectly ruled on all other issues.

The Court finds its order of dismissal adequately addresses whether trial counsel was ineffective in failing to object to the trial judge's Allen charge. The Court declines to rule on whether trial counsel was deficient in the manner of his objection to the charge because it is not dispositive to Applicant's claims. See Strickland v. Washington, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674 (1984) ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies ... [i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice[.]").

¹ Allen v. United States, 164 U.S. 492 (1896).

Regarding prejudice, the Court has reviewed each of the allegedly coercive statements in the trial judge's charge. The Court does not find any of the statements, standing alone, to be coercive. Likewise, the Court does not find the charge as a whole to be overly coercive. State v. Jones, 320 S.C. 555, 559, 466 S.E.2d 733, 735 (Ct. App. 1996) (citing State v. Dawson, 203 S.C. 167, 26 S.E.2d 506 (1943)). Specifically, the Court finds the charge did not mandate the jury reach a decision; did not reduce the burden of proof the jury must hold the State to; did not directly address the minority voting jurors; and did not set an inappropriate time limit on jury deliberations. Therefore, the Court finds all of Applicant's exceptions to the charge to be without merit when read in light of the entire charge.

Accordingly, trial counsel was not ineffective in failing to object to the charge. Furthermore, in light of the Court's finding the charge was not coercive, the Court also finds Applicant's rights to due process and a fair trial were not offended by the trial judge's decision to issue the charge. Regarding Applicant's third and final ground for reconsideration, the Court finds its prior order properly addressed each of Applicant's remaining allegations.

Based on the foregoing, the Court finds and concludes Applicant has not established any errors or deficiencies in the prior Order of Dismissal. Therefore, Applicant's motion for reconsideration is hereby denied and his application for post-conviction relief is dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief.

Rule 71.1(g), SCRPC, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal

IT IS THEREFORE ORDERED THAT:

1. Applicant's "Motion for Reconsideration" is denied;
2. The Application for Post-Conviction Relief is dismissed with prejudice; and
3. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

IT IS SO ORDERED this 2nd day of May, 2014.


THE HONORABLE J. CORDELL MADDOX, JR.
Presiding Judge

Anderson, South Carolina

WITNESSES

LARGE/HCPD

ARREST WARRANT NO. _____

I-268391

CDR: 0116 16-03-0010, 0020

CDR:

DOA: 01-13-05

ACTION OF GRAND JURY

TRUE BILL

Foreman of Grand Jury

MAR 01 2007

VERDICT

Guilty

Foreman of Petit Jury Date:

June 1, 2007

DOCKET NO. 2007-GS-26- 928

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY

76197.2

JAR

COURT OF GENERAL SESSIONS

MARCH

TERM 2007

THE STATE

vs.

LUTHER GARNER AKA KARIEM WARD B/M

DOB: [REDACTED]

SSN: [REDACTED]

ATTORNEY: STUART AXELROD

INDICTMENT FOR:

MURDER

ORIGINAL

J. GREGORY HEMBREE, SOLICITOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT FOR:
MURDER

At a Court of General Sessions, convened on March 1, 2007 the Grand Jurors of Horry County present upon their oath:

MURDER
CDR: 0116 16-13-0010, 0020

That LUTHER GARNER AKA KARIEM WARD did in Horry County on or about January 11, 2005, unlawfully kill the victim, Amadro Flores Espinozat, with malice aforethought, either express or implied, by means beating the victim in the head and that the victim died as a proximate result thereof, in violation of Section 16-3-10, S.C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



SOLICITOR

WITNESSES

LARGE/HCPD

ARREST WARRANT NO. I-268390

CDR:0079 16-11-311

DOA: 01-13-05

ACTION OF GRAND JURY
TRUE BILL

[Signature]
Foreman of Grand Jury

MAR 01 2007

VERDICT

Guilty

[Signature]
Foreman of Petit Jury Date: June 1, 2007

DOCKET NO. 2007-GS-26- 927

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY

JAR

76197

COURT OF GENERAL SESSIONS

MARCH

TERM 2007

THE STATE

VS.

LUTHER GARNER AKA KARIEM WARD B/M

[REDACTED]

[REDACTED]

SSN [REDACTED] DOB [REDACTED]

STUART AXEL ROD

Attorney

INDICTMENT FOR:
BURGLARY FIRST DEGREE

ORIGINAL

J. GREGORY HEMBREE, SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT FOR
BURGLARY FIRST DEGREE

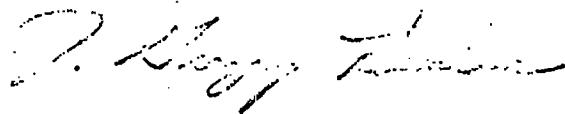
At a Court of General Sessions, convened on March 1, 2007, the Grand Jurors of Horry County present upon their oath:

BURGLARY FIRST DEGREE

(CDR: 0079 16-11-311)

That LUTHER GARNER AKA KARIEM WARD did in Horry County on or about January 11, 2005, did enter the dwelling of Amadro Flores Espinozat, [REDACTED] Pine Valley Estates, Conway South Carolina without consent and with the intent to commit a crime therein and the defendant did while armed with a deadly weapon, in violation of Section 16-11-311(A), Code of Laws of South Carolina, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



SOLICITOR

WITNESSES

LARGE/HCPD

ARREST WARRANT NO. _____

CAW:200703020

CDR: 026 16-11-0330 (B)

DOA: 01-13-05

ACTION OF GRAND JURY

TRUE BILL

Tom L. Kirk MAR 29 2007
Foreman of Grand Jury

VERDICT

Guilty

[Signature] June 1, 2007
Foreman of Petit Jury Date:

DOCKET NO. 2007-GS-26- 1536

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY

JAR 76197.2

COURT OF GENERAL SESSIONS

APRIL TERM 2007

THE STATE

VS.

LUTHER GARNER AKA KARIEM WARD B/M

SSN _____ DOB _____

STUART AXELROD
Attorney

INDICTMENT FOR:

ATTEMPTED ARMED ROBBERY

ORIGINAL

J. GREGORY HEMBREE, SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT FOR
ATTEMPTED ARMED ROBBERY

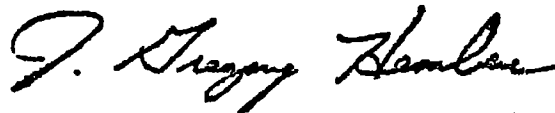
At a Court of General Sessions, convened on March 29, 2007, the Grand Jurors of Horry County present upon their oath:

ATTEMPTED ARMED ROBBERY

(CDR: 026 16-11-0330(B))

That LUTHER GARNER AKA KARIEM WARD did in Horry County on or about the 11TH day of January, 2005, while armed with a deadly weapon, attempt to take and carry away the personal from or in the immediate presence of Amadro Flores Espinoza, [REDACTED] Conway, SC, with intent to deprive him of possession by use of force, threats or intimidation, in violation of Section 16-11-330(A), S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



SOLICITOR