

RECEIVED

APR 05 2017

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

S.C. SUPREME COURT

Appeal from Beaufort County

Brooks P. Goldsmith, Circuit Court Judge

MYKEL JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001684

APPENDIX

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

RUSTON NEELY
Assistant Attorney General

Attorney General Office
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

INDEX	i
TRIAL TRANSCRIPT DATED JUNE 18-20, 2012.....	1
<u>ANDERS BRIEF OF APPELLANT</u>	320
<u>STATE V. JOHNSON</u> , 2014-UP-134 (S.C. Ct. App. filed April 2, 2014)	332
REMITTITUR	334
APPLICATION FOR POST-CONVICTION RELIEF	335
RETURN.....	342
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED MAY 17, 2016.....	347
ORDER OF DISMISSAL.....	397
MOTION TO ALTER/AMEND JUDGMENT	404
ORDER DENYING MOTION TO ALTER/AMEND JUDGMENT	414
INDICTMENTS AND SENTENCE SHEETS.....	415

STATE OF SOUTH CAROLINA	)	COURT OF GENERAL SESSIONS
	)	
COUNTY OF BEAUFORT	)	Case No(s) : 2011GS0702269,
	)	2011GS0702270
State of South Carolina,	)	
	)	
Plaintiff,	)	
	)	
-VS-	)	TRANSCRIPT OF RECORD
	)	
Mykel Johnson,	)	
	)	
Defendant.	)	

June 18-20, 2012
Beaufort, South Carolina

B E F O R E:

HONORABLE CARMEN T. MULLEN, Judge.

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

JEFFREY S. STEPHENS, Esquire
Attorney for the Plaintiff

ERIK ERICKSON, Esquire
Attorney for the Defendant

Recorded by: Sharon Vizer-Hanks
Circuit Court Reporter

Transcribed by: Teresa B. Johnson.
Circuit Court Reporter

I N D E X**DIRECT CROSS REDIRECT RECROSS****June 18, 2012**

Jury Qualifications 7

Jury Selection 14

Jackson v. Deno motion**STATE WITNESSES:**

George Erdel

by Mr. Stephens 21

by Mr. Erickson 24

Argument of Counsel 27

Ruling of the Court 28

Biggers motion**STATE WITNESSES:**

George Erdel

by Mr. Stephens 29

by Mr. Erickson 35

Frank Babecki

by Mr. Stephens 44

by Mr. Erickson 47

Motions 48

I N D E X

DIRECT CROSS REDIRECT RECROSS

June 19, 2012

Ruling of the Court 68

Court Remarks to Jury 70

Opening Statements

by Mr. Stephens 77

by Mr. Erickson 82

STATE WITNESSES:

Melanie Smith

by Mr. Stephens 85

by Mr. Erickson 88

Josh Dowling

by Mr. Stephens 90

by Mr. Erickson 103

by Mr. Stephens 115

by Mr. Erickson 120

Billy Crumpton

by Mr. Stephens 125

George Erdel

by Mr. Stephens 130

by Mr. Erickson 144

by Mr. Stephens 153

by Mr. Erickson 155

I N D E XDIRECT CROSS REDIRECT RECROSS

June 19, 2012 (con't)

STATE WITNESSES (con't):

Jeff Vortisch

by Mr. Stephens 161

Frank Babecki

by Mr. Stephens 169

by Mr. Erickson 180

by Mr. Stephens 197

Desiree Constantineau

by Mr. Stephens 199

by Mr. Erickson 209

by Mr. Stephens 213

by Mr. Erickson 215

Motions 221

DEFENSE WITNESSES:

Josh Dowling

by Mr. Erickson 225

I N D E XDIRECT CROSS REDIRECT RECROSS

June 20, 2012

DEFENSE WITNESSES (con't):

Kendalle Simmons

by Mr. Erickson 247

by Mr. Stephens 250

STATE REBUTTAL WITNESSES:

Malcolm Moore

by Mr. Stephens 263

Closing Argument

by Mr. Stephens 266

by Mr. Erickson 278

by Mr. Stephens 288

Jury Charge 294

Deliberation 311

Verdict 312

Sentencing of the Court 314

Certificate of Reporter 319

EXHIBITS PAGE

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
PLAINTIFF EXHIBITS			
P-1	Photo lineup	31	155
P-2	911 DVD	68	87
P-3	Large aerial photo	68	123
P-4	Photo	68	123
P-5	Photo	68	123
P-6	Photo	68	123
P-7	Photo	68	123
P-8	Photo	68	165
P-10	Bullet	68	123
P-11	Cell phone texts	68	129

DEFENSE EXHIBITS

D-1	Photo	109	123
D-2	Photo	109	123
D-3	DVD - victim interview	149	149
D-4	Text messages	183	183
D-5	Statement	210	

COURT EXHIBITS

C-1	Release of Juvenile Records		

P R O C E E D I N G S

1
2 **THE COURT:** All right. We ready to have the
3 jury come back in?

4 **MR. STEPHENS:** Yes, ma'am.

5 **THE COURT:** All right. Let's bring the jury
6 in.

7 (WHEREUPON, the jury panel enters at approximately
8 11:15 a.m.)

9 **THE COURT:** Ladies and Gentlemen, if you
10 would, give me your attention. At this time, we
11 are about to begin the trial entitled the State of
12 South Carolina versus Mykel Johnson, Ladies and
13 Gentlemen, who is charged in the bill of
14 indictments by the Grand Jury of Beaufort County
15 with two counts of Attempted Murder.

16 Ladies and Gentlemen, the State in this case
17 is being represented by Jeffrey Stephens and Adam
18 Rousseau.

19 Gentlemen, if you would, stand and face the
20 jury panel. Thank you.

21 Ladies and Gentlemen, Mr. Johnson, Mykel
22 Johnson, is being represented by Eric Erickson.

23 If you both would, please stand. Mr. Johnson,
24 if you would, also stand and face the jury panel.
25 Thank you, gentlemen. You may be seated.

1 Ladies and Gentlemen, I'm going to ask you a
2 number of questions related to this case. I again
3 ask you that if you need to respond to a question,
4 if you would, simply stand, give me your name and
5 juror number and, uh, then when called upon, go
6 ahead and tell me what you need to tell me.

7 Ladies and Gentlemen, I will tell you that
8 this is a case or an allegation of attempted murder
9 that occurred on October 28th of 2011 back at the
10 Cross Creek Apartments behind the TJ Maxx here in
11 Beaufort county in that mall, the PetSmart shopping
12 mall. Ladies and Gentlemen, the allegation is that
13 the defendant did shoot at a Frank Babecki and, as
14 well, a Desiree Constantineau.

15 Ladies and Gentlemen, is there any member of
16 the jury panel related by blood or connected by
17 marriage with the defendant in this case, Mr. Mykel
18 Johnson? If so, please stand. (No response.)

19 Is here anyone on the jury panel -- I'm sorry.
20 Is there any member of the jury panel who is a
21 close personal friend or share a special
22 relationship with the defendant, Mr. Mykel Johnson?
23 If so, please stand. (No response.)

24 Additionally, Ladies and Gentlemen, you've
25 been introduced to the attorneys trying this case,

Jury Qualification

9

1 Mr. Stephens, Mr. Rousseau and Mr. Erickson --
2 Rousseau, I apologize, sir.

3 Ladies and Gentlemen, the question is the
4 same. Is there any member of the jury panel
5 related by blood, connected by marriage or does
6 anyone on the jury have a close personal or special
7 relationship with any of the attorneys trying this
8 case? If so, please stand. (No response.)

9 Additionally, Ladies and Gentlemen, is there
10 any member of the jury panel who has ever been
11 represented by any of the attorneys trying this
12 case or been an employee or have any particular
13 relationship with any of the attorneys trying this
14 case? If so, please stand. (No response.)

15 Ladies and Gentlemen, the following are a list
16 of potential witnesses in this case. My question
17 will be the same. Is there any member of the jury
18 panel related by blood or connected by marriage or
19 have a close personal or social relationship with
20 any of these potential witnesses? They are: First
21 Sergeant Christopher Cushman of the Beaufort Police
22 Department.

23 And if you are here, Ladies and Gentlemen, any
24 of the witnesses that are here, if you would,
25 please stand and face the panel.

1 Investigator Josh Dowling of the Beaufort
2 Police Department. Thank you, Investigator
3 Dowling.

4 Investigator George Erdel of the Beaufort
5 Police Department, Master Sergeant Melanie Smith,
6 Sergeant Jeff Vortisch, Frank Babecki, Desiree
7 Constantineau, Kenny McCollum, Adriana Johnson,
8 Malcolm Moore.

9 Thank you, sir.

10 Billy Crumpton, Kendalle Simmons. Very well.

11 Ladies and Gentlemen, the question is, is
12 there any member of the jury panel related by blood
13 or connected by marriage or have a close personal
14 or social relationship with any of those potential
15 witnesses? If so, please stand. (No response.)

16 Ladies and Gentlemen, I know you know very
17 little about this case. It is an alleged shooting.
18 But my question to you is is there any member of
19 the jury panel that has any independent knowledge
20 about this case. In other words, from another
21 source, either by word of mouth or the newspaper or
22 anything else. If so, please stand.

23 **THE BAILIFF:** One standing, Your Honor.

24 **THE COURT:** Yes, ma'am. Your name and juror
25 number.

Jury Qualification

11

1 **THE JUROR:** 187, Shirley Rogers.

2 **THE COURT:** Ms. Rogers, before you go ahead
3 and speak in front of the rest of the panel, would
4 you please come around and just speak to me in
5 private if you don't mind? Thank you.

6 (WHEREUPON, the following bench conference is held
7 with Juror Number 187, Shirley Rogers.)

8 **THE COURT:** You understand what the
9 allegations are. My question is, can you be fair
10 and impartial in the trial of this case or would
11 you prefer not to sit on it?

12 **THE JUROR:** I would prefer not to sit on it.

13 **THE COURT:** Okay. All right, Ms. Rogers.
14 I'm going to go ahead and excuse you. What I want
15 you to do is this for me. I want you to call the
16 jury line after six o'clock tonight. It will tell
17 you whether or not you need to report tomorrow. If
18 you need to report, come. If it says call the next
19 day, which it may say call Tuesday night after
20 6:00, just follow whatever it says.

21 **THE JUROR:** Okay.

22 **THE COURT:** Okay. All right. Thank you.

23 (WHEREUPON, the bench conference is concluded.)

24 **THE COURT:** Number 187, Ms. Rogers, is going
25 to be excused from the trial of this case. I have

1 her calling after 6:00.

2 THE BAILIFF: Yes, ma'am. That's what I
3 gave her a card for.

4 THE COURT: Thank you.

5 Ladies and Gentlemen of the jury panel, is
6 there any member of the jury panel who is a member
7 of or a contributor to any group which has as its
8 primary concern the promotion of law enforcement or
9 victim's rights? That would include such groups as
10 CAV, Citizens Against Violent Crime, or MADD,
11 Mothers Against Drunk Driving, or SADD, Students
12 Against Drunk Driving. If so, please stand.

13 (No response.)

14 Ladies and Gentlemen, based on the nature of
15 the charges, is there any juror that feels that
16 they can not sit and be fair and impartial in the
17 trial of this case to both the State and the
18 defense? If so, please stand. (No response.)

19 Ladies and Gentlemen, is there any member of
20 the jury panel who's conscious of any interest, any
21 bias or prejudice for or against the defendant, Mr.
22 Mykel Johnson? If so, please stand.

23 (No response.)

24 Ladies and Gentlemen, is there any member of
25 the jury panel who has ever been a victim of an

Jury Qualification

13

1 attempted murder? If so, please stand.

2 (No response.)

3 Ladies and Gentlemen, is there any member of
4 the jury panel who has ever been accused of or
5 convicted of attempted murder? If so, please
6 stand. (No response.)

7 Ladies and Gentlemen, is there any reason
8 whatsoever that you can not give both the State of
9 South Carolina and the defendant, Mr. Mykel
10 Johnson, a fair and impartial trial in this case?
11 If so, please stand. (No response.)

12 Is there any further questions to request of
13 this panel from the State?

14 **MR. STEPHENS:** None, Your Honor. Thank you.

15 **THE COURT:** From the defense?

16 **MR. ERICKSON:** No, Your Honor.

17 **THE COURT:** Thank you.

18 How long is it going to take?

19 **THE CLERK:** Just a few minutes.

20 **THE COURT:** Okay. Ladies and Gentlemen,
21 what's going to happen at this time is those that
22 have been qualified, your name is being put into a
23 computer. It will randomly select a list of
24 jurors. When your name is called, I'm just going
25 to ask that you simply stand in your place. The

1 attorneys have an opportunity to either ask you to
2 be seated or to be struck from the trial of this
3 case. They each have a certain amount of strikes
4 that they are allowed to employ. All right. If
5 you are chosen, Mr. Sorrell will tell you to come
6 take a seat in the jury panel. All right. It will
7 take -- just a moment and we should be able to get
8 going, Ladies and Gentlemen.

9 (WHEREUPON, the trial jury is selected.)

10 THE COURT: Are there any matters -- any
11 matters of law I need to take up regarding the jury
12 selection process from the State?

13 MR. STEPHENS: No, Your Honor. Thank you.

14 THE COURT: From the defense?

15 MR. ERICKSON: No, Your Honor.

16 THE COURT: Very well. Ladies and
17 Gentlemen, those of you that are sitting out here
18 still in the gallery, obviously, you are not jurors
19 in the trial of this first case. I'm going to
20 ahead and excuse you, Ladies and Gentlemen. I
21 simply need to ask you to call in to the jury line.

22 You're going to be given a card when you
23 leave. It's going to have a phone number with a
24 recorded message. Call in after 6 o'clock tonight.
25 It will tell you whether or not you need to report

Jury Qualification

15

1 in the morning. It may tell you to call Tuesday
2 night after 6 o'clock. I respectfully just ask
3 that you follow the prompts. We do need you if we
4 are going to pull another jury. Again, Ladies and
5 Gentlemen, I don't want to keep you coming and
6 going unless I absolutely need you. Again, if
7 you'll just call after 6 o'clock. Don't call
8 before. The message literally gets put on there at
9 5:59. All right. Thank you for being here, Ladies
10 and Gentlemen. You are excused.

11 (WHEREUPON, the jury panel exits at approximately
12 11:39 a.m.)

13 THE COURT: Well, welcome, Ladies and
14 Gentlemen. As you understand, you are the jury for
15 the trial of this first case. I am going to go
16 ahead and excuse you to return tomorrow. There are
17 a few things I need to tell you for instructions.
18 As well, after I excuse you, your bailiffs are
19 going to take you back to the jury room. You are
20 to report straight to the jury room through a back
21 door and not come through the courtroom tomorrow
22 when you report.

23 Ladies and Gentlemen, again, there are a few
24 things. Most importantly, you are not to discuss
25 this case. Not only with each other or with anyone

1 else. Again, Ladies and Gentlemen, the reason for
2 that is simply someone is going to tell you
3 something about something. They know nothing about
4 this case. I know you very little. But again, you
5 are not permitted to go home and tell a spouse or a
6 loved one even what the charges are, the parties
7 involved, the attorneys or any of the potential
8 witnesses. Again, Ladies and Gentlemen, it would
9 be inappropriate for you to be influenced by any
10 outside source. You are going have everything you
11 need to decide this case right here in this
12 courtroom. Again, I don't want you tainted in any
13 way.

14 Additionally, Ladies and Gentlemen, I don't
15 think there's going to be anything in the newspaper
16 or on the news or on the radio or television. But
17 out of an abundance of caution, if you happen to
18 wake up tomorrow morning and open the paper or turn
19 on the TV and see something about this case, you
20 are to turn it off or disregard it. Again, it
21 would be -- would not be appropriate for you again
22 to be influenced in any way.

23 Additionally, Ladies and Gentlemen, I have
24 instructed the parties and the witnesses and the
25 lawyers in this case not to speak to you when they

Jury Qualification

17

1 come and go from the courthouse. The reason why is
2 that even in innocent conversation as you are
3 walking down the stairs or riding the elevator can
4 be misconstrued. It always gets reported back. So
5 out of abundance of caution, they are told not to
6 speak with you. So again, if you pass them and
7 don't smile or even say hello, they are not being
8 unfriendly. They are simply following my order.

9 Ladies and Gentlemen, additionally, if you
10 were able to get into the courtroom here today with
11 a cell phone or a computer, I'm going to ask that
12 you leave it back in your car or back at home. It
13 is not permissible for you to bring electronic
14 devices or electronic communication into the
15 courtroom or into your jury room. There's just too
16 much temptation to be able to get information off
17 of it. We ask that you leave it back there.

18 If you are concerned about someone needing to
19 contact you emergently while you are performing
20 jury service here, Ladies and Gentlemen, just give
21 them the Clerk of Court's number. Tell them to say
22 that you are sitting on a jury in Carmen Mullen's
23 courtroom and I assure you I will find you
24 immediately. All right.

25 Ladies and Gentlemen, I appreciate your

1 willingness to serve. I will tell you that this
2 case is only expected to last two days. It's
3 expected to last Tuesday and Wednesday. Possibly
4 could go over to Thursday. We don't always know
5 what happens. I will tell you that that's what
6 your expectation should be.

7 Additionally, I typically run my courtroom
8 from 9:30 until about 5:00 or 5:30 in the
9 afternoon. However, Ladies and Gentlemen, if any
10 of you have prior engagements or a certain time
11 that you need to be home, either to pick up
12 children or a longstanding party or a baseball
13 game, I don't want anyone to miss those things.
14 I'm simply asking that you tell the bailiffs what
15 it is that you need and what time you need to be
16 out of here. I can certainly accommodate you based
17 on the short length of this trial.

18 Ladies and Gentlemen, the last thing before I
19 go ahead and excuse you to your jury room, I need
20 you before you leave today to elect a foreperson. A
21 foreperson doesn't have any more say than anyone
22 else. They are simply the person that gets the
23 discussion going once the case is sent to you for
24 your deliberations. And it's also the person that
25 I speak with in regards to time and when you all

Jury Qualification

19

1 are able to report for jury duty. What I'm going
2 to ask, Ladies and Gentlemen, when you have elected
3 that foreperson, let the bailiffs know. That
4 foreperson needs to keep this front seat up here at
5 all times. My alternate needs to stay in the back.
6 You can move around if you have trouble seeing.

7 Ladies and Gentlemen, for the rest of you, as
8 you come and go from the courtroom, you are welcome
9 to change seats if you'd like. You certainly are
10 not limited to the seats that you are in.

11 Again, Ladies and Gentlemen, thank you. Does
12 anyone have any problem with reporting tomorrow
13 morning at 9:30? Are y'all okay? We can start at
14 10:00 if we need to. A lot of times, my jurors,
15 usually when I say that, they say we want to report
16 at 9:00 or earlier. But is 9:30 okay for everyone?
17 I know some of you are driving a good distance. I
18 want to make sure you get here.

19 Ladies and Gentlemen, I can not start until
20 all 13 of you are here. So if you run into car
21 trouble or have any problem, please call to the
22 clerk's office. Tell them what it is and we will
23 come get you. Okay? Again, Thank you, Ladies and
24 Gentlemen. We appreciate it. We look forward to
25 seeing you tomorrow morning at 9:30. You are

1 excused.

2 (WHEREUPON, the jury exits at approximately
3 11:45 a.m.)

4 **THE COURT:** All right. Y'all, it's my
5 understanding that we have some pretrial motions
6 that we're going to try to take up right now.

7 For this case, if y'all will be back at 1:00,
8 Mr. Erickson and Mr. Stephens. And we'll be at
9 ease in this case until 1 o'clock. We're going to
10 get as many of the pretrial motions done as we
11 possibly can. Whatever is flow over, we'll do in
12 the morning.

13 **MR. STEPHENS:** Okay.

14 (WHEREUPON, a lunch recess is taken.)

15 **THE COURT:** Thank you, you all. Please be
16 seated. All right. What is the first motion we're
17 going to take up?

18 **MR. STEPHENS:** Your Honor, the State's got a
19 Jackson v. Deno motion on statements that Mr.
20 Johnson made when he was first taken into custody,
21 Your Honor. The State calls Investigator George
22 Erdel from the Beaufort Police Department.

23 **THE CLERK:** Come forward and be sworn, sir.

24 **GEORGE ERDEL**

25 having first been sworn, testifies as follows:

1 **THE CLERK:** You may be seated. Would you
2 state your name and spell it for the court, please?

3 **THE WITNESS:** George Erdel. E-R-D-E-L.

4 **DIRECT EXAMINATION**

5 **BY MR. STEPHENS:**

6 **Q** Investigator Erdel, you are a criminal
7 investigator for the Beaufort Police Department, is that
8 correct?

9 **A** Yes, sir.

10 **Q** And as part of your, uh, duties, were you
11 involved in investigating the shooting that occurred at
12 Cross Creek Apartments on October 28th of last year?

13 **A** I was involved. Uh, Investigator Dowling was
14 the primary case officer.

15 **Q** So you were not the lead investigator?

16 **A** That's correct.

17 **Q** Now, also as part of your duties related to
18 that investigation and other duties you may have at the
19 Beaufort Police Department, were you involved in the
20 apprehension of a suspect in that case, Mykel Johnson, on
21 November 8th, 2011?

22 **A** Yes.

23 **Q** Where was Mr. Johnson taken into custody?

24 **A** He was -- I don't recall the exact location,
25 the name of the street. It was in a trailer out in

1 Yemassee.

2 Q And who actually went and took him into
3 custody?

4 A The United States Marshall Service.

5 Q Obviously, there was some local law enforcement
6 involved in that as well?

7 A Correct. Members of the Beaufort County
8 Sheriff's Office and myself were also present.

9 Q What was your role in that in taking him into
10 custody at that location?

11 A I was there because I had knowledge of the
12 case. I basically -- the actual apprehension itself, I
13 was on the perimeter. I was at the rear of the house.
14 The Marshall Service members actually entered the house
15 and took custody of him.

16 Q Someone else actually went into the home and
17 got him?

18 A That's correct.

19 Q And when he was brought out of the home, was he
20 in handcuffs at that time?

21 A Yes.

22 Q Do you know if anyone had read him his Miranda
23 rights at that point?

24 A I do -- I don't believe so, no.

25 Q Did you personally speak with Mr. Johnson?

1 A I did.

2 Q What did you say to him?

3 A I told him, in essence, that we would be going
4 to the police department, that he would be advised of his
5 rights and he could speak to us, to the law enforcement
6 at the police department.

7 Q Okay. Did you ask him any questions at that
8 point?

9 A No, sir.

10 Q Did Mr. Johnson make any statements to you?

11 A Yes.

12 Q And what, if any, statements did he make to you
13 at that time?

14 A He stated that he had wanted to turn himself in
15 and he was going to do so once he had an attorney. He
16 also asked me how we had found him. And he stated that
17 there was -- I really didn't understand exactly what he
18 was saying. He said something about there being
19 something on his cell phone that he wanted us to see.
20 But because I had not mirandized him and I wanted to get
21 him down to the police department, I didn't ask him to
22 elaborate any further.

23 Q Again, you stated that you had not asked him
24 any questions at that point?

25 A That is correct.

1 Q There is no question that he was under arrest?

2 A That's correct.

3 Q Now, after he, uh, was taken to the Beaufort
4 Police Department or to the Beaufort County Detention
5 Center, was -- tell me, did you interview him there?

6 A Uh, a statement was made at the police
7 department in which he invoked his rights and the
8 interview was terminated.

9 Q Okay. So at that point, he was given his
10 Miranda warnings and declined to speak with officers?

11 A Correct.

12 Q It was clear at that point he understood his
13 rights?

14 A Yes.

15 Q Just to repeat. The statements that he made
16 from the point that he was going to turn himself in if he
17 got a lawyer, that's what you testified to?

18 A Yes, sir.

19 Q And asked how did you find him?

20 A Yes.

21 MR. STEPHENS: Your Honor, that's all the
22 questions the State has.

23 THE COURT: Okay. Mr. Erickson?

24 MR. ERICKSON: Thank you, Judge.

25 CROSS-EXAMINATION

1 BY MR. ERICKSON:

2 Q Officer Erdel, I want to ask you how many
3 officers were out there from Yemassee to arrest Mr.
4 Johnson?

5 A Maybe -- between 10 to 15 maybe.

6 Q 10 to 15?

7 A Perhaps. I didn't really count.

8 Q Uniformed officers?

9 A Yes.

10 Q Clearly he --

11 A I wasn't in uniform. I was wearing my normal,
12 you know, shirt and tie kind of thing. Monday through
13 Friday attire. I'm not a patrol officer. I wear
14 detective clothing. I was not uniformed but the rest of
15 the officers were.

16 Q Would you describe that as a show of force by
17 the police departments?

18 A Uh, you have to specify, sir. I was the only
19 member of the Beaufort Police Department that was there.
20 The United States Marshall Service was there. I don't
21 know that I would classify it that way or not.

22 Q Were guns drawn?

23 A I assume so.

24 Q Is it reasonable to say that's a show of force?

25 A I suppose.

1 Q Was Mr. Johnson handcuffed at the time he gave
2 those statements?

3 A Yes.

4 Q All right. Did you know Mr. Johnson's age at
5 the time?

6 A Yes.

7 Q How old was he?

8 A I believe he was 16.

9 Q And how much education did Mr. Johnson have at
10 that time?

11 A I have no idea.

12 Q Did he ask for his mother?

13 A Not that I recall.

14 Q Did he ask for any adult to accompany him?

15 A Not that I recall.

16 Q Did he ask for a lawyer before he made those
17 statements?

18 A No.

19 Q How do you know that?

20 A Well, he didn't ask me for a lawyer.

21 Q Could he have asked somebody in your party of
22 10 to 15?

23 A That would call for me to speculate, and I
24 don't really know.

25 Q Who else might have been in there to hear what

Argument

27

1 Mr. Johnson had to say?

2 A The members of the Marshall Service that took
3 him into custody, if he said anything.

4 Q To your knowledge, are you the only one that,
5 uh, heard those two statements?

6 A I don't know if the people that were standing
7 around heard him or paid him any mind or not. There were
8 other people in the immediate vicinity. Whether they
9 paid any attention or not, I couldn't say.

10 Q Did you answer Mr. Johnson's question on how
11 did you find him?

12 A I said somebody gave you up.

13 Q Somebody did what?

14 A Gave you up.

15 Q Okay. I don't have nothing further.

16 THE COURT: Anything further?

17 MR. STEPHENS: No, Your Honor. Only argument
18 by the State.

19 THE COURT: Okay. You may step down, sir.
20 Thank you.

21 Whenever you're ready, Mr. Stephens.

22 MR. STEPHENS: Excuse me, Your Honor.

23 THE COURT: Whenever you're ready.

24 MR. STEPHENS: Your Honor, the State just
25 argues that this is clearly voluntary statements

1 that while Mr. Johnson was under arrest at this
2 point, there's no question this was custodial.
3 However, it was not an interrogation. No questions
4 were asked of him. When he was interviewed later,
5 he was given his Miranda rights. He clearly
6 understood them and invoked his right to remain
7 silent. Mr. Johnson established that he knew what
8 his rights were and he did invoke them, but these
9 were spontaneous admissions -- excuse me, utterances
10 by the defendant.

11 **THE COURT:** Mr. Erickson?

12 **MR. ERICKSON:** That's what I want to make
13 clear, Your Honor. Mr. Johnson clearly invoked his
14 rights during the video interrogation. There's no
15 reason he would have said these things at that time.
16 He clearly understands what he says to be used
17 against him. I just have serious doubt as to
18 whether or not he made those questions. I would
19 say, uh, with the show of force and all those
20 deputies that he really had no chance in that
21 situation to really, uh, say anything. I mean, I
22 would just ask that you deny the motion letting
23 those two statements in.

24 **THE COURT:** Okay. Well, respectfully, I do
25 think the statements were voluntary. They were not

1 elicited by interrogation and they were spontaneous
2 utterances from his own mouth, unsolicited. I think
3 they are voluntary and I think it's admissible.
4 Mr. Stephens, what's your next motion?

5 **MR. STEPHENS:** Your Honor, the State has a
6 Biggers motion on the admissibility of a photo
7 lineup done by one of the victims in the case, uh,
8 Frank Babecki.

9 **THE COURT:** Okay.

10 **MR. STEPHENS:** Again, the State recalls
11 Investigator --

12 **THE COURT:** Sorry. Come on back. I didn't
13 realize you were there too. I'm just going to
14 remind you you are under oath. Thank you, sir.

15 **THE WITNESS:** Yes, Your Honor.

16 **GEORGE ERDEL**

17 having previously been sworn, testifies as follows:

18 **DIRECT EXAMINATION**

19 **BY MR. STEPHENS:**

20 **Q** Investigator Erdel, you testified a moment ago
21 that you were involved, although not the lead
22 investigator, with the investigation of the shooting that
23 occurred at Cross Creek Apartments on October 28th --

24 **COURT REPORTER:** I'm sorry. That occurred?

25 **BY MR. STEPHENS:**

1 Q I'm sorry. That occurred at Cross Creek
2 Apartments in Beaufort on October 28th. As part of your
3 involvement in that investigation, did you have contact
4 with the victims in the case, Frank Babecki and Desiree
5 Constantineau?

6 A Yes, sir.

7 Q Do you know if, uh, either one of them
8 submitted to a photo lineup to identify the suspect
9 involved in the shooting?

10 A Uh, Mr. Babecki did.

11 Q How was the photo lineup prepared that was
12 given to Mr. Babecki?

13 A When a photo lineup is conducted, we -- if we
14 have a subject that we want to put into the lineup, we
15 use a program. It's our reporting system. We search for
16 a criteria of other people that look similar to that
17 person. The system comes back with people whose
18 parameters fit that description. We scroll through the
19 pictures until we find suitable candidates. There are
20 six candidates up in a lineup, then we print the lineup
21 out.

22 Q So the computer gives you a list of potential
23 pictures based on the criteria you put in and then you
24 select individuals to go in the lineup?

25 A Yes, sir.

1 Q How is the order of the pictures in the lineup
2 determined?

3 A The program randomizes them. You have to hit
4 like a little button that says "Done", "Randomize". And
5 you can't print the lineup until you hit that button.
6 You press that button. The lineup is finished. You hit
7 the print button and the lineup comes out.

8 MR. STEPHENS: Your Honor, may I approach?

9 THE COURT: You may.

10 (WHEREUPON, State's Exhibit 1 is marked for
11 identification purposes.)

12 BY MR. STEPHENS:

13 Q Officer Erdel, I'm handing you what's been
14 marked State's Exhibit 1. Can you please take a look?
15 Can you identify that document?

16 A This is the photo lineup that I printed out.

17 Q How do you know that's a photo lineup you
18 printed out. Is there anything that identifies it as
19 such? Are there any markings on it?

20 A The date of the printout is up top here and
21 where Mr. Babecki initialed and placed a date by Mr.
22 Johnson's photograph as indicated on here.

23 Q Now, is Mr. Johnson's photo on that lineup?

24 A Yes, sir.

25 Q All right. It's at the number 1 position,

1 correct?

2 A Correct.

3 Q Now, you just testified a minute ago that that
4 is a random generation by the computer?

5 A Correct.

6 Q So you had nothing to do with placing that
7 picture in the number 1 position?

8 A I did not.

9 Q Now, you also indicated that it is initialed by
10 Frank Babecki. So the next question, did you present
11 this to, uh, -- this photo lineup to him?

12 A I did.

13 Q What, if any, instructions did you give him
14 when you presented this to him?

15 A There's a standard disclaimer that we give that
16 the person may or may not be in the photographic lineup.
17 The person who is viewing the lineup should not assume
18 that the person who committed the offense is in the
19 lineup. So I gave him that admonition before handing him
20 the lineup.

21 Q Now, are you present in the room when they look
22 through the lineup?

23 A I give them the lineup. I usually will leave
24 the room and give them a chance to look at it without me
25 being in there.

1 Q In this case, did you leave the room?

2 A I wasn't able to make it out of the room before
3 Mr. Babecki identified Mr. Johnson as the offender.

4 Q Would it be fair to say that he picked him out
5 immediately?

6 A Yes.

7 Q Now, based on your discussions with Mr. Babecki
8 and Mrs. Constantineau, did they have any prior knowledge
9 of the suspect that they believed had committed the
10 offense?

11 A They stated that they knew who he was and that
12 they had seen him on numerous occasions prior and he was
13 a known person to them, in other words.

14 Q Under those conditions, do you believe, in your
15 opinion as a police investigator that you needed to give
16 Mr. Babecki a photo lineup to identify the suspect?

17 A No, sir.

18 Q Why did you submit it?

19 A Out of an abundance of caution.

20 Q Did the female victim in the case, Mrs.
21 Constantineau, also do a photo lineup?

22 A She did not.

23 Q Do you recall why she didn't do one?

24 A I don't recall. I believe -- she was pregnant
25 at the time. I want to say that she had to leave for --

1 because of the stress and all that stuff and what was
2 going on with the baby, but I couldn't say that with 100
3 percent certainty. I do believe she had left around the
4 same time I gave Mr. Babecki a lineup.

5 Q Did you observe Mr. Babecki circle and initial
6 the spot where the picture of Mykel Johnson was?

7 A Yes.

8 Q And are those his initials?

9 THE COURT: Can I see the lineup?

10 THE WITNESS: I'm sorry. Can you say that
11 again?

12 BY MR. STEPHENS:

13 Q So those are his initials ---

14 A Yes, sir.

15 Q --- that you saw him put on there? Was this
16 entire process video recorded?

17 A Yes.

18 MR. STEPHENS: Beg the Court's indulgence for
19 just a moment, Your Honor. (Pause.)

20 BY MR. STEPHENS:

21 Q How would you gauge Mr. Babecki's certainty
22 that this was the individual he seen shooting at him and
23 his wife?

24 A Positive. Very -- 100 percent.

25 MR. STEPHENS: Your Honor, I don't have

1 anything further for Investigator Erdel at this
2 point.

3 THE COURT: Okay. Mr. Erickson.

4 MR. ERICKSON: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. ERICKSON:

7 Q Officer, you mentioned you prepared Mr. Babecki
8 prior to this lineup?

9 A As far as how? I'm confused.

10 Q You stated certain things to Mr. Babecki as far
11 as the order of the lineup?

12 A As far as -- no, not as far as the order. I
13 basically say that just because I'm giving you a lineup
14 does not mean the person is in there.

15 Q All right. That's what I wanted to hear. And
16 the other thing, did you have an occasion prior to the
17 lineup to look at Facebook with Mr. Babecki?

18 A I don't know about prior to the lineup. I
19 don't remember if I did that or if Investigator Dowling
20 did that. I'm not sure. I'm not sure.

21 Q You have any knowledge that Facebook was used
22 prior to the lineup in this case?

23 A Prior to the lineup?

24 Q Yes.

25 A I have no knowledge of that, no.

1 **MR. ERICKSON:** I would -- at this time, I
2 would like to play the video of that lineup. I
3 believe there is something about Facebook said by
4 Mr. Babecki either in the beginning or the end of
5 that.

6 **THE COURT:** Okay. Let's go ahead and play
7 it. Let's cue it up.

8 **MR. ERICKSON:** I could not get it to play on
9 that big screen. I don't know whether we can see it
10 on --

11 **MR. STEPHENS:** Your Honor, we can bring, uh,
12 -- I believe Mr. Erickson's got a copy of the video.
13 We can bring one of the other televisions up.

14 **THE COURT:** All right.

15 **MR. STEPHENS:** He's trying -- since he's the
16 proponent for the evidence, Your Honor, we don't
17 have anything cooked up and ready to play. So we
18 would need, I think, a few minutes.

19 **THE COURT:** Okay. Let's go ahead and bring
20 it out. All right. So we'll go ahead and break and
21 take 10 minutes and you can go ahead and pull it up.
22 Uh, after your Biggers hearing, what else does the
23 State have?

24 **MR. STEPHENS:** Your Honor, all that I have
25 is, uh, I have a motion in limine to request that

1 the defense not be able to inquire into speculation
2 as to the defendant -- victim, Frank Babecki's drug
3 involvement. Specifically, after the female victim,
4 Mrs. Constantineau, testifies, in her video
5 interview, the officers ask her if she's aware of
6 whether her husband is involved in any drug use with
7 I believe either this defendant or other people.
8 She says probably. I think that's highly
9 prejudicial, also not relevant to these charges
10 unless there's some tie that's made between his drug
11 use and the offense charged. The State would argue
12 that that should be excluded.

13 If Mr. Erickson tries to use that as some kind
14 of prior inconsistent statement by Mrs.
15 Constantineau, we just ask that that portion
16 relating to speculation on Mr. Babecki's drug use be
17 admitted.

18 THE COURT: Okay.

19 MR. ERICKSON: Well, to reply to that, Your
20 Honor, I think --

21 THE COURT: We're not arguing it yet.

22 MR. ERICKSON: All right.

23 THE COURT: We're not arguing it yet.

24 MR. ERICKSON: All right.

25 THE COURT: So what other motions do you have

1 after?

2 **MR. STEPHENS:** Lastly, Your Honor, the State
3 intends to use jail calls from between the
4 defendant, Mr. Johnson, and his mother and Malcolm
5 Moore to show a, uh, attempt to interfere with the
6 victims. He asked his mother to have someone pay
7 the victims not to show up. The State would argue
8 that as evidence of consciousness of guilt. I don't
9 know if we need a preliminary ruling on
10 admissibility, Your Honor. But before the State
11 mentions any of that in its opening, we want to
12 bring that up.

13 **THE COURT:** Okay. All right. Anything else,
14 Mr. Erickson, from you?

15 **MR. ERICKSON:** I have a text message that I
16 may try to get in.

17 **THE COURT:** Okay.

18 **MR. ERICKSON:** From Frank to my client about
19 wanting to, uh, buy some marijuana.

20 **MR. STEPHENS:** The State has no objection to
21 that, Your Honor. We're going to have Billy
22 Crumpton with the Beaufort County Sheriff's Office
23 testify on foundation for the search of the
24 defendant's cell phone. We believe that's going to
25 lay the foundation.

1 **THE COURT:** Okay. All right. Well, let's go
2 and get those hooked up however long it takes to get
3 it hooked up.

4 **MR. STEPHENS:** So, Your Honor, are we in
5 recess?

6 **THE COURT:** We are. Someone just get it
7 hooked up. Let me know when y'all are done.
8 (WHEREUPON, a short recess is taken.)

9 **THE COURT:** All right. Mr. Erickson, are we
10 cued up?

11 **MR. ERICKSON:** Yes, Your Honor.

12 **THE COURT:** All right. Let's go.

13 **MR. ERICKSON:** Do I need to have Investigator
14 Erdel back?

15 **THE COURT:** All right. You needed me to see
16 -- what am I looking for here, Mr. Erickson?

17 **MR. ERICKSON:** You're going to look for a
18 statement from Mr. Babecki relating to Facebook.

19 **THE COURT:** Okay.

20 **MR. ERICKSON:** And Mr. Babecki, the officers
21 asked Mr. Babecki to describe what the perpetrator
22 looks like.

23 **THE COURT:** I see, uh, Investigator Erdel.
24 Who is the other investigator? I can't tell.

25 **MR. STEPHENS:** Your Honor, that's

1 Investigator Tony Ray.

2 THE COURT: Thank you.

3 MR. ERICKSON: If I could ask Investigator
4 Erdel to --

5 THE COURT: Come on up.

6 MR. ERICKSON: I think that would be just
7 easier.

8 THE COURT: Come on up, Mr. Erdel.

9 (WHEREUPON, Defendant's Exhibit 3 is played.)

10 MR. ERICKSON: I just missed it. I got to
11 back it up.

12 THE COURT: I didn't hear it. Was it Ray
13 that said it? Investigator Ray?

14 MR. ERICKSON: Uh, it was, uh, George Erdel.

15 THE COURT: Okay. Well, then back it up and
16 play it louder cause I didn't hear it.

17 (WHEREUPON, Defendant's Exhibit 3 is resumed.)

18 MR. ERICKSON: This is -- I can't get it at
19 the 36-minute mark exactly. I have to kind of play
20 it. You want me to alert you when it gets closer?

21 THE COURT: Is he telling how he knows the
22 defendant in this case? Is that what he's talking
23 about?

24 MR. ERICKSON: Right now, he is.

25 THE COURT: Okay.

1 (WHEREUPON, Defendant's Exhibit 3 is continued.)

2 MR. ERICKSON: We're at the 24-minute mark.
3 We need to get to 36.

4 THE COURT: Okay.

5 MR. ERICKSON: I don't -- you know, sometimes
6 it's hard to skip around.

7 THE COURT: Can't fast-forward it?

8 MR. ERICKSON: Well, I fast-forwarded it too
9 much last time.

10 THE COURT: Hold on a second.

11 (WHEREUPON, Defendant's Exhibit 3 is continued.)

12 MR. ERICKSON: We've got 10 minutes of this
13 before it comes up.

14 THE COURT: Well, I'm interested -- there was
15 a portion that we discussed about the potential of
16 him having bought drugs or talked to your client.
17 They are saying there's a cell phone, either a text
18 or a phone call.

19 (WHEREUPON, Defendant's Exhibit 3 is continued.)

20 THE COURT: All right. Investigator Erdel,
21 does that refresh your recollection in any way about
22 something that had to do with Facebook?

23 THE WITNESS: Yes, Your Honor. That would
24 have been subsequent to the identification by photo
25 lineup. I was attempting to obtain a more current

1 picture to see if his appearance had changed.

2 MR. ERICKSON: And I did not recall that
3 until I watched the video.

4 THE COURT: That was after you did the
5 lineup?

6 THE WITNESS: That video there was taken
7 after the lineup. I did the lineup first because
8 Investigator Dowling was -- initially, Your Honor,
9 when that incident happened --

10 THE COURT: Well, this should be easy enough.
11 What was the date of that video? Cause your lineup
12 was on 10/28 of '11.

13 MR. ERICKSON: I think they were both on --

14 THE WITNESS: They were on the same day.

15 THE COURT: On the same day.

16 THE WITNESS: The way the video burns, Your
17 Honor, it will go in order, subsequent order from,
18 like, first video to last video. So the lineup
19 video was first. Then you will see the other video
20 will be second.

21 THE COURT: Okay. So you did a photo lineup,
22 then once he identified him on a photo lineup, you
23 went to Facebook to see if you could pull up a more
24 current picture of him?

25 THE WITNESS: Yes, Your Honor. And to

1 clarify, if I may, when the initial report went out,
2 I was doing something else. I did not even know
3 that it had taken place until Investigator Dowling
4 called me and said, hey, I'm working a shooting
5 case, and asked me to, you know, research the name,
6 the alias name that we had and so forth and put the
7 lineup together.

8 So the victims, Mr. Babecki and his wife came
9 down to meet me. I showed them the photo lineup.
10 Once we got things solidified, later on, a positive
11 identification had been made. Then it was let's
12 find out. Research the suspect and find out what
13 his deal is, who he is, where he is, what he looks
14 like, any information we can.

15 **THE COURT:** You can go ahead and ask him
16 questions.

17 **MR. ERICKSON:** I don't have any more
18 questions for Officer Erdel. I would be curious as
19 to what Mr. Babecki would have to say as to when he
20 saw the Facebook photo.

21 **THE COURT:** Mr. Babecki is not here.

22 **MR. STEPHENS:** He is outside, Your Honor.

23 **THE COURT:** He is?

24 **MR. STEPHENS:** So I intend to call him next.

25 **THE COURT:** Okay. All right. You can step

1 down, sir.

2 Go ahead and call him.

3 **MR. STEPHENS:** Your Honor, if I can leave
4 that up.

5 **THE COURT:** Sure.

6 **MR. STEPHENS:** If we need to watch the video
7 and for my motion in limine -- I don't want to make
8 the motion now, but I want to cover any references
9 or activity that's not directly connected to the
10 offense or to what immediately proceeded the
11 offense. Provided upon whatever Mr. Erickson may
12 provide in his defense.

13 **THE COURT:** Come right up here. Put your
14 left hand on the Bible and raise your right hand.

15 **FRANK BABECKI**

16 having first been sworn, testifies as follows:

17 **THE CLERK:** You may be seated. State your
18 name and spell it for the Court please, sir.

19 **THE WITNESS:** Frank, F-R-A-N-K. Last name
20 B-A-B-E-C-K-I.

21 **DIRECT EXAMINATION**

22 **BY MR. STEPHENS:**

23 **Q** Mr. Babecki, uh, October 28th, 2011, do you
24 recall a shooting that took place at Cross Creek
25 Apartments?

1 A Yeah.

2 Q Uh, what was your involvement in that shooting?
3 Just in general.

4 A Uh, I was living at that development. Somebody
5 I know was walking towards me and said what happened the
6 other night. Shots started ringing out.

7 Q Now, do you recall going to Beaufort Police
8 Department later that day and having a picture lineup,
9 six pictures on a page presented to you when they were
10 trying to identify the person, suspect involved?

11 A Yes.

12 Q You're being handed what's been marked State's
13 Exhibit 1. Is that the photo lineup that was given to
14 you when, uh, they were trying to identify the suspect
15 involved in the shooting?

16 A Yes.

17 Q Are those your initials on the page, Mr.
18 Babecki?

19 A Yes.

20 Q Did you recall circling that picture and
21 initialing it?

22 A Yes.

23 Q Do you recall if you were told whether the
24 person who committed the crime was definitely on that
25 page or whether he just might be on that page?

1 A Yeah.

2 Q Go ahead and tell us, sir.

3 A Say the question again.

4 Q Were you told that the person who committed the
5 offense was definitely going to be on that page?

6 A No, no, no, sir.

7 Q Now, you recall being interviewed at the
8 Beaufort Police Department by Investigator Edwards seated
9 right here and another investigator?

10 A Yes, sir.

11 Q Were you shown Facebook photos of Mr. Johnson
12 from his Facebook page?

13 A Yes, sir. I believe so, yes.

14 Q Do you recall if that was before or after you
15 did the photo lineup?

16 A I think before. No, after. I did it after. I
17 saw that after.

18 Q Okay. Now, Mr. Babecki, when you were shown
19 that picture where you just circled, how certain were you
20 of the, uh, identity of the person you circled as the
21 person who shot at you?

22 A I knew him. I'm certain.

23 THE COURT: How did you know him?

24 THE WITNESS: He lived in my neighborhood.

25 THE COURT: And you had seen him before?

1 **THE WITNESS:** Yes.

2 **MR. STEPHENS:** Your Honor, I don't have any
3 further questions for Mr. Babecki at this time.

4 **THE COURT:** Mr. Erickson?

5 **CROSS-EXAMINATION**

6 **BY MR. ERICKSON:**

7 **Q** Yes, Mr. Babecki, do you know why you were
8 shown those Facebook photos?

9 **A** Do I know why?

10 **Q** Yeah.

11 **A** No, sir.

12 **Q** Did you want to see those or did the officer?

13 **A** I believe at the time he did and then I also
14 did too.

15 **Q** You don't remember why you wanted to look at
16 those Facebook?

17 **A** It was so long ago, I really don't recall.

18 **Q** How do you remember that you saw Facebook after
19 the lineup?

20 **A** Cause the lineup was shown to me first when it
21 happened. It was after, but I don't recall asking for
22 the Facebook pages. I don't recall asking for that.

23 **Q** So the officer asked for you to look at them?

24 **A** I believe so.

25 **MR. STEPHENS:** Your Honor, I have to object.

1 At this point, it's been asked and answered. Mr.
2 Erickson is going at it many different ways but Mr.
3 Babecki has already testified he doesn't know why.

4 THE COURT: Mr. Erickson, anything further?

5 MR. ERICKSON: Nothing further.

6 THE COURT: Anything further?

7 MR. STEPHENS: Nothing further from the
8 State, Your Honor. Thank you.

9 THE COURT: Okay. You can step down, sir.
10 Anything else, Mr. Stephens?

11 MR. STEPHENS: Your Honor, as I indicated,
12 the State intends to make a motion in limine. I
13 think it would help if I could cue this video up to
14 the start so you would have a better idea of the
15 kind of information --

16 THE COURT: Is this in regards to any alleged
17 drug dealing by your client?

18 MR. STEPHENS: Uh, drug use by Mr. Babecki,
19 Your Honor.

20 THE COURT: Drug use?

21 MR. STEPHENS: Yes, Your Honor. I think that
22 that would be prohibited as 404(b) and under 403,
23 unduly prejudicial, Your Honor.

24 THE COURT: Unless it affects his ability to
25 identify the defendant as the assailant.

1 **MR. STEPHENS:** Yes, Your Honor. But any
2 generalizations that he has used drugs in the past
3 not directly connected to his recall or use
4 immediately before or after this incident, Your
5 Honor.

6 **THE COURT:** All right. Well, Mr. Erickson,
7 as far as the photo ID lineup, I do think, quite
8 frankly, it was a good lineup. I don't feel it's
9 necessary since the officer said cause he knew him.
10 I don't think it was suggestive. I certainly don't
11 see any prejudice to it. He testified that he
12 actually knew your client and had been in the
13 neighborhood. So I think it's a good lineup and I'm
14 going to let it in. Okay.

15 **MR. ERICKSON:** Just for the record, I was
16 going to say that the Facebook show up was
17 unnecessarily suggestive and it could have
18 influenced the witness. He told you that he
19 couldn't remember exactly.

20 **THE COURT:** He said it was done after the
21 lineup.

22 **MR. ERICKSON:** But he said it was so long ago
23 that he had trouble remembering, so I just
24 questioned his memory.

25 **MR. STEPHENS:** Your Honor, if Mr. Erickson

1 wants to cross-examine Mr. Babecki during trial as
2 to his present ability to recall, uh, Mr. Johnson
3 and whether that's affected by seeing the FaceBook
4 photos, I think that's open area for cross-
5 examination.

6 **THE COURT:** I'm assuming Mr. Babecki, and
7 maybe we should have asked him, gave him his name.
8 I'm assuming gave the officer the name of the person
9 that shot at him cause he knew him.

10 **MR. STEPHENS:** He used his street name Hot
11 Boy, Your Honor.

12 **THE COURT:** Okay.

13 **MR. STEPHENS:** Your Honor, if I may move on
14 to the State's motion in limine.

15 **THE COURT:** Okay.

16 (WHEREUPON, a short recess is taken.)

17 **THE COURT:** All right. What are we looking
18 at now, Mr. Stephens?

19 **MR. STEPHENS:** Your Honor, I just wanted to
20 play the beginning of that interview. For one, it's
21 going to be about 10 or 12 minutes. But pretty
22 quickly, the investigator in this case asked Frank
23 Babecki's wife if she knows if Frank's been involved
24 in drug use. And this is the kind of information I
25 don't think should come in. It's not relevant under

Remarks

51

1 403, highly prejudicial.

2 THE COURT: You are playing Mrs. Babecki's --

3 MR. STEPHENS: Yes, sir. To the very
4 beginning.

5 THE COURT: Okay.

6 MR. STEPHENS: They do them kind of
7 continuously.

8 (WHEREUPON, Defendant's Exhibit 3 is played.)

9 MR. STEPHENS: Your Honor, I'd like to stop
10 it there.

11 THE COURT: Okay.

12 MR. STEPHENS: Just to, uh, -- I just think
13 that that illustrates what I'm worried about coming
14 in. Basically, any general information that, uh,
15 especially if it's speculative that Mr. Babecki may
16 use drugs, I believe that one of the alibi witnesses
17 is going to be Kendalle Simmons. He's listed as an
18 alibi witness. He testified that, uh, Mr. Babecki
19 used drugs with him, Your Honor. If it is not
20 connected to Mr. Babecki's ability to observe the
21 events or recall the events or if it's not connected
22 to how any of the res geste of how this offense
23 happened, Your Honor, I just believe it is unduly
24 prejudicial and it's also that character evidence
25 that wouldn't be admissible or appropriate for this

1 case, Your Honor.

2 THE COURT: Mr. Erickson?

3 MR. ERICKSON: Your Honor, Judge, it comes
4 under other crimes, wrongs, and I believe there's an
5 exception where at certain times, that bad act
6 evidence could come in. I want to show it for the
7 reasons of motive or identity. You just heard Mrs.
8 Babecki talk about a drug deal slash robbery gone
9 wrong. That's our position in this as to the
10 motive, as to why my client was named in this
11 particular crime. Mr. Babecki's mad at my client
12 for possibly doing that, that drug deal gone wrong.
13 That's totally speculation too, but it still goes to
14 motive and it goes to identity. If it wasn't for
15 drug use, these two parties wouldn't even know each
16 other.

17 THE COURT: It goes to identity?

18 MR. STEPHENS: Your Honor, --

19 THE COURT: Let him explain that. I'm having
20 a hard time finding the identity connection.

21 MR. ERICKSON: Identity, that is why these
22 two parties know each other, that is why Mr. Babecki
23 can pick out my client through texting transactions.

24 THE COURT: Between your client and Mr.
25 Babecki?

1 **MR. ERICKSON:** Right. That's the only way,
2 uh, Mr. Babecki knows where my client lives, because
3 of drug transactions.

4 **THE COURT:** Okay. But none of that occurred
5 at anyone's house is my understanding. I think it's
6 permissible. The underlying case, you can basically
7 say that it was alleged that H.B. robbed Mike of
8 money. Is that correct?

9 **MR. STEPHENS:** Yes, Your Honor. The State
10 has no objection to that. We also have no objection
11 to the text that Mr. Erickson --

12 **THE COURT:** And it was over marijuana
13 apparently. So where do you need to go further than
14 that? And what is this text message that you want
15 to get in Mr. Erickson said? And it is a text
16 message from who to who?

17 **MR. ERICKSON:** Mr. Babecki to my client.

18 **THE COURT:** What does it say?

19 **MR. ERICKSON:** I'll hand it up to you. It's
20 written in language that's not plain language. I
21 went ahead and transcribed it the best I could.
22 Actually, I do have the extract. It's an extract.
23 If you give me a minute, I can find the actual
24 extract.

25 **THE COURT:** Okay.

1 **MR. ERICKSON:** It's also the same as what I .
2 have on this sheet. I found the actual extract.

3 **THE COURT:** Frank Babecki's text to your
4 client. (Reading.)

5 All right. And you want to get that text in,
6 correct?

7 **MR. ERICKSON:** Yes, ma'am.

8 **THE COURT:** Well, I can tell you that if .
9 Frank Babecki takes the stand, he can certainly ask
10 him about this text. That's coming in. That
11 basically shows that he uses drugs. The text is,
12 "Could you spot me a 10 and I'll have it for you by
13 two o'clock latest, my man. I need a smoke bad. I
14 got like two bucks just til my deposit goes
15 through." Basically, this is Frank Babecki, the
16 victim, trying to get spotted a 10? I'm assuming
17 it's marijuana. I don't know if a 10 is a dime bag
18 or what it is exactly. But I'm sure it's something.

19 **MR. STEPHENS:** That's what Mr. Erickson is
20 going to argue. I expect that Mr. Babecki is going
21 to testify that the same friend who got the
22 defendant's number is the one who sent the text
23 messages. And just based on our interviews, I
24 expect that's what he's going to testify to. But
25 the State doesn't have an objection to that. We do

1 believe that part of that might be the drug
2 transaction that might have started this whole
3 thing.

4 **THE COURT:** Uh-huh. Again, I'm having a hard
5 time. Are we going to unnecessarily be talking
6 about Frank Babecki's character and his pot smoking?
7 No. But it's definitely relevant based on how these
8 people know each other and whether or not it was
9 someone else who used Mr. Babecki's phone to email
10 the defendant.

11 **MR. STEPHENS:** Your Honor, I don't think that
12 that, uh, -- the State has any issue with that.
13 Again, our concern is that a witness named Kendalle
14 Simmons may be called to testify just that he has,
15 in the past, used drugs with Frank Babecki. I think
16 that's unduly prejudicial and not relevant to this
17 offense.

18 **THE COURT:** I think he can ask him how he
19 knows him. I agree, I don't think it's necessary
20 that they talk about the past that they, you know,
21 smoked. But if he says I bought drugs from him or
22 we do drugs together, uh, I'm having a hard time
23 following exactly what you're trying to give me.
24 Basically, through this, it's going to come out. At
25 least, at a minimum, smoking marijuana.

1 **MR. STEPHENS:** Yes, Your Honor. But there's
2 a difference between those specific facts and Mr.
3 Erickson banging the drugs that he uses drugs with
4 this person and this person. I don't believe that
5 that is relevant. Now, that specific act on October
6 27th might have been the genesis of this shooting.
7 The State has no objection to that. Otherwise, we
8 don't find his drug use to be relevant or potential
9 drug use, alleged drug use to be relevant except as
10 it relates specifically to this incident. We also
11 would object to Mrs. Constantineau being asked on
12 cross-examination if her husband uses drugs. We
13 again believe that's highly prejudicial. She
14 already stated that she can speculate about his use.

15 **THE COURT:** Uh-huh.

16 **MR. STEPHENS:** But we believe it's going to
17 be impossible to unring that bell when the question
18 is asked in front of the jury.

19 **THE COURT:** Well, how are you going to unring
20 the bell? It's already done in this text message.
21 There's nothing to unring.

22 **MR. STEPHENS:** Ma'am, Mr. Babecki is going to
23 say he didn't send that message.

24 **THE COURT:** If you're asking me are we going
25 to beat a dead horse on drug use, again, there's an

Remarks

57

1 allegation that he was high while this occurred and
2 either imagined the shooting or can't adequately
3 identify anyone. But I don't think that really
4 matters, because his eight-month pregnant wife is
5 also going to testify who shot at him. So again, to
6 the point -- let's just do this, Mr. Stephens, at
7 the point you think they are going into it
8 unnecessarily, you can object. I'll do whatever I
9 need to do. I just don't see how you avoid the drug
10 issue in this case based on this text message. I
11 understand your client says it wasn't his. It was
12 his friend's. But if that's the case, Frank's going
13 to have to get up here and testify that his friend,
14 Kendalle -- who's the one that was supposedly
15 texting?

16 **MR. STEPHENS:** I think it was his friend Mike
17 that he referenced.

18 **THE COURT:** Then apparently he's going to
19 have to throw his friend Mike under the bus. That
20 Mike's the big smoker.

21 **MR. STEPHENS:** I understand.

22 **THE COURT:** Anyway, okay. What else you got,
23 Mr. Erickson?

24 **MR. STEPHENS:** The last thing I've got and I
25 don't know that we need a pretrial determination.

1 The State intends to put on the evidence through
2 Investigator Erdel of flight as consciousness of
3 guilt and argue it in opening, Your Honor. Also,
4 uh, that we intend to put on evidence that Mr.
5 Johnson had, uh, tried to have someone offer money
6 to the victims not to show up as interfering with
7 the victims, interfering with witness is also
8 consciousness of guilt, Your Honor. Part of that is
9 going to be through the testimony of Mr. Babecki and
10 through jail calls that we recorded between Mr.
11 Johnson and his mother.

12 **THE COURT:** Yeah, the jail calls to his
13 mother to pay off the victims?

14 **MR. STEPHENS:** Yes, Your Honor. There is a
15 jail call where Mr. Johnson says specifically, he
16 talks about if the victim don't show up, the case
17 gets dismissed. He says should we offer them money
18 not to show up. I believe that's relevant
19 especially since Mr. Babecki is going to testify
20 that he was, in fact, offered money not to show up.
21 I can play that for you, Your Honor. I'm not sure
22 how clear that's going to be through my computer. I
23 might have to work on that.

24 **THE COURT:** Why don't you work on that.
25 Mr. Erickson, you need to be heard on that?

1 **MR. ERICKSON:** That was between the mother
2 and Mr. Johnson. The mother will testify that she
3 did not answer that question. She didn't give any
4 money to anybody. That's just a standard question
5 that people have, what if people don't show up. You
6 know? Nobody knows who's going to show up at a
7 trial.

8 **THE COURT:** I do think it's -- I think it's
9 relevant. I think it certainly is admissible in
10 this case.

11 **MR. STEPHENS:** Your Honor, the State would
12 argue State v. Edwards, 383 S.C. 66. That's a 2009
13 case, Your Honor, where the defendant in that case
14 gave a letter to, I believe his wife, to give to
15 victim in the case threatening her if she did show
16 up to testify against him. That letter was not
17 delivered. But we believe this is a similar
18 situation where the defendant attempted to interfere
19 with this. The court called the attempt the same.
20 Interfering with a witness.

21 **THE COURT:** Again, I think it's appropriate
22 and I think it's allowed. I'm going to let that
23 portion in.

24 **MR. ERICKSON:** I totally object to that
25 Edwards case, Your Honor. That dealt with an

1 attempt to kill situation. This situation deals
2 with an attempt to get some money. In the money
3 situation, which is what we have, Mr. Babecki or
4 whoever it is, can take it or leave it. There's no
5 threat on his life. Therefore, I would argue this
6 is no intimidation of a witness like you have in
7 Edwards where there was a threat to kill a witness.

8 THE COURT: I'm having a hard time with the
9 distinction. Why don't you give me the Edwards case
10 and let me take a look at it?

11 MR. STEPHENS: Thank you, Your Honor. There
12 are other cases cited in Edwards about any attempt
13 to procure a witness' absence from court as being
14 intimidation of a witness, Your Honor.
15 Specifically, Your Honor, Edwards cites State v.
16 Goodson, a 1954 case, where it says evidence of a
17 person charged with a crime procured or attempt to
18 procure the absence of a witness or to bribe or
19 suppress testimony --

20 THE COURT: You going too fast.

21 MR. ERICKSON: Where are you?

22 MR. STEPHENS: Quoting State v. Goodson.
23 It's on the third page of the Edwards opinion.
24 Evidence of a person charged with a crime procured
25 or attempted to procure the absence of a witness or

1 to bribe or suppress testimony against him tends to
2 show unrighteousness of the defendant's cause and a
3 consciousness of guilt.

4 **THE COURT:** I mean, once again, it goes here,
5 just reading this Edwards case, just as conflicting
6 statements and attempts to flee are indicative of
7 guilty knowledge and intent, so too are threats that
8 are communicated.

9 **MR. ERICKSON:** Your Honor, I'm arguing this
10 is not a threat situation. Edwards is all about
11 witness intimidation, threat to kill. There's no
12 threat to kill here.

13 **THE COURT:** My understanding here is that Mr.
14 Babecki is going to testify that someone offered him
15 money not to come. Is that correct?

16 **MR. STEPHENS:** Yes, Your Honor. Your Honor,
17 the State had debated whether we were going to offer
18 testimony about an intent to threaten or kill the
19 victims in the case. However, we don't have
20 anything that is, that can be linked directly enough
21 to the defendant other than his statement that he --
22 that maybe they should offer them money not to show
23 up.

24 **THE COURT:** I think the problem you're going
25 to have in this case, Mr. Stephens, is that you got

1 to connect the threat, which I'm going to assume the
2 mother tried to pay the witness. Is that correct?
3 Is that what she's going to say?

4 **MR. STEPHENS:** Your Honor, when I spoke with
5 Mr. Babecki today, he indicated that Malcolm, who I
6 took to be Malcolm Moore contacted him and offered
7 him money that would be provided from the mother for
8 him not to show up. Again, we also have the phone
9 call between Mr. Johnson and his mother where he
10 asked to contact the victims and offer them money
11 not to show up. We believe that that is the
12 connection.

13 **THE COURT:** Okay. I'm going to need to hear
14 that statement. That's a tough connection to go
15 ahead and try to make that a third party went and
16 offered the victim money in this case. To read your
17 own case law you just provided, that's difficult to
18 do and certainly grounds for reversal if it's not
19 connected up. I haven't heard what his statement
20 is. I don't know if it's a question. I don't know
21 if it's a statement or what exactly he's doing. But
22 if you do get a conviction, I'm assuming you want to
23 keep it.

24 **MR. STEPHENS:** Yes, ma'am.

25 **THE COURT:** All the case law that you just

1 handed up says unless it's direct, it won't be
2 upheld.

3 MR. STEPHENS: Your Honor, I can point you to
4 this. I'm not sure how clear it's going to be. I
5 do have the jail call that the State intends to
6 offer. May I proceed?

7 THE COURT: Sure.

8 (WHEREUPON, there is a pause.)

9 MR. STEPHENS: Your Honor, I don't know that
10 I'm going to get it any louder than the computer
11 speakers here, although I can have it prepared for
12 the morning if I need to.

13 THE COURT: If you play it for the jury.
14 Okay. Why don't you go ahead and play it for me
15 right now.

16 (WHEREUPON, jail call recording is played.)

17 MR. STEPHENS: I believe that the officer
18 recorded the wrong one. He pulled the calls I asked
19 for specifically. I apologize for wasting the
20 court's time.

21 (WHEREUPON, jail call recording is played.)

22 MR. STEPHENS: There is a discussion just
23 beforehand about what happens if the victims don't
24 show up. Then he says got some people who can offer
25 them some money not to show up.

1 **THE COURT:** We haven't gotten to that yet?

2 **MR. STEPHENS:** That was it, Your Honor.

3 **THE COURT:** Okay.

4 **MR. STEPHENS:** Just before that, he's talking
5 about if they don't show up, the charges get
6 dismissed. That whole portion. Later that same
7 day, Your Honor, there's a portion that Mr. Johnson
8 makes to his mother, tell Malcolm something got to
9 move quick, quick. Since the State, the testimony
10 from Mr. Babecki is going to be Malcolm contacted
11 him about the bribe, the State would argue that's
12 part of the same plan.

13 **THE COURT:** Any more?

14 **MR. STEPHENS:** On this issue, no.

15 (WHEREUPON, jail call recording is continued.)

16 **MR. STEPHENS:** That's all that we would offer
17 on that, Your Honor. That and just Mr. Babecki's
18 testimony that Malcolm Moore, whose street name is
19 Rachet came to him and offered him money. He said
20 the mother would pay him \$500 beforehand and \$500
21 after the trial if he didn't appear. We'll say,
22 Your Honor, that the defendant was aware that he was
23 being monitored. Other than the one comment about
24 offering them some money, I think it's all vague.

25 If Mr. Johnson had really thought for a second

1 in that particular call that this was recording, we
2 wouldn't have even had that. But we do have him
3 clearly saying to his mother that she should contact
4 people and would offer them money not to show up.
5 Later the same afternoon on March 15th, there's a
6 comment from him to his mother that if they don't
7 show up, the charges are going to get dismissed and
8 then asking if she's contacted Malcolm Moore cause
9 something's got to move quick, quick. Then the
10 testimony from Mr. Babecki that Malcolm Moore did
11 contact him to offer him money.

12 THE COURT: All right. Let me tell you, I'm
13 going to do some of my own research. I'll let you
14 all know in the morning.

15 MR. ERICKSON: I also have the mother willing
16 to testify on that no connection. She's here now.
17 I'm just saying that's wishful thinking of Mr.
18 Johnson about witnesses not showing up. We all
19 think that that might happen. But that case law
20 talks about a connection and Mrs. Johnson is right
21 here as well as Malcolm Moore who will both testify
22 that there's no connection, neither of them gave any
23 money.

24 THE COURT: And neither of them even
25 approached Mr. Babecki?

1 **MR. ERICKSON:** Not according to my knowledge.

2 Not according to what they said they'd testify to.

3 **THE COURT:** So it didn't happen is what
4 you're saying they are going to say?

5 **MR. ERICKSON:** Yes, ma'am.

6 **THE COURT:** That's different than them just
7 doing it on their own. You are telling me that
8 their testimony is going to be that they didn't do
9 it?

10 **MR. ERICKSON:** That's correct.

11 **MR. STEPHENS:** Your Honor, I believe that
12 goes to weight, not admissibility. I have a witness
13 who's going to testify that they did.

14 **THE COURT:** Let me do this. Again, I'm going
15 to read the case law again. Obviously, it's
16 disfavored, not full-scale disfavored these days.
17 Let me go through and see what else I can find in
18 other jurisdictions.

19 **MR. STEPHENS:** Thank you. And that's all
20 from the State, Your Honor.

21 **THE COURT:** Mr. Erickson, what do you have?

22 **MR. ERICKSON:** The only other thing I had was
23 the text message coming in and we've already covered
24 that.

25 **THE COURT:** Yep.

Remarks

67

1 MR. ERICKSON: So I don't believe I have
2 anything.

3 THE COURT: We're good to go then. Have you
4 all premarked your exhibits?

5 MR. ERICKSON: Yes, ma'am.

6 THE COURT: You have?

7 MR. ERICKSON: I will. We will before
8 tomorrow.

9 MR. STEPHENS: Your Honor, I've only
10 premarked the photo lineup. We'll have the others
11 marked.

12 THE COURT: I'll let you all know this issue
13 and if you all can premark what you can agree on,
14 what you can, mark it for ID. Okay.

15 MR. STEPHENS: Yes, Your Honor.

16 THE COURT: Anything else y'all need?

17 MR. STEPHENS: Nothing from the State, Your
18 Honor.

19 THE COURT: Okay. Anything else, Mr.
20 Erickson?

21 MR. ERICKSON: No, that's all.

22 THE COURT: Okay.

23 (WHEREUPON, the Court recesses for the day.)

P R O C E E D I N G S

(WHEREUPON, State's Exhibits 2 through 11 are marked for identification purposes.)

(WHEREUPON, the Court resumes on the 19th day of June, 2012 at approximately 9:47 a.m.)

THE COURT: Did y'all have an opportunity to mark your exhibits?

MR. STEPHENS: I have, Your Honor. I don't know if Mr. Erickson has anything to mark.

MR. ERICKSON: I have mine marked. Yes, ma'am.

THE COURT: Have you had yours marked?

COURT REPORTER: I've marked State's Exhibits.

THE COURT: But not defense. Okay. Thank you. Okay.

Maybe at the first break, Mr. Erickson, you can get that done.

MR. ERICKSON: Get what done?

THE COURT: Get your exhibits marked by the Court Reporter.

MR. ERICKSON: Oh, I see. All right.

THE COURT: All right. Before we start, just as far as the ruling as to, uh, the intimidation of a witness, you have not charged the defendant with intimidation of a witness, have you?

1 **MR. STEPHENS:** Uh, no, Your Honor. Since
2 he's a juvenile, there would be a delay trying to
3 have that charge waived up to General Sessions, we
4 did not charge him.

5 **THE COURT:** Okay. Well, I have read again
6 Edwards. While I understand it's persuasive and I
7 understand why the State's trying to use it, I have
8 just decided that we're not going to put it in
9 evidence. I think we all recognize that this is
10 certainly a 403 analysis. I do think the prejudice
11 outweighs any probative value. The question is
12 whether or not Mr. Johnson shot at these two people.
13 I don't think it's necessarily intimidation of a
14 witness. If you want to charge him with that later
15 on, you are welcome to. But in this case, I think
16 out of an abundance of caution, I'm not going to
17 allow you to present that evidence. All right.

18 **MR. STEPHENS:** I understand, Your Honor.

19 **THE COURT:** Thank you.

20 **MR. ERICKSON:** Thank you, Your Honor.

21 **THE COURT:** Even though I do agree with you,
22 Mr. Stephens that the sway is kind of towards
23 allowing it these days, whereas prior to now, it's
24 always been a strict prohibition. I just don't
25 think in this case it's a good idea.

1 **MR. STEPHENS:** Your Honor, just in the off
2 chance that witness testimony strays there --

3 **THE COURT:** If they open up the door,
4 absolutely you can run through it.

5 **MR. STEPHENS:** Thank you, Your Honor.

6 **THE COURT:** All right. Anything else, y'all?

7 **MR. STEPHENS:** Nothing from the State, Your
8 Honor.

9 **THE COURT:** Anything else, Mr. Erickson?

10 **MR. ERICKSON:** No, ma'am.

11 **THE COURT:** All right. Let's bring the jury
12 in.

13 **THE BAILIFF:** Yes, Your Honor.

14 (WHEREUPON, the jury enters at approximately
15 9:55 a.m.)

16 **THE COURT:** Thank you. Good morning, Ladies
17 and Gentlemen. It's a pleasure to see you all. At
18 this time, we are going to begin the trial of this
19 case. Before we do that, I'm going to go ahead and
20 have you sworn in as the jury in this case. So, if
21 you will, all please stand and raise your right
22 hand. Lasondra is going to administer the oath.

23 (WHEREUPON, the jury is first duly sworn.)

24 **THE COURT:** Thank you, Ladies and Gentlemen.
25 What I am now going to say is intended to serve as

Court Remarks to Jury

71

1 an introduction to the trial of this case. These
2 remarks are not a charge on the law. I am going to
3 instruct you on the law that is applicable to this
4 case at the end of the trial. This is just simply
5 an explanation so you can better understand how the
6 trial will unfold.

7 Ladies and Gentlemen, the defendant in this
8 case, Mr. Johnson, has been charged by indictments
9 that are filed in this court with the offenses of
10 Attempted Murder, the elements of which I will
11 explain to you at the end of the trial. Ladies and
12 Gentlemen, these indictments are simply the charge
13 by which the case is brought into the courtroom. It
14 is not in any sense evidence of any of the
15 allegations that it contains.

16 The defendant, Mr. Johnson, has plead not
17 guilty to these indictments. The State, therefore,
18 has the burden of proving each of the elements of
19 the indictments beyond a reasonable doubt. It is
20 your duty, Ladies and Gentlemen of the jury, to
21 decide whether the State has met that burden.

22 Your purpose as jurors is to find and determine
23 the facts. You, the jury, are the sole judge of all
24 facts in this case. If at any time I make any
25 comment regarding the facts of this case, you must

1 disregard it. You are only to determine the facts
2 of this case from the testimony you are going to
3 hear from the witness stand as well as any other
4 evidence that's entered into this case. It's up to
5 you to determine the inferences which you feel may
6 be properly drawn from the evidence. Please
7 understand that it is especially important that you
8 perform your duty of determining the facts
9 diligently and consciously. Ordinarily, there is no
10 way to correct an erroneous determination of the
11 facts by a jury.

12 On the other hand and with equal emphasis, the
13 same law that makes you the judge of the facts makes
14 me the judge of the law. The law as given by the
15 court is the only law that you may consider. You
16 must accept and follow it even though you may
17 disagree with it. I can not tell you what the facts
18 of this case are. You can not disagree with me
19 about what the law is or what you think the law
20 ought to be. Your job is to take the law as I give
21 it to you and apply it to the facts as you find
22 them. From there, render a true and just verdict
23 under the oath you just took.

24 Now, Ladies and Gentlemen, until I advise you
25 to begin your deliberations in this case, you must

Court Remarks to Jury

73

1 not discuss this case with anyone. That includes
2 your fellow jurors, friends, family members or
3 anyone that is involved in this case. After the
4 case is submitted to you, you must discuss it only
5 in the jury room with your fellow jurors.

6 The attorneys and parties in this case have
7 been advised that they are not to talk to you coming
8 and going from the courthouse over the next day or
9 so. Ladies and Gentlemen, again, if you happen to
10 pass someone involved in this case and they don't
11 say hello, they are not being unfriendly. They are
12 simply following my orders.

13 Ladies and Gentlemen, additionally, during the
14 trial of this case, you are not to read, listen to
15 or watch any news reports about this case. This
16 includes anything that may be in the newspaper or on
17 the internet, radio or television. And you must not
18 consider anything, Ladies and Gentlemen, that you
19 may have read or heard about this case outside of
20 this courtroom before or during the trial.

21 Please understand that it is important that you
22 keep an open mind and not decide any issue in the
23 case until all the evidence has been presented, the
24 parties have made their closing argument and I
25 charge you on the law that is applicable to this

1 case. Please understand it is your solemn duty to
2 determine the guilt or innocence of the defendant.
3 Your verdict must be based solely on the evidence as
4 is presented to you in this trial and on the law as
5 I instruct you during and at the close of the trial.

6 Ladies and Gentlemen, now, in just a moment,
7 the Solicitor is going to make what is called an
8 opening statement. He's going to tell you or
9 explain to you what he believes the issues are in
10 this case. The attorney for the defendant is also
11 going to make an opening statement, although he is
12 not required to do so.

13 Ladies and Gentlemen, what these attorneys tell
14 you in their opening statements is not evidence in
15 this case. It is argument. I remind you, Ladies
16 and Gentlemen, that the evidence in this case will
17 come from the witness stand as well as the other
18 exhibits that are entered into the case or any
19 stipulations the lawyers enter into.

20 From time to time during the trial of this
21 case, you may hear one of the lawyers say something
22 like, Your Honor, I believe we have a matter of law
23 to take up or I myself may have a bench confidence
24 with them or I may send you back to your jury room
25 to discuss something with the attorneys. I want you

Court Remarks to Jury

75

1 to know something. We aren't hiding anything from
2 you. Oftentimes when I have to rule as a matter of
3 law whether or not certain evidence is admissible, I
4 may make a comment on the facts of this case.
5 Again, I would never want anything I say to
6 influence you in your determination of facts. Out
7 of an abundance of caution, we do it in private
8 outside of your presence.

9 Ladies and Gentlemen, in determining what the
10 true facts are in this case, you must decide whether
11 or not the testimony of the witnesses are
12 believable. It's my responsibility to rule as a
13 matter of law whether or not certain testimony is
14 admitted. Once it is admitted, whether or not you
15 believe it is solely for you to determine.

16 In deciding whether to believe a witness, you
17 have the right to consider the interest of a
18 witness, the bias of the witness, any prejudice of a
19 witness, you can look at the opportunity that that
20 witness had to see the things that matters about
21 which they are testifying. You can look at the way
22 the witness acts on the witness stand. You have the
23 right to use anything that is in the record to help
24 you determine the believability of the witnesses in
25 this case.

1 Ladies and Gentlemen, it is my understanding
2 from the bailiffs that some of you have requested
3 that you be allowed to take notes during the trial
4 of this case. To that end, we are going to provide
5 you with, if they have not already, with a notepad
6 and pens and pencils to go ahead and take notes.
7 Ladies and Gentlemen, as you come and go from the
8 courtroom during the trial of this case, you are to
9 leave your notepads and pens in your seat.

10 You are to use your notes for your sole benefit
11 and not for anyone else's on the jury. You may rely
12 on your notes, but again, please, Ladies and
13 Gentlemen, some people are better notetakers than
14 others. Please don't discount when you go back for
15 your deliberations some adequately recalling
16 testimony that may be different than what you have
17 on your notes. Again, Ladies and Gentlemen, your
18 job is to watch and look at all the evidence in this
19 case. And at the end of this case, render a true
20 and just verdict. Ladies and Gentlemen, at this
21 time, we are going to go ahead and begin the trial
22 of this case.

23 Is there anything further the State would like
24 me to address the jury on?

25 **MR. STEPHENS:** No, Your Honor. Thank you.

Opening Statement by Mr. Stephens

77

1 **THE COURT:** Anything from the defense?

2 **MR. ERICKSON:** No, ma'am.

3 **THE COURT:** Ladies and Gentlemen, we are
4 going to begin the trial of this case. If you
5 would, give Mr. Stephens your attention.

6 **MR. STEPHENS:** Thank you.

7 Good morning, Ladies and Gentlemen. My name is
8 Jeff Stephens. I'm an Assistant Solicitor with the
9 14th Judicial Circuit Solicitor Office. That means
10 I'm the prosecutor of the case. We have a big fancy
11 name. That also means that I've got the honor and
12 the privilege of representing the State of South
13 Carolina in this case, the State versus Mykel
14 Johnson. Mykel Johnson is that young man you see
15 sitting over there. He is 16 years old. He's being
16 charged with Attempted Murder, he's being tried for
17 Attempted Murder and he's being tried as an adult.

18 Now, I'm not sure when childhood ends. I'm not
19 sure when childhood ends generally for most of us.
20 I know that my grandfather grew up on a farm in
21 Iowa. He left home at 15 in 1943 and enlisted in
22 the Merchant Marines. Then when he turned 16, he
23 enlisted in the Army and fought in World War II. I
24 think even in World War II, that was a little
25 unusual. Most of us don't have our childhood end

1 abruptly at 15. I think today it's more usual for
2 people to cling to their childhood well into their
3 20s.

4 I can say for Mykel Johnson, his childhood
5 ended abruptly on October 28th, 2011, when he made
6 the decision to arm himself with a handgun, when he
7 made the decision to pull that handgun out and to
8 fire two rounds at a car being driven by a young
9 pregnant marine, and Desiree Constantineau. You're
10 going to hear from her in just a little while today.
11 Also, in the car that Mr. Johnson fired at was her
12 husband, Frank Babecki.

13 Two rounds were fired. The evidence is going to
14 show you that one of those rounds went through the
15 rear passenger panel of the vehicle and hit the
16 passenger side front window shattering it. The
17 other round went through the rear driver's side
18 panel and lodged in the rear driver's side
19 passenger's seat in the headrest in the little metal
20 bar. You're going to see a picture of that.

21 You're going to hear that after Mr. Johnson
22 made this decision to pull this weapon and shoot at
23 these victims, he then fled from the scene. He fled
24 from his mother's house or his mother's apartment,
25 Cross Creek Apartments, in Beaufort and was

1 apprehended about a week and a half later at a
2 trailer in Yemassee, South Carolina. That's
3 information that you may consider in what we call
4 consciousness of guilt evidence. What it means is
5 that someone flees from the scene knowing that
6 someone's going to search for them. That shows a
7 consciousness of their own guilt.

8 You're going to hear testimony from
9 Investigator Erdel with the Beaufort Police
10 Department. Investigator Erdel is going to tell you
11 that he was present when Mykel Johnson was
12 apprehended in Yemassee. When Mr. Johnson exited
13 the home, his first words to Investigator Erdel,
14 they weren't what's going on, what are you doing
15 here, they were I was going to turn myself in when I
16 hired a lawyer. He then said how did you find me.
17 This is consciousness of guilt. What's more, they
18 are products of a calculating adult mind, not a
19 child. He fled his mother's home. He went hiding.
20 That's a calculated adult mind, Ladies and
21 Gentlemen.

22 You are also going to hear the 911 call from
23 the victims in this case reporting this incident to
24 the police. You are going to hear the fear in their
25 voices cause this just happened. More importantly,

1 you're going to hear with an absolute certainty as
2 to who shot at them, Mykel Johnson, who they knew as
3 a Hot Boy. They will testify to that. You will
4 hear testimony that they continued to be absolutely
5 certain of that. Frank Babecki also submitted to a
6 photo lineup ID.

7 **COURT REPORTER:** I'm sorry, Your Honor. I hate
8 to interrupt. I can't hear him.

9 **THE COURT:** I'm sorry. If you will, just
10 speak up, Mr. Stephens, just a little.

11 **MR. STEPHENS:** Absolutely.

12 **THE COURT:** Thank you.

13 **MR. STEPHENS:** Frank Babecki submitted to do
14 a photo lineup where he immediately, within seconds
15 before the officer even left the room identified the
16 picture of Mykel Johnson as the person who shot at
17 him.

18 Now, you may hear witnesses who say that Mykel
19 Johnson was at a different location when this
20 happened. I would urge you to follow the judge's
21 direction. She said when you listen to a witness,
22 consider their motives, why they are here. You may
23 hear testimony from friends of Mykel Johnson who are
24 just here to try to get him out of trouble.

25 You'll also hear the testimony of the victims

Opening Statement by Mr. Stephens

81

1 who had no motive to get Mr. Johnson in trouble.
2 They do not want to be here. They have a young
3 child now and just want to move on with their lives.
4 However, they are here to tell you the truth that
5 for some reason, Mr. Johnson decided to pull out a
6 pistol and shoot at their vehicle.

7 Now, Mr. Babecki is going to tell you that all
8 they did when they were leaving their apartment
9 complex on October 28th is he asked his wife to slow
10 down when he recognized Mr. Johnson. He yelled
11 something out of the window, what happened the other
12 night. For whatever reason, whether he was in fear
13 or whether he was just acting aggressively or
14 whatever goes through the mind of someone who shoots
15 somebody else, he pulled a weapon and shot him.

16 At that point, when he pulled the weapon, he
17 aimed it at their vehicle and he was shooting at
18 them, he formed the intent to commit murder. He
19 knew the probable consequences of pulling that
20 trigger, that he might end the lives of two people.
21 Only by narrow circumstance, unless he's a trick
22 marksman, did that not happen.

23 Again, Ladies and Gentlemen, I'm confident that
24 after you heard all the evidence in this case, the
25 testimony of Babecki, the testimony of the officers

1 involved and you've seen all the evidence that you
2 will be convinced that the State has met its burden
3 of proving beyond a reasonable doubt that Mr.
4 Johnson did commit Attempted Murder, two counts on
5 Desiree Constantineau and Frank Babecki, and you
6 will return a verdict of guilty on both of those
7 indictments.

8 **THE COURT:** Thank you, Mr. Stephens.
9 Mr. Erickson.

10 **MR. ERICKSON:** May it please the Court?

11 **THE COURT:** Yes, sir.

12 **MR. ERICKSON:** Mr. Solicitor.

13 Ladies and Gentlemen of the jury, I want to
14 first thank you for being here doing your community
15 service. My name is Eric Erickson. I represent Mr.
16 Johnson. I've been a defense attorney here in the
17 Low Country for about 15 years. Before that, like
18 Mr. Stephens, I was in the Army. I was in the
19 military, I should say. Mr. Stephens was in the
20 Marines. So we're both coming at this with some
21 government experience. We both have knowledge about
22 what a crime is.

23 Today, you're going to hear about a crime. And
24 what I don't like about opening statements is what
25 you just heard from the Solicitor. He told you

1 about the whole case. But you know what? It was
2 all about one side. Court is hearing about two
3 sides. You ever had a friend or a brother or sister
4 tell you about one side of a story and you ask
5 yourself is that all there is? Well, of course not.
6 There's always another side. There's always another
7 angle.

8 What we try to do in court is try to find
9 truth. We find the truth using evidence. Today,
10 there's going to be different kinds of evidence.
11 There's going to be witness evidence, which is
12 called direct testimony. There may be scientific
13 evidence. There may be physical evidence, like a
14 gun. Scientific evidence is going to be things like
15 DNA, fingerprints, and there might be circumstantial
16 evidence. The judge is going to give you the law on
17 what those different types of evidence are. Like
18 the judge said, your job is to listen to the facts
19 and the judge will give you the law.

20 I want to talk a little bit about our defense.
21 Mr. Solicitor said a little bit about an alibi
22 defense. Before we even get there, our biggest
23 defense is the credibility of the witnesses. The
24 State's going to bring up witnesses. You're going
25 to have to weigh and balance, using your own

1 judgement the truth of what they have to say, how
2 they got what they have to say, how close were they,
3 what motive do they have to say what they say.

4 I like to say in my trials that anybody can say
5 anything about anybody at any time. I mean, that's
6 really what anybody can do. My job is to prevent
7 that. My job is to say, hey, don't listen to
8 somebody just because they said it. Look for
9 corroboration. Is there any scientific evidence or
10 physical evidence that corroborates or matches the
11 story? You're going to see evidence in here that
12 I'm going to be calling out mismatch, no match, no
13 evidence, lack of evidence. That's what you're
14 going to see in this case. And it's going to be the
15 Solicitor's job to make sure he fills in all these
16 gaps. Thank you for being here.

17 **THE COURT:** Thank you, sir.

18 Mr. Stephens, will you call your first witness,
19 sir?

20 **MR. STEPHENS:** Thank you, Your Honor. The
21 State calls Melanie Smith.

22 **THE CLERK:** Place your left hand on the Bible
23 and raise your right hand for me please.

24 **MELANIE SMITH**

25 having first been sworn, testifies as follows:

1 **THE CLERK:** Please be seated. State your
2 name and spell it for the Court please.

3 **THE BAILIFF:** State your full name for the
4 Court Reporter and spell your last name.

5 **THE WITNESS:** My name is Melanie Smith. My
6 last name is S-M-I-T-H.

7 **DIRECT EXAMINATION**

8 **BY MR. STEPHENS:**

9 **Q** Ms. Smith, where are you currently employed?

10 **A** Beaufort County Communications, the 911 center.

11 **Q** How long have you been employed with 911?

12 **A** I been there 14 years.

13 **Q** And what are your duties and responsibilities
14 in that office?

15 **A** I make the investigations on complaints. I'm
16 the liaison for all the departments. My main job is
17 making tapes for evidence or lawyers or Freedom of
18 Information request.

19 **Q** Now, if you could, briefly describe what
20 happens when emergency services receives a 911 call and
21 how those might be stored or recorded.

22 **A** Uh, everything comes in through our digital
23 phone lines. It's also recorded on a digital recorder.
24 The dispatcher will take the call and then dispatch
25 emergency services. When I get a copy, correction, a

1 request for a recording, I'll go to our CAD, which is our
2 computer-aided dispatch program, find the incident and
3 all the documentation that goes with it and then go to
4 the recorder and find the phone calls or radio
5 transmissions, whichever is requested and make copies of
6 those.

7 Q Now, you say every 911 call is saved or only
8 when they are requested?

9 A No, they are all saved for a minimum of 60
10 days.

11 Q Did you receive a request from me to download
12 or record a copy of a 911 tape for the case of the State
13 versus Mykel Johnson?

14 A Yes, I did.

15 Q And did you, for lack of a better word, burn a
16 copy of that tape from your digital storage device to
17 some kind of portable media?

18 A Yes, to a disk, CD.

19 MR. STEPHENS: Your Honor, may I approach?

20 THE COURT: You may.

21 MR. ERICKSON: No objection.

22 BY MR. STEPHENS:

23 Q I'm handing what's been marked as State's
24 Exhibit 2 to Master Sergeant Smith. You can hold on to
25 that for a moment, Master Sergeant.

1 **A** Okay.

2 **Q** Do you recognize that disk?

3 **A** Yes, I do.

4 **Q** Now, what is it?

5 **A** It's a copy of the 911 call for a shots fired
6 call at 266 Robert Smalls Parkway that occurred on
7 October 28th, 2011.

8 **Q** All right. Is there a case number or some
9 other identification on it?

10 **A** What I have here is Beaufort Police
11 Department's event number. That's how we track things.
12 Do you need me to state that event number?

13 **Q** That's all right. So that was a recording of a
14 shots fired that basically is what it says it is. Your
15 information system records the location from which they
16 get the call with all those details?

17 **A** Correct.

18 **MR. STEPHENS:** Your Honor, at this point, the
19 State moves to admit State's Exhibit 2 and play the
20 recording for the jury.

21 **THE COURT:** Any objection?

22 **MR. ERICKSON:** No objection.

23 **THE COURT:** Okay. Please go ahead.

24 **(WHEREUPON, State's Exhibit 2 is admitted into the**
25 **record.)**

1 (WHEREUPON, State's Exhibit 2 is played.)

2 MR. STEPHENS: Thank you, Master Sergeant
3 Smith.

4 Your Honor, I don't have any further questions
5 for Master Sergeant Smith at this time.

6 THE COURT: Mr. Erickson?

7 MR. ERICKSON: Yes, ma'am. I'd like to ask
8 Ms. Smith a few questions.

9 CROSS-EXAMINATION

10 BY MR. ERICKSON:

11 Q Ms. Smith, good morning.

12 A Good morning.

13 Q You got a tough job listening to all those type
14 of calls. I don't know how you get any sleep. My first
15 question is were you able to hear anybody else in the
16 background when you were talking to that woman?

17 A I actually wasn't talking to her. I just made
18 the recording.

19 Q Didn't you ask questions?

20 A I'm sorry. I couldn't hear you.

21 Q Oh, you weren't the person asking the
22 questions?

23 A I wasn't the person actually taking the call.
24 I actually just made the recording from the system.

25 Q Who was asking the questions?

1 **A** The call taker, Erin Mowry.

2 **Q** All right. I don't have anything further.

3 Thank you.

4 **THE COURT:** Anything further?

5 **MR. STEPHENS:** No, Your Honor. Thank you.

6 **THE COURT:** Any objection to Master Sergeant
7 Smith being released?

8 **MR. STEPHENS:** Not from the State, Your
9 Honor.

10 **MR. ERICKSON:** Not from the State -- I mean,
11 not from the defense.

12 **THE COURT:** You are excused. Thank you.

13 **THE WITNESS:** Thank you.

14 **THE COURT:** The State will call the next
15 witness.

16 **MR. STEPHENS:** Your Honor, the State calls
17 Officer Joshua Dowling of the Beaufort Police
18 Department.

19 **THE CLERK:** Place your left hand on the Bible
20 and raise your right hand please.

21 **JOSHUA DOWLING**

22 having first been sworn, testifies as follows:

23 **THE CLERK:** Please be seated. State your
24 name and spell it for the Court please.

25 **THE BAILIFF:** Please state your full name

1 and spell your last name for the Court Reporter.

2 **THE WITNESS:** First name's Joshua. Last name
3 Dowling, D-O-W-L-I-N-G.

4 **DIRECT EXAMINATION**

5 **BY MR. STEPHENS:**

6 **Q** Officer Dowling, you are currently a police
7 officer with the Beaufort Police Department, correct?

8 **A** I am. I been here since May of 2007. I had
9 prior law enforcement. I worked at another agency. I
10 became an investigator with the City of Beaufort
11 approximately two years ago.

12 **Q** So you been an investigator for two years?

13 **A** Yes.

14 **Q** Or thereabout. Were you working in your
15 capacity as a police investigator on October 28th, 2011?

16 **A** I was.

17 **Q** And did you come assigned to an investigation
18 of shots fired in the vicinity of Cross Creek Apartments
19 in Beaufort, Beaufort County, South Carolina?

20 **A** I did. The case that we're here for today. I
21 was involved in it. Yes.

22 **Q** Where were you or how did you get assigned to
23 this investigation?

24 **A** October 28th, 2011, uh, at the time of this
25 incident, I was in close proximity to the incident

1 location. I had received a call from the on-duty
2 supervisor in reference to a shooting. I had responded
3 to that location. I was not too far from the location.
4 I was within the shopping center, Cross Creek Shopping
5 Center, which the incident location is further north of
6 that shopping center.

7 Q How long after the first report of shots fired
8 were you able to respond to that location?

9 A I would say several minutes had elapsed by the
10 time the initial officers had arrived there and
11 ascertained what had transpired. And by the time they
12 had relayed that information to me, I would say several
13 minutes had elapsed.

14 Q Okay. It happened quickly because you were on
15 call and had your vehicle do you say?

16 A Yes. I was out of my vehicle at a store on a
17 follow up on another case.

18 Q All right. Now, when you arrived at the scene,
19 did you go to the actual Cross Creek Apartments or the
20 IHOP where the victims called 911? Where did you go
21 initially?

22 A Our initial action is we congregated by the
23 entrance to the Cross Creek Apartment complex. It's a
24 long driveway and it takes you to the apartment complex.
25 Our initial concern when I arrived there is we had an

1 active shooter. The other officers had ascertained that
2 this suspect lived in the complex. Our first priority on
3 scene was to see if we could locate this shooter. We had
4 congregated in a group and moved in slowly and tactically
5 to this apartment complex.

6 Q Now, how familiar are you with that area of the
7 Cross Creek Apartments and that part of Parris Island
8 Gateway?

9 A I'm very familiar since that's an area that's
10 quite patrolled frequently.

11 MR. STEPHENS: Your Honor, may I approach?

12 THE COURT: You may.

13 BY MR. STEPHENS:

14 Q I'm showing the witness what has been
15 previously marked as State's Exhibit 3. Do you recognize
16 this?

17 A I do. That's an aerial shot of Cross Creek
18 Apartments. That would be the shopping center I
19 referenced earlier.

20 Q Is this a fair and accurate representation of
21 how this area looks? I don't know if it's that time of
22 year. But is it a fair and accurate representation of
23 where everything is located in narrow view?

24 A Yes.

25 Q Now, can you please point out approximately

1 where the defendants and their -- excuse me. The victims
2 and their vehicle were located when you responded to this
3 incident.

4 Q When I responded to this incident, the victim's
5 vehicle had pulled into -- this is an aerial shot of IHOP
6 -- they were pulled into one of these side parking lots.
7 That's where the victim's vehicle was by IHOP.

8 MR. STEPHENS: Your Honor, can you see or do
9 I need to move?

10 THE COURT: That's fine. Can the jury see?
11 Can you all see?

12 THE WITNESS: You want me to step down maybe?

13 THE COURT: Why don't you go ahead and step
14 down and get up closer to the jury so they could
15 have a better opportunity. I believe there's an
16 easel over there too if you want to use that.

17 BY MR. STEPHENS:

18 Q I can hold it for you. Were you able to
19 determine where the -- or the approximate location that
20 the shots were fired at the vehicle?

21 THE COURT: Take it a little closer to the
22 jury.

23 THE WITNESS: The general proximity of where
24 the shooting, the vehicle was, the victim's vehicle
25 was engaged was within this general vicinity right

1 here. The reason why we believe that strongly is
2 there was shattered, fresh shattered glass by this
3 entry way.

4 **COURT REPORTER:** I'm sorry. Fresh shattered
5 glass --

6 **THE COURT:** Fresh shattered glass by the
7 entry way.

8 **BY MR. STEPHENS:**

9 **Q** Now, when you arrived by the scene, did you
10 take any photographs of the scene where the suspected
11 shooting had occurred? Any damage to the vehicle or
12 anything like that?

13 **A** Yes, all photographic evidence that I took when
14 I processed the scene was with the victim's vehicle which
15 was right here and parked here and photographed it. A
16 couple of photographs were taken later on at the
17 apartment complex.

18 **Q** Thank you, Officer Dowling. Officer Dowling,
19 let me show you a number of photographs. If you could,
20 please identify them if you can. This is State's Exhibit
21 4. Do you recognize it?

22 **A** Yes, this photograph right here is the entryway
23 to Cross Creek. This is the shattered glass that I had
24 just referenced that corroborated the damage to the
25 victim's vehicle.

1 Q Now, were you able to determine where that
2 shattered glass came from, what window of the vehicle or
3 anything like that?

4 A That glass right there would have been -- I
5 have it documented. One moment.

6 Q Let me -- let me just move on with the pictures
7 and maybe that will tell us more information. Do you
8 recognize this picture, State's Exhibit number 5?

9 A Yes, that right there is the victim's vehicle
10 that was photographed at the IHOP parking lot. Right
11 here, there was a bullet that went through the rear
12 passenger panel right here. That's one round entered
13 through there. Another round was suspected to enter
14 right through this window right here.

15 Q Did the victims indicate those were not
16 preexisting holes in the vehicle?

17 A Yes, that's correct. Those were a result of
18 the shooter in this case.

19 Q I'm showing you what's been marked as State's
20 Exhibit number 6. Do you recognize that picture?

21 A I do. When I was processing the vehicle for
22 evidence purposes, we had opened the rear. I took a --
23 when I process the scene, I try to take as many
24 photographs as possible. This was a shot of the interior
25 of the vehicle from the rear of the victim's vehicle.

1 Q Now, it appears like that passenger door window
2 is broken. Is that correct?

3 A Yes, that's where we suspected that one of the
4 bullets exited out the passenger window of the victim's
5 vehicle. Just to give you a better overview, this right
6 here is where this being on the driver's side, the rounds
7 went in. One of the rounds went out the passenger
8 window. Another round got lodged into the headrest which
9 I took a photograph of.

10 Q This is marked as State's Exhibit 7. You just
11 mentioned that you took a photo of a round that lodged in
12 the seat. What am I looking at here?

13 A This right here was by the -- the only case I
14 worked in an attempted murder where this was almost a
15 homicide. The reason why is when the gun was fired, one
16 of the rounds get lodged into the headrest, the rear
17 driver's headrest. You can see right here. That's a
18 bullet right there. This little tiny metal that supports
19 the headrest, because the rest of it is surrounded by
20 insulation, that one little pole right there prevented
21 this round from going right through. One of the rounds
22 went out the passenger window. This round was stopped by
23 this little beam right here.

24 Q Now, did the victims indicate that there was a
25 person that had been sitting in that passenger side seat?

1 A Yes.

2 Q What did they tell you as far as who had been
3 sitting there?

4 A Desiree Constantineau was the driver. Frank
5 Babecki was the passenger in the front.

6 Q Lastly, this is State's Exhibit number 8. What
7 is that?

8 A That right there is simply just a close up
9 picture of the bullet that was lodged into this beam
10 right here. It's the bullet right there. We were able
11 to pull it out. We photographed it. That just reflected
12 off that pole right there that was stuck in the
13 insulation.

14 Q Thank you, Officer Dowling. Officer Dowling,
15 handing you what's been marked as State's Exhibit 10.
16 Can you please take that out, examine it and tell me if
17 you recognize it?

18 A Yes, this is my handwriting. What I did when I
19 was at the incident location, this right here is a bullet
20 that was recovered out of the headrest for evidence
21 purposes right there. The bullet I was able to recover
22 from the headrest.

23 Q Thank you. I'm retrieving State's Exhibit
24 number 10 from the witness. I didn't ask, but how were
25 you able to identify that as the bullet you retrieved?

1 A That right there is my handwriting on the
2 evidence. To maintain custody of it, I took the bullet
3 and brought it back to the Beaufort City Police
4 Department. We have an evidence protocol where we write
5 down what we retrieve, the case number, the item that was
6 collected and that's put into an evidence locker and
7 stored it at the Beaufort City Police Department pending
8 disposition of the case.

9 Q Thank you. Now, did you do anything else to
10 process the scene to look for evidence?

11 A In regards to the victim's vehicle?

12 Q Yes. Was there anything else you could do to
13 process the scene for all the DNA, the fingerprints or
14 any of the stuff that you normally see in CSI and NCIS,
15 all those shows?

16 A There was no other evidence that was collected
17 that I could think of at the time that would be pressing
18 to collect. We had the photographic evidence and we had
19 the round that was collected.

20 Q Did the victims indicate if the suspect had
21 ever touched the vehicle or been anywhere near the
22 vehicle?

23 A No, he was not in -- although in proximity of
24 the vehicle, he did not touch the vehicle. He was what
25 they explained to be walking on the side, walking into

1 the apartment complex, they were exiting, driving out.

2 Q When any kind of firearm fires a bullet, isn't
3 there a cartridge or something left behind when a weapon
4 fires?

5 A It would depend on what kind of weapon was
6 fired.

7 Q In this case, were you able to recover any kind
8 of brass or cartridge, anything like that from the area?

9 A There was none located. But the main
10 concentration was processing the vehicle. The first
11 concentration was securing this apartment complex. With
12 the amount of vehicle traffic in there, it could have
13 been crushed. It is a heavily wooded area as well, the
14 entryway.

15 Q Now, if you had taken a suspect into custody
16 immediately or shortly after this shooting, is there
17 anything you could have done to process the suspect for
18 evidence?

19 A When we take a suspect involved in a shooting
20 into custody, a recent shooting, the Beaufort County lab
21 advises us, it's a four-hour window where we can do
22 gunshot residue. When you discharge a firearm, powder
23 comes out of the gun and gunshot residue. You are able
24 to do a swab and confirm that this person shot a gun.
25 It's about a four-hour --

1 **MR. ERICKSON:** I'm going to object to this
2 testimony. Has he been entered as an expert witness
3 in ballistics?

4 **THE COURT:** Okay. If y'all will approach
5 right over here.

6 (WHEREUPON, a bench conference is taken off the
7 record.)

8 **BY MR. STEPHENS:**

9 **Q** Investigator Dowling, was a suspect taken into
10 custody such that a gunshot residue test could be
11 performed within that four-hour window that you had to
12 test them under your normal procedures?

13 **A** No.

14 **Q** Now, what steps, if any, did you take to try to
15 locate the suspect that the victims had identified on the
16 911 call as Hot Boy?

17 **A** Well, at the time of this shooting, we brought
18 the victim back to the Beaufort City Police Department.
19 We had a street name of Hot Boy, which Investigator Erdel
20 ran it through a program. We have a database where if we
21 have any cases with a person from a criminal case simply
22 to a traffic accident, we enter these individuals into
23 databases. We were able to run this name, this street
24 alias of Hot Boy and come up with the defendant's name
25 Mykel Johnson that showed an apartment address at Cross

1 Creek Apartments. Subsequently, what we were able to do
2 is put Mykel Johnson into a photo lineup and the victim
3 was able to identify, corroborating the street name of
4 the actual suspect.

5 Q Now, after you had retrieved a known address
6 for Mykel Johnson, who you believed might be this Hot
7 Boy, what steps did you take to apprehend him?

8 A The initial actions that we took is after we
9 had identified the suspect, we did a search warrant at
10 the apartments that Mykel Johnson, the defendant, was
11 linked to, at Cross Creek Apartments. We executed that
12 search warrant, but there was nobody home at that point.

13 Q Was there any indication that Mykel Johnson did
14 actually live there?

15 A Yes.

16 Q Were you able to speak to anyone who lived
17 there to identify whether Mykel Johnson was located
18 there?

19 A I spoke to his mother, Adriana Johnson. She
20 advised me that he, uh, lived in the back bedroom. You
21 walk into the apartment and you go straight down the
22 hallway. She explained to me that that was his bedroom
23 that he stayed at.

24 Q Now, did you or any other member of law
25 enforcement go back to that address and look for him at

1 any time prior to his apprehension in Yemassee?

2 A Yes, there was -- all the officers -- any time
3 the city has a violent crime like this, we do our best to
4 try to apprehend the suspects. The entire Beaufort City
5 Police Department knew about this. We also share
6 information. We have an outstanding relationship with
7 Beaufort County Sheriff's Office. We relayed wanted
8 subjects. They relay to us. There was an effort to
9 apprehend him and get him off the streets to protect
10 everybody. There were police officers going out to that
11 general area on the look out for him. There was
12 absolutely no sign of him.

13 Q So you and other officers from Beaufort Police
14 Department were unable to locate him in that area again?

15 A That's correct. We had to request the services
16 of the United States Marshall Services. Any time that we
17 have the inability of tracking down somebody, we have
18 good contact with the U.S. Marshalls. They were able to
19 track the defendant down.

20 Q Were you present when the defendant, Mr.
21 Johnson was taken into custody?

22 A I was not present when he was taken into
23 custody, no.

24 Q And did you subsequently interview him or take
25 any other investigative steps?

1 A Yes, when he was taken into custody, he was
2 brought back to the Beaufort City Police Department. We
3 always want to get everybody's side of the story to give
4 them a chance to --

5 Q Investigator Erdel [sic], let me just ask, uh,
6 did Mr. -- were there any other evidence that was
7 obtained in this case after Mr. Johnson was taken into
8 custody?

9 A As it pertains to?

10 Q Is there any other additional evidence that you
11 as a lead investigator in the case were able to obtain
12 after Mr. Johnson was taken into custody?

13 A Mr. Johnson did not want to talk. He wanted
14 the representation of an attorney when we asked him for
15 his side of the story. From the defendant's side, we did
16 not develop any information.

17 MR. STEPHENS: Your Honor, I don't believe I
18 have any further questions of Investigator Erdel
19 [sic] at this point.

20 THE COURT: Mr. Erickson?

21 MR. ERICKSON: Thank you. May it please the
22 Court.

23 CROSS-EXAMINATION

24 BY MR. ERICKSON:

25 Q You had the occasion to fill out the search

1 warrant. Is that the truth?

2 A In regards to the apartment complex?

3 Q Yes, sir.

4 A Yes, sir.

5 Q Was there some confusion as to the nickname of
6 the defendant?

7 A Initially when I typed the affidavit up, uh, I
8 had indicated on the affidavit the street alias of "Hot
9 Dog" and his street alias is actually "Hot Boy". That
10 was just due to coor -- getting everything coordinated,
11 going from the crime scene, back to the P.D., typing up
12 an affidavit because these affidavits are quite involved.
13 There was a typo. When I showed the judge, I observed my
14 typo and I scratched it out with the permission of the
15 judge and indicated Hot Boy, which is his street name. I
16 explained to the judge it was simply a typo on my part.

17 Q I see that on the search warrant. Thank you
18 for clearing that up. Is it true that you did not see
19 the crime scene or the crime happen?

20 A Did I witness the shooting?

21 Q Yes.

22 A No, I did not witness the shooting.

23 Q About how long did you arrive at the scene
24 after you recall?

25 A A very short time thereafter from when the

1 officers arrived based upon the dispatch tapes from
2 hearing in the background, the officer arrived and I was
3 called in immediately thereafter. Within minutes because
4 I was inside the store at Cross Creek Shopping Center
5 doing a followup on a case. So within minutes.

6 Q So we developed a time line. Would you say the
7 911 call happened when?

8 A When did the 911 call happen?

9 Q Yes, sir.

10 A Based upon -- the 911 call, based upon the
11 victim had advised that she'd just been shot at and was
12 pulling across the street to the IHOP.

13 Q So your testimony is just a few minutes after
14 the 911 call, you arrived at the scene?

15 A Yes, I was there a short time after.

16 Q From that time, how long did you take to go
17 over to the apartment where Mr. Johnson presumably lived?

18 A When I arrived on the scene, I generalized what
19 actions took place. I wasn't keeping a time log of the
20 exact moments and time. I thought we had an active
21 shooter. I believe the police officers did too. From
22 the best of my recollection, when the initial officers
23 got there, they called me. We had established a
24 perimeter by the entrance. We moved into the apartment
25 complex to see if the shooter was still there. Our

1 biggest concern is the shooter is going to engage us. We
2 just didn't know the exact details at that point. As far
3 as a general time log of events, I'm just going based
4 upon my recollection of arriving, moving in and going
5 from that point forward.

6 Q What I'm getting at officer is there wasn't
7 much time for the shooter to run anywhere, was there?

8 A I would have to completely speculate on that.
9 There's trails behind the apartment complex. There's
10 various trails. And I know because I've had people bail
11 out. When I was a road officer, I had people bail out in
12 that general area and I immediately lose them because
13 there's trails back there that take you to Broad River
14 Boulevard. There's another one that takes you to the
15 shopping center. So if somebody wanted to leave that
16 area in a hurry, that certainly wouldn't be an issue.

17 Q And when did you actually search the apartment
18 where Mr. Johnson presumably lived?

19 A Well, there was a great deal of time that
20 lapsed at that point. After we secured the Cross Creek
21 Apartment complex, after we made sure there were no more
22 apparent victims and the shooter wasn't in that general
23 area, I went back to the victim's vehicle. Had a chance
24 to talk to the victims and ascertain what was going on.
25 At that point, we return to the Beaufort Police

1 Department with the victim. Do a photo lineup once we
2 figure out who Hot Boy's street name really was. Then we
3 had to coordinate with a judge to go before a judge and
4 have a search warrant signed to enter the apartments that
5 we suspected the suspect to be in. So a great deal of
6 time elapsed at that point because of the logistics and
7 gathering the evidence and coordinating with a judge.

8 Q All right. Thank you. Let me turn to the
9 shots. How many shots were fired at the victim? Did you
10 say two?

11 A Yes, sir.

12 Q Did you see or determine what caliber bullet
13 that was?

14 A No, sir.

15 Q Why was that?

16 A The round that was recovered?

17 Q Yes, sir.

18 A Well, the -- I'm not a ballistic expert by any
19 means. When I look at it, if I had to take an educated
20 guess, I would guess either a .40 caliber or .45 caliber.
21 I'm certainly not a ballistics expert.

22 Q Is there any reason that it was not sent out to
23 ballistics?

24 A Yes, sir. The reason why we didn't send it out
25 to ballistics is any ballistics that we do, we send it

1 out to SLED, which is the South Carolina Law Enforcement
2 Division. They have a division that they process
3 ballistic forensics. That was held onto because to do a
4 ballistic analysis, you want to recover the weapon. In
5 this case, we never recover the weapon, which is not
6 uncommon in cases. Sometimes, you do. When you do
7 recover a weapon, it's nice because you can take that
8 bullet recovered from the scene and say that that gun
9 fired it. There was no need to have a ballistic analysis
10 done in my opinion.

11 Q I want to know what kind of shells or bullets
12 you found when you executed your search warrant.

13 A Inside the defendant's apartment?

14 Q Yes, sir.

15 A If I can just pull out my search warrant. One
16 moment, sir. (Pause.)

17 Upon executing a search warrant at the
18 defendant's residence and within his bedroom, I located
19 the following -- you requested the ammunition, sir?

20 Q Yes, sir.

21 A Two shot gun shells of federal .22 caliber box
22 with 50 rounds in it. It only had 49 rounds in it.

23 MR. ERICKSON: May I approach the witness?

24 THE COURT: You may.

25 MR. ERICKSON: At this time, I'd like to

1 admit to defense exhibits relating to the officer's
2 testimony.

3 (WHEREUPON, Defendant's Exhibits 1 and 2 are marked
4 for identification purposes.)

5 BY MR. ERICKSON:

6 Q Officer, while she's marking the second one --
7 Officer, I'm going to show you what we're calling Defense
8 Exhibit 1. Could you identify that please?

9 A It appears -- is that the box of federal
10 ammunition?

11 Q Yes, sir. Is that the one you found in your
12 report?

13 A I have no idea.

14 Q Let me try Exhibit number 2 and see if that
15 refreshes your recollection. Were those shells found
16 within this box?

17 A I would have no way of knowing. These are --
18 it would appear to be some of the rounds we observed on
19 that day, yes. I can't definitively answer that.

20 Q Would you look at your report? Did you take
21 the pictures? Were you the one that took the photos of
22 the evidence?

23 A Inside the apartment?

24 Q Yeah.

25 A Yes.

1 Q You should have that. Let me approach -- let
2 me get the whole wad of photos and try to refresh his
3 memory here. Basically, Officer, I have a CD with 48
4 pictures taken inside of Mr. Johnson's car. Excuse me,
5 his apartment. Would you look through here. Those are
6 some of the pictures I found on that CD.

7 A Yes, sir. These were -- when we executed the
8 search warrant, these are photos that were taken.

9 Q All right. Are there any photos that matched
10 the two marked as Defense Exhibits?

11 A Yes, right there.

12 Q So would that be a true copy of what you saw in
13 the apartment?

14 A The pictures?

15 Q Yes, sir.

16 A Yeah, those are the -- I took those photographs
17 when we executed the search warrant, yes.

18 Q Thank you, Officer. Caliber bullet on that
19 photo is what?

20 A On the search warrant or the picture?

21 Q On this picture right here, this caliber
22 bullet.

23 A I can not make out the caliber on the picture.

24 Q Well, this is the caliber of the tray of
25 bullets. It says .22. So that would be what, .22

1 caliber?

2 A Yes.

3 Q All right. .22 caliber. And you just
4 testified that the slug in the car is probably a .45
5 caliber, is that right?

6 A Possibly a .40 caliber or a .45 caliber.

7 Q That's not -- that's different from this, is
8 that true?

9 A Yes. But there's been no claim made by me or
10 anybody else that those rounds were the same ones that
11 were used as the attempted murder weapon. Those rounds
12 right there are .22 caliber.

13 Q There is a second significance to this, isn't
14 there officer? There's only one shell there missing
15 there. And there are two shots?

16 A Yes.

17 Q So this is not a match?

18 A There's been no claim that there is a match
19 here. In addition, we have the shotgun shell that was
20 recovered inside the apartment. It's not uncommon for us
21 to execute the search warrant and find multiple different
22 rounds inside the residence. That's not uncommon at all.

23 Q So the shotgun shells was not a match with the
24 vehicle either, is that right?

25 A No.

1 Q So it's safe to say that all the shells that
2 you found in the apartment were not a match?

3 A There was no -- in regards to ammunition of .40
4 caliber or .45 caliber, we did not recover any inside
5 that apartment.

6 Q I'm going to ask you about forensic evidence.
7 Just for the jury's sake, could you define what forensic
8 evidence is.

9 A A definition of forensic evidence?

10 Q Yes, sir.

11 A From my standpoint, forensic evidence would be
12 physical evidence that could be tested scientifically
13 from collection of DNA, fingerprints, microscopic
14 evidence to analyze and try to create a link towards. I
15 mean, that's -- I'm by no means a scientist, but that's
16 my general understanding of forensics.

17 Q That's basically scientific evidence, is that
18 fair?

19 A Yes.

20 Q Was any DNA in this case gathered?

21 A No.

22 Q Was any fingerprints in this case gathered by
23 law enforcement?

24 A No.

25 Q Was there a gun found by law enforcement in

1 this case?

2 A No.

3 Q And you mentioned there was no gunpowder
4 residue test that was done either?

5 A Due to the time that had elapsed, there would
6 be no reason to administer gunshot residue. A suspect
7 was apprehended several, several days later. We would
8 not do that test. Nor was there any need for any DNA
9 collection or fingerprint collection. Fingerprint and
10 DNA would be collected. Let's say you went to a
11 burglary, the scene of a burglary, someone crawled into
12 a residence, then there would be grounds to dust for
13 fingerprints to collect DNA. Under this case, there was
14 no need to collect DNA or fingerprints.

15 Q I just have a final question, Officer. Absent
16 the two eyewitnesses in this case that are going to
17 testify later, what do you personally know that connects
18 my client, Mr. Johnson, to this crime?

19 A Well, you have the -- you have the personal
20 knowledge.

21 Q Without any eyewitness testimony, do you have
22 any physical evidence that connects Mr. Johnson to the
23 crime? Physical evidence?

24 A Physical evidence like a weapon?

25 Q That's right.

1 **A** There was no weapon recovered.

2 **Q** All right. So I'm asking you as an officer,
3 based on what you seen, what evidence connects Mr.
4 Johnson to this crime absent the eyewitness testimony?
5 Just you personally, what you found, what you gathered.

6 **MR. STEPHENS:** Objection, Your Honor. May I
7 approach?

8 **THE COURT:** You may.

9 (WHEREUPON, a bench conference is held off the
10 record.)

11 **BY MR. ERICKSON:**

12 **Q** I'm trying to ask you a final question. It's
13 related to any physical scientific evidence that you
14 gathered in this case, is there any of that linking Mr.
15 Johnson to the crime?

16 **A** From the physical evidence standpoint, it is
17 certainly not uncommon for violent cases when you do not
18 have a gun. The gun could be anywhere. It could be in
19 the Beaufort River. It could be in the woods. We do not
20 have the gun. So we do not have that physical evidence.
21 That certainly frustrates me. But from that standpoint,
22 physical evidence-wise, that would, in my view, that
23 would be the only piece of evidence that we would have to
24 link a shooter to the case. This case involves a gun
25 that was deployed. There would be no other physical

1 evidence until -- unless Mr. Johnson was taken into
2 custody within one or two hours, we would have been able
3 to administer gunshot residue, but he wasn't. We didn't
4 recover the gun. So there is no physical evidence that
5 we can collect.

6 Q All right. Nothing further. Thank you.

7 **REDIRECT EXAMINATION**

8 **BY MR. STEPHENS:**

9 Q Just a few questions, Officer Dowling. Uh,
10 first off, I neglected to ask. When Mr. Johnson was
11 taken into custody, did he have a cell phone in his
12 possession?

13 A He did. When he was taken into custody by the
14 U.S. Marshalls, he did have in possession a cell phone.

15 Q Now, were there any attempts to forensically --
16 I know we keep throwing out that word forensic --
17 forensically examine the cell phone that he had in his
18 possession when he was taken into custody?

19 A Yes, the Beaufort County Sheriff's Office, they
20 have a computer division that deals with forensics when
21 it comes to, I wouldn't necessarily say forensics, but
22 they have the capability to take a telephone and extract
23 information out of it that includes address book
24 information, text messages sent, calls, ingoing, outgoing
25 calls, that was done on the defendant's telephone.

1 Q Now, why did you -- does that have to be done
2 pursuant to a search warrant?

3 A The phone extraction, yes. You need a search
4 warrant to do that.

5 Q Was one obtained for the search of Mr.
6 Johnson's phone?

7 A Yes.

8 Q Why did you -- what kind of evidence were you
9 looking for on that cell phone?

10 A When we do extraction reports on cell phones,
11 we look for correspondence during the commission of the
12 crime, any incoming and outgoing calls, text messages
13 that were sent so on and so forth.

14 Q Do you know which technicians specifically
15 conducted the extraction on Mr. Johnson's cell phone?

16 A Yes, Billy Crumpton with the Beaufort County
17 Sheriff's Office.

18 Q Thank you, Officer Dowling. Uh, first of all,
19 there were questions about, from Mr. Erickson about
20 whether or not Mr. Johnson would be able to flee the
21 scene prior to your arrival. Was Beaufort Police
22 Department in control of what vehicles were leaving Cross
23 Creek Apartments at the time you arrived prior to your
24 arrival and/or foot traffic leaving the apartments?

25 A No, when we initially arrived on the scene, it

1 was more or less trying to organize, trying to ascertain
2 what had happened at this location. So from the outer
3 perimeter, the only area we were monitoring was the
4 driveway that the vehicles could have gone undetected.
5 Certainly, anybody could have left on foot completely
6 undetected. When you take Cross Creek, you have a
7 heavily wooded region. It's not -- it would be very easy
8 to slip through the police.

9 Q All right. There were questions about -- there
10 were questions about whether or not you had done a
11 gunshot residue test on the suspect. I believe you
12 answered why you didn't. Let me just ask, if Mr. Johnson
13 was located in his home when you executed that search
14 warrant, would a gunshot residue test had been performed
15 on him?

16 A Yes, absolutely. If we had arrested him a
17 short time thereafter, a four-hour window, we would have
18 done a gunshot residue, yes.

19 Q If there was no gunshot residue on him, would
20 that have exonerated him?

21 A After the shooting?

22 Q Yes.

23 A Sure.

24 Q But he was not at that residence?

25 A No.

1 Q Now, there were questions about the bullets,
2 the 49 bullets I think that were testified to that were
3 located inside Mr. Johnson's residence and the two
4 shotgun shells. There were no weapons, corresponding
5 weapons for any of those sets of ammunition located in
6 the apartment, were there?

7 A No, we just recovered the ammunition. No
8 weapons.

9 Q If there were corresponding weapons, those
10 would have also had to have been taken from the
11 residence?

12 A Yes, they would have been seized, correct.

13 Q You've got an issued sidearm as part of your
14 job as a Beaufort Police Department officer, correct?

15 A Yes, sir.

16 Q Now, had you ever qualified to fire that
17 weapon?

18 A Yes, I carry a Springfield .45 S.D.

19 Q Now, when you qualify or shoot that weapon, do
20 you have to take your ammunition with you?

21 A Ammunition is provided by the City of Beaufort
22 Police Department.

23 Q I'm just asking. If you have ammunition and
24 clips that are inserted in that weapon, don't you take
25 them with you when you intend to fire that weapon?

1 A Yes, sir.

2 Q What caliber weapon do you carry as a police
3 officer?

4 A I carry a .45.

5 Q You ever shot a lower caliber weapon?

6 A Yes, sir. I shot over my years a multitude of
7 .38s, .22s, .40 caliber. I've shot shotguns.

8 Q Now, what would you use if you were trying to
9 penetrate an object?

10 A A vehicle or --

11 Q You just stated that carry a .45. Why do you
12 carry a .45?

13 A A .45 -- a .40 caliber or .45 is going to have
14 -- a .45 is going to have more of a -- it's going to
15 penetrate walls and penetrate vehicles. If you shot a
16 vehicle, that round is going to penetrate that vehicle
17 and go right throw and hit the target.

18 Q In your opinion, if you had to shoot at
19 someone, would you use a .22 or would you use that
20 service .45 pistol that you carry?

21 A If I was -- if someone engaged me in a
22 shooting, I would use my .45 because more likely to save
23 my life and hit the target.

24 Q Thank you, Officer Dowling. I don't have any
25 further questions for Officer Dowling. Thank you.

1 **THE COURT:** Anything further?

2 **MR. ERICKSON:** I might want to expand on the
3 perimeter that you were talking about. I'd like to
4 get the map down so the jury can see how that
5 perimeter was set out.

6 **THE COURT:** Go ahead.

7 **MR. ERICKSON:** Mr. Bailiff, if you would,
8 help me out with that. Thank you very much.

9 (WHEREUPON, there is a pause.)

10 **RECROSS EXAMINATION**

11 **BY MR. ERICKSON:**

12 **Q** What I'd like to show the jury is the
13 perimeter, uh, just after you arrived at the scene, how
14 you branched out --

15 **THE COURT:** Mr. Erickson, if you would, stand
16 this way so that my jurors can see. Thank you.

17 **THE WITNESS:** You'd like to see where we set
18 up when I arrived?

19 **BY MR. ERICKSON:**

20 **Q** Yes, sir.

21 **A** There was officers right here dealing with the
22 victim.

23 **Q** Point out where the site was where the shooting
24 occurred first just to orient everybody.

25 **A** The shooting had taken place in this proximity.

1 Q Okay.

2 A This right here is Parris, uh, Gateway, Highway
3 280. That's IHOP and the Sake House.

4 Q Where is Mr. Johnson's apartment on that map?

5 A Mr. Johnson's apartment would be right over
6 here.

7 Q All right. Go ahead and show me the perimeter
8 that you set up.

9 A When we initially arrived there?

10 Q Yes, sir.

11 A When we initially arrived, there were officers
12 with the victims. We set out -- there were a few
13 officers here. We congregate. I don't wear bulletproof
14 vest unless I go into a high risk situation. We're
15 setting up officers who had higher caliber weapons and
16 shotguns so on and so forth. We had a quick debriefing
17 of how we're going to move in into this shopping center.
18 There's several points of ambush that's heavily wooded.
19 Then you contend with breezeways where you could be
20 ambushed walking in. We moved in slowly and tactically.

21 Q That was within minutes of arriving at the
22 scene?

23 A Well, minutes arriving --

24 Q Within minutes of arriving at the scene, you
25 branched out like that?

1 **A** Between -- just to kind of explain to the jury
2 how everything developed, you have the initial shooting.
3 The victim goes here. When the police arrive there, they
4 talk to the victim. I'm way over here. After they
5 ascertain what's going on, they contact me by a cell
6 phone. I walked out. I remember I parked far away. I
7 had to walk to my vehicle. By the time I got to my
8 vehicle and took that left turn, which sometimes can be
9 quite death-defying with the volume of traffic. I
10 believe I pulled in here or here and met with the
11 officers. We had a debrief. We had a bulletproof vest.
12 I mean, I can't give you the exact time period, but by
13 the time things developed, I mean, I can't say for
14 certain how many minutes elapsed.

15 **Q** Any officers arrived before you at the scene or
16 were you the first responder?

17 **A** I was probably one of the last people to arrive
18 at the scene.

19 **Q** Okay. Thank you for pointing that out.
20 Nothing further for this officer.

21 **THE COURT:** Anything further, Mr. Stephens?

22 **MR. STEPHENS:** No, Your Honor. The State
23 just moves to admit State's Exhibits, uh, 3, 4, 5,
24 6, 7, 8 and 10 into evidence.

25 **THE COURT:** Any objection?

23 Mr. Foreperson, when y'all are ready, knock on
24 the door and we'll bring you back into the
25 courtroom. All right. Thank you.

1 (WHEREUPON, the jury exits at approximately
2 11:15 a.m.)

3 THE BAILIFF: The jury is clear. The door
4 is closed, Your Honor.

5 THE COURT: All right. We'll take a 10-
6 minute recess and be back. Thank you.

7 (WHEREUPON, a short recess is taken.)

8 THE COURT: The State ready to go?

9 MR. STEPHENS: Yes, Your Honor.

10 THE COURT: You ready?

11 MR. ERICKSON: (No response.)

12 THE COURT: You ready?

13 MR. ERICKSON: I'm ready, Your Honor.

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

15 THE BAILIFF: Yes, Your Honor.

16 THE COURT: Thank you.

17 (WHEREUPON, the jury enters at approximately
18 11:32 a.m.)

19 THE COURT: Go ahead and sit down, Ladies and
20 Gentlemen of the jury. They are standing for you.

21 THE BAILIFF: The jury is seated, Your
22 Honor.

23 THE COURT: Welcome back, Ladies and
24 Gentlemen. At this time, we're going to go ahead
25 and continue with the trial of this case. If the

1 State would, call the next witness.

2 MR. STEPHENS: Yes, Your Honor. Thank you.

3 The State calls Billy Crumpton.

4 THE CLERK: Sir, would you place your left
5 hand on the Bible and raise your right hand for me
6 please.

7 BILLY CRUMPTON

8 having first been sworn, testifies as follows:

9 THE CLERK: Please be seated. State your
10 name and spell it for the court please.

11 THE WITNESS: William Crumpton. Last name is
12 spelled C-R-U-M-P-T-O-N.

13 DIRECT EXAMINATION

14 BY MR. STEPHENS:

15 Q Mr. Crumpton, where are you currently employed?

16 A With the Beaufort County Sheriff's Office.

17 Q What are your duties there?

18 A I'm employed as the Computer Forensics
19 Technician.

20 Q In total, how long have you been working in law
21 enforcement?

22 A Almost 27 years in law enforcement.

23 Q And how long have you been working in this
24 specific area of computer technician?

25 A Since about 2004.

1 Q Now, Officer Dowling of the Beaufort Police
2 Department testified a few minutes ago about having taken
3 a, having seized a cell phone belonging to the defendant
4 in this case, Mr. Mykel Johnson, and having received a
5 search warrant for the search, forensic search of that
6 cell phone. Were you involved in the search of that cell
7 phone?

8 A No, I wasn't.

9 Q Can you please describe to the jury just in
10 brief detail how a computer search or searching a cell
11 phone works? How do you go in and pull out information
12 off that phone.

13 Q There's a variety of different applications or
14 tools that you can use to examine and/or extract
15 information from a cell phone. A cell phone is a pretty
16 dynamic piece, dynamic device. It kind of changes a
17 little bit because it's always reaching out to the
18 network versus a hard drive which if you pull it off a
19 computer, it kind of is what it is.

20 The software that we use in this particular
21 instance is a user-friendly device which contains
22 software. Once you know what the model and make of the
23 phone is, you can look that model and make up in this
24 device and it tells you actually what kind of cable, the
25 number of the cable that's required for the cell phone.

1 It's going to tell you -- it will give you some choices
2 as far as call logs or text messaging or contacts that
3 might be available in the phone.

4 Basically, with this software, you just hook
5 the cell phone up to the device. Identify it in the
6 device as a Samsung and the model number and then you say
7 extract. In this particular phone, that was pretty much
8 the extent of it. It's straightforward. Then, whatever
9 is available in the phone, it gives you that information
10 in an extraction report which gives you call logs,
11 history and SMS and that type of thing.

12 Q How is a, for example, a text message log, how
13 does that look when it prints it out?

14 A Well, the phone log is going to give you the
15 telephone number. Uh, it's going to give you the date,
16 the name of the -- the incoming number and the outgoing
17 number. It just depends on what's available in the
18 phone. Some people put, they may put just the name or
19 they may put no name and the number or no name. It just
20 depends on what the user actually inputs into the device
21 as to what you're going to get out of it.

22 MR. STEPHENS: Your Honor, may I approach the
23 witness?

24 THE COURT: You may.

25 BY MR. STEPHENS:

1 Q Officer Crumpton, I'm handing you what's marked
2 as State's Exhibit 11. Do you recognize that document?

3 A I do.

4 Q What is it?

5 A This is an SMS text message log based on the
6 most recent review of this case that looks like a text
7 message log for this case for that phone.

8 Q Would you please -- can you please flip through
9 very briefly and see if that appears to be the same log
10 that you originally extracted from the phone without any
11 additions or changes?

12 A Can I check my notes just a second?

13 Q Certainly.

14 A (Reviewing.) Yes, it does.

15 Q Thank you. Retrieving State's Exhibit 11 from
16 the witness. This is, uh, all the text messages that
17 could be pulled off of that Samsung that belonged to Mr.
18 Johnson that was submitted for your evaluation or your
19 extraction?

20 A Yes.

21 MR. STEPHENS: All right. Your Honor, at
22 this point, the State moves to have State's Exhibit
23 11 moved into evidence.

24 THE COURT: Any objection?

25 MR. ERICKSON: No objection.

1 **THE COURT:** Without objection.

2 (WHEREUPON, State's Exhibit 11 is admitted into the
3 record.)

4 **BY MR. STEPHENS:**

5 **Q** And the original cell phone is still in police
6 custody, is that correct?

7 **A** It's been returned to the city.

8 **MR. STEPHENS:** Okay. Your Honor, I don't
9 have any further questions for Officer Crumpton at
10 this time.

11 **THE COURT:** Mr. Erickson?

12 **MR. ERICKSON:** No questions for this officer.

13 **THE COURT:** All right. Any objection to
14 Officer Crumpton being excused?

15 **MR. STEPHENS:** None from the State, Your
16 Honor.

17 **MR. ERICKSON:** Nothing from the defense.

18 **THE COURT:** You are excused, sir. Thank you.

19 **THE WITNESS:** Thank you, Your Honor.

20 **THE COURT:** Call your next witness.

21 **MR. STEPHENS:** Thank you, Your Honor. Your
22 Honor, the State calls George Erdel.

23 **THE CLERK:** Place your left hand on the
24 Bible. Raise your right hand for me please.

25 **GEORGE ERDEL**

1 having first been sworn, testifies as follows:

2 **THE CLERK:** Please be seated. State your
3 name and spell it for the court please.

4 **THE WITNESS:** My name is George Erdel.
5 Common spelling on the first name. Last name is
6 E-R-D-E-L.

7 **DIRECT EXAMINATION**

8 **BY MR. STEPHENS:**

9 **Q** Officer Erdel, where are you currently
10 employed?

11 **A** I'm at Beaufort Police Department.

12 **Q** And what are your duties there?

13 **A** I'm a Criminal Investigator.

14 **Q** How long have you been employed with the
15 Beaufort Police Department?

16 **A** I been employed with the Police Department for
17 nine years. I been in investigations for about three.

18 **Q** Prior to coming to the Beaufort Police
19 Department, did you have any other experience in law
20 enforcement?

21 **A** Yes, I was a military police officer in the
22 U.S. Marine Corps for about seven years. I reenlisted
23 early in my first.

24 **Q** Now, as part of your duties as an investigator,
25 were you ever assigned in any capacity to, as lead

1 investigator or to assist in the investigation in the
2 case of the State versus Mykel Johnson?

3 A I assisted Investigator Dowling. Investigator
4 Dowling was the lead case officer. I did assist him at
5 his request with certain elements of the case.

6 Q You said you assisted with certain elements of
7 the case. What was your initial involvement with the
8 case, how were you tasked initially in this case?

9 A Initially, I was advised by Officer Dowling
10 that there had been a shooting. Prior to receiving that
11 information, I was engaged in some other duties. I was
12 not aware initially that the shooting had taken place.
13 Upon receiving information from Officer Dowling, he
14 basically told me that there was a suspect that went by
15 the street name of Hot Boy and asked me to look into and
16 see if I could search that alias and find out who Hot Boy
17 was. At which time, I did. I went into our report
18 system. There is a computer program. I searched the
19 name Hot Boy. It came up with Mr. Johnson was associated
20 with that alias. There were no others associated with
21 that alias in the system.

22 Q Did that program also provide you any personal
23 information like home address or anything like that?

24 A Yes, it did. It did.

25 Q What home address did it provide?

1 A Cross Creek Apartments. I don't recall the
2 specific apartment number.

3 Q Okay. What did you do with that information?

4 A As far as -- I compiled a photographic lineup
5 at the request of Officer Dowling to show the victims.
6 It was my understanding they knew who Hot Boy was but
7 they only knew him as Hot Boy. I had to get a picture of
8 him. Once I did, I used that photograph for a lineup to
9 see if they could identify, if they could make a match
10 with a person they knew and verify that he was Hot Boy.

11 Q Let's talk a little bit more about how a photo
12 lineup is done. You said you went to get information
13 about this defendant. How exactly do you get pictures of
14 other potential suspects to put into a photo lineup?

15 A There's a module in this program that you
16 basically put the person that you want to put in a
17 lineup. In this case, it would be Mr. Johnson. You
18 select criteria such as height, weight and race and sex.
19 The system selects potential matches so that you could
20 have somebody to look similar to put in the lineup.

21 Once you scroll through the pictures that it
22 provides you and finds the best matches, there's a
23 feature -- it's actually a requirement to complete the
24 lineup up. There's a button that says done slash
25 randomize. You press that button and it scatters the

1 pictures and have the computer determine what slots they
2 should be in. Then you hit the print button and you can
3 print out the lineup.

4 Q All right. Was that procedure followed in this
5 case?

6 A Yes, it was.

7 Q How many pictures do you use?

8 A Six.

9 Q They sometimes call that a six pack?

10 A I have heard that referred to as six-pack photo
11 lineup.

12 Q Have you heard of other means of doing
13 identification such as a show-up identification or single
14 photo identification?

15 A Yes, I have.

16 Q Why is the six-photo lineup done instead of a
17 show-up, for instance?

18 A In this instance, a show-up would be where the
19 victims, if the suspect was located shortly thereafter,
20 we could have brought the victims to the suspect and say
21 is this the guy if it would have been in the immediate
22 proximity, if it would have been very shortly thereafter.
23 If it was close in time to distance, we could bring the
24 victim and say is this the guy who shot you. However,
25 once time lapses, you have the option to do either a

1 single photo, which I believe we could have done single
2 photo because he was a known person. However, out of an
3 abundance of caution, I went ahead and did a six-pack
4 photo lineup and placed Mr. Johnson in that line up.

5 Q Did either of the victims indicate that they
6 knew the suspect who had shot at them?

7 A They both did. They both stated they knew who
8 he was.

9 Q Is a photo lineup normally done in a situation
10 when the victims know the person involved?

11 A It's not required, however, I like to kind of
12 extend a level playing field, make it more fair so to
13 speak. In this particular case, I have no prior
14 knowledge of Mr. Johnson. I did not know him from the
15 next person. In my opinion, it would be better to do a
16 six-person photo lineup. In my mind, that would
17 establish that the victims, if they picked him from six
18 people, that's not suggestive, whereas somebody might
19 argue, well, you just showed him one picture. So I
20 wanted to do the six-person photo lineup for fairness
21 sake and to establish that they really did know who he
22 was.

23 Q There were two victims in this case, Frank
24 Babecki and Desiree Constantineau, is that correct?

25 A Yes, sir.

1 Q Did they each do a photo lineup or both or
2 neither?

3 A Mr. Babecki did. And Mrs. Con -- I can't say
4 her name -- Constantineau did not.

5 Q Do you recall why she did not do a lineup?

6 A I do not recall. I want to say that Mr.
7 Babecki stayed at the police department after our
8 initial, after he initially had come down there. I think
9 she left because she -- she was pregnant at the time and
10 she was very stressed out and upset. I think she may
11 have had to go somewhere or she wanted to just to get out
12 of there. I don't recall specifically. I do believe
13 that she left at that point.

14 Q Do you recall how far along she was at that
15 time?

16 A I want to say like eight months maybe.

17 Q When you took Mr. Babecki, is there a certain
18 location you go to do the photo lineup?

19 A We have an interview room at the Police
20 Department.

21 Q So you will take the witness in there
22 presumably. What do you tell them?

23 A Basically, admonition is given when you do a
24 lineup. Bare in mind, one was not required but I did one
25 anyway, so I followed it to the hill. Basically, there's

1 an admonition that when you give somebody a lineup, just
2 because you are giving that person a lineup does mean
3 that person is in there. That's what I told Mr. Babecki.
4 Actually, I believe it was just prior to entering into
5 the interview room.

6 Sometimes what will happen is you think you
7 might have somebody that is a match for this or whatever
8 and they may not be in there. I don't want to prejudice
9 anything he's going to want to say or suggest anything to
10 him. I let him know the person may or may not be in
11 here. That was the admonition I had given to him prior
12 to entering -- if my memory serves me correctly, it was
13 just prior to entering the room.

14 Q When you give the photo lineup to Mr. Babecki,
15 did he select an individual as the suspect he believed
16 that shot at him?

17 A He did. He selected -- he immediately selected
18 Mr. Johnson as the individual he claimed shot him.

19 Q You said immediately, about how long did it
20 take for him to select that photo?

21 A I couldn't get out -- I set him down at the
22 table. Another thing I do is I leave the room to avoid
23 any -- I don't want the person to think that I'm
24 suggesting to them anything in any way. My goal upon
25 handing him a lineup was to leave the room and allow him

1 time to choose. We have -- most people can see if they
2 know it's in there. Basically, what I would normally do
3 is I'll leave the room and give that person a few minutes
4 to look at the lineup. I will see that they made a
5 decision on the monitor. Once I see that and I come back
6 into the room -- I was not able to actually even leave
7 the room before he emphatically stated that's him and
8 initialed. I said, if that's him, initial the picture
9 and circle it.

10 Q Investigator Erdel, I'm handing you what's been
11 marked as State's Exhibit number 1. Do you recognize
12 that document?

13 A Yes, sir.

14 Q What is it?

15 A This the photo lineup that I prepared for Mr.
16 Babecki.

17 Q Now, is there any indication on there where he
18 selected the individual in the number 1 spot as the
19 suspect?

20 A Yes, sir. The photograph is circled and has
21 his initial and the date on there. Mr. Babecki's
22 initials.

23 Q Thank you. I'm retrieving State's Exhibit
24 number 1 from Investigator Erdel. Now, Investigator
25 Erdel, you also interviewed the victims in this case when

1 Mrs. Constantineau got back to the police station, is
2 that correct?

3 A That is correct.

4 Q Now, did they both indicate to you that -- they
5 are here and going to testify. But just in brief, did
6 they indicate to you that their neighbor that they knew
7 as Hot Boy was outside the vehicle that they drove past?

8 A They were very emphatic about it. They
9 indicated it was Hot Boy.

10 Q Now, did Mr. Babecki indicate that he actually
11 saw, uh, Hot Boy shoot at him?

12 A Yes.

13 Q Did Mrs. Constantineau -- excuse me -- yeah,
14 Mrs. Constantineau state that she saw Mr. -- that she saw
15 Hot Boy shoot?

16 A (No response.)

17 Q To the best of your recollection.

18 A I don't remember if she said that she saw the
19 actually firing of the gun, but basically, her indication
20 was she knew that -- she knew him. Her husband asked her
21 to stop. She was driving. Slow down so that he could
22 talk to him and he fired the gun. Whether -- I can't
23 recall if she indicated she actually saw him firing the
24 gun. But she was -- it was her account that he shot the
25 gun at her.

1 Q Now, based on the photo lineup and their
2 indication that Hot Boy, who you were able to identify
3 was Mykel Johnson, was the person that shot at them, were
4 you able to get arrest warrants for the arrest of Mr.
5 Johnson?

6 A I believe Officer Dowling did that.

7 Q Now, do you recall or do you know how and when
8 Mr. Johnson was taken into custody?

9 A Mr. Johnson was taken into custody. As
10 Investigator Dowling had testified to earlier, we were
11 unable to locate him that day or for a significant period
12 of time thereafter. I don't recall the exact date. I
13 basically made contact with the U.S. Marshall Service. I
14 kind of serve as the default liaison between the Beaufort
15 Police Department and Marshall Service. We have utilized
16 their assistance in the past to find people who have fled
17 the area or don't want to be found. That's because they
18 are able to -- that's just what they do all the time. We
19 kind of exhausted our resources or our abilities to find
20 him. I contacted the Marshall Service in order to help
21 us locate him. They eventually did locate him.

22 Q Were you present when the -- with the U.S.
23 Marshalls when he was taken into custody?

24 A I was.

25 Q How did that happen?

1 A The Marshall Service personnel contacted me.
2 The supervising agent Stewart Cunningham out of the
3 Savannah office contacted me and stated that he wanted me
4 to go with the team to, and I don't recall the address.
5 It was an address. It was a trailer in Yemassee. He
6 stated we're going out there. We've got information that
7 he's out there. Basically, what happens -- I been on a
8 few of these. I won't be able to say what they do every
9 time. But basically a team of officers, that includes
10 Marshalls and also Beaufort County Sheriff's Deputies
11 surround the -- surrounded -- in this particular
12 instance, surrounded the trailer.

13 I took up a position if you were basically
14 looking at the front door of the trailer or you would
15 consider the front side, you would say I would be on the
16 back right corner of the trailer. I overheard the
17 Marshall personnel. They actually had pulled some people
18 out of the apartment and were calling out Mr. Johnson at
19 which time he apparently had failed to come out. Then I
20 heard the commotion and was actually going into the
21 residence in getting him out of the room that he had been
22 in. They brought him out front in handcuffs at that
23 point.

24 Q Did you speak with Mr. Johnson when he was
25 brought out of that trailer?

1 A I didn't, uh, -- I didn't ask him any
2 questions. Basically, in an instance like that where
3 somebody's under arrest and we know it, especially when
4 it's a big case, we will bring it back to talk with us.
5 I did speak with him because he asked me questions. At
6 which point, I engaged him in a conversation but it was
7 at his behest. It was -- he initiated it.

8 Q You know if he had been provided Miranda
9 warnings yet?

10 A At that point, he had not. He was not being
11 questioned at that point.

12 Q You said he asked you questions. Do you recall
13 what he said to you?

14 A I do recall what he said to me. He asked me --
15 I do not recall the exact order, but the gist of it was,
16 uh, he did say that he was going to turn himself in once
17 he hired a lawyer. There was -- he didn't specify and I
18 didn't ask. He said there was something in his phone
19 that will tell the story. Then he asked how did y'all
20 find me. That's -- you know, I did tell him, listen, I'm
21 not going to discuss the case with you here. I'm going
22 to take you back to the police department. In actuality,
23 I had a Beaufort County Sheriff's Deputy transport him to
24 the police department and handed him off to officers
25 there. I was still out with the Marshalls at the trailer

1 trying to get a ride back to my vehicle where it was
2 staged at.

3 Q All right. Uh, now, when he was given his
4 Miranda warnings later at the Beaufort Police Station, do
5 you have any question in your mind that he understood
6 that he had a right to remain silent and not say
7 anything?

8 A I believe he understood what his rights were,
9 yes.

10 Q Now, when you, uh, when he came out and he
11 asked you or said that he was going to turn himself in
12 when he got a lawyer and asked you how you found him, did
13 he ask you any questions about what you wanted him for?

14 A No.

15 Q But he did indicate that he would have turned
16 himself in and got a lawyer, correct?

17 A That's what he said.

18 Q When you took him into custody, did he have a
19 weapon on him?

20 A No.

21 Q Were you able -- were officers able to locate
22 weapons in that residence in Yemassee that could be
23 linked back to Mr. Johnson?

24 A No, sir.

25 Q You said you didn't recall when he was taken

1 into custody. Would it be fair to say that it was at
2 least a week or so later?

3 A I believe it was around a week, week and a
4 half. It's been a lot of cases between now and then. I
5 couldn't quote you the exact number of days, but it was
6 not contemporaneous with the incident. It was probably
7 between a week to a week and a half later to the best of
8 my recollection. I mean, I could look at the report and
9 tell you the specific date, but I don't recall it off the
10 top of my head.

11 Q I know you said you didn't recall the exact
12 location, but in proximity was -- how close would you
13 said that this trailer was to the AmTrak stop in
14 Yemassee?

15 A I mean, it's in Yemassee and the train station
16 is in Yemassee. It wouldn't be far. I couldn't give you
17 an exact date or an exact time or distance range from it,
18 but it's probably not too terribly far.

19 Q Thank you, Investigator. After Mr. Johnson was
20 taken into custody, did you take any other investigative
21 steps to assist in this investigation?

22 A Other than turning over the phone to
23 Investigator Dowling once I got it off his person at the
24 scene, Mr. Johnson had the phone at the scene, I believe.
25 But after that, no.

1 **MR. STEPHENS:** Your Honor, I don't believe I
2 have any further questions for Investigator Erdel at
3 this time. Thank you.

4 **THE COURT:** Mr. Erickson?

5 **MR. ERICKSON:** Thank you, Judge.

6 **MR. ERICKSON:** May it please the Court.

7 **THE COURT:** Yes, sir.

8 **CROSS-EXAMINATION**

9 **BY MR. ERICKSON:**

10 **Q** Officer Erdel, did you ever hear the name
11 Little Man?

12 **A** I don't think so.

13 **Q** That hadn't come up in your discussions?

14 **A** With?

15 **Q** When you were investigating this crime, did
16 Little Man ever come up in your discussions?

17 **A** I didn't really -- again, I was in an assistant
18 role as far as basically finding Mr. Johnson or making
19 liaison with the Marshall Service and doing the lineup.
20 I didn't -- other than that, I really didn't have a lot
21 of involvement. I couldn't speak to that. I never heard
22 the name or said the name. I had a limited role in the
23 actual investigation of the offense itself.

24 **Q** How did you come up with the name of Hot Boy?
25 Who gave you that?

1 A I believe Investigator Dowling may have
2 referenced it. I mean, as you heard earlier, it was in
3 the -- actually in the initial call. I don't recall
4 specifically how I heard it. It may be that Investigator
5 Dowling told me or I heard one of the other officers
6 saying it. I can not recall specifically how I heard the
7 name Hot Boy. I know it was relayed to me. I didn't
8 know it first hand.

9 Q And you did not see the crime occur?

10 A No, sir.

11 Q Were you a first responder or a second
12 responder?

13 A I never went to the scene at all.

14 Q You, uh, conducted a video interview of the
15 witnesses, did you not?

16 A Yes, sir.

17 Q And one interview was with Mr. Babecki?

18 A Yes, sir.

19 Q And that was on video?

20 A Yes, sir.

21 Q And then there was a Mrs. Constantineau,
22 Desiree, was another video interview?

23 A Yes, sir.

24 Q Have you had a chance to see that interview?

25 A I have not reviewed it in its entirety. I have

1 seen some of it previous to today.

2 Q During the interview, Officer, did you feel Mr.
3 Babecki was being truthful in all his answers?

4 A Not necessarily.

5 MR. STEPHENS: Objection, Your Honor. This
6 calls for speculation. He could be more specific.

7 THE COURT: Why don't you rephrase your
8 question?

9 BY MR. ERICKSON:

10 Q All right. Officer, you were there when Mr.
11 Babecki answered all your questions?

12 A Yes.

13 Q During the video?

14 A Yes, sir.

15 Q Did you feel that he was being truthful --
16 were there times in that video where you felt he was
17 being untruthful?

18 A I don't know if I can say that anything he said
19 was overtly not true. I felt like maybe there would be
20 something -- in other words, if you would say it would be
21 a lie, I guess, of omission, in other words, there were
22 things that were not revealed, however, I can't think of
23 anything where he said that was like in and of itself
24 like a lie, not true.

25 MR. ERICKSON: At this time, Your Honor, I'd

1 like to admit the CD ---

2 **THE COURT:** You want to play the video?

3 **MR. ERICKSON:** --- into evidence, but I don't
4 want to play it right now. I just want to mark it.

5 **MR. STEPHENS:** Objection, Your Honor. At
6 this point, I believe it's Crawford v. Washington
7 testimony or hearsay. He's not trying to admit it
8 as evidence of prior inconsistent statement. Right
9 now, I think it's a definite Crawford issue. They
10 were asked questions as part of a law enforcement
11 investigation.

12 **THE COURT:** Okay. Y'all need to approach.

13 (WHEREUPON, a bench conference is held off the
14 record.)

15 **BY MR. ERICKSON:**

16 Q Officer Erdel, are you familiar with the video
17 interview that you did on Mr. Babecki and Desiree
18 Constantineau?

19 A Yes.

20 **MR. ERICKSON:** Can I approach the witness?

21 **THE COURT:** You may.

22 **BY MR. ERICKSON:**

23 Q Does this look like the CD or the DVD?

24 A Uh, this is not my handwriting. However,
25 Investigator -- I don't recall specifically. I assume

1 this contains the video. This is our case number. This
2 should be the DVD that it was done on.

3 Q I believe there is a photo lineup on there as
4 well.

5 A I think the photo lineup we printed out. I
6 don't know if we made a copy of the CD or DVD. I think
7 it was strictly a hard printout and one that I had
8 already just looked at a few minutes ago.

9 Q All right. Thank you.

10 MR. ERICKSON: Any objections to admitting
11 this as an exhibit?

12 MR. STEPHENS: Your Honor, the State would
13 just have to renew its earlier objection.

14 THE COURT: On the basis?

15 MR. STEPHENS: Well, Your Honor, one, the
16 State believes this testimony is hearsay. Neither
17 of the victims have testified. If it's admitted,
18 that's the interview of the victims. It's their
19 words about what happened. They are going to be
20 present. He may be able to use it later if he
21 believes there's inconsistencies.

22 THE COURT: Erdel was also in those
23 interviews.

24 MR. STEPHENS: Yes, Your Honor.

25 THE COURT: He was there as well.

1 **MR. STEPHENS:** And I think that Mr. Erickson
2 is free to ask whether he thought, whether
3 Investigator Erdel thought there were
4 inconsistencies between the two victims. However, --

5 **THE COURT:** I'm going to go ahead and allow
6 it admitted. But I agree with Mr. Stephens. You
7 need to ask the question that we discussed. So go
8 ahead and do that.

9 **(WHEREUPON, Defendant's Exhibit 3 is marked for**
10 **identification and admitted into the record.)**

11 **BY MR. ERICKSON:**

12 **Q** This will be Defense Exhibit number 3. Now,
13 Officer, you interviewed both of those witnesses in that
14 video interview, is that correct?

15 **A** That's correct.

16 **Q** Were there instances where there were
17 inconsistencies between their answers?

18 **A** Yes.

19 **Q** Do you remember any particular inconsistencies?

20 **A** I remember there was his wife, Mrs.
21 Constantineau, and that's Mr. Babecki's wife, I'm trying
22 to remember to the best of my ability how the words kind
23 of came out. But basically, uh, I was asking her how Mr.
24 Babecki had known Hot Boy and if there had ever been any
25 kind of interactions as far as any drug use or dealing

1 between them. She said she thought so.

2 MR. STEPHENS: Objection, Your Honor. May I
3 approach?

4 THE COURT: Y'all approach.

5 (WHEREUPON, a bench conference is held off the
6 record.)

7 BY MR. ERICKSON:

8 Q Did we cut you off in your answer?

9 A It's the nature of the business, I guess.

10 Q You said you remember inconsistency between the
11 husband and the wife?

12 A There was some variation in what he said versus
13 what she said.

14 Q Anything in particular you remember?

15 A I don't recall particular words that were used.
16 I don't know what to say without getting cut off again.

17 Q You remember anything --

18 THE COURT: You can go ahead and answer the
19 question.

20 THE WITNESS: Okay. All right. Uh, she said
21 basically -- she said that they had known each
22 other, Hot Boy knew her husband. And I had asked
23 was there -- I don't recall if I asked -- there was
24 another party that was mentioned besides Hot Boy.
25 It was like a mutual circle of people that kind of

1 -- came to know Mr. Babecki. She said somebody
2 about possibly something to do with marijuana being
3 involved. He said -- he said something different.
4 I don't recall specifically what he said. It will
5 be on the video.

6 **BY MR. ERICKSON:**

7 **Q** One other followup question on that. Was there
8 any inconsistency about a so-called robbery or drug deal
9 gone bad?

10 **A** They had referenced the fact that, if I'm
11 remembering correctly, that supposedly, Hot Boy had
12 robbed Mr. Babecki's friend. Neither Mrs. Constantineau
13 nor Mr. Babecki could give us Mike's last name. I don't
14 think there was any -- if I recall correctly, I don't
15 think there was any difference in what they said about
16 that but that basically Hot Boy had ripped off this guy
17 named Mike in a deal for marijuana. I want to say around
18 -- it was either \$275 or \$375 worth of marijuana.

19 They both referenced that event. I don't
20 remember specifically what they said about the event
21 other than it was in the sense that it was a robbery, it
22 wasn't like somebody sticks a gun in your face robbery.
23 It was a, here, I'm going to sell you marijuana, then I
24 take the money and run and don't give you the marijuana.
25 That kind of thing. They both reference that event.

1 Q Let me turn your attention to Desiree
2 Constantineau. Any particular reason she did not do a
3 photo lineup?

4 A I don't -- again, like I said earlier to Mr.
5 Stephens, if I -- you got to understand it was a chaotic
6 kind of thing that was going on as far as patrol officers
7 were still out holding the house. We're not a large
8 agency. We don't have -- we're not the L.A.P.D. We
9 don't have a lot of officers. While this is going on,
10 multiple calls, things -- you know, business for a police
11 department continues whether we've got something, quote,
12 unquote, hot going on or not.

13 So Investigator Dowling had gotten with me. I
14 want to say Mr. Babecki and his wife came down there in
15 their own vehicle. In fact, I'm fairly sure that's what
16 happened. She was very stressed out. She was, I
17 believe, eight months pregnant at the time.

18 They both stated they knew who the person was.
19 They had basically laid out very clearly that this was a
20 known entity to them. This was a known person. It was
21 not some random stranger. I may have intended to have
22 given her one later and just didn't once I saw how
23 clearly and adamantly that Mr. Babecki identified Hot
24 Boy. I just don't recall why I didn't give her one or if
25 she was even there or if she left. I just don't recall.

1 Q Isn't it true, Officer, that on the video
2 interview Ms. Babecki asked to do a lineup?

3 A She may have. I don't recall.

4 Q Also, isn't it true that maybe she didn't get a
5 lineup because she really didn't see who did the
6 shooting?

7 A She told me she saw who did the shooting. That
8 would have no effect on the lineup one way or the other.
9 I mean, if she said I didn't see the person, if she would
10 have told me I didn't see him, then I would say what's
11 the point of giving you a lineup. But she said she did
12 see him.

13 Q All right. Nothing further right now.

14 THE COURT: Anything further, Mr. Stephens?

15 MR. STEPHENS: Yes, Your Honor. Just for the
16 record, the State wanted to renew its objection to
17 that line of questioning about the inconsistencies.

18 THE COURT: You did it contemporaneously and
19 it's on the record.

20 MR. STEPHENS: Thank you, Your Honor.

21 REDIRECT EXAMINATION

22 BY MR. STEPHENS:

23 Q Just a couple of questions. You stated that --
24 I think some of this has been beaten to death. When I
25 asked you originally about the photo lineup, you stated

1 you didn't believe it had to be done because both victims
2 stated they knew the defendant, correct?

3 A Right. And my understanding of experience and
4 training and case law, my understanding is when the
5 person is a known -- you show a lineup, you are required
6 to show a lineup if you want to do a photo ID if they
7 don't know the person. By the time, even by the time the
8 lineup was done, it was very clear to me that both of
9 them knew who they were talking about. Obviously, I
10 wasn't at the scene. I wasn't there when it happened,
11 but they both were adamant and said this is the person
12 who shot at me. So that's why, even though I didn't have
13 to do a lineup though, again, like I said, out of an
14 abundance of caution, I did one anyway to try to take the
15 extra step.

16 Q Thank you, Investigator. And as far as that
17 name Hot Boy, that's a name provided by the victims,
18 correct?

19 A That was a name provided by the victims. And I
20 assume, to the best of my recollection, it was relayed to
21 me, I know it was relayed to me by them personally,
22 specifically when they came down, but as to how the first
23 time I heard Hot Boy, I assume it was Investigator
24 Dowling that told me. I don't recall it specifically.

25 Q Did they mention that Hot Boy was their

1 neighbor?

2 A They did.

3 Q And when it retrieved this picture of Mykel
4 Johnson, it also indicated he was in fact known as Hot
5 Boy in the neighborhood of the victims, correct?

6 A That's correct. In other words, when I was
7 looking for him, I didn't put in Mykel Johnson. I had no
8 idea who Mykel Johnson was. I had never dealt with him.
9 I had never seen him. I basically did like a search
10 query like you would do -- it wasn't on the internet, but
11 there's a slot you can go to to search for aliases.
12 That's how I found that photograph and that information.

13 MR. STEPHENS: Your Honor, I've got no
14 further questions for officer, uh, for Investigator
15 Erdel. The State does just move to admit State's
16 Exhibit 1.

17 THE COURT: Any objection?

18 MR. ERICKSON: Is that the lineup photo?

19 THE COURT: Yes.

20 MR. ERICKSON: No objection. Just one
21 followup on the neighbor answer.

22 (WHEREUPON, State's Exhibit 1 is admitted into the
23 record.)

24 REXCROSS-EXAMINATION

25 BY MR. ERICKSON:

1 Q This talk about neighbors, there's a bunch of
2 buildings in a row, right?

3 A Yes, sir.

4 Q So how many buildings apart do these people
5 live?

6 A I didn't ask that. If they told me, I don't
7 recall the answer. I was -- at that point, I was more
8 concerned about there's a shooter out here. There's a
9 guy who has been reported to have shot somebody out
10 there. I don't believe that I asked him that question as
11 far as how far apart they were. At that point, it had
12 become clear to me that they knew who they were talking
13 about. They lived in the same complex. I don't believe
14 I asked him like how far away it was. I don't know how
15 far away it was.

16 MR. ERICKSON: Nothing further.

17 THE COURT: Anything further, Mr. Stephens?

18 MR. STEPHENS: No, Your Honor. Thank you.

19 THE COURT: You may step down, sir.

20 THE WITNESS: Thank you, Your Honor.

21 MR. STEPHENS: If I could, the State would
22 ask for a very short recess. I don't see my -- I
23 want to make sure my next officer is ready to come
24 testify.

25 THE COURT: Okay. Ladies and Gentlemen of

1 the jury, we're going to go ahead and take a brief
2 recess again. Do not discuss this case. It would
3 be inappropriate to do so at this time. We'll be
4 right back with you shortly. Thank you.

5 (WHEREUPON, the jury exits at approximately
6 12:14 p.m.)

7 THE BAILIFF: The jury is clear. The door
8 is closed, Your Honor.

9 THE COURT: Thank you.

10 Mr. Stephens, who do you have left to call?

11 MR. STEPHENS: Your Honor, for officers,
12 right now, I only have Sergeant Vortisch with the
13 Beaufort county Detention Center. I just wanted to
14 speak with him for a moment.

15 THE COURT: Okay. And who else?

16 MR. STEPHENS: Also to arrange for my next
17 witness. I have the victims. However, Your Honor,
18 they've got a small child with them. I let them go
19 until 1:00 cause they had no childcare and they had
20 the child here all morning.

21 THE COURT: Okay.

22 MR. STEPHENS: I had one other witness, but I
23 don't think he's going to be able to make it before
24 I close the case. I'll keep him as a rebuttal
25 witness depending on when we go into the defense

1 case.

2 **THE COURT:** So you've got Vortisch left and
3 then Mr. Babecki and Mrs. Constantineau, is that
4 correct?

5 **MR. STEPHENS:** Yes, Your Honor.

6 **THE COURT:** What I propose we do, let's go
7 ahead and put Vortisch up. Then we'll take a break
8 for lunch and come back. Then we'll be able to fit
9 the two victims in. Okay?

10 **MR. STEPHENS:** Thank you, Your Honor.

11 **THE COURT:** That way, we'll get them back
12 here by 1:00. You also might want to see if maybe
13 someone in your office can take the baby while they
14 are testifying.

15 **MR. STEPHENS:** Yes, Your Honor. My victim's
16 advocate will.

17 **THE COURT:** Okay. All right. Go talk to --
18 I'll give you five minutes to talk to Vortisch, then
19 we'll come on in and do that. Okay.

20 **MR. STEPHENS:** Your Honor, I think there
21 might be an issue. I intended to call Sergeant
22 Vortisch to put on one jail call in which the
23 defendant states this is Hot Boy, since there has
24 been an issue of identity.

25 **MR. ERICKSON:** I'm going to object. We had

1 pretrial motions yesterday. Now, all of a sudden,
2 he wants to bring up another statement.

3 MR. STEPHENS: This is one of the jail calls
4 that were all turned over to Mr. Erickson.

5 THE COURT: He had them all, right?

6 MR. STEPHENS: Yes, Your Honor.

7 THE COURT: Well, it's fair game.

8 MR. STEPHENS: I also sent an email to Mr.
9 Erickson where I indicated I was going to use this
10 jail call.

11 THE COURT: All right. Well, it's fair game.
12 Okay. Let's go ahead and take five minutes. Talk
13 to Vortisch quickly and let's get going.

14 Mr. Erickson, it looks like we're really moving
15 along here. How many people do you intend on
16 putting up?

17 MR. ERICKSON: Maybe two.

18 THE COURT: Two? Okay. Does it look like we
19 going to argue and charge today, y'all?

20 MR. ERICKSON: I don't know. I was thinking
21 that we could do closing statements and my case
22 tomorrow.

23 MR. STEPHENS: I think that he may -- in Mr.
24 Erickson's case, he may eat up time on the cross-
25 examination of the victims with playing the video.

1 **THE COURT:** Okay. I guess my point is, Mr.
2 Erickson, if you've got witnesses, you better get
3 them down here this afternoon if they are not here
4 now. Okay?

5 **MR. ERICKSON:** All right.

6 **THE COURT:** Okay.

7 **MR. STEPHENS:** Thank you, Your Honor.

8 **THE COURT:** Mr. Stephens, you have three
9 minutes now.

10 **MR. STEPHENS:** Thank you, Your Honor.

11 (WHEREUPON, a short recess is taken.)

12 **THE COURT:** Okay. Let's bring them in now.

13 **MR. STEPHENS:** Your Honor, just to avoid
14 getting into anything that might be inadmissible, I
15 was just going to fast-forward over the phone call
16 just the portion where Mr. Johnson identifies
17 himself ---

18 **THE COURT:** Okay.

19 **MR. STEPHENS:** --- as Hot Boy.

20 **THE COURT:** Why don't you just go ahead and
21 do it?

22 **MR. STEPHENS:** I just wanted to make sure
23 that foundation is set. Even if Mr. Erickson does
24 object, I'm kind of like a robot. I've got to go
25 through my motions.

1 **THE BAILIFF:** Jury entering, Your Honor.
2 (WHEREUPON, the jury enters at approximately
3 12:22 p.m.)
4 **THE BAILIFF:** The jury is seated, Your
5 Honor.
6 **THE COURT:** Thank you.
7 Welcome back, Ladies and Gentlemen.
8 If you would, call your next witness, Mr.
9 Stephens.
10 **MR. STEPHENS:** Thank you, Your Honor. Your
11 Honor, the State calls Jeff Vortisch.
12 **THE COURT:** Come on, Sergeant.
13 **THE CLERK:** Place your left hand on the
14 Bible. Raise your right hand for me please.
15 **JEFF VORTISCH**
16 having first been sworn, testifies as follows:
17 **THE CLERK:** Please be seated. State your
18 name and spell it for the Court please.
19 **THE WITNESS:** Sergeant Jeff Vortisch.
20 J-E-F-F. V-O-R-T-I-S-C-H.
21 **DIRECT EXAMINATION**
22 **BY MR. STEPHENS:**
23 Q Now, you are currently a Sergeant Correctional
24 Officer, is that correct?
25 A Yes, sir.

1 Q And where do you work?

2 A Beaufort County Detention Center.

3 Q And what are your duties at the Beaufort County
4 Detention Center?

5 A I run the Office of Professional Standards,
6 Internal Affairs, Inmate Phone System, a few of those.

7 Q You mention Inmate Phone System. How exactly
8 does the Inmate Phone System work?

9 A If someone is booked into our facility, they
10 are given a pin number. It's a unique digit of numbers
11 to this person. You have to put the number into the
12 phone to use our inmate phone system. And it
13 automatically records the name of the person, those
14 numbers associated with the name and then it identifies,
15 they have to say their first and last name when they make
16 the call. That's the one of our policies and procedures.
17 And, uh, all calls are recorded except those to
18 attorneys. And those to attorneys, we have track of
19 them, but we don't record them.

20 Q Now, did you do anything to indicate to the
21 inmates that their calls are being recorded?

22 A Yes, sir. There is a recording at the
23 beginning of every call that says this phone call is
24 subject to recording and monitoring. It's in our
25 handbook as well that they are issued that all calls are

1 subject to be monitored. A part of my duties is I do
2 listen to phone calls as an administrator for the
3 program. They are told right up front that calls are
4 subject to be listened to.

5 MR. STEPHENS: Your Honor, may I approach?

6 THE COURT: You may.

7 BY MR. STEPHENS:

8 Q Sergeant Vortisch, I'm handing you what is
9 marked as State's Exhibit number 9. Do you recognize it?

10 A Yes, sir. I do.

11 Q What is it?

12 A This is a CD that I created for you under a
13 subpoena, a subpoena I received for the month of June.
14 At the top of the CD, I put the subpoena number 0602. I
15 also put the disk number 0602. Sometimes it takes more
16 than one disk. I write the name of the person. I
17 initial it and I date it.

18 Q Thank you, Sergeant Vortisch. I am retrieving
19 State's Exhibit number 9.

20 MR. STEPHENS: Your Honor, at this point, I'd
21 like to load the disk, have Sergeant Vortisch
22 identify the information to confirm that these are
23 calls from Mr. Johnson and then play the call that
24 we mentioned. (Pause.)

25 BY MR. STEPHENS:

1 Q Sergeant Vortisch, I apologize if it's a bit
2 clumsy. But do you recognize the kind of screen that
3 comes up when that disk is loaded?

4 A This is a screen that is displayed when you put
5 in a disk that has been recorded with the secured
6 software. It's proprietary. It lets the location of the
7 calls, in this case, Beaufort County Detention Center,
8 the call time, the type of call, the number that was
9 called and the person making the call.

10 Q All right. Now, what does that account number
11 signify?

12 A The account number 83800, that is Mykel
13 Johnson's number that was assigned to him when he was
14 booked into our jail.

15 Q All right. And you used that name or number to
16 retrieve these?

17 A Yes, sir.

18 Q Okay. Now, directing your attention
19 specifically to the call date 05-04-2012. Who -- clearly
20 this is a CD of calls from Mr. Johnson. But what in this
21 call indicates that it's Mr. Johnson making the call?

22 A There's a couple of things. It tells me that
23 it's coming from Housing Unit SHA. It tells me the phone
24 that was being used. Mr. Johnson was housed in SHA by
25 himself because of his statute. The other thing it tells

1 me is obviously his name, Mykel Johnson. His number is
2 83800.. The date and time, I can verify that through our
3 records within the jail that put him at that location at
4 that time.

5 **MR. STEPHENS:** Your Honor, at this point, the
6 State moves to admit State's Exhibit number 9 and
7 play a portion of the jail call dated 5/04/2012 for
8 the jury.

9 **MR. ERICKSON:** No objection.

10 **THE COURT:** Without objection.

11 (WHEREUPON, State's Exhibit 9 is admitted into the
12 record.)

13 (WHEREUPON, there is a pause.)

14 **MR. STEPHENS:** I'm begging the court's
15 indulgence. Technology fails for you in court, Your
16 Honor. The State would ask for a very brief recess
17 even though we set this up and tried it in advance
18 to make sure it will play.

19 **THE COURT:** Ladies and Gentlemen, I think now
20 is a very good time for lunch. It's about 12 -- a
21 little after 12:30 back by the clock back there.
22 Ladies and Gentlemen, I'm going to ask that you
23 return to the jury room by 1:45. At that time, we
24 will go ahead and continue the trial of this case.

25 I need to remind you, Ladies and Gentlemen,

1 over the lunch hour, you are not only not to discuss
2 this case, you are not to do any independent
3 research. Go get a bite to eat. We look forward to
4 seeing you all back. And if you will, be back at
5 1:45 and we'll continue the case. Thank you.

6 (WHEREUPON, the jury exits at approximately
7 12:32 p.m.)

8 THE BAILIFF: The jury is clear. The door
9 is closed, Your Honor.

10 THE COURT: Sergeant, I hope you have no
11 where to go other than back to the jail.

12 THE WITNESS: Thank you, ma'am.

13 THE COURT: You okay?

14 THE WITNESS: Yes, ma'am.

15 THE COURT: All right. We'll see y'all back.
16 Okay. I'm sure you'll get it cued up by then, Mr.
17 Stephens.

18 MR. STEPHENS: Yes, Your Honor.

19 THE COURT: See y'all back at 1:45.

20 (WHEREUPON, a lunch recess is taken.)

21 THE COURT: Thank you, y'all. Please be
22 seated.

23 Come on up, Sergeant.

24 You cued up and ready to go?

25 MR. STEPHENS: Yes, Your Honor. We tested at

1 length.

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

4 THE BAILIFF: Yes, Your Honor.

5 THE COURT: Thank you.

6 THE BAILIFF: Jury entering, Your Honor.

7 (WHEREUPON, the jury enters at approximately
8 2:05 p.m.)

9 THE BAILIFF: Jury seated, Your Honor.

10 THE COURT: Thank you.

11 Welcome back, Ladies and Gentlemen. I hope you
12 had a nice lunch. At this time, my understanding is
13 we are cued up and ready to play the CD. So
14 whenever you are ready, sir.

15 MR. STEPHENS: Thank you, Your Honor.

16 BY MR. STEPHENS:

17 Q Officer Vortisch, I just want to confirm. You
18 saw me reload and prep this jail call, correct?

19 A Yes, sir. I did.

20 Q Just to refresh everyone's recollection,
21 hopefully, I'm not taking out any of the Court Reporter's
22 equipment here. This call is listed as 05-04-2012,
23 correct?

24 A Yes, sir.

25 Q And the originator, is this still the housing

1 unit that the defendant was lodged at, his name and
2 account number?

3 A Yes, sir. It is.

4 Q All right. Now, this is a phone call cued at
5 just before the eight minute mark.

6 (WHEREUPON, State's Exhibit 9 is played.)

7 MR. STEPHENS: Your Honor, that's all the
8 State wanted to produce.

9 THE COURT: Okay.

10 MR. STEPHENS: That was the defendant making
11 a phone call.

12 THE COURT: No. No editorial.

13 MR. STEPHENS: Yes, Your Honor. Sorry.

14 THE COURT: It speaks for itself.

15 MR. STEPHENS: Your Honor, I have no further
16 questions for Sergeant Vortisch. Thank you.

17 THE COURT: Mr. Erickson?

18 MR. ERICKSON: Appreciate the job you do over
19 there. No questions.

20 THE WITNESS: Thanks.

21 THE COURT: You are excused, Sergeant.

22 THE WITNESS: Thank you.

23 THE COURT: The State will call their next
24 witness.

25 MR. STEPHENS: Thank you, Your Honor. The

1 State calls Frank Babecki.

2 THE CLERK: Place your left hand on the Bible
3 and raise your right hand for me, sir.

4 FRANK BABECKI

5 having first been sworn, testifies as follows:

6 THE CLERK: Please be seated. State your
7 name and spell it for the court please.

8 THE WITNESS: First name's Frank --

9 THE BAILIFF: Wait until you get there.

10 THE WITNESS: First name is Frank, F-R-A-N-K.
11 Last name is Babecki, B-A-B-E-C-K-I.

12 DIRECT EXAMINATION

13 BY MR. STEPHENS:

14 Q Mr. Babecki, where do you live, sir?

15 A Excuse me.

16 Q Where do you live?

17 A Uh, Cross Creek.

18 Q That's Cross Creek Apartments?

19 A Yes, sir.

20 Q In Beaufort?

21 A Yes.

22 Q Who else lives with you?

23 A My wife and my six-month year old daughter.

24 Q And your wife is Desiree Constantineau?

25 A Yes, sir.

1 Q Okay. I'm going to try hard not to mall your
2 names.

3 A Yeah.

4 Q How long have you lived at Cross Creek
5 Apartments?

6 A Uh, since August, last August.

7 Q August of 2011?

8 A Yes.

9 Q So if you moved in in August, on October 28th
10 of 2011, you been there, uh, about three months?

11 A Yes.

12 Q Now, while you were residing at Cross Creek
13 Apartments from August until October 28th of last year,
14 did you meet a young man who lived in a complex who went
15 by Hot Boy?

16 A Yeah. Yes, sir.

17 Q Do you see that individual in the courtroom?

18 A Yes.

19 Q Can you point him out please?

20 A (Pointing.)

21 **MR. STEPHENS:** I'd note for the record that
22 Mr. Babecki has indicated the defendant, Mr.
23 Johnson.

24 **BY MR. STEPHENS:**

25 Q How did you meet Mr. Johnson?

1 A I seen him a few times hanging out by the --
2 they got like a little playground area over there. I
3 talked to him a couple of times. That's really it.

4 Q You said you seen him around a few times.
5 Prior to October 28th, 2011, can you estimate how many
6 times you may have seen him at the complex?

7 A 10, 15.

8 Q You know if you had mutual friends or people in
9 common that you both knew?

10 A Uh, yeah. Yes.

11 Q Okay. Now, on October 28th, 2011, you recall
12 what you were doing that day?

13 A No, sir.

14 Q Was there an incident where your car was shot
15 at?

16 A Well, yes. Yes. If you are asking me that
17 question, yes. What happened was my wife and I were
18 going to IHOP. When we were leaving, that's when it all
19 happened. We were pulling out.

20 Q Let me try to break this down piece by piece,
21 Mr. Babecki. So you and your wife were planning on going
22 to IHOP?

23 A Yes.

24 Q This is --

25 A She was pregnant at the time.

1 Q So before you --

2 A She was eight months.

3 Q All right. And do you recall what time of day
4 this happened?

5 A It was noon.

6 Q Now, uh, you were going to IHOP. Did you have
7 a car at that time?

8 A It was a rental car at the time.

9 Q Were you driving that rental car?

10 A My wife was.

11 Q Did you encounter Mr. Johnson on your way to
12 IHOP?

13 A Yes, he was walking into the neighborhood.
14 Said what happened the other night.

15 Q In general, what were you referring to when you
16 asked what happened the other night?

17 A Uh, a few days prior before that, uh, something
18 happened like a pot deal. So I wanted to go ask him what
19 happened.

20 Q Did you actually approach him?

21 A No, I didn't approach him. I was in the
22 vehicle. We were rolling. I said what happened the
23 other night. He was walking the other way.

24 Q Was your windows up or down?

25 A The driver's side was down. The driver's side

1 was down.

2 Q So you driving along to IHOP. You see Mr.
3 Johnson.

4 A Yes.

5 Q Where was he located on the road?

6 A He was on the sidewalk.

7 Q All right.

8 MR. STEPHENS: Your Honor, may I approach?

9 THE COURT: You may.

10 BY MR. STEPHENS:

11 Q Mr. Babecki, I'm going to ask you to exit the
12 witness stand just so you can --

13 THE COURT: Go ahead and step down, sir.

14 BY MR. STEPHENS:

15 Q -- just so you can point on the map.

16 THE COURT: If you'll just speak up for my
17 Court Reporter when you do cause you won't have the
18 mic on you. Thank you, sir.

19 THE WITNESS: No problem.

20 BY MR. STEPHENS:

21 Q Would you please indicate -- could you please
22 indicate about where your car was and where Mr. Johnson
23 was located when you yelled out the window at him?

24 A He was walking through here. About right here
25 he was walking this way.

1 **THE COURT:** Thank you. You need to speak up.

2 **THE WITNESS:** Oh, I'm sorry. Okay. Uh, I
3 was driving out this way, my wife and I, to go right
4 across the street to here. He was on the sidewalk
5 walking the opposite direction.

6 **BY MR. STEPHENS:**

7 **Q** Thank you, Mr. Babecki. You may have a seat.
8 For the record, the witness has indicated a portion of
9 the map just in front of the Parris Island Gateway Road
10 that intersects Ambrose Way on the map. That's State's
11 Exhibit 3.

12 Now, you said you yelled something out the
13 window about something that happened the other day?

14 **A** Yes, my words are what happened the other
15 night.

16 **Q** What, if anything, happened after that?

17 **A** What if anything?

18 **Q** I'm sorry. It's lawyer's speak, Mr. Babecki.
19 I'm just asking what happened next.

20 **A** What happened next? As I was driving, bullet
21 holes started shattering my windows.

22 **Q** All right. So you saw Mr. Johnson holding some
23 kind of firearm?

24 **A** Yes.

25 **Q** Could you describe what kind of firearm it was?

1 A Yeah, it was a silver gun. Black and silver
2 gun.

3 Q About how far away from the vehicle would you
4 estimate he was when you saw this happen?

5 A 20 feet.

6 Q Can you tell what direction he was running?

7 A Towards the complex.

8 Q Okay.

9 A We were going towards IHOP. So he was going --
10 he was already in the neighborhood.

11 Q What happened next, Mr. Babecki?

12 A After that, my wife started panicking. The
13 windows shattered. Two or three windows shattered. She
14 called 911. We pulled over in the parking lot. The cops
15 came.

16 Q Now, if I could go back to this incident
17 involving Mike. I think you were asked when you were
18 interviewed later by Investigator Erdel if, uh, the
19 defendant, Mr. Johnson's phone number was located in your
20 phone.

21 A Yes.

22 Q You recall that?

23 A Yes.

24 Q Can you explain why the defendant's phone
25 number would be in your phone?

1 **A** I had his phone number. I had his phone number
2 for the couple of times that I bumped into him and took
3 his number. He took mine. We were friends for the most
4 part. More acquaintances. We see each other and say
5 what's up.

6 **Q** You know if anyone had used your phone to --

7 **A** At the time, a buddy of mine Kendalle was
8 living in there. Maybe one or two or three times, he
9 probably would use it if he ran out of minutes on his
10 phone. He slept over at the house all the time.

11 **Q** Did anyone else --

12 **A** I might have even sent that text message to do
13 a favor for somebody.

14 **Q** Now, when you say that text message, you
15 understand there is message that was sent on October 26th
16 from your phone to Mr. Johnson's phone?

17 **A** Right.

18 **MR. STEPHENS:** This is reading from State's
19 Exhibit 11, Your Honor.

20 **THE COURT:** Uh-huh.

21 **BY MR. STEPHENS:**

22 **Q** Uh, I -- "could you spot me a 10 and I'll have
23 it for you by two o'clock. I need a smoke bad. I got
24 like two bucks. Just until my deptsit [sic] goes through
25 and I give you an extra 10 for fronting me homey".

1 A That was the text that was sent.

2 Q You recall sending a text like that from your
3 phone?

4 A Yeah, I believe so.

5 Q Now, were you saying that on your own behalf,
6 Mr. Babecki?

7 A No, actually I was getting it for somebody.

8 Q All right. Were they trying to purchase
9 marijuana from the defendant, Mr. Johnson?

10 A They were trying to get it through me because I
11 knew where to get it from.

12 Q Why would you think that Mr. Johnson would have
13 marijuana for sale?

14 A At the time when we were talking, I actually --
15 he actually told me he had a little bit to sell.

16 COURT REPORTER: I'm sorry. Actually?

17 THE WITNESS: He had a little bit for sale.

18 BY MR. STEPHENS:

19 Q Now, was this transaction, to your knowledge,
20 was this transaction connected at all to the --

21 A There wasn't any transaction.

22 Q Okay. So there was never a --

23 A There was no transaction, no.

24 Q When you referenced Mike and what happened last
25 night, you said something about a drug deal gone bad?

1 A Yeah. I didn't actually know the whole story.
2 It was something over like \$300. I didn't know the whole
3 story. So truthfully, I was asking him what happened the
4 other night. Mike told me it was something over \$300.
5 That's what I was asking him about. My words were just
6 what happened that night.

7 Q Is Mike some other person who lived in the --

8 A He used to live in there. He was staying with
9 somebody in the Navy.

10 Q So Mr. Babecki, you are saying that you were
11 not involved in whatever transaction went bad?

12 A No, no. I wasn't involved in that. I heard of
13 it through Mike. I saw him. I just said what happened
14 the other night.

15 Q Do you know of any reason that Mr. Johnson
16 might think you were involved in that transaction?

17 A Not to my knowledge, sir.

18 Q Thank you, Mr. Babecki. Just a few more
19 questions for you. Now, let me ask you about how
20 everything looked when the shooting happened. You said
21 it was some time in the afternoon, you think maybe
22 between 12:00 and 2:00. Was it an overcast day? A
23 bright day?

24 A It was beautiful out. Like right now. Sunny
25 day.

1 Q Did you have any problem recognizing Mr.
2 Johnson as the individual that was on the street?

3 A No, not at all. I knew him.

4 Q What was -- do you recall what he was wearing
5 at the time?

6 A I believe a black t-shirt, black pants.

7 Q And did he say anything to you before pulling
8 out that gun and opening fire at you?

9 A No, not a word, sir. He ran while he was
10 shooting.

11 Q Mr. Babecki, you have a, uh, pending charge
12 with the Solicitor's office for Financial Transaction
13 Card Fraud, is that correct?

14 A Yes, sir.

15 Q Now, any promises been made by my office about
16 how that charge would be disposed of?

17 A No.

18 Q So we haven't offered you anything in exchange
19 for your testimony?

20 A No.

21 Q Correct me if I'm wrong, but is that scheduled
22 to go into our Pre-trial Diversion program?

23 A I'm pretty sure. I'm pretty sure, sir.

24 **MR. STEPHENS:** Your Honor, I don't believe I
25 have any further questions for Mr. Babecki at this

1 time.

2 Thank you, Mr. Babecki. Mr. Erickson may have
3 some questions for you.

4 **CROSS-EXAMINATION**

5 **BY MR. ERICKSON:**

6 Q Mr. Babecki, what do you do for work, sir?

7 A I'm a plumber.

8 Q All right. And you mentioned you know Mr.
9 Johnson because you lived in the same apartment complex?

10 A Yes, sir.

11 Q Any other reasons you might know Mr. Johnson?

12 A No, sir. Any other reasons why I might know
13 him?

14 Q Yes, sir.

15 A No.

16 Q How about through phone number exchanges?

17 A What do you mean by that?

18 Q Did you exchange phone numbers?

19 A Yes.

20 Q What about any drug exchanges?

21 **MR. STEPHENS:** Objection, Your Honor. May I
22 approach?

23 **THE COURT:** You may.

24 (WHEREUPON, a bench conference is held off the
25 record.)

1 BY MR. ERICKSON:

2 Q Back to my question, Mr. Babecki. Did you have
3 any drug exchanges, such as marijuana with Mr. Johnson?

4 A Maybe once or twice before, yes, sir.
5 Something very small. Maybe \$5 or \$10 worth.

6 Q Worth of marijuana?

7 A Yes.

8 MR. ERICKSON: May I approach the witness?

9 THE COURT: You may.

10 BY MR. ERICKSON:

11 Q I've got a phone text the prosecutor alluded
12 to. I want you to go ahead and read that and see if that
13 is correct.

14 A What am I reading?

15 Q Right here. If you could, read that aloud.

16 A Yeah. It says I -- could you spot me a 10 and
17 I'll have it for by two o'clock latest, my man. I need a
18 smoke and I got two bucks just until my deposit goes
19 through and I'll give you. That's what it says.

20 Q Did you text that?

21 A It could have been me. I believe so. Yeah, I
22 believe so. It could have been for a friend of mine.
23 That's the way I text so I believe so.

24 Q What is a 10?

25 A A 10, like a 10, \$10 worth.

1 **MR. STEPHENS:** Your Honor, I object. It's
2 cumulative. We already have all the texts that are
3 admitted.

4 **THE COURT:** It's already in evidence?

5 **MR. STEPHENS:** Yes, Your Honor.

6 **MR. ERICKSON:** This is a particular text.
7 There's over 300 texts. This is number 151 that I
8 would like the jury to focus in on.

9 **THE COURT:** Okay. Can I see it?

10 **BY MR. ERICKSON:**

11 **Q** Let me ask you another question, Mr. Babecki.

12 **MR. ERICKSON:** Is that all right, Judge?

13 **THE COURT:** I want to see it first.

14 (WHEREUPON, there is a pause.)

15 **BY MR. ERICKSON:**

16 **Q** Mr. Babecki, may I approach again?

17 **A** Yes, sir.

18 **Q** You mentioned this is your text. I would like
19 you, for the record, to state the date on there for me
20 please.

21 **A** The date?

22 **Q** The date that you made that text.

23 **A** It says on here 10/27/11.

24 **Q** Is that a day before the incident?

25 **A** Yeah. It was 10/28, the incident. Yeah.

1 **MR. ERICKSON:** I'm going to go ahead and
2 admit this as Defendant's Exhibit number 4, I
3 believe.

4 (WHEREUPON, Defendant's Exhibit 4 is marked for
5 identification and admitted into the record.)

6 **THE COURT:** It's in evidence subject to your
7 objection.

8 **MR. STEPHENS:** Your Honor, the State already
9 has its objection on the record as cumulative. But
10 we understand Your Honor's ruling.

11 **BY MR. ERICKSON:**

12 **Q** Mr. Babecki, you said you were friends with Mr.
13 Johnson at one time?

14 **A** Yeah. More like acquaintances. Like I said,
15 we've bumped past each other while I would be coming home
16 from wherever I was.

17 **Q** You know of any particular reason why Mr.
18 Johnson might shoot you?

19 **A** Not at all. Or my wife.

20 **Q** Would it be -- could it possibly be because
21 your friend was robbed the night before?

22 **A** Like I said, I didn't know the whole situation.
23 I was asking him what happened the other night. I was
24 trying to get his side of the story. I just asked what
25 happened, if he was all right or whatever. I didn't know

1 what happened. I just overheard the story about \$300 and
2 I said what happened the other night. That's when the
3 shots started.

4 Q Did your friend tell you who robbed him?

5 A No.

6 Q Actually, was it more of a drug deal gone bad?

7 A I believe so. I don't have any information on
8 it other than what I just told you, sir.

9 Q In your testimony just now, you mentioned you
10 were driving the car?

11 A My wife was.

12 Q I just wanted to clear that up. Why were you
13 not driving the car?

14 A Why wasn't I driving the car?

15 Q Yes, sir.

16 A At the time, I believe I was suspended.

17 Q You did not have a driver's license?

18 A It was suspended because I didn't know I had to
19 make up -- when I moved here from New York, I owed \$108.
20 It got confused with the DMV up there. I had to take
21 care of that when I got down to South Carolina. I got a
22 new South Carolina driver's license. I wasn't driving
23 for like two or three months at the time.

24 Q Why were you in a rental car?

25 A We were in a rental car because my wife -- we

1 had a brand new Toyota Camry and she got hit in the back
2 in Port Royal and it tore the back out of the car. So we
3 were in a rental car for about a month.

4 Q All right. You mentioned about your past. In
5 fact, the prosecutor brought out the fact that you were
6 charged right now with a crime, is that it?

7 A Yeah. Yes.

8 Q What are you charged with?

9 A I believe it's -- what happened was it was a
10 misunderstanding. But it's a transaction and credit card
11 fraud. What happened was there was a misunderstanding.

12 MR. STEPHENS: Your Honor, I would object on
13 relevance. We already established that he was
14 charged with financial card crime. He already
15 stated that he was charged and it's pending. I
16 don't understand the relevance or any other line of
17 inquiry on it.

18 MR. ERICKSON: My next question is if he
19 received any favorable treatment for testifying here
20 today.

21 THE COURT: Go ahead and ask it.

22 BY MR. ERICKSON:

23 Q Mr. Babecki, any favorable treatment from the
24 State for testifying today?

25 A No.

1 Q What about the offer of pretrial intervention?

2 A No, not at all, sir.

3 Q But you were offered that, is that correct?

4 A Yes, PTI, yes, I was.

5 MR. ERICKSON: At this time, Your Honor, I
6 have entered, uh, Exhibit number 3 is the video. I
7 would like to play it because there's some
8 inconsistent statements.

9 THE COURT: Okay. I don't need the
10 editorial. Let's just go ahead and play it.

11 MR. ERICKSON: All right.

12 THE COURT: Is it cued up? Are you ready to
13 go?

14 MR. ERICKSON: Well, it was until he
15 unplugged it.

16 MR. STEPHENS: I'm just going to confer with
17 Mr. Erickson to make sure it's cued up.

18 THE COURT: Okay.

19 (WHEREUPON, there is a pause.)

20 MR. ERICKSON: There's two witness interviews
21 on this tape. I'm trying to get the right one.

22 (Pause.)

23 Soon as I know who's coming on, I'll turn it
24 up. (Pause.)

25 (WHEREUPON, Defendant's Exhibit 3 is played.)

1 **MR. ERICKSON:** Can I get a recess to get the
2 right video on here, Your Honor?

3 **THE COURT:** Okay. Are you finished with
4 questioning him or is there anything else we can do
5 in the meantime?

6 **MR. ERICKSON:** I want to show the video and
7 then question him some more on the inconsistencies.

8 **THE COURT:** Okay. Why don't you see what you
9 can do to get it set up?

10 Ladies and Gentlemen of the jury, are y'all
11 okay? We just got back so does anyone need a break?
12 No?

13 (WHEREUPON, there is a pause.)

14 **MR. ERICKSON:** What we could do is Mr.
15 Babecki could stand down subject to recall and then
16 we could do the next witness. It's in that order.

17 **THE COURT:** My understanding from Mr.
18 Stephens is that he didn't have any objection to you
19 going ahead and doing Mrs. Constantineau's although
20 you are going to want to question her, I assume.

21 **MR. STEPHENS:** That's correct, Your Honor.
22 At this point, like I said, the entire disk has been
23 moved into evidence.

24 **THE COURT:** Let's do this. Why don't you
25 play both of them since that's what's cued up and

1 ask him questions that are relevant to him and then
2 when she comes up, they will have already seen it
3 and you can ask those questions.

4 MR. ERICKSON: All right.

5 (WHEREUPON, Defendant's Exhibit 3 is played.)

6 BY MR. ERICKSON:

7 Q I want to stop it right there. Did you hear
8 what your answer was, Mr. Babecki?

9 A Yes, I heard my answer. Yes, I heard my
10 answer. You going -- referring back to the text
11 messages? Is that what you're going back towards?

12 Q That's correct.

13 A Yes.

14 Q Any particular reason --

15 A My answer was no that I never smoked with him,
16 but through the text messages, I was asking him for a
17 buddy of mine that needed something. There was no
18 transaction made.

19 Q But the question you were asked was do you ever
20 smoke weed.

21 A No, that question was did I ever smoke weed
22 with him. That's what the question was and I said no.

23 Q Should I play that again?

24 A You can play that again. That's what I thought
25 I heard.

1 (WHEREUPON, Defendant's Exhibit 3 is played.)

2 BY MR. ERICKSON:

3 Q All right. So you stated that you never smoked
4 marijuana with H.B. ---

5 A Yes, sir.

6 Q --- is that correct?

7 A Yes.

8 Q This video was done on the day of the incident,
9 October 28th?

10 A Yes.

11 Q And that text that you just read, that was a
12 day before, right?

13 A That was the day before, yeah. There was no
14 transaction made when they asked me that question. It
15 was a text message, but there was no transaction having
16 made.

17 Q Okay. I think I also heard you say that you
18 did not blame Mr. Johnson for the robbery on your friend?

19 A No, I didn't blame him.

20 Q So your statement is that Mr. Johnson did not
21 rob your friend?

22 A I didn't -- well, when you asked me earlier, I
23 didn't know the full story. What happened was when I
24 heard it from Mike when he was walking in the
25 neighborhood, I had asked him what had happened the other

1 night. Simple as that. Those were the exact words.

2 Q All right. The officer was concerned with this
3 video. In fact, he stopped twice because he was
4 concerned about your answers?

5 A My wife answers.

6 (WHEREUPON, Defendant's Exhibit 3 is played.)

7 BY MR. ERICKSON:

8 Q I believe your wife --

9 A She said I knew where he lived. I was never in
10 his house. I don't know where his apartment door was.

11 Q All right. Well, the officer who interviewed
12 both you and your wife says it does not match up. Here
13 is what he says.

14 (WHEREUPON, Defendant's Exhibit 3 is played.)

15 BY MR. ERICKSON:

16 Q I'll stop it right there. Why did you get
17 H.B.'s phone number?

18 A Why did I?

19 Q Yes.

20 A When we bumped heads at the playground that
21 night in the beginning, that's when I got his phone
22 number when I was walking back from my mail box. He got
23 a new phone number, I believe. And it was not Mike's
24 god-brother. He was living with Mike's real brother.
25 Mike's god-brother was in the Navy. Mike's other brother

1 who lives in Bluffton, that's what they were referring to
2 on that tape.

3 Q But you said you got H.B.'s number from Mike.

4 A I got his new number from Mike.

5 Q Right.

6 A His new number.

7 Q Why did Mike need his new number?

8 A Mike wanted to give it to his brother.

9 Q And it's Mike's brother who got robbed?

10 A I'm assuming so. I didn't know all the
11 information, sir.

12 Q Okay. There's another point where the officer
13 states it doesn't match up. They are talking about that.

14 MR. STEPHENS: Objection, Your Honor. Mr.
15 Erickson keeps editorializing and testifying as he
16 goes along.

17 THE COURT: Just ask him questions, Mr.
18 Erickson.

19 (WHEREUPON, Defendant's Exhibit 3 is played.)

20 BY MR. ERICKSON:

21 Q Did you just say H.B. robbed his brother?

22 A Yes, because that's what Mike told me when he
23 got to the scene.

24 Q So that's what you thought?

25 A Mike told me the night before. When they got

1 to the scene after the shooting, Mike was walking. He
2 was at the scene when the cops were there. That's when
3 he said it.

4 (WHEREUPON, Defendant's Exhibit 3 is played.)

5 BY MR. ERICKSON:

6 Q You just hit another spot.

7 A Uh-huh.

8 Q And the officer said it doesn't match up with
9 what your wife said.

10 A What doesn't match up?

11 MR. STEPHENS: Objection, Your Honor. Again,
12 this is not a question he just asked.

13 THE WITNESS: What doesn't match up, sir?

14 BY MR. ERICKSON:

15 Q About the so-called robbery of \$250.

16 A Yeah, because there was no information known to
17 get it. I didn't know. I was clueless to it. I heard
18 about it. I asked him what happened. I was clueless of
19 the whole situation.

20 Q We haven't played this whole thing, have we?
21 I'm going to continue this tape.

22 (WHEREUPON, Defendant's Exhibit 3 is played.)

23 BY MR. ERICKSON:

24 Q Let me stop it right there. That statement
25 that you just gave, Mike -- it says Mike told me that

1 H.B. robbed him of \$250. You believe that statement?

2 A Yes.

3 Q And that's really the point of this whole
4 incident, isn't it?

5 A The point of the whole incident was that I --

6 MR. STEPHENS: Objection. Calls for
7 speculation, Your Honor.

8 THE COURT: You can ask him a question.

9 BY MR. ERICKSON:

10 Q You were pissed that your friend Mike was
11 robbed, weren't you?

12 A When the kid came -- I knew the kid for, like I
13 said, I lived in there, it was three months.

14 Q Who was the kid?

15 A Mike. The kid Mike. I didn't know them for a
16 very long time. Like I said, I was clueless to the
17 situation. When it went down, I heard from Mike that he
18 robbed his brother for \$250 or for \$300. That's all I
19 know.

20 Q So you were pissed about that?

21 A When he told me, I was like that was wrong to
22 do.

23 Q Did that make you want to get back at H.B.?

24 A No. Almost nine years older than the kid.
25 It's not my business. It wasn't any of my business.

1 (WHEREUPON, Defendant's Exhibit 3 is played.)

2 BY MR. ERICKSON:

3 Q 25 feet. That's not what your wife said.

4 A I said 25 feet when I was questioned earlier.

5 My wife might have said 10 feet.

6 Q That's correct.

7 A I didn't have a ruler at the time, sir.

8 Q That's correct.

9 (WHEREUPON, Defendant's Exhibit 3 is played.)

10 BY MR. ERICKSON:

11 Q I'm going to stop you there. You explained how
12 the shots came into the car.

13 A The shots came through the back of the car. As
14 we were pulling out, he was already past us. He was
15 running and shooting.

16 Q All right. Let me ask you, at this time, did
17 you like H.B.?

18 A At the time, I was, like I said, an
19 acquaintance. I was a friend of his at the time which I
20 thought.

21 Q So you liked him?

22 A Yeah, he was a nice kid.

23 Q Did you hang out with him?

24 A I told you a couple of times that we saw each
25 other, it was, hey, what's up, what you doing tonight,

1 blah, blah, blah. Nothing. Then I would walk upstairs.

2 That's about it.

3 Q Did you feel bad for Mike getting robbed?

4 A Did I feel bad? No, it was not my business. I
5 didn't feel bad at all.

6 Q You say you --

7 A When I first heard about it, at first, I didn't
8 believe it. I didn't know if it was true. I didn't know
9 if it was the truth or a lie. I was -- like I said, I
10 was clueless to it.

11 Q Let's see what you said on the tape.

12 A All right.

13 (WHEREUPON, Defendant's Exhibit 3 is played.)

14 BY MR. ERICKSON:

15 Q You just gave completely different answers.

16 A On what?

17 MR. STEPHENS: Objection, Your Honor. Mr.
18 Erickson is still editorializing and not asking
19 questions.

20 THE COURT: Ask him a question, Mr. Erickson.

21 BY MR. ERICKSON:

22 Q I asked you do you -- what did I say? I asked
23 you if you liked H.B.

24 A You asked me if I liked him. I said yes, he
25 was more like an acquaintance. When I first met him,

1 there were no problems. Hi, how are you doing and I'd go
2 upstairs. Other than that, that was it.

3 Q But did you hear yourself on the tape? You
4 said you don't like him.

5 A Yes, after the situation. That's why I said
6 it. At the time, we're going back 10 months ago. It's
7 really hard to remember word-for-word.

8 Q And I asked you if you felt bad for Mike
9 getting robbed. And you just said no.

10 A On the tape?

11 Q No, here.

12 A Yeah. No, no. You asked me if I felt bad. I
13 said at the moment, I said that was wrong. That's what I
14 told you. I said I thought that was wrong to do. Those
15 were my words.

16 Q All right. We're just about done. Another 30
17 seconds on the tape. I've got another question before I
18 start it. Did you say that your wife saw the shooting?

19 A My wife was in the vehicle, yes.

20 Q Did she see the shooting?

21 A Not that I know of, no. She was driving the
22 car. Once the bullets hit, she just was hysterical.
23 Like I said, she was eight months pregnant. One went
24 through the back window and hit the passenger, the
25 headrest. A bullet got stuck in that. Could of hit my

1 head. Another went out the passenger window.

2 Q All right. So back to my question. You are
3 stating today that your wife did not see the shooting?

4 MR. STEPHENS: Objection, Your Honor. This
5 calls for speculation on the part of Mr. Babecki as
6 to what his wife saw.

7 THE COURT: Okay. You just need to ask a
8 question.

9 MR. ERICKSON: All right. I'm just trying to
10 reiterate what he's saying. Let's listen to your
11 answer on the video.

12 THE COURT: Ask him the question.

13 (WHEREUPON, Defendant's Exhibit 3 is played.)

14 BY MR. ERICKSON:

15 Q And so did my wife. That's what you said on
16 the tape?

17 A Yes.

18 Q All right. I have nothing further. Thank you.

19 THE COURT: Mr. Stephens?

20 MR. STEPHENS: Thank you, Your Honor.

21 REDIRECT EXAMINATION

22 BY MR. STEPHENS:

23 Q I'll try to be brief. Mr. Babecki ---

24 A Yes.

25 Q --- how do you feel about Mr. Johnson after he

- 1 shot at your vehicle?
- 2 A How do I feel?
- 3 Q Yeah, how do you feel about him personally
- 4 knowing that he's the person that shot at your vehicle?
- 5 A I mean, how would anybody feel if you got shot
- 6 at?
- 7 Q That's fair enough, Mr. Babecki.
- 8 A You been shot at, wouldn't anybody be annoyed?
- 9 Q Mr. Babecki, you testified on cross-examination
- 10 about text messages that you sent, that you admitted to
- 11 sending to the defendant. I'd like to take a look at one
- 12 additional text message.
- 13 A Uh-huh.
- 14 Q I'm handing the witness what's been marked as
- 15 State's Exhibit 11. Mr. Babecki, can you read the text
- 16 message sent at -- number 156. First, let me ask you, is
- 17 that a text message you remember sending to Mr. Johnson?
- 18 A 156. Good job. Thanks for trying to kill me
- 19 and my pregnant wife.
- 20 Q Thanks, Mr. Babecki. Do you recall sending
- 21 that message?
- 22 A Yeah, I recall sending it, sir.
- 23 Q That was sent after the shooting.
- 24 A Yes, sir.
- 25 Q Did you receive any kind of response from Mr.

1 Johnson?

2 A No, not that I believe.

3 Q Thank you, Mr. Babecki. I don't have any
4 further questions for you.

5 A No problem, sir.

6 THE COURT: Mr. Erickson, anything further?

7 MR. ERICKSON: No, ma'am.

8 THE COURT: Mr. Babecki, you may step down,
9 sir.

10 The State will call the next witness.

11 MR. STEPHENS: Thank you, Your Honor. The
12 State calls Desiree Constantineau.

13 THE COURT: Mrs. Constantineau, come on
14 forward please. Place your left hand on the Bible
15 and raise your right hand.

16 THE WITNESS: Yes, ma'am.

17 DESIREE CONSTANTINEAU

18 having first been sworn, testifies as follows:

19 THE CLERK: Please be seated. State your
20 name and spell it for the court please.

21 THE WITNESS: My name is Desiree
22 Constantineau. C-O-N-S-T-A-N-T-I-N-E-A-U.

23 DIRECT EXAMINATION

24 BY MR. STEPHENS:

25 Q Good afternoon, Mrs. Constantineau.

1 A Good afternoon, sir.

2 Q I see by your uniform that, uh, -- although I
3 already know this -- you are a Lance Corporal in the
4 United States Marine Corps.

5 A Yes, sir.

6 Q You are currently on active duty, is that
7 correct?

8 A Yes, sir.

9 Q Are you stationed at one of the local bases
10 here?

11 A Yes, sir. I'm at the air station.

12 Q And where do you live?

13 A I live at Cross Creek Apartments.

14 Q How long have you lived there?

15 A Uh, about a year.

16 Q You live there with your husband, Frank?

17 A Yes, sir.

18 Q Now, we just watched the video of your
19 interview. It looks like you were pregnant during that
20 interview, is that correct?

21 A Yes, sir.

22 Q You have a child now?

23 A Yes.

24 Q At the time of -- do you recall the events of
25 October 28th, 2011?

1 A Yes, sir. I do.

2 Q It involved a shooting at your vehicle?

3 A Yes, sir.

4 Q At the time that occurred, you lived at Cross
5 Creek Apartments about three months?

6 A Yes.

7 Q Did you know a neighbor by the name of, street
8 name of Hot Boy?

9 A Yes, sir. I did.

10 Q And how did you know that individual?

11 A Uh, he lived in my apartment complex. I had
12 met him through my husband.

13 Q Prior to October 28th, 2011, about how many
14 times do you think you have seen that individual?

15 A Uh, maybe about five.

16 Q Do you see that individual in the courtroom
17 right now?

18 A Yes, sir.

19 Q Could you please point him out?

20 A He's right there. (Pointing.)

21 Q Let the record reflect that Mrs. Constantineau
22 has indicated the defendant, Mr. Johnson. You know Hot
23 Boy's actual name when you knew him at Cross Creek?

24 A No, sir. I didn't. I didn't find out until
25 after the shooting.

1 Q Now, on the day of the shooting, can you please
2 tell the court what you were doing just prior to the
3 shooting?

4 A Uh, yes, sir. Myself and my husband were
5 leaving our apartment complex. We were just driving out
6 the entrance. My husband had seen the defendant and told
7 me to stop. I stopped. He yelled out the window what
8 happened the other day. The defendant kept walking. We
9 continued to drive. When we started to drive is when we
10 heard the shots.

11 Q Now, you said that you saw the defendant
12 walking on the same street that you were driving on?

13 A Yes, sir. We were leaving the apartment
14 complex as he was walking in.

15 Q And who recognized him as Hot Boy, your
16 neighbor? Did you recognize him or --

17 A Yes, sir. I did.

18 Q So you recognized him. Did your husband point
19 out that that was Hot Boy?

20 A Yes, sir. He did.

21 Q But did you independently recognize him to be
22 Hot Boy as well?

23 A Yes, sir. I did.

24 Q Now, you said that your husband yelled out the
25 window at him and then you heard shots fired. Did you

1 actually see Hot Boy shoot at your car?

2 A No, sir. I did not.

3 Q What was the, uh, -- what did you see? You
4 said that your husband yelled out the window. Where were
5 you looking when that happened?

6 A I was looking right at him. When my husband
7 yelled, he was about equal with the driver's side window.

8 Q Was your car stopped at that point or still in
9 motion?

10 A When he was talking to him, my car was stopped.

11 Q All right. Now, was it completely stopped or
12 was it what we call a California stop, kind of a roll and
13 stop?

14 A It was pretty much like a roll and stop. He
15 didn't even acknowledge my husband when he talked to him.

16 Q Now, at what point did you look away from the
17 defendant such that you did not see, uh, any shots being
18 fired?

19 A As soon as he didn't acknowledge, I just kept
20 driving. I looked right at the road.

21 Q You said that you heard shots fired. Uh, what,
22 if anything, did you see other than the sound of shots
23 fired?

24 A As soon as I heard the second shot, I turned
25 around and looked behind the vehicle and I saw him

1 running.

2 Q Did you see if there was any impact from the
3 shots that were fired?

4 A Uh, yes, sir. The passenger side front window
5 was completely shattered. And the back window on the
6 driver's side, there was a hole in it. Then, after
7 everything happened, we drove across the street to the
8 IHOP parking lot. We got out of the car. That's when I
9 walked around the back of the car, saw a bullet hole in
10 the actual back panel of the vehicle.

11 Q You saw Hot Boy on the road as you were
12 exiting, uh, Cross Creek Apartments. Did you see anyone
13 else near your vehicle?

14 A No, I did not. Not at all.

15 Q Did you see anyone within eyeshot?

16 A No, sir.

17 Q When Mr. Johnson was running away, did you see
18 anyone else?

19 A No.

20 Q Did you see if Mr. Johnson had anything in his
21 hands?

22 A No, sir.

23 Q You said you crossed at IHOP and then called
24 911?

25 A Yes, I did.

1 Q You recall if you were interviewed by Beaufort
2 Police Department about what happened?

3 A I was. Initially when we had called the cops,
4 uh, they had come there and just kind of assessed the
5 vehicle. Then we followed them to the police station
6 where myself and my husband were both interviewed.

7 Q Before you called 911, did you discuss what you
8 were going to tell them with your husband?

9 A No, sir. Not at all.

10 Q How soon after the shooting would you say it
11 was before you called 911?

12 A Probably about 45 seconds, which is what it
13 took me to drive from where I was across the street to
14 IHOP.

15 Q At any point between when you reported the
16 shooting to 911 and being interviewed by the Beaufort
17 Police Department, did you and your husband discuss
18 exactly what you were going to tell the officers?

19 A No, sir.

20 Q Did you compare notes on what you saw versus
21 what he saw so that you could have your story straight?

22 A When we wrote our statements, we were
23 completely separate from each other. We didn't even have
24 a chance to talk.

25 Q What was Hot Boy wearing when you saw him by

1 the side of the road?

2 A Uh, he was wearing a black t-shirt and a black
3 pair of pants.

4 Q Did you have any problem whatsoever recognizing
5 him?

6 A No, not at all.

7 Q It was a clear sunny day?

8 A It absolutely was, yes, sir.

9 Q How far away would you say he was from your car
10 when you saw him and recognized him?

11 A Maybe about 10 or 15 feet, if that.

12 MR. STEPHENS: Your Honor, may I approach?

13 THE COURT: You may.

14 BY MR. STEPHENS:

15 Q Lance Corporal, I'm just going to ask you to
16 step down from the witness box for one second.

17 A Okay.

18 Q If you would, show the jury where on this map
19 that's been marked as State's Exhibit number 3, where
20 your car was located about the point that the shots were
21 fired at it.

22 A We were about right here.

23 THE COURT: You need to speak up, ma'am.

24 THE WITNESS: Yes, ma'am. We were
25 approximately right here.

1 BY MR. STEPHENS:

2 Q That is just to the left of the sign or the
3 marking on the map that says Ambrose Run?

4 A Yes.

5 Q Thank you, Mrs. Constantineau. Now, Lance
6 Corporal when your husband leaned across you and yelled
7 out the window what happened -- let me first ask, do you
8 know what he yelled out the window?

9 A Yes, sir. He yelled what happened the other
10 night.

11 Q Do you know what he was asking by that
12 question?

13 A I didn't know exactly what happened until
14 afterwards. My husband said something about someone
15 robbing money.

16 Q At the time he yelled, did you think that was
17 about some kind of robbery?

18 A No, sir. I didn't.

19 Q To the best of your knowledge, was your husband
20 angry at Hot Boy when he was yelling out the window?

21 A No, sir. Not at all.

22 Q Was he acting in a confrontational manner?

23 A Not at all.

24 Q Did he have any weapons in the vehicle that
25 were out in view?

1. A Absolutely not. No.

2. Q Do you have any idea why the individual you
3 know as Hot Boy would shoot at your vehicle?

4. A No, not at all.

5. Q After this happened and you went to IHOP, you
6 went by the Beaufort Police Department, is that correct?

7. A Yes, sir.

8. Q And after the interview and subsequent to these
9 actions, have you had any effects that went on about this
10 robbery, I mean, about this shooting? I notice that you
11 were eight months pregnant at the time. It had been
12 speculated by one of the officers that you might have
13 been having a problem or concerns over the safety and
14 health of the child. Was that correct?

15. A Yes, sir. I did wind up going, uh, for weekly
16 stress tests after that incident happened where they
17 strapped a fetal heart rate monitor around my stomach to
18 check the blood pressure and make sure the baby's heart
19 rate was okay.

20. Q Did you have any medical concerns about the
21 baby's health before this happened?

22. A No, sir.

23. Q Thank you.

24. THE COURT: Mr. Erickson?

25. MR. ERICKSON: Thank you, Judge. May it

1 please the Court.

2 **CROSS-EXAMINATION**

3 **BY MR. ERICKSON:**

4 **Q** Mrs. Constantineau?

5 **A** Constantineau.

6 **Q** Constantineau. Why were you not shown a photo
7 lineup?

8 **A** I'm not sure, sir.

9 **Q** Did you ask to see one?

10 **A** No, sir. I did not.

11 **Q** Isn't it true that you were, uh, videotaped
12 with Officer Erdel prior to today?

13 **A** Yes, sir.

14 **Q** Have you seen that tape?

15 **A** No, sir. I haven't.

16 **Q** All right. Isn't it true that you did not see
17 the shooting?

18 **A** I didn't see him actually fire the gun, no,
19 sir.

20 **Q** About how far away were you from the shooter?

21 **A** Probably about 10, 15 feet.

22 **Q** So you could not see who did it?

23 **A** I didn't see anyone else, sir, but I did not
24 see him fire the gun, no.

25 **Q** Did you see a gun?

1 A No, sir.

2 Q You wrote a statement, I believe, on that very
3 same day.

4 MR. STEPHENS: May I approach the witness?

5 THE COURT: You may.

6 BY MR. ERICKSON:

7 Q I'm going to approach you and ask you if that's
8 the statement you wrote that day.

9 A Yes, sir. It is.

10 MR. ERICKSON: All right. I'd like to mark
11 that as a defense exhibit.

12 THE COURT: Go ahead and hand that to the
13 Court Reporter.

14 (WHEREUPON, Defendant's Exhibit 5 is marked for
15 identification purposes.)

16 MR. ERICKSON: That will be number 5, I
17 believe.

18 BY MR. ERICKSON:

19 Q I'd like for you to refresh your recollection
20 and spend a few minutes on what you wrote. You can go
21 ahead and keep that.

22 A Yes, sir.

23 Q My question to you is why did you not describe
24 the shooter in your statement?

25 A I'm not sure, sir. It was pretty much directly

1 after the shooting. I wasn't thinking straight. I had
2 never written a statement like this before. I didn't
3 know I had to.

4 Q Is it because you might not have known who the
5 shooter was?

6 A Absolutely not, no.

7 Q You say, you testified just now you seen Mykel
8 Johnson, who is sitting here, about five times?

9 A Yes, sir.

10 Q You should know about how tall he is?

11 A Yes, sir.

12 Q How tall is he?

13 A About my height, about 5'6.

14 Q 5'6.

15 MR. ERICKSON: Judge, may I have the witness
16 come down and stand next to my client?

17 THE COURT: No, sir.

18 MR. ERICKSON: May they stand in front of the
19 jury?

20 THE COURT: No, sir.

21 MR. ERICKSON: May I have my client stand up?

22 THE COURT: You may if you would like.

23 MR. ERICKSON: Go ahead and stand up.

24 (WHEREUPON, the defendant complies.)

25 MR. ERICKSON: That's as good as we can do, I

1 guess.

2 **THE COURT:** You may be seated, sir.

3 **BY MR. ERICKSON:**

4 **Q** There was also a 911 tape. You remember
5 calling in?

6 **A** Yes, sir.

7 **Q** Were you the one that dialed 911?

8 **A** Yes, sir.

9 **Q** All right. During that call, were you asking
10 your husband what the shooter looked like?

11 **A** No, sir.

12 **MR. ERICKSON:** Beg your indulgence one minute
13 please. (Pause.)

14 **BY MR. ERICKSON:**

15 **Q** Let me ask you -- this is about the 911 tape --
16 you remember saying that your husband knows who he is?

17 **A** Yes, sir.

18 **Q** Why didn't you say that you know who he is?

19 **A** Cause I've only seen him a couple of times,
20 sir. My husband actually had conversations and things of
21 that sort with him. I hadn't.

22 **Q** You also stated in your 911 call that your
23 husband knows where he lives.

24 **A** Yes, sir. I didn't know where he lived. He
25 only been at my apartment a couple of times. I had seen

1 him across the street at the playground.

2 Q To the best of your knowledge, the only
3 description you made at the time was that he had black
4 pants, black hat and black shirt?

5 A Yes, sir.

6 Q All right. I think that's all the questions I
7 have.

8 THE COURT: Anything further, Mr. Stephens?

9 MR. STEPHENS: Yes, Your Honor. Just a few
10 questions on redirect.

11 REDIRECT EXAMINATION

12 BY MR. STEPHENS:

13 Q Mrs. Constantineau, look at the defense exhibit
14 that you were handed. Do you still have that or was that
15 retrieved?

16 A Yes.

17 Q If you look at that defense exhibit, doesn't it
18 say as we pulled away, he fired two shots that hit our
19 car?

20 A Yes, sir.

21 Q It doesn't say that you saw him fire two shots
22 at your car, correct?

23 A No, sir. It does not.

24 Q You just testified on direct that you saw no
25 one other than Mr. Johnson outside your car, correct?

1 A Correct, sir.

2 Q And you heard the two shots that were fired?

3 A Yes, sir.

4 Q You saw Mr. Johnson run away?

5 A Yes, sir.

6 Q Is that a conclusion that you made that he

7 fired the two shots that hit your car?

8 A Yes, sir. There was absolutely nobody else

9 around.

10 Q Thank you, Mrs. Constantineau. I don't believe

11 I have any further questions. I'll beg the Court's

12 indulgence for just one moment. (Pause.)

13 Mrs. Constantineau, one more question. You

14 called 911 prior to this statement being given to the

15 Beaufort Police Department, correct?

16 A Yes.

17 Q You recall if you identified Hot Boy and what

18 he was wearing in that 911 call?

19 A Yes, sir. I did. They had asked me what did

20 he look like and I did tell him.

21 Q So you had already described him?

22 A Yes.

23 Q Thank you. No further questions. Thank you.

24 MR. ERICKSON: I just have a couple of

25 follow-up.

RECROSS-EXAMINATION

BY MR. ERICKSON:

Q Did you think your husband was pissed at Mykel Johnson for allegedly robbing Mike?

A No, sir.

Q On the video, you said just the opposite.

MR. STEPHENS: Objection, Your Honor. Again, this is the attorney testifying. Is there a question there.

THE COURT: You need to pose a question, Mr. Erickson.

MR. ERICKSON: Well, I just did. I'm bringing up a prior inconsistent statement.

THE COURT: You didn't phrase it properly. You have to phrase it properly to be able to ask it.

MR. ERICKSON: All right.

BY MR. ERICKSON:

Q You remember giving a video interview with Officer Erdel?

A Yes, sir, vaguely.

Q You remember the statement you made on that video about the robbery?

A I don't remember my exact words, but I remember speaking with the officer about it, yes, sir.

Q Do you remember saying that your husband was

1 pissed at Mark for the robbery?

2 **A** No, sir. I don't remember that.

3 **MR. ERICKSON:** I'd like to play that.

4 **THE COURT:** Actually, no, you've already
5 played it once because you couldn't figure out how
6 to play it during that person's testimony. We're
7 not going to play it multiple times.

8 **MR. ERICKSON:** All right. It's in evidence.
9 That's all the questions I have for this witness.
10 I've got a rebuttal witness. I'd like to call
11 Officer Erdel back up.

12 **THE COURT:** Okay. Sir, they haven't rested
13 their case yet, number one. So you can't call a
14 witness. You need to sit down.

15 Anything further of this witness at this time?

16 **MR. STEPHENS:** No thank you, Your Honor.

17 **THE COURT:** Ma'am, you may step down. Thank
18 you.

19 **MR. STEPHENS:** Your Honor, the State is
20 preparing to rest. Just want to make sure that our
21 request to publish the exhibits that have been moved
22 into evidence. I don't know that we need to take a
23 recess.

24 **THE COURT:** You want to go ahead and publish
25 them?

1 **MR. STEPHENS:** Yes, Your Honor. The State
2 requests to publish State's Exhibits 1 -- I believe
3 1 through 10 or 1 through 11, Your Honor.

4 **THE COURT:** Okay. Go ahead and pass them
5 around.

6 **MR. STEPHENS:** Your Honor, for the sake of
7 expediency, I would like to try to hand State's
8 Exhibit 3 up.

9 **THE COURT:** I think it's already been
10 published.

11 **MR. STEPHENS:** Yes, Your Honor. I think the
12 jurors have seen it. The State has nothing else,
13 Your Honor. We are prepared to rest.

14 **THE COURT:** Let's go ahead and let those
15 circulate. Let them circulate. Then we'll take a
16 break.

17 (WHEREUPON, there is a pause.)

18 **MR. STEPHENS:** Your Honor, prior to resting,
19 I believe that I have covered jurisdiction on the
20 record. Out of abundance of caution, the State
21 would also ask that the Court take judicial notice
22 that Cross Creek Apartments is in Beaufort, Beaufort
23 County, South Carolina.

24 **THE COURT:** Okay.

25 (WHEREUPON, there is a pause.)

1 **THE BAILIFF:** They are finish, Your Honor.

2 **THE COURT:** Thank you. Ladies and Gentlemen
3 of the jury, at this time, the State has rested
4 their case. There's some matters of law I need to
5 take up with the attorneys. I'm going to send you
6 back to your jury room. We're going to be back with
7 you shortly. Again, do not discuss this case. It
8 would be inappropriate to do so at this time.

9 (WHEREUPON, the jury exits at approximately
10 3:57 p.m.)

11 **THE BAILIFF:** The jury is clear and the door
12 is closed, Your Honor.

13 **THE COURT:** Okay. We're going to take five
14 minutes. Then we're going to come back and we're
15 going to argue any directed verdict motions.

16 Mr. Erickson, you need to get it together.
17 That's all I can tell you right now. If you ever,
18 in my courtroom, ask a victim to stand up next to a
19 defendant who allegedly shot at her, I'm going to
20 put you in jail. That was absolutely ridiculous.
21 You could have gotten your client's size in by
22 asking the investigating officer who either arrested
23 him or booked him what his height was.

24 **MR. ERICKSON:** That's what I plan to do for
25 rebuttal.

Remarks

219

1 **THE COURT:** You should have never asked a
2 victim to stand next to a defendant. I've been
3 doing this for 18 years and I've never heard anyone
4 do that.

5 Secondly, everyone in this room better learn
6 how to use technology or I'm not going to let you do
7 it again in this courtroom. You have wasted so much
8 of this jury's time by not knowing how to cue up a
9 CD. Y'all need to learn how to do it.

10 Additionally, y'all need to have had, and you
11 apparently did, Mr. Stephens, but have the exhibits
12 premarked. Number one, you were offering an exhibit
13 and you didn't even hand it to the Court Reporter.
14 It's sitting up there with the witness. It's not
15 her job to hand it. She doesn't know any better.
16 Additionally, you can't call rebuttal witness in the
17 State's case. Seriously, y'all, you need to take
18 five minutes. Everyone needs to get their head
19 together and try the rest of this case cleanly.
20 (WHEREUPON, a short recess is taken.)

21 **THE COURT:** All right. Any motions? Mr.
22 Erickson, any motions?

23 **MR. ERICKSON:** No, ma'am.

24 **THE COURT:** All right. My understanding is
25 we still have a couple of jurors out on a smoke

1 break. How many witnesses do you intend to call,
2 Mr. Erickson?

3 MR. ERICKSON: I'm still trying to figure
4 that out now. We have a maximum of two.

5 THE COURT: Are they both here and we'll be
6 able to have them testify today?

7 MR. ERICKSON: That's correct. One is in
8 jail. I'm not sure if we want to call him yet or
9 not.

10 THE COURT: Do we need to have him brought
11 over? Do we have him here?

12 OFFICER: I'll get him. I'll get him.

13 THE COURT: He's not in lockup right there
14 though?

15 OFFICER: No, ma'am.

16 THE COURT: Let's go get him. Who is it? Do
17 you know who it is?

18 MR. ERICKSON: Kendalle.

19 THE COURT: Kendalle? Let's bring him on
20 over. I appreciate it guys. Thank you.

21 MR. ERICKSON: The other one is Malcolm Moore
22 who is with us in the back.

23 THE COURT: Very good. Okay. Okay. Mr.
24 Erickson and Mr. Stephens, come approach.

25 (WHEREUPON, a bench conference is held off the

Motions

221

1 record.)

2 **THE COURT:** All right. Mr. Erickson, any
3 motions?

4 **MR. ERICKSON:** Yes, Your Honor. One motion.
5 I make a motion for directed verdict on the grounds
6 the State did not prove all the elements of
7 attempted murder. I don't think they proved it was
8 intentional. I don't think they proved it was
9 malice aforethought, nor did they sufficiently prove
10 beyond a reasonable doubt the identity of the
11 shooter. Based on those grounds, I would ask you to
12 direct a verdict in our favor.

13 **THE COURT:** All right. Mr. Stephens.

14 **MR. STEPHENS:** Thank you, Your Honor. I
15 believe the State has met its burden, especially
16 today, with the evidence in the light most favorable
17 to the State. There was direct testimony from the
18 victims in the case and direct evidence from Mr.
19 Babecki that Mr. Johnson was the individual who
20 fired the weapon at the car. Evidence from Mrs.
21 Constantineau that he was present and the shots were
22 fired which was circumstantial evidence that he
23 fired at the vehicle.

24 Your Honor, we believe that the use of a deadly
25 weapon, there could be implied or inferred malice

1 aforethought with the use of a deadly weapon, Your
2 Honor. Taking the weapon, brandishing it at the car
3 and firing, we believe shows the intent to kill.

4 **THE COURT:** Well, viewing the evidence in
5 light of the State, the nonmoving party, I do find
6 that there was both direct and circumstantial
7 evidence that Mr. Johnson, in this case, shot at the
8 vehicle with Mr. and Mrs. Babecki. At this time,
9 I'm denying the defense's motion for directed
10 verdict.

11 My understanding is the jury is all back, is
12 that correct?

13 **THE BAILIFF:** Correct.

14 **THE COURT:** Mr. Erickson, are we going to
15 call your first witness, the man that's sitting back
16 here?

17 **MR. ERICKSON:** When is the best time to call
18 my rebuttal witness?

19 **THE COURT:** Well, you can either call it in
20 your case which is where would be normally done as
21 far as any rebuttal. If you would like to call
22 rebuttal witness, you may do that.

23 **MR. ERICKSON:** That's my first witness I'd
24 like to call.

25 **MR. STEPHENS:** Your Honor, I do have, uh, one

Remarks

223

1 housekeeping matter. I intend to cross-examine Mr.
2 Moore with the jail call conversation between
3 himself and Mr. Johnson in which he states, you
4 remember I seen you shoot me. I didn't know if you
5 wanted to hear that beforehand if there's any
6 concerns. Again, that's the attempt to give him an
7 opportunity to explain and then to confront him with
8 that prior statement. Given that there have been
9 issues about jail calls, I just want to make sure
10 that --

11 **THE COURT:** My question is how do we identify
12 that it's Mr. Moore that states it. How could he
13 have identified it?

14 **MR. STEPHENS:** I can ask him if it's his
15 voice, Your Honor, in the jail call. I can -- on
16 rebuttal, I can call Sergeant Vortisch about the
17 jail logs. I do have a copy of the jail logs.

18 **THE COURT:** Is Mr. Moore in jail?

19 **MR. STEPHENS:** He was, uh, a visitor visiting
20 Mr. Johnson.

21 **THE COURT:** Okay. Explain to me again how we
22 are having a jail log and where Mr. Moore was. You
23 wanted to get in this statement that he said you
24 remember I saw you shooting?

25 **MR. STEPHENS:** Yes.

1 **THE COURT:** This is a conversation between
2 Mr. Moore and I'm assuming Mr. Johnson who was in
3 jail, correct?

4 **MR. STEPHENS:** Correct. Mr. Moore was
5 visiting the jail along with Mr. Johnson's mother.

6 **THE COURT:** Well, I think you can ask Mr.
7 Moore on cross-examination whether you recall
8 stating that. If he says no, then, uh, I guess you
9 can use it to impeach him. You can ask him, you
10 know, if that's your voice. Is that you speaking
11 with him?

12 **MR. STEPHENS:** Yes, Your Honor.

13 **THE COURT:** I don't think Vortisch can do
14 anything other than verify again that it's a phone
15 call from Mr. Johnson. No one can verify who's on
16 the other side.

17 **MR. STEPHENS:** Yes, Your Honor.

18 **THE COURT:** Okay. All right. So Mr.
19 Erickson, who are you going to call first? I just
20 want to make sure that person is in the courtroom.

21 **MR. ERICKSON:** I'm going to call Officer
22 Dowling.

23 **THE COURT:** Okay. Very good. Let's bring
24 the jury in.

25 **THE BAILIFF:** Yes, Your Honor.

1 (WHEREUPON, the jury enters at approximately
2 4:12 p.m.)

3 THE COURT: You can call your first witness.

4 MR. ERICKSON: Thank you, Your Honor. The
5 defense calls Officer Dowling to the stand.

6 THE COURT: Come on forward, sir. We're just
7 going to reswear you again out of an abundance of
8 caution, if you don't mind.

9 THE WITNESS: Yes, Your Honor.

10 THE COURT: Place your left hand on the
11 Bible. Raise your right hand.

12 JOSHUA DOWLING

13 having first been sworn, testifies as follows:

14 THE CLERK: Please be seated. State your
15 name and spell it for the Court please.

16 THE WITNESS: First name Joshua. Last name
17 Dowling, D-O-W-L-I-N-G.

18 DIRECT EXAMINATION

19 BY MR. ERICKSON:

20 Q Thank you, Officer. Is it true that you are
21 the lead investigator in this case?

22 A Yes, sir.

23 Q Did you have an occasion to make a police
24 report?

25 A I did the investigative notes in regards to the

1 case. I didn't do the initial report. That's done by
2 the responding officer that arrives on the scene.

3 MR. ERICKSON: May I approach the witness,
4 Your Honor?

5 THE COURT: You may.

6 BY MR. ERICKSON:

7 Q This is a copy of the police report I got from
8 your office. Can you tell me if that's authentic?

9 A It appears to be out of order. In my case
10 file, I have the case, the report. This one appears to
11 be authentic, but it appears to be out of order.

12 Q So you do have your own case file?

13 A I have -- documented in my case notes, I have a
14 police report as well.

15 Q I just really have one question for you to
16 answer. I wanted to ask you in your case notes do you
17 have a height and weight for Mykel Johnson.

18 A I have -- when I did the -- when I typed out
19 the arrest warrant to arrest Mr. Johnson, the defendant,
20 it's indicated that his height is that of 5'4 and that
21 his weight is 130 on the arrest warrant.

22 Q Would you mind looking through the report that
23 I have and see if there's any other height and weight
24 measurements for Mr. Johnson?

25 MR. STEPHENS: Objection, Your Honor. May we

1 approach?

2 THE COURT: You may.

3 You keep looking.

4 (WHEREUPON, a bench conference is held off the
5 record.)

6 MR. ERICKSON: May I approach the witness?

7 THE COURT: You may.

8 BY MR. ERICKSON:

9 Q Officer, I'm going to show you what I'm talking
10 about to speed things up here. All right. Let me refer
11 you to this page here. Mykel Johnson.

12 A Yes, sir.

13 Q What do you show there for the measurements?

14 A That right there indicates a height of 5'3 and
15 weight of 130.

16 Q All right. Let me just take another minute and
17 see if it says anything else about his measurements.

18 MR. STEPHENS: Objection, Your Honor.

19 THE COURT: Basis?

20 MR. STEPHENS: The State doesn't know where
21 that information is coming from, whether or not this
22 is some form of hearsay that may or may not be --

23 THE COURT: Why don't you ask him that on
24 redirect?

25 MR. STEPHENS: Thank you, Your Honor.

1 **THE COURT:** Or direct.

2 **MR. ERICKSON:** And here is the booking

3 report.

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

5 **MR. ERICKSON:** What does that say?

6 **THE WITNESS:** The booking report indicates a

7 height of 5'3, weight 130.

8 **MR. ERICKSON:** All right. Let me keep

9 looking through this report to see if it says

10 anything else. That's all the questions I have for

11 this officer.

12 **THE COURT:** Anything further, Mr. Stephens?

13 **MR. STEPHENS:** No, Your Honor. Thank you.

14 **THE COURT:** All right. You may step down,

15 sir. Thank you.

16 **THE WITNESS:** Thank you.

17 **THE COURT:** All right. If you will, call

18 your next witness.

19 **MR. ERICKSON:** (No response.)

20 **THE COURT:** Sir, are you going to call your

21 witness?

22 **MR. ERICKSON:** (No response.)

23 **THE COURT:** Ladies and Gentlemen of the jury,

24 we are going to take another short recess. Again,

25 do not discuss this case. It wouldn't be

1 appropriate to do so at this time. We'll be right
2 back with you. Thank you.

3 (WHEREUPON, the jury exits at approximately
4 4:17 p.m.)

5 THE BAILIFF: The jury is clear, Your Honor.

6 THE COURT: Thank you. Sir, do you need a
7 minute to talk to your client?

8 MR. ERICKSON: I do, Your Honor.

9 THE COURT: All right. We're going to take
10 ten minutes.

11 (WHEREUPON, a short recess is taken.)

12 THE COURT: Okay. Mr. Erickson, I don't
13 think you need to be talking about -- why don't
14 y'all approach for a minute.

15 (WHEREUPON, a bench conference is held off the
16 record.)

17 THE COURT: All right. Mr. Erickson?

18 MR. ERICKSON: That's all of our witnesses.

19 THE COURT: You're going to go ahead and
20 rest?

21 MR. ERICKSON: Not going to call anybody
22 else.

23 THE COURT: Okay. You're going to rest?

24 MR. ERICKSON: Yes, ma'am.

25 THE COURT: Okay. All right. The State have

1 anything else?

2 MR. STEPHENS: We don't have a case in
3 rebuttal.

4 THE COURT: All right. Let's bring the jury
5 on in. I'm going to go ahead and send them home for
6 the day. We're going to start back up at 10:00 a.m.
7 tomorrow morning. We're going to argue and charge.

8 Mr. Erickson, when the jury comes in, I think
9 you need to stand up and rest in front of the jury.
10 All right. Thank you.

11 THE BAILIFF: Jury entering, Your Honor.

12 (WHEREUPON, the jury enters at approximately
13 4:36 a.m.)

14 THE BAILIFF: The jury is seated, Your
15 Honor.

16 THE COURT: Thank you. Welcome back, Ladies
17 and Gentlemen.

18 Mr. Erickson?

19 MR. ERICKSON: Yes, Your Honor. At this
20 time, the defense calls no more witnesses. We rest.

21 THE COURT: Thank you, sir. Ladies and
22 Gentlemen, at this time, both sides have rested
23 their case. What we have left to do is hear the
24 arguments from the lawyers and also my charge on the
25 law. There's also some matters that I need to take

1 up with the lawyers before we do all that.

2 Ladies and Gentlemen, based on the late hour,
3 it's almost about 20 til 5:00. I'm going to go
4 ahead and send you home for the evening and ask that
5 you return tomorrow morning at 10:00 a.m. We're
6 going to go ahead and conclude this case. Normally,
7 we'll start at 9:30. Inevitably, you're going to be
8 sitting back there for the first half hour anyway,
9 so you may as well not be here until 10:00. All
10 right.

11 Ladies and Gentlemen, again, although you have
12 heard all the evidence in this case, you have not
13 heard the arguments of the lawyers, nor my charge on
14 the law. That would be inappropriate for you to do
15 any of your own independent research or to discuss
16 this case with anyone. I simply ask that you go
17 home, get a good night's rest. We look forward to
18 seeing you all back tomorrow morning at 10 a.m. and
19 we're going to conclude the case. Thank you, Your
20 Honor. Make sure you leave your notes in your
21 seats. Okay.

22 (WHEREUPON, the jury exits at approximately
23 4:38 p.m.)

24 THE BAILIFF: Jury is clear, Your Honor.

25 THE COURT: Thank you. Any motions?

1 **MR. STEPHENS:** No motions from the State,
2 Your Honor.

3 **MR. ERICKSON:** Motions? Motion to renew my
4 directed verdict motion based on the same argument.

5 **THE COURT:** Okay. Respectfully, I deny it
6 based on the same. I do think there is evidence on
7 which this jury can determine that your client, Mr.
8 Johnson, shot at the vehicle.

9 I want to go through, y'all, my jury charge
10 with you so that you can anticipate what I'm going
11 to charge in the morning. Does anyone have any
12 specific request to charge before I go through mine?

13 **MR. ERICKSON:** Not from the defendant.

14 **THE COURT:** From the State?

15 **MR. STEPHENS:** Your Honor, other than
16 standard instructions and I think this is probably
17 all going to be covered, Your Honor, the elements of
18 attempted murder, direct and circumstantial
19 evidence, credibility of witnesses.

20 **THE COURT:** Okay. Anything other than the
21 standard?

22 **MR. STEPHENS:** Uh, Your Honor, just since
23 attempted murder is a fairly new charge, I'd just
24 ask that the malice aforethought and expressed and
25 inferred, uh, expressed and inferred, malice

1 aforethought be given from the murder charge. I'm
2 not sure how the charge is written for the new
3 attempted murder charge. I'm sure it's the same.

4 **THE COURT:** I explain it the same. I explain
5 it the same. All right. Let me just go through
6 what I'm going to charge. I obviously charge
7 presumption of innocence, reasonable doubt, jury is
8 the judge of the facts, I'm the judge of the law. I
9 explain direct and circumstantial evidence, how to
10 judge the credibility of witnesses, uh, the fact
11 that the defendant did not testify can not be
12 considered by them in the jury room. I am going to
13 charge prior inconsistent statements. I'm going to
14 charge identification. I'm going to charge criminal
15 intent and obviously attempted murder and expressed
16 and inferred malice. There was no alibi defense.
17 And the verdict must be unanimous. Obviously, the
18 verdict is just up or down two counts of attempted
19 murder. Uh, anything else from either side?

20 **MR. STEPHENS:** Nothing from the State, Your
21 Honor.

22 **THE COURT:** Anything else?

23 **MR. ERICKSON:** Nothing from the defense.

24 **THE COURT:** All right. Y'all, I look forward
25 to seeing you all tomorrow morning at about a

1 quarter til 10:00. If you all will, be prepared and
2 ready to go and no one will be late. Also, if you
3 would, tonight before you leave, I want to make sure
4 y'all have gone through the evidence and make sure
5 we have them lined up with the Court Reporter
6 particularly if you intend on using any of the
7 evidence tomorrow during your closing arguments. I
8 don't want anyone shuffling, looking for exhibits
9 while you are arguing. You better have them at your
10 hand. You better have them ready to go. All right.
11 Good night, y'all.
12 (WHEREUPON, the Court recesses for the day.)

Remarks

235

P R O C E E D I N G S

(WHEREUPON, the Court resumes on the 20th day of June, 2012 at approximately 10:00 a.m.)

THE COURT: Sir, anything we need to take up this morning?

MR. ERICKSON: Yes, ma'am. I have a motion.

THE COURT: Okay.

MR. ERICKSON: I have alerted Mr. Stephens to this earlier today as well as your law clerk. I would like to reopen the defense case-in-chief specifically to call one alibi witness. The reason for doing that, Your Honor, if I may proceed?

THE COURT: Yes.

MR. ERICKSON: Yesterday, he was -- and I'm talking about Kendalle Simmons. Kendalle was not dressed for court. He had jail clothes on. I really did not want to have him testify in his clothes. Today, I got his clothes.

THE COURT: So why didn't you have clothes for him and have him dressed out? If you had had clothes there, he would have been dressed.

MR. ERICKSON: Well, our case-in-chief was supposed to be Wednesday in our planning. So today, I had arranged for clothes to be delivered there. I believe Officer Grayson over there said he knew

1 somebody or had a way of getting clothes to Kendalle
2 today. That's the conversation I remember with Mr.
3 Grayson. That's the reason we weren't ready
4 yesterday.

5 **THE COURT:** You understand trials are fluid.
6 You never know when the State is going to end their
7 case. You obviously are the defense. Again, you
8 don't know what witnesses they'll put up. You don't
9 know how long the cross-examinations are. While I
10 will give you this much deference, I truly believe
11 as a trial lawyer, probably the hardest thing to
12 trying a case is having your witnesses here when
13 they need to be here. I think that is a difficult
14 part. I also think smart lawyers get someone else
15 in charge of that, whether it's their paralegal or
16 someone else to make sure that they are there when
17 they need to be. When you see things are moving
18 along, you need to be prepared. With that said --

19 Mr. Stephens, sit down. Until you are ready to
20 speak, sit down.

21 I have looked at the case law. It's clearly
22 within my discretion whether or not to allow you to
23 reopen your case understanding this is not any type
24 of precedence I am not to set in any way, shape or
25 form. But in this case, I am going to allow you to

Remarks

237

1 reopen your case to call Kendalle Simmons.

2 Is he dressed out, y'all?

3 **OFFICER:** No, ma'am.

4 **THE COURT:** And do you have clothes for him?

5 And Mr. Stephens, I'm going to let you put on
6 the record everything you want.

7 **MR. STEPHENS:** Thank you, Your Honor.

8 **THE COURT:** No worries. Just sit down.

9 **MR. STEPHENS:** Thank you, Your Honor.

10 **THE COURT:** Do you have clothing for him?

11 **MR. ERICKSON:** Yes. I was at the jail at
12 eight o'clock. Delivered the clothes to Officer
13 Chaplin, who said he would dress him. That was at
14 8:30 this morning.

15 **THE COURT:** Do we have something back there?

16 **MR. ERICKSON:** He told me to leave the
17 clothes at the front desk.

18 **THE COURT:** He might take about 10 or 15
19 minutes at the most, y'all. Is that okay? Thank
20 you. I appreciate it, y'all.

21 While we are doing that, Mr. Stephens, you can
22 go ahead and put your objection on the record.

23 **MR. STEPHENS:** Thank you, Your Honor. The
24 State has no objection to Mr. Erickson being allowed
25 to reopen his case. I believe that the case law is

1 clear that it's within the Court's sound discretion.

2 However, Your Honor, just a few points about
3 the reason to reopen his case. Kendalle Simmons is
4 currently a detainee at the county detention center.
5 We don't believe that Mr. Erickson has any kind of
6 right to have Mr. Simmons dressed out in civilian
7 attire. I believe the case law on that issue all
8 deals with prejudice to having the defendant in jail
9 clothes. Clearly, we'd never put a defendant on for
10 trial in jail clothes. Precedent set in Supreme
11 Court case Estill v. Williams, 425 U.S. 501, 1976
12 case and its progeny of cases all deal with, uh,
13 jail, uh, the defendant being dressed in jail
14 attire. I haven't found anything about a witness
15 and a right for him to be dressed out in civilian
16 attire.

17 Notwithstanding that, Your Honor, Mr. Simmons
18 has currently pending General Sessions charges. He
19 has a retained attorney, Kimberly Smith with the
20 private bar. We spoke with Kimberly Smith this
21 morning. She was not contacted about Mr. Simmons
22 testifying. He is represented by counsel. He has
23 been approached and asked to testify and --

24 **THE COURT:** Mr. Erickson, did you call Ms.
25 Smith, his lawyer?

Remarks

239

1 **MR. ERICKSON:** No, ma'am. I did not know he
2 had a lawyer.

3 **MR. STEPHENS:** That's it, Your Honor. That's
4 all the State's position on that.

5 **THE COURT:** Well, I agree with you, Mr.
6 Stephens that there is no right to have a witness
7 dressed out, although I am going to let him be
8 dressed out in this case.

9 **MR. STEPHENS:** I understand, Your Honor.
10 Thank you.

11 **THE COURT:** Clearly, I am concerned that Mr.
12 Erickson did not contact Mr. Simmons' lawyer. He
13 did give you the name as an alibi witness though,
14 didn't he?

15 **MR. STEPHENS:** He did, Your Honor.

16 **THE COURT:** Thank you. All right. We'll be
17 at ease until I speak with Ms. Smith and until Mr.
18 Simmons is dressed out. Will someone come let me
19 know when he's done? And we'll go from there.
20 Okay.

21 (WHEREUPON, there is a short recess.)

22 **THE COURT:** All right. I have called over to
23 Kimberly Smith's office. She is at a Worker's Comp
24 hearing in Yemassee. Fred Kuhn is on his way over
25 to speak with Mr. Simmons just to make sure that he

1 has counsel ahead of time. We will speak to him.
2 When he gets here, I will go ahead and just make a
3 couple of comments to Mr. Simmons. Then I will give
4 them an opportunity to go speak. Okay. So
5 protecting everybody's rights. Mr. Stephens, is it
6 possible, can you pull up for me what he's charged
7 with and can you tell me whether or not Kimberly
8 Smith is appointed or retained?

9 **MR. STEPHENS:** Yes, Your Honor. I believe
10 she is retained on the charges on Mr. Simmons or was
11 handling it for the purposes of the preliminary
12 hearing, Your Honor.

13 **THE COURT:** Okay.

14 **MR. STEPHENS:** Was at least involved
15 somewhat. He has a possession of -- Unlawful
16 Carrying of a Pistol and I believe Possession of a
17 Stolen Pistol, Your Honor.

18 **THE COURT:** Uh-huh.

19 **MR. STEPHENS:** He pled guilty on some charges
20 in July of last year and has not been sentenced on
21 those yet. There is a co-defendant who is awaiting
22 trial. And I think, as part of the plea offer, his
23 sentencing is deferred.

24 **THE COURT:** Okay. So he's already pled
25 guilty though.

Remarks

241

1 MR. STEPHENS: Yes, Your Honor.

2 THE COURT: Okay.

3 MR. STEPHENS: I have a copy of the

4 transcript of that plea.

5 THE COURT: Okay.

6 MR. STEPHENS: The State's position is it's

7 still a conviction even though he hasn't been

8 sentenced.

9 THE COURT: Well, let's just let him come

10 over and explain to him what perjury is.

11 MR. STEPHENS: Thank you, Your Honor.

12 MR. ERICKSON: Can I ask what those

13 convictions were? What he plead down to or whatever?

14 MR. STEPHENS: Mr. Erickson has been provided

15 a copy of the transcript. He basically had been

16 charged with Armed Robbery. He pled, I believe, to

17 Assault and Battery and Strong Armed Robbery. I beg

18 the Court's indulgence.

19 THE COURT: All right.

20 MR. STEPHENS: Yes, Your Honor. It's an

21 Armed Robbery pled down to a Strong Arm Robbery and

22 an Assault and Battery first degree, Your Honor.

23 THE COURT: Okay.

24 MR. ERICKSON: Thank you.

25 MR. STEPHENS: I can make another copy of

1 this prior to the beginning if we stand in recess
2 for a few minutes, Your Honor.

3 **THE COURT:** I think we'll have a minute.

4 **MR. STEPHENS:** Thank you, Your Honor.

5 **THE COURT:** You do believe Ms. Smith was
6 retained?

7 **MR. STEPHENS:** I do, Your Honor. We spoke
8 very briefly at Mr. Simmons --

9 **THE COURT:** What does it say?

10 **THE CLERK:** She was court-appointed.

11 **THE COURT:** She was court-appointed.

12 **MR. STEPHENS:** My apologies. I was mistaken.

13 **THE COURT:** Okay. And his deal was that his
14 sentencing would be deferred until he testified
15 against the co-defendant in his trial?

16 **MR. STEPHENS:** I think that's the case, Your
17 Honor. Mr. Bannon, the assistant Solicitor,
18 prosecuted Mr. Simmons on that charge, on those
19 charges rather. I do know that they are deferred.
20 I don't know all the details of his plea agreement
21 on that, Your Honor.

22 (WHEREUPON, there is a pause.)

23 **THE COURT:** Mr. Kuhn, thank you so much for
24 coming. What I'm going to do is bring Mr. Simmons
25 out real quickly. You haven't meant him, have you?

Remarks

243

1 **MR. KUHN:** I have not.

2 **THE COURT:** I did not think so. Bring him on

3 out. I just want to introduce him to you.

4 You are Mr. Simmons?

5 **THE WITNESS:** Yes, ma'am.

6 **THE COURT:** Mr. Simmons, I'm Carmen Mullin.

7 I am trying the case of Mykel Johnson who I

8 understand you have been called as an alibi witness.

9 It's also my understanding that obviously you were

10 in lockup. I've been told by the State that you

11 pled guilty to Strong Arm Robbery and Assault and

12 Battery first degree last July and that you are

13 going to testify against a co-defendant in another

14 case and at that point, you're going to be

15 sentenced. Your attorney is Kimberly Smith, is that

16 correct?

17 **THE WITNESS:** Yes, ma'am.

18 **THE COURT:** Mr. Kuhn is one of the head

19 partners of the firm that Kimberly Smith is in.

20 Moss and Kuhn is the firm name. Ms. Smith right now

21 is in another courtroom and indisposed. I asked Mr.

22 Kuhn to come down here and speak to you in regards

23 to your giving testimony. Again, you will have to

24 be concerned about obviously perjuring yourself

25 which would possibly result in new charges. I just

1 want you to have counsel before you testify and have
2 him just be here while you testify.

3 Mr. Kuhn, the intent is that if he still wishes
4 to testify and wants to go forward, we're going to
5 go ahead and put him up. We'll be done. It will be
6 quick and you will be out of here.

7 So if you would, uh, Grayson, just give Mr.
8 Kuhn a little bit of time to go speak with him.

9 And Fred, as soon as you're ready, just let
10 them know and come back and get me and we'll go from
11 there. Okay. I appreciate it. Thank you.

12 I will say Kimberly was appointed on this case.
13 I was able to find that out.

14 We're going to be at ease until he comes back.
15 (WHEREUPON, a short recess is taken.)

16 THE COURT: Is Ms. Smith back there? Bring
17 her out here.

18 MRS. SMITH: Hey, Judge.

19 THE COURT: Good to see you.

20 MRS. SMITH: Good to see you.

21 THE COURT: And I'm sorry we drug you out of
22 a Worker's Comp hearing.

23 MRS. SMITH: You didn't.

24 THE COURT: You just finished?

25 MRS. SMITH: Yeah. I was on the way back

Remarks

245

1 when I got your message. So sorry y'all have been
2 waiting on me.

3 **THE COURT:** Do we need to bring Mr. Simmons
4 out?

5 **MRS. SMITH:** I think so.

6 **THE COURT:** Okay. Let's go ahead and bring
7 him out. Have you had an opportunity to talk with
8 him? Is he going to testify? Do you know?

9 **MRS. SMITH:** Judge, myself and Mr. Kuhn have
10 talked with him at length. He's made his decision.

11 **THE COURT:** You're going to testify?

12 **THE WITNESS:** Yes.

13 **THE COURT:** Okay. And Ms. Smith, you'll stay
14 with me while --

15 **MRS. SMITH:** Absolutely. I'm not going
16 anywhere.

17 **THE COURT:** Again, Mr. Erickson, you
18 understand that when you subpoena someone who has
19 pending charges, has not been sentenced and is in
20 jail, you are required to let their lawyer know.

21 **MR. ERICKSON:** Your Honor, like I said, I
22 didn't know he had a lawyer.

23 **THE COURT:** He's in jail. There's a pretty
24 good indication he had a lawyer. Okay. Let's go
25 ahead and -- why don't we just have him take a seat

1 somewhere. You're going to call him obviously, Mr.
2 Erickson.

3 **MR. ERICKSON:** I'd like to take a couple of
4 minutes with him right now.

5 **THE COURT:** No, we're going forward. This
6 jury's been here since 10 o'clock this morning. You
7 should have spoken with him beforehand. We're going
8 forward.

9 Let's go ahead and -- you can take a seat, sir,
10 right there just in front of Mr. Kuhn. Yes, sir.

11 Let's bring the jury in.

12 **THE BAILIFF:** Yes, Your Honor.

13 Jury entering, Your Honor.

14 **THE COURT:** Thank you.

15 (WHEREUPON, the jury enters at approximately
16 11:36 a.m.)

17 **THE BAILIFF:** The jury is seated.

18 **THE COURT:** Thank you. Good morning, Ladies
19 and Gentlemen. I apologize for the delay. All good
20 plans don't always go accordingly. Ladies and
21 Gentlemen, at this time, what I am going to do is
22 allow the defense to call one more witness before we
23 go ahead and argue and charge on this case.

24 So at this time, Mr. Erickson, if you will,
25 call your witness.

Kendalle Simmons - Direct Examination by Mr. Erickson

247

1 **MR. ERICKSON:** Thank you, Your Honor. The
2 defense calls Kendalle Simmons to the stand.

3 **THE COURT:** Come on over here, Mr. Simmons.
4 Right here. Place your left hand on the Bible and
5 raise your right hand.

6 **THE WITNESS:** Right here?

7 **THE COURT:** Yes, sir. Right here.

8 **THE CLERK:** Raise your right hand.

9 **KENDALLE SIMMONS**

10 having first been sworn, testifies as follows:

11 **THE CLERK:** Please be seated. State your
12 name and spell it for the court please.

13 **THE WITNESS:** Kendalle Simmons. K-E-N-D-A-L-
14 L-E, S-I-M-M-O-N-S.

15 **THE COURT:** Mr. Simmons, I'm just going to
16 ask you -- I can hear you pretty well. Speak up if
17 you can so everybody can hear you. All right, sir.

18 All right. Mr. Erickson.

19 **DIRECT EXAMINATION**

20 **BY MR. ERICKSON:**

21 **Q** Good morning, Mr. Simmons.

22 **A** Good morning.

23 **Q** Tell me where you physically live.

24 **A** Lady's Island, South Carolina.

25 **Q** All right. What address is that?

- 1 A [REDACTED].
- 2 Q How far did you get in school?
- 3 A 10th grade.
- 4 Q And how old are you right now?
- 5 A 20.
- 6 Q All right. And what was your last job?
- 7 A Working -- I was working at Zaxby's.
- 8 Q Do you know somebody named Mykel Johnson?
- 9 A Yes, sir.
- 10 Q Could you point him out?
- 11 A (Pointing.)
- 12 Q How do you know Mykel Johnson?
- 13 A From school.
- 14 Q All right. How long have you known Mr.
- 15 Johnson?
- 16 A Six or seven years.
- 17 Q All right. Can you take -- can you take me
- 18 back to an incident -- do you remember what you were
- 19 doing on the night of October 28th, 2011?
- 20 A Friday.
- 21 Q That day, do you remember what you were doing?
- 22 A Yes, sir.
- 23 Q What were you doing?
- 24 A Well, I got up that morning. Went to go get my
- 25 check around 2:00. Took it to Wal-Mart and cashed it. I

1 went to a friend, Malcolm Moore's house. I arrived at
2 his house a little after 3 o'clock. He was making music
3 the whole day.

4 Q Now, where is Malcolm Moore's house?

5 A On Lady's Island.

6 Q Okay. Is that close to where you live?

7 A Yes, sir.

8 Q And who was there?

9 A It was me, myself, Malcolm and Mykel.

10 Q So there was a total of three people there?

11 A Three people, yes, sir.

12 Q And you said you made music together?

13 A Yes, sir.

14 Q Is that a normal thing that y'all do when you
15 get together?

16 A Yes, sir. Yes, sir.

17 Q All right. And then, uh, how long did that go
18 on?

19 A Until I left.

20 Q What time was that?

21 A Around 6:45, 7 o'clock p.m.

22 Q Now, since you been friends for six or seven
23 years with Mr. Johnson, you know where he lives?

24 A Yes, sir.

25 Q Where does he live?

1 **A** Cross Creek Apartments.

2 **Q** And how far is that from the house you were
3 making music at?

4 **A** Around -- well, driving, it will take you like
5 15 minutes to get there. So it's approximately two to
6 three miles maybe.

7 **Q** That's all I have for this witness. Please
8 answer any questions from the Solicitor.

9 **THE COURT:** Mr. Stephens.

10 **MR. STEPHENS:** Thank you, Your Honor.

11 **CROSS-EXAMINATION**

12 **BY MR. STEPHENS:**

13 **Q** Mr. Simmons, you said that you've known Mr.
14 Johnson for six or seven years, is that correct?

15 **A** Yes, sir.

16 **Q** Would you say that you are good friends with
17 him?

18 **A** Yes, sir.

19 **Q** Very good friends?

20 **A** Yes, sir.

21 **Q** Now, let me just take you specifically to that
22 date that Mr. Erickson talked about a minute ago. On
23 October 28th, you said you got up around 2:00 and you
24 went to cash a check?

25 **A** To go get it and cash it, yes.

1 Q Where did you have to go get it?

2 A Zaxby's.

3 Q And how far is that from where you lived on
4 Lady's Island?

5 A Maybe 10 minutes, 10 or 15 minutes.

6 Q All right. Before you went to Zaxby's to go
7 get your check, did you do anything else to get ready to
8 go get out?

9 A You mean like, I freshened up.

10 Q So what time do you think you left your house?

11 A Around 1:30.

12 Q You just said that you went to go get your
13 check around 2:00. Okay. So you left the house at 1:30.
14 You went and got your check around 2:00?

15 A Yeah, cause I can't get my check til 2 o'clock.

16 Q Fair enough. Now, after you got your check,
17 where did you take it to?

18 A Wal-Mart.

19 Q Okay. Zaxby's is pretty close to Wal-Mart,
20 correct?

21 A Yes.

22 Q How long do you think it took you to get from
23 Zaxby's to Wal-Mart to cash your check?

24 A Three minutes.

25 Q You had to park?

1 A Yeah.

2 Q Then you went in to Wal-Mart?

3 A Uh-huh.

4 Q Did you have to wait in line to cash your
5 check?

6 A Yes.

7 Q Okay. Uh, when you left Wal-Mart, you said it
8 took you probably -- well, it would take about 15 minutes
9 to get from Cross Creek Apartments to Mr. Moore's address
10 on Lady's Island. How long did it take you to get from
11 Wal-Mart to -- approximately how long did it take you to
12 get from Wal-Mart to Mr. Moore's address?

13 A Around 15 minutes.

14 Q Okay. And you estimate you got there around
15 3:00 in the afternoon, is that correct?

16 A Around 3:00, yes.

17 Q Did you check your watch when you got there?

18 A No, sir.

19 Q Do you keep any kind of journal, Mr. Simmons?
20 Diary or anything like that?

21 A No, sir.

22 Q Did you do anything to notate this is the time
23 I got to Malcolm Moore's home?

24 A No, sir.

25 Q So you are just estimating that you got there

1 around 3:00?

2 A Yeah, I know I got there around 3:00 for sure.

3 Q How do you know for sure, sir?

4 A Cause I received a phone call and I looked at
5 the time.

6 Q All right.

7 A I get my check at 2 o'clock. It takes me like
8 two to three minutes to get to Wal-Mart and park and
9 stuff like you said. The line was very long. It was a
10 Friday. So I walked around Wal-Mart. My check was
11 cashed like 2:45. So I know I got to Malcolm's house 3
12 o'clock, around 3:00, a little bit after 3:00 maybe.

13 Q You said you know what time it was cause you
14 looked down at the phone call you received. My first
15 question is what time was it when you got that phone
16 call?

17 A Like 3:15.

18 Q And who was that call from?

19 A One of my girlfriends.

20 Q Again, fair enough, Mr. Simmons. Do you know
21 where Mr. Johnson was before he, uh, -- before he got to
22 Mr. Moore's home?

23 A No, sir.

24 Q Were you with him any time before 2:00 in the
25 afternoon when you got up and went to Zaxby's?

1 A No, sir.

2 Q You said that you left Mr. Moore's home around
3 7:00 p.m., is that correct?

4 A Yes.

5 Q When you left Mr. Moore's home, was Mr. Johnson
6 still there?

7 A Yes, sir.

8 Q Do you know what time he went home?

9 A No, sir.

10 Q Did you see if he went home?

11 A No, sir. I left and went home.

12 Q Do you recall if you saw Mr. Johnson at his
13 home or in Beaufort any time after that date?

14 A As in?

15 Q Did you see him around anywhere in town after
16 the date that they were making music on October 28th?

17 A I believe so. Yes.

18 Q You saw him out and about in Beaufort after
19 that date?

20 A Uh-huh.

21 Q Did you see him at his home or Cross Creek
22 Apartments after October 28th?

23 A Yes.

24 Q Mr. Simmons, are you sure that that was October
25 28th, 2011?

1 A Friday.

2 Q I didn't say Friday, Mr. Moore -- Mr. Simmons.
3 I said are you sure that it was October 28th that you saw
4 him at Malcolm Moore's home?

5 A Yes.

6 Q How do you know that?

7 A Cause if it was, that day was a Friday.
8 Because my friend killed himself October 30th, 2010. I
9 know it was October 28th.

10 Q Okay. You know that you saw Mr. Johnson on
11 October 28th at 3:00 p.m. exactly at Mr. Moore's home?
12 And you said that you saw him at some point later at
13 Cross Creek Apartments. Do you recall when you saw him
14 next at Cross Creek Apartments?

15 A The exact date and time?

16 Q In general -- relative to October 28th, when
17 did you see him next to the best of your recollection?

18 A Probably like, uh, a week later maybe.

19 Q Okay. Now, Mr. Simmons, did anyone contact you
20 other than Mr. Erickson, the attorney here, did anyone
21 contact you to talk to you about the testimony that you
22 were going to give here in court?

23 A No, sir.

24 Q Did you ever have a conversation with Malcolm
25 Moore about how he wanted you to testify or Mr. Johnson

1 wanted you to testify in court?

2 A Say that again.

3 Q Did you ever talk to Malcolm Moore or Mykel
4 Johnson about how they wanted you to testify here in
5 court?

6 A As in what should I say?

7 Q That's correct.

8 A No.

9 Q Mr. Simmons, you have the street name Hood or
10 Hoodman?

11 A Yes.

12 Q Are you aware that Mr. Moore and Mr. Johnson --
13 are you aware if Mr. Moore or Mr. Johnson had a telephone
14 conversation at Beaufort County Detention Center asking
15 about making sure that your testimony was straight if you
16 had to testify?

17 A Did I know anything about it?

18 MR. ERICKSON: Objection. Calls for
19 speculation.

20 MR. STEPHENS: I asked if he knows.

21 THE COURT: You can ask the question.

22 BY MR. STEPHENS:

23 Q Again, Mr. Simmons, I just ask are you aware of
24 whether Mr. Johnson had a conversation with Malcolm Moore
25 at the Beaufort County Detention Center on or about March

1 31st of this year when they discussed making sure you had
2 your testimony straight if you testified in court?

3 A No, sir.

4 Q So you are unaware of that? And you just said
5 you had no conversations with Malcolm Moore prior to
6 testifying today about the subject of your testimony?

7 A Say that again.

8 Q I'm sorry. That's a little too much lawyer
9 speak. You just testified, didn't you, that you didn't
10 talk to Malcolm Moore about how you were going to
11 testify.

12 A Yes.

13 Q Did you receive any letters from Mr. Johnson
14 about how he wanted you to testify as his alibi witness
15 in court?

16 A No, sir.

17 Q When you saw Mr. Johnson at Malcolm Moore's
18 home on October 28th, do you know if he was armed?

19 A No, sir.

20 Q No, he wasn't or you don't know?

21 A That he wasn't, to my knowledge.

22 Q So you just mean he didn't show you if he had a
23 handgun on him at that time?

24 A I'm pretty sure he wasn't. He wasn't armed.

25 Q All right, Mr. Simmons. Do you know if Mr.

1 Johnson possesses an weap -- any guns?

2 A No, sir.

3 Q You don't know or to the best of your
4 knowledge, he does not?

5 A He does not.

6 Q How do you know that?

7 A Cause I never saw him with a gun.

8 Q All right. Have you ever been to his home, to
9 the apartment, Cross Creek Apartments?

10 A Yes, sir.

11 Q Do you know if he has guns or ammunition in his
12 apartment?

13 A No, sir. He doesn't that I saw.

14 Q Thank you, Mr. Simmons.

15 MR. STEPHENS: Your Honor, I don't believe I
16 have any further questions for the witness.

17 THE COURT: Mr. Erickson, anything further?

18 MR. ERICKSON: Nothing further.

19 THE COURT: All right. You can just keep
20 your seat for a minute.

21 Ladies and Gentlemen of the jury, I need to
22 take up a very brief matter of law.

23 Mr. Erickson, are you resting at this time?

24 MR. ERICKSON: Yes, Your Honor. The defense
25 rest.

Remarks

259

1 **THE COURT:** Any further?

2 **MR. STEPHENS:** Uh, yes, Your Honor. The
3 State intends to call one, possibly two rebuttal
4 witnesses, Your Honor.

5 **THE COURT:** Okay. Ladies and Gentlemen, I'm
6 going to go ahead and send you back to your jury
7 room very briefly. Again, do not discuss this case.
8 It wouldn't be appropriate to do so. Thank you.

9 (WHEREUPON, the jury exits at approximately
10 11:57 a.m.)

11 **THE BAILIFF:** The jury is clear.

12 **THE COURT:** Okay. Y'all can take him back.
13 You can step down, sir.

14 **MR. STEPHENS:** Your Honor, the State may put
15 up Malcolm Moore. We have a jail call that we'd
16 like to play, a conversation between Mr. Johnson and
17 Mr. Moore. I believe that the State can, because
18 it's already in evidence, the jail calls, if we
19 could just play them. However, if you believe we
20 need to introduce Malcolm Moore's testimony to play
21 it, he's already been subpoenaed.

22 **THE COURT:** Is that him back there?

23 **MR. STEPHENS:** Uh, yes, Your Honor. Like I
24 said, the State's position is that the jail calls
25 already in evidence. We're prepared just to play.

1 **THE COURT:** All the jail calls are on the CD?

2 **MR. STEPHENS:** Yes, Your Honor.

3 **THE COURT:** Did you pull out certain ones? I
4 thought there was a lot. My understanding is there
5 was an enormous amount in this case.

6 **MR. STEPHENS:** Yes, Your Honor. There are
7 over 400 jail calls.

8 **THE COURT:** And did you give the jury all 400
9 or do you have a disk hopefully narrowed down?

10 **MR. STEPHENS:** It is a disk, Your Honor. I
11 mean, all the jail calls are on one disk. They
12 don't have a computer to play it on, Your Honor.

13 **THE COURT:** Well, they'd have to ask for it.
14 But I guess my question is how do you get the jury
15 to zero in on the jail calls you want them to if you
16 have them all in evidence.

17 **MR. STEPHENS:** I also have a disk, Your
18 Honor, with just that jail call on it. I have a
19 jail call with the prior -- the prior jail call I
20 admitted on it, but it's got two other calls on it.
21 I have a disk with just the call I want to play and
22 the testimony of Mr. Simmons on its own disk, Your
23 Honor. I can have it marked appropriately, Your
24 Honor.

25 **THE COURT:** I don't know if you can use it to

Remarks

261

1 impeach him. It's a conversation that he wasn't a
2 part of. I don't think it's really for impeachment.
3 I think you do really have to call, uh, Mr. Moore
4 who is in the back of the courtroom and you say he's
5 under subpoena. If you want to go ahead and pull
6 him up here and get them to play it and then go
7 ahead and say is this you speaking with H.B.

8 **MR. STEPHENS:** Yes, ma'am.

9 **THE COURT:** We'll go ahead and do it that
10 way. Anyone else after that do you think?

11 **MR. STEPHENS:** No, Your Honor.

12 **THE COURT:** I think we're good.

13 **MR. STEPHENS:** Okay.

14 **THE COURT:** Okay. Let's do this. Your
15 motions are renewed, Mr. Erickson. I respectfully
16 deny your motion again for a directed verdict based
17 on the same thing I've done before since you have
18 now rested your case. We're going to go ahead and
19 bring them in.

20 We'll just go ahead, for the record, you will
21 renew your motion again for directed verdict just
22 right now after the rebuttal. But we're going to go
23 straight into closings and argument. This jury has
24 been waiting a long time today. Okay. Any
25 objection, Mr. Erickson?

1 MR. ERICKSON: Your Honor, I think I needed
2 to publish one of my last exhibits.

3 THE COURT: Which one was that?

4 MR. ERICKSON: Number 5.. I tried to do that
5 yesterday.

6 THE COURT: You have now rested twice and not
7 done everything you needed to do? Okay. Which one
8 did you want to publish?

9 MR. ERICKSON: Defense number 5.

10 THE COURT: Okay. It's going to go to the
11 jury anyway. It's a piece of evidence. So if they
12 are going to have it back there, we're not going to
13 go ahead and show it as a viewing right now.

14 MR. ERICKSON: That's all I need.

15 THE COURT: Okay. Everyone else ready to go?
16 You ready to call Mr. Moore?

17 MR. STEPHENS: Yes, ma'am.

18 THE COURT: You are Mr. Moore, correct?

19 THE WITNESS: Yes, ma'am.

20 THE COURT: All right, sir. Let's bring the
21 jury back in.

22 THE BAILIFF: Yes, Your Honor.

23 THE COURT: Again, we're going to go straight
24 into closing arguments, y'all.

25 MR. STEPHENS: Appreciate it, Your Honor.

1 Thank you.

2 (WHEREUPON, the jury enters at approximately
3 12:02 p.m.)

4 THE COURT: Thank you. It's my understanding
5 you'd like to call a rebuttal witness, is that
6 correct, Mr. Stephens?

7 MR. STEPHENS: Yes, Your Honor. Thank you.

8 THE COURT: All right.

9 MR. STEPHENS: The State calls Malcolm Moore.

10 THE COURT: Come on forward, Mr. Moore. Come
11 right around here, sir. There's a Bible over here.
12 If you will, place your left hand on the Bible and
13 raise your right hand.

14 MALCOLM MOORE

15 having first been sworn, testifies as follows:

16 THE CLERK: Please be seated. State your
17 name and spell it for the court, please.

18 THE WITNESS: My name is Malcolm Moore,
19 M-O-O-R-E.

20 DIRECT EXAMINATION

21 BY MR. STEPHENS:

22 Q Good morning, Mr. Moore. Do you know the
23 defendant in this case, Mykel Johnson?

24 A Yes, sir.

25 Q And would you say that you are a good friend of

1 his and his family's?

2 A Yes, I would say that.

3 Q In fact, have you been sitting with his family
4 during this trial?

5 A Yes, sir.

6 Q Now, how many times would you say you went to
7 visit Mr. Johnson while he's been at the detention
8 center?

9 A Probably like three or four.

10 Q Three or four. So it would it be fair to say
11 you may have visited him dozens of times?

12 A No.

13 Q Okay. Do you recall if you visited him on
14 March 31st, 2012?

15 A I didn't recall the date, sir.

16 Q Do you recall a conversation with him where he
17 discussed the testimony, the potential testimony of Hood
18 or Kendalle Simmons?

19 A I mean, he always talked about a lot of stuff.
20 You have to really refresh my memory.

21 Q You recall if he had a conversation with you
22 where he said you had to make sure Kendalle Simmons'
23 testimony was straight if he came to testify?

24 A I mean, he was stressing. He always asked
25 about a lot of stuff. I'd shoot him little short answers

1 just so he wouldn't have to worry about it.

2 Q So you don't -- you do or do not recall if he
3 said Kendalle Simmons testimony had to be straight.

4 A No, sir.

5 Q You don't recall?

6 A No, sir.

7 MR. STEPHENS: Thank you, Your Honor. I've
8 got no further questions for Mr. Simmons.

9 THE COURT: Okay. Mr. Erickson?

10 MR. ERICKSON: No questions.

11 THE COURT: All right. You may step down,
12 sir.

13 THE WITNESS: All right.

14 THE COURT: All right. Any further from the
15 State?

16 MR. STEPHENS: No, Your Honor.

17 THE COURT: Ladies and Gentlemen, the State
18 has now rested as well.

19 For the record, Sharon, again, the motions are
20 renewed and denied based on the same grounds.

21 Ladies and Gentlemen, at this time, what we're
22 going to do is go ahead and hear the arguments from
23 the attorneys. I'm going to charge you on the law
24 that's applicable to this case. I'm going to get
25 this case sent to you.

1 I will also tell you that, based on the late
2 hour, I believe the bailiffs are back there ordering
3 pizza or something for you to feed you so that by
4 the time we're finished, you'll be able to go back
5 and begin your deliberations and have something to
6 eat. Ladies and Gentlemen, so if you don't mind,
7 again, anyone need a break? Are you all okay?

8 Mr. Stephens.

9 **MR. STEPHENS:** Thank you, Your Honor.

10 I was about to say good morning, folks, but I
11 think good afternoon may be more appropriate. I get
12 to speak to you twice today so bear with me. You
13 may be tired of hearing my voice and what I've got
14 to say. First, I'd like to talk to you a little bit
15 about what Mr. Johnson is charged with, the evidence
16 that you've heard and the burden the State has to
17 prove and my recitation of what I think the evidence
18 is and what we did prove.

19 Now, the Court will instruct you that the
20 arguments of counsel are just arguments. This is
21 not the evidence. What I'm saying to you is not the
22 evidence. If there's some conflict between anything
23 that I say and that Mr. Erickson says, between what
24 you remember or your notes -- I applaud you all for
25 being diligent and taking notes. Please feel free

1 to disregard and go with what you know the facts
2 are. You are the finders of fact.

3 Now, as to the charges, Mr. Johnson there is
4 charged with Attempted Murder times two. The judge
5 will shortly instruct you as to the elements of
6 attempted murder. Basically, what it means is in
7 Beaufort County, South Carolina, Mr. Johnson did
8 with the intent to kill and malice aforethought,
9 which will also be defined that he did act in
10 attempting to kill the victims in the case.

11 Now, you can all understand kind of what
12 attempt to kill is. You try to kill someone.
13 There's some other legal terms that are going to be
14 defined as far as malice and malice aforethought.
15 You will talk about whether it's direct or inferred.
16 In this case, you are going to receive an
17 instruction that use of a deadly weapon in a
18 shooting like this, when there is a conscious
19 decision to use that weapon showed such a disregard
20 for human life that that -- from that you can infer
21 an attempt to kill and malice aforethought. When
22 Mr. Johnson fired that weapon, he understood the
23 probable consequences of it. He could hit and kill
24 someone. It was aimed at the vehicles of the
25 victims.

1 You heard their testimony that they were in the
2 car. They had spoken with him. It wasn't like he
3 was firing up in the air and the bullets just
4 happened to come down and penetrate the car. So
5 those are the elements, intent to kill, malice
6 aforethought and actual -- the actual act of intent
7 to kill or the intent, the attempt and the malice
8 aforethought.

9 Now, what evidence did you see to prove those
10 elements? The first thing you heard is the 911
11 call. If you recall the fear in the voice of Mrs.
12 Constantineau when she was on the phone with 911, it
13 was immediately after the incident. Mrs.
14 Constantineau and Mr. Babecki, they were not
15 thinking about what might come in at trial or
16 getting stories straight. They told you exactly
17 what happened. The person they recognized as Hot
18 Boy, who lived in an apartment complex had shot at
19 them. They can't tell you why. We'll talk about
20 motive in a minute.

21 But what you heard on the 911 tape was his
22 name, his description and what happened. That's
23 pretty compelling evidence immediately after the
24 incident.

25 **COURT REPORTER:** I'm sorry, Your Honor. I'm

1 having trouble hearing. I apologize.

2 **MR. STEPHENS:** I'll try to speak up.

3 **THE COURT:** Speak up.

4 **MR. STEPHENS:** I apologize.

5 **THE COURT:** Thank you. Thank you.

6 **MR. STEPHENS:** The next piece of evidence you
7 saw was this, State's Exhibit number 1, it's the
8 photo lineup that Mr. Babecki did. It clearly
9 states that he recognized this suspect, Mykel
10 Johnson, as the person that shot him. Lets up any
11 confusion as to whether Hot Boy was Mykel Johnson.
12 You also heard the telephone call from the jail and
13 you might have wondered what all the setup to listen
14 to a 10-second snippet of conversation. In that jail
15 call, Mr. Johnson clearly says this is Hot Boy,
16 which is his street name. So let there be no
17 confusion when the victim said Hot Boy did this,
18 they are talking about Mykel Johnson.

19 You saw the pictures of the scene. The
20 pictures are consistent with the story that the
21 victims told. You see the shattered glass from the
22 passenger side windshield. You see the impact holes
23 from the bullets that penetrated the car. The
24 shattered windshield is there. The other bullethole
25 is there. There's the bullet that was recovered

1 from the vehicle which you also saw in court.

2 Again, Ladies and Gentlemen, when I started
3 this case, I talked about don't be fooled by the
4 fact that he's 16. His childhood has ended. He has
5 the calculating mind of an adult. He took the
6 calculated act of aiming and shooting this vehicle.
7 Consider that he was also running. We're going to
8 talk about that flight as well.

9 Other than the 911 call and the photos, you
10 heard the victim's testimony from Mrs. Constantineau
11 and Mr. Babecki. They have been completely
12 consistent. You saw the prior statement from Mrs.
13 Constantineau that Mr. Erickson tried to introduce
14 to show there has been some change in their stories
15 or something that's not been consistent. Please
16 consider where there might be variations between
17 some of the things that happened before the
18 shooting, things that Mr. Babecki might not have
19 wanted to be completely forthcoming about. He did
20 admit that he's made small purchases of marijuana
21 from Mr. Johnson. That's something he didn't admit
22 first off to the law enforcement. But if you think
23 about it, it's completely understandable. Who wants
24 to walk in the first time they meet a police officer
25 and say, by the way, I've made small purchases of

1 marijuana from the person that shot at me. It had
2 nothing to do with the actual shooting.

3 They had been completely consistent from the
4 911 call to the statements they wrote to the
5 interviews that you watched to their testimony here
6 is the fact that on October 28th, some time around
7 2:00 in the afternoon, they were leaving their
8 apartment complex. They saw Mr. Johnson on the side
9 of the road. Mr. Babecki yelled out the window
10 something about the other day. And Mr. Johnson
11 fired at him.

12 Mrs. Constantineau told you she didn't actually
13 see him fire. I asked if that was a conclusion you
14 made. She said yes. She concluded by the fact that
15 she heard the pistol shot and saw the shattered
16 windshield that she inferred that, uh, and seeing
17 Mr. Johnson before and afterward that she concluded
18 that he shot at her.

19 When the judge gives you your instruction, one
20 of the things she's going to talk about is direct
21 and circumstantial evidence. Direct evidence is
22 like Mr. Babecki gave, that he saw Mr. Johnson aim a
23 pistol at their vehicle and shoot. Circumstantial
24 evidence is something from which you can infer
25 additional facts. That's kind of confusing. I know

1 it is for me when I try to think about it. But I'm
2 a prior military attorney. In the military, we give
3 an example of what we're talking about when the
4 judge gives that instruction. The example we
5 usually give is if you look outside and you see that
6 it's raining, that is direct evidence that it's
7 raining. If you look outside your window and you
8 see that the ground is wet, that's circumstantial
9 evidence it was raining.

10 The important thing to consider is both types
11 of evidence are equally admissible. You should give
12 weight to both of them in court. The fact that Mr.
13 Babecki actually saw the shooting, Mrs.
14 Constantineau saw the defendant, then heard the
15 rounds and then saw him running away with no one
16 else in sight, that's circumstantial evidence that
17 that was Mr. Johnson who fired the pistol.

18 Now, that's compelling enough that there was
19 the evidence that these witnesses had been
20 completely consistent in their stories. That's not
21 all you can consider in this case. I also mentioned
22 in the beginning that you can consider the flight of
23 the defendant from the scene as evidence of his
24 guilt. That is -- when we talk about circumstantial
25 evidence, that's some more of this circumstantial

1 evidence that you can consider, that he fled the
2 scene. That he knew that they were looking for him
3 and he was in hiding in Yemassee when he was
4 apprehended. You can consider the statements he
5 made when he was apprehended.

6 I just want to make sure. Am I still talking
7 too --

8 **COURT REPORTER:** Good.

9 **MR. STEPHENS:** Okay. You can consider that
10 he said not why do you want me, what's this all
11 about or even can I call my mom. No, he said I was
12 going to turn myself in when I got a lawyer. He
13 said how did you find me. Thoughts of a calculating
14 mind and not a child. Also, the thing that a person
15 who knew they were guilty would ask.

16 Besides that, one of the things that we haven't
17 talked about but has been moved into evidence,
18 you're going to have a copy of the text messages
19 from Mr. Johnson's cell phone. You heard testimony
20 from Officer Crumpton about the computer extraction
21 that they do on a cell phone to pull these text
22 messages. Mr. Erickson referenced some of the text
23 messages from Frank Babecki. Mr. Babecki admitted
24 about trying to set up a purchase of marijuana.

25 There are other messages in here that I'd urge

1 you to look at. One, I mentioned Mr. Babecki's text
2 message to Mr. Johnson asking or saying, hey, good
3 job, buddy, trying to kill me and my pregnant wife.
4 That's something that he said Mr. Johnson never
5 replied to. Consider that. Text message about
6 trying to kill them. No response.

7 What else is there? Well, if you look on
8 October the 23rd, there's a text message from Mr.
9 Johnson's mother to Mr. Johnson saying that she's
10 going to have to get him and his guns out of her
11 house. Mr. Erickson elicited the fact that there
12 was two different types of ammunition for weapons
13 that weren't used in this incident that were in his
14 apartment, two different types of ammunition. Now,
15 that's some evidence that he has guns. There's a
16 text message from his mother that he has guns.

17 So folks, you also have to consider the
18 testimony that was provided by Mr. Simmons. Mr.
19 Simmons says he was somewhere else. What he said
20 was around 3 p.m., because I got a phone call. Mr.
21 Johnson was at Malcolm Moore's home and they were
22 making music.

23 Well, the State argues two things with respect
24 to that. One, Mr. Simmons, despite his friendship
25 and any bias to fabricate, may be completely honest

1 to the best of his recollection. He may have seen
2 Kendalle Simmons -- excuse me, Mykel Johnson at
3 Malcolm Moore's home some time after 3:00 p.m. on
4 October 28th. He doesn't say where was Mr. Johnson
5 before that. What he doesn't say is where was Mr.
6 Johnson after that. It is completely understandable
7 and plausible that Mr. Johnson got to Malcolm
8 Moore's home.

9 Malcolm Moore wasn't called as an alibi
10 witness, so I don't know how Malcolm Moore got
11 there. Excuse me. I don't know how Mykel Johnson
12 got to his home if that's what happened. I don't
13 know where Mykel Johnson was taken to after they
14 were done making music. He wasn't taken back home.

15 You've already heard testimony that on the
16 search, and it was under observation by the Beaufort
17 County Police Department and that Mr. Johnson fled
18 the county or fled the area. That's option number
19 1. Mr. Simmons could be completely truthful. Only
20 Mr. Simmons knows for sure if he was completely
21 truthful. And he could be just not knowing. Or he
22 could be trying to help his buddy out, a guy he's
23 known for six or seven years, a good friend. He
24 doesn't really have to make up a story. All he has
25 to do is be certain that this was October 28th.

1 Now, there is some credence to that, Ladies and
2 Gentlemen, he says he saw Mykel Johnson at his
3 apartment after this date. He says that, uh, he was
4 still around town when we already know Mykel Johnson
5 fled the area.

6 Also worth noting, when you are considering the
7 credibility of Mr. Simmons, that he said Mykel
8 Johnson doesn't have guns. I know this for a fact,
9 he does not have guns. Well, what do we know for a
10 fact? He has guns, according to his mother. He has
11 ammunition according to the pictures that you saw
12 and the testimony of Officer Dowling. Mr. Simmons
13 is not credible. If you want to consider his
14 testimony in the best light possible, he is simply
15 unaware of what happened before he got to Malcolm
16 Moore's house.

17 So elements -- you have testimony direct and
18 circumstantial that Mr. Moore or Mr. Johnson fired a
19 weapon, two rounds penetrating the vehicle of the
20 victims. That is attempt to kill. That is intent
21 to kill because he made a conscious choice. He made
22 an instantaneous choice. Apply the evidence you've
23 heard to these elements. Malice aforethought, use
24 of deadly weapon, you can infer he was actually
25 trying to kill these people. That was a conscious

1 decision he made. All the elements are met.

2 You are going to hear about the State's burden,
3 not just the proof, but proof beyond a reasonable
4 doubt. The judge is going to give you that
5 definition. I would submit in the military, we give
6 the example that reasonable doubt is not doubt that
7 is fanciful or imaginative. Just because there is
8 some possible explanation, no matter how outlandish,
9 a second shooter on the grassy knoll, that is not
10 reasonable doubt.

11 Reasonable doubt is a doubt that would cause
12 you to pause on something that was important to you.
13 In this case, there is no reasonable doubt. Mr.
14 Moore -- excuse me, Mr. Johnson fired the rounds,
15 attempted to kill the victims. That's what
16 happened.

17 I talked to you a minute ago about the text
18 messages. We talked about the flight of the
19 defendant. Even though he says I was going to turn
20 myself in, also consider the texts that were then
21 sent from his aunt around November 5th, 2011. Was
22 Mr. Moore [sic] actually going to turn himself in or
23 was his flight only a pause? I submit Mr. Moore
24 [sic] is a calculating criminal. He was planning on
25 fleeing, not just Beaufort, but fleeing farther.

1 The diligent actions of the Marshall Service here
2 today.

3 Ladies and Gentlemen, when you consider the
4 elements of the crime of attempted murder that the
5 judge is going to give you, the evidence that you
6 heard, physical evidence that you've seen and the
7 testimony you've heard, and you consider the burden
8 of the State to prove this case beyond a reasonable
9 doubt, I'm confident you are going to arrive at the
10 evident conclusion that we have met our burden, that
11 we've shown beyond a reasonable doubt that Mr.
12 Johnson attempted to murder the victims in this
13 case. Thank you.

14 **THE COURT:** Thank you, sir.

15 Mr. Erickson.

16 **MR. ERICKSON:** Thank you. May it please the
17 Court, Your Honor.

18 I'm going to need a tripod over there.

19 (Pause.)

20 Is that close enough for y'all to see?

21 Can we move it a little closer? Put it right
22 there in the middle.

23 How about that? Is that better for everybody?

24 All right. I always like to thank the jurors
25 for being here and trying to help us solve this case

1 today. I've got a closing statement there. I'll be
2 referring to it point-by-point. The first thing I
3 want to say is these are awesome charges against my
4 client, my 16-year-old client, Mr. Johnson for
5 attempted murder. That's about as tough as it gets.

6 The way this statement is set up, it's set up
7 almost like a scale. On one side, we have evidence
8 of guilt. On the other side, we have reasonable
9 doubt which leans more towards evidence. The judge
10 is going to give you a definition on what reasonable
11 doubt is. But for now, according to the case law,
12 reasonable doubt is anything that makes you hesitate
13 to act.

14 So to start out, the way I'm going to -- now,
15 you can use any way you want to try to decipher all
16 this evidence you've heard during these last couple
17 of days. The way I'm going to lay it out is I'm
18 going to lay it out first with the police officers,
19 what they had to say. And much of them testified
20 the same. For instance, when we talk about the
21 weapon, all of the officers said there was no weapon
22 found. When there's no weapon found, that led us to
23 reasonable doubt. No weapon was attributed to Mr.
24 Johnson.

25 The other thing I have on this statement is

1 when I looked at this, the big picture, I saw a lot
2 of missing and mismatched evidence. I told you that
3 in opening statement. That's why I call this
4 defense the M&M defense. There's an M or a double M
5 almost with every piece of evidence. The weapon is
6 the first example of missing evidence.

7 You look at the next piece of evidence all the
8 officers testified to. They talked about the
9 bullets. Everybody testified there were two shots.
10 I have an exhibit that shows what kind of bullets
11 that were attached to Mr. Johnson during the search
12 of his bedroom. I have these Exhibit 1 and 2. One
13 of them is the shell box with the .22 bullets. Here
14 is the box of rounds. There's 50 rounds here.
15 There's only one missing. I call that a mismatch.
16 There's two shots, only one bullet missing. So it
17 couldn't have been from this ammunition. Plus
18 Officer Dowling testified it was probably a .45
19 slug. These are .22s. Again, that's a mismatch.

20 Let's go down to the next piece of possible
21 evidence. Ballistics, that's the scientific name
22 for gun examination or bullet examination. There
23 was none. The State put on no ballistics expert.
24 That leads to reasonable doubt. That's missing
25 evidence.

1 Let's go down to number 4, gunpowder residue
2 found on the defendant's hands. There was no test
3 done for one reason or another. Again, that's an M,
4 that's missing evidence the State does not have.

5 We go down to the next piece of possible
6 evidence. No DNA. Since there's no DNA, that's
7 missing evidence. That's reasonable doubt. No
8 fingerprints. Missing evidence. Reasonable doubt.
9 No confession. Missing evidence. Reasonable doubt.
10 No written confession.

11 Number 8, no forensic evidence. That just
12 talks about you heard the officers say forensic
13 evidence is scientific evidence. That's kind of a
14 whole ball of wax. The last thing I have is
15 evidence that the officers talked about, the
16 perimeter set up. I think that's important.

17 When I had Officer Dowling down there, we
18 looked at the map. You'll get to see it. He was
19 pointed out where the officers spread out. It was
20 fairly quick. There were a couple of officers
21 already in the vicinity. So if somebody was
22 running, and I'm going to say Mr. Johnson was
23 running, there's a good chance he would have been
24 caught. Officers have radios. They've got dogs.
25 They've got cars. They had the perimeter. They

1 should have caught Mr. Johnson in his own
2 neighborhood if, in fact, Mr. Johnson was there.
3 That's a mismatch. They tried to do that but they
4 found nobody. There's no match, so it's a mismatch.
5 Okay. Now, that's all I have to say about the
6 officers.

7 Now, we got to talk about the witnesses because
8 what they say up there is evidence. Frank was the
9 first -- Frank Babecki was the first witness. You
10 will see the video. I know I bothered you a lot by
11 playing the video and -- but I wanted to make sure
12 you saw it. You have another chance to see it if
13 you want. I'm just going to say, there was a lot of
14 inconsistent statements. You heard him up here.
15 Even when he was on the stand, uh, he could not be
16 straight. He could not give two answers the same.

17 So I want you to -- if you don't remember the
18 video, I want you to look at the video, particularly
19 statements about, uh, in the video Frank was asked
20 if he smokes marijuana. His answer was no, never.
21 But there was a text from the day before that's in
22 evidence.

23 This is Defense Exhibit 4. You will see two
24 text messages. One from 10/26 and one from 10/27.
25 Mr. Babecki did not deny doing these. He's trying

1 to buy marijuana here. So why does he say he's
2 never smoked or doesn't smoke? That's an
3 inconsistent statement. Why does he want to lie? I
4 don't know. Frank even went up on the stand and said
5 he was driving at one point. I had to correct him.
6 He said, oh, that's right. I was a passenger.

7 Let's talk about this same phone text and the
8 fact there's another thing, another problem. I
9 asked him about this. I said this looks like it
10 came from your phone. This is Frank. This is your
11 name. This is your phone. He said, yeah, that was
12 my phone but I let somebody else use my phone. I
13 was trying to help somebody else get some marijuana.
14 It wasn't for me. Wow, that's a story.

15 He makes another statement down here, number 5.
16 He was asked why did he have H.B.'s phone number in
17 his cell phone. Mr. Babecki said, well, I had it
18 for Mike. Well, I think he had it because he really
19 wanted to buy some weed. So again, he's not
20 straight. Inconsistent statement. Then, he talks
21 about that he was 25 feet away in the video. He
22 says 20 away up here.

23 That's different than what Desiree says.
24 Desiree says that she was only 10 feet away. I'm
25 going to talk to her about right now. What's

1 important for Desiree is that she said she did not
2 see the shooter. And I think that's big. She's
3 closer, 10 feet away and doesn't see the shooter,
4 how does Frank see the shooter at 25 feet away?
5 Desiree says she did not see the gun. That's also
6 big. Didn't see the gun. Didn't see the shooter.
7 But you know what, that's incredible.

8 If you look at the two witnesses, you're going
9 to have to give weight to these witnesses. That's
10 what I call credibility. I think you're going to
11 have to give very little weight to what Frank says
12 because of all the inconsistent statements. I'm
13 going to say Desiree is the more credible witness.
14 In this case, her credibility helps the defense
15 because of what she said there. She did not see the
16 gun, did not see the shooter. And you know what,
17 that makes sense.

18 Really, at the end of the day, you've got to do
19 what makes sense. I'll tell you why it makes sense.
20 I'm going to use one of the State's exhibits. It
21 makes sense because when the car was driving by,
22 whoever shot, made the shots, did it from the rear.
23 You can see the bullets enter the rear left side and
24 then came out the front. What Desiree is saying is
25 totally true. You can't see who is shooting you

1 from behind. But Frank said, oh, he saw him. He
2 saw the shots. He saw the gun.

3 The last thing I want to talk about is motive.
4 This is our defense. Our motive here is Frank was
5 -- and I'm going to use the word pissed because
6 that's what Desiree says in the video. Frank was
7 pissed that his friend, Mark's brother, was robbed
8 the night before. Frank was pissed. Thought it was
9 Mr. Johnson that did it. Wanted to pin this
10 shooting on Mr. Johnson. That's the motive. That's
11 the motive. That's the why. That's the reason for
12 pinning this whole thing on Mr. Johnson, to get Mr.
13 Johnson in trouble for something he didn't do.

14 When I cross-examined Frank here about the
15 robbery, Frank was inconsistent again. First, he
16 said he did blame Mr. Johnson. Then he said he
17 didn't. Was inconsistent. Can't believe what
18 Frank's saying. Frank is the main reason we're here
19 today. We wouldn't be here if Desiree said she
20 didn't see the gun or didn't see the shooting.
21 We're here because of Frank.

22 I'm going to talk about the defendant not
23 wanting to testify. The judge is going to give you
24 an instruction there. He's 16 years old. I don't
25 know you were when you were 16. I didn't learn to

1 talk in a courtroom until I was much older. He
2 doesn't like talking in front of people. But he has
3 friends. He has friends and he has a good one up
4 here that you listened to today and I thought he was
5 truthful. The prosecutor had a hard time finding
6 any untruth.

7 The alibi, that's who exactly I'm talking
8 about. He's our alibi witness. He's the witness
9 that comes up there and says that he was with Mr.
10 Johnson at the time of this incident. They were
11 making music together. That's what they do. That's
12 what Mr. Johnson hopes to do when he grows up. He
13 wants to make music. Too bad you didn't get a
14 chance to hear any of that today.

15 I'm just about done here. I want to go back to
16 this other side. There's one point I wanted to get
17 in. It's about tools of the trade. All these
18 potential evidence tools that the police could have
19 done or got in one way or another. Those are tools
20 of the trade. Those are tools that would help you
21 decide this case. That's all physical evidence,
22 forensic, scientific evidence that you can touch,
23 feel, smell. That's -- that would corroborate, uh,
24 the witness testimony. There was no corroboration.
25 None of that.

1 And to make you understand that those are the
2 tools of the trade in a court of law. If you had a
3 builder building a house and he didn't have all the
4 tools he needed to build that house, that house
5 would not have been built. That's what I'm saying
6 today. You can not build this case, uh, without
7 that other evidence. What you're doing is you're
8 taking somebody's word and that's it. You've got to
9 have more than that. So those are the tools of the
10 trade and the state is missing those tools. They
11 are not in the toolbox today. They can't build a
12 house today.

13 To sum it up here, credibility really decides
14 motive. That's our second biggest offense. You
15 have got to weigh and balance how much weight to
16 give each one of those witnesses up there. I'm
17 going to say Frank does not deserve much weight.
18 The burden of proof, the State has that burden of
19 proof and its beyond a reasonable doubt. If you
20 think you have to hesitate, speculate, say the word
21 probably, that's not good enough for this court.
22 With every piece of evidence, you've got to say
23 beyond a reasonable doubt that is helpful to convict
24 Mr. Johnson.

25 I'm going to say to you that there's a lot of

1 reasonable doubt. Each one of those yeses I had on
2 the other side is reasonable doubt. The State has
3 to overcome each of those yeses to give you that
4 reasonable doubt. I thank you for being here and
5 listening to our case today.

6 **THE COURT:** Mr. Stephens?

7 **MR. STEPHENS:** Thank you, Your Honor. I'm
8 going to try to be brief although this is a very
9 serious charge. I'm going to try to give it as much
10 time as it needs. What is this case about? Mr.
11 Erickson came up with some different theories about
12 what he believes the case is about. The one that we
13 most need to disabuse ourselves of is this idea that
14 this case is --

15 **COURT REPORTER:** I'm sorry, Your Honor. I am so
16 sorry. I just can't hear.

17 **THE COURT:** That's alright. You need to
18 speak up just a little bit more, Mr. Stephens. I
19 know it's hard. You've got your back turned.

20 **MR. STEPHENS:** I know. I'm just surprised.

21 This case is not about Frank Babecki. He is
22 the victim in this case, as is his wife. Mr.
23 Erickson said that Frank Babecki was the main reason
24 that we are here today. That is simply not true.
25 Mykel Johnson who is sitting right over there is the

Reply by Mr. Stephens

289

1 main, sole, and exclusive reason that we are here
2 today.

3 Mr. Erickson said that the State did not have
4 the proper tools to build a house. Well, this is
5 not a metaphor, folks. These are real peoples'
6 lives. But if we were to go into that metaphor, we
7 have built the house. Mykel Johnson built it
8 himself. He provided the tools. He pulled out a
9 gun and shot at the victims. You seen the evidence
10 of the shooting. He fled from the scene. He made
11 the statements about the crime. Folks, Mykel
12 Johnson built this house himself. Now, he has to
13 live in it.

14 What else do we have for theories or what this
15 case is about? Well, Mr. Erickson told you in the
16 beginning, in his opening that he believed this was
17 about mismatched or missing evidence. He made that
18 analogy. I'll address what's missing. First, live
19 testimony in the history of jurisprudence has always
20 been the best evidence for a jury to hear. You
21 judge credibility and you can tell based on your
22 knowledge and experience, knowledge of the ways of
23 the world that people are telling the truth. You
24 can believe witnesses totally, not at all or
25 somewhere in the middle. You can believe some

1 witnesses or no witnesses based on your own
2 judgement. You heard the victims. Were they
3 credible? Were they shot at? You heard the 911
4 call. Were they shot at? There's no evidence
5 that's missing. You heard the evidence.

6 What is Mr. Erickson talking about about
7 evidence is missing. He mentioned a gun. There was
8 no gun. There were no ballistic examinations. He
9 mentioned gunshot residue. Ladies and Gentlemen, I
10 submit that evidence was not present because each
11 one of those items, including DNA and fingerprints,
12 fled the scene with Mr. Johnson. There was no gun
13 because the shooter took it with him. Maybe he
14 disposed of it, maybe he threw it in the woods,
15 maybe he took it to Yemassee, maybe it ended up in a
16 river somewhere. We don't know. And it's a good
17 thing that you don't have to have a weapon to
18 convict cause then all a shooter has to do is get
19 rid of that weapon and case closed. We got to
20 dismiss. That's not true.

21 You heard the evidence. The gun disappeared
22 when the shooter fled the scene. That shooter was
23 Mykel Johnson. The gunshot residue, which would
24 have been on his hands or clothing, that fled the
25 scene when he left. There's no way to test that

Reply by Mr. Stephens

291

1 when the shooter leaves. And it's not required,
2 Ladies and Gentlemen.

3 DNA fingerprints. Again, you heard me ask
4 Officer Dowling if there's any way to process a
5 scene for DNA fingerprints. There's not testimony
6 that the shooter touched the vehicle or touched
7 anything else other than the gun that he was
8 carrying that could be tested. Again, that evidence
9 fled the scene. There's nothing missing. You've
10 heard the evidence. You've seen that beyond a
11 reasonable doubt, Ladies and Gentlemen.

12 Assuming this did happen, well, Mr. Erickson
13 stated that Frank was, and I quote, pissed and
14 that's why this was fabricated. This whole thing
15 was fabricated against Mykel Johnson. Ladies and
16 Gentlemen, just ask yourselves whether that's
17 reasonable. You heard the 911 call. Minutes or
18 seconds after the shooting, Mrs. Constantineau was
19 on the phone saying this is what happened, this is
20 who did it. It was Hot Boy.

21 Is it reasonable that they stopped somewhere
22 between Cross Creek Apartments and the IHOP parking
23 lot and came up with this plan to frame Mykel
24 Johnson? No doubt that someone did shoot at the
25 car. You seen the pictures of broken glass. You

1 seen the puncture holes in the vehicle. This was a
2 real shooter. Mykel Johnson did it. This whole
3 notion of a mismatch of information is simply not
4 true. This idea of fabricating a case based on a
5 motive that some third person was robbed and somehow
6 Frank Babecki is now trying to get even with Mykel
7 Johnson, it just simply doesn't make sense.

8 However, Mr. Erickson did indicate that, uh,
9 there was this robbery or ripping somebody off for
10 drugs. Frank Babecki confirmed it. Assuming that's
11 true, what was in the mind of Mykel Johnson? Car
12 pulls up. Someone asked what happened the other
13 day. For whatever reason -- there's been ample
14 evidence that there was drug distribution involved.
15 Mr. Johnson is not going to go to the police. He
16 does self-help. Pulls a gun. That's how he makes
17 his statement. He fires. Again, calculating
18 actions of an adult.

19 So what I think the case is about -- and my
20 opinions are not evidence, but to me, everything
21 keeps coming back to guns. Whatever your position
22 is on guns, on control or Second Amendment right to
23 have guns, everyone has to agree that guns are
24 prevalent and all over the place. They are a
25 culture. And unfortunately, they all too frequently

Reply by Mr. Stephens

293

1 end up in the hands of someone who should never have
2 a firearm.

3 There's ample evidence that Mr. Johnson had
4 guns. There's ample evidence that he, uh, as Mr.
5 Erickson just said, how he wants to make music when
6 he gets older. Now, I don't know what kind of music
7 he wants to make. Quite frankly, although I don't
8 like it, if he wants to make music that's about
9 selling drugs or shooting at people, that's fine.
10 Because you know what, that's artistic expression.
11 But if you live that out, you lose the line between
12 reality and what's acceptable fantasy if you
13 actually try to live that out, the drugs and the
14 guns. That, I have a problem with, Ladies and
15 Gentlemen.

16 I don't know what was going through Mykel
17 Johnson's mind when he pulled out a gun and he shot
18 at these two victims. The evidence prove he did it.
19 We've met our burden to show that Mykel Johnson
20 attempted to kill these victims. Now, the case is
21 going into your hands. You have the awesome
22 responsibility and the duty to take it into jury
23 deliberations.

24 I know that given his age, you may have
25 sympathies for Mr. Johnson. Ladies and Gentlemen,

1 everyone in this courtroom has a duty. I have a
2 duty to put up a case. Mr. Erickson has his duty.
3 Now, it's time to perform your duties to consider
4 the evidence and to render the appropriate verdict.
5 Consider the evidence, the elements that have to be
6 met, whether the State met its burden. I'm
7 confident again that you will find we have met our
8 burden of proving Mykel Johnson guilty of attempted
9 murder of the victims in this case. Thank you very
10 much.

11 **THE COURT:** Mr. Foreperson and members of the
12 jury, it's now my duty to charge you on the law
13 that's applicable to this case. Now, the defendant
14 has charged -- excuse me. The State has charged the
15 defendant, Mykel Johnson, with two counts of
16 Attempted Murder. I remind you, Ladies and
17 Gentlemen, that the fact that the defendant was
18 arrested, charged and indicted in this case is not
19 evidence in this case, nor does it create any
20 presumption or inference of guilt. These documents
21 are simply the formal written instruments which
22 contain the charges that are made against the
23 defendant. They are the formal documents by which
24 this case is brought into this courtroom.

25 Ladies and Gentlemen, the defendant, Mr.

1 Johnson, has pled not guilty to these indictments
2 and that plea puts the burden on the State to prove
3 that the defendant is guilty beyond a reasonable
4 doubt. Ladies and Gentlemen, a person charged with
5 committing a criminal offense in South Carolina is
6 never required to prove himself innocent. I charge
7 you that it's an important rule of law that the
8 defendant in a criminal trial, no matter what the
9 seriousness of the charge may be, will always be
10 presumed to be innocent of the crime for which an
11 indictment was issued unless guilt has been proven
12 by evidence satisfying you, the jury, of that guilt
13 beyond a reasonable doubt.

14 This presumption of innocence accompanies the
15 defendant throughout the trial until you reach a
16 verdict of guilt based on evidence satisfying you of
17 that guilt beyond a reasonable doubt. The
18 presumption of innocence is not a mere legal theory.
19 It's not just a legal phrase we use. It is a
20 substantial right to which every defendant is
21 entitled unless you, the jury, are satisfied from
22 the evidence of the defendant's guilt beyond a
23 reasonable doubt.

24 Now, what is a reasonable doubt in the law? A
25 reasonable doubt is the kind of doubt that would

1 cause a reasonable person to hesitate to act in
2 their most important decisions. Now, Ladies and
3 Gentlemen, the State has the burden of proving the
4 defendant guilty beyond a reasonable doubt. Now,
5 some of you may have served as jurors in civil cases
6 where you were told that it was only necessary to
7 prove that a fact is more likely true than not true
8 such as what we call the greater weight of the
9 evidence or the preponderance of the evidence. In
10 criminal cases, the State's evidence and proof must
11 be more powerful than that. It must be beyond a
12 reasonable doubt.

13 Proof beyond a reasonable doubt is proof that
14 leaves you firmly convinced of the defendant's
15 guilt. Ladies and Gentlemen, there are very few
16 things in this world that we know with absolute
17 certainty. In criminal cases, the law does not
18 require proof that overcomes every possible doubt.

19 If, based on your consideration of the
20 evidence, you are firmly convinced that the
21 defendant is guilty of the crime charged, you must
22 find him guilty. If, on the other hand, you think
23 there is a real possibility that the defendant is
24 not guilty, you must give the defendant the benefit
25 of the doubt and find him not guilty.

Jury Charge

297

1 I remind you, Ladies and Gentlemen, that during
2 the trial, you and I have certain duties to perform.
3 As the trial judge, it is my responsibility to
4 preside over the trial of this case and I also have
5 the duty to rule on the admissibility of the
6 evidence that's offered during this trial. You are
7 to consider only the competent evidence that is then
8 before you. Ladies and Gentlemen, you are to
9 consider only the testimony which has been presented
10 from the witness stand and any exhibits which have
11 been made a part of the record in this case.

12 Ladies and Gentlemen, I have the additional
13 duty to charge you on the law that's applicable to
14 this case. As the presiding judge, I am the sole
15 judge of the law in this case. It's your duty as
16 jurors to accept and apply the law as I will now
17 state it to you. If you already have an idea as to
18 what the law is or what the law ought to be and it
19 does not agree with what I now tell you the law is,
20 you must abandon this idea because you have sworn to
21 accept the law and apply the law exactly as I have
22 stated to you.

23 Now, Ladies and Gentlemen, in every case tried
24 in this court before a jury, the jury becomes the
25 sole and exclusive judge of the facts in a case.

1 The trial judge can not state, comment, or make any
2 statement to a trial jury about the facts in this
3 case. Since you, the jury, are the sole judge of
4 the facts in this case, you are not to infer from
5 what I said during the progress in this trial in
6 ruling upon the admissibility of evidence or
7 otherwise or anything that I say now during the
8 course of this instruction to you that I have an
9 opinion about the facts in this case. The law does
10 not allow me to have an opinion about the facts of
11 this case. Again, Ladies and Gentlemen, this is a
12 matter solely for you, the jury, to determine.

13 Ladies and Gentlemen, there are two types of
14 evidence that are generally presented in a trial.
15 They are direct evidence and circumstantial
16 evidence. Direct evidence is the testimony of a
17 person who claims to have actual knowledge of a fact
18 such as an eyewitness. It is evidence which
19 immediately establishes the main fact to be proved.
20 Circumstantial evidence is proof of a chain of facts
21 and circumstances indicating the existence of a
22 fact. It is evidence which immediately establishes
23 collateral facts from which the main fact may or may
24 not be inferred. Circumstantial evidence is based
25 on inference and not on personal knowledge or

1 observation.

2 Ladies and Gentlemen, the law makes absolutely
3 no distinction between the weight or value to be
4 given to either direct or circumstantial evidence.
5 Nor is a greater degree of certainty required of
6 circumstantial than of direct evidence. Ladies and
7 Gentlemen, you should weigh all the evidence in this
8 case. After weighing all the evidence, if you are
9 not convinced of the guilt of the defendant beyond a
10 reasonable doubt, you must find the defendant not
11 guilty. If, on the other hand, after hearing all
12 the evidence in this case, if you are convinced of
13 the guilt of the defendant beyond a reasonable
14 doubt, you must find the defendant guilty.

15 Ladies and Gentlemen, necessarily you must
16 determine the credibility of witnesses who have
17 testified in this case. Credibility simply means
18 believability. It becomes your duty as jurors to
19 analyze and to evaluate the evidence and determine
20 which evidence convinces you of its truth.

21 In determining the believability of witnesses
22 who have testified in this case, you may believe one
23 witness over several witnesses or several witnesses
24 over one witness. You may believe a part of the
25 testimony of a witness and reject the remaining part

1 of the testimony of that same witness. You may
2 believe the testimony of a witness in its entirety
3 or reject the testimony of a witness in its
4 entirety. You may consider whether any witness has
5 exhibited to you any interest, bias, prejudice or
6 other motive in this case. And you may also
7 consider the appearance and manner of the witness
8 while on the witness stand.

9 Ladies and Gentlemen, I instruct you and
10 emphasize that the fact that the defendant did not
11 testify is not a factor to be considered by you in
12 any way in your deliberation and in your
13 consideration on the question of the guilt or the
14 innocence of the defendant. It must not be
15 considered by you in any manner whatsoever. A
16 defendant has the constitutional right to remain
17 silent. The assertion of this right must not be
18 considered by you in your deliberations. I repeat,
19 Ladies and Gentlemen, under your oath, you are to
20 draw no conclusions whatsoever from the fact that
21 the defendant in this case did not testify. The
22 fact that this defendant did not testify should not
23 even be discussed in a jury room. The burden of
24 proof, as I have stated to you, is on the State.
25 Ladies and Gentlemen, the defendant is not required

1 to prove his innocence. The burden of proof remains
2 on the State to prove guilt beyond a reasonable
3 doubt.

4 Now, Ladies and Gentlemen, there has been
5 evidence presented that witnesses have made prior
6 statements which are not consistent with the
7 witnesses' present testimony. You may use this
8 evidence to decide whether to believe the witness.
9 You may also use evidence of the earlier
10 contradictory statements to determine the truth of
11 those statements. It's up to you to decide whether
12 to believe the earlier statements or the testimony
13 given at trial.

14 If a witness is shown to have knowingly
15 testified untruthfully concerning any material
16 matter, you may consider this in determining whether
17 to trust the witness' testimony as to other matters.
18 You again may reject all testimony of that witness
19 or give all or part of the testimony the weight you
20 think it deserves.

21 Now, Ladies and Gentlemen, I remind you again
22 that the burden of proof in this trial is on the
23 state. This burden of proof of beyond a reasonable
24 doubt extends to every element of the crime charged
25 and it specifically includes the burden of proving

1 beyond a reasonable doubt the identity of the
2 defendant as the person who committed the crime.

3 Identification testimony is an expression of
4 belief or impression by a witness. You must
5 determine the accuracy of the identification of the
6 defendant. You must consider the believability of
7 each identification witness in the same way as any
8 other witness. You must be satisfied beyond a
9 reasonable doubt of the accuracy of the
10 identification of the defendant before you may find
11 the defendant guilty. On the other hand, if, after
12 examining the testimony, you have a reasonable doubt
13 as to the accuracy of the identification, you must
14 find the defendant not guilty.

15 In order to establish criminal liability,
16 criminal intent is required. For example, the
17 mental state required to be proven by the State for
18 a particular crime might be purpose, intent,
19 knowledge, recklessness or criminal negligence.
20 Criminal intent must be proven by the State beyond a
21 reasonable doubt.

22 Ladies and Gentlemen, criminal intent is always
23 a matter that must be determined by the jury from
24 the circumstances surrounding the situation.
25 There's no way to prove intent to mathematical

1 certainty. There's no way medical science can
2 dissect a person's brain and determine what the
3 person had in mind. So the law says that criminal
4 intent may be inferred from the circumstances shown
5 to have existed at the time. This is how you make a
6 determination of whether or not the element
7 requiring intent was present.

8 It is not necessary to establish intent by
9 direct and positive evidence. Intent may be
10 established by inference in the same way as any
11 other fact by taking into consideration the acts of
12 the parties and all the facts and circumstances of
13 the case based on evidence introduced during the
14 trial of this case. Ladies and Gentlemen, again,
15 criminal intent is a mental state, a conscious
16 wrongdoing. It's up to you to determine what the
17 defendant intended to do based on the circumstances
18 shown to have existed.

19 Ladies and Gentlemen, the defendant is charged
20 in this case with two counts of Attempted Murder. I
21 will go ahead and tell you the requirements or the
22 elements of Attempted Murder. A person who, with
23 intent to kill -- attempts to kill another person
24 with malice aforethought either expressed or implied
25 commits the offense of attempted murder. Ladies and

1 Gentlemen, an attempt is an effort to accomplish a
2 crime which does not succeed. An attempt includes a
3 specific intent to do a particular criminal act
4 along with an act falling short of the act intended.
5 The State must show more than mere preparation in
6 intent. There must be some overt act committed in
7 an effort to commit the crime.

8 Ladies and Gentlemen, intent means intending
9 the result which actually occurs, not accidentally
10 or involuntary. Intent may be shown by acts and
11 conduct of the defendant and other circumstances
12 from which you may naturally and reasonably infer
13 intent.

14 Ladies and Gentlemen, malice is hatred, ill-
15 will or hostility towards another person. It is the
16 intentional doing of a wrongful act without just
17 cause or excuse and with an intent to inflict an
18 injury or under circumstances that the law will
19 infer an evil intent. Ladies and Gentlemen, malice
20 aforethought does not require that malice exist for
21 any particular time before the act is committed.
22 But malice must exist in the mind of the defendant
23 just before and at the time that the act is
24 committed. Therefore, there must be a combination
25 of the previous evil intent and the act.

1 Ladies and Gentlemen, malice aforethought may
2 be expressed or inferred. Now, these terms
3 expressed or inferred do not mean different types of
4 malice but merely the manner in which malice may be
5 shown to exist, that is, either by direct evidence
6 or by inference from the facts or circumstances
7 which are proved beyond a reasonable doubt.

8 Ladies and Gentlemen, expressed malice is shown
9 when a person speaks words which express hatred or
10 ill-will for another person or when the person
11 prepared beforehand to do the act which was later
12 complained of or accomplished. For example, lying
13 in wait for a person or any other acts of
14 preparation going to show that the deed was within
15 the defendant's mind would be expressed malice.
16 Malice may be inferred, Ladies and Gentlemen, from
17 conduct showing a total disregard for human life.
18 Inferred malice may also arise when the deed is done
19 with a deadly weapon.

20 A deadly weapon is an article, instrument or
21 substance which is likely to cause death or great
22 bodily harm. Ladies and Gentlemen, whether an
23 instrument has been used as a deadly weapon depends
24 on the facts and circumstances of each case. I
25 charge you, Ladies and Gentlemen, that the following

1 are examples of instruments which may be deadly
2 weapons: a pistol, a shotgun, a rifle, a dirk, a
3 dagger, a knife, lighter fluid. Ladies and
4 Gentlemen, also a gun may be a deadly weapon even if
5 it is not operating.

6 Now, Ladies and Gentlemen, the defendant in
7 this case has raised the defense of alibi. In order
8 to establish an alibi, it must be shown the
9 defendant was at another specified place at the time
10 the crime was committed and that it was therefore
11 impossible for the defendant to have been at the
12 scene of the crime. Mere denial of presence at the
13 scene of a crime does not constitute an alibi.

14 Ladies and Gentlemen, there is no burden on the
15 defendant to prove an alibi. The burden is on the
16 State to prove beyond a reasonable doubt that the
17 defendant was actually present at the scene of the
18 crime and actually participated in it and was not
19 somewhere else. In other words, the State has the
20 burden of disproving the defendant's alibi defense.

21 Ladies and Gentlemen, during the course of this
22 trial, you have been allowed to take notes. I
23 charge you that your notes should be used only as
24 aids to your memory and should not be allowed to
25 take precedence over your independent memory of

1 facts. Ladies and Gentlemen, the notes are only for
2 the jury's personal use in refreshing recollection
3 of the evidence.

4 When in deliberations at the end of the case,
5 do not rely on the recollection of a juror who took
6 notes about the testimony of a witness solely
7 because the juror took notes. You should not be
8 unduly influenced by the notes of other jurors. As
9 well, we all know notes can be wrong. Ladies and
10 Gentlemen, notes are not entitled to any greater
11 weight than each juror's memory of the evidence.
12 Those jurors who do not take notes should rely on
13 their independent recollection of the evidence and
14 not be influenced by the fact that another juror has
15 taken notes.

16 Keep in mind, Ladies and Gentlemen, that every
17 word spoken in this courtroom is recorded verbatim
18 and can be replayed for you during your
19 deliberations if necessary. Ladies and Gentlemen,
20 if there is a discrepancy between a juror's
21 recollection of the evidence and the juror's notes,
22 you, the jury should request a read back of the
23 record. The Court's transcript prevails over a
24 juror's notes. Ladies and Gentlemen, I remind you
25 that your notes are not a substitute for the

1 official record or for the governing principles of
2 law which I am going to further charge you.

3 Now, Mr. Foreperson and members of the jury, I
4 have now charged you on the law that's applicable to
5 this case in order to help guide you a fair and just
6 result. You are the judges of the facts in this
7 case. Based on your determination of the facts in
8 this case and the law as I have explained it to you,
9 you will soon begin your deliberations.

10 Ladies and Gentlemen, you have been selected as
11 fair and impartial jurors. You are sworn to fairly
12 and impartially try and determine the facts in this
13 case. When you comply with your oath to do so, no
14 one can criticize your verdict. Ladies and
15 Gentlemen, you are to decide the case based solely
16 on the testimony you have heard from the sworn
17 witnesses who have testified for you along with the
18 evidence in this case and exhibits presented to you
19 which you will have back in the jury room.

20 Ladies and Gentlemen, you must decide the
21 issues in this case without any bias or prejudice
22 towards either party. You can not allow yourself to
23 be governed by prejudice for or against any person
24 by public opinion or by any other arbitrary factor.
25 Both the defendant and the State have the right to

1 expect that each of you will be careful -- that will
2 carefully and impartially consider all the evidence
3 in this case and that you will follow the law as I
4 have instructed to you in reaching your verdict in
5 this case.

6 And to that end, Mr. Foreperson, my law clerk
7 has prepared a verdict form. It simply has across
8 the top the State of South Carolina, county of
9 Beaufort. The State of South Carolina again versus
10 Mykel Johnson. And it has the indictment numbers.
11 There are two questions on this verdict form, Mr.
12 Foreperson. You must find a verdict on each
13 question. The first is as to indictment 2011-GS-07-
14 2269, the charge of Attempted Murder against Frank
15 Babecki, we, the jury, unanimously find the
16 defendant, Mykel Johnson, either not guilty or
17 guilty. The second question says the same thing as
18 to the second victim, Desiree Constantineau. Ladies
19 and Gentlemen, please don't get the order that I
20 placed, guilty or not guilty, as having any
21 significance whatsoever. Every trial, I just
22 reverse them.

23 All right. Mr. Foreperson, under that, there
24 is a certification that this is the unanimous
25 verdict of the jury, it is the verdict of all 12

1 jurors. I ask that you sign the form and date it.
2 And when you have reached a verdict, Mr. Foreperson,
3 I ask that you knock on your jury room door and we
4 will accept you back into the courtroom to accept
5 your verdict. All right.

6 Ladies and Gentlemen, for the very last time, I
7 am going to send you back to your jury room and I'm
8 going to tell you not to begin deliberating. I'm going
9 to ask the attorneys if there's anything further
10 that they want me to charge you. If there is, I'm
11 going to bring you back out and charge you further.
12 If not, I'm going to send back with the bailiff this
13 verdict form and all the evidence that's come into
14 the case. And that is going to be your signal to
15 begin your deliberations. All right? Thank you,
16 Ladies and Gentlemen. I appreciate it. I hope
17 lunch is coming soon. I will be with you very
18 shortly. Thank you.

19 (WHEREUPON, the jury exits at approximately
20 2:48 p.m.)

21 **THE BAILIFF:** The jury is clear, Your Honor.

22 **THE COURT:** All right. Any exceptions or
23 additions?

24 **MR. STEPHENS:** Just one question, Your Honor.

25 **THE COURT:** Yes.

1 **MR. STEPHENS:** I heard the charge on prior
2 inconsistent statement. I didn't -- don't believe I
3 heard anything on prior inconsistent statement. I
4 don't know if the evidence -- I didn't put on prior
5 inconsistent statement. I don't know if the
6 evidence called for it.

7 **THE COURT:** I don't think it called for it.

8 **MR. STEPHENS:** Does that require some
9 allegation of recent fabrication?

10 **THE COURT:** Right, and I don't think we're
11 there.

12 Anything, Mr. Erickson?

13 **MR. ERICKSON:** No additions.

14 **THE COURT:** All right. Gentlemen, I want you
15 to go through and make sure that the evidence is
16 marked and what's going in and let's get it back to
17 them. Okay. And we will be at ease.

18 (WHEREUPON, deliberation of the jury commenced.)

19 (WHEREUPON, the alternate juror is dismissed.)

20 **THE BAILIFF:** Jury entering, Your Honor.

21 **THE COURT:** Thank you.

22 (WHEREUPON, the jury enters the courtroom.)

23 **THE BAILIFF:** The jury is seated.

24 **THE COURT:** Mr. Foreperson, I understand
25 you've reached a verdict.

1 **THE JUROR:** Yes, we have, Your Honor.

2 **THE COURT:** Please pass it to the bailiff,
3 sir.

4 **(WHEREUPON,** the verdict forms are handed to the
5 Court.)

6 **THE COURT:** Would you please publish the
7 verdict?

8 **THE CLERK:** State of South Carolina, county
9 of Beaufort, the State of South Carolina versus
10 Mykel Johnson as to indictment number 2011-GS-07-
11 02269, the charge of Attempted Murder against Frank
12 Babecki, we, the jury, unanimously find the
13 defendant, Mykel Johnson, guilty. As to indictment
14 number 2011-GS-07-02270, the charge of Attempted
15 Murder against Desiree Constantineau, we, the jury,
16 unanimously find the defendant, Mykel Johnson,
17 guilty.

18 **THE COURT:** Thank you.

19 Ladies and Gentlemen, of the jury, if this is
20 your verdict, will you please indicate by raising
21 your right hands?

22 **(WHEREUPON,** each juror responds.)

23 **THE COURT:** Thank you. All the jurors have
24 raised their right hand. Is there anything further
25 required with this jury from the State?

1 **MR. STEPHENS:** Not from the State, Your
2 Honor. Thank you.

3 **THE COURT:** From the defense?

4 **MR. ERICKSON:** Nothing, Your Honor.

5 **THE COURT:** Ladies and Gentlemen, I get to
6 send you away with my thanks. You not only have
7 resolved this case, uh, for us, but additionally,
8 when I start a week, I have a number of cases that
9 are on the roster. And we are able, because we have
10 jurors willing to sit and hear these cases, be able
11 to resolve those cases by either guilty pleas or
12 other means.

13 Please understand how much we appreciate your
14 good work here. You all have been a wonderful jury,
15 very attentive. Y'all have been very diligent. I
16 apologize there has been some waiting in this case.
17 Of course, it was to make sure that we put the best
18 evidence for you -- forward for you and gave
19 everyone a fair opportunity to present their case.

20 Ladies and Gentlemen, at this time, I will tell
21 you you are permitted to discuss this case with
22 people if you choose. Sometimes the attorneys or a
23 witness may want to know what you thought or you are
24 permitted to go home and tell a family member what
25 you were doing out here for the last three days. Of

1 course, you are never required to talk to anyone
2 about this. If someone persists, I want you to call
3 to the Clerk's office and just let me know who that
4 person is and I will go take care of them.

5 All right. You have earned your jury exemption
6 certainly for the next three years up here in
7 circuit court. I can't take care of anything in a
8 lower court. Again, Ladies and Gentlemen, thank you
9 for being here. Thank you for your attention. At
10 this time, you are excused for the remainder of the
11 week. Thank you.

12 (WHEREUPON, the jury exits the courtroom.)

13 THE BAILIFF: Jury is clear and the door is
14 closed, Your Honor.

15 THE COURT: Thank you. All right. Mr.
16 Erickson, we need to go ahead and sentence your
17 client.

18 MR. ERICKSON: I just want to renew post-
19 trial motions?

20 THE COURT: Sir?

21 MR. ERICKSON: I just want to renew my motion
22 for directed verdict based on the same grounds also
23 motion for JNOV and motion for new trial and motion
24 for an appeal bond.

25 THE COURT: All right. Well, respectfully, I

1 do think there was evidence in which this jury could
2 and did find your client guilty. Additionally, I
3 deny your motion for a new trial. And lastly, I'm
4 going to go ahead and sentence him and I'm not going
5 to give him an appeal bond. As you know, he is
6 facing up to 60 years of prison on these charges.
7 We need to go forward. We need to sentence him.
8 After that, you can file your appropriate appeals
9 and whatever else you need to.

10 **MR. ERICKSON:** Yes, ma'am.

11 **THE COURT:** All right. Again, what is his
12 prior record? And I know he is a juvenile. So I
13 don't know if there's anything.

14 **MR. STEPHENS:** Yes, Your Honor. He's got
15 prior juvenile convictions. I'm not sure what they
16 term them for. Resisting Arrest in 2011, Your
17 Honor. Armed Robbery that was pled to. A Juvenile
18 in Possession of a Handgun in 2010, Your Honor.
19 I'll hand up those convictions, Your Honor.

20 **THE COURT:** Okay. No, I'm fine.

21 Mr. Erickson, what do you want to say about
22 your client?

23 **MR. ERICKSON:** I want to say that he's still
24 a juvenile at age 16. I'm sorry the Court had to
25 treat him as an adult. His mind is still

1 developing. This is a tough situation, obviously,
2 for him and his mother who are very close. Mr.
3 Johnson had all -- for intents and purposes had the
4 desire to complete his GED and go on to try to have
5 some kind of a music career.

6 I guess when you look at the facts of this
7 case, the fact that nobody was actually injured or
8 killed, I think that is some mitigation to this
9 lengthy 60-year potential sentence. That's probably
10 the best thing that happened in this case that
11 nobody died or got injured. I don't know if my
12 client wants to say anything.

13 **THE COURT:** Would you like to say anything,
14 Mr. Johnson?

15 **MR. JOHNSON:** I just want to say I'm sorry,
16 you know, even though I'm innocent. I'm sorry that
17 that even happen to the victims, but I ain't the one
18 who did it. I do want to say I want continue still
19 to finish school and get my GED and become a
20 successful citizen. I ask you can you please have
21 leniency.

22 **THE COURT:** I need a sentencing sheet.

23 **MR. STEPHENS:** Your Honor, I'm handing up the
24 sentencing sheets.

25 **THE COURT:** Mr. Erickson, I agree with you.

1 The best thing out of this entire situation is that
2 no one was injured and I do think that's a
3 mitigating circumstance. I agree with you. I also
4 know that he is 16 years of age. That's very young.
5 However, of course, these are very serious charges.
6 As you know, each one carries up to 30 years. The
7 significance -- I think he's understood from the
8 beginning, quite frankly, in one of the jail phone
9 calls. He said it to his mother. I'm looking at 60
10 years in prison.

11 On indictment number 2011-2269, it is for
12 Attempted Murder, the sentence of this Court is you
13 be committed to the Department of Corrections for a
14 period of 15 years. Indictment number 2011-2270,
15 again for Attempted Murder, the sentence of this
16 Court is you be committed to the Department of
17 Corrections for a period of 15 years. Those are to
18 run concurrent to each other. Obviously, I've given
19 you time that you've served since you been arrested
20 on this. Good luck to you, sir.

21 **MR. STEPHENS:** Thank you, Your Honor.

22 **MR. ERICKSON:** Thank you, Your Honor.

23 **THE COURT:** All right. Is there anything
24 else on this case that we need to put on the record?

25 **MR. STEPHENS:** Your Honor, nothing from the

1 State. Mr. Erickson just stepped back with his
2 client.

3 THE COURT: All right. Tell him to come on
4 back. He can go back again afterwards.

5 Mr. Erickson, I just wanted to make sure there
6 was nothing further that we need to put on the
7 record for you in regards to this case. They are
8 welcome to let you go back and speak with your
9 client further. Is there anything else, sir?

10 MR. ERICKSON: No, ma'am.

11 THE COURT: Okay. Well, we'll go ahead and
12 be at ease in this courtroom.

13 (END OF PROCEEDING)
14
15
16
17
18

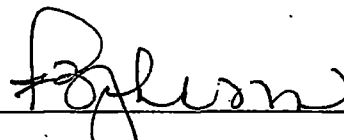
CERTIFICATE

319

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

I, the undersigned, Teresa B. Johnson, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Beaufort, South Carolina, on this 30th day of December, 2012.

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

A handwritten signature in dark ink, appearing to read 'T. B. Johnson', is written over a horizontal line.

Teresa B. Johnson

Circuit Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MYKEL JOHNSON,

APPELLANT

APPELLATE CASE NO. 2012-212478

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

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

ATTORNEY 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.....

PETITION TO BE RELIEVED AS COUNSEL

TABLE OF AUTHORITIES

Cases

<u>Doyle v. Ohio</u> , 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)	5, 6
<u>Edmond v. State</u> , 341 S.C. 340, 534 S.E.2d 682, 685 (2000)	5
<u>Fletcher v. Weir</u> , 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982)	6
<u>State v. Bell</u> , 347 S.C. 267, 554 S.E.2d 435 (Ct.App.2001)	6
<u>State v. Weston</u> , 367 S.C. 279, 625 S.E.2d 641 (2006)	6
<u>Wainwright v. Greenfield</u> , 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986)	5

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to strike testimony from the investigator that Appellant did not want to talk and wanted the representation of an attorney because the testimony constituted an improper comment on Appellant's constitutional right to remain silent and right to an attorney?

STATEMENT OF THE CASE

In December of 2011, the Beaufort County Grand Jury indicted Johnson for two counts of attempted murder, indictments #2011-GS-70-2269, 2270. On June 18, 2012, Johnson proceeded to jury trial before the Honorable Carmen t. Mullen. Attorney Eric Erickson represented Johnson at trial. Attorney Jeffrey S. Stephens prosecuted the case on behalf of the State. The jury returned verdicts of guilty and Judge Mullen sentenced Johnson to fifteen (15) years concurrent for each charge. A timely notice of intent to appeal was served on June 28, 2012. This appeal follows.

ARGUMENT

The trial judge erred in failing to strike testimony from the investigator that Appellant did not want to talk and wanted the representation of an attorney because the testimony constituted an improper comment on Appellant's constitutional right to remain silent and right to an attorney.

The jury found Appellant guilty of shooting at Desiree Constantineau and Frank Babecki as they were driving out of their apartment at the Cross Creek Apartment Complex. The Appellant, Johnson, also lived in the apartment complex and Babecki admitted that he purchased marijuana from Johnson. (R. p. 181, lines 2-7). Both Constantineua and Babecki identified Johnson as the shooter. (R. p. 174, line 20 – p. 175, lines 1-2; p. 202, line 4 – p. 203, lines 1-22).

Investigator Joshua Dowling with the Beaufort Police Department investigated the incident. At trial Investigator Dowling testified that after Johnson was taken into custody, "Mr. Johnson did not want to talk. He wanted the representation of an attorney when we asked him for his side of the story. From the defendant's side, we did not develop any information." (R. p. 103, lines 13-16). During a pre-trial hearing Investigator George Erdel with the Beaufort Police Department testified that Johnson was mirandized before invoking his rights. (R. p. 24, lines 3-13). The judge erred in failing to strike Investigator Dowling's comments on Appellant's invocation of the right to remain silent and the right to an attorney.

In Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), the United States Supreme Court held that the due process clause of the Fourteenth Amendment is violated when a state prosecutor seeks to impeach a defendant's exculpatory story, told for the first time at the trial, by cross-examining him about his post-arrest silence after receiving Miranda warnings. Doyle also prohibits the State from commenting upon the defendant's request for an attorney. See Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986); Edmond v. State, 341 S.C. 340, 345, 534 S.E.2d 682, 685 (2000). The rationale for Doyle is

that it would be a violation of due process to allow comment on the silence which Miranda warnings have encouraged.

Subsequent to Doyle, in Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982), the Supreme Court clarified that Doyle was applicable only in situations in which the government had induced, via Miranda warnings, a defendant's belief that his exercise of a constitutional right would not be used against him. 455 U.S. at 607, 102 S.Ct. 1309 ("in the absence of the sort of affirmative assurances embodied in the Miranda warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to post arrest silence when a defendant chooses to take the stand.") See also State v. Bell, 347 S.C. 267, 554 S.E.2d 435 (Ct.App.2001) (recognizing that Doyle is applicable only after Miranda warnings have been given).

State v. Weston, 367 S.C. 279, 291-292, 625 S.E.2d 641, 648 (2006).

Investigator Dowlings testimony constituted a Doyle violation as the testimony was an improper comment on appellant constitutional right to remain silent and right to an attorney. The judge's failure to strike and give a curative instruction to the jury requires reversal of the conviction and sentence.

CONCLUSION

Based on the above argument the conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of August, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort CountyCarmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MYKEL JOHNSON,

APPELLANT

APPELLATE CASE NO. 2012-212478

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Mykel Johnson states:

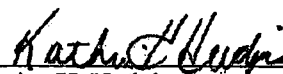
1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. She has reviewed the record of appellant's trial before Judge Carmen T. Mullen, which was held on June 20, 2012, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Mykel Johnson.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of August, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MYKEL JOHNSON,

APPELLANT

APPELLATE CASE NO. 2012-212478

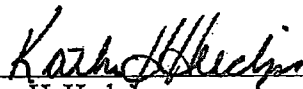
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments and sentencing sheets;
- (2) Entire trial transcript.

I certify that this designation contains no matter which is irrelevant to this appeal.

August 19th, 2013.



Kathrine H. Hudgins
Appellate Defender

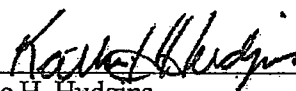
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

August 19, 2013



Kathrine H. Hudgins
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 Beaufort County
Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MYKEL JOHNSON,

APPELLANT

APPELLATE CASE NO. 2012-212478

CERTIFICATE OF SERVICE

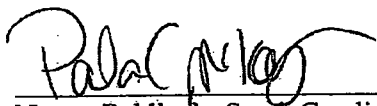
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Mykel Johnson, # 351916 at Lee Correctional Institution, 990 Wisacky Hwy. Bishopville, SC 29010 this 19th day of August, 2013,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of August, 2013.



(L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

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

The State, Respondent,

v.

Mykel Johnson, Appellant.

Appellate Case No. 2012-212478

Appeal From Beaufort County
Carmen T. Mullen, Circuit Court Judge

Unpublished Opinion No. 2014-UP-134
Submitted February 1, 2014 – Filed April 2, 2014

APPEAL DISMISSED

Appellate Defender Kathrine Haggard Hudgins, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General Salley W. Elliott,
both of Columbia; and Solicitor Isaac McDuffie Stone,
III, of Bluffton, for Respondent.

PER CURIAM: Dismissed after review pursuant to *Anders v. California*, 386 U.S. 738 (1967). Counsel's motion to be relieved is granted.¹

APPEAL DISMISSED.

FEW, C.J., and SHORT and GEATHERS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

April 18, 2014

The Honorable Jerri Ann Roseneau
PO Box 1128
Beaufort SC 29901-1128

REMITTITUR

Re: The State v. Mykel Johnson
Lower Court Case No. 2011GS0702269, 2011GS0702270
Appellate Case No. 2012-212478

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Mykel Johnson, 351916
Salley W. Elliott, Esquire
Alan McCrory Wilson, Esquire
Kathrine Haggard Hudgins, Esquire
Isaac McDuffie Stone, III, Esquire

RECEIVED

APR 21 2014

SC OFFICE OF
APPELLATE COUNSEL

AW 1335

2014 CP0701759

FORM 5

STATE OF SOUTH CAROLINA

2014 JUL 21 PM 4:01

IN THE COURT OF COMMON PLEAS

COUNTY OF Beaufort

BEAUFORT COUNTY, S.C.

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

v.

State of South Carolina

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 Beaufort county
2. Name and location of Court which imposed sentence Beaufort county
3. Name(s) of co-defendant(s) (if any) NO co-defendants
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2011 G.S. 0762269
 - (b) 2011 G.S. 0762270
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) June 20, 2012 15 years run concurrent
 - (b) _____

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty Jury trial
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Conviction YES & APPEALED
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. The court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Dismissed in the court of Appeals
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. April 4
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) I answered yes to number (7)
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: INEFFECTIVE ASSISTANCE OF COUNSEL

- (a) _____
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) My lawyer didn't probably represent me at trial
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? Court of Appeals
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? This is my 1st P.C.R.
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? Already specified in (B)
- (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. Direct Appeal.
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. ~~SC~~ The court of Appeals Columbia
- ii. SC
- iii. _____
- iv. _____
- (c) the disposition thereof:
- i. W/A
- ii. _____
- iii. _____

- iv. _____
- (d) the date of each such disposition:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- NO
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. N/A This is my 1st P.C.R
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. N/A
- ii. _____
- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) NO the grounds have not ^{been} presented. Because
- (b) this my 1st P.C.R
- (c) _____
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? Yes my trial.
- (c) your sentencing? _____
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? MY Appeal.
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Direct Appeal.

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. Eric Ericson Beaufort County At my trial.
 - ii. Kathrine Haggard Hudgins of Columbia. for
 - iii. the courts of appeal.
- (b) the proceedings at which each such attorney represented you:
 - i. Eric Ericson At my trial.
 - ii. Kathrine Haggard Hudgins on my Appeal.
 - iii. _____

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

A new trial. or VACATED ~~some~~ sentence or a time cut

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

NO

STATE OF SOUTH CAROLINA)

County of)

VERIFICATION

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.

Mykel Johnson

SWORN to and subscribed before me this 15th
day of July, 2014.

[Signature] (L.S.)
Notary Public

My Commission Expires: 09/10/2023

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

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.

~~XXXXXXXXXXXXXXXXXXXX~~
Mikael Johnson

Applicant

SWORN or affirmed to and subscribed before me this

15th day of July, 2014.

[Signature]
Notary Public

My Commission Expires: 09/10/2023

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Mykel Johnson, #351916,

2014-CP-07-1759

Applicant,

v.

RETURN

State of South Carolina,

Respondent.

Respondent, making its Return to the application for post-conviction relief (PCR) filed July 21, 2014, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. The Applicant was indicted at the December 2011 term of the Beaufort County Grand Jury for two (2) counts of Attempted Murder (2012-GS-07-2269, 2270). Eric Erickson, Esquire, represented him. The Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted. The Honorable Carmen T. Mullen sentenced Applicant to incarceration for fifteen (15) years for each count of Attempted Murder, with the sentences to run concurrently.

A notice of appeal was filed on Applicant's behalf and an appeal perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Johnson, 2014-UP-134 (Filed on April 2, 2014). The Remittitur was issued on April 18, 2014.

Attached herewith and incorporated herein are the records of the Beaufort County Clerk of Court regarding the subject conviction(s), Applicant's records from the South Carolina

Department of Corrections, the application, and the record on appeal. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "My lawyer didn't probably(sic) represent me at trial."

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

III.

Respondent's interpret Applicant's allegation as ineffective assistance of counsel. In a post-conviction relief action, 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, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced 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).

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

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

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held on Applicant's allegations.

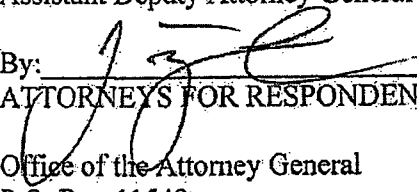
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Deputy Attorney General

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

January 29, 2016.

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

MYKEL JOHNSON, #35196

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2014-CP-07-1759

AFFIDAVIT OF SERVICE BY MAIL

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:

James K. Falk, Esq.
 Falk Law Firm, LLC
 PO Box 1058
 Charleston, SC 29402

DATED this 29th day of January, 2016.


 Elizabeth McLellan, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA
FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT
COURT OF COMMON PLEAS
CASE NUMBER 2014-CP-07-01759

MYKEL D. JOHNSON

APPELLANT

VERSUS

MAY 17, 2016

TRANSCRIPT OF POST-CONVICTION RELIEF HEARING
BEAUFORT, SOUTH CAROLINA

STATE OF SOUTH CAROLINA

APPELLEE

B E F O R E:

HON. BROOKS P. GOLDSMITH, JUDGE

WANDA H. ROWE, CVR-M
OFFICIAL COURT REPORTER

APPEARANCES

ON BEHALF OF APPELLANT
MYKEL D. JOHNSON:

HON. JAMES K. FALK
FALK LAW FIRM, LLC
30 BROAD STREET, SUITE 350
POST OFFICE BOX 1058
CHARLESTON, SOUTH CAROLINA 29402-1058
843-606-6007
jfalklaw@gmail.com

ON BEHALF OF APPELLEE
STATE OF SOUTH CAROLINA:

HON. J. RUTLEDGE JOHNSON
ASSISTANT ATTORNEY GENERAL
POST OFFICE BOX 11549
COLUMBIA, SOUTH CAROLINA 29211-1549
803-734-3693
rjohnson@scag.gov

INDEX

Caption.....	1
Appearances.....	2
Index.....	3
By the Court.....	4

ERIC ERICKSON

Direct Examination	
By Mr. Falk.....	5
Cross-examination	
By Mr. Johnson.....	34
Re-direct Examination	
By Mr. Falk.....	40

MYKEL D. JOHNSON

Direct Examination	
By Mr. Falk.....	42
By the Court.....	43

ATTACHMENTS

Certificate of Reporter.....	50
Keyword Index	
No exhibits were admitted.	

5-17-16 JOHNSON V STATE

BY THE COURT

1 BEGINNING 9:42 A.M.

2 BY THE COURT:

3 MR. JOHNSON: May it please the Court, your Honor?
4 This is Mykel Johnson versus the State of South
5 Carolina. It's Case Number 2014-CP-07-01759. Mr.
6 Johnson was indicted at the December 2011 term of the
7 Beaufort County Grand Jury for two counts of attempted
8 murder. Eric Erickson, Esquire, represented him. He
9 proceeded to jury trial, pursuant to which he was found
10 guilty as indicted. I believe that would be on June 18
11 through June 20, 2012. The Honorable Carmen T. Mullen
12 sentenced him to confinement for fifteen years for each
13 count of attempted murder, both charges to run
14 concurrently. A notice of appeal was filed on his
15 behalf, and an appeal was perfected. The Court of
16 Appeals confirmed his conviction and sentence. On April
17 2, 2014, the remittitur was thereafter issued on April
18 18, 2014. He filed this immediate action on July 21,
19 2014. The State filed its return on January 29, 2016.
20 And he is represented here today by Mr. Jim Falk.

21 THE COURT: Mr. Falk.

22 MR. FALK: Yes, your Honor. We would like to call
23 Mr. Erickson to the stand.

24 THE COURT: All right.

25 MR. FALK: May I bring my documents up?

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 THE COURT: You may.

2 MADAM CLERK: Place your left hand on the Bible and
3 raise your right. Do you solemnly swear or affirm that
4 the testimony you give to the Court in this case, shall
5 be the truth, so help you God?

6 ERIC ERICKSON: I do.

7 MADAM CLERK: You may be seated.

8 ERIC ERICKSON, DIRECT EXAMINATION

9 BY MR. FALK:

10 Q Mr. Erickson.

11 A Good morning.

12 Q Good morning. Could you explain to the Court how
13 you became involved with my client.

14 A Well, I was privately retained by his mother, and
15 went from there.

16 Q Okay. I didn't know if you were appointed to the
17 case or privately retained.

18 A Private.

19 Q Okay. And how much time did you spend with Mr.
20 Johnson? He was in custody at the time; was he not?

21 A That's correct. I'll have to pull my file. I did
22 a number of jail visits, and I can add those up to get
23 some kind of time. I first did a jail visit on January
24 10, and second one was January 18. February 2nd was the
25 third one.

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 Q Is this 2012?

2 A 2012, correct. Jail visit number 4 was, looks
3 like, February 10. Jail visit number 5 was February
4 22nd.

5 Q During those visits, was there a discussion about
6 an alibi witness?

7 A Yes, there was.

8 Q What kind of discussion did you have? Did he give
9 you a list of people who would be alibi witnesses?

10 A Yes. And I believe we called one as an alibi
11 witness. I believe that was Malcolm Moore.

12 Q Does the name Josh Talley ring a bell?

13 A He was the police officer for Beaufort City.

14 Q And Kendale Simmons?

15 A Yes, he was another one of Mr. Johnson's friends
16 and possible alibi witnesses.

17 Q Okay. Because that was the -- that was the alibi
18 witness that you had called, is it not? Kendale
19 Simmons?

20 A I'd have to look at the record. I know I called
21 one of the two.

22 Q Okay.

23 A I have more jail visits if you want to let me
24 continue as far as your first question.

25 Q No, I think we're okay.

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 A Okay.

2 Q Now, as far as your conversation about Kendale
3 Simmons, he was in custody at that time. Is that
4 correct?

5 A Correct.

6 Q Did you speak with him while he was in custody?

7 A Umm.

8 Q Did you speak with his alibi witness?

9 A I'd have to -- I'd have to check my notes on that.
10 Which one you talking about? Malcolm Moore or Kendale
11 Simmons?

12 Q Kendale Simmons.

13 A I -- I have a note where I received an email from
14 Kendale about the alibi on February 28, 2012.

15 Q But you don't recall whether or not you spoke to
16 him?

17 A Not without referring to my notes. Like I said,
18 there was an email from him. Could I come back to that?
19 Cause I'll look through it.

20 Q Well, do you recall any conversations other than my
21 client suggesting that Kendale Simmons would be an alibi
22 witness? Do you recall any conversations you had with
23 my client about Mr. Simmons?

24 A Do I recall any conversations with Mr. Simmons?

25 Q Yes.

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 A Other than that email, I haven't found anything
2 yet. I know I have some notes that Mr. Johnson wanted
3 me to call Malcolm Moore. That was in jail visit number
4 -- number 16. And I did call Malcolm Moore. I'm still
5 trying to find Kendale Simmons, whether or not I had
6 discussions with him. I can't answer your question with
7 Kendale Simmons, other than that email I received from
8 him.

9 Q Can you recall asking my client whether or not he
10 had any conversations with Kendale Simmons after his
11 arrest?

12 A Not exactly.

13 Q Is it safe to say that, when Mr. Simmons came to
14 testify, that, that somewhat backfired on the defense?

15 A I don't know why the jury did not accept that
16 alibi. I do have a note, sir, where Malcolm Moore and
17 Kendale Simmons came to my law office to discuss the
18 alibi. That was at 5:30 in the afternoon on March the
19 19th, 2012.

20 Q Okay. Do you have a copy of the transcript up
21 there?

22 A I do.

23 Q Would you look at Page 263 there. The State
24 interviewed Malcolm Moore as their rebuttal witness.

25 A I'm on Page 263, Line --

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 Q Starting with Line 22. If you could kind of just
2 look through those -- his testimony -- that whole --
3 goes from 263 through 265.

4 A Okay.

5 Q Would it appear that the State's rebuttal witness
6 somewhat took the wind out of Mr. Simmons' testimony,
7 where it shows -- where it relates that there was a jail
8 call between the two? Between Mr. Moore and Mr.
9 Simmons.

10 A Where do you see that jail call? I see where they
11 visited.

12 Q Line 24, where there was a comment from Mr. --
13 well, there's a reference to the comment, and it's
14 earlier in the transcript that do you recall -- you were
15 referring to a comment made by Mr. Simmons -- excuse me
16 -- by Mr. Johnson that Kendale Simmons' testimony had to
17 be straight?

18 A Yes, I see that.

19 Q And then, there were prior copy -- there's prior
20 discussions about Mr. Moore and conversations about Mr.
21 Simmons' testimony and that it had to be straight.

22 A I see that.

23 Q Do you think that that -- and the prosecution was
24 aware of that because they reviewed the jail tapes. Is
25 that correct?

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 A Correct.

2 Q Okay. Did you have an opportunity to review those
3 jail tapes prior? I mean, is it possible, right? those
4 400 jail tapes?

5 A Right. It's safe to say I did not review all of
6 them.

7 Q Okay. But is it safe to say that, when you call an
8 alibi witness who then looks as though he's been -- his
9 credibility's been challenged, is that certainly -- is
10 it a detrimental effect on the case?

11 MR. JOHNSON: Objection, your Honor. That calls
12 for speculation, and that's the ultimate question for
13 this Court to decide, not for a witness to opine upon.

14 A I -- I just know that --

15 THE COURT: Hold on just one second.

16 MR. FALK: I'm not sure if he's not qualified to
17 render that opinion. He certainly can render an opinion
18 on an expert -- on an ultimate issue of a case. I'm
19 just asking if he thinks the fact that his alibi witness
20 had took a great deal of effort to get into the Court,
21 that he testified that, yeah, I was with Mr. Johnson;
22 and then, all of a sudden, there's testimony that the
23 jury's made aware of the fact that there's communication
24 between two people; and it sounds as though Mr. Johnson
25 was trying to set up this alibi, you know, tell the

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 alibi witness what to say. So, I think when you have an
2 alibi witness, then, all of a sudden it shows up that
3 person is lying, I think that that has a problem with
4 your case. I think he could opine to that.

5 MR. JOHNSON: Your Honor, that sounds to me like
6 he's trying to render an expert testimony. And under
7 *Green versus State* in this state, there are no legal
8 experts in PCR, and I would ask you to strike his
9 testimony -- or strike the question and not allow the
10 testimony.

11 THE COURT: I've overruled the objection. I'll
12 allow the witness to answer the question, if the witness
13 can.

14 MR. FALK: Thank you, your Honor.

15 BY MR. FALK:

16 A Well, sir, if you're referencing the term straight,
17 I think that has more than one meaning, really. It
18 could mean what you're suggesting, and it could also
19 mean you have to tell the truth.

20 Q Okay. All right. So, this is a case that had a --
21 that the two alleged victims in the case made
22 identifications. Is that correct?

23 A Correct.

24 Q Or one of the witnesses -- one of the victims did?

25 A One did.

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 Q Okay. And that was a -- they identified them
2 through a photo pack. Is that correct?

3 A Photo lineup.

4 Q Yeah, okay. And that was Mr. -- I cannot --

5 A Frank Babecki.

6 Q Babecki. He identified my client. Is that
7 correct?

8 A Yes, sir.

9 Q Okay. Now, Joshua Dowling was called to testify.
10 If you could look at Page 101. Excuse me -- yeah. Page
11 101, Line 1.

12 A Okay.

13 Q Have you looked at Lines 1 through 4?

14 A 1 through 4, okay.

15 Q On 101.

16 A Yes.

17 Q So, there, Joshua Dowling, in effect, would be
18 bolstering subsequent testimony from Mr. Babecki about
19 the photo I.D. Is that correct?

20 MR. JOHNSON: Objection. That calls for a legal
21 conclusion, your Honor. The term *bolstering* should be
22 stricken from that question.

23 BY MR. FALK:

24 Q So, that was the -- and Mr. Babecki had not
25 testified at that time.

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 THE COURT: Mr. Falk, do you want to respond to
2 that?

3 MR. FALK: I'll withdraw the question.

4 THE COURT: The question's withdrawn. Fine.

5 BY MR. FALK:

6 Q At the time when they called Joshua Dowling to the
7 stand, Mr. Babecki had not testified yet. Is that
8 correct?

9 A Correct.

10 Q And so, the jury did not hear anything about an
11 identification up until that time. Is that correct?

12 A I'd have to review what -- Joshua Dowling was the
13 second witness. I'd have to review what the first
14 witness --

15 Q Okay.

16 A -- said. What's her -- Edeline or Earline? Erdel,
17 I guess, is his name. The Beaufort Police.

18 Q Sure. Okay. Do you want to look at that?

19 A I don't -- I don't know if he mentioned it or not.
20 And your question --

21 Q Well, the only person who made an identification in
22 this case is Mr. Babecki. Is that correct?

23 A Correct.

24 Q And up until this time, the jury did not -- was not
25 aware that any identification had been made. Is that

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 correct?

2 A I'd have to review what Officer Erdel said in his
3 testimony. He was -- Erdel was the first witness.

4 Q If you want to look.

5 A Let's see. All right, I guess that was pretrial
6 motions where George Erdel spoke first.

7 Q Right.

8 A As far as the primary case, Melanie Smith; then
9 Josh Dowling; then, Billy Crumpton; then, George Erdel.
10 So, your question, I guess, would go to Melanie Smith.
11 She was the 911 operator.

12 Q Okay.

13 A And that'd be what she had to say about any
14 identification.

15 Q But as far as the photo pack and the -- as far as
16 the photo pack, that what -- the jury first hears that
17 from Officer Dowling. Is that correct?

18 A Yes.

19 Q Okay. Did you consider to try to object to that
20 statement made by Officer Dowling?

21 A Well, if I didn't object, I guess I didn't.

22 Q Okay. Isn't that hearsay testimony, though? This
23 is what somebody else did.

24 A I believe so.

25 Q And so now, the jury, the first time they hear

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 about this identification is from an officer.

2 A I -- I would have to look at the opening statement
3 by Solicitor Stephens. He pretty much laid out the
4 whole case in his opening statement.

5 Q Okay. But as far as there was no trial strategy as
6 far as letting the jury hear from Officer Dowling about
7 the item.

8 MR. JOHNSON: Objection, your Honor. He's putting
9 words in this witnesses' mouth. That is a leading
10 question and this is his witness. On direct
11 examination, that is not proper.

12 MR. FALK: (a) your Honor, I think under these
13 circumstances, if your Honor wants me to move to have
14 him treated as a hostile witness, but he's certainly the
15 State's witness in this case. I'm just calling him
16 first. I should be able to -- I should be able to lead,
17 I would think.

18 THE COURT: All right. I'll overrule the
19 objection. Go ahead.

20 BY MR. FALK:

21 Q Did you have any kind of reason for not objecting
22 to that being a hearsay statement?

23 A Not that I know of.

24 Q Okay. Thank you. And then, if we could look at
25 Page 136, Line 14. I guess Lines 14 through 18.

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 A Yes, I see that.

2 Q Did you consider objecting to those statements?
3 Again, it's when you gave the photo lineup to Mr.
4 Babecki that he selected an individual as the suspect he
5 believed had shot at him. And so, he did; he selected
6 -- he immediately selected Mr. Johnson as the individual
7 he claims shot at him. Did you consider objecting to
8 that?

9 A Evidently not.

10 Q So, would that have been trial strategy to let the
11 jury hear that?

12 A My strategy was to get any statements tossed out in
13 pretrial. I believe we did a pretrial motion on that,
14 and it was -- I was denied. And so, the statements were
15 going to come in. And I suppose I could have objected
16 again.

17 Q Well, Mr. Babecki had not testified. He didn't
18 even testify on this day. Had Mr. Babecki not
19 testified, the jury still hears about this
20 identification.

21 A That's right. And my strategy was, I thought that
22 was a tainted identification photo lineup, and I
23 addressed that at pretrial with the idea that he was
24 probably shown a Facebook picture pre-I.D. But under
25 cross-examination, Mr. Babecki said he was not shown

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 that Facebook pre-I.D.; he was shown that Facebook
2 after.

3 Q Okay.

4 A I had argued that unduly suggestiveness on my
5 pretrial motion, and -- and it was denied.

6 Q That objection's not preserved?

7 A Correct.

8 Q Now, what was the reason for allowing the 911 call
9 to come in?

10 A Well, that was utterance of the victims.

11 Q Did you try to have it -- did you try to have the
12 911 call excluded?

13 A No, cause I did not know what ground I could do
14 that.

15 Q That that was hearsay? Out-of-court statements,
16 offered to prove the truth of the matter asserted?

17 A Well, you had the 911 operator testify as to the
18 authenticity. And then, you had the actual witnesses
19 testifying.

20 Q Well, actually, the 91 -- the person on the 911
21 call was not in court. Is that correct?

22 A Say that again.

23 Q The person who testified to the authenticity of the
24 911 calls was not the witness, because the person on the
25 911 call was not present.

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 A Well, whoever that Mrs. Smith was, I believe she
2 was in charge of authenticity.

3 Q If you look at -- if you look at 89, Page 89, Line
4 1.

5 A I see that. The call-taker, Erin Mallory.

6 Q So, the Court heard -- the Court heard statements
7 made by Erin Mallory.

8 A I see that, but the --

9 Q Okay. And so, you made your own decision that that
10 would be admissible because it was excited utterance?

11 A I did, because they also had Frank Babecki in Court
12 to testify to that call, as well as his wife.

13 MR. FALK: Your Honor, if I may for a moment. I
14 have tried to get a copy of this 911. The disk, the
15 disk that is in evidence that's identified here as the
16 one that was played, does not play anymore. And I asked
17 Mr. Erickson, I mean, you could hear -- it's a five-
18 minute-forty-one second 911 call. The exhibit in the
19 file says it, but it does not play. You can hear maybe
20 the first 17 seconds of it. As a matter -- if we could
21 possibly hold this record open, if necessary, just so we
22 -- if it is possible to get another copy of the 911
23 call, possibly from the solicitor's office. I drove
24 down here Friday to listen to the tape, and it was
25 unplayable. I asked Mr. Erickson, and he does not -- he

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 said -- I talked to Mr. Erickson on Friday. He does not
2 have a copy of it. And to the extent that the 911 call
3 would possibly have information that would not fit under
4 the excited utterance, it's not transcribed. So,
5 there's no record of what, actually, was here. And I'm
6 just saying to the extent the 911 call may have
7 contained prejudicial hearsay, which would not be
8 admissible under the hearsay exception. I would just
9 like an opportunity to find it, get a certified copy.
10 And I'll give it to Mr. Johnson. I'll give it to the
11 Court before it reaches its decision.

12 MR. JOHNSON: I'm aware of that. It does not play.
13 I have no objection to that, your Honor. The only
14 objection I will say, and I've kind of let this go maybe
15 a little too far, is that this is not one of the issues
16 that was brought up in the application. The only
17 amendment that I have received from Mr. Falk is that
18 counsel was ineffective for not objecting to Mr. Dowling
19 making some type of reference, which the State disputes,
20 on Mr. Johnson's right to remain silent. Therefore, I
21 believe any of this 911 testimony is not proper, because
22 it was not pled and the State is not aware that this was
23 going to be argued today, your Honor.

24 MR. FALK: I think I did talk to Mr. Rutledge [sic]
25 about the 911 tape; that I was trying to get it; that I

1 thought there'd be parts of it that were inadmissible.
2 I did not file a written, but I do believe we had a
3 conversation, because he knew I was coming down here to
4 get the tape.

5 MR. JOHNSON: Yeah, we discussed that, your Honor,
6 but for the State to be properly prepared, we must have,
7 you know, usually amendments of any type of amendment to
8 the application.

9 THE COURT: All right. I understand that now. So,
10 where are we? Mr. Falk wants to leave the record open
11 to give him an opportunity to see if he can listen to
12 the C.D. and determine whether or not there's any issue.

13 MR. FALK: No, my point would be is, if the
14 solicitor's office still has a copy of the C.D., I think
15 it's certified that that is the original copy, then, I
16 would provide it to Mr. Rutledge [sic], and provide it
17 to the Court, and the Court can make its own
18 determination.

19 MR. JOHNSON: And our argument is, your Honor, it's
20 still going to come in, because it's an excited
21 utterance. The lady who made the 911 tape -- I mean,
22 the call, was clearly still under the impression of the
23 situation. And he would have no legal basis on which to
24 object to this 911 tape coming in.

25 THE COURT: Let me ask a question about that, now

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 that you mentioned it. Tell me, when was the 911 call
2 made?

3 MR. JOHNSON: Immediately after Mr. Johnson shot
4 the car up to the two victims. They pulled into an
5 IHOP. Within seconds after, Mr. Johnson shot the car.

6 THE COURT: Is there any evidence to the contrary?

7 MR. FALK: Well, your Honor, I will say that the
8 case law -- I think it's the two cases I filed,
9 *Crawford*, United States Supreme Court. One of them is
10 *Hammond*, and I think the other one is *Davis*, both of
11 which talk about how -- and I think they were both 911
12 calls -- where you can still have portions of testimony
13 like this that may -- part of it fits under the hearsay
14 exemption, but it can evolve into testimonial hearsay,
15 and I'm not aware of what the jury was able to hear.
16 You know. It's part of the record in the case, but it's
17 not part of the record that was supplied to me. But
18 there is certainly a very realistic possibility that,
19 after five minutes, she may have calmed down and she may
20 have no longer been still agitated. And any statements
21 that were no longer -- what I'm saying is that portions
22 may have been inadmissible, just like there's portions
23 that may not have been admissible, and I'm unable to
24 determine.

25 MR. JOHNSON: Your Honor, there is no *Crawford*

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 issue. They had a chance to cross-examine this witness
2 because she testified at trial. So, I think *Crawford* is
3 out the window on this case. Clearly, if someone is on
4 a 911 tape, the entirety of that 911 tape, you're not
5 going to calm them down. That's just common sense. And
6 under 803(2), excited utterance, a statement relating to
7 a startling event or condition made while the declarant
8 was under the stress of excitement caused by the event
9 or condition. Clearly, here within minutes, seconds of
10 the shooting, she's still going to be in that state.
11 That's just common sense, your Honor. I don't think any
12 case law can overturn that. So, the entirety of the 911
13 tape would be under an excited utterance, and there's no
14 objection to which Mr. Erickson could make.

15 MR. FALK: Your Honor, if I could -- at this point,
16 there is a *Crawford* issue because that person has not
17 testified. If that person doesn't testify, the jury
18 still hears the 911 tape. I mean, we're going on the
19 assumption that both of these victims are going to
20 testify the next day. And I think Mr. Erickson was
21 going on the assumption that both of these victims are
22 going to testify the next day. But the point is, at
23 this moment, it's all hearsay.

24 THE COURT: Well, let me ask you this. Why would
25 it not be possible for, during the lunch break today, or

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 some time today --

2 MR. FALK: Yes, your Honor.

3 THE COURT: -- go get the disc, listen to it, and
4 see. We'll leave the issue open today.

5 MR. FALK: Thank you, your Honor.

6 THE COURT: And come back to it perhaps a few hours
7 later.

8 MR. FALK: Okay.

9 THE COURT: I just hate to leave the record open
10 for thirty days or whatever and we're stumbling all over
11 each other.

12 MR. JOHNSON: That's fine with me, your Honor.

13 THE COURT: All right.

14 BY MR. FALK:

15 Q Joshua Dowling again testified on Page 96.

16 A Page 96?

17 Q And starting at -- well, I guess that's a question
18 from 24 -- on Line 24, over to Line -- Page 97, Line 5.
19 If you read that, is it not hearsay statements again?

20 A What the victims told the officer?

21 Q Yes.

22 A Yes.

23 MR. JOHNSON: What line, now?

24 MR. FALK: Page 96, Line 24, going over to Page 97,
25 Line 5.

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 MR. JOHNSON: Thanks.

2 BY MR. FALK:

3 A Again, that's a situation where the victims are
4 going to testify in court.

5 Q So, if the victims are going to testify, then, this
6 -- then, is there not a relevancy objection to this or
7 that this is cumulative testimony?

8 MR. JOHNSON: Your Honor, I'm going to object,
9 because I don't believe this is hearsay. I think this
10 goes to the fact of what the police officer does with
11 that information and the subsequent action by the police
12 office. Because if you look at Page 97, you talk about
13 the picture, getting the bullet out of the -- out of the
14 headrest of the car. So, he has to know where the
15 passenger's sitting to be able to conduct an
16 investigation on where the bullet -- why it was lodged
17 or where it was lodged. And that's the basis for his
18 subsequent investigation. Your Honor, that's not a
19 hearsay statement.

20 MR. FALK: I still think it's, again, the jury's
21 hearing evidence that, if it's information that should
22 come from the witness and not from somebody who heard
23 what the witness says.

24 THE COURT: All right. You argue it's bolstering,
25 then.

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 MR. FALK: Yes, well, or cumulative. If you want
2 to say bolstering or the objection should be it's
3 irrelevant because it's cumulative. But yes. And
4 again, your Honor, this witness hadn't testified. The
5 victims hadn't testified at this time. The jury hears
6 the entire case for the State through the hearsay
7 statements from the investigating officers.

8 MR. JOHNSON: Your Honor, then, I'm going to object
9 to this entire line of questioning, because this is the
10 first time I've heard that this was going to be an issue
11 here at PCR. So, this is more of a surprise tactic than
12 anything else.

13 THE COURT: What do you know about that, Mr. Falk?

14 MR. FALK: I think it falls under the general
15 ineffective assistance of counsel that every Court
16 determines.

17 THE COURT: I'm going to sustain the objection.

18 MR. JOHNSON: Thank you, your Honor.

19 BY MR. FALK:

20 Q All right. Could you look at Page 103.

21 A Page 103?

22 Q Yes. If you would look at Lines 13 through 16.

23 A All right.

24 Q Is it fair to say that that's, again, Joshua
25 Dowling is testifying?

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 A Yes.

2 Q And is he not telling the jury that my client
3 wanted to exercise his *Miranda* rights to talk to his
4 lawyer; he didn't want to speak?

5 A Yes.

6 Q So, he's exercising his right to remain silent.

7 A Yes.

8 Q And the jury heard that.

9 A Well, heard what?

10 Q Well, the jury heard these police officer saying
11 that my client chose to exercise his right to remain
12 silent.

13 A Yes.

14 Q Okay. And that was post-*Miranda*. Is that not
15 correct? to read to the -- this statement was made after
16 he was *Mirandized*. Is that not correct?

17 A It was made -- when did you say?

18 Q Well, he had already been *Mirandized* at this point,
19 had he not?

20 A Correct, back at the police station.

21 Q All right. And so then, Officer Dowling said we
22 talked to him further or we tried to talk to him, but
23 instead, he chose to remain silent; invoke his right to
24 remain silent.

25 A Correct?

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 Q Did you consider objecting at that point?

2 A No, I did not object and I did not consider it.

3 Q Did you want the jury to hear that?

4 A My client wanted to have his right to remain
5 silent?

6 Q Yes.

7 A I didn't think there was anything wrong with that.

8 Q Are you familiar with the Supreme Court case of
9 *Doyle versus Ohio*?

10 MR. JOHNSON: And your Honor, I'm going to object
11 at this point, because, under *Ashley versus State* and
12 *Simmons versus State*, this is the exact issue raised at
13 the Court of Appeals through an *Anders versus California*
14 brief. The Court of Appeals affirmed his conviction.
15 That was dealt with on direct appeal. And therefore,
16 it's improper for a PCR forum.

17 MR. FALK: Your Honor, the reason why -- certainly,
18 I talked to appellate counsel on this, and this is an
19 issue that was not preserved. So, that is why it was an
20 *Anders* brief and not a merit brief. This was an
21 unpreserved issue, so, it was never really going to be
22 heard by the appellate court because trial counsel
23 failed to preserve the objection that my client's *Fifth*
24 *Amendment* right to remain silent had been impeded or
25 whatever, had been jeopardized, because the Court was

1 able -- because the jury was able to hear that. They
2 certainly were able to draw their own negative
3 conclusions. It did go up on appeal. It was an *Anders*
4 brief; not a merits brief; and the reason why is because
5 the issue was not preserved. You got to preserve these
6 issues in order for it to go up. There is no clear
7 error doctrine.

8 MR. JOHNSON: Just to respond, your Honor. As your
9 Honor is aware, if an issue is unpreserved, the Court of
10 Appeals is very quick to tell appellate counsel. So,
11 further, an *Anders* brief is not just when you just think
12 it's not preserved. An *Anders* brief, the whole point is
13 that, in good conscience and through the duty that
14 appellate counsel has to argue merit issues, if they
15 feel that there is no merit issues to raise, they're
16 allowed to file an *Anders versus California* brief. The
17 Court then reviews the entire record for any preserved
18 errors and makes a decision.

19 In this case, they said that it is affirmed.
20 Pursuant to *Anders versus California*, there was no
21 mention in the Court of Appeals' opinion concerning the
22 fact that this issue was not preserved. So, I think
23 that the Court of Appeals dealt with this issue, and
24 therefore, it's not proper under *Simmons versus State*
25 and *Ashley versus State* for the PCR forum.

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 THE COURT: I'm not sure I have the order. Do you
2 all have it?

3 MR. FALK: I have a copy of the -- may I approach?

4 THE COURT: I thought I had a copy in this packet.

5 MR. FALK: The Court of Appeals didn't say anything
6 other than affirm. It didn't say -- the Court of
7 Appeals didn't say anything. They just said *affirmed*.
8 I don't know what conclusion we can draw from that, but
9 I mean, we certainly have a constitutional right that my
10 client had that's recognized by the United States
11 Supreme Court in *Doyle versus Ohio* and its progeny. The
12 only cases since *Doyle versus Ohio* have been saying
13 that. This issue only arises once a person has been
14 *Mirandized*. So, once a person's been *Mirandized*; and
15 then, the jury hears the fact that he wanted to remain
16 silent. There was prejudicial error in *Doyle versus*
17 *Ohio*, and I think it's prejudicial error here. And I
18 think the only reason is because trial counsel didn't
19 preserve the objection.

20 THE COURT: All right. So, see if I understand
21 correctly. It was not briefed. It wasn't addressed in
22 the *Anders* brief.

23 MR. JOHNSON: It was briefed. That's the exact
24 issue that was briefed, your Honor.

25 MR. FALK: But -- but --

1 MR. JOHNSON: I can provide a copy of that if I can
2 get in my database.

3 MR. FALK: May I approach, your Honor?

4 THE COURT: If you don't talk one at a time, the
5 court reporter's going to get upset.

6 All right. So, it was briefed.

7 MR. FALK: The issue was -- was --

8 THE COURT: The issue was.

9 MR. FALK: Right. But what I'm saying is, the
10 appellate defense was not able to say that this issue
11 had been preserved.

12 MR. JOHNSON: Your Honor, that's a hearsay
13 statement, whatever appellate counsel said.

14 MR. FALK: No, I mean, it was -- all right, there
15 was no sentence in that brief that's saying the issue
16 wasn't preserved.

17 THE COURT: No, but errors allege that it was not
18 stricken.

19 MR. FALK: But if you read the transcript, there
20 was no request to have it stricken with appellate
21 counsel. They're saying -- as I read that, they're
22 saying that -- the appellate defense there is saying
23 that the error was that the judge should have sua sponte
24 made its own motion to strike it and give a corrective
25 instruction to the jury.

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 THE COURT: All right. The pretrial hearing
2 referenced in the Page 5 of the *Anders* brief is
3 referring -- you all tell me if I'm right, now -- merely
4 to the fact that Johnson was *Mirandized*. It doesn't
5 have anything to do with the statement. That wasn't
6 discussed.

7 MR. FALK: Well, there was a *Jackson versus Denno*.

8 THE COURT: There was?

9 MR. FALK: Yes.

10 THE COURT: That issue was or was not taken up
11 in --

12 MR. FALK: I think the voluntariness of the
13 statement -- some other statement -- in the *Jackson*
14 *versus Denno* hearing, there were the statements that
15 were at issue that -- but it was not that issue. I
16 mean, there were other statement by my client made that
17 trial counsel tried to keep out through the *Jackson*
18 *versus Denno* hearing.

19 THE COURT: But this issue wasn't taken up in the
20 *Jackson v. Denno* hearing.

21 MR. FALK: Not that I can see, your Honor.

22 THE COURT: All right. Let's go back to -- now I
23 think I now understand what all occurred. And the
24 State's position is? The applicant says that he failed
25 to object. The State says it was submitted to the

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 appellate court on *Anders* brief. The appellate court
2 doesn't specifically address the issue. Okay. Now,
3 help me again. What says the State, now? You're citing
4 which case for the proposition that?

5 MR. JOHNSON: I am citing two cases, your Honor.
6 And I've had them -- it's *Simmons versus State*, which is
7 264 S.C. 417. That's 1974 case, which stands for the
8 proposition that the PCR is not a substitute for direct
9 appeal. And also, *Ashley versus State*, which is 260
10 S.C. 436. It's a '73 opinion that basically states that
11 PCR applicant cannot assert any issues that could have
12 been raised at trial or on direct appeal. And the fact
13 that this issue was briefed on direct appeal shows that
14 this is not proper for PCR forum, as this issue's
15 already been addressed because an *Anders* brief that,
16 your Honor, the Court is presumed to have reviewed the
17 entire record and make an opinion -- or issued an
18 opinion based on they reviewed the entire record.

19 THE COURT: Well, I assume if we have the --

20 MR. JOHNSON: And in *Anders* brief, the defendant at
21 the time, applicant here, is given the opportunity to
22 brief any issue they think would have merit. It's like
23 a *Johnson* petition is to PCR.

24 THE COURT: Right. But I guess if we had the
25 State's brief, the State's brief where it said --

5-17-16 JOHNSON V STATE

DIRECT - ERICKSON

1 MR. FALK: There is no brief.

2 MR. JOHNSON: We don't respond to an *Anders* brief.

3 THE COURT: You don't.

4 MR. JOHNSON: No, your Honor. Just like a *Johnson*
5 petition, the State is not required to respond.

6 MR. FALK: And my response is the citations that he
7 gave is that we are not raising an issue that we could
8 have raised on direct appeal, because we couldn't raise
9 it on direct appeal because it wasn't preserved. I
10 mean, that's the whole issue here is that these are
11 issues that were not preserved. We're making an
12 assumption that the Court of Appeals didn't see anything
13 here, but we can also equally make the same assumption
14 that the Court of Appeals doesn't address it because it
15 wasn't preserved.

16 I mean, we all know that South Carolina has very
17 rigorous error preservation rules, and that there is no
18 clear -- what the other standard is other states have,
19 clear error or something like doctrine like that. And
20 so, I mean, I think it would be unrealistic. The relief
21 that they, in effect, are asking for in that *Anders*
22 brief, I think it would be unrealistic for a trial
23 counsel to stand up and say, you know, you shouldn't
24 have said that and I'm going to tell the jury that you
25 shouldn't have said that.

5-17-16 JOHNSON V STATE

CROSS - ERICKSON

1 THE COURT: The *Simmons* citation was 464 South
2 Carolina? What was the --

3 MR. JOHNSON: *Simmons*? 264 S.C. 417.

4 THE COURT: 417. And the other was 264, 36?

5 MR. JOHNSON: Yes, sir.

6 THE COURT: Let me look at those, since we're
7 apparently going to come back and address this issue.
8 We're going to break this case up into a later date some
9 time today -- later time some time today. But go ahead.
10 We'll take that issue under advisement today.

11 MR. FALK: Okay.

12 THE COURT: Hopefully, resolve it today.

13 MR. FALK: Okay. Your Honor, let me just make sure
14 I have no further questions.

15 THE COURT: All right.

16 MR. FALK: We have no more questions.

17 MR. JOHNSON: May it please the Court, your Honor?

18 THE COURT: Certainly.

19 ERIC ERICKSON, CROSS-EXAMINATION

20 BY MR. JOHNSON:

21 Q So, Mr. Erickson, how long have you been practicing
22 criminal law?

23 A As of today?

24 Q Yes, or as of this trial.

25 A Since 1996, when I started as a public defender.

5-17-16 JOHNSON V STATE

CROSS - ERICKSON

1 Q So, it's fair to say you've tried quite a few
2 cases.

3 A Yes.

4 Q Have you tried murder cases?

5 A Not to trial. I've had a murder case that I got
6 dismissed based on some psychiatric examinations.

7 Q But have you tried attempted murder cases in the
8 past?

9 A This is my first attempted murder case.

10 Q But it's safe to say you had been practicing for
11 about sixteen years before this case came about?

12 A Yes.

13 Q And been in front of juries?

14 A Yes.

15 Q And dealt with hearsay objections?

16 A Yes.

17 Q And *Jackson v. Denno* hearing?

18 A Yes.

19 Q And *Neil v. Biggers* hearings, correct?

20 A Yes.

21 Q Okay.

22 A I'll say that attempted murder was not codified
23 until 2011. It used to be called an ABWIK. And I have
24 dealt with a lot of ABWIKs prior -- prior to the
25 attempted murder.

1 Q And that would be the *Omnibus Crime Bill* of, I
2 guess, June 2010?

3 A Yes.

4 Q And in this case, you have two victims who knew Mr.
5 Johnson prior to this incident, correct?

6 A At least one did.

7 Q The male did.

8 A Yes, Mr. Babecki.

9 Q And as you tried to point out, it was over -- they
10 knew each other because of drug transactions, correct?

11 A Correct.

12 Q Marijuana transactions?

13 A Correct.

14 Q Okay. And he readily identified Mr. Johnson
15 immediately after -- or actually during the incident,
16 correct?

17 A Correct.

18 Q Because he actually conversed with him prior to the
19 shooting.

20 A Correct.

21 Q And the jury heard all that testimony, correct?

22 A Correct.

23 Q And during when Officer Dowling shows Mr. Babecki
24 the lineup, Mr. -- or Officer Dowling is leaving the
25 room to give Mr. Babecki time to make his decision. And

5-17-16 JOHNSON V STATE

CROSS - ERICKSON

1 by the time he gets to the door, Mr. Babecki says, stop,
2 I know exactly who it is, correct?

3 A I don't recall that.

4 Q Would you dispute that, my recitation of the facts
5 that the jury would have heard?

6 A I don't -- I don't know what you're alluding to.

7 Q What I'm alluding to is that this was the
8 information that this jury would have heard at the
9 trial.

10 A Okay.

11 Q And they know -- the victims know Mr. Johnson as
12 Hot Boy, his street name.

13 A Correct.

14 Q Okay.

15 MR. JOHNSON: Court's indulgence, your Honor.

16 THE COURT: All right, sir.

17 BY MR. JOHNSON:

18 Q You've testified that you did have discussions
19 concerning the alibi witnesses?

20 A Yes.

21 Q And you actually called a few at trial, correct?

22 A Yes.

23 Q Do you see any of those witnesses here today?

24 A No..

25 Q Now, concerning Mr. Dowling's testimony prior to

5-17-16 JOHNSON V STATE

CROSS - ERICKSON

1 the victims coming in and testifying, as to Mr. Babecki
2 identifying Mr. Johnson, did you not take that testimony
3 as simply Officer Dowling testifying as to what he
4 observed Mr. Babecki doing?

5 MR. FALK: Your Honor, this is a leading, I mean.

6 MR. JOHNSON: It's cross-examination, your Honor.

7 MR. FALK: Of his own witness.

8 MR. JOHNSON: It's not my witness. He called him.

9 THE COURT: Overruled. Go ahead.

10 BY MR. JOHNSON:

11 Q Do you want me to re-state that question?

12 A Re-state the question, yes, sir.

13 Q On Page 101, opposing counsel is trying to allude
14 that this is a hearsay statement from Officer Dowling as
15 to what Mr. Babecki did, but in your trial strategy, did
16 you not take those statements as Mr. -- or Officer
17 Dowling testifying as to simply what he observed?

18 A And what statements are you alluding to?

19 Q It's Page 101 that he showed the photo lineup to
20 Mr. Babecki.

21 A Yes.

22 Q Is that not simply what he observed? He observed
23 Mr. Babecki pointing out Mr. Johnson in the photo
24 lineup?

25 A Correct.

5-17-16 JOHNSON V STATE

CROSS - ERICKSON

1 Q So, you wouldn't have had a reasonable basis on
2 which to object, would you?

3 A No.

4 Q And then, the next day, did Mr. Babecki not come in
5 and testify that he picked Mr. Johnson out of the
6 lineup?

7 A Yes, he did.

8 Q And the female was not shown in the photo lineup,
9 correct?

10 A Correct.

11 Q Because she was pregnant?

12 A Correct. And I also believe the female never saw
13 who actually did the shooting, and I brought that up in
14 trial.

15 Q And she readily admits that in her testimony; does
16 she not?

17 A Correct.

18 Q And based on all that evidence that the jury heard,
19 they convicted him of two counts of attempted murder,
20 correct?

21 A Yes.

22 Q Because, had he been a few inches closer to the
23 female victim, this would be a murder case, correct?

24 MR. FALK: Objection. That's speculation.

25 MR. JOHNSON: Your Honor, the bullet landed four

5-17-16 JOHNSON V STATE

RE-DIRECT - ERICKSON

1 inches from her head.

2 THE COURT: Overruled. Go ahead.

3 BY MR. JOHNSON:

4 Q Is that not correct?

5 A Correct.

6 MR. JOHNSON: No further questions at this time,
7 your Honor. Thank you.

8 THE COURT: Re-direct?

9 ERIC ERICKSON, RE-DIRECT EXAMINATION

10 BY MR. FALK:

11 Q Mr. Johnson asked you about your experience prior
12 to this case, your experience trying criminal cases.

13 A Yes, cause I -- I have a book of my trial victories
14 that I usually bring over to the jail when somebody's
15 deciding whether or not to retain me.

16 Q Is it fair to say that the trial court was
17 frustrated with the counsel in this case on both sides?

18 A In some parts of the trial, yes.

19 Q You were admonished by the judge. Is that correct?

20 A That's correct.

21 Q And you were admonished (1) because you asked the
22 victim to come and stand next to the defendant.

23 MR. JOHNSON: Objection, your Honor, as to
24 relevance, and this is outside the scope of cross-
25 examination.

5-17-16 JOHNSON V STATE

RE-DIRECT - ERICKSON

1 MR. FALK: Your Honor, I don't think it's outside
2 the scope. We're talking about errors that he's
3 admonished for, and it's in the record.

4 MR. JOHNSON: And I've never asked anything about
5 those, your Honor.

6 THE COURT: No. I'll sustain the objection.

7 MR. FALK: I'm sorry. You said you'll sustain the
8 objection?

9 THE COURT: Yes.

10 MR. FALK: No further questions.

11 MR. JOHNSON: Nothing for the State, your Honor.
12 Thank you.

13 THE COURT: You may step down, Mr. Erickson.

14 A Thank you, Judge.

15 THE COURT: Call your next witness.

16 MR. FALK: One moment, your Honor.

17 I call my client to the stand.

18 THE COURT: All right.

19 MADAM CLERK: Place your left hand on the *Bible*.
20 Raise your right. Do you solemnly swear or affirm the
21 testimony you give to the Court in this case shall be
22 the truth, so help you God?

23 MADAM CLERK: You may be seated.

24 COURT REPORTER: I'm sorry. Your answer was?

25 MR. MYKEL D. JOHNSON: Yes, I do.

5-17-16 JOHNSON V STATE

DIRECT - JOHNSON

1 MADAM CLERK: You may be seated.

2 MYKEL D. JOHNSON, DIRECT EXAMINATION

3 BY MR. FALK:

4 Q You were brought to the police station. Is that
5 correct?

6 A Yes, that's correct.

7 Q And when you got to the police station, did they
8 read you your *Miranda* rights?

9 A That's correct.

10 Q And do you recall how quickly after you got there
11 that they read you your *Miranda* rights?

12 A Probably like ten minutes there.

13 Q Okay. Some time after they read you your *Miranda*
14 rights, do you recall having telling Mr. Johnson that
15 you didn't want to talk?

16 A Yes, I told him I wanted proper representation, my
17 counselor, now I want to speak.

18 Q Okay.

19 COURT REPORTER: I'm sorry. Say that again,
20 please.

21 A Proper -- I wanted to be represented by my counsel.
22 I invoke my right to speak.

23 Q And that statement was made after you were read
24 your *Miranda* rights. Is that correct?

25 A Yes.

5-17-16 JOHNSON V STATE

BY THE COURT

1 MR. FALK: No further questions.

2 MR. JOHNSON: Nothing from the State, your Honor.

3 BY THE COURT:

4 THE COURT: You may step down. Call your next
5 witness.

6 MR. FALK: We have no further witnesses.

7 MR. JOHNSON: Your Honor, I have no further
8 witnesses at this time. I'd like to see what the Court
9 is going to rule and how the Court's going to rule
10 before I call Mr. Erickson again to the stand, your
11 Honor.

12 THE COURT: Say that again. You want to what, now?
13 We're going to wait. Aren't we still --

14 MR. ERICKSON: Yes, your Honor.

15 THE COURT: -- going to re-convene this hearing?

16 MR. FALK: We're going to make an attempt to go get
17 the tape from the solicitor's office, that's correct.

18 MR. JOHNSON: But I just want to reserve the right
19 to re-call Mr. Erickson.

20 THE COURT: I see. Depending on what happens then.

21 MR. JOHNSON: Yes, sir.

22 THE COURT: Okay. I understand. We'll do that.

23 All right. Then, we'll continue this case until
24 hopefully, a few hours from now.

25 MR. FALK: Thank you, your Honor. Thank you.

5-17-16 JOHNSON V STATE

BY THE COURT

1 OFF THE RECORD 10:43 A.M.

2 BACK ON THE RECORD 12:41 P.M.

3 MR. FALK: Your Honor, if I could just tell you
4 where we stand. I spoke to the -- well, the solicitor's
5 office called me, and they said they will not know if
6 they've got this disc until tomorrow, which is the
7 soonest that they would know. And he is not optimistic
8 that they will have the disc. But he will know whether
9 or not it exists tomorrow.

10 He's got my telephone number. He's got Mr.
11 Johnson's telephone number. My suggestion, if, I mean,
12 a way to resolve this, if the disc does exist, if you
13 allow us to, in effect, tender proposed orders, which we
14 could brief whatever argument we think exists from the
15 disc. And so, you know, so the Court would have an
16 opportunity to hear it; counsel would have an
17 opportunity to hear it; and then, we could tender
18 proposed orders.

19 THE COURT: Well, let me ask you this. I guess
20 there's a problem with us re-visiting this tomorrow.

21 MR. FALK: Your Honor, I have a get a biopsy
22 tomorrow. And so, that's going to be tomorrow or
23 Thursday. Otherwise, that's the obvious answer, yes.
24 But I can't -- I -- possibly Friday, but I don't know if
25 you all will still be here.

5-17-16 JOHNSON V STATEBY THE COURT

1 THE COURT: That'll be the only thing we have
2 Friday, I think, isn't it?

3 MR. JOHNSON: Yes, sir. We're not scheduled for
4 Friday, but I can certainly, if your Honor wants me to,
5 I can certainly stay down here and we can do it.

6 THE COURT: And of course we may not have it. May
7 not have a disc.

8 MR. FALK: Well, that's what I'm saying. And the
9 reason why I gave them Mr. Johnson's number is that, if
10 it's after 11:00 o'clock, I'm not going to be able to do
11 anything with the information. You know what I'm
12 saying. And so, Mr. Johnson will know tomorrow whether
13 or not --

14 MR. JOHNSON: I can certainly advise.

15 MR. FALK: -- whether or not it exists. And then,
16 we can go from there.

17 THE COURT: All right. So, --

18 MR. FALK: I'll be able to respond by telephone
19 Thursday or whatever. I'm just not sure I'll be ready
20 to --

21 THE COURT: All right. So, let me see if I -- I'm
22 going to try to do it in a nutshell to see if I
23 understand your proposal. And that is that we will
24 conclude the hearing today, with the exception of the
25 issue about the disc.

5-17-16 JOHNSON V STATE

BY THE COURT

1 MR. FALK: Yes, your Honor.

2 THE COURT: And if it does not exist, you both
3 going to send proposed orders?

4 MR. FALK: Yes, your Honor.

5 THE COURT: If it does exist, and we'll get a copy;
6 you all brief it; and still send proposed orders?

7 MR. FALK: Well, here's -- in order to save time on
8 the A.G.'s, my suggestion, if it does exist, let me
9 tender my proposed order first. And then, Mr. Rutledge
10 [sic] -- which would, in effect, include a brief as to
11 why it's admissible and what it says. Mr. Rutledge
12 [sic] would have an opportunity to review that. Then,
13 he could tender a second, you know, and give --

14 MR. JOHNSON: I'm kind of confused on that. I'd
15 rather have -- have -- know before; have a hearing; let
16 you rule on it; and then we, you know.

17 MR. FALK: Okay. Well, then, maybe it's Friday.
18 Maybe we'll know.

19 THE COURT: Well, we'll know some time tomorrow
20 whether we're going to have one.

21 MR. JOHNSON: Yes, sir. And I will certainly alert
22 all parties and your Honor.

23 THE COURT: All right.

24 MR. FALK: Based on my conversation, I'm not
25 optimistic it exists.

5-17-16 JOHNSON V STATEBY THE COURT

1 THE COURT: Here's the plan. See if this is
2 agreeable, then. If there's a disc, we'll be back here
3 9:30 Friday.

4 MR. FALK: Okay.

5 THE COURT: If there's not, then, you both are
6 going to send proposed orders.

7 MR. FALK: Yes, your Honor.

8 THE COURT: Within? That's the trick. Within?

9 MR. FALK: Thirty? Okay. Fifteen.

10 THE COURT: Fifteen.

11 MR. JOHNSON: Fine with me, your Honor.

12 THE COURT: With the caveat that, if one of you
13 presents something in the proposed order that the other
14 side considers new they need to respond to, then, you
15 fire something out saying I disagree with Page 3, Item
16 whatever; --

17 MR. FALK: Yeah, okay.

18 THE COURT: -- we didn't talk about that. You
19 know, something like that.

20 MR. JOHNSON: Yes, sir.

21 MR. FALK: I mean, obviously, my issue's going to
22 be the *Doyle*.

23 THE COURT: All right. I was looking over --
24 looking at some things earlier to give you some early
25 thoughts on some things I was looking at. And let's

5-17-16 JOHNSON V STATE

BY THE COURT

1 suppose the Court found there was a *Doyle* violation.
2 All right. But you know, that doesn't necessarily
3 result in --

4 MR. FALK: Prejudice.

5 THE COURT: Yes. I was looking at some cases that
6 would say that doesn't necessarily end it.

7 MR. JOHNSON: And that would be my argument, your
8 Honor.

9 THE COURT: Okay.

10 MR. JOHNSON: Is that, based on the identification
11 and everything else, that there's --

12 THE COURT: That's why I wanted to mention that, so
13 you --

14 MR. FALK: No, I know. I just -- I thought there
15 was case law. There's a difference between whether or
16 not there's a problem on a hearsay thing. Whether it is
17 an evidentiary question that should have been dealt with
18 one way or another, and hearsay was let in and it
19 shouldn't, but where we're talking about a
20 constitutional right. I thought the prejudice -- I have
21 a lesser requirement of prejudice when it's a violation
22 of a constitution, as opposed to just an evidentiary.

23 THE COURT: All right. One of the cases I was
24 looking at mentioned the fact that there was a *Doyle*
25 violation --

5-17-16 JOHNSON V STATE

BY THE COURT

1 MR. FALK: Okay.

2 THE COURT: -- in this case -- in that case, but it
3 wasn't egregious. And it was just kind of just
4 something. And they mentioned that the solicitor did
5 not hammer it and did not argue it. It was just
6 something that came out during the trial. Therefore,
7 so, if you're going to -- if you're going to address
8 that issue, be thinking, okay, what if it is a *Doyle*
9 violation.

10 MR. FALK: Yes, your Honor.

11 THE COURT: All right. Friday, 9:30, if disc.
12 Otherwise, proposed orders, fifteen days.

13 MR. JOHNSON: Sounds good.

14 MR. FALK: Thank you, your Honor.

15 THE COURT: All right.

16 MR. JOHNSON: Appreciate your patience, your Honor.

17 THE COURT: Sure thing.

END PROCEEDING 12:46 P.M.

5-17-16 JOHNSON V STATE

BY THE COURT

CERTIFICATE OF REPORTER
MAY 17, 2016 TRANSCRIPT OF
POST-CONVICTION RELIEF HEARING

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

I, Wanda H. Rowe, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing May 17, 2016 Transcript of Post-conviction Relief Hearing is a true, accurate, and complete record of the proceedings had on said date, in the case of Mykel D. Johnson versus State of South Carolina, Beaufort County, Court of Common Pleas, Case Number 2014-CP-07-01759; that no exhibits were admitted; that I am of neither kin, counsel, nor interest to any party hereto.

THIS CERTIFICATE OF REPORTER CONTAINS MY ORIGINAL SIGNATURE AND IS ATTACHED TO THE ORIGINAL OF THIS TRANSCRIPT REQUESTED BY SCCID. PURSUANT TO SCACR 607, REQUESTS FOR COPIES OF THIS TRANSCRIPT MUST BE MADE TO THE COURT REPORTER. UNAUTHORIZED COPYING/EMAILING IS PROHIBITED.

Witness my signature October 27, 2016.


Wanda H. Rowe, CVR-M
Official Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Mykel Johnson, #351916,

2014-CP-07-1759

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 21, 2014. The Respondent made its Return on January 29, 2016. An evidentiary hearing into the matter was convened on May 17, 2016, at the Beaufort County Courthouse in Beaufort, SC. Jim Falk, Esquire, represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Eric Erickson, Esquire, also testified. This Court had before it a copy of the records of the Beaufort County Clerk of Court, records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. The Applicant was indicted at the December 2011 term of the Beaufort County Grand Jury for two (2) counts of

Attempted Murder (2012-GS-07-2269, 2270). Eric Erickson, Esquire, represented him. The Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted. The Honorable Carmen T. Mullen sentenced Applicant to incarceration for fifteen (15) years for each count of Attempted Murder, with the sentences to run concurrently.

A notice of appeal was filed on Applicant's behalf and an appeal perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Johnson, 2014-UP-134 (Filed on April 2, 2014). The Remittitur was issued on April 18, 2014.

In his current Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "My lawyer didn't probably(sic) represent me at trial."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witness presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

SUMMARY OF TESTIMONY

At the evidentiary hearing, Counsel testified that he was retained by Applicant's mother and visited Applicant at least five times while Applicant was in custody. During these meetings, he and

Applicant discussed possible alibi witnesses, and Applicant gave him a list of witnesses to locate including: Malcolm Moore, was called at trial; Josh Dowling, a police officer; and Kendale Simmons, a friend of Applicant's who was in custody at the time. Counsel then testified that he called Mr. Moore at trial and had spoken with Mr. Moore on March 12, 2012 concerning his testimony prior to trial. Counsel then testified that the State's rebuttal witness was that Mr. Simmons' testimony needed to be "straight," which Counsel considered to mean tell the truth. Counsel admitted he did not review all of the jail tapes. Counsel then stated that one of the victims had identified the Applicant prior to and during trial. Counsel stated he did not object to Ofc. Dowling's testimony on page 101 of the transcript because he did not see that it would be hearsay testimony.

Counsel then testified that his strategy was to have any of Applicant's statements suppressed prior to trial. He also addressed the photo lineup during a pretrial hearing, arguing that it should be suppressed; however this pretrial motion was denied. Counsel also stated that the 911 tape which was introduced at trial was an excited utterance. Counsel lastly testified he did not object on page 103 of the transcript because he did not consider the officer's testimony a comment on his right to remain silent.

On cross-examination, Counsel testified he has tried cases since 1996. Counsel admitted this was his first attempted murder case, however he had tried cases that dealt with assault and battery with intent to kill (which was changed to attend murder and 2010) prior to this case. Counsel also testified he had dealt with Jackson v. Denno hearings as well as Neil v. Biggers hearings prior to this



case. Counsel reiterated that one of the victims identified Applicant in a photo lineup and also during the incident. Counsel then stated he found no reason to object to Ofc. Dowling's testimony because he was simply testifying to what he saw at the time. Counsel lastly stated that while the male victim identified the Applicant, he emphasized at trial that the female victim could not identify the Applicant.

Applicant testified that when he was advised of his Miranda rights, he told the officer that he did not want to talk to him until he had an attorney.

Ineffective Assistance of Counsel

The Applicant alleges he is entitled to post-conviction relief on the basis that he received ineffective assistance of trial counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002). To be entitled to post conviction relief, the Applicant must prove both of the following: (1) his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) the Applicant suffered prejudice by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). Under this standard, counsel's deficient performance must have prejudiced the Applicant to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

First, this Court finds Applicant's testimony concerning Counsel's alleged ineffectiveness not credible while finding Counsel's testimony credible.

A. Trial counsel's failure to object to the testimony by Officer Dowling.

Applicant contends that Counsel was ineffective for failing to object to Ofc. Dowling's testimony on p. 101 of the transcript. This argument is without merit.

Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d, 529 (1992).

Further, "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." State v. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985) (emphasis added), citing Strickland v. Washington, 104 S.Ct. 2052, 890 L.E.2d 674(1984). Because of the difficulties inherent in making the evaluation, a court must

indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. Id.

In this case, Counsel clearly articulated that he did not object to Ofc. Dowling's testimony because he did not see this testimony as hearsay, but rather what he saw at the time. This court agrees that the statements were not hearsay as he observed the victim identify Applicant in a photo lineup and thus counsel had no reasonable basis on which to object. This Court finds these are legitimate reasons for his lack of objection to the testimony.

Under Butler and Whitehead, Counsel's representation of Applicant in this regard was not ineffective based on his particular trial strategy. Thus, this allegation is denied.

B. Doyle v. Ohio violation

Applicant also alleges that Counsel was ineffective for failing to Ofc Dowling's testimony that when Applicant was arrested, he invoked his right remain silent. This allegation is without merit.

This allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973).

This was the exact issue raised in Applicant's direct appeal. (See Anders Brief of Appellant pp. 5-6). As such, this issue is not proper for the PCR forum. Therefore, this allegation is denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

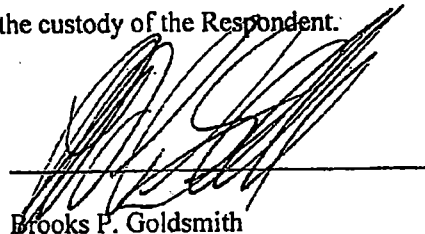
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED!

June 20, 2016



Brooks P. Goldsmith
Presiding Circuit Court Judge
Fourteenth Judicial Circuit

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOR THE 14th JUDICIAL CIRCUIT
	)	
Mykel Johnson	)	
	)	
Applicant	)	2014-CP-07-1759
vs.	)	
	)	
State of South Carolina	)	MOTION TO ALTER / AMEND
Respondent,	)	SENTENCE
	)	

2016 JUL -7 PM 3:51
 TERRILL ROSENEAU
 BEAUFORT COUNTY, S.C.
 CLERK OF COURT

TO: Honorable Brooks P Goldsmith, PO Box 895, Edisto Island SC 29483;
Rutledge Johnson, Office of SC Attorney General, PO Box 11549, Columbia,
SC 29211-1549, .

Applicant by counsel moves pursuant to Rule 59(e) South Carolina Rules of Civil Procedure to alter or amend this court's June 20, 2016 Order of Dismissal.

As grounds for this motion, states:

Applicant's counsel received a copy of the Court's June 20, 2016 Order of Dismissal on July 5, 2016.

On or about June 19, 2016 Applicant's counsel submitted a proposed order granting PCR relief in the above case. (Copy attached hereto as exhibit A). Both at the PCR hearing and in his proposed order, Applicant's counsel argued that Officer Dowling was permitted to testify before the jury that the defendant invoked his Miranda right to counsel and his right to remain silent. Applicant's counsel argued further that trial counsel's failure to object to Officer Dowling's testimony and thus preserve the Doyle v Ohio issue for appellate review amounted to ineffective assistance of counsel.

In its Order of Dismissal the PCR judge ruled that Applicant's Doyle v Ohio argument is barred by S.C. Code Ann. § 17-27-20(b) because it is a direct appeal issue. The court notes that the Doyle v Ohio issue was raised in applicant's Anders brief. However, applicant's counsel respectfully contends that the Court's order of dismissal does not address whether trial counsel's failure to properly preserve the issue for direct appeal amounts to ineffective assistance of counsel. Counsel for applicant maintains further that appellate review by means of an Anders brief is not the equivalent of appellate review by means of a merits brief.

Applicant therefore moves that Order of Dismissal be altered or amended to address whether trial counsel's failure properly preserve the Doyle v Ohio issue for appellate review amounts to ineffective assistance of counsel.

Respectfully Submitted,



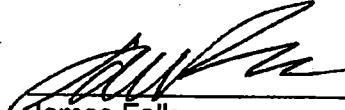
James Falk, Esq.
PO Box 1058
Charleston, SC 29402
(843) 606- 6007
(843) 972 9005 fax
jfalklaw@gmail.com

Charleston, SC

July 5, 2016

CERTIFICATE OF SERVICE

Undersigned certifies that on July 5, 2016 a copy of the above was deposited in the US
Mail to the above named individuals at the above identified address.


James Falk

2016 JUL -7 PM 3:51
JERRI ALYN ROSEMEAU
CLERK OF COURT
DEAFORT COUNTY S.C.

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Mykel Johnson, #351916,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

2014-CP-07-1759

**ORDER GRANTING APPLICANT
POST CONVICTION RELIEF**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 21, 2014. The Respondent made its Return on January 29, 2016. An evidentiary hearing into the matter was convened on May 17, 2016, at the Beaufort County Courthouse in Beaufort, SC. Jim Falk, Esquire, represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Eric Erickson, Esquire, also testified. This Court had before it a copy of the records of the Beaufort County Clerk of Court, records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. The Applicant was indicted at the December 2011 term of the Beaufort County Grand Jury for two (2) counts of Attempted Murder (2012-GS-07-2269, 2270). Eric Erickson,

Esquire, represented him. The Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted. The Honorable Carmen T. Mullen sentenced Applicant to incarceration for fifteen (15) years for each count of Attempted Murder, with the sentences to run concurrently.

A notice of appeal was filed on Applicant's behalf and an appeal perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Johnson, 2014-UP-134 (Filed on April 2, 2014). The Remittitur was issued on April 18, 2014.

In his current Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "My lawyer didn't probably(sic) represent me at trial."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witness presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

As specific grounds for his ineffective assistance of counsel claim, Applicant asserts that trial counsel permitted a state's witness to testify that in response to questioning by law enforcement, Applicant exercised his Fifth Amendment right to remain silent. Applicant asserts that the state's testimony violated his rights under *Doyle v Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) and trial counsel's failure to either:

EXHIBIT A

object to the testimony; move to strike the testimony; and or seek a curative instruction constituted ineffective assistance of counsel.

At the trial the State called Officer Joshua Dowling of the Beaufort Police Department to testify as the lead investigator into the case. At the close of his testimony the following colloquy took place:

Q: Investigator Erdel [sic], let me just ask, uh, did Mr. -- were there any other evidence that was obtained in this case after Mr. Johnson was taken into custody?

A: As it pertains to?

Q: Is there any other additional evidence that you as a lead investigator in the case were able to obtain after Mr. Johnson was taken into custody?

A: Mr. Johnson did not want to talk. He wanted the representation of an attorney when we asked him for his side of the story. From the defendant's side, we did not develop any information.

(Trial Transcript p. 103, lines 5-16)

The record reflects no contemporaneous objection from Mr. Erickson to this testimony. During his direct examination at the PCR hearing, Mr. Erickson stated that he did not see any grounds upon which to object to Officer Dowling's testimony. Mr. Erickson testified further that his failure to object was neither purposeful nor was it part of his trial strategy.

In *Doyle v. Ohio*. The United States Supreme Court held that the due process clause of the Fourteenth Amendment is violated when a state prosecutor seeks to impeach a defendant's exculpatory story told for the first time at the trial, by cross-examining. The protections in *Doyle* were then extended to protect against the state commenting upon the defendant's request for an attorney. See *Wainwright v. Greenfield*,

474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (19~6). In *Wainwright* the Court stated that "The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony." *Wainwright*, 474 U.S. at 292, 106 S.Ct. 634.

In *Brown v. State*, 375 S.C. 464, 652 S.E.2d 765 (2007) the South Carolina Court of Appeals considered the effect of an alleged *Doyle* violation in the context of a post-conviction review. In *Brown* the South Carolina Court of Appeals denied applicant's requested relief finding that there was no *Doyle* violation. The *Brown* court noted that in order for there to be a *Doyle* violation applicant's statement must have been both post-arrest and post-Miranda. In *Brown* the court found no evidence that applicant was ever Mirandized prior to making his statement. However, in Mr. Johnson's case there was clear evidence that Mr. Johnson was given his Miranda warning before he made the statement invoking his right.

Prior to the start of Mr. Johnson's trial, the court conducted a *Jackson v Denno* hearing. At this pre-trial hearing the following colloquy occurred between the solicitor, and Stephen Erdel, who was a criminal investigator for the Beaufort Police Department.

- Q: There- is no question that he [Mykel Johnson] was under arrest?
A: That's correct.
Q: Now, after he, uh, was taken to the Beaufort Police Department or to the Beaufort County Detention Center, was - - tell me, did you interview him there?
A: Uh, a statement was made at the police department in which he invoked his rights and the interview was terminated.
Q: Okay. So at that point, he was given his Miranda warnings and declined to speak with officers?
A: Correct.

EXHIBIT A

(Trial Transcript page 24 lines 1 – 14).

Although Appellate counsel raised this issue of Officer Dowling's testimony in its *Anders* brief, there was no basis for appellate review because trial counsel failed to preserve the issue. An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review." *State v. Nichols*, 325 S.C. 111, 120–21, 481 S.E.2d 118, 123 (1997) A party cannot complain of an error which his own conduct has induced. *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984). "Where an objection and the ground therefore is not stated in the record, there is no basis for appellate review." *State v. Morris*, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct.App.1991).

Whether or not Officer Dowling's testimony violated Applicant's rights under *Doyle* and *Wainwright* would have been an issue for direct appeal and therefore not cognizable in a PCR application. *Simmons v State* 264 S.C. 417, 215 S.E.2d 883 (1974). However trial counsel's ineffective assistance of counsel as evidenced by his failure to preserve this issue is a proper subject of collateral attack though a PCR action. See *Hyman v State*, 278 S.C. 501, 299 S.E.2d 330 (SC 1983); *Mangal v State*, 415 S.C. 310, 781 S.E.2d 732 (SC App 2015). This court finds that trial counsel was deficient in not objecting to Officer Dowling's testimony. Since trial counsel failed to make a contemporaneous objection to the testimony, he was precluded from either moving to strike the testimony and or seek a curative instruction from the court.

Having concluded that trial counsel was deficient for failing to either object to; move to strike; and or seek a curative instruction for Officer Dowling's testimony, this court must consider whether Applicant was prejudiced by trial counsel's deficient performance. The

EXHIBIT A

United States Supreme Court stated that testimony regarding a defendant's silence in the face of police questioning has a significant potential for prejudice. *U.S. v. Hale*, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed2d 99 (1975). *The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest. Id* at 422 U.S. 180. The Hale court went on to rule that the respondent's silence during police interrogation lacked significant probative value and that any reference to his silence under such circumstances carried with it an intolerably prejudicial impact. *Id*. Similarly this Court finds that Officer Dowling's testimony regarding Applicant's invocation of his Fifth Amendment Right was equally prejudicial.

CONCLUSION

Based on all of the forgoing this Court finds that Applicant met his burden of proof that Trial counsel's performance was deficient and that as a direct result of counsel's deficient performance, the jury heard highly prejudicial testimony that deprived applicant of his constitutional protections against self-incrimination. Accordingly this court grant's applicant post-conviction relief and remands this case back to the Beaufort County Solicitor's Office.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief is granted; and,
2. Applicant shall be released from the custody of the South Carolina Department of Corrections.

EXHIBIT A

AND IT IS SO ORDERED!

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

FOR THE 14th JUDICIAL CIRCUIT

Mykel Johnson

Applicant

2014-CP-07-1759

vs.

State of South Carolina

MOTION TO ALTER/AMEND

Respondent

SENTENCE

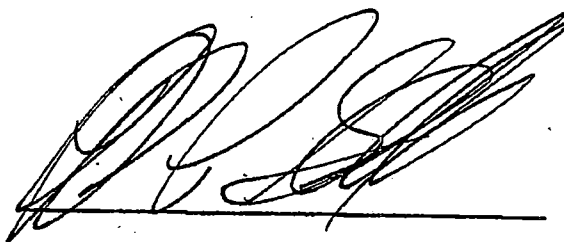
2016 AUG -3 PM 3:04
TERRI ANN ROSENEAU
CLERK OF COURT
BEAUFORT COUNTY, S.C.

This matter comes before the Court by way of Applicant's Motion pursuant to Rule 59(e), requesting that this court alter or amend the Order of Dismissal dated June 20, 2016.

After reviewing memorandum submitted by both parties I find no reason to alter or amend the prior Order.

THE MOTION OF THE APPLICANT IS ACCORDINGLY DENIED.

July 31, 2016



BROOKS P. GOLDSMITH

WITNESSES

Inv. J. Dowling, Beaufort PD

DOCKET NO. 2011GS0702269

The State of South Carolina

County of Beaufort

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

COURT OF GENERAL SESSIONS

DECEMBER Term 2011

Hereby appear in my own proper person and plead guilty to the within indictment or to

ARREST WARRANT NUMBER

J358107

THE STATE

vs.

Mykel Johnson

ACTION OF GRAND JURY

Burt Wynn
Foreperson of Grand Jury
Date:

DEC 15 2011

VERDICT

Defendant

Indictment for
Attempted Murder

Witness:

SC Code: 16-03-0029
CDR Code:3410

C.C.C. PLS. and G.S.

Foreperson of Petit Jury
Date:
INDICT

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

INDICTMENT
2011GS0702269

At a Court of General Sessions, convened on December 15, 2011, the Grand Jurors of Beaufort County present upon their oath:

Attempted Murder

That in Beaufort County, South Carolina, on or about October 28, 2011, the Defendant, Mykel Johnson, with intent to kill and malice aforethought, did attempt to kill Frank Babiecki, to wit: the Defendant did shoot a handgun at Frank Babiecki; in violation of the Common Law of South Carolina.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


Solicitor

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Beaufort
STATE VS.INDICTMENT/CASE# 2011GS0702269AKA: Mykel JohnsonA/W#: J358107Race: AFRICAN AME Sex: M Age: Date of Offense: 10/28/2011DOB: SS#:S.C. Code §: 16-03-0029Address: CDR Code #: 3410City, State, Zip: DL#: SID#:

SENTENCE SHEET

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐
In disposition of the said indictment comes now the Defendant who was
TO: Attempted Murder☒ CONVICTED OF or ☐ PLEADSin violation of § 16-03-0029 of the S.C. Code of Laws, bearing CDR Code # 3410
NON-VIOLENT ☐ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☒ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: Jeff Stephens, Red Team 12/4/11 Mykel Johnson 6232
SC Bar# Defendant Attorney for Defendant SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUPTotal: \$ plus 20% fee: \$ days/hours Public Service EmploymentPayment Terms: ☐ Set by SCDPPPS Recipient:

*Fine:	\$	
§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)	\$	\$ <u>3.90</u>
TOTAL	\$	\$ <u>132.90</u>

Obtain GED ☐Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning \$ paid to Public Defender FundOther: Certified - A True CopyJen Ann Roseneau - Clerk of Court
Beaufort County, SC - LaSandra Young☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.Clerk of Court/ Deputy Clerk LaSandra YoungCourt Reporter: Sharon P. Vigen - Hight

SCCA/217 (03/2011)

Presiding Judge CrullJudge Code: 6/20/12Sentence Date: 6/20/12

WITNESSES

Inv. J. Dowling, Beaufort PD

DOCKET NO. 2011GS0702270

The State of South Carolina

County of Beaufort

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

COURT OF GENERAL SESSIONS

DECEMBER Term 2011

Hereby appear in my own proper person and plead guilty to the within indictment or to:

ARREST WARRANT NUMBER

J358108

THE STATE

VS.

Mykel Johnson

Defendant

ACTION OF GRAND JURY

Beau Work
Foreperson of Grand Jury
Date:

DEC 15 2011

VERDICT

**Indictment for
Attempted Murder**

Witness:

SC Code: 16-03-0029
CDR Code: 3410

C.C.C. PLS. and G.S.

Foreperson of Petit Jury
Date:

INDICT

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

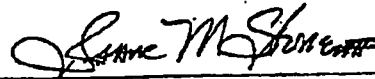
INDICTMENT
2011GS0702270

At a Court of General Sessions, convened on December 15, 2011, the Grand Jurors of Beaufort County present upon their oath:

Attempted Murder

That in Beaufort County, South Carolina, on or about October 28, 2011, the Defendant, Mykel Johnson, with intent to kill and malice aforethought did attempt to kill Desiree Constantineau, to wit: the Defendant did shoot a handgun at Desiree Constantineau; in violation of the Common Law of South Carolina.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


Solicitor

STATE OF SOUTH CAROLINA

COUNTY OF Beaufort
STATE VS.

Mykel Johnson

AKA:

Race: AFRICAN AMESex: M Age:

DOB: SS#:

Address:

City, State, Zip:

DL#:

SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Attempted Murder

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS0702270

A/W#: J358108

Date of Offense: 10/28/2011

S.C. Code § 16-03-0029

CDR Code #: 3410

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0029 of the S.C. Code of Laws, bearing CDR Code # 3410

NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Jeff Stephens, Red Team

72418 SC Bar#

Mykel Johnson Defendant

Unit 11111111 Attorney for Defendant

8232 SC Bar#

WHEREFORE, the Defendant is committed to the

☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)	\$	\$ 3.90
TOTAL		\$ 133.90

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code:

Sentence Date:

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

Certified - A True Copy

Jeri Ann Roseneau - Clerk of Court
Beaufort County, SC - LaSandra Young☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

6/20/12